COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MOBILISA, INC., A Washington Corporation,	)	
	)	**Court of Appeals**
Plaintiff-Appellee,	)	**Division One**
	)	**No. 1-CA-CV 06-0521**
v.	)	
	)	**Maricopa County**
JOHN DOE 1 and	)	**Superior Court**
THE SUGGESTION BOX, INC.,	)	**Cause No. CV2005-**
	)	**012619**
Defendants-Appellants.	)	

BRIEF OF PUBLIC CITIZEN AND ELECTRONIC FRONTIER FOUNDATION AS AMICI CURIAE

Paul Alan Levy
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Corynne McSherry
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, California 94110-1914
(415) 436-9333

John P. Flynn
Tiffany & Bosco, P.A.
Camelback Esplanade II, Third Floor
2525 East Camelback Road
Phoenix, Arizona 85016
(602) 255-6020

Attorneys for Amici Curiae

September 26, 2006

TABLE OF CONTENTS

This case presents a legal question that has increasingly troubled the state and federal courts – what standard should govern discovery sought at the outset of a case to identify anonymous Internet speakers whose anonymous speech allegedly violates plaintiffs' rights? Resolution of this question requires the courts to balance the right of anonymous speech, which is guaranteed by the First Amendment as well as the Arizona Constitution, against the right to judicial redress of a person who claims to have suffered legally cognizable harm. Amici file this brief, not to advance the interest of either party to this appeal, but to argue for a manner of analysis and to urge that, regardless of how this Court rules as between the parties, it should join the growing consensus among appellate and trial courts around the country that a would-be plaintiff should not be able to obtain the identity of anonymous Internet speakers for no more than the cost of hiring a lawyer and filing a complaint.

INTEREST OF AMICI CURIAE

Public Citizen is a public interest organization based in Washington, D.C., which has approximately 100,000 members, nearly 2000 of them in Arizona. Since its founding by Ralph Nader in 1971, Public Citizen has urged citizens to speak out against abuses by a variety of large institutions, including corporations, government agencies, and unions, and it has advocated a variety of protections for the rights of consumers, citizens and employees to encourage them to do so. Along with its efforts to encourage public participation, Public Citizen has brought and defended numerous

cases involving the First Amendment rights of citizens who participate in public debates.

In recent years, Public Citizen has watched with dismay as an increasing number of companies have used litigation to prevent ordinary citizens from using the Internet to express their views about the manner in which companies have conducted their affairs. In recent years, Public Citizen has represented consumers, *Bosley Medical Institute v. Kremer*, 403 F.3d 672 (9th Cir. 2005), workers, *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.), investors, *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.); and other members of the public, *Taubman v. WebFeats,* 319 F.3d 770 (6th Cir. 2003), who were sued for criticisms they voiced on the Internet. *See generally* http://www.citizen.org/litigation/ briefs/internet.htm. In these and other cases, companies have brought suit without having a substantial legal basis, hoping to silence their critics through the threat of ruinous litigation, or by using litigation to obtain the names of critics with the objective of taking extra-judicial action against them (such as by firing employees found to have made critical comments). Public Citizen has represented Doe defendants or appeared as amicus curiae in several cases in which subpoenas have sought to identify anonymous posters on Internet bulletin boards or web sites. *Doe v. Cahill*, 884 A.2d 451 (2005); *Fitch v. Doe*, 869 A.2d 722,

2005 ME 39 (Me. 2005); *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (2003); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001); *Donato v. Moldow*, No. BER-L-6214-01 (N.J. Super. Bergen Cy.); *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.); *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.); *iXL Enterprises v. Doe, No.* 2000CV30567 (Ga. Super. Fulton Cy.); *Thomas & Betts v. John Does 1 to 50*, Case No. GIC 748128 (Cal. Super. San Diego Cy.); *Hritz v. Doe,* C-1-00-835 (S.D. Ohio); *WRNN TV Associates v. Doe*, CV-00-0181990S (Conn. Super. Stamford); *In re Jimmie Cokinos*, No. B-172,785 (Tex Dist Ct, Jefferson Cy.); *Tendler v. Doe*, No. 1 06 cv 064507 (Cal. Super. Santa Clara Cy.).

