CIRCUIT COURT OF BUCKINGHAM COUNTY, VIRGINIA

THOMAS L. GARRETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CL08000197-00
	)	
BETTER PUBLICATIONS, LLC, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF WALDO JAQUITH IN OPPOSITION TO MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

Statement of the Case.. 1

I. THE DOCUMENTS SOUGHT ARE IRRELEVANT TO THE ISSUES IN THE CASE..5

II. THE QUALIFIED PRIVILEGE FOR JOURNALISTS PROTECTS AGAINST THE DISCLOSURES THAT PLAINTIFF SEEKS.. 8

III. THE FIRST AMENDMENT CREATES A QUALIFIED PRIVILEGE AGAINST DISCOVERY FOR ANONYMOUS INTERNET SPEAKERS... 11

IV. PLAINTIFF'S ARGUMENTS IN SUPPORT OF ITS REQUESTED DISCOVERY DO NOT SATISFY THE TEST FOR BREACHING THE QUALIFIED PRIVILEGES THAT PROTECT JOURNALISTS AND/OR ANONYMOUS SPEAKERS.. 17

V. MANY OF THE EMAILS ARE PROTECTED BY THE ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES. 19

Conclusion. 20

STATEMENT OF THE CASE

Local celebrity Thomas Garrett has sued the publisher of "*The Hook*" and two reporters who allegedly defamed Garrett through articles written in February 2007 and February and April 2008, about criminal charges against Garrett. Garrett runs a public relations firm for Hollywood stars, has written a book and hosted radio and television programs, and put himself in the public eye by filing a sensational lawsuit accusing a local funeral director of both racist and outrageous conduct. Garrett is a public figure; his activities are a worthy subject of journalistic coverage and public comment.

The day after Garrett sued *The Hook*, a story about the lawsuit appeared in the December 23, 2008 edition of *The Daily Progress*, a Charlottesville newspaper. Waldo Jaquith followed up on the *Daily Progress* story with a story of his own on his blog, *cvillenews.com.* *cvillenews.com* is an online periodical, with new articles appearing several times each week, that focuses on news occurring in and near Charlottesville. The periodical appears online in typical blog format, with the most recent posting at the top, and the stories then descending in reverse chronological order. Many of the articles begin by noting that a particular story has been addressed in a local print publication, such as *The Daily Progress* or *The Hook*, adding facts obtained by Jaquith by interviewing the protagonists or by obtaining or reviewing additional documents and sources; Jaquith also includes his personal analysis of the situation. Jaquith Affidavit ¶ 4. Some of the investigative articles on the blog have had significant impact on public issues. For example, following up on a fact that first appeared in the comment section of his blog, a two-part series revealed that the "state climatologist" was not, in fact, filling that function, leading to his precipitous retirement. *Id.* ¶ 5.

Like many other news web sites, Jaquith's news site allows readers to discuss the story, adding their own observations. Frequently the posts include useful new facts, insights and analysis, and a discussion may ensue, which Jaquith will often join. The comment feature increases the extent

of community interest in his news blog, as well as providing him with useful information that he can use both to inform his coverage of that story and to provide ideas for future stories. Jaquith believes that many Internet users post on his web site – and view his site – expecting to remain anonymous, and that if he cannot protect their anonymity, he will lose readers and commenters. The comment feature on each article automatically turns off 21 days after the article first appears. *Id.* ¶ 6.

