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

whether the email's accusations against the director were true or false.[4/] The court discussed several other cases involving the identity of anonymous Internet speakers, and applied the five-factor test of *Sony Music, supra*, including that the claimant must have "shown a prima facie cause of actionable harm," and found that the test for discovery had been satisfied.

Although many of these cases set out slightly different tests, 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 were 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.

IV. Procedures That This Court Should Follow in Deciding Whether to Compel Identification of Orthomom and the Posters to Her Blog.

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

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. *Cahill*, 884 A.2d at 461; *Seescandy*, 185 F.R.D. at 579. In *Dendrite*, for example, the court required the plaintiff to post on the message board a notice of its application for discovery. The notice identified the screen names for the four Does, and gave information about the local bar referral service so that the individuals concerned could retain counsel to oppose disclosure. The New Jersey Appellate Division specifically approved of this requirement and ordered trial

---

4/ The decision makes clear that no evidence of falsity was presented. However, as discussed below in Part IV(D), the Doe had argued that the protection of his identity should rest on whether the petition for discovery could survive under a motion to dismiss standard.

judges 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. The purpose of requiring notice to the anonymous defendant and identifying the specific statements alleged to be actionable can be served only by allowing enough time to respond to plaintiff's showing of the basis for disclosure – ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment.

In this case, Greenbaum deliberately withheld notice from Orthomom and from the commenters whom she seeks to identify, even though Orthomom's email address is shown on her blog, Levy Affirmation ¶ 9, and even though the comment feature would have allowed Greenbaum to post a notice that she was seeking to identify her critics. *Id.* ¶ 19. Orthomom learned of this suit only because an article about this proceeding appeared in the New York Daily News, and somebody sent a copy to Orthomom. *Id.* ¶ 18. Moreover, the Court directed Google to give notice to Orthomom about this action. Although Orthomom has authorized her counsel to defend the anonymity of the persons who have posted comments on her blog, the Court should not allow Greenbaum to pursue the commenters further until she has specified the statements on which seeks to proceed and given proper notice to those commenters that their identity is at risk.[5/]

B. Require Specificity Concerning the Statements at Issue.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff has a valid reason for piercing each speaker's anonymity. Thus, the court should require Greenbaum to quote the exact statement by each anonymous speaker that is alleged to

---

5/ As explained in the Levy Affirmation ¶¶ 12, 14, a blogger like Orthomom does not have access to information that would allow her to notify the commenters herself.

have violated her rights. Indeed, under Section 3016(a) of the CPLR, "the particular words complained of shall be set forth in the complaint." Attaching fifty pages of material and letting the defendant guess which words are actually the subject of the proceeding is not sufficient. *See Edison v. Viva Int'l,* 70 A.D.2d 379, 385, 421 N.Y.S.2d 203 (App. Div. Dept. 1 1979) (dismissing complaint where attachment did not make clear exactly which words were allegedly defamatory). Greenbaum should not be permitted to evade the specificity requirement under New York law by the ruse of initiating a pre-litigation discovery proceeding instead of a complaint against a John Doe defendant.

Specific identification of the statements at issue is essential if the remaining parts of the test for identifying anonymous speakers are to be applied properly. Here, Greenbaum seeks to identify all those who have posted comments on Orthomom's blog as "anonymous," but not all of the anonymous statements even hint that Greenbaum is a "bigot" or "anti-Semite." Indeed, some anonymous comments are favorable to Greenbaum or hostile to Orthomom. Greenbaum attached fifty printed pages from Orthomom's blog, indicating that they are the "latest examples" of the statements about which she complains, but does not specify which words within the fifty pages constitute allegedly defamatory statements. Nothing in Orthomom's own article calls Greenbaum a "bigot," and although Greenbaum contends at some points in her petition and supporting papers that she seeks to identify Orthomom and commenters for calling her an "anti-Semite," Petition ¶ 6; Feder Affirmation ¶ 8, neither that word nor the adjective "anti-Semitic" appears in the fifty pages. In those circumstances, even if Greenbaum had given notice of the pendency of this proceeding, specific commenters could still not be certain whether **their** identities are the intended subject of Greenbaum's discovery. The Court should not proceed further with respect to the commenters until the actionable statements have been specified and notice has been given that Greenbaum seeks the identities of the posters of those specific statements.

