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14
 15 UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

16	RON PAUL 2012 PRESIDENTIAL CAMPAIGN)	No. CV-12-0240-MEJ
	COMMITTEE, INC., a Delaware Corporation,)	
17)	MEMORANDUM OF
	Plaintiff,)	PUBLIC CITIZEN, AMERICAN
18)	CIVIL LIBERTIES UNION,
)	ELECTRONIC FRONTIER
19)	FOUNDATION AND DIGITAL
	v.)	MEDIA LAW PROJECT AS
20)	AMICI CURIAE ADDRESSING
)	THE PROPER STANDARD FOR
21	DOES 1-10, INCLUSIVE,)	EARLY DISCOVERY TO
)	IDENTIFY ANONYMOUS
22	Defendants.)	SPEAKERS

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1 This case involves an issue which, until this week, had been addressed consistently in the
2 Northern District of California, as well as by state appellate courts and federal trial courts across the
3 country: What procedures apply, and what showings are required, when a plaintiff asserts a claim for
4 defamation or some other wrong based on anonymous online speech and seeks to identify the
5 anonymous speaker? Based on the well-accepted First Amendment right to speak anonymously, and
6 recognizing that First Amendment rights cannot be infringed without a compelling state interest,
7 before subpoenas to identify anonymous speakers are permitted, courts across the country insist that
8 anonymous would-be defendants must be notified of the threat to their First Amendment right to speak
9 anonymously and that would-be plaintiffs must make both a legal and an evidentiary showing of merit
10 before government power may be deployed to identify anonymous critics. The courts then balance
11 the interests of the plaintiff in securing relief from genuine harm based on a real violation of his rights,
12 and of the defendant in remaining anonymous.

13 Plaintiff Ron Paul 2012 Presidential Campaign Committee (“Paul Committee”) has sued
14 anonymous Internet bloggers over a YouTube video that denounces Jon Huntsman, formerly a rival
15 candidate for the Republican presidential nomination. The gist of the video is that Huntsman is “weak
16 on China” because he speaks Mandarin and has adopted Chinese children; in one particularly vicious
17 moment, the video raises a question about whether Huntsman really adopted those children. The
18 video closes with a screen that reads

19 American Values and Liberty
20 Vote Ron Paul

21 and was posted under the pseudonym NHLiberty4Paul. The video can be viewed on YouTube at
22 <http://www.youtube.com/user/NHLiberty4Paul/videos>. Paul Committee’s lawsuit contends that Mr.
23 Paul never authorized the use of his name on the video, and that authorization was, in fact, required
24 because members of the public will assume that Paul Committee issued the video. Consequently, Paul
25 Committee alleges that the posting infringes the common law trademark in his name (Count I), is false
26 advertising (Count II), and defames him (Count III).

27 Shortly after filing the complaint, plaintiff moved for leave to take early discovery, citing a
28

1 series of decisions in which courts have allowed pro se prisoners suing over mistreatment at the hands
2 of police or prison officers to use discovery to identify officers named only as Doe defendants, as well
3 as a few unreported orders allowing discovery to identify anonymous defendants who used file-sharing
4 software to download copyrighted sound recordings. But plaintiff made no mention of well-
5 established precedent in state and federal courts throughout the United States, including in this district,
6 that requires a court to balance a plaintiff's interest in proceeding with a valid lawsuit against the First
7 Amendment right of anonymous speakers to retain their anonymity by requiring plaintiffs to produce
8 evidence—not mere allegations in a complaint—showing that there is a realistic chance that the
9 lawsuit will be successful. Amici, who have played a leading role in developing the national
10 consensus standard regarding the test for identifying anonymous Internet speakers, and have also been
11 deeply involved in cases involving claims of trademark infringement as well as defamation, submit
12 this brief to explain why the motion was properly denied but to urge the Court to clarify its January
13 25 order setting the standard that will apply to future attempts to pursue discovery, both for the benefit
14 of the parties here and to maintain a uniform standard in this district.

15 **INTEREST OF AMICI CURIAE**

16 As more fully set forth in the motion for leave to file as amici curiae, Public Citizen is a
17 consumer advocacy organization, the Digital Media Law Project is an organization dedicated to
18 providing education and legal resources for online speakers, and the ACLU and Electronic Frontier
19 Foundation are civil liberties organizations. Amici work on a range of issues, including the right of
20 Internet users to speak anonymously so long as they have done no wrong. Since the turn of the
21 century, amici have sought to encourage the development of First Amendment precedent requiring
22 courts to cast a skeptical eye on subpoenas that seek to compel the identification of anonymous
23 Internet speakers, and they have been involved in many of the major cases in which the standard for
24 deciding whether to allow or to enforce such subpoenas has been established. Amici have also been
25 involved in many cases in which Internet critics have been improperly sued for trademark violations
26 simply because they used the names of companies about which they wanted to express their views.
27 This experience makes amici uniquely well equipped to explain why and how this Court should clarify

1 the standards for unmasking anonymous online critics of public figures and why this particular motion
2 for early discovery was properly denied.

3 SUMMARY OF ARGUMENT

4 Federal and state courts throughout the country have applied well-accepted First Amendment
5 principles to cases such as this one by following the so-called *Dendrite*^{1/} test to decide when to allow
6 discovery to identify anonymous Internet speakers. Under that test, which has repeatedly been
7 endorsed by district judges in this District, anonymous would-be defendants must be notified of the
8 threat to their First Amendment right to speak anonymously, would-be plaintiffs must make both a
9 legal and an evidentiary showing of merit before government power may be deployed to identify
10 anonymous critics, and the court must balance the interests of the plaintiff in securing relief from
11 genuine harm based on a real violation of his rights, and of the defendant in remaining anonymous.

