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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA

APR 10 2008

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DOE I and DOE II, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 Individuals, whose true names are unknown, )  
 using the following pseudonyms: )  
 pauliewalnuts; neoprag; STANFORDtroll; :D; )  
 lkjhgf; yalelaw; Spanky; ylsdooder; HI; David )  
 Carr; vincimus; Cheese Eating Surrender )  
 Monkey; A horse walks into a bar; The )  
 Ayatollah of Rock-n-Rollah; DRACULA; )  
 Sleazy Z; Whamo; Ari Gold; Ugly Women; )  
 playboytroll; Dean\_Harold\_Koh; kr0nz; )  
 reminderdood; r@ygold; who is; Joel )  
 Schellhammer; Prof. Brian Leiter; )  
 Hitlerhitlerhitler; lonelyvirgin; Patrick Zeke )  
 <patrick8765@hotmail.com>; Patrick Bateman )  
 <batemanhls08@hotmail.com>; [DOE I] got a )  
 157 LSAT; azn, azn, azn; Dirty Nigger; leaf; t14 )  
 Gunner; kibitzer; yalels2009; AK47, )  
 )  
 Defendants. )  
 )

Case No.: Misc. 07-CV-00909-CFD  
District of Connecticut

Misc No. 5:08mc00001

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY MOVANT ANTHONY  
CIOLLI'S MOTION TO QUASH THIRD PARTY SUBPOENA TO AOL, LLC

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## I. INTRODUCTION

This case involves the inappropriate attempt of Plaintiffs Doe 1 and Doe 2<sup>1</sup> and their attorneys to use the civil subpoena process and power of this Court to identify multiple individuals who make use of the Internet anonymity provided by their AOL account for a variety of constitutionally-protected purposes, such as obtaining emotional support during a long fight with a terminal illness, researching potential career opportunities, and communicating to the public opinions about politics, education, and other subjects. The subpoena issued to AOL, an Internet service provider and operator of a popular instant messaging service, demands that AOL disclose the true identities, other user names, IP addresses, and other protected personal information pertaining to Movant Anthony Ciolli and other individuals who have shared his AOL account. Movant asks this Court to quash this subpoena because it demands duplicative information already in the Plaintiffs' possession and its enforcement would violate Movant's First Amendment right to speak anonymously.

Movant and others who share his AOL account have committed no wrong—other than to have used the Internet to contribute to and benefit from its free and vibrant marketplace of ideas—and yet this Court's enforcement of this subpoena would violate their fundamental constitutionally-protected rights. Not only have they not committed any wrong, but the Plaintiffs have not even *accused* them of any wrongdoing, for neither Movant nor anyone who has made use of his AOL account is a party to the underlying litigation in which discovery is sought. Through this motion to quash, Movant seeks to vindicate the proposition that “[p]eople 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

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<sup>1</sup> “Doe 1” and “Doe 2” are used to refer to the Plaintiffs in this case due to an *ex parte* motion to proceed in fictitious name granted in the Connecticut litigation. *See* Exhibit B. Though Movant Ciolli did not have the opportunity to contest this motion, he shall use these pseudonyms in lieu of Plaintiffs' real names in this memorandum.



order to discover their identities.” Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

## **II. STATEMENT OF THE FACTS**

### **A. THE CONNECTICUT LITIGATION**

Plaintiffs Doe 1 and Doe 2 initiated civil proceedings against Movant Ciolli and 28 pseudonymous defendants in the United States District Court for the District of Connecticut on June 8, 2007. Exhibit A. Upon filing their amended complaint on November 8, 2007, the Plaintiffs added numerous additional pseudonymous defendants to the lawsuit, and, conceding that they had sued him in error, voluntarily dismissed Movant Ciolli from the litigation. Exhibit G. In its current form, the Connecticut litigation entails the Plaintiffs accusing 39 unknown individuals of appropriation of another’s name or likeness, publicity that places another in a false light before the public, intentional infliction of emotional distress, negligent infliction of emotional distress, defamation, and copyright infringement. Virtually all of the Plaintiffs’ causes of action stem from postings by the 39 pseudonymous defendants on the AutoAdmit.com law school message board.<sup>2</sup>

#### **1. The AutoAdmit.com Law School Message Board**

From June 2004 to March 2007, Movant Ciolli was employed by AutoAdmit, a higher education admissions and career website based in Allentown, Pennsylvania. Until his resignation on March 12, 2007, Movant Ciolli held the position of “Chief Education Director.”

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<sup>2</sup> A small number of Plaintiffs’ causes of action stem from postings by the pseudonymous defendant “pauliewalnuts” on T14 Talent, a website devoted to rating the looks of female law students at the nation’s 14 most prestigious law schools, which included Plaintiff Doe 2. Neither Movant Ciolli, Mr. Cohen, nor AutoAdmit owned, controlled, participated in, or otherwise had an affiliation with the T14 Talent website. At no point was the T14 Talent website hosted on AutoAdmit’s server, nor were T14 Talent photographs ever uploaded to the AutoAdmit website. In fact, Movant Ciolli, who found it highly distasteful that girls such as Plaintiff Doe 2 had been entered into the T14 Talent contest without their consent, both privately and publicly urged the T14 Talent administrators to voluntarily shut down the contest or, in the alternative, to cede to reasonable opt-out requests. Movant Ciolli’s efforts succeeded on February 28, 2007, when “pauliewalnuts” voluntarily agreed to disband the T14 Talent enterprise.

Movant's job duties involved maintaining the AutoAdmit Studies section of AutoAdmit's website, as well as developing educational content and publications for AutoAdmit Studies. AutoAdmit, also known as Xoxohth, is owned by Jarret Cohen, who served as Movant Ciolli's supervisor during his tenure. In addition to AutoAdmit Studies, the AutoAdmit website contains several other sections, including the law school message board that is the subject of the underlying litigation. Movant Ciolli did not have decision-making or managerial authority over these other parts of the website, which were administered by Mr. Cohen.

Mr. Cohen has maintained AutoAdmit's law school message board as a public forum for the free and open exchange of ideas, and thus allows individuals to post on his board anonymously. Though Mr. Cohen does not agree with many of the comments law students make on his message board, he "ha[s] always felt that the diversity of opinions—even unpopular ones—on the site is a good thing," and that "people should have the right to comment on controversial subjects without fear of being persecuted, just as on mundane subjects." Jarret Cohen, *Free Expression on the Internet*, HARV. L. REC., Apr. 12, 2007, <http://media.www.hlrecord.org/media/storage/paper609/news/2007/04/12/Opinion/Free-Expression.On.The.Internet-2838281.shtml>. By all accounts, Mr. Cohen has succeeded in this endeavor. As Temple Law School Professor David Hoffman has observed, AutoAdmit's "anonymity enables, and its format records, discussions among rising lawyers that are frank and heterodox (in legal culture) with respect to race, gender relations, and professional development." David Hoffman, *Xoxohth, Civility, and Prestige: Part I*, [http://www.concurringopinions.com/archives/2006/10/xoxohth\\_civilit\\_1.html](http://www.concurringopinions.com/archives/2006/10/xoxohth_civilit_1.html).

An important feature of the AutoAdmit law school message board is that individuals can reply immediately to criticisms and other opinions on the message board with their own facts or

opinions in an effort to persuade readers of the validity of their own positions. On the AutoAdmit message board, such responses have the same prominence as the original message. Unlike a newspaper, which cannot be required to print a response to its criticisms, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974), message boards such as AutoAdmit are ideal forums for airing the full gamut of viewpoints on specific topics. Because many people regularly revisit the same message boards, essentially the same audience will view both a response and the original criticism. In this way, message boards such as Mr. Cohen's are pure marketplaces of ideas and forums for disagreements, deserving as much First Amendment protection as a newspaper. Reno v. ACLU, 521 U.S. 844, 870 (1997).

## **2. The Plaintiffs Seek to Censor AutoAdmit Users**

But while all individuals have equal access to the AutoAdmit message boards, not all who disagree with the opinions of its users have exercised their right to reply. On January 26, 2007, Plaintiff Doe 1 sent Movant Ciolli an email requesting clarification on the AutoAdmit law school message board's policy for deleting messages. Plaintiff Doe 2 sent Movant Ciolli a similar email on February 12, 2007, in which she demanded that an administrator delete a post about her from the message board. Because Movant Ciolli did not administer the message board section of AutoAdmit, he requested both Plaintiffs to direct their correspondence to Mr. Cohen.

Rather than respond to their critics on AutoAdmit or engage in a meaningful dialogue with Mr. Cohen, Plaintiffs at this time initiated a campaign to harass and threaten Movant Ciolli with the aim of coercing Mr. Cohen into censoring the speech of AutoAdmit's users. To this end, Plaintiffs hired ReputationDefender, Inc., a public relations agency specializing in online reputation management, to draw media attention to the matter. Acting on the direction of Plaintiffs, ReputationDefender executives contacted deans of students at various top law schools

and defamed or otherwise maligned Movant Ciolli. For instance, Ross Chanin—ReputationDefender’s director of operations—told Gary Clinton, the dean of students at the law school Movant Ciolli attended, that Movant Ciolli had founded and administered the T14 Talent contest. When Movant Ciolli confronted Mr. Chanin about this lie, Mr. Chanin confirmed, in writing, that he was aware that Movant Ciolli did not found or administer the T14 Talent website, but demanded that AutoAdmit “remove all damaging threads right away” and “establish an easy dispute resolution mechanism” or else ReputationDefender would continue in its efforts “to protect [its] clients.”