Amicus Electronic Frontier Foundation ("EFF") is a donor-supported membership organization working to protect fundamental rights regardless of technology; to educate the press, policymakers, and the general public about civil liberties issues related to technology; and to act as a defender of those liberties. EFF currently has over 11,000 dues-paying members. Among its various activities, EFF opposes misguided legislation, initiates and defends court cases preserving individuals' rights, launches global public campaigns, introduces leading edge proposals and papers, hosts frequent educational events, engages the press regularly, and publishes a comprehensive archive of digital civil liberties information on the

most linked-to web sites in the world at www.eff.org. EFF is particularly concerned with protecting the rights of individuals to speak anonymously, on the Internet or otherwise, and regularly advises and defends individuals around the country whose free speech rights are threatened.

STATEMENT OF THE CASE

Protection for the right to engage in anonymous communication is fundamental to a free society. Moreover, this right receives the same protection whether the anonymous communication is a political leaflet or an email. 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.*

This case arose from an anonymous email that was sent to several email addresses of executives of Mobilisa, a software development company based in Port Townsend, Washington. The complaint and the affidavit supporting immediate discovery both stressed Mobilisa's role in providing mobile and wireless systems for the government and the military, and the classified information that is stored by Mobilisa. The complaint charges that defendant John Doe, an unknown person, gained unauthorized access to unspecified information on a Mobilisa email account, intercepted an unidentified email containing sensitive albeit nonclassified information from a Mobilisa executive, and redistributed that email to other persons within Mobilisa using the services of an Arizona-based company called "The Suggestion Box," which enables member of the public to send email anonymously. Although the email itself has not been placed in the record, the papers filed by the parties reveal that the "sensitive information" was a communication from Mobilisa's married CEO, Nelson Ludlow, to his lover, one Shara Smith, and that the anonymous defendant sent an almost identical version of the email, apparently with a spelling error, to several email addresses of other Mobilisa staff with the comment, "Is this a company you want to work for?"

Mobilisa's security staff conducted an analysis of its electronic systems but was not only unable to identify the source of the breach, but could not confirm that there

had been a breach of Mobilisa's systems. However, Ludlow swore that he had sent the email only to some of his own addresses and to Smith's address, and had not redistributed the email to anyone else.

Mobilisa filed suit against "John Does 1-10" in Washington state court alleging that Doe had obtained the email from Mobilisa's system without authorization in violation of two federal statutes – the Stored Communications Act, 18 U.S.C. § 2707, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 – and the state-law tort of trespass to chattels. Neither Ludlow, the sender of the purloined email, nor Smith, its recipient, joined in the action as plaintiffs.

Because it could not effect service on Doe without identifying him and ascertaining his address, Mobilisa obtained a commission from the state court in Washington to obtain a subpoena from the Arizona courts, to compel Suggestion Box to provide information identifying the person who had used its services to send the purloined email. Suggestion Box objected to the subpoena, and Mobilisa responded by filing a motion for leave to take discovery, attaching an affidavit from Ludlow asserting that, because neither he nor Smith had provided the email to anyone, or authorized anyone to obtain access to their email accounts, the person who had sent the email must have obtained it from Mobilisa's servers in violation of federal law. Moreover, Ludlow averred that his security staff had investigated the source of the

leak but had been "unable to identify the security breach"; in a supplemental affidavit, Ludlow averred that Smith's own email provider had searched for the email on its servers but was unable to locate it. Accordingly, Mobilisa contended that it needed the court's assistance to identify the culprit, and because Suggestion Box's privacy policy warned users that it might have to reveal their identities when necessary to comply with a court order, it asked the court to issue such an order to identify the person who had sent the purloined email to Mobilisa staff email accounts.

Suggestion Box opposed this motion, arguing that its anonymous users' rights under the First Amendment and the Arizona Constitution barred discovery seeking to identify an anonymous speaker unless there was evidence sufficient to establish genuine issues of fact on each of the elements of the cause of action alleged against the speaker. Suggestion Box argued that the evidence of wrongdoing was too equivocal to support compelled identification of its user. For example, Suggestion Box argued, it remained possible that the email had been purloined from an email account other than on the Mobilisa's servers – for example, the private email accounts of Ludlow or Smith.

The Superior Court entertained oral argument on the motion for discovery and ruled that the First Amendment required application of the standard adopted by the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451 (2005), requiring plaintiff

to present enough evidence to survive a motion for summary judgment before permitting it to breach the defendant's right to maintain the anonymity of its speech. Rather than denying the motion outright, however, the court below deferred ruling to give plaintiff the opportunity to present additional proof of defendant's wrongdoing. The court below, having noticed Mobilisa's failure to notify Doe of its efforts to identify him (such as by sending an email to him via Suggestion Box), directed Suggestion Box itself to attempt to contact Doe.

