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This appeal arises from the efforts of Judy Gatelli, a member of the Scranton City Council who was President of the Council when this case began, to compel the identification of nearly one hundred of her constituents who have used an Internet message board to criticize her conduct in office. Although many of the criticisms are vitriolic, they are largely expressions of opinion. After the trial court required her to be more specific in her claims against each anonymous speaker, and to produce evidence supporting her legal claims against them, Gatelli winnowed down the list of defendants to seek only 42 identities, and submitted a very conclusory affidavit averring that certain statements were false and had caused her compensable damage. The trial court ordered that six Doe defendants, whom the court concluded had falsely accused Gatelli of "serious sexual misconduct," be identified. The message board host has appealed that order pro se, and Gatelli has cross-appealed seeking to identify eight more anonymous defendants.

This brief is filed on behalf of eight of the anonymous posters who were parties to the proceedings below because they were among the group of nearly one hundred Doe defendants whom Gatelli sued and sought to identify. The identities of each of these eight Does were protected by the court, and none of them is among the eight additional Does whom Gatelli seeks to identify. However, they file this brief to address the standards that this Court should employ in deciding these appeals. Their interest is not specifically in seeing that any given Does be ordered identified or be protected against identified, but rather in the route the Court follows in deciding whether to do so. Specifically, these Doe appellees (aquamg, bigdaddy, bo peep, jimbu15, katie, MistyMtTop, newgirl, and PowerToThePeople) urge the Court to follow the consensus approach followed by other state and federal courts, including cases in Pennsylvania, which requires a public official to provide admissible evidence establishing a prima facie case of defamation, and then balances the citizens' right to remain anonymous against the official's right to proceed. In the circumstances of this case,

this approach may ultimately require denial of the request for identification of some of the defendants and granting the request to identify others.

STATEMENT OF THE CASE

The Internet is a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, 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.

Full First Amendment protection applies to speech on the Internet. *Id.*

Knowing that people have personal interests in news developments, and that people love to share their opinions with anyone who will listen, many companies have organized outlets for the expression of citizen opinions. Yahoo!, for example, has separate "message boards" for each publicly traded company.[1] Many newspapers provide "blogs" for citizens to discuss particular topics or the affairs of particular communities.[2] Other web site operators offer their own opinions, but also provide message boards or guest books where any member of the public can post reactions to things they see on the web site or in previous guest book comments. Typically, these outlets are electronic bulletin board systems where individuals can discuss major companies, public figures, or other topics

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[1] *See. e.g.*, *Dendrite v Doe,* 342 N.J. Super. 134, 775 A.2d 756 (2005); *Highfields Capital v. Doe,* 385 F. Supp.2d 969 (N.D. Cal. 2005).

[2] *E.g.*, *Doe v Cahill*, 884 A.2d 451 (Del. 2005).

at no cost by posting comments for others to read and discuss.

The individuals who post messages in such forums generally do so under pseudonyms – similar to the system of truck drivers using "handles" when speaking on their CB's. Nothing prevents an individual from using a real name, but the message board at issue here is typical in that most people choose nicknames. These often colorful monikers protect the writer's identity from those who express disagreement, and they encourage uninhibited exchange of ideas and opinions. Such exchanges can be very heated; as seen from the messages and responses in the message board at issue here, they are sometimes filled with invective and insult, often directed at other posters. Most, if not all, of what is said on message boards is taken with a grain of salt.

One aspect of message boards makes them very different from almost any other form of published expression: Because any member of the public can express a point of view, a person who disagrees for any reason with something that is said – including the belief that a statement contains false or misleading information – can respond immediately at no cost. That response can have the same prominence as the offending message. Such a forum is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). The reply can provide facts or opinions to controvert the criticism and persuade the audience that the critics are wrong. And because many people regularly revisit the message board, the response is likely to be seen by much the same audience as those who saw the original criticism. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, is the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

The message board at issue here is annexed to a web site called dohertydeceit.com

maintained by plaintiff-counterclaim defendant Joseph Pilchesky. The web site criticizes Chris Doherty, the mayor of Scranton, and his administration, and carries numerous specific articles addressed to particular local issues that Pilchesky desires to discuss. In addition, attached to the web site is the "Scranton Political Times Message Board," accessible at http://www.activeboard.com/forum.spark?forumID=65524. The message board is divided into numerous "threads," or topics, addressing a variety of issues selected by the active participants in the messaging system. Any member of the public can read the messages posted to the board.

Members of the public can also post messages to the board, so long as they register. In the course of registration, a would-be poster picks the user name, or pseudonym, that will be provided with each message posted by that user, and also provides an email address through which communications can be sent to that person. A successful registrant receives a confirmation email at the address that is given during the registration process. *Id.* Once a username has been selected by one user, no other user can select that username. Consequently, all postings made using any one username are necessarily from the user who registered for that username.

Perusal of the message boards reveals that they display a great variety of opinions about the elected leadership of Scranton, many of them expressing hostility toward the elected officials, but some supporting the administration and attacking its critics, including Pilchesky individually. Many of the comments are nasty and vitriolic, using strong language, attacking both incumbent public officials and other posters.

In 2005, messages were posted on the message board that attacked Sara Hailstone, a Scranton official. Hailstone's sister, a local judge, complained to the Pennsylvania State Police who, at the suggestion of a local prosecutor, contacted the Internet Service Provider ("ISP") that hosted the

message board to "request" that the message board be removed from the Internet, knowing that a request from a law enforcement agency would be enough to suppress the message board. *Id.* Exhibit D. After the ISP complied with this "request," Pilchesky sued in federal court for a violation of his First Amendment rights. Following that suit, the request to take the web site down was withdrawn. A motion to dismiss the complaint on a theory of qualified immunity was denied in substantial part. *Pilchesky v. Miller*, 2006 WL 2884453 (M.D.Pa. Aug. 8, 2006). That case has since been settled.

In early 2007, City Council President Judy Gatelli cancelled a City Council meeting citing concern about "threats" against her on the dohertydeceit.com message board. Subsequently, Pilchesky brought this action in the Court of Common Pleas for Lackawanna County against Gatelli for defamation, and Gatelli counterclaimed against Pilchesky for defamation. Gatelli also filed a joinder action against Joanne Pilchesky, Joseph Pilchesky's wife, and approximately ninety Doe defendants, identifying each by the pseudonyms that they used for posting comments to the Scranton Political Times Message Board. The first count of the joinder complaint enumerated 130 different postings and alleged, in general terms, that they are false and defamatory. However, the complaint did not specify which posting was made by which defendant and, in fact, some pseudonyms listed in the caption of the complaint did not post any of the specific statements enumerated in the complaint. Count II and III of the complaint alleged that the Doe defendants engaged in a civil conspiracy with Pilchesky by posting defamatory messages, and that the Doe defendants and Pilchesky engaged in a campaign of intentional infliction of emotional distress on Gatelli, knowing of her "publicized sensitivity to criticism." Neither count specified which of the enumerated messages allegedly implicated the torts alleged in that count. Gatelli verified her complaint, but only "to the best of her knowledge, information and belief." The complaint does not allege that Gatelli

suffered any economic harm as a result of the allegedly actionable statements.

