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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

MORDECHAI TENDLER, Plaintiff, v. JOHN DOE,, Defendant.	No. 1 06 cv 064507 **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO QUASH** DATE: September 8, 2006 TIME: 8:30 AM PLACE: Department 7

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This case involves a vague claim of defamation advanced by a defrocked rabbi, who has been expelled from the rabbinical council and fired by his congregation based on serious allegations of sexual abuse, against four bloggers who have commented on the substantial public controversy surrounding his conduct. Rather than filing a defamation action in New York, where he lives, the rabbi found counsel in Dayton, Ohio who filed a conclusory "petition for prelitigation discovery," that alleged no more than that "false, misleading, and defamatory materials" about him had appeared on three blogs, then obtained an ex parte order authorizing discovery to identify the bloggers. After the rabbi failed to obtain the discovery promptly, the petition was dismissed for want of prosecution. At that point, the rabbi found a California attorney who filed an affidavit that attached the Ohio petition and order allowing discovery, but omitted the fact that the petition had

subsequently dismissed; the attorneys' affidavit additionally alleged, falsely, that the Ohio petition had sought discovery to identify **four** bloggers.

Because the rabbi's request for discovery fails to meet the consensus standard for overcoming the First Amendment right to speak anonymously, the Court should quash the subpoena. By a separate motion to strike pursuant to section 425.16 of the Code of Civil Procedure, movants ask the Court to strike the rabbi's action and award the bloggers their reasonable attorney fees.

STATEMENT OF THE CASE

The Internet is 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. Yahoo! and Raging Bull, for example, have separate "message boards" for each publicly traded company.[1/] Many newspapers provide blogs for citizens to discuss particular topics, or the affairs of particular communities.[2/] Google, through its Blogspot division, gives individuals the opportunity to create blogs of their own, on which bloggers can post discussions of current events while leaving it open for visitors to post their own comments. Typically, these

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1/ *See. e.g.*, *Dendrite v Doe,* 342 N. J. Super. 134, 775 A.2d 756 (2005); *Highfields Capital v. Doe,* 385 F. Supp.2d 969 (N.D. Cal. 2005).

2/ *E.g.*, *Doe v Cahill*, 884 A.2d 451 (Del. 2005).

outlets are electronic bulletin board systems where individuals can discuss major companies, public figures, or other topics at no cost by posting comments for others to read and discuss.

The individuals who post messages in such forums generally do so under pseudonyms – similar to the system of truck drivers using "handles" speaking on their CB's. Nothing prevents an individual from using a real name, but the blog at issue here is typical in that most people choose nicknames. These often colorful monikers protect the writer's identity from those who express disagreement, and encourage uninhibited exchange of ideas and opinions. Such exchanges can be very heated; as seen from the blogs at issue in this case, they are sometimes filled with invective and insult, often directed at other posters. Most if not everything said on blogs is taken with a grain of salt.

One aspect of message boards and blogs makes them very different from almost any other form of published expression: Because any member of the public can express a point of view, a person who disagrees for any reason with something that is said – including the belief that a statement contains false or misleading information – can respond immediately at no cost. That response will often have the same prominence as the offending message; or, the target of criticism may establish a rival blog, as some anonymous person has done for the purpose of criticizing those who criticize alleged rabbinical abusers.[3/] A blog is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). The reply can provide facts or opinions to controvert the criticism and persuade the audience that the critics are wrong. And, because many people regularly revisit the blog, the response is likely to be seen by much the same audience as those who saw the original criticism. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, is the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

The four blogs at issue on this subpoena are devoted to issues of sexual and similar abuses directed by rabbis and other authority figures in the Orthodox Jewish community. The

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[3/] *See* http://www.jewishsurvivor.blogspot.com/.

plaintiff/petitioner in this case is Mordechai Tendler, an Orthodox rabbi who until this past spring served a congregation in New Hempstead, New York. Tendler was accused by some of the women in his congregation of abusing his position to have sex with them, such as by telling a woman who was having trouble finding a marriage partner that her problem was that she was too closed to men, and that she needed to have sex with him in order to learn how to open herself up. After several such accusers came forward, Tendler was investigated by a special ethics committee of the Rabbinical Council of America, which in turn hired a private investigations firm to help find the facts. Based on their detailed report, Tendler was expelled from the RCA and, after further controversy, fired by his congregation.

