CAUSE NO. 416-00886-05

CITADEL SECURITY SOFTWARE INC.	)	DISTRICT COURT OF
	)	
Plaintiff,	)	
	)	
v.	)	COLLIN COUNTY, TEXAS
	)	
JOHN DOES 1-5,	)	
	)	
Defendants.	)	416th JUDICIAL DISTRICT

MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA TO YAHOO! AND FOR LEAVE TO PROCEED ANONYMOUSLY

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This case involves a high-tech company whose management dumped nearly 800,000 shares of stock before the company's stock price collapsed, and which now faces several class action suits under the securities laws alleging that the company hid bad news while its executives were selling off their own stock. Through this lawsuit, the company seeks to suppress criticism on the Internet message board where these shenanigans, which are undisputed, were discussed. The company has sued five anonymous Internet posters on general allegations of defamation and business disparagement, and has subpoenaed Yahoo! to identify the five speakers. However, because the First Amendment guarantees the right to speak anonymously unless that right is abused, because there is neither allegation nor evidence that the speakers committed any legal wrong, and because in any event this Court neither has personal jurisdiction over the defendant nor is the proper venue for this claim, the subpoena should be quashed.

STATEMENT OF THE CASE

A. Factual Background

1. The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to read them. As the Supreme Court explained in *Reno v. ACLU,* 521 U.S. 844, 853, 870 (1997), "From the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide 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." The Court held, therefore, that full First Amendment protection applies to speech on the Internet. *Id.* Or, as another court put it, "[defendant] is free to shout 'Taubman

Sucks!' from the rooftops . . .. Essentially, this is what he has done in his domain name. The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and Mishkoff has a First Amendment right to express his opinion about Taubman." *Taubman v. WebFeats*, 319 F.3d 770, 778 (6th Cir. 2003).

Knowing that people have personal and economic interests in the corporations that shape our world, and in the stocks that they hope will provide for their secure future, and knowing, too, that people love to share their opinions with anyone who will listen, Yahoo! has organized outlets for the expression of opinions about publicly-traded companies. Yahoo! maintains these outlets for most publicly-traded companies and permits anyone to post messages to them. The individuals who post messages generally do so under a pseudonym – similar to the old system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the message board at issue here will reveal, most people choose nicknames. 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. Indeed, every message board has regular posters who persistently complain about the company, others who persistently praise it, and others whose opinions vary between praise and criticism over time. Such exchanges are often very heated, and they are sometimes filled with invective and insult. Most, if not everything, that is said on message boards is taken with a grain of salt.

One aspect of the message board that makes it very different from almost any other form of published expression is that, because any member of the public can use a message board to express his point of view, a person who disagrees with something that is said on a message board for any

reason – including the belief that a statement contains false or misleading information – can respond to those statements immediately at no cost, and that response will have the same prominence as the offending message. A message board is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, corporations and executives can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong. And, because many people regularly revisit the message board about a particular company, a response is likely to 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, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

2. In October 2004, Yahoo! introduced a message board devoted to plaintiff Citadel Security Software. The opening message on the message board sets out the ground rules:

> This is the Yahoo! Message Board about Citadel Security Software (NasdaqSC: CDSS), where you can discuss the future prospects of the company and share information about it with others. This board is not connected in any way with the company, and any messages are solely the opinion and responsibility of the poster.
>
> http://finance.messages.yahoo.com/bbs?.mm=FN&action=m&board=1609129190&tid=cdss&sid=1609129190&mid=1.

Every page of message listings is accompanied by a similar warning that all messages should be treated as the opinions of the poster and taken with a grain of salt:

> Reminder: This board is not connected with the company. These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose. Never assume that you are anonymous and cannot be identified by your posts. Please read our Terms of Service. For more

information regarding investments and the Internet, please visit the SEC Web site.

http://finance.messages.yahoo.com/bbs?.mm=FN&action=m&board=1609129190&tid=cdss&sid=1609129190&mid=1

Many members of the public regularly turn to the Yahoo! message board as one source of information about Citadel. As of the date of this motion, more than 3000 messages had been posted on the Citadel board in the less than six months since it was established. Review of those messages reveals an enormous variety of topics and posters. Investors and members of the public discuss the latest news about what services the company is providing and may provide, what new business it may develop, how Citadel compares to its competitors, what the strengths and weaknesses of Citadel's operations are, and what its managers and employees might do better. Many of the messages praise Citadel, some criticize it, and some are neutral. Most of the messages give every appearance of being highly opinionated. Many of the posts are extremely vituperative.

