SUPREME COURT OF THE STATE OF NEW YORK
COUNT OF NEW YORK
----------X

In the Matter of the Application Pursuant to
CPLR 3102 of

PAMELA GREENBAUM,

Index No: 102063/07

Petitioner,

-against-

GOOGLE, INC., d/b/a BLOGGER and
BLOGSPOT.COM,

Respondent.
----------X

MEMORANDUM OF LAW OF PROPOSED INTERVENOR "ORTHOMOM" IN OPPOSITION TO PETITIONER'S APPLICATION FOR PRE-COMMENCEMENT DISCLOSURE

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

Scarola Ellis LLP
888 Seventh Avenue
New York, NY 10106
(212) 757-0007

Attorneys for Proposed Intervenor "Orthomom"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

MISCELLANEOUS

STATEMENT OF THE CASE

This case involves a vague claim of defamation advanced by Pamela Greenbaum, a public official on the eve of her campaign for re-election to the Lawrence, New York school board, against a blogger who has discussed a variety of issues arising in her community. Among other issues, the blogger has discussed whether the public schools should provide financing for educational services to children who attend private religious schools. In reaction to her statements, other people have posted comments on the blog accusing the official of being a bigot. Instead of suing her critics for defamation as Doe defendants, the official initiated a prelitigation discovery petition against Google, which provides the servers where the blog is hosted, asserting that the blogger and her commenters either had accused her of being a "bigot" or had implied that her positions reflected anti-Semitism.

Because federal law immunizes the blogger herself from suit over comments that others post on her blog, because the statements at issue are not defamatory, and because the public official's showing in support of discovery fails to meet the consensus standard for overcoming the First Amendment right to speak anonymously, the Court should deny the petition.

* * * *

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

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

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. Google's Blogspot gives individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, major companies, or other topics while leaving it open for visitors to post their own comments.

The individuals who post messages in such forums generally do so under pseudonyms – similar to the system of truck drivers using "handles" speaking on their CB's. Nothing prevents an individual from using a real name, but the blog at issue here is typical in that most choose nicknames. These monikers protect the writer's identity from those who express disagreement, and encourage uninhibited exchange of ideas and opinions. Such exchanges can be very heated. As on the blog here, they are sometimes filled with invective and insult, often directed at other posters.

One aspect of message boards and blogs makes them very different from almost any other form of published expression: Because any member of the public can express a point of view, a person who disagrees for any reason with something that is said – such as because she believes that a statement contains false or misleading information – can respond immediately, at no cost. Levy Affirmation, ¶ 19. That response will often have the same prominence as the offending message. A blog 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 response 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 same blog, the response is likely to be seen by much the same audience as those who saw the original criticism. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, is the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

The blog at issue here, orthomom.blogspot.com, is devoted to issues within both the Five Towns community on Long Island and the larger community of Orthodox Jewry, and provides current, and sometimes outspoken, social commentary and criticism. The blog's main author is Orthomom, who identifies herself as an Orthodox Jewish parent of school-age children in the Five Towns. Orthomom herself posts the main articles, but any reader can post a comment just under the article about which he desires to comment.[1/]

An important issue facing the Five Towns has been the division between Orthodox Jewish families, who make up a growing part of the population in Lawrence but send their children to private religious schools, and the rest of the population, whose children form the majority of the public school population. The Orthodox residents want the school system to spend some of its resources on providing certain educational services for their children, but some members of the school board have resisted those requests because they do not believe that the uses are constitutional or socially desirable. The popular majority has, in turn, rejected proposed school budgets and voted off the school board members who did not support their interests. *See* Levy Affirmation, Exhibit E.

Pamela Greenbaum is an elected member of the Board of Education of the Lawrence Public Schools, Union Free School District 15. Greenbaum has opposed the use of public school funds to provide educational services to private school children. Greenbaum has been criticized for this position, including on the Orthomom blog. On January 11, 2007, in the one article by Orthomom that Greenbaum specifically identifies as being defamatory, Orthomom took issue with Greenbaum's

---

1/ A comment poster has the option of posting under an existing Google or Blogger account, in which case the commenter's pseudonym will be hyperlinked to the commenter's own blog profile; or under another name (or pseudonym) of the commenter's own choosing, in which case the name used can be hyperlinked to the commenter's own web site; or as an entirely anonymous commenter. Every posting on the blog, both the blogger's articles and each of the comments, displays the time of posting. Levy Affirmation ¶ 19.

position, as quoted in a local newspaper, that private school children could only be allowed to use public school facilities if the public school's teachers were not involved in teaching those children at the public's expense. Order to Show Cause ("OSC") Exhibit A, page 10. Orthomom argued that such expenditures would be legal and that Greenbaum should not object simply as a matter of personal preference. *Id.*[2/] Orthomom also disputed Greenbaum's statement that the school board president was being buffeted by too many "factions pulling at him," and that he should "stop listening to everyone else and start listening to his heart." Orthomom argued that it is **desirable** for a school board president to try to listen to everyone. *Id.*[3/]

