STATE OF NEW HAMPSHIRE

SUPREME COURT

2009 Term
June Session

Docket No. 2009-0262

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc..

APPEAL FROM ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF PUBLIC CITIZEN AS AMICUS CURIAE SUPPORTING REVERSAL

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MISCELLANEOUS

At the behest of Mortgage Specialists, Inc. ("MSI"), a company that was criticized on an Internet forum, the trial court issued an injunction forbidding the host, respondent Implode-Explode Heavy Industries ("Implode"), from restoring two allegedly defamatory messages, posted anonymously by an individual using the pseudonym "brianbattersby," but removed temporarily in response to MSI's request, to its web site. The court also ordered the host to provide information identifying the user of that pseudonym. The court entered this order even though federal law immunizes the hosts of forums from being sued for content posted by others, and even though MSI chose not to sue the anonymous poster – who could be held liable if the posts were defamatory. Moreover, the court below did not follow the standard legal procedure adopted in every state around the country that has addressed the question, whereby the allegedly defamed party names the **defamer** as a Doe defendant, gives the Doe notice that it is seeking discovery to identify her, and then makes a legal and evidentiary showing of a prima facie case of defamation before obtaining **relief** against the Doe — namely, stripping away the Doe's anonymity. Because the trial court applied the wrong legal standard both in adopting the injunction against re-posting and in requiring identification of the anonymous poster, its order should be reversed in those respects.

STATEMENT OF THE CASE

A. Introduction

Protection for the right to engage in anonymous communication is fundamental to a free society. Indeed, as electronic communications have become essential tools for speech, the Internet in all its forms – web pages, email, chat rooms, and the like – has become a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844,

853, 870 (1997),

> From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

Full First Amendment protection applies to speech on the Internet. *Id.*

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. For example, Yahoo! and Raging Bull host message boards for every publicly traded company where investors and other members of the public can discuss the company. Blogspot, WordPress and TypePad give individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, companies, or other topics while leaving it open for visitors to post their comments. YouTube also permits visitors to comment on the videos that are posted there. Many web sites that address specific subjects also include guestbooks or forum where visitors can sound off on what they see there. And increasingly, newspapers host forums, arranged by specific community or by news topic, where readers can exchange ideas and other information about news developments.

The individuals who post messages generally do so under pseudonyms – similar to the old system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the forums at issue here will reveal, most people choose nicknames. *See* http://implode-explode.com/forum/; http://implode-explode.com/forum/memberlist.php (list of registered pseudonyms). These typically colorful monikers protect

the writer's identity from those who disagree with him or her, and they encourage the uninhibited exchange of ideas and opinions. Such exchanges are often heated, and they are sometimes filled with invective and insult. Most, if not everything, that is said on forums is taken with a grain of salt.

Many forums have a significant feature that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use a forum to express his point of view; a person who disagrees with something that is said on a forum for any reason – including the belief that a statement contains false or misleading information – can respond to that statement immediately at no cost, and that response can have the same prominence as the offending message. Most forums are thus unlike a newspaper, which have limited space for responses and often refuse to print them – a choice that the First Amendment protects. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, on most forums companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. And, because many people regularly revisit forums, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

B. Facts and Proceedings Below

This case arose out of material posted on the web site of Implode, a company which, among other things, ranks various businesses in the mortgage industry and publishes news articles about that industry. A reported story on the site, authored by Implode's own staff, suggested that petitioner

MSI was being investigated by a state agency for improper mortgage activities; the story included information from a document, the "2007 Loan Chart," that had been obtained from an anonymous source. Appendix at 3 ("App.3 ").

