

DOCKET NUMBER CV-00-0181990S

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|------------------------------|---|----------------------|
| WRNN-TV ASSOCIATES LIMITED   | ) | SUPERIOR COURT       |
| PARTNERSHIP,                 | ) |                      |
|                              | ) |                      |
| Plaintiff,                   | ) | JUDICIAL DISTRICT OF |
|                              | ) | STAMFORD/NORWALK     |
| v.                           | ) | AT STAMFORD          |
|                              | ) |                      |
| JOHN DOES 1-10, individuals, | ) |                      |
|                              | ) |                      |
| Defendants.                  | ) | JANUARY 4, 2001      |

**MEMORANDUM IN SUPPORT OF  
MOTION OF JANE DOE TO QUASH SUBPOENA AND DEPOSITION**

Plaintiff WRNN-TV Associates, a limited partnership based in New York City that operates a television station in Kingston, New York, filed this action for the purpose of taking discovery in California from Yahoo! to identify several individuals who have exercised their rights under the First Amendment and the state constitution to criticize, on the Internet, the manner in which the television station has been operated. Purportedly to facilitate a lawsuit against its critics, WRNN seeks the identities of the founder of the “RNNSucks” web site and of other individuals who have used a message board on the RNNSucks web site to post “false and defamatory” comments about the station, its owners, and some of its on-air personalities, as well as discussing allegedly confidential business information.

WRNN has not specified the false statements or the confidential facts that have been posted, and it has not made the other allegations that would be necessary to state a claim either for defamation or for disclosure of trade secrets or other confidential information. Indeed, WRNN’s counsel has been quoted in the press as stating that his client may never actually file a lawsuit against its critics, even if it obtains the information it seeks. Nevertheless, the Court authorized such discovery because Yahoo! had not objected to plaintiff’s request.

**ORAL ARGUMENT REQUESTED  
TESTIMONY NOT REQUIRED**

With this motion, however, Jane Doe, the founder of the web site in question, objects to the identification of herself and the various persons who have posted information on her website's message board.<sup>1</sup> She argues that plaintiff is misusing the Connecticut bill of discovery procedure and that the First Amendment bars the government from interfering with the decision to speak anonymously unless the complaint alleges, and plaintiff presents sufficient evidence to establish a prima facie case, that each speaker violated WRNN's rights in some way. Accordingly, the subpoena for information identifying Doe and the other posters should be quashed.

## STATEMENT

### A. Facts.

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to view them. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 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.*

Knowing that people have personal and economic interests in the corporations that shape our world, and in the stocks that they hope will provide for their future, and knowing, too, that people love to share their opinions with anyone who will listen, Yahoo! has organized outlets for the

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<sup>1</sup> In identifying the webmaster as Jane Doe, we do not intend to specify her gender.

expression of opinions about companies. These outlets, called “message boards,” are an electronic bulletin board system on which individuals discuss major companies by posting comments for others to read and discuss.

The individuals who post on Yahoo! message boards generally do so under a pseudonym – similar to the old system of truck drivers using "handles" speaking on their CB's. Nothing prevents an individual from using his real name, but, as an inspection of the message board at issue in this case will reveal, most people choose anonymous 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. Such exchanges are often very heated and, as seen from the various messages and responses on the message board at issue in this case, they are sometimes filled with invective and insult.

One aspect of a message board that makes it very different from almost any other form of published expression is that, because 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 statements about himself – can respond to those statements immediately at no cost; moreover, the response will have the same prominence as the offending message. A message board is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, corporations and executives can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong. And because many people are regularly visitors to the message board about a particular company, the corporate response is likely to be seen by much the same audience as those who saw the original criticism. As a result, 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.

The message board at issue in this case is on a home page created by Jane Doe for the purpose of criticizing WRNN-TV. <http://www.geocities.com/rnnsucks/index.html>. As alleged in the Amended Complaint, ¶ 1, WRNN-TV Associates is a Delaware Limited Partnership whose principal office is located in New York, New York. WRNN operates a television station in Kingston, New York, which calls itself the Regional News Network. According to its own web site, [www.rnntv.com](http://www.rnntv.com), WRNN offers news, weather, sports and other programming directed at viewers throughout the New York metropolitan area. As a news broadcaster itself, WRNN is constantly appealing for the public attention that permits it to sell advertising and thus to make a profit; WRNN is a classic public figure because, through its own broadcast facilities, it has easy access to the channels of communication to respond to whatever criticisms may be made about it.

