

DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 07-CV-00159

SOLERS, INC.
Appellant

v.

JOHN DOE
Appellee

and

SOFTWARE & INFORMATION
INDUSTRY ASSOCIATION
Intervenor-Appellee

BRIEF OF INTERVENOR-APPELLEE,
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE.....	1
III. STATEMENT OF THE FACTS	3
A. The Parties	3
B. The Anti-Piracy Program.....	4
C. John Doe's Communication To SIIA.....	5
D. Solers' Subpoena to SIIA and the Superior Court Proceeding.....	6
E. The Discovery Order.....	9
F. Solers' Appeal	10
IV. SUMMARY OF ARGUMENT.....	11
V. ARGUMENT.....	12
A. The Superior Court Properly Applied a Qualified First Amendment Privilege to John Doe's Anonymous Internet Communications Concerning the Important Public Issue of Software Piracy.....	13
1. The First Amendment Protects Anonymous Internet Communications.....	13
2. A Qualified First Amendment Privilege Applies to Discovery Requests Seeking the Identity of Anonymous Internet Communicators.....	15
3. John Doe's Communications Are Entitled to First Amendment Protection.....	18

a. The Qualified First Amendment Privilege Applies to Communications Made to a Limited Audience.....	19
b. Doe's Communications Involve a Matter of Public Interest.....	21
4. The Superior Court Did Not Abuse Its Discretion In Finding That Solers Failed to Overcome the Qualified First Amendment Privilege.	23
a. Solers Failed To Allege Facts Sufficient To Demonstrate Actual Harm.....	24
b. Solers Failed To Submit Any Evidence of Exhaustion of Alternative Sources	26
c. A Comparison of the Magnitude of Harms Favors Doe.	27
d. Discovery of Doe's Identity Threatens to Chill Speech on a Matter of Public Concern.....	28
B. The Disclosure of John Doe's Identity Is Also Unwarranted On Other Grounds, Including The Court's Lack Of Personal Jurisdiction Over Doe and The Work Product Doctrine.	29
1. The Work Product Doctrine Protects John Doe's Communications With SIIA	29
2. The Superior Court Did Not Have Personal Jurisdiction Over Doe.....	30
C. Solers Is Precluded From Challenging the Superior Court's Orders	32
VI. CONCLUSION	34

TABLE OF AUTHORITIES

FEDERAL CASES:	Page
<i>Bell Atlantic Corp. v. Twombly</i> , --- U.S. ---, 127 S. Ct. 1955 (2007).....	26
<i>Bennett Enters., Inc. v. Domino's Pizza, Inc.</i> , 45 F.3d 493 (D.D.C. 1995).....	24
<i>Best Western Int'l, Inc. v. Doe</i> , No. CV-06-1357-PHX-DGC 2006 WL 2091695 (D. Ariz. July 25, 2006)	<i>passim</i>
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972).....	20
<i>Brown & Williamson Tobacco Corp. v. Jacobson</i> , 713 F.2d 262 (7th Cir. 1983)	24
<i>Buckley v. Am. Constitutional Law Found.</i> , 525 U.S. 182 (1999).....	14
<i>Chiperas v. Rubin</i> , 1998 WL 531845 (D.D.C. Aug. 24, 1998)	29
<i>CMI, Inc. v. Intoximeters, Inc.</i> , 918 F. Supp. 1068 (W.D. Ky. 1995).....	25
<i>Columbia Ins. Co. v. Seecandy.com</i> , 185 F.R.D. 573 (N.D. Cal. 1999).....	16, 19, 26, 31
<i>Doe v. 2TheMart.com, Inc.</i> , 140 F. Supp. 2d 1088 (W.D. Wash. 2001)	14, 15
<i>Equal Employment Opportunity Comm'n v. Lutheran Soc. Servs.</i> , 186 F.3d 959 (D.C. Cir. 1999)	29
<i>Golden Palace, Inc. v. Nat'l Broad. Co., Inc.</i> , 386 F. Supp. 107 (D.D.C. 1974).....	25
<i>GTE New Media Sers., Inc. v. BellSouth Corp.</i> , 199 F.3d 1343 (D.C. Cir. 2000).....	31
<i>Highfields Capital Mgmt. L.P. v. Doe</i> , 385 F. Supp. 2d 969 (N.D. Cal. 2005).....	16, 18, 26, 27, 28
<i>In re Grand Jury Subpoena</i> , 397 F.3d 964 (D.C. Cir. 2005).....	20
<i>In re Miller</i> , 397 F.3d 964 (D.C. Cir. 2005), <i>reissued in</i> 438 F.3d 1141 (D.C. Cir. 2006)	20
<i>In re Plywood Antitrust Litig.</i> , 655 F.2d 627 (5th Cir. 1981)	26
<i>In re Verizon Internet Servs., Inc.</i> , 257 F. Supp. 2d 244 (D.D.C. 2003) <i>rev'd on other</i> <i>grounds by Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.</i> , 351 F.3d 1229 (D.C. Cir. 2003)	19
<i>Jankovic v. Int'l Crisis Group</i> , 429 F. Supp. 2d 165 (D.D.C. 2006).....	24

<i>Lee v. DOJ</i> , 401 F. Supp. 2d 123 (D.D.C. 2005).....	20
<i>Lee v. DOJ</i> , 287 F. Supp. 2d 15 (D.D.C. 2003).....	17, 20, 21, 26
<i>Lee v. DOJ</i> , 413 F.3d 53 (D.C. Cir. 2005).....	12
<i>Martin Marietta Corp. v. Evening Star Newspaper Co.</i> , 417 F. Supp. 947 (D.D.C. 1976)	24
<i>McIntyre v. Ohio Elections Comm'n</i> , 514 U.S. 334 (1995)	14
<i>McMann v. Doe</i> , 460 F. Supp. 2d 259 (D. Mass. 2006)	17
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964).....	20, 22
<i>NAACP v. Ala. ex rel. Patterson</i> , 357 U.S. 449 (1958)	15
<i>NLRB v. Midland Daily News</i> , 151 F.3d 472 (6th Cir. 1998).....	15
<i>Plant v. Does</i> , 19 F. Supp. 2d 1316 (S.D. Fl. 1998)	31
<i>Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.</i> , 351 F.3d 1229 (D.C. Cir. 2003)	22, 23
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	14
<i>Sony Music Entmt. Inc. v. Does 1-40</i> , 326 F. Supp. 2d 556 (S.D.N.Y. 2004).....	15, 19, 20
<i>S. Air Transport, Inc. v. Am. Broad. Cos.</i> , 670 F. Supp. 38 (D.D.C. 1987)	25
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967).....	22
<i>UMG Recordings, Inc. v. Does 1-4</i> , No. GD06-007965, 2006 WL 1343597 (N.D. Cal. Apr. 19, 2006)	19, 20
<i>Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council</i> , 425 U.S. 748 (1976)	22
<i>Zerilli v. Smith</i> , 656 F.2d 706 (D.C. Cir. 1981)	17, 26
STATE CASES:	
<i>Ayala v. Washington</i> , 679 A.2d 1057 (D.C. 1996)	20
<i>Chamberlain v. Am. Honda Fin. Corp.</i> , No. 05-CV-755, 2007 WL 2216600 (D.C. Aug. 2, 2007)	26

<i>Curry v. Curry</i> , 65 App. D.C. 47 (1935)	32
<i>Dendrite Intl, Inc. v. Doe</i> , 775 A.2d 756 (N.J. Super. App. Div. 2001).....	12, 15, 17, 18, 26, 28
<i>Desmond v. Robertson</i> , 211 A.2d 775 (D.C. 1965)	32, 33
<i>Doe v. Cahill</i> , 884 A.2d 451 (Del. 2005).....	17
<i>Ganss v. Goldenberg</i> , 39 App. D.C. 597 (1912).....	32, 33
<i>Halpern v. Gunn</i> , 57 A.2d 741 (D.C. 1948)	32, 33, 34
<i>Holder v. Haarmann & Reimer Corp.</i> , 779 A.2d 264 (D.C. 2001).....	30
<i>In re J.D.C.</i> , 594 A.2d 70 (D.C. 1991)	13
<i>In Re Subpoena Duces Tecum to Am. OnLine, Inc.</i> , No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000) <i>rev'd on other grounds by Am. OnLine, Inc. v. Anonymous Publicity Traded Co.</i> , 542 S.E.2d 377 (Va. 2001).....	19
<i>Kay v. Pick</i> , 711 A.2d 1251 (D.C. 1998).....	12, 13
<i>Melvin v. Doe</i> , 836 A.2d 42 (Pa. 2003)	16
<i>Philips v. Evening Star Newspaper Co.</i> , 424 A.2d 78 (D.C. 1980).....	24
<i>R.H. Bouligny, Inc. v. United Steel Workers of Am., AFL-CIO</i> 154 S.E.2d 344 (N.C. 1967)	25
<i>Reunion Indus., Inc. v. Doe I</i> , No. GD06-007965, 2007 WL 1453491, 80 Pa. D. & C. 4th 449 (Pa. Ct. Com. Pl. March 5, 2007).....	17, 19, 21
<i>Rubin v. Gordin</i> , 165 So.2d 824 (Fla. 3d Dist. Ct. App. 1964)	33
<i>Rudolph v. Sensener</i> , 39 App. D.C. 385 (1912).....	34
<i>Sebastian v. District of Columbia</i> , 636 A.2d 958 (D.C. 1994).....	29
<i>St. Paul Fire & Marine Ins. Co. v. Naples Comm. Hosp., Inc.</i> , 585 So.2d 374 (Fla. 2d DCA 1991)	25
<i>Wheeler v. Goulart</i> , 593 A.2d 173 (D.C. 1991).....	27
STATUTES:	
DC Code § 13-423(a)(3).....	30