True to its word, three days later ReputationDefender launched a website, titled the “Campaign to Clean Up AutoAdmit.com,” that contained the same false statements of fact about Movant Ciolli that Mr. Chanin—as well as the Plaintiffs—had admitted were not true.<sup>3</sup> Shortly after launching this defamatory website, Mr. Chanin and Michael Fertik, the Chief Executive Officer of ReputationDefender, participated in a conference call with Mr. Cohen and Movant Ciolli, who by then had resigned from his position as AutoAdmit’s Chief Education Director. During this conference call, Messrs. Chanin and Fertik used the defamatory website to obtain leverage over Mr. Cohen. ReputationDefender made many demands of Mr. Cohen, including that Mr. Cohen implement a privacy policy, terms of service, and dispute resolution system on the AutoAdmit law school message board and remove all postings referencing Plaintiffs Doe 1 and Doe 2. In exchange, Messrs. Chanin and Fertik offered only to remove the defamatory

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<sup>3</sup> In an essay written in March 2007 for publication in Volume 19 of the *Yale Journal of Law & Feminism*, Plaintiff Doe 1 acknowledged that Movant Ciolli and the T14 Talent site owner were not the same person, writing that “[Movant Ciolli] eventually acquired the ‘Girls of the T14’ website for AutoAdmit, and it was shut down.” Doe 1, *Of Legal Rights and Moral Wrong: A Case Study of Internet Defamation*, 19 *YALE J.L. & FEMINISM* 279, 283 (2007). Similarly, Plaintiff Doe 2 was aware that Movant Ciolli was not “pauliewalnuts” and had no involvement with the T14 Talent website. In an interview for a March 7, 2007, *Washington Post* article, Plaintiff Doe 2 stated that T14 Talent was “a separate contest site,” with the newspaper also reporting that Movant Ciolli had persuaded “pauliewalnuts” to shut down the T14 Talent website for privacy concerns. Ellen Nakashima, *Harsh Words Die Hard on the Web*, WASH. POST, Mar. 7, 2007, at A1.

website they had created on behalf of Plaintiffs Doe 1 and Doe 2. No requests were ever made of Movant Ciolli.

### **3. The Plaintiffs Use Movant Ciolli as a “Hostage” to Coerce Mr. Cohen**

The day after Mr. Cohen refused to submit to ReputationDefender’s unreasonable demands, Andrew Shen, an associate employed by Keker & VanNest LLP, sent Movant Ciolli and Mr. Cohen an email, demanding that Mr. Cohen

(1) remove all comments regarding my clients, (2) remove all photographs of my clients, (3) preserve IP addresses and any other potentially identifying information relating to the individuals posting these comments and photographs, (4) monitor your websites to remove future posts, and (5) cooperate with Google to delete any posts or photographs relating to my clients that it may have cached from these sites.

At no point did Atty. Shen threaten to file suit against Movant Ciolli, Mr. Cohen, or AutoAdmit. Rather, Atty. Shen implied that, if Mr. Cohen complied with these requests, Plaintiffs Doe 1 and Doe 2 would not proceed with litigation against various third parties. Atty. Shen further stated that if Mr. Cohen did not agree to undertake these steps, Movant Ciolli and Mr. Cohen would become “entangled” in the litigation against those third parties.

When Mr. Cohen did not agree to all of Atty. Shen’s demands, Plaintiffs Doe 1 and Doe 2 initiated the Connecticut litigation. Though Plaintiffs sued Movant Ciolli and 28 pseudonymous defendants in their initial complaint, Plaintiffs made no reference to any particular wrongdoing by Movant Ciolli in their complaint. Rather, the Plaintiffs merely identified Movant Ciolli as AutoAdmit’s Chief Education Director. The Plaintiffs did not accuse Movant Ciolli of authoring any tortious postings, engaging in copyright infringement, or otherwise participating in any illegal conduct, nor did they allege that any of the 28 pseudonymous defendants was an alter ego of Movant Ciolli. Furthermore, Plaintiffs never

alleged that Movant Ciolli had been sued in his capacity as a purported administrator.<sup>4</sup> On the contrary, their attorney, Mark Lemley, told the *Wall Street Journal* that his clients were not pursuing Movant Ciolli as an administrator. But in this same interview, Atty. Lemley acknowledged that “[t]here is no specific reference to Ciolli as one of the posters in the complaint as filed,” and refused to disclose why the Plaintiffs sued Movant Ciolli. Amir Efrati, *Why Was Ex-AutoAdmit Director Ciolli Sued?*, WALL STREET J. L. BLOG, June 13, 2007, <http://blogs.wsj.com/law/2007/06/13/why-was-ex-autoadmit-director-ciolli-sued/>.

Shortly after filing suit, Atty. Lemley, along with Plaintiffs’ local counsel David Rosen, engaged in several telephone, email, and in-person conversations with Mr. Cohen about the lawsuit, even though neither Mr. Cohen nor AutoAdmit were parties to the litigation. During these conversations, which began in mid to late June 2007, Mr. Cohen repeatedly told the Plaintiffs’ attorneys that Movant Ciolli did not write any actionable content or administer the AutoAdmit message boards or the unaffiliated T14 Talent website, and inquired as to why Movant Ciolli had been named as a defendant in the Connecticut litigation. Attys. Lemley and Rosen refused to tell Mr. Cohen why they had named Movant Ciolli as a defendant, but told Mr. Cohen that Movant Ciolli would have “nothing to worry about” with respect to the Connecticut litigation.

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<sup>4</sup> Had Movant Ciolli been sued for purportedly being an administrator of the AutoAdmit message board, he would have enjoyed absolute immunity for all tortious content written by AutoAdmit’s third party users under the safe harbor provisions of the Communications Decency Act, 47 U.S.C. § 230. *See* Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997); *see also* Parker v. Google, Inc., No. 06-3074 (3d Cir. July 10, 2007); DiMeo v. Max, 2007 U.S. App. LEXIS 22467 (3d Cir. 2007); Green v. America Online, 318 F.3d 465 (3d Cir. 2003); Carafano v. Metrosplash, 339 F.3d 1119 (9th Cir. 2003); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Ben Ezra, Weinstein, & Co. v. America Online, 206 F.3d 980 (10th Cir. 2000); Doe v. MySpace, Inc., 474 F. Supp. 2d 843 (W.D. Tex. Feb. 13, 2007); Global Royalties, Ltd. v. Xcentric Ventures, LLC, 2007 U.S. Dist. LEXIS 77551 (D. Ariz., Oct. 10, 2007); Doe v. Bates, 2006 U.S. Dist. LEXIS 93348 (E.D. Tex. Dec. 27, 2006); Prickett v. infoUSA, Inc., 2006 WL 887431 (E.D. Tex. 2006); Ramey v. Darkside Products, Inc., 2004 U.S. Dist. LEXIS 10107 (D.D.C. 2004); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Doe v. Cahill, 884 A.2d 451 (Del.Supr. 2005); Gentry v. eBay, Inc., 99 Cal. App. 4th 816 (2002); Kathleen R. v. City of Livermore, 87 Cal.App.4th 684 (2001); Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash. App. Div. 2001), Barrett v. Clark, 2001 WL 881259 (Cal. Sup. Ct. 2001).

Attys. Rosen and Lemley began at this point the first of many attempts to negotiate a settlement agreement with Mr. Cohen even though Mr. Cohen was not a party to the Connecticut litigation. To this end, Attys. Rosen and Lemley informed Mr. Cohen that Plaintiffs Doe 1 and Doe 2 would drop Movant Ciolli from the lawsuit if Mr. Cohen would provide them with a wide range of concessions not related to the litigation, such as creating a dispute resolution system for AutoAdmit and implementing a terms of service or privacy policy. Mr. Cohen informed Atty. Lemley that he was not acting as an agent of Movant Ciolli or any of the other Connecticut defendants, and was not authorized to negotiate a settlement on their behalf. Nevertheless, Atty. Lemley contacted Mr. Cohen and his attorney several times formally proposing such agreements.

Though actively negotiating with Mr. Cohen throughout the summer, Plaintiffs Doe 1 and Doe 2 did not communicate at all with Movant Ciolli or his counsel, Marc Randazza. Plaintiffs, moreover, had made no effort to effect service of process upon Mr. Ciolli in connection with the Connecticut litigation, notwithstanding that they were well aware of Mr. Ciolli's home address.<sup>5</sup> In fact, in order to not lose their leverage over Mr. Cohen, Attys. Rosen and Lemley repeatedly filed motions requesting 30 day extensions in which to submit an amended complaint and to effect service of process on Movant Ciolli. Exhibit C, D, and E.

Movant Ciolli's first contact with Plaintiffs with respect to the Connecticut litigation took place on August 7, 2007, when Mr. Cohen informed Movant Ciolli that Atty. Lemley had arranged a meeting in Philadelphia between Plaintiffs, Mr. Cohen, and their respective attorneys. Though Plaintiffs had not invited Movant Ciolli to this meeting, Mr. Cohen recommended that Movant Ciolli and Atty. Randazza attend. Though Movant Ciolli and Atty. Randazza were present, they played no meaningful role at the meeting, for Plaintiffs Doe 1 and Doe 2 apparently

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<sup>5</sup> Plaintiffs Doe 1 and Doe 2 included Movant Ciolli's home address in all filings up to his voluntarily dismissal on November 8, 2007, including all three motions for extension of time. See Exhibits C, D, and E.

wanted to negotiate only with Mr. Cohen, who remained a non-party to the Connecticut litigation.

