

Paul Alan Levy  
Public Citizen Litigation Group  
1600 - 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20009  
202-588-1000

DENDRITE INTERNATIONAL, INC.,	)	SUPERIOR COURT OF NEW JERSEY
a New Jersey corporation,	)	MORRIS COUNTY CHANCERY
	)	DIVISION – GENERAL EQUITY PART
Plaintiff,	)	
	)	DOCKET NO. MRSC-129-00
v.	)	
	)	Civil Action
JOHN DOES Nos. 1 through 4 and DOES	)	
5 through 14, inclusive,	)	<b>MEMORANDUM OF PUBLIC CITIZEN</b>
	)	<b>AS AMICUS CURIAE IN OPPOSITION</b>
Defendants.	)	<b>TO THE REQUESTED DISCOVERY</b>

#### **INTEREST OF AMICUS CURIAE**

Public Citizen is a public interest organization based in Washington, D.C., which has about 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 do participate in public debate.

In recent years, Public Citizen has watched with dismay as an increasing number of companies have resorted to litigation to prevent ordinary citizens from using the Internet to express their views about the manner in which companies have conducted their affairs. Over the past year, Public Citizen has represented consumers, *ServiceMaster v. Virga*, No. 99-2866-TUV (W.D. Tenn.)

([www.citizen.org/litigation/briefs/virga.htm](http://www.citizen.org/litigation/briefs/virga.htm)), workers, *Northwest Airlines v. Teamsters Local 2000*. No. 00-08DWF/AJB (D. Minn.) ([www.citizen.org/litigation/briefs/trooppo2.htm](http://www.citizen.org/litigation/briefs/trooppo2.htm)), and other members of the public, *Thomas & Betts v. John Does 1 to 50*, Case No. GIC 748128 (Cal. Super. San Diego Cy.) ([www.citizen.org/litigation/briefs/sandiego.htm](http://www.citizen.org/litigation/briefs/sandiego.htm)); *Circuit City Stores v. Shane*, No. C-1-00-0141 (S.D. Ohio) (<http://www.citizen.org/litigation/briefs/shanemem.htm>), who have been sued for criticisms they voiced on the Internet. 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).

Public Citizen recognizes 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 have argued in these cases, however, that a Court should give the defendants 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 identify its critics, it is affording the plaintiff very significant relief which, in some cases, may be the only substantive order that the plaintiff obtains against the defendants in the case. Before such an order is issued, therefore, the Court should ascertain whether the plaintiffs have both valid legal claims, and require a minimum showing that there is genuine sufficient to support those claims.

Public Citizen does not represent any party to this case, although we have endeavored to contact all parties whose counsel we have been able to identify, both plaintiff and defendants. Public

Citizen seeks 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**

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! organized outlets for the expression of opinions on these topics. These outlets, called the Message Boards, are an electronic bulletin board system where individuals freely discuss major companies by posting comments for others to read and respond to.

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.

One of Yahoo's Message Boards is devoted to the plaintiff, Dendrite International. Dendrite's web site, [www.dendrite.com](http://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 customer in over 150 companies and 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." In short, this 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 900 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 highly opinionated.

This lawsuit has 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," who was 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 displays a tremendous 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 itself as a current employees; one of them, implementor, identifies herself as a former employee (without saying how long ago she left the company); one pseudonym, xxplrr, states that it has never worked for plaintiff; and the final pseudonym, gacbar, does not say anything about its employment status.

The complaint alleges a series of different claims against the four anonymous posters. 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 motion now before the Court seeks legal relief against the four posters that may be equally significant – it seeks the Court's leave to serve a subpoena that could have the effect of identifying them, 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 customers whenever it has been subpoenaed to provide information about them, the Court 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 we understand that at least two of the anonymous posters have themselves retained counsel and plan to file papers with the Court. Public Citizen, which is committed to principles of free speech on the Internet, now files this brief to urge the Court to demand direct proof in support of the allegations against each poster before Dendrite is entitled to compel their identification.

