IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND FOR
MIAMI, DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 99-22831 CA01

ERIC HVIDE,

Plaintiff,

vs.

JOHN DOES 1 through 8, persons presently unknown to Plaintiffs but whose true identities will be included in the amendments hereto when those identities are discovered,

Defendants,

_____/

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION AND
AMERICAN CIVIL LIBERTIES UNION OF FLORIDA

Introduction

This case presents novel issues of national importance. Amici, the American Civil Liberties Union and the American Civil Liberties Union of Florida, seek to address the difficult and important issues raised by defamation cases brought against anonymous Internet posters. Most of the defendants in this case are unrepresented and may not even know they have been sued. Amici offer this brief to be

of assistance to the Court as it addresses the issues presented by the motions of Ajusthefactsjack,@ Ainquizitrl1,@ and Ainquiziter1" to quash the subpoenas issued by Plaintiff. The instant case requires the Court to carefully accommodate both the state=s interest in protecting Plaintiff=s reputation and Defendants= First Amendment right to speak anonymously. Amici therefore suggest that if a Complaint is filed that is facially sufficient, the Court should do the following. First, the Court should not enforce any subpoena that would disclose Defendants= identity until Defendants have received notice of the Complaint and subpoena. Second, the Court should structure the case in order to balance the Plaintiff=s right to proceed with Defendants= right to communicate anonymously. Specifically, the Court should require the Plaintiff to litigate those issues that can be resolved without disclosure of Defendant=s identity prior to ordering disclosure. Finally, amici suggest that the Court should require Plaintiff to establish that he has suffered actual, financial damages before breaching Defendants= anonymity.

Interest of Amici

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of individual liberty embodied in the Bill of Rights. The ACLU of Florida is a state affiliate of the ACLU.

The ACLU and the ACLU of Florida maintain a strong and abiding interest in defending citizens= fundamental civil liberties from unconstitutional and unwarranted governmental intrusion. This case raises constitutional issues that are of central importance to the ACLU and its affiliates. The ACLU and its affiliates have been involved in virtually all of the leading Internet free speech cases including ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), aff=d, 521 U.S. 844 (1997) and ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997).

Movant has consented to the filing of this Brief. Plaintiff does not consent to the filing of this Brief.

Statement of Facts and Statement of the Case

Amici have no independent knowledge of the facts of this case. Amici rely entirely on the pleadings and motions previously filed.[1]

Yahoo!, Inc. (Yahoo!) maintains a number of computer bulletin boards at its Internet site. Anyone with Internet access may access these bulletin boards, read the messages that have been posted there, and post a message of his or her own. There are literally hundreds of thousands of bulletin boards accessible on the Internet including those offered by Yahoo!. Yahoo! follows standard procedure for Internet bulletin boards; each message identifies the person speaking by a self-designated

[1] Amici have received copies of the Complaint, September 29, 1999; Defendant John Doe=s Motion to Quash Plaintiff=s Subpoena to Yahoo! and Request for Protective Order, November 12, 1999 (along with attachments)(Mov.=s Mot. 1); Defendant John Doe=s Motion to Quash Plaintiff=s Subpoena to Yahoo! and Request for Protective Order, December 10, 1999 (along with attachments)(Mov.=s Mot. 2); Defendant John Doe=s Motion to Quash Plaintiff=s Subpoena to America Online and Request for Protective Order, December 23, 1999 (along with attachments)(Mov.=s Mot. 3); and Plaintiff=s Memorandum of Law in Opposition to Motion to Quash Subpoena to Yahoo! by Anonymous Movant Ajustthefactsjack,@ January 24, 2000 (along with attachments) (Pl.=s Mem.). Amici received a copy of Plaintiff=s Amended Complaint, dated February 17, 1999, early in the evening of the day before this Brief was filed.

screen name, which is rarely the person=s actual name. In addition, many individuals use more than one screen name. Thus, messages posted under two different screen names may have been posted by one individual. Similarly, it is possible for more than one person to post a message under a single screen name. See generally Miller , 977 F. Supp. 1228; Reno, 929 F. Supp. 824.

Plaintiff alleges that Defendants have posted messages about him on these bulletin boards. (Complaint && 4). Plaintiff further alleges that these messages have caused legally cognizable harm, for which he seeks compensatory and punitive damages. ((Complaint && 12-30). Because the people who posted the messages did so using screen names only, Plaintiff asserts that he does not know their actual identity. (Complaint && 2). Thus, he sued AJohn Does 1 through 8" rather than any specific person.

Strikingly, the Complaint does not identify the screen names of all of the people alleged to have posted defamatory messages.[2] The Complaint does not specify the bulletin board on which the postings were made.[3] The Complaint also does not identify the specific postings which Plaintiff believes to be legally cognizable. Indeed, it does not identify a single specific statement uttered by a single person.[4] Instead, the Complaint merely asserts, in a conclusory fashion, that there were Anumerous false and defamatory statements messages@ (sic) and lists five categories of allegedly defamatory messages, such as Afalse statements indicating that Hvide is unfit to work at his place of business.@ (Complaint && 3,

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[2] There are eight defendants; only two screen names, AThe 1 Quiz@ and Ambfna,@ are mentioned in the Complaint. (Complaint && 3).

[3] In Plaintiff=s response to the Motion to Quash, he indicated that the board is a Yahoo! message board Afor HVIDE Marine (AHMAR@).@ (Pl.=s Mem. && 3-4).

[4] The Amended Complaint does contain some specific statements, but continues to have the same deficits as the original Complaint discussed above. For discussion of the deficits in the Amended

6). The Complaint does not link any specific statement to any screen name or any person. Thus, it is not possible from the face of the Complaint for any person (except those two specifically identified) to know if he or she is intended to be named as a defendant or to know what speech the Plaintiff believes is legally cognizable.[5] It is also not possible from the face of the Complaint for any person to know if he or she might have a defense to the Complaint, such as that the statements were true or were constitutionally protected opinion.

After filing the Complaint, Plaintiff served a number of subpoenas to Yahoo! and America Online (AOL) in an effort to determine the identity of persons who posted information about Plaintiff on the Internet. There appear to have been anywhere from 4 to 11 subpoenas:

1. On September 29, 1999, Plaintiff issued a subpoena directed at Yahoo! seeking information about AThe 1 Quiz@ and Ambfna.@ The papers submitted do not indicate whether the people who use those screen names received any notice of the subpoena or whether Yahoo! has disclosed any information about those individual(s).[6]

Complaint, see footnote 9, infra.

