SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

PAUL McMANN, Plaintiff, v. JOHN DOE and JOHN DOE II, Defendants.	Case No. CV2006-092226

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND TO QUASH SUBPOENA

This case is the second attempt by the plaintiff, Paul McMann, to obtain a subpoena against John Doe, an anonymous web critic who maintains a site devoted to McMann at www.paulmcmann.com. One week before McMann filed this case, the U.S. District Court for the District of Massachusetts dismissed an almost identical complaint, stating in an alternative holding that McMann's claims of defamation, invasion of privacy, and copyright infringement in that case failed to state a claim for relief. *McMann v. Doe*, ___ F. Supp. 2d ___, 2006 WL 3102986 (D. Mass. Oct. 31, 2006).

In his new complaint, McMann alleges for the first time the existence of a *second* John Doe who he claims, without any basis in fact and apparently for the purpose of obtaining jurisdiction in this Court, resides in Arizona and "jointly and covertly registered and created" the critical website with a separate Doe residing in Massachusetts. Cmplt. ¶¶ 4, 13. Based on this complaint, McMann sent a subpoena to GoDaddy and Domains by Proxy (jointly, "GoDaddy"), the companies responsible for registering and

hosting the paulmcmann.com website. *See* Email from K. Willis, Domains by Proxy, to John Doe (Nov. 10, 2006) (Aff. of Gregory A. Beck, Exh. 1). The subpoena seeks information about Doe's identity. *Id.* McMann and his counsel made no attempt to notify Doe of the case against him or the pending subpoena, and Doe would not have learned of the subpoena at all if GoDaddy had not informed him of it just over a week ago. *Id.*

McMann's counsel has refused to cooperate in Doe's efforts to file a timely motion to quash. He would not give Doe's Washington, D.C. counsel a copy of the complaint or subpoena until Doe had retained Arizona counsel and entered an appearance in the case. Aff. ¶ 6. Nor would he give GoDaddy even a short extension of time to respond to the subpoena so that Doe's counsel would have time to enter an appearance and review the subpoena prior to filing this motion. *Id.* Moreover, McMann omitted from his complaint all mention of the prior Massachusetts lawsuit and the quotations of the allegedly defamatory statements included in that complaint, which would have enabled this Court to conclude on its own—as did the court in Massachusetts—that this lawsuit is baseless.

Doe respectfully requests that this Court quash the subpoena and dismiss the case.

BACKGROUND

Plaintiff Paul McMann is a real-estate developer in Massachusetts. Cmplt. ¶¶ 1-2. Defendant John Doe was involved in a business transaction with Paul McMann and was extremely dissatisfied with the experience. To express his displeasure, Doe created a website and registered it with the domain name paulmcmann.com. *See*

www.paulmcmann.com (Aff. Exh. 2). Although the complaint also alleges the existence of a *second* John Doe, the Doe defendant alleged to reside in Arizona is a purely fictitious person included in the complaint without evidentiary basis and apparently for the purpose of manufacturing jurisdiction in this Court. *See* Letter from Gregory A. Beck to Joseph E. Holland (Nov. 16, 2006) (Aff. Exh. 9).

Doe's website has not been fully developed and is primarily a holding site on which Doe promises to post future information about McMann. *See* Aff. Exh. 2. The website prominently features McMann's name over a large picture of a jack o' lantern, a statement that McMann has "turned lives upside down," and a warning to the reader to "Be afraid. Be very afraid." *Id.* Doe states on the site that "[t]here are a number of people"—more than five and less than one thousand—"who have had negative dealings with this man." *Id.* Although Doe acknowledges that he is "sure there are people who have had positive experiences," he notes that he has not met any. *Id.* Doe also posted a photograph of McMann on the site that he took from McMann's own business website, Cmplt. ¶ 15, but the picture was removed from the site prior to the date McMann filed the complaint in this case. *See* Aff. Exh. 2.

Links from Doe's main web page lead to a section of the site called "Known Companies," which contains a list of businesses registered in McMann's name obtained from the Massachusetts state corporations website, s*ee* www.paulmcmann.com/ Company_Names.php (Aff. Exh. 3), and to an unaffiliated Internet message board on which McMann posted a message soliciting a hacker to attack Doe's site. *See* antionline.com/showthread.php?t=273752&page=1 (Aff. Exh. 4). Finally, the page

contains a link to a "blog," which is really a message board where readers are invited to "sound off about your own experiences." *See* blog.paulmcmann.com (Aff. Exh. 5). Several people posted messages on the blog. *Id.* One, with the pseudonym "beingscrewed" wrote: "I'm currently being screwed by Paul," but provided no further details. *Id.* Another wrote that she had won a lawsuit against McMann and that he was a "terrible man." *Id.* Doe himself, using the pseudonym "truthteller," wrote that "[m]any dealings with [McMann] end up in the legal system." *Id.* That is essentially the only information about McMann on the website.

