

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COVENTRY FIRST LLC,)	
)	
Plaintiff,)	
)	
v.)	No. 11-3700 (JS)
)	
JOHN DOES 1-10, inclusive,)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF
MOTION TO QUASH SUBPOENA**

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In this case, a company seeks to prevent an anonymous consumer critic from using its name to identify a parodic Twitter page where the critic makes biting comments about the company's business. Without seeking the Court's leave, as Rule 26(d) requires, and without supplying any reason to believe that it has a realistic chance of prevailing on any of its claims, plaintiff issued a subpoena to Twitter to compel the identification of the anonymous defendant. Well-established procedures require a plaintiff to make a legal and evidentiary showing of merit before it can take away a defendant's First Amendment right to advance anonymous criticisms, and no trademark claim can succeed in this case, for several reasons. For example, Doe's use is completely noncommercial, and there is no likelihood that anyone viewing the page of hostile tweets about the plaintiff would experience any confusion about whether the company itself was the author of the parody. Consequently, the subpoena to Twitter should be quashed.

FACTS AND PROCEEDINGS TO DATE

Coventry First ("Coventry") is a company in the viatical business — it buys existing life insurance policies from their owners, then resells the policies to investors who cover the premiums because, when the insured person dies, the investors will receive the insurance proceeds. Proponents say that viatical settlements benefit policy owners because, without the option to sell the policy, a policy owner who no longer needs, wants or can afford the insurance must give up the policy's value, and the life insurance provider gets a windfall. And if the insured's health has declined since the policy was issued, the policy could be worth considerably more than the surrender value.

There is, of course, a ghoulish side to this business. The buyer of the life insurance policy is counting on its customer's early death, and the earlier the death, the more profitable the investment. Defendant Doe has chosen to criticize this aspect of Coventry's business by establishing an account on the Twitter micro-blogging platform, where she publishes statements about Coventry.

Logically, she chose the name Coventry First to identify the subject of her messages or “tweets.”¹

Twitter users connect by signing up to “follow” other users, and they do this by visiting the pages of other users and clicking the “follow” button. Typically a Twitter page contains the Twitter user’s Twitter title, a short statement relating to the sorts of messages that can be found on the page, and a listing of recent tweets in reverse chronological order, i.e., the most recent tweets appear first. When Doe first established the Twitter account, she simply indicated that the purpose of the account was “Just talking about the life settlement industry.” Later, she changed the page to read:

Coventry First Fan
@coventryfirst Above Ground!
(Parody Site) Coventry First Profits from the early death of its Clients. The sooner
they die the more \$ they make! Sunlight is disinfectant.

Doe also changed the Twitter name to Coventryfirstin. *See* Levy Affidavit Exhibit C.

On June 7, 2001, Coventry filed this action, alleging six counts of violations of its trademark rights. The first three counts allege infringement, a claim that the public may be confused about possible affiliation between plaintiff and Doe’s Twitter home page. The fourth count characterizes Doe’s Twitter name as a domain name that was used in violation of the federal anti-cybersquatting statute, while the fifth asserts that Coventry is a famous mark and that Doe’s use dilutes the mark. The sixth, catchall count alleges that Doe was unjustly enriched by misuse of the mark.

On June 7 Coventry also issued a subpoena to Twitter purporting to require it to produce information identifying Doe. Levy Affidavit Exhibit B. Coventry did not seek the Court’s leave to initiate this discovery. Although any Twitter user can send a message to any other Twitter user by visiting the user’s Twitter page and pressing “reply” to any of the user’s tweets, Coventry made no

¹The use of the female gender in pronouns identifying Doe is generic, without intending to provide any actual information about Doe’s gender.

effort to notify Doe that it was trying to take away Doe’s anonymity. However, Twitter notified Doe of the existence of the subpoena, Exhibit A, and Doe retained undersigned counsel, Mr. Levy. Mr. Levy contacted plaintiff’s counsel about the subpoena, and plaintiff’s counsel agreed to postpone the effective date of the subpoena so that the parties could discuss relevant issues. Levy Affidavit Exhibit D. In the course of conferring about this motion to quash, Mr. Levy explained the bases for the motion and urged that the subpoena be withdrawn without prejudice to a possible motion for leave to take early discovery. Levy Affidavit ¶ 7. Because Coventry’s counsel was not willing to withdraw the subpoena, *id.* ¶¶ 7-8, this motion is being filed.

ARGUMENT

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT WAS FILED IN FLAGRANT VIOLATION OF THE FEDERAL RULES OF CIVIL PROCEDURE FORBIDDING DISCOVERY BEFORE THE RULE 26(f) DISCOVERY PLANNING MEETING.

The first reason why the subpoena should be quashed is that it is premature. Rule 26(d) of the Federal Rules of Civil Procedure provides:

(d) Timing and Sequence of Discovery.

