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DENDRITE INTERNATIONAL, INC. a New Jersey corporation, Plaintiff-Appellant, v. JOHN DOES Nos. 1 through 4 and DOES 5 through 14, inclusive, Defendants-Appellees.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2774-00 CIVIL ACTION On Appeal from an Order of the Superior Court of New Jersey, Chancery Division, General Equity Part, Morris County Sat Below: Hon. Kenneth C. MacKenzie

BRIEF OF AMICI CURIAE PUBLIC CITIZEN AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Amici curiae have submitted an identical brief under a separate cover in the case Immunomedics v. Jean Doe, Docket No. A-2762-00.

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INTEREST OF AMICI CURIAE

Public Citizen is a public interest organization based in Washington, D.C., which has approximately 150,000 members, more than five thousand of them in New Jersey. Since its founding by Ralph Nader in 1971, Public Citizen has urged citizens to speak out against abuses by a variety of large institutions, including corporations, government agencies, and unions, and it has advocated a variety of protections for the rights of consumers, citizens and employees to encourage them to do so. Along with its efforts to encourage public participation, Public Citizen has brought and defended numerous cases involving the First Amendment rights of citizens who participate in public debates.

In recent years, Public Citizen has watched with dismay as an increasing number of companies have used litigation to prevent ordinary citizens from using the Internet to express their views about the manner in which companies have conducted their affairs. In recent years, Public Citizen has represented consumers, *ServiceMaster v. Virga*, No. 99-2866-TUV (W.D. Tenn.), workers, *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.), investors, *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.); *iXL Enterprises v. Doe, No.* 2000CV30567 (Ga. Super. Fulton Cy.), and other members of the public, *Thomas & Betts v. John Does 1 to 50*, Case No. GIC 748128 (Cal. Super. San Diego Cy.); *Circuit City Stores v. Shane*, No. C-1-00-0141 (S.D. Ohio), who have been sued for criticisms they voiced on the Internet. *See generally* http://www.citizen.org/litigation/briefs/ internet.htm. In these and other cases, companies have brought suit without having a substantial legal basis, hoping to silence their critics through the threat of ruinous litigation, or by using litigation to obtain the names of critics with the objective of taking extra-judicial action against them (such as by firing employees found to have made critical comments).

The American Civil Liberties Union of New Jersey ("ACLU-NJ') is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 8,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 300,000 members nationwide. ACLU-NJ strongly supports freedom of speech and has participated in many cases involving free speech rights. *Green Party v. Hartz Mountain Industries*, 164 N.J. 127 (2000) (involving free speech rights at a privately owned shopping mall); *First Puerto Rican Festival of New Jersey v. City of Vineland*, 108 F. Supp. 2d 392 (D.N.J. 1998) (challenge to ordinances that chilled use of traditional public forum). It has also participated as *amicus curiae* and in other capacities in numerous cases involving rights guaranteed by the federal and state constitutions. *V.C. v. M.J.B.*, 163 N.J. 200 (2000); *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Elementary Sch.*, 150 N.J. 575 (1997); *Mourning v. Correctional Medical Services*, 300 N.J. Super. 213 (App. Div.1997); *Rutgers Council of AAUP Chapters v. Rutgers*, 298 N.J. Super. 442 (App. Div. 1997); *Boy Scouts of America v. Dale*, 160 N.J. 562 (1999), *rev'd*, 530 U.S. 640 (2000); *C.K. v. New Jersey Dep't of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996); *Presbytery of New Jersey v. Florio*, 902 F. Supp. 492 (D.N.J. 1995), *aff'd*, 99 F.3d 101 (3d Cir. 1996); *Liang v. Immigration and Naturalization Service*, 206 F.3d 308 (3d Cir. 2000), *cert. pending*, 69 USLW 3346 (Nov. 2, 2000); *United States v. Velasquez*, 37 F. Supp.2d 663 (D.N.J. 1999); *Hughes v. Lipscher*, 852 F. Supp. 293 (D.N.J. 1994); *State in Interest of J.G.*, 151 N.J. 565 (1997); *In re Petition for Certif. filed by Twp. of Warren*, 132 N.J. 1 (1993); *Abbott v. Burke*, 119 N.J. 287 (1990); *In re Nov. 14, 1989 Non-Group Rate Filing by Blue Cross & Blue Shield*, 239 N.J. Super. 434 (App. Div. 1990).

Because of the importance of the Internet as a forum for free speech, the National ACLU has also taken a strong interest in cases involving Internet censorship and criminal prosecution for Internet communication. *See Reno v. ACLU*, 521 U.S. 844 (1997)(challenge to constitutionality of Communications Decency Act); *ACLU v. Reno II*, 217 F.3d 162 (2000)(challenge to constitutionality of Child Online Protection Act).

Amici recognize that some persons abuse the apparent ability to speak anonymously on the Internet, treating anonymity as a license to defame adversaries, or to breach their legal duties in other ways. Consequently, we do not advocate any absolute right to speak anonymously. We argue in this brief that a Court should give anonymous parties an opportunity to defend themselves before **any** orders are entered against them, and that the Court should recognize that, merely by permitting the plaintiff to learn the identity of its critics, it is affording the plaintiff very significant relief which, in some cases, may be the only substantive order that the plaintiff obtains in the case. Before such an order is issued, therefore, the Court should both ascertain whether the plaintiffs have valid legal claims, and require a showing that there is evidence sufficient to support those claims.

Amici do not represent any party to this case; rather, they seek the Court's permission to file this brief to argue for the application of a legal standard that guarantees that companies with valid claims and a proper purpose for suing will be able to obtain a judicial forum for the adjudication of their grievances, without stripping citizens of their right to speak anonymously unless a sufficient showing is made to overcome the protected interest in anonymity.

STATEMENT

A. Internet Message Boards

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 listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union,* 521 U.S. 844, 853, 870 (1997), "From a publisher's standpoint, it constitutes a vast platform from which to address and hear from a world-wide audience of millions or 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 internet is a traditional public forum, and full First Amendment protection applies to free speech on the internet. *Id.*

Knowing that people have personal and economic interests in the corporations that shape our world, and in the stocks they hope will provide for a secure future, and knowing, too, that people love to share their opinions with anyone who will listen, Yahoo! and several other internet service providers have organized outlets for the expression of opinions on these topics. These outlets, called Message Boards, are an electronic bulletin board system where individuals freely discuss major companies by posting comments for others to read and respond to.

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 statements about himself – can respond to those statements immediately, and be given 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, the 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.

Yahoo! maintains a Message Board for every publicly traded company and permits anyone to post messages to it. The individuals who post messages there generally do so under a "handle" – similar to the old system of CB's with truck drivers. Nothing prevents the individual from using his real name, but as inspection of the Message Board at issue in this case will reveal, usually the person chooses an anonymous nickname. These typically colorful nicknames protect the writer's identity from those who disagree with him or her, and encourage the uninhibited exchange of ideas and opinions. Such exchanges are often very heated and, as seen from the various messages and the responses on the Message Board at issue in this case, they are sometimes filled with invective and insult. Most, if not everything, that is said on the Message Board is taken with a grain of salt.

Posters use pseudonyms rather than posting under their own names for a variety of sound reasons, much as anonymous writers throughout history have done. *See* Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 895-898 (2000). First, many posters believe that their opinions may be taken less seriously (or too seriously) if they can be identified by their personal characteristics, such as their gender, ethnicity, or occupation; they may want to have

their thoughts and opinions evaluated for their intrinsic merit rather than in light of the status of the speaker. Second, because exchanges online are often vituperative, many posters do not want to be identified because they are afraid that other posters – or other readers who "lurk" on the message board but do not post – may react unpredictably to an unpleasant exchange. Third, many posters are afraid that they may suffer retaliation for their views, if, for example, they complain about financially or politically important people in their home or work communities, or if they speak critically about their employers or unions.

B. The Dendrite Message Board

One of Yahoo's Message Boards is devoted to the plaintiff, Dendrite International. Dendrite's web site, www.dendrite.com, reveals that it is a very large corporation – in its most recent fiscal year, it had more than 1300 employees, revenues in excess of $170,000,000 and almost $60,000,000 in assets; it services over 150 companies in 57 countries from 21 offices around the world (according to its annual report, it had more than 30,000 **new** customers in 1999 alone). According to its web site, the company issues several press releases every month. Its complaint alleges that it is "a leading global provider of highly specialized, integrated product and service offerings for the Pharmaceutical and Consumer Package Goods (CPG) industries." Pa67. In short, Dendrite is a major company that has invited public scrutiny and public comment, and it is a public figure for the purpose of First Amendment analysis of its defamation and similar claims.

The opening message on Yahoo's Dendrite Board, dated September 10, 1997, states its purpose:

> This is the Yahoo! Message Board about Dendrite International Inc (Nasdaq: DRTE) 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://messages.yahoo.com/bbs?.mm=FN&action=m&board=4688055&tid=drte&sid=4688055&mid=1

Every page of message listings is accompanied by a similar warning that all messages should be treated as the opinions of the posters. :

> 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. Please read our Terms of Service.
>
> http://messages.yahoo.com/bbs?.mm=FN&action=l&board=4688055&tid=drte&sid=4688055&mid=&start=872

Large numbers of investors turn to the Yahoo! Message Board as a source of news and information about Dendrite. As of the date this brief is written, over 1700 messages have been posted on the Board. A casual review of those messages reveals an enormous variety of topics and posters. Investors and members of the public discuss the latest news about what products the company has sold and may sell, what new products it may develop, what other businesses Dendrite might buy, what other companies might buy Dendrite, what the strengths and weaknesses of Dendrite's operations are, and what its managers and employees might do better. To some extent, Dendrite employees also use the forum to discuss their problems with the company – whether Dendrite is meeting its obligations to its employees, and what the employees might do about it. Many of the messages praise Dendrite, some criticize it, and some are basically neutral. Most of the posts give every appearance of being written by highly opinionated persons.