As for Orthomom, although she is aware that her identity is sought, the petition is not specific enough for the Court to test the sufficiency of Greenbaum's showing. As stated above, Orthomom herself has not called Greenbaum a bigot or anti-Semite; apparently, Greenbaum contends that something that Orthomom has said implies such a sentiment. However, until the specific posts allegedly containing that implication are provided, Orthomom cannot defend herself, such as by arguing that a particular statement was made by a commenter instead of by herself and hence is immune from suit under federal law (*see* Section C), or by showing that the particular statement is not of and concerning Greenbaum as required for trademark liability by *New York Times v. Sullivan*, 376 U.S. 254, 288 (1964), or by contending that a particular statement reflects nonactionable opinion, and not an actionable statement of fact whose truth or falsity can be determined.

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

Next, the court should review each statement to determine whether it is facially actionable. In this regard, Greenbaum's contention that she has been defamed appears dubious. To be sure, to be labeled a bigot or an anti-Semite is unpleasant, but not every statement using those terms, or even implying them to be true, is actionable as libel. There are several respects in which Greenbaum's showing is inadequate to justify identification of either Orthomom or any of her commenters.

First, to the extent that Greenbaum seeks to identify Orthomom because of statements posted to the blog by other people, federal law affords complete immunity from suit. The Communications Decency Act, 47 U.S.C. § 230 ("CDA"), bars a claim against a provider of an "interactive computer service," or against any person who puts information on such an interactive computer service, as the publisher or speaker of material posted on that service by another person. The courts have **unanimously** held that the host of an interactive web site is an "interactive computer service"

provider, and hence is immune from suit that would treat her as the publisher of any information posted by others. *Universal Communication Systems v. Lycos, Inc.*, 2007 WL 549111 at *4 (1st Cir., Feb. 23, 2007); *Barrett v. Rosenthal*, 40 Cal.4th 33, 51 Cal.Rptr.3d 55, 146 P.3d 510, 514, 525 (Cal. 2006); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Zeran v. America Online*, 129 F.3d 327 (4th Cir.1997). Until Greenbaum identifies the particular language on which she purportedly hopes to sue, the Court cannot decide whether her claims could survive a motion to dismiss under the CDA.

Second, many defamation cases are derailed by the rule that 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. *Gross v. New York Times Co.*, 82 N.Y.2d 146, 603 N.Y.S.2d 813, 623 N.E.2d 1163 (1993); *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 139, 589 N.Y.S.2d 825, 603 N.E.2d 930, 934 (1992). "Under the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1990). Thus, the First Amendment protects against libel claims based on opinions that do not imply false statements of fact, or on loose, figurative or hyperbolic language. *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 245, 566 N.Y.S.2d 906 (N.Y. 1991). The New York approach is "flexible and is decidedly . . . protective of 'the cherished constitutional guarantee of free speech.'" *Gross v. New York Times Co., supra*, 82 N.Y.2d at 152.

