UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

In Re Subpoena to Twitter, Inc.	)	
	)	Misc. No. 3:20-mc-00003-GEC
TREVOR FITZGIBBON,	)	
	)	Action currently pending in the
Plaintiff,	)	United States District Court
	)	for the Eastern District of Virginia
v.	)	No. 3:19-cv-477-REP
	)	
JESSELYN A. RADACK,	)	
	)	
Defendant.	)	

MEMORANDUM OF PUBLIC CITIZEN AS AMICUS CURIAE SUPPORTING TWITTER'S MOTION TO QUASH

TABLE OF CONTENTS

Table of Authorities iii

Statement of the Case 1

Interest of Amicus Curiae 2

BACKGROUND 3

Facts of This Case and Proceedings to Date. 4

Summary of Argument 7

Argument

I. The Constitution Limits Compelled Identification of Anonymous Speakers. 10

II. The Proper Test for Determining Whether Fitzgibbon Has Shown a Compelling Interest in Identifying the Doe Internet Speakers Depends on His Purpose for Seeking That Discovery.. 12

III. Anonymous Speakers Sought to Be Identified Only to Provide Evidence as Third-Party Witnesses Should Lose Their Right to Anonymity Only If Their Evidence is Truly Needed to Allow the Party to Prove Core Claims or Defenses.

Conclusion 15

TABLE OF AUTHORITIES

CASES

AF Holdings v. Does 1-1058,
752 F.3d 990 (D.C. Cir. 2014) 16

Anderson v. Hale,
2001 WL 503045 (N.D. Ill. May 10, 2001) 15

Awtry v. Glassdoor, Inc.,
2016 WL 1275566 (N.D. Cal. Apr. 1, 2016) 14

Baker v. F and F Investments,
470 F.2d 778 (2d Cir. 1972) 13

Com. Bus. System v. Halifax Corp.,
484 S.E.2d 892 (Va. 1997) 16

Dendrite Int'l v. Doe,
775 A.2d 756 (N.J. App. 2001) 2, 12

Digital Music News v. Superior Court,
171 Cal. Rptr. 3d 799 (Cal. App. 2 Dist. 2014) 11. 14

Doe v. 2theMart.com,
140 F. Supp.2d 1088 (W.D. Wash. 2001) 11, 12, 13, 14

Doe v. Cahill,
884 A.2d 451 (Del. 2005) 12

Enterline v. Pocono Medical Center,
751 F. Supp.2d 782 (M.D. Pa. 2008) 11, 14

Food Lion v. Capital Cities/ABC,
194 F.3d 505 (4th Cir. 1999) 16

Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 16

Independent Newspapers v. Brodie,
407 Md. 415, 966 A.2d 432 (2009) 12

In re Indiana Newspapers,
963 N.E.2d 534 (Ind. App. 2012) 12

In re Petroleum Products Antitrust Litigation,
680 F.2d 5 (2d Cir. 1982) 16

In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31,
2010 WL 2219343, (E.D.N.Y. Feb 5, 2010),
adopted in part, 2010 WL 1686811 (E.D.N.Y. Apr. 26, 2010) 14

In re Subpoena Duces Tecum to America Online,
52 Va. Cir. 26, 2000 WL 1210372 ,
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261 Va. 350, 542 S.E.2d 377 (2001). 11, 12

In re Verizon Internet Services,
257 F. Supp.2d 244 (D.D.C.2003),
rev'd sub nom RIAA v. Verizon Internet Services,
351 F.3d 1229 (D.C. Cir.2003). 11

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780 F.2d 1134 (4th Cir. 1986) 13

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138 Cal. App.4th 872, 42 Cal. Rptr.3d 79 (Cal App. 6 Dist. 2006). 11

McIntyre v. Ohio Elections Committee,
514 U.S. 334 (1995) 7, 8

McVicker v. King,
266 F.R.D. 92 (W.D. Pa. 2010) 11, 14

Mick Haig Productions v. Doe,
687 F.3d 649 (5th Cir. 2012) 10

Mortgage Specialists v. Implode-Explode Heavy Industries,
160 N.H. 227, 999 A.2d 184 (2010) 12

