DOCKET NO. FST-CV09-4017229-S	:	SUPERIOR COURT
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	:	
ADAPTIVE MARKETING LLC	:	J.D. OF STAMFORD/NORWALK
	:	AT STAMFORD
V.	:	
	:	
YAHOO!, INC.	:	SEPTEMBER 21, 2009

SPECIAL APPEARANCE OF REAL PARTY IN INTEREST "FLANEUR DE FRAUDE" IN OPPOSITION TO THE ORDER TO SHOW CAUSE

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MISCELLANEOUS

In this case, "Flaneur de Fraude" ("Flaneur"), an anonymous Internet blogger, appears specially as the real party in interest to oppose an effort by Adaptive Marketing ("Adaptive") to invoke the Court's process to compel the production of identifying information. Adaptive runs a marketing scheme, based on misleading advertisements promising "free credit scores," that has been widely criticized, and seeks to identify an anonymous blogger who echoed these criticisms. Although Adaptive claims vaguely that the blogger's posts are defamatory, it has introduced no evidence that the blogger wrote anything false, that the blog post caused Adaptive any damage, or that an action against Flaneur can be maintained in Connecticut. Moreover, Adaptive did not follow the standard legal procedure adopted in every state around the country that has addressed the question, whereby the allegedly defamed party gives the anonymous critic notice that it is seeking discovery to identify him or her, and then makes a legal and evidentiary showing of a prima facie case of defamation before obtaining **relief** against the "Doe" — namely, stripping away the Doe's anonymity. Indeed, Adaptive's papers do not even satisfy the established Connecticut-law standards for a bill of discovery. Its request that Yahoo! be ordered to provide information identifying the blogger should be denied.

STATEMENT OF THE CASE

A. Introduction

Protection for the right to engage in anonymous communication is fundamental to a free society. Indeed, as electronic communications have become essential tools for speech, the Internet in all its forms – web pages, email, chat rooms, and the like – 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. ACLU*, 521 U.S. 844,

853, 870 (1997),

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

Full First Amendment protection applies to 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. For example, Yahoo! and Raging Bull host message boards for every publicly traded company where investors and other members of the public can discuss the company. Blogspot, WordPress and TypePad give individuals the opportunity to create blogs of their own, on which bloggers can, at no cost, post discussions of current events, public figures, companies, or other topics while leaving it open for visitors to post their comments. YouTube also permits visitors to comment on the videos that are posted there. Many web sites that address specific subjects also include guestbooks or forum where visitors can sound off on what they see there. And increasingly, newspapers host forums arranged by specific community or by news topic, where readers can exchange ideas and other information about news developments.

The individuals who write on these forums often use pseudonyms. These typically colorful monikers protect the writer's identity from those who disagree with him or her, and they encourage the uninhibited exchange of ideas and opinions. Internet discussions are often heated, and they are sometimes filled with invective and insult. Most, if not everything, that is said on forums is taken with a grain of salt.

Many forums have a significant feature that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use a forum to express his point of view; a person who disagrees with something that is said on a forum for any reason – including the belief that a statement contains false or misleading information – can respond to that statement immediately at no cost. Most forums are thus unlike a newspaper, which have limited space for responses and often refuse to print them – a choice that the First Amendment protects. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, on most forums companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. Because many people regularly revisit forums, a response will likely be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, not the courtroom, is the best forum for the resolution of disagreements about the truth of disputed facts and opinions.

B. Facts and Proceedings To Date

Plaintiff Adaptive Marketing LLC runs television advertising promising to provide "free credit scores" to callers. However, individuals who call in response to the ads are offered "credit monitoring services" for which their credit cards are charged $29.95 per month. These services, offered by Adaptive and others, have widely been criticized by the Federal Trade Commission, the Wall Street Journal, and others. *See, e.g.,* Federal Trade Commission, *Marketer of "Free Credit Reports" Settles FTC Charges*, August 15, 2005 (attached to Levy Affidavit); Arrington,

Nuveen Jain's Latest Scam: Intelius, Washington Post, May 30, 2008 (attached to Levy Affidavit); *Freescore: More Credit Score Confusion*, Wall Street Journal, August 14, 2009 (attached to Levy Affidavit). Consumers can obtain both their credit scores and their entire credit reports — which are more significant — for free simply by visiting a federally mandated web site, www.annualcreditreport.com. The FTC expressly requires that consumers be given truly free credit reports — with no hidden membership fees or other services tied in — through this site. Federal Trade Commission, *Your Rights: Credit Reporting* (attached to Levy Affidavit).

