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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

TINA JACOBSON, Plaintiff, vs. JOHN DOE and/or JANE DOE, Defendants.	Case No. CV2012-3098 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COWLES PUBLISHING COMPANY'S MOTION TO QUASH SUBPOENA DUCES TECUM

COMES NOW Cowles Publishing Company, doing business as *The Spokesman*-Review newspaper (hereinafter "Cowles Publishing" or "*Spokesman-Review*"), acting by and through its attorneys, Witherspoon Kelley, and respectfully files the following Memorandum of Points and Authorities in support of its Motion to Quash the Subpoena Duces Tecum served upon it by

Plaintiff in the above-referenced matter.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

For the past eight and one-half years, *Spokesman-Review* newsroom employee Dave Oliveria, who has worked as a reporter, associate editor and columnist for the newspaper for 28 years, has supervised a *Spokesman-Review* blog site entitled *"Huckleberries." (Oliveria Affidavit, ¶ 3)* The blog site is devoted to issues of local, regional and national importance and encourages postings by readers of the blog on various topics. *(Oliveria Affidavit, ¶ 4)* The postings are made anonymously, although *The Spokesman-Review* maintains information, not disclosed to the public, on its computer system that could potentially provide information concerning the identity of anonymous posters. *(Oliveria Affidavit)*

The Service Agreement and Privacy Policy of *The Spokesman-Review* published as notice to blog posters states that, although the newspaper may make publicly available demographic information about posters, *The Spokesman-Review* will not make public the identities of any posters except by order of a court or generally when necessary to protect *The Spokesman-Review's* own interests or property. *(Oliveria Affidavit, ¶ 5)*

On February 14, 2012, Dave Oliveria posted on the blog live tweeting by *Spokesman-Review* reporter Jonathan Blunt concerning the visit of Republican presidential candidate Rick Santorum to North Idaho. The postings concerning Santorum's visit to the Coeur d'Alene Resort Events Center included a photograph of him on a stage with several other individuals, including Plaintiff, seated in the background. *(Oliveria Affidavit, ¶ 7)*

The photograph and visit by candidate Santorum stimulated a variety of comments by anonymous posters on the *Huckleberries* blog. Some of the initial postings addressed to the identity of those seated on the stage with Santorum. Many of the postings were imaginative, fanciful and sometimes sarcastic in nature and contained offhand and pointed comments concerning the photograph and Santorum's visit. For instance, the poster "Dennis" offered the

[1] Facts referenced herein are taken from the Affidavit of Dave Oliveria and attachments thereto filed herewith.

opinion that the photograph "looks like a 'Star Wars' convention." Poster "Phaedrus" offered the quirky comment "is Tina Jacobson wearing a camouflage skirt?" *(Oliveria Affidavit, Exhibit B)*

After a lengthy series of postings commenting on Santorum and his campaign and the appearance of Tina Jacobson, poster "almostinnocentbystander" posted "Is that the missing $10,000 from Kootenai County Central Committee funds actually stuffed inside Tina's blouse??? Let's not try to find out." Poster "Phaedrus" then posted "Missing funds? Do tell." and poster "OutofStaterTater" posted "Yes, do tell, Bystander. Tina's missing funds at the local GOP, Sheriff Mack and John Birch Society are coming to town, things are getting interesting around here." almostinnocentbystander then posted "The treasury has gone a little light and Mistress Tina is not allowing the treasurer report to go into the minutes (which seems common practice). Let me rephrase that . . . a whole boatload of money is missing and Tina won't let anybody see the books. Doesn't she make her living as a bookkeeper? Did you just see where Idaho is high on the list for embezzlement? Not that any of that is related or anything . . ." *(Oliveria Affidavit, ¶ 10 and Exhibit B)*

Prior to 6:00 p.m. on February 14, 2012, Dave Oliveria removed the two postings by almostinnocentbystander and those by Phaedrus and OutofStaterTater from the *Huckleberries* blog, not because Oliveria believed the postings to be defamatory, but because he thought they constituted *ad hominem* comment, which he tries to discourage on the *Huckleberries* blog. No other comments responding to almostinnocentbystander's original February 14 post were ever posted on the *Huckleberries* blog. *(Oliveria Affidavit, ¶ 11)*