Tendler has fought back against the accusations, claiming that the accusations were brought forward in retaliation for his favorable views on feminist issues, and that he was denied due process; he also filed suit for libel in a rabbinical court in Israel. The debate between his supporters and detractors has raged for years; the controversy has been extensively reported both in the Jewish press and in mainstream media sources such as the New York Post and on television. *See* articles attached to the Dratch Affidavit. (An extensive collection of news reports and other documents about the controversy is available online at http://www.theawarenesscenter.org/Tendler_mordecai.html). The controversy has also been extensively discussed on many blogs, including the four whose authors Tendler seeks to identify: www.rabbinicintegrity.blogspot.com; www.jewishsurvivors.blogspot.com; www.jewishwhistleblower.blogspot.com, www.newhempsteadnews.blogspot..com.

On February 15, 2006, Tendler filed a petition for prelitigation discovery in the Common Pleas Court for Montgomery County, Ohio, invoking Ohio Revised Code § 2317.48 and Rule 34(D) of the Ohio Rules of Civil Procedure. Tendler Exhibit A. The petition was extremely barebones – it stated that Tendler has been the subject of false and defamatory statements on three blogs: www.jewishsurvivors.blogspot.com; www.rabbinicintegrity.blogspot.com, www.newhempsteadnews.blogspot..com. No specific defamatory statements were identified, and no evidence was supplied that any of the postings were, in fact, false. Although Tendler

apparently still lives in New York, Levy Affidavit ¶ 5, the petition did not reveal that Tendler was not from Ohio, and it gave no indication of why the petition was being filed in Ohio. Even though Rule 34(D) requires a party seeking prelitigation discovery to serve his request on the anticipated adverse pasty, no effort was made to notify the bloggers in question that Tendler was seeking to identify them, even though each of the blogs identified in the petition has a "comment" feature that would have allowed Tendler or his counsel to post a comment revealing the intention to seek discovery; and even though two of the blogs contain "profiles" that reveal the operators' email addresses. Nor was the Ohio court informed that this means of contacting the Does existed.[4/]

The Court granted the petition authorizing discovery, Tendler Exhibit B, and Tendler sent Ohio subpoenas to Google, a California company that owns and operates Blogspot. However, Google declined to respond to the subpoena unless it was issued by a California court. Meanwhile, on March 16, 2006, the Ohio court notified Tendler's counsel that his proceeding would be dismissed for want of prosecution unless Tendler explained the reasons for delay. Levy Affidavit, Exhibit 1. Tendler filed a status report on March 29, noting that Google was insisting on a California subpoena, and asserting that counsel had, therefore, obtained a commission for subpoenas in California; the report predicted that compliance would be obtained within twenty-one days. Levy Affidavit, Exhibit 2.[5/] After more than twenty-one more days had passed, the Ohio court dismissed the case on April 25, 2006, without prejudice to reopening. Levy Affidavit, Exhibit 3. The Ohio court's electronic docket reflects that the case was then closed on April 26, 2006. Levy Affidavit, Exhibit 4.

Nevertheless, on May 24, 2006, Tendler filed a new case in this Court, captioned *Mordecai Tendler, Plaintiff, v. John Doe, Defendant*, with an affidavit of his counsel, Patrick Guevara, requesting issuance of subpoenas to identify the operators of the four blogs, and averred,

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[4/] The comment feature has been disabled on jewishwhistleblower.blogspot.com. However, that blogger's email address is posted on his blog's profile; had Tendler alleged in his petition that Jewish Whistleblower had published defamatory material and petitioned for discovery to identify him, he could have notified the Doe of his petition that way.

[5/] There is no indication in the record that this representation was accurate. So far as the record reveals, no California subpoenas were sought until May 2006.

incorrectly, that Tendler had petitioned for leave to take discovery to identify all four bloggers. In fact, although Mr. Guevara obtained a subpoena to identify the operator of www.jewishwhistleblower.blogspot.com, that blog had never been identified in the Ohio petition. The affidavit attached the Ohio order granting discovery, but made no mention of the fact that the case itself had been dismissed.

