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| VINCENT DONATO, ERIC OBERNAUER |) | SUPERIOR COURT OF NEW |
| LAWRENCE R. CAMPANGA, and GINA |) | JERSEY, BERGEN COUNTY |
| CALOGERO, |) | LAW DIVISION |
| |) | |
| Plaintiffs, |) | DOCKET NO. BER-L-6214-01 |
| |) | |
| v. |) | CIVIL ACTION |
| |) | |
| STEPHEN MOLDOW, JOHN DOES Nos. 1-40, |) | |
| JANE DOES 1-20, |) | MEMORANDUM OF PUBLIC |
| |) | CITIZEN AND AMERICAN |
| Defendants. |) | CIVIL LIBERTIES UNION OF |
| |) | NEW JERSEY FOUNDATION |
| STEPHEN MOLDOW, |) | AS AMICUS CURIAE IN |
| |) | OPPOSITION TO THE |
| Third Party Plaintiff, |) | REQUESTED DISCOVERY AND |
| |) | IN SUPPORT OF THE |
| v. |) | MOTION TO DISMISS |
| |) | |
| KENNETH HOFFMAN, RICHARD REFORM |) | |
| 1 through 10 and RITA REFORM 1 through 10, |) | |
| |) | |
| Third Party Defendants. |) | |

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INTEREST OF AMICI CURIAE

Public Citizen and the American Civil Liberties Union of New Jersey Foundation file this brief to address an important issue concerning the First Amendment and Due Process rights of the anonymous Internet speakers who are not otherwise represented by counsel in this case. Public Citizen is a national consumer advocacy organization that supports free speech rights on the Internet, and the ACLU is a state-wide civil liberties organization. Both organizations appeared as amici curiae in *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), and were the advocates of the four-part test that was adopted by the Appellate Division in that case. We present this brief to explain why we believe that the anonymous speaker defendants are entitled to have their First Amendment rights considered and protected whether or not they personally appear through counsel to object to enforcement of the subpoena in this case, and why the case cannot be maintained against the operator of an internet message board on which allegedly tortious messages have been posted.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case in which the plaintiffs, a group of public officials in the Borough of Emerson, New Jersey, seek damages and injunctive relief against a large number of anonymous persons, all of them apparently citizens of Emerson, who have criticized the plaintiffs on an Internet message board, and against a citizen of Emerson who created that message board. The message board host is represented by counsel, as are a significant group of the anonymous posters, who have moved to quash the subpoena against them. These posters have argued that, under the recent decision in *Dendrite v. Doe*, the plaintiff must satisfy certain standards before enforcing a subpoena that seeks to obtain identifying information about them – (1) that notice be given, (2) that plaintiffs be required to set forth the precise words alleged to be actionable and to show that those words are actionable,

(3) that plaintiffs be required to present sufficient evidence establishing that it has a genuine chance of prevailing on the claim against each anonymous speaker, and finally (4) that the court balance the equities before deciding on whether to divest each speaker of his anonymity. Amici agree that it is appropriate to hold the plaintiffs to this test, and without prejudging whether that test can be met in this case, we note that there are a large number of comments that do not appear to provide fair grounds for litigation.

However, this brief is devoted to two different questions – first, how should the *Dendrite* test be applied to anonymous speakers who are not represented by counsel, and second, what standard should be applied to the liability of the webmaster who created the bulletin board on which the allegedly libelous statements were posted. It is our contention that the Court has an independent obligation to apply the *Dendrite* standard before permitting the enforcement of a subpoena from public officials to identify anonymous critics, even against those who have not yet appeared in the case, and that the webmaster cannot be held liable absent specific allegations that he himself wrote or adopted specific messages whose text is set forth and determined to be actionable. To explain why this is so, we begin by reviewing the reasons why the Appellate Division imposed such a rigorous standard on plaintiffs seeking to identify anonymous speakers, and then proceed to a consideration of the specific issues in this case.

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.

* * *

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*, 132 F. Supp.2d 1261 (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/hollddec.pdf>, *appeal pending*, No. D037907 (Cal. App. 4th Dist.) (same).