Two days later Dave Oliveria was visited by John Cross of Region 1 Republicans, who asked him to provide the identity of the poster almostinnocentbystander. Cross told Oliveria he was representing local Republicans who were upset about the posting. Oliveria did not provide the information. *(Oliveria Affidavit, ¶ 12)*

Oliveria then, by e-mail, informed almostinnocentbystander of Cross' visit and later posted on the *Huckleberries* blog an e-mail from almostinnocentbystander, stating "I apologize for and retract my derogatory and unsubstantiated commentary regarding Tina Jacobson."

Oliveria subsequently has had phone conversations and e-mail exchanges with almostinnocentbystander. Their understanding was that the identity of this source and the substance of their communications would remain confidential to him and would not be disclosed. *(Oliveria Affidavit, ¶ 13)*

Despite the removal of almostinnocentbystander's posting from the blog site, Tina Jacobson on April 23, 2012, through counsel, filed the instant lawsuit in which she asserts that the entry by almostinnocentbystander on the blog site "stated that there was $10,000 missing from the Republican Central Committee funds and that the missing funds were hidden in the person of Mrs. Jacobson." The lawsuit alleges that the comment about Mrs. Jacobson was false, constituted libel *per se* and seeks damages of not less than $10,000. The Complaint also seeks to enjoin almostinnocentbystander permanently "from committing such further actions adverse to Mrs. Jacobson."

On April 25, 2012, counsel for Plaintiff served on the registered agent for Cowles Publishing a Subpoena Duces Tecum seeking information concerning the identity of the posters almostinnocentbystander, Phaedrus and OutofStaterTater.

On May 1, 2012, Cowles Publishing filed a Motion to Quash the Subpoena, asserting that the Subpoena violated the right to speak anonymously under the First Amendment to the United States Constitution and Article I, Section 9 of the Idaho Constitution, and also constituted an infringement of the reporter's privilege of Dave Oliveria under the First Amendment and Article I, Section 9 of the Idaho Constitution.

II. ARGUMENT

A. Anonymous Speech is Protected Under the First Amendment.

The right to speak anonymously in this country is protected under the First Amendment. *NAACP v. Alabama,* 357 U.S. 449 (1958); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Doe v. Reed*, 132 S.Ct. 449 (2011).

The right to speak anonymously dates back to the days of the Federalist papers, which were, at least in part, published under pseudonyms to provide protection to the authors from

retribution or retaliation arising from their commenting on political issues of the day.[2]

Article I, Section 9 of the Idaho Constitution parallels the First Amendment and, as such, offers similar protection to anonymous speech. As will be discussed below, both Article I, Section 9 of the Idaho Constitution and the First Amendment also provide the underpinnings to the recognition of reporter's privilege in the State of Idaho.

Any attempt to compel identification of anonymous speakers, which threatens the fundamental right of anonymity, must be subject to review by the court under "closest scrutiny." *NAACP v. Alabama, supra,* at 461. The underlying purpose of such protection is to allow members of the public to freely discuss issues without fear of negative repercussions, such as adverse impact on employment status or harassment from individuals opposed to the anonymous comments that may be posted. This doctrine of anonymity parallels the "hands-off" approach that the United States Congress has adopted in not limiting the free flow of communication on the internet, as evidenced by the provisions of the Communications Decency Act of 1996, including Section 230, which provides immunity for service providers as to any content that may be posted by third parties on internet websites hosted by the service providers. 47 U.S.C. § 230.

The Supreme Court of Delaware has articulated the rationale for protecting anonymous speech on the internet as follows:

> The internet is a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate. Unlike thirty years ago, when 'many citizens [were] barred from meaningful participation in public discourse by financial or status inequalities and a relatively small number of powerful speakers [could] dominate the

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[2] "Undoubtedly the most famous pieces of anonymous political advocacy are the Federalist papers, penned by James Madison, Alexander Hamilton and John Jay, but published under the pseudonym 'Publius,' [Citation omitted.) Their opponents, the anti-Federalists, also published anonymously, cloaking their real identities with pseudonyms such as 'Brutus,' 'Centinel,' and 'The Federal Farmer.' [Citation omitted.] It is now settled that '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.'" *In re Anonymous Online Speakers,* 661 F.3d 1168, 1172-1173 (9th Cir. 2011), citing *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995).