Upon discovering the site, McMann filed suit against the site's operator as "John Doe" in the U.S. District Court for the District of Massachusetts. *McMann*, ___ F. Supp. at ___, 2006 WL 3102986, at *1 (for the Court's convenience, the decision is attached as Aff. Exh. 13). McMann claimed that Doe had violated his right to privacy, infringed his "common law copyright interest" in his photograph, and defamed him. *Id.* Seeking to identify Doe, McMann then filed an ex parte motion for leave to subpoena GoDaddy.com and Domains by Proxy, Inc., two jointly operated companies that registered the paulmcmann.com domain name and hosted the website. *Id.*

The court denied the motion sua sponte, holding that McMann would have to submit a sworn affidavit in support of his allegations before discovery would be allowed. *Id.* McMann then resubmitted his motion along with an affidavit swearing to the harm he had suffered and the measures he had already taken to reveal John Doe's name. *Id.* The court responded by sua sponte dismissing the case. *Id.* at *3. It initially held that it lacked subject-matter jurisdiction because McMann alleged no federal claims and the

state citizenship of John Doe could not be determined for purposes of diversity jurisdiction. *Id.* at *2-3. However, the court then went on to examine whether a subpoena against Doe would otherwise have been proper. *Id.* at *4-6. Acknowledging that "anonymous speakers should not be able to use the internet to freely defame individuals," *id.* at *1, the court nevertheless held that McMann had failed to state a claim for any cause of action that justified violating Doe's First Amendment right to speak anonymously. *Id.* at *5-6.

In making this ruling, the court carefully examined the allegations in McMann's complaint and the standards other courts have required plaintiffs to meet before allowing the release of an anonymous speaker's identity. *Id.* The court relied most heavily on the U.S. District Court for the District of Arizona's decision in *Best Western Int'l, Inc. v. Doe*, No. cv-06-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006), and the Delaware Supreme Court's holding in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). *McMann*, 2006 WL 3102986, at *4. The District of Arizona in *Best Western* held that Internet speakers have a qualified First Amendment right to remain anonymous that must be weighed against the plaintiff's need for discovery to redress alleged wrongs. *Best Western*, 2006 WL 2091695, *3-4. The court held that to protect this First Amendment interest, a plaintiff must make some preliminary showing prior to obtaining access to an anonymous speaker's identity. *Id.* at *4. It noted that a variety of standards could be applied for the defendants' required showing, but, because of the importance of the free speech interests involved, settled on the "summary judgment" standard set forth by the Delaware Supreme Court in *Cahill*. *Id.* Under this standard, a plaintiff must "submit sufficient

evidence to establish a *prima facie* case for each essential element of the claim in question . . . *within plaintiff's control*" before gaining access to the identity of an anonymous speaker. *Id.* at *4-5 (quotation omitted).[1]

The District of Massachusetts ultimately did not decide whether to adopt the summary judgment test used by the District of Arizona because it held that McMann's complaint did not even state a claim on which relief could be granted and thus failed *any* test. *McMann*, 2006 WL 3102986, at *5. The court first rejected McMann's right-to-privacy claim, holding that information about business dealings with McMann and a publicly available photograph did not intrude on his privacy. *Id.* The court further held that McMann's identity was not misappropriated for advertising purposes because, "[b]y posting Paul McMann's photograph on his webpage, John Doe did not attempt to employ the photo for commercial value, but rather as part of a declaration of his opinion of Mr. McMann." *Id.* Moreover, the court held that a cause of action for "false light" publicity did not exist in Massachusetts and rejected the claim for violation of "common law copyright" by noting that state common-law copyright claims are expressly preempted by federal law. *Id.* Finally, the court rejected McMann's claim for defamation. *Id.* at *5-6. The court noted that Doe's allegations that McMann had "turned lives upside down" and

[1] The District of Massachusetts expressed some doubt about how well the summary judgment test would work in a suit against a public figure, where a plaintiff might not be able to produce evidence of actual malice. *McMann*, 2006 WL 3102986, at *4. Based on this concern, several courts in anonymity cases, including *Cahill*, have held that the requirement of showing a prima facie claim for defamation does not extend to the actual malice element. *See Cahill*, 884 A.2d at 464. For purposes of this motion, Doe does not claim that McMann is a public figure, so this potential problem would have no effect on the application of the test here.

that the reader should "be afraid" are bland, vague, subjective, and not provably true or false. *Id.* at *6. In sum, the court found that McMann had "not met the evidentiary burden required to remove John Doe's constitutional interest in his anonymity." *Id.* at *6. Based on its jurisdictional ruling, the court dismissed the case without prejudice. *Id.* at *3.

