**A143680**

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**FIRST APPELLATE DISTRICT, DIVISION FOUR**

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ZL TECHNOLOGIES, INC.,

Plaintiff-Appellant

v.

DOES 1-7,

Defendants,

GLASSDOOR, INC.,

Real Party in Interest and Respondent.

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On Appeal from the Marin County Superior Court
Case No. CIV 1203944
Honorable Lynn Duryee and Mark A. Talamantes

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# BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC. AND TWITTER, INC. SUPPORTING THE POSITION OF RESPONDENT GLASSDOOR, INC.

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TO BE FILED IN THE COURT OF APPEAL

APP-008

| COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION Four | Court of Appeal Case Number: A143680 |
|---|---|
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| APPELLANT/PETITIONER: ZL Technologies<br>RESPONDENT/REAL PARTY IN INTEREST: Glassdoor | |
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This litigation arises out of seven online reviews that criticized ZL Technologies' treatment of its employees. The company, which claims that each of the reviews contains false and defamatory statements, filed suit against the seven reviewers as Doe defendants, then pursued discovery from the host of the comments, Glassdoor. But plaintiff produced no evidence showing that anything the Does had said about it was false, even though the Sixth Appellate District, in a decision that was binding in the Superior Court, has held that a plaintiff seeking to identify anonymous detractors who it claims have defamed it must produce such evidence before imposing on the First Amendment right to speak anonymously. Instead, the company argues that the court should presume falsity. The Superior Court ruled that plaintiff had not shown enough to justify compelling disclosure.

Courts in eleven states and the District of Columbia now demand a showing beyond the filing of a facially valid complaint before a plaintiff can deprive an anonymous speaker of the First Amendment right to speak anonymously; California's Sixth Appellate District has joined this consensus. So, too, have many federal courts, including the Northern District of California. This

Court should affirm the denial of disclosure here and hold, in agreement with courts elsewhere and with the trial court below, that the right to speak anonymously cannot be breached without a sufficient showing that the discovering party has valid reasons to seek such identification. Indeed, amici urge this Court to take a step further than the Sixth Appellate District and join the majority of state appellate courts in holding that, after the plaintiff has made some evidentiary showing in support of its claims, the Court should balance the First Amendment right to remain anonymous against the plaintiff's right to proceed on its claims.

**INTEREST OF AMICI CURIAE**

Public Citizen is a public-interest organization based in Washington, D.C. It has more than 400,000 members and supporters nationwide, roughly 60,000 in California. Since 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended many cases involving the First Amendment rights of citizens who participate in civic affairs. See http://www.citizen.org/litigation/briefs/internet.htm. Public Citizen has represented Doe defendants and Internet forum

hosts, and has appeared as amicus curiae, in cases involving subpoenas seeking to identify hundreds of authors of anonymous Internet messages.

Twitter, Inc. is a global platform for public self-expression and conversation in real time, where users communicate directly to each other or to the entire platform community, via the exchange of 140 character messages known as Tweets. Its services have transformed and elevated this country's long tradition of town halls, private assemblies, robust debate, and anonymous complaints by bringing it online and making it more accessible to people everywhere. As a provider of online services that people use to exercise their First Amendment right to free speech, it is committed to protecting its users from invasions of that fundamental right. And because Twitter is headquartered in San Francisco, this Court's decisions about the standards applicable to subpoenas to identify users charged with wrongful speech may affect subpoenas directed to amicus.

Amici are the subject of reviews on Glassdoor, some of them highly favorable and some quite critical.

## QUESTIONS PRESENTED

1. What procedures must a plaintiff follow, and what showing must it make, when the plaintiff claims to have been wronged by anonymous speech, and seeks to identify anonymous defendants?

2. Has appellant ZL Technologies met the standard?

## STATEMENT

### A. Background

Protection for the right to engage in anonymous communication is fundamental to a free society. Indeed, as electronic communications have become essential tools for speech, the Internet in all its forms—web pages, email, chat rooms, and the like—has become 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.

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. For example, Yahoo! and Raging Bull host message boards for every publicly traded company where investors, and other members of the public, can post discussions about the company. Blogger, WordPress and TypePad give individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, companies, or other topics while leaving it open for visitors to post their own comments. Other web sites, such as Yelp and Angie's List, have organized forums for consumers to share their experiences with local merchants. And still other sites are organized by industry, such as Trip Advisor that hosts reviews of hotels, restaurants and tourist venues, 800Notes where recipients of telemarketing calls can describe

their experiences with cold marketing calls, RateMD's which provides a forum for patients to review medical professionals, and Avvo which enables clients and other lawyers to post reviews of lawyers. Glassdoor is a web site of the latter class, where employees and former employees can provide feedback about their employment experiences.

The individuals who post messages on such web sites often do so under pseudonyms—similar to the old system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the forum at issue here will reveal, many people choose nicknames that protect the writer's identity from those who disagree with him or her, and hence encourage the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature—and Glassdoor is typical in that respect—that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use the forum to express his point of view; a person who disagrees with something that is said on a

message board for any reason—including the belief that a statement contains false or misleading information—can respond to that statement immediately at no cost, and that response can have the same prominence as the offending message. To be sure, like a newspaper, such sites cannot be **required** to print responses to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). But on most Internet forums (including those amici operate), companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong.

Glassdoor, indeed, enables any company that is reviewed to place its reply directly under the review to which it is replying. Because many people regularly revisit message boards, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of

disputed propositions of fact and opinion.

### B. Facts and Proceedings Below

ZL Technologies is a company based in San Jose, California; according to paragraphs 1 and 5 of its complaint, it "provides email archiving, eDiscovery and compliance software support of businesses throughout the country"; it "is a well-known and respected provider of electronic archiving software"; and it has "generated consistent growth" since it was founded in 1999. AA 2.