Moreover, some of the statements at issue in these cases, such as the statements that various plaintiffs should “go to hell” or “burn in hell” – basically statements of antipathy – are almost certainly not actionable, even if they are unpleasant, hurtful, or annoying. It is hard to imagine what damages plaintiffs could prove that they 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 a lawyer to put before the court evidence that these public officials are likeable people who deserve to go to heaven instead. Rather, the very inconsequential nature of these statements strongly implies that this lawsuit is an exercise in intimidation against all citizens of Emerson, warning them not to speak publicly because they cannot keep their identities confidential. Surely, the Court should not permit public officials to abuse the judicial process by bringing a frivolous action against their constituents, using judicial process to identify them, and then using their public authority to punish them, 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); *cf. Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982). 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).

The Appellate Division in *Dendrite* adopted a similar balancing test for cases involving subpoenas to identify anonymous internet speakers:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford

the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to R. 4:6- 2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 342 N.J. Super. 134, 141-142, 775 A.2d 756, 760-761 (App. Div. 2001).

B. Public Officials Must Make the *Dendrite* Showings Before Identifying a Citizen Who Criticizes Them Regardless of Whether the Citizen Appears in Court to Defend His Right to Anonymity.

The Court has an obligation to apply these same tests, sua sponte, before enforcing a subpoena for information that might lead to the identification of those anonymous speakers who are not represented by counsel in this case. After all, a Court subpoena is an injunction, requiring a third party to identify the anonymous speakers, and as the Superior Court recognized in *Dendrite*, enforcement of such a subpoena through the threat of sanction by the government if the subpoena

is not obeyed constitutes state action that has the potential for infringing the First Amendment right to speak anonymously. The fact that a party against whose interests this court order is being issued and enforced is not present in court does not reduce the Court's obligation to protect the First Amendment interests at stake. If anything, the lack of adversary proceedings with respect to such individuals increases the Court's responsibilities.

In this regard, the role of the Court is similar to that of a judge deciding in an ex parte proceeding whether to issue a warrant at the request of a prosecutor. The judge in that context must apply firm standards of probable cause in light of the affidavits presented in support of the warrant application, to ensure that warrant is not being sought in violation of the Fourth Amendment by overzealous prosecutors. By the same token, when a subpoena is sought for information identifying an anonymous speaker who is not in court to defend himself or herself, the Court should nevertheless apply the governing legal standards, established for this case by the Appellate Division in *Dendrite*, to protect the rights of the absent Doe defendants.

Indeed, the differences between this case and a warrant application call for an even stricter application of the governing standard. First, in the case of a warrant application, a person whose property has been searched pursuant to an unjustified warrant can move after the fact to suppress the evidence obtained pursuant to the search; and the defendant may also have a *Bivens* or section 1983 action to recover damages if the search violated his Fourth Amendment rights. Because the evidence obtained pursuant to such a search is held in confidence and not disclosed to the community at large except as needed in conjunction with the pursuit of criminal charges, the suppression and damages remedies undo much of the harm caused by the search itself. In the context of anonymous speech, however, compulsory disclosure of the identity of the speaker violates the First Amendment right

to anonymity and cannot be undone by a later suppression or damages remedy. Moreover, there is good reason to believe that plaintiffs often seek such subpoenas to identify their critics as a way to silence or punish their speech, without necessarily intending to pursue litigation against those critics, but in the hope of using private means to obtain satisfaction. Fischman, *Your Corporate Reputation Online*, http://www.fhdlaw.com/html/corporate_reputation.htm (attorney specializing in representing plaintiffs in internet libel cases urges companies to file first and decide whether to sue later); Fischman, *Protecting the Value of Your Goodwill from Online Assault*, http://www.fhdlaw.com/html/bruce_article.htm (same); Eisenhofer & Liebesman, *Caught by the Net: What to Do If a Message Board Messes With Your Client*, 10 Business Law Today No. 1 (Sept/Oct. 2000), at 40-46 (same). Thus, it is at the stage of deciding whether to enforce a subpoena for identifying information that the Court should take care to ensure that the plaintiff has a sufficient legal and evidentiary basis for identifying the speaker.