Six days later, on November 6, 2006, McMann filed the present defamation case in this Court. McMann's new complaint alleged essentially the same facts as had the Massachusetts complaint but added an allegation of a second John Doe residing in Arizona. *Compare* Cmplt. *with* Aff. Exh. 10. The second complaint omitted any mention of the prior decision against McMann or the statements he had previously alleged to be defamatory. Without asking permission of this Court or alerting it to the possible infringement on Doe's right to anonymous speech, McMann then sent a subpoena to GoDaddy seeking Doe's identity. *See* Aff. Exh. 1. On the afternoon of Friday, November 10, GoDaddy notified Doe by email of the subpoena, stating that it would release the requested identifying information in three business days unless it received notice that a motion to quash had been filed. *Id.* Doe retained counsel soon thereafter, who obtained an extension from GoDaddy until November 21, the return date on the subpoena. McMann's counsel, however, refused to provide Doe with a copy of the subpoena, so he is forced to file this motion without the benefit of having seen the instrument against which he is arguing. Aff. Exh. 9.

ARGUMENT

The complaint should be dismissed for lack of personal jurisdiction. McMann filed suit in a foreign jurisdiction where neither he nor Doe resides based on a manufactured allegation of a second, non-existent John Doe defendant who resides in Arizona. Because Doe has no significant connection to this forum, this Court has no personal jurisdiction to decide the case.

Moreover, the subpoena to GoDaddy should be quashed. McMann must make a preliminary showing prior to obtaining the identity of an anonymous defendant, which requires him to present evidence on each element of his claims sufficient to withstand a motion for summary judgment. McMann fails to meet this burden or even to state a claim on which relief could be granted.

I. This Court Lacks Personal Jurisdiction Over Doe.

To be subject to personal jurisdiction in Arizona, Doe must have "certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted); *Bils v. Bils*, 200 Ariz. 45, 47, 22 P.3d 38, 40 (Ariz. 2001). A court may exercise either general or specific jurisdiction over a defendant. *See Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 414-15 nn. 8-9 (1984). In either case, a defendant's connection with the state must be such that "it should reasonably anticipate being haled into court" in the state in the event of a dispute. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980); *Bills*, 200 Ariz. at 47, 22 P.3d at 40. Here, McMann cannot meet his burden of establishing either form

of jurisdiction because Doe does not live in Arizona and all the relevant events occurred outside the state.

A. This Court Lacks General Jurisdiction Over Doe.

General jurisdiction applies only if "the defendant has substantial or continuous and systematic contacts with the forum state." *Batton v. Tenn. Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (Ariz. 1987) (quotations omitted). In this case, McMann alleges that one Doe defendant resides in Massachusetts, where McMann himself resides and where he conducts his business. Cmplt. ¶¶ 1-2. However, McMann's complaint—unlike his prior Massachusetts complaint—also alleges the existence of a *second* Doe defendant who lives in Arizona and "jointly and covertly registered and created" the paulmcmann.com website. Cmplt ¶¶ 4, 13.

McMann's allegation of an Arizona John Doe is without basis in fact. McMann's counsel admitted in a telephone conversation that the only basis for this allegation was the assumption that a Doe must reside near the corporate headquarters of Domains by Proxy and GoDaddy, both of which are located in Arizona. *See* Aff. Exh. 9. These companies, however, are large national Internet service providers, and there is no reason to assume that any particular registrant resides in close geographic proximity to their headquarters. *See* Cmplt. ¶ 7 (noting that the companies are "among the largest domain name registrars"). This allegation is the equivalent of an assumption that a user of the Google search engine must necessarily reside close to Google's corporate headquarters in Northern California. Moreover, there is no factual basis for an allegation that more than one John Doe jointly created and registered the website.

Aside from its unsupported allegation of residence, the complaint does not allege any basis for general jurisdiction in Arizona. McMann does not allege that Doe owns property in Arizona, has employees or offices in Arizona, or has any other contacts with the state. Doe's website does not offer any goods for sale to Arizona residents. Doe thus does not have "substantial" or "systematic and continuous" contacts with Arizona so as to support the exercise of general jurisdiction.