Google notified the bloggers that subpoenas had been received seeking their identities, and three of the four bloggers – JewishSurvivors; JewishWhistleblower, and NewHempsteadNews – asked undersigned counsel Mr. Levy to represent them in seeking to quash the subpoenas. Mr. Levy contacted Mr. Guevara to notify him of his involvement, and by both voicemail and email told Mr. Guevara that, presumably unknown to Mr. Guevara, the Ohio case had actually been dismissed and hence he had no basis for seeking subpoenas from this Court based on an Ohio order. Levy Affidavit ¶ 3 and Exhibit 5. Mr. Guevara never responded to either the telephone call or the email, but when Mr. Levy called to follow up, he was advised by an assistant that Mr. Guevara was just local counsel and had forwarded Mr. Levy's messages to lead counsel in Ohio. Accordingly, Mr. Levy contacted the Ohio attorney, James Fleisher, to explain his concern. Mr. Levy suggested that Tendler withdraw the subpoenas because they had been obtained through misrepresentation of the status in Ohio, without prejudice to having the Ohio case reopened and new subpoenas being sought. However, Mr. Levy asked for notice so that his clients could oppose the motion. Levy Affidavit, Exhibit 6. Mr. Fleisher represented by an email sent on Thursday, June 15, that the Ohio court's dismissal of the case had been "inadvertent," and that the Court had reopened the case; he therefore claimed that the procedural problem was "moot." Levy Affidavit, Exhibit 7. In fact, Mr. Fleisher's statement was false – no motion to reopen was filed until several days later, on June 19. Levy Affidavit, ¶ 7 and Exhibits 10, 11. Despite the fact that Mr. Fleisher was aware that the Does were represented by counsel and wanted the opportunity to oppose, he did not give notice before seeking reopening, a request submitted **after** Mr. Fleisher represented to Mr. Levy that the case had already been reopened. Levy Affidavit, ¶ 5 and Exhibits 10, 11. Mr. Fleisher did give Google two separate extensions of time for compliance with the subpoena, ow set

to expire on July 14, 2006. Levy Affidavit, Exhibit 9. Because Tendler has nevertheless failed to withdraw his subpoenas voluntarily, defendants now move to quash them.

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, someone claims to have been damaged by an anonymous speaker's tortious speech, 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 seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

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 him 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 anonymous speech but is exposed to the plaintiff's 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 extrajudicial action may be the only reason for many such lawsuits. The record here reveals that there is a significant possibility of retaliation against the Does if they are identified.

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 the relief. And, 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.

Some individuals may speak anonymously because they fear the entirely proper consequences of improper speech, such as the prospect of substantial damages liability if they tell lies about somebody they do not like for the purpose of damaging her reputation. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for vicious defamers to hide behind pseudonyms, nor too easy for a big company or a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

This Court should expand the developing consensus among those courts that have considered this question, by relying on the general rule that only a compelling interest is sufficient to warrant infringement of free speech rights. Specifically, when faced with a demand for discovery to identify an anonymous speaker, a court should (1) provide notice to the potential defendant and an opportunity to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate its rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of its claims, and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing his right to remain anonymous, in 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 its 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 and may delay his quest for redress. However, everything that the plaintiff must do to meet this test, it must also do

to prevail on the merits of its case. So long as the test does not demand more information than plaintiffs will be reasonably able to provide shortly after they file a complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

ARGUMENT

I. The First Amendment Protection Against Compelled Identification of Anonymous Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Watchtower Bible and 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.
> * * *
> 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.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a 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. Accordingly, First Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

Internet speakers speak anonymously for various reasons. They may wish to avoid having their views stereotyped according to their race, ethnicity, gender, or class characteristics. 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 individual speaks for the group. They may be discussing embarrassing subjects and 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. 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 every speaker and discover his or her identity. 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 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. Rights may also be curtailed by means of private retribution following 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 speakers to remain anonymous, justification for incursions 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).