According to its corporate profile, "Citadel is a leader in enterprise vulnerability management solutions, helping enterprises effectively neutralize security vulnerabilities through automated vulnerability remediation (AVR) technology." www.citadel.com/overview.asp. Its web site reveals that it appeals regularly to the public for financial support and to the media for attention, issuing several press releases each month. *E.g.*, www.citadel.com/press.asp. Its products have been touted publicly for excellence, *e.g.*, eWEEK Announces Finalists for Its 5th Annual Excellence Awards Program, biz.yahoo.com/prnews/050328/nym148.html?.v=4; Citadel Security Software's Hercules Wins Two SC Magazine Global Awards 2005, www.citadel.com/PressView.asp?search_criteria=168. In the post-9/11 era, in which the vulnerability of government agencies to cyber-terrorism and the exposure of private data on corporate networks to identity thieves both command constant public interest, a company like Citadel that seeks to serve those objectives is naturally a

subject of considerable public attention. Citadel is unquestionably a public figure, and discussions of Citadel are a matter of public interest and concern.

With public attention and adulation comes the risk of criticism when members of the public perceive that the company has made mistakes. This case arose in the aftermath of a drastic drop in stock price in mid-December 2004, after Citadel admitted that it was not going to meet its target revenue figures, because certain business opportunities that Citadel had predicted would be secured would not come to fruition in 2004. www.citadel.com/PressView.asp?search_criteria=154. Throughout 2004, members of Citadel management, and particularly Citadel's chief executive officer, Steven Solomon, sold off nearly 800,000 shares of stock at then-prevailing prices between $4 and $5 per share; Solomon alone sold 700,000 shares of stock. finance.yahoo.com/q/it?s=cdss**.** Following the price drop, the stock was initially temporarily worth about $2.50 per share; it is currently hovering at about $1 per share.[1]

Nor surprisingly, these events provoked criticism on the Yahoo! message board, even among posters who had previously been extremely supportive of the company. Defendant onlymybusiness99 was one such individual. As his posts reflect, onlymybusiness99 is a Minnesotan, finance.messages.yahoo.com/bbs?.mm=FN&board=1609129190&tid=cdss&sid=1609129190&action=m&mid=1245, who purchased stock in Citadel in the fall of 2004. finance.messages.yahoo.com/bbs?.mm=FN&board=1609129190&tid=cdss&sid=1609129190&action=m&mid=250. Defendant made clear that he was not an experienced investor, *id.*, but the

[1]Several law firms specializing in class actions have since sued Citadel under the securities laws; these cases are pending before Honorable Sidney Fitzwater in the United States District Court for the Northern District of Texas. *E.g.*, *Lentz v. Citadel Security Software,* Nos. 3:05-cv-00100.

general tenor of his comments on the bulletin board were quite favorable, *e.g.*, finance.messages.yahoo.com/bbs?.mm=FN&board=1609129190&tid=cdss&sid=1609129190&action=m&mid=166. However, after the price dropped precipitously, defendant noted the huge volume of stock sales in less than a one-month period, commented ironically on Solomon's good judgment in getting his money out just before the disappointing announcement drove its stock down, and inquired about the factual basis for assertions that the stock sales were "automatic" or "planned." finance.messages.yahoo.com/bbs?.mm=FN&board=1609129190&tid=cdss&sid=1609129190&action=m&mid=913. Several subsequent posts articulated the theory that there was good money to be made in CDSS stock, by studying Solomon's publicly reported transactions in company stock and basing one's investment strategy on the assumption that, when Solomon is selling, the stock price is likely to go down soon. *E.g.*, finance.messages.yahoo.com /bbs?.mm=FN&board=1609129190&tid =cdss&sid= 16091291 90&action=m&mid=1007.

B. Proceedings to Date

On March 16, 2005, Citadel filed this action against five anonymous defendants who published allegedly false and defamatory statements about Citadel "on an Internet bulletin board." Although the Petition does not identify the message board, plaintiff's suit against the users of five screen names that posted several messages on the Yahoo! message board for CDSS, coupled with the fact that Citadel has subpoenaed Yahoo! to identify each of those speakers, reveals that it is Yahoo!'s CDSS message board that is at issue.