(1) Timing.

A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

Rule 26(f)(1), in turn, requires parties to confer about possible settlement and to develop a plan for discovery “at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).” And Rule 16(b) requires a scheduling conference “within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.”

None of these conditions precedent has been met. No party has yet been served or appeared; indeed, the purpose of the subpoena is to obtain Doe's name and address so that she can be served. Nor does any of the exceptions apply — this case is not exempt from initial disclosure, and no exception has been authorized by the rules, by any stipulation, or by court order.

When a plaintiff wants early discovery, its usual course is to file a motion for leave to take such discovery, providing notice to the other parties and showing the presence of “good cause” by demonstrating why discovery is needed as well as making a showing of some likelihood of success on the merits. Wright, Miller & Marcus, 8A *Fed. Prac. & Proc: Civil* § 2046.1 (3d ed. 2010), at 288-289; *Edgenet, Inc. v. Home Depot U.S.A.*, 259 F.R.D. 385, 386-387 (E.D.Wis. 2009); *Cecere v. County of Nassau*, 258 F. Supp.2d 184, 186 (E.D.N.Y. 2003). Indeed, given the First Amendment issues at stake on a subpoena seeking to identify anonymous Internet critics, as discussed in the remainder of this brief, plaintiff would have had to show its effort to notify Doe of the subpoena and meet the legal and evidentiary requirements established by the case law before the First Amendment right of anonymous speech may be overcome. Because plaintiff jumped the gun by serving a subpoena that misrepresented to Twitter that discovery had already opened, the subpoena should be quashed. And, indeed, because plaintiff had no justification for serving discovery without leave, the Court should impose sanctions. Federal Rules of Civil Procedure 26(g) (imposing mandatory sanctions on a party who improperly certifies that a discovery request is “warranted by existing law”); *In re Byrd, Inc.*, 927 F.2d 1135, 1136-38 (10th Cir. 1991) (sanctions for serving a subpoena *duces tecum* on third party in violation of both local and Federal Rules); *In re Air Crash at Charlotte, N.C.*, 982 F. Supp. 1092, 1095-96 (D.S.C. 1997) (imposing sanction for invalid subpoena).

II. COVENTRY HAS NOT MADE THE LEGAL AND FACTUAL SHOWING OF A VALID CLAIM THAT IS NEEDED BEFORE DOE’S FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY MAY BE DENIED THROUGH ENFORCEMENT OF THE SUBPOENA.

A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 166-167 (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 Shakespeare and Mark Twain to the authors of the Federalist Papers:

[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 (emphasis added).

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. *Reno v. ACLU*, 521 U.S. 844,

853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz.App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J.App. 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or 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 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.

Moreover, although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. See Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, many observers argue that the law should provide special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007); Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Who's Afraid of Anonymous Speech?*

McIntyre and the Internet, 75 Ore. L. Rev. 117 (1996).

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). Abridgement 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*, 357 U.S. at 461. First Amendment 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. Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Id.* at 524; *NAACP*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347 (1995).

The courts have recognized the serious chilling effect that subpoenas seeking to identify anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). In an analogous area of law, the courts have evolved a standard for compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In those cases, courts apply a three-part test, under which a litigant seeking to identify an 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 the 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 his case. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *United States v. Driden*, 633 F.2d 346, 358 (3d Cir. 1980); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972).

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, “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). *See also Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D.Cal. 1999):

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.** (emphasis added).

B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard for the Identification of John Doe Defendants.

In recent cases, courts have recognized that the mere fact that a plaintiff has filed a lawsuit over a particular piece of speech does not create a compelling government interest in taking away the defendant’s anonymity. The challenge for courts is to find a standard that makes it neither too

easy nor too hard to identify anonymous speakers. Setting the bar “too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.” *Cahill*, 884 A.2d at 457. But setting the bar too high will make it impossible for plaintiffs with perfectly valid claims to identify wrongdoers and proceed with their cases.

Courts have drawn on the media’s privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), arose in a procedural context very similar to this case. Like Rule 26(d), New Jersey requires a motion for leave to take discovery when sought before the defendants have been served; in response to such a motion, the Appellate Division of the Superior Court established a five-part standard that must be met before leave to take discovery should be granted:

- 1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
- 2. Require Specificity:** Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
- 3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
- 4. Require An Evidentiary Showing:** Courts require the plaintiff to produce evidence supporting each element of its claims.
- 5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

A somewhat less exacting standard, formulated in *Cahill*, requires the submission of evidence to support the plaintiff's claims, but not an explicit balancing of interests after the evidence is deemed otherwise sufficient to support discovery. *Cahill*, 884 A.2d 451. In *Cahill*, the Delaware Superior Court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including that the statements are false. The *Cahill* court rejected the final "balancing" stage of the *Dendrite* standard.

