

1 Paul Alan Levy (DC Bar 946400) (*Pro Hac Vice* sought)
plevy@citizen.org
2 Scott Michelman
Public Citizen Litigation Group
3 1600 20th Street NW
Washington, D.C. 20009
4 Telephone: (202) 588-1000

5 Paul S. Jasper (CSBN 200138)
PJasper@Schnader.com
6 Todd B. Holvick (CSBN 257784)
THolvick@Shnader.com
7 SCHNADER HARRISON SEGAL & LEWIS LLP
650 California Street, 19th Floor
8 San Francisco, CA 94108-2736
Telephone: 415-364-6700
9 Facsimile: 415-364-6785

10 Attorneys for Amicus Curiae Public Citizen, Inc.

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

16 MUSIC Group Macao Commercial Offshore
17 Limited, a Macao entity, and MUSIC Group
Services US, Inc., a Washington Corporation,

18 Plaintiffs,

19 John Does I-IX,

20 Defendants.

Case No. CV 14-80328 MISC

**MEMORANDUM OF PUBLIC
CITIZEN, INC. AS AMICUS CURIAE
ADDRESSING THE PROPER
APPLICATION OF THE STANDARD
FOR EARLY DISCOVERY TO
IDENTIFY ANONYMOUS SPEAKERS**

SCHNADER HARRISON SEGAL & LEWIS LLP
650 CALIFORNIA STREET, 19TH FLOOR
SAN FRANCISCO, CA 94108-2736
(415) 364-6700
FAX: (415) 364-6785

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SCHNADER HARRISON SEGAL & LEWIS LLP
650 CALIFORNIA STREET, 19TH FLOOR
SAN FRANCISCO, CA 94108-2736
(415) 364-6700
FAX: (415) 364-6785

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Art of Living v. Does 1-10,
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Bihari v. Gross,
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Bosley Med. Inst. v. Kremer,
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Ealy v. Littlejohn,
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FEC v. Florida for Kennedy Committee,
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1 *Fodor v. Doe*,
 2 2011 WL 1629572 (D. Nev. April 27, 2011).....12

3 *Ghanam v. Does*,
 4 845 N.W.2d 128 (Mich. App. 2014).....12

5 *Highfields Capital Mgmt. v. Doe*,
 6 385 F. Supp.2d 969, 976 (N.D. Cal. 2005)8, 9, 22

7 *Howell by Goerdts v. Tribune Entertainment Co.*,
 8 106 F.3d 215, 218 (7th Cir. 1997)14

9 *In re Baxter*,
 10 2001 WL 34806203 (W.D. La. Dec. 20, 2001)12

11 *In re Indiana Newspapers*,
 12 963 N.E.2d 534 (Ind. App. 2012)20

13 *In re Verizon Internet Services*,
 14 257 F. Supp.2d 244 (D.D.C. 2003), *rev'd on another grounds, RIAA v. Verizon*
 15 *Internet Services*, 351 F.3d 1229, 1239 (D.C. Cir. 2003).....20

16 *Independent Newspapers v. Brodie*,
 17 966 A.2d 432 (Md. 2009)20

18 *Jackson v. Twentyman*,
 19 27 U.S. (2 Peters) 136 (1829)14

20 *Johnson v. Columbia Properties Anchorage*,
 21 437 F.3d 894 (9th Cir. 2006)14

22 *Koch Industries v. Doe*,
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24 *Matrixx Initiatives v. Doe*,
 25 138 Cal. App.4th 872, 42 Cal. Rptr.3d 79 (Cal. App. 6th Dist. 2006)20

26 *Maxon v. Ottawa Pub. Co.*,
 27 929 N.E.2d 666 (Ill. App. 2010)12

28 *McIntyre v. Ohio Elec. Comm'n*,
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SCNADER HARRISON SEGAL & LEWIS LLP
 650 CALIFORNIA STREET, 19TH FLOOR
 SAN FRANCISCO, CA 94108-2736
 (415) 364-6700
 FAX: (415) 364-6785

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5 *O’Connor v. Superior Court*,
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7 *Oja v. U.S. Army Corps of Engineers*,
 8 440 F.3d 1122, 1129-1134 (9th Cir. 2006)18

9 *Pilchesky v. Gatelli*,
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11 *re Subpoena Duces Tecum to AOL*,
 12 52 Va. Cir. 26, 2000 WL 1210372, *rev’d on other grounds, AOL v. Anonymous*
 13 *Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001)20

14 *Reed Elsevier, Inc. v. Muchnick*,
 15 559 U.S. 154, 166 (2010).....15

16 *Sinclair v. TubeSockTedD*,
 17 596 F. Supp.2d 128, 132 (D.D.C. 2009)13

18 *Solers v. Doe*,
 19 977 A.2d 941 (D.C. 2009)20

20 *Steam Press Holdings v. Teamsters Local 996*,
 21 302 F.3d 998, 1004 (9th Cir. 2002)17

22 *Stone v. Paddock Pub. Co.*,
 23 961 N.E.2d 380 (Ill. App. 2011)12

24 *Thomas M. Cooley Law School v. John Doe 1*,
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26 *Underwager v. Channel 9 Australia*,
 27 69 F.3d 361 (9th Cir. 1995)17

28 *Unelko Corp. v. Rooney*,
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SCHNADER HARRISON SEGAL & LEWIS LLP
 650 CALIFORNIA STREET, 19TH FLOOR
 SAN FRANCISCO, CA 94108-2736
 (415) 364-6700
 FAX: (415) 364-6785

1 Wash. Rev. Code § 4.16.100(1).....18

2 **OTHER AUTHORITIES**

3 ABA Litigation Section, LITIGATION, Vol 37, No. 3 (Spring 2011), at 27.....13

4 Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 HARV. L. REV. 501,

5 504-505 (1999).....6

6 Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet Speakers*13

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SCHNADER HARRISON SEGAL & LEWIS LLP
650 CALIFORNIA STREET, 19TH FLOOR
SAN FRANCISCO, CA 94108-2736
(415) 364-6700
FAX: (415) 364-6785

1 This amicus brief is submitted in support of the motion of nonparty Twitter, Inc.
 2 [Dkt. 16] for an order correcting the Court’s order dated January 6, 2015 [Dkt 15]. This case
 3 involves an issue that has been addressed consistently in the Northern District of California, as
 4 well as by state appellate courts and federal trial courts across the country: What procedures
 5 apply, and what showings are required, when a plaintiff asserts a claim for defamation or some
 6 other wrong based on anonymous online speech and seeks to identify the anonymous speaker?
 7 Based on the well-accepted First Amendment right to speak anonymously, and recognizing that
 8 First Amendment rights cannot be infringed without a compelling state interest, before
 9 subpoenas to identify anonymous speakers are permitted, courts across the country insist that
 10 would-be plaintiffs must make both a legal and an evidentiary showing of merit before
 11 government power may be deployed to identify anonymous critics. The courts then balance the
 12 interests of the plaintiff in securing relief from genuine harm based on a real violation of his
 13 rights, and of the defendant in remaining anonymous.

