MARGARET B. KWOKA (pro hac vice pending)
GREGORY A. BECK (pro hac vice pending)
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

MATTHEW ZIMMERMAN (CA Bar No. 212423)
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, California 94110-1914
(415) 436-9333

Attorneys for John Doe "Stillworldly"

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

IA GLOBAL, INC.,

Plaintiff,

v.

JOHN DOE, DOE, INC. and DOES 3-1000, inclusive,

Defendants.

Case No. CGC-08-482287

DEFENDANT JOHN DOE "STILLWORLDLY" MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH

DATE: ~~March 30, 2009~~ April 2, 2009
TIME: 9:30 a.m. 9:00 AM.
PLACE: Department ~~301~~ 612

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INTRODUCTION

This case involves a meritless claim of defamation by a floundering publicly traded company against anonymous Internet posters who have commented about the performance of the company on a public message board. IA Global's subpoena for the defendants' identities threatens the defendants' First Amendment rights to speak anonymously. Because IA Global seeks to invoke the court's subpoena power to compel the production of the defendants' identities without being able to show even a valid complaint, must less an ability to prevail on its substantive claims, defendant "Stillworldly" asks this court to quash the subpoena.

STATEMENT OF THE CASE

Plaintiff IA Global, Inc. ("IA Global"), is a publicly traded company purportedly engaged in a variety of activities, including the operation of telemarketing call centers abroad. *See* IA Global: Our Mission, located at <http://www.iaglobalinc.com/>. In its initial year of public trading, from mid-1999 to mid-2000, IA Global's stock price hovered around five dollars per share. *See* IAO: Basic Chart, located at <http://finance.yahoo.com/q/bc?s=IAO>. In late 2000, it experienced a steep decline, and, since December of 2000, IA Global's stock has traded for less than one dollar per share. *Id.* On April 30, 2007, the stock hit a mini-peak of $0.57, after which it fell to $0.29 by March 14, 2008, and, continuing its decline, to its approximate current value of $.04 per share. *Id.*

The Internet portal Yahoo! maintains a finance section in which each publicly traded company has a profile with pricing information on the company's stock, news about the company, statistics, links to Securities and Exchange Commission (SEC) filings, and other information about the company. *See* Yahoo! Finance, located at <http://finance.yahoo.com/>. Recognizing the interest the public takes in the performance of publicly traded companies, Yahoo! also hosts a message board for each company dedicated to public conversation, including one for IA Global. *See* Exhibit B to Declaration of Margaret Kwoka in Support of Motion to Quash and Special Motion to Strike ("Kwoka Declaration"). Any person can register a username with Yahoo! and post messages under that username. Inspection of the message boards reveals that most users choose anonymous usernames, or monikers, which are used by posters to identify and respond to

each other. Each message posted is tagged with the poster's username.

During the period between March 14, 2008, and November 20, 2008, Defendant John Doe "Stillworldly") (hereinafter "Stillworldly") regularly posted comments on the Yahoo! message board dedicated to IA Global, using his Yahoo! username "stillworldly."[1] Like much of the other commentary posted on Yahoo! message boards dedicated to publicly traded companies, his posts contained primarily speculation, opinion, prediction, and debate about IA Global's prospects. Also similar to other posters, Stillworldly frequently referred to the company's public documents, statements, reports, and statistics to support his opinions about how IA Global's stock was likely to perform in the future. Stillworldly's expressed opinions were generally that IA Global was not doing well, that its stock was likely to fall rather than rise, and that it was a poor investment choice.

On November 25, 2008, IA Global filed suit against anonymous Yahoo! message board posters, asserting claims of libel and unfair competition, and seeking damages and an injunction. On February 11, 2009, IA Global subpoenaed Yahoo! for identifying information about Defendant John Does by their usernames: stillworldly, stockdisease25, and stds42. *See* Exhibit A to Kwoka Decl. Stillworldly was notified by email from Yahoo! that his identity would be released if he did not file this Motion. IA Global made no attempt to contact Stillworldly directly, either before the lawsuit to ask Stillworldly to retract any allegedly false or defamatory statements, or after filing the lawsuit to alert him that he was subject to suit.

