
**IN THE COURT OF SPECIAL APPEALS
OF MARYLAND**

September Term 2008

No. 00054

INDEPENDENT NEWSPAPERS, INC.,

Appellant,

v.

ZEBULON J. BRODIE,

Appellee.

On Appeal from the Circuit Court for Queen Anne's County
(Honorable Thomas G. Ross, Judge)

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case presents an issue of first impression in Maryland, involving a legal question that has increasingly troubled the state and federal courts during the past decade: What standard should govern discovery sought at the outset of a case to identify anonymous Internet speakers whose speech allegedly violates plaintiffs' rights? Resolution of this question implicates a balance between the right of anonymous speech, which is guaranteed by the First Amendment, and the right to judicial redress of a person who claims to have suffered legally cognizable harm. In resolving this question, we urge this Court to join the broad and growing consensus among appellate and trial courts around the country that a plaintiff should not be able to identify anonymous Internet speakers for no more than the cost of hiring a lawyer and filing a complaint. Rather, the Court should hold that a plaintiff must make a factual and legal showing that impingement on the right to remain anonymous is justified because the plaintiff has a realistic possibility of succeeding in the litigation.

The court below denied a motion for a protective order and granted a motion to enforce a subpoena to identify Doe speakers, some of whom are not even named defendants, without the showing that is required by law. Accordingly, its order should be reversed, and the case should be remanded to determine whether plaintiff can make the required showing.

QUESTIONS PRESENTED

1. May a court breach the constitutional right to speak anonymously and order the identification of Internet speakers who are alleged to have violated the plaintiff's rights without a factual and legal showing that the plaintiff has a supportable claim on the merits?
2. Did plaintiff Brodie make the required showing in this case?

STATEMENT OF FACTS

A. Background

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

v. American Civil Liberties Union, 521 U.S. 844, 853, 870 (1997),

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

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

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

The individuals who post messages generally do so under pseudonyms – similar to the old system of truck drivers using “handles” when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the forums at issue here will reveal, most people choose nicknames. These typically colorful monikers protect the writer's identity from those who disagree with him or her, and they encourage the uninhibited exchange of ideas and opinions. Such exchanges are often very heated, and they are sometimes filled with invective and insult. Most, if not everything, that is said on message boards is taken with a grain of salt.

Many message boards have a significant feature that makes them very different from

almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use a message board to express his point of view; a person who disagrees with something that is said on a message board for any reason – including the belief that a statement contains false or misleading information – can respond to that statements immediately at no cost, and that response can have the same prominence as the offending message. Most message boards are thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, on most message boards companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. And, because many people regularly revisit message boards, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.¹

B. Facts of This Case

Zebulon Brodie is the scion of an old family on the Eastern Shore. Brodie is a real estate developer who operates various area businesses, including food establishments and a management company. He owned a historic landmark home in Church Hill, Maryland, that was sold to a developer. Shortly after the sale, the house burned down to the ground.

Defendant INI publishes several community newspapers in the Eastern Shore area of

¹The policies of the Newszap blogs, where the statements at issue in this case were posted, states as follows:

Sometimes people complain simply because they don't agree with somebody else's opinion. In those cases, they might instead want to post their own comments in the forum to express their disagreement — and perhaps enlighten other citizens by doing so. That's precisely what public forums are intended to do!

http://www2.newszap.com/about_us.html.

Delaware and Maryland, as well as in Arizona and Florida, and maintains web sites devoted to news developments in those areas. INI also operates an Internet web site at NewsZap.com, which features individual community web pages for communities in the four states. There are, for example, twenty separate web pages for counties, cities and towns on the Eastern Shore. Each community page links to a “public issues forum” where users engage in dialogue on public issues related to the community. Although any member of the public can view the forums, registration is required in order to participate in the discussions on a forum. Extract at 19 (“E19”).

On March 14, 2006, a series of comments relating to the burning of Brodie’s former home were posted on the Centreville Public Issues Forum on INI’s NewsZap, including the following exchange in a thread entitled “Centreville Eyesores” (E36-38):

CorsicaRiver: I think there must be a special circle in Hell reserved for a greedy, selfish developer who deliberately burns down a beautiful pre-war Civil War house, after cutting down all the 100-year-old cypress trees around it. . . . What I’m referring to is not in Centreville, but nearby in Church Hill The white Greek Revival house facing 213 that Zeb Brodie sold 3 months ago for \$1.85 mil to developers, who deliberately torched it this past weekend. . . . Shame on you, Mr. Brodie!

Born & Raised Here: Oh my God, they burned the place down? I can’t believe it!!!! I heard Bill Sharp bought it from Brodie, don’t know if that’s true or not. Has anyone else heard the same thing?

CorsicaRiver: Yes, they burned it down . . . and shame on Bill Sharp as well as on Mr. Brodie! I just found out some more information about the house. It was known as the Charles Cahall Farm and apparently dated back to the 1850s. In his 1980 historic sites survey, Orlando Ridout of the Maryland Historic Trust called it "one of the most carefully preserved farmhouses in the country," "remarkable," and "virtually untouched." There were also a well-preserved meat house, windmill, and granary. . . .