14 In moving to compel compliance with their subpoena, plaintiffs acknowledged this rule;
 15 in response to the motion, Twitter asked the Court to apply this standard in deciding whether to
 16 enforce the subpoena. However, instead of applying the standard, the Court ordered Twitter to
 17 comply with the subpoena unless one of the Does retained counsel and moved to quash. Amicus
 18 submits, however, that it is a federal court’s responsibility to decide whether the First
 19 Amendment bars its order, even if none of the Does can afford or find counsel. And inspection of
 20 the complaint and of the record created to date in support of compelling discovery reveals that
 21 the request for discovery falls far short of meeting the standard applied by well-established
 22 precedent in state and federal courts throughout the United States, including in this district.

23 **INTEREST OF AMICUS CURIAE**

24 As more fully set forth in the motion for leave to file as amicus curiae, Public Citizen,
 25 Inc. (“Public Citizen”) is a consumer advocacy organization that works on a range of issues,
 26 including the right of Internet users to speak anonymously so long as they have done no wrong.
 27 Since the turn of the century, amicus has sought to encourage the development of First
 28 Amendment precedent requiring courts to cast a skeptical eye on subpoenas that seek to compel

1 who are sued for allegedly engaging in actionable speech. That court granted such leave, but
2 Twitter refused to respond to a subpoena unless plaintiffs could show that they had produced
3 evidence that the speech was wrongful; Twitter also pointed out that one of the two accounts,
4 NotUliBehringer, had been deleted months before the discovery was served, and that Twitter had
5 not retained any identifying documents about that account. Plaintiffs then issued a subpoena
6 from this Court, and when Twitter objected to the subpoena, plaintiffs moved to compel
7 compliance with the subpoena. Both in moving to compel, and in opposing that motion,
8 plaintiffs and Twitter cited decisions applying the First Amendment to decide whether to compel
9 identification of online speakers, and requiring the plaintiff to produce evidence sufficient to
10 establish a prima facie case on the causes of action alleged. However, plaintiffs did not submit
11 any evidence in support of their claims; instead, they produced evidence that certain allegedly
12 tortious statements had been made and then proceeded on the assumption that the allegations of
13 their complaint had been proven.

14 The Court acknowledged the existence of First Amendment standards for identification
15 of anonymous speakers, but instead of applying that standard, it postponed that question. It
16 ordered Twitter to give notice to the anonymous users, and indicated that it would return to the
17 First Amendment issue if any of the users retained counsel and moved to quash the subpoenas.
18 Twitter has now sought clarification of that order.

19 SUMMARY OF ARGUMENT

20 Federal and state courts throughout the country have applied well-accepted First
21 Amendment principles to cases such as this one by following the so-called *Dendrite*¹ test to
22 decide when to allow discovery to identify anonymous Internet speakers. Under that test, which
23 has repeatedly been endorsed by district judges in this District, anonymous would-be defendants
24 must be notified of the threat to their First Amendment right to speak anonymously, would-be
25 plaintiffs must make both a legal and an evidentiary showing of merit before government power
26 may be deployed to identify anonymous critics, and the court must balance the interests of the
27

28 ¹*Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. App. 2001).

1 plaintiff in securing relief from genuine harm based on a real violation of his rights, and of the
2 defendant in remaining anonymous.

3 The principal advantage of the *Dendrite* test is its flexibility. It balances the interests of
4 the plaintiff who claims to have been wronged against the interest in anonymity of the Internet
5 speaker who claims to have done no wrong. In that way, it provides for a preliminary
6 determination based on a case-by-case, individualized assessment of the equities. It avoids
7 creating a false dichotomy between protection for anonymity and the right of victims to be
8 compensated for their harms. It ensures that online speakers who engage in flagrant
9 infringement of intellectual property rights or who make actionable statements about public
10 figures, companies, or private individuals will not be immune from identification and from legal
11 responsibility. At the same time, the standard helps ensure that persons with legitimate reasons
12 for using others' intellectual property, or for criticizing public figures, will be allowed to
13 maintain the secrecy of their identity as the First Amendment allows.

14 The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is
15 the "outing" of anonymous speakers. In the first few years of the Internet, thousands of lawsuits
16 were filed seeking to identify online speakers, and enforcement of subpoenas was almost
17 automatic. Internet Service Providers ("ISPs") reported staggering statistics about the number of
18 subpoenas they received. Although no firm numbers can be cited, experience leads amicus to
19 believe that the number of suits being filed to identify online speakers dropped after *Dendrite*
20 was decided. Decisions that adopted strict legal and evidentiary standards for defendant
21 identification sent a signal to would-be plaintiffs and their counsel to stop and think before they
22 sue. At the same time, the identification of many online speakers, and publicity about verdicts
23 against formerly anonymous defendants, discouraged some would-be posters from indulging in
24 the sort of Wild West behavior that once prevailed.

25 Applying the governing standard to this case, the Court should rule that plaintiffs have
26 not justified an order compelling discovery. They have introduced no evidence in support of the
27 validity of their claims, only evidence that a variety of statements have been made. They have
28 done nothing to justify the federal law claims on which they predicate federal jurisdiction, and

1 consideration of the federal law counts reveals that the claims are insubstantial. And the state-
 2 law claims are likewise invalid, either because they are time-barred or because they lack merit on
 3 the face of the complaint, and in any event no evidence shows that plaintiffs have viable state-
 4 law claims.

5 ARGUMENT

6 A. The Constitution Limits Compelled Identification of Anonymous Internet 7 Speakers.

8 The First Amendment protects the right to speak anonymously:

9 [A]n author is generally free to decide whether or not to disclose his or her true
 10 identity. The decision in favor of anonymity may be motivated by fear of
 11 economic or official retaliation, by concern about social ostracism, or merely by a
 12 desire to preserve as much of one's privacy as possible. Whatever the motivation
 13 may be . . . the interest in having anonymous works enter the marketplace of
 14 ideas unquestionably outweighs any public interest in requiring disclosure as a
 15 condition of entry. Accordingly, **an author's decision to remain anonymous,
 16 like other decisions concerning omissions or additions to the content of a
 17 publication, is an aspect of the freedom of speech protected by the First
 18 Amendment.**

15 * * *

16 Under our Constitution, anonymous pamphleteering is not a pernicious,
 17 fraudulent practice, but an honorable tradition of advocacy and of dissent.