> marketplace of ideas,' the internet now allows anyone with a phone line to 'become a town crier with a voice that resonates farther than it could from any soapbox.' Through the internet, speakers can bypass mainstream media to speak directly to 'an audience larger and more diverse than any the Framers could have imagined.' Moreover, speakers on internet chat rooms and blogs can speak directly to other people with similar interests. A person in Alaska can have a conversation with a person in Japan about beekeeping in Bangladesh, just as easily as several Smyrna residents can have a conversation about Smyrna politics.
>
> Internet speech is often anonymous. 'Many participants in cyberspace discussions employ pseudonymous identities, and, even when a speaker chooses to reveal her real name, she may still be anonymous for all practical purposes.' For better or worse, then, 'the audience must evaluate [a] speaker's ideas based on her words alone.' 'This unique feature of [the internet] promises to make public debate in cyberspace less hierarchical and discriminatory' than in the real world because it disguises status indicators such as race, class, and age.
>
> It is clear that speech over the internet is entitled to First Amendment protection. This protection extends to anonymous internet speech. Anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering. As the United States Supreme Court recently noted, 'anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.' The United States Supreme Court continued, '[t]he right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.'

Doe v. Cahill, 884 A.2d 451, 455-456 (Del. 2005).

B. Courts have Imposed Stringent Requirements for Compelling the Identification of Anonymous Posters.

Courts have imposed stringent tests that must be satisfied before compelling production of the identity of anonymous posters and have generally followed the decisions in two key state court cases in analyzing whether to compel production of information concerning the identity

of anonymous posters. The standard most applied is that set out in *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J.Super 2001). The test adopted in *Dendrite* requires a plaintiff seeking identity information to satisfy four requirements: (1) the plaintiff must undertake efforts to notify the anonymous speaker that the speaker is the subject of a subpoena (including a posting on the same message board as the alleged actionable speech occurred) and must withhold taking action in order for the anonymous speaker to be given the opportunity to file an opposition; (2) the plaintiff must set forth the exact statements which allegedly constitute actionable speech; (3) the plaintiff's complaint must make out a *prima facie* cause of action against the anonymous speaker; and (4) even if the plaintiff has presented a *prima facie* case, the court must still balance the anonymous speaker's First Amendment right of anonymous free speech against the relative strength of the case and the need for disclosure in order for the plaintiff to prevail.

A similar test is set out in the other key case -- *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). In *Cahill*, the Delaware Supreme Court requires that a plaintiff seeking the identity of anonymous parties must offer enough evidence to survive a motion for summary judgment, submitting sufficient evidence to create a genuine issue of material fact on each element of the libel claim. The Delaware court specifically adopted the first and third elements (requiring notice and proof of a *prima* facie case) of the *Dendrite* test, and, in so doing, concluded that the second and fourth elements of *Dendrite* are already "subsumed in the summary judgment inquiry."

In the *Dendrite* case, the court denied the plaintiff's request for discovery of the identity of anonymous posters, finding that the plaintiff had failed to establish necessary harm as required for a *prima facie* case of defamation. In *Cahill*, the court also refused to order disclosure of an anonymous poster's identity, finding that no reasonable person could construe the statements complained of as anything other than protected expressions of opinion.

The Ninth Circuit Court of Appeals recently adopted the standard set out in *Doe v. Cahill* as the test for compelling the identity of anonymous posters, describing the *Cahill* test as applying the "most exacting standards." *In re Anonymous Online Speakers*, 661 F.3d 1168,

1176 (9th Cir. 2011).

