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**In the
SUPREME COURT OF PENNSYLVANIA**

Nos. 50 WAP 2002 and 51 WAP 2002

JOAN ORIE MELVIN,

Appellee,

v.

JOHN DOE, ALLEN DOE, BRUCE DOE, CARL DOE, DAVID DOE,
EDWARD DOE, FRANK DOE, GEORGE DOE, HARRY DOE,
IRVING DOE, KEVIN DOE, LARRY DOE, and JANE DOE,

Appellants

**BRIEF FOR
PUBLIC CITIZEN, ELECTRONIC FRONTIER FOUNDATION,
AND ELECTRONIC PRIVACY INFORMATION CENTER
AS AMICI CURIAE**

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INTEREST OF AMICI CURIAE

Public Citizen is a public interest organization based in Washington, D.C., which has approximately 125,000 members, more than four thousand of them in Pennsylvania. Since its founding by Ralph Nader in 1971, Public Citizen has urged citizens to speak out against abuses by a variety of large institutions, including corporations, government agencies, and unions, and it has advocated a variety of protections for the rights of consumers, citizens and employees to encourage them to do so. Along with its efforts to encourage public participation, Public Citizen has brought and defended numerous cases involving the First Amendment rights of citizens who participate in public debates.

In recent years, Public Citizen has watched with dismay as an increasing number of companies have used litigation to prevent ordinary citizens from using the Internet to express their views about the manner in which companies have conducted their affairs. In recent years, Public Citizen has represented consumers, *ServiceMaster v. Virga*, No. 99-2866-TUV (W.D. Tenn.), workers, *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.), investors, *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.); and other members of the public, *Circuit City Stores v. Shane*, No. C-1-00-0141 (S.D. Ohio), who have been sued for criticisms they voiced on the Internet. See generally <http://www.citizen.org/litigation/briefs/internet.htm>. In these and other cases, companies have brought suit without having a substantial legal basis, hoping to silence their critics through the threat of ruinous litigation, or by using litigation to obtain the names of critics with the objective of taking extra-judicial action against them (such as by firing employees found to have made critical comments). Public Citizen has represented Doe defendants or appeared as amicus curiae in several cases in which subpoenas

have sought to identify anonymous posters on Internet bulletin boards or web sites. *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.); *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.); *iXL Enterprises v. Doe*, No. 2000CV30567 (Ga. Super. Fulton Cy.); *Thomas & Betts v. John Does 1 to 50*, Case No. GIC 748128 (Cal. Super. San Diego Cy.); *Hritz v. Doe*, C-1-00-835 (S.D. Ohio); *WRNN TV Associates v. Doe*, CV-00-0181990S (Conn. Super. Stamford); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001); *Donato v. Moldow*, No. BER-L-6214-01 (N.J. Super. Bergen Cy.).

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco. EFF has about 7300 members all over the United States and maintains one of the most-linked-to Web sites (<http://www.eff.org>) in the world.

EFF believes that free speech is a fundamental human right and that free expression is vital to society. The vast web of electronic media that now connects us has heralded a new age of communications, a new way to convey speech. New digital networks offer a tremendous potential to empower individuals in an ever over-powering world. While EFF is mindful of the serious issues that may arise when information, ideas and opinions flow free, EFF is dedicated to addressing such matters constructively while ensuring that fundamental rights are protected - including the right to communicate and read anonymously.

Thus, EFF's interest in this case. EFF has represented individuals involved in several "Doe" litigations and has advised many others, both in California state courts and in various state and

federal courts nationwide. *E.g., Doe v. 2TheMart.com*, 140 F. Supp.2d 1088 (W.D. Wash. 2001); *Kesler v. Doe*, App. No. G029100 (Cal. App. 4th Dist. 2001); *Medinex Systems v. AWE2BAD4MDNX*, CIV0-1-0106-N-EJL (PVT) (N.D. Cal.); *Rural/Metro Corp. v. John/Jane Doe I et al*, C 00-21283 (N.D.Cal.); *Pre-Paid Legal Services. of Florida v. Sturtz*, No. CV798295 (Cal. Super. Santa Clara Cty.); *Hritz v. Doe*, C-1-00-835 (S.D. Ohio).

The Electronic Privacy Information Center ("EPIC") is a non-profit, public interest research organization focusing on privacy and civil liberties in the fields of telecommunications, electronic information and computer networks. EPIC's activities include the promotion and defense of individuals' constitutional right to engage in anonymous communication. EPIC frequently presents testimony before Congress and administrative bodies, publishes educational materials, and participates in litigation addressing significant and precedent-setting issues. EPIC recently filed an amicus brief in support of the right of anonymous speech in *Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 122 S. Ct. 2080 (2002).

QUESTIONS PRESENTED

1. May a public official compel the identification of an anonymous Internet critic simply by denying the criticism and relying on a presumption that her reputation may have been harmed, that her feelings may have been hurt, or that she may have been damaged in some other way?