DC Code § 16-470217

DC Code § 16-470317

RULES:

Fed. R. Civ. P. 3327

Fed. R. Civ. P. 34.....27

Fed. R. Civ. P. 37.....27

Fed. R. Civ. P. 45.....27

D.C Super. Ct. R. Civ. P. 45(c)(3)(A).....13, 29

MISCELLANEOUS:

The Role of Technology in Reducing Illegal File Sharing: Hearing Before the House
Comm. on Science and Technology, 110th Congress (Jun. 5, 2007)23

An Update -- Piracy on University Networks: Hearing Before the House Subcomm.
on Courts, the Internet, and Intellectual Property, 110th Congress (Mar. 8, 2007).....23

File Sharing: Selected Universities Report Taking Action to Reduce Copyright
Infringement, GAO Report to Congressional Requesters, GAO-04-503 (May 2004)23

I. STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in quashing Appellant Solers' subpoena that requested the identity of John Doe, an individual who anonymously communicated with Intervenor-Appellee, the Software & Information Industry Association ("SIIA"), via the Internet about an important public issue, where Solers (i) presented no *prima facie* evidence of actual injury, a requisite element to each of its causes of action, and (ii) did not argue that it exhausted alternative sources of the information, as required to overcome the qualified First Amendment privilege?

2. Did the district court abuse its discretion in quashing Appellant Solers' subpoena on the alternative grounds that the communications are protected work product and Solers failed to demonstrate that the Superior Court had personal jurisdiction over Doe?

3. Should this Court dismiss Solers' appeal because Solers asked the trial court to enter the order of dismissal that it now seeks to appeal?

II. STATEMENT OF THE CASE

This appeal calls upon the Court to affirm the trial court's factual finding that Appellant Solers, which issued a subpoena seeking the identity of an anonymous individual who communicated with Intervenor-Appellee via the Internet on a matter of public concern, failed to overcome the qualified First Amendment privilege that applies to the communications because it was unable to establish a *prima facie* case for its underlying claims, and had not attempted to show that it had exhausted alternative sources of information. The Superior Court found that SIIA's rights not to disclose the information sought outweighed Solers' claim of entitlement to

that information. In light of the interests asserted by SIIA, and with absolutely no record put forward by the Solers to support its assertions, the trial court did not abuse its discretion in making that finding.

Appellant Solers brought this suit for defamation and tortious interference against an unidentified John Doe, alleging that Doe provided false and defamatory information regarding Solers to SIIA about software piracy. SIIA is the software industry's largest professional association, and the software industry depends on SIIA to help protect its interests in areas that the United States government cannot adequately address. SIIA protects software publishers who represent a significant sector of the American economy, by conducting a corporate anti-piracy program. Doe is alleged to have reported anonymously to SIIA, via its online reporting form, that Solers engaged in copyright violations. Solers brought its suit as a vehicle for uncovering Doe's identity, presumably to silence and punish him for his report.

Immediately after filing suit in the District, Solers served SIIA with a subpoena seeking production of documents that would reveal Doe's identity. SIIA raised a Rule 45 objection to the subpoena on a number of grounds, including that Solers had not overcome the qualified First Amendment privilege that applies to such communications and, further, that the communications are protected work product. Solers moved to enforce the subpoena, and SIIA moved to quash. A series of legal briefs and hearings provided Solers with ample opportunities to make a record sufficient to overcome the privilege. However, Solers placed no evidence whatsoever before the court. The Honorable Judge Blackburne-Rigsby, with no contribution to the record from Solers, and uncontradicted evidence from SIIA, granted SIIA's motion to quash the subpoena.

The Superior Court found that Solers failed to overcome the qualified First Amendment privilege for anonymous Internet communications because it had not put forward any competent

evidence necessary to overcome the privilege. For example, the court held that Solers failed to sufficiently allege actual harm or demonstrate that it exhausted all reasonable alternative sources of information regarding John Doe's identity. In doing so, the Superior Court correctly followed the consistent case law from other jurisdictions that have adjudicated issues of third-parties' discovery rights related to anonymous speech and the Internet.

Solers attempted a direct appeal of Judge Blackburne-Rigsby's discovery order; however, this Court dismissed that appeal for lack of jurisdiction as having been taken from a non-appealable order. Solers then petitioned the Superior Court for summary dismissal of its claims, specifically asking the Superior Court to dismiss its case. The Superior Court granted Solers' request and dismissed the action in its entirety for failure to state a claim for relief. Solers then filed this appeal.

III. STATEMENT OF THE FACTS

A. The Parties

Solers is a Virginia corporation with its principal place of business in Arlington, Virginia. (App. 2.) Solers develops software and other technology for agencies within the Department of Defense. (*Id.*) John Doe is an individual who anonymously reported to SIIA via the Internet that Solers was infringing copyrights in software programs.¹ (App. 2 and 12.) John Doe has not been served with the complaint or summons. Intervenor-Appellee SIIA is the principal trade association for the software and digital content industry. (App. 62.) One of its missions is to protect the intellectual property of software publishers by fighting the software piracy that

¹ Despite reference to this individual as "John Doe" throughout the proceedings, there is nothing on the record to indicate the gender of the anonymous communicator. SIIA makes no representations as to whether the informant is male or female.

threatens to undermine the industry. (*Id.*) To fulfill this mission, SIIA operates an anti-piracy enforcement program. (App. 63.)

B. The Anti-Piracy Program

Software piracy presents a serious drain on the economic well-being of the United States, which provides approximately 80 percent of the world's software. (App. 62.) On average, in North America alone, the software industry annually loses about \$2 billion in revenue to software piracy. (App. 62-63.) In the United States, one in every four copies of business-application software is used illegally. (App. 63.) Software piracy greatly harms both software companies and society in general. (App. 63.) Piracy deprives software companies of revenues, just as it robs the programmers, writers and others who have created the software programs of fair compensation. (*Id.*) Because of the money lost to pirates, publishers have fewer resources to devote to research and development of new products, have less revenue to justify lowering software prices, and are forced to pass these costs on to the public. (*Id.*) As long as software piracy exists, there will be fewer jobs, less research and development, and increased costs that will continue to be borne by consumers. (*Id.*)

To combat the software piracy problem, SIIA established an Anti-Piracy Division and developed anti-piracy programs involving both education and enforcement. (*Id.*) SIIA's enforcement program enables sources with knowledge of software piracy to anonymously report directly to SIIA via telephone or the Internet about companies using unlicensed software, offering software illegally on the Internet, or re-selling unlicensed software. (*Id.*) SIIA allows individuals to submit information about software piracy to SIIA on a confidential basis. (*Id.*) SIIA's program recognizes that the reduction of software piracy is furthered when concerned individuals who witness what they believe to be piracy – and face retribution by stepping

forward, as in this case – are protected through anonymity. (*Id.*) Therefore, it is essential for SIIA's program, and for the security of the software industry, to keep the identities of its sources anonymous. (*Id.*)

SIIA employees working at the direction of SIIA's in-house counsel receive the reports from sources concerning software piracy. (App. 63.) In-house counsel, in consultation with her client SIIA, determines whether to pursue the matter, up to and including litigation. (*Id.*) Sources who report instances of software piracy by corporate software end-users may become eligible for financial payment under SIIA's Corporate Anti-Piracy Reward Program by signing a document agreeing to the terms and conditions of that program. (App. 64.)