18 *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 341-342, 356 (1995) (emphasis added).

19 Internet speakers may choose to speak anonymously for a variety of reasons. They may
 20 wish to avoid having their views stereotyped according to their racial, ethnic or class
 21 characteristics, or their gender. They may be associated with an organization but want to express
 22 an opinion of their own, without running the risk that, despite the standard disclaimer against
 23 attribution of opinions to the group, readers will assume that the group feels the same way. They
 24 may want to say or imply things about themselves that they are unwilling to disclose otherwise.
 25 And they may wish to say things that might make other people angry and stir a desire for
 26 retaliation.

27 Although the Internet allows anonymous communication, it creates an unparalleled
 28 capacity to monitor every speaker and to discover his or her identity. Because of the Internet's

1 technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint
 2 that, if saved by the recipient, starts a path that can be traced back to the original sender. *See*
 3 Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 HARV. L. REV. 501, 504-505
 4 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to
 5 compel disclosure of the information, can learn who is saying what to whom. To avoid the Big
 6 Brother implications of unlimited enforcement of such power to uncover the identities of
 7 anonymous Internet speakers who have done nothing but exercise their First Amendment rights,
 8 the law must allow such subpoenas only where the party seeking disclosure can make some
 9 evidentiary showing that the lawsuit has actual merit, and when the balance of the parties'
 10 interests warrants such disclosure.

11 The courts have recognized the serious chilling effect that subpoenas seeking to identify
 12 anonymous speakers can have on dissenters and the First Amendment interests that are
 13 implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281,
 14 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978); *Burse v.*
 15 *United States*, 466 F.2d 1059, 1084-1086 (9th Cir. 1972). As one court said in refusing to order
 16 identification of anonymous Internet speakers whose identities were allegedly relevant to the
 17 defense against a shareholder derivative suit, "If Internet users could be stripped of that
 18 anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would
 19 have a significant chilling effect on Internet communications and thus on basic First Amendment
 20 rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). Courts in this
 21 district have written along the same lines:

22 People are permitted to interact pseudonymously and anonymously with each
 23 other so long as those acts are not in violation of the law. This ability to speak
 24 one's mind without the burden of the other party knowing all the facts about one's
 25 identity can foster open communication and robust debate. . . . **People who have
 committed no wrong should be able to participate online without fear that
 someone who wishes to harass or embarrass them can file a frivolous lawsuit
 and thereby gain the power of the court's order to discover their identities.**

26 *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (emphasis
 27 added).

1 **B. The Qualified Privilege for Anonymous Speech Supports a Five-Part**
 2 **Standard for Identification of Doe Defendants That Demands Showings, Not**
 3 **Just Allegations, and a Balancing of Interests.**

4 In many cases, courts properly grant early discovery to identify defendants without
 5 having to address significant constitutional concerns. For example, pro se prisoners use
 6 discovery to identify police officers or prison personnel who participate in activities that violate
 7 the prisoner’s civil rights, but who often cannot be identified before suit is filed. Similarly, it is
 8 not uncommon for litigants bringing non-constitutional tort claims, such as those arising out of
 9 workplace injuries, to require discovery to identify the maker of the machine that injured them.
 10 But in those cases, there is no significant legal interest that is violated by an identification order,
 11 and hence discovery in those cases is fairly routine.

12 But the First Amendment right to speak anonymously, and the danger of a chilling effect
 13 if the mere filing of a notice-pleading complaint is a ticket to identify the plaintiff’s critics, have
 14 led courts to recognize that the mere fact that a plaintiff has filed a lawsuit over particular speech
 15 does not create a compelling government interest in taking away the defendant’s anonymity.
 16 The challenge for courts is to find a standard that makes it neither too easy nor too hard to
 17 identify anonymous speakers. Setting the bar “too low will chill potential posters from
 18 exercising their First Amendment right to speak anonymously. The possibility of losing
 19 anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their
 20 comments or simply not commenting at all.” *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005). Yet
 21 setting the bar too high will make it impossible for plaintiffs with perfectly valid claims to
 22 identify wrongdoers and proceed with their cases.

23 Court have drawn on the media’s privilege against revealing sources in civil cases to
 24 enunciate a similar rule protecting against the identification of anonymous Internet speakers.
 25 The leading decision on this subject, *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), which has
 26 been embraced by several district judges in the Northern District of California, established a
 27 five-part standard that has been followed or adapted throughout the country:

- 28 1. Give Notice: Courts require the plaintiff (and sometimes the ISP) to provide
 reasonable notice to the potential defendants and an opportunity for them to
 defend their anonymity before issuance of any subpoena.

- 1 2. Require Specificity: Courts require the plaintiff to allege with specificity the
2 speech or conduct that has allegedly violated its rights.
- 3 3. Ensure Facial Validity: Courts review each claim in the complaint to ensure that it
4 states a cause of action upon which relief may be granted based on each statement
5 and against each defendant.
- 6 4. Require An Evidentiary Showing: Courts require the plaintiff to produce evidence
7 supporting each element of its claims.
- 8 5. Balance the Equities: Weigh the potential harm (if any) to the plaintiff from being
9 unable to proceed against the harm to the defendant from losing the First
10 Amendment right to anonymity.

11 *Id.* at 760-61.

12 Several cases in this district followed *Dendrite* strictly. The leading opinion was
13 authored by Magistrate Judge Wayne Brazil in *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d
14 969, 976 (N.D. Cal. 2005), and adopted by Judge Chesney. That case involved postings on a
15 Yahoo! message board about Highfields, the largest shareholder in a company called Silicon
16 Graphics (“SGI”), including a number of comments that purported to be authored by Highfields,
17 in a context mocking both Highfields and SGI. Highfields’s complaint cited various theories of
18 defamation, commercial disparagement, and unfair competition, as well as a variety of state and
19 federal trademark claims, but the court refused to allow discovery to identify the anonymous
20 posters. Judge Brazil’s opinion squarely endorsed the *Dendrite* analysis and held that there was
21 insufficient evidence of likely confusion, of false statements of fact, or of damage to the plaintiff.
22 *Id.* at 977-989. But even if there had been some proof of wrongdoing, Judge Brazil
23 recommended quashing the subpoena because there was little reason to believe that any possibly
24 wrongful conduct had harmed the plaintiff and because the right to post anonymous criticisms of
25 companies was too important to be sacrificed in such a case; consequently, the balance of harms
26 tipped decidedly in favor of retaining anonymity. (Plaintiffs’ web site describes them as “one of
27 the world’s largest holding companies for pro audio and music products brands.”
28 <http://www.music-group.com/index.aspx>) *Highfields* was followed by *USA Technologies v. Doe*,
713 F. Supp.2d 901 (N.D. Cal. 2010), where the plaintiff claimed both defamation and federal
securities law violations.