[5] It is not clear whether Plaintiff intends Ajustthefactsjack@ to be a defendant or a witness. (Pl.=s Mem. & 13).

[6] Because an individual can use more than one screen name, these two screen names may

represent one, two, or more individuals. Indeed, it appears that in this case more than one person used the screen name AThe 1 Quiz@ mentioned in the Amended Complaint. See Attachment to Amended Complaint at 3.

2. On October 25, 1999, Plaintiff issued a subpoena directed at Yahoo! seeking information about eight screen names, including Ajustthefactsjack@ but not including the two mentioned in the first subpoena. A person who alleges he used the screen name Ajustthefactsjack,@ has specially appeared and moved to quash this subpoena. Yahoo! apparently has not turned over information about the other seven screen names pending disposition of the motion. (Letter from Elizabeth Banker to David Harris of 12/10/99;[7] Pl.=s Mem. & 6). The papers submitted do not indicate whether any individual (other than Movant) who has used any of the screen names has received notice of the subpoena.

3. On November 22, 1999, Plaintiff issued a subpoena(s) directed at Yahoo! seeking information about from one to eight screen names. It is clear a subpoena was issued on this date seeking information about Ajustthefactsjack,@ but is not clear whether the other screen names (or yet additional screen names) were also the subject of separate subpoenas. Again, it appears Yahoo! has not turned over information pending disposition of the motion. (Letter from Elizabeth Banker to David Harris of 12/10/99). The papers do not indicate whether any individual (other than Movant) who has used any of the screen names has received notice of the subpoena(s).

4. On December 7, 1999, Plaintiff issued a subpoena directed at AOL seeking information about two additional screen names, not identified in any prior subpoena. One of those screen names may or may not be an alternate screen name for Ajustthefactsjack.@ The same counsel who represents Ajustthefactsjack@ has filed a Motion to Quash the AOL subpoena on behalf of the people who hold the screen names Ainquizitrl1" and Ainquiziter1." The record does not reflect whether these are the screen

[7] The letter from Yahoo!=s counsel identifies the case as Hvide v. John Does 1-50. This is apparently an error.

names of two additional individuals, additional screen names for Ajustthefactsjack,@ or some other possible variation. It appears that AOL has not turned over the information pending disposition of the motion. (Letter from Patrick Carome to David Harris of 12/23/99). The papers do not indicate whether any individual (other than Movant) who has used any of the screen names has received notice of the subpoena.

The Court initially heard argument on the motions to quash on Tuesday, January 25, 2000. The Court has set the motions for reargument on Thursday, February 24, 2000.

Summary of Argument

Suits for defamation (or similar causes of action) against anonymous or pseudonymous Internet posters present unique and novel issues of law. In order to resolve those issues, courts must consider two major values: the First Amendment right to speak anonymously on the Internet and the state=s interest in protecting citizens from defamatory communications in this important new medium of communication.

The Internet embodies the First Amendment ideal of a Amarketplace of ideas.@ The Internet gives ordinary citizens inexpensive access to a medium of mass communication, allowing them to speak directly Ato an audience larger and more diverse than any the Framers could have imagined.@ ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999). The Internet has developed distinctive conventions of communication that foster Auninhibited, robust and wide-open@ debate. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Many speakers employ pseudonymous Ascreen names@ online. The widespread use of pseudonyms forces the audience to evaluate a speaker=s ideas based solely on content; it also permits Internet users to experiment with controversial and unpopular ideas. In addition,

different Internet discussion fora tend to develop specific conventions governing the tenor and tone of discussion. Discourse on financial message boards, for example, tends to resemble informal spoken conversation more than it does formal written communications, and anyone who regularly frequents the message boards learns to interpret what is posted accordingly. The Internet also gives users a unique right to reply to speech on the Internet they believe to be wrong or defamatory. A bulletin board user can promptly post a reply to an objectionable posting and, in many (though by no means all) cases, the reply will reach the exact audience that read the initial posting. These unique features of the Internet suggest that defamation law should be applied carefully to Internet communications, lest the threat of being held liable for defamation chills Internet users from engaging in the types of spirited discussions that have become the norm.

In determining what rules to apply to Internet defamation, the Court also must weigh the potentially chilling effect of any rule that would allow breach of the constitutional right to speak anonymously without notice and without any showing of need or merit. Traditional defamation cases typically involve speakers whose identity is readily ascertainable. In contrast, Internet defamation cases, or at least those that involve interactive fora such as bulletin boards, typically involve anonymous speakers. The Supreme Court has recently reaffirmed the constitutional right to speak anonymously, see McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342 (1995), and at least one federal court has recognized the importance of protecting anonymous speech in the Internet context. See Miller, 977 F. Supp. at 1231.

After weighing these values, amici believe that anonymity should be breached only when necessary. In this case, there are two deficiencies on the face of the Complaint that should cause the

Court to reject an attempt to breach anonymity. First, the Complaint does not have sufficient specificity to identify the persons sued (even by screen name) or the statements alleged to be defamatory. Second, the Complaint does not establish that this Court has jurisdiction. Until those deficiencies are cured, the Court ought not take an action that breaches anonymity.

If a Complaint is filed that is facially sufficient in this case, amici suggest that the Court take the following steps to protect the Defendants= rights. First, to protect the Defendants= rights to procedural due process, the Court should not enforce any subpoena that would disclose Defendants= identity until each Defendant has received notice of the Complaint and the subpoena. Notice could be effected in at least two ways. The Court could order Plaintiff to provide notice by posting the relevant information on the online bulletin board that contained the allegedly offending statements, or by sending notice to e-mail addresses associated with the relevant screen names. In addition, the Court could order Yahoo! and AOL to notify the persons identified by the screen names listed in Plaintiff=s subpoena.

Second, the Court should structure the case in order to balance Plaintiff=s right to proceed with Defendants= right to communicate anonymously. For example, several issues in the case should be resolved without the need to breach Defendants= anonymity. The Court should require Plaintiff to litigate these issues before allowing disclosure of Defendants= identity. It is difficult to predict such issues without more specific information than Plaintiff has provided in the Complaint, but these issues may include the defense that Defendants= statements were constitutionally protected opinion, a defense that can be decided by the Court as a matter of law without regard to the identities of Defendants. In addition, amici argue that the Court should require Plaintiff to establish actual, financial damages before breaching Defendants= right to anonymity.