C. John Doe's Communication To SIIA

In March 2005, SIIA received an anonymous communication via the Internet from the John Doe named in the Complaint who alleged that Solers was using unlicensed software. (App. 64.) On information and belief, John Doe does not work or reside in the District of Columbia. (*Id.*) While Solers premises jurisdiction on contractual obligations under SIIA's Corporate Anti-Piracy Reward Program, in fact, John Doe never agreed to the terms and conditions of the program and never signed any contract with SIIA. (*Id.*) After SIIA contacted Solers in connection with its investigation, Solers made clear that if SIIA brought enforcement litigation against Solers, it would aggressively pursue John Doe's identity in discovery. (*Id.*) SIIA ultimately decided that it would not at that time pursue a claim against Solers. (*Id.*) SIIA's decision does not mean SIIA has concluded that John Doe's information was false. (*Id.*)

Although Solers chose to make this matter public through litigation, SIIA has and will continue to keep within SIIA the substance of what John Doe reported confidential within SIIA. (App. 64.) SIIA is not a competitor or customer of Solers and does not buy any goods from, or

sell any goods to, Solers. (*Id.*) SIIA has no intention of using the information it received from John Doe to harm or damage Solers. (*Id.*) Solers has not demonstrated how it has been harmed by a communication from John Doe to SIIA that SIIA has maintained confidential and has no further intent of pursuing. (*Id.*)

D. Solers' Subpoena to SIIA and the Superior Court Proceeding

Solers filed this lawsuit in the District of Columbia on May 18, 2005. (App. 6-13.) Solers' only purpose for filing the lawsuit was to obtain a subpoena over SIIA, which has its office in the District, seeking documents that will expose John Doe's identity. Immediately after filing suit, Solers issued to SIIA a subpoena duces tecum. (App. 14-22.) On June 8, 2005, SIIA objected to the subpoena on the grounds that: (1) the court lacks personal jurisdiction over Doe and therefore lacked authority to issue a subpoena; (2) the subpoena seeks materials protected by the work product doctrine; (3) the subpoena seeks disclosure of confidential commercial information; (4) the subpoena seeks information regarding an anonymous individual that is protected by the First Amendment; and (5) the allegedly defamatory statement is subject to a privilege. (App. 23-28.) On June 10, 2005, Solers filed a motion to enforce the subpoena. (App. 29-58.) SIIA responded with a motion to quash the subpoena on June 24, 2005 that set forth the qualified privilege that applies to John Doe's anonymous Internet communications and the burden that Solers would need to meet to overcome it. (App. 59-94.)

For more than a year, the Superior Court offered Solers multiple opportunities, including oral arguments at two separate court hearings, to demonstrate how it could overcome the qualified First Amendment privilege. Solers repeatedly declined to make any showing whatsoever to meet its burden:

- Solers filed an opposition to the motion to quash on July 8, 2005 that relied on case law recognizing the same qualified First Amendment privilege that SIIA invokes, but Solers entirely failed to demonstrate that it could overcome that privilege. (App. 95-104.)
- Following further briefing from SIIA on this issue (App. 105-124), the Superior Court held oral argument on December 16, 2005, where Solers again offered nothing substantive to meet its burden. (App. 125-160.)
- Solers subsequent briefing of supplemental authority again failed to demonstrate how Solers could overcome the qualified privilege. (App. 161-164.)
- After SIIA filed a reply that again pointed out Solers' failure to meet its burden, (App. 165-69), the Superior Court on April 28, 2006 held a hearing to give Solers yet another opportunity to demonstrate that it was entitled to the non-party discovery.² (App. 170-180, 192.) Judge Blackburne-Rigsby noted that there was no dispute between the parties regarding the applicable legal standard, including the qualified First Amendment privilege that applied to Solers' subpoena. (App. 174.) The court pointed out that Solers' complaint was deficient in two important respects: (1) Solers pleaded no factual allegations supporting the claim that it had suffered actual injury; and (2) Solers failed to demonstrate that it had taken any steps, other than filing the lawsuit solely to obtain the subpoena, to learn Doe's identity. (App. at 173, 178.) Offered a chance to respond, Solers again was unable to explain how it had suffered any injury, and identified just one action taken to exhaust alternative sources of information: Solers claimed that it had

² SIIA was not notified of this hearing and therefore did not attend.

conducted an unspecified number of internal "discussions" to investigate Doe's identity. (*Id.*)

- Solers then made a supplemental filing to address the Court's concerns. (App. 181-191.) However, rather than attempting to make the showing the law requires, Solers instead attacked the premise for the court's inquiry, arguing that it need not demonstrate a *prima facie* case of actual economic injury. Regarding exhaustion of alternative sources of information, Solers simply and without any supporting affidavits represented that an unspecified "review was conducted of Solers' e-mail server." (App. 182-84.)
- After SIIA filed a reply pointing out the continued deficiencies in Solers' submissions, (App. 192-197), Solers filed an amended complaint on June 16, 2006, that also failed to address the Superior Court's concerns about the absence of factual allegations sufficient to overcome the qualified First Amendment privilege. (App. 198-206.)
- Solers contemporaneously filed a fifth substantive memorandum which, like the prior four Court filings, continued to ignore the Superior Court's demand for Solers to demonstrate a *prima face* case of actual injury and the exhaustion of alternative sources of information. (App. 207-212.) SIIA filed its response on June 23, 2006, pointing out that Solers again had failed to overcome the qualified First Amendment privilege, and asking the Court to grant its motion to quash the subpoena. (App. 213-219.)

E. The Discovery Order

After allowing Solers these multiple opportunities over the course of more than a year to overcome the qualified First Amendment privilege that protects anonymous Internet communications, the Honorable Judge Blackburne-Rigsby issued an order on August 16, 2006 (the "August 16 Order"). The August 16 Order granted SIIA's motion to quash the subpoena on the grounds that Solers had not satisfied the well-established test for subpoenas seeking the identity of an anonymous online speaker. (App. 220-227.)³ The court found that John Doe provided the information in connection with SIIA's Corporate Anti-Piracy Program, under which SIIA identifies corporate end-users of pirated software and pursues copyright claims against them on behalf of the software industry. (App. 220.) The Court also found that SIIA's enforcement program enables sources with knowledge of software piracy to report information anonymously and confidentially to SIIA via telephone or the Internet. (*Id.*) Judge Blackburne-Rigsby adhered to the well-established test that courts throughout the country require plaintiffs to satisfy when they seek to unmask anonymous online speakers. Under that high threshold, she determined that Solers had not adequately demonstrated the viability of its defamation claim because it had not demonstrated actual injury, and that Solers also failed to exhaust alternative means of ascertaining John Doe's identity.⁴ (App. 223-227.)

³ The Order mistakenly identified SIIA as "SILA."

⁴ The Superior Court did not address the other arguments SIIA raised in support of its motion to quash the subpoena, including that the documents are protected attorney work product and that the Court lacked personal jurisdiction over John Doe.

F. Solers' Appeal

On September 15, 2006, Solers filed a notice of appeal seeking review of the interlocutory August 16 Order. On November 30, 2006, the Court of Appeals dismissed Solers' appeal for lack of jurisdiction on the grounds that it was taken from a non-appealable order.

Solers returned to the Superior Court for a January 12, 2007 status hearing⁵ and informed the judge that "the only order of business for the Court is to enter an order of dismissal" of Solers' claims. (App. 229.) Solers took the position that it couldn't "go forward with the case at the trial level" because Solers could not "get our discovery." (App. 230.) Solers urged the court that "the appropriate step at this point" would be dismissal of the complaint, and Solers submitted a proposed order of dismissal to the Court. (*Id.*) Solers' counsel proffered to the Honorable Judge Anderson⁶ that the Court should enter a dismissal for the reasons set forth in Judge Blackburne-Rigsby's August 16 Order. (App. 231.) The Court orally dismissed the case, and indicated that it subsequently would enter a written order. (App. 231-232.)

On February 12, 2007, Solers noticed the present appeal. Later that day, the Superior Court entered its written order dismissing the case for failure to state a claim, adopting the grounds set forth in the Court's August 16 Order. (App. 220-227.) On March 9, 2007, Solers filed a praecipe supplementing the notice of appeal, attaching the February 12, 2007 order of dismissal and the August 16 Order. On May 14, 2007, SIIA filed a motion to dismiss the appeal. On May 31, 2007, this Court denied that motion without opinion.

⁵ SIIA had no notice of, and thus did not attend, this hearing.

⁶ The case was reassigned to Judge Anderson after Judge Blackburne-Rigsby was elevated to this Court.