SCHNADER HARRISON SEGAL & LEWIS LLP
650 CALIFORNIA STREET, 19TH FLOOR
SAN FRANCISCO, CA 94108-2736
(415) 364-6700
FAX: (415) 364-6785

1 Most recently, in *Art of Living v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9,
2 2011), Magistrate Judge Lloyd initially denied application of the *Dendrite* standard because Art
3 of Living had sued for copyright infringement, and many cases about illegal downloading had, in
4 Judge Lloyd's view, created a "copyright exception" to *Dendrite*. Judge Koh overruled Judge
5 Lloyd's decision, holding that the speech in the downloading cases is barely speech at all, but
6 that the Does in *Art of Living* had been sued for committing copyright infringement in the course
7 of criticizing an international religious group which was, if not political speech, comparable to
8 political speech in its degree of First Amendment protection. Consequently, Judge Koh
9 concluded, the nature of the Does' speech commanded application of the *Highfields Capital* (and
10 thus *Dendrite*) approach rather than the more permissive standard applied in the illegal-
11 downloading cases.

12 The propriety of applying such a balancing test is confirmed by strong dictum in the
13 Ninth Circuit's decision in *Anonymous Online Speakers v. United States District Court*, 661 F.3d
14 1168 (9th Cir. 2011). Plaintiff there brought a variety of claims against a rival, including
15 defamation and tortious interference both with business relations and with contract. After
16 discovery to identify Doe speakers connected with the rival was denied in part and granted in
17 part, both sides sought mandamus. The Ninth Circuit's opinion does not determine the precise
18 standard to be applied in future cases because, on mandamus, the court of appeals reviews only
19 for clear error. However, in deciding that the trial court did not commit clear error in ruling that
20 there had been a sufficient evidentiary showing and hence granting discovery into the identity of
21 three of the defendants, the Ninth Circuit said that the court below had "appropriately considered
22 the important value of anonymous speech balanced against a party's need for relevant discovery
23 in a civil action." *Id.* at 1176. Moreover, in dicta, the Court expressed approval of a heightened
24 standard to determine when discovery is appropriate to determine a speaker's identity when non-
25 commercial speech is involved. *Id.* at 1176-1177. Although *Anonymous Online Speakers* does
26 not hold that the requirement of proof of a factual basis must be applied by district courts in the
27 Ninth Circuit, it surely suggests that in the context of noncommercial speech, the court of appeal
28 would approve application of such a requirement.

SCHNADER HARRISON SEGAL & LEWIS LLP
650 CALIFORNIA STREET, 19TH FLOOR
SAN FRANCISCO, CA 94108-2736
(415) 364-6700
FAX: (415) 364-6785

1 Although *Dendrite* has become the majority rule around the country, and is usually
2 applied in this District, a somewhat less exacting standard, formulated by the Delaware Supreme
3 Court in *Cahill*, requires the submission of evidence to support the plaintiff's claims, but not an
4 explicit balancing of interests after the evidence is deemed otherwise sufficient to support
5 discovery. *Cahill*, 884 A.2d 451. In *Cahill*, the Delaware Superior Court had ruled that a town
6 councilman who sued over statements attacking his fitness to hold office could identify the
7 anonymous posters so long as he was not proceeding in bad faith and could establish that the
8 statements about him were actionable because they might have a defamatory meaning.
9 However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient
10 to establish a prima facie case on all elements of a defamation claim that ought to be within his
11 control without discovery, including that the statements are false. The *Cahill* court rejected the
12 final "balancing" stage of the *Dendrite* standard.

13 With one exception, all of the other state appellate courts that have addressed the issue of
14 subpoenas to identify anonymous Internet speakers have adopted some variant of the *Dendrite* or
15 *Cahill* standard. Several courts expressly endorse the *Dendrite* test, requiring notice and an
16 opportunity to respond, legally valid claims, evidence supporting those claims, and finally an
17 explicit balancing of the reasons supporting disclosure and the reasons supporting continued
18 anonymity. These decisions include:

19 *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007), where a private company
20 sought to identify the sender of an anonymous email message who had allegedly
21 hacked into the company's computers to obtain derogatory information about
22 plaintiff's CEO that was conveyed in the message. Directly following the
23 *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection
24 of the balancing stage, the court analogized an order requiring identification of an
25 anonymous speaker to a preliminary injunction against speech. The Court called
26 for the plaintiff to present evidence sufficient to defeat a motion for summary
27 judgment, followed by a balancing of the equities between the two sides.

28 *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009), a case involving
complaints about trash near a Dunkin Donuts shop, where the court required
notice to Doe, specification of the defamatory words in full context, prima facie
showing, and, "if all else is satisfied, balanc[ing] the anonymous poster's First
Amendment right of free speech against the strength of the prima facie case of
defamation presented by the plaintiff and the necessity for disclosure of the
anonymous defendant's identity." 966 A.2d at 457.

1 *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H.
2 2010), where a mortgage lender sought to identify the author of comments saying
3 that its president “was caught for fraud back in 2002 for signing borrowers names
4 and bought his way out.” The New Hampshire Supreme Court held that “the
Dendrite test is the appropriate standard by which to strike the balance between a
defamation plaintiff’s right to protect its reputation and a defendant’s right to
exercise free speech anonymously.”

5 *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011), which held that a city council
6 chair had to meet the *Dendrite* test before she could identify constituents whose
7 scabrous accusations included selling out her constituents, prostituting herself
after having run as a reformer, and getting patronage jobs for her family.

8 *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012), where the court
9 reversed on order allowing the recently retired head of a local charity to identify
10 an anonymous individual who had commented on a newspaper story about the
financial problems of the charity by asserting that the missing money could be
found in the plaintiff’s bank account, because he had provided no evidence that
the accusation was false.

11 Several other state appellate courts use a *Cahill*-like summary judgment standard. For
12 example:

13 *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008), where the appellate court
14 reversed a trial court decision allowing an executive to learn the identity of
several online critics who allegedly defamed her by such references as “a
management consisting of boobs, losers and crooks.”

15 *Doe v. Coleman*, 436 S.W.3d 207 (Ky. App. 2012), where the chairman of a local
16 airports authority sued several Does for criticizing his conduct in office on the
17 Topix message board (the opinion does not specify the statements). The trial
judge granted a motion to compel discovery but the appeals court reversed
because the plaintiff had introduced no affidavits showing falsity.

