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RON PAUL 2012 PRESIDENTIAL CAMPAIGN COMMITTEE, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RON PAUL 2012 PRESIDENTIAL CAMPAIGN COMMITTEE, INC. A Delaware Corporation, Plaintiff, v. John Does, 1 through 10, Defendants.	Case No. CV-12-00240-MEJ **PLAINTIFF'S EX PARTE APPLICATION FOR EXPEDITED DISCOVERY; AMENDED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **[DECLARATION OF JESSE BENTON, REQUEST FOR JUDICIAL NOTICE AND [PROPOSED] ORDER GRANTING EX PARTE APPLICATION WERE FILED/LODGED PREVIOUSLY; DECLARATION OF MICHAEL A. GROW FILED CONCURRENTLY HEREWITH]**

1 Plaintiff Ron Paul 2012 Presidential Campaign Committee, Inc. ("Plaintiff")
2 respectfully applies to the Court *ex parte* for leave to take depositions and obtain
3 documents from YouTube, Inc. ("YouTube") and Twitter, Inc. ("Twitter") on an
4 expedited basis. Specifically, Plaintiff requests leave to promptly take depositions
5 and obtain documents from YouTube and Twitter to learn the identities of the Doe
6 defendants in this action and to require YouTube and Twitter to respond within 10
7 days of service of the subpoenas.

8 This discovery is needed to enable Plaintiff to identify the Does responsible
9 for engaging in the conduct complained of in the Complaint filed in this action.
10 The Complaint sets out information currently known to Plaintiff regarding
11 Defendants' acts of false designation of origin, false advertising, and libel. More
12 detailed information of Defendants is available only through the proposed
13 discovery. The discovery needs to be expedited so that the information can be
14 utilized to identify the Doe defendants and to provide them with notice of a
15 proposed preliminary injunction hearing. Moreover, as shown in the accompanying
16 memo, the arguments raised in the Amici Brief filed by the Public Citizen
17 Litigation Group and others provide no justification for denying the motion for
18 expedited discovery. For these reasons, Plaintiff respectfully requests that the
19 Court issue an order allowing Plaintiff to take the expedited depositions and obtain
20 document production.

21 Dated: February 10, 2012

Respectfully submitted,

22 ARENT FOX LLP

23

24 By: /s/ Jerrold Abeles
25 JERROLD ABELES
26 DAVID G. BAYLES

27 Attorneys for Plaintiff
RON PAUL 2012 PRESIDENTIAL
28 CAMPAIGN COMMITTEE, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Ron Paul 2012 Presidential Campaign Committee, Inc. ("Plaintiff") has the exclusive right to use the trade name and service mark RON PAUL in connection with the providing of information regarding political issues and political fund raising services. Plaintiff uses the RON PAUL name and mark to promote, support, and endorse Dr. Ron Paul as the 2012 Republican nominee for President of the United States. See Declaration of Jesse Benton, filed Jan. 18, 2012, Docket No. 5-2 ("Benton Decl."), ¶ 2. By virtue of its use, Plaintiff has established common law trade name and service mark rights in the name and mark RON PAUL.

The John Doe defendants described in the Complaint made unauthorized use of the name and mark RON PAUL in connection with the dissemination of misleading information in the form of a video posted on the YouTube website entitled "Jon Huntsman's Values" ("the Video"). *Id.* The Video uses the RON PAUL name and mark to falsely indicate that Plaintiff is the source of the video. The Video also contains false representations of fact that are calculated to irreparably injure Plaintiff and to destroy the goodwill associated with the RON PAUL name and mark. The Video contains traditional Chinese background music and it begins with the text "Jon Huntsman – American Values? / The Manchurian Candidate - What's He Hiding?" *Id.* The Video shows, among other things, 2012 Republican presidential candidate Jon Huntsman speaking Chinese and then inquires whether Mr. Huntsman is "weak on China." *Id.* The Video also questions Mr. Huntsman's religious faith, refers to Mr. Huntsman as "China Jon" and asks whether his daughters are "even adopted." *Id.* The Video ends with a fictitious depiction of Mr. Huntsman in a Mao Zedong uniform and the text "American Values and Liberty – Vote Ron Paul," thereby falsely implying that Plaintiff created, endorsed or is affiliated in some way with the Video and its content. *Id.*

Plaintiff did not create or endorse the Video and is not affiliated in any way with the Video or its content. *Id.,* ¶ 4. Defendants did not publically use their true names or contact information in association with the Video and, instead, have used the pseudonym NHLiberty4Paul. *Id.*, ¶ 5. Defendants' pseudonym NHLiberty4Paul is also the user name for an account with Twitter, Inc. Benton Decl., ¶ 5; *see also* Declaration of Michael Grow ("Grow Decl."), ¶ 3. Plaintiff needs expedited discovery to identify the Doe defendants so this action may proceed.

