TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE

Public Citizen is a public interest organization based in Washington, D.C., which has approximately 125,000 members, more than four thousand of them in Pennsylvania. Since its founding by Ralph Nader in 1971, Public Citizen has urged citizens to speak out against abuses by a variety of large institutions, including corporations, government agencies, and unions, and it has advocated a variety of protections for the rights of consumers, citizens and employees to encourage them to do so. Along with its efforts to encourage public participation, Public Citizen has brought and defended numerous cases involving the First Amendment rights of citizens who participate in public debates.

In recent years, Public Citizen has watched with dismay as an increasing number of companies have used litigation to prevent ordinary citizens from using the Internet to express their views about the manner in which those companies have conducted their affairs. Public Citizen has represented consumers, *ServiceMaster v. Virga*, No. 99-2866-TUV (W.D. Tenn.), workers, *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.), investors, *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.), and other members of the public, *Circuit City Stores v. Shane*, No. C-1-00-0141 (S.D. Ohio), who have been sued for criticisms they voiced on the Internet. *See generally* http://www.citizen.org/litigation/ briefs/internet.htm. In these and other cases,

companies have brought suit without having a substantial legal basis, hoping to silence their critics through the threat of ruinous litigation, or to use litigation to obtain the names of critics with the objective of taking extra-judicial action against them (such as firing employees who made critical comments). Public Citizen has represented Doe defendants or appeared as amicus curiae in several cases in which subpoenas have sought to identify anonymous posters on Internet bulletin boards or web sites. *Recording Industry Association of America v. Verizon Internet Services,* Nos. 03-7015, 03-7053 (D.C. Cir); *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.); *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.); *iXL Enterprises v. Doe, No.* 2000CV30567 (Ga. Super. Fulton Cy.); *Thomas & Betts v. John Does 1 to 50*, Case No. GIC 748128 (Cal. Super. San Diego Cy.); *Hritz v. Doe,* C-1-00-835 (S.D. Ohio); *WRNN TV Associates v. Doe*, CV-00-0181990S (Conn. Super. Stamford); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001); *Donato v. Moldow*, No. BER-L-6214-01 (N.J. Super. Bergen Cy.).

In this series of cases, Public Citizen has argued that suits against anonymous speakers are unlike the normal tort case, where the identification of an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a lawsuit filed over anonymous speech, the identification of the speaker provides an important measure of relief to the plaintiff because it enables the

plaintiff to employ extra-judicial self-help measures to counteract both the speech and the speaker, and thus creates a substantial risk of harm to the speaker. In our system of laws, the courts ordinarily do not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief.

Whatever the reason for anonymous speech, rules making it too easy to remove anonymity will deprive the "marketplace of ideas" of valuable contributions. To be sure, some people speak anonymously because they fear the entirely proper consequences of improper speech, such as the prospect of substantial damages liability if they lie about someone they don't like. The challenge for the courts is to develop a test for subpoenas about anonymous posters that makes it neither too easy for vicious defamers or other wrongdoers to hide behind pseudonyms, **nor** too easy for a big company or a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

Public Citizen files this brief to urge this Court to embrace the developing consensus among those courts that have considered this question, by borrowing a standard from the rules governing the disclosure of anonymous sources in libel cases.

STATEMENT

On May 16, 2002, Equidyne sued twenty-one anonymous defendants who were identified only by the pseudonyms that they had used while discussing Equidyne on the Yahoo! and Lycos message boards devoted to that company. Message boards are an electronic bulletin board system where individuals discuss designated topics by posting comments for others to read and respond to. *Global Telemedia v. Doe*, 132 FSupp2d 1161, 1264 (CDCal 2001). Equidyne claimed that defendants were current or former employees of Equidyne; that they had signed confidentiality agreements; and that their postings to the Yahoo! and Lycos boards had disclosed confidential information covered by their agreements. Equidyne asserted that this conduct violated those agreements (Count I), was undertaken for the ulterior motive of affecting the price of Equidyne's stock (Count II), and was done to promote by false and misleading statements a slate of candidates to be elected at Equidyne's May 28 annual meeting and led by former executive Henry Rhodes (Count III). Equidyne made clear its view that Rhodes' notice of intent to nominate candidates was legally insufficient; however, it sought injunctive relief against future disclosures of confidential matter, as well as damages allegedly caused by the posting of the confidential information.