Adaptive is a subsidiary of Vertrue, Inc. Vertrue itself has repeatedly been in trouble with the law for schemes seducing consumers into giving their credit card numbers, which are then billed monthly. *See* Oldenburg, *Same Old Scam, Every Month: Credit Card Charges for Purchases You Don't Remember*, Washington Post, May 7, 2006 (attached to Levy Affidavit); Huffman, Hard to Escape from Negative Option Marketing, ConsumerAffairs.com, Oct. 5, 2005 (attached to Levy Affidavit); Fried, *Metro Business: Telemarketer Settles Claims of Fraud*, New York Times, Sept. 19, 2000) (attached to Levy Affidavit). As discussed in these articles, and linked from the blog post, Vertrue and its predecessor companies, CardMember Publishing Corporation and MemberWorks Incorporated, have been the subject of several consumer class actions, lawsuits by state attorneys general, and a Senate subpoena delving into its dishonest marketing. *E.g.*, Prepared Statement of the Federal Trade Commission before the Committee on Financial Services, November 1, 2001, footnote 9 (attached to Levy Affidavit). The Better Business Bureau gives Vertrue an "F" rating, based on such evidence as the more than 2500 consumer complaints in its records **(**attached to Levy Affidavit)

Adaptive recently attracted additional negative attention when it hired former presidential

speechwriter and New York Times columnist Ben Stein to appear in its TV commercials for free credit scores. On July 16, 2009, Felix Salmon, a blogger with the Reuters news service, in a blog post headlined "Ben Stein, predatory bait-and-switch merchant," complained that Stein was fronting for an unethical company and was "dangling a 'free' credit report in front of people so that he can sock them with a massive monthly fee for, essentially, doing nothing at all." http://blogs.reuters.com/felix-salmon/2009/07/16/ben-stein-predatory-bait-and-switch-merchant. He called on the New York Times to cancel Stein's contract for violating the Times' conflict of interest policies.

Movant Flaneur de Fraude operates a blog entitled "flâneur de fraude" located at http://datatoinformation.wordpress.com/. Her blog explains that she "works for a boutique investigative firm . . . that does pretrial interviews and research for law firms." http://datatoinformation.wordpress.com/about/.[1] Her blog is devoted to "finance, accounting and regulation that is related to fraud and consumer protection."

Flaneur posted an article on her blog summarizing and praising Salmon's post about Adaptive and Stein. She conducted her own research and added several details about Vertrue, providing Vertrue's corporate history and recounting several examples of what she called that company's "deceptive business practices." She cited a lawsuit brought against Vertrue by the New York Attorney General, a discussion of Vertrue in a report from the Federal Trade Commission that cited settlements with several state attorneys general, a demand for documents from the Senate Commerce Committee, and several consumer class actions. When the New York Times dismissed Stein for his conflict of interest, Flaneur updated her blog with that

[1]Counsel use the female gender for Flaneur without intending to specify her actual gender.

information.

On August 14, 2009, Adaptive filed an application for a Bill of Discovery against Yahoo!, Inc., a California company located in Sunnyvale, California. Adaptive alleged that it is a Delaware limited liability company that has "an office" in Norwalk, Connecticut, and complained that Flaneur, a Yahoo! user, had made "multiple statements accusing Adaptive of inappropriate, deceptive, and illegal conduct, including allegations of 'running a predatory bait-and-switch campaign' and engaging in 'deceptive business practices.'" Bill of Discovery ¶ 6 (capitalization adjusted). Adaptive "believes it has a valid cause of action against [Flaneur] for defamation, trade libel and tortious interference with contractual relations and business expectancies." *Id.* ¶ 8. The bill of discovery is verified by Adaptive's general counsel, but only "to the best of my knowledge and belief." Although Adaptive knew Flaneur's email address, it did not give any notice of the application to Flaneur. At Adaptive's behest, the Court issued an order to show cause compelling Yahoo! to appear on September 21. Yahoo! notified Flaneur of the pendency of the proceeding.