SecretAgentMan: Bastards!

Chatdusoleil: . . . Has there been a news story on the fire this weekend? Or an investigation?

There was also an exchange of opinions about one of Brodie’s business establishments. On Monday, March 20, 2006, at 4:52 pm, CorsicaRiver reposted the commentary of a previous user, RockyRaccoonMD. The evidence supplied by Brodie does not clearly distinguish between the portion written by RockyRaccoonMD and the portion written by

CorsicaRiver, but the entire text is as follows (E67-68):

Remember Mr. Brodie owns Dunkin' Donuts in town. He [is at] the corner of the shop every morning. I think I will make [a] trip there this week and let him know what I think and [not step] foot into that business, or any others that he owns (which includes the Subway), ever again. I'm sure it will not mean much of a difference but . . .

I wouldn't go to that Dunkin' Donuts of Brodie's anyway . . . have you taken a close look at it lately? One of the most dirty and unsanitary-looking food-service places I have seen . . . I bought coffee [a] couple of times but quickly lost my appetite.²

(ellipses in original; brackets represent words not shown on printed page in record but inferred from context)

A user with the screen name Suze responded at 5:13 p.m. (E67):

Corsica - I haven't seen the inside of DD in a while, but have you seen the outside? I drove the [drive] through not long ago and was completely and utterly SHOCKED at the amount of trash that is [] and sides of that building. It's apparent no one is cleaning the outside of the building and the [] wafting into the river that runs right alongside. ☺

If they don't keep the outside clean then Hmm... makes you wonder

Counsel for Brodie wrote to INI, complaining that these two lines of commentary were libelous and demanding that the posts be removed and retracted. The NewsZap webmaster promptly removed both threads from the Internet. E19-20.

PROCEEDINGS BELOW

On May 26, 2006, plaintiff filed a two-count complaint in the Circuit Court for Queen Anne's County, alleging that defendants INI and three individual Doe defendants identified

²As on many message boards, a poster on a NewsZap forum can repost part or all of a previous post for the purpose of commenting on it. Generally, in this three-page excerpt of a thread, the reposted material appears in large type, and the new comment appears in small type. However, for this post, both paragraphs appear in large type under the legend, "RockyRaccoonMD wrote:" Because Brodie only provided three pages of the forum thread in question, it is impossible to be certain what RockyRaccoonMD actually said in his original post. This distinction is important because the Communications Decency Act, 47 U.S.C. § 230, protects a reposter against being held liable for defamatory content in a communication originally written by someone else. *Barrett v. Rosenthal*, 146 P.3d 510, 514, 525 (Cal. 2006).

by their pseudonyms – CorsicaRiver, chatdusoleil, and Born & Raised Here – defamed Brodie and conspired to defame Brodie by accusing him of “getting ‘away with torching [the burned house] and having ‘no sense of decency,’” and further stating about Brodie:

there must be a special circle in Hell reserved for a greedy, selfish developer who deliberately burns down a beautiful pre-war Civil War house, after cutting down all the 100-year-old cypress trees around it. A really hot circle of Hell, where they do nasty things to you with nail guns and hot asphalt.

E11 ¶ 10.

The complaint further alleged that Brodie was defamed by accusations of “maintaining ‘dirty and unsanitary-looking food-service places’ and allowing trash from those establishments to ‘waft’ into the nearby waterway.” *Id.* ¶ 8.

Defendant INI promptly moved to dismiss the complaint against it, arguing that, pursuant to the Communications Decency Act (“CDA”), 47 U.S.C. § 230, it is immune from liability for comments posted on its web site by other persons; that, in any event, the comments alleged to be actionable are not “of and concerning” Brodie and express non-actionable opinion rather than fact; and that a civil conspiracy claim must be dismissed when the tort that the defendants allegedly conspired to commit cannot be sustained. At the same time, Brodie served a subpoena to identify the Doe defendants CorsicaRiver, chatdusoleil, and Born & Raised Here, and INI moved for a protective order shielding it from that subpoena, arguing that under authorities such as *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), and *Dendrite Int’l v. Doe*, 775 A.2d 756 (N.J. App. 2001), the plaintiff should be required to make a legal and evidentiary showing of a valid cause of action before impinging on the Does’ right to speak anonymously. INI noted that no such showing had been made in this case. Brodie argued that so long as he alleged a valid cause of action, he should be permitted to identify the Doe defendants.

By opinion and order dated November 21, 2006, the Court (Honorable Thomas G. Ross) granted dismissal based on the section 230 defense, expressly finding it unnecessary to pass on whether the statements were “of and concerning” Brodie or whether they stated non-actionable opinion. E47-49. At the same time, Judge Ross stated (E49):

none of this means that the original, culpable parties who posted the defamatory statements escape accountability if their statements were indeed defamatory. Therefore, it is incumbent upon INI to provide identifying information for the three registered users also named in the present suit.