No registration is required to post a comment, but each poster is required to provide an email address and a name. Some posters provide what purports to be a real name, and some provide what is plainly a pseudonym. Posters are also permitted to provide a URL for their own blogs, and it appears that a number of posters are local bloggers. Jaquith does nothing to verify that either the email address or the name is accurate, however. Each comment is displayed with the date and time of the posting, and the poster's name. *Id.* ¶ 7. In response to the subpoena to identify the posters, Jaquith would be able to provide the Internet Protocol ("IP") addresses recorded in the datebase on his web site, which show the computers that each poster was using to gain access to the Internet at the time he or she visited Jaquith's site (the date and time he could provide for each post already appear on the blog), as well as the email address provided when posting.[1] Some IP addresses could themselves reveal the identity of posters, because occasionally Internet users use "static" IP addresses that do not change every time they are online. More commonly, Internet users gain access

[1]Jaquith cannot, however, provide IP addresses for visitors to his web site who only look at articles and do not post. Web servers can record such information, but he does not know whether the service that hosts his blog does record such data; if it does, he does not have the information. *Id.* ¶ 12. Accordingly, Jaquith does not have information responsive to ¶ 1(b) of the subpoena. If he did have such access, he would oppose the subpoena because it infringes his viewers' First Amendment right to read anonymously, which follow ineluctably from the constitutional right to receive information. *See Bd of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). If plaintiff seeks to subpoena the information from Jaquith's web host, he will intervene to protect that First Amendment right.

to the Internet (and hence have the ability to post comments) by using "dynamic" IP addresses that are assigned to them temporarily by their Internet Service Providers. Obtaining the IP address for such a poster is only the first step in gaining their true identity, because the discovering party must then send a subpoena to the ISP who controls that IP address, seeking records identifying the specific customer who was using that IP address at the specific date and time of the posting.[2] *Id.* ¶ 10.

Like most *cvillenews.com* articles, the article on the Garrett defamation action, entitled "*The Hook* Sued for Defamation," contained both original reporting, including a quotation from Hawes Spencer, the editor of *The Hook*, and a discussion of the legal and factual context, including earlier libel suits and Garrett's own web sites, as well as providing Jaquith's opinion about the lawsuit. Some 81 comments were posted about Jaquith's article. Several of the posters (for example, the first and second posters) identified themselves by providing links to their own blogs. Several posts expressed support for Garrett's position in the case, while others criticized him. Several of the posters criticized each other or criticized Jaquith. Pursuant to the normal practice, the comment feature was automatically disabled 21 days after it first appeared. *See* attachment to the subpoena.

On January 15, 2009, Garrett sent a subpoena to Jaquith demanding all documents that could be used to identify both all persons who posted comments on "*The Hook* Sued for Defamation" as well as all person who even **looked** at the article (subpoena ¶ 1); all written communications including emails relating to Jaquith's article on *cvillenews.com*, to comments on the article, to Garrett himself, to the defamation action against *The Hook*, or to any other blogs or articles about

[2] Sometimes it is impossible to identify the poster, because he or she uses an "anonymizer" to disguise the actual address from which the posting is made. For example, among the identities being subpoenaed in this case, Jaquith had noticed that there is a series of comments, all very favorable to Garrett, that appear to have been made using an anonymizer to make it impossible to identify the user(s). Jaquith Aff. ¶ 11.

those subjects (subpoena ¶ 2); documents "relating to information obtained, generated or created in writing the [*cvillenews.com*] article" (subpoena ¶ 3); and documents reflecting comments posted by Jaquith on web sites other than *cvillenews.com* (subpoena ¶ 4). Plaintiff sent a virtually identical subpoena to each defendant. Jaquith moved to quash the subpoena, arguing *pro se* that it infringed his First Amendment rights and the rights of his users and viewers, as well as violating a Virginia law, Va. Code § 8.01-407.1, creating special procedures for subpoenas identifying anonymous speakers who are alleged to have engaged in tortious speech violating the plaintiff's rights.[3]