SUMMARY OF ARGUMENT

IA Global must make a preliminary showing on each element of its claims prior to obtaining the identity of a defendant and thereby severely burdening his First Amendment right to speak anonymously. IA Global fails even to state a claim on which relief could be granted, having neglected to identify which message board comments are alleged to be defamatory and to which defendant those statements may be attributed, or to identify any postings that assert a provably false statement of fact. Even if the complaint did state a claim, IA Global has advanced no

[1] For simplicity's sake, John Doe #1 will be referred to using masculine pronouns. This should not be taken as an admission regarding "his" gender.

evidence of the falsity of any of the message board postings and has failed to show that it has suffered any harm as a result of a single anonymous poster commenting on an Internet message board. The subpoena to Yahoo! seeking Stillworldly's identity should be quashed.

ARGUMENT

I. The First Amendment Protects the Right to Anonymous Internet Speech.

It is well established that the First Amendment protects the right of a speaker to remain anonymous. *Watchtower Bible and Tract Soc'y. of New York v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. American Constitutional Law Found.*, 525 US. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 357 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960). "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley*, 362 U.S. at 64. As the Supreme Court said in *McIntyre:*

> [A]n author generally is 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.

514 U.S. at 341-42.

First Amendment rights are equally robust when applied to speech that takes place on the Internet. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). The U.S. Supreme Court has treated the Internet as a forum of preeminent importance because it provides any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away at virtually no cost. *See Reno*, 521 U.S. at 868-70. "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." *Id.* at 870.

A court order, even if granted to a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). Abridgement of the right to free speech, "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. 449, 461 (1958). Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524. A court order to compel production of individuals' identities in a situation that threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP*, 357 U.S. at 461; *see Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

II. IA Global Must Make a Preliminary Showing Prior to Obtaining Stillworldly's Identity.

Because of the First Amendment interests at stake, a growing consensus of courts require a strong showing by a plaintiff seeking to identify anonymous Internet speakers. As the California Court of Appeal held, "[r]equiring at least [a preliminary showing] ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1171 (2008); *see also Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("If Internet users could be stripped of [their] anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.").

Although the court in *Krinsky* quashed the subpoena seeking an anonymous Internet poster's identity based on the plaintiff's failure generally to demonstrate that "there [was] a factual and legal basis for believing libel may have occurred," other courts have broken down the standard into a more definite test. The first appellate decision in the country remains the leading case: *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). In *Dendrite*, a company sued four anonymous defendants who had criticized it on a Yahoo! bulletin board. *Id.* at 140. The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, under which the court should: (1) provide notice to the potential defendant and an opportunity for him to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate its rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of 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 in the light of the strength of the plaintiff's evidence. *Id.* at 141-42.

Numerous reported decisions from federal and state courts have adopted the *Dendrite* test or a variation of that test, including courts of this State. *See, e.g., Krinsky*, 159 Cal. App. 4th 1154; *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005). Just last week, the Maryland Court of Appeals added itself to the ranks of courts that have adopted the *Dendrite* test as their own. *See Independent Newspapers, Inc. v. Brodie*, --- A.2d ----, 2009 WL 484956, *19 (Md. Feb. 27, 2009). Although the tests have differed slightly, each appellate court has conducted the essential weighing of the plaintiff's interest in identifying the speakers against the interests implicated by the First Amendment right to anonymity, thereby ensuring that First Amendment rights are not trammeled unnecessarily.[2] *See, e.g., Doe v. Cahill*, 884 A.2d 451 (Del. 2005). Courts must, at a minimum, review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a sufficient basis for piercing a speaker's anonymity.

III. IA Global Has Failed to Make the Showing Required to Obtain a Subpoena.

A. IA Global Did Not Provide Reasonable Notice of the Threat to Stillworldly's Anonymity.

When asked to subpoena anonymous Internet speakers, a court should ensure that the plaintiff has undertaken the best efforts available to notify the speakers that they are the subject of a subpoena, and then withhold any action for a reasonable period of time so that the defendants have time to retain counsel. *Cahill*, 844 A.2d at 461. This requirement provides anonymous defendants the critical opportunity to defend against a threat to their First Amendment rights. In this case, IA Global made no effort to notify the defendants of the subpoena, even though the message board on which the posts at issue appear was still active and available as a means of providing notice. Although Stillworldly did ultimately learn of the lawsuit, other defendants may not have, and IA Global's actions underscore the importance of the notice rule in general.