Despite repeated requests by both Movant Ciolli and Atty. Randazza, Plaintiffs Doe 1 and Doe 2 and their attorneys refused to state why they had named Movant Ciolli as a defendant in the Connecticut litigation. When asked what Plaintiffs Doe 1 and Doe 2 wanted from Movant Ciolli as part of a potential agreement, their attorneys replied that their clients wanted “nothing” from Movant Ciolli, but only wanted concessions from Mr. Cohen.

Plaintiffs Doe 1 and Doe 2 stated, both directly and through their attorneys, that they would drop Movant Ciolli from the lawsuit if Mr. Cohen would accede to various demands, including that Mr. Cohen institute a privacy policy and terms of service on the AutoAdmit message board, delete all postings about Plaintiffs Doe 1 and Doe 2 from the message board, request that Google remove all postings about Plaintiffs Doe 1 and Doe 2 from its search engine, remove all future threads about Plaintiffs Doe 1 and Doe 2 within 14 days of their initial posting, begin logging IPs on the AutoAdmit website, create a dispute resolution system to arbitrate disputes whenever they arose between Mr. Cohen and any individual (not just Plaintiffs Doe 1 and Doe 2) complaining about content on the AutoAdmit message board, and require that Mr. Cohen respond to all emails regarding AutoAdmit-related matters sent by anyone (not just Plaintiffs Doe 1 and Doe 2) within 14 days. The only consideration Plaintiffs Doe 1 and Doe 2 ever offered Mr. Cohen for agreeing to the above terms was dropping Movant Ciolli from the lawsuit.

Mr. Cohen believed that many of the demands made by the Plaintiffs were unreasonable and completely unrelated to the purpose of the Connecticut litigation. As a consequence Mr. Cohen did not enter into any agreement with the Plaintiffs. Mr. Cohen stated that Plaintiffs Doe



1 and Doe 2 were using Movant Ciolli as a “hostage” in order to coerce Mr. Cohen into accepting proposals he would not otherwise accept, and he did not wish to change the nature and character of his website in order to have Movant Ciolli dropped from the lawsuit.

At the conclusion of the meeting, Atty. Randazza formally requested that Plaintiffs Doe 1 and Doe 2 serve Mr. Ciolli so that he could make an appearance in the Connecticut litigation and begin the process of clearing his name. Plaintiffs Doe 1 and Doe 2 refused. Several days later, Atty. Randazza called Atty. McLaughlin, once again inquiring as to why Movant Ciolli had been sued and again requesting that Movant Ciolli be served. Atty. McLaughlin advised that service of process would not be effected upon Movant Ciolli, and implied that Movant Ciolli had been named in the Connecticut litigation because of “suspicions” that he was one of the pseudonymous defendants. Atty. McLaughlin refused, however, to tell Atty. Randazza which particular pseudonymous defendant was suspected to be an alter ego of Movant Ciolli. To say the least, this claim appeared to be a bit of back-pedaling on the Plaintiffs’ part.

In the months following the meeting, Attys. Rosen and Lemley continued to try to negotiate a settlement agreement with Mr. Cohen, and frequently sent letters and made phone calls to Mr. Cohen’s attorney, always reiterating Plaintiffs Doe 1 and Doe 2’s offer to dismiss Movant Ciolli from the lawsuit in exchange for Mr. Cohen acceding to their earlier demands. While actively negotiating with Mr. Cohen and his attorney, Attys. Rosen and Lemley filed multiple motions for additional 30 day extensions of time within which to file an amended complaint, and never attempted to serve Movant Ciolli. See Exhibits C, D, and E.

#### **4. The Plaintiffs Admit Movant Ciolli Was Sued in Error and Voluntarily Dismiss Him from the Connecticut Litigation**

In mid-September 2007, Atty. Lemley and Atty. Randazza exchanged several phone calls and email messages regarding Movant Ciolli’s participation in the case. During these

conversations, Atty. Lemley resurrected the previously-repudiated story that Movant Ciolli had been sued due to a belief that Movant Ciolli was “pauliewalnuts” and had created the T14 Talent website, but claimed that “information obtained from Reputation Defender... led us to question the Ciolli-Walnuts connection.” In response, Movant Ciolli provided to Atty. Lemley a sworn declaration stating that Movant Ciolli was not “pauliewalnuts” or any other pseudonymous defendant. Exhibit F. However, in a subsequent telephone conversation that took place in late September 2007, Atty. Lemley informed Atty. Randazza that, although Plaintiffs Doe 1 and Doe 2 knew that Movant Ciolli was not “pauliewalnuts,” one of the Plaintiffs did not wish to drop Movant Ciolli from the lawsuit because she was upset with him. Atty. Randazza and Atty. Lemley did not exchange any correspondence after that conversation.

Movant Ciolli and Atty. Randazza began to investigate the true identity of “pauliewalnuts” after being informed that Plaintiffs Doe 1 and Doe 2 sued him purportedly on the basis that Movant Ciolli was “pauliewalnuts.” Through these efforts, Movant Ciolli discovered that “pauliewalnuts” was in fact a pseudonym for Douglas Phillabaum. In an exchange of emails that took place on September 26, 2007, Mr. Phillabaum admitted to Atty. Randazza that he was “pauliewalnuts” and acknowledged that Mr. Ciolli not only had not played a role in the T14 Talent website’s administration, but, further, had convinced Mr. Phillabaum to shut down the T14 Talent website.

After Atty. Lemley had informed Atty. Randazza that Plaintiffs Doe 1 and Doe 2 would not drop Movant Ciolli from the Connecticut litigation, Atty. Lemley once again contacted Mr. Cohen’s attorney. During this conversation, Atty. Lemley continued to try to reach a settlement agreement with Mr. Cohen, stating that Plaintiffs Doe 1 and Doe 2 would dismiss Movant Ciolli from the lawsuit if Mr. Cohen agreed to delete all threads about the Plaintiffs on the AutoAdmit

message board within 14 days. Mr. Cohen's attorney informed Atty. Lemley that Mr. Cohen could not enter into any agreement that contained a time limitation. Atty. Lemley stated that he would inform his clients and be in touch again shortly.

The day after speaking to Mr. Cohen's attorney, Atty. Lemley filed a third motion for extension of time to submit an amended complaint in the Connecticut litigation, as well as a request for an additional 30 days to serve the original complaint on Mr. Ciolli, who still, inexplicably, had not been served despite Plaintiffs' knowledge of his home address and multiple requests for service by Movant Ciolli's attorney. Exhibit E.

On November 8, 2007, Plaintiffs Doe 1 and Doe 2 voluntarily dismissed Movant Ciolli from the Connecticut litigation. Exhibit G. In addition to dismissing all causes of action against Movant Ciolli, the Plaintiffs added several additional pseudonymous defendants to their lawsuit, none of whom are alter egos of Movant Ciolli. The only reference to Movant Ciolli in the amended complaint is, once again, a statement identifying him as a purported manager of AutoAdmit. *Id.* at ¶ 15. Neither Movant Ciolli nor Mr. Cohen ever entered into a settlement agreement with Plaintiffs Doe 1 or Doe 2 as a condition to this voluntary dismissal.

#### **5. The Plaintiffs Request Expedited Discovery**

On January 24, 2008, Plaintiffs Doe 1 and Doe 2 filed a motion for expedited discovery in the Connecticut litigation for the limited purpose of ascertaining the true identities of the pseudonymous defendants. Exhibit H. The court granted this motion for limited expedited discovery on January 28, 2008. Shortly thereafter, Movant Ciolli, through Atty. Randazza, was served with a subpoena directing him to provide all documents relating to the identities of the pseudonymous defendants, as well as requesting that he appear for a deposition scheduled for March 2, 2008.

Movant Ciolli complied with this subpoena by providing the Plaintiffs with all the non-privileged documents they had requested, and was deposed on the scheduled date, where he answered, under oath, all questions asked of him by Ben Berkowitz, counsel for the Plaintiffs. As he had done in his previous declaration, Movant Ciolli once again swore under oath that none of the pseudonymous defendants in the Connecticut litigation are his alter egos, and provided all information he had pertaining to their identities or that could be used to facilitate the identification process. Exhibit I at 31:12-168:18.

At his deposition, Movant Ciolli provided Atty. Berkowitz with his current address:

Q: What is your current address?

A: [REDACTED]<sup>6</sup>

Id. at 6:9-10. Movant Ciolli also told Atty. Berkowitz that “AnthonyCiolli” is his AOL Instant Messenger screen name:

Q: Is AnthonyCiolli your instant messenger user name?

A: Yes.

Id. at 113:11-13. When Atty. Berkowitz showed him an AOL Instant Messenger conversation between “AnthonyCiolli” and “halawaddin,” Mr. Cohen’s screen name, Movant Ciolli once again confirmed that his AOL Instant Messenger screen name is “AnthonyCiolli”:

Q: And you are the user using the user name AnthonyCiolli?

A: Yes.

Q: And Jarret is the user using the user name halawaddin?