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. The First Amendment 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 a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right of those who have done no wrong

to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff complains about the content of material posted online and seeks a judgment granting relief against the posting of that material, including an order compelling disclosure of a speaker's identity, which, if successful, would destroy the defendant's First Amendment right to remain anonymous.

Suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. Identifying the speaker gives a would-be plaintiff an important measure of relief because it enables the plaintiff to employ extra-judicial self-help measures to counteract both the speech and the speaker. Identifying the speaker can also create a substantial risk of harm to the speaker, who not only loses the right to speak anonymously, but may be exposed to efforts to restrain or oppose his speech. For example, an employer might discharge a whistleblower, or other persons may decide not to do business with her; a public official might use her powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. As discussed below, similar cases across the country, and advice openly given by lawyers to potential clients, demonstrate that access to identifying information to enable extra-judicial action may be the only reason plaintiffs bring many such lawsuits.

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 granting the relief. The 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 simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

Although the standard for resolving such disputes has never been decided at the appellate level in Connecticut, this Court will not be writing on an entirely clean slate because there is a developing consensus among those courts that have considered this question that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Specifically, there is a developing consensus that a court faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process 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, in many jurisdictions (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. Courts 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. However, everything that the plaintiff must do to meet this test, it must also do to prevail on the merits of

its case. So long as the test does not demand more information than a plaintiff would reasonably be able to provide shortly after filing the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

On the record developed to date, discovery should be denied because Adaptive has not shown that the identified statements are false statements of fact about Adaptive, or even that Adaptive can sue Flaneur in Connecticut.

ARGUMENT

I. THE FEDERAL AND STATE CONSTITUTIONS AND CONNECTICUT LAW BAR THE DISCOVERY SOUGHT FROM YAHOO!

A. The First Amendment and Connecticut Constitution Limit Compelled Identification of Anonymous Internet 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); *Seymour v. Elections Enforcement Com'n*, 255 Conn. 78, 99, 762 A.2d 880 (2000) ("anonymous distribution of one's ideas is not only protected by the first amendment, but lies at the core of its existence."). 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 U.S. at 341-342, 356.

Moreover, because the protections afforded to free speech by the Connecticut Constitution extend further than the First Amendment, *State v. Linares*, 232 Conn. 345, 378-386, 655 A.2d 737 (1995), the Connecticut Constitution similarly protects the right to speak anonymously.

These rights are fully applicable to speech on the Internet. 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). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may 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.

Moreover, at the same time that the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the technology of the Internet, any speaker who sends an email or visits a website leaves an electronic footprint that, if saved by the recipient, provides the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). 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. Consequently, many observers argue that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). 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. First Amendment rights may also be curtailed by means of private retribution following such 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 anonymous speakers to remain anonymous, justification for an incursion 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).

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). In an analogous area of law, the courts have evolved a standard for compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In those cases, 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 its case; (2) disclosure of the source to prove the issue is "necessary" 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. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press*,

621 F.2d 721, 726 (5th Cir. 1980); *Baker v. F and F Inv.*, 470 F.2d 778 (2d Cir. 1972); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972). *Accord Connecticut State Board of Labor Relations v. Fagin*, 33 Conn. Sup. 204, 206-207, 370 A.2d 1095 (1976).

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, "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). *See also Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999):

> 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.

B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard for the Identification of John Doe Defendants.

In recent cases, courts have drawn on the privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers.

The leading case is *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo!. That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which we urge the Court to apply

in this case:

> 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 [New Jersey's rules], 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.
>
> 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.

