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RICHARD R. ROOKER, CLERK
L. Stratton D.C.

IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

DONALD R. SWARTZ and TERRY KELLER SWARTZ,	)	
Plaintiffs,	)	
v.	)	Case No. 08C-431
JOHN DOE #1, JOHN DOE #2, and JOHN DOE #3,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Before the Court is Defendant John Doe #1's Motion to Dismiss and Plaintiffs' request for a review of Defendant's Motion to Quash Subpoena and for Protective Order. The Court notes that a temporary protective order was orally granted at the hearing on March 13, 2009, pending the disposition of the Motion to Dismiss; however, no written Order was ever submitted by Defendant.

As detailed further in the Memorandum portion of this Order, the Motion to Dismiss is GRANTED in part and DENIED in part. Plaintiffs' request to discover the identity of John Doe #1 is GRANTED and Defendant's request for a protective order is DENIED. The Court additionally GRANTS Defendant's oral Rule 9 motion and recommends that the Court of Appeals consider the matter to provide guidance to other Tennessee courts facing similar issues.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Donald R. and Terry Keller Swartz, husband and wife, are residents of Old Hickory, Tennessee, located in Davidson County. Plaintiffs have engaged in various business

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activities, including the restoring and selling of real property and the operation of recovery facilities for recovering substance abusers.[1] Defendant John Doe #1 is the author of a blog entitled "Stop Swartz," located at http://stopswartz.blogspot.com, that contained statements critical of Plaintiffs.[2] In their original Complaint filed February 11, 2008, Plaintiffs alleged that several of the posts on the Stop Swartz blog contain defamatory statements and invasions of their privacy. Plaintiffs also made claims of defamation and violation of privacy against two other anonymous defendants.[3]

After filing this action, Plaintiffs had the Circuit Court Clerk's Office issue subpoenas in blank. One of those subpoenas was issued to Google, Inc., the parent company of the Blogger hosting service used by the Stop Swartz blog, on August 28, 2008. Plaintiffs sought the name and address of the blog author and the identyfing information of two separate email addresses, stopswartz@gmail.com and ohvnasucks@gmail.com.[4] Plaintiffs made no apparent attempt to communicate with the blog author via those email addresses or by using the comment feature on the blog. After receiving the subpoena, Google notified Defendant John Doe #1 through email. Counsel for John Doe #1 then made a special appearance and moved to quash the subpoena and for a protective order barring further discovery by Plaintiffs regarding the identity of John Doe #1.

Defendant John Doe #1's Motion to Quash and for Protective Order was heard on March 13, 2009. During the hearing, counsel for John Doe #1 indicated that if the Motion to Quash was not granted, he intended to file a Motion to Dismiss. After hearing argument from both parties,

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1 Amended Complaint ¶ 1.

2 Because the defendants have been identified as John Does, the Court will refer to them in with masculine pronouns. The Court makes no finding as to whether the defendants are male or female.

3 John Doe #2 is alleged to have provided information and defamatory statements to John Doe #1. John Doe #3 is alleged to have published statements on the website Craigslist.org that were defamatory and violated Plaintiffs' privacy.

4 In addition to owning and operating the blog hosting service in question, Google, Inc. also owns and operates the Gmail web-based email service used by the blog author.

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this Court determined that further inquiry was necessary to evaluate the matter and indicated to the parties that the Court would follow the analysis contained in the New Jersey case *Dendrite International, Inc. v. Doe.*[5] The Court declined to grant the Motion to Quash, but orally granted a Temporary Protective Order pending further hearing. The Court also granted Plaintiffs' oral motion for leave to amend their Complaint and ordered Defendant to file his Motion to Dismiss within thirty (30) days of the filing of the Amended Complaint. The parties were instructed to present limited proof at that hearing in order for the Court to evaluate the claims as part of the *Dendrite* analysis.

John Doe #1's Motion to Dismiss was heard on August 25, 2009, along with argument and proof regarding Plaintiffs' ability to discover the identity of John Doe #1. Although the Court had permitted Defendant to file a sworn affidavit under a pseudonym, counsel for Defendant presented no proof. Donald and Terry Keller Swartz both presented live testimony at the hearing.

II. MOTION TO DISMISS

The Court must first determine whether Defendant John Doe #1 is entitled to dismissal before considering whether to allow Plaintiffs to discover his identity. Defendant argues that he is not subject to the personal jurisdiction of this Court. Defendant further argues that there is no evidence that the alleged acts occurred in Davidson County.

