

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00941-CAMA-BNB

FAÇONNABLE USA CORPORATION,)
A Delaware Corporation,)
)
Plaintiff,)
)
v.)
)
JOHN DOES 1-10,)
All whose true names are unknown,)
)
Defendants.)

**MEMORANDUM OF SKYBEAM, INC.,
IN SUPPORT OF ITS OBJECTIONS TO MAGISTRATE JUDGE BOLAND’S ORDER
COMPELLING SKYBEAM TO IDENTIFY DEFENDANTS**

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In this case, Magistrate Judge Boland ordered an Internet Service Provider to identify one of its customers. The Magistrate Judge's order infringes on the well-established First Amendment right of anonymous speech, and departs from a broad consensus rule developed among the various state appellate courts and federal district courts around the country that have considered the same question. Recognizing that First Amendment rights cannot be infringed without a compelling state interest, courts generally hold, following the *Dendrite* test (named after the first appellate decision on the issue), that anonymous would-be defendants must be notified of the threat to their First Amendment right to speak anonymously, and would-be plaintiffs must make both a legal and an evidentiary showing of merit before government power may be deployed to identify anonymous critics.

In this case, not only has such a showing not been made, but the magistrate ordered identification of a speaker despite the fact that this Court lacks subject matter jurisdiction over the case. Skybeam expects to receive other subpoenas to identify its users and it is important both that the proper procedures and standard be employed before such orders are granted. Accordingly, Skybeam urges the Court to reverse the magistrate judge's order.

STATEMENT

A. Background

Protection for the right to engage in anonymous communication is fundamental to a free society. Indeed, as electronic communications have become essential tools for speech, the Internet in all its forms—web pages, email, and the like—has become a democratic institution in the fullest sense. It is a modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997),

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

Full First Amendment protection applies to speech on the Internet. *Id.* Or, as another court put it, “[defendant] is free to shout ‘Taubman Sucks!’ from the rooftops Essentially, this is what [defendant] has done in his domain name. The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and [defendant] has a First Amendment right to express his opinion about Taubman.” *Taubman v. WebFeats*, 319 F.3d 770, 778 (6th Cir. 2003).

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. For example, Yahoo! and Raging Bull host message boards for every publicly traded company where investors, and other members of the public, can post discussions about the company. Google's Blogspot gives individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, major companies, or other topics while leaving it open for visitors to post their own comments. Google's YouTube web site also provides a discussion function whereby visitors can comment on the videos that are posted there. Many web sites that address specific subjects also include guestbooks or message boards where visitors can sound off on what they see there. Newspaper publishers host blogs, arranged by specific community or by news topic, where readers can exchange ideas and other information about news developments of interest. And other web sites, like the Wikipedia site on which the messages at issue in this case were posted, allow any individual to contribute to the

creation of web pages about various subjects through the “wiki” technology.

Individuals who communicate through online public forums generally do so anonymously, often using pseudonyms or displaying at most the Internet Protocol address from which they are accessing the Internet to make their contributions. Nothing prevents an individual from using her real name, but most people choose nicknames. These typically colorful monikers protect the writer’s identity from those who disagree with him or her, and they encourage the uninhibited exchange of ideas and opinions. Indeed, online forums often have regular posters who persistently complain about companies or individuals under discussion, others who persistently praise them, and others whose opinions vary between praise and criticism.

Many online forums have a significant feature that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use an online forum to express his point of view; a person who disagrees with something that is said on such a forum for any reason – including the belief that a statement contains false or misleading information – can respond to those statements immediately at no cost, and that response can have the same prominence as the offending message. On Wikipedia, disagreements about what an article should say often devolve into edit wars in which the participants change each other’s additions and deletions, sometimes while debating what content should remain using the site’s “discussion” or “talk” feature. http://en.wikipedia.org/wiki/Wikipedia:Edit_warring. An online forum is thus unlike a newspaper, which often will not print a response to its criticisms, and cannot be required to do so. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, on most online forums companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. And, because many people regularly revisit online forums