Many comments were appended to this article, some criticizing Greenbaum in much stronger terms. One commenter stated, "Pam Greenbaum is a bigot and really should not be on the board." OSC Exhibit B, at 1. Another said, "Greenbaum is smarter than she seems. Unfortunately, there is a significant group of voters who can't get enough of her bigotry." *Id.* at 1-2. Others accused Greenbaum of being an obstructionist and of putting forward the position of the local teachers' association which could support her in the election. *Id.* at 4. Still others took Greenbaum's side,

---

2/ "Um...what? Unless I'm mistaken, there is no law against district private school students being taught on public school property by public school teachers. The reason such an arrangement generally does not occur is a matter of the choice private school parents make to send their children elsewhere to be educated. In this case, we are discussing the prospect of private school students receiving extracurricular education from public school teachers on public school property. There is no connection whatsoever to the religious education these students may receive in another venue during the school day. I just don't see how Greenbaum can object on principle to the concept of district children being taught by district teachers on district property. Anyone remember Super Sunday, the (now-defunct) program where district teachers were paid to provide extracurricular activities to private school students on public school property? That was legal. And if she's discussing her personal preference as opposed to some legal issue with Dr. Mansdorf's suggestion, then...wow. Way to make it clear that you have no interest in helping the private school community in any fashion."

3/ "He should stop listening to everyone? In my estimation, a school board president who tries to listen to everyone, and tries to meet everyone in the district's needs, seems like a worthy president indeed." The article is attached to the Levy Affirmation as Exhibit F.

denouncing "pathetic attempts to make the new board members look good" and accusing Orthomom of having "a one-sided blog probably run by those complementing [sic] themselves." *Id.* at 5. Yet another poster denounced "U PEOPLE" for rejecting school budgets and driving "THE GOOD QUALITY FAMILIES" out of Lawrence. *Id.* at 6. The discussion continues in this vein. The words "anti-semite" and "anti-semitic" do not appear anywhere in either Orthomom's article or in the comments appended to it.

The Lawrence School Board will hold elections in the spring of 2007 for new three-year terms beginning next summer. http://www.lawrence.org/district/petitionsavailable.htm. Greenbaum filed a petition for prelitigation discovery dated February 8, 2007, under CPLR § 3102(c), contending that she needed the information to file a defamation action against Orthomom and the commenters on her blog. The proceeding was brought against Google, which could help identify Orthomom by revealing the Internet Protocol ("IP") numbers from which she made her postings and registered to create her blog, and the exact times of those acts. Google has similar information about the commenters on the blog. Levy Affirmation ¶¶ 12-14. Those IP numbers can be used to identify the Internet Service Providers ("ISP's") whose facilities were used to post the comments; subpoenas could then be served on the ISP's to identify the Internet users who used particular IP numbers at those particular times, ultimately leading to the identification of the commenters. *Id.*

According to the petition and the affirmations by petitioner and her counsel Adam Feder, Orthomom was responsible for publishing and disseminating "defamatory and untrue statements calling . . . Greenbaum a 'bigot' and 'anti-Semite.'" Feder Affirmation in Support of Request for Emergency Relief (capitalization corrected). Petitioner claimed that "the most recent of these postings" was published on January 11. *Id.* Although Orthomom's email address is posted on her blog, neither Greenbaum nor her lawyer notified Orthomom that Greenbaum was attempting to

compel disclosure of her identity. However, an article in the New York Daily News about Greenbaum's filing quoted liberally from the filing, and was then sent by a sympathetic member of the community to Orthomom by email. Levy Affirmation ¶ 18 and Exhibit B. The Court set a hearing on the Order to Show Cause for February 19. At that hearing, the Court, with the consent of both Google and Greenbaum, ordered that a hearing be held on April 5, 2007, and that Google provide notice to Orthomom so that she could appear to defend her anonymity.

SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when someone claims to have been damaged by an anonymous speaker's tortious speech, the courts must balance the right to obtain redress from the perpetrators of civil wrongs, against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, irreparably destroying the defendant's First Amendment right to remain anonymous.

Suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant 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. The

record here reveals a significant possibility of retaliation against Orthomom if she is identified.

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. Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deter valuable contributions to the marketplace of ideas.

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 others and damage their reputation. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for vicious defamers to hide behind pseudonyms, nor too easy for a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

This Court should join 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 defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying her anonymous critics – and that the defendant is not denied important First Amendment rights, unless the plaintiff has a

realistic chance of success on the merits.

Meeting these criteria can require time and effort on a plaintiff's part, but everything a plaintiff must do to meet this test, she must also do to prevail on the merits of her case. So long as the test does not demand more information than plaintiffs will be reasonably able to provide when they bring suit, the standard does not unfairly prevent plaintiffs with legitimate grievances from achieving redress against anonymous speakers.