Garrett has opposed that motion and filed a cross-motion to compel that makes several key concessions, which frame the arguments set forth in this memorandum. First, in response to Jaquith's arguments about the right of proposed defendants to remain anonymous unless the plaintiff makes out a prima facie case that their speech was wrongful, and to Jaquith's invocation of section 8.01-407.1, Garrett specifically disclaimed any assertion that he is entitled to identify the commenters so that he can file defamation actions against them. Indeed, in response to a call from Jaquith's lead counsel, Mr. Levy, Garrett's lead counsel, James Creekmore, agreed to stipulate that he would not file suit against any poster who is identified pursuant to his discovery unless that person is a member of *The Hook*'s staff. Indeed, Mr. Creekmore added that the only purpose of discovery is to determine whether the posters were associated with *The Hook*, and that he has no desire to identify any other poster. Levy Affidavit ¶ 2. Second, although much of Garrett's brief is devoted to sniping at supposed inaccuracies in Jaquith's *cvillenews.com* article, Garrett does not contend that he has any defamation claim against Jaquith, or that Jaquith's article has hurt his reputation. He argues only that is discovery is needed to show " malice" on the part of *Hook* staff

[3]Jaquith did not mention ¶ 4 of the subpoena because he does not have any such documents.

and the impact of *The Hook* articles on his reputation.

As we now show, however, this discovery is not only irrelevant to the issues in the litigation, but seeks disclosure that would violate the qualified First Amendment privileges protecting journalists and protecting the right to speak anonymously.[4]

I. THE DOCUMENTS SOUGHT ARE IRRELEVANT TO THE ISSUES IN THE CASE.

The requested recovery should be denied because the documents at issue are largely if not entirely irrelevant to the issues in the litigation between Garrett and *The Hook* and its two reporters.

First of all, the subpoena to Jaquith is recklessly overbroad, in ways that Garrett never deigns to explain in his motion to compel. Garrett has served almost identical subpoenas on the named defendants and on Jaquith – they are different largely because they identify different articles as the subject of the subpoena. Several things sought from Jaquith would seem relevant only if obtained from the defendants. For example, Garrett demands the notes and drafts for Jaquith's article about the lawsuit against *The Hook*, which might bear on Jaquith's editorial process and hence on whether he was aware of false facts, but Jaquith's editorial process is not an issue in the case. Nor does the motion to compel explain how this information is relevant to his case. Similarly, perhaps one could follow the rationale for seeking the IP addresses for readers of the stories alleged to be defamatory, on the theory that this might enable Garrett to interrogate the readers of the stories about how they perceived the story, or whether it changed their opinion about Garrett. This would raise difficult questions about the right of Internet **readers** to remain anonymous, but Jaquith's story is not alleged to be defamatory, so reader reaction to his story is absolutely irrelevant to the issues in this case.

[4]Apart from the electronic documents reflecting IP and email addresses for the anonymous posters to the blog, each of the documents being withheld, apart from documents exchanged between Jaquith and his undersigned counsel, is identified in the attached objections log.

Again, Garrett never explains why they **are** relevant. As Jaquith's affidavit reflects, he does not have either notes or drafts of his story or IP numbers of his blog's readers, but the overbreadth of the subpoena is telling.

The subpoena to identify the anonymous commenters is similarly and vastly overbroad, even under a simple test of relevance, because many of the posts either do not reflect an adverse opinion of Garrett, or simply comment on the discussion about the subject of Jaquith's article without relating to Garrett at all. Indeed, a number of the posts reflect positive opinions about Garrett. Garrett has simply sent an overbroad subpoena rather than confining his discovery to the identification of the authors of posts that are consistent with his legal theory. Garrett's motion to compel should be denied in its entirety based on its vastly overbroad and oppressive nature.

The main stated purpose of the motion to compel identification of the anonymous commenters on the *cvillenews.com* blog, and to obtain Jaquith's communications with his sources, is to determine whether the staff for *The Hook* made statements hostile to Garrett which would, Garrett claims, show that they had a malicious attitude toward him. However, the question of whether defendants bore him ill-will is at best tangential to this case. Garrett is a limited-purpose public figure – according to his complaint, ¶¶ 8-9, he "enjoy[s] a burgeoning career as a publicist, talent agent, author, editor, actor, and radio personality," and recently "made his national television debut." News organizations have covered his activities, not least because he was a defendant in connection with criminal charges. In addition, he holds himself out to the public as a publicist for Hollywood personalities. Garrett was fundamentally involved in the controversy that gave rise to his defamation claim. *The Hook* reported on his criminal charges, reported on past litigation that focuses the public eye on Garrett, and subsequently commented on the accuracies of his self-aggrandizement. Garrett responded with a lawsuit.