The *Dendrite* suit was been filed over a series of postings by four different posters, using the pseudonyms implementor_extraordinaire, gacbar, ajcazz, and xxplrr. From a casual review of the Dendrite message board, the posters range in frequency from "implementor," a regular visitor to the

message board who posted numerous messages over several months' time, to "ajcazz," a casual visitor who posted only a couple of messages on a single day and never returned. The contents of the messages over which suit has been brought also display a wide range, from the gripes of an employee like "ajcazz," who complained about pressure from management to produce and said that other employees were lazy, to claims by "implementor" that employees and customers are leaving Dendrite in droves and that Dendrite is not spending enough time and money protecting its interests. One of the pseudonyms, ajcazz, identifies himself as a current employee; another of them, implementor, identifies herself as a former employee; one pseudonym, xxplrr, states that he has never worked for plaintiff; and the final pseudonym, gacbar, does not say anything about employment in his posts.[1]

The complaint alleges a series of different claims against the four anonymous posters, based on a number of statements that are specifically alleged in the complaint. Three of the posters (all except gacbar) are alleged to have made false statements; two posters (implementor and ajcazz) are alleged to have violated their employment agreements; and three of the posters (all except ajcazz) are alleged to have published secret information, allegedly in violation of various common law or contractual obligations. The complaint seeks both damages and injunctive relief against further violations. However, the issue now before the Court concerns a form of relief that could be equally significant – plaintiff sought to compel Yahoo! to identify the four posters, thus depriving them of the anonymity that each of them claimed in making the comments.

Although Yahoo, to which the subpoenas are directed, now gives notice to the affected

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[1]Because the defendants are anonymous, any gender-specific pronouns used to describe them are not intended to state their actual gender.

customers whenever it has been subpoenaed to provide information about them, Judge MacKenzie properly required plaintiff to publish notice on the Message Board itself, to give the posters a few days to come before it to explain why their identities should be concealed from the plaintiff. Public Citizen learned of the court's order by virtue of this internet posting, and two of the anonymous posters themselves retained counsel and filed papers with the court.

One of the two posters who appeared below, John Doe No. 4, whose screen name was "gacbar," appeared by counsel who submitted a letter brief arguing that gacbar had a First Amendment right to speak anonymously, that there was no evidence whatsoever that gacbar had revealed any trade secrets, and that a defendant's First Amendment rights should not be infringed without such evidence. Gacbar filed an affidavit, which he signed as "John Doe," affirming that he had never been employed by or worked for Dendrite and that he had never misappropriated any trade secrets or any other confidential information; indeed, his affidavit pointed out that the plaintiff had never specified which trade secrets he had allegedly misappropriated. Gacbar's counsel also explained that his client would ordinarily not have been able to afford a lawyer to defend himself against this action, but that he was appearing as a favor for gacbar based on a 25 year friendship. Pa43, 44. Gacbar urged that the motion for leave to seek discovery identifying him be denied, and that the complaint against him be dismissed.

The second poster who appeared was John Doe No. 3, whose screen name is xxplrr, and who is the only defendant whose anonymity is directly at issue on this appeal.[2] Xxplrr filed an affidavit

[2] Plaintiff did not appeal the denial of its motion for leave to seek discovery of gacbar's identity. However, because this is an interlocutory appeal, and defendant gacbar has not been dismissed from the action, plaintiff would presumably be entitled to return to Judge MacKenzie with a request for further discovery with respect to gacbar based on whatever this Court decides in this appeal.

from his counsel along with numerous exhibits and a detailed memorandum of law. Like gacbar, xxplrr invoked his First Amendment right to speak anonymously, and argued that the claims against him failed for a number of reasons. With respect to the alleged trade secret violations (which Dendrite does not pursue on this appeal), xxplrr argued that the supposedly confidential features of its contracts with third parties were not only generic contract terms that did not qualify as trade secrets, but had previously been disclosed in detail by Dendrite's annual reports. Moreover, Dendrite has not alleged that xxplrr, a person who had never been a Dendrite employee, had obtained the information in any way that implicated a duty not to disclose the information. With respect to the allegedly defamatory postings, xxplrr argued that one of the alleged topics of his comments – Dendrite's changes in revenue recognition, and the negative implications of those changes – had been extensively discussed by several different posters on the message board, and had been the subject of public reports and news articles cited in those postings, and that xxplrr had not made any defamatory statements of fact but had simply echoed facts stated by others and expressed his opinions about them. More generally, xxplrr argued that his postings consisted largely of opinion, and that, because Dendrite was a public figure, he could not be held liable for defamation without proof of actual malice. Finally, xxplrr argued that there was no evidence that his statements had caused plaintiff any harm – in that regard, he submitted a comparison between his various postings and the changes in Dendrite's stock price, showing that the price had often increased after his postings, and in any event that there was no pattern of loss of value based on his statements.

Public Citizen filed a brief below as amicus curiae in order to discuss the standard that courts ought to apply in deciding whether to compel the identification of anonymous internet posters who are sued for allegedly violating the rights of the companies that they criticize. Public Citizen argued

that courts need to strike a balance in such cases, so that companies cannot strip their critics of their anonymity simply by filing a complaint against them, but at the same time not creating an immunity that would permit anonymous speakers to violate other persons' rights with impunity. Public Citizen noted that companies frequently file suit against their critics, without necessarily having supportable claims or even expecting to litigate a case to judgment, hoping that the mere threat of identification will silence critics who may be afraid that they will not be able to afford counsel to defend themselves. On the other hand, amicus agreed that, if members of the public believe that they cannot be identified and brought to justice no matter how outrageous their libels or other on-line tortious speech may be, the result will be to encourage improper anonymous speech.

In order to strike that balance, Public Citizen argued that a court that receives a motion to identify defendants who are being sued for their anonymous speech should begin by taking steps to ensure that the plaintiff has given the best possible notice of the pending motion, so that the real defendants have the opportunity to defend their anonymity. Next, regardless of whether a particular anonymous defendant enters an appearance, the court should both require the plaintiff to identify each of the anonymous statements that is alleged to be actionable, and carefully scrutinize the complaint to make sure that, with respect to those statements, it states a valid claim against each of the anonymous defendants. Then the court should require the plaintiff to present sufficient evidence to demonstrate that it has some likelihood of success on the merits of its claims against each defendant. Finally, if the defendant presents evidence in opposition to the complaint, the court should balance the equities to decide if the threat of damage from the denial of anonymity outweighs the damage to the plaintiff from being denied the right to know who its litigation adversary is.

Public Citizen also explained the way in which this standard should be applied to the four

anonymous defendants whose identification was at issue before the court. Recognizing that the two represented defendants would have the benefit of a presentation by their own counsel, amicus explained some of the doubts it had about the sufficiency of the claim against the two unrepresented defendants. With respect to Doe No. 2, whose screen name was ajcazz, amicus observed that his allegedly defamatory posts were largely related to labor issues, and argued that, in light of the labor law preemption principles of *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), the plaintiff was required to show actual damage before it could proceed with a libel claim against this defendant. Amicus pointed out that the relatively innocuous nature of the statements made it doubtful that plaintiff could show actual damage, while also noting that if, as seemed apparent from the messages, the speaker was relatively junior employee, it was understandable that the employee could not afford to hire a lawyer to defend himself against the litigation. In addition, amicus argued that the mere fact that plaintiff requires its employees to sign an agreement that includes a non-disparagement clause does not permit lawsuits against employee whistleblowers without meeting the normal standards for a defamation claim. And, with respect to Doe No. 1, screen name implementor, amicus pointed out that plaintiff's evidence concerning the contents, universality, and alleged violations of its standard employment agreement contained significant gaps.

In response to these arguments, the plaintiff filed a reply which explained in greater detail the basis for its claims against the four defendants, and attempted, for the first time, to set forth an evidentiary basis for allegations. These papers included a detailed affidavits from Dendrite officials Savage and Bailye, which contained several facts supporting the claim of falsity with respect to several statements that were the basis for defamation claims, and showing the confidential nature of several of the facts alleged to be trade secrets. One of the exhibits was a detailed rebuttal to a public

report that had questioned Dendrite's revenue recognition procedures. Dendrite also argued that, because Yahoo! users had to agree to a privacy policy that forbade them to libel other persons or otherwise abuse their right to participate in message boards, and that warned them of the possibility that Yahoo! might respond to a proper subpoena by disclosing their personal information, all of the defendants had waived their First Amendment right of anonymous speech when they registered as Yahoo! users.

After hearing oral argument and receiving several post-hearing exchanges of correspondence relating to the case, Judge MacKenzie granted the motion for leave to take discovery against the two posters who were employees or former employees, ajcazz and implementor_extraordinaire, while denying leave to take discovery to identify the two non-employees, xxplrr and gacbar. Judge MacKenzie began by acknowledging the tension between two important interests that must be considered in deciding a case such as this one. On the one hand, the court recognized its duty to provide a forum in which parties with genuine grievances may achieve redress.

> "However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. . . . 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 identity**."
>
> Pa8-9, *quoting Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999) (emphasis added).

In order to strike that balance, the court below looked to other cases decided in state and federal courts both in pre-litigation subpoena cases, such as *Seescandy* and *In re Subpoena Duces Tecum to America Online*, 2000 WL 1210372 (Va. Cir. Ct. 1999), *rev'd on other grounds*, 2001 Va. LEXIS

38 (2001), and several cases in which plaintiffs' interest in pursuing a libel case had been balanced against the need to protect a reporter's sources against identification, such as *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974). Pa9. The court decided to follow the *Seescandy* test, under which four separate requirements must be met – (1) sufficiently identifying the persons sought be sued, to be sure that they are subject to suit in the state or federal court (primarily subject matter and personal jurisdiction); (2) attempting to locate the person to be sure they have notice that an attempt is being made to identify them; (3) establishing that the suit can withstand a motion to dismiss, and (4) showing that the specific discovery sought is justified and that the discovery targets are reasonably likely to have information about the defendant. *Id.* 9-10.