As a quick review of the RNN Sucks web site will show, Doe believes that WRNN has not done as good a job as its predecessor in the same broadcast slot, WTZA. On various pages of the site, Doe has posted information about the proud traditions of WTZA, with which she contrasts a number of aspects in which she believes that WRNN is inferior. Other pages detail a number of criticisms of the ways in which WRNN management mistreat the station employees, and give specific examples of RNN broadcasts that she deems substandard.

Part of Doe's "RNN Sucks" web site is a message board devoted to WRNN. <http://messages.yahoo.com/bbs?action=m&tid=0a16160b0d1b130b&sid=0a16160b0d1b130b&mid=1&g=1>. As of the date of this memorandum, nearly 700 messages had been posted on the WRNN board. Review of those messages reveals a variety of topics and posters. Employees, former employees, other

workers in the television industry, and various viewers discuss the latest news about WRNN's operations, which on-air personalities and managers are doing a good job, which ones are not doing a good job, what actions can be taken to influence WRNN's work or to obtain redress for its misconduct, prospects for union organization of plaintiff's employees or for litigation for employee benefits, and the like. Some messages praise WRNN, some criticize it, and some are neutral.

**B. Proceedings to Date.**

Rather than take advantage of the message board's open access policy to reply to the criticisms posted there, and rather than respond on its own web site or indeed in its television broadcasts, WRNN-TV Associates has filed suit in this Court against Yahoo! to obtain a subpoena seeking to identify Jane Doe, as well as the various individuals who have posted messages on the RNNsucks Message Board under ten different pseudonyms.<sup>2</sup> According to the allegations of the complaint, webmaster Jane Doe and "others" have posted messages "which contain derogatory, false and libelous statements about WRNN and certain of its executive officers and on-air personalities." Amended Complaint ¶ 10. Neither in the complaint, nor in any other filing, has WRNN identified even a single defamatory statement, not to speak of explaining which portions of which statements are false. Nor does the plaintiff make the other necessary allegations that would be needed to state a claim for defamation. Thus, for example, there is no pleading of special damages, as would be needed for libel per quod, and yet without a pleading of any specific words, there is no indication that the libel is per se. Nor, despite the fact that the plaintiff is a public figure, has it made any allegations of actual malice. And, wholly apart from the lack of allegations, plaintiff has not presented any evidence in support of its contention that some of the messages are false.

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<sup>2</sup>Because no registration is required to post messages on the message board, it is possible, and even likely, that different persons may use the same pseudonym on the message board at different times.

The complaint further alleges, ¶ 10, that “some of the messages contain confidential business information concerning WRNN.” Again, however, nothing in the complaint specifies the allegedly confidential information, and the complaint does not include the other allegations needed to state a claim based on the disclosure of such information, such as that the information was obtained under a pledge of confidentiality or in circumstances creating a duty to maintain confidentiality. And, as with the claim of defamation, there is no evidence in support of the breach confidentiality.

The complaint, at ¶ 3, alleges that Yahoo! does business in Connecticut, in the sense that its portals on the World Wide Web can be accessed in Connecticut, as they can throughout the United States and, indeed, throughout the world. However, the complaint does not allege that Yahoo! has committed any violation of plaintiff’s rights – indeed, Yahoo! enjoys statutory immunity from being sued for statements that others post on its facilities. And yet, apart from the allegation that Yahoo! transacts business in Connecticut, nothing in the complaint suggests any nexus between the web site and the state of Connecticut. After all, plaintiff is maintained under Delaware law, and has its headquarters in New York City. The television station that is the subject of the web site is based in Kingston, New York. There is no indication of why this proceeding was initiated in Connecticut. For aught that appears, the only reason is that the plaintiff wants to take advantage of a Connecticut pre-litigation discovery procedure that could not be pursued either at its own place of business, or in the state where Yahoo! keeps the records that the plaintiff wants to obtain.

After filing the complaint, plaintiff filed a motion for leave to take discovery from Yahoo! in California. This Court initially declined to authorize the proposed discovery, but revisited the issue after plaintiff requested an explanation of the decision, and pointed out that defendant Yahoo! had not objected to the pursuit of the requested discovery. Pursuant to its standard procedure in these cases, Yahoo! did not object to the discovery, although it tries to give notice to its registered

users so that they may, if they choose, move to quash any subpoenas that seek personally identifying information. *See* McGoff Affidavit ¶¶ 3-5 and Exhibit B (filing in another case explains Yahoo!’s standard procedures in cases like this one). As a result, the Court allowed the deposition to proceed, for the reason that “because the parties are in agreement – [here] don’t need the court ruling.” Yahoo!’s counsel advise that, if a motion to quash is filed, it will withhold the information sought pending a ruling on such a motion.