In a closely analogous area of law, courts have developed a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In such cases, many 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 the plaintiff's case; (2) disclosure of the source is "necessary" to prove the issue because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *Dangerfield v. Star Editorial*, 817 F. Supp. 833, 836-837 (C.D. Cal.1993). The California courts have applied a similar analysis. *Mitchell v. Superior Court*, 37 Cal.3d 268, 279-283, 208 Cal. Rptr. 152 (1984).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to defense 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).

II. Applying the Qualified Privilege for Anonymous Speech to Develop a Standard for the Identification of John Doe Defendants.

Several courts have enunciated standards to govern identification of anonymous Internet speakers. The first appellate decision in the country remains the leading case: a company sued four individuals who had criticized it on a Yahoo! bulletin board. *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). The court set out a five-part standard for cases

involving subpoenas to identify anonymous Internet speakers, which the Court should 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 R. 4:6- 2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.

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.

The Supreme Court did not simply reverse the order quashing the appeal, and it did not simply hold that, on remand, the lower appellate court had to decide whether actual economic harm is an element of the cause of action for defamation. Rather, the Supreme Court implicitly accepted the trial judge's analysis of the procedures for deciding whether to order the identification of an anonymous Internet speaker, and remanded for the Superior Court to decide whether one of the elements of "a prima facie case" that a defamation plaintiff must "establish" is the existence of economic harm. 575 Pa. at 278, 836 A.2d at 50. The remand order would not have included this element, which commands production of "evidence," unless, at the very least, the Supreme Court was endorsing the trial court's invocation of a summary judgment standard to decide whether to allow the discovery.

In *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the Delaware Supreme Court became the third appellate court to establish standards for identifying anonymous Internet speakers who are accused of defamation, and as in *Dendrite* and *Melvin*, the Court required an evidentiary showing. The Delaware Superior Court 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.

In addition to these appellate decisions, numerous reported decisions from federal district courts adopt standards similar to either *Dendrite* or *Cahill*. In *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005), in an opinion authored by renowned federal discovery expert Magistrate Judge Wayne Brazil, the court required first that the plaintiff "adduce competent

evidence . . . address[ing] all of the inference of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts." *Id.* at 975. If the plaintiff makes that evidentiary showing, "the court [must] assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant."*Id.* In *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), the Court weighed the limited First Amendment interests of alleged file-sharers but upheld discovery to identify them after satisfying itself that plaintiffs had produced evidence showing a prima facie case that hundreds of songs that defendants had posted online were copyrighted and had been infringed. And in *Alvis Coatings v. Doe*, 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 (a copy is attached to this brief as Exhibit 12) that explained the ways in which certain comments were false.

A similar approach was used 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.[6/]

Although each of these cases sets out a slightly different test, each court weighed plaintiff's interest identifying the people who 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 plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

IV. Procedures That Courts Should Follow in Deciding Whether to Compel Identification of John Doe Defendants in Particular Cases

A. Give Notice of the Threat to Anonymity and an Opportunity to Defend Against the Threat.

First, when asked to subpoena anonymous Internet speakers, a court should ensure that the plaintiff has undertaken the best efforts available to notify the speakers that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendants have had the time to retain counsel. *Cahill*, 884 A.2d at 461; *Seescandy*, 185 F.R.D. at 579. In *Dendrite*, for example, the court required the plaintiff to post on the message board a notice of its application for discovery. The notice identified the four screen names that were sought to be

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[6/] A Connecticut court applied a balancing test to decide whether it was appropriate to compel Time-Warner Cable Co. to identify one of its subscribers, who was accused of defaming the plaintiff. *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Conn. Super. 2003). The Court took testimony from one of the plaintiff's officials, who attested both to the falsity of the defendant's communication and to the damage that the communication has caused, and decided that the evidence was sufficient to establish "probable cause that it has suffered damages as the result of the tortious acts of defendant Doe," at *7, and therefore ordered identification. *See also In re Subpoena to AOL*, 52 Va. Cir. 26, 34, 2000 WL 1210372 (Va. Cir. Fairfax Cty. 2000), *rev'd on other grounds sub nom.*, *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001) (emphasis added): "[The Court must be] satisfied by the pleadings or evidence supplied . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed, and . . . the subpoenaed identity information [must be] centrally needed to advance that claim." A lesser standard was enunciated in *Klehr Harrison Harvey Branzburg & Ellers v. JPA Development*, 2006 WL 37020 (Pa.Com.Pl. Jan. 4, 2006), but the case was settled on appeal.