Like many Internet blogs, and like the online sites of many newspapers, Implode's web site features a "comment" feature that allows users of the site to post comments. Only registered users may post messages; in the registration process, a would-be poster must choose a unique username and must provide an email address that is used for the purpose of verifying the registration. *See* http://implode-explode.com/forum/profile.php?mode=register&agreed=true. A few days after the "Loan Chart" information appeared, an anonymous individual using the pseudonym "brianbattersby" posted comments on a forum provided for comments about each of the financial institutions featured on Implode's web site. App3-4. Brianbattersby asserted that MSI's president, Michael Gill, "was caught for fraud back in 2002 for signing borrowers names and bought his way out." She later posted a second comment: "Mortgage Specialists Fraud Michael Gill Fraud Mortgage Specialists NH Fraud Michael Gill NH Fraud." App.4[1] Implode agreed to remove the contested material temporarily, but would not agree either to refrain from reposting it, or to identify the source of either the Loan Chart or the brianbattersby postings. *Id.*[2]

MSI filed an ex parte complaint, verified by Michael Gill only "to the best of my knowledge, information and belief," App.22, asserting that loan document was confidential information and that

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[1]We refer here to anonymous Internet speakers using the female generic gender, regardless of the actual gender even when it is known to counsel. In this case, counsel has no idea who the actual Doe is and what her actual gender is.

[2]Because this amicus brief does not address the legal issues relating to Mortgage's claims with respect to the Loan Chart's posting, the facts and proceedings below with respect to those claims are not discussed in this Statement.

the brianbattersby statements were "false and defamatory." App.16 ¶ 16. With respect to the latter claim, MSI asserted it would suffer irreparable injury from the posting on the Internet, App.19, and asked the Court to enjoin Implode from further posting of those comments. It also demanded that Implode provide it with all available identifying information about brianbattersby so that it could pursue further remedies against the individual responsible for the posting. App.20. In response, Implode invoked the federal statute that gave it immunity against claims over the posting of the brianbattersby comments and argued that, in light of the First Amendment right to speak anonymously, MSI should not be allowed to compel the identification of this poster unless it gave notice so that the poster could protect her interest in remaining anonymous, and unless it presented evidence in support of its claim of defamation. App.87-90.

The trial court granted both of MSI's claims for relief. First, the court did not find Implode liable for any violation of MSI's rights through refusing to agree not to allowing the brianbattersby comments to be reposted on its forum; but, without addressing Implode's immunity argument under section 230, it enjoined any further posting of those messages. Order at 6 ¶ 4. Far from holding Implode liable, the trial court recited MSI's argument that MSI "does not claim that the respondent wrongfully published the information" and that MSI "is willing to hold [Implode] harmless with respect to the publication of that information." *Id.* 4. The court did not explain how it can issue an injunction against a party that was not held liable. Second, the court ruled that "the maintenance of a free press does not give a publisher the right to protect the identity of someone who provided it with . . . . defamatory information." *Id.* 6. The court indicated that it was not holding "that the press has any responsibility to 'police' the information that it is given." Rather, it said it wanted to give "notice to individuals that they may well have to accept the responsibility of their actions in a civil

court if they elect to seek to disseminate through the press any . . . defamatory material." *Id.* Accordingly, without ever ensuring that the anonymous poster "brianbattersby" had received notice of the claim against her, the Court ordered Implode to provide whatever identifying information it has. *Id.* ¶ *5.*

SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff complains about the content of material posted online and seeks a judgment granting relief against the posting of that material, including an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Federal law provides that such controversies must be decided by litigation between the person creating such content and the person aggrieved by the content, and not by litigation against the Internet host on whose facilities the material is posted. Under 47 U.S.C. § 230, the provider of an "interactive computer service" — such as the host for a forum — is absolutely immune from suit based on the content provided by another. This immunity is not limited to suits for damages, but extends to suits seeking equitable relief as well. Because the defendant in this case cannot be sued

and cannot be held liable, it cannot be subjected to any form of relief, even an injunction. Rather, the plaintiff's recourse is to sue the anonymous poster and seek discovery seeking the identity of the poster from the host as a third party. Following appropriate notice and adversary litigation, the Court can decide whether to order the identification of the poster and, ultimately, award equitable and legal relief against that person. That is exactly the course that the plaintiff in this case refused to follow.

Moreover, suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables it to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to speak anonymously, but may be exposed to efforts to restrain or oppose his speech. For example, an employer might discharge a whistleblower, and a public official might use his powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. Similar cases across the country, and advice openly given by lawyers to potential clients, demonstrate that access to identifying information to enable extra-judicial action may be the only reason plaintiffs bring many such lawsuits.