II. ARGUMENT

A. Courts Frequently Permit Expedited Discovery Where a Defendant's Identity Cannot Otherwise Be Determined

Courts in the Ninth Circuit and across the country routinely allow discovery to identify "Doe" defendants. *See Wakefield v. Thompson*, 177 F. 3d 1160, 1163 (9th Cir. 1999) (error to dismiss unnamed defendants given possibility that identity could be ascertained through discovery); *Valentin v. Kinkins*, 121 F.3d 72, 75-76 (2nd Cir. 1997) (vacating dismissal; pro se plaintiff should have been permitted to conduct discovery to reveal identity of the defendant); *Dean v. Barber*, 951 F.2d 1210, 1215 (11th Cir. 1992) (error to deny the plaintiff's motion to join John Doe defendant where identity of John Doe could have been determined through discovery); *Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir. 1985) (error to dismiss claim merely because the defendant was unnamed; "Rather than dismissing the claim, the court should have ordered disclosure of the Officer Doe's identity"); *Maclin v. Paulson*, 627 F.2d 83, 87 (7th Cir. 1980) (where "party is ignorant of defendants' true identity … plaintiff should have been permitted to obtain their identity through limited discovery").

Multiple district courts in the Ninth Circuit, including this Court, have granted plaintiff motions for leave to take expedited discovery to determine the identity of defendants. See, *e.g.*, Request for Judicial Notice (filed Jan. 18, 2012,

Docket No. 5-1), Exs. A-G (Order, *Maverick Recording Co. v. Does 1-4*, Case No. C-04-1135 MMC (N.D. Cal. April 28, 2004); Order, *Arista Records LLC v. Does 1-16*, No. 07-1641 LKK EFB (E.D. Cal. Aug. 23, 2007); Order, *Sony BMG Music Ent't v. Does 1-16*, No. 07-cv-00581-BTM-AJJB (S.D. Cal. Apr. 19, 2007); Order, *UMG Recordings, Inc. v. Does 1-2*, No. CV04-0960(RSL) (W.D. Wash. May 14, 2004); Order, *Loud Records, LLC v. Does 1-5*, No. CV -04-0134-RHW (E.D. Wash. May 10, 2004); Order, *London-Sire Records, Inc. v. Does 1-4*, No. CV 04-1962 ABC (AJWx) (C.D. Cal. Apr. 2, 2004); Order, *Interscope Records v. Does 1-4*, No. CV -04-131 TUC-JM (D. Ariz. Mar. 25, 2004).)

Courts allow parties to conduct expedited discovery in advance of a Rule 26(f) conference where the party establishes "good cause" for such discovery. *See UMG Recordings, Inc.* 2006 WL 1343597 at * 1 (N.D. Cal. Mar. 6, 2000); *Entertainment Tech. Corp. v. Walt Disney Imagineering*, No. Civ. A. 03-35456, 2003 WL 22519440, at *4 (E.D. Pa. Oct. 2, 2003) (applying reasonableness standard); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002); *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613-614 (D. Ariz. 2001) (applying a good cause standard).

In short, there is nothing unusual about Plaintiff's request for permission to conduct expedited discovery to determine Defendants' identity.

B. Plaintiff Satisfied the Four *Columbia* Factors For Expedited Discovery

In its January 25, 2012 order, the Court cited *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) and noted that the factors listed in that opinion should be addressed in connection with a motion for expedited discovery. The case holds that a court should consider whether: (1) the plaintiff can identify the missing party with sufficient specificity such that the court can determine that defendant is a real person or entity who could be sued in federal court; (2) the plaintiff has identified all previous steps taken to locate the elusive

defendant; (3) the plaintiff's suit against defendant could withstand a motion to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable likelihood of being able to identify the defendant through discovery such that service of process would be possible. *Id.; see also Incorp Services, Inc. v. Does 1-10*, 2011 WL 5444789, at *1 (N.D. Cal. Nov. 9, 2011).