Generally speaking, name-calling and other hyperbolic statements, including loose accusations that public figures or others are racists or bigots, are treated as nonactionable opinion. For example, in *Covino v. Hageman*, 165 Misc.2d 465, 627 N.Y.S.2d 894 (N.Y. Sup. Richmond Co. 1995), the court held that an accusation of being "racially insensitive" was not defamatory, citing with apparent approval other cases holding that "[a]ccusations of racism and prejudice and the like [are] nonactionable expressions of opinion." *Id.* at 467-469, citing *Kimura v. Superior Court*, 230 Cal. App.3d 1235, 281 Cal. Rptr. 691 (1991); *Stevens v. Tillman*, 855 F2d 394, 400 (7th Cir. 1988);

Pritchard v. Herald Co., 120 A.D.2d 956, 503 N.Y.S.2d 460 (App. Div. Dept. 4 1986). *See also Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280-281, 649 N.E.2d 182 (Ohio1995)("bigot," "gay-basher," "neo-numbskull," "anti-homosexual diatribe," and "hate-mongering" held not actionable); *Raible v. Newsweek*, 341 F. Supp. 804, 807-808 (W.D. Pa. 1972). Other epithets held to be nonactionable opinion include "big fat ugly Jew," *Weiner v. Doubleday & Co.*, 142 A.D.2d 100, 535 N.Y.S.2d 597 (App. Div. Dept. 1 1988), *aff'd*, 74 N.Y.2d 586, 549 N.E.2d 453, 550 N.Y.S.2d 251 (N.Y. 1989) and "murderous vigilante" who has "venomous feelings against black people." *Goetz v. Kunstler*, 164 Misc.2d 557, 625 N.Y.S.2d 447 (N.Y. Sup. N.Y. Co. 1995).

Here, Greenbaum's own petition implicitly acknowledges that the commenters on Orthomom's blog used the word "bigot" to express an opinion based on true, disclosed facts: "At some point after the January 11, 2007 article was posted, an anonymous commenter wrote that I am a 'BIGOT' because my position on the use of public funds runs contrary to the interests of local Yeshivas." Petition ¶ 8. The use of the word "bigot" by the commenters on Orthomom's blog falls comfortably within the aegis of the opinion privilege upheld in such cases.

Third, because Greenbaum is an elected public official, her critics cannot be held liable for defamation unless she can show that false statements were made about her with actual malice – that is, with knowledge that the things they were saying were false, or with reckless disregard of the probability that their statements were false. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). However, nowhere in her pre-litigation petition does Greenbaum even allege actual malice.

D. Require an Evidentiary Basis for the Claims.

No person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of 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. Identification of an otherwise anonymous speaker is itself a major form of relief in cases like this one, and relief is generally not awarded to a plaintiff absent evidence in support of the claims. Withholding relief until evidence is produced is particularly proper where the relief may violate the defendant's First Amendment right to speak anonymously. Indeed, it has been held that CPLR Section 3102(c) alone requires affidavits establishing the existence of a cause of action. *In re Gleich*,111 A.D.2d 130, 131, 489 N.Y.S.2d 510, 512 (App. Div. Dept 1 1985) ("Disclosure to aid in bringing an action, under CPLR 3102 (subd [c]), is granted only where the party seeking the disclosure has shown in his affidavits facts which 'fairly indicate he has some cause of action against the adverse party.'").

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. In a recent case, a major Pennsylvania energy company filed a John Doe case against an employee who had criticized it on a Yahoo! message board on theories that would not have withstood a motion for summary judgment; obtained a subpoena and thereby the poster's identifying information; dismissed the lawsuit; and fired the employee. *See Swiger v. Allegheny Electric*, 2007 WL 442383 (E.D. Pa. Feb. 7, 2007) (discussing facts).

One leading advocate of liberal 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*,

available at http://www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, available at http://www.fhdlaw.com/html/ bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer 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.*

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 person 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 sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F. Supp. 551, 566-567 (E.D. Mich. 1979). In effect, the plaintiff should be required to meet 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 requirements that disclosure be "necessary" to the prosecution of the case, and that identification "go[] 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 plainly not "necessary."