Argument

I. THE COURT SHOULD GRANT THE MOTIONS TO QUASH AND SUA SPONTE DISMISS THE COMPLAINT WITHOUT PREJUDICE OR REQUIRE THAT AN AMENDED COMPLAINT BE FILED.

A. The Complaint Is So Lacking in Specificity That the Court Should Dismiss It Sua Sponte or Require that An Amended Complaint Be Filed.

A complaint must plead the facts with sufficient specificity that a defendant can determine that he or she is being sued and the facts that form the basis for the action. Fla. R. Civ. P. 1.110(b)(2) (AA pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.@) (emphasis added) This Complaint fails in both respects. First, it is not possible for any individual to determine if he or she is a defendant in this case. Understandably, no actual persons are named. Less understandably, eight people are sued, but only two screen names are even mentioned. The bulletin board on which the allegedly offending messages were posted is not mentioned. Most disturbingly, the content of the allegedly offending messages is not reproduced. Thus, if a person who had posted information about Plaintiff anywhere on the Internet were to read this Complaint, there is no means by which that person could determine if he or she is a defendant.

Because the messages are not mentioned, or linked to any particular speaker, it is not possible for anyone to determine what postings have offended the Plaintiff.[8] If the person(s) who uses the screen names that are listed in the Complaint (or anyone else who suspects he or she might be a defendant)

[8] As far as the Complaint makes clear, Plaintiff may be alleging that all of the speakers on the bulletin board are liable for all of the postings, a form of collective responsibility unsupported by law.

posted more than one message, it would not be possible to determine whether Plaintiff is alleging that one or more of the messages were offensive. It would thus not be possible to determine if any defenses existed.[9]

[9] In the early evening prior to service of this Brief, amici learned that an Amended Complaint had been filed. Amici immediately obtained a copy of the Complaint dated February 17, 2000. That Complaint is more specific than the original Complaint discussed in the text. However, it suffers from the same fundamental problems. The Amended Complaint purports to sue 11 people (8 John Does and 3 identified screen names). One of the screen names identified in the original Complaint has been dropped from the Amended Complaint but remains the subject of a subpoena. It is not possible to tell if that person remains a possible defendant. Moreover, it appears that none of the subpoenas asked for information about one of the new screen names listed in the Amended Complaint. The Amended Complaint does not list the screen names for the 8 John Does or the messages they posted that are alleged to be actionable. Most of the screen names for which subpoenas have been issued are still not mentioned in the Complaint and their postings are not identified. It is still not possible for anyone other than the three listed screen names to know if they are defendants.

In Columbia Insurance Co. v. SEESCANDY, Inc., the court held that it would not breach the anonymity of an Internet poster without first requiring Plaintiff to show the adequacy of the Complaint. 185 F.R.D. 573, 578-80 (N.D. Cal 1999). A[P]laintiff should establish to the Court=s satisfaction that plaintiff=s suit against defendant could withstand a motion to dismiss. A conclusory pleading will never be sufficient to establish this element.@ Id.[10]

Because the Complaint is so lacking in specificity, it should be dismissed sua sponte or the Court should require that an adequate amended Complaint be filed.

B. The Court Should Dismiss the Complaint for Lack of Personal Jurisdiction.

This case must be dismissed if the Court lacks personal jurisdiction over Defendants. See Fla. R. Civ. P. 1.140(b)(2). The Complaint makes no allegations to establish that the Court has, or even that it could have, personal jurisdiction over Defendants. Based on the allegations of the Complaint, the only conceivable basis for personal jurisdiction is the mere posting of a message to an Internet bulletin board that is accessible in Dade County, Florida. The postings at issue in the case can be read by all Internet users worldwide, including those in Dade County, Florida. The overwhelming weight of authority holds that posting content on the Internet that is generally available to all Internet users is

[10] The SEESCANDY court also required the plaintiff to (1) Aidentify the missing party with sufficient specificity@ to allow determination of whether Adefendant is a real person or entity@; (2) Aidentify all previous steps taken to locate the elusive defendant@; and (3) Afile a request for discovery@ with the court, indicating, inter alia, the justification for the request. Id. at 578-80.

insufficient to establish personal jurisdiction over a defendant. See Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997), aff=g 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (A[C]reating a [web] site, like placing a product into the stream of commerce, may be felt nationwide - or even worldwide - but, without more, it is not an act purposefully directed toward the forum state@); Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999) (same); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) (same); Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (same); see also Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351 (3d DCA Fla. 1994)(holding that out-of-state defendant=s use of computer database physically located in Florida was insufficient to establish personal jurisdiction in Florida).

There is authority in Florida that would permit a party to file an action and then engage in discovery to establish jurisdiction. Gleneagle Ship Mgmt. Co. v. Leondakos, 602 So. 2d 1282 (Fla. 1992). However, in Gleneagle, the plaintiff had obtained service on the defendant and had alleged a basis for jurisdiction. Moreover, the defendant=s identity was known and the constitutional right of anonymous speech was not implicated. At the very least, this Court should refrain from permitting discovery to establish jurisdiction until the plaintiff proffers evidence to support the claim of personal jurisdiction. See, e.g., SEESCANDY.com, 185 F.R.D. at 578 (requiring plaintiff in action against anonymous online defendant to Aidentify the missing party with sufficient specificity such that the court can determine that defendant is a real person or entity who could be sued@ in order to Aensure that federal requirements of jurisdiction and justiciability are satisfied.@). If Plaintiff proffers sufficient evidence, the Court should then consider additional actions to protect Defendants= right to communicate anonymously while determining whether personal jurisdiction has been established over Defendants.

See *infra* at 22-31. For example, the Court could accept *in camera* evidence from Defendants to establish lack of personal jurisdiction without revealing Defendants= identity to Plaintiff.

II. THE COURT MUST CONSIDER THE VALUES IMPLICATED BY THE NOVEL CONTEXT OF THIS CASE.

A. The Nature of the Internet

The Internet promises to transform the First Amendment Amarketplace of ideas@ from ideal to reality. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (A[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.@); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (AIt is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .@). With a relatively small initial investment, any Internet user can bypass editors and publishers to speak directly to an audience of millions. Freedom of the press, as one court noted, is no longer Alimited to those who own one.@ Reno, 31 F. Supp. 2d at 476 (entering preliminary injunction against enforcement of 47 U.S.C. ' 231 of the Child Online Protection Act). The democratic nature of discussion on the Internet means that the Internet speakers need not win the approval of the mainstream media in order to be heard: Internet speakers are free to define for themselves what topics are worthy of discussion. Almost inevitably, therefore, Internet discussions tend to be more lively and free wheeling than discussions in the mainstream media, simply by the virtue of the fact they include more participants and more perspectives.