Equidyne then obtained leave to subpoena Yahoo! and Lycos to obtain information that would identify the individuals who used the twenty-one pseudonyms. A59-60. In response to its subpoena, but apparently without notice to at least some

of the individuals concerned, Lycos identified five defendants. Three of those defendants, including Henry Rhodes, moved to dismiss the complaint. Docket Entry Numbers ("DEN") 30-32, 47. Equidyne subsequently dismissed its complaint against two of the moving defendants, but not Rhodes.

Unlike Lycos, Yahoo routinely provides email notice whenever it receives a subpoena seeking to identify one of its users. After such notices were received by the various defendants who had posted on Yahoo!, discussion about the subpoenas appeared on the message board, further propagating the news and giving users notice of the threat to their anonymity. A13. One such defendant, who had used the pseudonym Aeschylus_2000, took advantage of this notice to file a pro se motion to quash the subpoena, using a brief that was apparently downloaded from the Internet and providing the address of an Ohio lawyer as a mail drop. A66-88. Aeschylus invoked his First Amendment right to speak anonymously and pointed to the rulings of several courts, such as *Dendrite v. Doe*, 342 NJSuper 134, 775 A2d 756 (AppDiv 2001), that require plaintiffs who seek to compel the identification of anonymous Internet speakers to give notice of the specific statements alleged to be actionable, to explain why the statements were unlawful, and to provide evidence showing that the speakers had engaged in actionable conduct. Aeschylus argued that this standard had not been met in his case because, although the complaint enumerated the statements of several of the anonymous defendants, none of his own statements had been

identified.

Equidyne acknowledged that *Dendrite* provide desirable guidance when deciding when to compel identification of anonymous speakers. A107. Equidyne purported to meet that standard by pointing to three Aeschylus statements. A100-101. Equidyne did not claim that the statements were actionable on any theories stated in the complaint, because the statements did not contain any confidential information, Equidyne did not claim that Aeschylus was an employee or former employee. and hence were not posted in violation of any confidentiality agreement, Instead, Equidyne argued that Aeschylus' postings were unlawful because they referred to earlier postings about Rhodes' attempt to run a slate of candidates for the Equidyne board of directors, urged stockholders to vote the incumbents out, and urged readers to support the would-be insurgent slate. Equidyne argued that, by promoting a slate of candidates for which no proxy statement had been filed, without disclosing his own identity or disclosing the identity of the slate that he was supporting, Aeschylus committed a per se violation of the proxy solicitation rules under Section 14(a) of the Exchange Act. A108-112.

Having now received, for the first time, a statement of the charges against him, Aeschylus retained counsel who, because the time for filing a reply brief under the district court's rules had expired, filed a motion for leave to file a late reply brief. A164. This motion was, however, opposed by Equidyne on timeliness grounds.

A167-169. Although Aeschylus' counsel explained that the delay was caused by Aeschylus' efforts to obtain counsel, and committed to filing his brief within two days of receiving permission to do so, A173-174, the Court held the motion for leave to file reply for two months and then denied the pro se motion to quash.

The district court's ruling accepted *Dendrite* "as a guidepost" to help "balance the interests and equities" at stake on the motion to quash. A8. The court ruled, however, that adequate notice had been given through Yahoo! email notice and the discussion of the subpoenas on the message board, *id.*, and that the listing of specific emails in Equidyne's responsive brief met the requirement of specifying the actionable statements. A8-9. Moreover, the court decided that the statements provided adequate grounds for a claim under section 14(a) and the SEC's implementing regulations. A9.