At this point, Mobilisa submitted an additional affidavit from Ludlow, specifically denying that he had given anybody access to his private email accounts. He admitted that he had printed out the email but averred that he had destroyed the printed version. Mobilisa also submitted an affidavit from Smith herself, likewise averring that she had never given or sent the email to anyone, and that although she too had printed out the email before deleting in from her email box, she had destroyed the printed version about a day after printing it. Smith averred that she had deleted the email from her personal account a few hours after receiving it, which, according to Mobilisa, tended to show that the email could not have been obtained from Smith's own email account. In addition, on January 13, 2006, Suggestion Box sent an email message to Doe, notifying him that Mobilisa had sued him and was trying to obtain Doe's identity. When Doe did not respond to this email or enter an appearance,

Mobilisa argued that the Superior Court should grant discovery because the Doe had not entered any appearance to oppose the subpoena.

Suggestion Box continued to maintain that the evidence was insufficient to negate the possibility that Doe had purloined the email from some source other than Mobilisa's own computer system. After Suggestion Box had prepared its opposition, a person identifying himself as John Doe contacted Suggestion Box's counsel Charles Mudd and denied having obtained the email from Mobilisa's system. Mr. Mudd then submitted an affidavit in which he stated that he had agreed, with the consent of his client Suggestion Box, to represent this person in opposition to the subpoena. Purporting not to waive Doe's attorney-client privilege, counsel nevertheless proceeded to recount under penalty of perjury statements that Doe had made to counsel. According to Doe's statements recounted by counsel, Doe stated that he had not known of the litigation until February 9, 2006, when he looked at the email account to which the January 13 email had been sent. Doe expressly denied having obtained access to Mobilisa's computer systems, or taking the purloined email from that system, but asserted his desire to remain anonymous, although he did not give any particular reason why being identified could harm him. Doe's recounted statements did not expressly state whether he was the person who had sent the purloined email to the various Mobilisa email accounts, or explain how he had

obtained the email; nor did the recounted statements explain why the email had been sent on to the Mobilisa email accounts. However, Doe asked for leave to submit a brief arguing against an order compelling his identification.

Mobilisa argued that the Mudd affidavit was entirely hearsay and that, in any event, Doe had merely succeeded at creating issues of fact about whether Doe had improperly accessed the Mobilisa email system or whether some other person close to Doe had done so. Mr. Mudd submitted a memorandum on behalf of both "John Doe 1" and Suggestion Box, presenting further argument in opposition to discovery, which apparently crossed in the mail with the Superior Court's ruling.

The court below ruled that the evidence submitted by Mobilisa was sufficient to show, or to imply through reasonable inferences, that "the email information in questions was, more likely than not, wrongfully obtained." The court did not explain this conclusion or even state that it had concluded that the information was wrongfully obtained from **Mobilisa**'s computer system. The court also did not indicate whether it had given any weight to the affidavit from counsel describing the statements from John Doe 1. In any event, the Court granted Mobilisa leave to obtain discovery of Doe's identity from Suggestion Box. Both Suggestion Box and Doe sought permission to appeal the ruling, and sought a stay of discovery pending a ruling on appeal.

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 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 provides 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. 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 would-be plaintiffs' lawyers to potential clients, demonstrate that access to identifying information to enable extrajudicial action may be the only reason for many such lawsuits.

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 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.

The 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. Two major approaches have emerged in the cases. Several courts, led by New Jersey's intermediate court of appeals in *Dendrite v. Doe*, have followed a five-step approach when faced with a demand for discovery to identify an anonymous speaker. Under *Dendrite*, 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. A second major approach, adopted by Delaware in *Doe v. Cahill*, eliminates the final "balancing" stage and allows discovery once plaintiff shows that it has enough evidence supporting its claims to survive a motion for summary judgment. In this brief, amici explain why the *Dendrite* approach is preferable, but the most important point is that the courts

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 should reasonably be 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 provides any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. 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. 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 discuss 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. On the other hand, some people may speak anonymously because they know what they are saying or doing is actionable and they want to avoid being held legally responsible for their delicts. A rule that makes it too hard to identify anonymous speakers is also inappropriate.