Gatelli then filed a petition to compel Pilchesky to identify each of the anonymous defendants. Undersigned counsel was retained by seven of the Doe defendants who were identified in the joinder complaint – aquamg, bigdaddy, bo peep, jimbu15, katie, MistyMtTop, and newgirl – to protect their First Amendment right to speak anonymously. The seven Does both argued that they themselves could not properly be ordered identified, and asked the Court to establish a procedure for future disposition of the motion to compel, requiring Gatelli to specify which allegations were being made about which posts against each of the Doe defendants, and to provide evidence in support of each of those clams. The Does urged that Pilchesky then be ordered to notify the Does of the action that had been brought against them, and to warn them that their identities could be ordered disclosed, using the email addresses that they had given in the course of registration.

On October 10, 2007, Judge Peter O'Brien from the Court of Common Pleas for Monroe County, sitting by designation, denied Gatelli's petition to compel disclosure without prejudice because there had not been sufficient notice to the Does, and because Gatelli provided no evidence of wrongdoing sufficient to meet the Pennsylvania standard for identifying anonymous defendants. The Court ruled that Gatelli could renew her petition if she specified which Does were being sued for which statements, specified the cause(s) of actions that she alleges based on those words, and provided "evidence sufficient to establish a prima facie case against each additional Defendant supported by affidavit." Plaintiff Pilchesky was ordered to provide notice of the renewed petition to each of the additional defendants.

On March 20, 2008, Gatelli filed an amended petition that significantly cut the number of Doe defendants she sought to identify, from 90 to 42 posters, including five of the seven originally

represented by undersigned counsel – aquamg, bigdaddy, bopeep, jimbu15, and MistyMtTop.[3] She specified a limited number of allegedly actionable statements by each of the posters, and attached a short affidavit in which she averred, in very conclusory terms, that five categories of statements that are "necessarily" false in light of certain fact she avers about herself. For example, she swore that she has never been convicted of a crime, hence any post calling her a "thief", "crook," or so forth must be false; she swore that she is "not a racist," hence one who labels her "Nazi" must be making a false statement. She swore that she is a "heterosexual monogamous married woman," and had never engaged in sexual relations with Mayor Doherty or others besides her husband, and hence that any post using a variety of terms, including "bimbo," "butch," "whore," "dyke" "prostitution," "bought and paid for," and the like were necessarily false and defamatory.

On April 11, Joseph Pilchesky certified that he had provided notice to the Doe defendants. In addition to the clients whom we represented in our original papers, we agreed to represent Powertothepeople in opposing disclosure. In a memorandum opposing discovery, we explained why Gatelli's amended petition and supporting affidavit did not support her demand for the identification of any of our six clients whose identities she still sought, or, indeed, for most of the other anonymous additional defendants. We also requested leave to take discovery to pierce some of Gatelli's conclusory averments. Pilchesky filed a memorandum addressing the anonymity of each of the Does not represented by undersigned counsel.

On October 1, 2008, Judge O'Brien denied the petition for disclosure in part and granted it in part. First, he adopted what he understood to be the test previously adopted by a judge from the Lackawanna Court of Common Pleas in *Polito v. AOL-Time Warner*, 78 Pa D. & C. 4th 328 (2004),

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[3]No statements were identified by either of two other Does – katie and newgirl.

requiring that a plaintiff (1) state a claim under Pennsylvania law entitling her to civil or criminal redress, (2) show that the identifying information is directly related to her claim and fundamentally necessary to secure relief, (3) show that she is seeking the information in good faith, and not for some improper purpose, and (4) show that she cannot discovery the identity by alternative means." Opin. at 4-5. He held that it is actionable per se "to accuse . . . either a man or woman of any sexual misconduct . . . [or] of adultery or fornication," Opin. at 5, and concluded that six of the posters had "attribut[ed] serious sexual misconduct to Defendant Gatelli." Opin. at 7. At pages 6 to 7 of his opinion, Judge O'Brien quoted in full the posts that he felt accused Gatelli of serious sexual misconduct:

> Adam claimed that, meeting Gatelli at a drugstore, he had "called her a Doherty blowjob right to her face."
>
> FRICKELLMOIE set forth a piece of doggerel that began with the line, "Judy and Sherry [another member of the City Council] down on their knees S-E-R-V-I-N-G the King
>
> Lipstick and Lashes said, " . . . I have some words for those two whores, but they can't be said on TV. . .."
>
> 1 Musketeer said, "Just when you thought Judy Gatelli was the world's biggest asshole, she shows up as the world's dumbest, biggest asshole. And where was the whore of all whores tonight? She was a no-show once again. Too afraid of questions?...."
>
> Gatellis blue dress said, "... Does this mean Fat ass Judy Gatelli determines for us what free speech is? I don't think so, you fat-assed, no good, Doherty blowjob, crony-ridden piece of ****.. . ."
>
> MILOs Ghost said, "Nazi-Protected Opinionated Free Speech deal with it. Whore."

Although Gatelli did, in fact, aver that she has been monogamous and has never had sex with Mayor Doherty, Affidavit ¶ 6, Judge O'Brien did not expressly address the question whether Gatelli had

submitted evidence showing that the accusations of sexual misconduct were false. Nor did he engage in any express balancing of the plaintiff's right to redress for these wrongs and of defendants' right to anonymous speech.

Pilchesky appealed the order compelling him to identify these six speakers to the Commonwealth Court, which transferred the appeal to this Court. Gatelli appealed the order insofar as it protected from disclosure eight additional Doe defendants: Antisystemicmovements; BobbyMcGoof; Brainwashed; City Haul; History Writer; Milo Ferlicker; No Representation; and The Mole.

SUMMARY OF ARGUMENT

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. Full First Amendment protection applies to communications on the Internet, and longstanding precedent 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, 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 speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief

to the plaintiff because it enables him 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 speak anonymously, but may be exposed to efforts to restrain or oppose his speech. For example, an employer might discharge a whistleblower, and a public official might use his powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. Similar cases across the country, and advice openly given by lawyers to potential clients, demonstrate that access to identifying information to enable extrajudicial action may be the only reason for many such lawsuits. On the other hand, 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.

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. Moreover, our legal system ordinarily does 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. The challenge for the courts is to develop a test for the identification of anonymous speakers that 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.

This Court should embrace the developing consensus among those courts that have considered this question – including other Pennsylvania courts – by relying on the general rule that only a compelling interest is sufficient to warrant infringement of the free speech right to remain

anonymous. Specifically, when faced with a demand for discovery to identify an anonymous 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 her 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, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a 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 can require time and effort on a plaintiff's part and may delay her quest for redress. However, everything that the plaintiff must do to meet this test, she must also do to prevail on the merits of her case. So long as the test does not demand more information than a plaintiff will be reasonably able to provide shortly after filing 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 primarily involve demands for monetary relief. Only in the rare case will a plaintiff have a sound argument for being granted a preliminary injunction, notwithstanding the strong rule against prior restraints of speech, and in any event Pennsylvania does not allow injunctions as a remedy for defamation. Accordingly, although applying this standard may delay service of the complaint, 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.

