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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

TINA JACOBSON, Plaintiff, vs. JOHN DOE and/or JANE DOE, Defendants.	Case No. CV 2012-3098 MEMORANDUM IN RESPONSE TO MOTION TO QUASH SUBPOENA

1. RELIEF REQUESTED

Plaintiff, Tina Jacobson, has sued John and/or Jane Doe for anonymous defamation made by an anonymous interactive internet blogger. The internet service provider of the blog has been subpoenaed to identify relevant anonymous bloggers. The subpoena is directed to a website service provider who is a fact witness. The provider readily admits it has the requested information. The service provider claims federal statutory immunity for liable appearing on its blog but is not a party to the action. However, the provider purports to stand in the shoes of the defamer and is applying legal doctrines inapplicable to an internet provider to shield the wrongdoer. The subject matter of the subpoena does **not** deal with information in the hands of a newspaper or involve a newspaper's attendant rights under

1 the law. There is no legal basis to file the motion. The Court is asked to deny the Motion to Quash the
2 Subpoena and enter an Order compelling Cowles Publishing Company d/b/a The Spokesman-Review
3 ("Spokesman-Review") to disclose the subpoenaed information concerning anonymous internet
4 bloggers "almostinnocentbystander," "Phaedrus," and "OutofStaterTater". Further, the Court is asked to
5 award a reasonable attorney fee and applicable costs to Ms. Jacobson for having to defend this motion.
6
7 **2. ISSUES BEFORE THE COURT**

8 2.1 Whether the identity of the anonymous blogger who defamed Ms. Jacobson as an
9 embezzler and later admitted the charge was baseless, can be sheltered by an internet service provider?

10 2.2 Whether the identity of fact witnesses to the publication of defamation can be sheltered
11 by an internet service provider?
12
13 **3. INTRODUCTION**

14 "Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
15 Who steals my purse steals trash;
'Tis something, nothing;
16 'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
17 Robs me of that which not enriches him,
And makes me poor indeed."
18

19 Shakespeare's Othello, Iago speaking to Othello, Act III, scene 3: Cited by Chief Justice Rehnquist while permitting a defamation claim to proceed over a newspaper's objection. Milkovich v. Lorain
20 Journal, 497 U.S. 1, 12, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990)

21 Ms. Jacobson is the Chairman of the Kootenai County Republican Party ("Party") and is
22 entrusted with the safekeeping of donated funds. She has been accused of embezzling $10,000.00 of the
23 fund and then covering up the theft by hiding Party financial records. The charge if true would be Grand
24 Theft which is a felony in Idaho. IC §18-2407(b). It is a serious charge. It is also a lie. The author of
25 the accusation subsequently admitted the charge is unsubstantiated. The lie was published using a blog
26

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exclusively owned by its service provider, the Spokesman Review. The published lie has been reviewed by many and the subject of incessant gossip by those who frequent the blog. Beyond cavil the accusation and publication is actionable defamation in Idaho.

Ms. Jacobson has been labeled a thief of public money from the dark cover of the internet. The defamer did so using the stealth of an anonymous blog name. Two witnesses to the publication of the defamation are also anonymous bloggers. Only the bloggers and Spokesman-Review know the true identity.

Ms. Jacobson's position of trust and occupation compel her to both investigate the serious charge and vindicate her good name. She can only do that in a court of law. That is what is done in a civil society. In this action, Ms. Jacobson has requested and then was required to compel the identity of the defamer and fact witnesses from the only source available to prosecute this case. The Spokesman-Review has admitted it has the subpoenaed information but refuses to release such. (Spokesman-Review Memo p. 2; Aff. of D. Olvieria, ¶15)

The Spokesman-Review has filed a motion to protect the guilty and deprive Ms. Jacobson of her fair day in court. The motion to quash is an attack on the judicial system. It seeks to shelter an acknowledged defamer and perpetuate an internet myth that there is no personal responsibility for reprehensible comments made in the world of the "blogosphere".

To advance its motion, the Spokesman-Review argues snippets of its internet policies and case law that would mislead a reader as to the issues in this motion. The Spokesman-Review makes no effort to segregate the applicable legal principles arguably applicable to a newspaper from those of an anonymous blogger. It writes with hope that some doctrine will give them cover to continue as a shill for legally impermissible speech. Spokesman-Review suggests by its arguments:

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1. The right to speak anonymously includes the right to defame anonymously.
2. Ms. Jacobson has failed to meet preconditions to warrant identifying an anonymous blogger.
3. The two bloggers who responded to the publication of the defamation are "innocent" bystanders who have no role in the litigation.
4. Mr. Oliveria is a reporter and he has a reporter privilege not to disclose the identity of the person he communicated with whom he identified as "almostinnocentbystander".

The undisputed facts, the law and equity defeat the Spokesman-Review's motion to quash.

4. STATEMENT OF FACTS

The parties have entered into a stipulation of certain controlling facts. Mr. D. F. Oliveria, Ms. Jacobson and Mr. Andersen have likewise filed affidavits of relevant facts. The following is undisputed.

4.1 The Huckleberries Blog.

The Spokesman-Review owns and operates as an interactive service provider the Huckleberries Online blog ("Huckleberries"). The Spokesman-Review has created a number of web based forums such as blogs, letters, comments, and community forums. As part of access to Huckleberries, which utilizes the website, the user is permitted to anonymously post comments. As a condition to posting comments however, users must agree to comply with Spokesman-Review's "Service Agreement," "Privacy Policy," "Forum Standards," and "Community Guidelines." (Stipulation Ex. 1-4) Further, to gain access to the blog, each commentator must register using an e-mail address; provide the IP address and the user's name. (Aff. of D. Oliveria, ¶15) There is no dispute that the Spokesman-Review knows the identities of those individuals that are the subject of the Subpoena Duces Tecum. (Id.) The bloggers

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are not anonymous. Their identity is fully made known to the Spokesman-Review as a condition of participating in the blog. One may use a blog name that is fictitious, however, their identity is known.

4.2 No Expectation by Bloggers of Privacy.

By contract, bloggers on Huckleberries do not have an expectation of privacy. That is the rule of the road for the Spokesman-Review as the service provider and cannot be ignored in consideration of the motion. There is an urban legend that the Spokesman-Review has agreed to defend to the hilt the right to blog anonymously. There is no such undertaking and that argument is not germane to this motion. Any blogger is specifically advised their identity may be revealed if compelled by legal process, i.e., a subpoena.