12 The principal advantage of the *Dendrite* test is its flexibility. It balances the interests of the
13 plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker
14 who claims to have done no wrong. In that way, it provides for a preliminary determination based on
15 a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between
16 protection for anonymity and the right of victims to be compensated for their harms. It ensures that
17 online speakers who engage in flagrant infringement of intellectual property rights or who make
18 actionable statements about public figures, companies, or private individuals will not be immune from
19 identification and from legal responsibility. At the same time, the standard helps ensure that persons
20 with legitimate reasons for using others' intellectual property, or for criticizing public figures, will be
21 allowed to maintain the secrecy of their identity as the First Amendment allows.

22 The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is the
23 "outing" of anonymous speakers. In the first few years of the Internet, thousands of lawsuits were
24 filed seeking to identify online speakers, and enforcement of subpoenas was almost automatic.
25 Internet Service Providers ("ISPs") reported staggering statistics about the number of subpoenas they

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27 ^{1/} *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. App. 2001).

1 Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent
2 practice, but an honorable tradition of advocacy and of dissent.

3 *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 341-342, 356 (1995) (emphasis added).

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

11 Although the Internet allows anonymous communication, it creates an unparalleled capacity
12 to monitor every speaker and to discover his or her identity. Because of the Internet's technology,
13 any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the
14 recipient, starts a path that can be traced back to the original sender. *See Lessig, The Law of the*
15 *Horse: What Cyber Law Might Teach*, 113 HARV. L. REV. 501, 504-505 (1999). Thus, anybody with
16 enough time, resources and interest, if coupled with the power to compel disclosure of the
17 information, can learn who is saying what to whom. To avoid the Big Brother implications of
18 unlimited enforcement of such power to uncover the identities of anonymous Internet speakers who
19 have done nothing but exercise their First Amendment rights, the law must allow such subpoenas only
20 where the party seeking disclosure can make some evidentiary showing that the lawsuit has actual
21 merit, and when the balance of the parties' interests warrants such disclosure.

22 The courts have recognized the serious chilling effect that subpoenas seeking to identify
23 anonymous speakers can have on dissenters and the First Amendment interests that are implicated
24 by such subpoenas. *E.g., FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th
25 Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978); *Bursey v. United States*, 466
26 F.2d 1059, 1084-1086 (9th Cir. 1972). As one court said in refusing to order identification of
27 anonymous Internet speakers whose identities were allegedly relevant to the defense against a

1 shareholder derivative suit, “If Internet users could be stripped of that anonymity by a civil subpoena
2 enforced under the liberal rules of civil discovery, this would have a significant chilling effect on
3 Internet communications and thus on basic First Amendment rights.” *Doe v. 2theMart.com*, 140 F.
4 Supp.2d 1088, 1093 (W.D. Wash. 2001). Courts in this district have written along the same lines:

5 People are permitted to interact pseudonymously and anonymously with each
6 other so long as those acts are not in violation of the law. This ability to speak one’s
7 mind without the burden of the other party knowing all the facts about one’s identity
8 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.**

9 *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)
10 (emphasis added).

11 **B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard
12 for Identification of Doe Defendants That Demands Showings, Not Just
13 Allegations, and a Balancing of Interests.**

14 Amici fully appreciate and support the line of appellate cases cited by plaintiff in its motion
15 for leave to take early discovery; these cases allow pro se prisoners to use discovery to identify police
16 officers or prison personnel who participate in activities that violate the prisoner’s civil rights, but
17 who often cannot be identified before suit is filed. Similarly, it is not uncommon for litigants bringing
18 non-constitutional tort claims, such as those arising out of workplace injuries, to require discovery
19 to identify the maker of the machine that injured them. But in those cases, there is no significant legal
20 interest that is violated by an identification order, and hence discovery in those cases is fairly routine.
21 Even when no speech is involved, the Ninth Circuit decision cited by plaintiff’s ex parte motion (at
22 4) denies discovery when “it is clear that the complaint would be dismissed on other grounds.”
Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).

23 But the First Amendment right to speak anonymously, and the danger of a chilling effect if
24 the mere filing of a notice-pleading complaint is a ticket to identify the plaintiff’s critics, have led
25 courts to recognize that the mere fact that a plaintiff has filed a lawsuit over particular speech does
26 not create a compelling government interest in taking away the defendant’s anonymity. The challenge
27 for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous
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1 speakers. Setting the bar “too low will chill potential posters from exercising their First Amendment
2 right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate
3 anonymous posters into self-censoring their comments or simply not commenting at all.” *Doe v.*
4 *Cahill*, 884 A.2d 451, 457 (Del. 2005). Yet setting the bar too high will make it impossible for
5 plaintiffs with perfectly valid claims to identify wrongdoers and proceed with their cases.

6 Court have drawn on the media’s privilege against revealing sources in civil cases to enunciate
7 a similar rule protecting against the identification of anonymous Internet speakers. The leading
8 decision on this subject, *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), which has been embraced
9 by several district judges in the Northern District of California, established a five-part standard that
10 has been followed or adapted throughout the country:

11 1. Give Notice: Courts require the plaintiff (and sometimes the ISP) to provide
12 reasonable notice to the potential defendants and an opportunity for them to defend
their anonymity before issuance of any subpoena.

13 2. Require Specificity: Courts require the plaintiff to allege with specificity the
14 speech or conduct that has allegedly violated its rights.

15 3. Ensure Facial Validity: Courts review each claim in the complaint to ensure
16 that it states a cause of action upon which relief may be granted based on each
statement and against each defendant.

