UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWRENCE SINCLAIR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:08-cv-00434-HHK
	)	
TubeSockTedD, mzmolly and OWNINGLIARS,	)	
	)	
Defendants.	)	

MEMORANDUM OF DEMOCRATIC UNDERGROUND AND MZMOLLY IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DEMOCRATIC UNDERGROUND TO COMPLY WITH SUBPOENA AND TO COMPEL PUBLIC CITIZEN TO COMPLY WITH LETTER FROM PLAINTIFF'S COUNSEL "DEMANDING" INFORMATION

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MISCELLANEOUS

This case involves bloggers who criticized Larry Sinclair, a Minnesota resident who has been trying to secure press coverage for a sensational claim about Presidential candidate Barack Obama – that in 1999, when Obama was a member of the Illinois Legislature, Obama bought him cocaine, after which he performed fellatio on Obama. Although broadly publicized in the blogosphere, a tabloid newspaper, and right-wing radio shows, Sinclair has expressed frustration that the "mainstream media" has ignored him. Now that his suit alleging that Obama violated his First Amendment rights by getting the media to suppress his story has been thrown out of court, Sinclair has brought his quest for 15 minutes of fame to this Court, suing three bloggers who said his story about Obama is a lie, and has subpoenaed identifying information, for the supposed purpose of pursing litigation against them in a court which is, not coincidentally, located in a major media market. In fact, Sinclair's own blog openly acknowledges that he plans to use this lawsuit to "get this in the open and show that Mr. Obama did do as I said he did," and that he and his attorney are trying to use this case to take Obama's deposition about Sinclair's claims: "The aim of the Sinclair-Sibley legal strategy is eventually to discover Barack Obama on oath."

There is no reason to allow plaintiff and his counsel to create the circus that they desire. Apart from their improper purpose, both the lawsuit and the motion to compel are frivolous. Under well-established law, courts do not order the identification of anonymous Internet speakers, even when those speakers are named as defendants in a lawsuit, unless the plaintiff can show that there is good reason to believe that the suit has a reasonable probability of success, and thus that the need for disclosure outweighs the First Amendment right to speak anonymously. The Court should deny the motion to compel. Indeed, we show in the course of our argument on the subpoena that the Court lacks subject matter jurisdiction.

STATEMENT OF THE CASE

A. Factual Background

1. The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in London's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to read them. As the Supreme Court explained in *Reno v. ACLU,* 521 U.S. 844, 853, 870 (1997), "From the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer." The Court held, therefore, that full First Amendment protection applies to speech on the Internet. *Id.* Or, as another court put it, "[defendant] is free to shout 'Taubman Sucks!' from the rooftops . . .. Essentially, this is what he has done in his domain name. The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and [defendant] has a First Amendment right to express his opinion about Taubman." *Taubman v. WebFeats*, 319 F.3d 770, 778 (6th Cir. 2003).

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. Democratic Underground hosts discussion boards that are aimed to provide a forum for "Democrats of all stripes, along with other progressives who will work with us to achieve our shared goals." http://www.democraticunderground.com/about.html. Google has several such forums, including YouTube, which allows members of the public to post videos and to

comment on each other's videos. Digg.com provides a forum for posting content and then solicits its members votes on the significance of that content, thereby increasing the prominence of various media that its members deem most significant and "providing tools for our community to discuss the topics that they're passionate about." http://digg.com/about.

The individuals who post messages generally 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 various message boards at issue in this case will reveal, most people choose nicknames. These typically colorful monikers protect the writer's identity from those who disagree with him or her, and they encourage the uninhibited exchange of ideas and opinions. Indeed, every message board has regular posters who persistently complain about companies or individuals under discussion, others who persistently praise them, and others whose opinions vary between praise and criticism. Such exchanges are often very heated, and they are sometimes filled with invective and insult. Most, if not everything, that is said on message boards is taken with a grain of salt.

Many message boards have a significant feature 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 a message board 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 those statements immediately at no cost, and that response can have the same prominence as the offending message.[1] A message board is thus

[1]Some message boards make registration subject to approval based on membership in a specific group, and message boards vary in the extent to which they monitor postings. For example, Democratic Underground's message boards are actively moderated by a group of volunteer moderators, who delete posts and ban people whose presence runs counter the **(footnote continued)**

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). By contrast, on most message boards 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. And, because many people regularly revisit message boards about a particular topic, 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.

2. Plaintiff Larry Sinclair lives in Duluth, Minnesota. According to the story he gave to the *Globe* tabloid newspaper, he has a lengthy criminal record including credit card fraud, drug-dealing, and smuggling. *See also* Goldwich, Morrow and Alexander Affidavits. He has used several different names, include La-Rye Ashaiti Silvas and LaRye Vizcarra Avila. http://larrysinclair0926.wordpress.com/2008/03/22/criminal-records-check-results-and- examples-of-mis-information/. The prison record for LaRye V. Avila includes many citations for assault, threats, intimidation, and verbal abuse. Levy Affidavit, Exhibit D. Sinclair is wanted on warrants in two states. Stiles Affidavit, Exhibit H. One of the warrants remains outstanding, Morrow Affidavit ¶ 3, despite a

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mission of the site. In fact, had Sinclair contacted Democratic Underground claiming that the posting about him was false, and made a reasonable case for that the posting about him was false, the post might well have been removed. A reasonably civil response to mzmolly, explaining that her post was not factually correct, would likely have been left up for others to view.

motion by Sinclair to dismiss it. Levy Affidavit, Exhibit G.[2]

In late 2007, Sinclair contacted presidential candidate Barack Obama with the claim that he had engaged in sexual activities with Obama and that they had shared drugs, and he demanded that Obama address his allegations. When Obama ignored his claims, he contacted major newspapers to try to get them to run his story. In an interview, he represented that he was working with a Chicago Tribune reporter who was in the process of fact-checking his story, and other reporters. http://wizbangblue.com/2008/02/17/larry-sinclair-sues-obama-and-is-offered-100k-to-take-polygraph.php, attached to Stiles Affidavit, Exhibit J. When he failed to secure the coverage that he felt his story deserved, he sued Obama pro se, alleging that Obama had deliberately suppressed the story and thereby violated his First Amendment rights. *Sinclair v. Obama*, No. 08-360 (D. Minn.). Sinclair moved for leave to proceed in forma pauperis, but that motion was denied and the case was dismissed sua sponte without having been served on any of the defendants. Levy Affidavit, Exhibit H.