All of the other state appellate courts, plus several federal district courts, that have addressed the issue of subpoenas to identify anonymous Internet speakers have adopted some variant of the *Dendrite* or *Cahill* standards. Several courts expressly endorse the *Dendrite* test, requiring notice and opportunity to respond, legally valid claims, evidence supporting those claims, and finally an explicit balancing of the reasons supporting disclosure and the reasons supporting continued anonymity. These decisions include:

Pilchesky v. Gatelli, 12 A.3d 430 (Pa. Super. 2011), which held that a city council chair had to meet the *Dendrite* test before she could identify constituents whose scabrous accusations included selling out her constituents, prostituting herself after having run as a reformer, and getting patronage jobs for her family.

Mortgage Specialists v. Implode-Explode Heavy Industries, 999 A.2d 184 (N.H. 2010), where a mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the *Dendrite*

test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously.”

Mobilisa v. Doe, 170 P.3d 712 (Ariz. App. 2007), where a private company sought to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court analogized an order requiring identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.

Independent Newspapers, 966 A.2d 432, where Maryland's highest court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, “if all else is satisfied, balanc[ing] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity.” 966 A.2d at 457.

Several other courts have followed a *Cahill*-like summary judgment standard, although without necessarily rejecting the final balancing stage. For example:

Solers v. Doe, 977 A.2d 941 (D.C. 2009), where the court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.²

Krinsky v. Doe 6, 72 Cal.Rptr.3d 231 (Cal.App. 2008), where the appellate court reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as “a management consisting of boobs, losers and crooks.”

In re Does 1-10, 242 S.W.3d 805 (Tex.App. 2007), which reversed a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog.

² In *Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666 (Ill. App. 2010), the Illinois Court of Appeals found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery the state's rules already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe.

Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. Although its holding reached only the issue of appellate jurisdiction, in reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action:

[C]ourt-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that **once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.**

836 A.2d at 50 (emphasis added)

Federal district courts have repeatedly followed *Cahill* and *Dendrite*. *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969, 976 (N.D. Cal. 2005) (required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *Fodor v. Doe*, 2011 WL 1629572 (D.Nev., April 27, 2011) (followed *Highfields Capital*); *Koch Industries v. Doe*, 2011 WL 1775765 (D.Utah May 9, 2011): ("The case law ... has begun to coalesce around the basic framework of the test articulated in *Dendrite*," quoting *SaleHoo Group v. Doe*, 722 F.Supp.2d 1210, 1214 (W.D. Wash. 2010)); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009) (court did not choose between *Cahill* and *Dendrite* because

plaintiff would lose under either standard); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress).

Although these cases set out slightly different standards, each requires a court to weigh the plaintiff's interest in identifying the person who 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 trammelled 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.

Coventry may argue, as plaintiffs often do, that trademark infringement is outside the protection of the First Amendment, and that because the use of its name on the Twitter account violates its trademark, the Court need not consider whether there are sound reasons to withhold the power of a court order to compel Twitter to identify the anonymous critic. However, such arguments beg the question, and other courts, facing precisely the same arguments, have understood that they are fundamentally unsound. Plaintiff has not shown that Doe violated its trademark—at this point, it is only an allegation, and the issue in the case is what showing plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power.

C. Coventry Cannot Meet the *Dendrite* / *Cahill* Test for Compelling Identification.

1. Coventry Deliberately Failed to Provide Notice of Its Subpoena.

Although Twitter provides an easy means whereby any member of the public can send a

message to any Twitter user, *supra* at 3, Coventry deliberately provided no such notice. Although Twitter itself provided such notice, the issue warrants brief discussion for two reasons. First, many Internet Service Providers do not provide notice that they have received subpoenas to identify their users, but simply release identifying information when they receive subpoenas that appear to be valid on their face, or provide notice for such a short period of time that a Doe does not have a practical opportunity to retain counsel and oppose identification. Consequently, if the Court chooses to write an opinion about the proper standard to be followed in the Eastern District of Pennsylvania by plaintiffs who seek to identify anonymous Internet speakers, we urge the Court to include an express requirement of notice, as did in the *Pilchesky*, *Dendrite*, *Cahill*, and *Mobilisa* courts even though, by the time each of those cases was decided, a Doe had already appeared to oppose discovery.

Notice is also relevant because it helps show that Coventry did not seek discovery in good faith. Not only is notice required by every court that has discussed the standard for early discovery to identify anonymous Internet speakers, but the case law generally requires notice to the other parties whenever a motion for early discovery is filed, Wright, Miller & Marcus, 8A *Fed. Prac. & Proc: Civil* § 2046.1 (3d ed. 2010), at 288, and notice and an opportunity to defend are fundamental requirements of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Coventry cannot claim to have been ignorant of the notice requirement. In other cases, the plaintiff's maneuvering to deprive an anonymous Internet user of a fair opportunity to oppose discovery has been held to suggest a bad faith purpose for the subpoena and, indeed, to support an award of sanctions for disregard for Rule 45's duty of due diligence and restraint. *In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, 2010 WL 2219343, at *8-11 (E.D.N.Y. Feb 5, 2010), *adopted in relevant part*, 2010 WL 1686811, at *2-3 (Apr. 26, 2010).