Not reached in the Superior Court, answered in the affirmative in the trial court. Amici argue for a negative answer.

2. Did the trial judge abuse his discretion by refusing to balance the equities in the circumstances of the particular case before ordering America Online to provide information identifying the anonymous critic of a public official?

Not reached in the Superior Court, implicitly answered in the negative in the trial court. Amici argue for an affirmative answer.

STATEMENT

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997), “From a publisher’s standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.” The Internet is a traditional public forum, and full First Amendment protection applies to free speech on the Internet. *Id.*

Several Internet service providers (“ISP”) have organized outlets for the expression of opinions. These outlets, called message boards, are an electronic bulletin board system where individuals freely discuss designated topics by posting comments for others to read and respond to. *Global Telemedia v. Doe*, 132 F. Supp. 2d 1161, 1264 (C.D. Cal. 2001). Individuals sometimes organize their own message boards for the discussion of specific topics in which they are interested, such as the “Eye on Emerson” site at issue in *Donato v. Moldow*, *supra* page 2, or the Northwest Flight Attendants Forum at issue in *Northwest v. Local 2000*, *supra* page 2. And, as in this case, some individuals establish commentary web sites that reflect only their own views.

This appeal arises from a defamation suit filed over criticisms advanced anonymously by

John Doe, a citizen of Allegheny County, Pennsylvania, about an elected Superior Court judge, the plaintiff-respondent Joan Orié Melvin. Doe was the author of the political commentary page entitled "Grant Street 1999" and maintained on the servers of America Online. (Various courthouses and government office buildings are located on Grant Street in Pittsburgh.) In one of his columns, Doe criticized two local judges for allegedly lobbying the governor to appoint certain individuals to vacant judgeships, an action that Doe called unethical. One of the two judges in question was plaintiff Melvin who, represented by her brother, Jack Orié, a local attorney, filed a suit alleging that the statements were false and defamatory. Melvin's counsel was quoted in the local press as stating that, as a judge, his sister "has to be above the fray," but that he was going to find out who had criticized his sister within weeks and that "I'll get him in the long run. . . . I live for this stuff." R.75a. It appears that Doe, via the Grant Street 1999 web page, was a regular commentator on local politics until this suit was brought. According to an article in the local press, the Doe defendant is "a faceless guy deep in the bowels of the old political system." R.75a.

At the outset of the case, plaintiff initiated discovery to compel America Online to identify the person who authored the Grant Street web site. Doe opposed that discovery, and the trial court agreed to postpone issuance of an order compelling AOL to identify its customer to give defendants an opportunity to move for summary judgment by arguing that plaintiff could not make out a prima facie case. As the Court explained, "A plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit. [Accordingly], plaintiff should not be permitted to engage in discovery to learn the identity of the Doe defendants until the Doe defendants [have] had an opportunity to establish that, as a matter of law, plaintiff could not prevail in this lawsuit." 49 Pa. D. & C.4th 449, at 451 and n.2.

Thus, the court drew from established case law recognizing the existence of a right to speak anonymously unless the speech is actionable, *id.* at 455, and held that “the complaint on its face [must] set forth a valid cause of action and . . . the plaintiff [must] offer testimony that will permit a jury to award damages.” *Id.* at 462.

Consequently, the court deferred the attempt to identify the defendant until it satisfied itself that the plaintiff had presented testimony sufficient to overcome a motion for summary judgment. The Court authorized Doe to take the plaintiff’s deposition, although, at that deposition, plaintiff responded only to questions that bore directly on the issue of whether the statements about her were true or false. She refused to answer any questions bearing on whether any person had believed the statements about her, whether her reputation had sustained any damage, whether she had suffered any emotional distress or other actual harm, and whether she had incurred actual expenses or other monetary damages.

In the end, the trial court denied defendant’s motion for summary judgment and ordered that defendant’s identity be revealed. 49 Pa. D. & C.4th 449, 452. The court acknowledged that the First Amendment protects the right to speak anonymously, *id.* at 455, and that the identification of the defendant should not be compelled in cases where the plaintiff cannot show that she has a cause of action that meets the standards of legal and factual sufficiency. However, the court determined that the statements about Judge Melvin were capable of a defamatory meaning, and that plaintiff had offered evidence that the statements were false. *Id.* at 452. The court also indicated that plaintiff had “produced evidence which would support a finding . . . that she has sustained actual harm,” *id.*, *see also id.* at 462-463, although elsewhere the court indicated that the First Amendment protection for anonymity does not extend to any speech that is both defamatory and untrue. *Id.* at 455. In this

respect, the Court appeared to hold that defendant must be identified despite the absence of any evidence of actual harm, not just the absence of evidence of economic damages or actual harm. Indeed, given Melvin's refusal to answer questions at her deposition about **any** emotional or reputational harm she might have suffered, the appellate posture of the case would appear to require this Court to presume that there is no evidence of such harms.