[2] For examples of slight variations on the test for compelling the identification of an anonymous speaker, *see, e.g., Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Sony Music Entm't v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); *Alvis Coatings v. Doe,* No. 3L94 CV 374-H, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (Pa. 2003).

B. IA Global Did Not Specifically Identify the Allegedly Defamatory Statements.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff has a valid reason for piercing each speaker's anonymity. *Dendrite*, 342 N.J. Super. at 141. Thus, courts require plaintiffs to quote the exact statements by each anonymous speaker who allegedly violated their rights. *Id.* Moreover, in California, "[t]he general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1612 n.5 (1991). Since every message board poster has a username, IA Global does not need any discovery about the defendants' identities to allege with sufficient specificity what speech it claims to be defamatory and to which defendant it alleges that speech is attributable.

This case is a prime example of the wisdom of such a requirement. In its complaint, IA Global alleges that the defendants "have falsely suggested that IA Global will be bankrupt and has engaged in 'massive insider selling' and made other false and misleading statements with the intent to manipulate the stock price." Complaint ¶ 6. Stillworldly was able to identify some statements he made expressing his views of the likelihood that IA Global would end up bankrupt. However, a review of the message board shows a person under the username KMottman submitted a post entitled "Massive Insider Selling..." Exhibit C to Kwoka Decl. (post #15). Although Stillwordly replied to that post, Stillworldly never used the phrase quoted in the complaint. It is thus possible that the allegation in the complaint does not pertain to Stillworldly at all. Stillworldly is left to guess which statements are at issue and defend against claims on a hypothetical basis.

Even assuming that the complaint's allegations of statements relating to bankruptcy and insider selling are sufficient to identify comments on those topics, the "other false and misleading statements" remain completely undefined. Compounding the vagueness of these allegations, IA Global named 1000 Doe defendants but only identified two of the defendants by their Yahoo! usernames, stillworldly and stockdisease25.[3] Complaint ¶ 5. Thus, IA Global's subpoena would heavily burden Stillworldly's First Amendment rights without even identifying the speech at issue.

[3] IA Global subpoenaed the identifying information of a third Yahoo! user whose username was not mentioned in the complaint. *See* Exhibit A to Kwoka Decl.

C. IA Global's Defamation Claim Fails on the Face of the Complaint.

The court should also review each claim in the case to determine whether it is facially actionable. *Dendrite*, 342 N.J. Super. at 141. This requirement ensures that a defendant will not lose his right to anonymity on the basis of a complaint that fails even to state a valid cause of action. Careful scrutiny of the complaint is especially important in a case alleging libel, because whether a statement is one of verifiable fact or one expressing an opinion, and therefore protected by the First Amendment, is a question of law to be decided by a court. *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d. 254, 260 (1986). In determining whether a statement asserts a fact or opinon, California courts look at the totality of the circumstances to determine the "natural and probable effect upon the mind of the average reader." *Id.* Message board posts, which typically take an informal and hypoerbolic tone, are less likely to be understood by the reader as assertions of fact. *Global Telemedia Intern., Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001).

Stillworldly's posts regarding the possibility of IA Global filing for bankruptcy were all protected statements of opinion. In November of 2008, IA Global issued a quarterly report that sparked an intense debate on the message board in which Stillworldly participated. Seven of Stillworldly's comments referred to bankruptcy. In the first such post, on November 19th, Stillworldly quoted two paragraphs directly from the quarterly report that tended to indicate negative performance, and then posed a question: "Does this mean that bankruptcy is on the horizon?" Exhibit C to Kwoka Decl. (post #1). Next, he posted an entry entitled "Bankruptcy coming?" Exhibit C to Kwoka Decl. (post #2). In the content of the second post, Stillworldly cited several additional facts taken from the report and presented his views of what those facts indicated about the company. *Id.* He ended the post with a comical line, "CONCLUSION: <Sounds of birds chirping>", indicating that he believed IA Global's future to be in jeopardy based on the quarterly report figures. *See id.* He reiterated this same comical phrase in a third stand-alone post in the same string. Exhibit C to Kwoka Decl. (post #3).