### ARGUMENT

**BECAUSE IDENTIFICATION OF THE POSTERS TRENCHES ON THEIR RIGHT TO SPEAK ANONYMOUSLY, THE COURT SHOULD NOT AUTHORIZE THE SUBPOENA TO YAHOO UNLESS PLAINTIFF CAN DEMONSTRATE, THROUGH ADMISSIBLE EVIDENCE, THAT IT HAS SUFFICIENT PROOF THAT THE POSTERS HAVE VIOLATED ITS LEGITIMATE RIGHTS.**

Plaintiff's request for a third-party subpoena to Yahoo!, whereby plaintiff seeks to use judicial process to identify its Internet critics, constitutes a potential violation of those critics' right to speak anonymously.

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.

\* \* \*

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, which 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 hundreds or even thousands of miles away, at virtually no cost, and 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](http://www.annoy.com), a site "created and designed to annoy" legislators through anonymous communications).

The references in these cases to people who communicate anonymously, because they are afraid of economic retaliation, are not merely theoretical. Several anonymous posters in Yahoo!'s Dendrite Message Board identify themselves as Dendrite employees, and such employees could face retaliation from Dendrite. 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. Other posters may work for companies that do not wish to offend Dendrite by harboring employees who criticize Dendrite publicly.

Moreover, some of the statements at issue in this case, especially 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 hardly the stuff of which the typical libel suit is made. 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 two large law firms, both Gibson, Dunn and the Allegaert firm, 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 hope to keep their identities confidential. Surely, the Court should not permit 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 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 snoop on communications to 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.

Because compelled identification of anonymous speakers trenches on their First Amendment right to remain anonymous, the First Amendment creates 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 can 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); *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).

A federal District Court recently applied these principles in a case where the plaintiff was seeking to identify John Doe defendants against which it had filed a lawsuit. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). The 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 giving 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.

In this regard, Public Citizen commends the Court for its sua sponte decision requiring the plaintiff to publish a notice on the Yahoo message boards of the pendency of its request for a subpoena, thus giving the anonymous posters an opportunity to appear before this Court to defend their right to anonymity. 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](http://www.cdt.org)) that several 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 the Court entered provides an important procedural protection for the right to speak anonymously.

It must also be recognized that some anonymous speakers may choose not to appear in this Court at this time to defend their interests. For example, if a poster were not located in New Jersey, he or she might have an argument that merely posting a criticism on the Internet was not sufficient to subject him to personal jurisdiction in New Jersey, simply because the plaintiff is headquartered here. The precedents are divided on that question. *Compare Barrett v. Catacombs Press*, 44 F. Supp.2d 717, 731 (E.D.Pa. 1999) (fact that plaintiff was Pennsylvania resident was not enough to subject person making statements about plaintiff on web site to jurisdiction in Pennsylvania) *with Blumenthal v. Drudge*, 992 F. Supp. 44, 57 (D.D.C. 1998) (jurisdiction upheld). Defendants in those circumstances might prefer to appear in the foreign jurisdiction where the plaintiff will have to enforce any subpoena against Yahoo, on the theory that such an appearance would not risk subjecting the defendant to this Court's personal jurisdiction. Indeed, the fact that Yahoo is located in

California may make that option especially attractive, both because Article I, Section 1 of the California Constitution contains an explicit right of privacy that applies to private companies as well as to the state government, *see Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538 (1999), and because in California the defendant may be able to file a special motion to strike under the California anti-SLAPP statute, Code of Civil Procedure § 425.16.<sup>1</sup>

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 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. The Court should, first, 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 do not bother to do this – they may quote one or two messages by a few individuals, but then demand production of a larger number of identities. In this case, the plaintiff has forthrightly identified each statement of which it complains – in its papers in support of the order to show cause if not in the verified complaint – and thus the plaintiff meets this part of the test.

Second, the Court should review each statement to determine whether it is facially actionable.

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<sup>1</sup> The time originally allowed by the Court for responses to its 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 refuses to respond to a subpoena until 15 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 to get notice to such an individual; other posters were somewhat more frequent, and implementor-extraordinaire posted very often. In any event, the Court'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.