Since September 2010, plaintiff has attracted some decidedly mixed reviews on Glassdoor.com, a review site on which current and former employees of businesses can post ratings and comments about their places of employment. AA 3. Comments address such diverse topics as salaries, interview questions, and even the company's products and operations. In addition to providing text commentary, posting employees have the opportunity to rate the employer on a scale of one through five, both on an overall basis and with respect to a number of categories such as "Culture & Values" and "Compensation & Benefits." Reviewers are asked to list both the "Pros" and the "Cons" of working at the employer, and to offer "advice to senior

management." Reviewers do not have the option of choosing pseudonyms; they may only describe themselves as "current employee" or "former employee." AA 62-68.

As of August 2012, when the complaint in this case was filed, eleven employee reviews had been posted about ZL Technologies; three were largely positive, giving plaintiff four of five stars; seven reviews were overall fairly critical, from employees who indicated that they were "very dissatisfied." AA 62-68. Even employees whose overall opinions rated plaintiff poorly had some good things to say; some of the allegedly defamatory posts complimented plaintiff's product and the overall quality of its staff. Management, however, came under severe criticism for mistreating individual staff members, berating employees in public, and causing substantial turnover both among the staff and among managers whose history with the company does not go back to the company's founding. *Id.*

Persons wishing to post reviews on glassdoor.com must register an account, providing an email address at which they may be contacted, AA 25. Glassdoor also retains the Internet Protocol ("IP") addresses from which reviews are posted. AA 26. Employers are also given the opportunity to respond to reviews

once they sign up for a free employer account; after moderation by the Glassdoor site, such responses appear directly beneath the reviews themselves. http://employers.glassdoor.com/how-glass door -works/.

On August 29, 2012, plaintiff filed a two-count complaint in the Superior Court for Marin County. AA 1-9. Paragraphs 7 to 16 of the complaint identified seven reviews, posted on September 21, 2010; April 13, 2011; April 26, 2011, April 28, 2011; March 15, 2012; March 20, 2012; and June 20, 2012, and alleged that they were defamatory. AA 2-5. The posts were not set forth in full, but the complaint quoted several captions, clauses and sentences from each review, apparently identifying the portions of the reviews that plaintiff found objectionable. For some of the posts, the complaint explained the ways in which plaintiff considered them to be false. In other respects, instead of alleging falsity the complaint asserted only that statements "cast[] a negative light on plaintiff" (for example, ¶ 8) or that a statement's "statistics are misleading." ¶ 16. For several of the statements quoted in the complaint, instead of alleging that the statement is either false or even misleading, the complaint alleges only that a posting included "personal attacks on Plaintiff's CEO, Ken Leong." ¶ 13.

AA 2-5.

Plaintiff then served a subpoena on Glassdoor, AA 30-33, which objected to the subpoena on the ground that it was burdensome and overbroad, and also that the subpoena conflicted with the right of Glassdoor's users under both the First Amendment to the United States Constitution and the California Constitution to speak anonymously in that plaintiff had not made a prima facie showing that the reviews at issue in the complaint were false and hence actionable. AA 70-81. In the course of the meet-and-confer process, counsel for plaintiff and Glassdoor apparently discussed whether the anonymous defendants would receive any notice; however, plaintiff simply assumed that the Does would receive notice and took no responsibility for ensuring that such notice would be given. AA 42. The record does not reflect that any such notice was given – certainly none appears on the Glassdoor page with respect to ZL Technologies, such as in the form of a posting by plaintiff in response to any of the comments. Amici have been told by Glassdoor that no notice was given.

The Superior Court issued a tentative ruling denying the motion to compel discovery. AA 82. The tentative ruling began

by recognizing that the First Amendment protects the right to post anonymously, providing a quotation but not a citation to the Supreme Court's decision in *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995), then apparently rested on two grounds: first that the posts were largely matters of opinions rather than facts: "The material posted here is similar to that written on bathroom walls – anonymous, angry, opinionated, and not very reliable. The material is obviously the opinion of the angry and anonymous writers." AA 82. Second, the opinion also noted the possibility that plaintiff might have alternate ways of identifying the anonymous reviews, in that ZL Technologies "is in the best position of knowing who its former employees are and of contacting them for questioning." *Id.* But after oral argument at the motion hearing, the judge modified her approach somewhat, AA 83, referencing the tentative ruling but leaving out any reference to alternate means of securing identifying information:

> The court finds that plaintiff has failed to make a sufficient showing that the anonymous speakers engaged in wrongful conduct causing harm to plaintiff. In the context of this website, the material posted is primarily opinion and would not be considered reliable by the average person.

This ruling did not make clear whether the trial court was relying

in part on plaintiff's failure to present evidence in support of its claims that the speech was wrongful, or whether it was resting only on the argument that the posts were entirely matters of opinion that cannot, as a matter of law, be the subject of a defamation claim.

Plaintiff did not respond to this ruling by renewing its motion to compel discovery, such as by submitting an affidavit from officials within the company showing that they had sufficient personal knowledge to demonstrate the falsity of some of the statements whose authors plaintiffs sought to identify. Nor did plaintiff seek appellate review by writ of the denial of discovery, pointing out that plaintiff could not pursue its complaint further without identifying the Doe defendants and serving them with process. Eventually, the Superior Court brought plaintiff's failure to prosecute to a head by issuing an order to show cause why the complaint should not be dismissed for failure to effect service. Plaintiff responded that the only reason why it had not effected service was that it had been unable to identify them. It did attempt to meet the argument that it had not pursued alternate means to identify the reviewers; one of its counsel submitted an affidavit describing efforts to interview

several former employees; some of them refused to respond and others denied having posted such reviews. AA 87-94. However, apart from asserting at a high level of generality that plaintiff had established a prima facie case of defamation by filing its complaint, plaintiff never made additional efforts to supplement the record with evidence of falsity or of damage to reputation.

The Superior Court thereupon dismissed the complaint for failure to effect service in the more than two years since the action had been filed. AA 96. This appeal followed. AA 97.