Given the very nasty, vitriolic and offensive comments that remain at issue in this case, many of them using the kind of language that lawyers, and judges, and indeed any courteous person would eschew, and given the fact that at least some of these posters seem to revel in the fact that Gatelli has identified them as defendants, it may tempting to allow Gatelli to identify them and leave them to their fate. However, even if relatively low First Amendment value is assigned to speech that personally insults public officials, the issue in the case remains: What sorts of public criticism are so far beyond the pale of constitutional protection that a high-ranking public official may bring suit against her constituents for making these criticisms? For each poster, the Court should decide whether the statements about Gatelli are merely rhetoric, name-calling or hyperbole (and hence opinion), or whether they are statements of falsifiable fact and, for those statements that are actionable, whether Gatelli has submitted evidence that the statements are false and has shown that her interest in unmasking her constituents overcomes their First Amendment right to remain anonymous. On the record of this case, Gatelli has minimal evidence that at least some of the Doe defendants have made false factual statements about her, but she has not provided evidence sufficient to warrant discovery of all fourteen defendants whose identities she is still pursuing. Moreover, Judge O'Brien failed to conduct the requisite balancing of the interests. This Court should either conduct that balancing itself, in the first instance, or it should remand the case to Judge O'Brien to do the balancing in light of any other evidence that Gatelli may choose to present.

ARGUMENT

I. The First Amendment Protection Against Compelled Identification of Anonymous Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (2003); *Watchtower Bible and Tract Soc. of New York 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). 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 United States 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.

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 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, First Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521

U.S. 844 (1997).

Internet speakers speak anonymously for various reasons. They may wish to avoid having their views stereotyped according to their race, ethnicity, gender, or class characteristics. 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 individual speaks for the group. 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, a rule that makes it too easy to remove the cloak of anonymity will 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. Speakers who send email or visit a website leave behind electronic footprints that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original senders. 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.

A court order, even if granted for a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel production of individuals' identities in a situation that threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see 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 v. Alabama*, 357 U.S. at 461. These rights may also be curtailed by private retribution following 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. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of speakers to remain anonymous, justification for incursions 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.*, 514 U.S. 334, 347 (1995).

In a closely analogous area of law, courts have developed a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In such cases, many 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 the plaintiff's case; (2) disclosure of the source is "necessary" to prove the issue 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. *United States v. Driden*, 633 F.2d 346, 358 (3d Cir. 1980); *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). The Pennsylvania courts have specifically followed this analysis. *Commonwealth v. Bowden*, 576 Pa. 151, 176, 838 A.2d 740, 755 (Pa. 2003); *Davis v. Glanton*, 705 A.2d 879, 885 *et seq.* (Pa. Super. 1997); *McMenamin v. Tartaglione*, 139 Pa. Comwlth. 269, 287, 590 A.2d 802, 811 (1991). This standard must be applied

on an individualized, case-by-case basis. *Davis*, 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). Similarly, in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), the court expressed concern about the possible chilling effect of such discovery:

> 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.

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

Several courts have enunciated standards to govern identification of anonymous Internet speakers. The first appellate decision in the country remains the leading case. *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). There, Dendrite sued four individuals who had criticized it on a Yahoo! bulletin board. The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which we 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.
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> 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 . . ., 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.
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> 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.
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> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.

Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (Allegheny Cty. 2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. 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 (836 A.2d at 50):

> [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.

Although the Supreme Court's holding was that this Court had wrongly dismissed the appeal for lack of appellate jurisdiction, it did not simply reverse the order quashing the appeal, and it did not simply hold that, on remand, this Court had to decide whether actual economic harm is an element of the cause of action for defamation. Rather, the Supreme Court implicitly accepted the lower court's analysis of the procedures for deciding whether to order the identification of an anonymous Internet speaker, and remanded for this Court to decide whether one of the elements of "a prima facie case" that a defamation plaintiff must "establish" is the existence of economic harm. 575 Pa. at 278, 836 A.2d at 50. The remand order would not have included this element, which commands production of "evidence," unless, at the very least, the Supreme Court was endorsing the trial court's application of a summary judgment standard before allowing the discovery.

Since *Melvin* was decided, several cases in the Court of Common Pleas have recognized that disclosure turns on whether the plaintiff can produce sufficient evidence to carry her claim against a Doe defendant through summary judgment. In *Reunion Industries v. Doe*, 80 Pa. D.&C. 4th 449 (Com. Pl. Allegheny Cty. 2007), Judge Wettick, who also decided *Melvin*, reaffirmed his commitment to the summary judgment standard, and denied the requested discovery to support the plaintiff's defamation claim. In *Polito v. Doe*, 78 Pa. D. & C. 328 (Com. Pl. Lackawanna Cty. 2004), Judge Nealon held that the plaintiff had shown a prima facie case supporting her claim that insulting and pornographic emails sent directly to her AOL account, despite her efforts to change her

address and avoid the messages, constituted harassment and stalking by communication under Pennsylvania law. And in *Klehr Harrison v. JPA Development*, 2006 WL 37020 (Com. Pl. Philadelphia Cty. Jan. 4, 2006), the court agreed with a law review article stating that a defendant "may oppose the discovery request by establishing that he or she is entitled to summary judgment. [This standard] would permit discovery of a defendant's identity when the plaintiff had evidence supporting all elements of his claim . . .." *Id*. at *9.

In *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the Delaware Supreme Court became the third appellate court to address the standards for identifying anonymous Internet speakers who are accused of defamation, and as in *Dendrite* and *Melvin*, the Court required a substantial showing that required **evidence** supporting the cause of action. 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 Court rejected the final "balancing" stage of the *Dendrite* standard.

All of the other appellate courts that have addressed the issue of subpoenas to identify anonymous Internet speakers, as well as several federal district courts, have adopted some variant of the *Dendrite* or *Cahill* standards. Several courts have expressly endorsed 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. *Independent Newspapers v. Brodie*, — A.2d —, 2009 WL 484956 (Md. Feb. 27, 2009), involved several posters on a community forum sponsored by a newspaper chain on the Eastern Shore of Maryland, who commented on the suspcious circumstances surrounding the burning of a historic home and the unsanitary conditions of a local Dunkin' Donuts shop. The Maryland Court of Appeals squarely embraced *Dendrite* and held that once the plaintiff shows the elements of a prima facie case, the court should balance the strength of that prima facie case against the anonymous speakers' First Amendment right to remain anonymous. Similarly, *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007), involved a subpoena by a private company seeking 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 drew an analogy between an order requiring identification of an anonymous speaker and a preliminary injunction against speech, and called for plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides. In *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005), Judge Wayne Brazil required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests," and held that plaintiff's trademark and defamation claims based on sardonic postings about plaintiff's chief executive did not support discovery. *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001), similarly expressed a preference for the *Dendrite* approach, requiring a showing of reasonable possibility or probability of success.