SUMMARY OF ARGUMENT

The Supreme Court of the United States has held that the Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Accordingly, the Court has held that full First Amendment protection applies to communications on the Internet. Longstanding Supreme Court precedent also recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, alleging that the speech was in violation of the rights of another, the courts must balance the right to obtain redress from the perpetrators of civil wrongs, against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a defendant's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Defamation suits against anonymous speakers are unlike the normal tort case, in which the identification of an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a lawsuit filed over anonymous speech, the identification of the speaker provides an important measure of relief to the plaintiff because it enables the plaintiff

to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to anonymous speech but is exposed to the plaintiff's self-help efforts to restrain or oppose his speech. In our system of laws, we ordinarily do not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief.

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. To be sure, some individuals may speak anonymously because they fear the entirely proper consequences of improper speech, such as the prospect of substantial damages liability if they tell lies about somebody they do not like for the purpose of damaging her reputation. The challenge for the courts is to develop a test for the identification of anonymous posters which makes it neither too easy for vicious defamers to hide behind pseudonyms, **nor** too easy for a big company or a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

Amici urge this Court to embrace the developing consensus among those courts that have considered this question, by borrowing a standard from the well-developed rules governing the disclosure of anonymous sources in libel cases. Specifically, when faced with a complaint against an anonymous speaker and a demand for discovery to identify that speaker, a court should (1) provide notice to the potential defendant and an opportunity to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate its rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require

the plaintiff to produce evidence supporting each element of its claims, and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed, against the harm to the defendant from losing his right to remain anonymous, and in light of the strength of the plaintiff's evidence of wrongdoing. In this way, the Court ensures that the plaintiff does not obtain an important form of relief – identifying its anonymous critics – and that the defendant is not denied important First Amendment rights, unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria will require time and effort on the part of the plaintiff, and may delay its quest for redress against a defendant whose speech is alleged to have violated the plaintiff's rights. However, everything that the plaintiff must do to comply with this test, it must also do to prevail on the merits of the case. Therefore, so long as this standard does not demand more information than most plaintiffs will be reasonably able to provide shortly after they file the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker. Moreover, most cases of this kind will primarily involve demands for monetary relief, except in the rare case where the plaintiff has a sound argument for being granted a preliminary injunction, notwithstanding the strong rule against prior restraints of speech.

Accordingly, although applying this standard may delay service of the complaint or completion of the litigation, it will not, ordinarily, prejudice the plaintiff. On the other hand, the fact that after the defendant is identified, his right to speak anonymously has been irretrievably lost, counsels in favor of caution, and hence in favor of allowing sufficient time for the defendant to respond and requiring a sufficient showing on the part of the plaintiff.

Applying the foregoing test, the court below properly required plaintiff to show that she had

set forth a valid claim for relief and gave defendant the opportunity to move for summary judgment before deciding whether to compel disclosure of defendant's identity. However, the court below erred both in deciding that a prima facie case had been presented, and in refusing to balance the equities before deciding whether to order the identity disclosed.

ARGUMENT

A. The First Amendment Protection Against the Compelled Identification of Anonymous Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 122 S. Ct. 2080, 2089-2090 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*,

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

* * *

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated

the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. Accordingly, the Court has held that First Amendment rights are fully applicable to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998); *ACLU v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno* 119 S. Ct. 1450 (1999), *aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site “created and designed to annoy” legislators through anonymous communications); *Global Telemedia v. Does*, 132 F. Supp.2d 1261 (C.D. Cal. 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California’s anti-SLAPP statute); *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1092-1093 (W.D. Wash. 2001); *Hollis-Eden Pharmaceutical Corp. v. Angelawatch*, GIC 759462 (Cal. Super. San Diego Cy., March 20, 2001), unofficially published at <http://www.citizen.org/litigation/briefs/holldc.pdf>, *appeal dismissed*, No. D037907 (Cal. App. 4th Dist.).

Internet speakers may choose to speak anonymously for a variety of reasons. R.60a-62a. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or according to their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may be discussing embarrassing subjects and may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that

might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, the impact of a rule that makes it too easy to remove the cloak of anonymity is to deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. That is because the technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind an electronic footprint that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original sender. See Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. As a result, many informed observers have argued that the law should provide special protections for anonymity on the Internet. E.g., Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech?* *McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

A court order, even when issued at the behest of a private party, constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). The Court has acknowledged that abridgment of the rights to speech and press, "even though unintended, may inevitably follow from

varied forms of governmental action,” such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. The Court noted that rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524. The novelty of the procedural requirements at issue cannot be used to thwart consideration of the constitutional issues involved. *NAACP v. Alabama*, 357 U.S. at 457. Instead, the Court held, due process requires the showing of a “subordinating interest which is compelling” where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, *supra*, 514 U.S. at 347.