The democratic nature of Internet discussions is supported by the convention of anonymity. Most Internet speakers apply pseudonymous Ascreen names@ when discussing a topic on an Internet

bulletin board. The use of pseudonyms forces the audience to judge a speaker=s arguments based on the words alone rather than the identity of the speaker. It also allows Internet users to experiment with unpopular ideas or opinions and to speak freely without fear of retaliation in the Areal world.@

Bulletin board conventions governing tone and tenor of discussions also foster debate that is Auninhibited, robust, and wide-open.@ New York Times Co., 376 U.S. at 270. A financial board like the one at issue here is typically devoted to discussion of a particular company (in this case, Hvide Marine, which is listed by the ticker symbol AHMAR@). Discussion of factual information about the company and its management is common, but so too are idle speculation about its future stock price, random musings about its prospects, and even Aoff-topic@ trivia. See Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998) (noting the speculative nature of stock tips). Board discussion resembles informal spoken conversation more than formal written conversation, and speed and spontaneity are more important than precise factual accuracy. Indeed, speed and spontaneity are prized so much that grammar, spelling, and punctuation are often disregarded, and hyperbole, exaggeration, and other emotional rhetoric are as prevalent as (if not more prevalent than) rational deliberation. Any person who frequents the boards quickly learns to Aread between the lines@ to gauge a poster=s credibility and to ascertain the poster=s meaning, and any court seeking to determine the meaning of an allegedly defamatory posting must do the same.

In deciding how expansively to apply defamation law to the instant case, the Court should also consider a plaintiff=s Aself-help@ remedy. Internet bulletin boards provide an opportunity to test the free speech principle that the answer to speech with which we disagree is more speech. New York Times Co. v. Sullivan, 376 U.S. at 270 (>[T]he fitting remedy for evil counsels is good ones.@). Unlike

someone defamed in the Miami Herald, someone who disagrees with a bulletin board post can go onto the bulletin board and post a message disagreeing with or correcting the prior message. See Miami Herald v. Tornillo, 418 U.S. 241 (1974) (holding unconstitutional Florida=s Aright of reply@ law, which forced newspapers to give space to politicians to reply to criticism). Plaintiff in this case could go onto his company=s bulletin board and respond to Defendants= statements; such a response would likely reach virtually all of those who read the criticisms he found objectionable. This is especially true because financial boards devoted to a single corporation (like Yahoo!=s AHMAR@ board) are likely to have a limited number of repeat visitors, thereby increasing the chance that Plaintiff=s response would reach many, if not all, of the original readers. This self-help remedy is concededly imperfect: any message board user can instantly republish a defamatory message simply by forwarding it to a different discussion forum. Nonetheless, the existence of an immediate right to reply to any defamatory statements suggests courts should exercise caution in evaluating a plaintiff=s unsupported allegations that a defamatory posting caused him harm.

Courts also should be sensitive to the threat that breaching Defendants= anonymity will chill robust public discussion on the Internet. The democratic nature of the Internet means that unlike traditional media speakers, Internet speakers typically do not have professional training to judge the credibility of the information they post, editors to peruse their posts for problems, lawyers to advise them of the complexities of defamation law, or libel insurance to pay large judgments. If speakers face liability for casual remarks made on Internet bulletin boards, they are unlikely to hire counsel to review their speech before posting. Instead, they are likely to refrain from speaking entirely or to steer far away from any speech that might risk liability. See Frederick Schauer, Fear, Risk and the First

Amendment: Unraveling the AChilling Effect@, 58 B.U.L. Rev. 685, 693 (1978) (ADeterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should.@). Thus, liability in this context could easily chill speech, preventing the Abreathing space@ essential to the First Amendment. New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964)(A[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.@).

The potential chilling effect is magnified by the ease with which plaintiffs can bring a defamation action for any online criticism. In the last year and a half, plaintiffs have increasingly used the courts to seek to breach Internet anonymity. Eleanor Abreu, EPIC Blasts Yahoo for Identifying Posters, The Industry Standard, & 2 (Nov.10,1999) <http://www.thestandard.com/articles/display/0,1449,7564,00.html?02>; Bruce Keller and Peter Johnson, Online Anonymity: Who is John Doe, 5 BNA Electronic Com. and Law Rep. 70 (Jan. 10, 2000). As in this case, plaintiffs typically can make out a prima facie case for libel without any proof of financial harm. See Restatement (Second) of Torts ' 559 cmt. d (1977). Once a plaintiff files his complaint against anonymous John Does, it is a relatively simple matter to obtain a subpoena to have a web host such as Yahoo! or an Internet service provider (ISP) such as AOL turn over the names and addresses of the Doe defendant. Prior to responding to such a subpoena, web hosts and ISPs are not now required to provide any notice to a poster that someone is seeking information about him. Some ISPs provide notice as a matter of policy; some do not. Posters often do not have an opportunity to file a motion to intervene to prevent breach of their anonymity. If the ISP does comply with the subpoena, it will normally do so before any court has had an opportunity to review the matter to determine if it is

even facially sufficient. Thus, any party can potentially file a frivolous suit and use the court processes to breach the confidentiality of the speaker. Even if a plaintiff pursues his suit no farther, the person sued may have already surrendered important First Amendment rights.

The preceding discussion suggests courts must adapt defamation law to the unique nature of Internet discourse: the need for a remedy for defamation may be less compelling in the context of the Internet, and the danger of chilling robust participation may be greater. Courts also should be careful to prevent the misuse of court processes simply to breach online anonymity.