2. Coventry Has Identified the Words That It Deems Actionable.

Courts require plaintiffs who wish to strip an internet speaker of anonymity to specify the words that they claim are actionable, so that defendants know exactly what is challenged and so courts can make an adequate preliminary assessment of merit. *Dendrite*, 775 A.2d at 760. Here, Coventry First has apparently met this part of the test, by complaining about the fact that Doe has used its name to identify Doe’s Twitter account and hence placed its name in the “path” portion of the URL for the home page of the account.

3. None of Coventry’s Claims Could Withstand a Motion to Dismiss.

The Court should next review each claim asserted by plaintiffs to determine whether it is facially actionable. *Dendrite*, 775 A.2d at 760. Where, as here, the complaint shows that plaintiffs are not entitled to any relief, no purpose is served by allowing discovery.

a) Trademark Infringement Claims (Counts I, II, III and VI)

Coventry First’s first three claims allege trademark infringement, unfair competition, and false designation of origin; its final claim vaguely alleges that Doe has been unjustly enriched by the previously alleged misuse of the trademark. Because trademark infringement “is a type of unfair competition,” these claims “have virtually identical elements and are properly addressed together as an action brought under . . . section 43 of the Lanham Act.” *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1050 (10th Cir. 2008).

i. Coventry First’s attempt to use trademark law to suppress critical social comment on its business model fails because the Lanham Act only prohibits use of a mark “in connection with the sale, offering for sale, distribution, or advertising of any goods or services.” 15 U.S.C. § 1114(1)(a).

This limit ensures that marks will not be “transformed from rights against unfair competition to rights to control language.” Mark Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1710-11 (1999). “Much useful social and commerce discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company, or product by using its trademark.” *New Kids on the Block v. News Am. Publ’g*, 971 F.2d 302, 307 (9th Cir. 1992). Here, however, Coventry First does not even **allege** such commercial use.

Defendant did not use her Twitter account to engage in the sale of any “goods or services.” Rather, she employed Coventry First’s mark only to mock its business model. This case is thus analogous to *Bosley Medical Institute v. Kremer*, a case in which Bosley sued Kremer for trademark infringement after Kremer created a website at www.BosleyMedical.com on which he criticized Bosley’s surgical services. 403 F.3d 672 (9th Cir. 2005). Noting that Kremer had not used Bosley’s mark “in connection with the sale of goods,” as the Lanham Act requires, the court rejected Bosley’s claim: “Kremer is not Bosley’s competitor; he is their critic. His use of the Bosley mark is not in connection with a sale of goods or services—it is in connection with the expression of his opinion *about* Bosley’s goods and services.” *Id.* at 679. The court then added that “[a]ny harm to Bosley arises not from a competitor’s sale of a similar product under Bosley’s mark, but from Kremer’s criticism of their services. Bosley cannot use the Lanham Act either as a shield from Kremer’s criticism, or as a sword to shut Kremer up.” *Id.* at 680. So too here. Because defendant did not speak “in connection with the sale of goods or services,” but rather offered fully protected social critique, her parody is shielded by the same logic at Kremer’s website. *See also Utah Lighthouse Ministry v. Discovery Computing*, 506 F. Supp. 2d 889, 896-98 (D. Utah. 2007).

This reading of the “goods and services” requirement—and the necessary corollary that Doe did not violate the Lanham Act—are compelled by the First Amendment. It is black letter law that the Lanham Act is construed to be consistent with the First Amendment and therefore covers only commercial speech, which receives reduced constitutional protection. *Taubman Co. v. WebFeats*, 319 F.3d 770, 774 (6th Cir. 2003). The speech at issue here, however, is not commercial because Doe advertised no product and proposed no commercial transaction. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). Nor does the prospect of commercial injury to Coventry First transform this social commentary into commercial speech. *Nissan Motor Co. v. Nissan Computer Corp.*, 278 F.3d 1002, 1016-17 (9th Cir. 2004). If it did, then any corporation could “shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct.” *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987).