Applying this test, Judge MacKenzie decided the first two conditions had been met with respect to each of the defendants. Thus, there was a sufficient basis for concluding that each of the defendants had a sufficient nexus to New Jersey to be sued there, and steps had been taken to notify each of the defendants because, as a condition of going forward with its motion, Dendrite had been required to post a notice on the Yahoo! message board announcing its motion, warning the defendants that they could be identified unless they persuaded the court not to allow discovery, and even providing the address for the county lawyer referral service. However, the third and fourth conditions had not been met with respect to two of the defendants. With respect to the libel claims. the court decided that most of the statements involved were verifiable accusations of fact, not merely opinions, but that there was sufficient evidence that some of the statements were true that Dendrite has not met its burden of showing that those statements were false. Pa12-15. The court also decided that because Dendrite was a public figure, it would have to show actual malice, and that there was enough evidence of actual malice on the part of xxplrr. Because the court decided that Dendrite need

only establish a prime facie case of defamation, this was sufficient to warrant discovery of xxplrr's identity. Finally, however, on the key issue of whether Dendrite had presented evidence that it had been harmed, as required by New Jersey law, the only evidence of harm was that Dendrite's stock price had allegedly dropped in response to the negative postings. The evidence was insufficient to show that gacbar's and xxplrr's statements were associated with lower stock prices, and the only evidence was contained in the affidavit of plaintiff's counsel, who did not purport to be an expert on the issue. Pa15-16. As a result, there was not a sufficient basis for believing that the defamation claim could succeed to warrant denying these defendants the right to remain anonymous.

Turning next to the trade secret issues, the court concluded that there was no evidence that the messages from xxplrr or gacbar contained trade secrets, as opposed to general commercial information that would have been known outside the company and was not so confidential or peculiar to Dendrite to qualify as a trade secret. Pa19. Moreover, because there was no evidence that either of these defendants was an employee, and both defendants denied being employees, Dendrite could not establish either that they had obtained the information that they posted through their employment by Dendrite, or that they had breached confidences reposed in them by Dendrite. Pa19-20. In sum, the court found insufficient evidence to satisfy any of the requirements for a trade secret cause of action.

Based on these subsidiary rulings, the court held that "Dendrite has failed to provide this Court with ample proof from which to conclude that John Does Nos. 3 and 4 have used their constitutional protections in order to conduct themselves in a manner which is unlawful or that would warrant this Court to revoke their constitutional protections." Pa22.

Judge MacKenzie also discussed Dendrite's contention that the defendants were parties to

agreements in which they might have waived their full First Amendment right to speak anonymously on the internet. He decided that Yahoo!'s privacy policy, which placed all of its users on notice that they might be identified if that information were subpoenaed, was not a waiver of the right to speak anonymously. After all, implicit in the policy was that Yahoo! would not disclose their personal information if the subpoena were not enforced, and the cases providing for a waiver of privacy based on agreements with internet service providers had been decided in the Fourth Amendment context, and did not extend to authorizing a waiver of First Amendment rights.

Judge MacKenzie reached a different conclusion regarding Dendrite's contention that Does 1 and 2 waived their free speech rights by signing an employment agreement containing confidentiality and non-disparagement clauses and promises not to solicit other employees to leave Dendrite. The court acknowledged the possibility that these particular defendants might not have executed the standard employment agreement, or that some other arguments might be advanced against finding a waiver, but the court refused to consider such possibilities because neither defendant had appeared to rebut the plaintiff's claims – "John Does Nos. 1 and 2 must assert a right before the Court will recognize and assess it." Pa25. Accordingly, Judge MacKenzie authorized Dendrite to pursue discovery to identify them, while withholding such authority with respect to Does Nos. 3 and 4.[3]

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[3] Subsequent to the decision under appeal, Doe 1 (implementor) moved to quash Dendrite's subpoena to the internet service provider that he had used to post his messages on the Yahoo! message board. Judge MacKenzie denied that motion because implementor was admittedly a former employee and had posted messages acknowledging that, after leaving Dendrite, he induced other employees to leave Dendrite, in violation of a term of the standard employment agreement. In addition, the judge was persuaded that implementor's allegedly libelous communications, in violation of the non-disparagement clause, created obvious harm to Dendrite's reputation. No appeal has been filed from this disclosure order, and implementor has now been identified.

C. The Immunomedics Message Board.

Another of Yahoo!'s message boards is devoted to a discussion of Immunomedics, a biopharmaceutical company that develops, makes and sells diagnostic imaging and therapeutic products for the detection and treatment of cancer and infectious diseases. Like Dendrite, Immunomedics is a large company, and has attracted an even larger amount of discussion than Dendrite. As of last October, there were more than 20,000 messages on its Yahoo! message board; today, there are more than 25,000.

As in the *Dendrite* case, Immunomedics filed a complaint that two individual John Doe posters had placed messages on the Yahoo! board that made false and defamatory statements about it, and that the statements disclosed confidential information in violation of employment agreements containing confidentiality clauses. Immunomedics' complaint was a study in generalities – it neither specified the messages that allegedly violated its rights, nor alleged what was false about the statements or what confidential information they contained. The only specific allegations in the complaint were the Yahoo! usernames that had been used to make the postings that allegedly violated its rights – "moonshine_fr" and "bioledger." Without first seeking leave, Immunomedics subpoenaed Yahoo!, which in turn sent email messages to the last known email addresses of these two John Does.

Bioledger has never entered any appearance in this case; so far as we are aware, the record does not reflect whether the Yahoo! email to bioledger was received. However, moonshine_fr retained counsel and filed a motion to quash the subpoena to Yahoo! It was only in response to this motion that Immunomedics, in a reply affidavit dated December 8, 2000, specified the messages that had allegedly violated its rights. Immunomedics acknowledged that Doe had not made false

statements about it, but limited its claim to the assertion that moonshine was one of its employees or former employees and that she had disclosed two pieces of confidential information, admitted that each piece was true. One item was filed by plaintiff under seal; the message contained the words "a worried employee," which, plaintiff alleged, meant that moonshine was one of **its** employees. The second item contained the assertion that Immunomedics was in the process of dismissing a senior company official in Europe, a fact that was said to be known to only a few people within the company.

Once moonshine learned what the precise allegations against her were, she undertook to show that they were false. She sought to do this without filing an affidavit, presumably because she was afraid that if she made factual statements in an affidavit, the company would claim that it needed to cross-examine her, and needed to know who she was in order to conduct that cross-examination. Thus, her attorney alleged at the hearing, held on December 15, 2000, that moonshine was not an employee, and asked for permission to make an in camera showing pertaining to her employment status. Hearing Transcript 14. Defendant also argued that, simply because one of her messages was signed "a worried employee" did not demonstrate that she was an employee of Immunomedics. *Id.* 26. However, he indicated that moonshine **is** an employee in the same industry, and he argued that if the defendant were identified, she could be branded a "troublemaker" and thus have difficulty keeping her employment in the industry. *Id.* 15.

In addition, defendant identified persons outside the company who were aware of the information that she was alleged to have revealed, and argued that if these persons were aware of the information, it could not been confidential as plaintiff was claiming. (This evidence would also have rebutted any inference that the defendant must have been an employee at the time of her posting

because the information was closely held within the company.) In the short time available to her, the defendant was not able to obtain affidavits to counterpose to plaintiff's affidavit claiming that the information was strictly internal to the company. She did obtain a signed but unsworn letter from a European doctor who asserted that he was aware of one of the allegedly confidential facts. Defendant requested a continuance to permit her attorney to obtain admissible evidence that would show the non-confidential character of the information.

Judge Zucker-Zarett denied the motion to quash the subpoena for reasons that she explained from the bench. It appears that her decision was based on the fact that the plaintiff had presented some material that tended to suggest that moonshine was an employee, while defendant had not presented any admissible evidence showing that she was not an employee. *Id.* 28. Judge Zucker-Zarett said that she was reluctant to accept any in camera showings with respect to Doe's employment status because she did not have any master list of employees. *Id.* 29-30. Given the evidence that Doe is an employee, the judge concluded that the plaintiff could survive a motion to dismiss the claim that Doe was obligated not to disclose confidential information. However, the judge never explained why she decided that the information released was confidential, and never directly addressed the request for a continuance to permit the defendant to introduce evidence contesting the confidential character of the information that the defendant had been accused of disclosing. The judge also never explained what legal standard she was using to decide whether to quash the subpoena – she remarked elliptically that Judge MacKenzie's opinion in *Dendrite* was "well-reasoned," but added that this was a very "open area of law." Tr. 30. On several occasions during the hearing, she stated that the issue was whether plaintiff's claim met the standards for a motion to dismiss. *Id.* 30, 33.

After denying the motion to quash, Judge Zucker-Zarett granted a stay pending appeal of the denial of the motion with respect to defendant moonshine_fr.

SUMMARY OF ARGUMENT

The Supreme Court of the United States has recognized the potential of the Internet as an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate their views on issues of public concern to all who will listen, but at minimal cost. Accordingly, it has held that full First Amendment protection applies to communications on the Internet. Longstanding Supreme Court precedent also declares 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, alleging that the speech was in violation of the rights of another, 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, these rights come into conflict when the plaintiff seeks an order compelling disclosure of the defendant's identity, which may irreparably destroy the defendant's First Amendment right to remain anonymous.

In this brief, we argue that this Court should embrace the developing consensus among those courts that have considered this question, by borrowing a standard from the well-developed rules governing the disclosure of anonymous sources in libel cases. Specifically, when faced with a complaint against an anonymous speaker, and a demand for discovery to identify that speaker, a court should (1) provide notice to the potential defendant, and an opportunity to defend his anonymity; (2) require the plaintiff to specify the statements that are alleged to violate its rights; (3) review the complaint to ensure that it states a valid cause of action based on each statement and each

defendant; (4) require the plaintiff to produce evidence supporting each element of its claims, and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed, against the harm to the defendant from losing his right to remain anonymous, and in light of the strength of the plaintiff's evidence of wrongdoing, much as it would do if deciding whether to grant a preliminary injunction. In this way, the Court ensures that the plaintiff cannot obtain an important form of relief – identifying its anonymous criticism – and that a defendant is not denied important First Amendment rights, unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria will require time and effort on the part of the plaintiff, and may delay its quest for redress against a defendant whose speech is alleged to have violated the plaintiff's rights. However, everything that the plaintiff must do and prove to comply with this test is something that it would have to do to prevail; therefore, so long most plaintiffs will be reasonably able to provide such information shortly after they file the complaint – and we believe that the test does not impose unreasonable evidentiary expectations – the test does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker. Moreover, most cases of this kind will primarily involve demands for monetary relief, except in the rare case where the plaintiff has a sound argument for being granted a preliminary injunction, notwithstanding the strong rule against prior restraints of speech. Accordingly, the fact that meeting this test may delay service of the complaint, it will not, ordinarily, prejudice the plaintiff. On the other hand, the fact that once the defendant is identified, his right to speak anonymously has been irretrievably lost, counsels in favor of caution, and hence allowing sufficient time for the defendant to respond and requiring a sufficient showing on the part of the plaintiff.