4.2.1 The Spokesman-Review Service Agreement.

The Spokesman-Review's Service Agreement (Spokesman-Review Memo p. 2; Stipulation Ex. 1) sets out constraints for a user on its website, including:

> If you choose to use any of THE SPOKESMAN-REVIEW Web services…you agree to abide by all of the terms and conditions of this Agreement.
>
> …
>
> If you submit any commentary to forums, discussions and/or message boards now or hereafter offered by S-R.COM, you agree to abide by our Forum Standards and our Community Guidelines.
>
> …
>
> You represent, warrant and covenant (a) that no materials of any kind submitted through your individual account will…(ii) contain **libelous** or otherwise unlawful material… You hereby indemnify…The Spokesman-Review…in connection with any claim arising out of any breach by you…
>
> …
>
> YOU AGREE THAT USE OF OUR WEB SERVICES IS AT YOUR SOLE RISK.

(Stipulation Ex. 1)

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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26

4.2.2 The Spokesman-Review Forum Standards.

The Spokesman-Review's Forum Standards further inform bloggers that they are expected to abide by certain standards, including:

> **Forum Posting Policy**
> You cannot upload to our websites, or distribute or otherwise publish through them, anything that is libelous, **defamatory**, obscene, pornographic or abusive, or that otherwise violates any law."
>
> ...
>
> **Inappropriate Forum Behavior**
> You agree not to post messages or other content or send emails with an illegal or harmful content, including but not limited to content that:
>
> ...
>
> • is **defamatory** or libelous;
>
> • is abusive, harassing, or threatening
>
> ...
>
> • is illegal or encourages criminal acts; or
>
> • could expose S-R.Com or the Spokesman-Review to liability.
>
> **Email Address**
> ... Please understand that we reserve the right to disclose whatever personal information we may have about you as deemed necessary or appropriate to satisfy any law, regulation, **legal process** or governmental request.

Important to this motion, the Spokesman-Review specifically disclaims any ownership in the content of a blog. The **Forum Standards** state unequivocally that:

> While we do not and cannot review every message posted in our varied on line forums and **are not responsible for the content of the message posted by anyone other than direct employees of S-R.COM**, we reserve the right to delete, move, or edit messages that we deem abusive, **defamatory**, obscene, in violation of copyright or trademark laws, or otherwise unacceptable. **We reserve the right to remove the posting privileges of users who violate these standards of forum behavior at any time.**

(Stipulation Ex. 3)

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4.2.3 The Spokesman-Review Community Guidelines.

The Spokesman-Review's Community Guidelines likewise stresses the importance of civil dialog, avoiding abusive comments and reserving the right to ban offenders. (Stipulation Ex. 2)

4.2.4 The Spokesman-Review Privacy Policy.

The Spokesman-Review's Privacy Policy notifies bloggers in clear terms that the Spokesman-Review:

> "…may disclose Personal Information if we are required to do so by law or we in good faith believe that such action is necessary **to (1) comply with law or with legal process** . . . (3) protect against misuse or unauthorized use of [the website] . . . (Among other things, this means that if you provide false information or attempt to pose as someone else, information about you may be disclosed as part of any investigation into your actions.)"

(Stipulation Ex. 4) (Bolding added for emphasis.)

4.3 The Defamation.

Ms. Jacobson is the Chairman of the Kootenai County Republican Party Central Committee. (Aff. of T. Jacobson, ¶3) On Tuesday, February 14, 2012, then Republican Presidential Candidate Rick Santorum spoke at an event in Coeur d'Alene, which Mrs. Jacobson attended and was seated on the dais. (Aff. of T. Jacobson, ¶6) The defamation at issue in the underlying lawsuit arose out of Ms. Jacobson's attendance at the event and was made utilizing the Huckleberries blog web-site.

At 12:05 p.m. on February 14, 2012, Mr. Oliveria posted on Huckleberries a live feed of two reporters' "tweets" attending Mr. Santorum's speech. (Stipulation Ex. 6, p.10) Bloggers subsequently began posting comments on Huckleberries about the event. (Id.) At 3:31 p.m. a user who used the blog name of "almostinnocentbystander," blogged the first of the defaming statements in the midst of a blog thread discussing theocracy:

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> "[i]s that the missing $10,000 from Kootenai County Central Committee funds actually stuffed inside Tina's blouse??? Let's not try to find out."

(Stipulation Ex. 6, p. 7)

Other users, including those identifying themselves "Phaedrus" and "OutofStaterTater," immediately sought more information from "almostinnocentbystander". "Almostinnocentbystander" obliged them and responded to the inquiries with the following statement:

> "...the treasury has gone a little light and Mistress Tina is not allowing the treasurer report to go into the minutes (which seems common practice). Let me rephrase that . . . a whole Boat load [sic] of money is missing and Tina won't let anyone see the books. Doesn't she make her living as a bookkeeper? Did you just see where Idaho is high on the list for embezzlement? Not that any of that is related or anything . . ."

(Id.)

At 5:55 p.m. on February 14, 2012, Mr. Oliveria acknowledged the comment stated wrongdoing by Ms. Jacobson and posted on the blog the following comment:

> I removed 4-5 posts under this thread in which an unsubstantiated accusation was made against a local Republican official. Unless there's proof of wrongdoing, I don't want to see any of this here – for your sake more than mine.

(Stipulate Ex. 6, p. 15)

It is undisputed that the removed posts were the defaming comments posted by "almostinnocentbystander" and the follow-up inquires of "Phaedrus" and "OutofStaterTator".

On February 17, 2012, Mr. Oliveria continued the defamation discussion when he posted a blog under a banner stating, "Groundless Claim Leads To Ban". Mr. Oliveria wrote:

> On Tuesday, HucksOnline poster Almost Innocent Bystander made a baseless accusation against Tina Jacobson, chairwoman of the Kootenai County Republican Central Committee. I deleted that post and three others that referred back to it as soon as I saw them. I also informed Almost Innocent Bystander that posting Privileges at HucksOnline have been revoked. In response today, Almost Innocent Bystander emailed this: "I apologize for and retract my derogatory and

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> unsubstantiated commentary regarding Tina Jacobson." HucksOnline commenters should feel free to flag posts they think are inappropriate.