Dendrite v. Doe, 775 A.2d at 760-761.[2]

A somewhat less exacting standard, adopted by the Delaware Supreme Court, requires the submission of evidence to support the plaintiff's claims, but not an explicit balancing of interests after the evidence is deemed otherwise sufficient to support discovery. *Doe v. Cahill,* 884 A.2d 451 (Del. 2005). In *Cahill*, 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 that ought to be within his control without discovery, including that the statements are false. The Court rejected the final "balancing" stage of the *Dendrite* standard.

All of the other appellate courts, as well as several federal district courts, that have addressed the issue of subpoenas or other court process to identify anonymous Internet speakers have adopted some variant of the *Dendrite* or *Cahill* standards. Several courts expressly endorse

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[2] *Dendrite* has received a favorable reception among commentators. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech,* 82 Notre Dame L. Rev. 1537 (2007); O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyber-Slapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U. L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001). The one article that expresses disagreement with *Dendrite* – written by the lawyer who lost *Dendrite* – advocates a standard similar to the *Cahill* case discussed next. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 Ore. L. Rev. 795 (2004).

the *Dendrite* test, requiring notice and opportunity to respond, legally valid claims, evidence supporting those claims, and finally an explicit balancing of the reasons supporting disclosure and the reasons supporting continued anonymity. *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001).

Several other courts have followed a *Cahill*-like summary judgment or prima facie case standard. *Krinsky v. Doe 6*, 159 Cal. App.4th 1154, 72 Cal. Rptr.3d 231 (Cal. App. 6 Dist. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007). 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.

Among the federal district court decisions following *Cahill* and *Dendrite* is *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2,

2004); *Caster v. Signature Management Team*, 566 F. Supp.2d 1205 (D. Nev. 2008); and *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006*). See also Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004) (court weighed limited First Amendment interests of file-sharers, upheld discovery to identify them after plaintiffs' evidence showed prima facie case that Does posted online hundreds of copyrighted songs); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008) (same).

Although no Connecticut appellate court has addressed the *Dendrite* issue, a Connecticut trial judge applied a balancing test to decide whether it was appropriate to compel Time-Warner Cable Co. to identify one of its subscribers, who was accused of defaming the plaintiff. *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Conn. Super. Stamford-Norwalk Dec. 2, 2003). Plaintiff's official testified about both the falsity of the defendant's communication and the damage that the communication had caused. Drawing on such cases as *Doe v. 2TheMart.Com*, the court ruled that plaintiff had showed "the untruthfulness of many statements in the e-mail and the disruption to its business caused by the dissemination of such statements to key employees." *Id.* at *1. Hence, the evidence established "probable cause that [plaintiff] has suffered damages as the result of the tortious acts of defendant Doe," at *7, and the court ordered identification. Similarly, in *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008), the Court granted discovery only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress based on vile personal attacks on a student gossip message board.

Although these cases set out slightly different standards, each requires a court to weigh

the plaintiff's interest in identifying the person that has allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a would-be plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

C. Adaptive Has Not Followed the Steps Required Before Identification of John Doe Speaker May Be Ordered in This Case.

This Court should follow the five *Dendrite* steps in deciding whether to allow plaintiffs to compel the identification of anonymous Internet speakers. Because Adaptive has not followed the five steps, its request for an order compelling Yahoo! to identify Flaneur should be denied.

(1) Require Notice of the Threat to Anonymity and an Opportunity to Defend Anonymity.

When a court receives a request for compel identification of an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a the request, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. at 579. Thus, in *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved this requirement. 342 N.J. Super. at 141, 775 A.2d at 760.

Notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property. *Id.* at 235. In the Internet context, posting on the Internet forum where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, and the Court is urged to follow the *Dendrite* example by requiring posting in addition to other means that are likely to be effective.