Because INI recognized that the court's opinion had implicitly assumed that the posts were actionable in ordering identification of the Does, while expressly reserving that question in the section of its opinion addressing the motion to dismiss, it moved for reconsideration of its motion for a protective order. INI argued that numerous cases, including *Dendrite* and *Cahill*, required a legal showing of a valid cause of action as well as an evidentiary showing. In response, Brodie argued that this is an issue of first impression in Maryland, that the trial court was "not bound" by decisions in other states, and that, if any other decision should be applied, it was the ruling of a federal court in New York addressing whether alleged copyright infringers should be identified so that they could be sued for using file-sharing programs to download copyrighted musical recordings. Mem. at 2-3, *citing Sony Music v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004). Finally, Brodie argued that if speech is alleged to be defamatory per se, then it is, ipso facto, not protected by the First Amendment and hence there is no right to say it anonymously.

On March 12, 2007, Judge Ross granted the motion for reconsideration in part, but also denied it in part. E57. He agreed with INI that the right to speak anonymously is protected by the First Amendment, reviewed the standards for applying that right to subpoenas to identify Doe defendants, and indicated that none of the standards were entirely satisfactory. He purported to "agree with INI that, no matter what standard this Court utilizes in deciding whether or not to grant their motion [for a protective order], the piety of the First Amendment requires ensuring that Plaintiff has stated a valid claim for defamation." E56. Judge Ross then proceeded to decide only whether the complaint stated a valid claim without ever explaining why that was **all** that is required or, if not, why he felt the standard for breaching anonymity was nevertheless met. Judge Ross ruled that statements about the burning of Brodie's house by *CorsicaRiver et al.* did not attribute criminal conduct to Brodie, but only to the developers who had bought the house from him; because the defamatory

statements were not of and concerning Brodie, he could not sue those posters for defamation. E57. On the other hand, he ruled that the statements in the Complaint about Brodie's "maintaining a 'dirty and unsanitary-looking food-service place' and allowing trash from those establishments to 'waft' into the nearby waterway" were defamatory per se because they refer negatively to Brodie's business. *Id.* Accordingly, the Court stated, "Plaintiff may enforce a subpoena regarding the identity of individuals" who made those statements. *Id.*

INI pointed out, however, that there was no reason to believe that the three posters identified in the previously-served subpoena were responsible for the posts about Brodie's Dunkin' Donuts facility, and asked Brodie to provide the actual postings from the forum (which INI had deleted in response to Brodie's complaint). On April 13, 2007, Brodie provided three pages from the forum thread containing the actual postings which, for the first time, showed the context of the allegedly actionable statements. E61-63. Brodie's counsel indicated that the posters responsible for the statements were "Suze" and "RockyRaccoonMD," without acknowledging that neither was identified in the complaint as a Doe defendant. E60. Without amending his complaint, Brodie then served a new subpoena, dated May 22, 2007, seeking to identify those posters as well as the three others whose anonymity had been protected by the Court's earlier opinion. E59.

INI moved to quash that subpoena and sought a protective order. It argued both that the Court should require proof of wrongdoing rather than merely allegations, and that the posts did not meet even the facial validity standard adopted the Court's March 12 ruling. After all, the statements were non-actionable opinion, not defamatory statements of fact. In response, Brodie argued that opinions are actionable as defamation. By a one-page order on February 19, 2008, Judge Ross denied the motion to quash and for a protective order, and ordered INI to comply with "the subpoena and discovery requests of plaintiff." E70.

INI appealed on March 17, 2008. E71.

SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to

communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

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

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

Although this is an issue of first impression in Maryland, this Court will not be writing on an entirely clean slate because there is a developing consensus among those courts that have considered this question that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Specifically, there is a developing consensus that a court faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process should: (1) provide notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying her anonymous critics – and that the defendant is not denied important First Amendment rights unless the plaintiff has a realistic chance of success on the merits.

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

Moreover, most cases of this kind primarily involve demands for monetary relief. Only in the rare case will a plaintiff have a sound argument for being granted a preliminary injunction, given the nearly insurmountable rule against prior restraints of speech. Accordingly, although applying this standard may delay service of the complaint, it will not ordinarily prejudice the plaintiff. On the other hand, the fact that after the defendant is identified, her right to speak anonymously has been irretrievably lost, counsels in favor of caution and hence in favor of allowing sufficient time for the defendant to respond and

requiring a sufficient showing on the part of the plaintiff.

Here, discovery should be denied because the posts at issue do not state defamatory facts, but only set forth the non-actionable opinions of the posters, because the claims against the posters are time-barred, and because, if the statements are actionable, plaintiff has declined to present any evidence that the stated facts are false or that the statements have caused any actual harm. Moreover, the balance of equities in this case weighs against requiring INI to identify its users. The order under review should, therefore, be reversed.

ARGUMENT

THE CONSTITUTION BARS THE DISCOVERY SOUGHT FROM INI.