A: Yes.

Q: This conversation took place on August 26, 2007?

A: Yes.

Q: What software were you using?

A: AOL Instant Messenger.

Id. at 115:3-13.

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<sup>6</sup> Movant Ciolli, in order to comply with this Court’s Standing Order No. 04-01, has redacted all home addresses, dates of birth, names of minor children, social security numbers, and/or other personal data identifiers from this document and all attached exhibits.

Atty. Berkowitz did not ask Movant Ciolli to state his email address,<sup>7</sup> phone number, or disclose other AOL Instant Messenger screen names at his deposition, nor did he ask if other individuals ever used Movant Ciolli's "AnthonyCiolli" screen name. Movant Ciolli, however, would have provided this information to Atty. Berkowitz if he had been asked. Furthermore, neither Atty. Berkowitz nor any other attorney representing the Plaintiffs has requested this information from Movant Ciolli subsequent to his deposition.

#### **B. THE AOL SUBPOENA**

On March 18, 2008, Atty. Berkowitz issued a subpoena on behalf of Plaintiffs Doe 1 and Doe 2 to AOL, seeking information related to Movant Ciolli's AOL account. Exhibit K. AOL informed Movant Ciolli of this subpoena in a letter sent on March 25, 2008, and received by Movant Ciolli on March 27, 2008. Id. In this letter, AOL stated that it will comply with the subpoena if Movant Ciolli does not move to quash the subpoena within two weeks of receipt of the notification letter. Id. A copy of the subpoena was included with this letter. The subpoena issued to AOL requests, in pertinent part,

All DOCUMENTS RELATING TO the identity of all persons who have registered or used the following AOL Instant Messenger (IM) username: AnthonyCiolli DOCUMENTS responsive to this request may contain, without limitation, information RELATING TO first and last names, present or last known mailing addresses, telephone numbers, e-mail addresses, registration addresses, *other user names or login IDs*, and/or the Internet Protocol ("IP") addresses associated with the IM username AnthonyCiolli.

Id. at p. 2, ¶ 3 (emphasis added).

Upon reading the letter from AOL, Movant Ciolli contacted Jane Roe<sup>8</sup> and informed her of the situation, providing her with a copy of the letter and subpoena. Ms. Roe is not, nor ever has been, one of the pseudonymous defendants in the Connecticut litigation, and has never been

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<sup>7</sup> Movant Ciolli's current email address, however, was included in the email headers of documents provided to the Plaintiffs' attorneys pursuant to their subpoena. For a representative example, see Exhibit J.

<sup>8</sup> To protect this individual's privacy, the fictitious name "Jane Roe" will be used throughout this memorandum and associated documents.

accused of any wrongdoing by the Plaintiffs or anyone else connected to the underlying litigation. Likewise, Ms. Roe possesses no information pertaining to the identities of any of the pseudonymous Connecticut defendants, and does not have an account on the AutoAdmit message board. Ms. Roe had not even heard of the Plaintiffs or the AutoAdmit message board until well after the events described in the Plaintiffs' amended complaint had taken place.

For more than a decade, however, Ms. Roe has shared several computers, as well as the AOL account underlying this subpoena, with Movant Ciolli and, until his death, John Roe.<sup>9</sup> Like Ms. Roe, Mr. Roe is not, nor ever has been, one of the pseudonymous defendants in the Connecticut litigation, and during his lifetime had never been accused of any wrongdoing by the Plaintiffs or anyone else connected to the underlying litigation. Prior to his death, Mr. Roe did not have an account on the AutoAdmit message board, nor did he possess any information pertaining to the identities of any of the pseudonymous Connecticut defendants. In fact, Mr. Roe's death predates not only the initiation of the Connecticut litigation, but the creation of AutoAdmit itself. Yet Plaintiffs' subpoena, if granted, would force AOL to provide the Plaintiffs with every single AOL user name Mr. Roe and Ms. Roe have ever used, irreparably damaging their First Amendment right to speak anonymously on the Internet.

Movant Ciolli now comes before this Court seeking to quash the subpoena to AOL pursuant to Fed. R. Civ. P. 45(c)(3)(A)(iii) because the discovery sought is unreasonably duplicative and its enforcement would violate his rights as guaranteed by the First Amendment of the United States Constitution and other applicable law.<sup>10</sup>

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<sup>9</sup> To protect this individual's privacy, the fictitious name "John Roe" will be used throughout this memorandum and associated documents.

<sup>10</sup> Movant has standing to bring this motion because his privileges or privacy interests are implicated by the subpoena. See *In re Subpoena to University of North Carolina*, 367 F. Supp. 2d 945, 951-58 (M.D.N.C. 2005); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1095-97 (W.D. Wash. 2001).

### **III. LEGAL ARGUMENT**

#### **A. MOVANT HAS A FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY ON THE INTERNET**

The Supreme Court of the United States has held, time after time, that the right to speak anonymously is protected under the First Amendment of the United States Constitution. See, e.g., Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150 (2002); Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960). The Court has acknowledged that anonymous speech has “played an important role in the progress of mankind.” Talley, 362 U.S. at 64. The Court has further described anonymity as “a shield from the tyranny of the majority” and written that anonymity “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression....” McIntyre, 514 U.S. at 357. The McIntyre Court further held that “the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry,” and thus “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 protected by the First Amendment.” Id. at 342.

The Supreme Court has already held that First Amendment rights—including the right to speak anonymously—extend to the Internet medium. The Court has described the Internet as “a vast platform from which to address and hear from a worldwide audience of millions” where “any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.” Reno v. ACLU, 521 U.S. 844, 870 (1997). As a result, the Court found that there is “no basis for qualifying the level of First Amendment scrutiny that applies to

this medium.” Id. Numerous lower courts have also explicitly acknowledged that full First Amendment protections extend to anonymous Internet speech.<sup>11</sup>

The Supreme Court has further held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373 (1976). This irreparable injury is especially egregious when it involves the unmasking of an anonymous Internet user. See Melvin v. Doe, 836 A.2d 42, 50 (Pa. 2003) (“[I]t 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.”). Because the injury in such situations is irreparable, the Court has found that an attempt to use a court order to compel discovery of an individual’s identity constitutes “governmental action” that “is subject to the closest scrutiny.” NAACP v. Alabama, 357 U.S. 449, 461 (1958). As a result, “discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts,” and “[c]ourts should impose a high threshold on subpoena requests that encroach on this right [to anonymous speech].” Doe v. 2TheMart.com, 140 F. Supp. 2d 1088, 1093-97 (W.D. Wash. 2001).

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<sup>11</sup> See, e.g., Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) (“The constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.”); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (acknowledging “the legitimate and valuable right to participate in online forums anonymously or pseudonymously.”); ACLU v. Johnson, 4 F. Supp. 2d 1029 (D.N.M. 1998), aff’d 194 F.3d 1149 (10th Cir. 1999); ACLU v. Miller, 977 F. Supp. 1228 (N.D.Ga. 1997); Doe v. Cahill, 884 A.2d 451, 456 (Del.Supr. 2005) (“It is clear that speech over the internet is entitled to First Amendment protection. This protection extends to anonymous internet speech.”); La Societe Metro Cash v. Time Warner Cable, 2003 Conn. Super. LEXIS 3302, at \*13 (2003) (“[T]here is a First Amendment right to anonymous speech that extends to speech on the Internet.”); Polito v. AOL Time Warner, Inc., 78 Pa. D. & C.4th 328, 334 (2004) (“[T]he right to communicate anonymously on the Internet falls within the ambit of the First Amendment’s protections.”).



**B. MOVANT'S RIGHT TO REMAIN ANONYMOUS DESERVES THE HIGHEST DEFERENCE BECAUSE MOVANT IS NOT A PARTY TO THE UNDERLYING LITIGATION AND HAS NOT BEEN ACCUSED OF ANY WRONGDOING**

Movant Ciolli, as a non-party to the underlying litigation who has not been accused of any wrongdoing by the Plaintiffs, deserves the highest deference when it comes to preserving his First Amendment rights. As one district court faced with a similar issue stated, “[p]eople who have committed no wrong should be able to participate online without the 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.” Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999). The highest level of judicial scrutiny is particularly appropriate when a civil subpoena seeks to unmask those who not only are non-parties to the lawsuit, but, like Ms. Roe and Mr. Roe, have absolutely no connection to the litigation whatsoever and possess no knowledge that is in any way relevant to any aspect of the litigation, let alone the narrow issue of identifying pseudonymous defendants, which is the only discovery authorized by the court in the underlying action. Any standard other than the highest level of scrutiny will fundamentally jeopardize “the rich, diverse, and far ranging exchange of ideas” that “internet anonymity facilitates.” 2TheMart.com, 140 F. Supp. 2d at 1092.