Other state appellate courts have followed a *Cahill*-like summary judgment or prima facie evidence standard. Apart from *Brodie* in Maryland, the most recent state appellate court to address

the issue is *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal.App. 6 Dist. 2008), which 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." Similarly, *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007), reversed a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog about the hospital.

Among other federal district court decisions following *Cahill* and *Dendrite* is *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), where the court refused to enforce a subpoena to identify the authors of several postings by Best Western franchisees that criticized the Best Western motel chain, because the plaintiff had not presented any evidence of wrongdoing on the part of the Doe defendants. The court suggested that it would follow a five-factor test drawn from *Cahill*, *Dendrite* and other decisions. In *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), and *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008), the courts weighed the limited First Amendment interests of alleged file-sharers but upheld discovery to identify them after satisfying itself that plaintiffs had produced evidence showing a prima facie case that defendants had posted online hundreds of copyrighted songs. In *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), the court ordered the identification of a commercial competitor of the plaintiff who posted defamatory comments on bulletin boards only after considering a detailed affidavit that explained how certain comments were false. In *Doe I v. Individuals*, 561 F. Supp.2d 249 (D. Conn. 2008), the Court similarly granted discovery after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotion distress based on vile personal attacks on a student

gossip message board. And in *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006*)*, the court first refused to allow pre-service discovery to identify an anonymous critic of the plaintiff businessman, and dismissed sua sponte for lack of subject matter jurisdiction because Does cannot be sued in diversity, but as an alternative holding addressed the showing required to obtain such discovery. The court expressed some concern about the level of detail that plaintiff might have to show to establish a prima facie case under *Cahill*, but held that in any event the complaint did not even state a valid claim. *Accord Sinclair v. v. TubeSockTedD*, — F. Supp.2d —, 2009 WL 320408 (D.D.C., Feb. 10, 2009); *Quixtar v. Signature Management Team*, 2008 WL 2721265 (D. Nev. Jul. 7 2008).

Although each of these cases sets out a slightly different test, each court weighed plaintiff's interest identifying the people who 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 trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity. [4]

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[4] The one appellate case that some have cited as pointing in a different direction is *Lassa v. Rongstad*, 294 Wis. 187, 718 N.W.2d 673 (2006), a non-Internet case in which a political candidate sued a political organization over a leaflet, written by several unidentified members, that denounced the candidate for her relationship with a recently indicted political leader. After the known defendant was sanctioned for lying under oath to avoid giving information identifying the other, anonymous authors, the parties settled the case on terms that allowed Rongstad to appeal. On appeal, he presented an argument, not made below, that the court should have considered his motion to dismiss the complaint before ruling on the pending discovery motions. A plurality opinion joined by only two of the four justices participating in that case stated that Wisconsin's detailed pleading requirement met the First Amendment concerns raised by the court in *Cahill*. However, one of the other justices concurred on other grounds but declined to reach the First Amendment issues; the fourth justice dissented on First Amendment grounds; and three justices disqualified themselves. The plurality opinion does not state Wisconsin law because a majority of justices must join an opinion for it to "have any precedential value." *State ex rel. Ziervogel v. Washington Cy. Bd. of Adjustment,* 263 Wis.2d 321, 328, 661 N.W.2d 884, 888 (Wis. App. 2003), *rev'd on other grounds*,

III. Procedures That This Court Should Follow in Deciding Whether to Compel Identification of John Doe Defendants.

A. Give Notice of the Threat to Anonymity and an Opportunity to Defend Against the Threat.

First, when asked to subpoena anonymous Internet speakers, a court should ensure that the plaintiff has undertaken the best efforts available to notify the speakers 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. *Cahill*, 884 A.2d at 461; *Seescandy*, 185 F.R.D. at 579. Thus, in *Dendrite*, the court required the plaintiff to post on the message board a notice of its application for discovery. The notice identified the four screen names that were sought to be identified, and gave information about the local bar-referral service so that the individuals concerned could retain counsel to voice their objections, if any. 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.

In this case, Judge O'Brien ordered Pilchesky to send e-mail notice to the email addresses that each Doe provided when registering to post on the message board; it is, in fact, common practice for many ISP's to provide similar email notice. But such notice is not always successful, because Internet users often change their email addresses, or stop using some email addresses without actually canceling them. In the recent *Brodie* case, for example, Independent Newspapers (the message board host) sent email notice to each of the Does whose identity was sought, but after the *Washington Post* reported on the case, one of the Doe defendants contacted the newspapers'

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269 Wis.2d 549, 676 N.W.2d 401 (2004); *Doe v. Archdiocese of Milwaukee*, 211 Wis.2d 312, 334 n. 11, 565 N.W.2d 94 (1997). Moreover, *Cahill* was decided after briefing was complete, and it is not clear that any party argued for the application of *Cahill*'s summary judgment standard, not to speak of *Dendrite*'s balancing standard.

undersigned counsel and advised that she had never received that email notice. The email notice did not bounce back to the newspaper because the email address had not been canceled, but was only suspended. By the same token, if suit is brought long after the message in question were posted, mere placement on the message board may not be as effective as email notice if the poster has stopped watching the message board. In short, courts should seek to require all effective means of notice to be employed.

Because, in a suit over anonymous speech, preliminary injunctive relief would ordinarily be barred by the rule against prior restraints, and the only relief sought is damages, there is rarely any reason for expedition that counsels against requiring notice and opportunity to object. The purpose of requiring notice to the anonymous defendant and identification of the specific statements alleged to be actionable can be served only by allowing enough time to respond to plaintiff's showing of the basis for disclosure – ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment, plus enough time to take into account the fact that the Doe probably does not yet have a lawyer. Virginia, for example, requires thirty days notice after the plaintiffs provide the required showing to justify even issuing a subpoena. Va. Code § 8.01-407.1. Similarly, the model policy for ISP's offered by the Cyberslapp Coalition (of which Public Citizen is a part) recommends that thirty days notice be provided. http://www.cyberslapp.org/about/page.cfm?pageid=6.

In this case, Gatelli did not provide any notice, but the Pilchesky defendants, for their part, posted the Rule to Show Cause on the Doherty Deceit web site at http://www.dohertydeceit.com/Identityrule.PDF#page=1, with a link from the message board at http://scrantonpoliticaltimes.activeboard.com/forum.spark?forumID=65524&p=3&topicID=12213552. Moreover, Judge O'Brien

ordered email notice, and information about the litigation and the subpoena were posted to the message board, and the Scranton Times-Tribune covered the litigation regularly. The requirement of notice and an opportunity to respond has been satisfied here.

The court should, however, draw no inferences adverse to the Does from the fact that only our eight clients appeared specifically to defend their anonymity. Some of the Does may have relied Pilchesky's promise to defend their anonymity in court, invoking the standing that courts generally accord to the providers of message boards and Internet access to defend the anonymity rights of their users. *E.g.*, *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (Va.2001) (AOL allowed to assert First Amendment rights of user). Moreover, an anonymous defendant will be hard-pressed to defend her anonymity pro se (although we are aware of a case in Washington state court where that was attempted). Other users might have been unable to find counsel, and not only because of the expense. Before Mr. Barron agreed to serve as local counsel in this case, several lawyers in central Pennsylvania refused to get involved in this case because they were worried about possible adverse consequences for their other clients of taking a position adverse to the Scranton city administration and the governing political organization.