IV. SUMMARY OF ARGUMENT

The Superior Court correctly determined that John Doe's anonymous communication to SIIA via the Internet, concerning the important public issue of software piracy, was entitled to First Amendment protection. Judge Blackburne-Rigsby, correctly recognizing the important considerations involved in this case, applied the qualified First Amendment privilege that protects the identity of individuals anonymously engaged in expressive activities via the Internet. Under that test, Solers was required to satisfy an elevated showing of need by presenting competent evidence to make a *prima facie* showing under each element of a cause of action, and also to demonstrate that it had exhausted possible alternative sources of information in seeking John Doe's identity. Solers was unable to demonstrate *prima facie* that it suffered actual economic loss as a result of the alleged defamation – one of the elements of that cause of action – or that Solers had exhausted alternative sources of the information. In light of these failures, Judge Blackburne-Rigsby properly granted SIIA's motion to quash.

Solers challenges only the legal standard that the Superior Court applied to resolve the discovery dispute. This Court should affirm the trial court's decision to apply the qualified First Amendment privilege to SIIA's motion to quash the subpoena because John Doe's anonymous Internet communication is entitled to First Amendment protection. Many courts have held that First Amendment protections extend to anonymous Internet speech, and Solers has advanced no justification for deviating from that rule here. In addition, the trial court's factual findings that Solers failed to meet its burden to overcome the qualified First Amendment privilege are not subject to review because Solers does not challenge them. Nevertheless, the Superior Court did not abuse its discretion in granting SIIA's motion to quash the Solers subpoena.

The Court also should affirm the Superior Court's ruling on two alternative grounds raised below. Solers failed to demonstrate that the court had personal jurisdiction over John Doe, in that Solers failed to allege where John Doe lives or works, the undisputed record put forward by SIIA establishes that John Doe did not enter into a contract with SIIA in the District, and John Doe did not commit a tort in the District. In addition, the subpoena seeks materials protected by the attorney work product doctrine because the information sought was collected at the direction of SIIA's counsel in anticipation of possible litigation.

The Court also should affirm the Superior Court's decision on the grounds that Solers is precluded from lodging the appeal. Solers specifically asked the Superior Court to enter the order of dismissal that Solers now seeks to overturn. Because Solers invited the decision below, it has waived its right to an appeal and/or lacks standing to bring the appeal, and should be estopped from claiming any error.

For all of these reasons, SIIA requests that the Court affirm the Superior Court's grant of SIIA's motion to quash the subpoena.

V. ARGUMENT

The Superior Court's August 16 Order granted SIIA's motion to quash, thereby resolving a discovery dispute under Rule 45 of the Superior Court Rules of Civil Procedure. This Court reviews discovery orders under an abuse of discretion standard. *Kay v. Pick*, 711 A.2d 1251, 1256 (D.C. 1998) (affirming grant of motion to quash on privilege grounds). *See also Lee v. DOJ*, 413 F.3d 53, 59 (D.C. Cir. 2005) (noting under federal rule that the court's function on appeal of a discovery dispute "is solely to determine whether the trial court abused its discretion in entering the challenged [discovery] order") (quoting *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981); *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 772 (N.J. 2001) (applying abuse of

discretion standard to request for discovery of identity of anonymous Internet communicator). Abuse of discretion occurs "if [the trial court's] actions are clearly unreasonable, arbitrary, or fanciful." *Kay*, 711 A.2d at 1256 (quotation omitted). The trial court has broad discretion to weigh factors in deciding whether discovery should be compelled. *Id.* While the appellate court may find that a trial court has abused its discretion by resting its conclusions on incorrect legal standards, "[t]he trial judge, wielding discretionary power, need not be right by appellate court lights in order to be upheld. Even if the appellate judges disagree with his call, they will defer to him." *In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991) (quoting *Johnson v. United States*, 398 A.2d 354, 362 (D.C. 1979)).

A. The Superior Court Properly Applied a Qualified First Amendment Privilege to John Doe's Anonymous Internet Communications Concerning the Important Public Issue of Software Piracy.

Under Rule 45(c)(3)(A) of the Superior Court Rules of Civil Procedure, a court must quash a subpoena that "requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden." The Superior Court determined that a qualified First Amendment privilege⁷ applied to Solers' request for disclosure of documents that would reveal the identity of John Doe's anonymous communications to SIIA via the Internet concerning the important public issue of software piracy. The Superior Court applied the correct legal standard to Doe's speech.

1. The First Amendment Protects Anonymous Internet Communications.

The right to speak anonymously is as fundamentally important today as it was during the ratification of the United States Constitution. Indeed, throughout Revolutionary and early

⁷ Solers incorrectly argues that the court and SIIA called for an absolute privilege. (BA at 14.) SIIA always has asserted that a qualified privilege applies, and that a litigant could overcome that privilege by making an appropriate showing, which Solers never attempted to make here.

American history, anonymous speech and the use of pseudonyms were powerful tools for public debate. The *Federalist Papers*, authored by James Madison, Alexander Hamilton and John Jay, were written anonymously under the name "Publius." The anti-federalists responded with anonymous articles of their own, authored by "Cato" and "Brutus," among others. See *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995)). Anonymous speech thus is a great tradition that is woven into the fabric of this nation's history. Id.

Consequently, the Supreme Court has recognized that, under certain circumstances, the courts must be solicitous of the First Amendment interests of anonymous speakers in matters of public concern. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999). "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." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). Regardless of the motivations of anonymous speakers, because "[a]nonymity is a shield from the tyranny of the majority," id. at 357, without some protection for anonymous speakers, many voices on important issues of the day would be chilled.

Courts consistently have recognized that nowhere is the danger of chilling the value of anonymous speech greater than in the context of the Internet. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates further than it could from any soapbox"); *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 at *3 (D. Ariz. July 25, 2006) (anonymity is a particularly important component of Internet speech). Judges recognize that Internet anonymity facilitates the rich, diverse and far ranging exchange of ideas, and that the

"ability to speak one's mind" on the Internet "without the burden of the other party knowing all of the facts about one's identity can foster open communication and robust debate." *2TheMart.com*, 140 F. Supp. 2d at 1092 (citations omitted). The free exchange of ideas on the Internet is driven largely by the ability of Internet users to communicate anonymously; therefore, the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded. *Id.* at 1093.

Under these important First Amendment principles, courts in a variety of contexts have held that plaintiffs "seeking information regarding anonymous individuals raise First Amendment concerns." *Sony Music Entmt. Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 563 (S.D.N.Y. 2004). *See also NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (discovery order requiring NAACP to disclose its membership list interfered with the First Amendment's freedom of assembly); *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998) (First Amendment protected newspaper publisher from disclosing identity of an anonymous advertiser). Consequently, in many instances, courts have declined to compel disclosure of anonymous Internet speakers sought from third parties. *See 2TheMart.Com*, 140 F. Supp. 2d at 1090, 1097-98 (granting motion to quash subpoena seeking identities of non-party ISP subscribers who posted messages on Internet); *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. 2001) (denying motion for expedited discovery to obtain identity of ISP subscriber due to failure to establish *prima facie* defamation claim); *Best Western*, 2006 WL 2091695 at *5 (denying request for discovery of identity of anonymous Internet message board posters).

2. A Qualified First Amendment Privilege Applies to Discovery Requests Seeking the Identity of Anonymous Internet Communicators.

Solers incorrectly identifies when the qualified First Amendment privilege applies to John Doe's anonymous communications, and the burden that a plaintiff must overcome to obtain

the discovery. (App. at 20-22 (citing *Columbia First Bank v. Ferguson*, 665 A.2d 650 (D.C. 1995).) The qualified First Amendment privilege that applies here to protect disclosure of the identity of an anonymous communicator can be asserted only before that disclosure is compelled. Any First Amendment privilege that exists is destroyed once the identity is revealed. See *Melvin v. Doe*, 836 A.2d 42, 50 (Pa. 2003) ("[I]t is clear that once [defendant-appellants'] identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure disclosure.").

Where a subpoena requests information that would reveal the identity of an anonymous Internet communicator, the court must weigh, with exacting scrutiny, the fundamental and fragile First Amendment right to anonymous Internet expression against the subpoenaing party's need for disclosure. Courts have established a qualified privilege that protects the speaker's ability to use the Internet to communicate anonymously, unless the party seeking the testimony overcomes the privilege by making a proper showing. Under this test, the party seeking the information must: (1) make a concrete showing of a *prima facie* claim of actionable harm; (2) demonstrate that the discovery request is sufficiently specific; (3) show the absence of alternative means to obtain the subpoenaed information; (4) demonstrate a central need for the subpoenaed information to advance the claim; and (5) show that the Doe defendants' expectation of privacy and First Amendment right of anonymous speech does not outweigh the *prima facie* case presented and the plaintiff's need for disclosure. See *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 970-71 (N.D. Cal. 2005); *Best Western*, 2006 WL 2091695 at *5 (citations omitted); *Columbia Ins. Co. v. Seecandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999);

Dendrite, 775 A.2d at 760-61.⁸ This test provides the safeguard necessary to protect the First Amendment rights of anonymous Internet communicators. *Dendrite*, 775 A.2d at 770-71.