identified, and gave information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. (The *Dendrite* Order to Show Cause is appended to the Levy Affidavit as Exhibit 13). The Appellate Division specifically approved of this requirement and ordered trial judges in New Jersey to follow it. 342 N.J. Super. at 141, 775 A.2d at 760. Because, in a suit over anonymous speech, preliminary injunctive relief would ordinarily be barred by the rule against prior restraints, and the only relief sought is damages, there is rarely any reason for expedition that counsels against requiring notice and opportunity to object. The purpose of requiring notice to the anonymous defendant and identifying the specific statements alleged to be actionable can be served only by allowing enough time to respond to plaintiff's showing of the basis for disclosure – ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment.

In this case, Google eventually gave notice to the bloggers that their identities were being sought, but in other respects Tendler has deliberately withheld notice from the Does. He did not give them any notice that he was filing a petition for discovery in Ohio, and even after they retained counsel who called attention to the fact that the California subpoenas had been sought on false pretenses by withholding the fact that the Ohio case had been dismissed, Tendler claims to have obtained reopening of the Ohio case but did not give any notice of his request for reopening. Had such notice been given, the Does could have cited Ohio precedent that denies the right to take prelitigation discovery when the plaintiff does not provide " the underlying facts and circumstances" in sufficient detail to support the claimed cause of action. *Bridgestone/Firestone v. Hankook Tire Mfg. Co.*, 116 Ohio App.3d 228, 232, 687 N.E.2d 502, 504 (1996). At the very least, the court should not give any deference to the Ohio court's orders because they were obtained through the deliberate denial of notice and an opportunity to oppose.

B. Require Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, courts should require plaintiffs to quote the exact statements by each anonymous speaker

that are alleged to have violated its rights. It is startling how often plaintiffs in these sorts of cases do not bother to do this. Instead, they may quote messages by a few individuals, and then demand production of a larger number of identities. Or, as in this case, they may not identify even a single allegedly defamatory statement; and even in the general terms in which the Ohio petition for discovery was framed, Tendler alleged that he had been defamed on only three identified blogs – www.jewishsurvivors.blogspot.com; www.rabbinicintegrity.blogspot..com, www.newhempsteadnews.blogspot..com – but he has obtained subpoenas to identify a fourth blogger as well, the operator of www.jewishwhistleblower.blogspot.com. Moreover, specification of the allegedly defamatory statements will be needed so0 that the Court can determine whether any of them are actionable, an issue discussed int eh next section of this memorandum.

C. Review the Facial Validity of the Claims After the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable. In this regard, Tendler's contention that he has been defamed appear dubious, particularly without knowing precisely which statements on the blogs are alleged to be false and defamatory. To be sure, the subject of the blogs is quite serious, inasmuch as Tendler has been accused by several women of highly improper behavior. Yet it is equally true that some apparently neutral bodies have taken action against Tendler based on those accusations, presumably because they thought there was good reason to believe the truth of the accusations, and all the bloggers have done is report on the controversy, post original documents and news reports from the controversy, and express their opinions about who is right and who is wrong. Even assuming that Tendler denies the accuracy of the accusations against him, there are several respects in which he may have great difficulty alleging a tenable claim for defamation against the bloggers.

First, many defamation cases are derailed by the rule that expressions of opinion are not actionable for defamation, and the issue of whether a statement is opinion or fact is one for the Court to resolve as a matter of law. *Carver v. Bonds*, 37 Cal. Rptr.3d 480, 494+, 135 Cal. App.4th 328, 346 (Cal. App. 1 Dist. 2005). "Under the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1990). Although the Supreme Court redefined

this dictum somewhat in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the First Amendment nevertheless protects against libel claims based on opinions that do not imply false statements of fact, or on loose, figurative or hyperbolic language, *Carver v. Bonds*, *supra*; there is certainly a good deal of such language on the blogs at issue. Moreover, Ohio recognizes a broader exception to the libel laws for opinion that is protected under its state constitution *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280-281, 649 N.E.2d 182 (Ohio1995).