B. This Court Also Lacks Specific Jurisdiction over Doe.

Specific jurisdiction over Doe in Arizona would exist only if: (1) Doe purposefully availed himself of the privilege of conducting activities in the forum; (2) the claim arises out of Doe's forum-related activities; and (3) the exercise of jurisdiction is reasonable, in that it comports with fair play and substantial justice. *See Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). In tort cases such as this one, the requirement of purposeful availment is shown if the defendant's tortious conduct is purposefully directed at and causes the brunt of its effect in the forum state. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997).

1. Doe's Website Is Not Purposefully Directed at Arizona.

When personal jurisdiction is claimed based on a defendant's activities on the Internet, the courts—including the Ninth Circuit in *Cybersell*, 130 F.3d at 418—have followed the lead of the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), in holding that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of

commercial activity that an entity conducts over the Internet." *Id.* at 1124. Under this test, Doe's website cannot provide the basis for personal jurisdiction.

First, Doe's site is entirely passive in nature. *See* Aff. Exh. 2. "A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction." *Zippo*, 952 F. Supp. at 1124; *Cybersell*, 130 F.3d at 419-20. Something more is needed to "indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Cybersell*, 130 F.3d at 418. Thus, in *Cybersell*, the Ninth Circuit, applying Arizona law, held that Arizona did not have jurisdiction over a Florida company whose only contact with Arizona was a minimally interactive web page that was "limited to receiving the browser's name and address and an indication of interest." *Id.* at 419. The court reasoned that basing personal jurisdiction "on an essentially passive web page advertisement . . . would not comport with traditional notions of what qualifies as purposeful activity invoking the benefits and protections of the forum state." *Id.* at 420. Although the blog on Doe's website allows users to post information about their own experiences with McMann, this sort of interactivity does not give rise to jurisdiction in Arizona. *See Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390 (4th Cir. 2003) (holding the court lacked personal jurisdiction based on a website that allowed users to exchange information with the host computer); *Bible & Gospel Trust v. Wyman*, 354 F. Supp. 2d 1025 (D. Minn. 2005) (holding that a guest book feature or other means for visitors to communicate with each other is not sufficiently interactive); *Coastal Video*

Commc'ns Corp. v. Staywell Corp., 59 F. Supp. 2d 562 (E.D. Va. 1999) (holding that an interactive website alone does not confer personal jurisdiction).

Doe's website is not only passive, but entirely noncommercial in nature. Doe is not selling any goods or services from his website or making any money from it. Like the defendant in *Cybersell*, Doe is not subject to jurisdiction in this state when he has "conducted no commercial activity over the Internet in Arizona." 130 F.3d at 419; *see also Berthold Types Ltd. v. European Mikrograf Co.*, 102 F. Supp. 2d 928 (N.D. Ill. 2000) (holding that a company's partially interactive website did not give rise to jurisdiction in a state because sales could not be conducted over the site).

The allegation that Doe's website is registered and hosted with GoDaddy, an Arizona company, also does not serve as a basis for establishing personal jurisdiction. Cmplt. ¶ 13. Courts have recognized that an agreement with an Internet service provider is a brief transaction completed over the Internet with little interaction, no negotiation of terms, and no promise of future interaction other than the payment of recurring fees. *AOL, Inc. v. Huang*, 106 F. Supp. 2d 848, 856-57 (E.D. Va. 2000). This de minimis contact with the state is not the sort of connection substantial enough to give rise to personal jurisdiction. *Carefirst*, 334 F.3d at 402 ("[W]e have described as 'de minimis' the level of contact created by the connection between an out-of-state defendant and a web server located within a forum."); *Amberson Holdings LLC v. Westside Story Newspaper*, 110 F. Supp. 2d 332, 335 (D.N.J. 2000) ("It is unimaginable that such a contract, without any additional contacts, could serve to subject a defendant to personal jurisdiction."); *see also Zippo*, 952 F. Supp. at 1125 ("When a consumer logs onto a

server in a foreign jurisdiction he is engaging in a fundamentally different type of contact than an entity that is using the Internet to sell or market products or services to residents of foreign jurisdictions.").[2]

In any case, the claims in this case arise from Doe's acts of creating and uploading the websites from outside of Arizona, *not* from the registration and hosting of those sites in Arizona. Indeed, there is no allegation or evidence that Doe even knew GoDaddy was located in Arizona. Neither GoDaddy nor Domains by Proxy advertise on their home pages that they are located in Arizona, *see* www.godaddy.com, www.domainsbyproxy.com (Aff. Exhs. 6-7). Courts have recognized that a consumer's selection of an Internet service provider has nothing to do with the company's physical location. *See Huang*, 106 F. Supp. 2d at 856-57 (finding no personal jurisdiction based on a contract with a domain name registrar in Virginia when the registrar did not hold itself out as a Virginia company and the defendant may not have even known it was located there).