Because of the First Amendment interests at stake, under the first element of this test – a concrete showing of a *prima facie* claim – courts depart from traditional legal standards and require a plaintiff to do much more than establish that the discovery merely would be relevant to its claim, or that the complaint could survive a motion to dismiss. Instead, in order to demonstrate entitlement to the discovery, a litigant must meet a higher showing on each element of its causes of action. *See id.* at 756 (denying motion for expedited discovery to obtain identity of ISP subscriber due to failure to establish *prima facie* defamation claim); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (adopting summary judgment test and rejecting request for discovery of identity of individuals who anonymously posted statements on Internet message board); *Best Western*, 2006 WL 2091695 at *4 (describing heightened test and rejecting claim for discovery). *See also McMann v. Doe*, 460 F. Supp. 2d 259 (D. Mass. 2006) (test for whether to sustain non-party subpoena seeking identity of Doe defendant is whether plaintiff's assertions could satisfy summary judgment standard); *Reunion Indus., Inc. v. Doe 1*, No. GD06-007965, 2007 WL 1453491, 80 Pa. D. & C. 4th 449, 456 (Pa. Ct. Com. Pl. March 5, 2007) (reaffirming requirement that "a summary judgment standard is the appropriate standard for balancing the First Amendment protections of anonymous speech against interests furthered through state libel laws").

⁸ The test is analogous to relations between a journalist and a news source, another context where courts have recognized that the important public interest in protecting the source's identity may, in circumstances where the party cannot meet a heightened showing of need, outweigh a litigant's right to discover that information. *See e.g., Lee v. DOJ*, 287 F. Supp. 2d 15 (D.D.C. 2003) (setting forth exhaustion requirement); *Zerilli v. Smith*, 656 F.2d 706, 713 (D.C. Cir. 1981). *See also* DC Code §§ 16-4702 - 16-4703 (providing a qualified privilege for news information other than sources, and an absolute privilege as to sources).

Solers disputes the heightened legal standard that has evolved for anonymous Internet communications, and requests instead that this Court adopt a motion-to-dismiss standard that a plaintiff could satisfy by merely reciting the elements of a cause of action. This argument would eliminate any First Amendment protection for the anonymous communications. For this reason, courts that have adjudicated cases at the intersection of anonymity and the Internet have held that more is required. As the court in *Highfields Capital Management* explained:

It is not enough for a plaintiff simply to plead and pray. Allegation and speculation are insufficient. The standards that inform Rule 8 and Rule 12(b)(6) offer too little protection to the defendant's competing interests. Thus, the plaintiff must adduce *competent evidence* – and the evidence plaintiff adduces must address *all* of the inferences of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts. . . . The court may not enforce the subpoena if, under plaintiff's showing, any *essential* fact lacks the requisite evidentiary support.

Highfields, 385 F. Supp. 2d at 975-76 (emphasis in original). *See also Dendrite*, 775 A.2d at 770-71 (noting that "application of our motion-to-dismiss standard in isolation fails to provide a basis for an analysis and balancing of [plaintiff's] request for disclosure in light of John Doe No. 3's competing right of anonymity in the exercise of his right of free speech.").

Here, the Superior Court correctly determined that a qualified First Amendment privilege applies to Solers' subpoena seeking documents that would disclose the identity of John Doe, an anonymous Internet communicator.

3. John Doe's Communications Are Entitled to First Amendment Protection.

Solers bases its appeal entirely upon the misguided contention that John Doe's anonymous Internet communications are not subject to any First Amendment protection, and the qualified privilege does not apply, because Doe's communications were addressed to a limited audience and because Solers assigns no public importance to Doe's message. John Doe's anonymous communication to SIIA via the Internet about software piracy clearly, however, are

expressive speech about an important public issue that is entitled to First Amendment protection. *See Best Western Int'l*, 2006 WL 2091695 at *4 (undertaking qualified First Amendment privilege analysis to determine if the Doe-defendant's identity should be disclosed, finding that John Doe's communication was purely expressive, and that "[s]uch speech is entitled to substantial First Amendment protection."). Therefore, the Superior Court correctly applied the qualified First Amendment privilege in ruling on the discovery motion, and the Court should affirm that decision.⁹

a. The Qualified First Amendment Privilege Applies to Communications Made to a Limited Audience.

The qualified First Amendment privilege for anonymous Internet speech applies both to communications that are widely available, and to more restricted communications available to a narrower audience. Numerous courts have so held. *See, e.g., Sony Music Entmt., Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *UMG Recordings, Inc. v. Does 1-4*, No. 06-0652, 2006 WL 1343597, *3 (N.D. Cal. Apr. 19, 2006); *Reunion Industries*, 2007 WL 1453491, 80 Pa. D. & C. 4th at *456.¹⁰

⁹ This Court should note that, contrary to its position here that no privilege applies at all, Solers conceded below that the privilege applied and argued that it had satisfied the test to overcome it. (App. 174 (April 28, 2006 hearing) (court notes, without objection, that there was no dispute between the parties as to what test should be applied); App. 223 ("Solers does not argue that this is the incorrect legal standard to apply . . .")), and does so again on appeal. (See BA at 17 (asking the court to follow cases which required that a plaintiff satisfy certain thresholds before the court will order discovery).)

¹⁰ The anonymous communication cases upon which Solers relies all recognize that the First Amendment provides protection for anonymous communications. *See In Re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 260 (D.D.C. 2003) ("there is some level of First Amendment protection that should be afforded to anonymous expression on the Internet"), *rev'd on other grounds by Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); *Sony Music Entmt., Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 557 (S.D.N.Y. 2004) (noting that a file sharer's speech "is entitled to some level of First Amendment protection," and requiring the plaintiff to overcome a qualified First Amendment privilege); *In Re Subpoena Duces Tecum to Am. OnLine, Inc.*, No. 40570, 2000 WL 1210372 at *6 (Va. Cir.

For example, in *Sony Music* and *UMG Recordings*, the courts concluded that the identities of individuals who anonymously used a private Internet-based peer-to-peer file copying network to download and distribute sound recordings were subject to qualified First Amendment protection. The courts required the plaintiffs to overcome the qualified privilege before ordering any disclosure.

Solers has cited no authority to support its false proposition that First Amendment protections do not apply to communications between narrower groups of people and only apply where the audience is the public at large.¹¹ Solers' reliance on *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Ayala v. Washington*, 679 A.2d 1057 (D.C. 1996), (see BA at 14-16), is entirely misplaced. Neither case addresses the First Amendment protections that apply to anonymous communications or the Internet. Rather, that precedent addresses the inapposite issue of when a defamation defendant may raise the First Amendment as a defense to liability.

Ct. Jan 31, 2000) (noting, in applying qualified First Amendment privilege to anonymous Internet communications, that "To fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either United States Supreme Court precedent or the realities of speech in the twenty-first century. This Court declines to do either and holds that the right to communicate anonymously on the Internet falls within the scope of the First Amendment's protections."), *rev'd on other grounds by Am. OnLine, Inc. v. Anonymous Publicity Traded Co.*, 542 S.E.2d 377 (Va. 2001).

¹¹ Solers' reliance on *Branzburg v. Hayes*, 408 U.S. 665 (1972) and *In re Grand Jury Subpoena*, 365 U.S. App. D.C. 13 (D.C. Cir. 2005), (see BA at 17, n. 11), is similarly misguided. These cases hold that "there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source . . ." unless the subpoena is harassing or in bad faith. *In re Miller*, 397 F.3d 964, 970 (D.C. Cir. 2005), *reissued in* 438 F.3d 1141 (D.C. Cir. 2006). *Branzburg* and *Miller* are not applicable to civil cases and are confined to the grand jury or criminal trial context. *Lee v. DOJ*, 401 F. Supp. 2d 123, 136 (D.D.C. 2005). Moreover, in civil cases involving journalists who are subpoenaed -- such as the *Lee v. Department of Justice*, 287 F. Supp. 2d 15 (D.C. 2003) case cited by Solers, (BA at 17) -- while the courts hold that the First Amendment interest in anonymity must yield in certain circumstances, even there the party seeking the discovery must overcome the qualified privilege. *See Lee*, 287 F. Supp. 2d at 20-23 (plaintiff provided proof of efforts made to exhaust other reasonable sources for the information sought).