The Court finds that it does have personal jurisdiction over Defendant. At least one of the blog posts read by defense counsel at the hearing indicated that Defendant owned a home in Old Hickory, Tennessee, and that he had resided there for some time. Even if Defendant were not a resident of Old Hickory or Davidson County, he has availed himself of the jurisdiction through the blog. The Stop Swartz blog was a hyper-local blog focused solely on topics of concern to

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5 *Dendrite International, Inc. v. Doe*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

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residents of Old Hickory, Tennessee, and its effect were felt exclusively by Old Hickory residents.[6] It is true that the mere availability of a web page in a particular jurisdiction does not subject the author of that web page to personal jurisdiction.[7] However, the nature of the Stop Swartz blog was much more focused and interactive than a simple web page. Defendant solicited information through the blog regarding a shopping center fire and the whereabouts and activities of the Plaintiffs. Defendant John Doe #1 is therefore subject to the personal jurisdiction of this Court.

Defendant has argued under Tennessee Rule of Civil Procedure 12.02(6) that Plaintiffs have failed to state a claim upon which relief may be granted. The Court finds that Plaintiffs have failed to state a claim of defamation as to John Doe #1's statements regarding the listing of property on MLS.[8] Whether Plaintiffs list the properties they sell on certain real estate listings is a matter of fact and is not defamatory. However, Plaintiffs have adequately plead all other claims contained in the Amended Complaint to support a claim for which relief may be granted.

Defendant's Motion to Dismiss is therefore GRANTED as to the defamation claim contained in Paragraph 11 of the Amended Complaint, but is DENIED as to the rest of Plaintiffs' claims.

III. MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER

The Court must now determine whether Plaintiffs are entitled to discover the identity of the John Doe defendants in order to pursue their remaining claims. After hearing arguments for Defendant's Motion to Quash Subpoena and for Protective Order, the Court indicated to the parties that it would conduct the First Amendment inquiry according to the *Dendrite* analysis.

6 *See Calder v. Jones*, 465 U.S. 783 (1984).
7 *See Bensusan Restaurant Corp., v. King*, 937 F. Supp. 295 (S.D.N.Y.1996); *Zippo Mfr. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).
8 Amended Complaint ¶ 11.

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This Court granted a protective order protecting the identity of John Doe #1 pending the resolution of the Motion to Dismiss. Several months have passed since that hearing, and the Court now revisits the question of what standard should be applied to balance the First Amendment interests of John Doe #1 with the defamation and privacy concerns of Plaintiffs.

As an initial matter, the Court recognizes that anonymous speech is entitled to First Amendment protection.[9] Anonymous speech has played a significant role in literary, cultural, and political discourse throughout history.[10] Likewise, the democratic nature of the internet has rendered online speech significant in modern public discourse by "allowing more and diverse people to engage in public debate."[11] Anonymous speech is a particularly important component of internet speech.[12] Speech on the internet, whether made under a real name or anonymously, is subject to full First Amendment protection.[13] The U.S. Supreme Court has also found that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[14]

However, just as other forms of speech are limited by defamation or privacy considerations, internet anonymous speech is not entitled to absolute protection.[15] The free speech interests of the Defendant must therefore be balanced with the reputation and privacy

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9 *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); *Watchtowner Bible & Tract Soc. of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

10 *McIntyre*, 514 U.S. at 341-42.

11 *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005).

12 *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas . . . ."). *See generally* Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 Wash. L. Rev. 1157 (2006).

13 *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d at 1097 ([T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.").

14 *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

15 *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) ("Libelous utterances [are not] within the area of constitutionally protected speech . . . ."). *See also In re Subpoena Duces Tecu to America Online, Inc.*, 2000 WL 1210372, at *6 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom, American Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) ("Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.").

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interests of the Plaintiffs. This appears to be a case of first impression in Tennessee. The Court is not aware of any reported Tennessee case that addresses the issue of defamation and online anonymity.[16] It is therefore the task of this Court to determine what standard should be applied, and whether Plaintiffs are entitled to discover the identity of the anonymous defendants under that standard.

While no Tennessee court has previously visited this question, several state and federal courts have developed various standards that offer some guidance.[17] Courts have generally applied more protective tests to expressive speech cases than to intellectual property infringement cases.[18] Because John Doe #1's online statements are expressive speech, a higher-burden standard is more appropriate to properly balance Defendant's free speech interests.