about a particular topic, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

B. Facts of This Case and Proceedings to Date

This case arises from a disagreement among users of Wikipedia about the proper content of article about the fashion company Façonnable USA (“Façonnable”) and its owner M1 Group, Limited. M1 Group is a Lebanese conglomerate co-founded by Najib Mikati, who, in turn, is a billionaire and politician who recently became prime minister of Lebanon. Purvis, *Sharp, Mikati’s M1 Join to Bid for Retailer All Saints, Sky Says*, <http://www.bloomberg.com/news/2011-03-26/sharp-mikati-s-m1-join-to-bid-for-retailer-all-saints-sky-says.html>. According to press reports, Mikati holds office due to the support of Hezbollah. Dakrouob, *Mikati justifies Cabinet delay, Jumblatt blames Hezbollah*, <http://www.dailystar.com.lb/News/Politics/2011/May-28/Mikati-justifies-Cabinet-delay-Jumblatt-blames-Hezbollah.ashx#axzz1NxP9R4Ob>. Mikati has been criticized for providing too much support for Hezbollah; he has defended himself by insisting that he “represents not just Hezbollah but everyone.” Karhani, *Interview with Najib Mikati, Lebanese Prime Minister*, <http://www.france24.com/en/20110201-interview-mikati-lebanon-saad-hariri-elections-hezbollah-parliament-sleiman>. Mikati’s official web site shows his close meetings with Hezbollah to establish a government in Lebanon. <http://www.najib-mikati.net/indexEnglish.aspx?ID=0&PID=97>. Hezbollah is a Shi’a Muslim militant group and political party that has been designated by the United States as a terrorist organization. Complaint ¶ 10 n.1.

Wikipedia pages about commercial companies are often created by the company itself and

are maintained solely for purposes of advertising. The Wikipedia page for Façonnable currently states: “Page dependent on a deleted or nonexistent page: the page to which this redirected was deleted per WP:CSD#G11 as unambiguous advertising / promotion.” See <http://en.wikipedia.org/wiki/Faconnablw> (accessed May 29, 2011). Similarly, the Wikipedia page for M1 Group currently states: “22:38, 29 April 2011 JzG (talk | contribs) deleted “M1 Group” (G11: Unambiguous advertising or promotion: Also A7).” http://en.wikipedia.org/wiki/M1_Group (accessed May 29, 2011). The Wikipedia entries reflect that the pages were eliminated on April 29 and April 30, 2011.

On March 2011, an anonymous Internet user modified the Wikipedia page about both M1 Group and Façonnable to refer to their connections, implicitly through their founder, to Hezbollah. According to the complaint, ¶ 10, edits to the Wikipedia page about Façonnable included statements that “M1 Group is purported to be a strong supporter of Hezbollah” and warning that buyers of Façonnable products “should consider that their purchases provide support for an organization identified by the US government as a supporter of terrorism.” Apparently, M1 Group’s agents monitor its Wikipedia page closely and deleted the change. Complaint ¶ 12.

On April 7, 2011, Façonnable brought suit in this Court against the Doe poster(s), claiming that the anonymously posted statements were false and defamatory. In addition to pleading defamation, Second Claim for Relief, Complaint ¶¶ 18-21, Façonnable alleged that the postings violated the Lanham Act because they contained “false descriptions and representations concerning the nature, characteristics and qualities of Façonnable USA’s goods, services and commercial activities,” First Claim for Relief, ¶¶ 14-17, and violated Colorado’s Consumer Protection Act both for the same reason that the Lanham Act was violated and because the statements “made false representations . . . as to the affiliation or connection of a person therewith.” Third Claim for Relief, ¶¶ 22-26. A “verification” was attached to the complaint, but the verification was not

attested and was stated on information and belief.

Along with its complaint, Façonnable moved for leave to initiate early discovery to identify the anonymous poster(s) so that Façonnable could amend the complaint to identify them and serve process on them. The case was assigned for discovery purposes to Magistrate Judge Boyd N. Boland, who granted the order on April 18, 2011. Façonnable then sent a subpoena to Skybeam, Inc., an Internet Service Provider (“ISP”), whose facilities the Doe had used to post the statements at issue. Skybeam objected to the subpoena on the grounds that compelled disclosure would violate its customer’s First Amendment right to speak anonymously and that Façonnable had not, as courts uniformly require, made any effort to inform the Doe poster that her anonymity was at risk. Skybeam moved to modify the April 18 order authorizing expedited discovery and requested a protective order, DN 9, 10, giving Skybeam a reasonable amount of time to notify its user of the subpoena. Façonnable opposed the motion, urging the Magistrate Judge to reject the application of the First Amendment and to allow discovery on the ground that the need to identify the defendant provided good cause under Rule 26(c). DN 14. Façonnable also argued that, even if the First Amendment test was followed, the verified complaint showed a violation of Colorado’s Consumer Protection Act. Façonnable offered no argument to support its Lanham Act claim, did not offer any proof beyond its verified complaint, and still undertook no efforts to give notice to the Doe.