In this case, the Plaintiff has established good cause to seek expedited discovery under all of the factors listed in the *Columbia* case. First, the Plaintiff can identify the missing parties with sufficient specificity such that the Court can determine that Defendants are real people or entities who could be sued in federal court. Plaintiff has identified the user name (NHLiberty4Paul) as the owner of the Twitter account used by Defendants in connection with the Video. *See* Grow Decl., ¶ 2. Twitter users must provide personal contact information, including their name and email address, when creating a Twitter Account. *See* Grow Decl., Ex. A (Twitter Privacy Policy, https://twitter.com/privacy (last visited Jan. 26, 2012).) Similarly, to create a YouTube account, a user must submit his or her first and last name, birthday, gender, phone number, email address, and location. *See id.*, Ex. B (YouTube, www.youtube.com (follow the "Create Account" hyperlink) (last visited Jan. 26, 2012).) Under the YouTube Terms of Service, this information must be "accurate and complete." *See id.*, Ex. B (YouTube Terms of Service, http://www.youtube.com/static?gl=US&template=terms (last visited Jan. 26, 2012).) The object of the requested discovery is to obtain from YouTube and Twitter the identifying information that Defendants had to submit to create the NHLiberty4Paul accounts. Thus, if leave to take expedited discovery is granted, Plaintiff will be able to identify Defendants with sufficient specificity such that the Court can determine that they are real people or entities who are capable of being sued in federal court. *See* Grow Decl., ¶ 5.

Second, in this Memorandum, Plaintiff identifies the steps it previously took to identify the elusive Defendants. Initially, Plaintiff thoroughly reviewed the

1 NHLiberty4Paul YouTube and Twitter accounts to locate all publically-available
2 information about the user's actual identity. *See* Grow Decl., ¶ 6. However, no
3 such information was available. *Id.* Next, Plaintiff ran searches on the Google
4 search engine for the term NHLiberty4Paul to determine if Defendants used that
5 name on any other websites, with the hope that the new website(s) would disclose
6 additional contact information for Defendants. *Id.* However, Plaintiff was unable
7 to identify any additional information about Defendants' identity, nor did it locate
8 any reputable sources claiming to have conclusively identified Defendants'
9 identities. *Id.* Thus, Plaintiff has identified all steps it previously took to identify
10 the elusive Defendants.

11 Third, Plaintiff has pled sufficient facts in the Complaint to withstand a
12 motion to dismiss. Plaintiff's first claim is for false designation of origin in
13 violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). *See* Complaint,
14 filed Jan. 13, 2012, Docket No. 1, ¶¶ 11-26. To state a claim for false designation
15 of origin (including common law trade name or service mark infringement),
16 Plaintiff must allege that Defendants, in connection with any goods or services,
17 used in commerce any word, term, name, symbol, or device, or any combination
18 thereof, or any false designation of origin, false or misleading description of fact, or
19 false or misleading representation of fact, which is likely to cause confusion, or to
20 cause mistake, or to deceive as to the affiliation, connection, or association of such
21 person with another person, or as to the origin, sponsorship, or approval of his or
22 her goods, services, or commercial activities by another person. *See* 15 U.S.C. §
23 1125(a). Plaintiff has alleged that, in connection with the Video, Defendants used
24 Plaintiff's trade name and service mark RON PAUL; that Defendants used this
25 name and mark in commerce; and that Defendants' use of the RON PAUL name
26 and mark is a false designation of origin that is likely to cause, and has actually
27 caused, confusion, mistake, and deception among Plaintiff's prospective donors and
28 others as to the origin, source, sponsorship, or approval of the Video. *See*

Complaint, ¶¶ 11-20. Plaintiff has thus sufficiently pled facts necessary to withstand a motion to dismiss on its false designation of origin claim.

Plaintiff's second claim is for false description and representation in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). *See* Complaint, ¶¶ 11-33. To state a claim for false description and representation, a plaintiff must allege that the defendant, in connection with any goods or services, used in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of the defendant's or another person's goods, services, or commercial activities. *See* 15 U.S.C. § 1125(a). The Complaint asserts that Defendants made explicit and implicit false descriptions and false representations of fact in the Video, which has been distributed in commerce. *See* Complaint, ¶ 28. In addition, the statements were made in a manner calculated to mislead members of the public and the media and to create the false impression that these false representations originated from or are sponsored, approved, or authorized by Plaintiff. *Id.* Plaintiff also asserted that Defendants' Video is a commercial advertisement that misrepresents the nature, characteristics, and qualities of the Video itself and that falsely describes the nature, characteristics, attributes, and qualities of goods and services offered by Plaintiff. *See* Complaint, ¶ 29. Plaintiff has pled sufficient facts to state a claim for false description, and thus withstand a motion to dismiss its second claim.

Plaintiff's third claim is for common law defamation and libel. *See* Complaint, ¶¶ 11-41. Under California law, the elements of defamation are (1) an intentional publication to a third person; (2) of a statement of fact; (3) that is false and unprivileged; and (4) has a tendency to injure or cause special damages. *See, e.g., Smith v. Maldonado,* 72 Cal.App.4th 637, 645 (1999). Plaintiff has asserted that Defendants intentionally and publically published a statement of fact; that this

statement was false and unprivileged; and that Plaintiff has suffered injury and a loss of its reputation as a result of the statement. *See* Complaint, ¶¶ 35-40.