## 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 complains about the content of material posted online and seeks relief against its author, including an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Moreover, 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 it to employ extra-judicial self-help measures to counteract both the speech and the speaker; identification 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 punish 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. Even former employees who have continued to work in the same industry might well be worried about being identified that

someone who criticized a former employer publicly, especially if that employer retains clout in the field. There is evidence that access to identifying information to enable extra-judicial action may be the only reason some plaintiffs bring such suits (infra 19-21).

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 granting 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 deliberate defamers to hide behind pseudonyms, nor too easy for a company or a public figure to unmask critics simply by filing a complaint that purports to state an untested claim for relief under some tort or contract theory.

Although the standard for resolving such disputes is an issue of first impression in this Court, the Court will not be writing on an entirely clean slate because many appellate courts in other states, and indeed one of the coordinate appellate

districts in California, have considered this question in light of the principle that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Consequently, those courts have ruled that a trial judge faced with a demand for discovery to identify an anonymous Internet speaker so that he may be served with process 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 his 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 his claims; and, in many jurisdictions (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. Applying these requirements, a court can 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. However, everything that the plaintiff must do to meet this test, it must also do to prevail on the merits of her case. So long as the test does not demand more information than a plaintiff would reasonably be able to provide shortly after filing the complaint, without taking any discovery—and other cases show that plaintiffs with valid claims are easily able to meet such a test—the standard does not unfairly prevent the plaintiff with a legitimate grievance from securing redress against an anonymous speaker.

In arguing against a requirement of producing evidence, ZL Technologies contends that the Does enjoy no constitutional protection because false speech is not protected. That argument overstates the constitutional point, because false speech **can be** protected unless the plaintiff make several showings in addition to falsity, but the more important point is that, at this juncture, plaintiff has put forward only allegations of falsity and allegations of the other elements of a libel claim. Allegations are not enough to avoid the force of the constitutional protection for anonymous speech.

# ARGUMENT

## THE FIRST AMENDMENT REQUIRES A SHOWING OF MERIT ON BOTH THE LAW AND THE FACTS BEFORE A SUBPOENA TO IDENTIFY AN ANONYMOUS SPEAKER IS ENFORCED.

Appellate courts in many other states have addressed the same question on which the decision in this case turns—what showing should a plaintiff have to make before it may be granted access to the subpoena power to identify an anonymous Internet user who has criticized the plaintiff? As shown below at pages 23 to 32, those courts have properly decided that it is not enough for the plaintiff to show that it is only **possible** that the plaintiff has a valid claim, or to put forward a good faith belief in the rightness of its cause. Other appellate courts have held, whether under the First Amendment or under state procedures, that anonymous defendants are entitled to demand that the plaintiff make a factual showing, not just that the anonymous defendant has made critical statements, but also that the statements are actionable and that there is an evidentiary basis for the prima facie elements of the claim such as falsity and, in many jurisdictions, damages. Some appellate courts have required as well an express balancing of the plaintiff's interest in prosecuting

its lawsuit against the anonymous defendant's reasons for needing to stay anonymous.

A defamation plaintiff is uniquely in a position to know why the statement that it alleges to be false is, in fact, false and defamatory, and that the statement caused plaintiff injury. Unlike, for example, a personal injury plaintiff, who may know only that she or he is suffering in some way, without knowing why, the defamation plaintiff typically knows, before it decides to file suit, the evidence that would show the defendant's accusation to be false and defamatory. There is typically no reason why, at the outset of a case, a company about which false statements have been made cannot present evidence of falsity, and of the damage that the false statements have caused. In light of the constitutional protection for anonymous speech, and the value that society places on that right, this Court should join the broad judicial consensus in requiring such a showing.

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

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections*

*Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
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> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.
>
> *McIntyre*, 514 US at 341-342, 356 (emphasis added).

California courts have squarely agreed that the First Amendment protects the right to speak anonymously, *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 72 Cal. Rptr.3d 231 (Cal. App. 6 Dist. 2008), and also held that the California Constitution provides its own independent support for this right. *Rancho Publications v.*

*Superior Court*, 68 Cal. App. 4th 1538, 81 Cal. Rptr.2d 274 (Cal. App. 4 Dist. 1999).

The right to speak anonymously is fully applicable online. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *In re Does 1-10*, 242 SW3d 805 (Tex. App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the

group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. For example, clients who are reviewing experiences with a lawyer, or patients who are discussing experiences with a doctor, may well have occasion to discuss intimate or confidential details about themselves that they may not want to have associated with their own names in a way that is visible to anybody who does a Google search for their names or, indeed, for the name of the reviewed professional. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother

consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

Experience has taught that, when courts do not create sufficient barriers to subpoenas to identify anonymous Internet speakers named as defendants, the subpoena can be the main point of the litigation, in that plaintiffs may identify their critics and then seek 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 admit that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. An early advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/ corporate_ reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, 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 & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. After all, in most of these cases, particularly cases involving comments by employees or former employees, employees will not have the resources to oppose a claim for defamation of some other tort and will have no choice but to retract their criticisms and warn fellow employees of the cost of speaking. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* Indeed, in *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006), *aff'd*, 540 F.3d 179 (3rd Cir. 2008) a company represented by a well-respected law firm filed a Doe lawsuit, obtained the identity of an employee who criticized it online, fired the employee, and then dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity.

Companies that make pornographic movies have recently been bringing mass copyright infringement lawsuits against hundreds of anonymous Internet users at a time, without any

intention of going to trial, but hoping that embarrassment at being subpoenaed and then publicly identified as defendants in such cases will be enough to induce them to pay thousands of dollars in settlements. *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014) *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012); *Patrick Collins v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012). Indeed, some pornographic films are now being made not to be sold, but to be used as the basis for subpoenas to identify alleged downloaders who can then be pressured to "settle." *On The Cheap, LLC v. Does 1–5011*, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011). Amici do not suggest that ZL Technologies has brought this lawsuit to shake down former employees, but the rules governing subpoenas must be crafted with the recognition that some plaintiffs serving such subpoenas will not be properly motivated.