17 4. Require An Evidentiary Showing: Courts require the plaintiff to produce
evidence supporting each element of its claims.

18 5. Balance the Equities: Weigh the potential harm (if any) to the plaintiff from
19 being unable to proceed against the harm to the defendant from losing the First
Amendment right to anonymity.

20 *Id.* at 760-61.

21 Several cases in this district followed *Dendrite* strictly; until this Court’s ruling on the ex parte
22 motion, no case in this district had ever applied a motion to dismiss standard, rather than a higher
23 standard, to decide whether to identify an anonymous noncommercial speaker accused of denigrating
24 the plaintiff. The leading opinion was authored by Magistrate Judge Wayne Brazil in *Highfields*
25 *Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005), and adopted by Judge Chesney.
26 That case involved postings on a Yahoo! message board about Highfields, the largest shareholder in
27 a company called Silicon Graphics (“SGI”), including a number of comments that purported to be

1 authored by Highfields, in a context mocking both Highfields and SGI. Highfields’s complaint cited
2 various theories of defamation, commercial disparagement, and unfair competition, as well as a
3 variety of state and federal trademark claims, but the court refused to allow discovery to identify the
4 anonymous posters. Judge Brazil’s opinion squarely endorsed the *Dendrite* analysis and held that
5 there was insufficient evidence of likely confusion, of false statements of fact, or of damage to the
6 plaintiff. *Id.* at 977-989. But even if there had been some proof of wrongdoing, Judge Brazil
7 recommended quashing the subpoena because there was little reason to believe that any possibly
8 wrongful conduct had harmed the plaintiff and because the right to post anonymous criticisms of
9 publicly traded companies was too important to be sacrificed in such a case; consequently, the balance
10 of harms tipped decidedly in favor of retaining anonymity. *Highfields* was followed by *USA*
11 *Technologies v. Doe*, 713 F. Supp.2d 901 (N.D. Cal. 2010), where the plaintiff claimed both
12 defamation and federal securities law violations.

13 Most recently, in *Art of Living v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011),
14 Magistrate Judge Lloyd initially denied application of the *Dendrite* standard because Art of Living
15 had sued for copyright infringement, and many cases about illegal downloading had, in Judge Lloyd’s
16 view, created a “copyright exception” to *Dendrite*. Judge Koh overruled Judge Lloyd’s decision,
17 holding that the speech in the downloading cases is barely speech at all, but that the Does in *Art of*
18 *Living* had been sued for committing copyright infringement in the course of criticizing an
19 international religious group which was, if not political speech, comparable to political speech in its
20 degree of First Amendment protection. Consequently, Judge Koh concluded, the nature of the Does’
21 speech commanded application of the *Highfields Capital* (and thus *Dendrite*) approach rather than
22 the more permissive standard applied in the illegal downloading cases.

23 The propriety of applying such a balancing test is confirmed by strong dictum in the Ninth
24 Circuit’s decision in *Anonymous Online Speakers v. United States District Court*, 661 F.3d 1168 (9th
25 Cir. 2011). Plaintiff there brought a variety of claims against a rival, including defamation and
26 tortious interference both with business relations and with contract. After discovery to identify Doe
27 speakers connected with the rival was denied in part and granted in part, both sides sought mandamus.

1 Strictly speaking the Ninth Circuit’s opinion does not determine the precise standard to be applied
2 in future cases because, on mandamus, the court of appeals reviews only for clear error. However,
3 in deciding that the trial court did not commit clear error in ruling that there had been a sufficient
4 evidentiary showing and hence granting discovery into the identity of three of the defendants, the
5 Ninth Circuit said that the court below had “appropriately considered the important value of
6 anonymous speech balanced against a party’s need for relevant discovery in a civil action.” *Id.* at
7 1176. Moreover, in dicta, the Court expressed approval of a heightened standard to determine when
8 discovery is appropriate to determine a speaker’s identity when political speech is involved. *Id.* at
9 1176-1177. Although *Anonymous Online Speakers* does not hold that the requirement of proof of a
10 factual basis must be applied by district courts in the Ninth Circuit, it surely suggests that in the
11 context of the highly political speech at issue in this case, it would approve application of such a
12 requirement.

13 A pre-*Dendrite* ruling in this district also confirms the need to consider evidence. *Columbia*
14 *Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999). In that case, which was cited
15 in Wednesday’s order from this Court, the claim was that the anonymous registrant of certain domain
16 names infringed the plaintiff’s trademark to force plaintiff to pay for the names. *Id.* at 579. Although
17 the opinion articulated a motion to dismiss standard, its ultimate ruling depended on the consideration
18 of evidence. The court explained that defendant had sent the plaintiff copies of thirty-one emails that
19 defendant had received requesting plaintiff’s products: “[M]ost importantly, plaintiff can show actual
20 confusion, courtesy of the 31 emails . . . Evidence of actual confusion is strong proof of the fact of
21 likelihood of confusion. . . Plaintiff’s showing is sufficient to demonstrate that the Kumar defendants
22 have committed an unlawful act for which a federal cause of action can subsist.” *Id.* at 580
23 (punctuation and citation omitted).^{2/}

24 _____
25 ^{2/} There was a similar disconnect between what the trial court said and what the trial court did
26 in *Dendrite* itself—the judge articulated a motion to dismiss standard (page 6 of his opinion),
27 but in fact considered evidence in denying the plaintiff’s motion for leave to take early
28 discovery. (at pages 12, 13, 16, 19) (Opinion at [http://cyberslapp.org/documents/Dendrite
SuperiorCourtOpinion.pdf](http://cyberslapp.org/documents/DendriteSuperiorCourtOpinion.pdf)). This disconnect was one of *Dendrite*’s arguments on appeal; the