B. Anonymity

The First Amendment protects anonymous speech both in our society at large and on the Internet specifically. As described in the Supreme Court=s most recent anonymous speech case, McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), the United States has a strong tradition of anonymous speech in both literary and political contexts.[11] The Court cited Mark Twain (Samuel Langhorne Clemens), O. Henry (William Sydney Porter), and Benjamin Franklin as examples of famous literary figures who wrote under pseudonyms. 514 U.S. at 341 n. 4. In the political arena, the Court found the tradition of anonymity to be Amost famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed >Publius.=@ 514 U.S at 343

[11] The Supreme Court has long recognized the importance of anonymity. In Talley v. California, 362 U.S. 60, 65 (1960), the Court decided that a municipal ordinance preventing the distribution of handbills without the name and address of the author was void on its face, and stated, AIdentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.@ More generally, the Court added: AAnonymous pamphlets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.@ Id. at 64.

n.6. The Court noted that the Anti-Federalists also used pseudonyms, id, and that the tradition of anonymous political speech in America stretched back to Athe pre-Revolutionary War English pamphleteer, >Junius,= whose true identity remains a mystery.@ Id.

McIntyre struck down an Ohio law that prohibited the distribution of anonymous campaign literature, holding that the law encroached upon the First Amendment freedom to publish anonymously. See 514 U.S. at 342.The Court recognized that an author=s motive for speaking anonymously may be Afear of economic or official retaliation,@ Aconcern about social ostracism, or merely . . . a desire to preserve as much of one=s privacy as possible.@ Id. at 341-42. The Court nonetheless stated:

> Whatever the motivation may be, at least in the field of literary endeavor, 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.

Id. at 342; see also NAACP v. Alabama, 357 U.S. 449, 462 (1958) (holding that the NAACP could not be forced to disclose its membership list).

The right to anonymous speech is sufficiently strong that at least one court has relied on this right to deny a defamation plaintiff discovery about the identity of the speaker who placed an anonymous advertisement in a local newspaper. See Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538 (1999)(holding that a hospital failed to establish a compelling interest in breaching the anonymity of the persons who placed the ad). The court found that the public interest in having anonymous works enter the marketplace of ideas Aunquestionably outweighs any public interest in disclosure . . . .@ Id. at 1547 (quoting McIntyre).

In a related context, a federal district court explained that Adisclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of state libel laws.@ Southwell v. Southern Poverty Law Center, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The Southwell court thus held that summary judgment for defendant in a defamation case may be Aproper even without disclosure of a confidential source, if the plaintiff fails to produce evidence that the article in question is either 1) inherently improbable, or is 2) published with serious doubts about the truth of its contents.@ Id. at 1311. Several cases have even stated that anonymity must be protected even if the plaintiff is thereby foreclosed from recourse for defamation. See Adams v. Frontier Broadcasting Co., 555 P.2d 556, 557 (Wyo. 1976)(A[W]e are compelled to reject the requirement of censorship in favor of safeguarding the fundamental right of free speech even though this result forecloses the individual from recourse for defamation@);[12] see also SEESCANDY.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999)(A[T]he need to provide injured parties with a forum in which they may seek redress for grievances . . . must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously.@)

In an analogous context, the right of reporters to protect their sources, courts have required defamation plaintiffs to prove the strength of their claim before allowing access to confidential

[12] In Adams, a radio station was deemed not to be liable in a defamation claim for failing to use an electronic Adelay system@ during an open-mike show to prevent an anonymous caller=s defamatory comments. The Adams court ultimately concluded that Athe commitment to >uninhibited, robust, and wide-open= public debate must, in the balance, outweigh the common law right of an individual who is a public official or public figure to be free from defamatory remarks.@ 555 P.2d at 567.

information. For example, the Eighth Circuit Court of Appeals has noted the importance of keeping the identities of journalists= sources shielded in defamation cases. In balancing the need for confidentiality versus discovery, the Court must consider

> the strength of the movant=s case for libel. AAs a threshold matter, the court should be satisfied that a claim is not frivolous.@ Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980). 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 of informants.

Missouri ex rel Classic III, Inc. v. Ely, 954 S.W.2d 650, 659 (1997); see also Cervantes v. Time, Inc., 464 F.2d 986, 994 (8th Cir. 1972) (AThe point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error.@). Similarly, the Southwell Court feared that failure to Ainquire into the substance of a libel allegation@ would give public figure plaintiffs too much power to harass their critics simply by filing a libel action. Thus, the Court stated:

> Under such a regime, even plaintiffs who suspected their ultimate case would fail on the merits, could bring lawsuits simply as a harassment device to pester publishers and try to discover who was leaking the information they found damaging.

Id.(emphasis added).

This strong tradition of protecting anonymous speech is equally (if not more) important on the Internet. The Supreme Court has recognized that the Internet is a Avast democratic fora,@ Reno v. ACLU, 521 U.S. 844, 867 (1997), that allows anyone to become Aa pamphleteer@ or Aa town crier with a voice that resonates farther than it could from any soapbox.@ Id. at 870. The use of pseudonyms contributes to the robust nature of debate online. As one commentator explains, the extensive use of

pseudonymous identities in cyberspace discussion fora not only allows speakers to experiment with unconventional ideas; it also Apromises to make public debate in cyberspace less hierarchical and discriminatory than real world debate to the extent that it disguises status indicators such as race, class, gender, ethnicity and age that allow elite speakers to dominate real-world discourse.@ Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke L.J. 101, 142-43 (forthcoming Feb. 2000).

Recognizing the value of anonymity online, the Tenth Circuit, as well as district courts in Georgia and New Mexico, found that state laws that would have prohibited anonymous and pseudonymous communications over the Internet violate the free speech protections of the First Amendment. In Miller, the court struck down a Georgia law that would have made it a crime to Afalsely identify@ oneself online. See 977 F. Supp. at 1230. The court reasoned that Abecause >the identity of the speaker is no different from other components of [a] document=s contents that the author is free to include or exclude,= the statute . . . constitutes a presumptively invalid content-based restriction.@ 977 F. Supp. at 1232 (citing McIntyre, 514 U.S. at 340-42); see also ACLU v. Johnson, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998); aff=d, 194 F.3d 1149 (10th Cir. 1999) (holding that state Aharmful to minors@ law violated the First Amendment Abecause it prevents people from communicating and accessing information anonymously,@ and citing McIntyre for the principle that anonymity is Aan honorable tradition of advocacy and of dissent@). Both Miller and Johnson are rooted in the Supreme Court=s 1997 decision in Reno v. ACLU, 521 U.S. 844 (1997).[13]

[13] In Reno, the Supreme Court struck down a portion of the Communications Decency Act, finding Congress= legislative attempt to regulate Adecency@ on the Internet an unconstitutional burden on First