Among the weakest of the standards applied to expressive speech is that employed in the case *In re Subpoena Duces Tecum to America Online, Inc.* The Circuit Court of Virginia merely required that a plaintiff have a "legitimate, good faith basis" for the cause of action before allowing discovery of identifying information.[19] Some courts have applied a standard that is supposed to be equal to that of a motion to dismiss.[20] However, other courts have rejected the "motion to dismiss" standard as "potentially confusing because of the variations in the motion to

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16 At least one other trial level court has grappled with some of these issues. The Shelby County Chancery Court heard arguments in a similar blogging case, but Plaintiffs voluntarily dismissed the case without prejudice. *See City of Memphis, Tennessee v. John and/or Jane Does 1-30*, No. CH-08-0965 (2008), *available at* http://www.citizen.org/litigation/briefs/IntFreeSpch/cases/articles.cfm?ID=14267#memphis (last visited Sep. 19, 2009).

17 One particularly high-profile case was recently decided by the Supreme Court of the State of New York. *In the Matter of the Application of Liskula Cohen*, No. 100012/09, (N.Y. Sup. Ct. Aug. 17, 2009), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-08-17-Order%20Granting%20Cohen%27s%20Petition.pdf (last visited Sep. 18, 2009). However, because that case relied principally on New York State case law, it holds less persuasive power than other recent online defamation cases.

18 *See generally* Ashley I. Kissinger & Katharine Larsen, *Shielding Jane and John: Can the Media Protect Anonymous Online Speech?*, 26 COMM. LAW. 4, 5-8 (2009) (discussing the various free speech balancing tests applied to different forms of speech by different courts).

19 *In re Subpoeana Duces Tecum to America Online, Inc.*, 2000 WL 1210372 at *8 (2000). *See also Alvis Coating, Inc. v. John Does One Through Ten*, 2004 WL 2904405 (W.D.N.C. 2004) (apparently requiring nothing more than an allegation of libel).

20 *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999); *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (D. Wis. 2006).

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dismiss standard in different jurisdictions."[21] Several courts have required a showing of proof sufficient to defeat a motion for summary judgment before a defendant's anonymity may be pierced.[22]

A growing number of courts have begun to follow the standard established in *Dendrite International, Inc. v. John Doe No. 3*.[23] This test requires a substantial showing of proof, but avoids labels such as "summary judgment standard" in order to avoid confusion. The *Dendrite* test uses a five-step analysis to determine whether a plaintiff is entitled to discover the identity of an anonymous defendant.[24] First, a plaintiff must attempt to notify an anonymous online defendant that he or she is the subject of a subpoena or application for order of disclosure. Second, a plaintiff must give the defendant a reasonable time to file opposition to the application. Third, a plaintiff must identify the exact statements purportedly made by each anonymous online defendant that give rise to each claim. Fourth, a plaintiff must make a *prima facia* or substantial showing of proof for each element of each cause of action. If a plaintiff has successfully complied with the first four requirements and the court concludes that a substantial showing of proof has been made, the fifth and final step is for the court to balance the First Amendment interests of the anonymous defendant against the strength of the plaintiff's *prima facie* case and the need for disclosure to allow the claims to proceed.[25]

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21 *Doe I v. Individuals*, 201 F. Supp. 2d 249, 255 (D. Conn. 2008). *See also Krinskyv. Doe 6*, 72 Cal. Rptr.. 3d 231, 244 (Cal. Ct. App. 2008).

22 *See Doe v. Cahill*, 884 A.2d at 458-61; *In re Does 1-10*, 242 S.W.3d 805, 821 (Tex. App. 2007); *Best W. Int'l*, 2006 WL 2091695 at *4 (D. Ariz. 2006).

23 *See Independent Newspapers, Inc.*, 966 A.2d 432, 456 (Md. 2008); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005).

24 Some cases following *Dendrite* purport to use a four-step analysis, combining the first two requirements of notice and adequate time to respond. *See Doe I v. Individuals*, 561 F. Supp. 2D 249, 254 (D. Conn. 2008). While the two requirements may be considered together, they are separate steps in the *Dendrite* analysis.