Mount Hope Church v. Bash Back!,
2011 WL 13116849 (W.D. Wash. Apr. 21, 2011),
rev'd, 705 F.3d 418 (9th Cir. 2012) 4

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376 U.S. 254 (1964) 11

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402 U.S. 415 (1971) 11

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12 A.3d 430, 2011 Pa. Super. 3 (Pa. Super. 2011) 12

Ransome v. O'Bier,
2017 WL 1437100 (E.D. Va. Apr. 20, 2017) 16

Reno v. ACLU,
521 U.S. 844 (1997) 2, 3, 8

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2018 WL 3730434 (N.D. Cal. Aug. 6, 2018) 14

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2009 WL 4802567, at *2 (W.D. Mo. Dec. 9, 2009) 14

Swiger v. Allegheny Energy,
2006 WL 1409622 (E.D. Pa. May 19, 2006) 10

Talley v. California,
362 U.S. 60 (1960) 7

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No. 2284-2006 (N.Y. Sup. Ct. Rockland Cy. Nov. 16, 2011) 14, 16

Watchtower Bible & Tract Society v. Village of Stratton,
536 U.S. 150 (2002) 7

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129 F.3d 327 (4th Cir. 1997) 14

Zerilli v. Smith,
656 F.2d 705 (D.C. Cir. 1981) 16

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47 U.S.C. § 230 14

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INTRODUCTION

This case presents a question of first impression in this Court, but well-settled elsewhere: what standard governs judicial evaluation of a request to compel disclosure of information identifying pseudonymous speakers whose online statements make them potential witnesses in a lawsuit against others. Discovery to identify such speakers is constrained by the First Amendment right to speak anonymously which, in effect, creates a qualified privilege against discovery unless the party seeking to use court authority to identify the speaker shows a compelling need that cannot be met by alternative means. Courts across the country have held in these kinds of cases that the party seeking discovery has to show that he is proceeding in good faith, that the facts sought from the witness go to the heart of the case, and that the party has exhausted alternate means of obtaining the information needed for that purpose.

Plaintiff Trevor Fitzgibbon is a public relations and communications specialist who is, apparently, engaged in an extended online quarrel with defendant Jesselyn Radack. In this case, he is invoking state power to compel Twitter to disclose a large number of communications sent using its services and well as to identify three Twitter users, two of whom have criticized Fitzgibbon and one who has, apparently, never mentioned Fitzgibbon but has criticized a member of Congress whom Fitzgibbon's counsel, Stephen Biss, is currently representing in litigation against that Twitter user. Twitter has objected to the subpoena in its entirety, including the contention that the quest to identify the three Twitter users would violate their First Amendment right to engage in anonymous speech.

This amicus brief addresses only one aspect of the pending motion to quash: the proper legal standard that the Court should apply in deciding whether to override anonymous speakers' First Amendment rights. The brief also addresses how that standard should be applied on the present record.

INTEREST OF AMICUS CURIAE

Public Citizen, Inc., is a public interest organization based in Washington, D.C. with members and supporters in every state. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs and public debates. In particular, Public Citizen has appeared as amicus curiae in many cases in which subpoenas have sought to identify hundreds of authors of anonymous Internet messages. The courts in these and other cases have adopted slightly different versions of a standard that was originally suggested by Public Citizen and the American Civil Liberties Union as amici curiae, and adopted by the New Jersey Appellate Division in *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001). Public Citizen has also appeared in a number of cases addressing the proper standard for identifying anonymous Internet speakers who might be potential witnesses. Public Citizen was also one of the founding members of the Cyberslapp Coalition, which proposed a model policy that many Internet Service Providers now follow in responding to subpoenas to identify anonymous speakers.

BACKGROUND

As electronic communications have become essential tools for speech, the Internet has become 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*:

> From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone

line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

* * *

Full First Amendment protection applies to speech on the Internet.

521 U.S. 844, 853, 870 (1997).

Knowing that people love to share their views, many companies have organized outlets for the expression of opinions. A leading example of such outlets is Twitter, which has created a microblogging system that allows any member of the public to post communications containing up to 280 characters, or images possibly containing an even larger number of characters.