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 threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the right to speech, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. 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). Moreover, the free speech provision of the Arizona Constitution, art 2, § 6, has repeatedly been given a broader construction than the First Amendment. *Mountain*

States Tel. & Tel. Co. v. Arizona Corp. Com'n, 160 Ariz. 350, 354-355, 773 P.2d 455, 459-460 (1989). Unlike the federal constitution, the Arizona Constitution expressly protects the right of privacy, which extends protection to the right to remain anonymous. *Id.*, 160 Ariz. at 357, 773 P.2d at 462 n.13, citing Arizona Constitution art. 2, § 8..

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). *See also* Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 Ariz. L. Rev. 815, 850 (1984) ("It is now well established in all

federal circuits and in most states that journalists have a qualified privilege to refuse to disclose confidential sources when requested in civil litigation.").

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 this Court should apply here:

> 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:

> [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.

836 A.2d at 50.

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 economic harm is one of the elements of "a prima facie case" that a defamation plaintiff must "establish." 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. The *Cahill* court followed *Dendrite* in many respects, but even though the case did not require a decision on the fifth and final step of *Dendrite*, which calls for a final balancing of the equities of the case, the court

went out of its way to reject that step. The only explanation given for this position was that the fifth step is "unnecessary. The summary judgment test is itself the balance. The [balancing] requirement adds no protection above and beyond that of the summary judgment test and needlessly complicates the analysis." 884 A.2d at 461.

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 inferences 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 message boards only after considering a detailed affidavit that explained the ways in which certain comments were false. The most recent federal district court ruling on this subject is *Best Western Int'l v. Doe*, 2006 WL 2091695 (D Ariz. July 25, 2006), where Judge Campbell refused to enforce a subpoena to identify the authors of several postings by Best Western franchisees that criticized the Best Western motel chain, because, at the very least, 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; although the court did not choose between *Cahill* and *Dendrite*, it implied that a showing that plaintiff had enough evidence could survive a motion for summary judgment might not be sufficient to obtain discovery depending on the findings with respect to the other factors in the test. *Id.* at *5.

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.[1/]

[1/] A Connecticut court applied a balancing test to decide whether it was appropriate to compel Time-Warner Cable 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): ("[The Court must be] satisfied by the pleadings or evidence

A lesser standard was adopted by the Wisconsin Supreme Court in *Lassa v. Rongstad*, 718 N.W.2d 673 (2006), a non-Internet case in which a political candidate sued a political organization over a leaflet, written by several unidentified members, that denounced the candidate for her relationship with a recently indicted political leader. After the known defendant was sanctioned for lying under oath to avoid giving information identifying, the parties settled the case on terms that allowed the defendant to appeal. On appeal, he presented on argument not made below that the court should have considered his motion to dismiss the complaint before ruling on the pending discovery motions, while several amici argued more that the constitutional dimension of the discovery, namely the *Cahill* standard, required addressing the motion to dismiss first. The Court expressed acknowledged the concerns raised in *Cahill* but declined to adopt the *Cahill* test because the court concluded that the degree of specificity required by Wisconsin's pleading rules was sufficient protection against meritless litigation against anonymous speakers, and hence trial courts in Wisconsin should apply a motion to dismiss standard. *Id.* at 685-687. The decision

---

> 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.

may merit less consideration, however, because of the peculiar procedural posture of an appeal from a sanctions ruling.

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 legitimate basis for piercing the speaker's anonymity.

III. 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 the target of discovery, and gave 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 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, Doe eventually received the email that Suggestion Box has sent him pursuant to the order of the court below, but it appears that the Doe did not check the specific email account that was connected to his Suggestion Box email. In the experience of amici, the multiplicity of email addresses and the infrequency with which users check particular accounts – or even cancel their accounts years after registering with a particular address – frequently impedes effective notice. This

sequence shows how important it is to ensure that the plaintiff uses its best efforts to provide notice, and then to require adequate time for a response. Although the court below did not indicate whether it gave consideration to affidavit of Doe's counsel, in amici's view it would have been error to have refused to consider that submission given the practicalities of giving electronic notice. Although amici extend their praise to Suggestion Box for asserting the anonymity rights of its client, the sequence of events might imply that Suggestion Box did not itself provide notice to Doe after it received the subpoena. Court that are considering subpoenas of this sort should certainly engage with counsel for the Internet Service Provider to encourage or even direct them to give notice where possible.[2/]

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

---

[2/] Appellants argue that, because Mobilisa never sent its own email notifying Doe of the litigation, reversal is warranted for failure to comply with this aspect of the *Dendrite* and *Cahill* tests. The purpose of the text, however, is to achieve practical protections for Internet speakers. Whatever the source of the notice, once Doe appears and is given sufficient time to response so that his objections may be considered, that should be sufficient under the first prong of the test. The Internet Service Provider ("ISP") should be reimbursed by the plaintiff for any costs incurred in providing such notice.