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. 1998)

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 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). 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=1&board=4688055 &tid=drte&sid=4688055& mid=&start=872](http://messages.yahoo.com/bbs?.mm=FN&action=1&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; that is certainly true of the repartee in which many of the posters on the Dendrite message boards tend to be engaged.

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, for which it need not identify the defendants, there is no need to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1<sup>st</sup> Ci.r. 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.”

Indeed, some courts have gone even further and required the party seeking discovery of information protected by the First Amendment 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 (8<sup>th</sup> Cir./ 1972). “Mere speculation and conjecture about the fruits of such examination will not suffice.” *Id.* at 994.

We have grave qualms about whether the plaintiff’s evidence is strong enough to meet these tests, although we do believe that it should be given the opportunity to present affidavits or other evidence to bolster its claims before the Court rules. The only evidence submitted in support of disclosure in this case is the verified complaint, and although such verification may allow the complaint to be treated as an affidavit for evidentiary purposes, the verification is sworn by an individual Dendrite official, a Mr. Richard Savage, who could not possibly have personal knowledge of the falsity of many of the statements. For example, the complaint alleges the falsity of a statement that “management” is shopping the company, but the actual statement set forth in Exhibit G, from the poster known as “xxplr,” attributed this behavior to a management person named “John.” Only an affidavit from “John” can provide testimony based on personal knowledge about his conduct.

Similarly, the poster known as “ajcazz” alleges that **he** and his fellow workers were repeatedly threatened with discharge. Presumably Mr. Savage knows whether he himself engages in such behavior, but it is hard to believe that he has personal knowledge of whether other managers do it.

In other respects, the verified allegations in the complaint seem too conclusory to provide evidentiary support for the proposition that specific statements were false. For example, it is alleged that certain statements in several page-long messages “reveal . . . details of Dendrite’s confidential contracts with third parties,” or “reveal information concerning certain Dendrite accounts with hours of the company’s learning of such information,” allegedly in violation of Dendrite’s trade secret rights. The complaint does not specify which parts of the lengthy statements allegedly reveal secrets, and which do not. Moreover, inspection of the statements in question tends to suggest that much of the information (for example, the fact that certain Dendrite customers were choosing to switch to Dendrite rivals) would have been available not only to Dendrite employees but also to customers and to industry rivals. In order to show that it is necessary to identify the posters in order to pursue a lawsuit against them, Dendrite should be required to submit evidence that the information contained in these posts was available only or primarily to Dendrite employees, and not to others.

Even the allegations about alleged breach of the employment agreement have gaps that plaintiff should be required to close. The verified complaint alleges that, when they start working for Dendrite, employees “are” required to execute a standard employment agreement. However, plaintiff does not allege how long employees have been required to sign this contract, or whether all employees who might have been posting in the past several months have, in fact, signed such contracts. Nor does the complaint indicate whether the posters who indicated that they were former employees left Dendrite less than two years ago, a crucial fact because the duty of former employees

to refrain from inducing current employees to leave – a violation attributed to John Doe No. 1 – applies for only two years after leaving Dendrite. We suggest that Dendrite be given an opportunity to cure these lacunae in its proofs before the Court rules on its motion for leave to take discovery to identify the posters who are current and former employees.

Obviously, 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, the 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, we would urge the Court to 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.

Finally, even if the Court decides that one or more of the defendants needs to be identified so that he or she can be served with the complaint and subjected to discovery, the Court 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).

## CONCLUSION

The motion for leave to serve a subpoena on Yahoo seeking to identify the anonymous defendants should be denied, without prejudice to plaintiffs' refiling its motion after serving a more detailed complaint and more detailed affidavits, as urged in the foregoing memorandum.

Respectfully submitted,

Paul Alan Levy (DC Bar 946400)

Public Citizen Litigation Group  
1600 - 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20009  
(202) 588-1000

Attorney for Public Citizen

July 11, 2000