Defendant is hardly the first person to criticize the morbid assumptions underlying Coventry First’s life settlement business models. *See, e.g.*, Matthew Goldstein, *Profiting From Mortality*, *Business Week* (July 30, 2007) (describing the life settlement industry as a “ghoulish actuarial gamble: The quicker the death, the more profit is reaped”). Here, Doe chose to express her critical views in the form of a parody. She accordingly used Coventry First’s name as the Twitter account name in order to truthfully describe the subject of her commentary. A contrast between Coventry First’s mark and the preposterously grim statements attributed to it produced the humorous effect and social comment that Doe sought to express. *See Cliffs Notes v. Bantam Doubleday Dell Pub. Group*, 886 F.2d 490, 494 (2d Cir. 1989) (“A parody must convey two simultaneous —and contradictory —messages: that it is the original, but also that it is *not* the original and is instead a parody.”). This form of expression is fully protected by the First Amendment. *Mattel, Inc. v. Walking*

Mountain Productions, 353 F.3d 792, 801 (9th Cir. 2003) (“[B]ecause parody is “a form of social and literary criticism,” it has “socially significant value as free speech under the First Amendment.” (internal citations omitted)). It therefore lies beyond the Lanham Act’s reach.

ii. Coventry First’s variously labeled infringement claims also fail because it cannot overcome a fair-use defense. *KP Permanent Make-Up v. Lasting Impression I*, 543 U.S. 111 (2004). A nominative fair-use defense is established if the defendant used the plaintiff’s mark to discuss the plaintiff or the plaintiff’s product, and (1) the use of plaintiff’s mark is necessary to describe both the plaintiff’s product or service and the defendant’s product or service; (2) defendant uses only so much of the plaintiff’s mark as is necessary to describe plaintiff’s product; and (3) the defendant’s conduct or language reflect the true and accurate relationship between plaintiff and defendant’s products or services. *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 222 (3d Cir. 2005). This test is satisfied here because Doe’s cannot talk about Coventry First without using its name to identify the subject of criticism, and Doe uses the name only for that purpose. And because Doe’s page is about plaintiff, her use of the mark accurately reflects the fact that Coventry First is the target of Doe’s commentary. “Where, as here, use of the mark, as ‘the only symbol reasonably available [to denote plaintiff as the subject of commentary] does not attempt to capitalize on consumer confusion or to appropriate the cachet’ of the mark holder, it fails to ‘implicate the source-identification function that is the purpose of trademark.’” *International Stamp Art v. USPS*, 456 F.3d 1270, 1274 (11th Cir. 2006) (quoting *New Kids on the Block*, 971 F.2d at 308).

Indeed, federal courts have uniformly held in the analogous context of internet domain names that sites criticizing a company are protected against attempts to silence that commentary through the trademark laws. *See, e.g., Universal Communication System v. Lycos, Inc.*, 478 F.3d 412, 423-25

(1st Cir. 2007); *Bosley*, 403 F.3d at 679-80; *Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005); *TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004); *Taubman v. Webfeats*, 319 F.3d 770 (6th Cir. 2003); *CPC Int'l v. Skippy, Inc.*, 214 F.3d 256, 462 (4th Cir. 2000). Similarly, courts consistently uphold the use of a trademark in the meta tags of a web page to designate it as a page where criticisms of the trademark holder may be found. *Faegre & Benson v. Purdy*, 367 F. Supp.2d 1238, 1247 (D. Minn. 2005); *J.K. Harris & Company v. Kassel*, 253 F.Supp.2d 1120 (N.D. Cal. 2003); *Bihari v. Gross*, 119 F. Supp. 2d 309, 320 (S.D.N.Y. 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998). Just a domain name in the form www.trademark.com or a meta tag using the trademark may be used for a web site that comments on the trademark holder, a Twitter name may be used as the title of a Twitter page that consists of critical comments about the trademark holder without running afoul of the trademark laws.

b) Dilution (Count V)

Coventry's claim for trademark dilution (Count V) fails on the face of the complaint for the same reasons as the infringement claims. The federal anti-dilution statute, by its terms, excludes any "noncommercial use of the mark," 15 U.S.C. § 1125(c)(3)(C), and as discussed above not only does the complaint not allege commercial use, but the attachment to the complaint plainly shows that the mark is used only to identify a pageful of noncommercial criticisms. Yet another statutory exclusion bars the application of the dilution cause of action to any "fair use, including a nominative or descriptive fair use, . . . including use in connection with . . . (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner." 15 U.S.C. § 1125(c)(3)(A). As discussed above, it is apparent from the face of the complaint, including Exhibit A, that the Coventry First name has been used solely for the purpose

of identifying plaintiff as the subject of Doe’s criticism, which is prototypical nominative fair use.

c) Cyberpiracy (Count IV)

i. Coventry First’s cyberpiracy count does not allege a litigable claim because, despite its assertion that Doe uses the “domain name twitter.com/coventryfirst,” Complaint ¶ 66, this is not, in fact, a “domain name” covered by the ACPA. 15 U.S.C. § 1125(d)(1)(A). The statute defines the term “domain name” as follows: “any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet. . . .” 15 U.S.C. § 1127. Congress emphasized that the ACPA “provides a narrow definition of the term ‘domain name’ in order to tailor the bill’s reach narrowly to the problem sought to be addressed.” S.Rep. No. 106-140 (1999), 1999 WL 594571, at *10. This narrow reach is “important” because it “excludes . . . screen names, file names, and other identifiers not assigned by a domain name registrar or registry, which have little to do with cybersquatting in practice.” *Id.*

