VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

MICHAEL BISHOP,	)	
Plaintiff,	)	
v.	)	
GUY MORGAN,	)	Case No. 15-1254
RYAN SAWYERS,	)	
and	)	
JUSTIN WILK,	)	
Defendants.	)	
SHERIFF OF NOTTINGHAM PWC,	)	
Proposed Intervenor/Movant	)	

MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA

Introduction and Statement of Facts

This motion arises in a defamation action which, in turn, stems from a highly charged community controversy about plaintiff Michael Bishop, a local high school principal and the leader of a local baseball league. Defendant Ryan Sawyers, formerly the elected chair of the county school board, and some of his supporters, made strong accusations about plaintiff Michael Bishop, and Sawyer sought to have Bishop removed from his position as principal. Bishop's employment contract was subject to some action, the precise nature of which is disputed between the parties, but the main upshot of the controversy appears to be that defendant Sawyers became the subject of a recall effort seeking to remove him from his position as the Chairman-at-Large of the Prince William County School Board, a position from which he resigned before his term had expired.

Movant Sheriff of Nottingham PWC[1] is an anonymous blogger whose First Amendment right to speak anonymously is at stake in this motion. "Sheriff" has operated a blog about Prince William County political affairs since May 2012. *See* https://sheriffofnottinghampwc.blogspot.com/. The blog is highly opinionated and sets forth strong criticisms of a number of economically and politically powerful figures, many of whom might well want revenge against the Sheriff, perhaps taking out their unhappiness on the private institutions with which she is associated. To protect against such consequences, Sheriff blogs anonymously. She took Bishop's side in the controversy, arguing that the efforts to get Bishop fired were wrongheaded and illegal, and she strongly criticized defendant Sawyers on a number of occasions. One of her blog posts also mentioned defendant Morgan in passing, quoting a news story in which he appeared and referring to him as a "sidekick"

[1] This motion will refer to the anonymous blogger in this case using female pronouns, without any intention of revealing movant's actual gender.

of Sawyers. https://sheriffofnottinghampwc.blogspot.com/2018/06/alyson-satterwhite-in-target-sights-of.html,

In the course of pre-motion consultations pursuant to Va. Super. Ct. 4:15(b), defense counsel advised that they need to identify Sheriff so that they can take her deposition on two questions: whether plaintiff Bishop remains the principal of Patriot High School and whether there was any diminution of Bishop's reputation as a result of their criticisms of him. Defense counsel admitted that they do not claim that anything in Sheriff's blog is defamatory, and they have disclaimed any effort to hold Sheriff liable for tortious speech.

However, the fact that the supposed justification for seeking to identify Sheriff is something different than a desire to name her as a defendant in a defamation suit does not mean defense counsel can evade First Amendment protection for her right to speak anonymously. If anything, the fact that Sheriff is not even accused of wrongdoing means that she enjoys stronger protection against having her anonymity taken away. Sheriff does not have personal knowledge of facts relevant to this case, and the opinions and second-hand testimony that defendant says he needs to get by deposing Sheriff can readily be obtained from other, non-anonymous sources. Although this issue of what standard applies is one of first impression in Virginia, Virginia precedent recognizes the First Amendment protection of the right to speak anonymously; coupled with persuasive precedent in other jurisdictions, this line of authority should impel this Court to apply to quash this subpoena

I. The First Amendment Protection for Anonymous Speech Restricts Subpoenas to Identify Anonymous Bloggers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American*

Constitutional Law Found., 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
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> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.
>
> 514 U.S. at 341-342, 356.

The Virginia Supreme Court has firmly endorsed the First Amendment protection for anonymous speech, particularly in the sphere of political speech. In *Jaynes v. Commonwealth*, 666 S.E.2d 303, 312 (Va. 2008), the Supreme Court struck down a statute criminalizing anonymous spam on the ground that it infringed the First Amendment right to speak anonymously: "The right to engage in anonymous speech, particularly anonymous political or religious speech, is 'an aspect of the freedom of speech protected by the First Amendment.'"