18 *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007), which reversed a decision
19 allowing a hospital to identify employees who allegedly violated patient
confidentiality and disparaged their employer through posts on a blog.

20 *Solers v. Doe*, 977 A.2d 941 (D.C. 2009), where the court held that a government
21 contractor could identify an anonymous whistleblower who said that plaintiff was
using unlicensed software if it produced evidence that the statement was false.
22 The court adopted *Cahill*. After a remand, the same court held that the plaintiff
must show actual damage before the Doe can be identified. *Software & Info.*
23 *Indus. Ass’n v. Solers*, No. 10-CV1523 (D.C. Jan. 12, 2012).

24 Intermediate appellate courts in three other states have refused to create special
25 procedures pursuant to the First Amendment because they concluded that existing state
26 procedural rules provided equivalent protections, giving Doe defendants the opportunity to avoid
27 being identified pursuant to subpoena if the plaintiff cannot establish a prima facie case. In
28 Illinois, two appellate panels relied on Illinois court rules that already required a verified

1 complaint, specification of the defamatory words, determination that a valid claim was stated,
 2 and notice to the Doe. *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 2010); *Stone v.*
 3 *Paddock Pub. Co.*, 961 N.E.2d 380 (Ill. App. 2011). In Michigan, two separate panels of the
 4 Court of Appeal reached different conclusions. The first panel said that an anonymous defendant
 5 could obtain a protective order against discovery, deferring enforcement of an identifying
 6 subpoena while he pursued a motion for summary disposition either on the face of the complaint
 7 or for failure to produce sufficient evidence of defamation. *Thomas M. Cooley Law School v.*
 8 *John Doe 1*, 833 N.W.2d 331 (Mich. App. 2013). Because the court deemed these state-law
 9 procedures adequate to meet First Amendment standards, and accordingly reversed the trial
 10 court's order enforcing the plaintiff's subpoena, it declined to decide whether special First
 11 Amendment procedures might be needed in some cases. The court recognized that a later case
 12 might impel it to adopt the *Dendrite* approach, or that rulemaking by the state supreme court
 13 might provide a good basis for the adoption of that standard. A second panel endorsed the
 14 *Dendrite* approach, treated the first panel's decision as having rejected that approach, and invited
 15 the Michigan Supreme Court to resolve the difference. *Ghanam v. Does*, 845 N.W.2d 128
 16 (Mich. App. 2014). Plaintiff Ghanam's application for leave to appeal was recently denied by
 17 the Michigan Supreme Court. 856 N.W.2d 691. Most recently, the Virginia Court of Appeals
 18 refused to follow *Dendrite*; an appeal from this ruling is presently pending in Virginia Supreme
 19 Court, No. 140242.

20 In addition to the cases already discussed from this District, other federal district courts
 21 have repeatedly followed *Cahill* and *Dendrite*. See *Best Western Int'l v. Doe*, 2006 WL 2091695
 22 (D. Ariz. July 25, 2006) (court used five-factor test drawn from *Cahill*, *Dendrite* and other
 23 decisions); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. April 27, 2011) (following *Dendrite*);
 24 *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) (rejecting discovery to
 25 identify defendants in case alleging various trademark claims, breach of contract, and violation
 26 of the Computer Fraud and Abuse Act because “[t]he case law . . . has begun to coalesce around
 27 the basic framework of the test articulated in *Dendrite*” (quoting *SaleHoo Group v. Doe*, 722 F.
 28 Supp.2d 1210, 1214 (W.D. Wash. 2010) (alleging trademark and defamation claims)); *In re*

1 *Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, required
 2 showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F.
 3 Supp.2d 128, 132 (D.D.C. 2009) (did not choose between *Cahill* and *Dendrite* because plaintiff
 4 lost under either standard); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004)
 5 (identification allowed based on defamation and trademark claims in light of detailed affidavit
 6 about how comments were false); *Doe I and II v. Individuals whose true names are unknown*,
 7 561 F. Supp.2d 249 (D. Conn. 2008) (identification ordered after plaintiffs provided detailed
 8 affidavits showing basis for claims of defamation and intentional infliction of emotional
 9 distress). *See generally* Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet*
 10 *Speakers*, ABA Litigation Section, LITIGATION, Vol 37, No. 3 (Spring 2011), at 27.

11 Although these cases set out slightly different standards, each requires a court to weigh
 12 the plaintiff's interest in identifying the person who has allegedly violated its rights against the
 13 interests implicated by the potential violation of the First Amendment right to anonymity, thus
 14 ensuring that First Amendment rights are not trammled unnecessarily. Put another way, the
 15 qualified privilege to speak anonymously requires courts to review a would-be plaintiff's claims
 16 and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the
 17 speaker's anonymity before that anonymity is lost.²

18 **C. Plaintiffs Have Not Followed the Steps Required Before Identification of the**
 19 **John Doe Speakers May Be Ordered in This Case.**

20 **1. Plaintiffs Have Not Justified Pursuing Their Claims in Federal Court.**

21 The complaint alleges eight separate counts: four under federal law (Count I for violation
 22 of the Computer Fraud and Abuse Act, Count III for trademark infringement under the Lanham
 23 Act, Count IV for "cyberpiracy" under the Anticybersquatting Consumer Protection Act
 24 "(ACPA)", section 43(d) of the Lanham Act, and Count VIII for copyright infringement), and
 25 four under state law (Count II for unfair competition, a state common law version of their
 26

27 ² The order enforcing plaintiffs' subpoena cites several cases addressing a variety First
 28 Amendment theories for denying discovery, but none of them involved identification of Doe
 defendants so that they could be served with process; thus none of them addressed the
 combination of factors at issue in the cases discussed in this brief.

1 Lanham Act claims, Count V for intentional interference with contractual or business relations,
 2 Count VI for defamation, and Count VII for breach of the non-disparagement clause in an
 3 employment agreement that plaintiffs say would be at issue if, as they assume, the Doe
 4 defendants are current or former employees).