(Stipulation Ex. 6, p. 17)

4.4 Spokesman-Review Acknowledgement of the Defamation.

Any fair reading of the blogs leads inextricably to the conclusions that Mr. Oliveria acknowledged the defamation by words and actions at the time. (See, Stipulation Ex. 6, p. 17) Mr. Oliveria, after the fact, removed the defaming comments and related exchanges. He did so with the statement the claim was "unsubstantiated", "baseless", and accepted the accusation stated "wrongdoing" that could not be posted unless there was "proof". (Id.) Mr. Oliveria asserts he made a point to contact "almostinnocentbystander" to elicit a confession that the charge of theft about Ms. Jacobson was "baseless"; that he had removed them as "soon as I saw them"; and obtained acknowledgment the charge was "derogatory"; was "unsubstantiated" and was specifically about Tina Jacobson. (Stipulation Ex. 6, p. 17; Aff. of Oliveria ¶13) (There is no way to test the veracity of Mr. Oliveria's statements absent corroboration by the anonymous blogger.) Further, consistent with the Spokesman-Review's published policy the posting privileges for "almostinnocentbystander" were then stated to be revoked.[1] It is beyond cavil that Ms. Jacobson has been defamed and that the Spokesman-Review has by its words and actions acknowledged the defamation. The Spokesman-Review also knows the name of the defamer and at least two individuals who saw the defamation and acted upon the published scurrilous charge. (Aff. of Oliveria, ¶15)

[1] Mr. Oliveria's affidavit now states the revocation was only "temporary'. (Aff. Oliveria, ¶13) This change leaves open the question of whether "almostinnocentbystander" is now being permitted by agreement to surreptitiously lie in the weeds and await the imprimatur of this court to recommence anonymous defamation if the motion is granted.

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4.5 Need for the Subpoena Duces Tecum.

Ms. Jacobson has been accused of a crime, dereliction in her duty as an overseer of donated funds, lied about and is still being held up to public ridicule, all in a public forum. The ridicule continues in the blogs posted on Huckleberries. (Aff. of T. Jacobson, ¶¶12, 17, Ex. 3) She has no way to defend herself from the public inference of, "where there is smoke there must be fire" when it comes to money and politics absent her suit. She also had the unenviable duty to not only track down this rumor, but to satisfy the Party and herself that there is no wrongdoing with regards to entrusted money. (Aff. of T. Jacobson, ¶19)

Ms. Jacobson professionally and diligently sought to obtain information pertaining to "almostinnocentbystander's" identity from the Spokesman-Review without the need for public exposure. (Aff. of T. Jacobson, ¶21, Ex. 4) She made the request personally. The Spokesman-Review refused to voluntarily reveal the information. (Aff. of T. Jacobson, ¶23, Ex. 6) She has had to retain counsel to get the information. (Aff. of T. Jacobson, ¶24) Ms. Jacobson has directed issuance of process to the Spokesman-Review to produce the relevant information. (Stipulation Ex. 11) The Spokesman-Review then filed this motion to quash the subpoena.

5. POINTS OF AUTHORITY AND ARGUMENT

5.1 Spokesman-Review's Burden.

The motion before the Court is not about the merits of Ms. Jacobson's defamation claim; that will be for a jury to decide. The Spokesman-Review is not a party to the lawsuit; it is merely the holder of relevant information that cannot be obtained from any other source. This motion is not about the Spokesman-Review's First Amendment rights as they are not the publisher of the comments. Nor is this about the protected right of an anonymous blog. This motion is not about the breath of protected speech

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because no citizen has ever had a right to defame in any forum or in any manner. Rather, this motion is about a fact witness that refuses to surrender relevant information related to an acknowledged act of defamation. For the purposes of this motion, the Spokesman-Review is to be viewed only as an interactive computer service provider and nothing more.

There is no constitutional protection for defamatory comments posted on Spokesman-Review's blog, and no law has been cited to support that contention. Ms. Jacobson has the right to subpoena the Spokesman-Review for information relating to "almostinnocentbystander's" identity as well as the witnesses to the publication. See Idaho R. Civ. P. 45(b). "All persons, without exception...who, having organs of sense, can perceive, and perceiving, can make known their perception, to others, may be witnesses." I.C. § 9-201. "A witness, served with a subpoena, must attend at the time appointed, with any papers under his control, required by the subpoena, and answer all pertinent and legal questions, and unless sooner discharged, must remain until the testimony is closed." I.C. § 9-1301. The subpoena can be quashed only if, "it is unreasonable, oppressive, fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects [them] to undue burden." Idaho R. Civ. P. 45(d). To evade the subpoena, the Spokesman-Review relies on a broad assertion of privilege to defame anonymously which is not supported by the authority it cites or even the facts of this case when analyzed in light of the legal authority it does cite.

5.2 Spokesman-Review is a Service Provider for this Motion, not a Newspaper.

Spokesman-Review has blurred its role in this motion. The website called Huckleberries Online is owned by the Spokesman-Review not as a newspaper, but as a service provider. The Spokesman-Review status is nothing more than an interactive computer service provider under 47 U.S.C. §230. The Spokesman-Review cannot be viewed as having the protection of 47 U.S.C. §230 at the same time it

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argues legal authority applicable only to newspapers and reporters. The Communications Decency Act ("CDA"), 47 U.S.C. §230, provides that "[n]o provider or user of an interactive computer service shall be treated as the *publisher* or *speaker* of any information provided by another information content provider." (Emphasis added). The Spokesman-Review has no stake in this motion. It seeks to stand in the shoes of three users of Huckleberries.

By its very terms, 47 U.S.C §230 exempts interactive computer service providers from potential liability if they were deemed the publisher or speaker of content posted on internet blogs. See, Zeran v. American Online, Inc., 129 F.3d 327, 330-331 (4th Cir. 1997). The Spokesman-Review is an interactive computer service provider that falls within and claims the protections of the CDA. By asserting the protections of §230, the Spokesman-Review admitted that it was not the publisher of John Doe's defaming comments, thereby, insulating itself from what would otherwise be a libel lawsuit. The Spokesman-Review relies on the statute to absolve itself of any responsibility for the content of the blog, but now asks this Court to refer to the law applicable to a publisher to resolve its motion.

The Spokesman-Review in bringing this motion has no legitimate claim to protections as a newspaper or invoking Idaho's qualified reporter privilege. See, In re Indiana Newspapers Inc., 963 N.E.2d 534, 546-47 (Ind. Ct. App. 2012). The facts of Indiana Newspaper are instructive to the facts in this case. There, a newspaper published an article online and allowed registered users to post comments on the story. Id. at 538. One of the comments asserted that "[t]he missing money can be found in the [company's former president and board members'] bank accounts." Id. The former president filed a defamation suit against the anonymous poster and sought the identity from the newspaper that ran the blog. Id. at 541. The newspaper, like the Spokesman-Review, refused to reveal the blogger's identity,

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partially relying on Indiana's Shield Law.[2] Id. at 542-43. In rejecting this argument that court noted that the comments were not part of "the news gathering process" or investigative reporting, because the facts were not the basis for the story. Id. at 547. Most importantly, the Court noted that in a defamation case, a combination of shield laws and the newspaper's immunity under the CDA would render any plaintiff, who suffered a legitimate injury, entirely without redress. Id. at 548.