Later that day, Stillworldly responded to another poster's comments about prior positive performance of the company in part by saying, "And why is any of this relevant to today? Does it mean you can't find any facts to argue the bankruptcy scenario I posted earlier?" Exhibit C to

Kwoka Decl. (post #4). Later, he responded to a poster who disagreed with his interpretation of the quarterly report's indicators by saying, "Dude, will you come on here and admit you're wrong when they file bankruptcy?" Exhibit C to Kwoka Decl. (post #5). The next day, on November 20th, Stillworldly posted yet another response in the same string entitled "Re: Bankruptcy coming?" which stated: "With this name change crap strategy, I raise bankruptcy likelihood to 50% in the next 12 months."[4] Exhibit C to Kwoka Decl. (post #6). Finally, in response to a post by another person entitled "Bankruptcy is coming...." Stillworldly repeated his comical phrase "<Sounds of birds chirping> LOL". Exhibit C to Kwoka Decl. (post #7).

These statements, read together and in context, convey that based on the quarterly report, Stillworldly opined that IA Global was in poor financial health and was at risk of bankruptcy. *See Global Telemedia Intern.*, 132 F. Supp. 2d at 1268 (comment on message board that publicly traded company was a "sinking ship" in context of back and forth discussion was opinion); *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1012-13 (2001) (tenor, setting and format of allegedly defamatory internet postings, including insinuation that company would be out of business within 30 days, indicated that statements expressed opinions). Stillworldly's use of informal language and humor (such as "LOL," understood to mean "laughing out loud"), as well his statement regarding a "likelihood" of bankruptcy, indicate that he is asserting his opinion, not a fact. Stillworldly's postings on bankruptcy are also replete with questions, further demonstrating that he was not asserting fact but rather giving his hypothesis and inviting discussion. *See ComputerXpress, Inc.*, 93 Cal. App. 4th at 1013 (question posted, "is that fraud?" indicates speaker presented opinion). Thus, Stillworldly's bankruptcy-related statements are not actionable.

Although a review of the message board reveals that another user, not Stillworldly, posted a message entitled "Massive Insider Selling," Stillworldly did on three occasions comment on the topic of insiders selling stock. In these posts, Stillwordly gave his opinion that based on past insider sales of stock, insiders would continue to sell stock because those knowledgeable about IA Global did not have faith in its performance. The first post, on March 22, 2008, responded to a

[4] IA Global announced in a press release dated November 20, 2008, that it was considering changing its name and stock symbol. *See* Press Release of November 20, 2008, located at <http://www.iaglobalinc.com/media_11-20-2008.pdf>.

discussion thread about whether the company would be able to complete a deal for an acquisition. In this post, Stillworldly directly quoted three paragraphs from a public IA Global filing that tended to indicate that the company was in financial trouble. Exhibit C to Kwoka Decl. (post #8). Then, Stillworldly commented in his own words: "And some of IA Global's largest shareholders continue to regularly sell their shares. So sounds grim to me, others may agree – do you have anything to add or is it easier to just make insults?" *Id.* Another poster challenged Stillworldly, saying that only two insiders had sold the year before and that he didn't believe that could be characterized as "regularly." Exhibit C to Kwoka Decl. (post #12). This debate reveals statements of opinion about what the insider sales meant for the company's performance.

The second post, on April 30, 2008, responded to another poster, KMottman, who said: "Man I asked for some volume in combination with price movement north and damn if a big seller show up for 40K at .30. Whoever you are, just remove that sell order cause 1 month from today you'll be feeling stupid. JMHO." Exhibit C to Kwoka Decl. (post #13). In response to this post, Stillworldly said, "KMottman, you keep posting like profits matter, but the big insiders are dumping and will continue to dump just like that 40K today... Get out and write it off... even if this gets to profits (doubtful), this thing will go nowhere till big insiders are done (a year or more from now)." Exhibit C to Kwoka Decl. (post #9). In context, Stillworldly's post expresses his opinion that the value of IA Global's stock will decrease and that the sale of stock about which KMottman was upset was likely made by an insider who lacked confidence in the company.