B. Require Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that she does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, courts should require the plaintiff to quote the exact statements by each anonymous speaker that are alleged to have violated her rights. Where the plaintiff has sued many different anonymous speakers, the plaintiff should be required to specify which statements she is attributing to which anonymous speaker, as a basis for discovery of the identity of that speaker. Unless the plaintiff has linked the

specific basis for suit with the specific defendant being sued for that statement, the Doe defendant cannot decide whether he or she has a sound basis for opposing discovery, and the court cannot evaluate the propriety of the requested discovery.

Originally, plaintiff here quoted 130 different message board postings, but did not specify which statements were posted under which of the pseudonyms whose owners her discovery request seeks to identify. *But see* Rule 1019(i) of the Pennsylvania Rules of Civil Procedure (when action is based on a writing, copy of the writing should be attached to the complaint). Judge O'Brien appropriately required Gatelli to specify which posting goes with which defendant. Although some of the postings are quite long, Gatelli, as required by Judge O'Brien, eventually specified which parts of the statements were allegedly actionable by italicizing the parts on which she was suing, and identified which of her three causes of action was brought over each statement. This requirement was, therefore, also satisfied.

On the message board at issue here, the registration process permits any one posting name to be adopted by only one user. Hence, all comments posted under a single user name are necessarily posted by a single user. If any one statement by that user (for example, by antisystemicmovements) meets the remaining prongs of the test – *i.e.,* it is defamatory, Gatelli presents a prima facie case about that statement, and the balance of interests favors disclosure – then Gatelli would be entitled to enforcement of her subpoena with respect to that user, even if the same user posted other statements that merit protection under the balancing standard.

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

The court should review each statement to determine whether it is facially actionable. In this regard, some of Gatelli's claims appear highly dubious.

First, although Gatelli purports to be bringing three separate causes of action, for defamation, "civil conspiracy," and intentional infliction of emotional distress, each cause of action depends on Gatelli's establishing the elements of her defamation claim. For example, Gatelli alleges that the Doe defendants have engaged in a "civil conspiracy" to defame her; but the United States Supreme Court has held that a public figure cannot avoid the constitutional minimum requirements for defamation claims simply by changing the label that she places on the tort for which she is suing. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Courts have repeatedly held that a claim for "civil conspiracy" to harm a public figure plaintiff by publishing damaging statements about him or her must meet the full constitutional standards for a defamation claim. *Barr v. Clinton*, 370 F.3d 1196, 1202-1203 (D.C. Cir. 2004); *Tierney v. Vahle*, 304 F.3d 734, 743 (7th Cir. 2002); *Windsor v. The Tennessean*, 719 F.2d 155, 162 (6th Cir. 1983). Moreover, the Pennsylvania courts have specifically held that public figures cannot sue for intentional infliction of emotional distress. *Reiter v. Manna*, 436 Pa. Super. 192, 200, 647 A.2d 562, 567 (1994); *Jones v. City of Philadelphia*, 73 Pa. D. & C.4th 246, 270 (Com. Pl. 2005), *aff'd*, 893 A.2d 837, 845-846 (Pa. Cmwlth. 2006). *Hustler v. Falwell* itself was a case in which a claim for intentional infliction of emotional distress under Virginia law was barred by the First Amendment.[5] Accordingly, Gatelli cannot prevail in her quest to identify each of the fourteen remaining Doe defendants unless she shows that she has a viable claim for defamation against each of them.

Second, many defamation cases are derailed by the rule that expressions of opinion are not

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[5]In the court below, Gatelli cited *Polito v. AOL Time-Warner, supra*, as supporting her claim for intentional infliction of emotional distress, but the case is inapposite. Polito was not a public figure; she was complaining about emails that were sent to her personally, not messages posted on a message board; and Polito's complaint alleged both stalking and harassment, causes of action not alleged in the Joinder Complaint.

actionable for defamation, *Feldman v. Lafayette Green Condominium Ass'n*, 806 A.2d 497, 501 (Pa. Cmwlth. 2002), and the issue of whether a statement is opinion or fact is one for the Court to resolve as a matter of law. *Mathias v. Carpenter*, 402 Pa. Super. 358, 362-363, 587 A.2d 1 (1991); *Nanavati v. Burdette Timlin Mem. Hosp.*, 857 F.2d 96, 106-108 (3d Cir. 1988). Moreover, just as readers anticipate that newspaper commentators "will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere as a news reporting column," *Riley v. Moyed*, 529 A.2d 248, 252 (Del. 1987), so, too, statements on a message board are typically exaggerated and most readers will take them with a grain of salt rather than anticipating complete objectivity. The very context thus militates against a finding of defamatory meaning.

In the ruling under appeal, Judge O'Brien wrongly held that posters who referred to Gatelli using the word "whore" were necessarily accusing her of sexual misconduct or, more specifically, of providing sex for financial gain. When a politician is called a "whore," the reference is much more likely to be an allusion to the contention that the politician is too closely aligned with wealthy or powerful interests. For example, bo peep, one of the Does represented by undersigned counsel, was sued for the statement "Prostitution is the oldest occupation. And I'm not talking about sex." Judge O'Brien properly recognized that this statement used the word "prostitution" figuratively, not literally. By the same token, when Lipstick and Lashes and MILOs Ghost used the term "whore" in this context, they similarly were speaking figuratively even though, unlike bo peep, they did not immediately qualify the term by saying "I'm not talking about sex."

Indeed, scrutiny of the cases reveals that the word "whore" is often used as a fighting word that simply conveys hatred, *e.g., Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Doe v. Pulaski County Special School Dist.*, 306 F.3d 616, 625 (8th Cir. 2002), or as an adverse reference to

churches that do not, in the speaker's view, follow the right religious traditions. *Ridley v. Massachusetts Bay Transp. Authority,* 390 F.3d 65, 101 (1st Cir. 2004) (referring to language from Mormon preaching). Lawyers who used words like "whore" when referring to judges have been held protected by the First Amendment because, in context, it was not a literal assertion that the judge sells sex for money. *E.g. Justices of the Appellate Division v. Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426 (1973) (reversing discipline of lawyer who said, "And Appellate Division judges aren't any better. They're the whores who became madams."). *See also State v. Carpenter*, 171 P.3d 41, 81-82 (Alaska 2007) (citing case of telephone caller who referred to then U.S. Attorney, now Attorney General Eric Holder, as a whore who violated the caller's rights; court deemed this protected political speech because it was "rhetoric on a matter of public concern").