Here the facts are clear. The defamatory comments were made *in response* to a news feed. It necessarily follows that any Spokesman-Review reporter could not be engaged in an investigation. The Spokesman-Review should not be allowed to deny that it was the publisher of the blog while at the same time claiming protections that are only available to publishers and reporters. If such a result were possible, then Ms. Jacobson and all other anonymously defamed persons would be entirely at the mercy of newspaper owning a blog when attempting to vindicate their substantial legal right to their good reputation. The court in Indiana Newspapers rejected this construction of the law, and so should this Court.

The Spokesman-Review also attempts to assert a newspaper reporter's privilege to the post-defamation contact Mr. Oliveria made with "almostinnocentbystander" to elicit the apology. Logically after the fact discussions could not have been part of any investigative or news gathering function at that point in time. The Spokesman-Review's argument that Mr. Oliveria's follow up communications with "almostinnocentbystander" fall under the reporter privilege makes no sense. Whatever qualified privilege Spokesman-Review may claim while performing investigative journalism, it could not possibly

[2] Shield Laws are statutes that "grant newsgatherers the privilege, of varying breadth or nature, not to disclose in a legal proceeding the information or the source of information obtained by them in their professional capacity." Romulado P. Eclavea, Privilege of Newsgatherer Against Disclosure of Confidential Sources or Information, 99 A.L.R.3d 37, 43 (1980). Idaho recognizes only a qualified privilege of reporters not to reveal confidential sources related to newsgathering, because of the "public interest in the need for effective investigative reporting." In re Contempt of Wright, 108 Idaho 418, 419, 700 P.2d 40 (1985).

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apply retroactively to hide the defamer's identity. Such a construction of the law would ignore the very purpose of the qualified reporter privilege—to encourage the free flow of information to report matters of public interest. See Sierra Life Ins. v. Magic Valley Newspapers, Inc., 101 Idaho 795, 801, 623 P.2d 103 (1980); Contempt of Wright, 108 Idaho at 419, 700 P.2d 40. The qualified reporter privilege does not protect the free flow of defamatory comments, nor was it intended to insulate a defamer from liability after the fact. By the time Mr. Oliveria communicated with John/Jane Doe about his/her comments, the defamatory information was disseminated to the public and any right to assert an anonymous source was forfeited.

And again, the Spokesman-Review's myopic invocation of law is done in isolation and without reference to the very facts that it not only controls, but created. In Idaho the assertion of the qualified privilege would not apply in this case as the privilege is not absolute; rather, it is subject to a balancing test that consists of:

> (1) Whether there is probable cause to believe that the newsperson has information that is clearly relevant to a specific probable violation of law; (2) Whether the information sought cannot be obtained by alternative means less destructive of First Amendment rights; (3) Whether there is demonstrated a compelling and overriding interest in the information.

Wright, 108 Idaho at 421. (quoting Branzburg v. Hayes, 408 U.S. 665, 744 (1972) (Stewart, J., dissenting)). In addressing whether the balance favors disclosure of anonymous sources in the context of a libel suit, the Idaho Supreme Court has stated:

> We recognize that the news media rely upon confidential sources in the preparation of many stories, particularly those involving government or large organizations. The ability to keep the identity of those sources confidential is not infrequently a prerequisite to obtaining information. ***This interest, while legitimate, is not so paramount that the legitimate discovery needs of a libel plaintiff must bow before it.***

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Sierra, 101 Idaho at 801 (emphasis added). When the source of the information sought is "of overriding interest to the moving party" and not available from any other source, disclosure of confidential sources is warranted. Wright, 108 Idaho at 422.

John Doe/Jane Doe abused the liberty of free speech, and should now be *responsible* for that conduct. See Idaho Const. art. I, § 9. Ms. Jacobson cannot obtain the information she needs to proceed with her defamation claim without the identity of the "almostinnocentbystander". Ms. Jacobson diligently sought the identity, but Spokesman-Review refused to cooperate. By even the Spokesman-Review's reading of the law, by establishing a prima facie case of defamation against John Doe/Jane Doe, Ms. Jacobson's interest in discovering "almostinnocentbystander's" identity outweighs any after the fact assertion of the qualified reporter privilege. Allowing the Spokesman-Review to utilize the protections of the CDA and assert a qualified reporter's privilege will leave Ms. Jacobson without a way to vindicate her rights and attempt to restore her good name.

5.3 This case is about anonymous defamation which is not protected by the First Amendment.

Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978). Defamatory speech enjoys no legal protection and those who make defamatory remarks have always been required to answer for their conduct. The principle is embodied in the Idaho State Constitution, art. I, § 9.

> **Freedom of Speech**. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty.

The obligation of responsibility for what you say is so strong that Courts have long recognized that even the "press has no more license or right to publish falsehood and defamation than has a private

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individual." McDougall v. Sheridan, 23 Idaho 191, 218, 128 P. 954, 963 (1913). This long standing legal principle governing public comment in Idaho demonstrates the Spokesman-Review's arguments lack both legal efficacy and good faith. Neither the press nor a citizen can avoid liability for defamation by retreating to State Constitutional protections.

Nor do the Spokesman-Review's federal law arguments assist the Court. It has long been recognized that the Constitution does not afford protection to all forms of speech. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942). When discussing freedom of speech, the Supreme Court has stated, "[t]he constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Unlike the dissemination of ideas and opinions, however, "...there is no constitutional value in false statements of fact." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Defamatory statements "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky, 315 U.S. at 572.[3]

Even comments protected by the First Amendment must be balanced against other interests, particularly an "individual's right to the protection of his own good name . . . ." Gertz, 418 U.S. at 341. "Almostinnocentbystander's" false accusations have no recognized federal Constitutional protection. "Almostinnocentbystander" has admitted to Mr. Oliveria that he/she knew the statements about

[3] "If by the liberty of the press were understood merely the liberty of discussing the propriety of public measures and political opinions, let us have as much of it as you please: But if it means the liberty of affronting, calumniating and defaming one another, I, for my part, own myself willing to part with my share of it, whenever our legislators shall please so to alter the law and shall cheerfully consent to exchange my liberty of abusing others for the privilege of not being abused myself." B. Franklin, September 12, 1789.

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Ms. Jacobson were false, but posted them anyway. In our society "almostinnocentbystander" is accountable for those actions and the accountability comes in a court of law.