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors granting the relief. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind

pseudonyms, nor too easy for a big company or a public figure to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

Although the standard for resolving such disputes is an issue of first impression in New Hampshire, this Court will not be writing on an entirely clean slate because there is a developing consensus among those courts that have considered this question that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Specifically, there is a developing consensus that a court faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process should: (1) provide notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her 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 her claims; and, in many jurisdictions (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying her anonymous critics – and that the defendant is not denied important First Amendment rights unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria can require time and effort on a plaintiff's part. However, everything that the plaintiff must do to meet this test, it must also do to prevail on the merits of her case. So long as the test does not demand more information than a plaintiff would reasonably be able to provide shortly after filing the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

On the record developed to date, discovery should have been denied because MSI did not give notice of its discovery efforts to the anonymous poster, and because the plaintiff failed to present admissible evidence that facts stated in the posting are false.

ARGUMENT

I. FEDERAL LAW BARS THE INJUNCTION FORBIDDING IMPLODE FROM RESTORING THE BRIANBATTERSBY COMMENTS TO ITS FORUM.

The first reason why the order below should be reversed is that MSI sued the wrong defendant. A federal statute, section 230 of the Telecommunications Act of 1996, 47 U.S.C. § 230 (also known as section 230 of the Communications Decency Act), provides an absolute immunity from the filing of this action against Implode. Section 230(c)(1) states:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Section 230(e)(3) provides:

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Federal and state courts alike have consistently held that these provisions create an immunity from suit against web site hosts for defamation based on materials placed on their sites by third persons.[3]

Although MSI did not contest this immunity below, and although the trial court did not

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[3] *E.g.*, *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Universal Communications Systems v. Lycos*, 478 F.3d 413 (1st Cir. 2007); *Green v. America Online*, 318 F.3d 465, 468 (3d Cir. 2003); *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 983 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997); *Doe v. Friendfinder Network*, 540 F. Supp.2d 288, 294-295 (D.N.H. 2008); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 394, 211 Ariz. 569, 569 (2003); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711(2005); *Marczeski v. Law*, 122 F. Supp.2d 315, 327 (D. Conn. 2000); *Schneider v. Amazon.com*, 31 P.3d 37 (Wash. App. 2001).

squarely address why section 230 did not apply here, the court below did seem to take some comfort from the fact MSI was not seeking damages from Implode; perhaps the court believed that injunctive relief can be awarded without running afoul of section 230. If that was the court's unstated reasoning, however, the court was mistaken. First of all, the language of the statute does not distinguish between the forms of relief – instead, section 230(e)(3) forbids a "cause of action" from being "brought," and it forbids "liability" from being "imposed" under any law that is inconsistent with section 230. Moreover, an injunction is a form of relief that can be awarded only against a defendant who has been determined to have been liable for a legal wrong. Because no finding of liability was made against Implode — or could have been made, given Implode's immunity — Implode could not be subjected to an injunction. Moreover, a number of the cases in which section 230 has been applied involved claims for injunctive relief as well as damages, and none of those cases has dismissed the damages claims while allowing the claims for injunctive relief to stand. *E.g.*, *Ben Ezra, supra*, 206 F.3d at 983; *Green*, 318 F.3d at 470.

Additionally, the notion that a plaintiff who is unhappy about third-party material being posted may sue the web host for injunctive relief runs counter to the design of the statute. The statute was enacted because Congress recognized that web hosts may host thousands, millions or even billions of statements. *Carafano*, 339 F.3d at 1123-1124. Generally speaking, web hosts are paid very small sums for hosting services, or they offset the costs of hosting by selling advertising on the basis for pennies per page-view or per click. Not only can they not police the content in advance, but even when particular comments are challenged, it is unrealistic to expect the hosts to devote sufficient lawyer time to evaluate challenged statements and decide whether to remove or leave them posted, not to speak of hiring lawyers to litigate such cases. The cost of making

intelligent assessments of the risks of litigation, not to speak of the cost of participating in the litigation, far outstrips the money that can be earned from hosting challenged comments. *Chicago Lawyers Committee*, 519 F.3d at 668-669. The costs are no less if only an injunction is sought, and not damages. If web hosts could be subjected to the expense of litigation — wholly apart from the risks of being held liable for damages — the result is likely to be that as soon as any comment is challenged, the host will remove it rather than take the risk of being dragged into the litigation. *See Zeran*, 129 F.3d at 331; *Barrett v. Rosenthal*, 40 Cal.4th 33, 146 P.3d 510, 524-525 (2006).