Judge Boland denied the motion for a protective order. His order began by acknowledging that he was previously “unaware of a substantial body of law in other jurisdictions addressing First Amendment concerns and the issuance of John Doe subpoenas like those requested here.” DN 15, Opinion at 3.¹ Judge Boland also noted the overwhelming precedential support for the rule that the

¹ Façonnable did not present any such authority when seeking an order for expedited discovery. The precedent was provided by Skybeam in its motion to modify the order allowing expedited discovery.

First Amendment protects anonymous Internet speakers against being identified unless the plaintiff ensures that they are notified of the threat to their anonymity and makes both a legal and evidentiary showing that the lawsuit has merit. *Id.* 3-5, citing *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001), and its progeny. However, he said, “a few courts and commentators” disagree with that approach, *Opin.* 6-7, citing a single unreported trial court decision from a Pennsylvania state court, *Klehr Harrison Harvey Branzburg & Ellers v. JPA Development*, 2006 WL 37020 (Pa. Com. Pl. Jan. 4, 2006), and quoting at length from a law review article. Vogel, *Unmasking “John Doe” Defendants: the Case Against Excessive Hand-wringing over Legal Standards*, 83 Ore. L. Rev. 795 (2004).

Although Judge Boland cited authority holding that content neutral regulation of protected speech is subject only to intermediate scrutiny, he did not explain how the subpoena in this case, seeking to identify a defendant because he criticized the plaintiff, is content neutral. *Opin.* 9-10. He expressed concern that, if Façonnable could not identify the defendant, it “is left with no ability to vindicate its rights, and legal process is rendered meaningless.” *Id.* 10. He also ruled that, because Skybeam’s Terms of Service forbid infringements of trademark and the transmission of libelous material, and allow it to comply with legal process, the Court should not “take greater care than has been taken by the anonymous poster to protect his anonymity or to assure prior notice of a subpoena.” *Id.* 11-12. He also noted that the complaint had been verified and that the facts as alleged and verified spelled out “plausible” claims under the Lanham Act and Colorado Consumer Protection Act. *Id.* 10. Finally, although plaintiff had not filed a cross-motion to compel discovery, Judge Boland directed Skybeam to comply with the subpoena no later than June 3, 2011.

ARGUMENT

Introduction

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

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

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the

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

Although no District Judge in Colorado has yet addressed this question, most courts have followed the general rule that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Specifically, a court faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process should (1) provide notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying her anonymous critics – and that the defendant is not denied important First Amendment rights, unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria can require time and effort on a plaintiff's part and might delay its quest for redress. However, everything that the plaintiff must do to meet this test, it must also do to prevail on the merits of her case. So long as the test does not demand more information than a

plaintiff would be reasonably able to provide shortly after filing the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

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

Applying that standard in this case, discovery should be denied for several reasons. First, subject matter jurisdiction is based solely on plaintiff's Lanham Act claim, but plaintiff has not pleaded a viable Lanham Act claim, not to speak of providing evidence to support one. Absent that federal claim, the state-law claims should be dismissed and plaintiff should pursue them in state court if it desires to do so. Second, no notice was given so that the Doe could defend her anonymity. Third, although the complaint was verified, the verification was not attested and in any event was only on information and belief, which does not meet either the prima facie evidence or the summary judgment standard. Indeed, given the fact that there appears to be some truth to the contention that there is a relationship between plaintiff's owner and the terrorist organization Hezbollah, a specific affidavit from an individual with personal knowledge should be required before a subpoena stripping Doe of her First Amendment right to anonymity should be enforced.

Plaintiff contends that defamation and trademark infringement are outside the protection of the First Amendment, and that because the speech at issue on this appeal is so plainly actionable,

the Court need not consider whether there are sound reasons to withhold the power of a court order to compel Skybeam to identify the anonymous critic. However, as other courts addressing this issue have recognized, plaintiff's argument begs the question. Plaintiff has not shown that Doe defendant here defamed it or infringed its trademark — at this point, its allegations have no evidentiary basis. The issue is what showing plaintiff should have to make before anonymous critics are stripped of anonymity by an exercise of government power. Because Skybeam has filed a timely objection to the Magistrate Judge's order as being based on an incorrect legal standard, 28 U.S.C. § 636(b)(1), because Skybeam argues that Judge Boland followed the wrong standard, and because the application of the First Amendment to the facts of the case is at issue here, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the Court should conduct a de novo review of the order.