5.3.1. Ms. Jacobson is legally entitled to the identities.

The Spokesman-Review in essence admits the names are subject to release, but it argues there is a stringent test that applies to the release of the identity of an anonymous blogger. It relies on the ruling in Dendrite v. Doe, 342 N.J. Super. 134, 775 A.2d 756 (2001) to advance this argument. This argument is offered without once addressing the very contract governing its website that make it clear the blogger is at its sole risk, that their identity may be compelled; and, most importantly, the warranty of the blogger that he/she will not post libelous material. The terms of use are a contract and the bloggers are bound by its terms. See Fjeta v. Facebook, Inc., No. 11 Civ. 918 (RJH), 2012 WL 183896, at *7 (S.D.N.Y. Jan 24, 2012) (publication pending in F. Supp. 2d) (citing multiple cases and noting that courts routinely enforce terms and conditions that users consent to by clicking "I agree"; which undisputedly occurred for each of the bloggers on the Huckleberries Online website). There can be no protection or obligation on the exercise of legal process to someone who has agreed in advance to the release of their personal information. The motion should be denied based on the Spokesman-Review's internet provider contract.

Most troubling about the argument advanced by the Spokesman-Review as to the application of the Dendrite test is that it does not even acknowledge the undisputed facts. The blog postings meet the test Spokesman-Review contends is applicable. That conclusion was already reached by Mr. Oliveria and as such Ms. Jacobson's request should have been complied with immediately. Rather, the Spokesman-Review is acting as it were as a party to this litigation and demanding that Ms. Jacobson

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1 today prove her case in a summary judgment fashion. This motion is not the day Ms. Jacobson has to
2 prove her case to a witness. That is not the law of this state.
3
4 Ms. Jacobson respects that while internet discussion boards present a unique opportunity for
5 individuals to anonymously voice their opinions and exchange ideas, the law is "the right to speak
6 anonymously on the internet is not without its limits and does not protect speech that otherwise would
7 be unprotected." SaleHoo Group, Ltd. v. ABC Co., 722 F. Supp. 2d 1210, 1213-14 (W.D. Wash. 2010);
8 see also Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 237 (Cal. App. 2008).[4] The dangers associated with
9 misusing internet discussion boards should not be underestimated—particularly because the internet
10 provides a way to transmit defamatory statements to millions of other internet users instantly. See,
11 Cohen v. Google, Inc., 887 N.Y.S.2d 424, 429 (2009). "When vigorous criticism descends into
12 defamation . . . constitutional protection is no longer available." Krinsky, 72 Cal. Rptr. at 238. The
13 Spokesman-Review sub silencio recognizes there are circumstances in which the anonymous blogger's
14 identity will be required. They just will not do it in this case.
15
16 Idaho has not established the standard necessary to require disclosure of an anonymous web
17 poster's identity. Courts in other jurisdictions have generally agreed that "the strength of the plaintiff's
18 case must be evaluated before he or she is permitted to unmask an anonymous defendant by subpoena."
19 SaleHoo, 722 F. Supp. 2d at 1216. "At the lenient end of the spectrum, some courts have held that the
20 plaintiff only needs to make a showing of good faith," while others use a slightly more rigorous test and
21 require a determination of whether the plaintiff's claim would survive a motion to dismiss, with the most
22 stringent tests requiring the plaintiff to "submit evidence sufficient to defeat summary judgment . . . or
23
24
25 [4] The Spokesman-Review devotes a Page to a block quotation of the court in Doe v. Cahill. (Memorandum page 6) But The Spokesman-Review choose not to quote the succeeding paragraph, which notes the Constitution does not protect defamation and that an appropriate standard must balance "one person's right to speak anonymously against another person's right to protect his reputation." Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005).
26

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make a prima facie evidentiary showing." Id. at 1216 (citing In re America Online, Inc., 52 Va. Cir. 26, 2000 WL 1210372 at *8 (Va. Cir. Ct. 2000); Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999); and Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005)). Ms. Jacobson states her obligation is only to show good faith in her request. Otherwise there would be no meaning to the State Constitutional mandate that free speech carries responsibility for the abuse of that liberty. The Spokesman-Review advocates the stiffer burden of Doe v. Cahill and Dendrite. Respectfully, whatever the standard, such could never impose the impossible burden of showing and winning a Plaintiff's case on a discovery motion as suggested by the Spokesman-Review.

5.3.2 The Dendrite Test.

Prescinding from the false predicate that bloggers on Huckleberries are guaranteed anonymity, whatever test the Court selects, Ms. Jacobson prevails on the motion. Certainly a good faith basis for the request has been shown. If the Dendrite test were to be the law of this state, then Ms. Jacobson has shown more than a good faith prima facie case of defamation against "almostinnocentbystander" and the motion must be denied. Dendrite involved anonymous bloggers on Yahoo. Dendrite, 342 N.J. Super at 140, 775 A.2d at 760. The trial court issued a ruling directing release of the identity of John Does 1 and 2, but denied on John Does 3 and 4. Id. at 146-147, 775 A.2d at 764. Dendrite appealed the ruling on John Doe 3. Id. at 147, 775 A.2d at 764. Both the trial court and the Court of Appeals denied the release of the identity of John Doe 3 solely because there was no showing of "harm" by John Doe 3 to justify the defamation claim. Id. at 152, 158, 775 A.2d at 768, 772. The offending comments were made on Yahoo. Id. at 140, 775 A.2d at 760. The Court found the offending comments were an expression of opinion by John Doe 3 about what could be interpreted from a reading of Dendrite's Quarterly Report filed with the SEC, a public document. Id. at 144-145, 775 A.2d at 762-63. The trial

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court and the Court of Appeals concluded that comments at issue were not obviously false and that Dendrite failed to show the alleged harm, i.e., stock price fluctuation, was caused by the comments. Id. at 159, 775 A.2d at 772. The Dendrite facts are not apposite to this case. It is significant however; that the Dendrite court favorably cited legal authority that found the import of comments alleging the Plaintiff was "ripping off" was a clear statement of defamation. Id. at 153, 775 A.2d at 768-69. Further, the Dendrite court stated with favor the Restatement proposition that, "[w]ords that clearly denigrate a person's reputation are defamatory on their face and actionable per se." Id. at 158, 775 A.2d at 772 (quoting Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 765, 563 A.2d 31 (1989)).

The Dendrite Court did provide "guidelines" to New Jersey trial courts to conduct a case by case balancing test between the First Amendment right to speak anonymously and the right of a Plaintiff to protect both their proprietary interests as well as their reputations. Id. at 141, 775 A.2d at 760. If the New Jersey guidelines were to be adopted by this Court then Ms. Jacobson has met that test.