In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources or libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In such cases, the courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of its case; (2) disclosure of the source to prove the issue is “necessary” because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *Garland v. Torre*, 259 F.2d 545, 550-551 (2d Cir. 1958); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). The Pennsylvania courts have expressly adopted this

analysis. *Commonwealth v. Tyson*, 800 A.2d 327, 331-332 (Pa. Super. 2002); *Davis v. Glanton*, 705 A.2d 879, 885 *et seq.* (Pa. Super. 1997); *McMenamin v. Tartaglione*, 139 Pa. Commw. 269, 287, 590 A.2d 802, 811 (1991), *aff'd*, 527 Pa. 286, 590 A.2d 753 (1991). This standard must be applied on an individualized, case by case basis. *Davis, supra*, 705 A.2d at 885.

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to defense against a shareholder derivative action, “If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

B. Application of the Qualified Privilege for Anonymous Speech to Develop a Standard for the Identification of John Doe Defendants.

In a number of recent cases, other courts have drawn on the privilege against revealing sources to enunciate a similar standard for protecting against the identification of anonymous Internet speakers, while adapting the standard to conform to the different posture of such cases. The leading case is *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), a case in which a private company sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo! That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which amici urge the Court to apply in this case:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of

recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to R. 4:6- 2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 342 N.J. Super. 134, 141-142, 775 A.2d 756, 760-761 (App. Div. 2001).¹

¹ *Dendrite* has received a largely favorable reception among commentators. E.g., O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U. L. Rev. 213

A similar approach was used in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants who had registered Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect that such discovery could have:

People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Id. at 578.

Accordingly, the *Seescandy* court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus assuring them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the trademark claims that the plaintiff was bringing against the anonymous defendants. *Id.* at 580.

In another case similar to this one, the Virginia Circuit Court for Fairfax County considered a subpoena for identifying information of an AOL subscriber. The subscriber did not enter an appearance, but AOL argued for a standard that would protect its subscribers against needless piercing of their protected anonymity. The court required plaintiff to submit the actual Internet postings on which the defamation claim was based, and then articulated the following standard for

(2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001).

disclosure: The court must be

satisfied by the pleadings or evidence supplied to that court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed, and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.

In re Subpoena Duces Tecum to America Online, 52 Va. Cir. 26, 34, 2000 WL 1210372 (Va. Cir. Fairfax Cy. 2000), *rev'd on other grounds sub nom., America Online v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001).²

Although each of these cases sets out a slightly different standard, each requires the courts to weigh the plaintiff's interest in obtaining the name of the person that has allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trampled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a would-be plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

Moreover, the case here is a fortiori from *Dendrite*, *Seescandy*, and similar cases, because although those cases involved defendants who were sued either for their commercial speech (in *Seescandy*) or for their speech about commercial actors such as corporations and CEO's, the speech as issue here is core political speech about the conduct of a public official and about whether that

² Two unreported decisions, copies of which are attached to this brief, also reached results similar to *Dendrite*. A decision applying Canadian common law required the plaintiff to present evidence in support of its defamation claim before ordering enforcement of a subpoena for the identity of a John Doe defendant. *Irwin Toy, Ltd. v. Doe*, No. 00-CV-195699 CM (September 6, 2000). The Ontario Superior Court of Justice ruled that mere allegations were not sufficient, because otherwise anonymity on the Internet would be too easily shattered based on spurious claims. See also *Varian Medical Systems v. Delfino*, No. CV 780187 (Cal. Super., Santa Clara Cy.) (refusing to allow subpoena to identify anonymous posters who criticized Doe defendants on Yahoo! message board because of right to speak anonymously on Internet).

official should be retained by the voters. The protections that the First Amendment provides to the defendant are at their apogee when core political speech is at issue, the exposure of the plaintiff to comment is similarly at its apogee, and of course the danger to our democracy from the suppression of such speech is the greatest in such cases. Consequently, in this context above all others, the Court should not hesitate to follow the approach adopted by courts in other states in cases where commercial plaintiffs sought to identify their private sector critics.

C. The Procedures That Courts Should Follow in Deciding Whether to Require Identification of John Doe Defendants in Particular Cases.

In this portion of the brief, amici explain in detail the five steps that courts should follow in deciding whether to allow the plaintiff to compel the identification of an anonymous Internet speaker. In amici's view, the trial court sought to follow four of the five steps; however, its application of the fourth step was faulty, and its failure to follow the fifth step by balancing the equities between the two parties before issuing the order under appeal is the principal flaw in the decision below.

1. Give Notice of the Threat to Anonymity and an Opportunity to Defend It.

The first thing that a court should do when it receives a request for permission to subpoena an anonymous Internet poster is to require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendants have had the time to retain counsel. *Seescandy*, 185 F.R.D. at 579. Thus, in *Dendrite*, the Court required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. (The posted

Order to Show Cause, as it appears in the Appendix in the *Dendrite* appeal, is appended to this brief). The Appellate Division specifically approved of this requirement and ordered trial judges in New Jersey to follow it. 342 N.J. Super. at 141, 775 A.2d at 760. Because, in a defamation case, preliminary injunctive relief would ordinarily be barred by the rule against prior restraints, and the only relief sought is an award of damages, there is rarely any reason for expedition that counsels against requiring such notice and opportunity to object. A concomitant of the requirements of providing notice to the anonymous defendant and of identifying the specific statements alleged to be actionable is that enough time must be allowed to respond to the allegedly unlawful statements – ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment.