1 Although *Dendrite* has become the majority rule around the country, and is usually applied
2 in this District, a somewhat less exacting standard, formulated by the Delaware Supreme Court in
3 *Cahill*, requires the submission of evidence to support the plaintiff’s claims, but not an explicit
4 balancing of interests after the evidence is deemed otherwise sufficient to support discovery. *Cahill*,
5 884 A.2d 451. In *Cahill*, the Delaware Superior Court had ruled that a town councilman who sued
6 over statements attacking his fitness to hold office could identify the anonymous posters so long as
7 he was not proceeding in bad faith and could establish that the statements about him were actionable
8 because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that
9 a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a
10 defamation claim that ought to be within his control without discovery, including that the statements
11 are false. The *Cahill* court rejected the final “balancing” stage of the *Dendrite* standard.

12 All of the other state appellate courts that have addressed the issue of subpoenas to identify
13 anonymous Internet speakers have adopted some variant of the *Dendrite* or *Cahill* standard. Several
14 courts expressly endorse the *Dendrite* test, requiring notice and an opportunity to respond, legally
15 valid claims, evidence supporting those claims, and finally an explicit balancing of the reasons
16 supporting disclosure and the reasons supporting continued anonymity. These decisions include:

17 *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007), where a private company sought to
18 identify the sender of an anonymous email message who had allegedly hacked into the
19 company’s computers to obtain information that was conveyed in the message. Directly following the *Dendrite*
20 decision, and disagreeing with the Delaware Supreme Court’s rejection of the balancing stage, the court analogized an order requiring
21 identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for
22 summary judgment, followed by a balancing of the equities between the two sides.

23 *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009), where the court
24 required notice to Doe, specification of the defamatory words in full context, prima facie showing, and, “if all else is satisfied, balanc[ing] the anonymous poster’s First
25 Amendment right of free speech against the strength of the prima facie case of
26 defamation presented by the plaintiff and the necessity for disclosure of the
27 anonymous defendant’s identity.” 966 A.2d at 457.

28 *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H.
2010), where a mortgage lender sought to identify the author of comments saying that
its president “was caught for fraud back in 2002 for signing borrowers names and
bought his way out.” The New Hampshire Supreme Court held that “the *Dendrite* test
is the appropriate standard by which to strike the balance between a defamation

1 plaintiff's right to protect its reputation and a defendant's right to exercise free speech
2 anonymously."

3 *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011), which held that a city council
4 chair had to meet the *Dendrite* test before she could identify constituents whose
scabrous accusations included selling out her constituents, prostituting herself after
having run as a reformer, and getting patronage jobs for her family.

5 Several other courts use a *Cahill*-like summary judgment standard. For example:

6 *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008), where the appellate court
7 reversed a trial court decision allowing an executive to learn the identity of several
8 online critics who allegedly defamed her by such references as "a management
consisting of boobs, losers and crooks."

9 *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007), which reversed a decision
10 allowing a hospital to identify employees who allegedly violated patient
confidentiality and disparaged their employer through posts on a blog.

11 *Solers v. Doe*, 977 A.2d 941 (D.C. 2009), where the court held that a government
12 contractor could identify an anonymous whistleblower who said that plaintiff was
using unlicensed software if it produced evidence that the statement was false. The
13 court adopted *Cahill*. After a remand, the same court held that the plaintiff must show
actual damage before the Doe can be identified. *Software & Info. Indus. Ass'n v.*
Solers, No. 10-CV1523 (D.C. Jan. 12, 2012).^{3/}

14 In addition to the cases already discussed from this District, other federal district courts have
15 repeatedly followed *Cahill* and *Dendrite*. See *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz.
16 July 25, 2006) (court used five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *Fodor*
17 *v. Doe*, 2011 WL 1629572 (D. Nev. April 27, 2011) (following *Dendrite*); *Koch Industries v. Doe*,
18 2011 WL 1775765 (D. Utah May 9, 2011) (rejecting discovery to identify defendants in case alleging
19 various trademark claims, breach of contract, and violation of the Computer Fraud and Abuse Act
20 because "[t]he case law . . . has begun to coalesce around the basic framework of the test articulated
21 in *Dendrite*" (quoting *SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)
22 (alleging trademark and defamation claims)); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20,
23 2001) (preferred *Dendrite* approach, required showing of reasonable possibility or probability of
24 success); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009) (did not choose between

25 _____
26 ^{3/} In *Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666 (Ill. App. 2010), the Illinois Court of Appeals
27 found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery
because the state's rules already required a verified complaint, specification of the defamatory
words, determination that a valid claim was stated, and notice to the Doe.

1 *Cahill* and *Dendrite* because plaintiff lost under either standard); *Alvis Coatings v. Does*, 2004 WL
 2 2904405 (W.D.N.C. Dec. 2, 2004) (identification allowed based on defamation and trademark claims
 3 in light of detailed affidavit about how comments were false); *Doe I and II v. Individuals whose true*
 4 *names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008) (identification ordered after plaintiffs
 5 provided detailed affidavits showing basis for claims of defamation and intentional infliction of
 6 emotional distress). *See generally* Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet*
 7 *Speakers*, ABA Litigation Section, LITIGATION, Vol 37, No. 3 (Spring 2011), at 27.