ZL Technologies is a private company, but its subpoena invoked judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. That is why, for example, an action for damages for defamation, even when brought by an individual, must satisfy

First Amendment scrutiny, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), and why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347. *Cf. O'Grady v. Superior Court*, 139 Cal. App.4th 1423, 1468-1479, 44 Cal. Rptr.3d 72 (Cal. Ct. App. 6 Dist. 2006) (requiring parties to make a detailed showing of the need for the information before the **reporter's** qualified First Amendment privilege to keep the source confidential can be overcome).

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, "If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this

would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). *See also Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D .Cal. 1999):

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

### B. Many Courts Now Require a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff.

The fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak

anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Cahill*, 884 A.2d at 457.

Courts have drawn on the media's privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, established a five-part standard that became a model followed or adapted throughout the country:

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

> against the harm to the defendant from losing the First Amendment right to anonymity.
>
> *Id.* at 760-61.

Although some jurisdictions employ the fifth prong, and some do not. We argue in the final section of this brief for the adoption of the original *Dendrite* standard, but the first four parts of the test represent the minimum protections required by the First Amendment and the state courts addressing this issue are **unanimous** on this point. The trial court's decision should be affirmed based on the first four parts of the test alone.

The leading authority for rejection of the fifth, explicit balancing stage of the analysis is the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451. In *Cahill*, the trial 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

evidence that the statements are false.

The following state appellate courts have endorsed the *Dendrite* test, including the final balancing stage:

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

> *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009): The court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, balanc[ing of] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." *Id.* at 457.

> *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010): A mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the Dendrite test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech

anonymously." *Id.* at 193.

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

*In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012): The Court reversed on order allowing the recently retired head of a local charity to identify an anonymous individual who had commented on a newspaper story about the financial problems of the charity by asserting that the missing money could be found in the plaintiff's bank account, because he had provided no evidence that the accusation was false.

Several other state appellate courts have followed a *Cahill*-like summary judgment standard without express balancing:

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

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

*Solers v. Doe*, 977 A.2d 941 (D.C. 2009): The court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that

> the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.
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> *Doe v. Coleman*, 436 S.W.3d 207, 211 (Ky. Ct. App. 2014): The Kentucky Court of Appeals granted a writ or prohibition, overturning a trial court order that refused to quash a subpoena seeking to identify anonymous speakers who had criticized the chairman of the local airports board, because the trial court had not required the plaintiff to set forth a prima facie case for defamation under the summary judgment standard.

Intermediate appellate courts in three other states have refused to create special procedures pursuant to the First Amendment because they concluded that existing state procedural rules provided equivalent protections, giving Doe defendants the opportunity to avoid being identified pursuant to subpoena if the plaintiff cannot establish a prima facie case. In Illinois, two appellate panels relied on Illinois court rules that already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe. *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 2010); *Stone v. Paddock Pub. Co.*, 961 N.E.2d 380 (Ill. App. 2011). In Michigan, a panel of the Court of Appeals said that an anonymous defendant could obtain a protective order against discovery, deferring enforcement of an identifying subpoena while he pursued a motion for summary disposition

either on the face of the complaint or for failure to produce sufficient evidence of defamation. *Thomas M. Cooley Law School v. John Doe 1*, 833 N.W.2d 331 (Mich. App. 2013). Because the court deemed these state-law procedures adequate to meet First Amendment standards, and accordingly reversed the trial court's order enforcing the plaintiff's subpoena, it declined to decide whether special First Amendment procedures might be needed in some cases. The court recognized that a later case might impel it to adopt the *Dendrite* approach, or that rulemaking by the state supreme court might provide a good basis for the adoption of that standard. A second appellate panel expressly endorsed *Dendrite* but declined to impose it directly because of the prior panel holding. *Ghanam v. Does,* 845 N.W.2d 128 (Mich. App. 2014). A petition from the losing plaintiff for discretionary review of the *Ghanam* decision is pending. Finally, in *Yelp, Inc. v. Hadeed Carpet Cleaning*, 752 S.E.2d 554 (Va. App. 2014), *rev'd*, 770 S.E.2d 440 (Va. 2015), the Virginia court of appeals declined to apply the First Amendment tests required in other states because it concluded that a special Virginia statute regulating subpoenas to identify anonymous Internet speakers set a somewhat lower standard. However, that decision has since been vacated on the

ground that a Virginia court lacks jurisdiction to obtain documents from a California-based company through an undomesticated Virginia subpoena. 770 S.E.2d 440 (Va. 2015)

Federal courts have repeatedly followed *Cahill* or *Dendrite*. *E.g.*, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005) (required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) (endorsing the *Highfields Capital* test); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011) (following *Highfields Capital*); *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) ("The case law . . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*," *quoting SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)); *Best Western Int'l v Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009) (court did not choose

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

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to obtain enforcement of a subpoena to identify Doe defendants is too onerous a burden, because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. *E.g.*, *Fodor v. Doe*, *supra*; *In re Baxter*, *supra*; *Does v. Individuals whose true names are unknown*, *supra*; *Alvis Coatings v. Does*, *supra.* Indeed, in *Immunomedics v Doe*, 775 A.2d 773 (N.J. App. 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two

of the Does were identified while two were protected against discovery.