The subpoena seeks identifying information about Jane Doe, the webmaster who organized the RNNsucks web site, as well as of the persons who posted messages on Doe’s site under ten specified pseudonyms. The motion seeking leave to take discovery did not specify which of the messages posted using specific pseudonyms are allegedly defamatory, and which allegedly included confidential business information; indeed, the motion did not even represent that each of the pseudonyms was associated with a potentially actionable posting. Nor has plaintiff presented any evidence to support an allegation that any message violates its rights. Indeed, there is no indication that the posters of any of the messages in question have been made aware that plaintiff is seeking to identify them, and thus that, if they want to protect their right to continued anonymity, they need to move to quash the subpoena and notice of deposition to Yahoo!<sup>3</sup>

Doe’s concern about compelled disclosure of identities is heightened because, according to the posts, some of the persons using the Message Board are individuals who used to work for the

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<sup>3</sup> Although, under the safe harbor provision of the Communications Decency Act, 47 U.S.C. § 230, Doe cannot be held liable for allegedly defamatory communications posted by other persons on her message board, *see* cases cited *infra* at 11, she feels morally responsible to argue for the free speech and privacy rights of the persons who posted messages on that board. Accordingly, the Court is urged to consider our arguments in this memorandum about the impact of plaintiff’s bill of discovery on the rights of those third persons. Ideally, of course, such persons should obtain their own counsel to represent their interests, which may occur if the Court accepts our argument, *infra* at 24, that plaintiff is obligated to provide notice of its actions in a manner calculated to reach these prospective Doe defendants before it may proceed further to seek discovery to identify them.

plaintiff and who may still be employed in the broadcasting industry. Given the accounts of some former WRNN employees, which suggest that the plaintiff has attempted to injure their careers by attempting to call subsequent employers, even ex-employees must be wary of being identified in this case. See <http://www.geocities.com/rnnsucks/spkout.html> (account by “operations worker”). Moreover, there appears to be some reason to doubt that this proceeding was begun only for the purpose of identifying defendants in a proposed lawsuit, because, shortly after this bill of discovery was filed, plaintiff’s attorney in this case was quoted in the Kingston-based *Daily Freeman* as stating that the information was not necessarily being sought for the purpose of enabling litigation against the posters. The attorney stated that “it was premature to say whether the station will sue whoever is responsible for the site. ‘My client is simply seeking information to identify these people. . . . We would contact them as to why they did this. We would then assess whether we have an action against them.’” <http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&depid=74969&rfi=8> (copy attached).

Accordingly, Jane Doe now moves the Court to quash the subpoena and the notice of deposition. She, and the other persons who have posted messages on her web site message board, spoke anonymously on the web site and message board in the exercise of their right under the First Amendment and the state constitutions to speak anonymously, and their right to remain anonymous should not be taken away absent a compelling demonstration that their speech was likely wrongful and thus that their identification is needed to permit plaintiff to vindicate its own rights.

### **SUMMARY OF ARGUMENT**

The first reason why the motion to quash should be granted is that the Court lacks jurisdiction to compel discovery in this case. This action was initiated by a partnership based in New York, seeking information to support a cause of action over statements made on a web site

about a New York television station, by taking a deposition from Yahoo! in California. The only allegations in the complaint that have anything to do with Connecticut are that Yahoo!'s international internet business is conducted, in part, in Connecticut. But Yahoo! is immune from liability in this case, and nothing in the complaint suggests that the Court might have jurisdiction of the libel action that plaintiff claims it wants to bring. Accordingly, without ever reaching the free speech questions that are raised in this case, the Court should quash the subpoena for lack of personal jurisdiction.

Indeed, foreign business entities should not be encouraged to impose on the Connecticut courts their disputes about out-of-state discovery proceedings, in support of hypothetical causes of actions that belong in the courts of other states. If pre-litigation discovery is allowed on the theory set forth by plaintiff in this case, there will be a flood of out-of-state companies coming to Connecticut to take discovery to identify their Internet critics.

If the Court reaches the merits, however, it is well established that a privilege against discovery is a proper defense to the equitable bill of discovery. *Falco v. Institute of Living*, 254 Conn. 321, 757 A.2d 571 (2000). Deciding this motion will present the Court with an issue of first impression in this jurisdiction – what standard should be used to decide whether, in a particular case, a person's right to obtain redress from an allegedly libelous statement outweighs the speaker's First Amendment right to make anonymous criticisms. This is an important question because of the rising tide of cases in which those who have been criticized on the Internet are coming to court to identify their critics. As recently stated in the leading case of *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), in discussing the standards for discovery of a defendant's identity in a suit against the anonymous owners of a web site domain name, "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.”