The arguments advanced by plaintiffs against application of this First Amendment standard

are unpersuasive. First, although discovery to identify Doe defendants is commonplace in many circumstances, in most cases there is no countervailing interest in preserving the anonymity of the defendant; where, as here, such countervailing concerns exist, the courts are typically more cautious. Second, the fact that many Internet Service Providers ("ISP") require their users to provide identifying information, and reserve the right to release that information if required to do so by law or to prevent violations of the rights of others, does not undercut posters' expectation of privacy; rather, these provisions simply protect an ISP against liability for court-ordered disclosure, and the common policy of ISP's of providing notice so that posters can file their own motions to quash simply establishes the procedural context for the application of the test that we describe in this brief.

Applying the foregoing test, Judge MacKenzie properly denied plaintiff Dendrite the relief it sought – an order stripping Doe No. 3 of his anonymity, but Judge Zucker-Zarett improperly denied the Doe defendant in the *Immunomedics* case a fair opportunity to meet the plaintiff's claims of wrongdoing once they were specified.

ARGUMENT

BECAUSE IDENTIFICATION OF INTERNET POSTERS TRENCHES ON THEIR RIGHT TO SPEAK ANONYMOUSLY, A COURT SHOULD NOT COMPEL DISCOVERY FROM AN INTERNET SERVICE PROVIDER UNLESS A PLAINTIFF CAN DEMONSTRATE, THROUGH ADMISSIBLE EVIDENCE, THAT IT HAS SUFFICIENT PROOF THAT EACH POSTERS HAS VIOLATED ITS LEGITIMATE RIGHTS.

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

It is well-established that the First Amendment protects the right to speak anonymously. The Supreme Court has repeatedly upheld this right. *Buckley v. American Constitutional Law Found.* 119 S. Ct. 636, 645-646 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v.*

California, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain through the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*,

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
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> * * *
>
> 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, at least in theory, to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost; accordingly, the Court has held that First Amendment rights are fully applicable to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Several cases have 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* 119 S. Ct. 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*, 2001 U.S. Dist. LEXIS 2852 (C.D. Cal. 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California's anti-SLAPP statute); *Hollis-Eden Pharmaceutical Corp. v. Angelawatch*, GIC 759462 (Cal. Super. San Diego Cy., March 20, 2001), unofficially published at http://www.citizen.org/litigation/briefs/holldec.pdf.

The references in these cases to people who communicate anonymously, because they are afraid of retaliation, are not merely theoretical. Many anonymous posters on Yahoo!'s Message Boards identify themselves as employees of the companies that they are discussing, and such employees could face retaliation from their employers. Once they are identified by Yahoo!, the plaintiff could take immediate extra-judicial action against them by firing them, even if the court ultimately holds that each and every one of their statements on the Message Board was legally protected. Or posters may work for companies that do not wish to offend one of the plaintiffs by harboring employees who criticize them publicly. This concern was specifically expressed by the defendant in *Immunomedics*, who apparently works in the same industry as the plaintiff and is worried that, if she is identified as criticizing other companies on the Internet, she could gain a reputation as a "troublemaker" and have difficulty finding employment. Hearing Tr. 14-16.

Moreover, some of the statements at issue in these cases, such as the statements by "ajcazz" – basically complaints that he and his fellow workers are not treated very nicely by management and that his fellow employees don't work hard – are almost certainly not libelous, even if they are unpleasant or annoying. It is hard to imagine what damages plaintiff could prove that it suffered as a result of these statements; nor would it make any financial sense to spend tens or even hundreds of thousands of dollars to pay large law firms to put before the court evidence of how often managers

do or do not threaten to fire particular groups of employees to induce them to work harder. Rather, the very inconsequential nature of these statements strongly implies that this lawsuit is an exercise in intimidation against all employees of the company, warning them not to speak publicly because they cannot keep their identities confidential. Surely, the Court should not permit a plaintiff to abuse the judicial process by bringing a frivolous action against one of its employees, using judicial process to identify her, and then using its economic clout to silence her, regardless of whether the suit is ultimately deemed to be lacking in merit.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. That is because 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 can, if saved by the recipient, provide 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 of 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). It has acknowledged that 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. The Court noted that rights may be curtailed by means of private retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524. The novelty of the procedural requirements at issue cannot be used to thwart consideration of the constitutional issues involved. *NAACP v. Alabama*, 357 U.S. at 457. 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, courts have ruled, in the closely analogous area of disclosure of libel sources, that sources have a qualified privilege against disclosure. When deciding whether to compel the production of documents that would reveal the name of an anonymous source, the 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. *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *Garland v. Torre*, 259 F.2d 545, 550-551 (2d Cir. 1958); *Richards of*

Rockford v. PGE, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *See also United States v. Cuthbertson*, 630 F.2d 139, 146-149 (3d Cir. 1980) (qualified privilege recognized under common law).

B. Application of the Qualified Privilege for Anonymous Speech to Develop Standards for the Identification of John Doe Defendants.

In a number of recent cases, other courts have enunciated a similar standard for plaintiffs to meet before they can compel the identification of an anonymous Internet speaker. The leading case is *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several 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.
>
> *Id*. at 578.

Accordingly, the *Seescandy* court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and 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 such 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.

In recent cases, state courts have followed the *Seescandy* analysis in deciding whether to require the identification of posters on Internet message boards. The most significant of these cases,

apart from Judge MacKenzie's decision below, was decided by the Court of Common Pleas of Allegheny County Pennsylvania, in *Melvin v. Doe*, No. GD99-10264 (November 15, 2000), unofficially published at http://www.aclu.org/court/melvin.pdf. In *Melvin*, a judge sued an individual who had criticized her on an America Online web site for allegedly lobbying the governor of Pennsylvania to appoint a particular local attorney to the local bench. The court ruled that "[a] plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit. [Accordingly], plaintiff should not be permitted to engage in discovery to learn the identity of the Doe defendants until the Doe defendants had an opportunity to establish that, as a matter of law, plaintiff could not prevail in this lawsuit." Opin. 2 and n.2. Thus, the court drew from established case law recognizing the existence of a right to speak anonymously unless the speech is actionable, *id.* 6, and held that "the complaint on its face [must] set forth a valid cause of action and . . . the plaintiff [must] offer testimony that will permit a jury to award damages." *Id.* 14. Accordingly, the court deferred the attempt to identify the defendant until the court had satisfied itself that the plaintiff had presented testimony sufficient to overcome a motion for summary judgment. (After conducting this analysis, the court ultimately determined that plaintiff could identify the defendant, albeit subject to a protective order.)

In yet another case, the Virginia Circuit Court for Fairfax County considered a subpoena for identifying information of an AOL subscriber, in a case similar to this one. 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 Inc.,* 2000 WL 1210372 (Va. Cir. Ct. Fairfax Cty. 2000) (unofficially published at http://legal.web.aol.com/aol/aolpol/anonymous.html), *rev'd on other grounds,* 2001 Va. LEXIS 38 (2001).

Similarly, a recent decision applying Canadian common law required the plaintiff to present evidence in support of its defamation claim before ordering enforcement of a subpoena for the identity of a John Doe defendant. *Irwin Toy, Ltd. v. Doe*, No. 00-CV-195699 CM (September 6, 2000) Pa416-419. The Ontario Superior Court of Justice ruled that mere allegations were not sufficient, because otherwise anonymity on the Internet would be too easily shattered based on spurious claims. *See also Varian Medical Systems v. Delfino*, No. CV 780187 (Cal. Super, Santa Clara Cy.) (court refuses to allow subpoena to identify anonymous posters who criticized Doe defendants on Yahoo! message board because of right to speak anonymously on Internet) (copy attached to brief).

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 each poster's anonymity.

Counterposed to these carefully reasoned decisions are the handful of unreported cases from other states, cited in Dendrite's appellate brief, in which judges, often responding to ex parte requests for discovery, have ordered Internet service providers to identify their customers without giving any apparent consideration to the issues discussed in this brief. These decisions are remarkable for the lack of reasoning employed in reaching the decision to require disclosure; that dearth of reasoning is not surprising given the lack of experienced counsel opposing the applications for leave to take discovery in some cases. The one case that has some discussion, the *Stone & Webster* ruling of the Ohio Court of Common Pleas, rests on the proposition that a court subpoena does not involve state action and hence is not subject to scrutiny under the First Amendment. That reasoning is plainly incorrect, *supra* 25-26, and thus the decision should not be deemed persuasive. Nor does Ohio have a state constitution which, as in New Jersey, protects against private incursions on the right of free speech. *New Jersey Coalition v. JMB Realty*, 138 N.J. 326, 353 (1994).[4] Moreover, only one of these decisions reached the appellate level, and that decision, *Hvide v. Doe*, only denied discretionary appellate review of an order enforcing a subpoena. Pa489. Moreover, the defamatory statements over which the plaintiffs in many of Dendrite's cases sued were so specifically factual, and so likely to be found libelous, that identification of the speakers would have been allowed on the standard enunciated by Judge MacKenzie and urged by amici here. For example, in the *Biomatrix* case, the

[4] Generally speaking, the New Jersey Constitution is more protective of free speech activity than the already substantial First Amendment protection of the United States Constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that a state constitution may provide broader protections for free speech activities than the federal constitution provides); *State v. Schmid*, 84 N.J. 535 (1980) (holding that under the New Jersey Constitution, Princeton University can not ban leafleting on a campus open to the public); *Green Party of New Jersey v. Hartz Mountain Industries*, 164 N.J. 127 (2000) (holding that shopping malls may not impose prior restraints such as a million dollar insurance policy upon people wishing to distribute handbills on mall property).

posters accused the president of the company of having worked as a doctor for the Nazis, and accused another executive of a specific form of sexual misconduct. Pa23 n.11, 439. In *Hvide (*not "*Hyde*," the case name given by Dendrite), the founder of a company was accused of criminal activity, Pa219, and was removed from his company position as a result of the anonymous attacks. Pa486.