**C. THE INFORMATION SOUGHT IS UNREASONABLY CUMULATIVE OR DUPLICATIVE BECAUSE THE PLAINTIFFS ALREADY KNOW THAT THE “ANTHONYCIOLLI” USER NAME BELONGS TO MOVANT CIOLLI**

The United States Court of Appeals for the Fourth Circuit has held that “the simple fact that requested information is discoverable... does not mean that discovery must be had.” Nicholas v. Wyndham Int’l, Inc., 373 F.3d 537, 543 (4th Cir. 2004). Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure allows a district court to limit discovery upon the determination that “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from

some other source that is more convenient, less burdensome, or less expensive.” Id. (quoting Fed. R. Civ. P. 26(b)(2)(C)(i)). The purpose behind Rule 26(b)(2)(C) is to “enabl[e] courts to keep ‘tighter rein’ on discovery” and to “guard against redundant or disproportionate discovery.” Peacock v. Merrill, 2008 U.S. Dist. LEXIS 12598, at \*13 (S.D. Ala. 2008); Benson v. Giordano, 2007 U.S. Dist. LEXIS 61144, at \*6 (D. S.D. 2007); Ellis v. Fortune Seas, 175 F.R.D. 308, 310 (S.D. Ind. 1997). Even discovery requests “otherwise permitted under the Rules may be limited by the Court if... the discovery sought is unreasonably cumulative or duplicative.” Lectrolarm Custom Sys. v. Pelco Sales, Inc., 212 F.R.D. 567, 570 (E.D.Cal. 2002).

Allowing the Plaintiffs’ subpoena to stand will result in the unreasonably cumulative or duplicative discovery that Rule 26 is meant to prevent. Plaintiffs obtained explicit confirmation from Movant Ciolli at his March 2, 2008, deposition that “AnthonyCiolli” is his AOL Instant Messenger user name. See Exhibit I at 113:11-13; 115:3-13. At this same deposition, Movant Ciolli provided Plaintiffs with his present mailing address. Id. at 6:9-10. Movant Ciolli, through Atty. Randazza, also previously provided Plaintiffs with documents containing his email address. See Exhibit J. One of these documents included a log of an AOL Instant Messenger conversation Movant Ciolli had using the user name “AnthonyCiolli” that had not previously been in the Plaintiffs’ possession, providing further confirmation that Movant Ciolli is, in fact, “AnthonyCiolli.” Id. Yet despite their clear pre-existing knowledge that Movant Ciolli is “AnthonyCiolli,” Plaintiffs are now demanding that AOL provide them with all documents relating to the identity of “AnthonyCiolli.” See Exhibit K.

Given these facts, Plaintiffs’ discovery request is unreasonable. AOL, if compelled to provide the requested account information, will provide the Plaintiffs with no information about who owns the “AnthonyCiolli” account that they do not already possess. The only conceivable

legitimate benefit to the Plaintiffs from compelling this information from AOL is that it would provide independent confirmation that Movant Ciolli told the truth at his deposition when he said that he uses the “AnthonyCiolli” account. However, any kernel of doubt that could have possibly still existed regarding who owns the “AnthonyCiolli” user name has now been dissipated, for AOL, by giving Movant Ciolli notice of Plaintiffs’ subpoena—via a letter sent to the same home address Movant Ciolli provided Atty. Berkowitz at his deposition—has provided independent confirmation that “AnthonyCiolli” is Movant Ciolli’s AOL Instant Messenger user name. Id.

But while Plaintiffs will obtain no benefit from their discovery request and merely receive the same information Movant Ciolli has already provided them, Movant Ciolli, as well as non-movants Ms. Roe and Mr. Roe, will suffer irreparable harm due to AOL’s disclosure. Because Ms. Roe and Mr. Roe—non-parties who have not been accused of any wrongdoing and have no information pertaining to any of the pseudonymous parties in the Connecticut litigation—have AOL user names registered under the same account as Movant Ciolli, Plaintiffs’ demand that AOL provide “first and last names, present or last known mailing addresses, telephone numbers, e-mail addresses, registration addresses, other usernames or login IDs, and/or the Internet Protocol (“IP”) addresses associated with the IM username AnthonyCiolli,” if enforced, would eviscerate Ms. Roe and Mr. Roe’s constitutional right to speak anonymously on the Internet. Since the Plaintiffs have already obtained the information they seek regarding who owns the “AnthonyCiolli” user name through other, less burdensome, means, this Court must find that the discovery Plaintiffs are seeking is unduly cumulative or duplicative in violation of Rule 26(b)(2)(C) and, in order to protect the fundamental rights of Movant Ciolli, Mr. Roe, and Ms. Roe, quash Plaintiffs’ subpoena.

**D. THE PLAINTIFFS FAIL THE MOBILISA TEST AND OTHERWISE OFFER NO COMPELLING REASON FOR THIS COURT TO IGNORE MOVANT'S FIRST AMENDMENT RIGHTS**

The Arizona Court of Appeals, in Mobilisa v. Doe, 170 P.3d 712 (Ariz. Ct. App. 2007), has established a uniform test for the unmasking of an anonymous Internet speaker, regardless of whether that speaker is a party or a non-party to the underlying litigation. This test, sometimes referred to as a “summary judgment plus” test, essentially combines two tests already employed by the federal courts—the notice and summary judgment requirements established in Best Western Int'l v. Doe, 2006 U.S. Dist. LEXIS 56014 (D. Ariz. 2006) and the balancing test used in Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088 (W.D. Wash. 2001). This amalgamated, uniform test places the burden on the requesting party to prove that (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request, (2) the requesting party's cause of action could survive a motion for summary judgment on elements not dependent on the speaker's identity, and (3) a balance of the parties' competing interests favors disclosure. Mobilisa, 170 P.3d at 721.

Because the Plaintiffs' subpoena is unduly cumulative or duplicative in violation of Rule 26, it should not be necessary for this Court to apply the Mobilisa test to determine whether an Internet service provider should be compelled to disclose the identities of anonymous Internet users who are not parties to the underlying litigation. Nevertheless, the Plaintiffs in this case are unable to meet any element of the Mobilisa test.

**1. The Plaintiffs Have Not Met Their Burden of Ensuring Adequate Notice to the Anonymous Internet Speakers**

It is established law that “[a] court should not consider impacting a speaker's *First Amendment* rights without affording the speaker an opportunity to respond to the discovery request.” Id. at 719 (emphasis in original). “When First Amendment interests are at stake,” the

federal courts “disfavor *ex parte* discovery requests that afford the Plaintiff the important form of relief that comes from unmasking an anonymous defendant.” Best Western Int’l, 2006 U.S. Dist. LEXIS at \*16. Therefore, “the requesting party should make reasonable efforts to inform the anonymous party of the pending discovery request... and inform that party of the right to timely and anonymously file and serve a response to the request.” Mobilisa, 170 P.3d at 719. Furthermore, “[t]he requesting party’s efforts *must* include notifying the anonymous party via the *same* medium used by that party.” Id. (emphasis added). See also Best Western Int’l, 2006 U.S. Dist LEXIS at \*17 (holding that the requesting party “shall notify the anticipated recipients of its discovery requests, as well as the John Doe Defendants, through entries on the Internet site and other reasonable means, that it is seeking discovery of the Defendants’ identities and that the potential discovery recipients and John Doe Defendants may respond to its motion, should they choose to do so, within three weeks of the motion’s filing.”); Doe v. Cahill, 884 A.2d 451, 460 (“In the internet context, the plaintiff’s efforts should include posting a message of notification of the discovery request... on the same message board as the original... posting.”); Dendrite Int’l, Inc. v. Doe, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (“These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the... pertinent message board.”).

It is not sufficient for the requesting party to merely serve the subpoena on an Internet service provider or other intermediary from which discovery is desired and then merely expect that the intermediary will inform the anonymous speakers on the requesting party’s behalf. Rather, the requesting party *itself* must undertake reasonable efforts to inform the anonymous speakers of their discovery request. See Mobilisa, 170 P.3d at 719 (“[T]he *requesting party* should make reasonable efforts to inform the anonymous party of the pending discovery

request”) (emphasis added); Best Western Int’l, 2006 U.S. Dist. LEXIS at \*17 (“[T]he *plaintiff* must undertake reasonable efforts to notify the anonymous defendant of the discovery request and must withhold action to allow the defendant an opportunity to respond.”) (emphasis added); Cahill, 814 A.2d at 460 (“The *plaintiff* must undertake reasonable efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure.”) (emphasis added). The notice requirement can only be fulfilled via notification by the Internet intermediary if the requesting party can demonstrate that it made a good faith attempt to contact the anonymous speaker directly through the same medium used by the anonymous speaker. See Mobilisa, 170 P.3d at 721. For example, in Mobilisa, where the plaintiff sought discovery from an email provider as to the true identity of an anonymous email user, the court found that it was acceptable for the email provider to notify the anonymous users of the discovery request in lieu of the plaintiff only because the plaintiff’s counsel provided substantial evidence demonstrating that it had sent an email to the anonymous email user informing him of the discovery request, but had not received a response. Id.