5 We address the facial and evidentiary insufficiency of the state-law claims in parts C(2),
 6 (3) and (4) of this brief, below, but the Court need not reach those issues because plaintiffs do
 7 not claim diversity jurisdiction as a basis for bringing this case in federal court. There is no
 8 allegation that the citizenship of the parties is diverse. Indeed, plaintiffs cannot allege the Does’
 9 citizenship, for the very reason that it does not know who they are, and plaintiffs does not allege
 10 the citizenship of the “Macao entity,” whose entity form is not alleged and hence whose
 11 citizenship might be multiple if, for example, it is a limited liability company or partnership
 12 whose members have several different citizenships. *Johnson v. Columbia Properties Anchorage*,
 13 437 F.3d 894 (9th Cir. 2006). In any event, plaintiffs’ inability to specify the citizenship of the
 14 defendants is the reason why courts consistently hold that Does may not be sued under diversity
 15 jurisdiction. *Menzies v. Doe*, 194 F.3d 174 (D.C. Cir. 1999) (mem.); *Howell by Goerdts v.*
 16 *Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1997); *McMann v. Doe*, 460 F.Supp.2d
 17 259, 264 (D. Mass. 2006).³

18 Moreover, apart from the fact that plaintiffs offered no argument to justify their federal
 19 law claims in their motion to enforce their subpoena to Twitter, the federal counts of the
 20 complaints are **all** facially defective. The ACPA count fails because that claim can only be
 21 brought when the defendant registers, traffics in or uses a **domain name** that is confusingly
 22 similar to plaintiffs’ trademarks with a “bad faith intent to profit” from the mark contained in the
 23 domain name. *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 680 (9th Cir. 2005). Plaintiffs do not
 24

25 ³ Indeed, assuming the truth of plaintiffs’ assumption that the Does are either current or former
 26 employees of the plaintiffs, there is some likelihood that at least one of the Does has the same
 27 citizenship as a plaintiff. In that regard, there is no diversity if there are any foreign citizens on
 28 opposite sides of the caption, even if each is the citizen of a different foreign country, because
 diversity jurisdiction “does not encompass foreign plaintiffs suing foreign defendants.” *Cheng v.*
Boeing Co., 708 F.2d 1406, 1412 (9th Cir. 1983); *see also Jackson v. Twentymen*, 27 U.S. (2
 Peters) 136 (1829).

1 allege that the Does had a bad faith intent to profit, and they do not allege that the Does
2 registered or used any domain name at all, not to speak of a confusingly similar one. In fact,
3 their claim of confusion relates only to the Twitter account names that the Does chose. Just as an
4 allegedly confusing keyword meta tag cannot support an ACPA claim, *Bihari v. Gross*, 119 F.
5 Supp. 2d 309, 316 (S.D.N.Y. 2000), so an allegedly confusing Twitter handle is not subject to
6 the ACPA.

7 The copyright count fails because the complaint never alleges that the copyright in the
8 unspecified photographs or images was registered, but registration is a condition precedent to
9 filing a copyright infringement action. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166
10 (2010). Even if the copyright had been registered, plaintiffs have not specifically identified the
11 copyrighted photographs on which this count is predicated so that the Court can make a
12 judgment about whether a sound fair use defense would appear on the face of the complaint. *See*
13 *Art of Living v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011).

14 Although Count I of the complaint alleges a violation of the Computer Fraud and Abuse
15 Act (“CFAA”), this count turns on the theory that placing false statements on Twitter servers
16 constitutes an unauthorized use of Twitter’s computers because Twitter’s terms of service forbid
17 false statements. No authority holds that a defamation claim can be transformed into a federal
18 law claim just because the terms of service of the web site where allegedly defamatory
19 statements were posted forbid false statements; nor do plaintiffs have standing to complain about
20 an alleged violation of Twitter’s terms of service. Indeed, the documents submitted with
21 plaintiffs’ motion to compel reveal that plaintiffs asked Twitter to take down the Does’ Twitter
22 accounts because the accounts allegedly violated Twitter’s terms of service, but that Twitter
23 refused to do so because **Twitter** did not deem its terms of service to have been violated.

24 Finally, the Lanham Act infringement claims are facially defective for several reasons.
25 First, the cause of action for common law trademark infringement fails because the statute
26 applies only to a defendant who has used the trademark “in connection with a sale of goods or
27 services.” 15 U.S.C. § 1125(a)(1). The Ninth Circuit has held that under this language,
28 “trademark infringement law prevents only unauthorized uses of a trademark in connection with

1 a commercial transaction in which the trademark is being used to confuse potential consumers.”
2 *Bosley Medical Group v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005). The Court said that this
3 limitation is required to keep trademark law within First Amendment limits, because the ban on
4 merely “misleading” or “confusing” speech, although perfectly proper when applied with respect
5 to commercial speech, “would be impermissible if the same regulation were applied to
6 noncommercial expressions.” *Id.* at 677. After all, a political flyer or a newspaper article about
7 a public figure could not be enjoined, or made the basis for an award of damages, simply because
8 some readers would likely find it confusing. *O’Connor v. Superior Court*, 223 Cal. Rptr. 357,
9 361 (Cal. App. 1986). Consequently, the Ninth Circuit in *Bosley* upheld the dismissal of a
10 trademark infringement action against a consumer who established a web site, using the
11 company’s name as the domain name for his site, to criticize the company’s products. Here,
12 plaintiffs do not allege that the Does have used their mark in connection with a commercial
13 transaction, and review of the tweets reveals that, as in *Bosley*, the NotUliBehringer and FakeUli
14 Twitter accounts were used to criticize plaintiffs’ CEO, not to sell rival products.

15 Second, insofar as the trademark claim is based on the contention that the Twitter account
16 names “notUliBehringer” and “fakeUli” will cause a likelihood of consumer confusion, the
17 claims are laughable. First, there is no allegation that plaintiff corporations have any trademark
18 rights in the names “Uli” or “UliBehringer.” If anybody has a Lanham Act claim, it would be
19 Behringer himself, but he has not chosen to be a plaintiff. Moreover, far from implying that the
20 accounts are owned by Behringer, the account names indicate that the owner of the account is
21 **not** Behringer, and the account profile, which is attached to the complaint, specifies that
22 “NotUliNBehringer” is a “[p]arody account.” The tweets in the account do mention the names
23 of the corporate plaintiffs from time to time, but these mentions are plainly a nominative fair use,
24 using plaintiffs’ mark to identify them as a subject of parody and criticism.

25 In sum, there is no federal claim in the complaint that could justify maintaining the state-
26 law claims in federal court. Because there is no federal claim, the Court would not have
27 jurisdiction to take away the Does’ First Amendment right to speak anonymously even if the
28

SCHNADER HARRISON SEGAL & LEWIS LLP
650 CALIFORNIA STREET, 19TH FLOOR
SAN FRANCISCO, CA 94108-2736
(415) 364-6700
FAX: (415) 364-6785

1 state-law claims are valid. For that reason alone, the motion to compel compliance with the
2 subpoena to Twitter should be denied.