Internet speakers speak anonymously for various reasons. They might wish to avoid having their views stereotyped according to their race, ethnicity, gender, or class characteristics. They might be associated with a group but want to express opinions of their own, without running the risk that,

however much they disclaim attribution of opinions to the group, readers will assume that the individual speaks for the group. They might discuss embarrassing subjects and might want to say or imply things about themselves that they are unwilling to disclose otherwise. And they might wish to say things that might make other people angry and stir a desire for retaliation. As the California Court of Appeal recognized in *Krinsky v Doe No. 6*, 159 Cal. App. 4th 1154, 1162, 72 Cal. Rptr. 231, 237 (Cal. App. 2008),

> The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of any economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field.

Whatever the reason for wanting to speak anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor speakers and discover their identities. Speakers who send e-mail or visit a website leave behind electronic footprints that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original senders. Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom.

A court order, even if granted for 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 (1948). 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 v. Alabama, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524.

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identities were allegedly relevant to defend against a shareholder derivative action, "If Internet users could be stripped of that 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." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). Similarly, in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), the court expressed concern about the possible chilling effect of such discovery:

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

Virginia courts have recognized that subpoenas seeking to identify anonymous Internet speakers implicate First Amendment concerns that must be satisfied by a showing of compelling need before the subpoena can be enforced, *e.g.*, *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26 (Va. Cir. 2000), *rev'd on other grounds sub nom. America Online v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001); the Virginia legislature endorsed this proposition by enacting Virginia Code Section 8.01-407.1.

II. The Courts Have Adopted a Standard for Evaluating Subpoenas to Identify Anonymous Online Speakers.

Courts have enunciated two separate standards to ensure that subpoenas cannot strip anonymous Internet speakers of their First Amendment right to keep their speech anonymous without the support of the "compelling state interest" demanded by *Jaynes*, 666 S.E.2d at 313, and *McIntyre*, 514 U.S. at 347. When the party seeks to identify defendants for the purpose of suing them on the ground that their speech violates the plaintiff's rights under the law, the courts apply a multi-part test, first articulated in *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), and since followed by many other states, under which the would-be plaintiff must give reasonable notice the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena; must allege with specificity the speech or conduct that has allegedly violated its rights, to state a cause of action against each defendant; and must produce evidence supporting each element of its claims. *See also* Virginia Code Section 8.01-407.1.

Because defendants have disclaimed any effort to hold Sheriff responsible for tortious speech, it is the second standard for considering subpoenas to identify anonymous speakers that applied in this case. No Virginia court has yet addressed this issue, but a number of courts elsewhere have done so. The leading case of *Doe v. 2TheMart.com, supra*, establishes the relevant test to be applied when a party seeks to identify an anonymous speaker to obtain evidence for use against an existing party in litigation; it is borrowed from the First Amendment test for a subpoena for a reporter's sources. *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986). Several Virginia trial courts have adopted the *Larouche* test to govern subpoenas seeking to identify journalistic

sources. *In re Multi-Jurisdictional Grand Jury*, 64 Va. Cir. 423 (Va. Cir. 2004); *Clemente v. Clemente*, 56 Va. Cir. 530 (Arlington Cy. 2001); *Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Richmond 1995). And the *Larouche* test is analogous to the context of a subpoena to identify an anonymous Internet speaker who is not herself a party in the case because the reporter's source privilege, like the right to speak anonymously, is a privilege rooted in the First Amendment limitations on the exercise of state power to compel identification of an otherwise anonymous speaker.