[2] Under federal law, a plaintiff may, under limited circumstances not applicable to this case, obtain in rem jurisdiction over a domain name that is registered in a state. *See, e.g., Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002). Even in these cases, however, the plaintiff does not thereby gain personal jurisdiction over the site's owner.

2. Doe's Website Has No Impact in Arizona.

In *Panavision Int'l, L.P. v. Toeppen*, the Ninth Circuit found personal jurisdiction in California over a defendant in Illinois because the defendant had engaged in a scheme to extort money from a company that the defendant knew had its principal place of business in California and was likely to be injured there. 141 F.3d 1316, 1321 (9th Cir. 1998) (noting that the brunt of the defendants' tortious activities were felt in Arizona). In contrast, McMann alleges that he resides in Massachusetts and does business in New England, Cmplt ¶¶ 1-2, and the effects of Doe's allegedly tortious conduct—if any—would therefore not be felt in Arizona. *See Dahn World Co. Ltd. v. Chung*, No. CV 05-3477, 2006 WL 1794758 (D. Ariz. June 27, 2006) (holding that jurisdiction was not proper in Arizona when the plaintiff did not suffer the brunt of the harm there).

Moreover, the subject of Doe's site has nothing to do with Arizona. In *Carefirst*, the Fourth Circuit found no personal jurisdiction in Maryland based on a website devoted to information about medical care in Chicago. 334 F.3d 390. The court emphasized that "the overall content of [the defendant's] website has a strongly local character" that made personal jurisdiction in Maryland inappropriate. *Id.* at 401; s*ee also Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (holding that the court had no jurisdiction when "[t]he overall content of . . . [the defendant's] websites [was] decidedly local."); *Bible & Gospel Tr.*, 354 F. Supp. 2d 1025 (finding no jurisdiction where the subject of the website was directed at a different jurisdiction). Similarly, Doe's website in this case is devoted exclusively to McMann's business, which McMann admits in his complaint is in New England. *See Cybersell*, 130 F.3d at 419 (finding no personal jurisdiction in

Arizona where the defendant "did nothing to encourage people in Arizona to access its site, and there is no evidence that any part of its business (let alone a continuous part of its business) was sought or achieved in Arizona"). Indeed, McMann makes no allegation that Doe's website has even been viewed by anyone in Arizona.

Doe's creation from outside of Arizona of a noncommercial website that has no impact within Arizona has not given him reason to "reasonably anticipate being haled into court" there. Consequently, McMann's action should be dismissed for lack of personal jurisdiction.

II. Doe's First Amendment Right to Anonymous Speech Heavily Outweighs McMann's Interest in Pursuing this Meritless Litigation.

A. The First Amendment Protects Anonymous Internet Speech.

The First Amendment protects the right to anonymous speech. *Best Western*, 2006 WL 2091695, at *3; *see Watchtower Bible and Tract Soc'y. of New York v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). Anonymous or pseudonymous writings have played an important role over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court wrote in *McIntyre*:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public

> interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
> . . .
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

514 U.S. at 341-42, 356.

Moreover, the free speech provision of the Arizona Constitution, art. 2, § 6, has repeatedly been given a broader construction than the First Amendment. *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 354-55, 773 P.2d 455, 459-60 (1989). Unlike the federal constitution, the Arizona Constitution expressly protects the right of privacy, which includes the right to remain anonymous. *Id.*, 160 Ariz. at 357, 773 P.2d at 462 n.13.

As this Court has recognized, the right to anonymity is fully applicable to speech on the Internet. *Mobilisa, Inc. v. John Doe*, No. CV 2005-012619, at 2 (Ariz. Super. Ct. Jan. 4, 2006) (Aff. Exh. 11); *see also Best Western*, 2006 WL 2091695, at *3. The U.S. Supreme Court has treated the Internet as a forum of preeminent importance because it provides 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 (1997). "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas," and therefore "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded." *Best Western*, 2006 WL 2091695, at *3 (quotation omitted). In particular, courts have granted First Amendment protection to "gripe sites"—

noncommercial websites, such as the website at issue here, set up solely for the purpose of criticizing a particular person or company. *See, e.g.*, *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005) (holding that First Amendment concerns limited application of federal trademark law to the website fallwell.com, a gripe site about Reverend Jerry Falwell).[3]

B. McMann Must Make a Preliminary Showing Prior to Obtaining Doe's Identity.

A court order, even if granted for a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel production of individuals' identities in a situation that threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the right to speech, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP*, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-63; *Bates*, 361 U.S. at 524.