The petition also does not identify any of the allegedly actionable statements, or even describe their gist – it just alleges in general terms that the statements were false, disparaging, and made with knowledge of falsity. Nor does the petition allege that onlymybusiness99 made any

statements of fact about Citadel. And, although onlymybusiness99 is from Minnesota, and Citadel is headquartered in Dallas County, plaintiff alleges that venue is proper in this Court because the Internet is available in Collin County.

After filing its complaint, plaintiff transmitted a subpoena duces tecum and request for deposition by written questions to Yahoo! through a "custodian of records." Although the subpoena asked Yahoo! to communicate the notice to the owners of the screen names, plaintiff made no effort to communicate with defendants itself, such as by posting notice of the subpoena on the message board. Moreover, when contacted by undersigned counsel Mr. Levy who, hoping to ascertain the basis for the claims against his client, asked for a copy of the petition, Citadel's counsel refused any cooperation. *See* Letter from Paul Alan Levy, Esquire to David Harper, Esquire. After Mr. Levy received no response to his letter, he posted it to the message board. http://finance.messages.yahoo.com/bbs?.mm=FN&action=m&board=1609129190&tid=cdss&sid=1609129190&mid=3093. The following day, Citadel offered to stay the subpoena for the time being, *see* Letter from Carmen Griffin, Esquire to Mr. Levy, but it has refused to withdraw the subpoena or dismiss onlymybusiness99 from this case. Accordingly, onlymybusiness99 has entered a special appearance, objecting to jurisdiction and venue in this Court, and subject to that special appearance now moves to quash the subpoena to Yahoo!

ARGUMENT

The motion to quash should be granted for two reasons. First, Citadel has filed its complaint in the wrong court because onlymybusiness99 is not subject to personal jurisdiction in Texas and because venue does not lie in Collin County. Second, Citadel seeks information that is protected by a qualified privilege, in that disclosure would infringe defendant's First Amendment right to

speak anonymously on the Internet. The broad consensus among state and federal courts is that when the plaintiff seeks to identify an anonymous Internet speaker – even an anonymous speaker who has been sued for allegedly wrongful speech – the plaintiff must show that its claim is legally viable and that he has sufficient evidence of wrongdoing to create a compelling state interest that overcomes the right to anonymity. Because that test has not been met here, the motion to quash should be granted.

A. The Texas Courts Lack Jurisdiction.

The first reason why the subpoena to identify onlymybusiness99 should be quashed is that Citadel has improperly sued defendant in this Court. This issue is discussed in detail in defendant's special appearance, and those arguments are incorporated by reference as a basis for quashing the subpoena.

B. There Is No Basis for Venue in Collin County.

Citadel's Texas office is in Dallas, and the petition does not allege that it has a presence in Collin County. The petition's only reference to Collin County and to venue there is the allegation that "a substantial part of the events or omissions" occurred there because the posting "are available on the Internet in Collin County." But the implication of the sliding scale analysis, as shown in the Special Appearance, is that torts committed on Internet web sites do not occur in any jurisdiction where the site can be seen. If that were true, a company could maximize inconvenience to an Internet speaker by the simple tactic of choosing to file suit in a jurisdiction that maximizes inconvenience to the individual defendant. For example, a Texas company could file suit in Alaska or Hawaii, or even in the Virgin Islands or Guam, knowing that most defendants cannot find counsel there and cannot afford to defend themselves in such far-flung places, however meritless the

allegations. The chilling effect on free speech on the Internet is obvious, and the Court should not countenance it.

C. The First Amendment Bars the Enforcement of the Subpoena

1. The First Amendment Protects Against the Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960); *Doe v. State*, 112 S.W.3d 532 (Tex. Crim. App.2003), *aff'g State v. Doe*, 61 S.W.3d 99, 103 (Tex. App. – Dallas 2001). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court has stated:

> [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.

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 US 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998); *ACLU v. Miller,* 977 F. Supp. 1228, 1230 (N.D.Ga. 1997); *see also ApolloMEDIA Corp. v. Reno*, 526 U.S. 1061 1450 (1999)*, aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications); *Global Telemedia v. Does*, 132 F.Supp.2d 1261 (C.D. Cal. 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California's anti-SLAPP statute); *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1092-1093 (W.D.Wash. 2001) (denying subpoena to identify third parties).

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 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. Whatever the reason for wanting to speak anonymously, the impact of a rule that makes it too easy to remove the cloak of anonymity is to deprive the marketplace of ideas of valuable contributions, and potentially to bring unnecessary harm to the speakers themselves.