As a public figure, Garrett cannot recover for defamation unless he shows that each allegedly defamatory statements was made with "'actual malice,' meaning that it was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Hatfill v. The New York Times Co.*, 532 F.3d 312, 317 (4th Cir. 2008), citing *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964). It appears that Garrett is seeking discovery about other things that the defendants – or other members of the staff of *The Hook* – have said about him in order to establish that they are guilty of "common law malice" which includes not only "knowledge of falsity or reckless indifference to falsity . . . but also matters related to the speaker's motive and mental state," such as "some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff." *Great Coastal Exp. v. Ellington*, 230 Va. 142, 150, 334 S.E.2d 846, 851 (Va. 1985). But although evidence of motive can conceivably bear some relation to the actual malice inquiry, "proof of a media defendant's ill will toward a public figure plaintiff is, without more, insufficient to establish knowledge of falsity or reckless disregard for the truth." *Jackson v. Hartig*, 274 Va. 219, 231, 645 S.E.2d 303, 310 (Va. 2007)

Second, even if other statements by the named defendants were relevant to the liability of those defendants, that does not justify discovery seeking to obtain statements by other staff members of *The Hook*. Even **if** other staff at *The Hook* resented the suit filed against their paper and their fellow reporters, and hence made unflattering comments about Garrett on Jaquith's blog nine months or more after the last of the allegedly defamatory articles, the fact that they made such comments has no logical bearing on the mental state of the two named defendants, the reporters who wrote stories about Garrett, at the time they wrote those articles. Nor can statements by *Hook* staffers who were not assigned to work on the Garrett stories, or the mental state of such staffers, be attributed to *The Hook* itself. This plain irrelevance is heightened by Garrett's acknowledgment that he is seeking

discovery from Jaquith instead of demanding access to emails on the computer system of defendant Better Publications because he want to find out anything that staff members of *The Hook* may have written on their own time. Neither *The Hook* nor the defendant authors bear responsibility for what other *Hook* employees may have thought or said about Garrett on their own time.

A second reason given by Garrett for his discovery – this time confined to his efforts to identify the anonymous commenters on Jaquith's blog – is to ascertain whether the allegedly defamatory articles injured his reputation. Garrett never explains, however, why he needs to know the names of the posters in order to obtain this information. To the extent that some of the comments reflect that the posters believed the facts set forth in accused articles, Garrett can rely on that evidence of impact on reputation without knowing who wrote them.

II. THE QUALIFIED PRIVILEGE FOR JOURNALISTS PROTECTS AGAINST THE DISCLOSURES THAT PLAINTIFF SEEKS.

Virginia courts recognize a qualified reporter's privilege, as "an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment." *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431 (1974); *Clemente v. Clemente*, 56 Va. Cir. 530, 2001 WL 1486150 (Arlington Cy. Nov. 9, 2001). (A similar privilege should be recognized under Article 1, Section 12 of the Virginia Constitution). As set forth in detail in the defendants' Motion to Quash, the privilege applies to both confidential and non-confidential information relating to a reporter's news-gathering function. *E.g.*, *Church of Scientology v. Daniels,* 992 F2d 1329, 1335 (4th Cir. 1993); *Hatfill v. New York Times Co.*, 242 F.R.D. 353, 356-357 (E.D. Va. 2006). In the only cases of which we are aware, the reporter's privilege (or shield law) has been applied to the identity of anonymous commenters on a message board attached to the reporter's articles. *Beal v. Calobrisi*, Case No. 08-CA-1075 (Fla. Cir. Okaloosa Cy., Oct. 9, 2008); *Doe v. TS*, Case No.

08036093 (Ore. Cir. Clackamas Cy., Sept. 30, 2008) (copy attached); *Doty v. Molnar*, No. DV 07-022 (Mont. Dist. Yellowstone Cy., Sept. 3, 2008) (transcript attached).