Like the courts, legal scholars recently have advocated greater protection for anonymity on the Net. Because the medium is such a new one, scholars have often drawn comparisons to other areas of the law where courts have developed tests to protect anonymity. See, e.g., George P. Long, III, Comment: Who Are You?: Identity and Anonymity in Cyberspace, 55 U. Pitt. L. Rev. 1177, 1205-06 (1994) (noting that under federal wiretap standards, it is only with an initial showing of probable cause that a judge may authorize the interception of wire, oral, or electronic communications, and stating that the showing is necessary in order to avoid Acapricious disclosures of identity@); David Post, Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace, 1996 U. Chi. Legal F. 139, 166-67 (arguing that online standards for disclosure of identity should be constructed like corporate shareholder inspection laws, allowing access to private user information only after a plaintiff=s showing of probable success); Lyrissa Barnett Lidsky,

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Amendment speech. Reno, concentrating on the overbreadth of the statute as fashioned, did not directly address the role of anonymity in a defamation context. The Court did, however, address the burdens posed by an age verification system that would force users to provide identification before accessing Aindecency.@ The Court stated that the requirement A*would discourage users from accessing their sites*.@ Id. at 856 (emphasis added). Elsewhere the Court noted that A>There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password.=@ Id. at 857 n. 23. The Reno Court thus reasoned that the inability to access speech anonymously would have a chilling effect on protected speech.

Silencing John Doe, supra, at 126 (arguing that one way to fight the chilling effect of suits being brought against John Doe defendants is to invoke the constitutional opinion privilege).

III. IF A FACIALLY SUFFICIENT COMPLAINT IS FILED, THE COURT SHOULD PROTECT DEFENDANTS= DUE PROCESS AND ANONYMITY RIGHTS.

1. The Court Should Require Notice to Be Given To Defendants Before Breaching Anonymity.

One of the most elementary principles of procedural due process is the right to notice and the opportunity to be heard. Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (AAn elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.@); LaChance v. Erickson, 522 U.S. 262, 266 (1998) (AThe core of due process is the right to notice and a meaningful opportunity to be heard.@).

In this case, there is no evidence that the affected persons -- the Internet posters named in the Complaint and the subpoenas to AOL and Yahoo! -- have received notice of the lawsuit or the subpoenas.[14] If the posters receive no notice, and AOL and Yahoo! comply with the subpoenas, the posters will have no opportunity to object to the disclosure of their identity. Thus, lack of notice will effectively and permanently abridge the posters= First Amendment rights to communicate anonymously, in addition to violating their due process rights.

[14]In addition to the constitutional requirement of notice, movant has argued that Florida statutes require notice to the parties of a third person subpoena. (Mov.=s Mot. 2 at I); (Mov.=s Mot. 3 at I).

Plaintiff suggests that in the context of this case, notice to affected persons is impossible. (Pl.=s Mot. & 19). That is incorrect. Notice can be effected in at least two ways. First, Plaintiff should be required to provide notice by posting the relevant information on the online bulletin board that contained the allegedly offending statements, or by sending notice to e-mail addresses known to be associated with the relevant screen names listed in the Complaint and the subpoenas. While this type of notice may not result in actual notice to all affected persons, it is certainly far preferable to providing no notice whatsoever. See, e.g., Fla. R. Civ. P. 1.220(d)(2) (requiring that members of class receive notice Ain the manner determined by the court to be the most practicable under the circumstances@); Fed. R. Civ. P. 23(c)(2) (requiring that members of a class receive Athe best notice practicable under the circumstances@). The online notice should inform the reader that this action has been filed, and that subpoenas have been issued to Yahoo! and AOL seeking information about certain screen names. The notice should also inform the reader that any person affected by the lawsuit or the subpoenas has a right to file a motion in court to contest them. The Court should also require that the notice include electronic copies of the Complaint and the subpoenas.

In addition, the Court should order Yahoo! and AOL to provide notice to the persons identified by the screen names listed in the subpoenas. Circuit courts have the power to issue Aall writs necessary or proper to the complete exercise of their jurisdiction.@ Fla. Const., art. V, '5. That power unquestionably includes the power to issue orders to non-parties to ensure the proper administration of justice. See, e.g., United States v. New York Telephone, 434 U.S. 159 (1977) (A courts= power extends Ato persons, who though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.@);

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) (noting that court has an independent duty to protect indispensable parties, and when necessary, should Aon its own initiative, take steps to protect the absent party@); Fed. R. Civ. P. 23(e) (requiring that class action shall not be dismissed or compromised without Anotice . . . . given to all members of the class in such manner as the court directs@); Greenfield v. Villager Industries, Inc., 483 F.2d 824 (1973) (noting that due process requires Aindividual notice to all [class] members who can be identified through reasonable effort@). Because Yahoo! and AOL are the only entities with knowledge of the identity and contact information associated with the screen names listed in plaintiffs= subpoenas, the Court can and should require Yahoo! and AOL to provide such individuals with notice of the subpoenas affecting them. Of course, the proponent of the subpoena would have to bear reasonable costs incurred by Yahoo!, AOL, or other ISPs in providing notice. The requirement proposed here will ensure that the interested parties receive notice before their due process and First Amendment rights may be abridged.[15]

[15]Plaintiff suggests that Movant does not have standing to object to the lack of notice to defendants. (Pl.=s Mot. & 9). Amici take no position on this question, but believe that the Court itself must ensure that its processes are utilized only after affected parties have received adequate notice and an opportunity to be heard.

Plaintiff argues that Movant and other posters have no right to object to the subpoenas because they have no legitimate expectation of privacy in their identity, citing the Yahoo! Terms of Service, which states that Yahoo! will disclose information necessary to identify persons who post defamatory comments. (Pl.=s Opp. & 29-32). This argument is circular, because it assumes that the postings are in fact defamatory, which has not yet been resolved by the Court. Moreover, the question is not whether the posters have a legitimate expectation that Yahoo! will protect their identity, but rather whether governmental processes -- like the subpoenas issued in this case -- can be used to abridge their right to speak anonymously without any notice or opportunity to be heard. Because adequate notice has not been given, all of the subpoenas should be quashed.[16]

B. The Court Should Resolve Applicable Defenses Prior to Ordering Disclosure of Defendants= Identities.

If the Complaint is dismissed, or the subpoenas quashed, for any of the reasons suggested above, the Court need not reach the further questions discussed in this Brief, as they are likely to be moot. However, in the event that Plaintiff is able to establish that a Defendant has received service of the Complaint (but remains anonymous),[17] and the Court determines that it has personal jurisdiction over that Defendant, then the Court will have to determine what further steps, if any, it should take to

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[16] The Court has an obligation of its own to protect the rights of litigants. Thus, the Court should quash not only the subpoenas seeking information about movant, but all of the subpoenas.