Moreover, at the same time that the Internet gives individuals the opportunity to speak

anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. The technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind 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*, 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. As a result, many informed observers have argued 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, *Innovation and the Information Environment: 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, constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 364 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. As the Supreme Court has held, 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*, 560 F.2d 219, 226-230 (5th Cir. 1978). In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such 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. *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972); *Campbell v. Klevenhagen*, 760 F. Supp. 1206, 1210, 1215 (S.D. Tex. 1991); *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470, 472 (Tex.App.--Houston [1st Dist.] 1987).

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

speakers whose identity was 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).

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

In a number of recent cases, courts have drawn on the privilege against revealing sources to enunciate a similar standard for protecting against the identification of anonymous Internet speakers.[2]

The leading case is *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (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 movant urges 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

[2] Although there are no reported cases in Texas on this subject, in each of the several motions to quash Texas subpoenas of which we are aware, either the subpoena has been withdrawn in face of the motion to quash, or the subpoena has been quashed by unpublished order. *In re Jimmie Cokinos*, Cause No. B-172-785 (60th Jud. Dist., Jefferson County) (January 8, 2005); *Dynacq International, Inc. v. Yahoo Inc.*, No. GN2-02048 (53d Jud. Dist., Travis County) (date unknown; order reported by Doe's counsel).

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, 342 N.J.Super. at 141-142, 775 A.2d at 760-761.[3]

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[3] *Dendrite* has received a favorable reception among commentators. *E.g.*, 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 Cyberslapp: 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*

A similar approach was used in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several anonymous defendants who had registered Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect that such discovery could have:

> 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.
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> *Id*. at 578.

Accordingly, the *Seescandy* court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and to provide them with notice that the suit had been filed against them, thus assuring them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against the defendants. *Id*. at 579. This demonstration included a review of the evidence in support of the trademark claims that the plaintiff was bringing against the anonymous defendants. *Id.* at 580.

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. In another case, the Virginia Circuit Court for Fairfax County considered a subpoena for

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Cyberspace, 19 J. Marshall J.Computer & Info.L. 493 (2001).

identifying information of an AOL subscriber. The subscriber did not enter an appearance, but AOL argued for a standard that would protect its subscribers against needless piercing of their protected anonymity. The court required plaintiff to submit the actual Internet postings on which the defamation claim was based, and then articulated the following standard for disclosure: The court must be

> satisfied by the pleadings or evidence supplied to that court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed, and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.
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> *In re Subpoena Duces Tecum to America Online,* 52 Va.Cir. 26, 34, 2000 WL 1210372 (Va.Cir. Fairfax Cy. 2000), *rev'd on other grounds*, 261 Va. 350, 542 S.E.2d 377 (2001).[4]

More recently, a Connecticut court 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. 2003). The court took testimony from one of the plaintiff's officials, who attested both to the falsity of the defendant's communication and to the damage that the communication has caused. Drawing on such cases as *America Online* and *Doe v. 2TheMart.Com*, 140 F.Supp.2d 1088 (W.D.Wash 2001), that court decided that the evidence was sufficient to establish "probable cause that it has suffered damages as the result of the tortious acts of defendant Doe," at *7, and therefore ordered identification.[5]

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[4] Virginia has since implemented a *Dendrite*-like policy by statute, Va. St. § 8.01-407.1, and proposals for similar legislation are pending in other states.

[5] In *Fitch v. Doe*, — A.2d —, 2005 WL 627569, 2005 ME 39 (March 18, 2005), the Maine Supreme Court recognized the general rule but did not address it because the First Amendment had

Although each of these cases sets out a slightly different standard, each requires the courts to weigh the plaintiff's interest in obtaining the name of 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.

3. Citadel Has Not Followed The Steps Required Before Identification of John Doe Defendants May Be Ordered in This Case.

Courts should follow five steps in deciding whether to allow plaintiffs to compel the identification of anonymous Internet speakers. Because Citadel cannot meet these standards, it is not entitled to have his subpoena enforced.

(a) Notice of the Threat to Anonymity and an Opportunity to Defend It.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Seescandy*, 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

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not been raised below.

retain counsel to voice their objections, if any. (The posted Order to Show Cause, as it appears in the Appendix in the *Dendrite* appeal, is appended to this brief). The Appellate Division specifically approved this requirement. 342 NJSuper at 141, 775 A2d at 760. Here, Citadel met that concern by asking Yahoo! to provide notice, and that notice did reach onlymybusiness99.