Similarly, under California law, the elements of libel are (1) the intentional publication of a fact; (2) that is false; (3) unprivileged; and (4) has a natural tendency to injure or cause special damage. *See, e.g.*, *Marseglia v. JP Morgan Chase Bank*, 750 F.Supp.2d 1171, 1178 (S.D. Cal. 2010). Plaintiff has alleged that Defendants intentionally published the Video, which uses the name and mark RON PAUL, in a manner that is calculated to defame and discredit Plaintiff and Dr. Paul and to mislead the public into believing that the outrageous and false allegations contained in the Video were created or endorsed by, or originated with, Plaintiff; that this Video is unprivileged; and that the Video has the natural tendency to injure Plaintiff due to its content and widespread distribution. *See* Complaint, ¶¶ 35-41. The Complaint thus contains sufficient facts to withstand a motion to dismiss its defamation/libel claim.

Fourth, Plaintiff has demonstrated a reasonable likelihood of being able to identify Defendants through discovery such that service of process would be possible. *See* Grow Decl, ¶ 8. As explained above, both Twitter and YouTube require users to submit personal information when creating accounts. *See* Grow Decl., ¶¶ 2, 3, 4, 8, Exs. A, B. Thus, by seeking discovery from YouTube and Twitter with subpoenas, Plaintiff will be able to specifically identify Defendants such that service of process would be possible.

Plaintiff cannot serve the Complaint on Defendants and this action cannot proceed without discovery to determine the identity of Defendants. Plaintiff has satisfied the four *Columbia* factors, and thus has shown good cause for an order allowing expedited discovery.

C. The Amici Brief Provides No Basis for Denying Expedited Discovery

1. The Amici Arguments Are Based on a Misunderstanding of Intellectual Property Law

While the protection of free speech is unquestionably a worthy cause, this case does not involve free speech issues, so the Amici Brief is of little value in resolving the matters before the Court. In fact, the Amici Brief is based on the mistaken assumption that the name of a political candidate cannot function as a trademark or service mark. Because the Amici Brief erroneously claims that RON PAUL is not a trademark, the cited line of First Amendment cases is inapplicable to this action. The First Amendment offers no protection to those who engage in trademark counterfeiting, infringement, or the deliberate use of someone else's name or mark to cause confusion.

Although Ron Paul is the name of a well known political candidate, Plaintiff has established common law trade name and service mark rights in the name RON PAUL by using it in connection with actual services. For example, Plaintiff is using RON PAUL as a valid service mark for, among other things, information dissemination services and fund raising services. The United States Patent and Trademark Office has recognized that a political candidate's name may serve as a valid mark for a variety of goods and services, including the "providing of information about political elections" and "political fund raising services."[1] Examples of federal trademark and service mark registrations containing candidate names are attached as Exhibit G to the Grow Declaration.

Common law rights in a name or mark are established by using it in connection with particular goods or services. *See, e.g.*, *Chance v. Pac-Tel Teletrac*

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[1] *See* Grow Decl., Ex. G (*The Acceptable Identification of Goods and Services Manual* published by the USPTO, http://tess2.uspto.gov/netacgi/nph-brs?sect2=THESOFF§3=PLURON&pg1=ALL&s1=political&l=MAX§1=IDMLICON§4=HITOFF&op1=AND&d=TIDM&p=1&u=%2Fnetahtml%2Ftidm.html&r=0&f=S.)

Inc., 242 F.3d 1151, 1156 (9th Cir. 2001) ("Service marks and trademarks are governed by identical standards...and thus like with trademarks, common law rights are acquired in a service mark by adopting and using the mark in connection with services rendered."); *SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd.*, No. C 11–4991 CW, 2012 WL 368677, at *5 (N.D. Cal. Feb. 3, 2012). Moreover, it is not necessary to register a mark to assert a claim for false designation of origin. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) ("[I]t is common ground that § 43(a) protects qualifying unregistered trademarks"); *see also Kendall-Jackson Winery, Ltd. v. E.&J. Gallo Winery*, 150 F.3d 1042, 1047 n.7 (9th Cir. 1998) ("Registration is not a prerequisite for protection under § 43(a)."); *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1226 (9th Cir. 2008) ("[O]wnership of an unregistered trademark, like ownership of a registered mark, is sufficient to establish standing under the Lanham Act."). The name and mark RON PAUL is thus entitled to protection against false designation of origin under 15 U.S.C. § 1125(a). None of the cases cited in the Amici brief involve claims for false designation of origin or trade name or service mark infringement. For this reason, none of the cases cited by Amici have any relevance.