Stillworldly was challenged by another poster immediately thereafter, who called him a "complete imbecile" and questioned his financial knowledge. Exhibit C to Kwoka Decl. (post #14). As if to underscore that Stillworldly was conveying his opinion, he replied, on May 1, 2008, with a rhetorical question: "First, be nice / Second, don't show your utter ignorance and naivete / I suppose this is not a group of insiders controlling the stock and selling regularly?" followed by a link to an SEC filing demonstrating that a small group of stockholders controlled a large portion of IA Global's stock. Exhibit C to Kwoka Decl. (post #10); Exhibit H to Kwoka Decl (displaying contents of the link). *See, e.g., Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St. 2d 116, 124, 413 N.E.2d 1187, 1194 (Ohio 1980) (holding that a rhetorical question could "neither be true nor

false"); *see also Ollman v. Evans*, 750 F.2d 970, 989 (D.C. Cir. 1984) (rhetorical question about a professor: "Does he intend to use the classroom for indoctrination?" did not affirmatively state that professor was indoctrinating students); *Volm v. Legacy Health Sys., Inc.*, 237 F. Supp. 2d 1166, 1178 (D. Or. 2002) (rhetorical question incapable of being found true or false).

"Viewed in context, (the only relevant way to view communications)," it is clear that Stillworldly was engaged in a heated debate with at least two other posters in which he expressed his views of what the various insiders to the company were doing and why. *Highfields Capital Mgmt.*, 385 F. Supp. 2d at 975. His statements are riddled with "if" and "doubtful" and "I suppose," and he challenges the other posters to counter his positions. He frequently uses slang, informal language, and insult. No reasonable reader can understand Stillworldly's comments to be statements of verifiable fact. *See Baker*, 42 Cal. 3d at 260 ("where potentially defamatory statements are published in a public debate . . . in which the audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion"). Moreover, when he referred to a fact about the company, he provided a link to the source. Because his statement was clearly based on a public document that he provides for the readers, "any reader may look at the same document and determine what they think of the information." *Global Telemedia Intern.*, 132 F. Supp. 2d at 1268.

Yahoo! finance message boards have been widely recognized as an informal setting where readers take the posts with a grain of salt. In one California case, the court noted:

> The content, character, and quality of these messages covers a huge range. Many of the messages are crude, indecent, or transparently laughable–and many appear to have nothing whatsoever to do with [the company]. Many of the postings including misspellings, grammatical errors, and/or incomplete thoughts and sentences. Many of the posters use screen names that would suggest, if taken seriously, some connection with [the company]. Many postings imply (by content and/or screen name) that the author has some access to inside information or some unique ability to foretell the future performance of the company. Many of the postings purport to predict the price path of [the company] stock. Messages on this board reflect considerable venting, much tongue-in-cheek, little pretense of sophistication or thoughtfulness, and an ample and obvious sense of irreverence."

Highfields Capital Mgmt., 385 F. Supp. 2d at 973. Readers of these message boards are also

warned by Yahoo! in a disclaimer posted at the bottom of the screen: "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." Exhibit B to Kwoka Decl.

Courts have recognized that statements on message boards tend, by their nature and the nature of the forum, to express opinions. The court in *Krinsky* concluded that the context of the message board was an important factor in finding that a poster's comments were not actionable. *Krinsky*, 159 Cal. App. 4th at 250. In *Global Telemedia Intern.*, a case also concerning message board postings about a publicly traded company, the court found that "these postings . . . lack the formality and polish typically found in documents in which a reader would expect to find facts," and that a "reasonable reader, looking at the hundreds and thousands of postings about the company from a wide variety of posters, would not expect that [the poster at issue] was airing anything other than other than his personal views of the company and its prospects." 132 F. Supp. 2d at 1265. And, the Delaware Supreme Court agrees: "Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely." *Doe v. Cahill*, 884 A.2d at 456. Stillworldly's comments are opinions protected by the First Amendment and not actionable as libel under California law.