The combined *Dendrite/Cahill* test was followed by the Chief Magistrate Judge for the District of Idaho in denying enforcement of a subpoena seeking to compel identity of anonymous parties issued against an Idaho blog site, stemming from an action for defamation filed in the State of Illinois. *S 103, Inc. v. Bodybuilding.com, LLC*, Case No. CV 07-6311-EJL (2007). A copy of the Magistrate's Order is attached to this Memorandum.

C. Plaintiff Has Failed to Satisfy the Test for Compelling Production of Identity of Anonymous Posters.

1. Plaintiff has Failed to Provide Notice to Anonymous Posters of Subpoena Duces Tecum.

The courts in the *In re Anonymous Online Speakers, S 103, Inc. v. Bodybuilding.com*, *Dendrite* and *Cahill, supra*, decisions all recognize the necessity of informing anonymous posters of the attempt to compel the disclosure of their identities. This notice requirement comports with the notion of due process in allowing a person whose rights are affected to be present in Court to assert and protect those rights. These cases require the plaintiff to, at a minimum, post a notice on the blog site on which the complained of statement was originally posted, notifying the anonymous posters of the pending proceedings to compel production of information that would identify them so as to give the anonymous posters the right to appear (anonymously) through counsel or otherwise to argue their case. This is particularly important where the balance of the test involves an analysis as to whether a case for defamation has been made out.[3]

The Motion of Cowles Publishing to quash the Subpoena should be granted because Plaintiff has not provided the required notice to the three anonymous posters whose identities are sought.

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[3] Nevertheless, even if the anonymous commenters choose not to participate, Cowles Publishing has standing to assert the rights of anonymous posters on its website because (1) the anonymous posters face practical obstacles that may prevent them from asserting their own right; (2) the newspaper suffers an injury, since the failure to protect anonymous speakers would affect the newspaper's ability to maintain its client base, and (3) the newspaper can be expected to be an adequate advocate for anonymous posters. *See, Enterline v. Pocono, infra*.

2. Plaintiff Cannot Establish Elements of Defamation Necessary to Survive a Motion for Summary Judgment.

a. Motion to Quash Should be Granted as to Posters "Phaedrus" and "OutofStaterTater" Because they are Not Identified as Defamation Defendants.

Plaintiff obviously cannot satisfy the test for disclosure of the identities of two of the anonymous posters -- Phaedrus and OutofStaterTater -- because Plaintiff is not asserting in her Complaint that either Phaedrus or OutofStaterTater published any defamatory statement concerning Plaintiff. Since a necessary part of the test for disclosure of an anonymous poster is showing a *prima facie* case of defamation, Plaintiff cannot satisfy that test since she does not allege that either of these posters defamed her.

Courts have noted that when a subpoena seeks the identities of anonymous internet users who are not parties to the underlying litigation, a test more stringent than that set out in the *Dendrite* and *Cahill* cases must be satisfied. Identification in such cases is only appropriate where the compelling need for disclosure outweighs the First Amendment right of anonymous speakers. *See, Federation v. Taylor*, No. 09-3031-CU-5-GAT, 2009 WL 4802567 (W.D. Mo. 2009) and *Enterline v. Pocono Medical Center*, No. 3:08-cv-1934, 2008 U.S. Dist. LEXIS 100033 (M.D. Pa. 2008). There is no such compelling need in the case at bar overcoming the First Amendment rights of Phaedrus and OutofStaterTater.

A review of the comments posted on the *Huckleberries* blog by Phaedrus and OutofStaterTater establishes that they were not the source of any defamatory statements concerning Plaintiff. Phaedrus' comments were limited to opinions on Plaintiff's attire, questions as to identification of those sitting on the stage with candidate Santorum and comments about some of Santorum's statements made at his appearance in North Idaho. OutofStaterTater made only one comment, referencing almostinnocentbystander's post, and that was the fanciful remark "Yes, do tell, Bystander. Tina's missing funds at the local GOP, Sheriff Mack and John Birch Society are coming to town. Things are getting interesting around here."