Second, when the police and prosecutor seek judicial approval of a warrant to search a premises looking for evidence, they are normally acting pursuant to their disinterested duty to represent the interest of the community in punishing or preventing the commission of crimes against the community at large; the Court is entitled to presume that they are not acting out of self-interest and that they will not personally benefit from the execution of the warrant. However, when plaintiffs seek to identify a speaker for the purpose of pursuing a lawsuit against that speaker, not only are they seeking private benefits for themselves, but the lawsuit proclaims their view that the speaker has violated their rights, and that the speaker ought to be punished for speaking about them. No presumption of neutrality or regularity attaches to their desire to identify their adversaries.

Moreover, the fact that First Amendment rights are at stake provides another reason for

application of strict standards of necessity before approving the order. This is clear from the decision of the United States Supreme Court in *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968), where the Court reversed an ex parte injunction that had been granted against the holding of a rally. “An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.” *Id.* at 183-184. Although the holding of the case was that the trial court erred by granting the injunction without giving notice to the defendants, it explained that the **reason** why notice was so necessary was that the adversary process was needed to enable the Court to perform its obligation of deciding whether any order was needed, and then drawing that order as narrowly as possible. Here, too, where enforcement of the subpoena could breach the message board posters’ First Amendment right to speak anonymously, the Court should apply the *Dendrite* standards sua sponte with respect to any posters who are not represented in the proceedings before the Court.

In this regard, we acknowledge that in an aspect of the trial court proceeding in *Dendrite* that was not at issue when the case reached the Appellate Division, Judge MacKenzie appears not to have applied the full *Dendrite* test sua sponte in considering whether to authorize the issuance of a subpoena seeking the identities of two defendants, Doe 1 and Doe 2, who did not hire lawyers to defend their right to oppose issuance of the subpoena. On pages 5 and 17 of his opinion, which is not published but which appears on the Public Citizen web site at <http://www.citizen.org/documents/dendrite.pdf>, Judge MacKenzie appeared to apply a motion to dismiss standard in favor of these two defendants, inasmuch as he discussed the facts that *Dendrite*’s complaint stated a cause of action for

breach of the employment agreement, and that the message posts by Does 1 and 2 appeared to acknowledge their status as employees of Dendrite. On the other hand, Judge MacKenzie stated that he did not need to decide whether there was sufficient evidence that these two employees had actually signed the employment agreement that Dendrite was suing to enforce, *id.* at 18, and also stated that unless Does 1 and 2 appeared in his court to argue, he would not protect their rights. *Id.* at 18, 22.

This limitation is distinguishable here for two reasons. First, in securing the consent of the webmaster, defendant Moldow, to its request for the issuance of the subpoena to VantageNet, plaintiffs agreed that the subpoena would be “issued in accordance with the restrictions and procedures established by the Appellate Division in *Dendrite v. Doe No. 3*, 2001 N.J. Super. Lexis 300 (App. Div. 2001)”, ¶ C. Unlike Judge MacKenzie’s opinion, which suggests that Does who do not appear may not receive the full benefit of the *Dendrite* standards, there is nothing in the opinion of the Appellate Division that limits the protections afforded to absent Does.

Even more important are the differences between the kinds of speech and the kinds of parties that were at stake in *Dendrite* and in this case. In *Dendrite*, the messages were addressed to the private operations of a software company, discussing whether its executives were doing a good job for the shareholders and whether employees were being treated fairly; and the plaintiff was a private company. In this case, however, the messages are addressed to the performance in office of public officials, which is core political speech for which First Amendment protections are at their apogee. Even more so than private companies, public officials must expect harsh criticism, and cannot obtain damages for such criticism except in the most egregious cases of deliberate falsification. *See New York Times v. Sullivan*, 364 U.S. 254 (1964). The “harassment” cause of action is even further afield

– if public officials can sue whenever citizens write angry words that hurt their feelings, not spoken to their faces as in a fighting words case but simply posted on a public bulletin board, requiring those citizens to pay a lawyer to represent them against the prospect of a large damages award, then our democracy will be in grave danger. Moreover, the plaintiffs are public officials who enjoy the power to impose significant sanctions on citizens with whom they are at odds. These powers range from the ability to reject zoning changes, to the possible withholding of city services, and even to the exercise of the police power. *Cf. NAACP v. Alabama*, 357 U.S. 449 (1958). The Court need not decide at this juncture the truth or falsity of defendant Moldow’s counterclaim allegations, that he was summoned to the police station to answer questions in retaliation for his maintenance of the web site, in order to appreciate the chilling effect that compulsory identification of the anonymous critics of public officials can have on the willingness of citizens to speak in the future.¹