While the Video at issue in this case may contain speech that could be protected by the First Amendment, the infringing use of the name and mark RON PAUL is not entitled to any such protection. Moreover, Defendants are not "anonymous speakers" as contemplated in the cases cited by Amici. Rather, they are willful infringers by virtue of the fact that they have used a counterfeit imitation of the RON PAUL mark to falsely indicate that the information they are disseminating originates with Plaintiff or that they are affiliated with or endorsed by Plaintiff. Defendants have thus used the RON PAUL name and mark to falsely designate the origin of their information services in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

It is one thing to anonymously criticize a politician's views. Plaintiff does not dispute that the First Amendment protects many such forms of criticism. In contrast, it is an entirely different matter to impersonate a politician or his campaign committee, as Defendants have done here, and to use the committee's name and mark to falsely represent the source of the criticism in a way that creates a likelihood of confusion or actual confusion among members of the public. The First Amendment does not protect or condone such illegal activity, nor does it trump the protections afforded by the Lanham Act.

2. The Amici Brief Mischaracterizes Defendants' Acts of Infringement as Political Speech.

The arguments made by the Amici are based on the erroneous assumption that the use of the RON PAUL name and mark in the Video is the type of political speech that should qualify for broad protection under the First Amendment. *See* Amici Brief, pp. 4, 9, 20. Plaintiff does not, though, assert that Defendants have no right to criticize Jon Huntsman. Rather, Plaintiff seeks relief for the unauthorized use of the RON PAUL name and mark as a false designation of origin for the information embodied in the Video. Marks do not lose their protection merely because they happen to be used by a politician or a political campaign committee.

The Supreme Court has held that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). However, nothing in the Supreme Court's decisions or in any other cases permits the use of political expression as a pretext for violating the trademark and other intellectual property laws of this country.

Defendants here do not need to attribute their views to Plaintiff in order to express those views. But Defendants in this case have done just that. There is nothing in the video that indicates its source other than the name RON PAUL. Thus, Defendants have deliberately attempted to mislead people into believing that their ideas originate with or are endorsed by Plaintiff. Moreover, the use of the RON PAUL name and mark has allowed Defendants to cause actual confusion and to mislead the public into believing that Plaintiff created, distributed and approved information communicated in the Video.

By adopting and using the misleading pseudonym NHLiberty4Paul, and ending the Video with the slogan "VOTE RON PAUL," Defendants obviously intended to deceive the public into believing that Plaintiff is the source of the Video. The attempt has been successful, as shown by the evidence of actual confusion and public outrage against Dr. Paul caused by Defendants' unauthorized use of the RON PAUL name and mark. *See* Grow Decl. ¶ 17. This is precisely the type of confusion and deception that the Lanham Act is intended to avoid. Ordinary political speech does not cause this type of confusion. Infringement and false advertising does.

3. The Amici Brief Mischaracterizes the Acts of Infringement as Anonymous Speech

Unlike the defendants in the cases cited in the Amici Brief, Defendants here were not attempting to express their views anonymously. Had they wished to do so, they could have omitted the reference to the RON PAUL name and mark. Instead, they tried, successfully, to trick people into believing that the Video did not come from Plaintiff rather than from an anonymous source. Once again, none of the cases cited by Amici has any relevance to the issues before the Court, so they can be disregarded.

For example, *McIntyre v. Ohio Electric Comm'n*, quoted with emphasis by Amici on pages 4 and 5 of their brief, involved the distribution of pamphlets, by a

mother/taxpayer, that was signed anonymously as "Concerned Parents and Taxpayers." *See* 514 U.S. 334, 334 (1995). Unlike Defendants here, the anonymous pamphleteer was not attempting to mislead the public as to the source of the content, nor did she falsely attribute her views to any political candidate or other person or entity.

If Defendants in this case had been acting anonymously, their Video would not have caused actual confusion. In fact, because Defendants used the RON PAUL name and mark, the Video has caused great confusion. *See* Grow Decl., ¶ 17, Exs. H, I. As a direct result of Defendants' deliberate misconduct, the goodwill symbolized by the RON PAUL mark has been irreparably injured.

The Ninth Circuit has held that "[t]he right to speak, whether anonymously or otherwise, is not unlimited . . . and the degree of scrutiny varies depending on the circumstances and the type of speech at issue." *See Anonymous Online Speakers v. United States District Court*, 661 F.3d 1168, 1173 (9th Cir. 2011). In *Anonymous*, the Ninth Circuit followed the Supreme Court's well-established First Amendment precedent and explained that commercial speech, unlike political and other forms of expression, enjoys a limited measure of protection, and enjoys that limited protection only as long as "the communication is neither misleading nor related to unlawful activity." *Id.* at 1173 (quoting *Bd. of Trustees of SUNY v. Fox*, 492 U.S. 469, 477 (1989) and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)).

