UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NAJI A. ALKATEEB and DEANNA R. WILSON-ALKAEEB,	)	
Plaintiffs,	)	
v.	)	Case No. 05-cv-4683 (LMM)
DOES 1-15,	)	
Defendants.	)	

MEMORANDUM OF PUBLIC CITIZEN AS AMICUS CURIAE

STATEMENT OF THE CASE

The Internet is a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union,* 521 U.S. 844, 853, 870 (1997),

> From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

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

Knowing that people love to share their opinions with anyone who will listen, many companies have organized outlets for citizen discussion. Yahoo! and Raging Bull, for example, have separate "message boards" for each publicly traded company. Many newspapers provide "blogs" for citizens to discuss particular topics, or the affairs of particular communities. Many companies create chat areas, hoping to increase the number of visits to their web sites by giving customers extra reasons to return even when they do not have a specific shopping objective in mind. Typically, these outlets are electronic bulletin board systems where individuals can discuss major companies, public figures, or other subjects, at no cost by posting comments for others to read and discuss.

The individuals who post messages generally do so under pseudonyms – similar to the system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using a real name, but the chat rooms at issue here, http://weddings.theknot.com/ talk/talk.aspx and http://forums.photobucket.com/, are typical in that most people choose nicknames. These often colorful monikers protect a writer's identity from those who express disagreement, and encourage uninhibited exchange of ideas and opinions. Exchanges can be very heated and, as seen from the

messages and responses on the chat rooms at issue in this case, they are sometimes filled with invective and insult. Most, if not everything, said in such forums is taken with a grain of salt.

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

The two chat rooms at issue here are, as alleged in the complaint, devoted to discussions of wedding matters and photographs, respectively; but in many cases, the exchanges often become quite personal. Plaintiffs, who live in Arizona, participated in some of these discussions, but were offended by the personal attacks that ensued. Plaintiffs made copies of the offending messages, N. Alkateeb Aff. ¶ 9, but have not made them available to the Court; instead, the complaint contains an appendix that quotes some excerpts from the messages, or simply characterizes them. In addition, plaintiffs' affidavits have summarized the posts or, in some instances, quoted portions of them. Many of the statements cited by plaintiffs are nasty and offensive.

On May 13, 2005, plaintiffs sued fifteen Does, without identifying the pseudonyms they had

used or specifying the unlawful statements made by each. Personal jurisdiction was alleged on the basis that the Internet may be accessed anywhere, including New York, and that the Does' Internet Service Providers could also be found in New York. Subject matter jurisdiction was alleged under "28 U.S.C. § 1332(a) (diversity of citizenship)." However, there were no allegations about the citizenship of the defendants; indeed, the only basis for alleging diversity is the words quoted in the previous sentence. The complaint alleged that the various defendants had defamed plaintiffs by making false statements about them, invaded their privacy by making nasty and distorted statements about them, and tortiously inflicted emotional distress on them. The complaint did not specify which defendants had committed which torts by making which statements about them. However, the complaint attached an exhibit listing twenty-two pseudonyms, accompanied by quotations or characterizations of their statements. The complaint alleged that the defendants had used all of the pseudonyms, but did not explain why there were 15 defendants but 22 pseudonyms.

Without notice to the posters, plaintiffs moved ex parte for leave to subpoena identifying information about all of the user names listed in Exhibit A. The court endorsed this proposed discovery. Plaintiffs then served subpoenas that exceeded the discovery they had requested. For example, the subpoena to "The Knot" listed 35 screen names to be identified. The record does not reflect what methods were used to notify the various targets of the subpoenas, although three Doe defendants, who have now moved to quash the subpoena, apparently did get notice.

SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate their views at minimal cost while reaching all who will listen, and full First Amendment protection applies to communications on the Internet. Longstanding precedent also 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 defendant'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 anonymous speech but is exposed to the plaintiff's efforts to restrain or oppose his speech. For example, an employer might discharge a whistleblower, or 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 extra-judicial action may be the only reason for many such lawsuits. 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. Moreover, 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.