Sinclair posted a video on Google's YouTube site that showed him reciting his allegations against Obama – that in November 1999, while visiting Illinois to attend his god-son's graduation from the Great Lakes Naval Training Center, he rented a limousine and picked up Barack Obama, who was at that time a "State Representative"; that Obama obtained cocaine for Sinclair's use, and crack cocaine for his own use; and that following their use of the drugs, and apparently in return for the drugs, he performed fellatio on Obama. He dared Obama to take a polygraph test if Obama claimed he was wrong. Sinclair accepted a reward to take a polygraph himself, but failed it.

[2]In the event Sinclair's fugitive status interferes with this case, such as by preventing him from coming to D.C. to testify, the Court may need to consider whether to withhold its jurisdiction under the fugitive disentitlement doctrine. No such action seems warranted at this time.

http://www. whitehouse. com/NewsComments.aspx?start=&NewsID=116#; http://www.whitehouse .com/files/intercept3_4.pdf; http://www.whitehouse.com/files/ intercept1_2.pdf. (Sinclair claims that the testers were biased.) In addition, he gave his story to a tabloid newspaper, the *Globe*, which published two stories describing his claims but also reported the seamy facts of Sinclair's own background, including his felony record and his claim that he has a brain tumor and has less than a year to live. Levy Affidavit, Exhibit F. Sinclair has secured interviews from fringe radio hosts in which he has told his story (there is a list of these interviews, with links to relevant web sites where many can be heard, on Sinclair's blog); he has also created his own blog and MySpace pages, http://larrysinclair0926.wordpress.com/; http://www.myspace.com/larrysinclair0926. There he tells his story, points to other locations on the Internet where his claims have been discussed, responds to his critics, and sells Tshirts and other slogan-bearing paraphernalia. Indeed, Sinclair has engaged his critics vigorously, denouncing them with the claim that they are shills for the Obama campaign, or that the Obama campaign itself is lying about him to avoid having to confront his claims.

Sinclair's efforts to draw attention to his claims met with some success, in that numerous individuals posted comments arguing either that Obama was guilty as charged, or that Sinclair was lying about Obama. These posts asserted, among other things, that the story couldn't possibly be true because at the time he claimed the operative events took place, Sinclair was a patient in a mental institution. Such statements appeared on the Plunderbund web site on February 13 and 15, 2008. Stiles Affidavit, Exhibit I, and on the Topix web site on February 16, 18 and 20. Stiles Affidavit, Exhibit K. On February 18, an anonymous speaker, "FirehouseGallery," posted a video on YouTube (since removed) that repeated the mental patient statement. *Cited* in Complaint, Exhibit C.

On February 18, the first post that is the subject of this action was posted – a video by defendant TubeSockTedD that stated, "Larry Sinclair Is Spreading Lies About Obama." Complaint

Exhibit B. On February 20, defendant Owningliars posted a statement on Digg.com, apparently linking back to an unspecified YouTube video, which he urged his viewers to "watch" as "proof" that Sinclair was lying, because "it turns out that Larry was in a mental hospital at the time he says he met Barack Obama." Complaint ¶ 11 and Exhibit D. Finally, on February 25, defendant mzmolly posted a link to the FirehouseGallery You-Tube video on a message board on DemocraticUnderground.com, while repeating the substance of the mental patient statement. Complaint Exhibit D.

In addition to publicizing his side of the controversy, Sinclair has tried to determine the identity of his critics, posting their alleged names, details about their families, and photographs, Stiles Affidavit, Exhibit G, presumably so that his supporters can find them. Sinclair has specifically threatened retribution against his critics and their families. *Id.* Exhibit D; Levy Affidavit, Exhibit E. Given his violent past, Sinclair's critics could not be blamed for taking such threats seriously.

B. Proceedings to Date

On March 13, 2007, Sinclair filed this action, represented by Montgomery Blair Sibley. Sinclair recites the claims made in his YouTube video about Obama and claims that three of his many Internet critics defamed him by asserting that he is lying about Obama and that he could not have done what he said he did with Obama because he was a mental patient at the time. The complaint alleges that the statements are false, but does not allege that defendants published their statements with actual malice – that they either knew that the statements were false, or published them with reckless disregard of their probable falsity. The complaint does not set forth any basis for personal jurisdiction in this Court, and although the complaint alleges diversity jurisdiction, it does not affirmatively allege that all of the Doe defendants live in states other than Minnesota, which is

Sinclair's citizenship. Instead, the complaint alleges that after a reasonable opportunity for investigation or discovery, plaintiff will be able to establish diversity. The FAQ's for Sinclair's blog make no bones about what his **real** purpose is for filing this case – "The aim of the Sinclair-Sibley legal strategy is eventually to discover Barack Obama on oath." http://larrysinclair0926.wordpress.com/answers-to-faqs/. Stiles Affidavit, Exhibit B. The complaint attached four exhibits – the three blog comments over which he was suing, Exhibits B through D, and a document that purports to be a very poor copy of a hotel "activity" statement for the period of time that included his alleged time with Obama but which, however, contains internally inconsistent dates. Exhibit A.

Sinclair moved ex parte for leave to pursue discovery to identify the anonymous defendants, but made no attempt to give notice of the pendency of that motion as many cases require. *E.g.*, *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001). The court granted that motion ex parte, and Sinclair's blog proclaimed, "Judge Henry Kennedy granted a motion for discovery in the matter." Stiles Affidavit, Exhibit B. Sinclair served subpoenas on Google, Digg, and Democratic Underground, calling for production of documents by April 18, 2008. On April 16, 2008, undersigned counsel Mr. Levy served objections under Rule 45(c)(2)(B) on behalf of defendant mzmolly and Democratic Underground, pointing out the many cases requiring that a plaintiff who seeks to use discovery to identify anonymous Internet speakers in order to sue them must first make a legal and factual showing that his claims have some probability of success. Levy Affidavit, Exhibit A. The objections further explained that there were several reasons to believe that this Court would never enter judgment in Sinclair's favor, because Doe defendants cannot be sued in diversity, because there were no allegations supporting personal jurisdiction in this Court, and because Sinclair has neither alleged a sufficient defamation claim nor presented any evidence to support those claims. The objections concluded by urging Mr. Sibley to dismiss the complaint.