In the Uniform Resource Locator (“URL”) www.twitter.com/!/coventryfirst, the domain name – the part of the URL that is registered with a “domain name registrar”— is twitter.com. That name does not contain plaintiff’s trademark. Instead, the mark in the portion of the URL that comes after the second slash, which is the “path” portion of the domain name. But the statutory definition of domain names distinguishes them from post-domain paths. Once a person arrives at a website by entering its domain name (e.g., www.domain-name.com), he can navigate within that website to different pages. These pages are created by whoever owns the domain name, or, as in Twitter’s case, by the name registration process that Twitter has created. Each page within a website is uniquely identified by a post-domain path that “merely shows how a website’s data is organized within the

host computer's files" (e.g., www.domain-name.com/post/domain/name/path/). *Patmont Motor Werks v. Gateway Marine*, 1997 WL 811770 at *4 n.6 (N.D. Cal. Dec. 18, 1997). These post-domain paths—including Defendant's Twitter account at /coventryfirst—are **not** registered with any domain name registrar and do **not** signify source in the same manner as domain names often do.³ Id. Doe's account thus functions more analogously to a screen name by serving as the handle through which she communicates with others. Screen names are specifically exempted from the ACPA. S. Rep. No. 106-140 (1999), 1999 WL 594571, at *10. The name of Doe's Twitter account falls outside the ACPA's requirement that use involve a registered domain name.

ii. Even if Coventry First's cyberpiracy claim manages to surmount this textual barrier, it then encounters the requirement of "bad faith intent to profit." 15 U.S.C. § 1125(d)(1)(A)(i); see *Shields v. Zuccarini*, 254 F.3d 476, 482 (2001). However, in its complaint, Coventry First does not even **allege** this crucial element of any cyberpiracy claim. Absent such a profit motive—i.e., where use of a mark constitutes "bona fide noncommercial or fair use," 15 U.S.C. § 1125(d)(1)(B)(i)(IV)—the ACPA does not apply. *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1058 (10th Cir. 2008) (holding ACPA inapplicable where there was no "inference that the Defendants intended to profit"). Nor is it surprising that Coventry First failed to allege bad faith intent to profit, inasmuch as the Twitter count at issue here had no commercial purpose, was established solely to criticize Coventry First by mocking its business model, and hence falls "beyond the scope" of the ACPA. See *Lamparello v. Falwell*, 420 F.3d 309, 318 (4th Cir. 2005).

³ This distinction between "domain name" and "post-domain path" is also important in caselaw. For example, several courts have found that, as compared to use in domain names, "it is unlikely that the presence of another's trademark in a post-domain path of a URL would ever violate trademark law" because post-domain name paths do not signify source. *Interactive Products Corporation*, 326 F.3d at 698; see *Patmont Motor Works*, 1997 WL 811770, at *4; *PACCAR, Inc., v. Telescan, Tech. LLC*, 115 F. Supp. 2d 772, 780 (E.D. Mich. 2000).

Coventry First's cybersquatting claim fails because it neither alleges the statutory element "bad faith intent to profit," not alleges **anything** in its Complaint that would support a finding of bad faith intent to profit. Coventry First alleges no profit motive, no mechanisms by which Defendant even could profit, and no commercial purpose. Indeed, the Complaint says absolutely nothing about the Defendant's intent or about how one might set about "profiting" from a parody Twitter account. Ultimately, Coventry First offers little more than a conclusory assertion that Defendant violated the ACPA. For this reason alone, Coventry First cannot possibly show the requisite element of bad faith intent to profit.

Coventry First's inability to explain how Defendant acted with bad faith intent to profit is unsurprising in light of Defendant's actions and the ACPA's purpose. The Sixth Circuit described the "paradigmatic harm that the ACPA was enacted to eradicate [as] the practice of cybersquatters registering several hundred domain names in an effort to sell them to the legitimate owners." *Lucas Nursery & Landscaping v. Grosse*, 359 F.3d 806, 810 (6th Cir. 2004). But courts have consistently rejected claims that the use of domain names for internet "gripe sites" violate the ACPA. *Id.*, 359 F.3d at 810 (rejecting an ACPA claim against a dissatisfied customer who registered a domain containing the plaintiff's trademark for the purpose of detailing complaints against the company); *Lamparello*, 420 F.3d at 313 (rejecting an ACPA claim against the owner of a website critical of Reverend Jerry Falwell); *Utah Lighthouse*, 527 F.3d at 1058. Consequently, even if plaintiff's mark appeared in the domain name part of the URL, there would be no conceivable violation of the ACPA.