(b) Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that it does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that is alleged to have violated its rights. Indeed, like most states, Texas requires that defamatory words be set forth verbatim in a complaint for defamation. *Perkins v Welch*, 57 S.W.2d 914, 915 (Tex. Civ. App. – San Antonio 1933); *see also Granada Biosciences v. Barrett*, 958 S.W.2d 215, 222 (Tex.App.– Amarillo 1997); *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979). Citadel has not alleged the supposedly actionable words with any specificity.

(c) Review the Facial Validity of the Claims After the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable. In a defamation case, for example, some statements may be too vague or insufficiently factual to be defamatory. Other statements may be non-actionable because they mere express opinion, which is excluded from the cause of action for defamation. *Carr v. Brasher*, 776 SW2d 567, 570 (Tex. 1989); *Brewer v. Capital Cities/ABC*, 986 SW2d 636, 643 (Tex. App. – Ft. Worth 1998). If, in response to this motion to quash, Citadel identifies the specific statements over which it has sued defendant, the Court should then apply the Texas opinion standard to decide whether the statements are facially actionable.

(d) Require an Evidentiary Basis for the Claims.

No person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement 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 identification of the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless it comes forward with evidence in support of its claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this. Requiring actual evidence to enforce a subpoena 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 bring cases like this one 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. 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 46. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the company that has filed the action. *Id.*

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 meet the summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues with respect to which it needs to identify the anonymous speakers, before it is given the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

The extent to which a proponent of compelled 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, to obtain an injunction compelling the identification of the defendant, 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 or rests on confidential information. Thus, it is ordinarily proper to require a plaintiff to present proof of this element of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant. The same is true with respect to proof of damages. Even if discovery is needed to develop the full measure of damages, a plaintiff should surely have some information at the outset supporting claims that it suffered actual damages.

In this case, Citadel has yet to introduce **any** evidence that anything onlymybusiness99 said about it is false, not to speak of showing a reason to believe that complaints about problems that were already the subject of extensive public discussion were made with actual malice, or that defendant's statements caused plaintiff to suffer **any** damage. For this reason as well, the motion to quash should be granted.

(e) Balance the Equities.

After the Court has satisfied itself that a poster has made at least one statement that is actionable,

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

Just as the Missouri Court of Appeals approved such balancing in a reporter's source disclosure case, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel

identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite v. Doe*, 342 N.J.Super. 134, 141-142, 775 A.2d 756, 760-761 (App. Div. 2001).

See also In re Hochheim Prairie Farm Mut. Ins. Ass'n, 115 S.W.3d 793, 795-796 (Tex. App.-Beaumont 2003) (discovery under Rule 202 requires balancing of interests).

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 v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D.Mich. 1996). 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 interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual

grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

The 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 at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976).

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. And because the case has not been dismissed, the plaintiff can pursue discovery from third parties and possibly on a limited basis from the anonymous defendant, as it attempts to develop sufficient evidence to warrant an order identifying the speaker.[6]

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 cause significant damage to the plaintiff, and the extent to which the plaintiff's own fault is responsible for the problems of which it complains.

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[6]If, however, the motion to quash is granted based on the plaintiff's failure to allege actionable communications, there is no reason not to dismiss the Petition itself.

* * *

The principal advantage of the *Dendrite* 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 losses. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice, while at the same time ensuring that persons with legitimate reasons for speaking anonymously, while making measured criticisms, will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging the filing of unnecessary lawsuits. 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 serious 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 undersigned counsel to believe that

the number of civil suits currently being filed to identify online speakers has dropped dramatically from the earlier figures. The decisions in *Dendrite*, *2TheMart.com*, *Melvin, Seescandy* and other cases that have adopted strict legal and evidentiary standards for defendant identification have 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 lawsuits, to the occasional libel verdict against anonymous defendants, as well as the fact that many online speakers have been identified in cases that meet the *Dendrite* standards (indeed, two of the Doe defendants in *Dendrite* were identified), has discouraged some would-be posters from the sort of Wild West atmosphere that originally encouraged the more egregious examples of online irresponsibility, if not outright illegality. We urge the Court to preserve this balance by adopting the *Dendrite* test that weights the interests of defamation plaintiffs to vindicate their reputations in meritorious cases against the right of Internet speakers to maintain their anonymity when their speech is not actionable.

CONCLUSION

The subpoena to Yahoo! should be quashed.

Respectfully submitted,

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