Waldo Jaquith may assert the reporter's privilege because he engages in the traditional journalistic functions of gathering information on matters of public concern and disseminating them to the public. The Supreme Court has recognized that "liberty of the press is the right of the lonely pamphleteer just as much as the large, metropolitan publisher," *Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972), and courts have declined to limit the reporter's privilege to the regular employees of major news organizations. Rather, "an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press," *von Bulow v. von Bulow*, 811 F.2d 136, 142 (1987), so long as "the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation." *Id.* at 143. *Accord In re Madde*n, 151 F.3d 125, 129-30 (3d Cir. 1998).

Consistent with this functional understanding of journalism, courts have applied the reporter's privilege to nontraditional journalists engaged in newsgathering. *See, e.g.*, *Silkwood v. Kerr-McGee*, 563 F.2d 433, 436 (10th Cir. 1977) (applying the privilege to a documentary filmmaker); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (author of book about a family feud over ownership of a company); *Alexander v. FBI*, 186 F.R.D. 21, 50 (D.D.C. 1998) (former presidential aide gathering information for a book); *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (academic involved in pre-publication research); *In re Petroleum Products Antitrust Litigation,* 680 F.2d 5 (2d Cir. 1982) (trade newsletter compiling oil prices);*United States v. Garde*, 673 F. Supp. 604 (D.D.C. 1987) (non-profit organization could conceal names of whistleblowers).

More recently, courts have recognized that the reporter's privilege extends to bloggers and

website operators like to Jaquith. For example, *Blumenthal v. Drudge*, 186 FRD 236 (DDC 1999), applied the reporter's privilege to the blog "The Drudge Report," which the court had characterized in a prior opinion as "a gossip column focusing on gossip from Hollywood and Washington, D.C." *Blumenthal v. Drudge*, 992 F. Supp. 44 (DDC 1998).

In *O'Grady v. Superior Court*, 139 Cal. App.4th 1423, 44 Cal. Rptr.3d 72 (2006), the court applied both California's statutory privilege and the constitutional reporter's privilege to bloggers who published information about forthcoming Apple computer products against subpoenas by Apple. The court rejected the view that the bloggers "were engaged not in 'legitimate journalism or news,' but only in 'trade secret misappropriation' and copyright violations." 97 Cal. Rptr 3d at 97.

The court further decided that the bloggers were engaged in "legitimate newsgathering" even when they "merely reprinted 'verbatim copies' of Apple's internal information while exercising 'no editorial oversight at all.'" *Id.* The court found that there was no rationale for "[t]he primacy Apple would grant to editorial function," and that, in any case, "an absence of editorial judgment cannot be inferred merely from the fact that some source material is published verbatim." *Id.*

> We decline the implicit invitation to embroil ourselves in questions of what constitutes "legitimate journalis[m]." The shield law is intended to protect the gathering and dissemination of news, and that is what petitioners did here. We can think of no workable test or principle that would distinguish "legitimate" from "illegitimate" news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.
>
> 139 Cal. App.4th at 1457, 44 Cal. Rptr.3d at 97.

Waldo Jaquith unquestionably engages in "activities traditionally associated with the gathering and dissemination of news." His articles not only provide quotations and links to articles in other publications, but original material obtained from interviews or other sources, as well as

original analysis and opinion. Jaquith Aff. ¶ 3. In the best traditions of a free press, his investigative reporting has uncovered governmental wrongdoing and resulted in corrective action. Jaquith Aff. ¶ 5. The article at issue here, "*The Hook* Sued for Defamation," included a factual description of the case, a quotation from the editor of *The Hook* as well as an analysis of the case in relation to other defamation cases. The reporter's privilege is consistently applied to journalistic coverage of litigation. *Ashcraft v. Conoco*, 218 F.3d 282, 285 (4th Cir. 2000). Like several other articles on *cvillenews.com*, the article criticized a different publication, *The Daily Progress,* for its faulty coverage of the litigation, which is another classic journalistic function. In an era when an increasing amount of news coverage can exclusively be found online, and when even traditional newspapers like the *Christian Science Monitor* are moving to an exclusively online publication, there is no basis for drawing an artificial line confining the reporter's privilege to print and broadcast publications while excluding bloggers like Jaquith.