On April 17, Mr. Sibley responded to the Rule 45 objections by claiming that Rule 45(c)(3)(A) did not apply because the letter "raised no time, travel, burden or privilege objects [sic] to the subpoena," and that Rule 45(c)(3)(B) did not apply because "the objections of trade secret, expert opinion or travel are not raised by you in your letter." Levy Affidavit, Exhibit B. Mr. Sibley threatened to move for contempt if Democratic Underground did not produce the requested documents. In addition, Mr. Sibley demanded that Mr. Levy disclose the name of defendant mzmolly, asserting that "absent special circumstances" the attorney client privilege does not shield client identity from discovery, and threatening to serve a subpoena on Public Citizen Litigation Group, because "Judge Kennedy appears to have no problem with allowing discovery toward the end of identifying the individuals who have maligned my client." Later in the day, Mr. Levy responded by letter pointing out that there **are** exceptions when the attorney-client privilege shields client identity, and that if those exceptions did not apply in this case then anonymous defendants would never be able to retain counsel to seek to protect their First Amendment right to remain anonymous. Levy Affidavit, Exhibit C. Mr. Levy further observed that the threatened subpoena would seek the same information already subpoenaed from Democratic Underground, and hence would serve no useful purpose other than multiplying litigation. *See* 28 U.S.C. § 1927. Mr. Levy concluded by inviting Mr. Sibley to call to discuss the substantive objections to the subpoena previously raised.

Mr. Sibley did not serve a subpoena on Public Citizen and did not confer with Mr. Levy about the objections. Levy Affidavit ¶ 10. Instead, he filed a motion to compel responses both to the subpoena served on Democratic Underground and to his "demand" that Public Citizen reveal the identity and address of mzmolly.

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. Plaintiff here recognizes the value of anonymity, having assured the donors he has solicited to help him use this case to publicize his claims about Obama that their names will never be revealed. Stiles Affidavit, Exhibit C. Sinclair has explained that the reason he does not post on the Internet or provide to the media the name of the alleged limo driver from 1999

is to protect the driver from death threats by Sinclair's critics. *Id.* Exhibit B.

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 deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure 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 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 her 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 her 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 her 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 her 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 would 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, given the nearly insurmountable rule against prior restraints of speech. 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, her 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.

On the record of this case, it is apparent that plaintiff will never secure a favorable judgment, and has not presented evidence sufficient to warrant an order compelling identification of any of the Doe speakers. Indeed, he has indicated that the three defendants are only a means to a larger end – getting publicity for his claims about Obama and an excuse to subpoena Obama for deposition.

Plaintiff's claim is not viable because he has alleged only state-law claims and asks the Court to exercise diversity jurisdiction – yet the law is clear that Doe defendants cannot be sued in diversity – and also because this Court would not have personal jurisdiction over Sinclair's claims. Sinclair lives in Minnesota, and the mere fact that comments were made on web sites that can be downloaded in Washington, D.C. is not a sufficient basis to allow suit here. If anything, this case should be refiled in state court in Minnesota. Moreover, plaintiff has sued these three defendants for repeating criticisms that many others have made of him, yet the complaint does not even allege actual malice,

not to speak of give any reason to believe that such actual malice can be shown. And, in the face of a demand for evidence that the statements are false or caused actual damages, Sinclair has declined to provide any. Indeed, given his long criminal record and given the fact that the entire controversy is about Sinclair's claims to have engaged in illegal drug use, it is doubtful that any evidence of actual damages can be established.

Sinclair apparently hopes to use this case as a forum for litigation of the veracity of his assertions about Obama. He has openly avowed that the funds he is raising to support this litigation will go for that purpose. "Thank you and I promise the money contributed will get this in the open and show that Mr. Obama did do as I said he did." Stiles Affidavit, Exhibits C and F. He was similarly explicit about his objectives during a radio interview, in which he **thanked** the Doe defendants in this case for criticizing him ("I thank them very much for doing this because they have given me just that outlet in the courts to come out and prove my case." *Id*. ¶ 2.) However, his motion to compel can be decided without addressing those issues.

I THE FIRST AMENDMENT BARS THE DISCOVERY SOUGHT FROM DEMOCRATIC UNDERGROUND.

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

The First Amendment protects the right to speak anonymously. *Watchtower Bible & 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); *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. The Supreme Court has stated:

> [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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> * * *
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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 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 US 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998); *ACLU v. Miller,* 977 F. Supp. 1228, 1230 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno*, 526 U.S. 1061 (1999)*, aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications); *Global Telemedia v. Does*, 132 F. Supp.2d 1261 (C.D. Cal. 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California's anti-SLAPP statute); *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1092-1093 (W.D.Wash. 2001) (denying subpoena to identify third parties).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their

own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, the impact of a rule that makes it too easy to remove the cloak of anonymity is to deprive the marketplace of ideas of valuable contributions, and potentially to bring unnecessary harm to the speakers themselves.

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

A court order, even when issued at the behest of a private party, constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of

fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). 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. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524. As the Supreme Court has held, due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 560 F.2d 219, 226-230 (5th Cir. 1978). In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In those cases, 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 his case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of his

case. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972).

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

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

In a number of recent cases, courts have drawn on the privilege against revealing sources in civil cases to enunciate a similar standard for protecting against the identification of anonymous Internet speakers.

The leading case is *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo!. That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which 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.
>
> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
>
> The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to [New Jersey's rules], the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 775 A.2d at 760-761.[3]

A somewhat less exacting standard requires the submission of evidence to support the

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[3] *Dendrite* has received a favorable reception among commentators. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech,* 82 Notre Dame L. Rev. 1537 (2007); O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U.L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001).

plaintiff's claims, but not an explicit balancing of interests after the evidence is deemed otherwise sufficient to support discovery. *Doe v. Cahill,* 884 A.2d 451 (Del. 2005). 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. *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 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.