Moreover, this argument fails to acknowledge the fact that an order identifying the anonymous defendant is a form of relief, relief that can injure the defendant (by exposing the defendant to retaliation at the hands of the plaintiff and/or its supporters), and relief that can benefit the plaintiff by chilling future criticism as well as by identifying critics so that their dissent can be more easily addressed. Courts do not and should not give relief without proof.[1]

Finally, ZL Technologies argued below, and appears to argue again in this Court, that there is nothing to balance on the anonymous defendant's side of the scale because defamation is outside the First Amendment's protection and the speech at issue in this case is defamatory. But this argument begs the question, and courts in other states, facing precisely the same argument,

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[1]Corporate plaintiffs sometimes argue that speech criticizing them become commercial speech, which receives less First Amendment protection, because it has the potential to hurt their business. However, commercial speech is speech that promotes a commercial transaction; that speech might **discourage** commerce by criticizing a company does not make it commercial. *Nissan Motors v. Nissan Computer*, 378 F.3d 1002, 1016-1017 (9th Cir. 2004).

have understood that the argument is fundamentally unsound. Indeed, the United States Supreme Court has held that even in the defamation context, the First Amendment protects false speech unless it is shown to have been knowingly or recklessly false. *United States v. Alvarez*, 132 S.Ct. 2537 (2012). At this point, ZL Technologies has made only unsworn **allegations** about defamation, and the issue in the case is what showing a plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power. As we show in the next part of the brief, although ZL Technologies has claimed that some false statements have been made, it submitted no evidence in support of those claims, nor, in most respects, has it shown that the statements on which the suit is based are a proper basis for a defamation action.

### C. Plaintiff Did Not Follow the Required Procedures, or Make the Showing Required Before Identification of the Jane Doe Speaker May Be Ordered.

The superior court properly ruled that ZL Technologies had not overcome Jane Doe's First Amendment right to speak anonymously.

#### 1. Plaintiff Did Not Follow the Constitutionally Required Notice Procedures.

The first requirement in the *Dendrite / Cahill* consensus approach is for the plaintiff to notify the Doe of its efforts to take away his anonymity. In this case, to be sure, Glassdoor deserves credit for going beyond what some ISP's do, treating themselves only as stakeholders while leaving it to their anonymous users to retain counsel to seek to quash the requested discovery. But the fact that Glassdoor came forward to protect its users' First Amendment rights should not deprive the users of the ability to defend their own interests if they can afford to do so; and in that regard, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Thus, courts have held that when they receive a request for permission to subpoena an anonymous Internet poster, the plaintiff must undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Seescandy.com*, 185 F.R.D. at 579; *Dendrite*, 775 A.2d at 760.

Most ISP's are willing to give notice by using email or

"snailmail" addresses that they have obtained from their users. If a subpoena is sent to the ISP that provides Internet access to the Doe, then the ISP will commonly have a street address for its customer. Or if the host of the web site requires registration as a condition of posting, and requires the provision of a valid email address as part of registration, then sending a notice to that email address can be an effective way of providing notice.

Every court to reach the issue has held that the plaintiff needs to provide notice to the anonymous defendants; the court then withholds ruling on the requested discovery until the Does have had sufficient opportunity to secure counsel and oppose discovery; that opportunity is a key part of the procedural protections that the Constitution requires.[2] In *Krinsky v. Doe,* the Court of Appeal declined to reach the issue of whether notice is

[2] The industry standard is to provide at least two weeks or fifteen days' notice; a Virginia statute requires twenty-five days. Va. Code §§ 8.01-407.1(1) and (3). The Cyberslapp Coalition's model notice procedure recommended that ISP's attempt to give users thirty days. http://cyberslapp.org/about/page.cfm?pageid=6. The time allowed for the Doe to oppose the subpoena should take into consideration whether the controversy is purely a local one; if participation is national, the time for notice should take into consideration not just the time needed to find counsel where the Doe resides, but also to find local counsel in the jurisdiction where a motion to quash would have to be filed.

required on the ground that notice had already been given in that case. However, if the Court reverses the decision below in any respect and remands for consideration of plaintiff's discovery efforts under the standard adopted in the Court's opinion, the Court should instruct the Superior Court to ensure that notice is given so that the Does have a fair opportunity to defend their First Amendment right to speak anonymously.

In this case, ZL Technologies took no steps to notify the anonymous speakers, and because ensuring that notice has been given is part of the plaintiff's burden, that is reason alone to deny enforcement of its subpoena at this time.

#### 2. Plaintiff Pleaded the Does' Allegedly Actionable Statements Verbatim.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated his rights, and to plead just what it is about the statements that are false. Many states require such pleading as a matter of state law. In California, "the words constituting an

alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 31, 53 Cal. Rptr. 3d 752, 767 (Cal. Ct. App. 3 Dist. 2007); *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1612, 284 Cal. Rptr. 244, 253 (Cal. Ct. App. Dist 1 1991), *reh'g denied and opinion modified* (Sept. 6, 1991). Indeed, "where a plaintiff seeks damages … for conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002). Thus, many federal courts require verbatim pleading, because only then can the court decide whether the statements are fact or opinion, whether the statement is of and concerning the plaintiff, and whether the parts of the statement alleged to be false are potentially damaging to the plaintiff's reputation. *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979); *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 707-708 (N.D. Ill. 1990)

Here, the complaint alleges verbatim several portions of each Doe's post that it deemed actionable, and it attached the entire statements to its motion to compel, enabling the Superior

Court to assess the allegedly defamatory statements in context. Plaintiff therefore satisfied this prong of the test.

### 3. ZL Technologies Should be Required to Plead a Proper Claim for Defamation Against Each Doe.

There are several deficiencies in the adequacy of ZL Technologies' effort to plead a legally sufficient claim for defamation.

First, the complaint identified seven different statements as being allegedly defamatory, but four of the seven were posted on the Internet more than one year before August 29, 2012, when plaintiff filed its complaint: only the statements posted on March 15, 2012; March 20, 2012; and June 20, 2012 were posted within one year of the day the action was commenced. California's statute of limitations for defamation is one year. California Code of Civil Procedure 340(c). Moreover, California applies the "single publication rule," Civil Code § 3425.3, under which a claim for libel is complete on the first day a statement is first published for general distribution to the public; the statute does not begin to run anew each time the statement is viewed. *Shively v. Bozanich* 31 Cal.4th 1230, 7 Cal.Rptr.3d 576, 80 P.3d 676 (2003).