A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

* * *

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

McIntyre, 514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001).

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

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

Teach, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. Consequently, many observers argue that the law should provide special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007); Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

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

347 (1995).

Courts have recognized the serious chilling effect that subpoenas to identify anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). In an analogous area of law, the courts have evolved a standard for compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In those cases, courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of his case; (2) disclosure of the source to prove the issue is “necessary” because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of his case. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

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

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

In recent cases, courts have recognized that the mere fact that a plaintiff has filed a lawsuit

over a particular piece of speech does not create a compelling government interest in taking away the defendant's anonymity. The challenge for courts is to find a standard that neither makes it too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Doe v. Cahill*, 884 A.2d at 457. But setting the bar too high will make it impossible for plaintiffs with perfectly valid claims to identify wrongdoers and proceed with their cases.

Courts have drawn on the media's privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), established a five-part standard that has been followed or adapted throughout the country:

- 1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
- 2. Require Specificity:** Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
- 3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
- 4. Require An Evidentiary Showing:** Courts require the plaintiff to produce evidence supporting each element of its claims.
- 5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

A somewhat less exacting standard requires the submission of evidence to support the

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

All of the other state appellate courts, as well as several federal district courts, that have addressed the issue of subpoenas to identify anonymous Internet speakers have adopted some variant of the *Dendrite* or *Cahill* standards. Several courts expressly endorse the *Dendrite* test, requiring notice and opportunity to respond, legally valid claims, evidence supporting those claims, and finally an explicit balancing of the reasons supporting disclosure and the reasons supporting continued anonymity. For example, *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007), involved a subpoena by a private company seeking to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court drew an analogy between an order requiring identification of an anonymous speaker and a preliminary injunction against speech, and called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides. In *Independent Newspapers v. Brodie*, 966 A.2d 432 (2009), the court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, [it would] balance the

anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." 966 A.2d at 457. In *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 posted on a blog 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 plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." And earlier this year, *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011), held that a city council 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.

Several other courts have followed a *Cahill*-like summary judgment standard, although without necessarily rejecting the final balancing stage. For example, *Krinsky v. Doe 6*, 72 Cal.Rptr.3d 231 (Cal.App. 6 Dist. 2008), reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as "a management consisting of boobs, losers and crooks." *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007), reversed a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog about the hospital. In *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009), the court of appeals held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false, adopting *Cahill* and

joining Delaware in expressly rejecting *Dendrite*'s balancing stage.²

Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. In reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action (836 A.2d at 50):

[C]ourt-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.

Among the federal district court decisions following *Cahill* and *Dendrite* is *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), where the court refused to enforce a subpoena to identify the authors of several postings by Best Western franchisees that criticized the Best Western motel chain, because the plaintiff had not presented any evidence of wrongdoing on the part of the Doe defendants. The court suggested that it would follow a five-factor test drawn from *Cahill*, *Dendrite* and other decisions. *Id.* *5. *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969, 976 (N.D. Cal. 2005), required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests," and held that plaintiff's trademark and defamation claims based on sardonic postings about plaintiff's chief executive did

² In *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 2010), the Illinois Court of Appeals found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery the state's rules already required a verified complaint, specification of the defamatory words, determination that of a valid claim, and notice to the Doe.

not support discovery. *Fodor v. Doe*, 2011 WL 1629572 (D.Nev. April 27, 2011), followed *Highfields Capital*. See also *Koch Industries v. Doe*, 2011 WL 1775765 (D.Utah May 9, 2011) (The case law . . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*,” quoting *Salehoo v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)). *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001), similarly expressed a preference for the *Dendrite* approach, requiring a showing of reasonable possibility or probability of success. In *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009), the court quashed the subpoena without choosing between *Cahill* and *Dendrite* because plaintiff would lose under either standard. In *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), the court ordered the identification of a commercial competitor of the plaintiff who posted defamatory comments on bulletin boards only after considering a detailed affidavit that explained how certain comments were false. In *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008), the court granted discovery only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress based on vile personal attacks on a student gossip online forum.