Some individuals may speak anonymously because they fear the entirely proper consequences of improper speech, such as the prospect of substantial damages liability if they tell lies about

somebody they do not like for the purpose of damaging her reputation. The challenge for the courts is to develop a test for the identification of anonymous speakers which makes it **neither** too easy for vicious defamers to hide behind pseudonyms, **nor** too easy for a big company or a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under a tort or contract theory.

This Court should expand 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 free speech rights. Specifically, when faced with a demand for discovery to identify an anonymous speaker, a court should (1) provide notice to the potential defendants and an opportunity to defend anonymity; (2) require plaintiffs to specify the statements that allegedly violate their rights; (3) review the complaint to ensure that it states a cause of action against each defendant; (4) require plaintiffs to produce evidence supporting each element of their claims; and (5) balance the equities, weighing the potential harm to plaintiffs from being unable to proceed against the harm to defendants from losing the right to remain anonymous, in light of the strength of plaintiffs' evidence of wrongdoing. The court can thus ensure that plaintiffs do not obtain an important form of relief – identifying their anonymous critics – and that defendants are not denied important First Amendment rights, unless plaintiffs have a realistic chance of success on the merits.

Meeting these criteria can require time and effort on plaintiffs' part and may delay their quest for redress. However, everything that plaintiffs must do to meet this test, they must do to prevail on the merits in a case. So long as the test does not demand more information than plaintiffs will be reasonably able to provide shortly after they file the complaint, the standard does not unfairly prevent plaintiffs with a legitimate grievance from achieving redress against anonymous speakers.

Moreover, most cases of this kind will primarily involve demands for monetary relief, except

in the rare case where plaintiffs have sound arguments for a preliminary injunction, notwithstanding the strong rule against prior restraints of speech. Accordingly, although applying this standard may delay service of the complaint, it will not, ordinarily, prejudice plaintiffs. On the other hand, the fact that after defendants are identified, their right to speak anonymously has been irretrievably lost, counsels in favor of caution, and hence in favor of and requiring a sufficient showing on the part of plaintiffs, followed by a sufficient time for defendants to respond to that showing.

ARGUMENT

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

It is well-established that the First Amendment protects the right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *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 the literary efforts of Shakespeare and Mark Twain to 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.
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> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. The Internet is a public forum, and First Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Several courts have specifically upheld the right to communicate anonymously online. *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,* 119 S.Ct. 1450 (1999)*, aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998); *Global Telemedia v. Does*, 132 F. Supp.2d 1261 (C.D. Cal. 2001).

Internet users speak anonymously for various reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or according to 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 be discussing embarrassing subjects and may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. Speakers who send e-mail or visit a website leave behind electronic footprints that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original

senders. Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom.

A court order, even if granted for a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel production of individuals' identities in a situation that threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *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. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524.

Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of speakers to remain anonymous, justification for incursions on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).

In a closely analogous area of law, courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In such cases, many courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of the plaintiff's case; (2) disclosure of the source is "necessary" to prove the issue because the party seeking

disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *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).

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

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

Several courts have enunciated standards to govern identification of anonymous Internet speakers. In the leading case, a company sued four individuals who had criticized it on a Yahoo! bulletin board. *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which amici urge the Court to apply in this case:

> (1) 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. . . .
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> (2) [R]equire the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
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> (3) Determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants, [including whether] its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted.
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> (4) [Require] the plaintiff [to] produce sufficient evidence supporting each element of its cause of action, on a prima facie basis. . . .

> (5) [B]alance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
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> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.

Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (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):

> court-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.