The ruling in *Public Relations Society of America v. Road Runner High Speed Online*, 8 Misc.3d 820, 799 N.Y.S.2d 847 (N.Y. Co. 2005), does not support a contrary analysis. To be sure, after the court set forth the standard from *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), including the requirement that plaintiff establish a prima facie case that the Doe's speech was actionable, it allowed discovery while making clear that no evidence had been introduced on either side of the question whether the Doe's statements had been true or false. 8 Misc.3d at 824, 799 N.Y.S.2d at 851. However, inspection of the briefs in that case reveals that it was the Doe himself who argued for non-disclosure based on a motion to dismiss standard, Levy Affirmation, Exhibit D; hence, the decision did not represent a rejection of the higher standard applied in most states, requiring a presentation of **evidence** sufficient to create a prima facie case on all elements of the cause of action that should be in the hands of a plaintiff at the outset of her case. Moreover, the *Sony* decision **did** require the presentation of evidence to support the demand for disclosure. In that case, plaintiffs alleged a violation of the copyright laws, and provided "supporting evidence," including an affidavit showing that the defendants had displayed several copyrighted musical recordings that were available for download in violation of the copyright owner's rights

under 17 U.S.C. § 106. 326 F. Supp.2d at 565.

In this case, Greenbaum has presented an affirmation that simply avers in conclusory fashion, without specifying the allegedly defamatory statements, that Orthomom's blog contains "false" statements about her. She provides nothing like the specific averments that other courts have accepted as showing exactly how the statements at issue were false, such as the affidavits in *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (*see* Levy Affirmation, Exhibit C), or in *Dendrite v. Doe*, 342 N.J. Super. at 145, 775 A.2d at 763, where the chief executives of the plaintiff companies showed exactly how the statements were false, and explained what the truth was. Accordingly, Greenbaum's request for discovery should also be rejected for failure to provide any evidence that Orthomom (or the commenters on her blog) have said anything false about her.

Yet another failure of proof here concerns the obligation to plead and prove actual damage to reputation. *Sager v. Hospital Workers Local 1199*, 655 N.Y.S.2d 953, 954, 238 A.D.2d 152, 152 (App. Div. Dept. 1 1997). Greenbaum neither pleads nor proves this element of her cause of action.[6/]

E. Balance the Equities.

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

> [T]he final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to 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.

6/ In most cases, it would be unreasonable when the complaint is filed to expect a plaintiff to make a sufficient showing on actual malice to defeat summary judgment, because it is usually necessary to take defendant's deposition to learn what information was available to the defendant and what her motives were for making the defamatory statement. Thus, ordinarily the plaintiff need not produce evidence of actual malice to obtain an order identifying an anonymous Internet speaker. Here, however, Greenbaum has not even **alleged** actual malice and hence her petition fails for that reason, among many others.

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

Although *Ely* was a reporters' source disclosure case, *Dendrite* similarly called for individualized balancing when a plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> 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 preliminary injunction – considering the likelihood of success and balancing the equities – is particularly appropriate here 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. *See also Highfields Captial Mgmt. v. Doe*, 385 F. Supp.2d 969, 975 (N.D. Cal. 2005) ("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").

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to a motion to dismiss or a motion for summary judgment.

At the very least, plaintiffs could renew their motions after submitting more evidence.

In contrast, refusal to quash discovery to identify 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 a 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 Doe could lose a great deal from identification, even if the plaintiff has a wholly frivolous lawsuit.

In this case, the balancing of equities weighs very strongly **against** disclosure of the identities of Orthomom or any of her commenters. The nature of the plaintiff and of Orthomom's criticisms weighs heavily against allowing discovery. Greenbaum is a public official who is up for re-election in a few months, and who seeks to identify constituents who criticized her conduct in office. By holding elective office, Greenbaum voluntarily made her conduct a fair subject for comment, even robust and unkind comment; and the comments for which Greenbaum seeks to sue are core political speech, for which the protection of the First Amendment is at its apogee. Moreover, it is hard to overstate the chilling effect that would be caused if the court were to hold that members of the public who criticize their elected officials must fear being sued – and being identified – for having had the audacity to make their criticisms publicly.