Although the video in question contains comments concerning a political candidate, it obviously was written with a commercial purpose in mind, namely to dissuade potential contributors from sending money to Plaintiff. None of the cases cited by Amici involve the use of a well known name or mark in a manner calculated to cause tarnishment of the goodwill symbolized by that mark or to disrupt fundraising. Yet that is exactly what happened here. The First Amendment does not protect deceitful conduct designed to cause economic injury.

Because Defendants are not entitled to Constitutional protections for misleading, defamatory, and infringing use of the RON PAUL name and mark, the Court should disregard the Amici's irrelevant arguments and grant Plaintiff's motion for expedited discovery.

4. The *Dendrite* Factors Weigh in Favor of Plaintiff

The Amici assert that the Court should consider a New Jersey state court opinion when deciding whether to grant the motion for expedited discovery. *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001). As detailed above, this is not a First Amendment case, so *Dendrite* would be inapplicable even if authored by the Ninth Circuit or the Supreme Court. The nature of the disputed speech "should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes." *See Anonymous Online Speakers*, 661 F.3d at 1177. Here, the intentionally misleading, defamatory nature of the Video and infringing use of the RON PAUL mark outweigh any free speech issues.

Moreover, even if this case presented First Amendment questions and even if the Video had been anonymous rather than overt trademark infringement and defamation, Plaintiff has met the five *Dendrite* requirements.

a. Factor 1: Give Notice to the Anonymous Entities

The first *Dendrite* factor requires a plaintiff to undertake efforts to notify the anonymous defendants that they are the subject of a subpoena or an application for an order of disclosure, and to give the defendants a reasonable opportunity to file and serve opposition to the application. On January 27, 2012, in an effort to contact Defendants directly, Plaintiff contacted Twitter and YouTube to request all the information those entities possess, control, or can access related to the Twitter account @NHLiberty4Paul and the YouTube account NHLiberty4Paul, respectively, including but not limited to the identities, email addresses and contact information of the persons and/or entities that own or control that account, and any

1 and all related IP addresses, browser types, referring domains, pages visited, mobile
2 carriers, devices and application IDs, and search terms associated with that account.
3 *See* Grow Decl., ¶¶ 8-9. Twitter refused to provide this information absent valid
4 legal process. *See id.*, ¶ 8. Similarly, Google refused to provide this information
5 absent a valid third-party subpoena or other appropriate legal process. *See id.,* ¶ 9.
6 Furthermore, on February 9, 2012, Plaintiff's counsel sent a message to the
7 @NHLiberty4Paul Twitter account, and a private message to the NHLiberty4Paul
8 YouTube account to put Defendants on reasonable notice of the lawsuit and to
9 provide Defendants with an opportunity to defend their anonymity before the
10 issuance of any subpoena. *See id.,* ¶¶ 10-11. Defendants did not respond to either
11 message. Plaintiff attempted to provide Defendants with notice of the lawsuit and
12 the application for expedited discovery, and gave Defendants an opportunity to
13 oppose the disclosure of their identities. Plaintiff has therefore satisfied the first
14 *Dendrite* factor.

15 **b. Factor 2: Require Specificity Regarding the**
16 **Speech/Content at Issue**

17 The second *Dendrite* factor requires that a plaintiff set forth with specificity
18 the statements that the plaintiff alleges constitute actionable speech. Plaintiff
19 alleges, "[t]he Video ends with a fictitious depiction of Mr. Huntsman in a Mao
20 Zedong uniform and the text 'Vote Ron Paul,' thereby falsely implying that
21 Plaintiff is the origin of, created, endorsed or is affiliated in some way with the
22 Video and its content." Complaint, ¶ 12. Throughout its Complaint, Plaintiff
23 specifically refers to the fact that RON PAUL is a valid mark entitled to protection
24 under the Lanham Act. Thus, Plaintiff has stated with specificity the statements
25 that constitute actionable speech. In fact, Amici concede that Plaintiff has fulfilled
26 the second prong of the *Dendrite* test. *See* Amici Brief, p. 14.
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c. Factor 3: Ensure the Facial Validity of Plaintiff's Claims

All three of Plaintiff's causes of action are sufficiently pled and supported and would withstand a motion to dismiss. There can be no dispute that RON PAUL is a valid name and mark under the common law. Although Plaintiff has not registered it, other politicians or campaign committees have been able to obtain trademark or service mark registrations for their names for the same types of services offered by Plaintiff. For example, the USPTO issued to Sarah L. Palin Registration No. 4,005,353 for the mark SARAH PALIN, for use in connection with information about political elections and providing a website featuring information about political issues in Class 35, and educational and entertainment services, namely, providing motivational speaking services in the field of politics, culture, business and values in Class 41. Also, The Ronald Reagan Presidential Library Foundation owns U.S. Trademark Registration No. 3,933,461 for the mark RONALD REAGAN, for use in connection with various goods, and Bush For President, Inc. owned two federal registrations for the mark GEORGE W. BUSH FOR PRESIDENT & Design for assorted goods, including campaign buttons (U.S. Trademark Registration Nos. 2,531,401 and 2,590,290). *See* Grow Decl., ¶ 16, Ex. G. Thus, it is clear that RON PAUL can and does function as a service mark.