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.

Given the unusual claims brought here, the precise contents of the email are irrelevant, because the gravamen of the charge is improper access to the email rather than the actionability of its contents. Perhaps, also, the contents of the email may not have been placed in the public record to spare the sender and recipient public attention to its apparently seamy contents. Moreover, now that Doe has entered an appearance, it appears that both sides know precisely which email is at issue, and the Court is entitled to assume that the each side has made a tactical decision not to put the text in the record, even under seal.

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

Third, the court should review each claim in the case to determine whether it is facially actionable. When a claim is based on the contents of the statements, as in a defamation case for example, this stage may be particularly significant. For example, 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. *Yetman v. English,* 168 Ariz. 71, 811 P.2d 323 (1991) "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.

Here, by contrast, the language of the email is not what makes the conduct alleged in the complaint actionable, and it appears to be common ground between the parties that the complaint states a claim with respect to the two federal statutes alleged there.

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. The company 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."

On the other hand, the requirement of establishing a sufficient factual case to withstand summary judgment should not ignore the fact that the plaintiff is only beginning to pursue the case, and lacks the ability to obtain discovery from the defendant. In the typical defamation case, for example, where the plaintiff is a public figure that must show actual malice, a plaintiff will often not be able to show knowledge that a statement was false, or reckless disregard of probable falsity, without being able to identify the defendant and take his deposition to show what the defendant knew or believed at the time of the challenged statements. Thus, several courts in anonymity cases have suggested that the requirement of showing a prima facie case does not extend to the "actual malice" element of this claim.

In this case, Suggestion Box, joined eventually by the anonymous defendant, argued that Mobilisa's factual showings had not ruled out the possibility that the Doe obtained the email without any unauthorized access to Mobilisa's computers – for example, it could have come from the systems on which both Ludlow and Smith kept their personal email accounts. This admittedly technical argument depends on the fact that only Mobilisa, but not the individual sender and recipient of the emails, is the plaintiff in this case, and hence Mobilisa would have no standing to complain about the interception of email on some other company's system. There would have

been a stronger case for discovery if Ludlow and/or Smith were plaintiffs. Moreover, as Suggestion Box argued below, the fact that Mobilisa's security staff carefully reviewed the records of its computer system and were unable to find any evidence of access to the email on Mobilisa's servers suggests that whatever the means of purloining the email were, they did not involve the illegality that is alleged in the complaint. On the other hand, taken together the affidavits of Ludlow and Smith make clear that they did not willingly provide the email, and it may be plaintiff's inability to depose Doe that is responsible for plaintiff's inability to pinpoint the precise means by which the email was obtained.

Appellants also object to Mobilisa's failure to produce evidence of damages or improper intent. It is true that the Computer Fraud and Abuse Act is not violated unless the plaintiff either obtains a thing of value, 18 U.S.C. § 1030(a)(4), or causes at least $5,000 worth of damages, 18 U.S.C. § 1030(a)(5), and there is no reason why plaintiff should be unable to present evidence of damages if damages **were** caused. For example, in *Dendrite*, it was the plaintiff's failure to present evidence of damages, which was an element of the New Jersey cause of action for libel, that barred discovery, and in *Melvin*, the Pennsylvania Supreme Court remanded for consideration of whether actual damage was an element of Pennsylvania's libel cause of action. Similarly, actual injury is an element of the cause of action for trespass to

chattels. *Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1351, 71 P.3d 296, 302-303, 1 Cal. Rptr.3d 32, 40 (Cal. 2003), citing the Restatement (Second) of Torts § 218. However, actual damages is not an element of either the Stored Communications Act claim, and a showing in support of least one cause of action will suffice to allow discovery. Plaintiff's failure to present explicit evidence on the subject of intent should not bar discovery, because ordinarily a plaintiff will require discovery to obtain such evidence. The same result obtains when discovery is sought to identify the defendant in a libel case – courts do not ordinarily require the plaintiff to come forward with evidence of actual malice, which often depends on knowing the identity of the defendant and taking his deposition or obtaining documentary discovery. *Doe v. Cahill*, *supra*, 884 A.2d at 464.

E. Balance the Equities.

Even after the Court has satisfied itself that there is evidence that the speaker has made an actionable statement or undertaken actionable conduct,

> 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 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. 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 Capital 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").