But even if the facts of *Dendrite* were not thus distinguishable, we believe that Judge MacKenzie was wrong to refuse to apply the full protection of the *Dendrite* standards to the protection of absent Does. This duty flows from a Court’s obligation to issue the narrowest possible order that minimizes the impact on First Amendment rights, as required by the Supreme Court’s decision in the *Princess Anne* case. Nor is there anything in the Appellate Division’s decision in *Dendrite* that requires the defendant to enter a special appearance to contest the subpoena application

¹ The chilling effect of having to retain a lawyer and go to court simply to defend one’s comments and remain anonymous has been mitigated somewhat in this case by the generous offer of Richard Ravin, Esquire to represent anonymous posters pro bono. But some of the posters may have had conflicts that prevented Mr. Ravin from representing them, and although his offer was posted on the Eye on Emerson web site, it is also possible that some posters never learned of the offer of representation; indeed, it is possible that some defendants are not even aware that they have been named if they have not revisited the site since this suit was filed. Moreover, we are arguing for a prophylactic rule requiring court scrutiny in all cases brought by public officials, because we cannot be certain that in every case a lawyer as generous as Mr. Ravin will be available.

before the plaintiff must make the showings required by that Court's standard. Indeed, the opinion strongly implies that the showings are required of all plaintiffs, regardless of whether the defendants appear. The test is phrased in terms of what the plaintiff must do and what the Court must require, and there is no mention of the consideration of any information from the defendant until the last prong of the test, requiring the Court to consider the defendant's equities. Until the plaintiff makes the required showings of detailed allegations and evidence setting forth a prima facie case, there is really nothing to which the defendant can respond. Although the *Dendrite* opinion affirmed Judge MacKenzie's decision in favor of Doe No. 3, there is no question but that the Appellate Division was expanding the protections afforded to defendants by Judge MacKenzie, because the test announced by the trial judge did not provide for the consideration of any evidence in support of the plaintiff. Accordingly, the proper reading of the *Dendrite* opinion is that all defendants, including those who have not yet appeared, are entitled to the protections afforded by the requirement that a plaintiff make several discrete showings before it is entitled to a court order compelling the identification of anonymous Internet speakers.

A comparable principle can be found by analogy in the procedures that courts are required to follow when designating sex offenders under Megan's Law and issuing notifications to schools and community organizations. *In re Registrant R.F.*, 317 N. J. Super. 379, 389, 722 A.2d 538, 543-544 (App. Div. 1998). Citing the New Jersey Supreme Court's December 9, 1997 order concerning the procedures to be followed in Megan's Law cases, the Court made clear that the requirement of findings based on the standard of clear and convincing evidence applies even when the registrant does not appear to contest the notification. Such consideration is needed to avoid unnecessary impingement on the offender's privacy and freedom of association. Surely, if such scruples are

needed to protect former sex offenders against needless notification of their identity, at least as much protection should be afforded to internet speakers against whom there has never been a finding of impropriety, and against whom there has been nothing but an allegation that their speech violates their civil obligations to the targets of their criticism.

In summary, then, it is our contention that the *Dendrite* protections should be afforded to the speakers who are being sued in this case before the internet service provider VantageNet is ordered to provide identifying information about them, whether or not they are represented by counsel in this subpoena enforcement proceeding. Obviously, it will be advantageous for a given defendant to be represented. After all, as the Supreme Court noted in *Princess Anne*, only if a defendant participates in the process leading to the order can his attorney help narrow the order's impact on his First Amendment rights, such as by pointing to specific flaws in the arguments and proofs presented by the plaintiffs in compliance with *Dendrite*. Indeed, in *Dendrite* the represented Does were able to present their own evidence to undercut the contention that their posts has caused damages, and to point to reasons to believe that the statements over which they had been sued were true (and hence not actionable for defamation). However, the minimal protection of a sua sponte consideration of the rights of the absent speakers would best comport with existing standards under both state and federal law.