When considering whether a plaintiff asserted a claim for service mark infringement and false designation of origin under the Lanham Act that can survive a motion to dismiss, this Court has held that the test "is whether the alleged infringing act creates a likelihood of confusion." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 580 (N.D. Cal. 1999). Plaintiff's Complaint not only alleges a likelihood of confusion, but evidence of *actual confusion* has been submitted in connection with the pending motion.

As this Court held in *Columbia*, "most importantly, plaintiff can show actual confusion" and "evidence of actual confusion is strong proof of the fact of

1 likelihood of confusion." *Columbia Ins. Co.*, 185 F.R.D. at 580 (quoting 3 J.
2 Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, 23:13 at 23-
3 25). Among the instances of actual confusion is a January 6, 2012, communication
4 from Cindy McCain, wife of Senator John McCain, who stated "I deeply resent the
5 Video made using the adopted daughters of @johnhuntsman. [sic] @ronpaul
6 shame on you. This has shades of 2000 all over it." This tweet, which attributes the
7 Video to Dr. Ron Paul, was re-tweeted by 416 other Twitter users. *See* Grow Decl.,
8 ¶ 17, Ex. H. This actual confusion evidence demonstrates not only that the Video
9 does in fact use the RON PAUL name and mark as a false designation of origin but
10 also that there is ample ground for concluding that Plaintiff can survive a motion to
11 dismiss its false designation of origin claim under15 U.S.C. § 1125(a).

12 The facial validity of Plaintiff's second and third claims is detailed above in
13 Section II.B., incorporated herein.

14 The Amici mischaracterized the Lanham Act provision regarding false
15 designation of origin and false description or representation. Amici falsely claim
16 that 15 U.S.C. § 1125(a) applies "only to a defendant who has used the trademark
17 'in connection with a **sale** of goods or services.'" Amici Brief, p. 14 (emphasis
18 added). There is no "sale" requirement, and that language does not appear
19 anywhere in 15 U.S.C. § 1125(a), which provides that:

20 *(1) Any person who, **on or in connection with any goods or services**,*
21 *or any container for goods, uses in commerce any word, term, name,*
22 *symbol, or device, or any combination thereof, or any false*
23 *designation of origin, false or misleading description of fact, or false*
24 *or misleading representation of fact, which—*

25 *(A) is likely to cause confusion, or to cause mistake, or to*
26 *deceive as to the affiliation, connection, or association of such person*
27 *with another person, or as to the origin, sponsorship, or approval of*
28

> *his or her goods, services, or commercial activities by another person, or*
>
> ***(B)*** *in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.*

Moreover, USPTO regulations recognize that a sale is not necessary and that a mark may qualify for registration and the protections afforded by the Lanham Act when it is used for such services as "providing of information about political elections" and "political fund raising services." Grow Decl., Ex G. There is no credible dispute that Plaintiff has acquired common law rights in the RON PAUL mark for these services. Furthermore, Plaintiff properly referenced in the Complaint the commercial activity engaged in under the mark. As Plaintiff has alleged, the Video was posted from a Twitter account onto YouTube, both of which are commercial Web sites and services. In addition, the Video is obviously calculated to created adverse public reaction and backlash against Plaintiff and to hamper its information dissemination and fund raising services. Actual economic injury has resulted from Defendant's deliberate use of a counterfeit imitation of Defendant's name and mark. This is precisely the type of conduct that the law is designed to protect.

The Amici also improperly rely on *Bosley Medical Group v. Kremar*, 403 F.3d 672 (9th Cir. 2005). Amici Brief, p.14. That case is readily distinguishable because the defendant there was a disgruntled former customer of Bosley Medical Group who created a Web site that expressed his criticism of Bosley. The defendant in *Bosley* did not use the BOSLEY mark in an infringing or deceptive manner to falsely suggest the origin of any services. Moreover, the Ninth Circuit noted that the Web site clearly criticized Bosley and, therefore, the defendant's "use

of the Bosley Medical mark simply cannot mislead consumers into buying a competing product." *Bosley*, 403 F.3d at 679-80. That is far from the present case. Here, the RON PAUL mark was used in the Video to falsely suggest origin and to induce viewers to withhold contributions from Plaintiff and to send those contributions to Plaintiff's competitors. Moreover, the infringing use of the RON PAUL name and mark has actually caused widespread confusion as to the origin of the Video. *See* Grow Decl., ¶ 17.