3 **2. Plaintiffs Have Not Specified the Allegedly Defamatory Words Over**
4 **Which They Are Suing the Does for Defamation and Intentional**
5 **Interference With Business or Contractual Relations.**

6 The second stage of the *Dendrite* test has also not been satisfied in this case, at least with
7 respect to the claims for defamation and intentional interference with contractual or business
8 relationships; the latter claim turns on the defamation claims, *Unelko Corp. v. Rooney*, 912 F.2d
9 1049, 1058 (9th Cir. 1990). It is important to require the plaintiffs to set out the precise words
10 claimed to be defamatory (and the context of those words) because it is often possible to
11 determine, just from the words themselves, that no tenable claim for defamation could be
12 brought. Here, although a large number of tweets from the NotUliBehringer and FakeUli
13 accounts have been attached to the complaint, most of the tweets appear to be making fun of Uli
14 Behringer, not of the plaintiff companies. The “First Amendment . . . requires that the challenged
15 statement be ‘of and concerning’ the complainant.” *Steam Press Holdings v. Teamsters Local*
16 *996*, 302 F.3d 998, 1004 (9th Cir. 2002). Many of the tweets appear to be non-actionable
17 statements of opinion, not statements of fact that could be proved false, as the First Amendment
18 also requires. *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995). Moreover,
19 although the complaint contains some sensational generalizations that characterize the tweets,
20 undersigned counsel have not been able to identify which tweets, for example, make provably
21 false statements accusing the entity plaintiffs of encouraging domestic violence. To permit the
22 Court to apply these bedrock First Amendment principles to determine whether plaintiffs are
23 suing over any actionable words, it should require plaintiffs to be specific about which of the
24 tweets are the subject of their defamation claims.

25 **3. The Complaint’s State-Law Claims Do Not Justify Compelled**
26 **Identification of the Does.**

27 In their motion to compel compliance with the subpoena, plaintiffs argued that some of
28 the tweets from the FakeUli Twitter account referred to being fired from employment at Macao
Music, a fact which, plaintiffs contend, implies that the author is a former employee of one of the

1 Macao music entities. Mem. at 8. Plaintiffs then point to the non-disparagement clause in the
 2 employment contract which, they aver, all employees are required to sign. The contract itself is
 3 attached to the complaint, and under Ninth Circuit law can be considered when applying a
 4 motion to dismiss standard. *Branch v. Tunnell*, 14 F. 3d 449, 453-454 (9th Cir. 1994).

5 There is no evidence that all employees have to sign the contract; that is only an
 6 allegation in the complaint. But even if there were an affidavit establishing that all employees are
 7 required to sign that employment contract, that evidence would not justify an order compelling
 8 Twitter to release identifying information about the owner of that account, because nothing in the
 9 clause in question suggests that it applies to former employees. And even if there were a prima
 10 facie case of breach of contract by FakeUli, that would not justify compelling the identification
 11 of NotUliBehringer, even if Twitter **had** identifying records about that Doe.

12 Nor can the complaint's libel allegations justify identifying the one Doe for which
 13 Twitter has records. Specifically, the documents already before the Court reveal that Twitter has
 14 no identifying records about the NotUliBehringer account because the account was deleted
 15 before Twitter received a subpoena, and the complaint indicates that the FakeUli account was
 16 created in 2010, more than four years before the lawsuit was filed. But the statute of limitations
 17 for filing libel claims in the forum state, Washington, is two years. Wash. Rev. Code
 18 § 4.16.100(1). And the single publication rule means that even if the allegedly defamatory
 19 material remains online, plaintiffs have only one cause of action for each defamatory statement,
 20 and the statute has run on that cause of action in the meantime. *Oja v. U.S. Army Corps of*
 21 *Engineers*, 440 F.3d 1122, 1129-1134 (9th Cir. 2006).

22 **4. Plaintiffs Have Not Produced Evidence Showing That They Can**
 23 **Succeed on the Merits of Any of Their Claims.**

24 Even if the Court concluded that the complaint stated a facially sufficient claim against
 25 one of more of the Doe defendants, the motion to compel disclosure should still be denied
 26 because plaintiffs have produced no evidence in support of their claims. No anonymous speaker
 27 should be subjected to compulsory identification through a court's subpoena power unless the
 28 plaintiff produces sufficient evidence supporting each element of a cause of action to show a

1 realistic chance of winning a lawsuit against that defendant. This requirement has been followed
2 by the many state appellate courts and federal district courts discussed earlier in this brief,
3 because it prevents plaintiffs from being able to identify critics simply by filing facially adequate
4 complaints.

5 Plaintiffs often argue that they need to identify the defendants simply to proceed with
6 their case. However, no relief is generally awarded to plaintiffs until they come forward with
7 **evidence** in support of their claims, and the Court should recognize that identification of
8 otherwise anonymous speakers is a major form of relief in cases like this.

9 Moreover, that standard should be applied before the Court orders Twitter to provide
10 identifying information, and not just in the event one of the Doe defendants is able to retain
11 counsel to appear in this Court to move to quash the subpoenas. In *Dendrite* itself, the issue of
12 anonymity arose in the context of a motion by Dendrite International for leave to take early
13 discovery, and the Court assumed the responsibility of ensuring that government power was not
14 used to strip anonymous defendants of their First Amendment rights merely by taking the initial
15 step of authorizing discovery. When proceedings are ex parte, and where an absent party's
16 constitutional rights are at risk, the courts simply have greater responsibility to protect the absent
17 parties than when the Court has the benefit of a full adversary proceeding.⁴

18 Indeed, the Court does not know, and cannot know, why it is that none of the Does has
19 appeared to oppose the subpoena. Attorneys to litigate in federal court do not come cheap, and it
20 may be that the Does cannot afford an attorney in this District. Indeed, in light of the facts that
21 one of the plaintiffs is a "Macao entity," that according to plaintiffs' web site the plaintiffs are
22 based in the Philippines, and that the Does are alleged to be current or former employees, it is
23 quite possible that the Does do not have any lawyer contacts in the United States.

24 Although the proceeding remains ex parte in that the Doe defendants are themselves not
25 present, the respondent to the subpoena, Twitter, has argued that the Court should not compel it
26 to identify its users without first applying the *Dendrite / Cahill* standard. Twitter plainly has

27 ⁴ In *Mick Haig Productions v. Does 1-670*, 687 F.3d 649 (5th Cir. 2012), the trial court
28 appointed counsel ad litem to articulate the rights of the absent Doe defendants.

1 standing to raise the First Amendment rights of its absent users. Although the issue of ISP's
 2 standing to protect their customers has been squarely addressed in only a few cases,⁵ many of the
 3 appellate decisions in this area were decided based on the litigating efforts of the hosts of
 4 allegedly actionable speech, asserting their users' rights. *Brodie, supra, Indiana Newspapers,*
 5 *supra; Pilchesky, supra; Solers, supra.* Because Twitter has raised this issue, amicus
 6 respectfully suggests that the Court should decide the issue, rather than postponing decision until
 7 the Does appear and avoiding it if they do not.