Aeschylus moved for reargument, arguing that *Dendrite*'s requirements had not properly been applied because that decision requires a plaintiff to set forth a prima facie case on each element of its causes of action, including a showing that the allegedly unlawful action caused harm. A178-179. Equidyne responded that it need not have "financial injury" to pursue a claim under Section 14(a), A187, and that, in any event, its need to retain counsel and prepare its own proxy statement to respond to Rhodes' purported candidacy represented sufficient harm. A187-188.

The district court denied the motion, ruling that, although it accepted *Dendrite* as a guidepost, it was not endorsing every aspect of *Dendrite*. It further ruled that, at

the early stages of a lawsuit, it was not appropriate to require "a finding of harm," because a plaintiff should be given the opportunity to "develop evidence of the complete spectrum of injury." In the alternative, the court ruled that if a showing of harm were needed, Equidyne's showing was sufficient. A11-12.

Aeschylus appealed, arguing that enforcement of the subpoena was effectively a final decision denying his right to speak anonymously. Following its customary practice, Yahoo! has withheld compliance with the subpoena pending completion of the judicial process.

ARGUMENT

A. The First Amendment Protects Against the Compelled Identification of Anonymous Internet Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 122 SCt 2080, 2089-2090 (2002); *Buckley v. American Constitutional Law Found.*, 525 US 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 US 334 (1995); *Talley v. California*, 362 US 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*,

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated

> by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 US at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost:

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

Reno v. ACLU, 521 US 844, 853, 870 (1997).

Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 FSupp2d 1029, 1033 (D.N.M. 1998); *ACLU*

v. Miller, 977 F. Supp. 1228, 1230 (NDGa 1997); *see also ApolloMEDIA Corp. v. Reno* 526 US 1061 1450 (1999)*, aff'g* 19 FSupp2d 1081 (CDCal 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications); *Global Telemedia v. Does*, 132 FSupp2d 1261 (CDCal 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California's anti-SLAPP statute); *Doe v. 2TheMart.com*, 140 FSupp2d 1088, 1092-1093 (WDWash 2001); *Hollis-Eden Pharmaceutical Corp. v. Angelawatch*, GIC 759462 (CalSuper San Diego Cty, March 20, 2001), unofficially published at http://www.citizen.org/litigation/briefs/holldec.pdf, *appeal dismissed*, No. D037907 (CalApp 4th Dist.).

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

ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. The technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind an electronic footprint that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse*, 113 HarvLRev 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. As a result, many informed observers have argued that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 UChiLegalF 139; Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OreLRev 117 (1996).

A court order, even when issued at the behest of a private party, constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 364 US 254, 265 (1964); *Shelley v. Kraemer*, 334 US 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is

subject to the closest scrutiny." *NAACP v. Alabama*, 357 US 449, 461 (1958); *Bates v. City of Little Rock*, 361 US 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 US at 461. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 US at 524. The novelty of the procedural requirements at issue cannot be used to thwart consideration of the constitutional issues involved. *NAACP v. Alabama*, 357 US at 457. Instead, as the Court has held, due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 US at 524; *NAACP v. Alabama*, 357 US at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 US 334, 347 (1995).

In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In such cases, courts apply a three-part test, under which the person seeking to identify the

anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of its case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *Carey v. Hume,* 492 F2d 631 (DCCir 1974); *Cervantes v. Time,* 464 F2d 986 (CA8 1972); *Baker v. F&F Investment*, 470 F2d 778, 783 (CA2 1972); *Richards of Rockford v. PGE*, 71 FRD 388, 390-391 (NDCal 1976).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to defense against a shareholder derivative action, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 FSupp2d 1088, 1093 (WDWash 2001).

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

In a number of recent cases, courts have drawn on the privilege against revealing sources to enunciate a similar standard for protecting against the identification of anonymous Internet speakers, while adapting the standard to conform

to the different posture of such cases. The leading case is *Dendrite v. Doe*, 342 NJ Super 134, 775 A2d 756 (AppDiv 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo! That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which amicus urges the Court to apply in this case:

> We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.
>
> We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.
>
> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
>
> The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be

> granted pursuant to R. 4:6- 2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 342 NJSuper at 141-142, 775 A2d at 760-761.[1]

A similar approach was used in *Columbia Ins. Co. v. Seescandy.com*, 185 FRD 573 (NDCal 1999), where the plaintiff sued several defendants who had registered Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect that such discovery could have:

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[1] *Dendrite* has received a favorable reception among commentators. *E.g.*, O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham LRev 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. LRev 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle ULRev 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall JComputer & InfoL 493 (2001).