25 *Dendrite Int'l Inc.*, 775 A.2d at 760-61. The court in *Cahill* held that this final balancing step was unnecessary because defamation law or the summary judgment standard already balanced these competing rights. However, this approach was criticized in *Moblisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007). Most courts continue to include the final balancing step, and this Court holds that it necessary to adequately consider the First Amendment interests.

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The Court concludes that the *Dendrite* test is the best method of determining whether a plaintiff is entitled to pierce a defendant's shield of anonymity. The Court further finds that this factual showing must be made by affidavit, deposition, or sworn statement, and that mere allegations of fact are insufficient.[26] As the *Solers* and *Krinsky* courts have noted, the labels of "summary judgment" or even "*prima facie*" are potentially confusing. By adopting the *Dendrite* analysis, the Court does not focus on the terminology, but rather the requirement that a plaintiff make a substantial legal and factual showing that the claims have merit before permitting discovery of an anonymous defendant's identity.

IV. APPLICATION OF *DENDRITE* ANALYSIS

A. Adequate Notice

Due to the anonymity of the online speakers, Plaintiffs were unable to serve any of the John Doe defendants at the time this action was commenced. However, John Doe #1 did receive notice of the subpoena through Google Legal Support, a division of the parent company Google, which provided the hosting service. That notice provided the case name and number, as well as the contact information for Plaintiff's counsel.[27] The Google Legal Support notice also indicated that Google would comply with the subpoena unless it received a copy of a Motion to Quash before September 18, 2008.[28] John Doe #1 made a timely special appearance to quash the subpoena and to protect disclosure of his identity. The Court finds that the notice provided through Google was sufficient notice to enable John Doe #1 to challenge the request for pre-service discovery.

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26 The failure of the Maryland Court of Appeals in *Independent Newspapers, Inc. v. Brodie* to specify how a plaintiff should make a *prima facie* showing of his or her claims was criticized in a recent opinion by the Court of Appeals for the District of Columbia. *Solers v. Doe*, No. 07-CV-159 (D.C. Ct. App. August 13, 2009). Plaintiffs chose to present their proof through testimony under oath at the hearing and accompanying exhibits.

27 Defendant's Motion to Quash Subpoena and for Protective Order, Exhibit A.

28 *Id.*

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B. Time to Respond

Plaintiffs issued subpoenas to Google in September of 2008, and did not take any further action until John Doe #1 responded with his Motion to Quash in February 2009. The Court finds that Defendant was afforded sufficient time to respond to the subpoena.

C. Stating Claims with Specificity

The Court finds that, with the exception of the defamation claim arising out of the statement regarding MLS property listings, Plaintiffs have met the third requirement by stating their claims with specificity so that relief may be granted. The Amended Complaint identifies the specific statements that Plaintiffs allege as defamatory and in violation of their privacy.

D. Substantial Showing of Proof

1. Defamation Claims

In order to meet the factual showing requirement of the fourth prong of the *Dendrite* analysis, both Terry Keller Swartz and Donald Swartz presented testimony at the hearing and were subject to cross-examination by counsel for Defendant. A defamation claim in Tennessee requires a plaintiff to prove "that: 1) a party published a statement; 2)with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement."[29] Plaintiffs submitted and displayed several copies of the blog posts in question, and testified that the statements were publicly available for several months.[30] Plaintiffs testified that the allegations of arson, improper management of rehabilitation facilities, exploitation of recovering substance abusers, inferior construction work, negative effect on home prices, and being "run out of East

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29 *Sullivan v. Baptist Memorial Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999) (citing *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1972)).

30 The statements at issue are no longer available because the author of the Stop Swartz blog removed much of the content after this action was commenced.

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Nashville" are all false.[31] Plaintiffs also testified that they experienced actual damages from the allegedly defamatory statements, including loss of business, harm to their reputations, emotional distress, and the costs of having to hire a security expert inspect their home.

John Doe #1 argues that Plaintiffs had made themselves public figures through their political advocacy against certain elected officials and their involvement in the Old Hickory community. However, Plaintiff's actions were not sufficient to render them public figures, nor were their actions or whereabouts public issues.[32] The Court finds that Plaintiffs have made a substantial showing of proof to support their allegations that John Doe #1 acted recklessly or negligently by publishing statements that were false and defamatory.