Court-ordered notice was not necessary in this case, because AOL provides prompt, written notice of the service of a subpoena to its customers. Many major Internet service providers (“ISP”) do likewise, and in fact the Cyberslapp coalition of which amici are a part have proposed a model notification policy for ISP’s to follow. This policy, which is posted on line at www.cyberslapp.org/ISPLetter.cfm, is attached to this brief. However, some large ISP’s still do not provide notice to their customers before they respond to subpoenas. Moreover, the ISP should be held harmless against the cost of notification, which the person seeking the discovery should be directed to reimburse. Accordingly, an order such as the one that was entered and affirmed in *Dendrite* provides an important procedural protection for the right to speak anonymously.

2. Require Specificity Concerning the Statements.

Regardless of whether a speaker appears in court on the motion to show cause, the qualified privilege to speak anonymously requires the court, on its own if necessary, to review the plaintiff’s

claims and the evidence supporting them to ensure that plaintiff does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the second part of the standard for such cases is that the court should require the plaintiff to set forth the exact statements by each anonymous speaker that is alleged to have violated its rights. It is startling how often plaintiffs in these sorts of cases do not bother to do this. Instead, they may quote one or two messages by a few individuals, and then demand production of a larger number of identities. In this case, plaintiff appended the allegedly defamatory statement to her complaint, so this part of the standard has been satisfied.

3. Review the Facial Validity of the Claims After the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable. Some statements may be too vague or insufficiently factual to be deemed capable of having a defamatory meaning. Still other statements may be non-actionable because they are merely statements of opinion: "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is" *Feldman v. Lafayette Green Condominium Ass'n*, — A.2d —, 2002 WL 1989396 (Pa. Commw. 2002). Statements of opinion are entitled to constitutional protection no matter how extreme, vituperous, or vigorously expressed they may be. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Accord Nanavati v. Burdette Tomlin Mem. Hosp.*, 857 F.2d 96, 106-108 (3d Cir. 1988).

In this case, much of what Doe wrote is plainly protected as opinion based on disclosed facts. Defendant's contentions that urging the governor to appoint a particular individual to the bench

constitutes “political activity,” that identifying worthy candidates for the bench is forbidden to judges, and that Melvin’s alleged efforts in that regard constitute a reason for voters not to re-elect her, are all non-actionable statements of pure opinion. The one part of the statement that relates to a matter of fact that may be true or false is the assertion that Melvin attempted to persuade the governor’s staff to appoint a particular individual to the bench. It is, in amici’s view, a close question whether such a statement is actionable defamation. After all, a judge, like any lawyer, is obligated by the canons of ethics to attempt the betterment of the bar by seeking to have qualified individuals appointed to fill vacancies. In other words, although defendant’s opinion was that there was something unethical about what he says Melvin did, it was not, in fact, unethical; consequently, we question whether the assertion that Melvin was engaged in such conduct is defamatory. Indeed when asked during her deposition whether she believed that such conduct would be unethical, she refused to answer the question.

On the other hand, the assertion that Melvin attempted to persuade the governor to appoint a certain individual to the bench might lower her reputation in the opinion of some persons, and defendant did not argue that his assertion of fact was not sufficiently capable of a defamatory meaning to warrant placing that question before a jury. If the statement does qualify as potentially defamatory, however, it barely does so.

4. Require an Evidentiary Basis for the Claims.

Fourth, as Judge Wettick recognized, no person should be subjected to compulsory identification through a court’s subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against each Doe defendant. The requirement of presenting evidence prevents a plaintiff

from being able to identify its critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim, as plaintiff Melvin argued below, that they need identification of the defendants simply in order to proceed with their case. Superior Court Brief at 22, However, the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this, and relief is generally not awarded to a plaintiff unless it comes forward with evidence in support of its claims. Withholding relief absent evidence is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, *California Law Week*, Volume 1, No. 9, at 16, 18 (1999) (copy attached). Some lawyers who bring cases like this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. *E.g.*, http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=74969&rft=8 (copy attached). One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and only decide whether to sue for libel after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online* (copy attached); Fischman, *Protecting the Value of Your Goodwill from Online Assault*, (copy attached). Lawyers who represent plaintiffs in these cases also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer and Liebesman, *Caught by the Net*, 10 *Business Law Today* No. 1 (Sept./Oct. 2000), at 46. These lawyers similarly suggest that clients decide whether it is worth pursuing a defamation

action only after finding out who the defendant is. *Id.*

As Eisenhofer and Liebesman acknowledge, even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the public official who has filed the action. However, imposition of a requirement that proof of wrongdoing be presented to obtain the names of the anonymous critics, and not just to secure an award of damages or other relief, may well persuade plaintiffs that such subpoenas are not worth pursuing unless they are prepared to pursue litigation.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources that require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F. Supp. 551, 566-567 (E.D. Mich. 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues with respect to which it needs to identify the anonymous speakers, before it is given the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). “Mere speculation and conjecture about the fruits of such examination will not suffice.” *Id.* at 994.