SIIA has not contended that Solers is a "public figure" or asserted any other First Amendment defense to liability on John Doe's behalf. Instead, SIIA asserted, and the Superior Court agreed, that on the record below, the First Amendment protects SIIA from the compelled disclosure of documents that would reveal the identity of an anonymous individual who used the Internet to send SIIA a message concerning a matter of obvious public importance.

Solers also relies upon *Lee v. Department of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003).¹² The D.C. Circuit in *Lee* recognized a qualified First Amendment privilege that Solers seeks to avoid here, requiring that the court weigh the interests in disclosure against the interest in non-disclosure and that the party seeking disclosure must exhaust all other sources of information. *Id.* Indeed, Solers admits that *Lee* requires a party seeking to obtain disclosure of the identity of an anonymous communicator to first demonstrate that the information is unavailable from other sources, (BA at 17), but then entirely ignores the burden that this standard imposes on it here.

The courts uniformly agree – and Solers has offered no authority to the contrary – that the qualified First Amendment privilege that applies to anonymous Internet speech applies Internet communications to a limited audience, particularly where, as here, the subject of the communication is a matter of public interest.

b. Doe's Communications Involve a Matter of Public Interest.

The Superior Court's finding that Doe's communications to SIIA concern a matter of public interest also is not clearly erroneous. Solers contends that software piracy is not a matter of public importance because it concerns the pecuniary interests of SIIA's members. However, the law governing anonymous speech makes no distinction between "criticism of public officials and other types of speech such as commercial disparagement." *Reunion Industries, Inc.*, 80 Pa.

¹² The undersigned counsel represented the former CNN journalist subpoenaed in the *Lee* case.

D. & C. 4th at 452. *See also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 763 (1976) (Even speech which does "no more than propose a commercial transaction" is not "so removed from any exposition of ideas, . . . and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, . . . that it lacks all [First Amendment] protection.") (internal quotations and citations omitted); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("The guarantees for speech and press are not the preserve of political expression or comment upon public affairs."); *New York Times*, 376 U.S. at 266 (That publication is "for profit" does not eliminate First Amendment protections, otherwise "[t]he effect would be to shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources.") (internal quotations and citation omitted).

Solers also asks the Court to ignore the obvious proposition that piracy of intellectual property causes significant harm – and costs real money, for both businesses and consumers – unquestionably matters of enormous public interest.¹³ The undisputed evidence presented below demonstrates that software piracy is a serious problem in the United States, which provides approximately 80 percent of the world's software. (App. 62.) On average, in North America alone, the software industry annually loses about \$2 billion in revenue to piracy. (App. 62-63.) In the United States, one in every four copies of business application software is used illegally. (App. 63.) Software piracy greatly harms both software companies and society in general. (App. 63.) The United States government likewise has taken a significant interest in the issue of piracy, holding congressional hearings and issuing findings regarding the problem facing the

¹³ *See Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003) (Acknowledging the problem of piracy faced by the copyright industry, the D.C. Circuit noted that "[t]he stakes are large for the music, motion picture, and software industries and their role in fostering technological innovation and our popular culture").

affected industries.¹⁴ The contribution to the U.S. gross domestic product (GDP) by the copyright industries in 2005 was estimated at \$1,388.13 billion (\$1.38 trillion) or 11.12% of the total U.S. GDP. Communications concerning software piracy clearly are of public interest and should be protected and thus encouraged.

Therefore, under settled First Amendment precedent, John Doe's communication with SIIA through the Internet is speech protected by the First Amendment. This expression by John Doe appropriately was accorded broad First Amendment protection. The protections apply whether John Doe expressed his concerns to the world on an Internet discussion board, or, as here, through online communications with the leading representative of the software industry in the United States.

4. The Superior Court Did Not Abuse Its Discretion In Finding That Solers Failed to Overcome the Qualified First Amendment Privilege.

The Superior Court found that Solers failed to meet its burden of overcoming the qualified First Amendment privilege. The Court determined that Solers failed to establish a *prima facie* case for its underlying claims, and that Solers had not shown that it "exhausted every reasonable alternative source of information" before seeking to force SIIA to unmask John Doe. (App. 224-27.) The Court should affirm the order granting the motion to quash because Solers

¹⁴ See *Recording Indus. Ass'n of Am., Inc.* 351 F.3d at 1238-39 ("It is not surprising . . . that even as this case was being argued, committees of the Congress were considering how best to deal with the threat to copyrights posed by P2P file sharing schemes.") (citing, e.g., *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Senate Comm. on Governmental Affairs, 108th Congress (Sept. 30, 2003); Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the Senate Comm. on the Judiciary, 108th Congress (Sept. 9, 2003)); see also, e.g., The Role of Technology in Reducing Illegal File Sharing: Hearing Before the House Comm. on Science and Technology, 110th Congress (Jun. 5, 2007); An Update -- Piracy on University Networks: Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property, 110th Congress (Mar. 8, 2007); File Sharing: Selected Universities Report Taking Action to Reduce Copyright Infringement, GAO Report to Congressional Requesters, GAO-04-503 (May 2004).*

does not challenge the Superior Court's factual findings, and because the trial court's findings are not clearly erroneous.

a. Solers Failed To Allege Facts Sufficient To Demonstrate Actual Harm.

As stated by the court below, Solers' amended complaint failed to allege facts demonstrating that it is entitled to pursue actual damages – which as Solers acknowledges is one of the elements of a defamation cause of action.¹⁵ (App. 225-226.) See *Philips v. Evening Star Newspaper Co.*, 424 A.2d 78, 86 (D.C. 1980). A corporation such as Solers may meet this burden only by establishing an actual economic injury to its business through, for example, lost business or lost profits. "The law of libel has long reflected the distinction between corporate and human plaintiffs by limiting corporate recovery to actual damages in the form of lost profits." *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976).

[C]orporations have 'no reputation in any personal sense.' W.P. Keeton, D. Dobbs, R. Keaton & D. Owen, *Prosser & Keeton on Torts* s 111 at 779 (5th ed. 1984). As such, a corporation cannot be defamed by words, like unchastity, that would affect its purely personal repute. *Id.* Nonetheless, defamations suits brought by corporations will lie when 'the corporation is one for profit, and the

¹⁵ Solers similarly failed to meet its burden to overcome the qualified First Amendment privilege with respect to its claim for tortious interference with prospective business advantage, which it effectively abandoned below – never arguing in support of the claim in any of its numerous memoranda or at any of the hearings subsequent to the initial Opposition to the Motion to Quash. (App. at 103.) See *Jankovic v. Int'l Crisis Group*, 429 F. Supp. 2d 165, 179 (D.D.C. 2006) (dismissing plaintiffs' claim for tortious interference with business expectancy "for the reasons their defamation claims cannot be maintained"); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273-74 (7th Cir. 1983) (plaintiff may not recast libel claim as a tortious interference claim). Solers has not identified the existence of a valid business relationship or expectancy, alleged that John Doe had knowledge of the existence of a specific relationship or expectancy, identified any intentional interference that induced or caused the breach or termination of the relationship or expectancy, or alleged any resulting damage. See *Bennett Enters., Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (D.D.C. 1995). Indeed, because Solers' abandoned the claim, the Superior Court's August 16 Order did not address the tortious interference claim (App. 220-27), nor did Solers ask for consideration of the claim prior to seeking dismissal of the case in its entirety. (App. 228-32.)

matter tends to prejudice it in the conduct of its business or to deter others from dealing with it.' Restatement (Second) of Torts s 561(a)(1977).

S. Air Transport, Inc. v. Am. Broad. Cos., 670 F. Supp. 38, 41 (D.D.C. 1987), *aff'd*, 877 F.2d 1010 (D.C. Cir. 1989); *Golden Palace, Inc. v. Nat'l Broad. Co., Inc.*, 386 F. Supp. 107, 110 (D.D.C. 1974) (denying motion for leave to amend complaint where corporate plaintiff failed to show alleged defamation caused a loss in sales and profits). This rule is well-accepted. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Naples Comm. Hosp., Inc.*, 585 So.2d 374, 376 (Fla. 2d DCA 1991) ("Since a corporation has no reputation in the sense that an individual has, it is only with respect to its credit, property or business that a corporation can be injured by a false publication.") (quoting *Diplomatic Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377 (5th Cir. 1967)); *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1083 (W.D. Ky. 1995) ("[H]istorically, damages to corporate reputation may be proven only by loss of profits caused by the defamation."); *R.H. Bouligny, Inc. v. United Steel Workers of Am.*, 154 S.E.2d 344, 352 (N.C. 1967) ("Obviously, a corporation may not suffer mental anguish or an injury to personal reputation. It may, however, be injured in its credit, in its business good will, or in its relations with its employees.").