The Ninth Circuit has held that one of the purposes of the Lanham Act is to "protect consumers who have formed particular associations with a mark from buying a competing product using the same or substantially similar mark and to allow the mark holder to distinguish his product from that of his rivals." *Bosley*, 403 F.3d at 676 (citing *Avery Dennison Corp. v. Sumpton,* 189 F.3d 868, 873 (9th Cir.1999)). Defendants' conduct falls squarely within the types of conduct prohibited by the statute. The public has been confused and misled into believing falsely that Plaintiff created or endorsed the malicious Video, thereby adversely affecting Plaintiff's ability to disseminate information and raise funds.

Applying the proper standard to the third prong of the *Dendrite* test, it is clear that Plaintiff's three claims could survive a motion to dismiss.

d. Factor 4: Require an Evidentiary Showing Supporting Each Claim

The fourth *Dendrite* factor requires a plaintiff to produce sufficient evidence supporting each element of its claims. To prevail on claims for false designation of origin, one need merely show prior rights in a valid mark and that the unauthorized use of that mark is likely to cause confusion. As explained more fully above, the USPTO has recognized that a politician's name can serve as a trademark and Plaintiff has provided registration certificates issued by the USPTO for such trademarks. *See* Grow Decl., ¶ 16. Thus, Plaintiff has provided evidence demonstrating that it has prior rights in a valid mark, RON PAUL. Furthermore,

evidence of actual confusion is the best evidence that confusion is likely. In this case, there is ample evidence of actual confusion. *See id.*, ¶ 17.

Evidence supporting all three claims is attached to the Grow Declaration. Specifically, Plaintiff has submitted evidence of the offending Video, which confirms that it contains false descriptions and false representations of fact about Plaintiff and has been distributed in commerce, as alleged in the Complaint. Grow Decl., ¶ 18, Ex. J; Complaint, ¶ 28. A review of the Video and the screen shots of the Video attached to the Grow Declaration confirms the statements in the Video were made in a manner calculated to (a) mislead members of the public and the media, (b) create the false impression that these false representations originated from or are sponsored, approved, or authorized by Plaintiff, (c) misrepresent the nature, characteristics, and qualities of the Video itself, and (d) falsely describe the nature, characteristics, attributes, and qualities of goods and services offered by Plaintiff. The evidence confirms that the representations were not privileged, created actual confusion, and resulted in damage to Plaintiff's reputation. Plaintiff has thus submitted evidence supporting its three claims.

e. Factor 5: Balance the Equities

The final *Dendrite* factor requires the Court to balance a defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented by the plaintiff and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed. Here, the primary issue is not the content of the video. Rather it is the unauthorized use of the name and mark RON PAUL as a false designation of origin and as a misrepresentation of fact with respect to the Plaintiff's role in creating the Video. In this case, the balance of the equities clearly favors Plaintiff.

As the Ninth Circuit has explained, "where the identity of alleged defendants will not be known prior to the filing of a complaint[,] ... the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless

it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds." *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

When considering claims arising from Internet activity of the type alleged in Plaintiff's Complaint, it is appropriate for the Court to recognize the "great potential for irresponsible, malicious, and harmful communication" and that particularly in the age of the Internet, the "speed and power of internet technology makes it difficult for the truth to 'catch up' to the lie." *Anonymous Online Speakers v. United States District Court*, 661 F.3d 1168, 1176 (9th Cir. 2011).

As discussed above, Defendants' use of the RON PAUL name and mark is not protectable First Amendment speech. There is no First Amendment right to use another person's mark to cause confusion and deception. Indeed, if such right existed, there would be no enforceable trademark rights. Moreover, Defendants are not engaging in anonymous speech. Rather they are using the RON PAUL mark to suggest that Plaintiff is the author of the speech. Therefore, Defendants are not entitled to any First Amendment protections for their use of a counterfeit imitation of the RON PAUL mark, which use also has defamed Plaintiff.

Plaintiff cannot defend its reputation without the expedited discovery required to identify Defendants. No other means is available to obtain that identity. *See* Grow Decl., ¶¶ 8-11. Thus, the balance of the equities clearly favors Plaintiff in this case.

III. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court enter an order (a) granting Plaintiff's ex parte application, (b) allowing Plaintiff to serve immediate third-party discovery, and (c) requiring written responses to the discovery within 10 days, all for the limited purpose of discovering Defendants' identities.

1 Dated: February 10, 2012

Respectfully submitted,

2 ARENT FOX LLP

3

4 By: /s/ Jerrold Abeles

5 JERROLD ABELES
DAVID G. BAYLES

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7 Attorneys for Plaintiff
RON PAUL 2012 PRESIDENTIAL
8 CAMPAIGN COMMITTEE, INC.

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