A. The First Amendment and Article 40 of the Maryland Declaration of Rights Protect Against Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960); *Green v. City of Raleigh*, 523 F.3d 293, 301 (4th Cir. 2008); *Lubin v. Agora, Inc.*, 389 Md. 1, 19, 20, 23, 882 A.2d 833 (2005). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers. The Supreme Court has stated:

[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.

McIntyre, 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 public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998); *ACLU of Ga. v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno*, 526 U.S. 1061 (1999), *aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site “created and designed to annoy” legislators through anonymous communications); *Global Telemedia v. Does*, 132 F. Supp.2d 1261 (C.D. Cal. 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California’s anti-SLAPP statute); *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1092-1093 (W.D. Wash. 2001) (denying subpoena to identify third parties).

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

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. The technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind an electronic footprint that, if saved by the recipient, provides the beginning of a path that can be followed back to the original sender. *See* Lessig,

The Law of the Horse: What Cyber Law Might Teach, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. As a result, many observers argue that the law should provide special protections for anonymity on the Internet. E.g., Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524. As the Supreme Court has held, due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).³

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that

³Because rights under Article 40 of the Declaration of Rights are at least as broad as under the First Amendment, *Sigma Delta Chi v. Speaker*, 270 Md. 1, 310 A.2d 156, 158 (1973), Article 40 similarly protects the right to speak anonymously.

are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In those cases, courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of his case; (2) disclosure of the source to prove the issue is “necessary” because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of his case. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, “If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D.Wash. 2001).

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

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

The leading case is *Dendrite Int’l v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo!. That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which we urge the Court to

apply in this case:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to [New Jersey's rules], the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 775 A.2d at 760-761.⁴

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

All of the other appellate courts that have addressed the issue of subpoenas to identify anonymous Internet speakers, as well as several federal district courts, have adopted some variant of the *Dendrite* or *Cahill* standards. Several courts have expressly endorsed the *Dendrite* test, requiring notice and opportunity to respond, legally valid claims, evidence supporting those claims, and finally an explicit balancing of the reasons supporting disclosure and the reasons supporting continued anonymity. *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007), involved a subpoena by a private company seeking to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to

⁴ *Dendrite* has received a favorable reception among commentators. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007); O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyber-Slapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U. L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001).

obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court drew an analogy between an order requiring identification of an anonymous speaker and a preliminary injunction against speech, and called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides. In *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005), Judge Wayne Brazil required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests," and held that plaintiff's trademark and defamation claims based on sardonic postings about plaintiff's chief executive did not support discovery. *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001), similarly expressed a preference for the *Dendrite* approach, requiring a showing of reasonable possibility or probability of success.

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

[C]ourt-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and

that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.⁵

Among the federal district court decisions following *Cahill* and *Dendrite* is *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), where the court refused to enforce a subpoena to identify the authors of several postings by Best Western franchisees that criticized the Best Western motel chain, because the plaintiff had not presented any evidence of wrongdoing on the part of the Doe defendants. The court suggested that it would follow a five-factor test drawn from *Cahill*, *Dendrite* and other decisions. In *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), the court ordered the identification of a commercial competitor of the plaintiff who posted defamatory comments on bulletin boards only after considering a detailed affidavit that explained how certain comments were false. In *Doe I and II v. Individuals whose true names are unknown*, 2008 WL 2428206 (D. Conn. June 13, 2008), the Court granted discovery only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress based on vile personal attacks on a student gossip message board. Most recently, in *Quixtar v. Signature Management Team*, 2008 WL 2721265 (D. Nev. Jul. 7

⁵Since *Melvin* was decided, several Pennsylvania trial courts have recognized that disclosure turns on whether the plaintiff can produce sufficient evidence to carry her claim against a Doe defendant through summary judgment. In *Reunion Industries v. Doe*, 80 Pa. D.&C. 4th 449 (Com. Pl. Allegheny Cy. 2007), Judge Wettick, who also decided *Melvin*, reaffirmed his commitment to the summary judgment standard, and denied the requested discovery to support the plaintiff's defamation claim. In *Polito v. Doe*, 78 Pa. D.&C. 328 (Pa. Com. Pl. Lackawanna Cy. 2004), Judge Nealon held that the plaintiff had shown a prima facie case supporting her claim that insulting and pornographic emails sent directly to her AOL account, despite her efforts to change her address and avoid the messages, constituted harassment and stalking by communication under Pennsylvania law. And in *Klehr Harrison v. JPA Development*, 2006 WL 37020 (Pa. Com. Pl. Philadelphia Cy. Jan. 4, 2006), the court agreed with a law review article stating that a defendant "may oppose the discovery request by establishing that he or she is entitled to summary judgment. [This standard] would permit discovery of a defendant's identity when the plaintiff had evidence supporting all elements of his claim . . ." *Id.* at *9.