Several federal courts have followed the same approach, considering **evidence** supporting plaintiff's claim before giving discovery to identify an anonymous defendant. The leading case in this District is *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), where 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 hundreds of songs that defendants had posted online were copyrighted and had been infringed. Other districts use a similar analysis. For example, 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 the ways in which certain comments were false. And, in *Equidyne Corp. v.*

Does 1-21, No. 02-430-JJF (D. Del., Nov. 1, 2002) at 6-7 (attached), the court followed *Dendrite* to the extent of considering evidence that the defendant had used the Internet to solicit proxies in support of candidates for director, but without describing his own holdings, and that no proxy statement had been filed for those candidates, thus showing a potential violation of the proxy rules.[1]

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.

Accordingly, the court required 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

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[1]Numerous state trial courts have also employed balancing approaches. A New York Supreme Court Justice followed *Sony* in *Public Relations Soc. of America v. Road Runner High Speed Online*, 2005 WL 1364381(NY Sup. May 27, 2005). In *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Conn. Super. 2003), the court took testimony that attested both to the falsity of the defendant's communication and to the damage that the communication had caused, and decided that the evidence was sufficient to establish "probable cause that it has suffered damages as the result of the tortious acts of defendant Doe," at *7, and therefore ordered identification. And, in a Virginia case, a company, having first sued a Doe in Indiana and obtained from that court a commission to seek discovery in another state, subpoenaed AOL in Virginia to identify an AOL subscriber. *In re Subpoena to AOL,* 52 Va. Cir. 26, 2000 WL 1210372 (Va. Cir. Fairfax Cty. 2000), *rev'd on other grounds sub nom., AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001) (emphasis added). The court noted that considerations of comity required it to respect the Indiana court's ruling that discovery was appropriate, nevertheless decided that it must be "satisfied by the pleadings **or evidence** supplied . . . 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." *Id.* at 34 (emphasis added).

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 each of these cases sets out a slightly different test, each court weighed plaintiff's interest in identifying the people who allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

III. Procedures That Courts Should Follow In Deciding Whether to Compel Identification of John Doe Defendants in Particular Cases.

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

First, when asked to subpoena anonymous Internet speakers, a court should ensure that the plaintiff has undertaken the best efforts available to notify the speakers that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendants have had the time to retain counsel. *Seescandy*, 185 F.R.D. at 579. Thus, in *Dendrite*, the court required the plaintiff to post on the message board a notice of its application for discovery. The notice identified the four screen names that were sought to be identified, and gave information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. (The posted Order to Show Cause is attached)**.** The Appellate Division specifically approved of this requirement and ordered trial judges in New Jersey to follow it. 342 N.J. Super. at 141, 775 A.2d at 760. Because, in a suit over anonymous speech, preliminary

injunctive relief would ordinarily be barred by the rule against prior restraints, and the only relief sought is damages, there is rarely any reason for expedition that counsels against requiring notice and opportunity to object.[2] A concomitant of requiring notice to the anonymous defendant and identifying the specific statements alleged to be actionable is allowing enough time to respond to the allegedly unlawful statements – ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment. If, as commonly occurs, plaintiffs make an extensive showing in response to the motion to quash, the time for reply must be adequate.

In this case, it would have been simple for plaintiffs to have posted notice of their motion in the chat rooms themselves or, with respect to the email addresses that they have obtained for some of the Does, to send them email notice of the subpoena. Although such transmission is not tantamount to service of a summons, it would have represented plaintiffs' best efforts to provide fair notice to the Does. In future cases, amici suggest that courts should not entertain motions to identify anonymous Internet speakers until they are assured that comparable efforts have been made.

In this case, at least three Doe defendants have apparently received notice, because they have filed a motion to quash. However, there is no assurance that all owners of the other 32 pseudonyms received actual notice. Generally speaking, users commonly register with a message board ISP and then change email addresses without thinking to provide notice of the change to all of the places where they have registered using the address. Moreover, some ISP's still do not provide notice to their customers before they respond to subpoenas. We are advised that movants received notice from Google, not from TheKnot, which implies that many owners of Knot pseudonyms may NOT have

[2]Ordinarily, the plaintiff will ask the ISP for assurances that identifying information will be set aside and saved from any routine destruction of server files. In our experience, ISP's behave responsibly in response to such requests. If such assurances were withheld, the plaintiff could apply to the Court for an appropriate order.