C. Plaintiffs Cannot Avoid the Immunity from Suit That Congress Has Provided for the Sponsors of Internet Message Boards Without Specific Allegations That the Sponsor Personally Participated in the Writing of Identified Actionable Messages.

In addition to suing the individual posters who signed certain messages with pseudonyms, the plaintiffs have sued Steven Moldow, the webmaster of the Eye on Emerson site and the sponsor

of the message board on which the supposedly actionable messages have been posted. As we now explain, however, this aspect of the suit flies in the face of the absolute immunity against suit that Congress has provided to message board hosts such as Moldow, and the plaintiffs' apparent efforts to plead around the immunity statute are woefully inadequate.

Thus, the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(1), provides that "[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider." Every court to consider this issue has ruled that the CDA creates a federal immunity against suit under any law, federal or state, that might impose liability on an internet provider for content supplied to a web site by a different person. *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327, 330-331 (4th Cir. 1997); *Lockheed Martin Corp. v. NSI*, 985 F. Supp. 949, 962 n.7 (C.D. Cal. 1997), *aff'd*, 194 F.3d 980 (9th Cir. 1999); *Marczeski v. Law*, 122 F. Supp.2d 315, 327 (D. Conn. 2000); *Doe v. Franco Publications*, 2000 WL 816779 *4-5 (N.D. Ill.); *Blumenthal v. Drudge*, 982 F. Supp. 44, 49-53 (D.D.C. 1998); *Kathleen R. v. City of Livermore*, 104 Cal. Rptr.2d 772 (Cal. App 2001); *Barrett v. Clark*, 2001 WL 881259, *9 (Cal. Super.). Indeed, the statute not only protects covered defendants from being held liable, but also expressly provides that no such "cause of action may be brought" against them. 47 U.S.C. § 230(c)(3).

The legislative history makes clear that Congress provided this immunity because it was concerned about the impact of federal or state regulation on the "vibrant and competitive free market that presently exists for the Internet." Section 230(b)(2). As the court explained in *Zeran*, Congress was worried about the chilling effect that even the possibility of tort liability for the millions of postings that are disseminated through their services could have on interactive service providers,

because they could not possibly screen every message for every potential problem that it might present. “Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.” 129 F.3d at 331. Only by protecting service providers from such suits could Congress avoid this chilling effect.

It remains unclear how the plaintiffs hope to evade the Section 230 immunity. Perhaps they will argue, as some plaintiffs have, that the immunity extends only to actual Internet Service Providers (“ISP”) such as America Online and Prodigy, and does not reach persons who organize web sites that include message boards. Most courts that have considered this question have decided that the statute covers both, and in our view these courts are correct, for several reasons. First, the definition of “interactive computer service” is not limited to ISP’s, but extends to any person who creates a web site that includes a facility for multiple users to communicate with each other by posting information to the web site server, directly or indirectly:

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. § 230(f)(2).

The words “service or system that provides access to the Internet” may well be limited to ISP’s, but the definition only “includes” such organizations within the larger category of persons who “provide or enable access by multiple users to a computer server,” which is precisely what the host of a web site does.

Second, although many of the leading cases on the subject of section 230 immunity had been

brought against ISP's, they were brought against ISP's that provided specific informational web sites in addition to providing access to the Internet itself, and the claims related more to the web sites than to the basic Internet access. In *Zeran v. America Online*, for example, the actionable content had been posted on an interactive bulletin board sponsored by AOL, on which any AOL member could both read existing messages or post new messages. And in *Blumenthal v. Drudge* and *Ben Ezra v. American Online*, the plaintiffs claimed that he had been libeled by the content of news sites provided under contract with AOL, the former suing over content was prepared by the notorious muckraker Matt Drudge, and the second suing over content prepared by certain stock price reporting services. None of these cases involved a defendant that was sued simply for acting in the capacity as an ISP, and the courts, in analyzing these cases, did not rest with the fact that AOL is an ISP, but recognized that AOL was acting as a publisher of content provided by others. *See also Doe v. Franco Publications*, 2000 WL 816779 *4-5 (N.D. Ill.) (court holds that plaintiff's characterization of defendants as web hosts does not require denial of section 230 immunity). The major difference between this case and the AOL cases is that Moldow is not an ISP, but his role is that of the creator of a web site whose function is the same as the AOL function that made it a defendant in all of these cases. Because AOL's status as an ISP was not the basis for either the suits against it, or for the judicial recognition of its immunity under section 230, this difference should not deprive Moldow of the protection of the statute.