The qualified reporter's privilege requires the plaintiff to meet each of the following three prongs of the test: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986); *Clemente v. Clemente*, *supra*. As shown in the final section of this brief, Garrett has not met any of the prongs here.

III. THE FIRST AMENDMENT CREATES A QUALIFIED PRIVILEGE AGAINST DISCOVERY FOR ANONYMOUS INTERNET SPEAKERS

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960); *Green v. City of Raleigh*, 523 F.3d 293,

301 (4th Cir. 2008); *Jaynes v. Commonwealth*, 276 Va. 443, 461, 666 S.E.2d 303, 312-13 (2008). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers. The Supreme Court has stated:

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

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

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Many courts have expressly upheld the right to communicate anonymously through Internet blogs, message boards and emails.[5]

---

[5] *Independent Newspapers v. Brodie*, — A.2d —, 2009 WL 484956 (Feb. 27, 2009); *Sinclair v. TubeSockTedD*, — F. Supp.2d —, 2009 WL 320408 (DDC Feb. 10, 2009); *Quixtar v. Signature Management Team*, 566 F. Supp.2d 1205 (D. Nev. 2008); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal.App. 6 Dist. 2008), *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006*)*; *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Sony*

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 their 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.

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 to 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, if saved by the recipient, provides the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. As a result, many observers argue that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

Music Entertainment v. Does 1-40, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *In re 2TheMart.com, Inc. Securities Litigation*, 140 F. Supp.2d 1088 (W.D. Wash. 2001); *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); *Melvin v. Doe*, 49 PaD&C4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003); *In re Subpoena Duces Tecum to AOL*, 52 Va. Cir. 26, 2000 WL 1210372 (2000), *rev'd on other grounds sub nom. AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (Va.2001).

A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524. As the Supreme 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 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). Article 1, Section 12 of the Virginia Constitution should similarly be construed to protect that right.

As a court said in quashing a subpoena to identify anonymous Internet speakers whose identities were sought in a shareholder derivative suit, "If Internet users could be stripped of that

anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). Other courts endorse this analysis. The court in *Quixtar Mgmt.* said, "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. To fail to protect anonymity is, therefore, to chill speech." 566 F. Supp.2d at 1214 (punctuation omitted). And the Delaware Supreme Court said in *Doe v. Cahill*,

> We are concerned that setting the standard [for deciding whether to allow discovery to identify anonymous Internet speakers] too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes.. . . After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.
>
> 884 A.2d at 457

The Arizona Court of Appeals similarly expressed concern about setting the standard for identifying anonymous speakers too low. *Mobilisa v. Doe*, 217 Ariz. at 111, 170 P.3d at 720. *Accord Independent Newspapers v. Brodie*, — A.2d —, 2009 WL 484956 (Md. Feb. 27, 2009), at *19.

Most anonymous free speech cases have addressed the issue in the context of subpoenas to identify Doe defendants so that they can be served as defendants – in those cases, the consensus standard holds that the necessary "compelling interest" and "narrow tailoring" requirements are met if the plaintiff shows both that he has a legally valid cause of action against each such anonymous posters and that he has enough evidence to establish a prima facie case against each. Plaintiff has

sought to avoid meeting **that** standard – as well as the procedural requirements set forth in Va. Code § 8.01-407.1 — by stipulating that he does not seek his discovery for the purpose of identifying any potential additional defendants, with the possible exception of **other** *Hook* staff members. (To the extent that the discovery does seek to identify additional defendants, the *Dendrite* / *Cahill* standard as well as section 8.10-407.1 would apply, and plaintiff has simply not met that standard).