Instead of allowing hosts to be subjected to these choices, section 230 tells plaintiffs: sue the speaker, not the host. MSI could easily have done that here. As in *LaRoche v. Doe*, 134 N.H. 562, 564-565, 594 A.2d 1297 (1991), MSI could have sued "John Doe a/k/a brianbattersby," then used discovery to identify the Doe, giving notice to the Doe through such means as posting on the forum (as discussed in the next section of this brief). That is, in fact, what plaintiffs in MSI's shoes in other jurisdictions commonly follow. In that way, the litigation is filed against the party who is best situated to evaluate the circumstances about which she was speaking, and who has the greatest interest in defending her right to make the statements (although Public Citizen admires Implode's fortitude in hiring counsel and standing up for the free speech rights of its user). If the Doe is found liable, then the court can assess damages and, assuming that the jurisdiction allows an injunction against defamatory speech, the court can order the Doe to use its best efforts to remove the statement found to have been false and defamatory. In fact, when a valid judgment has been entered against a third-party speaker, many web hosts (such as Google) will remove the comment accordingly. But section 230 does not allow the plaintiff to sue the web host and obtain an injunction against the web host. Because MSI sued the wrong defendant, the injunction against reposting should be reversed.

II. THE CONSTITUTION BARS THE DISCOVERY SOUGHT FROM IMPLODE.

A. The First Amendment and Article 22 of the New Hampshire Bill of Rights Limit Compelled Identification of Anonymous Internet Speakers.

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 Shakespeare and Mark Twain to the authors of the Federalist Papers:

> [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.

McIntyre, 514 U.S. at 341-342, 356.

Moreover, because rights under Article 22 of the state Bill of Rights are at least as broad as under the First Amendment, *State v. Allard*, 148 N.H. 702, 813 A.2d 506, 510 (2002), Article 22 similarly protects the right to speak anonymously.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any

individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001).

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

Moreover, at the same time that the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the technology of the Internet, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, provides the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. Consequently, many observers argue that the law should provide special

protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). 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. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524. Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th

Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). In an analogous area of law, the courts have evolved a standard for compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In those cases, courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of his case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of his case. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972).

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, "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).

B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard for the Identification of John Doe Defendants.

In recent cases, courts have drawn on the privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers.

The leading case is *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board

maintained by Yahoo!. That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which we urge the Court to apply in this case:

> We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.
>
> We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.
>
> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
>
> The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to [New Jersey's rules], the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 775 A.2d at 760-761.[4]

A somewhat less exacting standard, adopted by the Delaware Supreme Court, requires the submission of evidence to support the plaintiff's claims, but not an explicit balancing of interests after the evidence is deemed otherwise sufficient to support discovery. *Doe v. Cahill,* 884 A.2d 451 (Del. 2005). In *Cahill*, the Delaware Superior Court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including that the statements are false. The Court rejected the final "balancing" stage of the *Dendrite* standard.

All of the other appellate courts, as well as several federal district courts, that have addressed the issue of subpoenas to identify anonymous Internet speakers have adopted some variant of the *Dendrite* or *Cahill* standards. Several courts expressly endorse the *Dendrite* test, requiring notice and opportunity to respond, legally valid claims, evidence supporting those claims, and finally an

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[4] *Dendrite* has received a favorable reception among commentators. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech,* 82 Notre Dame L. Rev. 1537 (2007); O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyber-Slapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U. L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001). The one article that expresses disagreement with *Dendrite* – written by the lawyer who lost *Dendrite* – advocates a standard similar to the *Cahill* case discussed next. Vogel, *Unmasking "John Doe" Defendants: the Case Against Excessive Hand-wringing over Legal Standards*, 83 Ore. L. Rev. 795 (2004).

explicit balancing of the reasons supporting disclosure and the reasons supporting continued anonymity. *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007), involved a subpoena by a private company seeking to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court drew an analogy between an order requiring identification of an anonymous speaker and a preliminary injunction against speech, and called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides. In *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009), the court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, balance 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. In *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005), the court required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests," and held that plaintiff's trademark and defamation claims based on sardonic postings about plaintiff's chief executive did not support discovery. *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001), similarly expressed a preference for the *Dendrite* approach, requiring a showing of reasonable possibility or probability of success.