Moreover, in the *Anadigics* case cited by Dendrite, the transcript of Judge Mahon's oral ruling suggests that he employed reasoning analogous to Judge MacKenzie's decision below. The case did not involve claims of defamation, but rather was a suit against an anonymous poster who had revealed that company executives were holding intensive meetings with a competitor regarding possible sale of the company; the poster urged readers to hold the stock because its price was going to "skyrocket" once this sale occurred. Pa477. The defense was based on the somewhat bizarre claim that the poster was a minor who had simply invented the story, and that it was merely a coincidence that the posting was true. Judge Mahon's decision reflects that he had examined an in camera affidavit attesting to the truth of the posting, Pa481, and that he embraced the reasoning of the decision in *Seescandy*, which he discussed at length in his oral decision, Pa481-482, as well as the reasoning of the *AOL* decision, also discussed at length in the oral ruling. To be sure, the defendant's offer of an in camera counter affidavit attesting to the defendant's story, that he was a child who made up facts contained in the posts, did not carry the day; but this was **not** because the judge was unwilling to consider evidence. Indeed, the oral opinion reflects that the judge treated the proffered affidavit as if it had been filed, Pa478, but concluded that the certification did not sufficiently rebut the plaintiff's claims, given the fact that the affidavit did not deny that the minor child who made the post was a relative of an insider or had obtained the information from an insider.

Pa482. Moreover, the excerpt from the *AOL* decision quoted in the oral ruling does not say that only the pleadings may be considered; "evidence supplied to th[e] court", as well as pleadings, are described as the appropriate basis for deciding whether the plaintiff has a legitimate claim that warrants identifying the defendant. Pa479. Indeed, the sheer incredibility of the defense (that it was mere coincidence that posts about internal company secrets were true, because they were the product of a child's active imagination) may well have impelled the judge to order disclosure in that case. Thus, even *Anadigics* is consistent with the reasoning employed by Judge MacKenzie in denying enforcement of the subpoena for xxplrr's identity in this case.[5]

C. The Procedures That Courts Should Follow in Deciding Whether to Require Identification of John Doe Defendants in Particular Cases.

In this section of the brief, we discuss each of the steps that a court faced with this question should follow, and in conjunction with each step, we explain how it applies to the facts of the two cases before the Court.

1. Provide Notice of Threat to Anonymity and Opportunity to Defend It.

First, the Court should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action until the defendants have had the time to retain counsel. *Seescandy*, 185 F.R.D. at 579. That was what Judge MacKenzie did below – notice of an application for discovery to identify anonymous message board critics was posted on the message board, identifying the four screen names that were sought to be identified, so that the individuals concerned could retain counsel to voice their objections, if any. Pa147-148. The record indicates that this notice was effective in reaching each of the four posters – gacbar and xxplrr

[5]Interestingly, there was no further action in *Anadigics* after denial of the motion to quash.

retained counsel, a person identifying himself as ajcazz contacted plaintiff's counsel but never took any further action, and the implementor_extraordinaire immediately stopped posting, presumably because he was frightened off by the notice. Ultimately, indeed, both posters who appeared were granted protection against disclosure.

In *Immunomedics*, by contrast, there was no notice of the subpoena on the bulletin board, and there is no assurance that the one poster who never appeared in court ever received notice of the subpoena. There are several reasons why that might happen. First, there is no requirement that a poster provide Yahoo! with an accurate email address when registering for a Yahoo! account, or the email address used by a particular Yahoo! registrant may change. In one case handled by Public Citizen, for example, the Doe defendant gave an accurate email address but stopped using that address a few months later, long before Yahoo! received a subpoena for that poster's identifying information. And on some message boards, there is not even a requirement that a member of the public register as a user before he is permitted to post messages. In one case recently handled by Public Citizen, involving messages posted on a Yahoo!-Geocities message board, Yahoo! had no registration information on any of the users, but it did have records of the Internet Protocol numbers from which the users had made posts. These "IP" numbers identified only the internet service providers that the posters had used in order to gain access to the Internet when they posted their messages, and Yahoo! had no way to contact the individual speakers to tell them that a subpoena had been served seeking information that could lead to their being identified. The only way to notify these message posters would have been to place notice on the message board itself, and provide enough time for the posters to revisit the board and take action to protect their interests if they chose to do so. (The case was settled without the need for any court ruling).

Moreover, although Yahoo! itself routinely provides notice to its customers whenever it receives a subpoena seeking identifying information, we are advised by colleagues at the Center for Democracy and Technology (www.cdt.org) that some large internet service providers still do not provide notice to their customers before they respond to subpoenas. Accordingly, an order such as the one that Judge MacKenzie entered provides an important procedural protection for the right to speak anonymously.[6]

2. Require Specificity Concerning the Statements.

Regardless of whether a speaker appears in court on the motion to show cause, we believe that the qualified privilege to speak anonymously requires the court, on its own if necessary, to review the plaintiff's claims, and the evidence supporting it, to ensure that it does, in fact, have a valid reason for piercing each poster's anonymity. Thus, the second requirement for such cases is that the court should require the plaintiff to set forth the exact statements by each anonymous poster that is alleged to have violated its rights. It is startling how often plaintiffs in these sorts of cases

[6] The time originally allowed by Judge MacKenzie for responses to his order to show cause may not have been sufficient. Even for posters who read the message board every day, it might well be difficult to obtain a lawyer within only a few days. Thus, for example, it is our understanding that Yahoo typically defers its response to a subpoena until 20 days after it has given notice to its members of the pendency of a subpoena for their account information. Moreover, a review of the Dendrite message board reveals that one of the posters, ajcazz, posted only two times, both about two months before the order to show cause was issued; it is thus quite possible that even fifteen days might not be enough time for such an individual to actually see the posted notice. Other posters were somewhat more frequent, and implementor-extraordinaire posted very often and thus, presumably, was a regular visitor. Moreover, although the complaint demanded injunctive relief (the reason why it qualified for consideration in the Equity Part, Pa64), Judge MacKenzie observed during oral argument that the primary relief being demanded was legal, Pa63; nor was there a claim for a preliminary injunction. As a result, there was no need for expedition in reaching the merits of the case. In any event, Judge MacKenzie's later decision to extend the time for filing responses to its order to show cause until July 11, or three weeks after the posting of the order to show cause, was much more likely to give posters enough time to learn that an attempt was being made to deprive them of anonymity and to locate counsel to defend themselves.

do not bother to do this – instead, they may quote one or two messages by a few individuals, and then demand production of a larger number of identities. In the *Dendrite* case, the plaintiff forthrightly identified each statement of which it complains – in its papers in support of the order to show cause although not in the complaint – and thus the plaintiff eventually met this part of the test. Similarly, on appeal, Dendrite has been quite specific in identifying the allegedly defamatory statements on which it is suing, although, notably, it appears to have abandoned claims based on statements by Doe No. 3 that had allegedly disclosed trade secrets.

In *Immunomedics*, however, the complaint contained only conclusory allegations, and it was only in the reply papers that the plaintiff set forth the specific statements that it was alleging as actionable. In that regard, it is noteworthy that, because the plaintiff in *Immunomedics* was required to be specific and to provide evidence in support of its claims, it admitted that it could not prove some of the claims that had originally been set forth as a basis for piercing the defendants' anonymity. Thus, after Immunomedics acknowledged that each of the statements on which it was suing was true, it had no viable claim for defamation against defendant moonshine.

A concomitant of the requirements of providing notice to the anonymous defendant and of identifying the specific statements alleged to be actionable, is that enough time must be allowed to respond to the allegedly unlawful statements – ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment. By this standard, Judge Zucker-Zarett may have erred in *Immunomedics* by refusing to give defendant sufficient time to secure evidence to rebut the contention that the particular information that she was accused of posting was confidential within the company at the time she published it. Even though the statements were not specified until the reply affidavit, dated December 8, 2000, by the time of the hearing on December 15 defendant's

counsel had identified two witnesses, and obtained a letter from one of them. Hearing Tr. 7-8, 12. Counsel also contended that, with more time, he could obtain sworn affidavits to support his position. Moreover, the *Immunomedics* suit is primarily an action for damages. Although the complaint prays for injunctive relief in passing, there was no motion for a preliminary injunction pending. In short, no reason appears in the record why the plaintiff would have been prejudiced by a short continuance to permit the defendant to secure evidence to defend herself. Moreover, the refusal of a continuance causes irreparable injury to the defendant, because, as her counsel observed below, once her anonymity is taken away from her, she can never get it back.

3. Review the Facial Validity of the Claims Once the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable. Some statements may be too vague or insufficiently factual to be deemed capable of having a defamatory meaning. Other claims, which seek an injunction forbidding message board posters from publishing alleged trade secrets that they have heard from other persons, may encounter severe problems under First Amendment prior restraint doctrine. *See Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996).

Still other statements may be non-actionable because they are merely statements of opinion, and the Supreme Court of New Jersey has squarely held that "statements of opinion are entitled to constitutional protection no matter how extreme, vituperous, or vigorously expressed they may be." *Kotlikoff v. The Community News*, 89 N.J. 62, 444 A.2d 1086, 1091 (1982), *citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974): “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Accord, Nanavati v.*

Burdette Tomlin Mem. Hosp., 857 F.2d 96, 106-108 (3d Cir. 1988).