[17] Ajustthefactsjack@ has obviously obtained actual notice of the Complaint and has appeared by counsel. However, it is not possible to determine from the face of the Complaint whether Ajustthefactsjack@ is a prospective defendant. If he were, amici take no position on whether the actual notice is sufficient to constitute service.

protect Defendants= rights to anonymous speech. See generally SEESCANDY.com,185 F.R.D. at 573; Southwell v. Southern Poverty Law Center, 949 F. Supp. at 1303.

There are a number of defenses to defamation. Some of those defenses can be resolved on a motion to dismiss or a motion for summary judgment without the need for the identity of the defendant to be revealed. The Court can resolve as a matter of law,[18] for example, whether Defendants= statements are constitutionally privileged statements of opinion without requiring disclosure of the identities of the Defendants. Opinion, in its ordinary sense, refers to statements couched in loose, figurative or speculative language or statements that are purely subjective expressions of speaker=s viewpoint. In Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), however, the Supreme Court rejected a Awholesale defamation exemption for anything that might be labeled opinion.@ Id. at 18. Instead, the Court defined constitutionally protected opinion to include only those statements that do not Aimply a false assertion of fact.@ Id. at 19. Two general categories of statements fit this definition. The first is a statement on a matter of public concern that is not capable of being proved false. See 497 U.S. at 20.[19] A second category of privileged opinion is a statement that Acannot >reasonably be

[18] In Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) the Supreme Court created some confusion with regard to this issue by suggesting that the Adispositive question@ in that case was whether a reasonable fact finder could conclude that the statements at issue implied an assertion of fact. Id. at 21. However, lower courts both before and since Milkovich have treated the issue as a matter of law. See, e.g., Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983) (question of law); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (stating that the Aoverwhelming weight@ of authority treats the issue as a matter of law), cert. denied, 471 U.S. 1127 (1985); Dilworth v. Dudley, 75 F.3d 307 (7th Cir. 1996) (question of law); H.R. Indus., Inc. v. Kirshner, 899 F. Supp. 995 (E.D.N.Y. 1995).

[19] The Court cited Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) in support

interpreted as stating actual facts= about an individual.@ Id. Hyperbole, satire, parody and invective fall into this second category. Id. The Court has held that protection of such statements is necessary so Athat public debate will not suffer from lack of imaginative expression.@ Id. See also Greenbelt Cooperative Publishing Ass=n, Inc. v. Bresler, 398 U.S. 6 (1970) (First Amendment barred newspaper that characterized a real estate developer=s negotiating position with the city as Ablackmail@ from being held liable for defamation, because Aeven the most careless reader@ would have interpreted the statement as Ano more than rhetorical hyperbole@); Old Dominion Branch NO. 496, National Ass=n of Letter Carriers v. Austin, 418 U.S. 264, 268, 284 (1974) (holding that labeling the plaintiffs Ascabs@ and invoking Jack London=s definition of a Ascab@ as a Atraitor to his God, his country, his family and his class@ was no more than Aloose, figurative@ language in the context of a labor dispute); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (rejecting action for intentional infliction because the highly offensive ad parody at issue could Anot reasonably be interpreted as stating actual facts@ about plaintiff, a public figure).

It is easy to see how statements made on financial bulletin boards might fall into the category of protected opinion. Courts have acknowledged the inherently speculative nature of Ainvestment advice,@ even when performed by trained financial analysts. See Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998) (finding the allegedly defamatory statements in defendant=s Astock tip@ column to be the author=s Aconstitutionally protected subjective views@); Jefferson County Sch. Dist. v.

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of this proposition. In Hepps, the Court held that a plaintiff suing a media defendant for defamation based on speech of public concern must prove falsity. Id. at 772.

Moody=s Investor=s Servs., Inc., 988 F. Supp. 1341, 1345 (D. Colo. 1997), aff=d, 175 F.3d 848 (10th Cir. 1999); National Life Ins. Co. v. Phillips Publ=g, Inc., 793 F. Supp. 627, 649 (D. Md. 1992); Morningstar Inc. v. Los Angeles Superior Court, 29 Cal. Rptr. 2d 547 (Cal Ct. App. 1994) (financial newsletter=s criticisms of plaintiff=s advertisements, titled ALies, Damn Lies, and Fund Advertisements,@ held to be protected as rhetorical hyperbole). When ordinary investors speculate about a corporation=s prospects and management on an Internet bulletin board, it becomes even more likely that statements that might look factual when taken out of context are merely hyperbole, speculation, or invective. Indeed, a corporation=s board is likely to be filled with emotional rants against the corporation and its management any time the stock price drops, and the dialogue tends to become more heated the lower the price drops.

Plaintiff=s Amended Complaint contains copies of some of the Defendants= allegedly defamatory postings. Plaintiff alleges, for example, that the following post implies Plaintiff engaged in illegal accounting practices: AEric HVIDE and MANGLEMENT (sic) said during the last quarterly conference call not three weeks ago that the company HMAR had liquidity for 1999! . . .They knew then they had a major problem. . .as shareholders, we should demand a complete ASEC@ audit of the company.@ When taken out of context, this post might be viewed as an accusation of illegality. However, it is clear that the poster is not asserting any first-hand knowledge of illegality but is merely speculating about the reason for a disjuncture between the company=s projections and its actual condition. The poster=s tone is sarcastic, and it is likely that if the statement were read in the context of the entire Athread of conversation@ on the AHMAR@ board, it should be viewed merely as the hyperbolic venting of a

frustrated shareholder angered by a sudden change in HMAR=s fortunes.[20] If so, this statement should clearly be protected as Aimaginative expression,@ 497 U.S. at 20, and an action against the poster could be dismissed by motion without revelation of the poster=s identity. This is not to say that all statements on bulletin boards will constitute protected opinion: the language of a posting may denote it as factual, or the poster may try to induce reliance by implying that he has special expertise or access to insider information. Nonetheless, in the instant case the Court could easily resolve whether Defendants= statements constitute constitutionally protected opinion before ordering disclosure of Defendants= identity.