received any notice at all. In this regard, although TheKnot collects email addresses in the course of member registration, http://www.theknot.com/join/me_join.aspx? target=talk_boards.htm?reply =y& board=C2001001&Object=1123508701233156, its privacy policy does nor refer to notifying members that data has been subpoenaed. It is for such reasons that the Cyberslapp Coalition, of which amicus is a part, urged all ISPs to provide such notice. *See* http://www.cyberslapp.org/ ISPLetter.cfm. Accordingly, an order such as the one that was entered and affirmed in *Dendrite* provides an important procedural protection for the right to speak anonymously.

B. Require Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, courts should require plaintiffs to quote the exact statements by each anonymous speaker that is alleged to have violated their rights. It is startling how often plaintiffs in these sorts of cases do not bother to do this. Instead, they may quote messages by a few individuals, and then demand production of a larger number of identities.

Plaintiffs here provided an exhibit quoting excerpts from posts by a number of the Does, but for nine Does, the exhibit simply asserts that the Doe "participated in chat sessions about Plaintiffs," without specifying anything that they said. And even for the excerpts, plaintiffs have not provided the actual postings so that the Court can be certain that the quotations are accurate and not taken out of context. Because plaintiffs have been making copies of statements about them since July 2004, Naji Alkateeb Aff. ¶ 9, there is no excuse for their having failed to provide the complete postings to the Court.

The failure to provide the actual remarks may well be prejudicial. For example, plaintiff Naji Alkateeb's affidavit asserts that defendant Leanna Banana posted material "and inferred [sic] that

I was an Arab terrorist;" but these statements are nowhere quoted, and Exhibit A states that Leanna Banana "posted pictures of personal information about Plaintiff including Arabs in car." Whether statements are reasonably susceptible of the defamatory meaning is a question of law for the Court, and hence Alkateeb's averments about what the posters implied cannot settle the matter for the Court. Rather, the actual statement would have to be reviewed to determine whether this defendant had made any statements that could be actionable if they are false.

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

Third, the court should review each of the statements on which the complaint is based and determine whether they are facially actionable. Here, several serious problems are apparent on the face of the complaint.

First of all, the complaint does not show a proper basis for either personal jurisdiction or subject matter jurisdiction. The complaint asserts that the Court has personal jurisdiction over each of the Does because they have made statements on the Internet that can be downloaded in New York, and because the companies that operate the message boards can be found in New York. However, it is well-established that personal jurisdiction cannot be asserted over persons who make statements on the Internet anywhere that the Internet may be viewed – rather, courts have used a "sliding scale" analysis under which Internet speakers are more exposed to jurisdiction in locations other than their residences the greater the degree of "commercial interactivity" of their web activity. *E.g.*, *ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002); *Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002); *Mink v. AAAA Development*, 190 F3d 333 (5th Cir. 1999). Several decisions in this District have adopted it this analysis, *Realuyo v. Villa Abrille*, 2003 WL 21537754 (S.D.N.Y. July 8, 2003), *aff'd mem.*, 93 Fed.Appx. 297 (2d Cir. 2004); *Citigroup v. City Holding Co.*, 97 F. Supp.2d 549, 565-566 (S.D.N.Y. 2000), and in *Bensusan Restaurant Corp. v. King*, 126

F.3d 25 (2nd Cir. 1997), the Court of Appeals refused to find that operation of a website using the trademark of a New York café owner constituted tortious action in New York under the state long-arm statute. The Knot is, to be sure, a commercially interactive web site, so if plaintiffs were suing The Knot they might well be able to sue anywhere in the country; but the message board posters are not subject to being sued in New York even if The Knot's servers are located in New York.