Moreover, such comments are clearly statements of opinion and, since an opinion is not provable as either true or false, such a statement is not actionable under Idaho defamation law. *See, Wiemer v. Rankin*, 117 Idaho 566, 790 P.2d 347 (1990); and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In an action for defamation, the burden is on the plaintiff to prove falsity, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), and as to posters Phaedrus and OutofStaterTater, Plaintiff cannot prove that any of the postings on the blog site were false and therefore cannot establish a *prima facie* case for defamation as to these two posters.

One of the primary means for protecting the anonymity of posters on the internet is to prevent plaintiffs from using a defamation lawsuit as an excuse for seeking out the identity of anonymous posters as a way of harassing the posters or exposing them to some sort of retribution or retaliation -- the end goal being to stifle criticism, in this case of Plaintiff.

Courts have recognized the concern that many defamation plaintiffs may bring lawsuits merely to learn the identity of anonymous critics:

> Indeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, '[t]he sudden urge in John Doe suits stems from the fact that many defamation actions are not really about money.' 'The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him.' This 'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked.

Doe v. Cahill, *supra*, 884 A.2d at 457.

That Plaintiff included in her Subpoena a demand to produce documents that would identify two innocent posters, against whom no allegation of defamation has been made, would appear to represent the very height of a retributive fishing expedition -- the ultimate goal of which is to identify individuals who may have been critical of Plaintiff, but whose comments do not rise to the level of defamation, and stifle further comments by them.

The Motion to Quash the Subpoenas as to posters Phaedrus and OutofStaterTater should be granted.

b. Plaintiff Cannot Establish Necessary Elements of a *Prima Facie* Case of Defamation.

In order to establish a *prima facie* case of defamation, plaintiff must prove that (1) the plaintiff communicated information concerning the plaintiff to others; (2) the information was defamatory; and (3) the plaintiff was damaged because of the communication. *Gough v. Tribune-Journal Company,* 73 Idaho 173, 249 P.2d 192 (1952); *Clark v. Spokesman-Review,* 144 Idaho 427, 163 P.3d 216 (2007). When a publication concerns a public figure or matters of public concern, the plaintiff must also show the falsity of the statement at issue in order to prevail in a defamation suit. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986). If the plaintiff is a public figure, plaintiff can recover only if plaintiff can prove actual malice -- that is, that defendant made the allegedly defamatory statement with knowledge of its falsity or reckless disregard of the truth -- by clear and convincing evidence. *Steele v. Spokesman-Review*, 138 Idaho 249, 61 P.3d 606 (2002).

Thus, in order to compel the production from Cowles Publishing of information that would identify anonymous posters, Plaintiff must provide proof to satisfy all these elements of a cause of action for defamation. In the case at bar, Plaintiff cannot establish by clear and convincing evidence the necessary elements of actual malice, falsity, or damage, and, therefore, the Motion to Quash the Subpoena should be granted as to all three posters.

i. Plaintiff Cannot Satisfy Proof of Actual Malice Required of Public Figure.

Plaintiff Tina Jacobson is Chairwoman of the Republican Party for Kootenai County and, in this capacity, qualifies as a public figure. In her status as Republican Chairwoman, Ms. Jacobson frequently speaks out on a variety of issues and is called upon to act as a spokesperson for the Republican Party. This voluntary thrusting of herself into matters of public concern qualifies her as a public figure. *See, Steele v. Spokesman-Review, supra,* where the attorney for the Aryan Nations was deemed to be a public figure; and *Clark v. Spokesman-*

Review, supra, where the State Chairman of the Republican Party was deemed to be a public figure.

Courts have recognized that public figure defamation plaintiffs must be held to a high standard when seeking to learn the identity of anonymous posters:

> A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker 'may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwarranted exposure to her mental processes.'

Doe v. Cahill, 884 A.2d at 457.

The postings on the blog site *Huckleberries* concerning Plaintiff arose out of her appearance in public with Republican presidential candidate Rick Santorum and the comments related to her position as Chairwoman of the Kootenai County Republican Party. Therefore, the standard of actual malice applies.