The individuals who post messages often do so under pseudonyms. Nothing prevents an individual from using her real name, but many people choose nicknames that protect the writer's identity from those who disagree with him or her, and hence encourage the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature—and Twitter is typical—that makes them very different from almost any other form of published expression. Members of the public can criticize as well as praise on these forums, and people who disagree with published statements can typically respond immediately at no cost, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disputes about facts and opinions.

Facts of This Case and Proceedings to Date

Trevor Fitzgibbon is a public relations professional who has taken on some high-profile clients, and who became further embroiled in controversy as a result of accusations that he was engaged in a variety of untoward conduct toward women, ranging from harassment to assault and rape. The controversy raged on various social media platforms, including Twitter. One of his accusers was Jesselyn Radack, an attorney in several high-profile cases who is also active on social media. In 2018, Fitzgibbon sued Radack in the United States District Court for the Eastern District of Virginia for defamation and other torts. After Radack was held in contempt for having violated a preliminary injunction issued in that litigation, the case was settled in 2019 with an agreement that included mutual promises from each side not to write about the other. Both parties now accuse each other of breaching that agreement. They have resumed litigation in this action, with a complaint and counterclaim alleging defamation, breach of contract, and fraudulent inducement to enter into the settlement agreement contracts, each claiming that the other side never intended to stop talking about his or her enemy. Both Fitzgibbon's complaint and Radack's counterclaim accuse the other party of colluding with various third parties to further their alleged respective campaigns of public harassment and criticism. Several Twitter users have expressed their views about this controversy.

Fitzgibbon has now served a subpoena on Twitter seeking information about two dozen Twitter users, all but one of whom have criticized him. The subpoena seeks to identify three Twitter users—@jimmyslama, @kaidinn, and @DevinsCow— as well as seeking non-content information, including "subscriber information," about each of 19 other Twitter users. That subscriber information, which Fitzgibbon says includes "the name, address, telephone number, and email address" which was used to set up each such account, Opposition to Motion to Quash, at 53-54,

amounts to a request for identifying information about each of these 19 users.[1] Twitter moved to quash the subpoena on several grounds, including the contention that compliance would violate the First Amendment rights of its users to speak anonymously, pointing to a series of decisions from state and federal courts holding that, when a plaintiff seeks to subpoena the identities of anonymous Internet users who have allegedly violated his rights, the plaintiff must make a legal and evidentiary showing sufficient to satisfy the Court that he has a realistic basis for proceeding against them. Fitzgibbon responded by arguing both that, because he was charging the online users with defamation, the fact that actionable defamation lies outside the protection of the First Amendment means that the online detractors have no First Amendment rights to protect, and that, in any event, that he needed to identify these online detractors to pursue his claims against Radack.

SUMMARY OF ARGUMENT

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 discovery seeks to identify an anonymous speaker, courts must balance the right to obtain redress from alleged perpetrators of civil wrongs against the right to anonymity of those who have done no wrong – and when the discovery targets are third-party witnesses, they are, by definition, speakers who have done no wrong. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the

[1] As originally served, the subpoena sought all communications between the defendant Radack and the 19 other users. However, in response to Twitter's objection based on the Stored Communications Act, Fitzgibbon modified his subpoena to limit the demanded production to non-content.

speaker's First Amendment right to remain anonymous.

In such cases, identifying an unknown speaker is not merely the first step toward establishing a defendant's liability for damages. Identifying the speaker gives the plaintiff immediate relief as well as a powerful new weapon, because it enables him to employ extra-judicial self-help measures to counteract both the speech and the speaker. It also creates a substantial risk of harm to the speaker, who forever loses the right to remain anonymous, not only on the speech at issue, but with respect to **all** speech posted with the same pseudonym. Moreover, the unmasked speaker is exposed to efforts to punish or deter his speech. For example, an employer might discharge a whistleblower, or a public official might use influence to retaliate against the speaker. Indeed, given the tenor of many online conversations, public exposure might lead a given individual to become the target of threats, doxxing and the like. Similar cases across the country, and advice openly given by lawyers to potential clients, demonstrate that access to identifying information to enable extra-judicial action may, in many cases, be the only reason plaintiffs bring many such lawsuits at all.