California applies this rule to Internet publications. *Yeager v. Bowlin*, 693 F.3d 1076, 1081 (9th Cir. 2012); *Traditional Cat Ass'n v. Gilbreath*, 118 Cal. App. 4th 392, 13 Cal.Rptr.3d 353, 358 (Cal. Ct. App. 4th Dist. 2004). Consequently, only the authors of the latter three reviews are subject to identification, and then only if the complaint alleges a sufficient claim against them.

Second, amici agree with the holding of the trial court below that many of the statements over which plaintiff has sued are constitutionally protected statements of opinion. "Under the First Amendment there is no such thing as a false idea," *Gregory v. McDonnell Douglas Corp.* (1976), 17 Cal. 3d 596, 600-01, 552 P.2d 425, 427, quoting *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339, and the distinction between protected opinions and actionable statements of fact is a question of law to be decided by the court. *Gregory*, 37 Cal.3d at 601. "[R]hetorical hyperbole, vigorous epithets, lusty and imaginative expressions of ... contempt, and language used in a loose, figurative sense have all been accorded constitutional protection." *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 809, 119 Cal. Rptr. 2d 108, 116 (Cal. App. 1 Dist. 2002) (internal quotations omitted). Such rhetorical statements as that Leong, plaintiff's CEO, "cannot effectively

manage the organization," ¶ 13, or "doesn't know what he is doing," ¶ 14, that "[t]here is no future [for the company]," ¶ 14 that "ZL's environment is unhealthy and makes one wonder if a work environment could possibly be worse," ¶ 15, all reflect plainly personal opinions rather than actionable statements of fact. Even statements that might seem more factual in nature when read in isolation read more like opinions when viewed in the rhetorical context of the reviews at issue. *Dreamstone Entm't Ltd. v. Maysalward Inc.*, 2014 WL 4181026, at *7 (C.D. Cal. Aug. 18, 2014). And such advice or predictions as "Give up and sell the business," ¶ 14, or "Stay as far away from this place as possible," ¶ 15, simply reflect that the authors think poorly of the plaintiff and do not contain actionable statements of fact. Personal predictions of future events, and recommendations about whether to work for an employer and whether an employer's leadership should stay or remain are not factual assertions capable of being proved true or false but rather expressions of the subjective judgment by the speakers.

Some statements among those identified by the complaint might state matters of fact that are capable or being proved true or false, and hence are capable of defamatory meaning; but the

complaint does not plead clearly enough for the Court to be certain that it is false statements of fact rather than opinions that are being challenged. Several posts assert that when employees have been at fault for something, company management "publicly humiliate the employee," ¶ 12 ("If management did not like someone for any reason, rather than address the matter privately, they publicly humiliate the employee and reduce his/her importance in the company by changing a title, or taking away projects"), or subject them to "public disparagement and humiliation." ¶ 15. Whether treatment of certain employees was "humiliat[ing]" smacks of the subjective judgment of the speaker (or of the employee addressed), but whether management "publicly disparage[s]" its own staff is more of a statement of fact. Paragraph 12 complains of a statement outside the statute of limitations, and does not allege that **this** part of the statement is false. Paragraph 15, however, is about a statement made within the limitations period, and includes the assertion that the review in question is "utterly false and libelous." Although this paragraph could have been written more cleanly to specify which statements were claimed to be false, amici agree that it sufficiently alleges the falsity of the assertion that plaintiff

publicly disparages staff members to meet a motion to dismiss standard.

Paragraph 8, although about a time-barred statement, contains several assertions that are matters of fact capable of being proved true or false. For example, the statement includes the assertion that plaintiff "hires inexperienced new graduates for the sole purpose of providing lower pay." The level of experience of new hires and the fact that they get lower pay are statements of fact, although paragraph 8 never alleges that these statements are false. The statement also includes the accusation that "no organization chart, job title or job description exists in the company." This is a statement of fact, and the complaint squarely alleges that it is false. If this paragraph did not show on its face that the review containing this statement was posted well outside the statute of limitations, this paragraph would meet the test of a motion to dismiss.

Several of the reviews contain concrete statistics that reflect poorly on the company. One review asserts that the "Turnover rate [among the staff] is nearly 50% annually," ¶ 15; paragraph 15 characterizes this review as an "utterly false and libelous post"; again, if this allegation is properly read as denying

the accuracy of the staff turnover statistic, it is a statement of fact that could be proved false. Another review asserts, "Most employees quit in less than a year." ¶ 13. This is a factual assertion that is capable of being proved true or false, but the complaint is deficient because it never alleges that the statement is false — paragraph 13 complains only that the statements alleged in the paragraph "contain personal attacks" on its CEO. Similarly, paragraph 16 complains of the statistical assertion that there is "90% turnover, year over year in sales and marketing," and of the assertion that "the company has never managed to keep any non-founding member of the executive team for more than 18 months." These are factual statements capable of being proved true or false, but paragraph 16 never alleges that the statistics are false, only that they are "misleading" and that they "call into question the stability of Plaintiff's business and leadership." However, to be actionable as defamation, a statement must be false, not merely misleading. *O'Connor v. Superior Court*, 177 Cal. App. 3d 1013, 1019, 223 Cal. Rptr. 357 (Cal. Ct. App. 5 Dist. 1986). Only commercial speech can be suppressed by the government if it is found merely misleading but not false. *Id.*; *Bates v. State Bar of Arizona*, 433 U.S. 350, 383

(1977) ("leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena"); *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) ("commercial speech [can be regulated even if it] is not provably false, or even wholly false, but only deceptive or misleading"). Hence, the allegations about these statements in paragraphs 13 and 16 are insufficient to withstand a motion to dismiss.