D. Coventry First Has Provided No Evidence That Justifies Stripping Defendant of Her Anonymity.

Identification of an otherwise anonymous speaker is itself a major form of relief because the defendant may then be subjected to harassment, economic retaliation, or other forms of retribution. *E.g. Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006) (company represented by respected law firm filed Doe lawsuit; obtained identity of employee who criticized it online; fired the employee; and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). For this reason, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence to show a realistic chance of winning a lawsuit against that Doe defendant. *Dendrite*, 775 A.2d at 760. Accordingly, to justify discovery a plaintiff must not merely withstand dismissal, but must put forth enough evidence to meet a summary-judgment standard by creating genuine issues of material fact on all issues in the case that are within its control. *Cahill*, 884 A.2d at 457; *see SaleHoo Group*, 722 F. Supp. 2d at 1217 (requiring evidence on element of commercial use before allowing discovery into anonymous speakers in a trademark case). This requirement prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. *See Cahill*, 884 A.2d at 458. Coventry Living cannot meet this evidentiary requirement, because it has failed to show likelihood of confusion with respect to its trademark infringement claim and cannot demonstrate that its mark is "famous" as required by a trademark dilution claim.

a. Coventry First's infringement claim is unsupported by evidence that Defendant's Twitter account created a likelihood of consumer confusion. Proof that "customers are likely to be misled or confused by the alleged infringer's use" is crucial to any infringement claim. *Facenda v. N.F.L. Films*, 542 F.3d 1007, 1018 (3d Cir. 2008). But not just any confusion will do. "[T]rademark infringement protects only against mistaken purchasing decisions and not against confusion

generally.” *Lang v. Ret. Living Publ'g Co.*, 949 F.2d 576, 582–83 (2d Cir. 1991) (internal quotation marks and citation omitted). Here, defendant’s Twitter account could not possibly create a likelihood of such confusion because it offered neither goods nor services. Because defendant does not sell anything on his Twitter page, no consumer could purchase a life settlement from him on the mistaken belief that it was a Coventry First service.

This case is just like *Parker v. Google*, where this Court rejected a plaintiff’s claim that Google had created a likelihood of confusion by republishing a website with his name in its title that might be mistaken for his own site. *Parker v. Google, Inc.*, 422 F. Supp. 2d 492 (E.D. Pa. 2006) *aff'd*, 242 F. App'x. 833 (3d Cir. 2007).⁴ The court explained that a “[c]onsumer looking for [Plaintiff’s] website on seduction and who is interested in purchasing seduction materials would not be confused by [Google’s] website, which does not sell anything and instead focuses only on negative descriptions of Plaintiff.” *Id.* at 502. Noting that “it is difficult to accept the possibility that someone would believe that Parker himself created a website that refers to him so negatively,” and that the challenged website “does not purport to sell anything and is not in competition with Plaintiff’s website for customers,” the court found “no likelihood of confusion.” *Id.* Defendant’s website is indistinguishable. It sells no goods, does not compete with Coventry First, and offers only negative commentary in the form of parody. *See also Lamparello v. Falwell*, 420 F.3d 309, 315 (4th

⁴ Presumably because the case before it, just like this one, did not involve the alleged use of a trademark to sell goods or services, the *Parker* court did not employ the Third Circuit’s ten-factor infringement analysis from *Interpace Corp v. Lapp, Inc.*, 721 F.2d 460 (3d Cir. 1983). *Parker*, 422 F. Supp. 2d 492, 502. Indeed, in the analogous context of nominative fair use, the Third Circuit has recognized that “the Lanham Act does not require that [*Lapp* analysis] be followed precisely so long as the relevant comparisons suggested by the test are made.” *A&H Sportswear v. Victoria’s Secret Stores*, 237 F.3d 198, 207 (3d Cir. 2000). Where, as here, full *Lapp* analysis would require the comparison of apples to oranges—social commentary versus insurance products—application of each of the factors would serve no purpose.

Cir. 2005) (“Reverend Falwell and Lamparello do not offer similar goods or services. Rather they offer opposing ideas and commentary.”).

Coventry First asserts in its complaint that defendant injured its “mark, business reputation, and good will,” but does not even allege facts, much less submit evidence, indicating a likelihood of confusion that could bring about such a result. This is unsurprising, since no reasonable consumer who came across defendant’s Twitter account would attribute to Coventry Living such statements as “horrible weekend..no plane crashes (they make a lot of money), no earthquakes :-)” or “good news for coventry...fukishima is much worse than anyone has been led to believe, many more deaths coming! ...CHA-CHING! death=profits.” Potential customers who decided to rely on Twitter for information about Coventry First—rather than making the far more obvious choice of going to either www.coventry.com or www.coventryfirst.com, or using a search engine like Google (whose first hit for “Coventry First” is the Coventry First website)—would immediately recognize that this was not Coventry First’s own site. Coventry First thus cannot meet its obligation to “show more than the theoretical possibility of confusion,” and instead must resort to the abstract possibility of “confusion resulting from the consuming public's carelessness, indifference, or ennui.” *Machinists v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200-01 (1st Cir. 1996). This “will not suffice” as evidence of a trademark infringement claim. *Id.* And regardless, such confusion over the provenance of the websites is “irrelevant” under the Lanham Act “unless there is confusion as to the origin of the respective products”—an evidentiary requirement that similarly cannot be satisfied in this case. *Taubman Co. v. Webfeats*, 319 F.3d 770, 776 (6th Cir. 2003).