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief. The constitutional challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure to unmask critics—thus violating their First Amendment right to speak anonymously—simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

Courts have addressed this question using two separate standards, depending on whether identification is sought to pursue litigation against the anonymous speaker, or sought to obtain evidence from the speaker against existing parties. Fitzgibbon's brief suggests that he believes that a number of the anonymous speakers have wronged him, but his complaint does not identify the anonymous account holders as defendants; he has produced no evidence that they have made false statements about him; and he does not articulate any basis for seeking to sue them in the Eastern District of Virginia. Thus, Fitzgibbon does not purport to be seeking to identify potential defendants for this litigation. His brief argues only that he needs the discovery sought by the subpoena to pursue his claims against Radack.

When discovery of the identity of a potential third-party witness is sought, courts consistently hold that the discovering party must show that 1) the subpoena was issued in good faith; 2) the information sought relates to a core claim or defense; 3) the identifying information is directly and materially relevant to that claim or defense; and 4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source. Applying these standards, Fitzgibbon's subpoena should not be enforced insofar as it seeks to identify the three Doe speakers or to compel disclosure of potentially identifying information about the owners of the nineteen other Twitter accounts.

ARGUMENT

I. The Constitution Limits Compelled Identification of Anonymous Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the

important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.
>
> *McIntyre*, 514 US at 341-342, 356.

The right to speak anonymously is fully applicable online. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to presumed racial, gender, or other characteristics. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite attribution disclaimers, readers will assume that the group orchestrated the statement. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. On Twitter, for example, users might employ pseudonyms to share important,

but sensitive, information about government officials, or to express dissenting views about officials who have significant power to retaliate against their critics. An equally valid reason to remain anonymous is the torrent of online hatred that sometimes follows online denunciations. Wilson, *An Online Agitator, a Social Media Exposé and the Fallout in Brooklyn,* New York Times (June 2, 2018), available at https://www.nytimes.com/2018/06/06/nyregion/amymek-mekelburg-huffpost -doxxing.html. That hatred can lead to real-world consequences, as Internet users will often “doxx” the targets of their ire— maliciously search for and publish private or identifying information about an individual on the Internet—to expose the speaker and, sometimes, then communicate with the person’s relatives, employers, or neighbors, Bowles, *How ‘Doxxing’ Became a Mainstream Tool in the Culture Wars* (New York Times Aug. 30, 2017), available at https://www.nytimes.com/2017/08/30/technology/doxxing-protests.html, or even bring weaponry to “investigate” claims of wrongdoing. *E.g.*, *Pizzagate Conspiracy Theory,* https://en.wikipedia.org/ wiki/Pizzagate_ conspiracy_theory. For example, Beth Bogaerts, one of the Twitter users whose subscriber information such as locational data is sought by the subpoena, received threats following her parting of ways with Fitzgibbon. *See* Affidavit of Beth Bogaerts, attached as Exhibit A.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to track down those who do. Anyone who sends an e-mail or visits a website leaves an electronic footprint that **could** start a path that can be traced back to the original sender. To avoid the Big Brother consequences of a rule that enables any company or political figure to identify critics, simply for the asking, the law provides special protections against such subpoenas. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

When courts do not create sufficient barriers to subpoenas to identify anonymous Internet speakers named as defendants or sought at potential witnesses, the subpoena can be the main point of the litigation, in that plaintiffs may identify their critics and then seek no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week, Volume 1, No. 9, at 16, 18 (1999). In the early Internet era, before courts consistently required an evidentiary showing before enforcing a subpoena to identify anonymous speakers, lawyers who represent plaintiffs in these cases would urge companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* For example, in *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006), a company filed a Doe lawsuit, obtained the identity of an employee who criticized it online, fired the employee, and then dismissed the lawsuit without obtaining any judicial remedy other than removal of anonymity.