As a result, not only must Plaintiff establish that the challenged statement was a statement of fact, but Plaintiff must also establish that the statement was made with knowledge of falsity or reckless disregard of the same, and such proof must be clear and convincing. almostinnocentbystander's offhanded and fanciful remark (addressed more to the nature of Tina Jacobson's attire than to the theft of money) on its face establishes that it was not intended as a statement of fact and, therefore, actual malice in the form of knowledge of falsity or reckless disregard of truth cannot be established.

The Motion to Quash should be granted.

ii. <u>Poster's Fanciful and Imaginative Comment Does Not Rise to the Level of a Statement of Fact</u>.

almostinnocentbystander's posting followed a line of postings that addressed a photograph that included Plaintiff. Some of the postings commented on Ms. Jacobson's attire: Phaedrus, "Mom jeans and a sweater vest. Ha! Is Tina Jacobson wearing a camouflage skirt;" Sisyphus, commenting on Santorum's attire, "Nothing says carpetbagger like a sweater vest and

cowboy boots. What does he do for a living? I would respect him more if he did the tequila dance;" Dennis: "Looks like a 'Star Wars' convention," and then the comment by almostinnocentbystander: "Is that the missing $10,000 from Kootenai County central funds actually stuffed inside Tina's blouse??? Let's not try to find out."

As the court said in *Cahill, supra,* "it should be understood that internet blogs, message boards and chat rooms are, by their nature, typically casual expressions of opinion." 884 A.2d at 465. In dismissing an action against 35 anonymous posters for libel and interference with contractual relations, the court in *Global Telemedia International v. Doe 1,* 132 F.Supp.2d 1261 (C.D. Cal. 2001), noted the following:

> . . . the general tenor, the setting and the format of [the posters'] statements strongly suggested that the postings are opinion. The statements were posted anonymously and amid the general cacophony of an internet chat-room in which about a thousand messages a week are posted . . . . Importantly, the postings are full of hyperbole, invective, shorthand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings. . . . [a] reasonable reader, looking through hundreds of thousands of postings about the company from a wide variety of posters, would not expect that [the defendant] was airing out anything other than his personal views.

Global Telemedia International, supra, at 1264-1268.

Since statements of opinion are protected under the First Amendment, *Milkovich v. Lorain Journal Company, supra,* almostinnocentbystander's statement posted among other fanciful, arbitrary and sometimes harsh statements is simply not actionable. In *Obsidian Finance Group, LLC v. Cox,* 812 F.Supp. 2d 1220 (2011), the court addressed the test for determining whether a statement can be construed as one of opinion or one of fact:

> The test assessed is (1) whether in the broad context, the general tenor of the entire work, including the subject of the statements, the setting, and the format, negates the impression that the defendant was asserting an objective fact; (2) whether the context and content of the specific statements, including the use of figurative and hyperbolic language, and the reasonable expectations of the audience, negate that impression; and (3) whether the statement is sufficiently factual to be susceptible of

being proved true or false.

812 F.Supp. 2d at 1223.

The court went on to note that statements made as part of an acknowledged heated debate often negate the impression that the defendant was asserting an objective fact. 812 F.Supp. 2d at 1223. Other courts have found that readers are less likely to view statements made on blogs as assertions of fact. *Nicosia v. DeRooy*, 72 F.Supp. 2d 1093, 1101 (N.D. Cal. 1999).

The court in *Obsidian* cited a string of cases holding that blogs are a subspecies of online speech, which inherently suggests that statements made there are not likely provable assertions of fact, that statements made on a personal website and through online discussion groups are less likely to be seen as assertions of fact, that online message boards provide virtual, public forums for people to communicate with each other about topics of interest and promote a looser, more relaxed communication style, and that readers give less deference to allegedly defamatory remarks published on online message boards, chat rooms and blogs because speaking online allows anyone with an internet connection to publish his thoughts, free from editorial constraints that serve as gate keepers for the more traditional media of disseminating information. 812 F.Supp. 2d at 1223-1224.