In some cases the defendant has real reason to fear the economic or other consequences of being identified, and the record in this case suggests that there is a very real danger of retaliation if Orthomom is identified. As shown by the Blau affidavit, significant community norms in the Orthodox Jewish community disapprove of criticizing leaders, and particularly of making those criticisms in ways that bring Jews or Judaism into disrepute outside the community. Critics and their

families can be shunned, even deprived of their livelihoods because many Orthodox Jews work for businesses that are run by fellow Orthodox Jews, or that depend on Orthodox customers. Articles in Orthomom's blog advance severe criticisms of various personalities and institutions within the Orthodox community, such as Orthodox yeshivas that Orthomom charges with discriminating against Sephardic Jewish families and children,[7/] and of an Orthodox Jewish group and its rabbis for their failure to take a strong stance against child molestation,[8/] and even of the teachers and administrators of Orthomom's children's yeshiva.[9/] Some of Orthomom's readers have specifically taken her to task for spreading "lashon hara," or evil talk.[10/] *See generally* Levy Affirmation ¶ 22. Thus, Orthomom faces a serious risk within her community if, as a result of Greenbaum's petition for discovery, she is identified as the author of these criticisms of wrongdoing within the community.

The Court of Appeals has recognized the importance of early disposition of meritless defamation claims, because "the threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545, 416 N.E.2d 557, 563 (N.Y. 1980). Loss of anonymity caused by meritless defamation claims can be equally chilling. With this concern in

---

7/ http://orthomom.blogspot.com/2005/08/simple-case-of-racism.html; http://orthomom.blogspot.com/2005/10/more- school-discrimination.html; http://orthomom.blogspot.com/2006/05/religious-racism.html; http://orthomom.blogspot.com/2006/05/gedolim-digging-in-heels-on-racist.html.

8/ http://orthomom.blogspot.com/2006/12/piling-on.html; http://orthomom.blogspot.com/2006/12/finally-agudah-comments-on-potentially.html; http://orthomom. blogspot.com/2006/12/agudah- leader-on-kolko-arrest.html.

9/ http://orthomom.blogspot.com/2005/09/some-words-to-wise-for-my-childrens.html

10/ http://orthomom.blogspot.com/2006/03/hatzalah-happenings.html; http://orthomom.blogspot.com/2006/03/more-hatzalah-happenings.html; http://orthomom.blogspot.com/2006/03/hatzalah- update. html; http://orthomom.blogspot.com/2007/02/great-post.html; http://orthomom.blogspot.com/2007/02/great-post.html.

mind, the Court should embrace the *Dendrite* approach that treats discovery as an equitable issue and consider the very real danger of retaliation in deciding whether to grant discovery in this case.

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

The main advantage of the *Dendrite* test is its flexibility. The test balances the relative interests of a plaintiff who claims that her reputation has been unfairly besmirched against the interest in anonymity of an Internet speaker who claims to have done no wrong, and provides a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids a false dichotomy between protecting anonymity and allowing tort victims to be compensated. It ensures that online speakers who make wild and outrageous statements 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 identities as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging improper 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. Adoption of strict legal and evidentiary standards for defendant identification here, as in other states, encourages plaintiffs and their counsel to stop and think before they sue, and ensures that litigation is undertaken for legitimate ends, not just to chill speech. At the same time, those standards do not stand 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

Orthomom should be allowed to intervene to defend her right, and the right of the persons posting on her blog, to remain anonymous, and Greenbaum's request for an order compelling Google to identify the persons posting criticisms on Orthomom's blog should be denied.

Dated: March 13, 2007

Respectfully submitted,

PUBLIC CITIZEN LITIGATION GROUP

By: Paul Alan Levy/DR
Paul Alan Levy
Allison M. Zieve
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

SCAROLA ELLIS LLP
888 Seventh Avenue
New York, New York 10106
(212) 757-0007

Attorneys for Proposed Intervenor "Orthomom"