A more recent problem has been presented by companies that make pornographic movies, which would bring mass copyright infringement lawsuits against hundreds of anonymous Internet users at a time, without any intention of going to trial, but hoping that embarrassment at being subpoenaed and then publicly identified as defendants—whether accurately or not—will be enough to induce even the innocent defendants to pay thousands of dollars in settlements. *AF Holdings v. Does 1-1058,* 752 F.3d 990, 992-993 (D.C. Cir. 2014); *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012). Even ordinary people who did no more than create home wi-fi networks and fail to encrypt them could easily be bullied into paying not to be identified. A judicial

crackdown over such abuses of the subpoena process has helped address this problem, by providing strict standards for such subpoenas.

The Fitzgibbon subpoena invokes judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. Consequently, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Injunctive relief, even to aid a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347.

> If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery [without a factual showing], 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).

Although the Does have not moved to quash the subpoena, Twitter has standing to invoke its users' First Amendment rights as a reason to quash the subpoena. *Digital Music News v. Superior Court*, 171 Cal. Rptr. 3d 799, 809 (Cal. App. 2d Dist. 2014).[2]

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[2] *See also McVicker v. King*, 266 F.R.D. 92, 95-96 (W.D.Pa. 2010); *Enterline v. Pocono Medical Center*, 751 F. Supp.2d 782, 785-786 (M.D. Pa. 2008); *Matrixx Initiatives v. Doe*, 138 Cal. App. 4th 872, 42 Cal.Rptr.3d 79 (Cal App. 6 Dist. 2006); *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 2000 WL 1210372 , *rev'd on other grounds sub nom. AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001)); and *In re Verizon Internet Services*, 257 F. Supp.2d 244 (D.D.C. 2003), *rev'd on other grounds sub nom RIAA v v. Verizon Internet Services*,

II. The Proper Test for Determining Whether Fitzgibbon Has Shown a Compelling Interest in Identifying the Doe Internet Speakers Depends on His Purpose for Seeking That Discovery.

Courts have developed two separate tests for evaluating a party's effort to use government authority to compel the identification of anonymous Internet speakers. When the purpose of identifying the speaker is to learn the name and location of an individual whom a plaintiff accuses of wrongful speech (for example, of defaming the plaintiff), a series of decisions in roughly a dozen state appellate courts as well as a number of federal trial courts have held that discovery depends on the plaintiff making a legal and evidentiary showing of the basis for the claim against each such speaker – the so-called *Dendrite / Cahill* standard.[3] Twitter's opening brief rested on the assumption that Fitzgibbon's subpoena was aimed at identifying potential co-defendants who might be added to his suit against Radack in the Eastern District of Virginia. Fitzgibbon's opposition brief never addresses the standard that the Court should apply, but the focus of his brief appears to be on using the subpoena to establish his claims against Radack. The appropriate standard for assessing a litigant's compelling need to breach the right of a potential third party witness to speak anonymously has been addressed by a separate line of cases, known as the *2theMart* standard,[4] which requires the party seeking discovery to show that he cannot prevail on his claims without this evidence and that he has exhausted alternative means of discovery that do not require breach of anonymity.

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351 F.3d 1229, 1239 (D.C.Cir.2003). Several appellate courts have allowed hosts to litigate their users First Amendment rights without expressly addressing standing. *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 160 N.H. 227, 999 A.2d 184, 192 (2010); *Pilchesky v. Gatelli*, 12 A.3d 430, 437, 2011 Pa. Super 3 (Pa. Super. 2011); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432, 456-457 (2009).

[3] *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001).

[4] *Doe v. 2theMart.com*, 140 F. Supp.2d at 1093

III. Anonymous Speakers Sought to Be Identified Only to Provide Evidence as Third-Party Witnesses Should Lose Their Right to Anonymity Only If Their Evidence is Truly Needed to Allow the Party to Prove Core Claims or Defenses.