In this regard, the language of the Ninth Circuit in *Standing Committee on Discipline v. Yagman* 55 F.3d 1430, 1440 (9th Cir. 1995), could have been written with this case in mind:

> When considered in context, . . . Yagman's statement cannot reasonably be interpreted as accusing Judge Keller of criminal misconduct. The term "dishonest" was one in a string of colorful adjectives Yagman used to convey the low esteem in which he held Judge Keller. The other terms he used — "ignorant," "ill-tempered," "buffoon," "sub-standard human," "right-wing fanatic," "a bully," "one of the worst judges in the United States" — all speak to competence and temperament rather than corruption; together they convey nothing more substantive than Yagman's contempt for Judge Keller. Viewed in context of these "lusty and imaginative expression[s]," *Letter Carriers*, 418 U.S. at 286, the word "dishonest" cannot reasonably be construed as suggesting that Judge Keller had committed specific illegal acts. *See Bresler*, 398 U.S. at 14, ("blackmail"). Yagman's remarks are thus statements of rhetorical hyperbole, incapable of being proved true or false.

In the context of this message board, the references to Gatelli as a "whore" were plainly not a suggestion that she was engaged in sex for money.

Turning to some even more distasteful examples, one might well question whether Adam or

Gatellis blue dress were accusing Gatelli of sexual misconduct when they applied the term "blowjob" to her (or, similarly, when FRICKELLMOIE referred to Gatelli and "Sherry" as "down on their knees S-E-R-V-I-N-G the King [Doherty]"). These posters may deserve to have their mouths washed out with soap, but that does not mean that they were literally accusing Gatelli of engaging in oral sex. Instead, they were using very offensive, colorful language to accuse Gatelli of being too subservient politically to Doherty. Assuming that this is the proper construction of their comments, their words are not actionable statements of fact, and are not a proper basis for the enforcement of a subpoena to compel Pilchesky to reveal their identifying information.

Similarly, some of the posters who are the subject of Gatelli's cross-appeal were guilty of nothing more than using colorful language that does not have a specific, factual meaning that accuses her of sexual misconduct. For example, Milo Ferlicker's statement "Judy the Doobie Hitler Butch," Amended Petition at 24, or City Haul's characterization of Gatelli as a "poor, pathetic, broken down, useless lump of flesh and bone," Amended Petition at 11, or as "Hitlerish" and "dyke-looking," Amended Petition at 37, seem to be nothing more than name-calling.

Some of the posters subject to the cross-appeal, however, may well have made factual statements capable of being proved false. For example, Antuisystemicmovements is charged with saying, "Butch thought she was going to clean up the City Council the same way she has been cleansing South Side and the same way she 'cleaned up' Scranton when she was STEALING and land-grabbing for Connors," Amended Petition at 5-6; "Butch is . . . a specialized thief charged with 'cleaning up the city council' the same way she cleaned up South Side," Amended Petition at 7; "that way she can give the money to her family instead of stealing off the taxpayers as Councilwoman in order to get jobs for her politically INBRED family," Amended Petition at 34; and "All the graft she

received isn't worth it to her." Amended Petition at 35. These statements appear to accuse Gatelli of specific, criminal, corrupt conduct, and if false could be a proper basis for a defamation action. Similarly, NoRepresentation stated that Gatelli "was for sale and she has been bought and paid for," Amended Petition at 27, apparently suggesting that Gatelli engaged in corrupt criminal activity by selling her votes (although it does **not** suggest that she sold sex for money, as Gatelli seems to have argued below by including therse words in the same paragraph of her affidavit, paragraph 6, as the words "whore" and "prostitute"); *see also* NoRepresentation's statement, *id.*, "Judy got corny [crony?] jobs for members of her family. Judy did favors to get those crony jobs" (Gatelli's daughter and son-in-law both work for local government bodies).

The Court should examine each of the statements by the eight additional defendants that are the subject of Gatelli's cross-appeal and decide whether they make actionable assertions of defamatory fact. If so, the Court will need to decide whether Gatelli's showings about the anonymous defendants making the actionable statements satisfy the remaining prongs of the test.

D. Require an Evidentiary Basis for the Claims.

The fourth prong of the national consensus standard rests on the proposition that no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of the cause of action – a prima facie case – and hence shows a realistic chance of winning a lawsuit against each Doe defendant. The requirement of presenting evidence prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need identification of defendants simply to proceed with the case. However, the Court should recognize that identification of an otherwise anonymous speaker is itself a major form of relief in cases like this

one, and relief is generally not awarded to a plaintiff absent evidence in support of the claims. Withholding relief until evidence is produced is particularly appropriate where the relief 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). 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&rfi=8. In a recent case, a major Pennsylvania energy company filed a John Doe case against an employee who had criticized it on a Yahoo! message board on theories that would not have withstood a motion for summary judgment; obtained a subpoena and thereby the poster's identifying information; dismissed the lawsuit; and fired the employee. *See Swiger v. Allegheny Electric*, 2007 WL 442383 (E.D. Pa. Feb. 7, 2007), *aff'd*, 540 F.3d 179 (3d Cir. 2008).

One leading advocate of using discovery procedures to identify anonymous critics urges corporate executives to use discovery first, and to decide whether to pursue a libel case only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, http://www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault,* http://www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have 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 to pursue a

defamation action only after finding out who the defendant is. *Id.* When respected members of the Bar are seeking clients by promoting the benefits that can be obtained from subpoenas without winning the lawsuit, the dangers posed by a mere "good faith" standard when libel suits are brought pro se (when the court cannot even rely on an officer of the court to screen baseless suits) are even more troubling.

To address 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 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 a summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues on which it needs to identify the anonymous speakers, before it gets 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. As discussed above, this is the approach that courts in Pennsylvania have already taken in response to subpoenas to identify anonymous Internet speakers.

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, the anonymity of the defendants should not be breached. *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 extent of the proof that a proponent of compelled disclosure of an anonymous speaker's identity should be required to offer may vary depending on the element of the claim that is in question. On many issues in suits for tortious speech, several elements of the plaintiff's claim will be based on evidence to which the plaintiff is likely to have easy access, even access that is superior to the defendants'. 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 element 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 proof of damages. Courts have traditionally required such proof in at least some cases, and a plaintiff should have ample means of proving its damages or other harm without need of discovery from the defendant. When a defamation action is filed over statements which, like anonymous internet postings, have less potential for damage – because they are less premeditated or less likely to be perceived as true – courts have traditionally required a higher standard of proof. For example, *Walker v. Grand Central Sanitation*, 430 Pa. Super. 236, 245-46, 634 A.2d 237, 241-42 (1993), changed Pennsylvania law to require at least proof of general damages even in cases of defamation per se. Although *Walker* was a slander case, other courts have read the decision as extending the requirement of proof of general damages to all cases of defamation *per se*. And, indeed, many states now require defamation plaintiffs to show actual harm as a

condition of establishing liability. *Dendrite*, 342 N.J.Super. at 158, 775 A.2d at 772; *Jenkins v. Revolution Helicopter Corp.*, 925 S.W.2d 939, 944-45 (Mo. Ct. App. 1996);*Ryan v. Herald Assoc.*,152 Vt. 275, 283, 566 A.2d 1316, 1320-1321 (1989); *Mareck v. Johns Hopkins University*, 60 Md. App. 217, 223, 482 A.2d 17, 21 (1984); *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1335 (10th Cir. 1996) (New Mexico law). The Supreme Court in *Melvin v. Doe*, 575 Pa. at 278, 836 A.2d at 51, remanded with instructions that this Court decide whether proof of economic harm is a pre-condition for a public official to establish liability for defamation.