The Plaintiffs in this case have not fulfilled the notice requirement, despite the fact that they clearly know it exists and are aware of what it entails.<sup>12</sup> Even though Movant Ciolli has broadband Internet access, which allows the “AnthonyCiolli” user name to remain perpetually online even when no one is physically present at Movant Ciolli’s computer, neither Plaintiffs nor their counsel ever sent “AnthonyCiolli” an instant message providing notice of the discovery request. Plaintiffs have also not attempted to send “AnthonyCiolli” an “offline” instant message during the rare times when the user name is not online. Perhaps most egregiously, Plaintiffs

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<sup>12</sup> Plaintiffs, through their counsel, have complied with the Mobilisa, Best Western, Cahill, and Dendrite notice requirements when issuing other subpoenas in this litigation. For example, Plaintiffs’ counsel posted a message on the AutoAdmit message board informing the pseudonymous defendants that it had filed a motion for expedited discovery. See [http://www.autoadmit.com/thread.php?thread\\_id=753114&mc=122&forum\\_id=2](http://www.autoadmit.com/thread.php?thread_id=753114&mc=122&forum_id=2).

have not taken any steps to inform Movant Ciolli's attorneys about the discovery request, even though they are aware that Movant Ciolli has used the "AnthonyCiolli" account and have informed Movant Ciolli's attorneys about other discovery requests in the Connecticut litigation, including those that do not even concern Movant Ciolli.<sup>13</sup> Had AOL not notified Movant Ciolli, he would not have been aware that his First Amendment rights were in jeopardy.<sup>14</sup> Given Plaintiffs' failure to provide adequate notice as required by law, Plaintiffs have failed to fulfill a required element of the Mobilisa test, and thus this Court must quash Plaintiffs' subpoena.

**2. The Plaintiffs' Causes of Action against the Pseudonymous Connecticut Defendants Could Not Survive a Motion for Summary Judgment on Elements Not Dependent on Movant's Identity**

The Mobilisa test requires that a plaintiff requesting discovery "demonstrate that it would survive a motion for summary judgment" filed by the defendants in the underlying litigation "on all of the elements within the requesting party's control—in other words, all elements not dependent upon knowing the identity of the anonymous speaker." Id. at 720. When evaluating a motion for summary judgment, the court will "view[] the facts and all inferences drawn properly therefrom in the light most favorable" to the plaintiff. See Holland v. Washington Homes, Inc., 487 F.3d 208, 213 (4th Cir. 2007). If genuine issues of material fact exist and none of the defendants would be entitled to judgment as a matter of law, then the plaintiff would survive the fictitious motion and this required element would be fulfilled. Mobilisa, 170 P.3d at 722. Even

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<sup>13</sup> For instance, Plaintiffs' counsel sent Movant Ciolli's attorney notice of Plaintiffs' opposition to a motion to quash filed by pseudonymous defendant "AK47," which had been filed by Plaintiffs on the very same day they issued their subpoena to AOL.

<sup>14</sup> Mr. Cohen, who uses the AOL user name "halawaddin" that is also the subject of this subpoena, was also not informed of this subpoena even though he, like Movant Ciolli, had been informed of all other discovery requests pertaining to him. In fact, Mr. Cohen informed Movant Ciolli that he never received notice from AOL regarding this subpoena because, while he has used AOL Instant Messenger, Mr. Cohen has never used AOL as an Internet service provider, and thus AOL does not have his address or other means of contacting him. Given the failure of both AOL and the Plaintiffs to notify Mr. Cohen and/or other users of the "halawaddin" user name, it is likely that the owners of the other user names subject to this subpoena—"AHWIAB," "SUA SPONTE 23," "draculaesq," "jct009," and "lathorpe"—are unaware of the subpoena's existence and have no actual knowledge that their constitutional rights may be in jeopardy.

when the anonymous speakers are not defendants in the underlying litigation it is necessary for the requesting party to fulfill the summary judgment requirement because “[r]equiring the requesting party to satisfy this step furthers the goal of compelling identification of anonymous internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech.” Id.

In this case, it is not possible, given the constraints of this memorandum, to evaluate whether every single one of Plaintiffs’ causes of action against every defendant in the Connecticut litigation would withstand a motion for summary judgment. Not only have Plaintiffs sued 39 pseudonymous defendants on seven different causes of action, but Plaintiffs have failed to specify which defendants are being sued for each cause of action, simply stating in their complaint that “[o]ne or more defendants” are being sued under each count of the amended complaint. See Exhibit G, ¶¶ 69, 76, 80, 81, 84-86, 90-93, 95-98. Given the lack of specificity of Plaintiffs’ complaint, the impracticality of fully discussing what could potentially involve as many as 273 analyses, and that it is only necessary to demonstrate that Plaintiffs would fail to withstand a summary judgment motion made by one defendant on one count in order for Plaintiffs to fail to meet this required element, Movant Ciolli shall limit this sub-section to only a portion of the 39 pseudonymous defendants on representative causes of action. Movant Ciolli’s limitation, however, should not be construed as a belief that the Plaintiffs could withstand a summary judgment motion with respect to the other defendants or causes of action.

**a. Plaintiffs Doe 1 and Doe 2 Could Not Withstand Motions for Summary Judgment by Defendants “Joel Schellhammer” and “hitlerhitlerhitler” for any Speech Torts**

Pseudonymous Connecticut defendants “Joel Schellhammer” and “hitlerhitlerhitler” are each only mentioned one time in Plaintiffs’ amended complaint. According to Plaintiffs, defendant “Joel Schellhammer” posted a link to a news article reporting truthful information



about Kazem Iravani, a convicted felon, and then reprinted the full text of United States v. Iravani, 1998 U.S. App. LEXIS 28249 (4th Cir. 1998). Exhibit G, ¶ 56. Similarly, Plaintiffs allege that “hitlerhitlerhitler” added a link to another news story reporting truthful information about Mr. Iravani. *Id.* at ¶ 57. Plaintiffs do not allege that “Joel Schellhammer” or “hitlerhitlerhitler” altered the text of United States v. Iravani or the linked news articles in any way, and do not accuse them of any other purported wrongdoing in their amended complaint.

Given the allegations in the amended complaint, it is likely that Plaintiffs are suing “Joel Schellhammer” and “hitlerhitlerhitler” for intentional infliction of emotional distress, negligent infliction of emotional distress, unreasonable publicity given to another’s life, publicity that places another in a false light before the public, and/or libel. Regardless of which of these causes of action Plaintiffs are actually suing under, they would fail to defeat a motion for summary judgment made by either of these defendants. The Supreme Court of the United States has held that truthfully publishing information released to the public in official court records is protected under the First and Fourteenth Amendments to the United States Constitution, and thus is absolutely privileged. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (“[T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.”).

This absolute privilege applies even when there has been substantial passage of time and the published judicial proceedings are embarrassing or offensive. See Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 1290 (D.D.C. 1981) (“Plaintiff cannot prevail on a theory that the subject matter... has become private with the passage of time. He also cannot object to republication of matters which are in the public record of the trial and related proceedings, no

matter how private or offensive, as information in the public record is absolutely privileged.”). The Supreme Court has found that “[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information,” for “[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.” Cox, 420 U.S. at 496. Given the clear controlling precedent from the Supreme Court, Plaintiffs would certainly not prevail if “Joel Schellhammer” or “hitlerhitlerhitler” were to file a motion for summary judgment in the Connecticut litigation.

**b. Plaintiff Doe 1 Could Not Withstand Motions for Summary Judgment by any Defendant on the Copyright Infringement Count**

Plaintiff Doe 1 has brought forth a suit for copyright infringement under 17 U.S.C. § 501 as part of the Connecticut litigation. Exhibit G, ¶¶ 67-69. Though Plaintiff Doe 1 does not specify which defendants she is seeking to hold liable for copyright infringement, the specific facts surrounding the alleged infringement are irrelevant since Plaintiff Doe 1’s cause of action would fail regardless of which defendants she asserts it against. It is well established that a plaintiff bears the burden of proving that she owns a valid, registered copyright in the work allegedly infringed at the time the infringement lawsuit is commenced. See Compaq Computer Corp. v. Ergonome Inc., 387 F.3d 403, 407 (5th Cir. 2004). Only the copyright owner at the time the alleged acts of infringement occurred has standing to bring an action for infringement, and a copyright owner may not designate a third party to bring an infringement action on her behalf. See Silvers v. Sony Pictures Entm’t Inc., 402 F.3d 881 (9th Cir. 2005); Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27 (2d Cir. 1982) (citing 17 U.S.C. § 501(b)).

Plaintiff Doe 1 does not own any exclusive rights to the works allegedly infringed. In her amended complaint, Plaintiff Doe 1 claims that she “owns valid copyrights in her photographs

and has registered these copyrights with the United States Copyright Office.” Exhibit G, ¶ 68. However, the registration certificates actually filed with the Copyright Office—which are dated two days before Plaintiff Doe 1 commenced her infringement action—do not list Plaintiff Doe 1 as the registered owner of the works in question, or identify her as their original author. Exhibit O. Plaintiff Doe 1 has submitted no evidence to support her completely unsubstantiated claim to ownership of a valid copyright, and thus she does not have standing to sue any of the Connecticut defendants for purported infringement of those photographs. As a result, Plaintiff Doe 1 would certainly not defeat a motion for summary judgment brought forth by any of the defendants with respect to her copyright infringement cause of action.

### **3. A Balance of Competing Interests Does Not Favor Disclosure of Movant’s Identity or Other Information**

Even in the event that the notice and summary judgment requirements are met, a court faced with the prospect of identifying an anonymous speaker must still apply an additional test to balance the parties’ competing interests. This is particularly necessary when the anonymous speaker is not a party to the underlying litigation. As the Mobilisa court observed, when “the anonymous speaker may be a non-party witness along with a number of known witnesses with the same information,” then “[t]he requesting party’s ability to survive summary judgment would not account for the fact that in such a case it may have only a slight need for the anonymous party’s identity.” Mobilisa, 170 P.3d at 720.