Several other courts have followed a *Cahill*-like summary judgment standard. 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." *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. Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (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.[4]

Among the federal district court decisions following *Cahill* 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), the Court 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. 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 the case sua

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[4]Since *Melvin* was decided, several Pennsylvania trial courts 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 Cy. 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 (Pa. Com. Pl. Lackawanna Cy. 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 (Pa. Com. Pl. Philadelphia Cy. 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.

sponte for lack of subject matter jurisdiction because Does cannot be sued in diversity, but as an alternative holding addressed the showing that must be made 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.[5]

A similar approach was used in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants for registering Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect of such discovery (*id.* at 578):

> 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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[5]A recent Wisconsin case addressed issues of anonymity in a non-Internet case. *Lassa v. Rongstad*, 294 Wis. 187, 718 N.W.2d 673 (2006). 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 establish 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 (Wisc. App. 2003); *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.

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

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

C. Sinclair Has Not Followed the Steps Required Before Identification of John Doe Speakers May Be Ordered in This Case.

Courts should follow five steps in deciding whether to allow plaintiffs to compel the identification of anonymous Internet speakers. Because Sinclair cannot meet these standards, he is not entitled to have his subpoena enforced.

(1) Require Notice of the Threat to Anonymity and an Opportunity to Defend It

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. at 579. Thus, in

Dendrite, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved this requirement. 342 N.J.Super. at 141, 775 A2d at 760.

Here, Sinclair did nothing to meet the notice requirement before he sought leave to take discovery, even though he could easily have posted statements on each of the forums where critical comments were made warning that he was planning to ask this Court for an order authorizing discovery. After the Court granted that motion, and subpoenas were served, Democratic Underground provided notice to mzmolly, and we understand that Google has notified TubeSockTedD and advised Sinclair that it will object to the subpoena for twenty days following that notice. We endeavored without success to contact counsel for Digg.com and cannot say whether any notice has been given to defendant Owningliars.

Over the course of representing anonymous Internet speakers or appearing amicus curiae in cases such as this over the past several years, undersigned counsel have learned that there are many Internet Service Providers who do not provide notice and a fair opportunity to respond before identifying records are provided in response to subpoenas. The precaution required by the court in *Dendrite* – a showing by the plaintiff of the steps undertaken to provide notice by posting on the forum where the allegedly defamatory statements were made, before discovery is authorized – is needed in such cases to ensure that any person whose anonymity is challenged has the ability to retain counsel to protect her rights.

(2) Demand Specificity Concerning the Statements

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 is alleged to have violated his rights. Indeed, many states, and many federal courts, require that defamatory words be set forth verbatim in a complaint for defamation. *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979). Had Sinclair filed this case in Minnesota, he would have been required to set out the allegedly defamatory words verbatim. *Russo v. NCS Pearson*, 462 F.Supp.2d 981 (D. Minn. 2006); *Glenn v. Daddy Rocks*, 171 F. Supp.2d 943, 947 (D. Minn.2001), *citing Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 326 (Minn.2000).

Here, Sinclair has set forth in his complaint the statements that he claims are defamatory. Sinclair has, therefore, met this aspect of the test.

(3) Review the Facial Validity of the Complaint After the Statements Are Specified

Third, the court should review the complaint to make sure that it states viable claims against each defendant. In this case, the complaint must be dismissed for several different reasons, some going to issues of jurisdiction and some to the merits of Sinclair's defamation claims. (mzmolly is not moving to dismiss, of course, because she has not been served).

(a) Plaintiff Has Not Sufficiently Pleaded Jurisdiction.

This court lacks subject matter jurisdiction. The complaint alleges only state-law causes of action, and alleges jurisdiction based on diversity of citizenship. But all of the defendants are Does, whose citizenship is unknown – the plaintiff alleges only that he hopes to be able to establish diversity of citizenship by taking depositions. However, "the essential elements of diversity jurisdiction must be alleged in the pleadings," 13B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3602, at 372 (2d ed. 1984); *Brown v. Keene*, 33 U.S.

(8. Pet.) 112 (1834), and it is well-established, in this district and elsewhere, that a diversity claim cannot be brought against Doe defendants. *Menzies v. Doe*, 194 F.3d 174 (D.C. Cir 1999) (mem.); *Howell by Goerdt v. Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1997); *McMann v. Doe*, 460 F.Supp.2d 259, 264 (D. Mass. 2006); *Meng v. Schwartz*, 305 F. Supp.2d 49 (D.D.C. 2004); *Stephens v. Halliburton Co.*, 2003 WL 22077752 (N.D. Tex. Sept. 5, 2003), at *5.[6]

Second, the complaint does not plead the existence of personal jurisdiction in Washington, D.C., and there is no reason to believe that personal jurisdiction can be established here. To be subject to personal jurisdiction, the Does must have "certain minimum contacts with [Washington, D.C.] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted). The minimum contacts test requires "in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus

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[6]*Macheras v. Ctr. Art Galleries-Hawaii*, 776 F.Supp. 1436, 1440 (D. Haw.1991), takes issue with the majority rule. That court noted that Congress amended 28 U.S.C. § 1441 to provide that for removal purposes, the citizenship of Does is ignored. The amendment was intended to prevent plaintiffs who sue in state court from precluding removal pursuant to diversity jurisdiction by the device of naming Doe defendants. The court felt that it made sense to read a similar rule into 28 U.S.C. § 1332. However, in addition to being inapposite, because the complaint was not filed exclusively against Doe defendants (there were three named diverse defendants in addition to four Does), *Macheras* is unpersuasive. Courts are no longer encouraged to read amendments to one statute into other statutes on the ground that, if Congress had thought about it, it would certainly have recognized the unfairness of not amending both statutes in the same way. Moreover, the Hawaii court's fairness reasoning is flawed – the amendment to section 1441 prevented plaintiffs from manipulating their complaints to prevent defendants from exercising their right to a federal forum, but a plaintiff who originally files in federal court pursuant to section 1332 is the master of his own choice of forum. Indeed, if *Macheras*' reading of section 1332 were correct, no amendment of section 1441 would have been required, because section 1441 **already** provided that removal is permitted if jurisdiction was proper under some other statutory predicate for federal jurisdiction. It follows that Congress' decision to place the new rule about Doe defendants in section 1441, where it would affect only removability, instead of section 1332 where it would govern both original filing of diversity cases in district court as well as removal, must have been deliberate.

invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A defendant's connection with the state must be such that "he should reasonably anticipate being haled into court" in the state in the event of a dispute. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Minimum contacts analysis requires assessment of whether the court is exercising "general" or "specific" jurisdiction. The exercise of general jurisdiction requires that a defendant's contacts with the forum be "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). Even "continuous activity of some sorts within a state is not enough to support [general jurisdiction]." *International Shoe*, 326 U.S. at 318. Sinclair does not even allege in his complaint that any of the Does own property or do business in Washington. General jurisdiction cannot, therefore, be the basis for the Court's assertion of jurisdiction to order discovery.