The extent to which a proponent of compelled disclosure of the identity should be required to offer proof to support each of the elements of its claims at the outset of its case, to obtain an injunction compelling the identification of the defendant, varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the

plaintiff's claim will ordinarily be based on evidence to which the plaintiff is likely to have easy access, even access that is superior to the defendant. For example, the plaintiff is likely to have ample means of proving that a statement is false. Thus, it is ordinarily proper to require a plaintiff to present proof of this elements of its claims as a condition of obtaining or enforcing a subpoena for the identification of a Doe defendant. The same is true with respect to the proof of damages, which is an element of a defamation claim in many states. *E.g.*, *Global Telemedia v. Does*, 132 F. Supp.2d 1261, 1270 (C.D. Cal. 2001); *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149, 158-159, 755 A.2d 583 (2000); *McLaughlin v. Rosanio, Bailets & Talamo*, 331 N.J. Super. 303, 308-309, 751 A.2d 1066 (2000), and is required in order to state a libel claim in the labor context, *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 64-65 (1966). *See also* decision below, 49 Pa. D. & C.4th 449, at 463 and n.8. A plaintiff should have ample means of proving its damages or other harm without need of discovery from the defendant.

On the other hand, if a defamation plaintiff is able to establish the other elements of its claim, it will normally not be able to present evidence showing the actual malice of the defendant without being able to identify him and take his deposition. There have been cases where summary judgment has been granted in favor of the defendant on the issue of actual malice without the disclosure of anonymous sources, where the volume of publicly available information on the topic of the defendant's comments was so great that the speaker could fairly have taken any view of the facts without being guilty of "reckless disregard" of the probable falsity of the matters stated, *e.g.*, *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972), but such cases are fairly unusual.³

³For example, if an anonymous web site author were to allege that a certain secretary to a past President suppressed evidence of a crime by her boss by erasing a major portion of a tape recording, or that another past President lied under oath about whether he had sexual relations with

Judge Wettick recognized that Doe should not be deprived of his anonymity unless Melvin had sufficient evidence to defeat summary judgment on all elements of her defamation claim; in this regard his decision in accord with *Dendrite*, and indeed with every other court that has discussed the standard inasmuch as all of them provide for the consideration of evidence and not just allegations. However, Judge Wettick ruled that plaintiff's flat denial of the factual accuracy of Doe's contention that she had sought the appointment of another judge was all the evidence that was needed, because there is no requirement of actual harm to get a defamation case to a jury. Amici endorse appellant's argument that, at least in the case of a public official, proof of actual damages should be required to defeat summary judgment on the merits of a defamation case. If the Court agrees with that argument, it will be unnecessary to reach the fifth and final element of the test for disclosure of anonymous speakers.

5. Balance the Equities.

Even after the Court has satisfied itself that each of the posters has made at least one statement that is actionable,

the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery

an intern, the secretary or the past President could create a genuine issue of material fact on the question of falsity, simply by submitting affidavits denying under oath that they were engaged in such conduct. Nevertheless, the defendant in such a case could presumably obtain summary judgment on the issue of actual malice without revealing his identity. The two sides of these factual questions have been so widely discussed that a court could decide that a jury could not reasonably find clear and convincing evidence that the statements were made reckless disregard for probably falsity, even if the author were never identified and deposed.

is not too severe.

Missouri ex rel. Classic III v. Ely, 954 S.W.2d 650, 659 (Mo. App. 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporters' source disclosure case, the *Dendrite* court called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 342 N.J. Super. 134, 141-142, 775 A.2d 756, 760-761 (App. Div. 2001).

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no need to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The requirement that there be sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly

appropriate because an order of disclosure is an injunction, and denial of a motion to identify the defendant does not compel dismissal of the complaint, but only defers the ultimate disposition of the case. In this regard, plaintiff's contention below, at page 22 of her brief, that the effect of defendant's argument against being identified would be to deny her the opportunity to have her day in court, is erroneous. Similarly, Judge Wettick erred when he rejected Doe's defense of his anonymity based solely on the existence of a genuine issue about whether the statement about Melvin was false, reasoning that "the First Amendment protections afforded the anonymous speaker do not extend to speech that may be false or injurious." 49 Pa. D. & C.4th at 457. Apart from the fact that, under the *New York Times* line of cases, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters," *Gertz v. Welch*, 418 U.S. 323, 341 (1974), the issue at this stage of the case is not whether the action should be dismissed or judgment granted rejecting the claim of defamation, but simply whether a sufficient showing has been made to overcome the right to speak anonymously.⁴

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to motion to dismiss or a motion for summary judgment. At