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

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

Accordingly, the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and give them notice that suit had been filed against them, thus providing them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against the defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the plaintiff's trademark claims against the anonymous defendants. *Id.* at 580.

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

C. The Magistrate Judge's Reasons for a Less Exacting Standard Are Not Persuasive.

Judge Boland offered a few reasons for disregarding the consensus rule followed by other courts across the nation, but his reasoning was not persuasive. First, he relied on an *Oregon Law Review* article and an unreported state trial court decision, but neither supports his conclusions. The article, written by Michael Vogel, the lawyer for Dendrite International whose position was rejected by the New Jersey Superior Court Appellate Division in *Dendrite*, 83 Ore. L. Rev at 800 n.31, actually argues that a Doe defendant is entitled both to be notified and to be given an opportunity to argue against identification before the Court decides whether to compel his identification, *id.* at 847-848, and supports the adoption of a summary judgment standard. *Id.* at 849-851. The author's only disagreement with *Dendrite* is his objection to the equitable balancing stage applied even after plaintiff presents evidence supporting each element of its claim and hence shows that it could defeat

a motion for summary judgment. *Id.* at 857.

The one state court decision that Judge Boland cited, *Klehr Harrison v. JPA Development, supra*, should not be followed here. First, even if *Klehr Harrison* stood for the proposition that *Dendrite* is wrong, the case is no longer good law because the Pennsylvania Superior Court, which is that state's intermediate appellate court, squarely embraced the *Dendrite* approach earlier this year in *Pilcheskly v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011). Moreover, the case presented a different issue than the anonymity question presented here. *Klehr Harrison* was a law firm that sued a company (JPA) and its principal officer (Pantelides) over a web site that defendants set up to complain about the firm's handling of litigation for one of JPA's competitors. Plaintiff argued that JPA and Pantelides themselves were the authors of comments on the web site's "guestbook," and sought discovery to confirm this allegation. Defendants objected to having to admit or deny that they were the authors of the comments. Thus, the identities of the defendants in the case were known, and the issue was whether additional allegations could be maintained against them.

Second, Judge Boland implied that he was applying only intermediate scrutiny to decide whether the right of anonymous speech should be breached insofar as he discussed Tenth Circuit authority providing that intermediate scrutiny is the appropriate standard for content-neutral regulation of protected speech. But Judge Boland never explained why the subpoena in this case should be treated as content-neutral. The only reason why plaintiff argues that Doe should forfeit her right of anonymous speech is that her speech falsely criticizes plaintiff. That is not a content-neutral reason. Indeed, subpoenas to identify anonymous Internet speakers are not even content-neutral as a class, because they are only sought when a plaintiff is unhappy about the content of the speech, and, indeed, when the speech criticized the plaintiff. Nobody sues over online speech that compliments the plaintiff, after all. Therefore, enforcement of the subpoena is properly subject to

strict scrutiny and the subpoena can only be enforced if plaintiff shows that there is a compelling state interest in breaching the Doe's anonymity.

Third, Judge Boland based his weak standard on the fact that Skybeam's Terms of Service forbid use to infringe trademarks or engage in defamation, and also allow Skybeam to disclose identifying information when so required by legal process. This analysis has several problems. Judge Boland's use of the Terms of Service begs the question. Certainly plaintiff here **alleges** that its Lanham Act rights have been violated and it **alleges** that it has been defamed, and it **argues** that its subpoena should be enforced. But the Court needs to decide whether there has been defamation and whether the subpoena should be enforced. The question is what sort of process and what showing should be required before that happens. Moreover, similar provisions can be found in the Terms of Service for every ISP. After all, no ISP is willing to be subject to suit by its users when it takes down illegal content or when it discloses information pursuant to legal requirements. Indeed, the ISP's in every one of the anonymity subpoena cases cited above had such provisions, and similar arguments were made in many of those cases. *E.g., Sedersten v. Taylor*, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009). If the rule were that the existence of such Terms of Service is enough to avoid the need to consider Internet users' First Amendment rights, then the chilling effect on Internet speech that animated the decisions in *Dendrite*, *Cahill*, and the other cases cited above would return with a vengeance.