Under the *2theMart* test, once notice has been given to the anonymous commenters,

1. The subpoena must have been issued in **good faith.**
2. The information sought must **relate to a core claim or defense.**
3. The identifying information must be **directly and materially relevant to that claim or defense.**
4. Information sufficient to establish or to disprove that claim or defense must be **unavailable from any other source.**

140 F. Supp.2d at 1095 (emphasis added).

In addition, "non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." *Id.* Several subsequent courts have followed this test. *Awtry v. Glassdoor, Inc.*, 2016 WL 1275566, at *16 (N.D. Cal. Apr. 1, 2016); *Mount Hope Church v. Bash Back!*, 2011 WL 13116849 (W.D. Wash. Apr. 21, 2011), *rev'd on other grounds*, 705 F.3d 418 (9th Cir. 2012); *In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, 2010 WL 2219343, at *8-11 (E.D.N.Y. Feb 5, 2010), *adopted in relevant part*, 2010 WL 1686811, at *2-3 (E.D.N.Y. Apr. 26, 2010); *McVicker v. King*, 266 F.R.D. 92, 94-97 (W.D. Pa. 2010); *Sedersten v. Taylor*, 2009 WL

4802567, at *2 (W.D. Mo. Dec. 9, 2009); *Enterline v. Pocono Medical Center*, 751 F. Supp.2d 782, 787-788 (M.D. Pa. 2008). *See also Digital Music News v. Superior Court,* 171 Cal. Rptr. 3d 799, 809 (Cal. App. 2d Dist. 2014); *Tendler v. Bais Knesses of New Hempstead,* No. 2284-2006 (N.Y. Sup. Ct. Rockland Cy. Nov. 16, 2011) (copy attached); *Anderson v. Hale*, 2001 WL 503045, at *7-9 (N.D. Ill. May 10, 2001).

III. Defendant Cannot Satisfy the *2theMart / Larouche* Balancing Test.

Under those standards, defendant's subpoena cannot withstand judicial scrutiny. In the course of pre-motion consultation, defendant through counsel offered two arguments for identifying Sheriff, both based on statements made in her blog post entitled. "*Al Sharption Launches Retaliation Against BOCS Members—Candland Now in the Crosshairs*, https://sheriffofnottinghampwc .blogspot.com/2016/08/al-sharption-launches-retaliation.html. First, he points to Sheriff's statement, "In the end, Sawyers had to retreat in defeat and Bishop retained his job"; he notes that this contradicts an allegation in the complaint that Bishop was fired; and he contends that he needs to take Sheriff's deposition to establish as a factual matter whether Bishop was fired or kept his job. *See* Levy Affidavit, Exhibit C. Second, he claims that he needs to take Shariff's deposition to explore the basis for statements on Sheriff's blog that laud Bishop's reputation in the community. Doing so, counsel contend, will enable them to argue to the jury that alleged falsehoods about Bishop did not injure his reputation and hence the defendants should not be subjected to damages for a diminution of Bishop's reputation. Exhibit C.[2]

Neither of these justifications can withstand judicial scrutiny, for several reasons.

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[2] In subsequent emails in the thread set forth in Exhibit C, defense counsel suggested that they might **not** want to present Sheriff's testimony at trial, but just want to take her deposition.

First, the subpoena does not meet the test of good faith, in that the reasons offered for identifying Sheriff verge on nonsensical. The contention that Sheriff must be identified to litigate the question of whether Bishop kept his job is frivolous. Sheriff cannot testify on this point based on personal knowledge— she can only testify about what she has read in the press or in other sources about this subject. The best evidence on this question would be obtained either from the public records of the Prince William County school system or of Patriot High School itself, whose web site at the present time identifies Bishop as the principal of the high school. https://patrioths.pwcs.edu/our_school/administration, or by taking the deposition of those institutions.

Another factor that should lead the court to question Morgan's good faith is the fact that, so far as counsel are aware, defendant made no effort to notify Sheriff of the pendency of a subpoena seeking to identify her, even though an email address for Sheriff appears on every blog post. Sheriff learned of the subpoena only because Google provided her with notice. *See* Levy Affidavit Exhibit A. Every case discussing the right to speak anonymously has stressed the need for the person sought to be identified to be given notice, yet defendant did nothing to apprise Sheriff of the effort to take away her key First Amendment right to speak anonymously.