To decide this question of free speech and privacy rights, the Court should use a standard similar to the one used to decide whether to compel the identification of anonymous sources in libel litigation. Under that test, the Court should first require plaintiff to notify each of the anonymous speakers it seeks to identify that their privacy is at risk, so that they have an opportunity to interpose any objections that they may have. Second, the Court should ascertain the degree to which plaintiff has a genuine need for disclosure in order to pursue an otherwise viable claim, and weigh that need against the speaker's need for anonymity. Opinions from several courts in various jurisdictions provide comparable guidelines for balancing the rights of plaintiffs who seek redress against wrongful speech and defendants who wish to preserve the anonymity of their speech. This Court should embrace that analysis. On the facts of this case, there can be no doubt that the right to anonymity should prevail.

## **ARGUMENT**

### **I. THE BILL OF DISCOVERY DOES NOT ALLOW A FOREIGN COMPANY TO PURSUE OUT-OF-STATE DISCOVERY TO SUPPORT A CAUSE OF ACTION THAT BELONGS IN THE COURTS OF ANOTHER STATE.**

This Court should not permit plaintiff to use its processes to pursue discovery against Yahoo! because this case simply does not belong in the Connecticut courts. Plaintiff is a Delaware partnership whose principal office is in New York City. Plaintiff operates a television station in Kingston, New York, and is pursuing discovery to identify persons who have posted messages pertaining to the operation of that New York station.

The only nexus between this case and Connecticut is that Yahoo!, which has the information that plaintiff is trying to obtain through the Court's orders, allegedly transacts business in

Connecticut. According to its SEC filings, Yahoo! is a Delaware corporation whose principal place of business is in California. <http://www.sec.gov/Archives/edgar/data/1011006/000091205700050784/a2028073z424b3.htm>. Indeed, plaintiff has scheduled its deposition of Yahoo! in San Francisco, California, not in Connecticut, and the subpoena duces tecum is returnable, in San Francisco as well.

Moreover, Yahoo! cannot be a party to the claims that plaintiff invokes as a basis for discovery, because it enjoys a statutory immunity from suit based on liability for those claims. Under section 509 of the Communications Decency Act, 47 U.S.C. § 230, a provider of internet services or interactive computer services like Yahoo! is not to be deemed the “publisher” of information provided by another person on its web site. The courts have routinely construed this provision as barring any claims under federal or state law against providers like Yahoo! for content provided by others through their services, including claims for defamation. *Ben Ezra, Weinstein, & Co. v. America Online*, 206 F.3d 980 (10<sup>th</sup> Cir. 2000); *Zeran v. America Online*, 129 F.3d 327 (4<sup>th</sup> Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

Thus, if personal jurisdiction is to be established in this case, it must be based on the activities of the defendants who have allegedly posted wrongful messages on the “RNNSucks” web site, and not on Yahoo!’s own activities. But the mere fact that defendants published their comments through Yahoo! is not a sufficient basis for exercising personal jurisdiction over them, even if Yahoo! itself is subject to personal jurisdiction in this state. *Amberson Holdings v. Westside Story Newspaper*, 110 F. Supp. 2d 332 (D.N.J. 2000) (fact that web site host’s server was located in New Jersey was not enough to warrant exercising personal jurisdiction over owner of web site). And, as a general rule, the equitable bill of discovery is not designed to enable discovery from immune third parties such as Yahoo!. *See Pottetti v. Clifford*, 146 Conn. 252, 261, 150 A.2d 207

(1959). In sum, the existence of personal jurisdiction over Yahoo! is irrelevant to the propriety of a bill of discovery in the courts of this state.

Moreover, courts faced with claims that personal jurisdiction may be based on a defendant's web site have **consistently** ruled that contact limited to viewing a non-resident defendant's non-commercial web site (or a commercial but merely passive web site) in the forum state, is insufficient to warrant the assertion of personal jurisdiction. "This theory simply cannot hold water. Indeed, under this view, personal jurisdiction in Internet-related cases would almost always be found in any forum in the country. . . . The Due Process Clause exists, in part, to give 'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to whether that conduct will and will not render them liable to suit.' . . . In the context of the Internet, [WRNN]'s expansive theory of personal jurisdiction would shred these constitutional assurances out of practical existence." *GTE New Media Services v. BellSouth Corp.*, 199 F.3d 1343,1350 (D.C. Cir. 2000) (citations omitted).