---

[3] *See also Taubman Co. v. Webfeats*, 319 F.3d 770, 776 (6th Cir. 2003) (holding that the First Amendment protected the website "shopsatwillowbend.com" from a claim by the "Shops at Willow Bend" shopping mall); *Ficker v. Tuohy*, 305 F. Supp. 2d 569, 572 (D. Md. 2004) (holding that that a congressional candidate's website robinficker.com was protected by the First Amendment against claims by opposing candidate Robin Ficker); *Crown Pontiac, Inc. v. Ballock*, 287 F. Supp. 2d 1256 (N.D. Ala. 2003) (holding that the gripe site crownpontiacnissan.com was protected against claims by the car dealer Crown Pontiac Nissan).

This Court has recognized that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns. *See Mobilisa*, No. CV 2005-012619, at 2; *see also Best Western*, 2006 WL 2091695, at *3. As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identities were allegedly relevant to a defense against a shareholder derivative action: "If Internet users could be stripped of [their] 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).

Several courts, including this one, have enunciated standards to govern identification of anonymous Internet speakers. The first appellate decision in the country remains the leading case: *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). In *Dendrite*, a company sued four anonymous defendants who had criticized it on a Yahoo! bulletin board. *Id.* at 140. The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, under which the court should: (1) provide notice to the potential defendant and an opportunity for him to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate its rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of its claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from

losing his right to remain anonymous in light of the strength of the plaintiff's evidence of wrongdoing. *Id.* at 141-42.

Numerous reported decisions from federal and state courts have adopted the *Dendrite* test or a variation of the test. In *Mobilisa*, this Court followed a very similar standard set forth by the Delaware Supreme Court in *Cahill*, 884 A.2d 451. The Court in *Cahill* ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters only if he could put forward sufficient evidence to establish a prima facie case on all elements of a defamation claim within his control, including evidence that the statements were false. *Id.* at 461. Under the *Cahill* standard, plaintiffs should only obtain the requested discovery if they can put forth at least enough evidence to survive a motion for summary judgment. *Id.* at 457. Similarly, the District of Arizona in *Best Western* refused to enforce a subpoena to identify the authors of postings criticizing the Best Western motel chain because the plaintiff had not presented any evidence of wrongdoing on the part of the Doe defendants. 2006 WL 2091695. Judge Campbell suggested in his opinion that the court would follow a five-factor test drawn from *Cahill*, *Dendrite*, and other decisions. *Id.* at *5.

Although other courts have adopted slightly different tests, each has conducted the essential step of weighing the plaintiff's interest in identifying the speakers who allegedly violated its rights against the interests implicated by the First Amendment right to

anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily.[4] Thus, courts must, at a minimum, review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a sufficient basis for piercing the speaker's anonymity.

C. McMann Has Failed to Make the Showing Required to Obtain a Subpoena.

1. McMann Has Not Specifically Identified the Allegedly Defamatory Statements.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff has a valid reason for piercing each speaker's anonymity. *Dendrite*, 342 N.J. Super. at 141. Thus, courts require plaintiffs to quote the exact statements by each anonymous speaker that allegedly violated their rights. *Id.*

The circumstances of this case illustrate the necessity of this requirement. McMann did not include a single allegedly defamatory statement in his complaint. Even more notably, despite substantially copying the bulk of the Massachusetts complaint for this case, McMann *excluded* the quotations of the allegedly defamatory statements included in that complaint. *Compare* Cmplt. *with* Aff. Exh. 10. And despite the complaint's recitation of the details of cease-and-desist letters sent by McMann to GoDaddy, the complaint omits all reference to the Massachusetts case in which the court

---

[4] *See, e.g.*, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Sony Music Entm't v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); *Alvis Coatings v. Doe*, No. 3L94 CV 374-H, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (Pa. 2003).

stated in an alternative holding that McMann failed to state a claim for relief. If McMann had included this information, the complaint would have revealed the claims to be meritless on their face.

2. A Review of the Facial Validity of McMann's Claims Reveals They Are Meritless.

The court should also review each claim in the case to determine whether it is facially actionable. *Dendrite*, 342 N.J. Super. at 141. This requirement is especially important in a case including allegations of defamation, where a review of the allegedly defamatory statements may reveal, as a matter of law, that the claims are meritless. Expressions of opinion are not actionable for defamation, and the issue of whether a statement is opinion or fact is one for the court to resolve as a matter of law. *Yetman v. English*, 168 Ariz. 71, 811 P.2d 323 (1991). The First Amendment protects against libel claims based on opinions that do not imply false statements of fact, or on loose, figurative, or hyperbolic language. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

That is exactly the sort of speech at issue here. Based on the prior lawsuit in Massachusetts, Doe assumes that the allegedly defamatory statements are the ones also alleged to be defamatory in that case—namely, the statements that McMann has "turned lives upside down" and that readers should "Be afraid. Be very afraid." The District of Massachusetts' analysis, although an alternative holding not binding on this Court, is instructive because it involved a complaint substantially identical to the present one. As the court held, the statements that McMann has "turned lives upside down" and that readers should "[b]e afraid" are "not provable as true or false, but rather are opinions."