Nor are there proper assertions of subject matter jurisdiction. Plaintiffs assert claims only under state tort law, but they make no allegations about the citizenship of the defendants, and give no reason to believe that **none** of the thirty persons whose information they have subpoenaed are citizens of Arizona, thus defeating complete diversity. To be sure, there may no way for plaintiffs to know the citizenship of the anonymous defendants, but their lack of knowledge is not a proper basis for suing in federal court. *Brooks v. Johnson and Johnson*, 685 F.Supp. 107, 110 (E.D. Pa. 1988); *Eckert v. Lane*, 678 F. Supp. 773, 776 (W.D. Ark.1988).

In any event, few of the statements listed in Exhibit A or recited in the affidavits appear to be actionable. Many of them are catty, mean, and in some cases offensive, to be sure, but name calling, playing games with the letters in a plaintiff's name, referring to possible Americanization of names, and the like are neither defamatory nor so outrageous as to afford a basis for suit based on infliction of emotional distress. Similarly, such terms as "moron," "paranoid," "crazy," "psycho," or "screws loose" are not generally taken as factual statements of mental illness, and thus are not the proper basis for a defamation action. Courts have "refused to hold defamatory on its face or defamatory at all an imputation of mental disorder which is made in an oblique or hyperbolic manner." *Bratt v. IBM Corp.*, 392 Mass. 508, 516, 467 N.E.2d 126, 133 (Mass. 1984). To be sure, this is the sort of speech against which we caution our children, but that does not mean that every hurtful thing that may be said on the playground is a basis for a lawsuit, or indeed for a federal case.

Expressions of opinion are not actionable for defamation, and the issue of whether a statement is opinion or fact is one for the Court to resolve as a matter of law. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286, 508 NYS 2d 901 (1986). Moreover, just as readers anticipate that comments appearing in the editorial section of a newspaper "will represent the viewpoints of their authors and, as such, contain considerable hyperbole, speculation, diversified forms of expression and opinion," *Brian v. Richardson*, 87 N.Y.2d 46, 53, 637 N.Y.S.2d 347 (1995), so, too, statements on a message board are typically exaggerated. Most readers will take them with a grain of salt rather than anticipating complete objectivity. *Global Telemedia v. Does*, 132 F. Supp.2d 1261, 1267 (C.D. Cal. 2001). The very context thus militates against a finding of defamatory meaning.

There may be a few statements at issue here that might form the basis for a defamation action, although the context in which they were made remains to be seen. Assertions that Naji Alkateeb beats his wife or that Deanna Alkateeb was engaged in "stalking," and statements boasting about hacking into plaintiffs' computer are examples that could conceivably afford a basis for litigation. But the Court should consider the claims against each defendant, based on the complete context, before deciding whether the subpoena to identify that defendant should be enforced.

D. Require an Evidentiary Basis for the Claims.

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

and relief is generally not awarded to a plaintiff absent evidence in support of the claims. Withholding relief until evidence is produced is particularly appropriate where the relief may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark, California Law Week*, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who bring cases like this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. *E.g.,* http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=74969&rfi=8. One leading advocate of discovery procedures to identify anonymous critics urges corporate executives to use discovery first, and to decide whether to pursue a libel case only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*; Fischman, *Protecting the Value of Your Goodwill from Online Assault* (*see* http://www.fhdlaw.com/html/whats_new.htm for links to both articles). Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer and Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers similarly suggest that clients decide whether to pursue a defamation action only after finding out who the defendant is. *Id.* When respected members of the Bar are seeking clients by promoting the benefits that can be obtained from subpoenas without winning the lawsuit, the dangers posed by a mere "good faith" standard when libel suits are brought pro se are even more troubling.