Judge Boland also erred by suggesting that his weaker standard was needed because, without disclosure, plaintiff will be unable to enforce its legal rights against defamation or misuse of its trademark. That concern would be legitimate only if the *Dendrite* or *Cahill* tests could be shown to frustrate the enforcement of legitimate claims. But those cases do not require more of plaintiffs than they can reasonably be expected to provide at the outset of a case. Many plaintiffs have

succeeded in identifying Doe defendants in jurisdictions that follow the *Dendrite* and *Cahill* standards. *E.g.*, *Doe I and II v. Individuals whose true names are unknown, supra*; *Alvis Coatings v. Does, supra*. For example, in *Immunomedics v. Doe*, 342 N.J. Super. 160, 775 A.2d 773 (2001), a companion case to *Dendrite* argued before the same panel, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the four Does had been identified while two had been protected against discovery.

Finally, Judge Boland suggested that he could avoid significant injury to Doe's right to speak anonymously by ordering plaintiff to use the information only for the purpose of litigation. This limitation is illusory. Plaintiff seeks to identify Doe so that it can amend the complaint to identify Doe by her real name, and then serve process on her. Once Doe is named in a public pleading as the author of the comments, her right of anonymous speech will be irretrievably lost.

D. Façonnable Has Not Followed the Steps Required Before Identification of a Doe Speaker May Be Ordered in This Case.

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

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

Indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property. *Id.* at 235. In the Internet context, posting on the Internet forum where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, at least if there is a continuing dialogue among participants. In this case, plaintiff could easily have posted using Wikipedia, either by placing a reference to the subpoena on the Wikipedia page itself, or by using the Wikipedia “talk” feature to explain its deletions with accompanying information about the subpoena.

Posting is not the only way of giving notice to a Doe; and now that Façonnable’s Wikipedia page has been deleted by editors, such posting is no longer possible. Because the subpoena in this case was sent to the ISP that provides Internet access to the Doe, the ISP has a mailing address for its customer; Skybeam has notified its customer after the entry of Judge Boland’s order. In other cases, when the host of the web site requires registration as a condition of posting, and requires the provision of an email address as part of registration, then sending a notice to that email address can be an effective way of providing notice. To be sure, such notice is not always effective, because Internet users sometimes adopt new email addresses, and either drop or stop using their old addresses. For example, in the recent *Brodie* case in Maryland, Public Citizen’s client, Independent Newspapers, gave email notice that it had received a subpoena to identify the owners of certain pseudonyms; one of those owners did not receive the message and, in fact, did not learn that there were proceedings to identify her until she read an account of the case in the *Washington Post* that mentioned her pseudonym, which had figured in the oral argument.

The industry standard is to provide two weeks or fifteen days' notice before the Court rules on the validity of the subpoena. That is, for example, the amount of time typically provided by such major providers as Google, Yahoo!, and Comcast. The time allowed for the Doe to oppose the subpoena should take into consideration whether the controversy is purely a local one. If participation is national, the time for notice should take into consideration not just the time needed to find counsel where the Doe resides, but also to find local counsel in the jurisdiction where a motion to quash would have to be filed.³

(2) Plaintiff Has Identified Two Sentences That It Claims Are Actionable.

The second stage of the *Dendrite* test has been satisfied in this case. It is important to require the plaintiff to set out the precise words claimed to be defamatory (and the context of those words) because it is often possible to determine, just from the words themselves, that no tenable claim for defamation could be brought. For example, some statements may not be actionable because they are not "of and concerning" the plaintiff, which is a requirement under the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). Other statements may be non-defamatory as a matter of law because they are merely rhetorical expressions of opinion, which are excluded from the cause of action for defamation. *Doe v. Cahill*, 884 A.2d at 467. Some may be obviously not actionable because the statute of limitations has run since the date of their posting.⁴

Here, Façonnable has identified two sentences that it claims are defamatory and violative of its trademark rights. Although the complaint suggests that other, unspecified words may also be

³ A Virginia statute requires twenty-five days' notice. Va. Code §§ 8.01-407.1(1) and (3). Plaintiff must serve its entire showing in support of discovery on the ISP along with the subpoena, thirty days before the date when compliance is due, and the ISP must furnish a copy of plaintiff's packet to the Doe within five days after that. *Id.*

⁴Courts generally hold that the single publication rule applies to Internet postings. See *Nationwide Bi-Weekly Admin. v. Belo Corp.*, 512 F.3d 137, 143-146 (5th Cir. 2007).

actionable, but Façonnable's ability to identify the Doe poster(s) rests on its ability to meet the test with respect to the two sentences that are identified in its complaint.