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

15 **C. Plaintiff Has Not Followed the Steps Required Before Identification of the John**
 16 **Doe Speakers May Be Ordered in This Case.^{4/}**

17 **1. Plaintiff Has Not Given Does Notice of This Motion.**

18 When courts receive requests for permission to subpoena anonymous Internet posters, they
 19 should require plaintiffs to undertake efforts to notify the posters that they are the subject of
 20 subpoenas, and then withhold any action for a reasonable period of time until defendants have had
 21 time to retain counsel. *Columbia Ins.*, 185 F.R.D. at 579. Thus, in *Dendrite*, the trial judge required
 22 the plaintiff to post on the message board a notice of an application for discovery to identify
 23 anonymous message board critics. The notice identified the four screen names that were sought to
 24 be identified, and provided information about the local bar referral service so that the individuals
 25 concerned could retain counsel to voice their objections, if any. The Appellate Division specifically

26 ^{4/} Although the Court has already denied plaintiff's motion for early discovery, amici include this
 27 discussion to illustrate the proper application of the national consensus standard and to explain
 why, under that standard, plaintiff's motion should have been denied.

1 approved this requirement. 775 A.2d at 760. Indeed, notice and an opportunity to defend are
2 fundamental requirements of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006).

3 Here, plaintiff has made no showing of any efforts to notify the Does that it is seeking to
4 compel their identification. To be sure, this lawsuit has been widely publicized, and there are even
5 references to the action in the comments section of NHLiberty4Paul's channel.
6 <http://www.youtube.com/user/NHLiberty4Paul/feed?filter=1> (last visited January 27, 2012). But
7 there is no indication that the Does have been told that this motion for expedited discovery is pending
8 or that there is any deadline for opposing it. Until such notice is given, the first step of *Dendrite* has
9 not been satisfied.

10 **2. Plaintiff Has Specified the Words Over Which It Is Suing the Does.**

11 The second stage of the *Dendrite* test has been satisfied in this case. It is important to require
12 the plaintiff to set out the precise words claimed to be defamatory (and the context of those words)
13 because it is often possible to determine, just from the words themselves, that no tenable claim for
14 defamation could be brought. Here, the actionable words have been quoted verbatim in the
15 complaint, although the entire video has not been provided to the Court. However, the video is
16 readily accessible publicly; amici are providing these URL's so that the context can be more readily
17 assessed. <http://www.youtube.com/user/NHLiberty4Paul/videos>; [http://www.techdirt.com/articles/
18 20120119/01493317470/what-is-ron-paul-thinking-sues-to-unmask-anonymous-internet-users.shtml](http://www.techdirt.com/articles/20120119/01493317470/what-is-ron-paul-thinking-sues-to-unmask-anonymous-internet-users.shtml).

19 **3. Plaintiff's Complaint Does Not Meet a Motion to Dismiss Standard.**

20 Neither of the trademark counts in this case could survive a motion to dismiss. The cause of
21 action for common law trademark infringement fails because the statute applies only to a defendant
22 who has used the trademark "in connection with a sale of goods or services." 15 U.S.C. § 1125(a)(1).
23 The Ninth Circuit has held that under this language, "trademark infringement law prevents only
24 unauthorized uses of a trademark in connection with a commercial transaction in which the trademark
25 is being used to confuse potential consumers." *Bosley Medical Group v. Kremer*, 403 F.3d 672, 676
26 (9th Cir. 2005). The Court said that this limitation is required to keep trademark law within First
27 Amendment limits, because the ban on merely "misleading" or "confusing" speech, although perfectly

1 proper when applied with respect to commercial speech, “would be impermissible if the same
 2 regulation were applied to noncommercial expressions.” *Id.* at 677. After all, a political flyer or a
 3 newspaper article about a public figure could not be enjoined, or made the basis for an award of
 4 damages, simply because some readers would likely find it confusing. *O’Connor v. Superior Court*,
 5 223 Cal. Rptr 357, 361 (Cal. App. 1986). Consequently, the Ninth Circuit in *Bosley* upheld the
 6 dismissal of a trademark infringement action against a consumer who established a web site, using
 7 the company’s name as the domain name for his site, to criticize the company’s products.

8 The false advertising cause of action fails because, in addition to being subject to the same
 9 “in connection with a sale of goods or services,” the false advertising subsection applies only to
 10 misleading descriptions “in commercial advertising or promotion.” 15 U.S.C. § 1125(a)(1)(B). In
 11 addition, the Ninth Circuit has held that standing to sue under this provision is available only to
 12 plaintiffs who can show “(1) a commercial injury based upon a misrepresentation about a product;
 13 and (2) that the injury is ‘competitive,’ or harmful to the plaintiff’s ability to compete with the
 14 defendant.” *Jack Russell Terrier Network of Northern California. v. American Kennel Club*, 407
 15 F.3d 1027, 1037 (9th Cir. 2005).^{5/}

16 Paul Committee’s complaint does not meet these tests. Although the complaint refers in
 17 passing to the video as being a “commercial advertisement,” it never alleges commercial injury—to
 18 the contrary, it is only injury to Paul’s electoral chances that are pleaded—and there is no allegation
 19 that plaintiff competes with the defendant, or that the injury of which Paul Committee complains
 20 prevents it from competing with the defendant. Moreover, inspection of the video—which is
 21

22
 23 ^{5/} In proposing the false advertising provision of the Lanham Act, the House Judiciary
 24 Committee explained that it would not affect non-commercial speech:

25 [T]he proposed change in Section 43(a) should not be read in any way to limit
 26 political speech, **consumer** or editorial **comment**, parodies, satires, or other
 27 constitutionally protected material. . . . The section is narrowly drafted to
 28 encompass only clearly false and misleading commercial speech.