C. The Court Should Require Plaintiff to Plead and Prove Special Damages.

In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court found that a cause of action for defamation by public officials must be restricted to provide the Abreathing space@ required by the First Amendment. The Court therefore held that public officials who brings suit for defamation must show that the defendant acted with Aactual malice,@ i.e., knowledge or reckless disregard of falsity, id. at 280, and the Court subsequently extended this analysis to public figure plaintiffs as well.[21] Curtis

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[20] Another post which Plaintiff alleges is defamatory clearly states on its face that the poster is merely engaging in speculation: AIt is possible that HMAR and ERIK both have some sort of continuing legal problems. . . . The SEC doesn=t investigate small potatoes . . . . If there is an investigation on it=s because of some sort of omission or commission . . . .@ (Amended Complaint && 6a).

[21] Plaintiff here likely concedes that he is a public figure, since he has chosen to plead actual malice. (Complaint && 16). The Supreme Court outlined the two most important factors in determining whether an individual is a public figure in Gertz v. Robert Welch, 418 U.S. 323 (1974). The first factor examines whether the plaintiff has channels of effective communication to rebut a defamatory falsehood. The second factor is whether the plaintiff voluntarily assumed a role in a public controversy and the attendant risk of public scrutiny. Id. Private figures need only plead actual malice if they wish to recover presumed or punitive damages. Id.

Publishing Co v. Butts, 388 U.S. 130 (1967). Under the actual malice rule, a court cannot impose defamation liability for merely negligent falsehoods, not because such falsehoods are valuable in and of themselves but because Aerroneous statement is inevitable in a free debate.@ 376 U.S. at 271-72.

However, the actual malice rule is not well suited to the problems raised by the new Internet defamation cases. In order to establish actual malice, a plaintiff must show Asufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.@ St Amant v. Thompson, 390 U.S. 727, 731 (1968). Actual malice can be established where the defendant fabricates a story, bases a story on Aan unverified anonymous telephone call,@ Id., publishes information Aso inherently improbable that only a reckless man would put it in circulation,@ Id., or publishes despite Aobvious reason to doubt the veracity of [an] informant.@ Id.

The examples of actual malice given by the Supreme Court have little to do with the processes that an ordinary individual (as opposed to a journalist) goes through before posting a statement on an Internet bulletin board. The average Internet user does not obtain his information from informants or other direct sources; nor does he have professional training that would help him evaluate the credibility of information sources. What this evidence suggests is that while the actual malice standard may provide sufficient Abreathing space@ for media defendants, it does not provide (at least as currently applied) sufficient breathing space for the average Internet bulletin board posters. A more fundamental problem is that a defendant=s anonymity ordinarily must be breached in order to litigate the question of actual malice because actual malice is an inquiry into the state of mind of the defendant. Thus, the actual malice rule provides no protection to Defendants= right to speak anonymously, for its protection does not come into play until anonymity is already breached.

Amici suggest that the Court provide the Abreathing space@ necessary for Internet speech to thrive by requiring Plaintiff to allege actual monetary damages (i.e., special damages). See Restatement (Second) of Torts ' 575(b) (1977) (defining Aspecial damages@ as Athe loss of something having economic or pecuniary value@). Plaintiffs seeking to recover for oral defamation (slander) are often required to prove special damages. Robert D. Sack & Sandra S. Baron, Libel, Slander, and Related Problems ' 2, at 63 (2d ed. 1994). However, in most cases of written defamation (libel), plaintiffs can recover damages without proof of any pecuniary loss whatsoever; damages will be presumed from the nature of the communication itself. See Gertz, 418 U.S. at 349 (describing the common law of defamation as Aan oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss@); David A. Anderson, Reputation, Compensation, and Proof, 25 Wm. & Mary L. Rev. 747, 748 (1984) (defining presumed damages and stating that A[t]oday, defamation is the only tort that allows substantial recovery without proof of injury@). The justification for allowing presumed damages is that harm to reputation Aoccurs in ways that are too subtle to prove.@ David W. Robertson et. al, Cases and Materials on Torts 714-15 (1st ed. 1989). The practical effect, however, is to make it easy for a plaintiff to sue for defamation any time he comes in for harsh criticism. See George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out 1-2, 217 (1996) (noting that defamation suits increasingly are brought to punish citizens for speaking out on matters of public concern). The threat that plaintiffs will use defamation actions to harass their critics is particularly potent in the context of a case like the instant one: for many bulletin board posters, the threat of having their identities revealed is enough to chill them into silence. Amici suggest that the Court counter this

threat by requiring Plaintiff to make out a prima facie case that he has suffered actual financial loss. Further, amici suggest that if an anonymous Defendant challenges the validity of that allegation, Plaintiff should be required to establish that he is likely to succeed in proving special damages. Such proof must be made prior to any order that would have the effect of breaching the anonymity of Defendants. Several jurisdictions have already abolished presumed damages in all defamation cases, and it seems particularly appropriate to do so in the context of Internet defamation, given the marked similarities to spoken rather than written conversation. E.g. Murphy v. Supreme Court, 331 Ark. 364 (1998); Zoeller v. American Family, 17 Kan. App.2d 223 (Ct. App., Kansas, 1992).

In this case, Plaintiff would be required to amend or refile the Complaint to allege such damages and any Defendant(s) could, upon motion, require Plaintiff to provide the factual basis that would establish a likelihood of success on that allegation. Although Plaintiff=s Amended Complaint alleges that he was fired as a result of the allegedly defamatory postings, Plaintiff=s allegation are insufficient due to a lack of evidence of causation, particularly in a situation where causation is improbable. If Plaintiff establishes ultimate facts to support causation, and no other impediments exist, Plaintiff=s case could proceed.

Conclusion

For all these reasons, amici respectfully suggest that the Court grant the motions to quash, and sua sponte dismiss the Complaint without prejudice or require that an amended Complaint be filed that is adequate.

Lyrissa Lidsky
Florida Bar No. 0022373
Cooperating Counsel, ACLU
Associate Professor
University of Florida College of Law
Holland Hall, Office 303
Gainesville, FL 32611
352-392-9002

Christopher A. Hansen
Ann Beeson
American Civil Liberties Union Foundation
125 Broad St. - 18th floor
New York, NY 10004
(212) 549-2500

Andrew H. Kayton
ACLU of Florida
3000 Biscayne Blvd - suite 215
Miami, FL 33137
(305) 576-2336

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