The Dendrite guidelines are: 1) Notice to the anonymous bloggers of the hearing on the blog. This has occurred.[5] 2) The Plaintiff must set forth the exact statements made by the anonymous blogger. This has been done. (Stipulation, Ex. 6 and Aff. of T. Jacobson, Ex. 1, 2 and 3) 3) Review of the complaint and provided information should set forth a prima facie cause of action against the

[5] The Spokesman-Review disingenuously argued in its brief that "notice" of the hearing on its motion needed to be posted by Ms. Jacobson addressed to the anonymous bloggers. They argue it is Ms. Jacobson's burden under the Dendrite test. This argument was made despite the fact that when it filed its motion it posted that fact on Huckleberries on May 5, 2012; and then again when it filed its memorandum it likewise posted all its submissions on the Huckleberries on May 14, 2012. To take this question out of consideration, a notice has been submitted by Ms. Jacobson's counsel and has been posted. (See Aff. M. Andersen)

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anonymous blogger.[6] See below discussion of the undisputed facts. 4) The Court must balance the First Amendment right to speak anonymously against the strength of the prima facie case presented and the necessity of the identity to permit the Plaintiff to properly proceed. See below.

5.3.3 Ms. Jacobson prima facie case of defamation.

The evidence of defamation is already in the record and well known to the Spokesman-Review. A defamation claim in Idaho requires proof that the defendant: "(1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication." Clark v. The Spokesman-Review, 144 Idaho 427, 430, 163 P.3d 216 (2007). Additionally, a plaintiff who is a public figure may prevail when by proving "actual malice, knowledge of falsity or reckless disregard of truth, by clear and convincing evidence." Id. (citing New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)).

First, there is no doubt in this case that publication has occurred, and it occurred on the website of the Spokesman-Review. The necessity for the identity of "Phaedrus" and "OutofStaterTater" is they are clearly the percipient witnesses to the publication.

Second, the court is more properly asked not if there is defamation, but whether "almostinnocentbystander's" comments about Ms. Jacobson are defamation *per se*. "A 'defamatory' statement is one 'tending to harm a person's reputation, [usually] by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business.'" Weitz v. Green, 148 Idaho 851, 862, 230 P.3d 743 (2010) (quoting Black's Law Dictionary 188 (3rd Pocket Ed. 2006)).

[6] "Prima facie proof" connotes a situation where a party has come forward with sufficient proof to prevail on an issue absent competent evidence to the contrary; however, prima facie proof does not shift the burden of persuasion on the issue, and when the prima facie proof is rebutted by competent evidence the issue is decided, like other issues, on the sum of the proof. See Reddy v. Johnston, 77 Idaho 402, 293 P.2d 945 (1956) (reversible error to treat presumption that services were rendered for pay as shifting burden of proof; equating prima facie proof and effect of presumption). Idaho Trial Handbook §12:5 (2d ed.)

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When determining whether comments are defamatory *per se*, the words should be considered in whole, given their ordinary and accepted meaning, and interpreted from the viewpoint of those to whom they were directed. Weeks v. M-P Publications, Inc., 95 Idaho 634, 636, 516 P.2d 193 (1973).

> In order to be libelous per se, the defamatory words must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule or cause him to be shunned and avoided; in other words, *they must reflect on his integrity, his character, and his good name and standing in the community, and tend to expose him to public hatred, contempt or disgrace.* The imputation must be one which tends to affect plaintiff in a class of society whose standard of opinion the court can recognize. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks plaintiff, and subject him to jests or banter, so as to affect his feelings.

Id. at 636-37 (emphasis added) (quoting Gough v. Tribune-Journal Co., 73 Idaho 173, 179, 249 P.2d 192 (1952)). Calling an innocent person a thief satisfies the requirements for defamation per se. See Barlow v. Int'l Harvester Co., 95 Idaho 881, 891, 552 P.2d 1102 (1974). The fact of defamation by "almostinnocentbystander" is not arguable in this case. It is certainly not for the Spokesman-Review to challenge. Ms. Jacobson views the comments to be defaming of her. And if the comments are not a per se defamation, then it is for the jury to decide.

The Spokesman-Review now suggests that the comments about theft by Ms. Jacobson were nothing more than an "ad hominem". Respectfully this gibberish argument is belied by the very palate on which the defamation was plastered, the blog. Certainly "Phaedrus" and "OutofStaterTater" thought the comments inferred stealing. Certainly Mr. Oliveria thought the comments were defaming when he stated they represented an unproven "wrongdoing" at the time he removed the comments; and to which he himself stated were an "unsubstantiated accusation". Certainly he felt the comments needed to be removed to "protect" the author, not him. Certainly Mr. Oliveria wrote that the author of the "baseless" defamation, "almostinnoncentbystander" acknowledged to him the commentary was both "derogatory

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and unsubstantiated". And most telling, even though the comments were apparently removed, bloggers still refer to the funds Ms. Jacobson "stole" and some even believe she is a thief. (Aff. of T. Jacobson, ¶17, Ex. 3) It is not for the Spokesman-Review to defend the comments of "almostinnocentbystander" as they are not adopted as theirs nor do they stand as a guarantor of the veracity of the content. Ms. Jacobson states unequivocally that the comments were defamatory and aimed at her. If there is an after the fact shading of the evident truth, then that can be argued by "almostinnocentbystander" to the jury.

Third, damages are always instructed when one's reputation is smeared. Ms. Jacobson was immediately damaged when the other viewers and commentators saw the post and began to wonder about the veracity of the comments. The Spokesman-Review's argument that only two people responded to the comments has no bearing on whether Ms. Jacobson suffered damages. No legal authority has been cited for the proposition that defaming statements require a response in order to damage a person's reputation. Its follow up argument that the comments were only posted for approximately two hours also misses the issue. The issue at this stage is whether Ms. Jacobson suffered damages. Evidence as to how many people saw the defamatory comments and how long the comments were posted will be relevant factors for a jury to consider in calculating a damage award. In addition, there are now other bloggers who have picked up the "she stole" theme and are repeating it on the blog. (Aff. of T. Jacobson, ¶17, Ex. 3) It has long been the law that in a defamation per se case, the defamed person is entitled to "substantial damages without proving actual damages." Barlow, 95 Idaho at 896.

As Chairman for the Party, Ms. Jacobson occupies a position where trust and integrity are of paramount concern. Because of "almostinnocentbystander's" false accusations, Ms. Jacobson's reputation for honesty and integrity are called into question. She has had to run the risk of the loss of

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her fellow party member's confidence and support; and her past performance of her voluntary public service has now been cast with suspicion. Bloggers continue to question whether she is a thief. (Aff. of T. Jacobson, Ex. 3) Because of the close-knit nature of the Rathdrum community, where Ms. Jacobson lives, her standing in the community has also been adversely impacted. Ms. Jacobson is now embarrassed because of "almostinnocentbystander's" defamatory statements. She has spent needless hours responding to the inquiries about the defamation. She has been required to direct an independent review of the financial records to clear her name. And of course, the very effect of classic defamation damages is being played out on the blog. Bloggers are now repeating the defamation as if the theft were a verity. Ms. Jacobson is legitimately worried about the impact of this claim on her present and future employment as a Controller. The fact of damages in an acknowledged defamation case cannot be contested by the Spokesman-Review. The nature and amount of damages will be for the jury to decide. If a showing of harm to Ms. Jacobson is necessary, she has demonstrated more than adequate evidence on this motion to set forth a prima facie case.