Specific jurisdiction is proper when the defendant's contacts with the forum are related to the controversy underlying the litigation. *See Helicopteros*, 466 U.S. at 414 n.8. To maintain specific personal jurisdiction, Sinclair must allege that: (1) each of the Does has purposely directed activities toward or purposely availed herself of the privilege of conducting business in the District (2) the cause of action arises from her activities in the District and (3) her conduct has a substantial enough connection with District to make the exercise of jurisdiction reasonable. The prospective defendants' contacts with the forum must have been sufficiently purposeful that defendants should have had fair warning that they would be subject to suit there. *See Helicopteros*, 466 U.S. at 414.

The complaint does not specify any basis for a finding of specific jurisdiction, but presumably Sinclair will claim defendants' statements were posted on the Internet and can be viewed here. Such a claim would fail. A specialized test has been applied to claims of personal jurisdiction based on activity on a web site. The courts uniformly hold that the fact that a web site can be

downloaded in a given location is not a sufficient basis for personal jurisdiction to sue in that forum, even if the plaintiff is located there. *E.g.*, *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 511-512 (D. C. Cir. 2002). Sinclair is a resident of Duluth, Minnesota, not Washington, DC, and even if he can show that he suffered harm (an issue addressed in the next section of this brief), the harm that he suffered would have been concentrated there; hence, that would be the place for him to sue. *Revell v. Lidov*, 317 F.3d 467, 473-476 (5th Cir. 2002) (no personal jurisdiction in Texas because, although allegedly defamatory statements were about a former FBI agent from Texas, they were not about his Texas activities or directed to readers in Texas). Indeed, mzmolly would not object to personal jurisdiction in Minnesota. There is no basis for personal jurisdiction over any of the defendants in this Court.

(b) The Complaint Does Not Plead a Valid Claim for Defamation

Courts reviewing requests for discovery to identify anonymous speakers also review the merits of the legal claims stated in the complaint to ensure that they state a claim on which relief can be granted. In a defamation case, for example, some statements may be too vague or insufficiently factual to be defamatory. Some statements may not be actionable because they are not "of and concerning" the plaintiff, which is a requirement under the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). Other statements may be non-defamatory as a matter of law because they are merely rhetorical expressions of opinion, which is excluded from the cause of action for defamation. *Doe v. Cahill,*884 A.2d at 467; *McMann v. Doe*, 460 F.Supp.2d at 269–270.

In this case, the complaint is defective on the merits for several reasons. First, not every statement that a plaintiff was "spreading lies" is actionable defamation. *Rocker Management v, Does*, 2003 WL 22149380 (N.D. Cal. May 29, 2003) at *1, *3 (statements that brokerage was "spreading lies" and "float rumors, lies and half truths everywhere they can" held not defamatory).

The Minnesota Supreme Court has expressed some doubt whether it would be defamatory to call a public figure a "liar" because the speaker considers one of the plaintiff's specific statements to be an unfounded accusation. *Beatty v. Ellings,* 285 Minn. 293, 300, 173 N.W.2d 12, 17 (Minn.1969). Indeed, although an accusation of perjury can certainly be the basis of a defamation suit, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), neither a candidate — nor a critic of a candidate — can come to court every time accusations of lying are slung about in the course of an election campaign. Otherwise, the issues in our elections would be resolved in court instead of in the marketplace of ideas and ultimately at the ballot box.

In context, the statements on which Sinclair is suing attack not the plaintiff's character, but the truthfulness of a specific statement. For example, TubeSockTedD did not call Sinclair a liar, but only said that Sinclair's statements about his alleged encounter with Obama were "lies." Mzmolly said that all the readers of the blog where she was posting understood that Sinclair's claims were "nonsense." Only OwningLiars called Sinclair a liar, and then only in the context of asserting that this particular statement was a lie. Moreover, the non-defamatory character of an accusation that Sinclair is lying when he claims to have used drugs with Obama in 1999, and the clear implication of his statement that he performed fellatio on Obama – that this was in return for the drugs that Obama gave him – is further established given the fact that, if the statements were true, Sinclair would have been committing a crime. Accusing Sinclair of being innocent of the crime to which his YouTube video admitted is not defamatory.

Although the specific statement that Sinclair is a former mental patient could reflect adversely on his reputation, and hence be defamatory, no claim can be brought against either mzmolly or, for that matter, Owningliars, under the Communications Decency Act, 47 U.S.C. § 230. Section 230(c)(1) specifies that "[n]o provider or user of an interactive computer service shall be

treated as the publisher or speaker of any information provided by another information content provider," and this court has previously held that the CDA bars suit against any interactive computer service provider that purports to state a claim based on content provided by another person. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). Although *Blumenthal* involved a suit against an interactive service provider, AOL, the CDA provided immunity not only for interactive computer providers but also for **users** of an interactive computer service, who cannot be sued for the content provided by a different content provider. *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003). In *Batzel*, the Ninth Circuit reversed a district court's denial of section 230 immunity and held that defendant Cremers would be immune from liability for forwarding to a listserv an email claiming that the plaintiff had acquired artwork that the Nazis had stolen from the Jews, so long as Smith, the defendant who sent him the email, would have reasonably understood that the purpose of sending the email would be to have it displayed to others on an interactive computer service. The California Supreme Court has extended the protection of Section 230 to Internet users who post content that they find on one Internet web site to a different web site. *Barrett v. Rosenthal*, 40 Cal.4th 33, 51 Cal.Rptr.3d 55, 146 P.3d 510, 514, 525 (Cal. 2006). There is no allegation that Mzmolly or OwningLiars unfairly summarized the gist of what they were reposting from YouTube. Accordingly, the complaint against them fails under Section 230.