2008), the court refused to order the identification of Doe defendants who were sued for intentional interference with contract and with business relations until the plaintiff notified the Does and plaintiff had a chance to meet the *Cahill* standard. And in *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006), the court dismissed the case sua sponte for lack of subject matter jurisdiction because Does cannot be sued in diversity, but as an alternative holding addressed the showing that must be made to obtain such discovery. The court expressed some concern about the level of detail that plaintiff might have to show to establish a prima facie case under *Cahill*, but held that in any event the complaint did not even state a valid claim.

In *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), and *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008), the courts weighed the limited First Amendment interests of alleged file-sharers but upheld discovery to identify them after satisfying themselves that plaintiffs had produced evidence showing a prima facie case that defendants had posted online hundreds of copyrighted songs. Brodie argued below, Memorandum in Response to Original Motion for Protective Order, at 8-11, that *Sony* allows a plaintiff to proceed on mere allegations in the complaint, but that is not an accurate statement of the case. In that case, as in every case where music companies sue alleged file-sharers, the plaintiffs attached to the complaint a list of downloaded songs for each Doe defendant and provided an affidavit explaining how the copyrighted nature of the songs is ascertained.

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

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

frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Accordingly, the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and give them notice that suit had been filed against them, thus providing them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against the defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the plaintiff's trademark claims against the anonymous defendants. *Id.* at 580.⁶

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

⁶A recent Wisconsin case addressed issues of anonymity in a non-Internet case. *Lassa v. Rongstad*, 294 Wis. 187, 718 N.W.2d 673 (2006). 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 other, anonymous authors, the parties settled the case on terms that allowed Rongstad to appeal. On appeal, he presented an argument, not made below, that the court should have considered his motion to dismiss the complaint before ruling on the pending discovery motions. A plurality opinion joined by only two of the four justices participating in that case stated that Wisconsin's detailed pleading requirement met the First Amendment concerns raised by the court in *Cahill*. Another justice concurred on other grounds but declined to reach First Amendment issues; the fourth justice dissented on First Amendment grounds; and three justices disqualified themselves. The plurality opinion does not establish Wisconsin law, because a majority of justices must join an opinion for it to "have any precedential value." *State ex rel. Ziervogel v. Washington Cy. Bd. of Adjustment*, 263 Wis.2d 321, 328, 661 N.W.2d 884, 888 (Wisc. App. 2003); *Doe v. Archdiocese of Milwaukee*, 211 Wis.2d 312, 334 n. 11, 565 N.W.2d 94 (1997). Moreover, *Cahill* was decided after briefing was complete, and it is not clear that any party argued for the application of *Cahill*'s summary judgment standard, not to speak of *Dendrite*'s balancing standard.

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

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

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

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

Here, Brodie did nothing to meet the notice requirement before he sought discovery, even though he could easily have posted statements on the forum where critical comments were made warning that he was planning to file suit and seek identifying information through discovery. However, after receiving subpoenas to identify the three Doe defendants, INI sent emails to each of them. When new subpoenas were served in May 2007, seeking to identify Suze and RockyRaccoonMD, INI sent an email to each of them as well.

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

(2) Demand Specificity Concerning the Statements.

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

Here, Brodie's complaint provided only portions of the statements on which he is suing. Eventually, he provided three pages of the thread, from which it is impossible to discern who was the author of one of the allegedly defamatory comments – the statement about the “dirty and unsanitary” status of the Dunkin' Donuts restaurant. Two posts on the forum – not only by CorsicaRiver but also by KidWellToo – appear to attribute the statement to RockyRaccoonMD, but the post by Suze implies that the statement is by CorsicaRiver. The three pages provided do not go back to the beginning of the thread where RockyRaccoonMD's original post appeared. Because the burden is on Brodie to show the basis for overcoming the right to speak anonymously, Brodie has not met this aspect of the test, although he should be given the opportunity to develop the record further on remand.

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

Third, courts reviewing requests for discovery to identify anonymous speakers also review the merits of the legal claims stated in the complaint to ensure that they state a claim on which relief can be granted. Specifying the precise statements reveals whether they were posted online too long before the suit was brought to comply with the statute of limitations. Moreover, in a defamation case, some statements may be too vague or insufficiently factual to be defamatory. Some statements may not be actionable because they are not “of and concerning” the plaintiff, which is a requirement under the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). Other statements may be non-defamatory as a matter of law because they are merely rhetorical expressions of opinion, which are excluded from the cause of action for defamation. *Doe v. Cahill*, 884 A.2d at 467; *McMann*

v. Doe, 460 F. Supp.2d at 269–270. Only those statements that assert provably false facts are actionable in defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990). To determine whether a statement asserts a provably false fact, the statement must be viewed in context. *Id.* at 21 (considering “general tenor” of article). As this Court has recognized, “[w]ords have different meanings depending on the context in which they are used and a meaning not warranted by the whole publication should not be imputed.” *Peroutka v. Streng*, 116 Md. App. 301, 695 A.2d 1287, 1293 (Md. App. 1997), quoting *Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992). The issue of whether a statement is opinion or fact is one for the Court to resolve as a matter of law. *Mathias v. Carpenter*, 402 Pa. Super. 358, 362-363, 587 A.2d 1 (1991); *Nanavati v. Burdette Tomlin Mem. Hosp.*, 857 F.2d 96, 106-108 (3d Cir. 1988).