Second, Tendler is at the very least an involuntary public figure with respect to the charges that have been swirling around him for the past several years, which have been extensively reported in both the Jewish and the secular press and which have resulted in at least one lawsuit, *see* Dratch Affidavit, ¶ 10 and attached exhibit; Levy Affidavit, Exhibit 14. Moreover, as the scion of an extremely prominent rabbinical family, not to speak of being the rabbinical leader of a congregation and, by his supporters' accounts, an active proponent of proposals concerning the treatment of women, as well as being a plaintiff in other lawsuits concerning the controversy, Blau Affidavit ¶ 8; Dratch Affidavit, ¶ 8, Tendler is a voluntary limited purpose public figure. Under the First Amendment, he must allege and prove actual malice in order to succeed in his libel claim, but his conclusory petition for discovery does not contain assertion that the bloggers made false statements with knowledge or their falsity or reckless disregard of probably falsity.

Third, the blogs at issue here have been online since early 2005 or late 2004, but the Ohio statute of limitations for libel suits is one year. O.R.C. § 2305.11(A). Indeed, the most recent posting to the JewishWhistleblower blog was in July, 2005. Although the blogs have remained online, and even early comments can still be viewed today, the single publication rule applies to Internet web sites. *Oja v. Army Corps of Engineers*, 440 F3d 1122 (9th Cir. 2006). Until Tendler specifies the statements on which he thinks he has actionable libel claims, the Court cannot determine whether he has any timely claims.

Fourth, because this case involves Internet blogs, which include both comments posted by visitors rather than the bloggers themselves, and also include blogger repostings of communications received from others, the Communications Decency Act may afford liability from

suit based on some of the postings. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). Again, until Tendler identifies the particular language on which he purportedly plans to sue, the Court will be unable to determine whether his claims could survive a motion to dismiss.

D. Require an Evidentiary Basis for the Claims.

Fourth, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of the cause of action to show a realistic chance of winning a lawsuit against each Doe defendant. The requirement of presenting evidence prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need identification of defendants simply to proceed with the case. However, identification of an otherwise anonymous speaker is itself a major form of relief in cases like this one, and relief is generally not awarded to a plaintiff absent evidence in support of the claims. Withholding relief until evidence is produced is particularly appropriate where the relief 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 bring cases like this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. E.g., http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id =74969&rfi=8. In a recent case, a major Pennsylvania energy company filed a John Doe case against an employee who had criticized it on a Yahoo! message board on theories that would not have withstood a motion for summary judgment; obtained a subpoena and thereby the poster's identifying information; dismissed the lawsuit; and fired the employee. *See Swiger v. Allegheny Electric*, No. 05-5725-JCJ (E.D. Pa.).

One leading advocate of discovery procedures to identify anonymous critics urges corporate executives to use discovery first, and to decide whether to pursue a libel case only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation*

Online; available at http://www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault* , available at http://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 and Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers similarly suggest that clients decide whether to pursue a defamation action only after finding out who the defendant is. *Id.*

As Eisenhofer and Liebesman acknowledge, the mere pendency of a subpoena may have the effect of deterring other members of the public from discussing the person who has filed the action. However, imposing a requirement that proof of wrongdoing be presented to obtain the names of the anonymous critics may well persuade plaintiffs that such subpoenas are not worth pursuing unless they are prepared to pursue litigation.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources that require a party seeking discovery of information protected by the First Amendment to show 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 meet a summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues on which it needs to identify the anonymous speakers, before it gets the opportunity to obtain their identities. *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.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no need to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir.

1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The requirement that there be sufficient evidence to prevail against the speaker to overcome the 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, it can scarcely be said that such identification is "necessary."

Although the Does doubt that Tendler will be able to meet this evidentiary requirement, we refrain from further comment pending submission of such proofs.

E. Balance the Equities.

Even after the Court has satisfied itself that the speaker has made an actionable statement,

> 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 reporters' source disclosure case, *Dendrite* called for individualized balancing when a plaintiff seeks to compel identification of an anonymous Internet speaker:

> 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.
>
> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.