ARGUMENT

I. Orthomom Should Be Allowed to Intervene to Oppose Discovery.

Orthomom is the real party in interest and would be clearly prejudiced were this action to proceed without her active involvement and the opportunity to oppose Greenbaum's request for discovery. Greenbaum is diametrically opposed to Orthomom's interests here. And, as is typically true in cases of this sort, Google, which hosts Orthomom's blog and is the only named respondent in this proceeding, regards itself as a stakeholder with respect to the identifying information in its possession, and will not argue one way or the other about whether disclosure is appropriate in this case. Thus, Orthomom's interests are not adequately represented by either of the parties to the proceeding. This fact strongly supports Orthomom's intervention. *St. Joseph's Hosp. Health Center v. Department of Health of State of N.Y.*, 224 A.D.2d 1008, 637 N.Y.S.2d 821 (App. Div. Dept. 4 1996). Indeed, the Court's order setting the April 5 hearing also ordered notice to Orthomom so that she would have the opportunity to appear at that hearing.

Under CPLR § 1012(a), intervention as of right is proper where the action involves "the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." In that regard, Greenbaum seeks to obtain information that Orthomom argues should remain confidential. Under CPLR § 1013, intervention by permission

is proper where there are issues of law or fact in common between the existing proceeding and the proposed intervenor's claim – in this case, Orthomom's claim that the First Amendment protects her right to remain anonymous. "[W]here the intervenor has a real and substantial interest in the outcome of the proceeding, intervention should be allowed." *Plantech Housing v. Conlan*, 74 A.D.2d 920, 921, 426 N.Y.S.2d 81 (App. Div. Dept. 2 1980), *appeal dismissed*, 51 N.Y.2d 862, 433 N.Y.S.2d 1018, 414 N.E.2d 398.

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

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from 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.
> * * *
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.
>
> 514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the

Internet as a forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. Accordingly, First Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

Internet speakers speak anonymously for various reasons. They may wish to avoid having their views stereotyped according to their race, ethnicity, gender, or class characteristics. They may be associated with a group but want to express opinions of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the individual speaks for the group. They may discuss 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. Levy Affirmation ¶ 10. 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. *Id.* ¶ 13. 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 developed a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In such cases, many courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of the plaintiff's case; (2) disclosure of the source is "necessary" to prove the issue because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of its case. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *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). *See also Knight-Ridder Broadcasting v. Greenberg*, 70 N.Y.2d 151, 161, 511 N.E.2d 1116, 1121 (N.Y. 1987) .

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers

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

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

As in many other states, prelitigation discovery proceedings are a well-established feature of New York law under CPLR Section 3102(c), and the procedure may be used to identify the proper defendant so long as the prerequisite is met – "where there is a demonstration that the party bringing such a petition has a meritorious cause of action." *Liberty Imports v. Bourguet*, 146 A.D.2d 535, 536, 536 N.Y.S.2d 784 (App. Div. Dept. 1 1989). *See also Holzman v. Manhattan and Bronx Surface Transit Operating Authority*, 271 A.D.2d 346, 347, 707 N.Y.S.2d 159 (App. Div. Dept. 1 2000). However, the imposition on First Amendment rights that is implicated by discovery to identify anonymous Internet speakers has led courts in other states to provide additional safeguards to ensure that the claim on the merits that supposedly justifies the discovery had a genuine chance of success. Orthomom urges this Court to follow the example set in the other states that have confronted this issue.

The first appellate decision in the country to address this issue remains the leading case. *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). A company sued four individuals who had criticized it on a Yahoo! bulletin board. The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, and we urge the Court to apply that framework here:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to R. 4:6- 2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

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):

> [C]ourt-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.

In *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the Delaware Supreme Court became the third appellate court to establish standards for identifying anonymous Internet speakers who are accused of defamation. As in *Dendrite* and *Melvin*, the court required an evidentiary showing. The Delaware Superior Court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim within his control without discovery, including that the statements are false.

In addition to these appellate decisions, numerous reported decisions from federal district courts adopt standards similar to either *Dendrite* or *Cahill*. In *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005), the court required first that the plaintiff "adduce competent evidence . . . address[ing] all of the inferences of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts." *Id.* at 975. If the plaintiff makes that evidentiary showing, "the court [must] assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." *Id.* In *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004),

the district 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 under copyright which thus had been infringed. And 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. *See* Levy Affirmation, Exhibit C.

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 the plaintiff to show that it had viable claims against the defendants, and reviewed the evidence in support of the plaintiff's claims. *Id.* at 579-580.

There is only one reported decision on this issue from the New York state courts. *Public Relations Society of America v. Road Runner High Speed Online*, 8 Misc.3d 820, 799 N.Y.S.2d 847 (N.Y. Sup. N.Y. Co. 2005). That case arose from a pre-litigation petition for discovery of the identity of a person who sent an anonymous email to the board of an organization denouncing in scathing terms the abilities of the organization's executive director. The court ruled that the executive director had a possible claim, although neither party had presented any evidence about