Moreover, just as readers will anticipate that newspaper commentators “will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere as a news reporting column,” *Riley v. Moyed*, 529 A.2d 248, 252 (Del. 1987), so, too, statements on a message board are typically exaggerated and most readers will take them with a grain of salt rather than anticipating complete objectivity. *Global Telemedia Int’l v. Doe I*, 132 F. Supp.2d 1261, 1267 (C.D. Cal. 2001). The very context thus militates against a finding of defamatory meaning.

Perhaps inadvertently, the trial judge enforced a subpoena that demanded identification of the authors of statements about the burning of the house that the judge had already held did not defame Brodie. Nor did the trial judge ever explained why the statements about the Dunkin’ Donuts were actionable statements of fact, not statements of opinion. One highly rhetorical post, by either CorsicaRiver or RockyRaccoonMD, wrote about “that Dunkin’ Donuts of Brodie’s” that it was “[o]ne of the most dirty and unsanitary-looking food-service places I have seen.” E61. Because only the poster could know how the condition of this Dunkin’ Donuts compared with other restaurants that the poster had seen, on its face this post simply states one subjective view of the restaurant, and is not capable of being proved true or false. Similarly, the statement that the poster “quickly lost my appetite” is his or her opinion that cannot be shown to be true or false.

Courts have held that this type of language is subjective and personal to one's own tastes and therefore cannot be verifiable statements of fact actionable in defamation. For example, in *Havalunch, Inc. v. Mazza*, 294 S.E.2d 70 (W. Va. 1981), the court overturned as a matter of law a jury verdict based on a student's statement about a local restaurant "Bring a can of Raid if you plan to eat here. . . . You'll regret everything you eat here, especially the BLT's," holding that the statements were simply the student's opinion, not implied statements of fact about the pervasiveness of vermin or the objective quality of the food. *Id.* at 75. See also *Greer v. Columbus Monthly Pub'g Corp.*, 448 N.E.2d 157, 161 (Ohio 1982) ("by its very nature, an article commenting upon the quality of a restaurant or its food, like a review of a play or movie, constitutes the opinion of the reviewer"); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 227 (2d Cir. 1985) (reversing jury verdict for plaintiff restaurant and stating "[t]he natural function of the review is to convey the critic's opinion of the restaurant reviewed: the food, the service, the decor, the atmosphere, and so forth. Such matters are to a large extent controlled by personal tastes"). In *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993), the Court held that the word "hefty" in the phrase "hefty mark-ups" was too subjective a word to be proved false. See also *Biospherics v. Forbes*, 151 F.3d 180, 184 (4th Cir. 1998) (holding that a column's observation that a company's stock price was based on "hype and hope" was opinion).

Similarly, the commentary by "Suze" cannot be proven true or false. Suze expresses an opinion, after viewing the exterior of the Dunkin' Donuts, about the property's condition. Suze was "shocked" at the amount of trash. Of course, it is impossible to prove whether or not the quantity of trash was "shocking" because shock is a personal reaction not readily reducible to objective fact. Several napkins, coffee cups and doughnut bags on the ground may be shocking to one person, but a non-issue to another. Moreover, the smiley face at the end of the comment that something was "wafting into the river that runs right along side. ☺" indicates the hyperbolic and metaphorical nature of the comment – *i.e.* the writer may be exaggerating about trash actually "wafting" into the river, but used the figurative language to convey his/her opinion regarding the unkempt nature of the exterior of the restaurant. See, *e.g.*, *Greenbelt Coop. Publ'g Ass'n v. Bressler*, 398 U.S. 6, 14 (1970) (finding hyperbolic

statements non-actionable).

Finally, the complaint has never been amended to allege defamation claims against two of the five Does whose identities were sought by the subpoena. Even assuming that a court should assume the truth of the properly stated allegations in a complaint, Brodie has never alleged that either RockyRaccoonMD or Suze defamed him or made statements about him either negligently or with actual malice. Indeed, it was not until more than one year after the statements about his Dunkin' Donuts were first made that Brodie even acknowledged that the involvement of RockyRaccoonMD or Suze. INI first learned that these two Does were the ones whose identities were sought, and hence was able to give notice to them, in May 2007, more than a year after the statements were published (and, indeed, more than a year after they were removed from the forum at Brodie's request). And even today, Brodie has yet to amend his complaint to allege defamation claims against these two defendants.

In the circumstances, there is every reason to question whether a suit by Brodie against Suze or RockyRaccoonMD would be timely. The statute of limitations for libel claims is one year. 5 Md Code. Ann., Courts & Judicial Proceedings, § 5-105. Moreover, every jurisdiction to consider the issue has applied the single publication rule to Internet communications. *E.g.*, *Nationwide Bi-Weekly Admin. v. Belo Corp.*, 512 F.3d 137, 143-145 (5th Cir. 2007); *Oja v. Army Corps of Engineers*, 440 F3d 1122 (9th Cir. 2006); *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 88-89 (2nd Cir. 2003). Accordingly, discovery should not be permitted to identify these Doe speakers because a suit against them for defamation would not be timely.