Moreover, nothing in the blog post that defendant has identified as providing the basis for their subpoena says anything, laudatory or otherwise, about whether Bishop's reputation was affected by defendants' criticisms. The page contains four references to Bishop:

> 1. "Sharpton & Porta joined the fray with vitriolic criticism and standing toe-to-toe with Sawyers in deeply personal attacks against Michael Bishop, the Patriot High School principal.
>
> [2.] In the end, Sawyers had to retreat in defeat and Bishop retained his job."
>
> 3. "So Democratic Chair Harry Wiggins now files a complaint with the FBI that

Michael Bishop influenced the sale of Pace West School to QBE."

4. "Sawyers also used his position as Chairman of the School Board to go after a popular and effective High School principal who was a leader in a competing youth baseball league."

The first three statements do not praise Bishop or otherwise speak to his reputation; they do complain about Bishop's detractors. The fourth statement says that Bishop was popular at the time Sawyers began attacking him, but does not express any opinion about the nature of Bishop's reputation after the attacks, or indeed about whether the attacks affected Bishop's reputation.

Although opinion about reputation is likely the sort of lay opinion that would be admissible under Rule 2:701 of the Rules of the Supreme Court of Virginia, the Court should not permit a non-party witness, who is not participating in the case in any other way, such as by being a fact witness or a testifying expert, to be summoned against her will to account under oath for her opinions about the performance in office and reputation of a public official. Moreover, there is no reason to believe that Sheriff's opinions about Bishop's reputation are any more probative on that question than the opinions of other journalists who have covered the controversies between plaintiff and defendants, but not written anonymously, or the opinions of the many other residents of Prince William County who have spoken publicly, for attribution, about the dispute.

For example, during the course of the controversy, a number of public officials opposed defendants' efforts to have Bishop fired and voted against Sawyers' motion, which was ultimately defeated by a vote of the Board's majority. Palermo, *Effort underway to recall Prince William School Board chairman*, Prince William Times (Nov. 22, 2016), https://www.princewilliam times.com/ news/effort- underway-to-recall-prince-william-school-board-chairman/article_c66584f0 -7646- 583e-8bab- 0d3cfc27a745.html. Bishop's supporters urged members of the public to turn

out in support of Bishop wearing red, the school's colors, Shaw, *Patriot Community Encouraged to Wear Red for Bishop*, Bristow Beat (June 12, 2016), http://bristowbeat.com/education/patriot-community-encouraged-wear- red-bishop/, and some 75 members of the public showed up for that purpose at the school board meeting that considered whether to renew Bishop's contract, speaking publicly in support of Bishop. Shaw, *Prince William School Board Restores Bishop's Contract*, Bristow Beat (June 16, 2016), http://bristowbeat.com/education/prince-william-school-board-restores-bishops- contract/.

Many residents appeared in front of local schools circulating petitions supporting the effort to recall defendant Sawyers, explaining that his attacks on plaintiff Bishop was among their motivating factors. Shaw, *Committee Petitions to Recall School Board Chairman*, Bristow Beat Nov. 6, 2016, http://bristowbeat.com/news/55024/. A community Facebook group, located at https://www.facebook.com/groups/ourschoolspwc/, consists of thousands of Prince William County residents devoted to the Prince William County Schools. Levy Affidavit, ¶ 6 and Exhibit D. The page contains numerous threads about the controversy between Sawyers and Bishop, in which people praised Bishop and castigated Sawyers. Levy Affidavit, Exhibit E. Assuming that a subpoena to testify to opinions about a public official are ever justified, any of those residents, who willingly identified themselves, could be asked to testify about the quality of Bishop's reputation. *See also* Shaw, Patriot High School Tops Prince William Scores in Washington Post Challenge Index, Bristow Beat May 9. 2017, http://bristowbeat.com/education/patriot-high-school-tops-prince-william-scores-washington-post-challenge-index/ (Washington Post education columnist Jay Mathews might be a better witness to testify about the quality of the education offered under Bishop's leadership).