135 Cong. Rec. H1207, H1217 (April 13, 1989) (emphasis added).

1 permissible under Ninth Circuit law even on a motion to dismiss standard^{6/}—belies any allegation that
2 it is commercial in any way. The video simply expresses views about the merits of two candidacies—
3 Huntsman’s and Paul’s. That is simply not commercial speech, and it is outside the scope of the
4 Lanham Act.

5 Consideration of the video itself also belies the allegation in the complaint that either the
6 video or the pseudonym under which the video was posted is likely to confuse viewers into believing
7 that Paul Committee itself issued the video. The final screen of the video simply contains the words
8 “Vote Ron Paul.” A candidate has no monopoly on the right to advocate his own election; nor can
9 he limit that right to his official campaign committee. Put another way, although the public interest
10 in disclosure of the sources and funding of campaign related speech (where, unlike here, such an
11 interest has been asserted by Congress or the FEC) may in some circumstances overcome interests
12 in anonymous speech, Paul Committee’s purely private and wholly illegitimate interest in trying to
13 control what other people say about Ron Paul’s campaign and about his opponents does not.
14 Although the FEC regulates television advertising supporting candidates, it has so far not imposed
15 regulations on Internet communications by individuals (as opposed to by political committees and
16 paid internet ads).

17 Indeed, if trademark law deemed any statement of support for a candidate to be as tied to the
18 candidate as Paul Committee here alleges, then the practical effect would be to give each candidate
19 veto power over any expression of support that the candidate did not approve. Moreover, history has
20 frequently shown that candidates want to distance themselves from some of their more extreme or
21 obnoxious supporters. If trademark law entitled a candidate to prevent expressions of support for
22 reasons of which they disapprove, future candidates would be compelled to file lawsuits against
23 supporters whose views are unpopular; otherwise, political opponents could argue that they are

24 ^{6/} The video itself can be considered on a motion to dismiss standard because the video is alleged
25 in the complaint. *Branch v. Tunnell*, 14 F.3d 449, 453-454 (9th Cir. 1994) (“When the
26 plaintiff fails to introduce a pertinent document as part of his pleading, the defendant may
27 introduce the exhibit as part of his motion attacking the pleading.”). *Accord, Parrino v. FHP,*
Inc., 146 F.3d 699, 705-706 (9th Cir. 1998); *Interstate Nat. Gas Co. v. Southern California*
Gas Co., 209 F.2d 380, 384 (9th Cir. 1953).

1 implicitly giving permission for the obnoxious support by “allowing” it to be expressed. Such a rule,
2 therefore, would put the courts foursquare into regulating political expression in every election.

3 Once the trademark claim is rejected on its face, the court would not retain subject matter
4 jurisdiction over this case. The only remaining claim in the case arises under state law, and although
5 the case may meet the amount in controversy requirement, there is no allegation that the citizenship
6 of the parties is diverse. Indeed, plaintiff cannot allege the Does’ citizenship, for the very reason that
7 it does not know who they are. That inability is the reason why courts consistently hold that Does
8 may not be sued under diversity jurisdiction. *Menzies v. Doe*, 194 F.3d 174 (D.C. Cir. 1999) (mem.);
9 *Howell by Goerd v. Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1997); *McMann v. Doe*,
10 460 F.Supp.2d 259, 264 (D. Mass. 2006). Without being certain that it has jurisdiction to consider
11 the defamation claim, the Court should not take away the Does’ First Amendment right to speak
12 anonymously to enable plaintiff to proceed on its defamation claim.

13 And, in any event, the complaint also fails to state a claim for defamation, on its face and
14 considered in conjunction with the video itself. First, although Paul and Paul Committee are
15 unquestionably public figures, the complaint does not allege that any false statements were made
16 **about them** with actual malice. Instead, the complaint alleged only that the statement was made with
17 “common law” malice—“malice, hatred and ill will toward Plaintiff and the desire to injure Plaintiff.”
18 But such allegations are not sufficient to alleged reckless disregard of probable falsity, which is the
19 actual malice standard. *Solano v. Playgirl*, 292 F.3d 1078, 1084-1085 (9th Cir. 2002); *Harte-Hanks*
20 *Communications v. Connaughton*, 491 U.S. 657, 666 n. 7 (1989).

21 Moreover, although the complaint makes the constitutionally-required allegation of factual
22 falsity—that the video’s expression of a constitutionally protected opinion “Vote Ron Paul” implies
23 that Paul himself or his official campaign committee issued the video—that fact implies nothing of
24 the kind. Polling data, not to speak of votes already cast in Iowa, New Hampshire and South
25 Carolina, suggest that there are thousands of Americans apart from Ron Paul and his official
26 committee who harbor the opinion that voters should support Mr. Paul; consequently, the mere
27 expression of the opinion does not imply that it is Ron Paul or his campaign that is speaking.

1 If anything, the final screen of the video implies that it is one of Paul's many political
2 supporters who created the video; the screen name NH4LibertyPaul implies that it is one of his New
3 Hampshire supporters who posted the video. But that is not the same as an implication that it was
4 Paul's official campaign committee that took these actions. Consequently, the alleged defamatory
5 statement—that a Paul supporter was responsible for the video and its posting—is not “of and
6 concerning” the organizational plaintiff in this case, as the First Amendment requires. *New York*
7 *Times v. Sullivan*, 374 U.S. 254, 288 (1964); *Steam Press Holdings v. Teamsters Local 996*, 302 F.3d
8 998, 1004 (9th Cir. 2002).

9 For these reasons, the complaint does not state a defamation claim on which relief can be
10 granted, and Paul Committee cannot succeed in meeting the third part of the *Dendrite / Highfields*
11 test.