In this case, although Gatelli submitted an affidavit in response to Judge O'Brien's order that she do so, it was a highly generalized affidavit that does little more than go through the motion of proving falsity. She set forth five separate paragraphs that lumped the statements made by 42 different posters into five categories and then averred that all statements in those categories were false. But her averments are inadequate to show falsity. For example, to the extent that some of the posters may be understood to have accused her of specific crimes of corruption, Gatelli's affidavit indicated that they must be false because "I have never been convicted of a crime." But the fact of never having been convicted – which we assume to be true – does not show that the person has never committed a crime.

The affidavit that was filed in *Alvis Holdings* (attached to this brief), and the opinions in such cases as *Sony Music v. Does*, 326 F. Supp.2d at 566-567, *Doe v Individuals*, 461 F. Supp.2d at 256-257, and *Immunomedics v. Doe*, 342 N. J. Super. 160, 775 A.2d 773 (N.J. Super. 2001) (the companion case to *Dendrite*) reflect the level of detail of the affidavits on which the courts there relied to establish a prima facie case. Here, although we have argued that some of the Does subject to the cross-appeal **have** made statements of fact that would be defamatory if false, Gatelli's

conclusory affidavit does not contain evidence that those statements are false. Accordingly, Gatelli's cross-appeal should be denied, although she should be given a further opportunity to submit proper evidence in the court below.

E. Balance the Equities.

Even after the Court has satisfied itself that each speaker whose identity is sought has made an actionable statement,

> 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 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, *Dendrite* called for individualized balancing when a plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming 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.
>
> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.

Accord, Independent Newspapers, Inc. v. Brodie, supra, — A.2d —, 2009 WL 484956, at *20 (Md. 2009).

The adoption of a standard comparable to the test for evaluating a request for 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 its ultimate disposition. Apart from the fact that, under *New York Times*, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters," *Gertz v. Robert Welch*, *Inc,.*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 tort claims in the complaint, but simply whether a sufficient showing has been made to overcome the right to speak anonymously. *See also Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005) ("court [must] assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant").

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to a motion to dismiss or a motion for summary judgment. At the very least, Gatelli could renew her motion after submitting more evidence. On remand, Gatelli shold be given the opportunity to make a proper showing about each to the Does whose statements may be determined by this Court to be actionable.

In contrast, 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. And it is settled law that any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). Indeed, the injury is 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.

It is not difficult to imagine a case in which the plaintiff is able to create a bare prima facie case for defamation but the equities nevertheless weigh against disclosure. For example, very much in the news are the consequences that have followed when American ISPs with a presence in China have revealed identifying information for persons who sent emails abroad or posted to online discussion sites on topics that the Chinese leadership wishes to censor. *E.g.*, Kopytoff, *China's stifling of Web detailed: U.S. firms often cooperate, experts reveal to Congress*, San Francisco Chronicle, February 19, 2006, page http://www.sfgate.com/ cgi-bin/article.cgi?f=/c/a/2006/02/19/ BUGFTHAP1A1.DTL, and the problems of "libel tourism" in which libel claims are brought against Americans in foreign courts. One of the solutions that is being suggested is that companies might maintain their servers outside China, and hence beyond the reach of that government's power. But imagine what might happen if a foreign figure accused of being responsible for a massacre (say, at Tian An Men Square, or in Tibet) of dissidents were to sue for libel in the United States, or initiate a proceeding abroad and obtain a commission to take discovery in the United States against a Chinese emigre who maintains a democracy web site in the United States. Suppose further that this leader swears an affidavit denying that he was involved, or even that there was a massacre – after all, what would be the consequences to such a person, living in China and in any event enjoying immunity from prosecution, who lied under oath in an affidavit submitted in the United States? Yet such an affidavit could create a prima facie case and the consequences to the defendant's family back in China could be horrendous. In such a case, the courts might find that the balance of the equities

requires a stronger and more reliable showing on the issue of falsity.

This hypothetical is extreme and unlikely, but in many cases, a Doe defendant has real reason to fear the economic or other consequences of being identified, and the example points up the need for a test that affords protection even in cases where a prima facie case can be presented. In this case, the anonymous defendants have severely criticized not only Gatelli herself, but the mayor of Scranton, whose political connections give him ample opportunity not only to reward his friends but also to punish his critics, through the exercise of the substantial discretionary authority that all public officials enjoy. For example, as discussed above, when the Pilchesky message board contained strong criticisms of the Director of Scranton's Office of Economic and Community Development, her sister, a local judge, got the Pennsylvania State Police to open a criminal investigation, and when Pilchesky refused to remove the comments from the message board, the police got the entire message board shut down by sending a "request" for such action to Pilchesky's ISP, knowing that the ISP was willing to honor such "requests" from law enforcement agencies. The Doe defendants, and others who post on the Scranton Political Times Message Board, live in and around Scranton, and have every reason to fear that if they can easily be identified, they could be the subject of official retaliation of various kinds – law enforcement efforts may be directed against them, their children may be punished in school, they may come before a judge who is a relative or ally of somebody they criticized, they may face increased inspections looking for code violations, their requests for zoning variances or business licenses may be denied.

Moreover, the nature of the plaintiff and of the message board, in some respects weigh against enforcement of the subpoena. Gatelli is a public official trying to identify several constituents who criticized her conduct in office. The fact that she may be sensitive to criticism –

see Joinder Complaint ¶ 133, alleging that her critics continued to criticize her publicly even after she was reduced to tears at a public meeting – should not give her any greater right to silence her critics. By holding elective office, Gatelli voluntarily made her conduct a fair subject for comment, even robust and unkind comment; and most of the comments for which the Does have been sued are core political speech, for which First Amendment protection is at its apogee.

The nature of the message board may also undercut Gatelli's interest in obtaining redress against the fourteen posters whose identities remain at issue in this case. Although, in theory, any Internet user could find a particular comment on this message board, and although some posters on the message board defend the administration and attack its critics, the general thrust of the message board is so unrelentingly hostile to Gatelli and her political allies, not to speak of being filled with vulgarities, that it is hard to imagine many neutral citizens remaining on the message board and being influenced about Gatelli's reputation when they reach the comments now at issue. The message board seems to act largely as the water cooler for Scranton citizens who hate Doherty, Gatelli and others. Comments around the water cooler, although theoretically amenable to an action for slander, simply do not have enough influence on overall public opinion to cause significant damage and hence would not weigh heavily in favor of Gatelli's claim for relief.