Finally if, as suggested by the Spokesman-Review, Ms. Jacobson were to be found to be a public figure by the jury, then it asserts Ms. Jacobson would have also have to show malice, i.e., the statement was made with the knowledge it was false in order to prevail. It is premature to determine if evidence of malice will be required in this case.[7] If such a showing were required, it is puzzling that the Spokesman-Review will not even acknowledge the undisputed fact from its website; Mr. Oliveria confirmation he spoke with "almostinnocentbystander", and then he blogged that in an e-mail the author admitted the commentary was both "derogatory and unsubstantiated". And the Spokesman-Review cannot deny in

[7] Courts addressing the issue of whether to unmask an anonymous blogger in public official defamation cases have refused to adopt a test requiring the plaintiff to show malice. See, e.g., Doe v. Cahill, 884 A.2d 451, 464 (Del. 2005); See also, In re Indiana Newspapers Inc., 963 N.E.2d 534, 552 (Ind. 2012).

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this case Ms. Jacobson can prove that the "almostinnocentbystander's" statements were false. In sum, Ms. Jacobson has established all the elements for a defamation claim under Idaho law.

The only issue standing in the way of Ms. Jacobson's defamation suit is identifying "almostinnocentbystander" who defamed her and two witnesses to the publication.

5.4 The defamatory comments are not "non-provable hyperbole" or statements of opinion that remain protected.

In addition to relegating the defamation to the category of a mere harmless ad hominem, the Spokesman-Review now seeks to stretch the facts to ask this Court to find as a matter of law on this motion that the defaming comments are nothing more than an expression of opinion that amount to non-provable hyperbole rather than a comment on a fact. It must again be stated, the Spokesman-Review does not refer to the obvious facts to be found by reading its own website. Statements that clearly impute that Ms. Jacobson stole money from the Party and then she refused to open up the books for inspection are false statements of fact. Ms. Jacobson has said the fact allegation is false. The financial reviewers say it is false. Mr. Oliveria stated the allegation of factual wrongdoing was "unsubstantiated". "Almostinnocentbystander" admitted the fact allegation was unsubstantiated. The Spokesman-Review understands the difference between an opinion and a statement of fact. This hyperbole argument is both legally and factually disingenuous.

Statements of opinion are generally afforded Constitutional protection, but there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich, 497 U.S. at 18. The Court eloquently stated:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of

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> opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Id. at 18-19. As the Spokesman-Review argues, some courts address whether a statement is opinion or fact under the totality of circumstances using the following test:

> (1) whether in the broad context, the general tenor of the entire work, including the subject of the statements, the setting, and the format, negates the impression that the defendant was asserting an objective fact; (2) whether the context and content of the specific statements, including the use of figurative and hyperbolic language, and the reasonable expectations of the audience, negate that impression; and (3) whether the statement is sufficiently factual to be susceptible of being proved true or false.

Obsidian Fin. Grp., LLC v. Cox, 812 F. Supp. 2d 1220, 1223 (D. Or. 2011).

It is clear from the content of the comments about Ms. Jacobson that John Doe/Jane Doe was not expressing an opinion. The commentators on the blog clearly read the comments to say Ms. Jacobson embezzled $10,000 from the Party and she attempted to cover up the theft. Any confusion the Spokesman-Review seeks to offer by argument is completely refuted by its own bloggers who still call Ms. Jacobson a thief. (Aff of T. Jacobson, Ex. 3) The Spokesman-Review cites numerous cases where comments made on the internet, or in other mediums, did not amount to defamatory statements. The Spokesman-Review relies heavily on Obsidian to conclude that John Doe's/Jane Doe's comments about Ms. Jacobson were "non-provable hyperbole." What the Spokesman-Review fails to mention is that the offending comments were posted on an "obviously critical" website devoted to a critic of the handling of a bankruptcy. The comments were posted on the website named "obsidianfinancesucks.com" and the other comment was posted on "bankruptcycorruption.com." Obsidian, 812 F. Supp. 2d at 1232. The federal district court noted, "[b]y virtue of the websites' titles, the reader of the statements is predisposed

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to view them with a certain amount of skepticism and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts."

It is presumed that the Spokesman-Review is not suggesting that someone logging on to Huckleberries, comes with a presupposed skepticism as the veracity of its content or that it is a single purpose website to rant about a single topic. Rather, it touts the blog as owned by a credible long established business organization, whose published Community Guidelines identifies itself as owned by a family newspaper, and which requires civility, decency and commonsense. It elicits from all bloggers a guarantee that no material posted will be defamatory. The Obsidian rational on the other hand is founded in the broad context of an extensive website dedicated to one topic, visited by a class of disaffected bloggers. Huckleberries is not that blog. The charge of embezzlement against Ms. Jacobson was blurted out in the context of a blog discussion concerning the role of religion in Senator Santorum's campaign. Not only was it defaming, it was so defaming that Mr. Oliveria himself removed the comment and lifted posting privileges. Apropos to this case, what the Obsidian Court ruled is the analysis of context stresses, ". . . the 'threshold question' in a defamation claim is 'whether a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact." Id. at 1223 (quoting Gardner v. Martino, 563 F.3d 981, 987 (9th Cir. 2009).[8] A reasonable fact finder can easily find the comments imply the fact of theft, embezzlement and cover-up. The rationale of Obsidian supports Ms. Jacobson's right to the information. More importantly for this motion, whether the comments were harmless or statement of fact is for the jury to decide, not this Court on a motion to quash.

In the main, the authority cited by the Spokesman-Review do not involve factual assertions like the defamatory statements about Ms. Jacobson, and the opinions were made in different contexts. For

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[8] If the Spokesman-Review wishes its readers to consider its postings as voiceless venting for those trapped in endless blogosphere postings such as one sees on sites like "obsidianfiancesucks.com", it needs to change the written policy and disown its reputation.

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example, the statements at issue in Gregory v. McDonnell Douglas Corp. were "of the kind typically generated in the 'economic give-and-take' of a spirited *labor dispute* in which the judgment, loyalties and subjective motives of rivals are reciprocally attacked and defended, frequently with considerable heat." 17 Cal. 3d 596, 603, 522 P.2d 425 (1976) (emphasis added). And undoubtedly, a student calling his teacher the "worst teacher" and a "babbler" in a *high school newspaper* does not amount to actionable defamation because of its context. Moyer v. Amador Valley Joint Union High School Dist., 225 Cal. App. 3d 720, 726 (1990). Further, the statement that "...sometimes the change of heart comes from the pocket' does not, when fairly considered, import that the plaintiff's change of heart *had come from any actual bribery or pecuniary inducements already received* . . . ." Sillars v. Collier, 23 N.E. 723, 724 (Mass. 1890) (emphasis added). In Taylor v. Lewis, the court was careful to point out that the article did not charge the plaintiff "with corruption or fraudulent practices in office" but merely "poor judgment." 132 Cal. App. 381, 386 (1933).