In this case, Adaptive deliberately decided not to give any notice of its bill of discovery, even though it could easily have posted a comment on the blog, and could have sent an email to the address listed on the blog post in question – the very Yahoo! email address about whose owner Adaptive seeks discovery here. We are advised that plaintiff's counsel has handled other proceedings to identify anonymous defendants, so plaintiff really has no excuse for having failed to give notice. Although, in this case, Yahoo! itself sent Flaneur notice of the Bill of Discovery, in our experience, there are many Internet Service Providers which, unlike Yahoo!, do not provide notice and a fair opportunity to respond before identifying records are provided in response to process. The precaution required by the court in *Dendrite* — a showing by the plaintiff of the steps undertaken to provide notice, such as by posting on the forum where the allegedly defamatory statements were made — is needed in such cases to ensure that any person whose anonymity is challenged has the ability to retain counsel to protect her rights.

(2) Demand Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Consequently, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated its rights. Indeed, many state and federal courts require that defamatory words be set forth verbatim in a complaint for defamation. *E.g.*, *Bobal v. RPI*, 916 F.2d 759, 763 (2d Cir. 1990); *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979).

Adaptive has specified two phrases that it deems actionable — "running a predatory bait-and-switch campaign and "deceptive business practices" — but its petition also refers vaguely to other "multiple statements" that "accus[e] Adaptive of inappropriate, deceptive and illegal conduct." Bill of Discovery ¶ 6. Because Adaptive has not specified any other words as a basis for its intended defamation claim, consideration of its Bill of Discovery should be confined to those two phrases. Flaneur does not have a fair opportunity to respond with respect to any other part of her post, and the Court cannot assess the application of the remaining parts of the test with respect to any words except the two quoted phrases.

(3) Review the Facial Validity of the Complaint After the Statements Are Specified.

Third, courts reviewing requests for discovery to identify anonymous speakers also review the merits of the legal claims stated in the complaint to ensure that they state a claim on which relief may be granted. For example, in a defamation case like this one, some statements may be too vague or insufficiently factual to be defamatory. Some statements may not be

actionable because they are not "of and concerning" the plaintiff, which is a requirement under the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). Moreover, only statements that assert provably false facts are actionable in defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990). Statements are non-defamatory as a matter of law if they are expressions of opinion based on disclosed supporting facts which are, themselves, true or substantially true; such opinions are by definition not defamatory. *Goodrich v. Waterbury Republican-American*, 188 Conn. 107, 448 A.2d 1317 (1982); *Doe v. Cahill,* 884 A.2d at 467; *McMann v. Doe*, 460 F. Supp.2d at 269–270.

> [I]n Connecticut, a defamation claim requires a statement that is an assertion of fact, either explicit or implied, and not merely an opinion, provided the opinion does not imply the existence of undisclosed defamatory facts. A comment is an opinion if it is clear from the surrounding circumstances that the maker of the statement did not intend to state an objective fact but intended rather to make a personal observation of the facts.
>
> *Indiaweekly.com v. Nehaflix.com*, 596 F. Supp.2d 497, 503 (D. Conn. 2009).

To determine whether a statement asserts a provably false fact, the statement must be viewed in context, with consideration to the "general tenor of the expression from the perspective of the reasonable person." *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 243, 567 N.E.2d 1270 (N.Y. 1991). "To be actionable, the statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion." *Daley v. Aetna Life and Cas. Co.*, 249 Conn. 766, 796, 734 A.2d 112, 129 (Conn. 1999). "Words have different meanings depending on the context in which they are used and a meaning not warranted by the whole publication should not be imputed." *Peroutka v. Streng*, 116 Md. App. 301, 695 A.2d 1287, 1293 (Md. App. 1997), *quoting Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992).

The issue of whether a statement is opinion or fact is one for the Court to resolve as a matter of law, "considering the context of the publication as a whole." *Goodrich*, 188 Conn. at 119; *Mr. Chow of New York v. Ste. Jour Azur*, 759 F.2d 219, 224 (2d Cir. 1985); *Thomas v. Telegraph Publishing Co.*, 155 N.H. 314, 338-339, 929 A.2d 993 (2007).