Indeed, as a general matter, the presumption ought to be that casual statements about a company on a Yahoo! message board express opinions, rather than facts, just as courts have generally been reluctant to treat negative "stock tips" in financial publications, or adverse commentary in financial newsletters, as defamatory statements of fact. *Biospherics v. Forbes,* 151 F.3d 180, 184 (4th Cir. 1998); *Morningstar v. Superior Court*, 23 Cal. App. 4th 676, 693 (1994); *Global Telemedia v. Does*, 2001 U.S. Dist. LEXIS 2852 (C.D. Cal. 2001), at 17. The same casual language, breezy tone, and appearance of being opinions instead of reported facts, that are found in an investment publications' "stock tips," are commonly found in message board postings as well. Indeed, the Yahoo! message boards contain routinely warn that "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." *See* http://messages.yahoo.com/bbs?.mm=FN&action=l&board=4688055 &tid=drte&sid= 4688055& mid=&start=872. Such a disclaimer has been cited as a basis for denying a cause of action for defamation against an adverse financial rating. *Jefferson County School District v. Moody's Investor Services*, 988 F.Supp. 1341, 1345 (D. Colo. 1997). The notion that most members of the public would treat the average message board posting as a reliable statement of fact on which to base major investment decisions is almost laughable. Similarly, statements by xxplrr that Dendrite apparently still claims are libelous, Pb12, to the effect that Dendrite's financial outlook is not good and used to be better, are plainly statements of prediction and opinion on which no libel suit can possibly be based. If a libel can be based on such statements, this Court will be inviting libel suits against every analyst and every financial publication that ever expresses a negative opinion about any company's general outlook.

4. Require an Evidentiary Basis for the Claims.

Fourth, 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 each Doe defendant. The requirement of presenting evidence prevents a plaintiff from being able to identify its critics simply by filing a facially adequate complaint. In this regard, we believe that, even though plaintiffs often claim that they need identification of the defendants "in order to permit a suit to go forward," the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this, and relief is generally not awarded to a plaintiff unless it comes forward with evidence in support of its claims. This is particularly true where the relief sought by the plaintiff may itself violate the defendant's First Amendment right to speak anonymously.[7]

Indeed, there have been a number of cases in which plaintiffs have succeeded in identifying their critics and then sought no further relief from the court, Thompson, *On the Net, in the Dark,*

[7]In this regard, Dendrite is correct when it says that Judge MacKenzie may have been somewhat inconsistent in addressing the question of whether it is appropriate to consider evidence in deciding whether to allow identification of the anonymous defendants. In some parts of the opinion, he seemed to suggest that he would apply only a motion to dismiss standard, which suggests that all allegations of the complaint should be taken at face value; other parts of his opinion state that the plaintiff must present a prima facie case, which plainly implies the need for consideration of evidence. And in still other parts of the opinion, Judge MacKenzie gave express consideration to the defendant's evidence, comparing it to the plaintiff's evidence in deciding whether the plaintiff had shown that it had a realistic likelihood of success. Thus, as in *Seescandy*, which includes both a motion to dismiss standard and a requirement that the plaintiff make a "showing that the specific discovery sought is justified," and where the court specifically considered evidence, Judge MacKenzie does seem to have straddled the issue of whether, and how, evidence should be considered in a motion such as this one. We believe that the evidence of both sides can properly be considered in deciding whether the plaintiff has shown a sufficient expectation of success on the merits to override the defendant's qualified right to speak anonymously on the Internet.

California Law Week,Volume 1, No. 9, at 16, 18 (1999) (copy attached). Some lawyers who bring cases such as this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. http://www.zwire.com/site/news.cfm?newsid =1098427&BRD=1769&PAG=461&dept_id=74969&rfi=8 (copy attached). One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and only decide whether they want to sue for libel after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, Pa400-402; Fischman, *Protecting the Value of Your Goodwill from Online Assault,* Pa403-405.

Moreover, even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the affairs of a company on Yahoo! or other bulletin boards. In this way, mere service of the subpoena may provide the plaintiff with all the relief it desires. By the same token, imposition of a requirement that proof of wrongdoing be presented to obtain the names of the anonymous critics, and not just to secure an award of damages or other relief, may well persuade plaintiffs that the suit is not worth pursuing. Pa395.

Thus, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources that require a party seeking discovery of information protected by the First Amendment to show 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 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 should be required to offer proof to support each of the elements of its claims at the outset of its case, in order 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 is likely to have easy access, even access that is superior to the defendant. For example, the plaintiff is likely to have ample means of proving that a statement is false, or that a particular piece of information was closely held within the company, and thus it is ordinarily altogether proper to require a plaintiff to present strong proof of these elements of its claims as a condition of obtaining or enforcing a subpoena for the identification of a Doe defendant. The same is true with respect to the proof of actual damages, which is an element of a defamation claim, not only in New Jersey, *infra* page 42, but in many other states. *E.g.*, *Global Telemedia v. Does*, 2001 U.S. Dist. LEXIS 2852 (C.D. Cal. 2001), at 11-12, and is required in order to state a libel claim in the labor context, *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 64-65 (1966). A plaintiff should have ample means of proving its damages without any need to take discovery from the defendant. On the other hand, if a defamation plaintiff is able to establish the other elements of its claim, it will normally not be able to present evidence showing the actual malice of the defendant without being able to identify him and take his deposition. There have been cases where summary judgment has been granted in favor of the defendant on the issue of actual malice without the disclosure of anonymous sources, where the volume of publicly available information on the topic of the defendant's comments was so great that

the speaker could fairly have taken any view of the facts without being guilty of "reckless disregard" of the probable falsity of the matters stated, *e.g.*, *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972), but such cases are fairly unusual.

In a case like *Immunomedics*, where the plaintiff's claim rests squarely on the proposition that the defendant is an employee, and the defendant denies that status, we believe that the Court should be open to the possibility of conducting a proceeding in camera to decide whether the plaintiff has a chance of success on the merits on this key question. Contrary to the trial judge in that case, who said that she could not make such a determination because she did not have a comprehensive list of current and former employees, the fact is that the plaintiff does have such a list, and there is no reason why the defendant's real identity cannot be ascertained and compared to the listing without providing the defendant's name to the plaintiff. The judge seems to have disregarded that possibility because she did not accept the defendant's contention that, even as a non-employee of the plaintiff, her employment opportunities elsewhere in the same industry could be severely damaged by revelation of the fact that she was making comments about another company on a Yahoo! chat board. In our experience, such a claim is entirely credible, and given the fact that the plaintiff has no valid legal claim if the person it has sued is not an employee, the First Amendment privilege of speaking anonymously should be deemed sufficiently weighty to require that a defendant be given an opportunity to show her non-employee status without having to be identified publicly.[8]

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[8] In that regard, Public Citizen is currently representing a Doe defendant who was sued on the theory that he had breached his employment agreement and fiduciary duties by disclosing inside information, and where the defendant flatly denied that he was an employee and indeed demonstrated that fact to a third party (by showing his current employment elsewhere). In that case, we are in the process of hammering out a procedure whereby a third party agreeable to both sides will test the defendant's claim of non-employment status.

Turning now to the facts of *Dendrite*, assuming that the Court rules that xxplrr's statements that its CEO was "shopping the company," but unable to find any buyers, were fact rather than opinion, we believe that this plaintiff has offered sufficient proof they were both false and stated with actual malice. Dendrite's affidavits, including one sworn by the official who was claimed to have been doing the shopping, flatly deny the accuracy of the statements, and the defendant has offered no testimony whatsoever to support either the truth of the statement or a reasonable basis for believing it to be true. Obviously, without such testimony, and without the opportunity to cross-examine Doe, there is no way to draw any final conclusions about this aspect of the libel claim, but the evidence is surely sufficient to warrant identifying xxplrr. On the other hand, we question whether there is sufficient basis for concluding that xxplrr's statements, that Dendrite has changed its revenue recognition policies in ways that made the company look better at certain times, were made with actual malice. This alleged change had been the subject of extensive discussion in the financial community – the independent Center for Financial Research and Analysis issued a thorough report on this subject, Pa120-127; an article on the Internet site "TheStreet.com" noted "red flags" about Dendrite including its revenue recognition policies; and posters prior to xxplrr commented on these reports. Pa118, 129. To be sure, Dendrite issued extensive rebuttals of the critical reports, Pa305-310, and there is presumably a triable question of fact about whether the claimed changes did or did not occur (although perhaps not under a clear and convincing evidence standard). However, we question whether an investor can be held liable for making statements with reckless disregard of their probably falsity when all he has done is take one side of a debate among the experts.

In any event, we believe that Judge MacKenzie properly held that the plaintiff had not offered sufficient evidence that xxplrr's statements caused it actual harm. Concrete evidence of harm is

required under New Jersey law. *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149, 158-159, 755 A.2d 583 (2000); *McLaughlin v. Rosanio, Bailets & Talamo*, 331 N.J. Super. 303, 308-309, 751 A.2d 1066 (2000). Dendrite relies on *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 769-770, 563 A.2d 31 (1989), for the proposition that the New Jersey Supreme Court has rejected any obligation to affirmatively allege damage, Pb22-23, but all the Court did in that case is reserve the question in light of the fact that the parties had not argued it and the lower courts had not discussed it.

Dendrite argues that its stock dropped by 3% after one of xxplrr's allegedly defamatory statements, but that evidence must be considered in the context of all of xxplrr's statements on which Dendrite is suing here. As an exhibit to the Reynolds affidavit made clear, Pa343, there is no apparent pattern of stock falling after his statements; to the contrary, its stock price sometime rose after allegedly defamatory statements were made. Moreover, as amicus pointed out at the hearing, the general decline in Dendrite's stock price during the period spanned by the various statements on which it sued in this case must be considered against the backdrop of a general decline in the entire NASDAQ stock index, which was quite substantial during that period. Pa53. And because the affiant who placed the stock price evidence in the record, Mr. Vogel, is not an expert in stock manipulation, he was unable to provide any persuasive evidence on that point, as Judge MacKenzie observed in his opinion. Pa15.