⁴Thus, the existence of a genuine issue about whether the statement is false is not a sufficient reason to disregard the serious potential for self-censorship if anonymity may be breached any time a public official swears that a critical statement about herself, whose status as defamatory is sufficient to be a question for the jury, is false. After all, the whole point of the Sullivan standard is the fear of "intolerable self-censorship" given that "the erroneous statement of fact . . . is nevertheless inevitable in free debate." *Gertz v. Welch, supra*, at 340. "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341. In short, *Gertz* makes clear that even though "many deserving plaintiffs . . . will be unable to surmount the barrier of the New York Times test," leading to "substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation," the *New York Times* test is necessary to protect "free debate." *Id.* at 342-343. It is, as the Court said in *Gertz*, "a measure of strategic protection for defamatory falsehood." *Id.* at 342.

the very least, the plaintiff retains the opportunity to renew her motion after submitting more evidence. In this case, for example, it is apparent that the plaintiff made a tactical decision not to reveal at her deposition any evidence that she might have of impact on her reputation or other harm; if her motion for disclosure were denied for lack of evidence, she might well decide to reveal more of her hand (assuming that such evidence exists). Moreover, as in this case, after the anonymous defendant appears through counsel, the court can order that attorney to accept substituted service and the case can go forward. And, because the case has not been dismissed, the plaintiff can pursue discovery from third parties and possibly from the anonymous defendant, as she attempts to develop sufficient evidence to warrant an order identifying the speaker.

However, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). Indeed, these injuries are magnified where the speaker faces the threat of economic or other retaliation. If, for example, the person whom the plaintiff seeks to identify is employed by someone over whom the plaintiff exercises influence or control, the defendant could lose a great deal from identification, even if the plaintiff has a wholly frivolous lawsuit.

The danger of retaliation against otherwise anonymous Internet speakers is not merely theoretical when the anonymous speaker is criticizing a public official such as the plaintiff in this case. As a judge, the plaintiff exercises a broad degree of virtually unreviewable discretion and thus could take action against an adversary with impunity. During the proceedings in this case, for example, plaintiff's counsel explained that one of the reasons why Doe should not be allowed to

subpoena Melvin's telephone records in an attempt to confirm the statement that she had spoken to the Governor or the key state senator was that she had a special ongoing responsibility for approving wiretaps. Moreover, as a judge sitting on the Superior Court, Melvin has especial influence throughout the state. And, given that the Doe defendant is apparently within "the bowels of the old political system" in Pittsburgh, R.75a, being "outed" by a subpoena, at the hands of plaintiff's counsel who has made no bones about his desire to "get" the defendant while allowing his sister to remain above the fray, could be devastating to defendant's career and his social relationships. That such retaliation might well be improper, and even unlawful if Doe is not a confidential or policy-making employee, is little comfort to the defendant. In short, the record suggests that defendant Doe is especially vulnerable to out-of-court retaliation should his identity be revealed.⁵

On the other side of the balance, the Court should consider the strength of the plaintiff's case and her interest in redeeming her reputation. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations and their propensity to damage reputation. In a case such as *Biomatrix v. Costanzo*, Docket No. BER-L-670-00 (N.J.

⁵Ironically, from a labor law perspective, Judge Wettick's requirement that Doe's identity be kept confidential after plaintiff and her counsel learn his name is likely to increase rather than decrease the likelihood that he will suffer retaliation as a result of being identified. After all, because retaliation against a public employee for making statements about a matter of public concern is unlawful, persons who engage in such retaliation customarily give a facially valid reason, or refuse to give any reason, for their actions. And, one part of the prima facie case of retaliatory discharge from public employment is a showing that the employer was aware of the exercise of free speech rights that a plaintiff alleges was the reason for his termination. By cloaking the fact of the free speech activity in a supposed veil of secrecy, Judge Wettick deprived Doe of his best defense in the event of retaliation. Nor would plaintiff's counsel need to reveal that a person against whom he was suggesting adverse action was the one whose identity is at stake in this suit, in the event he pursued his express intent to "get" Doe once he found out who Doe was. Putting the black ball next to Doe's real name would be enough to accomplish that objective. Thus, although Judge Wettick was evidently trying to protect Doe by issuing the protective order, in the circumstances of this case such an order could easily be counter-productive.

Super., Bergen Cy.), where the anonymous poster alleged that the head of a biotech company was a doctor who had collaborated with the Nazis in their heinous medical experiments, or *Hvide v. Doe*, Case No. 99-22831 CA01 (Fla. Cir. Ct, 11th Judicial Cir., Dade Cy.), where the defendant claimed that the head of the company was guilty of embezzling corporate funds and the plaintiff lost his job as a result of the claims, or *HealthSouth Corp. v. Krum*, Case No. 98-2812 (Pa. Ct. C.P. 1998), where the poster claimed that he was having an affair with the CEO's wife, a court will have little difficulty in recognizing a real defamation case and weighing the plaintiff's interest in disclosure quite heavily. In other cases, where the alleged defamation is an assertion that a sitting judge urged the appointment to the bench of a lawyer whom she deemed well-qualified, the Court can consider whether the suit is a matter of personal pique and not a genuine effort to secure an award of damages to remedy damage to her reputation. As amici suggested in argument about the third element of the test for disclosure, if the factual accusation in this case is potentially defamatory, it is barely sufficient to get the case to a jury, and Judge Wettick erred as a matter of law by refusing to consider the weakness of plaintiff's case as one factor in deciding whether to compel identification of her anonymous critic.