(3) Plaintiff Has Not Established Subject Matter Jurisdiction by Pleading Any Viable Federal Claims.

Plaintiff has failed to plead viable claims against Doe for several reasons. First, the Lanham Act claims cannot succeed, because Façonnable has not pleaded either the elements of an infringement claim that would be necessary to succeed in a claim under 15 U.S.C. § 1125(a)(1)(A), or the elements of a false advertising claim that would be needed for a claim under 15 U.S.C. § 1125(a)(1)(B).

Plaintiff alleges that Doe's criticism violates section 43(a) of the Lanham Act, 15 U.S.C. § 1125, because the criticism makes false representations or false descriptions about it, using its trademark to identify the subject of the criticism. Although Judge Boland assumed that plaintiff was advancing an infringement claim under section 43(a)(1)(A), a false description is not a sufficient basis for an infringement claim. To sue under section 43(a)(1)(A), plaintiff must allege both that the defendant has made a commercial use of its trademark to promote the sale of competing goods and services, and that there is a likelihood of confusion among customers about the source or affiliation of the alleged infringer's goods and services. *Utah Lighthouse Ministry v. F.A.I.R.*, 527 F.3d 1045, 1050 (10th Cir. 2008). Neither element is alleged here. Instead, Façonnable alleges that the false statements might interfere with its ability to sell its goods. That theory of commercial use was expressly rejected by the Tenth Circuit. *Id.* Moreover, to the extent that Façonnable is trying to protect its reputation against criticism, its claim is really one of defamation; it is not a trademark claim. *See Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

Nor has Façonnable pleaded a claim for false advertising under section 43(a)(1)(B). In the Tenth Circuit, there is no Lanham Act cause of action for "false advertising" unless the messages

are “(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant’s goods or services [and] . . . (4) disseminated sufficiently to the relevant purchasing public to constitute ‘advertising’ or ‘promotion’ within that industry.” *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273-1274 (10th Cir. 2000). Absent such allegations, Façonnable may only sue for defamation. *See Nevyas v. Morgan*, 309 F. Supp. 2d 673 (E.D. Pa. 2004). Nor is there any showing of a coordinated campaign to disparage the plaintiff, as required in light of the rule that “businesses harmed by isolated disparaging statements do not have redress under the Lanham Act; they must seek redress under state-law causes of action.” *Fashion Boutique v. Fendi USA*, 314 F.3d 48, 57 (2d Cir. 2002). Consequently, Façonnable lacks a viable federal claim, and must seek redress for its state-law defamation claims—including discovery to identify the Doe speaker—in state court.

Moreover, one of the two statements that Façonnable has identified is not about Façonnable. The statement “M1 Group is purported to be a strong supporter of Hezbollah” is about M1 Group, the company that owns Façonnable, not about Façonnable itself. But a crucial requirement for all defamation claims is that they be “of and concerning” the plaintiff. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). Consequently, the supposed falsity of this statement is not a proper basis for Façonnable to sue Doe, and cannot be the basis for compelling the identification of Doe.

(4) Façonnable Has Provided No Evidentiary Support for Its Claim.

No person should be subjected to compulsory identification through a court’s subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, because it prevents a plaintiff from being able

to identify his critics simply by filing a facially adequate complaint.

In this regard, plaintiffs often argue that they need to identify the defendants simply to proceed with their case. However, no relief is generally awarded to a plaintiff until the plaintiff comes forward with **evidence** in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who are highly respected in their own legal communities have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.*, Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily Freeman, November 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfti=8. An early advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.*

See Swiger v. Allegheny Energy, 2006 WL 1409622 (E.D. Pa. May 19, 2006) (company represented by the largest and most respected law firm in Philadelphia filed Doe lawsuit; obtained identity of employee who criticized it online; fired the employee; and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). In effect, the plaintiff should be required to present admissible evidence establishing a prima facie case, to “satisfy the trial court that he has evidence to establish that there is a genuine issue of fact.” *Downing v. Monitor Pub. Co.*, 415 A.2d 683 (N.H. 1980); *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). “Mere speculation and conjecture about the fruits of such examination will not suffice.” *Id.* at 994.⁵

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. In suits for defamation or disclosure of inside information, several elements of the plaintiff’s claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff in a defamation action is likely to have ample means of proving that a statement is false.