Moreover, the complaint alleges neither special damages nor actual malice, although both allegations are required in the circumstances of this case. Under Minnesota law, which applies to defamation cases pursuant to District of Columbia choice of law principles, *Foretich v. Glamour*, 753 F.Supp. 955, 966 n.5 (D.D.C.1990), special damages are required unless the plaintiff sues for statements that are defamatory per se: "charges of a crime, imputations of a loathsome disease, and unchastity, imputations affecting a person's conduct of business, trade, or profession." *Anderson*

v. Kammeier, 262 N.W.2d 366, 372 (Minn. 1977). The complaint pleads only general damage to reputation, but does not plead special damages, that is to say, actual pecuniary harm.

Finally, the complaint nowhere pleads that any of the defendants made their criticism with actual malice – knowledge that the statements were false, or recognition that the statements were probably false but with reckless disregard of such probable falsity. In effect, this standard requires that the defendant had "subjective awareness of probable falsity," *Herbert v. Lando,* 441 U.S. 153, 156 (1979), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n. 6 (1974), or "a high degree of awareness of . . . probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), quoting *Garrison v. State of Louisiana*, 379 U.S. 64, 74(1964). Because Sinclair deliberately put forward his own accusations against Obama, and took steps to publicize his accusations, he made himself a limited-purpose public figure with respect to the controversy that he was trying to create. Under long-standing precedent in this circuit, an otherwise private individual "has become a public figure for limited purposes if he has attempted to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute." *Lohrenz v. Donnelly*, 350 F.3d 1272, 1279 (D.C. Cir. 2003), citing *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1296-1297 (D.C. Cir.1980). Sinclair is unquestionably attempting to have a major impact on the presidential race, and although he has not succeeded in getting coverage in responsible publications, he has achieved widespread attention on blogs, in the tabloid media such as the *Globe,* and on extremist radio shows. He is, therefore, a public figure who must show actual malice under the First Amendment. Indeed, under Minnesota law, there is a special rule regarding damages and actual malice for private figures who sue private defendants who have communicated their alleged libels through the public media on a matter of public concern – such plaintiffs must show actual malice or actual damages. *McClure v. American Family Mut. Ins. Co.*, 29 F.Supp.2d 1046, 1055 (D. Minn. 1998).

Here, in response to Sinclair's sensational claims, several individuals posted statements online alleging that Sinclair could not have committed the crimes he claimed to have committed with Obama because he was, at the time, a mental patient; indeed, some posters attributed that finding to a newspaper reporter in Chicago. Stiles Affidavit, Exhibits I and K. There is no reason to believe that Sinclair will be able to prove that defendants' published credence in these well-publicized statements reflected actual malice, but for present purposes it suffices that actual malice is not pleaded. To the contrary, Sinclair has pleaded the opposite of actual malice. The complaint's defamation count, ¶¶ 20-23, includes no allegation of mzmolly's mens reas, and the "reckless misrepresentation" count pleads that mzmolly made the allegedly false statement, "without knowing whether that statement was true or false." ¶ 25. That is not sufficient to establish actual malice. Indeed, in that respect, the case is similar to *St. Amant v. Thompson*, where the defendant published another person's statement and assumed (mistakenly, absent the special protections under section 230) that he was thus not responsible for the publication, and yet the Supreme Court held that these facts do not meet the definition of actual malice. 390 U.S. at 731-732. Thus, assuming the veracity of the allegation that mzmolly simply "did not know" whether the statement was true or false, the complaint fails to plead actual malice. (Similar allegations are made about each of the other defendants. Complaint, ¶¶ 17, 33). Accordingly, this part of the test also bars plaintiff's motion to compel identification of his anonymous critics.[7]

(4) Require an Evidentiary Basis for the Claims

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

[7]The fact that the caption of this count of the complaint is entitled "reckless misrepresentation" instead of defamation does not allow plaintiff to avoid the burden of pleading and proving actual malice. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

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.

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 admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.,* Werthammer, *RNN Sues Yahoo Over Negative Web Site,* Daily Freeman, November 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id= 4969&rfi=8. One of the leading advocates 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 46. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

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). *Cf. Schultz v. Reader's Digest*, 468 F.Supp. 551, 566-567 (E.D.Mich. 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues with respect to which it needs to identify the anonymous speakers, before it is given the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

The extent to which a 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. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, 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 or rests on confidential information. Thus, it is ordinarily proper to require a plaintiff to present proof of this

element of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant. Sinclair can easily prove by affidavit whether he has been a mental patient and, if so, on what dates. The same is true with respect to proof of damages. Even if discovery is needed to develop the full measure of damages, a plaintiff should surely have some information at the outset supporting claims that he suffered actual damages.

In this case, Sinclair has yet to introduce **any** evidence that any statements by the Does are false, or that any of the statements caused plaintiff to suffer **any** damage. Although plaintiff must also prove actual malice, many courts addressing the *Dendrite* standard have assumed that, because actual malice can often not be proved without discovery, it is inappropriate to place the burden of establishing a prima facie case of actual malice on the plaintiff who has not yet been able to identify the defendant. Here, however, the complaint not only does not allege actual malice, it alleges facts inconsistent with actual malice – that the defendants simply did not know whether their statements were true or false. In those circumstances, the complaint forecloses Sinclair's claims as a matter of law, and his motion to compel discovery should, therefore, be denied.

(5) Balance the Equities

Even if, in response to this memorandum, Sinclair submits evidence sufficient to establish a prima facie case of defamation against each Doe defendant,

> 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 reporter's source disclosure case,

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.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite,* 775 A.2d at 760-761.

See also Mobilisa v. Doe, 170 P.3d at 720; *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d at 976.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of his case on subjects that are based on information within his own control, there is no basis to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) ("an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"). The requirement that there be sufficient evidence to prevail against the speaker, and sufficient showing of the exhaustion of alternate means of obtaining the plaintiff's goal, to overcome the defendant's interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can

scarcely be said that such identification is "necessary."