The U.S. District Court for the Western District of Washington, in Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1095 (2001), applied one of the first balancing tests to weigh these competing interests, and is the balancing test contemplated by the Mobilisa court to apply to situations involving anonymous non-parties. Like this Court, the court in 2TheMart.com was faced with the task of determining whether a subpoena to an Internet service provider demanding

the identities of anonymous users who were not parties to the underlying litigation should be quashed to preserve the movants' free speech and privacy rights. In that case, the defendant had sought the identities of 23 anonymous non-parties to aid a potential affirmative defense in the underlying securities litigation. Ultimately, the 2TheMart.com court quashed the subpoena, holding that "non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." Id.

A court applying the 2TheMart.com balancing test must consider four factors when evaluating a civil subpoena requesting the identities of non-party anonymous Internet users. These factors are (1) that the subpoena was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) the information sufficient to establish or to disprove that claim is unavailable from any other source. Id. Plaintiffs Doe 1 and Doe 2 not only fail the 2TheMart.com balancing test, but fail to satisfy a single one of the four factors.

**a. The Plaintiffs' Subpoena Was Not Issued in Good Faith**

Plaintiffs fail to meet the requirement that their subpoena be issued in good faith. The United States Supreme Court has explained that, when considering discovery requests, "a court is not required to blind itself to the purpose for which a party seeks information." Oppenheimer Fund v. Sanders, 437 U.S. 340, 353 (1978). The Court has stated that "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied." Id. The Court has also found that "discovery should be denied when a party's aim is to... embarrass or harass the person from whom he seeks discovery." Id.

The Plaintiffs in this case have consistently employed legal processes against Movant Ciolli and others for improper purposes. As mentioned in the preceding statement of facts, Plaintiffs Doe 1 and Doe 2 were aware as early as March 2007 that Movant Ciolli was innocent of any wrongdoing—in fact, Plaintiffs, as well as their agent Mr. Chanin, professed Movant Ciolli's innocence in writing. Nevertheless, Plaintiffs initiated civil proceedings against Movant Ciolli for the improper purpose of coercing a settlement agreement from Mr. Cohen, a non-party to the litigation. Over the course of five months, Plaintiffs, themselves and through Attys. Lemley and Rosen, repeatedly demanded that Mr. Cohen provide them with a wide variety of concessions unrelated to the aims of the Connecticut litigation, offering him only the sole consideration of dropping their claims against Movant Ciolli—all while refusing to serve process on Movant Ciolli or even disclosing why he was sued.

The Plaintiffs and their attorneys obtained several motions from the court in order to further obtain leverage over Mr. Cohen. The day before their initial meeting with Mr. Cohen in Philadelphia, the Plaintiffs obtained an ex parte 30 day extension of time to submit an amended complaint, which had been due the same day as the scheduled meeting. The following month, while still in the midst of active negotiations with Mr. Cohen, Plaintiffs obtained a second ex parte 30 day extension. After this second 30 days elapsed, Plaintiffs—who, through Atty. Lemley, had by now informed Movant Ciolli's attorney that he had been sued in error, but would not be dropped because one of the Plaintiffs was "upset" with him—sought yet another extension, this time not only requesting additional time to submit an amended complaint, but also an additional 30 days to serve Movant Ciolli with the initial complaint. As with the other motions, this third motion was made the day after Atty. Lemley contacted Mr. Cohen's attorney

yet again offering to drop Movant Ciolli from the lawsuit in exchange for Mr. Cohen giving in to certain demands from the Plaintiffs.

Plaintiffs have continued to harass Movant Ciolli even after eventually dropping him from the lawsuit. At Movant Ciolli's deposition, which the District of Connecticut had only authorized for the limited purpose of ascertaining the identities of the pseudonymous defendants, Atty. Berkowitz repeatedly asked questions substantially beyond the scope of the court's discovery order which were clearly intended to embarrass Movant Ciolli or to attempt to build a new case against him or Mr. Cohen. Though Movant Ciolli answered these questions, Atty. Berkowitz's conduct unnecessarily extended the length of the deposition and caused Movant Ciolli to incur greater attorneys' fees than necessary.

However, it is not necessary to demonstrate that Plaintiffs have engaged in abuse of process in order to show a lack of good faith. The 2TheMart.com court held that, "while not demonstrating bad faith *per se*," blanket requests for information of large groups of non-party speakers constitutes such an "apparent disregard for the privacy and First Amendment rights of the on-line users... [to] weigh[] against... balancing the interest here." 140 F. Supp. 2d at 1096. In the subpoena directed towards AOL, the Plaintiffs demonstrate this disregard for fundamental rights by demanding identifying information not just of Movant Ciolli, but other non-parties, such as Mr. Cohen. Furthermore, Plaintiffs have engaged in such conduct not just in conjunction with this subpoena, but throughout the entire discovery process. At Movant Ciolli's deposition, Atty. Berkowitz demanded that Movant Ciolli reveal the true names of more than 20 anonymous Internet users who were never accused of any wrongdoing by the Plaintiffs and are not parties to the Connecticut litigation.<sup>15</sup> Exhibit I.

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<sup>15</sup> These include the true names of the pseudonymous AutoAdmit users "primefactor," "sugarywitch," "Blue Smoke," "adalia," "annie\_econ" "MindTheGap76," "chancemeeting," "RedSox7," "spectre," "Portia," "bothered,"

Plaintiffs have also issued subpoenas to other Internet intermediaries besides AOL that are equally insensitive to the First Amendment and privacy rights of anonymous Internet users. For instance, Plaintiffs issued subpoenas to the University of North Carolina and highbeam.com demanding that these organizations provide them with the “first and last names, present or last known mailing addresses, telephone numbers, e-mail addresses, and logs containing the source Internet Protocol (“IP”) addresses” of all individuals who accessed publicly available newspaper articles found on their websites. Exhibits L and M. Plaintiffs also subpoenaed VLEX LLC demanding that this same identifying information be turned over for all individuals who used its website to look up United States. v. Iravani, a publicly released United States Court of Appeals for the Fourth Circuit decision. Exhibit N. The overly broad nature of Plaintiffs’ discovery requests—both the AOL subpoena before the court and its requests in other courts—combined with their previous improper actions cause the Plaintiffs to fail to meet the good-faith standard.

**b. The Information Sought Does Not Relate to a Core Claim or Defense**

The Plaintiffs likewise fail the second prong of the 2TheMart.com balancing test. The 2TheMart.com court held that “only when the identifying is needed to advance core claims or defenses can it be sufficiently material to compromise First Amendment rights.” 140 F. Supp. 2d at 1096. In this particular case, the Plaintiffs are not even entitled to use the discovery process to explore issues relating to any core claims or defenses. Because Plaintiffs have not served any of the pseudonymous defendants in the underlying litigation, the required Rule 26(f) conference between the parties has not taken place. As a result, the District of Connecticut has only authorized expedited discovery for the very limited purpose of ascertaining the identities of those pseudonymous defendants so that the Plaintiffs may serve them. In fact, in their own motion the

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“Octavia,” “NYCFan,” “MrMiyagi,” “boombjoe,” “cavalier” “jane hoya,” “Hazelrah,” and “flyfisher,” as well as the anonymous administrators of biglawboard.com, bigchangesboard.com, and the XOXO Reader blog.

Plaintiffs only requested that the court grant discovery for this extremely narrow purpose. Exhibit H. Because of comity principles, this Court should not preempt the District of Connecticut's jurisdiction by allowing discovery that is beyond the scope of what that court has authorized. See Kimberly-Clark Corp. v. Baxter Healthcare Corp., 1993 WL 524376 (N.D. Ill. 1993). Thus, at this stage of the proceedings the Plaintiffs may only seek information that is directly relevant to the *sole* matter of ascertaining the identities of the pseudonymous defendants in the Connecticut action.

The information Plaintiffs demand in their subpoena is irrelevant to establishing the identities of the pseudonymous Connecticut defendants. Neither Movant Ciolli nor non-movants Mr. Roe and Ms. Roe are parties to the litigation, and none have not been accused of any wrongdoing. Plaintiffs have never even alleged in either their initial or amended complaint—or any other document filed in the Connecticut litigation—that the “AnthonyCiolli” AOL Instant Messenger user name is owned by or has been used by any of the pseudonymous defendants, let alone specified which particular pseudonymous defendant allegedly made use of it as is required by law. Columbia Ins. Co. v. Seescandy.com, 185 F.5.D. 573, 578-79 (N.D. Cal. 1999). Plaintiffs' complaints and other filings have never even alleged that any of the pseudonymous defendants have used AOL Instant Messenger, let alone the “AnthonyCiolli” user name or any other user name used by Movant Ciolli. Accordingly, Plaintiffs fail the second prong of the 2TheMart.com test.

**c. The Identifying Information is Not Directly or Materially Relevant to a Core Claim or Defense**

The 2TheMart.com test requires not just that the identifying information relate to a core claim or defense, but that it is directly and materially relevant to that core claim or defense. As in 2TheMart.com, the Movant in this case is not a party to the underlying litigation. Because



Movant Ciolli “ha[s] not been named as [a] defendant[] as to any claim, cross-claim, or third-party claim... [his] identity is not needed to allow the litigation to proceed.” *Id.* The remote possibility that the information Plaintiffs have requested may theoretically lead to information pertaining to the identities of the pseudonymous defendants is irrelevant, for “[First Amendment rights] cannot be nullified by an unsupported allegation of wrongdoing raised by the party seeking the information.” *Id.* at 1097. But unlike 2TheMart.com, there is not even an allegation of wrongdoing present in this case.