IA Global's claim of unfair competition is based on the very same factual allegations of defamatory statements as its claim of libel and thus fails for the same reasons. "[T]he applicability of the First Amendment to [the defendant's] speech on the message board forecloses plaintiff's claim" to other claims for relief based on that speech. *Krinsky*, 159 Cal. App. 4th at 236; *see also Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1043 (1986) ("the limitations that define the First Amendment's zone of protection . . . apply to all claims whose gravamen is the alleged injurious falsehood of a statement"). Since Stillworldly's statements are protected by the First Amendment, IA Global's defamation claim cannot provide a basis to reveal Stillworldly's identity even when repackaged as an unfair competition claim. *See Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 394 (2004) (unfair competition claim failed where based on the same facts as failed defamation claim); *see also People v. E.W.A.P. Inc.*, 106 Cal. App. 3d 315, 322 (1980) (acknowledging unfair competition law can only reach speech not protected by First Amendment).

D. IA Global Has Provided No Evidentiary Basis for Its Claims.

No person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence to show a realistic chance of winning a lawsuit against that Doe defendant. *Dendrite*, 342 N.J. Super. at 141. This requirement prevents a plaintiff from being able to identify critics, and potentially retailiate against them, simply by filing a facially adequate complaint. Courts in California agree that an evidentiary showing on each element of a claim is necessary, citing *Dendrite*. In *Highfields Capital Mgmt.*, the court was clear:

> Allegation and speculation are insufficient. The standards that inform Rule 8 and Rule 12(b)(6) offer too little protection to the defendant's competing interest. Thus, the plaintiff must adduce competent evidence–and the evidence plaintiff adduces must address all of the inferences of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts.

385 F. Supp. 2d at 975; *see also Krinsky,* 159 Cal. App. 4th at 244-45.

Here, IA Global has failed to provide any factual basis or evidentiary support for its claims, either as to liability or as to damages. On the question of liability, where the subject matter of the speech is a matter of public concern, the plaintiff bears the burden to demonstrate that any factual statements are false. *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 747 (1989) (*citing Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)); *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 373-74 (1996). Whether speech is a matter of public concern is determined by the content, form, and context of the speech at issue. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-62 (1985). Unlike the speech at issue in *Dun & Bradstreet* – a single credit report distributed to only five people – the speech at issue here is clearly a matter of public concern, as the public takes interest in the performance of publicly traded companies and the speech occurred in a public venue available to millions of potential audience members. *See Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 1020-21 (1990) (statements in newsletter about sexual assault were of public concern because not solely in individual interest of speaker). IA Global has not offered any evidence by which it could meet its burden to prove that Stillworldly's comments are false, such as affidavits or other evidence that IA Global was not at risk of bankruptcy or that insiders did not sell IA Global stock.

Statements that are true in substance, even if they contain slight inaccuracies, are not

defamatory "so long as the imputation is substantially true so as to justify the gist or sting of the remark." *Smith v. Maldonado*, 72 Cal. App. 4th 637, 647 (1999) (internal quotation and citation omitted). Although it is not Stillworldly's burden to demonstrate the truth of his statements, public documents tend to support the assertions that IA Global is at risk of bankruptcy and that IA Global insiders have sold stock. In its most recent quarterly report filed with the SEC, IA Global states: "If the company is unable to obtain additional financing, we may need to restructure our operations, divest all or a portion of our business or ultimately file for bankruptcy." Exhibit D to Kwoka Decl. Thus, Stillworldly's opinion that IA Global was at risk of bankruptcy, which is not a factual statement in any event, is an opinion now shared by IA Global itself.

As to postings concerning insiders selling stock, even if they were factual rather than opinion statements expressing doubt about IA Global's performance, public records also tend to show their truth. The SEC requires reporting of certain trades made by directors, officers or owners of more than ten percent of a publicly traded company. 15 U.S.C. § 78p. Reports of these transactions, known as "insider" stock sales or purchases, are widely available and often discussed on the Yahoo! message board. Exhibit E to Kwoka Decl. At least two very large sales of stock by an insider were made in the six months prior to Stillworldly's comments that insiders were selling or dumping stock. Exhibits 5, 6, and 7 to Kwoka Decl. IA Global has not and cannot produce evidence that Stillworldly's comments, even if they contained factual material, were false.