In other cases, parties have sought discovery identifying anonymous posters for the purpose of obtaining additional evidence to use against the existing parties. In those cases, the courts have borrowed from the rich vein of case law governing compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In those cases, as discussed in the previous section of this brief, courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of his case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of his case.[6] Accordingly, in both *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001), and *Enterline v. Pocono Medical Center*, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008), the courts applied the three-part standard to decide whether to allow discovery identifying anonymous Internet posters as potential witnesses.[7]

---

[6]*Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Clemente v. Clemente*, 56 Va. Cir. 530, 2001 WL 1486150 (Va.Cir.Ct.).

[7]Jaquith unquestionably has standing to represent the First Amendment rights of those who post on his web site. The courts generally recognize the standing of an operator of a service that allows members of the public to engage in anonymous speech to protect those speakers' rights. For

As shown in the last part of this brief, plaintiff does not come close to meeting this standard.

IV. PLAINTIFF'S ARGUMENTS IN SUPPORT OF ITS REQUESTED DISCOVERY DO NOT SATISFY THE TEST FOR BREACHING THE QUALIFIED PRIVILEGES THAT PROTECT JOURNALISTS AND/OR ANONYMOUS SPEAKERS.

Garrett's expressed reasons for seeking Jaquith's emails with sources and identifying information about each of the anonymous posters who commented on the article do not surmount the qualified privilege against disclosure.

First, as argued above in Section I of this brief, Garrett's demand for discovery does not even meet the ordinary test for relevance, for several reasons. First, because he is a public figure, Garrett will have to prove that the defendants wrote false things about him with actual malice – that is, knowledge of falsity or reckless disregard of probable falsity – but none of the posted comments suggests that the posters believed that statements in the accused articles in *The Hook* were false. Certainly, none of the withheld emails shows any such knowledge on the part of authors of the emails. Instead, Garrett seeks to show that the authors of the anonymous comments bore ill will toward him, but such ill will would relate at most to common law malice. Second, although Garrett claims that he needs to find out whether employees of *The Hook* who are **not** named as defendants (and who were not involved in writing the articles) have said mean things about him, the mental state of such non-defendants when posting in December 2008 and January 2009 has no bearing on the mental state of the authors of the articles as of February 2007, February 2008, or April 2008. Third,

---

example, the Virginia Supreme Court allowed AOL to seek to protect the First Amendment rights of the user whose identity was subpoenaed in *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (Va.2001). In this case, Jaquith explains in his affidavit, ¶ 6, how his interests would be adversely affected by an order stripping his anonymous posters (and his email correspondents) of the right to remain anonymous. Moreover, given the fact that plaintiff seeks to identify the anonymous posters of more than 80 different comments, it is far more efficient to allow Jaquith – whose counsel are very experienced on the issue – to litigate the First Amendment issue.

although Garrett claims that he wants to identify anonymous posters to show that the accused articles hurt his reputation, in fact he does not need to know the names of the posters in order to be able to show that his reputation has suffered (if, indeed, it has). Fourth, many of the anonymous comments whose authors Garrett seeks to identify did not even express views about the truth or falsity of *The Hook*'s statements about Garrett, but simply expressed negative opinions about Garrett's decision to file a libel suit against a newspaper, or even expressed **positive** opinions about Garrett. At best Garrett's subpoena is vastly overbroad as a means of accomplishing his stated purposes.

Even if the Court concludes that some of the documents sought have some marginal value to Garrett's prosecution of the litigation, they certainly do not go to the heart of his case. None of the emails that Jaquith has withheld shows that anybody connected with *The Hook* entertained any doubts about the veracity of factual statements made in the articles. Although some of the anonymous commenters may have believed what they read about Garrett in *The Hook,* Garrett has not shown that he needs to identify anonymous Internet speakers in order to show that his reputation has suffered since *The Hook*'s articles were published. Presumably, Garrett filed his lawsuit alleging a diminution of his reputation because he already knew people who now have a lower opinion of him, and he should be expected to rely on **that** evidence instead of imposing a burden on the First Amendment rights of those who have dared to criticize him publicly on Jaquith's blog.