Moreover, in several recent cases – the only reported cases of which we are aware addressing this issue – courts have expressly extended the protection of section 230 to individuals who are not themselves ISP's, when they were sued for messages that other persons created. Thus, in *Marczeski v. Law, supra*, the defendant was the organizer of a chat room for the discussion of a dispute about

the plaintiff, and an anonymous poster accused the plaintiff of threatening her children; once the Court was satisfied that the defendant had not posted those comments, it dismissed the claim against her. Similarly, in *Schneider v. Amazon.com*, 31 P.3d 37 (Wash. App. 2001), the internet retailer was held immune from suit based on an allegedly defamatory statement contained in a book review that an Amazon customer posted on its web site: “We can discern no difference between web site operators and ISPs in the degree to which immunity will encourage editorial decisions that will reduce the volume of offensive material on the Internet.” *See also Stoner v. eBay, Inc.*, 2000 WL 1705637, at *1 (Cal. Super. 2000) (host of auction web site immune under section 230 from suit over content of materials sold on its site). And in *Barrett v. Clark, supra*, defendant Rosenthal reposted to a newsgroup in which she was a participant a report prepared by defendant Bolen; the Court held that section 230 immunized defendant Rosenthal from liability because she had not created the underlying report. So, here, Moldow cannot be held legally responsible for the content created by the various anonymous posters and posted by other persons to the web site that he created.²

Extending protection to persons in Moldow’s position also comports with the underlying policy of the statute. Section 230 is intended to encourage the creation of opportunities for members of the public to receive information in which they are interested and to participate in discussions about topics of interest. Indeed, as the Supreme Court observed in *Reno v. American Civil Liberties*

²In an unreported case, *Batzel v. Smith*, CV 00-9590 SVW (C.D. Cal. June 5, 2001), at 16-18, *appeal pending*, No. 01-56380 (9th Cir.), a judge summarily rejected a Section 230 brought against a museum security director who had placed on his internet mailing list addressed to the issue of stolen art an accusation that the plaintiff had bragged about having a large number of pictures stolen by her Nazi ancestors, opining that the statute only protects “true internet service providers.” This court did not analyze the language of the statute, or cite to any precedent for this distinction, and indeed it is not clear that this part of the opinion was necessary to the decision. In any event, we believe that this decision is erroneous.

Union, 521 U.S. 844 (1997), the Internet is a tremendously democratizing force, because it enables individuals who otherwise might have little access to an audience to gain that degree of respect that his or her ideas deserve. It is also a decentralizing force, freeing people from control by large media companies and creating the opportunity for groups of persons who are interested in particular topics to create forums for themselves, and allowing audiences for such forums to grow and shrink easily, with such attention being paid to those forums whose rules and standards meet with their approval and produce discussion whose reliability and analytic worth satisfy them. Moldow's forum, devoted exclusively to topics relating to a single local government and inviting residents of the town to participate in an on-line discussion, represents a terrific gift to the community. If a citizen like Moldow, who has created a democratic forum for his fellow citizens without any compensation, has to face the prospect of ruinous litigation from any person who is criticized in that forum, on the theory that he is liable for anything that any poster may say on his message board, then no rational citizen will dare to follow him. See *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149, 158, 755 A.2d 583 (2000) (recognizing the chilling effect of "long and costly litigation in defamation cases", and the need for early termination where possible).

To be sure, the plaintiffs' criticism, that some speakers might be more responsible if participation were not anonymous, or if all participants had to register and thus make themselves more readily subject to quick identification, is a fair one – it is a choice that a web master makes. If there were competition for audience share among various web sites devoted to Emerson, this is one way in which different web masters might promote their sites. But section 230 leaves it to the free market of ideas to determine which site is most worthwhile, by protecting the creators of any such web sites from liability for the content placed by others on their web sites.