(4) Require an Evidentiary Basis for the Claims.

Even if the Court concludes that at least one statement is objectively verifiable and hence actionable, and not time-barred, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement, which has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, prevents a plaintiff from being able to identify his

critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward with **evidence** in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who bring cases like this one have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.*, Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily Freeman, November 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfi=8. One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* See *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D.Pa. May 19, 2006) (company filed Doe lawsuit; obtained identity of employee who criticized it online; fired the employee; and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F.Supp. 551, 566-567 (E.D.Mich. 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case before it is allowed 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.

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false (in a defamation action) or rests on confidential information (in a suit for disclosure of inside information). Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant.

In this case, for example, if the forum posts about conditions at Brodie's Dunkin' Donuts are false, it should not be difficult for him to present evidence, based on first hand knowledge, establishing that trash **never** accumulates outside the restaurant and never gets from there into the nearby waterway, and that the restaurant is never dirty. Either he knows this on his own personal knowledge, because he personally checks the facility regularly, or the restaurant has a manager who has such personal knowledge. If the statements are false, Brodie could produce affidavits from those charged with cleaning the restaurant, detailing the cleaning protocols and schedule and averring that the interior is never left in a dirty or

unsanitary condition. Similarly, affidavits could be introduced about the maintenance of the exterior, averring that no trash is ever permitted to remain outside the restaurant, and no trash ever gets into the nearby waterway. Brodie does not need discovery to prove these facts, and yet he cannot prevail on his defamation claim unless he has such evidence. And he should be able to do this even now, at the outset of the litigation, before the Does' right to speak anonymously is breached. The fact that Brodie does not yet know the identity of the Doe defendants should not prevent him from presenting such evidence.

Brodie will also have to prove damages as an element of his cause of action. Maryland law distinguishes between defamation per se, which may often be established without proof of damages, and defamation per quod, for which special damages are required. *Samuels v. Tschechtelin*, 135 Md.App. 483, 763 A.2d 209, 244 (Md. App. 2000). Although an accusation that attributes inability to perform properly the necessary attributes of the plaintiff's business or profession is commonly considered to be defamation per se, many states recognize an exception for statements that relate only to the failure to perform properly on a single instance or occasion. In that case, the plaintiff is not suing for defamation per se and must allege and prove special damages. *Morron v. City of Middletown*, 464 F. Supp. 2d 111, 117 (D. Conn. 2006); *Woodmont Corp. v. Rockwood Center P'ship*, 811 F. Supp. 1478, 1484 (D. Kan. 1993); *Beinin v Berk*, 452 N.Y. Supp.2d 601, 602 (N.Y. App. Dept. 1 1982), *aff'd*, 444 N.E.2d 1005 (N.Y.); *Williams v Burns*, 540 F. Supp. 1243, 1251 (D. Colo. 1982); *Cinquanta v Burdett*, 388 P.2d 779, 781 (Colo. 1963). Maryland courts have referred favorably to the single instance rule. *Foley v. Hoffman*, 188 Md. 273, 284, 52 A.2d 476 (1947) (“‘incapacity or lack of due qualification’ to fill a position is not necessarily imputed by charging a single act of carelessness. Such a false statement . . . might be ‘rather indicative of human imperfection than of general professional incompetency or gross disregard of professional duty’”); *Gooch v. Md. Mech. Sys.*, 81 Md. App. 376, 400-01 (1990) (Alpert, J., concurring in part and dissenting in part) (quoting *Foley*).

Here, the forum posts on which Brodie has sued say at most that, on a particular occasion noticed by RockyRaccoonMD or CorsicaRiver, the conditions at Brodie's Dunkin' Donuts shop were dirtier than any other restaurant Rocky or Corsica had seen, and that on

a particular occasion noticed by Suze, trash accumulated outside the shop and some of that trash wafted into a nearby waterway. None of the Does asserted that the shop was habitually dirty or that trash habitually accumulated outside. Thus, although habitual unsanitary conditions inside a restaurant would make the facility unsuitable to serve food, one or two occasions would not amount to unfitness for business and hence are not libel per se. Brodie's failure to allege and prove special damages thus requires reversal of the order authorizing discovery.

There is no inherent unfairness in requiring Brodie to present evidence of actual damages at the outset of the suit. He should be able to present evidence that, for example, his Dunkin' Donuts experienced a loss of patronage after the two posts were made. Brodie does not need to identify the Does to assemble such proof. If, by contrast, the two statements had no impact on his business, there is no reason why making the statements should cost RockyRaccoonMD, CorsicaRiver, or Suze their right to remain anonymous.