Moreover, Garrett has not met the test of showing that he has exhausted alternate means of proving the facts that he claims the subpoenaed document are intended to prove. He claims that the only purpose of identifying anonymous posters is that he suspects that **some** of them may be staffers of *The Hook* about whose mental state he is legally entitled to inquire. But in order to obtain the limited information, Garrett proposes to breach the right of all the other posters to speak anonymously. Assuming that there is a limited number of *Hook* staff members whose online

postings he is trying to obtain, there is no reason why he cannot seek discovery directly from those staff members, first by taking depositions of the named defendants, and by obtaining access to work computers controlled by the defendants, and then by taking the depositions of other *Hook* staff members, and inspecting **their** computers (assuming that he can persuade the Court that the mental state of specific staff members other than the named defendants is relevant). But we are advised that Garrett has yet to take a single deposition, even of the named defendants, and has yet to obtain production of documents (or inspection of computers, if justified) from the named defendants. Until he completes such discovery, he has no basis to disturb the First Amendment rights of anonymous posters, even if he satisfies the Court that such evidence is relevant and goes to the heart of his case.

Also relevant in the calculus of burdens versus benefits is the fact that Garrett seeks discovery, not from a journalist who is a named defendant in the libel litigation, but from a third-party journalist who has simply reported on the controversy involving the journalist defendants. Courts grant third-party discovery targets greater protection from burdens on their privacy than defendants whose incentive to resist discovery might be to protect themselves against liability. *O'Grady v. Superior Court*, 139 Cal. App.4th 1423 (Cal. App. 2006), *citing Mitchell v. Superior Court,* 37 Cal.3d 268, 279, 690 P.2d 625 (1984); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998). Because Garrett is not suing Jaquith, but only seeking to obtain discovery from Jaquith for use in imposing liability on *The Hook*, Jaquith is entitled to more protection from imposition on his sources and his anonymous commenters.

V. MANY OF THE EMAILS ARE PROTECTED BY THE ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES.

Finally, most of the emails that refer to this litigation or to Garrett are being withheld because they represent trial preparation materials protected by the work product doctrine, and/or because they

reflect communications in which Jaquith sought and received legal advice. With the exception of emails that Jaquith has exchanged with his attorneys listed below, these emails are listed in the accompanying privilege log. Jaquith claims the privilege for lawyers whom he consulted for their legal advice without ultimately retaining them to represent him in this litigation. *Grand Jury Proceedings Under Seal v. United States,* 947 F.2d 1188, 1190 (4th Cir. 1991). He also claims the work product privilege for his lawyers' communications with him about the case. Because the work product privilege extends to documents created by non-lawyers in anticipation of litigation, *Duplan Corp. v. Deering Milliken,* 540 F.2d 1212, 1219 (4th Cir. 1976), he also claims the work product privilege for his communications with friends and colleagues in the course of thinking through his response to the subpoena, as well as communications with a law student who offered her assistance in opposing the subpoena.[8]

CONCLUSION

The motion to compel compliance with the subpoena should be denied.

Respectfully submitted,

Rebecca K. Glenberg
VSB # 44099
ACLU of Virginia
Suite 310
530 E. Main Street
Richmond, VA 23219
(804) 644-8080

J. Joshua Wheeler
VSB # 36934
The Thomas Jefferson Center
for The Protection of Free
Expression
400 Worrell Drive
Charlottesville, Virginia 22911
(434) 295-4784

Paul Alan Levy
DC Bar 946400
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

March 5, 2009

[8]Like Federal Rule 26(b)(3), which was amended to apply expressly to **all** preparation materials prepared by or for a party, Wright Miller & Marcus, *Fed. Prac. & Proc.: Civil* 2d. § 2024, at 357-259 (1994), Virginia Supreme Court Rule 4:1(b)(3) also applies to preparation by nonlawyers.