2. Invasion of Privacy Claims

In order to prevail in a claim for invasion of privacy, a plaintiff must show that a defendant has intruded, physically or otherwise, upon the solitude or seclusion of the plaintiff or his or her private concerns, and that the invasion would would be highly offensive to a reasonable person.[33] Plaintiffs testified that John Doe #1 invaded their privacy by publishing information on their activities and whereabouts, and encouraging others to do the same. Plaintiff Terry Keller Swartz also testified that John Doe #1 republished a statement made on Craigslist.com by John Doe #3 disclosing that "Terry Keller [Swartz] is an ex-addict."[34] The Court finds that Plaintiffs have made sufficient showing that these statements intruded on Plaintiff's private concerns, and that a reasonable person would find those intrusions highly offensive.

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31 Amended Complaint ¶ 12.

32 *See New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

33 *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 411 (Tenn. 2002) (*citing Roberts v. Essex Microtel Assocs., II, L.P.*, 46 S.W.3d 205, 211 (Tenn. Ct. App. 2001)).

34 *See* Amended Complaint ¶ 13.

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The Court finds that Plaintiffs have made a substantial legal and factual showing through sworn testimony and exhibits that their defamation and invasion of privacy claims have merit, thus satisfying the fourth prong of the *Dendrite* analysis.

E. Balancing Proof with Interests of the Speaker

Having found Plaintiffs' claims to be meritorious, the fifth and final step in the *Dendrite* analysis requires the Court to balance the strength of Plaintiffs' claims against the First Amendment concerns of Defendant. As guidance, the Court looks to the standard set forth in Justice Powell's concurrence in the U.S. Supreme Court case *Branzburg v. Hayes*, as well as the Tennessee Shield Law.[35] The Court determines that the relevant factors include: the specificity, relevance, and materiality of the discovery request; the absence of alternative means to obtain the requested information; and the extent and reasonableness of the speaker's privacy expectations.

The information sought by Plaintiffs is stated with specificity; Plaintiffs seek John Doe #1's name and address. This information is indisputably relevant and material to their claims. There is no other apparent method to obtain the information sought in the subpoena to Google. John Doe #1 had some expectation of privacy, having published his statements under a pseudonym on an anonymous blog. However, Defendant would have had notice that his personal information would be made available under certain circumstances. All users of the Blogger hosting service must agree to the Blogger Terms of Service and Privacy Notice.[36] The Blogger Privacy Notice in turn references the Google Privacy Policy.[37] The Google Privacy Policy in effect during the relevant time period states in relevant part, "We have a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to . . . satisfy

35 *See Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (J. Powell, concurring); T.C.A. § 24-1-208(c)(2). The *Brodie* and *Dendrite* courts have been criticized for failing to enumerate the factors used in the final balancing step of the *Dendrite* analysis. *See* Kent A. Lambert, *Online Identities Unmasked*, Litig. News, Summer 2009, at 11.

36 Blogger Terms of Service, http://www.blogger.com/terms.g (last visited Sep. 17, 2009).

37 Blogger Privacy Notice, April 9, 2007, http://www.blogger.com/privacy (last visited Sep. 17, 2009).

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any applicable law, regulation, legal process or enforceable governmental request."[38] Defendant has not cited any countervailing reasons to warrant a higher level of protection.

V. CONCLUSION

As previously stated, Defendant's Motion to Dismiss is therefore GRANTED as to the defamation claim contained in Paragraph 11 of the Amended Complaint, but is DENIED as to the rest of Plaintiffs' claims.

The Court further finds that Plaintiffs have made a sufficient showing of their claims to outweigh John Doe #1's free speech interests. Defendant's Motion to Quash and for Protective Order is therefore DENIED, and Plaintiffs are entitled to discover the identity and personal information of John Doe #1.

The Court additionally finds that this issue is an appropriate one for interlocutory review. Appellate court review would prevent irreparable injury, prevent needless and protracted litigation, and facilitate the development of a uniform body of law.[39] Defendant John Doe #1's oral request for interlocutory appeal is therefore GRANTED.

It is so ORDERED.

Entered this _____ day of October, 2009.

THOMAS W. BROTHERS, JUDGE

38 Google Privacy Center, *Archive: Privacy Policy Version 10/14/2005*, http://www.google.com/privacy_archive_2005.html (last visited Sep. 17, 2009) (in effect from Oct. 14, 2005, until Aug. 7, 2008).

39 Tenn. R. App. P. 9(a).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above has been mailed to:

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Google, Inc.
Attn: Google Legal Support
1600 Ampitheater Pkwy
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this 8th day of October, 2009.

Deputy Clerk