Another factor that bears on the strength of the plaintiff's case, and hence the balance of the equities concerning the propriety of stripping defendant of his anonymity at this stage of the case, is the dearth of evidence that defendant's vaguely defamatory factual statement caused the plaintiff any harm. This is not simply a question of the absence of evidence of actual damages; Melvin refused to say whether she had suffered any emotional damage or even whether her feelings were hurt by Doe's statements, whether any identifiable individual believed the statement about her, whether any person had treated her adversely because of the statement; she even refused to say

whether she believed that the conduct in which she was alleged to have engaged would have been unethical, if the factual statement about her were true.⁶ For aught that appears, this lawsuit was filed solely because a member of the public had the gall to criticize Melvin and she wants to force the identity of any critic into the open, whether or not such criticism was damaging in any way.

In balancing the equities, the Court below should consider the fact that plaintiff is an elected public official, whose performance in office is legitimately the subject of criticism and who ought to have a thicker skin than a private citizen whose activities are criticized. The Court should also consider the inherent lack of credence that is generally given to anonymous speech on the Internet. R.62a-63a. In those circumstances, the lack of evidence that Doe's false statement had any impact whatsoever on the defendant merits consideration in deciding whether the defendant should be deprived of his anonymity.

Yet another factor that ought to be weighed in the balancing prong of the test is any indication that disclosure has been sought for an improper purpose. This factor is strongly supported by *Doe v. 2theMart.com*, where the Court discussed an additional element in considering whether to require an ISP to reveal the name of an anonymous speaker that should be included here. The Court required consideration of whether the subpoena seeking the information was issued in good faith and not for any improper purpose. 140 F. Supp. 2d at 1095-1096, citing *America Online, Inc.*, 2000 WL 1210372, *1. In *2theMart* the court, considering a subpoena seeking the identity of third parties to the *litigation*, noted that the breadth of the subpoena, which sought disclosure of personal e-mails and other information in addition to the speakers' identities, "weighs against" the plaintiff.

⁶These questions and refusals to answer appear at pages 24 to 31 of Melvin's deposition; we are advised by counsel for defendant that the entire deposition appears in the lower court's record.

Id. at 1095. Here, the "good faith and no improper purpose" test raises a significant question. The plaintiff is a public official and Doe's criticism related to her official duties. Moreover, there is some suggestion in the record that Melvin's counsel told AOL's counsel that he would drop the legal proceedings once Doe was identified; R.78a; although Melvin's counsel denies this, *id.*, this factual issue ought to be considered on remand. Melvin's counsel also vowed to "get" his sister's critic while allowing his sister to "stay above the fray." R.75a, 78a. This evidence of possible improper purpose should be considered by the trial court on remand.

* * *

The principal advantage of the *Dendrite* test, which amici commend for adoption by this Court, is its flexibility. It attempts to balance the relative interests of the plaintiff who claims that her reputation has been unfairly besmirched against the interest in anonymity of the Internet speaker who claims to have done no wrong, and provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of tort victims to be compensated for their losses. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice, while ensuring at the same time that persons with legitimate reasons for speaking anonymously while making measured criticisms will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging the filing of unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed seeking to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic.

Consequently, many lawyers advised their clients to bring such cases without being serious about pursuing a defamation claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's have reported some staggering statistics about the number of subpoenas they have received – AOL's amicus brief in the lower court reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! told one judge at a hearing in California Superior Court that it had received “thousands” of such subpoenas.

Although we have no firm numbers, amici's experience leads them to believe that the number of civil suits being filed to identify online speakers has dropped dramatically. We credit the decisions in *Dendrite*, *2TheMart.com*, *Seescandy* and other cases that have adopted strict legal and evidentiary standards for defendant identification with sending a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these lawsuits, to the occasional libel verdict against originally anonymous defendants, as well as the fact that many online speakers have been identified in cases that meet the *Dendrite* standards (indeed, two of the Doe defendants in *Dendrite* were identified), has discouraged the sort of Wild West atmosphere, cited by plaintiff in her brief below, at 17, that originally encouraged some of the more egregious examples of online defamation. We urge the Court to preserve this balance by adopting the *Dendrite* test that balances the interests of defamation plaintiffs to vindicate their reputations in meritorious cases against the right of Internet speaker defendants to maintain their anonymity when their speech is not actionable.

CONCLUSION

The decision below should be vacated, and the case should be remanded to the trial court for further proceedings.

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