In considering claims brought against web site operators, the courts have used a sliding scale to determine whether the operation of a web site is sufficient basis for the exercise of personal jurisdiction in a forum where its operator is not present. *Mink v. AAAA Development*, 190 F.3d 333, 336-337 (5<sup>th</sup> Cir. 1999). A defendant who operates a purely passive web site will not be subject to personal jurisdiction in a foreign forum, *e.g.*, *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25, 29 (2d Cir. 1997), while a highly interactive site on which a company regularly conducts business with its customers in the forum will normally be a sufficient basis for personal jurisdiction. *E.g.*, *Sports Authority Michigan v. Justballs*, 97 F. Supp. 3d. 806, 813-814 (E.D. Mich. 2000); *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp 1119, 1124 (W.D. Pa. 1997). For cases in between these two extremes, "the exercise of jurisdiction is determined by

examining the level of interactivity and the commercial nature of the exchange of information that occurs on the Website.” *Mink v. AAAA Development*, 190 F.3d 333, 336-337 (5<sup>th</sup> Cir. 1999); *Berthold Types Ltd v. European Mikrograf Corp.*, 102 F. Supp.2d 928, 933 (N.D. Ill. 2000). Doe’s web site, however, is purely non-commercial.

The Court should not countenance the plaintiff’s shopping its case to this forum, where the underlying cause of action, if any, relates to New York, and where the discovery is to take place in California.<sup>4</sup>

**II. BECAUSE IDENTIFICATION OF DOE AND THE OTHER ANONYMOUS SPEAKERS TRENCHES ON THEIR RIGHT TO SPEAK ANONYMOUSLY, AND BECAUSE WRNN HAS NOT SHOWN ANY BASIS FOR ITS CLAIMS, THE COURT SHOULD QUASH THE DISCOVERY FROM YAHOO!**

Although it has presented no evidence that Doe or any other person who has posted messages on the web site has violated its rights, plaintiff seeks to invoke this Court’s authority in a way that would infringe irreparably the speakers’ First Amendment right to speak anonymously. WRNN is attempting to harness the powers of the Court to use it as if it were a private detective service, to locate members of the public who have engaged in speech criticizing it. Enforcement of the subpoena would terminate their right to engage in anonymous speech, and would impose undue burdens under the First Amendment and the New York and Connecticut rights of free speech and privacy. Accordingly, this Court should quash the subpoena.

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<sup>4</sup> If the Court does exercise jurisdiction on this case, it should not apply Connecticut law to decide the case. Instead, because plaintiff has its principal place of business in New York City, *Katz v. Goldberg*, 673 F. Supp. 76, 79-80 (D. Conn. 1987) (plaintiff’s domicile governs choice of law in defamation actions), and because the lawsuit alleges defamatory statements about a TV station located in Kingston, New York, New York is the state with the greatest interest in this action. *Restatement (Second) of Conflict of Laws* § 150(1). Hence, New York law would be selected under Connecticut’s conflict of laws analysis.

### **A. The First Amendment Protects the Right to Speak Anonymously.**

The First Amendment protects the right to speak anonymously, as the Supreme Court has repeatedly held. *Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 645-646 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases celebrate the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of William Shakespeare and Mark Twain through the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*,

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

\* \* \*

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

*McIntyre*, 514 U.S. at 341-342, 357 (footnote omitted).

Moreover, the protections afforded to free speech by the constitutions of both New York and Connecticut extend further than the First Amendment. *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 248-256, 566 N.Y.S.2d 906 (1991); *State v. Linares*, 232 Conn. 345, 378-386, 655 A.2d 737 (1995).

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a fully protected medium for public discourse, which places in the hands of any individual who wants to express his views the opportunity, at least in theory, to reach other members of the public at virtually no cost; consequently, First Amendment protections are fully applicable

to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Several lower court decisions have further upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *ACLU v. Miller*, 977 F. Supp. 1228, 1230, 1232-1233 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno*, 119 S. Ct. 1450 (1999), *aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of web site at www.annoy.com, a site “created and designed to annoy” legislators through anonymous communications).

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

**B. The Requested Pre-Complaint Discovery Would Violate Doe’s Substantive Constitutional Rights.**

Enforcement of WRNN’s subpoena to obtain the identities of Doe and the other posters on the message board would terminate once and for all their right to speak anonymously. WRNN is

invoking this Court's authority even though no substantive complaint has been filed and no cause of action set forth. In this posture, there is no way to enforce the subpoena and at the same time uphold Doe's right to due process. Accordingly, this Court should quash the subpoena.