If defendant's real purpose were to show that Bishop's reputation remained unsullied, any of these individuals could be asked to testify about Bishop's reputation without compromising the right to speak anonymously. If this sort of makeweight basis for identifying anonymous online speakers is approved as a basis for enforcing subpoenas, no anonymous bloggers in Virginia will be safe from being outed by those whom they have criticized. Indeed, the fact that Sheriff has in the past made public statements evincing disapproval of the policies pursued by the elected official who is the lead defendant in this case, makes this issuance of the subpoena especially offensive to First Amendment values—an anonymous blogger who has done no wrong is being punished for opinions that defendants do not like by being deprived of her anonymity.

Turning to the second prong of the *2theMart / Larouche* test, the evidence that defendant says he hopes to obtain by taking Sheriff's deposition does not go to a "core claim or defense." *See also Lee v. Dept. of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005) (identity of a journalist's source must "go to the heart of the case'); *Baker v. F & F Investment*, 470 F.2d 778, 783 (2d Cir. 1972) (same). The complaint alleges a number of statements by defendants about Bishop's inability to perform his profession and about his committing such crimes as lying to the Internal Revenue Service; if these statements were false and made with actual malice, they are defamatory per se and damages can be recovered without proof of actual injury to reputation. Consequently, the evidence that defense counsel claim they hope to adduce from Sheriff's testimony goes to the amount of damages, not the issue of liability. But as the New York Supreme Court held in the *Tendler* case cited above (and attached), the amount of damages is not a "core claim or defense."

Third, there is no showing that defendants have made any effort to secure testimony from the public officials, angered residents, or journalist Shaw, to show that Bishop's reputation was not

injured by defendants' allegedly false accusations. Without such a showing, defendants cannot meet the prong of the balancing test that demands a showing that proof of Bishop's co ntinued good reputation cannot be obtained from any other source.

Meeting the prong of the *Larouche / 2theMart* test that requires that the sought-after information be unavailable from any other source demand a showing that that the proponent of discovery has "exhausted other means of discovery" that do not trench on First Amendment interests but that might establish the proposition that is said to justify the disclosure of sources. *E.g.*, *LaRouche*, 780 F.2d at 1139; *Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993). "An alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure." *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981). So far as Sheriff is aware, defendants have not exhausted other means of showing that Bishop has not suffered any injury to his reputation as a result of their defamatory statements.

Yet another factor that should bear on the *Larouche* balancing test is the fact that Sheriff is not a party whose liability is sought to be enforced through discovery. In *O'Grady v. Superior Court*, 139 Cal. App.4th 1423, 1468-1479, 44 Cal. Rptr.3d 72 (Cal. App. 2006), the California Court of Appeal, considering the application of the qualified First Amendment privilege for journalists to withhold the identity of their sources, said, "Discovery is peculiarly appropriate when the reporter is a defendant in a libel action, because successful assertion of the privilege may shield the reporter himself from a liability he ought to bear." *Id.* at 1468, 44 Cal.Rptr.3d at 107. But the fact that the journalists subpoenaed in *O'Grady* were not parties weighed against disclosure. *Id.* at 1470. Similarly here, Sheriff is not a party to this litigation, and there is no concern that withholding discovery could enable her to avoid liability; this is a factor that should weigh in the balance of

interests at stake here, militating in favor of quashing the subpoena.

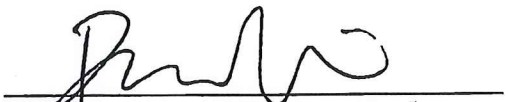
In the final analysis, the *2theMart / LaRouche* test demands that the party seeking discovery show that there is "a compelling interest in the information" that identifies the anonymous person who spoke to the newspaper. 780 F.2d at 1139. Because Sheriff has no personal knowledge of the facts that Morgan claims to want, because the information sought does not go to the heart of this case, and because Morgan can get the information he claims to want from many sources other than Sheriff, his subpoena to identify Sheriff should be quashed.

CONCLUSION

The motion to quash the subpoena to Google seeking information that would identify Sheriff should be granted.

Date: December 4, 2018

Respectfully submitted,



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