In several respects, amici also believe that the complaint misconstrues the statements at issue in attempting to give them defamatory meaning. For example, two of the reviews alleged in the complaint assert that the company repeatedly hires "immigrants with visa issues," ¶ 9 or employees "dependent on immigration law/work visas." ¶¶ 11, 12. The complaint asserts that these reviews implicitly accuse plaintiff of criminal activity, but the fair reading of these assertions is that plaintiff hires staff who are likely to be docile and to remain in plaintiff's employ, no matter how unpleasant, because without the work they could lose their right to remain in the United States. The complaint fairly asserts that these statements are false, but the claim that they are defamatory per se because they accuse plaintiff of criminal activity are wrong. In any event, both paragraphs concern

statements outside the statute of limitations and hence cannot be the basis for identifying those Does.

#### 4. ZL Technologies Presented No Evidence That the Defendants Made False Statements.

Even if the Court concludes that defamation has at least been adequately alleged about at least one portion of at least one of the challenged statements, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement, which has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, prevents a plaintiff from being able to identify his critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward with evidence in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of relief in cases

like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976); *O'Grady v. Superior Court*, 139 Cal.App.4th at 1479*, citing Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 274, 208 Cal.Rptr. 152, 690 P.2d 625. In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case before it is allowed to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

The extent to which a plaintiff who seeks to compel

disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. Particularly in suits for defamation, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false. If the review discussions of turnover statistics are false (paragraphs 15 and 16), if the statement in paragraph 14 that "the company isn't growing and hasn't for years" is false, plaintiff can swear to the statistics that show that these statements are false. If the contention that ZL Technologies staff are sometimes disparaged in front of their fellow employees is false (¶¶ 12, 15), if it is false that "no organization chart, job title or job description exists in the company," ¶ 8, the falsity of these statements could easily be established by affidavits.

One of the issues that divided the parties in the court below, and continues to be an issue on appeal, is whether ZL Technologies has the burden of proof on the issue of falsity. When "speech involves a matter of public concern, a

private-figure plaintiff has the burden of proving the falsity of the defamation." *Brown v. Kelly Broadcasting Co.,* 48 Cal.3d 711, 747 (1989); *accord Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 375 (Cal Ct. App. 1 Dist 1996) (burden on plaintiff when speech pertains to "matter of public interest"). It is well-established that "[m]atters of public interest include activities that involve private persons and entities." *Damon v. Ocean Hills Journalism Club*, 85 Cal. App.4th 468, 479 (Cal. Ct. App. 4 Dist. 2000) (quoting *Macias v. Hartwell*, 55 Cal. App.4th 669, 674 (Cal. Ct. App. 2 Dist. 1997). A claim relates to a matter of public interest whenever "the statement or activity precipitating the claim involve[s] conduct that could affect large numbers of people beyond the direct participants." *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898 (Cal. Ct. App. 1 Dist. 2004). The reviews posted by the Does on Glassdoor's website are a matter of public concern because the information in these reviews "could affect large numbers of" potential employees. *Id.* These reviews are designed to reach a wide audience and serve an informative function for the public. Anyone who is considering working at ZL can read reviews on Glassdoor to gain insight into the company's working conditions.

This Court has previously recognized that an online review describing a negative experience with a business constitutes a matter of public concern. *Wilbanks v. Wolk*, the leading case on this issue, explained that the relevant online review was "not simply a report of one broker's business practices, of interest only to that broker and to those who had been affected by those practices" but should be understood "in the context of information ostensibly provided to aid consumers. . . [and] the statements, therefore, were directly connected to an issue of public concern." *Id.* at 900. *Wilbanks* accords with other cases in which online reviews of businesses and institutions were found to be a matter of public concern because of the value in warning the public about future interactions. *See Crenier v. Taylor*, 234 Cal.App.4th 471, 483 (Cal Ct. App. 5 Dist. 2015) (online posts "attempting to warn people away from attending the Church. . . ostensibly provided to aid consumers choosing among churches"); *Chaker v. Mateo*, 209 Cal. App. 4th 1138, 1146 (Cal Ct. App. 4 Dist. 2012) (online Ripoff Report reviews "intended to serve as a warning" to the public about trustworthiness of business proprietor); *Carver v. Bonds*, 135 Cal. App. 4th 328, 343 (Cal. Ct. App. 1 Dist. 2005) (online review of podiatrist "were a warning not to use plaintiffs'

services"). Like the reviews at issue in those cases, Glassdoor reviews are written to inform and warn potential employees about ZL's employment practices, not to speak of informing consumers who might make purchasing contingent on how employers treat their staff. Therefore, these statements are a matter of public interest.

In the trial court, plaintiff sought to distinguish the wealth of authority holding that consumer reviews about businesses are matters of public concern by pointing to several California consumer protection statutes which, plaintiff argued, show that consumer protection is "a fundamental public policy in California." ZL Technologies Reply in Support of Motion to Compel, at 4. Although the argument is a non-sequitur, even if it were valid, the argument supports the argument that statements of current and former employees about their working conditions are equally a matter of public concern, in that many California statutes evince the Legislature's belief that the protection of employees is an important state public policy. *E.g.*, Cal. Lab. Code § 1182.11 (minimum wage); Cal. Lab. Code § 510(a) (hour limitations and overtime); Cal. Lab. Code § 204.3 (limits on compensating time off in lieu of overtime); Cal. Lab. Code § 142.3

(adoption of health and safety standards); Cal. Lab. Code § 232.5 (prohibition on sanctions for employee disclosure of working conditions); Cal. Gov. Code § 12945.2 (family care and medical leave).