A court order, even when issued at the behest of a private party, constitutes state action which is subject to constitutional limitations, including the First Amendment. *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). It has acknowledged that 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. The Court noted that rights may be curtailed by means of private retribution following such court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524. The novelty of the procedural requirements at issue cannot be used to thwart consideration of the constitutional issues involved. *NAACP v. Alabama*, 357 U.S. at 457. Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens to impair significantly fundamental rights protected by the First Amendment. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463.

Here, it is impossible to determine whether WRNN could make a showing that there is a compelling interest because no substantive complaint has been filed setting forth a cause of action against the persons to be identified. Indeed, there is no assurance that, after obtaining the disclosure it seeks, WRNN will ever file such a complaint. WRNN could well be using this Court as a detective agency to track down its critics and to exert extra-legal pressures. This concern is

heightened by the statements of plaintiff's counsel to the media, that WRNN may never actually file suit against the posters, but simply wants to contact them about their criticisms, while leaving to a later day the determination whether plaintiff actually has a basis for suing them. Thus, regardless of what test this Court may adopt to evaluate the sufficiency of WRNN's claims, it is clear that such claims must be filed to justify the issuance of an order compelling production. *See, e.g., In re Subpoena Duces Tecum to America Online Inc.*, Misc. Law No. 40570 (Va Cir. Ct., Fairfax 2000) (“[B]efore a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made.”); *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). *Cf. Quad Graphics, Inc. v. Southern Adirondack Library System*, 174 Misc. 2d 291, 664 N.Y.S.2d 225 (NY Sup. Ct., Saratoga County 1997) (refusing to compel identification of plaintiff's employee using library to surf the web on company time where doing so would breach protected interests and no criminal charges have been filed).

However, First Amendment considerations received no attention when the Court was considering WRNN's motion for leave to pursue discovery from Yahoo!. To the contrary, discovery was allowed only because Yahoo!, whose interests were not really at stake, did not object to the discovery; while no party whose interests **were** at stake was given a chance to object. Thus, the responsibility to protect the First Amendment rights of the posters should be met on this motion.

**C. This Court Should Require WRNN to Demonstrate That It Has Viable Claims.**

Because compelled identification of anonymous speakers trenches on their First Amendment right to remain anonymous, the First Amendment creates a qualified privilege against disclosure. The law pertaining to this issue is in its infancy – so far as we have been able to discover, there is no decision on point by any court in this state. However, in libel and other similar cases, the courts

apply a three-part test when deciding whether to compel the production of documents that would reveal the name of an anonymous source. Under that test, the person seeking to identify the anonymous speaker must show that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of its case; (2) disclosure of the source is “necessary” to prove the issue because the party seeking disclosure can prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *Garland v. Torre*, 259 F.2d 545, 550-551 (2d Cir. 1958) *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Accord Connecticut State Board of Labor Relations v. Fagin*, 33 Conn. Sup. 204, 206-207, 370 A.2d 1095 (1976).

In a number of recent cases, other courts have enunciated a similar standard that plaintiffs must meet before they can compel the identification of an anonymous Internet speaker. The leading case is *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants who had registered Internet domain names that used the plaintiff’s trademark. The court expressed concern about the possible chilling effect that such discovery could have:

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

*Id.* at 578.

Accordingly, the *Seescandy* court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against

them, thus giving them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the trademark claims that the plaintiff in that case was bringing against the anonymous defendants. *Id.* at 580.

Two recent state court decisions have followed *Seescandy* in deciding whether to require the identification of posters on Internet message boards. The most recent decision is *Dendrite Int'l v. Doe*, No. MRS C-129-00 (N.J. Super. Chancery, November 28, 2000), published unofficially at <http://www.citizen.org/litigation/briefs/dendrite.pdf>; copy attached to this brief. Dendrite, a global provider of software services for pharmaceutical companies, sued four anonymous posters on the Yahoo!'s Dendrite Message Board, alleging that some of them were employees or former employees who had violated their employment agreements by revealing trade secrets or criticizing the company publicly, and that some of them had defamed the company. The company moved for leave to commence discovery before service of the complaint to identify the defendants. Judge Kenneth MacKenzie began by ordering, sua sponte, that Dendrite publish notice of its motion on the Message Board itself, thus notifying the defendants that their anonymity was at risk, and include information on how to find a lawyer in the local area through the Bar referral service. Two of the four defendants promptly retained counsel and averred that they were not employees. The plaintiff submitted a copy of its standard employment agreement, which it was trying to enforce, along with testimony that all employees were required to sign the agreement. It also filed affidavits from officers attesting to the falsity of certain statements, and evidence purporting to show the impact of the statements on the company's stock prices.