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction – and not even a preliminary one at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). In some cases, identification of the Does may expose them to a significant danger of extra-judicial retaliation. In this case, the plaintiff is an individual with a long criminal record, and his prison records establish that he has been prone to violence – they show 15 administrative citations for "threats," and 28 citations for "assault," as well as a dozen sanctions for verbal abuse, and a few for sexual misconduct. Levy Affidavit, Exhibit D.[8] Moreover, plaintiff has been publishing on his blog the names and photographs of those whom he believes are responsible for criticizing him, as well as details about their families. Stiles Affidavit, Exhibit G. Indeed, Sinclair has specifically warned publicly that he is now ready to "attack" not only his critics but also their families, who are now "fair game and open season. . . . That means your mothers, fathers, grandparents, children, brothers, sisters, you name it." Stiles Affidavit, Exhibit E. He has sent a warning to an Internet critic that when he is identified he can expect a "visitor." Levy Affidavit, Exhibit E. *See also* Stiles Affidavit Exhibit D ("One message however for Paul Day. Watch your back, because someone will be watching you. Take it any way you want.") When they see statements like that from a career criminal like Sinclair, Internet users are certainly justified in

[8]Additional incidents of violence, purportedly obtained from records of an earlier incarceration, appear in Comment 875 on the BigHeadDC web site. http://bigheaddc.com/2008/04/10/ daily-kos-censors-mention-of-larry-sinclar/#comments.

treating this as a serious threat, and worrying about what will happen to them if Sinclair gets their name. [9]

However, 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. The plaintiff retains the opportunity to renew his motion after submitting more evidence.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. In this regard, 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. Here, although referring to somebody as a former mental patient could, in some cases, be the basis for a defamation action, that statement must be viewed against the backdrop of the larger controversy. Plaintiff is a career criminal whose very claims assert that he engaged in illegal conduct, and whose claim to fame is his deliberate effort to get publicity for sensational accusations against a prominent public figure. Indeed, although as argued above, we believe that this case will have to be pursued in Minnesota state court, if at all, there is reason to doubt that any District of Columbia jury would award Sinclair any damages or indeed find his critics liable. This is not a case in which there is any genuine likelihood of success on the merits, and there is grave reason for doubt that the case was brought for any other reason than to attempt to create a forum to litigate the substance of his accusations against Obama.

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[9]Sinclair has proclaimed the need to protect **his** supporters, and the limousine driver who is supposedly ready to testify, from alleged death threats and vigilante postings by his adversaries. Stiles Affidavit, Exhibit B. Comment 850, posted to the "BigHeadDC" web site, http://bigheaddc.com/2008/04/10/daily-kos-censors-mention-of-larry-sinclar/#comments, reprints certain statements on YouTube by larrysinclair0926 which, if properly attributed to Sinclair, would show that he wants to engage in physical confrontations with critics.

D. The *Dendrite / Mobilisa* Standard Strikes the Right Balance of Interests.

The principal advantage of the *Dendrite*/*Mobilisa* test is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong. In that way, it 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 victims to be compensated for their losses. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice, while at the same time ensuring that persons with legitimate reasons for speaking anonymously, while criticizing public figures, will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is discovery and the "outing" of anonymous speakers, and not damages. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed seeking to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic. Consequently, many lawyers advised their clients to bring such cases without being serious about pursuing a claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's have reported some staggering statistics about the number of subpoenas they received – AOL's amicus brief in the *Melvin* case reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! stated at a hearing in California Superior Court that it had received "thousands" of such subpoenas. *Universal Foods Corp. v. John Doe*, Case No. CV786442 (Cal. Super. Santa Clara Cy.), Transcript of Proceedings July 6, 2001, at page 3.

Although no firm numbers can be cited, experience leads undersigned counsel to believe that

the number of civil suits currently being filed to identify online speakers has dropped dramatically from the earlier figures. The decisions in *Dendrite*, *Melvin, Cahill, Mobilisa*, and other cases that have adopted strict legal and evidentiary standards for defendant identification have sent a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these lawsuits, to the occasional libel verdict against anonymous defendants, as well as the fact that many online speakers have been identified in cases that meet the *Dendrite* standards – indeed, two of the Doe defendants in *Dendrite* were identified, as was the defendant in the companion case to *Dendrite*, *Immunomedics v. Doe*, 342 N.J.Super. 160, 775 A.2d 773 (N.J. Super. App. Div. 2001) – has discouraged some would-be posters from the sort of Wild West atmosphere that originally encouraged the more egregious examples of online irresponsibility, if not outright illegality. We urge the Court to preserve this balance by adopting the *Dendrite* test that weighs the interests of defamation plaintiffs to vindicate their reputations in meritorious cases against the right of Internet speakers to maintain their anonymity when their speech is not actionable. In this case, that test leads ineluctably to the conclusion that the motion to compel discovery from DemocraticUnderground.com should be denied.

II. THE MOTION TO COMPEL PUBLIC CITIZEN TO COMPLY WITH MR. SIBLEY'S LETTER REQUESTING IDENTIFICATION OF MR. LEVY'S CLIENT IS BARRED BY THE FIRST AMENDMENT, THE ATTORNEY-CLIENT PRIVILEGE, AND RULES 37(a)(3)(B) AND 45(c)(2)(B)(i).

In addition to moving to compel Democratic Underground to comply with the subpoena that he served on it, Sinclair moves to compel Public Citizen Litigation Group, the law firm at which counsel for mzmolly and Democratic Underground work, to provide the name and address of defendant mzmolly. The motion recites that plaintiff's counsel, Montgomery Blair Sibley, Esquire, faxed a letter to Paul Alan Levy, Esquire, asking him to provide this information (indeed, the letter,

asked that the information be provided to "save me the trouble of securing and then serving a subpoena" seeking that information); that Mr. Levy declined to provide the information (citing both the First Amendment privilege discussed above, as well as the attorney-client privilege); and that an order compelling discovery is proper.