The complaint offers one other hint about how the plaintiffs hope to hold Moldow liable, in that they allege that Moldow “has actively participated in selective editing, deletion and re-writing of anonymously posted messages” on the message board, ¶ 11, that Moldow “ban[s] users whose messages he finds “disruptive” and “is quick to remove any negative message about himself or people he associates with,” ¶ 26, and that Moldow has “actively participated in the editing of messages,” and “by way of example and not limitation,” he deleted certain accusations that were particularly nasty and edited one message to remove profanity, “thus instructing participants in how to convey offensive language without encountering censorship.” ¶ 27. Presumably the plaintiffs intend to argue that, by these methods, Moldow incurred liability and went beyond the protection of section 230.

In most respects, this argument would be erroneous. In addition to providing a blanket immunity for the providers of interactive computer services, section 230(c)(1), the statute has a Good Samaritan provision that prevents a provider or even a user of an interactive computer service from being held liable for any action undertaken to limit the availability of information that is lewd or harassing or in any way objectionable. Section 230(c)(2)(A). The cases have uniformly held that this provision also protects against the imposition of liability on the theory that, because an internet host has eliminated some objectionable material, they must be deemed responsible for objectionable material that remains. *E.g., Blumenthal, supra*, 992 F. Supp at 52; *Ben Ezra, supra*, 206 F.3d at 985-86. Thus, the editing of statements to remove profanity, and the removal of some messages but not others, is not a proper basis for the imposition of liability in this case.

There is one aspect of the complaint, however, that cannot be dismissed on this basis. The complaint contains some general allegations that Moldow not only removed and edited but also

“actively posted” messages, ¶ 11, and that he “published” various statements knowing them to be false. ¶ 12. Moreover, although as discussed above the specific allegations about messages that Moldow edited (to remove profanity and delete offensive statements) reveal conduct that is plainly protected by section 230, the complaint makes general allegations that Moldow “participates in the editing” of messages; it is possible for an editor to be so closely involved in the creation of content that he becomes liable as an information provider.

However, New Jersey law also requires a defamation plaintiff to make very allegations that are sufficiently specific to identify the defamatory words, their utterer, and the facts and circumstances of their publication; general allegations that a defendant “published defamatory matter” are simply not sufficient to withstand a motion to dismiss. *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 NJ 739, 767-768, 563 A.2d 31 (1989); *Voorhees v. Preferred Mut. Ins. Co.*, 588 A.2d 417, 420 (N. J. Super. 1991); *Zoneraich v. Overlook Hospital*, 212 N. J. Super. 83, 101, 514 A.2d 53, 63 (N.J. Super. App. Div. 1986). Indeed, *Zoneraich* was specifically cited by the Appellate Division in *Dendrite* as stating the proper motion to dismiss standard for defamation cases. 342 N.J. Super. 134 at 155, 775 A.2d at 770.

Plaintiffs’ conclusory allegations about Moldow’s “publishing” defamatory statements on his message board, without specifying what conduct amounted to publishing, and their general allegations about his “editing” some of the posts, without specifying what content he added if any, do not sufficiently allege the “circumstances” of publication to state a claim for defamation under New Jersey law. Because the CDA immunizes a large fraction of the activities that have traditionally been treated as “publishing” under libel law, *Zeran v. America OnLine*, 129 F.3d 327, 331-334 (4th Cir. 1997), that conclusory allegation is no longer sufficient to state a libel claim. Neither do these

parts of the complaint specifically identify the defamatory words that Moldow is supposed to have “published” or “edited”. Accordingly, these aspects of the complaint should be dismissed as well, although in these respects it may be appropriate for the Court to grant the plaintiffs leave to replead.

CONCLUSION

The Court should decline to enforce the subpoena to obtain identifying information about any defendant or other poster, regardless of whether that person is represented by counsel on this motion to quash, unless the plaintiffs have met the standards of *Dendrite* with respect to posts by that person. Moreover, the Court should dismiss the complaint against defendant Moldow.

Respectfully submitted,

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