Moreover, just as readers will anticipate that newspaper commentators "will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere as a news reporting column," *Riley v. Moyed*, 529 A.2d 248, 252 (Del. 1987), so, too, statements on an Internet forum are typically exaggerated, and most readers will take them with a grain of salt rather than anticipating complete objectivity. *Global Telemedia Int'l v. Doe 1,* 132 F. Supp.2d 1261, 1267 (C.D. Cal. 2001). The very context thus militates against a finding of defamatory meaning.[3]

In this case, both of the phrases that Adaptive has identified are opinions based on fully disclosed facts. There is no dispute that, as fully discussed on the blog, Adaptive runs television advertising for "free" credit scores that can be obtained by a telephone call, and that during the telephone calls Adaptive obtains the callers' credit card numbers and charges them $29.95 per month for credit monitoring service. Whether or not consent is really given, and given with understanding, the characterization of "bait-and-switch," and indeed "predatory bait-and-switch", are simply the blogger's opinion of the disclosed facts, and hence this phrase rests comfortably within the constitutionally protected category of opinion based on disclosed facts. Indeed,

[3]Although the Bill of Discovery asserts plaintiff's "belief" that it has claims for trade libel and tortious interference with contractual relations and business expectancies, Adaptive cannot avoid meeting the standards of *New York Times v. Sullivan* by putting different labels on its tort claims. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

specific instances of bait-and-switch and other deceptive business conduct that have been the target of suit by government officials, criticism in the Wall Street Journal, Washington Post and other publications, class action lawsuits, Senate document demands and the like, are either mentioned in the blog post, or linked from the post, or both. Again, the phrase "deceptive business practices" is Flaneur's opinion based on disclosed facts.

Moreover, Flaneur used one of the two specified phrases — "deceptive business practices" — not about Adaptive but about Vertrue, Inc., which is not the plaintiff here. Thus, this phrase does not even meet the "of and concerning" test. The Bill of Discovery does not even plead that the supposedly actionable statements are false, that they have injured Adaptive's reputation, or that Flaneur published them with actual malice. The request for an order to Yahoo! should therefore be denied.

The Bill of Discovery also does not show a legally cognizable basis for seeking discovery because the Bill does not allege sufficient facts to warrant maintaining an action against Flaneur in Connecticut. The Bill asserts that Yahoo! does business in Connecticut, ¶ 2, but plaintiff seeks information to enable it to sue Flaneur. Connecticut cases are clear that an action cannot be maintained against foreign defendants premised on their Internet postings unless the defendant "specifically targeted Connecticut residents." *Rios v. Fergusan,* 51 Conn. Supp. 212, 2008 WL 6665285 , at *4 (Conn. Super. 2008); *RJM Aviation Assocs. v. London Aircraft Serv. Ctr.*, 45 Conn. L. Rptr. 759, 762, 2008 WL 2745574 (Conn Super. June 17, 2008); *Centennial Helicopters v. Sterling Corp.*, 2005 WL 3508575 (Conn. Super. Nov. 22, 2005). Nothing on the web page attached to the Bill of Discovery is targeted to Connecticut residents – the name of this State is not even mentioned. Nor does the web page provide any form of commercial

interactivity with Flaneur, and so the page does not meet the test for commercial interactivity set forth by the leading Internet jurisdiction case of *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa.1997), which was followed by the United States Court of Appeals for the Second Circuit in *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir.1997). Discovery should be denied here for this additional reason.[4]

(4) Both the Constitution and Connecticut Law Require an Evidentiary Basis for the Claims.

Even if the Court concludes that at least one statement is both a statement of fact, of and concerning the plaintiff, and subject to suit in Connecticut, no person should be subjected to compulsory identification through a court's power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, because it prevents a plaintiff from being able to identify its critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, no relief is generally awarded to a plaintiff until the plaintiff comes forward with **evidence** in support of its claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major

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[4]Connecticut courts have generally avoided addressing the *Zippo* test directly by focusing on whether the defendant specifically targeted Connecticut residents.