The court embraced the *Seescandy* approach, Opin. at 5-6, particularly in light of "New Jersey's commitment to maintaining the anonymity of individuals in specific situations and the need

for safeguards to ensure that this anonymity is protected.” *Id.* 8. Accordingly, Judge MacKenzie required Dendrite to prove a prima facie case on each alleged cause of action, which meant showing that it had a realistic chance of prevailing on the merits and that it was not seeking to identify the defendant simply for the sake of exposure. Specifically, with respect to the claim that certain defendants had revealed confidential business information and violated their employment agreements, the court refused to allow two defendants to be identified because the plaintiff had not shown exactly which information constituted a trade secret, *id.* 16, and because the plaintiff had not rebutted their contention that they were not its employees. *Id.* 16-17. The court further found that plaintiff’s evidence of harm from the statements was insufficient under New Jersey law to support a defamation claim. Last, the court indicated that it would be willing to entertain any arguments of the two anonymous defendants who had not appeared, such as the possibility that they may not have signed the alleged employment agreements, but only if they appeared (anonymously) to argue for their rights. Thus, the *Dendrite* decision strongly supports Doe’s arguments against disclosure here.

Another very recent case articulating the standard for protecting anonymous Internet speakers is *Melvin v. Doe*, decided in the Court of Common Pleas of Allegheny County Pennsylvania on November 15, 2000, unofficially published at <http://www.aclu.org/court/melvin.pdf>; copy of decision attached. In *Melvin*, a judge sued an individual who had criticized her on an America Online web site for allegedly lobbying the governor of Pennsylvania to appoint a particular local attorney to the local bench. The court ruled that “[a] plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit. [Accordingly], plaintiff should not be permitted to engage in discovery to learn the identity of the Doe defendants until the Doe defendants had an opportunity

to establish that, as a matter of law, plaintiff could not prevail in this lawsuit.” Opin. 2 and n.2. Thus, drawing from established case law recognizing the existence of a right to speak anonymously unless the speech is actionable, *id.* 6, “the complaint on its face [must] set forth a valid cause of action and . . . the plaintiff [must] offer testimony that will permit a jury to award damages.” *Id.* 14. Accordingly, the court deferred the attempt to identify the defendant until the court had satisfied itself that the plaintiff had presented testimony sufficient to overcome a motion for summary judgment. (After conducting this analysis, the court ultimately determined that the plaintiff could identify the defendant, albeit subject to a protective order.)

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

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

*In re Subpoena Duces Tecum to America Online Inc.*, Misc. Law No. 40570 (Va. Cir. Ct. Fairfax Cty. 2000) (unofficially published at <http://legal.web.aol.com/aol/aolpol/anonymous.html>; copy attached to this brief).

Similarly, a recent decision applying Canadian common law required the plaintiff to present evidence in support of its defamation claim before ordering enforcement of a subpoena for the identity of a John Doe defendant. *Irwin Toy, Ltd. v. Doe*, No. 00-CV-195699 CM (September 6, 2000) (copy attached). The Ontario Superior Court of Justice ruled that mere allegations were not

sufficient, because otherwise anonymity on the Internet would be too easily shattered based on spurious claims.<sup>5</sup>

Although each of these cases sets out a slightly different standard, each requires a court 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 unnecessarily trammled. Put another way, the qualified privilege to speak anonymously requires the Court to review a would-be plaintiff's claims, and the evidence supporting them, to ensure that the plaintiff has a valid reason for piercing each poster's anonymity.

From these cases and the constitutional considerations on which they are based, the steps that this Court should follow to decide this motion become apparent. First, the Court should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and should stay any discovery until they have had the time to retain counsel. *Seescandy*, 185 F.R.D. at 579. That was what Judge MacKenzie did in *Dendrite Int'l v. John Does 1 to 14*, No. MRSC-129-00 (N.J. Super. Chancery), where notice of an application for discovery to identify anonymous message board critics was posted on the message board so that the individuals concerned could retain counsel to voice their objections, if any. *See* <http://messages.yahoo.com/bbs?.mm=FN&action=m&board=4688055&tid=drte&sid=4688055&mid=867>. In that case, once notice was given, several of the posters retained counsel to object to the requested discovery, and each poster who appeared was granted protection against disclosure. Here, by contrast, plaintiff has never taken any steps to notify any of the individual posters whom it seeks to identify, and Yahoo! has given notice only to

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<sup>5</sup> In several unreported cases, judges, mostly responding to ex parte requests for discovery, have ordered Internet service providers to identify their customers without giving any apparent consideration to the issues discussed in this memorandum.

webmaster and one message board poster, known as RNNWatch. No further consideration should be given to the possibility of identifying the other posters until notice has been given and the posters have been given time to see the notice and retain counsel if they choose to do so.