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.
>
> *Id*. at 578.

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

Similarly, in *Melvin v. Doe*, 49 PaD&C4th 449 (2000), *review granted*, 805 A2d 525 (Pa 2002), the court allowed the defendant to present evidence and seek summary judgment, ordering disclosure only after finding genuine issues of material fact requiring trial. In yet another case, the Virginia Circuit Court for Fairfax County considered a subpoena for identifying information of an AOL subscriber. The subscriber did not enter an appearance, but AOL argued for a standard that would protect its subscribers against needless piercing of their protected anonymity. The

court required plaintiff to submit the actual Internet postings on which the defamation claim was based, and then articulated the following standard for disclosure: The court must be

> satisfied by the pleadings or evidence supplied to that court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed, and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.
>
> *In re Subpoena Duces Tecum to America Online,* 52 VaCir 26, 34, 2000 WL 1210372 (VaCir FairfaxCy 2000), *rev'd on other grounds*, 261 Va 350, 542 SE2d 377 (2001).[2]

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

C. The Court Below Erred as a Matter of Law By Not Following The Proper Steps Before Deciding to Require Identification of John Doe Defendants in This Case.

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[2] Virginia has implemented a *Dendrite*-like policy by statute, Va. St.§ 8.01-407.1, and proposals for similar legislation are pending in other states.

Courts should follow five steps in deciding whether to allow plaintiffs to compel the identification of anonymous Internet speakers. In amicus's view, the trial court sought to follow most of the five steps; however, its application of several steps was faulty. Consequently, it committed an error of law subject to de novo review.

1. Give Notice of the Threat to Anonymity and an Opportunity to Defend It.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendants have had the time to retain counsel. *Seescandy*, 185 FRD at 579. Thus, in *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. (The posted Order to Show Cause, as it appears in the Appendix in the *Dendrite* appeal, is appended to this brief)**.** The Appellate Division specifically approved this requirement. 342 NJSuper at 141, 775 A2d at 760.

Here, Court-ordered notice was not needed to tell Aeschylus that his anonymity was at risk because Yahoo! provides prompt notice by email to the email address that

the user was using when he registered an account. However, the notice was inadequate to help Aeschylus in one respect – the complaint did not place Aeschylus on notice of the claims against him. Only after Aeschylus filed a motion to quash did Equidyne reveal its actual claims against him. By ruling on the motion to quash without allowing Aeschylus's newly retained counsel to file a reply brief, the court violated his right to fair notice and an opportunity to respond.

Moreover, although many Internet service providers ("ISP") provide notice as Yahoo! does, some large ISP's still do not provide notice to their customers before they respond to subpoenas. For example, the record does not disclose that Lycos provided notice before its users were identified, and in amicus' experience, it does not always provide notice. Although it is too late to protect the rights of the five defendants in this case who posted on Lycos, the Court should embrace *Dendrite*'s ruling that court-ordered notice on the message board should precede **issuance** of a subpoena, and not just a ruling on a motion to enforce the subpoena.

2. Require Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires the court to review the plaintiff's claims to ensure that plaintiff does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the second step in the procedure for such cases is that the court should require the plaintiff to set forth the exact statements by each anonymous speaker that is alleged to have violated its rights. It is startling how often

plaintiffs in these sorts of cases do not bother to identify the allegedly actionable statements. Instead, they may quote messages by a few individuals, and then demand production of a larger number of identities. For example, the complaint specified statements by only thirteen of the twenty-one defendants. Accordingly, for this reason alone, it was error for the district court to authorize discovery to identify all defendants.