Yahoo! is not responding to the Order to Show Cause because it does not consider that it is subject to service of process in Connecticut. We are advised that Yahoo! will respond to a California subpoena. Consequently, if Adaptive is entitled to any relief, it should obtain a commission to seek discovery from the California Superior Court for the County of Santa Clara.

form of **relief** in cases like this. Requiring actual evidence to obtain such process is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark,* California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who are highly respected in their own legal communities have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.,* Werthammer, *RNN Sues Yahoo Over Negative Web Site,* Daily Freeman, November 21, 2000, www.zwire.com/site/news.cfm? newsid=1098427&BRD=1769&PAG=461&dept_id =4969&rfi=8. For example, in a recent widely publicized case, a model obtained pre-litigation discovery to identify a blogger who had posted suggestive photos found on the model's Facebook page and called her a "skank," but then announced that she had had no intention of suing for the defamation suit on which the pre-litigation discovery was predicated. http://www.nydailynews.com/gossip/2009/08/23/2009-08 -23_outted_blogger_rosemary_port_ blames_model_liskula_cohen_for_skank_stink.html.

One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_ reputation. htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, 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 & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* *See Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006), *aff'd* , 540 F.3d 179 (3rd Cir. 2008) (company represented by the largest and most respected law firm in Philadelphia filed Doe lawsuit; obtained identity of employee who criticized it online; fired the employee; and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F. Supp. 551, 566-567 (E.D. Mich. 1979). In effect, the plaintiff should be required to present admissible evidence establishing a prima facie case, or even to "satisfy the trial court that he has evidence to establish that there is a genuine issue of fact" regarding the falsity of the publication. *Downing v. Monitor Pub. Co.*, 120 N.H. 383, 387, 415 A.2d 683 (1980); *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.

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of its claims at

the outset of its case varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false (in a defamation action) or rests on confidential information (in a suit for disclosure of inside information). Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of compelling the identification of a Doe defendant.

Here, the Bill of Discovery asserts only that Adaptive "believes" that it has valid causes of action. Although the petition submitted below was "verified," the verification was made "to the best of my knowledge and belief," and the petition's verification does not even aver that the statements were false or damaged Adaptive's reputation.

Indeed, even without regard to the constitutional issues discussed above, several courts have denied bills of discovery for failure to present sufficient evidence to make out a factual basis to demonstrate that the plaintiff does, in fact, have a cause of action, *Cohen v. Connecticut State Med. Soc.*, 1993 WL 445953, at *2 (New Haven Dist. Oct. 18, 1993), or failure to demonstrate "probable cause" that the plaintiff has a viable cause of action against the person about whom information is sought. *Nestor v. Travelers Indemnity Co.*, 1992 WL 91696, at *2, 6 Conn. L. Rptr. 281 (New Haven. Dist., April 20, 1992). "The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action." *Berger v. Cuomo*, 230 Conn. 1, 7, 644 A.2d 333, 337 (1994). Thus, for example, in *Caputo v. Danbury Hospital*, 1996 WL 166724, at *1 (Danbury Dist. Mar. 22,

1996), the court denied the bill of discovery "on the ground that there is no competent evidence before it to support a finding of probable cause. The application submitted by Caputo is not verified, nor are any of the alleged facts set forth in affidavit form. Furthermore, . . . statements by attorneys are not evidence." Here, too, the Bill of Discovery is verified only "to the best of my knowledge and belief," and even then does not set forth the detailed facts needed to establish that Flaneur's statements are false or have caused actionable injury. The Court has nothing but the most conclusory assertions by plaintiff's attorney about the plaintiff's good faith, and no detailed facts to show probable cause to believe that plaintiff has a cause of action. By applying this requirement, the Court could deny the requested discovery without reaching the constitutional questions presented in this memorandum.

(5) Balance the Equities.

Even if, in response to this brief, Adaptive submits evidence sufficient to establish a prima facie case of defamation against Flaneur,

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

Just as *Ely* approved balancing in a reporter's source disclosure case, *Dendrite* required balancing when plaintiff seeks to compel identification of 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.
>
> *Dendrite,* 775 A.2d at 760-761.