Several other courts have followed a *Cahill*-like summary judgment standard. For example, *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal.App. 6 Dist. 2008), 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." *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007), reversed a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog about the hospital. Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. In reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action (836 A.2d at 50):

> [C]ourt-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.

Among the federal district court decisions following *Cahill* and *Dendrite* is *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), where the court refused to enforce a subpoena to identify the authors of several postings by Best Western franchisees that criticized the Best Western motel chain, because the plaintiff had not presented any evidence of wrongdoing on the part of the Doe defendants. The court suggested that it would follow a five-factor test drawn from *Cahill*, *Dendrite* and other decisions. In *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009), the Court quashed the subpoena without choosing between *Cahill* and *Dendrite* because plaintiff would lose under either standard. In *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2,

2004), the court ordered the identification of a commercial competitor of the plaintiff who posted defamatory comments on bulletin boards only after considering a detailed affidavit that explained how certain comments were false. In *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008), the Court granted discovery only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress based on vile personal attacks on a student gossip message board. In *Quixtar v. Signature Management Team*, 566 F. Supp.2d 1205 (D. Nev. 2008), the court refused to order the identification of Doe defendants who were sued for intentional interference with contract and with business relations until the plaintiff notified the Does and plaintiff had a chance to meet the *Cahill* standard. And in *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006*)*, the court dismissed the case sua sponte for lack of subject matter jurisdiction because Does cannot be sued in diversity, but as an alternative holding addressed the showing that must be made to obtain such discovery. The court expressed some concern about the level of detail that plaintiff might have to show to establish a prima facie case under *Cahill*, but held that in any event the complaint did not even state a valid claim. *See also Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004) (court weighed limited First Amendment interests of file-sharers, upheld discovery to identify them after plaintiffs's evidence showed prima facie case that Does posted online hundreds of copyrighted songs); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008) (same).

Evidence supporting relief was similarly considered in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants for registering Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect of such discovery (*id.* at 578):

> 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.

Accordingly, the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and give them notice that suit had been filed against them, thus providing them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against the defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the plaintiff's trademark claims against the anonymous defendants. *Id.* at 580.

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

C. MSI Has Not Followed the Steps Required Before Identification of John Doe Speaker May Be Ordered in This Case.

Courts should follow five steps in deciding whether to allow plaintiffs to compel the identification of anonymous Internet speakers. Because MSI has not met these standards, the order enforcing its subpoena should be reversed.

(1) Require Notice of the Threat to Anonymity and an Opportunity to Defend It.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. at 579. Thus, in *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved this requirement. 342 N.J. Super. at 141, 775 A.2d at 760.

Indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property. *Id.* at 235. In the Internet context, posting on the Internet forum where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, and the Court is urged to follow the *Dendrite* example by requiring posting in addition to other means that are likely to be effective.

Here, MSI deliberately refused to meet the notice requirement before seeking discovery, even though it could easily have posted statements on the forum where critical comments were made warning that it was planning to file suit and seek identifying information through discovery. Its

excuse for not providing notice was that it did not want to "emphasize and draw further attention to" the comments. App.103. Wholly apart from the fact that a desire not to bring attention to a dispute is no excuse for violating due process, the supposed desire not to draw attention to the dispute is belied by the fact that MSI filed a lawsuit over the comments, which is much more likely to draw public attention to the issue than would posting on an obscure forum.