3. Review the Facial Validity of the Claims After the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable. In a defamation case, for example, some statements may be too vague or insufficiently factual to be deemed capable of having a defamatory meaning. Still other statements may be non-actionable because they are merely statements of opinion. In a securities fraud case such as the one from which this appeal arises, the question may be whether the statement appears to reveal confidential information, which was the original basis for Equidyne's complaint, or whether there is a sufficiently concrete solicitation of proxies for a candidates to violate section 14(a), under the claim advanced by Equidyne after it was forced to identify the actionable words.

Here, Equidyne's claim is that by voicing support for a slate of candidates that was never actually formed, and voicing support for a proxy campaign that never

emerged, Aeschylus violated the SEC's regulations. Even assuming that the allegations described a facial violation of the regulations, it is doubtful whether anonymous support for never-announced candidates created a sufficiently serious threat to the stability of the securities markets or the governance of Equidyne to create a compelling basis for suppressing such speech. Although the proxy rules surely pass muster under a First Amendment facial challenge, it is far less clear that they would do so as applied to the facts alleged here. The Court need not confront that constitutional question, however, because, as set forth in item 4 below, Equidyne did not present sufficient evidence of damages to show the existence of a case or controversy about the propriety of Aeschylus' postings.

4. Require an Evidentiary Basis for the Claims.

Fourth, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against each Doe defendant. The requirement of presenting evidence prevents a plaintiff from being able to identify its critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need identification of the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless it comes forward with evidence in support of its claims, and the Court should recognize that identification of an otherwise anonymous speaker

is a major form of **relief** in cases like this. Withholding relief absent evidence is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark,* California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who bring cases like this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. *E.g.,* Werthammer, *RNN Sues Yahoo Over Negative Web Site,* Daily Freeman, November 21, 2000, http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=74969&rfi=8. One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online* (copy attached); Fischman, *Protecting the Value of Your Goodwill from Online Assault* (copy attached). Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer and Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers have similarly suggested that clients

decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.*

Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the public official who has filed the action. *Id.* The statistics cited by Aeschylus in his opening brief, at 18, show that such a chilling effect was at work in this case. However, imposition of a requirement that proof of wrongdoing be presented to obtain the names of the anonymous critics, and not just to secure an award of damages or other relief, may well persuade plaintiffs that such subpoenas are not worth pursuing unless they are prepared to pursue litigation.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those case require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F2d 5, 6-9 (CA2 1982); *Richards of Rockford v. PGE*, 71 FRD 388, 390-391 (NDCal 1976). *Cf. Schultz v. Reader's Digest*, 468 FSupp 551, 566-567 (EDMich 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues with respect to which it needs to identify the anonymous speakers, before it is given the opportunity to obtain their

identities. *Cervantes v. Time*, 464 F2d 986, 993-994 (CA8 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

The extent to which a proponent of compelled disclosure of the identity should be required to offer proof to support each of the elements of its claims at the outset of its case, to obtain an injunction compelling the identification of the defendant, varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff is likely to have easy access, that is usually superior to the defendant. For example, the plaintiff is likely to have ample means of proving that a statement is false or rests on confidential information. Thus, it is ordinarily proper to require a plaintiff to present proof of this element of its claims as a condition of obtaining or enforcing a subpoena for the identification of a Doe defendant. The same is true with respect to the proof of damages. Even if discovery is needed to develop the full measure of damages, a plaintiff should surely have some information at the outset supporting claims that it suffered actual damages.

Here, there is no possible claim for injunctive relief because plaintiff's annual meeting was held a mere twelve days after the complaint was filed, and no candidate emerged to challenge the incumbents after Equidyne successfully challenged Rhodes' declaration of candidacy on various technical grounds. Thus, by the time the motion for leave to take discovery came on for hearing, any claim for injunctive relief because

of Aeschylus' alleged proxy solicitation had become moot. Only if Equidyne has a viable claim for damages could the complaint against Aeschylus survive. Yet none of the harms the Equidyne has identified – the need to retain counsel to examine Rhodes' declaration of candidacy and the need to prepare its own proxy statement – were caused by Aeschylus' endorsement of Rhodes' efforts, even if they are legally compensable damages.