See also Independent Newspapers v. Brodie, 966 A.2d at 454; *Mobilisa v. Doe*, 170 P.3d at 720; *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d at 976.

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 basis to breach the anonymity of the defendants. *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) ("an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"). The requirement that there be sufficient evidence to prevail against the speaker, and sufficient showing of the exhaustion of alternate means of obtaining the plaintiff's goal, to overcome the defendant's interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, such identification is not "necessary."

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction – and not even a preliminary one. An order to provide identifying information about an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). In some cases, identification of the Does may expose them to significant danger of extra-judicial retaliation.

However, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint. The plaintiff retains the opportunity to renew its motion after submitting more evidence.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and its interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains.

In this case, Adaptive's interest does not weigh very heavily. Flaneur's blog post came against the background of many different stories in the press and actions by several different law enforcement agencies, not to speak of a blog post by Felix Salmon, over the conduct of Adaptive and its parent company; there is no evidence from which the court can conclude that Flaneur's blog post had any marginal impact on Adaptive's interest. Nor is there any indication that Adaptive has sued Reuters or other prominent companies that have criticized its conduct. To the

contrary, Adaptive's bill of discovery has the air of an effort to cleanse its reputation by pursuing the little guy instead of Reuters, the Wall Street Journal, the Washington Post, or the other publications that can afford to defend themselves.

Flaneur, however, faces the possibility of significant consequences merely from being identified. As her blog reveals, Flaneur is a private investigator who earns her living conducting investigations for private law firms. Although some of her clients and potential clients may well be pleased to learn that their investigator blogs on the subject of fraud, others might well want to send their business elsewhere out of concern that association with Flaneur or her firm might cause **their** clients anxiety. Given current economic conditions, loss of even one significant client could easily make it harder for Flaneur to earn a living. The balance of equities, therefore, weighs against disclosure.

D. The *Dendrite* / *Mobilisa* / *Brodie* Standard Strikes the Right Balance of Interests.

The principal advantage of the *Dendrite/Mobilisa*/*Brodie* test is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong. In that way, it provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of victims to be compensated for their harms. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice. At the same time, the standard helps ensure that persons with legitimate reasons for criticizing public figures anonymously will be allowed to

maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is discovery and the "outing" of anonymous speakers. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed seeking 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 serio

us about pursuing a claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's have reported some staggering statistics about the number of subpoenas they received – AOL's amicus brief in the *Melvin* case reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! stated at a hearing in California Superior Court that it had received "thousands" of such subpoenas. *Universal Foods Corp. v. John Doe*, Case No. CV786442 (Cal. Super. Santa Clara Cy.), Transcript of Proceedings July 6, 2001, at page 3.

Although no firm numbers can be cited, experience leads counsel to believe that the number of suits being filed to identify online speakers dropped after *Dendrite* was decided. The decisions in *Dendrite*, *Melvin, Cahill, Mobilisa*, and other cases that adopted strict legal and evidentiary standards for defendant identification sent a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these cases and to successful suits against Internet speakers, as well as the fact that many online speakers are identified in cases that meet the *Dendrite* standards – indeed, two Doe defendants in *Dendrite* were identified, as was the defendant in the companion case to *Dendrite*, *Immunomedics v. Doe*, 342 N.J. Super. 160, 775 A.2d 773 (N.J. Super. App. Div. 2001) – has discouraged some would-

be posters from indulging in the sort of Wild West atmosphere that originally encouraged the more egregious examples of online irresponsibility, if not outright illegality. The Court should preserve this balance by adopting the *Dendrite* test that weighs plaintiffs' interest in vindicating their reputations in meritorious cases against the right of Internet speakers to maintain their anonymity when their speech is not actionable. In this case, that test leads ineluctably to the conclusion that the request for discovery to identify Flaneur de Fraude should be denied.

CONCLUSION

The order to show cause should be discharged.

REAL PARTY IN INTEREST "FLANEUR DE FRAUDE",

By:_____

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CERTIFICATION

This is to certify that a copy of the foregoing was served by hand-delivery, this 17th day September 2009, to:

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