As Eisenhofer and Liebesman acknowledge, the mere pendency of a subpoena may have the effect of deterring other members of the public from discussing the public official who has filed the

action. However, imposing a requirement that proof of wrongdoing be presented to obtain the names of the anonymous critics may well persuade plaintiffs that such subpoenas are not worth pursuing unless they are prepared to pursue litigation.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources that require a party seeking discovery of information protected by the First Amendment to show reason to believe that the information will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976); *cf. Schultz v. Reader's Digest*, 468 F. Supp. 551, 566-567 (E.D. Mich. 1979). In effect, the plaintiff should be required to meet a summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues on which it needs to identify the anonymous speakers, before it gets the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no need 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). The requirement that there be sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

The extent of the proof that a proponent of compelled disclosure of the identity should be

required to offer may vary depending on the element of the claim that is in question. On many issues in suits for tortious speech, several elements of the plaintiff's claim will be based on evidence to which the plaintiff is likely to have easy access, even access that is superior to the defendant. Thus, it is ordinarily proper to require a plaintiff to present proof of these elements of its claims as a condition of obtaining or enforcing a subpoena for the identification of a Doe defendant. Plaintiff might also be able to produce evidence of context (for example, other accusations) that makes it reasonable to treat statements as actionable.

For example, the plaintiff is likely to have ample means of proving that a statement is false. This means more than simply making a general averment that all of the statements are false. Naji Alkateeb has presented detailed averments about the falsity of two of the statements (denying that he hits his wife or that he is a terrorist). There is no reason why plaintiffs cannot present similar proofs with respect to each of the statements on which they rely here.

In *Alvis Coatings v. Doe*, *supra*, for example, the plaintiff introduced a detailed affidavit listing specific statements by a single Doe, and explaining the ways in which each such statement was false. A copy of that affidavit is attached to this brief. Similarly, in *Sony Music*, plaintiffs introduced a listing of several copyrighted songs that each of the Doe defendants had posted for download, several hundred pages of "screen shots" of lists of songs that three of the defendants had made available for download, and a detailed affidavit explaining the procedure that plaintiffs had used to determine the copyrighted character of the songs on which plaintiffs were suing, as well as averring that plaintiffs had comparable screen shots of hundreds of songs offered by each of the Does who had been sued. 326 F. Supp.2d at 565. There is no reason why plaintiffs cannot introduce comparable evidence regarding each of the Doe defendants here, to justify their request that the Court strip these defendants of their anonymity.

To the extent that proof of damages is an element of the tort claims, a plaintiff should be in a position to provide evidence that specific statements have caused discernible injury. The affidavits assert that "the statements made on the web sites" have caused them injury by putting them in fear for their own safety, or that of their unborn child, but it is inconceivable that this claim of injury could be intended to apply to each of the statements alleged to be actionable. For example, "Deanna dear...Don't you have to go to Whole Foods or something?", even if actionable, could scarcely have caused the sort of injury claimed in plaintiffs' affidavits

Some have argued against a requirement that the plaintiff present evidence on the theory that such a rule is onerous for plaintiffs to meet. No evidence supports this concern. In most of the cases cited in Part II above, courts reviewed evidence as part of their analyses, and nevertheless found sufficient evidence and **enforced** the subpoena. In *Dendrite* itself, two Doe defendants were identified. Similarly, in *Immunomedics v. Doe*, 342 N.J.Super. 160, 775 A.2d 773 (2001), a companion case to *Dendrite*, enforcement of the subpoena was affirmed.

E. Balance the Equities.

Even after the Court has satisfied itself that the speaker has made an actionable statement,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . ... On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
>
> *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo. App. 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporters' source disclosure case, *Dendrite* called for individualized balancing when a plaintiff seeks to compel identification of an anonymous Internet speaker:

> 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.

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

The adoption of a standard comparable to the test for evaluating a request for a preliminary injunction – considering the likelihood of success and balancing the equities – is particularly appropriate because an order of disclosure is an injunction, and denial of a motion to identify the defendant does not compel dismissal of the complaint, but only defers its ultimate disposition. Apart from the fact that, under *New York Times,* "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters," *Gertz v. Welch*, 418 U.S. 323, 341 (1974), the issue at this stage of the case is not whether the action should be dismissed or judgment granted rejecting the tort claims in the complaint, but simply whether a sufficient showing has been made to overcome the right to speak anonymously.