Wilson v. Cowles Publishing, No. 23134-4-II, 2000 WL 1157110 (Wash. App. Aug. 11, 2000) cited by the Spokesman-Review is not reported, and would not be considered by a Washington Court as precedential. RCW 2.06.040. Addressing the case, that court found a proof problem with malice, not with whether or not there was an expression of an "opinion". Id. at *6-7. The court did, however, state, "an expression of opinion can be defamatory if it implies a false statement of fact" and "humorous or satirical writing can also be actionable if it implies a factual statement that would be actionable if expressly stated." Id. at *7.

In short, the Spokesman-Review offers no legal authority of assistance in resolving disclosure of the accuser of Ms. Jacobson. Rather, the most relevant authority to whether the statements involved an assertion of fact can be seen when it was said on a blog that, "[t]he missing money can be found in their

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bank accounts." Indiana Newspapers, 963 N.E. 2d at 538. And, there, the court found the statement was defamation per se. Id. at 550. Imputing the theft of Party money, placing it on Ms. Jacobson's body, stating specifically of non-disclosure of financial records and tying it all together with embezzlement in Idaho is defamation. The statements of "almostinnocentbystander" are not hyperbole.

5.5 The Subpoenaed Information.

The subpoena seeks the identity and relevant communications associated with the defamer and two percipient witnesses. The balancing analysis for the production of the information as to all three is in all respects identical. The briefing of the Spokesman-Review appears to be a half-hearted effort to protect the defamer, but is really focused on the two witnesses. Yet the arguments of the Spokesman-Review only reinforce why the information as to all three anonymous bloggers is necessary to this case.

As noted, no blogger on the website could contend they have an expectation of anonymous protection when their contract to use the website advises them there is no protection.

Further, the expectation of a Constitutional protection to comment anonymously could never be invoked by "almostinnocentbystander" because there is no protection for a defaming comment no matter how the defaming statement was posted. The law cited by the Spokesman-Review recognizes and builds on this precept of law. There was no basis for the Spokesman-Review to resist surrendering the information concerning the defamer.

Finally, the need for the witness identity is proven by the argument made by the Spokesman-Review. At trial Ms. Jacobson is going to have to prove publication. As a preview of the argument to be offered at trial, the defense well may be asserting there is no live witness who comes into the courtroom to say they read the blog, believed the comments were true and then acted on them either in their own belief structure, they repeated the defamation or they otherwise acted upon the statement. For

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sure, "Phaedrus" and "OutofStaterTater" did read, did act and are percipient witnesses to the defamation. The need for their testimony is necessitated by the burden of proof Ms. Jacobson will have at trial. These witnesses are not "innocent" as inferred by the Spokesman-Review. They voluntarily participated in a blog exchange. They seized on and immediately called for more detail of a defaming comment. They were willing participants in a blog where they agreed in advance their identity can be compelled by legal process. The Spokesman-Review suggests these witnesses should not be considered for identification because they are not the defamer. This argument ignores the requirements of the courtroom. They can properly be called upon at trial for their testimony and Ms. Jacobson should not be denied such just because they voluntarily choose to comment anonymously.

5.6 Motion for Attorney's Fees and Costs.

The Court is asked to award Ms. Jacobson her attorney's fees and costs pursuant to I.R.C.P. §45(h). Anyone failing to obey a subpoena without "an adequate" excuse may be deemed in contempt of court. There was no factual or legal excuse for the resistance to the subpoena properly served on the Spokesman-Review. The factual information requested is in the hands of the Spokesman-Review. It was given an opportunity to surrender such voluntarily as well by service of legal process if it needed a court sanctioned indicia to respond. There was no oppressive burden on the Spokesman-Review to respond. However, it chooses to concoct an inapplicable legal argument as its "excuse".

The Spokesman-Review is long established and has accomplished counsel to aid in creating its legal entities as well as protecting its First Amendment rights. The creation of the online blog was done in a manner to invoke the protections of 47 U.S.C. §230. The creation of the Service Agreement and attendant policies are clear and unequivocal adjunct writings to affect that purpose. The blogger is at his/her own personal risk and the Spokesman-Review is not responsible for the content. The blogger is

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a guarantor that the content will not defame. The blogger is told their personal information can be released upon the issuance of legal process. The Spokesman-Review cannot offer a legally cognizable excuse to its failure to respond to the subpoena based upon the very terms of use of its blog.

Mr. Oliveria, as the blog operator, at the time acknowledged the wrongdoing of the defamer was a baseless accusation. There was no factual impediment to suggest the request by Ms. Jacobson was perfidious.

The Spokesman-Review is a sophisticated owner and knows the intricacies of the Constitution. There never was a Constitutional issue concerning "almostinnocentbystander". There was never a doubt as to the facts about what transpired on its own website. There has never been a question as to the published Spokesman-Review contract for use of the blog. As demonstrated by this response, rather than acknowledge the law and the facts displayed on its blog, this obstructionist motion was filed to curry favor with its bloggers, not in the exercise of the duty owed to the Court. The assertion of any privilege with its motion was made in bad faith and an inadequate excuse to disobey the subpoena served on it.

The Court is asked to permit an application for attorney's fees and costs to be determined at a later date.

DATED this 21st day of May, 2012.

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1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be:

3 ☐ mailed, postage prepaid;
☑ hand delivered;
4 ☐ sent via facsimile;
☐ sent via email;

5

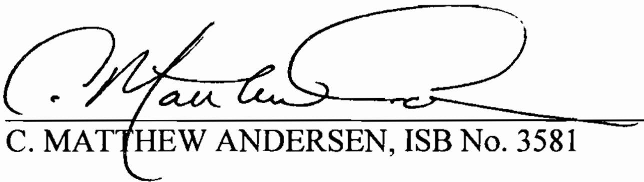
6 On May 21, 2012, to:

7 Duane Swinton
Witherspoon Kelley
8 422 W. Riverside Ave., Suite 1100
Spokane, WA 99201-0302

9

10 Joel P. Hazel
Witherspoon Kelley
11 The Spokesman Review Building
608 Northwest Boulevard, Suite 300
12 Coeur d'Alene, ID 83814-2146

13

14 

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