McMann, 2006 WL 3102986, at *6. The court correctly noted that the statements are "bland, vague, and subjective" and therefore "do not constitute defamation." *Id.* Indeed, it is impossible to imagine what sort of evidence would be submitted at a trial to prove the truth or falsity of these statements. No conceivable evidence, for example, could prove whether or not someone's life has been turned "upside down." These statements are protected opinion under the First Amendment. *See Yetman*, 168 Ariz. 71, 811 P.2d 323.

Because McMann's complaint omits specific references to allegedly defamatory text, we cannot tell for sure whether he is also claiming damages based on statements made on the website's blog. However, these statements—from a reader who wrote that he was being "screwed by Paul" and from another who wrote that McMann is a "terrible man"—are just as subjective and insusceptible to proof of truth or falsity as those rejected by the Massachusetts court. In any case, the Communications Decency Act affords immunity from liability for defamatory statements made by third parties on an Internet message board. 47 U.S.C. § 230; s*ee Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997).

McMann's complaint requests a judgment against Doe only for defamation, and not for the privacy and copyright claims asserted in his Massachusetts complaint. Cmplt. at 5, ¶ 1. Nevertheless, various paragraphs in McMann's complaint seem to be intended to allege facts supporting these other claims. Even in the event that McMann has adequately alleged these claims, they are without merit for the reasons set forth by the District of Massachusetts. Assuming that choice-of-law principles would require

application of the Massachusetts privacy statutes invoked in the complaint, McMann's privacy claim would fail because, as the District of Massachusetts pointed out, privacy laws do not protect a person against publication of that person's appearance in a public place. McMann, 2006 WL 3102986, at *5. Doe's website discusses only McMann's business dealings and does not contain any information about his personal life. Moreover, McMann cannot legitimately claim a privacy interest in a portrait-style photograph with no private or embarrassing content, especially since McMann displays the photograph, in cropped form, on his own business website. Aff. ¶ 20. Finally, McMann cannot have a "common-law copyright interest" in his photograph because the Copyright Act expressly preempts all common-law copyright claims. 17 U.S.C § 301; *see BV Eng'g v. UCLA*, 858 F.2d 1394 (9th Cir. 1988) ("The Copyright Act, moreover, preempts all state copyright laws."); *Fairway Constructors, Inc. v. Ahern*, 193 Ariz. 122, 970 P.2d 954 (Ariz. Ct. App. 1998) (holding that a claim for misappropriation of a home design was preempted by the Copyright Act). Indeed, the federal courts have *exclusive* jurisdiction over copyright claims, so no copyright claim could possibly be heard in this Court. 28 U.S.C. § 1338(a).

3. McMann Has Provided No Evidentiary Basis for His Claims.

No person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence to show a realistic chance of winning a lawsuit against that Doe defendant. *Dendrite*, 342 N.J. Super. at 141. Under the *Cahill* standard followed by both this Court and the District of Arizona, a plaintiff must put forth enough evidence to meet a summary judgment standard by

creating genuine issues of material fact on all issues in the case that are within its control. *Cahill*, 884 A.2d at 457. This requirement prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. Identification of an otherwise anonymous speaker is itself a major form of relief because the defendant may then be subjected to harassment, economic retaliation, or other forms of retribution. In this case, McMann has specifically requested identification of Doe as one of his claims for relief. Cmplt. at 5, ¶ 4.

Although the District of Massachusetts dismissed McMann's complaint for failure to provide any factual basis for his claims of liability or damages, McMann has repeated the same error in this court. For example, he has produced no affidavits or other evidence that any statements on Doe's website are false. Moreover, McMann alleges in his complaint that he has suffered at least $173,000 in damages from Doe's website, Cmplt. at 5, ¶ 7, but has offered no evidence to back up this allegation. Indeed, based on the sparse content of Doe's site, it strains credulity to believe that it could have had such a dramatic impact on McMann's finances. In *Dendrite,* it was the plaintiff's failure to present evidence of damages, which was an element of the New Jersey cause of action for libel, that barred discovery. *Dendrite*, 342 N.J. Super. at 154. Likewise, proof of damages is an element of a defamation claim in Arizona. *Morris v. Warner*, 160 Ariz. 55, 770 P.2d 359 (Ariz. App. Ct. 1988); Restatement (Second) of Torts § 558. Furthermore, although McMann also requests injunctive relief, including shutting down the website and censoring particular statements on the site, these requests for relief would be a prior restraint on speech that would violate the First Amendment. *See New York*

Times v. United States, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931); *State v. Bauer*, 159 Ariz. 443, 768 P.2d 175 (Ariz. App. Ct. 1988) (noting that a prior restraint carries a heavy presumption of unconstitutionality). Thus, McMann has not presented evidence that he is entitled to *any* of his claims for relief.