MSI's unwillingness to post a notice is even more bizarre in light of its other argument about notice: that it conducted an investigation and was able to identify a New Hampshire resident named Brian Battersby who works in the mortgage industry and therefore might well be the individual who posted the statements. MSI complained that it had tried to take Mr. Battersby's deposition but that Implode had moved to quash the deposition on the ground that the issue of personal jurisdiction remained to be litigated. App.102. However, MSI did not renew its effort to take the deposition after Implode's motion to dismiss for lack of personal jurisdiction was denied. And, given that MSI was able to deliver a deposition subpoena to this Mr. Battersby, it has no excuse for refusing to give him notice of its petition seeking to identify him. If this Battersby proved not to be the Doe, of course, then the need to provide notice to the actual Doe remained.[5]

In addition to posting on the forum, MSI could and should have asked the trial court to order Implode to send notice of the subpoena to the email address that brianbattersby would have had to provide in the course of registering to post comments on the forum. To be sure, such notice is not always effective, because Internet users sometimes adopt new email addresses, and they do not

[5]MSI contended below that it undertook "considerable efforts" to notify "brianbattersby" of its efforts to compel disclosure of its identity, App.102, but the only example it gave of these efforts was that it attempted to take Mr. Battersby's deposition. Even assuming that Mr. Battersby is the Doe, the deposition subpoena does not indicate that MSI was trying to identify an anonymous speaker using the pseudonym "brianbattersby." App.67-69.

always think to notify all of the web sites where they have given their old addresses. For example, in the recent *Brodie* case, Public Citizen's client, Independent Newspapers, gave email notice that it had received a subpoena to identify the owners of certain pseudonyms; one of those owners did not receive the message and, in fact, did not learn that there were proceedings to identify her until she read an account of the case in the *Washington Post* that mentioned her pseudonym, which had figured in the oral argument.

In the experience of amici, there are many Internet Service Providers that do not provide notice and a fair opportunity to respond before identifying records are provided in response to subpoenas. The precaution required by the court in *Dendrite* – a showing by the plaintiff of the steps undertaken to provide notice by posting on the forum where the allegedly defamatory statements were made – is needed in such cases to ensure that any person whose anonymity is challenged has the ability to retain counsel to protect her rights.

(2) Demand Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated his rights. Indeed, many state and federal courts require that defamatory words be set forth verbatim in a complaint for defamation. *E.g.*, *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979).

Here, MSI's petition provided only a portion of the statements on which it is suing. It would not have been difficult, for example, for MSI to attach the entire forum thread as an exhibit to its papers, or even to quote the entirety of the message. The context of the specific quoted words might,

for example, show that the quoted words were not really "of and concerning" MSI, or might show that the quoted words were hyperbole or some other form of constitutionally protected opinion. Here, the Court should require that, on remand, MSI provide the entire statement containing the words about which it is suing.

(3) Review the Facial Validity of the Complaint After the Statements Are Specified.

Third, courts reviewing requests for discovery to identify anonymous speakers also review the merits of the legal claims stated in the complaint to ensure that they state a claim on which relief may be granted. Moreover, in a defamation case, some statements may be too vague or insufficiently factual to be defamatory. Some statements may not be actionable because they are not "of and concerning" the plaintiff, which is a requirement under the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). Other statements may be non-defamatory as a matter of law because they are rhetorical expressions of opinion, which are, by definition, not defamatory. *Doe v. Cahill,* 884 A.2d at 467; *McMann v. Doe*, 460 F. Supp.2d at 269–270. Only statements that assert provably false facts are actionable in defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990). To determine whether a statement asserts a provably false fact, the statement must be viewed in context. *Id.* at 21 (considering "general tenor" of article). "Words have different meanings depending on the context in which they are used and a meaning not warranted by the whole publication should not be imputed." *Peroutka v. Streng*, 116 Md. App. 301, 695 A.2d 1287, 1293 (Md. App. 1997), *quoting Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992). The issue of whether a statement is opinion or fact is one for the Court to resolve as a matter of law, "considering the context of the publication as a whole." *Thomas v. Telegraph Publishing Co.*, 155

N.H. 314, 338-339, 929 A.2d 993 (2007). Moreover, just as readers will anticipate that newspaper commentators "will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere as a news reporting column," *Riley v. Moyed*, 529 A.2d 248, 252 (Del. 1987), so, too, statements on an Internet forum are typically exaggerated and most readers will take them with a grain of salt rather than anticipating complete objectivity. *Global Telemedia Int'l v. Doe 1,* 132 F. Supp.2d 1261, 1267 (C.D. Cal. 2001). The very context thus militates against a finding of defamatory meaning. Here, although the words quoted in the petition certainly sound factual, they might prove, in context, to have been "rhetorical hyperbole," which this Court has held is non-actionable opinion. *Pease v. Telegraph Pub. Co.*, 121 N.H. 62, 65 426 A.2d 463 (1981). MSI's failure to provide the context for those words prevented the trial court, and prevents this Court, from weighing them in context. On remand, MSI should be required to provide the context and address its arguments to that court accordingly.