The leading case of *Doe v. 2TheMart.com*, *supra*, establishes the relevant test to be applied when a party seeks to identify an anonymous speaker to obtain evidence for use against an existing party in litigation; it is borrowed from the First Amendment test for a subpoena for a reporter's sources. *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986). The *Larouche* test is analogous to the context of a subpoena to identify an anonymous Internet speaker who is not herself a party in the case because the reporter's source privilege, like the right to speak anonymously, is a privilege rooted in the First Amendment limitations on the exercise of state power to compel identification of an otherwise anonymous speaker. But although the First Amendment interest in the case of the reporter's sources is indirect—the privilege stems from concern that the effect of compelled disclosure on the reporter's ability to conduct effective journalism, an activity that receives strong support from the First Amendment, *Baker v. F and F Investments.*, 470 F.2d 778, 782 (2d Cir. 1972)—in subpoena cases disclosure would directly infringe the First Amendment rights of the anonymous speakers. Moreover, in many journalist source cases, a media company may be withholding the identity of a source whose information may or may not support the company's defense against a defamation action. In this case, as in most cases where an Internet Service Provider seeks to protect one of its anonymous users against compelled disclosure of identity, Twitter is not a defendant in this action and disclosure could not affect its potential liability.[5]

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[5] Fitzgibbon argues, Opp. at 55 & n.24, that Twitter has a self-interest in protecting against compelled disclosure of the identity of the Doe whose Twitter handle is @DevinCow, because Devin Nunes' state court lawsuit against @DevinsCow also alleges that Twitter is liable on a negligence

Under the *2theMart* test, once notice has been given to the anonymous commenters,

1. The subpoena must have been issued in **good faith**.

2. The information sought must **relate to a core claim or defense**.

3. The identifying information must be **directly and materially relevant to that claim or defense**.

4. Information sufficient to establish or to disprove that claim or defense must be **unavailable from any other source**.

140 F. Supp.2d at 1095 (emphasis added).

Thus, "non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." *Id.* Several subsequent courts have followed this test. *Awtry v. Glassdoor, Inc.*, 2016 WL 1275566, at *16 (N.D. Cal. Apr. 1, 2016); *Mount Hope Church v. Bash Back!*, 2011 WL 13116849 (W.D. Wash. Apr. 21, 2011), *rev'd on other grounds*, 705 F.3d 418 (9th Cir. 2012); *In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, 2010 WL 2219343, at *8-11 (E.D.N.Y. Feb 5, 2010), *adopted in relevant part*, 2010 WL 1686811, at *2-3 (E.D.N.Y. Apr. 26, 2010); *McVicker v. King*, 266 F.R.D. 92, 94-97 (W.D. Pa. 2010); *Sedersten v. Taylor*, 2009 WL 4802567, at *2 (W.D. Mo. Dec. 9, 2009); *Enterline v. Pocono Medical Center*, 751 F. Supp.2d 782, 787-788 (M.D. Pa. 2008). *See also Sines v. Kessler*, 2018 WL 3730434, at *12 (N.D. Cal. Aug. 6, 2018); *Digital Music News v. Superior Court,* 171 Cal. Rptr. 3d 799, 809 (Cal. App. 2d Dist. 2014); *Tendler v. Bais Knesses of New Hempstead,* No. 2284-2006 (N.Y. Sup. Ct. Rockland Cy. Nov. 16,

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theory for allowing @DevinCow to make fun of Congressman Devin Nunes using its platform. However, Twitter is not a defendant in **this** action, and in any event the negligence theory articulated in the *Nunes* litigation is foreclosed by a federal statute. 47 U.S.C. § 230. In light of longstanding Fourth Circuit precedent, *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), the claim that Twitter can be liable for negligently hosting @DevinCow's criticisms is frivolous.

2011) (copy attached); *Anderson v. Hale*, 2001 WL 503045, at *7-9 (N.D. Ill. May 10, 2001).