The Superior Court found that Solers did not allege any facts, much less demonstrate with *prima facie* proof, that it suffered actual harm as evidenced by any injury to its credit, property or business. The court noted that "[e]ven if Solers only had to demonstrate harm to its reputation regardless of lost profit, it has not done so."¹⁶ (App. 226.) The factual allegations in

¹⁶ Again, the Superior Court clearly and explicitly asked Solers to demonstrate a credible claim of harm, and Solers repeatedly failed. For example, at the April 28, 2006 hearing, the trial court specifically signaled to Solers that it needed to demonstrate tangible harm when it asked Solers' counsel: "The question that I still have remaining in this issue is the issue of the harm to your client. And, in the pleadings that I have so far, there's been no financial or economic harm demonstrated in the pleadings." (App. 173.) Solers' pleading, therefore, is deficient. As Solers

the complaint reveal only that Doe shared the information with SIIA, who is not alleged to conduct business with Solers, and the uncontested record reflects that the information has remained within SIIA. Indeed, the undisputed evidence is that SIIA has not disclosed the private Internet communication to any outsider,¹⁷ and SIIA is not in competition or in a position to do business itself with Solers. (See App. 78.) The Court's finding that Solers raised no factual allegations or evidence of actual injury to its credit, property or business, is not clearly erroneous.

b. Solers Failed To Submit Any Evidence of Exhaustion of Alternative Sources.

The Court also found that Solers never demonstrated – as is its burden – that it has taken steps to pursue John Doe's identity, let alone "exhaust" the possible alternative sources of information. (App. at 226-27.) See *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Best Western*, 2006 WL 2091695 at *5 (citations omitted); *Columbia Ins. Co. v. Seecandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999); *Dendrite*, 775 A.2d at 760-61. See also *Lee v. DOJ*, 287 F. Supp. 2d 15 (D.D.C. 2003); *Zerilli v. Smith*, 656 F.2d 706, 713 (D.C. Cir. 1981) (disclosure in journalist privilege case may be ordered "only after the litigant has shown that he has exhausted every reasonable alternative source of information"). Judge

has acknowledged, the United States Supreme Court recently explained that, in order to state a valid claim, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . ." *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, ---, 127 S.Ct. 1955, 1965 (2007)). Thus, under this requirement, as this Court has noted, a plaintiff "must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist." *Chamberlain v. Am. Honda Fin. Corp.*, No. 05-CV-755, 2007 WL 2216600, *3 (D.C. Aug. 2, 2007) (citing 5B Wright & Miller, Federal Practice and Procedure: Civil 3d § 1357, at 683 (2004); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 641 (5th Cir. 1981) ("Despite the liberality of modern rules of pleading, a complaint must still contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable theory.")).

¹⁷ Any public disclosure of the information that may result as a consequence of the litigation came from Solers, who decided to make the matter public through the litigation.

Blackburne-Rigsby recognized that there were a myriad of choices available to Solers for pursuing John Doe's identity. Solers, however, rested solely on its counsel's representation that Solers conducted "a review" of its "email server." Solers did not identify how it conducted this review (by reference to search terms and media searched), who conducted the review, what the review entailed (*i.e.*, active or archived emails), what were the results of that review, or any other meaningful information. Solers only purported to have examined its email server – not the documents that otherwise exist on its server, and not the individual computers of its employees and the emails stored on them or their browser cache histories (which would reveal the websites visited). Moreover, Solers did not demonstrate that it searched its computer backup tapes and other stored media for archived emails and documents, even though that step has become standard, and mandatory for litigants, in this age of electronic discovery.¹⁸ Solers' representation, therefore, was insufficient to demonstrate exhaustion.

Based upon this record, the Superior Court did not abuse its discretion in holding that Solers failed to satisfy its burden of demonstrating a legal right to compel the disclosure. *See Wheeler v. Goulart*, 593 A.2d 173, 175 (D.C. 1991).¹⁹

c. A Comparison of the Magnitude of Harms Favors Doe.

Solers also has not satisfied the element of the test courts apply in cases concerning subpoenas about anonymous Internet speakers, requiring that the court weigh the comparative harms that would be caused by a ruling in favor of or against disclosure. *See Highfields*, 385 F.

¹⁸ *See, e.g.*, Fed. R. Civ. Proc. 26, 33-34, 37 and 45 (The discovery rules were amended in 2006 to confirm the litigants' obligations regarding discovery of electronically-stored data.); see also Fed. R. Civ. P. 34, Advisory Committee Notes (addressing the purpose of the 2006 amendment).

¹⁹ In *Wheeler*, the Court compelled disclosure after finding that the party fighting disclosure had waived the privilege by having already identified the anonymous individual on two other occasions without requiring confidentiality. *See Wheeler*, 593 A.2d at 177. There is no evidence of waiver here.

Supp. 2d at 976; *Dendrite*, 775 A.2d at 756; *Best Western*, 2006 WL 2091695 at *4. Under the record facts in this matter, the First Amendment interests of the individual who anonymously communicated with SIIA – and the need for SIIA to maintain the confidentiality of that speaker's identity to preserve its efforts to combat software piracy – clearly outweigh Solers' need for disclosure of his identity. John Doe has an expectation of privacy in his anonymity, and his First Amendment interests clearly outweigh Solers' need for disclosure of his identity. Moreover, SIIA has a long-standing policy of anonymity for those who report piracy. In fact, over the almost twenty years that SIIA has conducted its Corporate Anti-Piracy program, it has never revealed the identity of a person who reported piracy to SIIA through its program, and this program could not survive without some ability to protect whistleblowers. Therefore, John Doe has a justifiable basis for relying on his expectation of anonymity.

d. Discovery of Doe's Identity Threatens to Chill Speech on a Matter of Public Concern.

Discovery of Doe's identity also would present a real threat that protected commentary on matters of public interest would be chilled. If the Court were to authorize the discovery, Solers undoubtedly would inflict considerable punishment on John Doe for using the Internet as a vehicle to reach his intended audience to communicate about software piracy. Because few would-be Internet communicators seeking to report potential software piracy would risk the financial and other burdens of defending a lawsuit, that speech likely would disappear. *See Highfields*, 385 F. Supp. 2d at 980. In contrast, Solers has not demonstrated that it has been harmed by the communication of the alleged messages. Therefore, the balance of harms tips decidedly against disclosure of John Doe's identity.

B. The Disclosure of John Doe's Identity Is Also Unwarranted On Other Grounds, Including The Court's Lack Of Personal Jurisdiction Over Doe and The Work Product Doctrine.

This Court also should affirm the Superior Court on other grounds previously asserted by SIIA yet not addressed by the court below. *See Sebastian v. District of Columbia*, 636 A.2d 958, 960 (D.C. 1994) (court may affirm the judgment of the trial court for reasons other than those upon which the trial court relied). The Superior Court properly quashed the subpoena under Rule 45(c)(3)(A) of the Superior Court Rules of Civil Procedure because it requested protected attorney work product and thus improperly required disclosure of privileged or other protected matter, and because the Court lacks personal jurisdiction over John Doe and thus subjected SIIA to an undue burden.

1. The Work Product Doctrine Protects John Doe's Communications With SIIA.

The Superior Court's Order quashing the subpoena should be affirmed on the ground that John Doe's communications with SIIA also are protected under the work product doctrine. (App. 23.) The materials that Solers seeks were prepared in anticipation of litigation and may be subject to discovery only upon a showing of substantial need and an inability to obtain the substantial equivalent without undue hardship. A document is protected by the work product doctrine if the court can determine that "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Equal Employment Opportunity Comm'n v. Lutheran Soc. Servs.*, 186 F.3d 959, 968 (D.C. Cir. 1999). Witness names are as protected as any other work product materials when they are interwoven into the preparation of a case for litigation. *Chiperas v. Rubin*, No. CIV.A. 96-130, 1998 WL 531845, at *1-2 (D.D.C. 1998).