In the *Obsidian Finance Group* case, the court determined that a series of blog entries concerning the handling of a bankruptcy of a particular company were protectable as statements of opinion. The blog entries included, among others, an allegation of a "hundred million dollar secret," a comment asserting that an official of Obsidian Financial "had covered up information worth a hundred million dollars," a statement that the Obsidian official had been "gunning" for a bankruptcy whistleblower, an allegation that the Obsidian officials were "thugs," a representation that Obsidian Finance, LLC "may have hired a hit man," and a statement that Obsidian Finance, LLC "stole money from the U.S. government." 812 F.Supp. 2d at 1225-1232.

In seeking to order disclosure of the identities of anonymous posters, the court noted that "while these statements appear at first glance to imply provable assertions, they lose the

ability to be characterized and understood as assertions of fact when the content and context of the surrounding statements are considered." 812 F.Supp. 2d at 1234.

Certainly, the initial assertion that Tina Jacobson may have $10,000 hidden in her blouse can only be considered as hyperbole, given the content and context of the other postings on the *Huckleberries* blog site. No reasonable person would believe that almostinnocentbystander actually meant this imaginative and hyperbolic posting about the location of $10,000 to be a statement of fact.

Courts have held the following statements to be non-actionable as statements of opinion: union officials accused of being "willing to sacrifice the interests of the members of their union to further their own political aspirations and personal ambitions;" *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425 (1976); a teacher called the "worst teacher" and a "babbler," *Moyer v. Amador Valley Joint Union High School District*, 225 Cal.App.3d 720 (1990); a mayor who "often misleads" reporters, *Craig v. Moore*, 4 Med. L. Rep. 1402 (Fla. Cir. Ct. Duvall County 1978); a statement that "[S]ometimes a [named legislator's] change of heart comes from the pocket," *Sillars v. Collier*, 20 N.E. 723 (Mass. 1890); and a councilman "did not consistently serve the interest of the city," and "usurped the functions of the city manager," "dictated appointments in violation of the charter," and "forced out of office useful employees of the city," "had as little respect for sound business usage in [his] conduct of the city's affairs as [he] showed for the charter of the merit system in the municipal service," "did not always . . . take the highest and best bids when selling, and the lowest when buying," and "lack[ed] that conscientious regard for the city's interest which makes the city office a public trust," *Taylor v. Lewis*, 132 Cal.App. 381, 22 P.2d 569 (1933).

In Washington, the fanciful portrayal in a cartoon of a state district court judge reading a book while presiding over court, suggesting that the book was a Madonna *"Sex"* book recently stolen from the public library, was deemed to be a non-actionable statement of opinion. *Wilson v. Cowles Publishing Company*, 101 Wn.App. 1077 (2000).

The statement complained of by Plaintiff can only be construed as a fanciful comment and non-provable hyperbole. Since Plaintiff cannot establish the statement was one of fact, she

cannot sustain a necessary element of a cause of action for defamation.

iii. Plaintiff Cannot Establish Damages to Withstand a Motion for Summary Judgment on the Defamation Claim.

Since this is a cause of action for defamation brought by a public figure, damages cannot be proved by speculation but must be established by clear and convincing evidence. *Wiemer v. Rankin, supra,* at 574.[4] Plaintiff must establish a causal connection between the publication of the complained-of statement and any actual damages suffered by her. Speculation and conjecture as to damages are not permissible. *Sunward Court v. Dunn & Bradstreet, Inc.*, 811 F.2d 511, 541 (10th Cir. 1987).

The lack of any damage arising out of the complained-of statement is underscored by the fact that only two persons -- Phaedrus and OutofStaterTater -- responded to the original posting and both of their posts were in the nature of questions, rather than factual statements. Moreover, the first posting was made at 3:31 p.m. on February 14th, and Dave Oliveria removed the postings from the *Huckleberries* website sometime between 5:30 and 6:00 p.m. on the same date.

Until the lawsuit alleging defamation was filed, there were no further postings on *Huckleberries* relating to the original posting by almostinnocentbystander. In fact, it is fair to say that the filing of a lawsuit and the Subpoena seeking production of information relating to the identity of three anonymous posters has generated far more publicity concerning the original posting than the original statement itself. As a result, any publicity concerning the statement has arisen far more from the filing of a lawsuit than from the original posting.