The adoption of a standard comparable to the test for evaluating a request for a preliminary injunction – considering the likelihood of success and balancing the equities – is particularly appropriate because an order of disclosure is an injunction, and denial of a motion to

identify the defendant does not compel dismissal of the complaint, but only defers its ultimate disposition. Apart from the fact that, under *New York Times*, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters," *Gertz v. Welch*, 418 U.S. 323, 341 (1974), the issue at this stage of the case is not whether the action should be dismissed or judgment granted rejecting the tort claims in the complaint, but simply whether a sufficient showing has been made to overcome the right to speak anonymously. *See also Highfields Captial Mgmt. v. Doe*, 385 F. Supp.2d 969, 975 (N.D. Cal. 2005) ("court [must] assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant"). In the analogous context of an order seeking the identification of a reporter's sources, the California Supreme Court expressly provided for a balancing stage in addition to the three factors considered by the federal courts in such cases as *Carey v. Hume* and *Shoen v Shoen*. *Mitchell v. Superior Court*, *supra*, 37 Cal.3d at 282-283

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to a motion to dismiss or a motion for summary judgment. At the very least, plaintiffs retain the opportunity to renew their motion after submitting more evidence.

In contrast, 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. And it is settled law that any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). Indeed, the injury is magnified where the speaker faces the threat of economic or other retaliation. If, for example, the person whom the plaintiff seeks to identify is employed by someone over whom the plaintiff exercises influence or control, the defendant could lose a great deal from identification, even if the plaintiff has a wholly frivolous lawsuit.

In some cases the defendant has real reason to fear the economic or other consequences of being identified, and the record in this case suggests that there is a very real danger of retaliation

if they are identified. As shown by the Dratch and Blau affidavits, and by the sources attached to or cited in them, there are community norms in the Orthodox Jewish community that disapprove of criticizing leaders, and particularly of making those criticisms outside the community in ways that bring Jews or Judaism into disrepute. Those who violate those norms can be formally excommunicated. Moreover, powerful and well-connected individuals – and the record discloses that Tendler is very well-connected – can convene tribunals of their friends to brand critics as having deviated from community norms; there is no avenue of appeal from these rulings. With or without official rulings, critics and their families can be shunned, even deprived of their livelihoods because many Orthodox Jews work for businesses that run by fellow Orthodox, or that depend on Orthodox customers. And those who speak out often face personal harassment such as late night phone calls, vandalism, and or run businesses that are dependent on customers from the community. Rabbi Blau notes that the Tendler family is notorious for playing hardball with its critics. Therefore, amici urge the Court to embrace the *Dendrite* approach that treats a discovery ruling as an equitable issue, and to consider the very real danger of retaliation in deciding whether to grant discovery in this case.

IV. Dendrite's Flexible Standard Discourages Frivolous Lawsuits While Allowing Genuine Cases to Proceed.

The main advantage of the *Dendrite* test is its flexibility. The test seeks to balance the relative interests of the plaintiff who claims that her reputation has been unfairly besmirched against the interest in anonymity of the Internet speaker who claims to have done no wrong, and 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 tort victims to be compensated for their losses. 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, while ensuring at the same time that persons with legitimate reasons for speaking anonymously while making measured criticisms will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed 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 defamation 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 reported staggering statistics about the number of subpoenas they have received – AOL's amicus brief in *Melvin v. Doe* reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! told one judge at a hearing in California Superior Court that it had received "thousands" of such subpoenas.

Although we have no firm numbers, amici believe that the adoption of strict legal and evidentiary standards for defendant identification in this case, like those adopted by courts in other states, will encourage would-be plaintiffs and their counsel to stop and think before they sue, and to ensure that litigation is undertaken for legitimate ends and not just to chill speech. At the same time, those standards have not stood in the way of identifying those who face legitimate libel and other claims.

We urge the Court to preserve this balance by adopting the *Dendrite* test that balances the interests of defamation plaintiffs to vindicate their rights in meritorious cases against the right of Internet speaker defendants to maintain their anonymity when their speech is not actionable.

CONCLUSION

The subpoenas to identify defendants should be quashed

Respectfully submitted,

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