Moreover, even if one of the statements is deemed defamatory per se, "the plaintiff must prove actual damages if the defendant was merely negligent in making the false statement." *Shapiro v. Massengill*, 105 Md. App. 743, 744, 661 A.2d 202 (1995); *see also Jacron Sales Co. v. Sindorf*, 276 Md. 580, 601, 350 A.2d 688 (1976). Only if Brodie proves actual malice does Maryland law allow him to avoid proof of actual damages. *Hanlon v. Davis*, 76 Md. App. 339, 356, 545 A.2d 72 (1988) (quoting *Hearst Corp. v. Hughes*, 297 Md. 112, 125-26, 466 A.2d 486 (1983)). To be sure, as the Delaware Supreme Court stated in *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005), in most cases it would be unfair to require a plaintiff to prove actual malice before he knows the defendant's identity, because such proof turns on the state of mind of the defendant and can, ordinarily, not be established or rebutted without the opportunity to take the defendant's deposition and, thereby, to establish what the defendant knew or did not know at the time of the actionable statement. However, it is fair for Brodie to be required to make a binding election at this time whether he will make a showing of actual malice and hence be excused from showing actual damages in the event one of the statements is held to be defamatory per se.

In this case, even though INI argued forcefully that Brodie should be required to

present evidence to support his claims of defamation, no such proof was adduced. If the statements about the Dunkin' Donuts are objectively factual and yet false, and if they caused actual damages, Brodie should have no difficulty presenting such evidence. Having failed to present such evidence, he is not entitled to discovery of the identity of the posters at this time.

(5) Balance the Equities.

Even if, on remand, Brodie submits evidence sufficient to establish a prima facie case of defamation against each Doe defendant,

the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

Missouri ex rel. Classic III v. Ely, 954 S.W.2d 650, 659 (Mo.App. 1997).

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

[A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite, 775 A.2d at 760-761.

See also *Mobilisa v. Doe*, 170 P.3d at 720; *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d

at 976.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of his case on subjects that are based on information within his own control, there is no basis to breach the anonymity of the defendants. *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) (“an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure”). The requirement that there be sufficient evidence to prevail against the speaker, and sufficient showing of the exhaustion of alternate means of obtaining the plaintiff’s goal, to overcome the defendant’s interest in anonymity is part and parcel of the requirement that disclosure be “necessary” to the prosecution of the case, and that identification “goes to the heart” of the plaintiff’s case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is “necessary.”

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

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

On the other side of the balance, the Court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains. In this case, there is little evidence in the record from which the Court can make a sound assessment of the equitable considerations in the case. Although referring to a restaurant as unsanitary could lower the owner's reputation, it is not at all clear that these statements have had any such impact or led to a reduction in patronage or revenues at Brodie's Dunkin' Donuts shop. Moreover, given current economic conditions, exposure as a critic of a prominent business person and scion of an old family in the area could easily make it harder for the Does to earn a living for their families. If necessary on remand, the trial court should have the opportunity to develop the record and perhaps Brodie will be able to make a convincing equitable case for identifying his anonymous critics.

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

The principal advantage of the *Dendrite*/*Mobilisa* test is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong. In that way, it provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of victims to be compensated for their 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 at the same time ensuring that persons with legitimate reasons for speaking anonymously, while criticizing public figures, will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is discovery and the "outing" of anonymous speakers, and not damages. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed seeking to identify

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

Although no firm numbers can be cited, experience leads undersigned counsel to believe that the number of civil suits currently being filed to identify online speakers has dropped dramatically from the earlier figures. The decisions in *Dendrite*, *Melvin*, *Cahill*, *Mobilisa*, and other cases that have adopted strict legal and evidentiary standards for defendant identification have sent a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these lawsuits and to the occasional libel verdict against anonymous defendants, as well as the fact that many online speakers have been identified in cases that meet the *Dendrite* standards – indeed, two of the Doe defendants in *Dendrite* were identified, as was the defendant in the companion case to *Dendrite*, *Immunomedics v. Doe*, 342 N.J. Super. 160, 775 A.2d 773 (N.J. Super. App. Div. 2001) – has discouraged some would-be posters from the sort of Wild West atmosphere that originally encouraged the more egregious examples of online irresponsibility, if not outright illegality. We urge the Court to preserve this balance by adopting the *Dendrite* test that weighs the interests of plaintiffs to vindicate their reputations in meritorious cases against the right of Internet speakers to maintain their anonymity when their speech is not actionable. In this case, that test leads ineluctably to the conclusion that the order compelling INI to identify CorsicaRiver, RockyRaccoonMD and Suze should be reversed.

CONCLUSION

The order denying INI's Motion to Quash and for Protective Order should be reversed and the motion should be granted in its entirety. In the alternative, the order should be

vacated and the case should be remanded with instructions that Brodie be given the opportunity to present evidence to the trial court in accordance with the reasoning of the Court's opinion.

Respectfully submitted,

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July 28, 2008

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STATEMENT ON PROPORTIONALLY SPACED TYPE

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