Denial of a motion to enforce a subpoena identifying defendants does not end the litigation, and hence is not comparable to motion to dismiss or a motion for summary judgment. **At the very least, plaintiffs retain the opportunity to renew their motion after submitting more evidence.**

In contrast, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. And it is settled law that any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). Indeed, the injury is magnified where the speaker faces the threat of economic or other retaliation. If, for example, the person whom

the plaintiff seeks to identify is employed by someone over whom the plaintiff exercises influence or control, the defendant could lose a great deal from identification, even if the plaintiff has a wholly frivolous lawsuit.

In this case, it does not appear that the balancing test will provide much assistance to the defendants. Name-calling and general nastiness directed to other participants in an online discussion is certainly speech, but little of the speech relates to matters of public concern. Like the wholesale offering of copyrighted songs for download, this is not speech of enormous value as compared, for example, to criticism of public officials or publicly traded companies. *Cf. Sony Music*, *supra*, 326 F. Supp.2d at 564.

On the other side of the balance, the Court should consider the strength of the plaintiffs' case and their interest in redeeming their reputation. In this regard, the Court can weigh not only the strength of the plaintiffs' evidence but also the nature of the allegations and their propensity to cause damage to important interests. In a case such as *Biomatrix v. Costanzo,* Docket No. BER-L-670-00 (N.J. Super., Bergen Cy.), where the poster alleged that the head of a biotech company was a doctor who had collaborated with the Nazis in heinous medical experiments, or *Hvide v. Doe*, Case No. 99-22831 CA01 (Fla. Cir. Ct, 11th Judicial Cir., Dade Cy.), where a poster claimed that the head of the company had embezzled corporate funds, and the plaintiff lost his job as a result of the claims, or *HealthSouth Corp. v. Krum,* Case No. 98-2812 (Pa. Ct. C.P. 1998), where the poster claimed that he was having an affair with the CEO's wife, a court will have little difficulty in recognizing a real tort case and weighing the plaintiff's interest in disclosure quite heavily. On the other hand, it is not at all clear why the plaintiffs here are concerned about their reputation among the denizens of these chat rooms. To be sure, any member of the public could patronize the chat rooms, but the complaint provides no reason to believe that what is said there matters to anyone besides those who were

visiting them at any particular time. Accordingly, there may be relatively little to weigh on either side of the balance, apart from plaintiffs' theoretical interest in being able to bring a lawsuit.

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

The main advantages of the *Dendrite* test are the procedural protections that it affords to ensure that Doe defendants have an opportunity to preserve their anonymity, and its flexible analysis of the interests and equities at stake in any particular case. The test seeks to balance the relative interests of the plaintiff who claims that her reputation has been unfairly besmirched, or that she has been otherwise wronged, against the interest in anonymity of the Internet speaker who claims to have done no wrong, and provides for a preliminary determination based on a case-by-case, party-by-party, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of tort victims to be compensated for their losses. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice, while ensuring at the same time that persons with legitimate reasons for speaking anonymously while making measured criticisms will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed 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 defamation 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 reported staggering statistics about the number of subpoenas they have received – AOL's amicus brief in *Melvin* reported the receipt of 475

subpoenas in a single fiscal year, and Yahoo! told one judge at a hearing in California Superior Court that it had received "thousands" of such subpoenas.

Although we have no firm numbers, amici believe that the adoption of strict legal and evidentiary standards for defendant identification in several different courts has encouraged would-be plaintiffs and their counsel to stop and think before they sue, and ensured that litigation is undertaken for legitimate ends and not just to chill speech. At the same time, those standards have not stood in the way of identifying those who face legitimate libel and other claims. We urge the Court to preserve this balance by adopting the *Dendrite* test that balances the interests of defamation plaintiffs to vindicate their rights in meritorious cases against the right of Internet speaker defendants to maintain their anonymity when their speech is not actionable.

CONCLUSION

The Court should deny enforcement of the subpoenas without prejudice.

Respectfully submitted,

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