In that regard, to the extent that some of these statements are determined to be actionable, the criticisms are certainly harsh ones that might well be expected to cause Gatelli emotional distress and, if credited, to damage her reputation. But although Gatelli included averments in her affidavit below about the harm that the statements had caused her, her showings were startlingly weak. Her affidavit was phrased at an extraordinary level of generality – all of the statements mentioned in the Amended Petition, collectively, have allegedly caused her emotional distress and led her to seek

medical attention and take medication. Gatelli is, of course, entitled to sue as many critics as she likes, but American justice is individual, not collective. In order to establish for the purposes of either the prima facie case or the balancing stage of the analysis that a particular defendant's statements have caused her actual harm, Gatelli must present averments showing that **that defendant's** statements are responsible for the harm. In that regard, Gatelli's apparent inability to narrow her complaint down to one or two or three defendants whose statements about her are truly actionable and false makes it more difficult for her to prevail against **any** single defendant. The court below has already held that the great majority of the allegedly actionable statements set forth in the Amended Petition cannot support a claim for defamation or Gatelli's demand for disclosure. In light of that holding, Gatelli averment that **all** of the statements created the harm that she alleged means that her alleged harm was largely caused by non-actionable statements.

Moreover, there is substantial reason to question the veracity of Gatelli's affidavit. Press reports make clear that Gatelli was in tears as a result of public criticisms, made to her face at City Council meetings, well before the dates of some of the statements on which she now seeks to proceed. Brown, *City Council adjourns amid corruption cries*, http://www.thetimes-tribune.com/ site/index. cfm?newsid=18634322&BRD =2185 &PAG=461&dept_id=590572&rfi=8. Gatelli's own Amended Petition recites statements on the Doherty Deceit message board that mention this; she accuses some of her detractors of being unduly gleeful about her distress. But that fact simply causes the reasonable observer to question even whether the actionable Message Board statements actually had any impact on Gatelli's need for medical attention or medication.

Moreover, considered together with known facts and with Gatelli's statements in other documents in this case, it appears, regrettably, that Gatelli may have signed her affidavit without due

regard for her oath. For example, the first paragraph of Gatelli's affidavit, which was signed on March 20, 2008, recites, "I am currently President of the Scranton City Council." However, the minutes of the Scranton City Council, which are available on the city's web site at http://www.scrantonpa.gov/city_council.html, reflect that as of the City Council meeting dated January 15, 2008, Gatelli had been succeeded as Council President by Bobby McGoff; Gatelli then became City Council **Vice** President. http://www.scrantonpa.gov/council_agendas/ 2008/ 01-15-2008 % 20 Minutes.html. Similarly, although Gatelli's affidavit avers "I have sought medical attention and am currently taking medications for my distress and anxiety," ¶ 15, in answers to interrogatories from the Pilcheskys signed only two months before, Gatelli answered a question about the medications that she was allegedly taking by stating that she was **not** taking any medications. Either one of her answers is false, or she **began** taking the medications so long after the allegedly actionable statements that the Court may well question whether the statements caused the need for medication. Thus, although some of the statements in this case would certainly have the potential for causing Gatelli harm depending on who read them, Gatelli has not put much credible evidence of those harms into the record.

In her petition for disclosure, Gatelli argued that the Doe defendants have no expectation of privacy because the Pilchesky defendants placed a notice at the home page of the message board warning posters that they might not be anonymous because they could be identified through their IP addresses, and further warning them that they could be held responsible for libelous messages. Reliance on these warnings begs the question, because the question before the Court is whether the messages **are** libelous or otherwise actionable, and whether government power should be invoked to strip the Doe defendants of their anonymity. Moreover, it is quite common for ISP's and message

board providers to include warnings about possible identification and cautions against use of the message board to engage in abusive communications. If nothing else, those warnings protect the ISP against liability if it is compelled by a court to provide identifying information; if written strongly enough and displayed prominently, they may also serve as an effective reminder to message board users to take the possibility of litigation into consideration when they post messages.

Such warnings were present on the message boards and blogs in most of the cases cited in Section II of this brief; yet that did not impel those courts to disregard the important First Amendment right to speak anonymously. The fact that the Pilcheskys placed those warnings on the home page of the message boards, as a means to encourage responsible use of the facility, does not undercut the right of those posters who did **not** violate Gatelli's rights to remain anonymous.

* * *

The balancing part of the *Dendrite* test is neither plaintiff- nor defendant-friendly. In many cases, consideration of the strength of the plaintiffs' case, the nature of the speech, and the propensity of the speech to cause serious damage to the plaintiff's legitimate and protected interests may strongly weigh in **favor** of disclosure. *See*, *e.g.*, *Biomatrix v. Costanzo*, Docket No. BER-L-670-00 (N.J. Super., Bergen Cy.) (anonymous poster alleged that head of biotech company was a doctor who had collaborated with the Nazis in their heinous medical experiments); *Hvide v. Doe*, Case No. 99-22831 CA01 (Fla. Cir. Ct, 11th Judicial Cir., Dade Cy.) (defendant claimed that head of company was guilty of embezzling corporate funds; plaintiff lost his job as a result); *HealthSouth Corp. v. Krum*, Case No. 98-2812 (Pa. Com Pl. 1998) (poster claimed that he was having affair with the CEO's wife). Similarly, in *Sony Music, supra*, the court considered the relatively low First Amendment value of the speech implicated by "sharing" copyrighted musical

recordings as one important reason to grant discovery based on the level of factual showing that the plaintiffs had presented.

In this case, however, the balance of equities generally tips in favor of the defendants, given the fact that the plaintiff is a public official, whose political allies are more than capable of retaliating against citizens whom she is suing for having criticized her, and given her inability to produce substantial evidence that particular criticisms caused her significant harm

IV. *Dendrite*'s Flexible Standard Discourages Frivolous Lawsuits While Allowing Genuine Cases to Proceed.

The main advantage of the *Dendrite* test is its flexibility. The test seeks 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 factual assertions 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 unnecessary lawsuits. The adoption of strict legal and evidentiary standards for defendant identification in this case, like those adopted by courts in other states, will encourage would-be plaintiffs and their counsel to stop and think before they sue, and to ensure that litigation is undertaken for legitimate ends and not just to chill

speech. At the same time, those standards have not stood in the way of identifying those who face legitimate libel and other claims. The Court should preserve this balance by adopting the *Dendrite* test that considers both the interests of defamation plaintiffs to vindicate their rights in meritorious cases and the right of Internet speaker defendants to maintain their anonymity. Where, as here, there is no realistic possibility that their speech could be made the basis of a successful action for defamation or any of the other torts that have been alleged here, discovery should be denied.

CONCLUSION

The cross-appeals by Gatelli and Pilchesky should be considered in accordance with the arguments presented above. If the Court concludes that some of the statements on which Gatelli bases her amended petition for disclosure are actionable statements of fact, but that there is insufficient evidence that those statements are false, the Court should remand to permit Gatelli to make a more detailed factual showing in support of her request for an order disclosing those defendants' identities. If the Court determines that there is sufficient evidence to support Gatelli's prima facie case on all statements found to be actionable, the Court should either balance the equities under the fifth prong of the *Dendrite* test, or remand to permit Judge O'Brien to do so in the first instance.

Respectfully submitted,

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