Damages from the fanciful posting are speculative at best.

D. Identity of Anonymous Posters are Protected by Reporter Privilege.

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[4] Unless Plaintiff can show by clear and convincing evidence that almosinnocentbystander acted with actual malice (as set out in Section II(C)(2)(b)(i) above), damages may not be presumed, even if the allegation is that the challenged statement constituted libel *per se*. *See, Wiemer v. Rankin, supra*. The First Amendment prohibits any presumption of damages in a defamation case unless there is proof of actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Courts have held that state laws relating to protection of confidential sources also limit disclosure of the identity of anonymous internet speakers. See, *Doe v. TS, et al.*, No. CV 08030693 (Oregon 5th Jud. Cir. 2008); and *Doty v. Mollnar*, No. DV 07-022 (Mont. 13th Jud. Cir. 2008). Idaho courts recognize that a qualified privilege exists under both the First Amendment and Article I, Section 9 of the Idaho Constitution, allowing the media to protect the identity of confidential sources. *In re Contempt of Wright*, 108 Idaho 418, 700 P.2d 40 (1985); and *State v. Salsbury*, 129 Idaho 307, 924 P.2d 208 (1996).

The *Huckleberries* website solicits comments from readers of the website concerning matters of local, regional and national importance. The website is monitored and discussion is stimulated by postings by Dave Oliveria, a reporter, associate editor and columnist for *The Spokesman-Review* for the least 28 years. *The Spokesman-Review's* Service Agreement and Privacy Policy assures posters of confidentiality unless *The Spokesman-Review* is directed by court order to reveal a poster's identity or unless protection of *The Spokesman-Review's* interests or property dictates disclosure.

Oliveria has also had e-mail exchanges and phone conversations with almostinnocentbystander, the understanding being that these exchanges and almostinnocentbystander's identity would remain confidential and not be disclosed. Thus, the relationship between *The Spokesman-Review* and these posters whose identities are sought is premised on confidentiality of their identities.

Because of the recognized chilling effect that arises from requiring the news media to identify confidential sources,[5] Idaho courts require that a party seeking the identity of a confidential source show that (1) the information is clearly related to the pending action, (2) the information cannot be obtained by less intrusive alternative means, and (3) there is a compelling and overriding interest in the information. *In re Contempt of Wright*, 168 Idaho 418, 700 P.2d 40 (1985).

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[5] "[T]he press' foundation as a reputed source of information is weakened when the ability of pundits to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with his news gathering ability." *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Ca. 1981).

There has been no showing of a compelling need for disclosure of the identities of Phaedrus and OutofStaterTater, nor a showing of how disclosure of their identities pertains to the pending litigation where they are not named as parties to the litigation. Similarly, there is not a compelling need for disclosure of the identity of almostinnocentbystander where that party's comments constituted expression of fanciful opinion and, given the context and content of the *Huckleberries* blog, could not be construed by a reasonable person as a statement of fact.

Thus, in addition to the protections set out in the line of cases originating with *Dendrite and Cahill*, courts have recognized that state law relating to reporter's privilege also protects the identity of anonymous internet posters. The Motion to Quash should be granted because Plaintiff fails to satisfy not only the test for disclosure of anonymous sources as set out above but also the elements for overcoming the qualified reporter's privilege in Idaho.

III. CONCLUSION

For the reasons set out above, Cowles Publishing respectfully requests that the Subpoena Duces Tecum issued by Plaintiff be quashed.

DATED this ____ day of May, 2012.

Joel P. Hazel
Duane M. Swinton (Pro Hac Vice pending)
Witherspoon • Kelley
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CERTIFICATE OF SERVICE

I certify that on this the _____ day of May, 2012, I caused a true and correct copy of MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COWLES PUBLISHING'S MOTION TO QUASH SUBPOENA DUCES TECUM to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

C. Matthew Andersen
Winston & Cashatt
250 Northwest Blvd., Suite 206
Coeur d'Alene, ID 83814

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Via Fax: (208) 765-2121
☐ Via email: cma@winstoncashatt.com

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