12 **4. Plaintiff Has Not Produced Sufficient Evidence to Show That It Can Succeed on**
13 **the Merits of Its Claim.**

14 Even if the Court concludes in considering some future motion from plaintiffs that the
15 conclusory uses of the word “commercial” in the complaint meet a motion to dismiss standard, that
16 conclusion would still be insufficient to justify discovery under *Dendrite / Highfields* absent evidence
17 supporting the allegations. No anonymous speaker should be subjected to compulsory identification
18 through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each
19 element of a cause of action to show a realistic chance of winning a lawsuit against that defendant.
20 This requirement has been followed by every state appellate court and every federal district court that
21 has addressed the standard for identifying anonymous Internet speakers, because it prevents plaintiffs
22 from being able to identify critics simply by filing facially adequate complaints.

23 Plaintiffs often argue that they need to identify the defendants simply to proceed with their
24 case. However, no relief is generally awarded to plaintiffs until they come forward with **evidence** in
25 support of their claims, and the Court should recognize that identification of otherwise anonymous
26 speakers is a major form of relief in cases like this. If nothing else, the identity of the video's author
27 and poster will provide grist for plaintiff's campaign mill. And requiring actual evidence to enforce

1 subpoenas is particularly appropriate where the relief itself may undermine, and thus violate,
2 defendants' First Amendment right to speak anonymously.

3 The only evidence available to the Court is the video itself (supplied by defendant) and the
4 affidavit of Paul's campaign manager, Jesse Benton. Neither the video nor the affidavit contains any
5 evidence supporting a prima facie case on the "commercial use" requirement for both the
6 infringement and the false advertising claim, or the "commercial advertisement," "commercial
7 injury," and "direct competitor" elements of the false advertising claim. And although Benton's
8 affidavit makes reference to the likely confusion issue, he avers only that the text in the video
9 "thereby falsely imply[ies] that Plaintiff created, endorsed or is affiliated in some way with the Video
10 and its content." Because the video is in the record, the Court can examine it and see that there is no
11 such implication. Moreover, the cause of action for false advertising has an additional requirement:
12 the plaintiff must allege **either** that the defendant's statements are literally false, or that any
13 misleading statements actually deceived consumers. *Southland Sod Farms v. Stover Seed Co.*, 108
14 F.3d 1134, 1139-1140 (9th Cir. 1997); *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks*, 902 F.2d
15 222, 228-29 (3d Cir. 1990). Here, there is no literal falsity, and there is no evidence that consumers
16 were actually confused.

17 Similarly, the evidence does not create a prima facie case of defamation, even if the Court
18 reaches that issue despite the absence of a viable trademark claim. There is no showing that the
19 implication that the video's author is a supporter of Mr. Paul's candidacy is false. Nor is there any
20 showing that the video makes any statement "of and concerning" Paul Committee. Moreover,
21 California law requires proof of actual damage to a defamation plaintiff, *Global Telemedia Int'l v.*
22 *Doe I*, 132 F. Supp.2d 1261, 1266, 1270 (C.D. Cal. 2001), but there is no evidence of damage here.
23 Consequently, there is no reason to believe that a defamation claim in this case could succeed.

24 **5. The Balance of Interests Tips Decidedly in the Does' Favor.**

25 Even if Paul Committee had presented enough evidence to warrant identifying defendants,
26 [t]he final factor to consider in balancing the need for confidentiality versus discovery
27 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

1 privileged information. In fact, there is a danger in such a case that it was brought just
2 to obtain the names On the other hand, if a case is strong and the information
3 sought goes to the heart of it and is not available from other sources, then the balance
4 may swing in favor of discovery if the harm from such discovery is not too severe.

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

6 Similarly, *Dendrite* called for such individualized balancing when the plaintiff seeks to
7 compel identification of an anonymous Internet speaker:

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

13 775 A.2d at 760.

14 Judges in this district have repeatedly endorsed this fifth stage of the *Dendrite* test, as in *Art of Living*
15 and *Highfields*.

16 A standard comparable to the test for grant or denial of a preliminary injunction, where the
17 court considers the likelihood of success and balances the equities, is particularly appropriate because
18 an order of disclosure is an injunction—not even a preliminary injunction. In every case, a refusal
19 to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once
20 speakers lose anonymity, they can never get it back. But denial of a motion to identify the defendant
21 based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the
22 complaint. Plaintiffs can renew their motions after submitting more evidence. Moreover, the
23 inclusion of a balancing stage allows Does to show that identification may expose them to significant
24 danger of extra-judicial retaliation. In that case, the court might require a greater quantum of evidence
25 on the elements of plaintiff's claims so that the equities can be correctly balanced.

26 This case presents a striking example of the importance of the balancing stage of the *Dendrite*
27 analysis. The speech at issue is core political speech, to all appearances from individuals who have
28 an opinion about the presidential race; consequently, the interest of the Does in protecting their right
to engage in this speech, anonymously or otherwise, is at its apogee. And given the intensified attack
culture that increasingly applies to public debate, the individuals involved with this video have every

1 reason to be concerned about the consequences of being identified as the authors of this video. Two
2 different presidential candidates, Jon Huntsman and Ron Paul, have already denounced the video, and
3 many expressions of anger about the video have been posted online by various supporters. Once
4 identified, the Does may face personal attacks from the candidates' supporters as a result of their
5 authorship. Nor is this is a context in which Congress and the FEC have acted to assert a public
6 interest in requiring the public disclosure of sponsorship of the communication, as they have done for
7 paid political advertisements and contributions to or expenditures by political committees.