Not only did Equidyne present no evidence that Aeschylus' alleged wrongs caused it damages, Equidyne has never even alleged the existence of such damages in its complaint. The complaint states claims which are admittedly not valid against Aeschylus, and the theory of his wrongdoing was articulated only in an opposition brief. Accordingly, this case cannot even be resolved on the theory that the allegation of damages in the complaint must be presumed to be valid at this stage of the proceeding. Because the district court failed to require **either** a complaint alleging damages based on the theory presented in Equidyne's opposition papers, or the presentation of admissible evidence of such damages, let alone both, its order compelling the identification of Aeschylus was legal error.

5. Balance the Equities.

After the Court has satisfied itself that each poster has made at least one statement that is actionable,

the final factor to consider in balancing the need for confidentiality

> versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
> *Missouri ex rel. Classic III v. Ely*, 954 SW2d 650, 659 (MoApp 1997).

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

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite v. Doe*, 342 NJSuper. 134, 141-142, 775 A2d 756, 760-761 (AppDiv 2001).

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no basis to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F2d 583, 597 (CA1 1980); *Southwell v. Southern Poverty Law Center*,

949 FSupp 1303, 1311 (WDMich 1996). The requirement that there be sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction – and not even a preliminary one at that – and denial of a motion to identify the defendant does not compel dismissal of the complaint, but only defers the ultimate disposition of the case. Therefore, plaintiff's contention below, A113, that the effect of defendant's argument against being identified would be to deny it the opportunity to have its day in court, is erroneous.

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to a motion to dismiss or a motion for summary judgment. At the very least, the plaintiff retains the opportunity to renew its motion after submitting more evidence. And because the case has not been dismissed, the plaintiff can pursue discovery from third parties and possibly from the anonymous defendant, as it attempts to develop sufficient evidence to warrant an

order identifying the speaker.

However, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 US 347, 373-374 (1976).

On the other side of the balance, the Court should consider the strength of the plaintiff's case, and its interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations and their propensity to cause significant damage to the plaintiff. In this case, there was at best a theoretical claim of harm and a theoretical claim of illegality with respect to a proxy contest that never happened. There appears to be little weight to be placed on Equidyne's side of the scales, too little to warrant holding that Aeschylus' right to maintain his anonymity should be denied.

* * *

The principal advantage of the *Dendrite* test is its flexibility. It attempts to balance the relative interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong, and provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of victims to be compensated for their losses. It ensures

that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice, while at the same time ensuring that persons with legitimate reasons for speaking anonymously, while making measured criticisms, will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging the filing of unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed seeking to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic. Consequently, many lawyers advised their clients to bring such cases without being serious about pursuing a claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's have reported some staggering statistics about the number of subpoenas they received – AOL's amicus brief in the *Melvin* case reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! told one judge at a hearing in California Superior Court that it had received "thousands" of such subpoenas.

Although we have no firm numbers, Public Citizen's experience leads us to believe that the number of civil suits currently being filed to identify online speakers has dropped dramatically from the earlier figures. We credit the decisions in *Dendrite*, *2TheMart.com*, *Seescandy* and other cases that have adopted strict legal and

evidentiary standards for defendant identification with sending a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these lawsuits, to the occasional libel verdict against originally anonymous defendants, as well as the fact that many online speakers have been identified in cases that meet the *Dendrite* standards (indeed, two of the Doe defendants in *Dendrite* were identified), has discouraged some would-be posters from the sort of Wild West atmosphere that originally encouraged the more egregious examples of online illegality. We urge the Court to preserve this balance by adopting the *Dendrite* test that balances the interests of defamation plaintiffs to vindicate their reputations in meritorious cases against the right of Internet speaker defendants to maintain their anonymity when their speech is not actionable.

CONCLUSION

The decision below should be vacated, and the case should be remanded to the trial court for further proceedings.

Respectfully submitted,

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