(4) Require an Evidentiary Basis for the Claims.

Even if the Court concludes that at least one statement is objectively verifiable and hence actionable, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, because it prevents a plaintiff from being able to identify his critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, no relief is generally awarded to a plaintiff until the plaintiff comes forward with **evidence** in support of his

claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark,* California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who are highly respected in their own legal communities have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.,* Werthammer, *RNN Sues Yahoo Over Negative Web Site,* Daily Freeman, November 21, 2000, www.zwire.com/site/news.cfm?newsid =1098427&BRD =1769&PAG=461&dept_id=4969&rfi=8. One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_ reputation. htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdlaw.com/html/ bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id. See Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006) (company represented by the largest and most respected law firm in Philadelphia filed

Doe lawsuit; obtained identity of employee who criticized it online; fired the employee; and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F.Supp. 551, 566-567 (E.D.Mich. 1979). In effect, the plaintiff should be required to present admissible evidence establishing a prima facie case, if not to "satisfy the trial court that he has evidence to establish that there is a genuine issue of fact." regarding the falsity of the publication. *Downing v. Monitor Pub. Co.*, 120 N.H. 383, 387, 415 A.2d 683 (1980); *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.[6]

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based

[6]The Court in *Downing* took comfort from the fact that the plaintiff there was represented by "respected counsel." It is a mistake to adopt a standard that depends on an evaluation of the quality of the lawyers appearing in the case. Less experienced lawyers, and even pro se parties, who are often involved in this sort of case, should be entitled to equal respect before the law.

on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false (in a defamation action) or rests on confidential information (in a suit for disclosure of inside information). Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant.

In this case, for example, assuming that the defamatory statement means, as a matter of fact, that Mr. Gill was accused of fraud in 2002 because he signed borrowers' names to documents, but that he paid money to avoid the consequences of this accusation, there is no reason why Mr. Gill could not prove, such as by an affidavit made on personal knowledge, that he never signed a borrower's name to a loan document or any other document, that he has never been accused of doing that, and that he never paid lawyers to deal with any such accusations. In this case, although the petition submitted below was "verified," the verification was made "to the best of my knowledge, information and belief," App.22, and the petition contains only the conclusory assertion that the brianbattersby statement was "false and defamatory." App.16. Such a sworn negative pregnant does not meet MSI's evidentiary burden, because it is not clear what facts the affiant avers to be false and what facts the affiant avers to be true. Was Mr. Gill denying that he ever signed a borrower's name to a document? Or was he only asserting that circumstances in which he signed a borrower's name did not, in his opinion, make his actions improper? If that is what he meant, what were the circumstances? Or, was he denying that such circumstances, even if improper, ever came to light, or that he ever had to make a payment to avoid the consequences of a discovery? Indeed, notifying the anonymous poster and providing an opportunity to respond might well have resulted in Doe retaining counsel who could have presented argument and evidence showing what transpired in

2002, how the statement should properly be understood, and how there may have been an inadequate showing of falsity.

In this regard, MSI argued below that the First Amendment does not protect defamatory statements and that it is sufficient for MSI to produce evidence that a posted comment was defamatory to warrant overriding the right to make that comment anonymously. App.103-104. citing *Doe v. Cahill*. Although courts do sometimes say in passing that defamatory speech does not enjoy First Amendment protection, they do not mean that the mere fact that speech has a defamatory meaning – or is capable of a defamatory meaning – is sufficient to take it entirely out of the ambit of First Amendment protection. What those courts mean is what the Court said in such cases as *New York Times v. Sullivan*, 376 U.S. 254 (19664) – that **false speech** is not protected by the First Amendment, but that such protections as the actual malice requirement are required to ensure that controversial speech about those who can afford to sue their detractors is not overly deterred by the risk of litigation. *Cahill*, for example, squarely held that proof of falsity was required before the First Amendment right of anonymous speech may be overridden, even if the statements were capable of defamatory meaning.