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. Counsel employed by amici have represented

several anonymous speakers who, because they were employed by the person they were criticizing, or because the targets of their criticism were important public officials with ample discretion with which to retaliate, had every reason to fear the extra judicial consequences of identification. An advantage enjoyed by the *Dendrite* analysis, compared to the *Cahill* approach, is that it permits courts to take such considerations in to account in deciding whether to compel identification of an anonymous Internet user.

Hypothesize, for example, an international libel suit filed in the United States by a foreign despot over a web site maintained by emigrees about abuses in their homeland, and a subpoena to identify the sponsors of the web site whose family remains in the home country, who could suffer serious retaliation if the names of the web site operators were revealed. At a time when the press are up in arms about the conduct of American-based Internet companies which, some believe, have too readily turned over identifying information about Chinese dissidents, surely American law should be structured so that the same result cannot be obtained by filing a John Doe case here at home. Yet even an affidavit made under penalty of perjury would not have significant consequences for an individual abroad who is beyond effective prosecution for perjury. By invoking the balancing portion of the *Dendrite* analysis, a court could respond to the equities presented by the danger of retaliation by, for

example, requiring a more exacting showing of the facts required to establish a prima facie case, or by insisting on live testimony.

The balancing stage of the case does not only protect the Doe defendant. In *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), for example, when there was an objection to subpoenas seeking to identify alleged "file-sharers" who has posted copyrighted sound recordings on their computers for others to download, the court took into account the limited First Amendment value of posting material copyrighted by others in deciding that a relatively superficial and conclusory showing of infringement was a sufficient basis for compelling the identification of the file sharers. In a case such as *Biomatrix v. Costanzo*, Docket No. BER-L-670-00 (N.J. Super., Bergen Cy.), where the poster alleged that the head of a biotech company was a doctor who had collaborated with the Nazis in heinous medical experiments, or *Hvide v. Doe*, Case No. 99-22831 CA01 (Fla. Cir. Ct, 11th Judicial Cir., Dade Cy.), where a poster claimed that the head of the company had embezzled corporate funds, and the plaintiff lost his job as a result of the claims, or *HealthSouth Corp. v. Krum*, Case No. 98-2812 (Pa. Ct. C.P. 1998), where the poster claimed that he was having an affair with the CEO's wife, a court will have little difficulty in recognizing a real tort case and weighing the plaintiff's interest in disclosure quite heavily.

Here, there are no unusually strong equities on either side of the case. If the plaintiff here were Ludlow rather than Mobilisa, the privacy interests implicated by the conduct alleged on the complaint might well make a strong case for relief. But that is not the complaint that was filed; instead, the plaintiff is the company itself, which alleges a highly technical statutory violation that does not depend at all on the contents of the communication, and no evidence has been presented to show actual damage or harm. As for the Doe defendant, the gravamen of the complaint here, as in *Sony Music*, is that Doe redistributed an email that someone else wrote. In some circumstances, "blowing the whistle" on wrongdoing shown by another person's writings might have high First Amendment value in an appropriate case. But, although the cover note suggesting that the sender questions whether the email shows that there is some reason not to work at Mobilisa, Doe has not placed anything in the record to support the inference that there was some relevant whistleblowing reason for having disseminated the email. The Court is left, therefore, with a case in which a private email has been obtained and distributed with little more to explain the action.

Before Doe entered the case, Suggestion Box speculated that Doe might have reason to worry about extra-judicial retaliation, such as being fired if Doe works at Mobilisa, from having his identity disclosed. However, Doe has now entered an

appearance in the case and yet provided no such reason for non-disclosure, which might have increased the equities supporting denial of discovery. In this case, therefore, the balancing stage of the analysis provides little support either for protecting the Doe defendant or for granting immediate discovery instead of remanding to permit plaintiff to make a stronger showing, if it can do so.

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 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 Court should use the foregoing analysis in deciding whether to affirm or reverse the decision below.

Respectfully submitted,

Paul Alan Levy

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Corynne McSherry
Kevin Bankston

Electronic Frontier Foundation
454 Shotwell Street
San Francisco, California 94110-1914
(415) 436-9333

John P. Flynn

Tiffany & Bosco, P.A.
Camelback Esplanade II
Third Floor
2525 East Camelback Road
Phoenix, Arizona 85016
(602) 255-6020

Attorneys for Amici Curiae

September 26, 2006