In this Court, Dendrite also relies on the affidavit of Bruce Savage, which supposedly shows that xxplrr's statements caused various other forms of harm to the company. However, the affidavit does nothing of the kind; rather, it simply attests to the theoretical impact that negative statements in general "may" have had on the company's ability to hire and retain employees, Pa302, and then

continues with the unassailable but irrelevant statement that **if** the firm cannot retain employees, it will be harmed. Pa303. Similarly, he states that securities analysts contacted the company to express concern about "the malicious statements posted on the board." Pa302. Thus, the affidavit claims that these harms occurred as a result of the statements of several anonymous speakers, some of which are not at issue in this appeal; it does not peg any ill effect to any particular statement by xxplrr, and in particular it does not tie any specific claim of harm to any of the statements of xxplrr that survive scrutiny under the other criteria in the test. Hence, the Savage affidavit does not provide any better evidence of actual harm than does the Vogel affidavit concerning stock prices.

5. Balance the Equities.

Finally, even after the Court has satisfied itself that each of the posters 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).

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no need to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The requirement that there be sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the 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." [9]

This aspect of the test follows from the fact that an order of disclosure is an injunction, and the test for the issuance of injunctions normally calls for a balancing of the equities. A refusal to quash a subpoena for the name of an anonymous poster 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). Indeed, these injuries are magnified where the speaker faces the threat of economic or other retaliation once he or she is identified. If, for example, the person that the plaintiff is seeking to identify is one of its own employees, the defendant could lose a great deal from identification even if the plaintiff has a wholly frivolous lawsuit. Or, as in the case of "moonshine," if the anonymous speaker works in the same industry as the plaintiff, and is thus subject to the kinds of informal pressures that may motivate the executives of one company to avoid giving unnecessary offense to the executives of another, it would not be surprising to find that such a defendant could suffer economic harm from being identified. This is an argument that the defendant in *Immunomedics* advanced, and we believe that the trial judge erred by failing to consider that argument as one factor

[9]To the extent that plaintiff has managed to provide notice to a particular defendant, and that defendant is represented by counsel in opposition to the request for leave to serve a subpoena, a court may reasonably expect that defendant to present evidence that the information was available elsewhere (for example, it is surprising how often a company will sue over alleged breach of confidentiality obligations by employees who posted information that was available on the company's web site or in its press releases). For those posters who have not been reached, however, a court should protect their interests by demanding at least a sworn statement, by an individual whose shows that he has a basis for knowing such facts, that the information would not have been available outside the company.

in deciding whether there was a sufficient expectation of success, whether the record warranted further study, whether an in camera procedure should be allowed, and whether a grant of a continuance to permit the presentation of further evidence would have been appropriate.[10]

* * *

The New Jersey courts "have recognized that First Amendment values are compromised by long and costly litigation in defamation cases . . . [and that b]y discouraging frivolous defamation actions, motions for summary judgment keep open lines of communication to the public on matters of public concern." *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149, 158, 755 A.2d 583 (2000) (citations and punctuation omitted). For similar reasons, a plaintiff who seeks to strip an Internet poster of the right to speak anonymously can easily deter speech simply by succeeding in dragging the defendant into court if there is no early test of whether the complaint is based on actionable speech and whether the plaintiff has concrete evidence that the speaker has violated its rights. So long as the test gives the genuinely aggrieved plaintiff a fair opportunity to present its case – and the test that we have proposed and that Judge MacKenzie employed in the *Dendrite* case does just that – the courts can achieve the objective of keeping the lines of Internet communication open while not encouraging posters to use anonymity to abuse the rights of others.

D. The Plaintiffs' Arguments Against Application of the First Amendment

[10] When a court decides that a defendant needs to be identified so that he or she can be served with the complaint and subjected to discovery, it should consider taking steps to prevent the plaintiff from making extra-judicial use of the information, outside the purview of this litigation. In several cases in which disclosures of identities has been ordered in the face of a qualified First Amendment privilege, the court has confined access to the information to the plaintiff's counsel, and forbidden its use for purposes other than the litigation. *Miller v. Transamerican Press*, 621 F.2d 721, 727 (5th Cir. 1980); *UAW v. National Right to Work Comm.*, 590 F.2d 1139, 1153 (D.C. Cir. 1978). Such a protective order may reduce the harm caused by disclosure.

Qualified Privilege Are Not Persuasive.

1. The Rule Allowing Discovery to Identify Doe Defendants Is Outweighed by Countervailing Interests.

Plaintiffs argue that the identification of otherwise unknown defendants at the outset of a case is a routine aspect of litigation, for which proof of a genuine basis for suit has never been required. Such identification is certainly routine in many kinds of cases – for example, if a citizen suffers excessive force at the hands of several police officers, and sues several of them as Does, or if a worker is injured while working on a machine, and cannot sue his employer because workers compensation is the exclusive remedy but does sue the manufacturer or repair service for having made a bad product or repaired it poorly, it is not at all unusual to sue John Doe defendants and use discovery to identify them in the course of the litigation. Most of the reported cases cited by the plaintiff are of that sort; they do not involve speech protected by the First Amendment, and with few exceptions they do not even bother to discuss the standards for deciding whether to compel the identification of John Doe defendants.

As in other states with which we are familiar, the filing of a complaint against a fictitious defendant cannot be used to mask other legal flaws in the complaint, which exist independent of the plaintiff's ignorance of the true name of the defendant. *Gallagher v. Burdette-Tomlin Hosp.*, 318 N.J. Super. 485, 492, 723 A.2d 1256, 1259 (App. Div. 1999), *aff'd*, 163 N.J. 38 (2000).[11] In most

[11]Many states **do** require a valid complaint as a prerequisite to pre-litigation discovery. *E.g.*, *Berger v. Cuomo*, 230 Conn. 1, 7, 644 A.2d 333, 337 (1994) ("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"); *Scattoreggio v. Cablevision Sys. Corp.* 203 App. Div. 2d 468, 610 NYS2d 319 (2d Dept 1994) (plaintiff cannot file petition for pre-litigation discovery in New York courts without explaining the precise basis for its claims and presenting proof of the facts on which its intended cause of action was reliant); *National City Bank v. Amedia*, 118 Ohio App.3d 542, 693 N.E.2d 837, 840 (9th Dist. 1997).

of such cases, there is simply no countervailing interest in denying the plaintiff the ability to identify the Doe defendants, and the real defendant has no reason to resist being identified, other than a general desire not to have to defend the case. But attempting to defend while retaining anonymity imposes some real tactical disadvantages, such as the difficulty of placing facts in the record on which the plaintiff would be entitled to cross-examine. As a result, the question of whether the complaint can otherwise withstand a motion to dismiss or for summary judgment, or whether any interim relief for the plaintiff is justified, does not arise until the defendant has been identified and added to the suit. Here, of course, the First Amendment and the right of free speech under the New Jersey Constitution create very strong countervailing interests that militate against making discovery freely available absent proof that the plaintiff can actually prevail on the merits of its case.

Dendrite cites *Dry Branch Kaolin Co. v. Doe*, 263 N.J. Super. 325, 622 A.2d 1320 (App. Div. 1993), for the proposition that "New Jersey courts require disclosure of the identity of . . . anonymous defendants even when there are claims of privilege protecting the Doe's identity." Pb16, 25. But far from supporting Dendrite's argument in this case, *Dry Branch* is actually more helpful to the defense. In *Dry Branch*, a lawyer forwarded claims of serious impropriety by the Dry Branch company, including violations of the criminal law, that he had received from an anonymous client who was a former Dry Branch executive. Dry Branch sued the executive for libel, naming him as a Doe defendant; in response to a subpoena seeking to identify Doe, the attorney raised his client's attorney-client privilege. But the Court did not, as Dendrite now suggests, simply order the identification of the client without considering the applicability of the privilege. To the contrary, it carefully evaluated the privilege claim, noted that there is substantial doubt that the identity of a client is within the privilege at all, and ultimately ruled that withholding the name of the client

"would not advance the purpose of the privilege," 263 N.J. Super. at 331, especially because the libelous communications continued even after the attorney's role had ended. *Id.* at 332. Far from holding that the mere filing of a complaint justifies identification of an anonymous defendant, the Court decided that the "countervailing concerns" opposed to the privilege prevailed because the privilege did not apply on the facts of that case. *Id.* Similarly, in this case, the Court should decide whether the First Amendment privilege to speak anonymously applies, and then override the privilege only if the plaintiff can show that it has a genuine chance of prevailing on its claims.[12]

Moreover, the New Jersey Supreme Court's decision in *Grodjesk v. Faghani*, 104 N.J. 89, 514 A.2d 1328 (1985), ignored in Dendrite's brief even though it was cited below, Pa50, provides further support for our argument that it is necessary to balance the interests in anonymous speech against the plaintiff's need to identify a potential defendant, by first deciding whether the plaintiff has shown that it can succeed on the merits of its claim. That case arose after the New Jersey Board of Dentistry investigated, and then dismissed, anonymous claims that two dentists had violated certain Board regulations. The dentists then sued Faghani, one of their former employees, claiming that her complaints to the Board, which had instigated the investigation, constituted malicious prosecution. When Faghani denied that she had made the report, plaintiffs subpoenaed the Board to prove that she was, in fact, the informant, and the Board successfully moved in the lower courts to quash the subpoena, citing the informant's privilege. The Supreme Court reversed because the

[12]Dendrite also cites *Brien v. Lomalow*, 227 N.J. Super. 288, 547 A.2d 318 (App. Div. 1988), for the proposition that the need to identify an anonymous defendant automatically outweighs any claims of privilege. However, in that case the Court simply referred in passing to the failure of the plaintiff to make any effort to sue the defendants anonymously and use discovery to identify them in deciding that a suit eventually brought against them was untimely; the Court did not pass on the question whether, on the facts of that case, the need to identify the defendants to satisfy the statute of limitations outweighed possible claims of informant privilege.

plaintiffs had made a substantial showing of need for the information in order to confirm that Faghani was, in fact, the confidential informant, without which they could not proceed with what the Court found was a colorable claim for malicious prosecution. In this regard, the Court weighed the evidence that the complaint against the plaintiffs had been dismissed, which created an inference that the complaint was filed falsely, as well as two affidavits from two current employees of the plaintiffs stating that Faghani had written a letter to the dental board about the plaintiffs, thus contradicting Faghani's denial. 104 N.J. at 101-102. The Court also relied on the fact that, because Faghani no longer worked for the plaintiffs, she was no longer subject to discharge for having complained about her employers, and "[n]othing indicates that she will be exposed to other economic retaliation or the threat of physical harm" if she were identified, and hence the need for confirmation of the informer's identity would outweigh the interest in non-disclosure. *Id.* at 102. However, the Court found no evidence that the plaintiffs had suffered a "special grievance," which is required for a claim of malicious prosecution, and thus remanded for further proceedings to determine whether the plaintiffs could make such a showing. *Id.* at 103.