8 Moreover, Paul Committee does not have a strong interest in finding out who issued the video,
9 precisely because it had no right to prevent members of the public from expressing their support for
10 their candidate, or opposition to rival candidates, just because the reasons are anathema to Mr. Paul.
11 To be sure, if the makers of the video had expressly misrepresented the video as coming from Paul
12 Committee, plaintiff would have an understandable interest in correcting that false statement of fact.
13 And if the makers had violated disclosure or disclaimer laws or regulations promulgated by the FEC
14 with congressional authorization, there could be a public interest in disclosing their identities. At
15 best, however, plaintiff must rely here on the fact that some members of the public may hold a
16 candidate in some way responsible for things his supporters say.

17 In the end, Paul Committee has no way of knowing whether this video was issued by a Paul
18 supporter with bad judgment, by a Huntsman supporter hoping to use reverse psychology to gain
19 sympathy for his candidate, or by a supporter of neither candidate who might want to criticize both
20 candidates or to make a satirical point about negative advertising. Whatever the underlying motive
21 of the video maker and poster, plaintiff has no right to state power to obtain subpoenas to identify the
22 videographer and ascertain her motives.

23 **D. The Court Should Address Plaintiff's Failure to Cite Contrary Authority In**
24 **Arguing for Early Discovery, Which Was Improper in the Context of an Ex**
Parte Motion.

25 Unfortunately, plaintiff's ex parte motion for expedited discovery cited several appellate cases
26 as supporting early discovery, without acknowledging that they had nothing to do with anonymous
27 speech—each of them involved pro se prisoners who sought early discovery to identify defendants

1 who had participated in alleged police brutality or prison mistreatment. It then cited and attached a
2 stack of unreported orders allowing early discovery to identify anonymous Internet users who had
3 used file-sharing software to download copyrighted sound recordings. But it made no mention of the
4 several cases from this District, and the many cases from other federal districts and state appellate
5 courts around the country holding that a plaintiff who seeks to identify anonymous Internet speakers
6 needs to make a preliminary factual and legal showing of merit. Although decisions by one district
7 judge are not “controlling authority,” in the circumstances, plaintiff presented a misleading picture
8 of the relevant precedents, perhaps recognizing that the ex parte nature of the proceeding might result
9 in an order allowing discovery without anybody presenting contrary authority to the Court. Moreover,
10 plaintiff made no mention of controlling Ninth Circuit authority that, in light of the patently non-
11 commercial nature of the video in question, precludes plaintiff’s trademark claims.

12 When, as here, a party seeks ex parte relief, it has a special obligation to bring potentially
13 adverse facts and authority to the Court’s attention. *Maine Audubon Soc. v. Purslow*, 907 F.2d 265,
14 268-269 (1st Cir. 1990) (“Where counsel appears ex parte ... the customary checks and balances do
15 not pertain—and the court is entitled to expect an even greater degree of thoroughness and candor
16 from unopposed counsel than in the typical adversarial setting.”); *Jorgenson v. County of Volusia*,
17 846 F.2d 1350, 1352 (11th Cir. 1988); *Noble Resources Pte. v. Metinvest Holding*, 622 F.Supp.2d 77,
18 83 n.9 (S.D.N.Y. 2009); *U.S. v. Toader*, 582 F.Supp.2d 987, 991 (N.D. Ill. 2008); *Eagan by Keith v.*
19 *Jackson*, 855 F. Supp. 765, 790 (E.D. Pa. 1994) (“Candor to the Court, though desirable under any
20 circumstance, is mandated in ex parte proceedings, where the Court is deprived of the benefits of the
21 ‘dialectic of the adversary system.’”); *Cedar Crest Health Center v. Bowen*, 129 F.R.D. 519, 525
22 (S.D. Ind. 1989).

23 Regrettably, as the national consensus approach to discovery seeking to identify anonymous
24 Internet speakers has gained support in state after state, amici have seen a number of similar ex parte
25 motions from plaintiffs seeking early discovery. Plaintiffs seem to count on the possibility that the
26 court, seeing an unopposed motion that seems legitimate on its face, may allow discovery that can
27 sometimes lead to the disclosure of a speaker’s identity before the speaker has had any chance to

1 protect her rights. In some cases, disclosures have led to significant extra-judicial consequences for
2 the Does. Sometimes disclosure occurs without opposition because the ISPs release information in
3 response to subpoenas without giving any notice to their users. Sometimes the disclosure occurs
4 because the notice is ineffective; and sometimes it is because the Does cannot afford to hire lawyers
5 to file a motion to quash, especially if the court is thousands of miles away.

6 These unfortunate practical realities make it critical that the Court clarify its existing decision
7 to conform both to the national consensus standard and to the decisions of other courts in this district.
8 If the Court's existing decision is not clarified, future plaintiffs seeking ex parte discovery in this
9 district to identify their critics will have every right to cite that decision as setting a motion to dismiss
10 standard, and to ignore the wealth of contrary authority. And because so many hosts of Internet
11 speech are amenable to process in this District, the Court's ruling could have a serious chilling effect
12 on free speech throughout the United States and indeed throughout the world.

13 Particularly given the striking weakness of the ex parte motion filed in this case, and indeed
14 the fact that this lawsuit is utterly devoid of merit, amici urge the Court to address this issue in a
15 clarified ruling on the motion for early discovery. The Court should remind lawyers that in filing such
16 ex parte motions, they must acknowledge cases from the Ninth Circuit and Northern District on the
17 subject, so that the judge receiving the ex parte papers can fairly decide whether to apply that case
18 law, and, if so, whether the standards of those cases have been met.

19 CONCLUSION

20 The January 25 ruling on the motion for leave to take early discovery should be clarified.

21 Respectfully submitted,

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