This motion is frivolous. First of all, no subpoena has been served on Public Citizen Litigation Group, which is a third party in this case and would not even be required to respond to a Rule 33 Interrogatory or a Rule 34 Request for Production of Documents, had one been served. Rule 37(a)(3)(B) allows a party to move to compel discovery when a **party** refuses to respond to interrogatories or requests for production, and Rule 45(c)(2)(B)(i) allows a motion to compel discovery when "the commanded person" – that is, the person commanded by a subpoena – objects to production. A letter from one attorney to another attorney does not constitute a command, and it does not provide the basis for a motion to compel. The motion to compel compliance should be denied, and Mr. Sibley should be personally sanctioned under Rule 37(A)(5)(B) (there is no reason to sanction Mr. Sibley's client for Mr. Sibley's improper conduct).

Second, the information demanded is subject to the same qualified First Amendment as is discussed earlier in this brief. Indeed, as Mr. Levy told Mr. Sibley, because his proposed subpoena for the name and address of mzmolly sought exactly the same discovery to which his subpoena to Democratic Underground is directed, and the outcome under the First Amendment would be the same under either subpoena, the only possible purpose of serving such a subpoena (or filing this part of his motion) is to multiply litigation. The Court is requested to impose sanctions on Mr. Sibley under 28 U.S.C. § 1927.

Third, if it is necessary to reach the issue (and in light of the foregoing two arguments it is not), this case presents exceptional circumstances. The identity and location of mzmolly is subject

to the attorney-client privilege because far from being "incidental to the attorney-client relationship," mzmolly's identity and location are central to that relationship. It is the very information that counsel have been retained to protect; counsel's retainer is limited to opposing the subpoena to identify mzmolly. *See* Levy Affidavit, ¶¶ 3-7. Sinclair's memo grudgingly admits that no absolute rule denies privileged status to the name and address of the client. Indeed,

> "[T]here is no federal body of law that requires the exclusion of the identity of the client from the extent of the attorney-client privilege. . . . [I]t must be assessed on a case to case basis, depending on the particular facts of each case.
>
> *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

A client's identity is protected from disclosure when it is "connected inextricably with a privileged communication – the confidential purpose for which he sought legal advice." *In re Grand Jury Subpoena*, 926 F.2d 1423, 1432 (5th Cir. 1991). The client's identity has also been deemed privileged when "disclosure of a client's identity would implicate the client in the matter for which he or she sought advice." *United States v. Liebman*, 742 F.2d 807, 810 (3d Cir. 1984). Similarly, in cases where the client has communicated her address for the purpose of obtaining legal advice or representation to which the address is crucial, the courts routinely hold that the privilege must be respected. *Litton Indus. v. Lehman Bros. Kuhn Loeb*, 130 F.R.D. 25, 26 (S.D.N.Y. 1990), *citing In re Stolar*, 397 F.Supp. 520, 524 (S.D.N.Y.1975) and M*atter of Grand Jury Subpoenas Served Upon Field*, 408 F.Supp. 1169, 1173 (S.D.N.Y.1976).

On the theory propounded by Sinclair, once an anonymous speaker retains counsel to protect her right to remain anonymous, the very communications that specify the information to be protected and that assure the lawyer that he is representing a real person who is, in fact, the owner of the pseudonym that is subject to suit must be revealed. Of course, anonymous defendants cannot appear in court to defend their own anonymity, and so Sinclair's rule would be tantamount to a rule that bars

anonymous free speech through the back door. Undersigned counsel Mr. Levy and Mr. Beck have between them been litigating issues of Internet anonymity for more than ten years, and Mr. Levy has been involved in most of the major cases cited in this brief. So far as we are aware, this is the first time that any attorney for a party trying to subpoena the names of prospective defendants has raised this far-fetched claim for disclosure of the Doe's identity by the attorney rather than the ISP. Although it is an issue of first impression, the purposes of the rule of attorney-client privilege would support the recognition of the exception in these circumstances as well.

III. REQUEST FOR SANCTIONS

Although there are no reported cases in this district discussing *Dendrite* and *Cahill*, there was in this case clearly no basis for subject matter or personal jurisdiction over the Doe defendants, and plaintiff's counsel was promptly placed on notice of these defects. Moreover, **every** appellate or federal district court decision to discuss the standards for subpoenas to identify anonymous Internet speakers has required the plaintiff to make some minimal evidentiary showing to support the claimed compelling interest in discovery. Undersigned counsel repeatedly invited Sinclair's counsel to engage in a discussion of the substantive objections to discovery, to determine whether, for example, the parties could agree that plaintiff would attempt to replead, or more properly refile in a court that had jurisdiction. Instead, plaintiff rushed into court with a barebones motion to compel that neither discusses any of the relevant cases, nor makes the slightest factual or other showing in response to the legitimate issues raised in the Rule 45 objections letter. Finally, plaintiff's counsel erroneously stated that he had conferred in good faith with undersigned counsel, even though he **never** tried to resolve or narrow the discovery issues to be presented to the Court. This is a case that cries out for sanctions under Rule 37 and 28 U.S.C. § 1927, and the Court should award them.

CONCLUSION

The motion to compel Democratic Underground to comply with plaintiff's subpoena, and to compel Public Citizen Litigation Group to comply with the letter "demand" of Montgomery Blair Sibley, Esquire, should be denied. The Court should award sanctions as requested.

Respectfully submitted,

/s/ Paul Alan Levy
Paul Alan Levy (DC Bar No. 946400)
Greg Beck (DC Bar No. 494479)

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for mzmolly and DemocraticUnderground.com

April 30, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWRENCE SINCLAIR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:08-cv-00434-HHK
	)	
TubeSockTedD, mzmolly and OWNINGLIARS,	)	
	)	
Defendants.	)	

PROPOSED ORDER

Plaintiff's motion to compel Democratic Underground to comply with plaintiff's subpoena, and to compel Public Citizen Litigation Group to comply with the letter "demand" of Montgomery Blair Sibley, Esquire, is denied. The Court finds that plaintiff's motion as filed was not substantially justified, and further finds that the motion directed at Public Citizen multiplied this proceeding unreasonably and vexatiously. The Court awards sanctions in favor of mzmolly and Democratic Underground against plaintiff and his counsel, jointly and severally, for the motion to compel Democratic Underground, and against plaintiff's counsel specifically for the motion to compel Public Citizen. The parties are ordered to confer in good faith to attempt to determine the amount of attorney fees to be awarded as a sanction. Failing an agreement between counsel, mzmolly and Democratic Underground may move for an award of a specific amount no later than ___ days from this date.

_____
United States District Judge