For the same reasons, Judge MacKenzie did not err in requiring Dendrite to make an evidentiary showing that it had at least a colorable basis for succeeding on its claims against each Doe defendant, and Judge Zucker-Zarett did err by failing to give defendant "moonshine" a continuance so that she could make factual showings of the non-confidential character of the information and of her non-employment status. Moreover, because the defendant in *Immunomedics* made a plausible argument that her status in the biopharmaceutical industry could be harmed by disclosure of her status as a "troublemaker," the trial court should have taken that concern into consideration in deciding whether there was a sufficient compelling need to identify this defendant.

2. Yahoo!'s Privacy Policy Does Not Waive the First Amendment Right to Speak Anonymously.

Dendrite has also argued that Yahoo! message board posters waive their right to speak anonymously when, as a condition of registration, they accept a user agreement in which Yahoo! forbids the posting of defamatory matter or other information that violates the rights of a third person, and a "privacy policy" under which Yahoo! reserves the right to disclose identifying information if so required pursuant to a subpoena, or "if we have reason to believe that disclosing this information is necessary to identify, contact or bring legal action against someone who may be violating Yahoo!'s Terms of Service . . .." Pb32-35 and n.10. In support of its waiver argument, Dendrite cites several federal court decisions which have refused to hold public employers liable for requiring their employees to undergo tests, or to suppress evidence in criminal prosecutions that was obtained by searching employees' electronic files. Pb33. These arguments, however, do not aid Dendrite here.

First of all, although Yahoo!'s privacy policy **allows** it to disclose information if it chooses to do so, in certain limited circumstances, that is a very different matter from compelling Yahoo! to provide such information though the exercise of the court's power. The privacy policy protects Yahoo! from being held liable for disclosures of information, but it does not create any entitlement for third parties to obtain information from Yahoo! Moreover, Yahoo!'s strict policy is (a) to refuse to disclose personal information except in response to a subpoena, (b) to provide notice to its users so that they may oppose subpoenas that are directed to them, (c) to postpone compliance with subpoenas for at least fifteen days following the provision of such notice, and (d) if a motion is filed to quash the subpoena, to withhold any disclosure until that motion and any appeal from a decision

on that motion is decided. Pa92-93, 97. (We attach to this brief an affidavit from a Yahoo! official, filed in a different case, that described Yahoo!'s policy in greater detail). In sum, Yahoo!'s policy amounts to a rule that, if information is subpoenaed and the user either does not file any opposition or the user files an opposition that is finally overruled, then and only then will personal information be disclosed. In these circumstances, it is an exercise in question-begging to say that, because Yahoo! users agree to Yahoo!'s policies, they accept a diminished expectation of privacy when they create accounts with Yahoo! Put another way, because users may be presumed to be acting in light of the strict policy requiring a subpoena and creating a mechanism for notification and opposition to enforcement, as well as the rule that Yahoo! may ultimately disclose the information if such opposition fails, the policy does not limit the expectation of privacy at all. In fact, the policy reinforces that expectation.[13]

Moreover, all of the cases cited by Dendrite are distinguishable, because every one of them involve claims under the Fourth Amendment's generalized right of privacy, and not the First Amendment right to speak anonymously. Two of the cases do not even involve speech, but rather were claims by public employees who claimed that, by subjecting fire fighters to drug testing, *Wilcher v. City of Wilmington*, 139 F.3d 366 (3d Cir. 1998), or by requiring an employee with multiple absences to submit to medical testing and disclosure of medical records, *Yin v. California*,

[13]Similarly, the fact that Yahoo!'s terms of service forbid users from defaming or otherwise violating the rights of third persons in their messages does not support plaintiffs' claims here. To be sure, if a plaintiff has a legitimate claim that is supported by evidence, that is sufficient to override the First Amendment right to communicate anonymously. But it is wrong to claim, as Dendrite repeatedly does in its brief, that our argument or Judge MacKenzie's decision serves to shield vicious defamers or unfaithful employees from being brought to justice. We argue that only those who have not abused their free speech rights should be protected in their anonymity, and the purpose of the test that we propose, and that Judge MacKenzie adopted, is to distinguish among the innocent, the guilty, and those whose statements afford at least a fair ground for litigation.

95 F.3d 864 (9th Cir. 1996) (Dendrite gives the wrong name for this case), their employers were conducting searches that violated their rights under the Fourth Amendment. *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000), likewise involved a search conducted by Simons' own employer, the CIA, on its own premises, of the work-related computer that Simons used to download files from the Internet. That court refused to suppress the fruits of a search whereby CIA learned, after its MIS auditor ran a search for the keyword "sex" designed to test the soundness of its firewall security system, that one of its employees had stored thousands of nude pictures, many of them of children, on his work computer. *United States v. Hambrick*, 55 F. Supp.2d 504 (W.D. Va. 1999), *aff'd mem.*, 225 F.3d 656, 2000 U.S. App. LEXIS 18655 (4th Cir. 2000), was the only case involving a subpoena seeking to identify a person who engaged in anonymous Internet communications. There, a defendant was prosecuted for using the Internet to solicit children for sexual activity, and the court refused to suppress information obtained from a voluntary disclosure by the defendant's Internet Service Provider after the FBI learned that the defendant, using the pseudonym "BlowUinVA," had sent a message to an undercover agent posing as a 14 year old boy asking him to come to Virginia for sex and to bring his 12-year-old brother with him.

In all these cases, the courts invoked the well-established rule that one of the factors to be considered in deciding whether a particular search violated an individual's reasonable expectation of privacy under the Fourth Amendment was whether the individual was party to an agreement allowing such searches. These cases raise interesting issues under the Fourth Amendment, but not a single one of them discussed the First Amendment or the right of free speech as a possible barrier to the search.

There is one other point that needs to be made about these other cases. Even if a First

Amendment defense had been raised there, it seems clear that the test for which we have argued in this brief, and which Judge MacKenzie applied in the *Dendrite* case, would easily have been satisfied. Presumably the agents who examined Simons' hard drive had probable cause to search his computer once they learned, through information supplied by a private contractor who was testing the CIA's security firewall, that a CIA employee had multiple hits for the word "sex" and multiple nude pictures on the government computer that was provided to him for work purposes in his government office. Similarly, Hambrick had provided probable cause to believe that he might be involved in child pornography efforts when he solicited two young teenagers to engage in sex. Although these cases' facts do not easily translate into the context of a civil suit for tortious speech, the evidence would surely support a finding of a fair likelihood of success if a private party sought to subpoena Yahoo! in these cases.

This fact also meets one of the larger points in Dendrite's brief, which is that the test for which we argue is unduly burdensome to the ordinary plaintiff who is trying to pursue a meritorious case. Dendrite sets forth some horrible examples of defendants who have hidden behind a veil of anonymity to commit obvious wrongs on the Internet, whether by posting inside information, or making false factual assertions that accuse individuals of horrible crimes, or engaging in deliberate price manipulation by short sellers, which Dendrite contends erect unnecessary barriers to litigation against such miscreants. *E.g.*, Pb36-37. The simple answer to this parade of horribles is that, if a defendant's conduct is so heinous, it is easy enough for the plaintiff to show that the posting was false or otherwise unlawful, and caused it real harm. We can cite, for our side, a parade of horribles in the opposite direction, where plaintiffs for whom the price of hiring counsel is no object have been able to sue defendants who have no resources to hire their own lawyers, identify them without much

trouble, and then badger them into a public apology and a promise never to speak publicly ever again through the threat of ruinous litigation and of destroying their careers.

The challenge for the courts, in our view, is to develop a test for the identification of anonymous posters which neither makes it too easy for vicious defamers to hide behind pseudonyms, **nor** makes it too easy for a big company to unmask its critics by the simple device of filing a complaint which manages to state a valid claim for relief under some tort or contract theory. We believe that Judge MacKenzie's test strikes the right balance, and no matter how the Court ultimately decides to apply this test in the circumstances of these two cases, we urge the Court to affirm Judge MacKenzie's holding that the success of a motion for leave to discover the identity of an anonymous Internet speaker depends on a showing that the plaintiff has a legitimate expectation of success, the strength of which varies with the defendant's interest in remaining anonymous.[14]

CONCLUSION

[14]Dendrite made a second waiver argument in the trial court with which we strongly disagree – that the presence of a non-disparagement clause in an employment agreement entitles an employer to subpoena the identify of any anonymous Internet poster who appears to be an employee. An employee who makes a public criticism of his employer's activities, or who discloses otherwise confidential information, in circumstances that warrant protection under the Conscientious Employee Protection Act, should not be subject to being identified, because an employer cannot nullify that law through an employment agreement. Similarly, an employee's right to criticize his employer pursuant to his protections under section 7 of the National Labor Relations Act, 29 U.S.C. § 157, or under any of the various federal whistleblower statutes, are not subject to waiver by a private agreement, and hence an employee whose Internet postings are protected by those laws is not subject to identification by subpoena regardless of the contents of an employment agreement. In our view, some of the criticisms made by "ajcazz" concerning Dendrite may have been thus protected; however, "ajcazz" did not appeal the order allowing a subpoena to Yahoo! for his identity, and his name has since been disclosed, making any such arguments moot. Although Immunomedics' complaint against "moonshine" rests on the proposition that she is or was an employee, none of her disclosures appear to be protected by any of these laws, and in any event "moonshine" denies employee status. Accordingly, the Court will not have occasion to discuss these important exceptions in this appeal.

For the foregoing reasons, *amici curiae* urge this Court to adopt a standard that protects the rights of speakers on the Internet to engage anonymously in constitutionally protected speech, to affirm the decision in *Dendrite*, and to vacate the decision in *Immunomedics* and remand that case for further proceedings consistent with the standard urged in this brief.

Respectfully submitted,

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ADDENDUM