4. The Balance of Equities Strongly Favors Doe.

In *Dendrite*, the court also required a balancing of the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case and the necessity for the disclosure of the anonymous defendant's identity. 342 N.J. Super. at 141-42. In *Cahill*, which was followed in *Mobilisa* and *Best Western*, the court held that the balancing process was not a separate element of the test, but was incorporated into the question whether the plaintiff satisfied the summary judgment test. 884 A.2d at 461.

Because of the weaknesses of McMann's claim and the importance of the First Amendment rights involved, the balancing process in this case strongly favors Doe. It is settled law that any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Given that McMann has failed three times to file a complaint stating or providing evidence in support of a claim for relief, no unfairness would result from again denying McMann his requested relief. Moreover, assuming McMann can show cause for these repeated failures, if the subpoena is quashed he will have the opportunity to amend his complaint and provide more evidence. In contrast, a refusal to quash a subpoena for the name of an

anonymous speaker would irreparably injure Doe because, once he has lost his identity, he can never get it back.

5. McMann Failed to Provide Reasonable Notice of the Threat to Doe's Anonymity or a Reasonable Opportunity to Defend Against the Threat.

When asked to subpoena anonymous Internet speakers, a court should ensure that the plaintiff has undertaken the best efforts available to notify the speakers that they are the subject of subpoena, and then withhold any action for a reasonable period of time so that the defendants have time to retain counsel. *Cahill*, 884 A.2d at 461. The purpose of requiring notice to the anonymous defendant and identifying the specific statements alleged to be actionable can be served only by allowing defendants enough time to respond to plaintiff's showing of the basis for disclosure—ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment.

In this case, the plaintiff made *no* effort to notify Doe of the subpoena to give him a chance to respond even though Doe's email address is plainly displayed in a large red font on his website and the website also contains a public blog on which McMann could have posted a message. Moreover, the plaintiff manufactured a non-existent defendant in the complaint (John Doe I), apparently for the sole purpose of establishing jurisdiction in a remote forum, making it difficult for Doe to obtain counsel in time to respond. *See* Aff. Exh. 9. And McMann's counsel refused to provide a copy of the complaint or subpoena until Doe had obtained Arizona counsel and entered an appearance in the case, even though the short time frame and his refusal of an extension did not allow enough time for a prior entry of appearance. *Id.*

Doe got notice of the subpoena only because Domains by Proxy sent an email notice to him on the afternoon of Friday, November 10, giving him only three business days to obtain counsel in Arizona and file a motion to quash. *See* Aff. Exh. 1. However, GoDaddy has stressed to Doe's counsel that no law required it to provide notice; GoDaddy did so solely as a "courtesy." *See* Aff. Exh. 8. Only after extensive negotiation was Doe's counsel able to reach an agreement with GoDaddy that it would not respond to the subpoena until the return date of November 21. Aff. ¶ 10. Even then, GoDaddy refused to provide Doe with a copy of the subpoena against which he is now defending. *Id.* ¶ 11.

Although Doe was able to file this motion in time, the actions of the plaintiff and GoDaddy underscore the importance of the notice rule in general. As this case demonstrates, neither plaintiffs nor Internet service providers can be counted on to provide reasonable notice to anonymous defendants, even when such notice would be extremely easy to give. Many John Doe targets of subpoenas may not know about the subpoena until it is too late or may be given an inadequate time (such as three business days) in which to respond to a complaint in a foreign jurisdiction. It is thus critical that the court itself ensure that the First Amendment rights of anonymous speakers are protected.[5]

[5] Because Doe must file this motion without the benefit of seeing the subpoena, Doe requests an opportunity to file further objections after obtaining and reviewing the subpoena.

CONCLUSION

The subpoena should be quashed, and the complaint should be dismissed.

Respectfully submitted,

Louis J. Hoffman (Ariz. State Bar No. 009722)
HOFFMAN & ZUR
14614 N. Kierland Blvd., Suite #300
Scottsdale, Arizona 85254
(480) 948-3295

Gregory A. Beck (DC Bar No. 494479)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Defendants

November 21, 2006