IA Global also fails to provide evidence of damages suffered as a result of Stillworldly's allegedly defamatory comments. Claims of defamation and unfair competition require a plaintiff to prove some type of harm. *See Global Telemedia Intern.*, 132 F. Supp. 2d at 1266; *Express, LLC v. Fetish Group, Inc.*, 464 F. Supp. 2d 965 (C.D. Cal 2006). However, in the context of the case, it strains credulity that IA Global could have suffered harm as a result of a single poster commenting on an anonymous financial message board riddled with slang, insult, hyperbole, and general informality. *See Dendrite*, 342 N.J. Super. at 158-59.

IA Global appears to contend that its stock price suffered as a result of Stillworldly's alleged defamation, but has not provided any supporting evidence of causation – or even correlation. *See* Complaint ¶ 6. In fact, public records support the opposite conclusion. IA

Global's stock price had spent years fluctuating in a range below the $1.00 per share mark, and had already been on a steep decline reaching down to $.25 before Stillworldly even began posting. Moreover, the message board indicates that over three thousand messages have been posted about IA Global. Although the stock continued to fall after Stillwordly began posting, the idea that a single poster caused it to continue to drop where it otherwise would have leveled off or risen is inherently unlikely. *See Global Telemedia Intern.*, 132 F. Supp. 2d at 1270 ("given the thousands of postings every day [it] is unlikely" that single poster on message board caused stock value to fall); *see also Dendrite*, 342 N.J. Super. at 158-59 (company executive's affidavit stating that postings may have significant deleterious effect on stock insufficient to demonstrate damages).

Furthermore, an examination of the message board at issue reveals that Stillworldly's comments were, at every turn, challenged by IA Global enthusiasts, singing the praises of the company's performance. *See* Exhibit C to Kwoka Decl. (post #11) (post on the IA Global message board that appears to be from the CEO of IA Global thanking the posters who "police" the message board and calling some posts "asinine"). As the Delaware Supreme Court stated:

> The internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The plaintiff can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an anonymous defendant's allegedly defamatory statements made on an internet blog or in a chat room.

Doe v. Cahill, 884 A.2d at 464. In this context, IA Global has not and cannot put forth evidence that Stillworldly's comments caused the company any harm.

To the extent that IA Global attempts to incorporate a claim of some sort of conspiracy to manipulate the price of IA Global stock, it has provided no factual basis or evidence for believing that any such conspiracy existed. "[I]nnuendos of stock manipulations do not suffice to overcome the First Amendment Rights of Internet users. Those rights cannot be nullified by an unsupported allegations of wrongdoing raised by the party seeking the information." *2theMart.com Inc.*, 140 F. Supp. 2d at 1079; *see Krinsky*, 159 Cal. App. 4th at 246 (declining to consider vague claims of stock manipulation as part of defamation case against anonymous speaker). Were these bare

allegations enough, any company bringing a defamation claim could obtain the identity of an anonymous speaker merely by baselessly asserting that the defendant was engaged in a conspiracy to manipulate the stock price. Moreover, any claim that IA Global suffered harm as a result of this alleged conspiracy fails for the same reasons that it cannot show harm suffered as a result of the allegedly defamatory postings. IA Global has not met its burden to show an evidentiary basis sufficient to justify the intrusion on Stillworldly's First Amendment rights.

E. The Balance of Equities Strongly Favors Stillworldly.

In *Dendrite*, the court required a balancing of the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case and the necessity for the disclosure of the anonymous defendant's identity. 342 N.J. Super. at 141-42. In this case, once Stillworldly loses his anonymity, he can never get it back. Moreover, it is settled law that any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). In contrast, because IA Global has not demonstrated any ability to succeed on the merits of its case, and in any event, has not shown that Stillworldly's allegedly defamatory comments were damaging, IA Global's interests would not be substantially harmed by granting this Motion to Quash.

CONCLUSION

The subpoena to identify defendant John Doe I, a/k/a Stillworldly, should be quashed.

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Respectfully submitted,

Matthew Zimmerman (State Bar No. 212423)
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, California 94110-1914
(415) 436-9333

Margaret B. Kwoka (MA Bar No. 670309)
Gregory A. Beck (DC Bar No. 494479)
Public Citizen Litigation Group
1600 – 20th Street, N.W.
Washington, D.C. 20009

(202) 588-1000

Attorneys for Defendant John Doe "Stillworldly"