Such is the case here. Solers' subpoena requests, *inter alia*, all documents relating to SIIA's beliefs about Solers and all documents identifying SIIA's confidential source. John Doe's

Internet communications were submitted through SIIA's online reporting form, which is made available to individuals who wish to provide information relating to software piracy. When this report is completed and submitted, SIIA's anti-piracy legal division pursues the lead, up to and including litigation. John Doe's response was received by two non-lawyers working at the direction of attorneys for SIIA. Counsel supervised the intake of John Doe's report and reviewed it as part of the process of investigating a claim and advising her client, SIIA, all in anticipation of potential litigation. Consequently, the work product doctrine operates to shield these documents from discovery.

2. The Superior Court Did Not Have Personal Jurisdiction Over Doe.

This Court should affirm the Superior Court's decision on the alternative ground that the court lacked personal jurisdiction over Doe. (App. 23.) Doe must either live or work in the District, or he must have other ties to the District sufficient to warrant application of D.C.'s long arm statute. D.C. Code § 13-423(a)(3). In its complaint and amended complaint, Solers does not assert that Doe either lives or works in D.C.; instead, Solers bases its claim to personal jurisdiction on the allegations that (1) Solers suffered injury within the District, and (2) that Doe signed a contract with SIIA subjecting it to the law and courts of the district. (App. 7, 199.) However, as found by the court below, Solers has not set forth any supportable allegation of harm, and thus there has been no demonstration of any injury suffered in the District. Additionally, the uncontested record conclusively demonstrates that John Doe did not enter into a contract with SIIA, as Doe did not agree to the terms and conditions of SIIA's Corporate Anti-Piracy Reward Program. (App. 79.)

A plaintiff bears the burden of establishing that the trial court has personal jurisdiction over the defendant. *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264 (D.C. 2001); *see also*

Columbia Ins. Co., 185 F.R.D. at 578 (plaintiff must identify unknown party with sufficient specificity such that the court can determine that he is a real person or entity over which the court has jurisdiction and that justiciability can be satisfied) (citations omitted). In addition, in order to survive a motion to dismiss for lack of personal jurisdiction in cases against an unidentified defendant, a plaintiff is required to demonstrate: (1) that they have engaged in a reasonably diligent search to identify the unknown defendant, and (2) that efforts have been taken to provide the defendant with constructive notice. *Plant v. Does*, 19 F. Supp. 2d 1316, 1320 (S.D. Fl. 1998) (citation omitted). The requirement that "unknown parties have at least constructive notice is no dispensable formality; rather, it is an essential element of due process without which a court has no jurisdiction to bind the absent parties." *Id.* (quoting *Friedman v. New York City Dep't of Hous. & Dev. Admin.*, 688 F.Supp. 896, 901 (S.D.N.Y. 1988)). Here, the record demonstrates that Solers has satisfied none of these requirements. Based upon the Superior Court's factual findings, which are not clearly erroneous, and the deficiencies in Solers' Complaint, this Court should find that the long-arm statute does not authorize personal jurisdiction over John Doe.

Solers also cannot establish that exercising personal jurisdiction over John Doe comports with due process. *See GTE New Media Sers., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C. Cir. 2000) (no personal jurisdiction where defendants' "sole contact with th[e] forum is the operation of Internet websites that are accessible to persons in the District"). It would be constitutionally unreasonable to require Doe to defend this suit in the District when there is no evidence that Doe has any ties to the jurisdiction.

C. Solers Is Precluded From Challenging the Superior Court's Orders.

The Court also should affirm because Solers asked the Superior Court to enter the dismissal order. Solers thus has waived any objections to that order, is estopped from claiming any error on appeal, and/or lacks standing to bring the appeal.

The long-standing rule in the District of Columbia is that a party does not have standing to take an appeal from an order of dismissal which it requested or consented to. *Ganss v. Goldenberg*, 39 App. D.C. 597, 599 (1912); *Curry v. Curry*, 65 App. D.C. 47, 49 (1935) ("A statement in a record on appeal that a party has consented to a decree is equivalent to an admission that the facts exist on which the decree rests . . ."). By inviting a dismissal, the party waives or is estopped from claiming any error in the court's action. *Halpern v. Gunn*, 57 A.2d 741, 742 (D.C. 1948); *Desmond v. Robertson*, 211 A.2d 775, 776 (D.C. 1965).

For example, in *Ganss v. Goldberg*, the Court of Appeals granted a motion to dismiss the appeal where the appellant-defendant consented to the entry of judgment. 39 App. D.C. at 599. Counsel for defendant refused to proceed with the litigation at the trial court level and informed the court that it could pass judgment for the plaintiff. *Id.* at 598. When asked whether he was assenting to the judgment, the defendant stated that "he did not wish to appear to assent or consent, but that the defendant had no objection to the court entering judgment." *Id.* at 598-99. After the trial court complied and entered the judgment, the appellant argued that judgment was "entered at his suggestion merely for the purpose of placing himself in a position to present the case to this court for its decision, and therefore does not stop him from urging that error was committed in entering it." *Id.* at 599. The Court of Appeals, granting the appellee's motion to dismiss, held that the appellant was estopped from contesting the judgment on appeal. *Id.* See

also Desmond, 211 A.2d at 775-76 (appellant-plaintiff lacked standing to bring the appeal because appellant refused to proceed with the litigation at the trial court level, and thus effectively consented to the dismissal); *Rubin v. Gordin*, 165 So.2d 824 (Fla. 3d Dist. Ct. App. 1964) (dismissing appeal brought by plaintiff who sought to prevent "further delays" associated with litigation by submitting letter requesting that trial court grant motion to dismiss to allow immediate appellate review; appeals court holds that by requesting dismissal, appellant waived his right to appeal).

Similarly here, at the January 12, 2007 status hearing in the Superior Court, Solers informed Judge Anderson, sitting for the very first time in this case,²⁰ that "the only order of business for the Court is to enter an order of dismissal" of Solers' claims. (App. 229.) Solers took the position that it couldn't "go forward with the case at the trial level" because Solers could not "get our discovery." (App. 230.) Solers urged the Court that "the appropriate step at this point" would be for the Court to dismiss the Complaint, and Solers submitted a proposed order of dismissal. (App. 230-231.) Solers made clear that its goal was to circumvent this Court's order dismissing the prior appeal for lack of jurisdiction. (*Id.*) The Court orally dismissed the case, and indicated that it subsequently would enter a written order. (App. 231-232.)

Appellant cannot claim that the trial court committed error by entering a dismissal that it requested. As in *Ganss*, the fact that Solers requested the dismissal merely to take an appeal does not relieve it from the consequences of the laws of waiver and estoppel. 39 App. D.C. at 599. Because Solers cannot assign error to the very action that it invited, it lacks standing to raise this appeal and the appeal must be dismissed. *See Halpern*, 57 A.2d at 742; *see also*

²⁰ This status conference was the first proceeding held following Judge Blackburne-Rigsby's elevation to this Court and the reassignment of the case to Judge Anderson.

Rudolph v. Sensener, 39 App. D.C. 385, 388 (1912) ("The situation is of their own creation, no matter what was the inducement thereto, and there is nothing from which they can appeal.").

Solers also may not convert the discovery order that this Court held was non-final and non-appealable into a final, appealable order by obtaining a consent dismissal of its Complaint. As noted *supra*, this Court held that Judge Blackburne-Rigsby's August 16 Order was a non-appealable order, and dismissed Solers' appeal from that order. In response, Solers refused to proceed with the litigation, but instead asked the Superior Court to dismiss its case, so that it might take an appeal of that same discovery order. The law is clear in the District of Columbia that a party cannot convert a non-final, non-appealable order into a final and appealable one by taking a dismissal of the action and then filing an appeal. *Halpern*, 57 A.2d at 742 (dismissing appeal where appellant-plaintiff requested dismissal so that he could make a non-final, non-appealable order appealable) (citing *Kelly v. Great Atl. & Pac. Tea Co.*, 86 F.2d 296, 297 (4th Cir. 1936)); *see also Rudolph*, 39 App. D.C. at 388 (dismissing appeal where, despite an adverse order, appellant could have litigated the matter but refused to). Therefore, the Court also should dismiss Solers' appeal from the non-final discovery order.

VI. CONCLUSION

SIIA plays a critical role in rooting out the software piracy that threatens to impose dramatic costs on software users and society at large. To achieve this important public goal, SIIA relies on the information provided via the Internet – anonymously – to its Corporate Anti-Piracy Program. The courts – recognizing the First Amendment interests in such communications – have established a qualified privilege that a party seeking to obtain the information must overcome before a court will order disclosure. Here the trial court offered Solers multiple opportunities to meet that burden. Instead, Solers simply asked the Court to

dismiss its case. For the reasons set forth above, the Court should affirm the trial court's grant of SIIA's motion to quash.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2007, a true copy of the foregoing brief was served by first-class mail to the following at the address indicated:

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