When evaluating this factor, this Court must also consider the overbroad nature of Plaintiffs’ discovery request. It is well established that courts should deny discovery requests that “are not limited by any time frame” or are otherwise “vague,” “overbroad,” or “burdensome.” Barcnas v. Ford Motor Co., 2004 U.S. Dist. LEXIS 25279, at \*24 (N.D.Cal. 2004). This is particularly the case when confidential information is involved, for even relevant documents that “contain additional confidential information that is irrelevant to plaintiffs’ suit” may nonetheless not be produced during discovery because “opening the files to the plaintiffs for a general search could reach well beyond the legitimate inquiries necessary to [the] litigation.” Sanchez v. City of Santa Ana, 936 F.2d 1027, 1034 (9th Cir. 1990). When the potentially relevant documents are “of limited or negligible value” it will typically not meet any proportionality test. Aramburu v. Boeing Co., 885 F. Supp. 1434, 1444 (D.Kan. 1995).

The Plaintiffs in this case seek to compel documents from AOL that are not limited by any time frame. In particular, Plaintiffs demand that AOL turn over all information *ever* associated with the “AnthonyCiolli” user name, including, but not limited to, all IP addresses and other user names. Exhibit K. Movant Ciolli, Ms. Roe, and Mr. Roe have made use of their shared AOL account for more than a decade; however, the earliest instance of any alleged

wrongdoing by the pseudonymous Connecticut defendants took place in June 2005, with the overwhelming majority of the defendants' purported acts occurring between February and July 2007. AOL screen names used by Ms. Roe and the late Mr. Roe between 1999 and 2004 to anonymously research, discuss, and cope with personal, private medical conditions have no bearing on any aspect of the Connecticut litigation—let alone the limited purpose for which expedited discovery has been authorized—yet Plaintiffs' subpoena would require that AOL disclose this information to them. Similarly, IP addresses used by Movant Ciolli to access his AOL account in 1997—literally when he was still enrolled in elementary school—would serve no legitimate purpose to the Plaintiffs, but irreparably harm Movant Ciolli's fundamental rights if disclosed.

But Plaintiffs' request would remain overbroad even if limited to the time period their causes of actions accrued. It is not necessary for Plaintiffs to receive such extensive discovery—discovery which would do irreparable harm to Movant Ciolli's constitutional rights—when other, less intrusive methods are available to reach the same ends. Providing Plaintiffs with every IP address used by Movant Ciolli, Mr. Roe, and Ms. Roe, even if only within a limited period of time, would, by itself, do nothing to further the goal of identifying the pseudonymous Connecticut defendants. Even if Plaintiffs had these IP addresses, those IP addresses could only be used to tie Movant Ciolli or non-movants Ms. Roe and Mr. Roe to a pseudonymous Connecticut defendant if Plaintiffs are able to establish that an IP address once used by Movant Ciolli, Ms. Roe, or Mr. Roe is identical to an IP address known to have been used by a pseudonymous defendant during the same time period. Plaintiffs have indicated, in their Connecticut filings, that they do possess several IP addresses believed to belong to pseudonymous defendants in that action. Exhibit H. Rather than requiring that AOL provide

Plaintiffs with all IP addresses spanning more than a decade, a less burdensome approach would entail the Plaintiffs providing AOL with IP addresses they have reason to believe belong to the pseudonymous defendants, and requesting that AOL inform Plaintiffs if any individuals using those IP addresses accessed any AOL Instant Messenger user names during that same time period. Such an approach would fully preserve Movant Ciolli, Ms. Roe, and Mr. Roe's constitutional rights while obtaining the same end result for the Plaintiffs. For these reasons, this Court must find that the Plaintiffs do not meet the third factor of the 2TheMart.com test, for Plaintiffs' subpoena is overly broad and requests information not materially relevant to identifying the pseudonymous Connecticut defendants.

**d. The Information Sought is Available from Another Source**

There is sufficient information available elsewhere to establish the information Plaintiffs are seeking. In 2TheMart.com, the court held that disclosing the identities of the anonymous non-parties was superfluous because the defendant could use chat room records to prove what those anonymous non-parties had said. Here, the information sought by the Plaintiffs—the identity of the owner of the “AnthonyCiolli” username—has already been established in Movant Ciolli's deposition, and the fact that AOL informed Movant Ciolli of Plaintiffs' subpoena further establishes that Movant Ciolli is, in fact, the owner of the username. At that same deposition, Movant Ciolli informed the Plaintiffs, under oath, that he was not any of the pseudonymous defendants, and provided them with all nonprivileged information he possessed pertaining to their identities. Thus, the Plaintiffs fail the fourth prong of the 2TheMart.com test. Because the information already obtained is more than sufficient, the Court should respect Movant Ciolli's First Amendment rights and not authorize the disclosure of any additional AOL user names used

by Movant Ciolli, disclosure of Mr. Roe and Ms. Roe's identities, and Movant Ciolli, Mr. Roe, and Ms. Roe's IP addresses, and other private information spanning more than a decade.

**E. THIS COURT SHOULD APPLY THE MOBILISA TEST RATHER THAN THE ONE USED IN 2THEMART.COM OR ANY ALTERNATE TEST**

The Mobilisa test is not the only test courts have adopted to answer the question of whether an Internet service provider should reveal the true identity of an anonymous non-party speaker. Some courts, for instance, have only applied the 2TheMart.com balancing test without also applying Mobilisa's notice and summary judgment requirements. As illustrated above, whether this Court applies the Mobilisa "summary judgment plus" test or solely uses the 2TheMart.com balancing test is not outcome determinative, since Plaintiffs Doe 1 and Doe 2 are unable to satisfy the requirements of either test. Nevertheless, Movant Ciolli urges the Court, for the following reasons, to apply the Mobilisa test to this case.

The Mobilisa test, if adopted, will result in more desirable outcomes than the 2TheMart.com test. Unlike the 2TheMart.com test, the Mobilisa test will better permit ease of application and better enable consistent decision making. As a natural consequence of the 2TheMart.com test only applying to non-parties to the underlying litigation, courts have applied different, and sometimes less rigorous, tests when faced with the prospect of potentially identifying an anonymous defendant through the discovery process. See, e.g., Columbia Ins.v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999) (finding that an anonymous defendant's identity can be disclosed through a subpoena if the plaintiff can prove that his allegations can withstand a motion to dismiss); Doe v. Cahill, 884 A.2d 451, 457 (Del.Supr. 2005) (finding that a "plaintiff must satisfy a 'summary judgment' standard before obtaining the identity of an anonymous defendant" but not requiring a balancing of competing interests). But applying widely divergent tests based on the status of the anonymous speaker is highly inappropriate, for

“the potential for chilling speech by unmasking the identity of an anonymous or pseudonymous internet speaker equally exists whether that party is a defendant or a witness.” Mobilisa, 170 P.3d at 719.

But while the Mobilisa test will promote beneficial outcomes, applying the 2TheMart.com test would encourage and reward the proliferation of frivolous litigation intended to chill constitutionally protected activities and further waste scarce judicial resources. The Mobilisa court acknowledged this danger, observing that “adopting differing standards could encourage assertion of... claims simply to reap the benefit of a less-stringent standard.” Id. The existence of two widely divergent standards for unmasking anonymous Internet speakers will encourage unscrupulous plaintiffs to strategically frame their litigation in a way that will maximize their chances of identifying anonymous critics or others with whom they disagree. For these reasons, Movant Ciolli asks that this Court adopt the Mobilisa test, even though applying the 2TheMart.com test would bring about the same result in this particular case.

#### IV. CONCLUSION

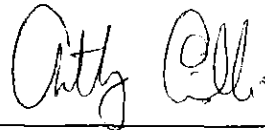
Federal courts should not compel Internet intermediaries such as AOL to unjustifiably reveal personal information in violation of First Amendment interests and the privacy rights of Internet users. Movant Ciolli, as well as non-movants Mr. Roe and Ms. Roe, are not parties to the underlying Connecticut litigation, and thus the Plaintiffs must meet the highest level of scrutiny in order to disclose their identities, other user names, IP addresses, or other protected information. The Plaintiffs plainly fail to satisfy this standard. The discovery they are requesting of AOL is duplicative of information they have already obtained from Movant Ciolli at his deposition. Furthermore, Plaintiffs fail to meet any of the requirements of the Mobilisa test. They have not provided adequate notice to Movant Ciolli or any other individuals whose

First Amendment rights are jeopardized by their discovery request. They cannot demonstrate that the litigation they have initiated in Connecticut could withstand a motion for summary judgment filed by one of the defendants. Finally, no factor considered in a balancing test weighs in their favor, for the subpoena was not issued in good faith, the material sought does not relate to a core claim, the documents requested are not materially relevant to any claim, and the same information has already been obtained from another source.

For the foregoing reasons, Movant Ciolli requests that this Court grant his motion to quash Plaintiffs' subpoena to AOL.

Dated: April 7, 2008

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Anthony Ciolli".

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Anthony Ciolli  
Pro Se

**CERTIFICATION OF SERVICE**

A copy of this motion, memorandum of law, and supporting documents was sent to the following by first class United States Mail on April 7, 2008:

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Anthony Ciolli