Second, the Court should require plaintiff to set forth the exact statements by each anonymous poster that is alleged to have violated its rights. To date, plaintiff has not set out a single one of the allegedly unlawful communications; until it does so, it should be denied the right to pursue any discovery against Yahoo! Indeed, under New York law, which applies here pursuant to the choice of law principles discussed earlier in this brief, WRNN is required to set forth the defamatory communications *in haec verba*. *Bobal v. RPI*, 916 F.2d 759, 763 (2d Cir. 1990) (applying New York law under *Erie* doctrine); CPLR § 3016(a).

Third, once plaintiff has provided specific statements, the Court should review each statement to determine whether it is facially actionable. Here, although WRNN has alleged that some of the statements of some of the posters are “false and defamatory,” it has not alleged the other elements of a defamation cause of action, such as that the statements are of and concerning WRNN, that they were made with malice, or that the statements are fact and not opinion. Moreover, because many of the messages on the web site relate to labor disputes between plaintiff and its current and former employees, WRNN is required to both plead and prove actual damages before it can proceed with its libel claims. *Plant Guard Workers Local 114 v. Linn*, 383 U.S. 53, 64-65 (1967). Plaintiff has not made such a showing.

Fourth, once the Court has determined that the complaint states a cause of action against each of the posters, it should require plaintiff to present evidence on each element of its cause of action sufficient to demonstrate that it has some likelihood of success on the merits of its claim. After all, the compelled identification of a speaker is a significant form of relief against that speaker – indeed,

it is all the relief that can be obtained in a proceeding such as this one, in which no damages or equitable relief are sought based on the allegedly wrongful speech. Ultimate relief should not be awarded in litigation unless the plaintiff presents an evidentiary basis for such relief.

Indeed, several courts have denied bills of discovery for failure to present sufficient evidence to make out a factual basis to demonstrate that the plaintiff does, in fact, have a cause of action, *Cohen v. Connecticut State Med. Soc.*, 1993 Conn. Super. LEXIS 2786, at 5 (New Haven Dist. 1993), or failure to demonstrate that the plaintiff has a viable cause of action against the person about whom information is sought. *Nestor v. Travelers Indemnity Co.*, 1992 Conn. Super. LEXIS 1094 (New Haven. Dist. 1992). “The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action.” *Berger v. Cuomo*, 230 Conn. 1, 7, 644 A.2d 333, 337 (1994). Thus, for example, in *Caputo v. Danbury Hospital*, 1996 Conn. Super. LEXIS 723 (Danbury Dist. 1996), the court denied the bill of discovery “on the ground that there is no competent evidence before it to support a finding of probable cause. The application submitted by Caputo is not verified, nor are any of the alleged facts set forth in affidavit form. Furthermore, . . . statements by attorneys are not evidence.” Here, too, the Court has nothing but the most conclusory assertions by plaintiff’s attorney, and no detailed facts to show probable cause to believe that plaintiff has a cause of action. By applying this requirement, the Court could deny the requested discovery without reaching the constitutional questions presented in this memorandum.<sup>6</sup>

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<sup>6</sup> Similarly, the plaintiff would not have been able to file a petition for pre-litigation discovery in the New York courts without explaining the precise basis for its claims against Doe and against each poster, and presenting proof of the facts on which its intended cause of action were reliant. *Scattoreggio v Cablevision Sys. Corp.* 203 App. Div. 2d 468, 610 NYS2d 319 (2d Dept 1994).

Finally, after the Court has satisfied itself that an anonymous poster has made at least one statement that is potentially actionable,

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

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

In effect, because of the irreparable injury that disclosure of the names of Doe and the message board posters would inflict by denying them the state and federal constitutional right to speak anonymously, this aspect of the test should employ a standard at least as high as that for a preliminary injunction, to determine whether this particular form of equitable relief should be awarded at the outset of the case.

If plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case, particularly those elements that are based on information within its own control, there is no need to breach Doe's anonymity. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The requirement of sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the requirements 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, such identification is scarcely "necessary."

Indeed, some courts have gone even further and required the 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). Under that approach, the plaintiff is required to meet the summary judgment standard of showing that there are genuine issues of fact, or that the plaintiff can prevail as a matter of law, 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.

In this case, there are neither sufficient allegations, nor any evidence, to establish that Doe or any of the message board posters have violated the plaintiff’s rights in any way. Thus, there is no basis for depriving Doe of her right to anonymity, and the subpoena should be quashed.

### **CONCLUSION**

The motion to quash the subpoena should be granted.

Respectfully submitted,

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