⁵*Downing* took comfort from the fact that the plaintiff there was represented by “respected counsel.” However, courts should not adopt a standard that depends on an evaluation of the quality of the lawyers appearing in the case. Less experienced lawyers, and even pro se parties, often seek subpoenas to identify anonymous critics, but should receive equal respect before the law.

Moreover, although one may well take with a grain of salt the assertion that a couple of sentences in a Wikipedia article that were promptly removed caused any injury to plaintiff, if there was such injury the plaintiff should have evidence of that fact. Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant.

Here, the one surviving statement that could be a basis for seeking Doe's identification is that buyers of Façonnable products "should consider that their purchases provide support for an organization identified by the US government as a supporter of terrorism." No probative evidence has been produced that this statement is false. The complaint purports to be verified, but the verification is not attested, either under oath before a notary nor under penalty of perjury pursuant to 28 U.S.C. § 1746. Moreover, Jean-Francois Beaudouin, the Façonnable "Director and Vice-President" who signed the verification, stated that the facts verified "are true and correct to the best of my knowledge, information and belief."

In addition, it is not clear exactly what Beaudouin is portraying as false. To the extent that Doe's statement expresses an opinion about what customers should consider in light of the reported ties between M1 Group and the Lebanese head of state, and between that individual and Hezbollah, there is no showing that Beaudouin is competent to testify about those facts; there is, indeed, no reason to believe that a Façonnable vice-president would have personal knowledge about those facts. Consequently, even if his verification has been attested, it would not be sufficient for summary judgment under Rule 56(e).

Consequently, having failed to produce any **evidence** that anything Doe has said either is false or has caused injury to the company, Façonnable has not met the fourth element of the *Dendrite* test to support the existence of a compelling state interest that warrants overriding Doe's

First Amendment right to speak anonymously.

(5) The Current Record Does Not Afford a Basis for Applying the Dendrite Balancing Test

Even if, in state court, Façonnable submits evidence sufficient to establish a prima facie case of defamation against Doe,

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

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

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

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

775 A.2d at 760-761.

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction—and not even a preliminary one at that. In every case, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing

the equities does not compel dismissal of the complaint. The plaintiff retains the opportunity to renew its motion after submitting more evidence. The inclusion of a balancing stage allows a Doe to show that identification may expose them to significant danger of extra-judicial retaliation. In that case, the court might require a greater quantum of evidence on the elements of plaintiff's claims so that the equities can be correctly balanced.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and its interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains. The balancing stage allows courts to apply a *Dendrite* analysis to many different causes of action, not just defamation, following the lead of the Arizona Court of Appeals which, in *Mobilisa v. Doe*, warned against the consequences of limiting the test to only certain causes of action. 170 P.3d at 719. If courts impose such limits, plaintiffs who hope to identify and intimidate anonymous speakers could simply conjure up additional causes of action to allege against them.

The Ninth Circuit's ruling in *In re Anonymous Online Speakers*, 2011 WL 61635 (9th Cir. Jan. 7, 2011), indirectly supports the use of a balancing approach, insofar as it holds that a court should decide whether to extend protection for anonymous speech depending on the nature of the speech at issue. In that case, however, there was no question that the speech attacking plaintiff Quixtar had been created by rival business owners as part of their economic attack on Quixtar, and the court declined to apply a *Dendrite* analysis to commercial speech. *Mobilisa* takes the better approach—it is wiser to hold that a plaintiff must meet some standards regardless of the plaintiff's allegations about the speech, but take the nature of the speech into account at the balancing stage,

as courts often do, for example, when the plaintiff has brought suit against online downloaders for copyright infringement.⁶ In any event, the speech in this case complains about the relationship between a company and a terrorist organization, which is surely speech on a matter of public interest and hence entitled to a high degree of constitutional protection.

In this case, the record does not enable the Court to assess the equitable considerations at stake. Once plaintiff refiles this case in state court and produces evidence in support of its state-law claims, both it and the Doe, if she takes advantage of the notice that has been given, may offer evidence and argument that permit the effective application of the balancing stage.

CONCLUSION

The Magistrate Judge's order denying Skybeam's motion for a protective order and compelling Skybeam to produce Doe's identifying information should be reversed, and the Court should quash the subpoena to Skybeam.

Respectfully submitted,

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⁶ *Call of the Wild Movie, LLC v. Does 1-1,062*, — F.Supp.2d —, 2011 WL 996786 (D.D.C. Mar. 22, 2011); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004)

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June 1, 2011