And several Court of Appeal decisions recognize that employee speech about an employer's working conditions is a matter of public concern whenever it involves "conduct that could directly affect a large number of people beyond the direct participants." *Rivero v. AFSCME*, 105 Cal. App. 4th 913, 924 (Cal. Ct. App. 1 Dist. 2005). The Does' reviews about ZL on Glassdoor "ha[ve] intrinsic value to others" because these reviews inform the public about the Does' views of working conditions at ZL. *Id.* at 925; *Cf. Summit Bank v. Rogers*, 206 Cal. App.4th 669 (Cal. Ct. App. 1 Dist. 2012) (online comments by former employee about employer were a matter of public interest). In a similar case, *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, the Second District found that a flyer describing labor practices of a garment factory constituted a matter of public interest. 117 Cal. App. 4th 1138 (Cal. Ct App. 2 Dist. 2004) Like the Does' reviews at issue in this case, the statements at issue in Fashion21 were critical of the employer and were made to inform

the public of the unfavorable working conditions. *See id.* at 1143-1144. Just as the court refused to apply a presumption of falsity to the company's defamation claims in *Fashion21*, no presumption of falsity should apply to ZL's defamation claim because the Does have spoken on a matter of public concern.

Similarly, if the various reviews over which plaintiff has sued have caused it discernible harm notwithstanding the glowing reviews that are also carried on Glassdoor, there is no reason why plaintiff should not be able to present evidence of that harm at the outset of the litigation, before it breaches the Does' right to speak anonymously.

Considering that a defamation plaintiff can reasonably be expected to have evidence of the falsity of statements that are "of and concerning her," and evidence of the damage that those statements have caused her, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant.

Here, even if the complaint were facially adequate, ZL Technologies' subpoena fails because it adduced no evidence in support of its complaint, even after Glassdoor's papers put it on

notice that the First Amendment requires evidence. There is no evidence that anything said about plaintiff on Glassdoor either is false or has actually caused any harm to ZL Technologies' reputation. That is sufficient basis for affirming the denial of the motion to compel.[3]

#### 5. The Court Should Adopt the *Dendrite* Balancing Test.

Even if ZL Technologies had properly alleged a claim for defamation, and even if it had presented evidence in support of that claim,

> [t]he 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

[3]Plaintiff argues that the trial court did not rely on the lack of evidence supporting its claims of defamation in denying its motion, and that, consequently, the lack of evidence "forms no part of the matter under appeal." Appellant Reply Brief at 15-16. Amici dispute plaintiff's reading of the order under review, which denied the requested discovery because plaintiff "has failed to make a sufficient showing that the anonymous speakers engaged in wrongful conduct causing harm to plaintiff." AA 83. It did not rest solely on legal conclusions about whether the challenged statements were opinion, in that it said that they were "primarily opinion." *Id.* But even if appellant's reading of the ruling below were correct, a judgment can be affirmed on alternate grounds supported by the record. *Affan v. Portofino Cove Homeowners' Ass'n*, 189 Cal. App.4th 930, 944 (Cal. Ct. App. 4 Dist. 2010).

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

Similarly, *Dendrite* called for such individualized balancing when the 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.
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> 775 A.2d at 760.

A standard comparable to the test for grant or denial of a preliminary injunction, where the court considers the likelihood of success and balances the equities, is particularly appropriate because an order of disclosure is an injunction—not even a preliminary injunction. In every case, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once speakers lose anonymity, they can never get it back. Moreover, denial of a motion to identify

the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint. Plaintiffs can renew their motions after submitting more evidence and additional equitable arguments.[4]

The inclusion of a balancing stage allows Does to show that identification may expose them to significant danger of extra-judicial retaliation. In that case, the court might require a greater quantum of evidence on the elements of plaintiff's claims so that the equities can be correctly balanced. Considering that each of the Doe defendants is a former employee of plaintiff, and may well continue to work in the same industry, they could well be exposed to personal economic consequences if they are identified as employees who criticized their employer on such a web site. Because there is no evidence that the Does received notice that an effort was being made to identify them, it is scarcely their fault that no effort was made to introduce evidence

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[4]The plaintiff failed either to take these steps, or to seek interlocutory review of the trial court's decision by writ and ultimately suffered dismissal of its complaint. Assuming that the Court agrees with amici that the failure to present evidence and other flaws in plaintiff's showing below requires affirmance of the denial of the motion to compel, amici express no view about whether the dismissal for want of prosecution was a proper exercise of the trial court's discretion.

of such concerns into the record.

On the other side of the balance, a court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. The Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains. The balancing stage allows courts to apply a *Dendrite* analysis to many different causes of action, not just defamation, following the lead of the Arizona Court of Appeals, which in *Mobilisa v. Doe* warned against the consequences of limiting the test to only certain causes of action. 170 P.3d at 719.

For example, in *In Re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011), the court of appeals said that when a Doe lawsuit is filed over commercial speech, the lesser protection that the First Amendment affords for commercial speech should be reflected in a more permissive approach to identifying the defendant. Amici do not necessarily agree that commercial speakers deserve no opportunity to speak anonymously; that issue is not presented here. But rather than

having to decide first whether speech is commercial before fixing the standard for deciding whether to identify a defendant, the balancing stage of *Dendrite* allows a court to modify the extent of the prima facie showing, in light of the lesser protection for the interest of commercial speakers, depending on what evidence the plaintiff is able to present from which an inference that the speech is commercial may be drawn.

In this case, the record does not enable the Court to assess the equitable considerations in the case. But to the extent that the Court uses this case as a vehicle to set the standard for future subpoenas to identify anonymous Internet speakers, it should squarely embrace the final, balancing stage of *Dendrite*.

## CONCLUSION

The order denying plaintiff ZL Technologies's motion to compel compliance with its subpoena should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF BRIEF LENGTH

Pursuant to California Rules of Court Rule 8.204(c)(1), I certify that this brief was prepared in Word Perfect using proportionately-spaced Century Schoolbook 13-point font, and that Word Perfect indicates that the brief contains 12,968 words.

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## CERTIFICATE OF SERVICE

I certify that on this 18th day of June, 2015, I have caused the foregoing brief to be served by first-class mail, postage prepaid, on the following:

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