In this case, for example, if it were true that an officer of a mortgage company has signed the names of borrowers to official documents, the public would have interest in learning that fact, and the First Amendment would protect that assertion, even though disclosure of that fact might have a defamatory meaning. Only by presenting concrete evidence that the statement was false could MSI show that the statement lacked First Amendment value.

(5) Balance the Equities.

Even if, on remand, MSI submits evidence sufficient to establish a prima facie case of

defamation against the Doe,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
>
> *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo.App. 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporter's source disclosure case, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite,* 775 A.2d at 760-761.

See also Independent Newspapers v. Brodie, 966 A.2d at 454; *Mobilisa v. Doe*, 170 P.3d at 720; *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d at 976.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of his case on subjects that are based on information within his own control, there is no basis to breach the anonymity of the defendants. *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without

identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) ("an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"). The requirement that there be sufficient evidence to prevail against the speaker, and sufficient showing of the exhaustion of alternate means of obtaining the plaintiff's goal, to overcome the defendant's interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, such identification is not "necessary."

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction – and not even a preliminary one. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). In some cases, identification of the Does may expose them to significant danger of extra-judicial retaliation.

However, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint. The plaintiff retains the opportunity to renew its motion after submitting more evidence.

On the other side of the balance, the Court should consider the strength of the plaintiff's case

and its interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains. In this case, there is little evidence in the record from which the Court can make a sound assessment of the equitable considerations in the case. For example, given current economic conditions, exposure as a critic of a prominent business person could easily make it harder for the Does to earn a living for their families. If necessary on remand, the trial court should have the opportunity to develop the record and perhaps MSI will be able to make a convincing equitable case for identifying its anonymous critic.

D. The *Dendrite / Mobilisa* Standard Strikes the Right Balance of Interests.

The principal advantage of the *Dendrite*/*Mobilisa* test is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong. In that way, it provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of victims to be compensated for their harms. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice. At the same time, the standard helps ensure that persons with legitimate reasons for criticizing public figures anonymously will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is discovery and the "outing" of anonymous speakers. In the first few years of the Internet, hundreds

or even thousands of lawsuits were filed seeking to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic. Consequently, many lawyers advised their clients to bring such cases without being serious about pursuing a claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's have reported some staggering statistics about the number of subpoenas they received – AOL's amicus brief in the *Melvin* case reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! stated at a hearing in California Superior Court that it had received "thousands" of such subpoenas. *Universal Foods Corp. v. John Doe*, Case No. CV786442 (Cal. Super. Santa Clara Cy.), Transcript of Proceedings July 6, 2001, at page 3.

Although no firm numbers can be cited, experience leads undersigned counsel to believe that the number of civil suits being filed to identify online speakers dropped after *Dendrite* was decided. The decisions in *Dendrite*, *Melvin, Cahill, Mobilisa*, and other cases that adopted strict legal and evidentiary standards for defendant identification sent a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these suits and to occasional libel verdicts against anonymous defendants, as well as the fact that many online speakers are identified in cases that meet the *Dendrite* standards – indeed, two of the Doe defendants in *Dendrite* were identified, as was the defendant in the companion case to *Dendrite*, *Immunomedics v. Doe*, 342 N.J.Super. 160, 775 A.2d 773 (N.J. Super. App. Div. 2001) – has discouraged some would-be posters from indulging in the sort of Wild West atmosphere that originally encouraged the more egregious examples of online irresponsibility, if not outright illegality. The Court should preserve this balance by adopting the *Dendrite* test that weighs the plaintiffs's interest in vindicating their reputations in meritorious cases against the right of Internet speakers to maintain their

anonymity when their speech is not actionable. In this case, that test leads ineluctably to the conclusion that the order compelling Implode to identify brianbattersby should be reversed.

CONCLUSION

The order ordering Implode not to re-post the brianbattersby comments should be reversed. The order to identify brianbattersby should be vacated, and the case should be remanded *with instructions that MSI given the opportunity to provide notice to brianbattersby and to present evidence to the trial court in accordance with the reasoning of the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date I caused two copies of this brief to be served on counsel for the parties to the appeal by their counsel at the following addresses by overnight delivery service:

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