b. Coventry First’s trademark dilution claim fails because no evidence supports its conclusory contention that the Coventry First mark is famous. A Lanham Act dilution plaintiff must

show that “[t]he plaintiff is the owner of a mark that qualifies as a ‘**famous mark**’” *Times Mirror Magazines v. Las Vegas Sports News*, 212 F.3d 157, 163 (3d Cir. 2000). As defined by the 2006 amendments to the federal dilution statute, a mark is “famous” if it is “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. § 1125(c)(2)(A); see *Gideons Int’l v. Gideon 300 Ministries*, 94 F. Supp. 2d 566, 586 (E.D. Pa. 1999) (“The average consumer would and does immediately associate the word “Gideon” with the plaintiff and its work.”). “This is a rigorous standard, as it extends protection only to highly distinctive marks that are well-known throughout the country.” *Green v. Fornario*, 486 F.3d 100, 105 (3d Cir. 2007) (citing *TCPIP Holding Co. v. Haar Commc’ns*, 244 F.3d 88, 99 (2d Cir. 2001)). Indeed, Congress has provided examples of marks it considers truly famous, such as “Kodak,” “Buick,” and “Dupont.” H.R. Rep. No. 104–374 at 4 (1995); See *Bd. of Regents, Univ. of Texas at Austin v. KST Elec.*, 550 F. Supp. 2d 657, 679 (W.D. Tex. 2008) (“One of the major purposes of the TDRA was to restrict dilution causes of action to those few truly famous marks like Budweiser beer, Camel cigarettes, Barbie Dolls, and the like.” (citations omitted)).

The complaint barely pleads this high standard for famousness. On the one hand, the complaint alleges that plaintiff’s mark is “well-known throughout the life settlement industry,” ¶¶ 15, and that it is “the relevant public” that has come to recognize the Coventry First mark; ¶ 16; throughout the complaint, plaintiff alleges use of its mark only in connection with “life settlement” products. *E.g.* ¶¶ 23, 36, 42, 52, 65, 70. But later the complaint alleges that the mark “is famous” and “has been, for many years, widely recognized by the general consuming public” (not “general consuming public of the United States.”). ¶ 75. Even if that this allegation is sufficient to meet the pleading standards for a dilution claim, Coventry Life has offered no evidence in support of the

allegation and there is no reason to believe that it can offer such evidence. Coventry Life, though perhaps familiar to those who do business in the specialized viatical market, is no Kodak or DuPont. The suggestion that Coventry Life is well-known to the consuming public of the United States would border on the preposterous. *See* Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 Fordham Intell. Prop. Media & Ent. L.J. 1143, 1158 (2006) (“[The Trade Dilution Revision Act] is simply not intended to protect trademarks whose fame is at all in doubt.”).

It is doubtful that most Americans have even heard of a life settlement or of the viatical business, let alone encountered the name of a particular company in that market. And it is well-established that fame in niche markets does not suffice for federal trademark dilution claims. *See, e.g., adidas-Am., Inc. v. Payless Shoesource*, 546 F. Supp. 2d 1029, 1088 n.11 (D. Or. 2008) (“Specific changes to federal dilution law under the TDRA include . . . a rejection of dilution claims based on ‘niche’ fame.” (citing 15 U.S.C. § 1125(c)); *accord Componentone, LLC v. Componentart, Inc.*, 2007 WL 4302108 (W.D. Pa. Dec. 6, 2007), at *1 -*2 (recognizing that the 2006 amendments overruled prior Third Circuit cases allowing dilution claims based on niche fame). Rather, after the 2006 amendments, dilution law only covers “a small category of extremely strong marks.” *Maker’s Mark Distillery v. Diageo N. Am.*, 703 F. Supp. 2d 671, 698 (W.D. Ky. 2010). Absent probative evidence in support of the facially implausible assertion that the allegedly diluted mark satisfies these high requirements, the Court should not strip Doe of her anonymity even if it concludes that Coventry Living included a facially adequate pleading of famousness.

E. The Dendrite Balancing Prong Also Supports Quashing the Subpoena.

Even if a plaintiff meets the other parts of the test for identifying anonymous Internet speakers, several courts, including in Pennsylvania, *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super.

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July 13, 2011