Fitzgibbon's subpoena cannot meet this standard. First, the aspect of the subpoena that seeks identifying information for @DevinCow strongly suggests bad faith. @DevinCow is a Twitter account holder who is a defendant in a different lawsuit, now pending in state court, in which a different plaintiff, also represented by Stephen Biss, counsel for plaintiff Fitzgibbon in this case, has been frustrated in his efforts to use Virginia state subpoenas to compel the identification of that defendant. The subpoenas have not succeeded, in part because Mr. Biss has not complied with Virginia's statutory procedure for such subpoenas—which do not apply in federal court—but also in part because he has not met the First Amendment standard for identifying anonymous speakers who have been sued for their speech.[6] The justifications set forth in Fitzgibbon's opposition to the motion to quash do not come close to showing any basis for believing that @DevinCow has had any involvement in making any false statements about Fitzgibbon or of that she has any evidence bearing on the claims by or against Fitzgibbon; the use of the subpoena in **this** case to identify @DevinCow is a transparent ruse. The significant indications of bad faith infect the validity of the entire subpoena, not just the aspect seeking to identify @DevinCow.

Second, the effort to discover the identities of @DevinCow, @jimmysllama and @Kaidinn, and to obtain location and other potential identifying information about the owners of twenty-two additional Twitter accounts, is not pursued in aid of Fitzgibbon's core claims, for defamation and breach of contract. Discovery is sought in aid of Fitzgibbon's claim that Radack is liable for having conspired to defame him with various third parties, who are not named as defendants in this

[6] Amicus here also submitted a brief as amicus curiae arguing that the enforcement subpoena seeking to identify @DevinCow in that case was foreclosed by the First Amendment right to speak anonymously

litigation. But under Virginia law, a conspiracy to commit a tort is actionable only if the plaintiff can also succeed on the underlying tort claim, here defamation. *Ransome v. O'Bier*, 2017 WL 1437100, at *4 (E.D. Va. Apr. 20, 2017), citing *Com. Bus. Sys. v. Halifax Corp.*, 484 S.E.2d 892, 896 (Va. 1997). Similarly, under *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and *Food Lion v. Capital Cities/ABC*, 194 F.3d 505, 522 (4th Cir. 1999), a tort claim that seeks damages for injury to reputation can succeed only if the claim meets First Amendment standards for a defamation claim. In effect, then, Fitzgibbon's civil conspiracy claim against Radack is one that piggybacks on his defamation claim and may, assuming that Radack has sufficient assets, provide an additional claim for damages. But discovery in aid of additional damages does not pertain to a core claim and hence does not provide a basis for overriding the right to speak anonymously. *Tendler v. Bais Knesses of New Hempstead*, *supra*, at page 2.

Third, Fitzgibbon has not shown that he has exhausted alternate sources of information that would not require imposing on the First Amendment rights of third parties. Other courts have said that "'an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure.'" *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 9 (2d Cir. 1982), quoting *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir.1981). So far as the record reflects, his only discovery efforts to date seeking to obtain Radack's alleged conspiratorial communications consists of sending her written discovery requests to which, his brief alleges, defendant Radack has refused to respond. His brief further asserts, at 44, 53, 57, without providing admissible evidence to support his contentions, that Radack has been guilty of spoliation and hence cannot be trusted to produce evidence voluntarily. He does not explain why he has not moved to compel discovery from Radack, including, if necessary, pursuing forensic examination of her electronic equipment.

Moreover, if Radack has been guilty of spoliation as Fitzgibbon alleges, the sanctions for such spoliation could easily be a sufficient route to establish her liability, making it wholly unnecessary to impose on the free speech rights of innocent third parties. The Eastern District docket sheet does not reflect the filing of any motion to compel discovery or to seek sanctions for alleged spoliation. https://www.courtlistener.com/docket/16048358/fitzgibbon-v-radack/. The very fact that Fitzgibbon has not pursued such alternate means to establish his claims against Radack gives ground to infer that other motives might be afoot.

* * * *

Fitzgibbon seeks discovery to identify various individuals who have criticized him as well as criticizing a different client of his attorney, Steven Biss. Enforcing the subpoena would infringe the First Amendment rights of twenty-two Twitter users to speak anonymously. The Court should quash his subpoena insofar as it seeks that information.

CONCLUSION

The motion to quash should be granted to the extent discussed above.

Respectfully submitted,

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