8 Addressing now the two state-law claims on which plaintiffs predicated their motion to
 9 compel Twitter to comply with the subpoena, there is no evidence to support the prima facie
 10 elements of a defamation claim. There is evidence only that some seventy-nine tweets were
 11 issued by NotUliBehringer, and a lesser number by FakeUli. There is no evidence that **any** of
 12 these tweets was false, not to speak of tweets that made statements of ascertainable fact of and
 13 concerning either of the two plaintiffs. Statements alleging falsity appear in the complaint, but
 14 allegations are not evidence; statements asserting falsity appear in plaintiffs' briefs, but
 15 arguments of counsel are also not evidence. And without any **evidence** that the statements are
 16 false, the Court was wrong, amicus submit, simply to assume that the nature of the Does' speech
 17 shows that it has little value. Put another way on this record is it not "pure defamation," and is
 18 quite comparable to the kind of statements to which that many courts cited on pages 10-12 have
 19 applied the *Dendrite* and *Cahill* analysis.

20 As for the contract claims based on the non-disparagement clause that the complaint and
 21 briefs assert were imposed on all employees or the two entity plaintiffs, not only is there no
 22 evidence supporting those allegations, but there is also no evidence or indeed reason to believe
 23 that any of the Doe defendants are currently parties to employment contracts that obligate them
 24 to refrain from disparaging the plaintiffs. Plaintiffs argue that they should be excused from
 25

26 ⁵*In re Subpoena Duces Tecum to AOL*, 52 Va. Cir. 26, 2000 WL 1210372, *rev'd on other*
 27 *grounds, AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001); *In re*
 28 *Verizon Internet Services*, 257 F. Supp.2d 244 (D.D.C. 2003), *rev'd on another grounds, RIAA v.*
Verizon Internet Services, 351 F.3d 1229, 1239 (D.C. Cir. 2003); *Matrixx Initiatives v. Doe*, 138
 Cal. App.4th 872, 42 Cal. Rptr.3d 79 (Cal. App. 6th Dist. 2006).

1 producing any evidence of employment status, because that is a category of fact, like facts
 2 supporting allegations of actual malice, that cannot be produced without first identifying the
 3 Does and taking discovery from them. But the problem with that argument is that, if it is
 4 accepted, then any company that insists on non-disparagement clauses from its staff would then
 5 get a free pass to identify any and all critics, so long as they allege, possibly without any factual
 6 basis, that the critics are employees.

7 Surely it is convenient for plaintiffs to believe that their critics are current employees, but
 8 why do they believe that? Rather than creating such a loophole in the *Dendrite* standard, the
 9 Court should demand that plaintiffs offer persuasive reasons to believe that the Does are current
 10 employees who are barred from making negative statements.

11 Here, no such reasons have been offered; indeed, plaintiffs' moving papers in this Court
 12 **conceded** that FakeUli was not a current employee, but rather a former one. Their motion to
 13 compel based on the non-disparagement clause should be denied.

14 **5. The Balance of Interests Plays No Role Given the Limited Record in**
 15 **This Case.**

16 Even if plaintiffs had presented enough evidence to warrant identifying defendants, [t]he
 17 final factor to consider in balancing the need for confidentiality versus discovery is the strength
 18 of the movant's case If the case is weak, then little purpose will be served by allowing such
 19 discovery, yet great harm will be done by revelation of privileged information. In fact, there is a
 20 danger in such a case that it was brought just to obtain the names On the other hand, if a
 21 case is strong and the information sought goes to the heart of it and is not available from other
 22 sources, then the balance may swing in favor of discovery if the harm from such discovery is not
 23 too severe.

24 *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo. App. 1997).

25 Similarly, *Dendrite* called for such individualized balancing when the plaintiff seeks to
 26 compel identification of an anonymous Internet speaker:

27 [A]ssuming the court concludes that the plaintiff has presented a prima facie
 28 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

1 the necessity for the disclosure of the anonymous defendant's identity to allow the
2 plaintiff to properly proceed.

3 775 A.2d at 760.

4 Judges in this district have repeatedly applied this fifth stage of the *Dendrite* test, as in *Art of*
5 *Living* and *Highfields*.

6 A standard comparable to the test for grant or denial of a preliminary injunction, where
7 the court considers the likelihood of success and balances the equities, is particularly appropriate
8 because an order of disclosure is an injunction—not even a preliminary injunction. In every
9 case, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable
10 injury, because once speakers lose anonymity, they can never get it back. But denial of a motion
11 to identify the defendant based on either lack of sufficient evidence or balancing the equities
12 does not compel dismissal of the complaint. Plaintiffs can renew their motions after submitting
13 more evidence. Moreover, the inclusion of a balancing stage allows Does to show that
14 identification may expose them to significant danger of extra-judicial retaliation. In that case,
15 the court might require a greater quantum of evidence on the elements of plaintiff's claims so
16 that the equities can be correctly balanced.

17 In this case, unless the Does move to quash it may be difficult to make any sound
18 judgments about the balancing stage of the *Dendrite* analysis. Certainly, as discussed above,
19 plaintiffs' legal claims appear to be exceptionally flimsy. Moreover, Macao is a special
20 administrative territory of of the People's Republic of China – if the Does are located in an
21 authoritarian country with little respect for free speech rights or little protection for those who
22 challenge the powerful, they might be especially exposed to possible retaliation if their identities
23 are disclosed. Additionally, although this case does not involve a judgment obtained abroad, the
24 passage of the SPEECH Act, 28 U.S.C. § 4101 *et seq.*, surely represents a Congressional policy
25 that American courts should not be deployed to enforce foreign legal requirements at odds with
26 the First Amendment simply because assets are located in the United States. But without
27 knowing where the Does are located, it is difficult to formulate judgments about how those
28 balancing considerations apply here.

CONCLUSION

The Court should require plaintiffs to show that they have viable claims that they are entitled to litigate in federal court before granting a motion to compel Twitter to identify anonymous speakers.

Dated: February 17, 2015

SCHNADER HARRISON SEGAL & LEWIS LLP

By: /s/ Paul S. Jasper
Paul S. Jasper
Attorneys for AMICUS CURIAE

Dated: February 17, 2015

PUBLIC CITIZEN LITIGATION GROUP

By: /s/ Paul Alan Levy
Paul Alan Levy (*Pro Hac Vice* sought)
Attorneys for AMICUS CURIAE

SCHNADER HARRISON SEGAL & LEWIS LLP
650 CALIFORNIA STREET, 19TH FLOOR
SAN FRANCISCO, CA 94108-2736
(415) 364-6700
FAX: (415) 364-6785

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