Louis J. Hoffman (Ariz. State Bar #009722)
HOFFMAN & ZUR
14614 North Kierland Boulevard, Suite 300
Scottsdale, Arizona 85254
Tel.: (480) 948-3295
Fax: (480) 948-3387

Gregory A. Beck (D.C. Bar #494479, admitted pro hac vice)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
Tel.: (202) 588-7713
Fax: (202) 588-7795

Attorneys for Defendants

SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

Paul McMann, Plaintiff, vs. John Doe and John Doe II, Defendants.	)	Case No. CV2006-092226 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND TO QUASH SUBPOENA**

Plaintiff Paul McMann has now had several opportunities to substantiate his vague claims of defamation against John Doe and, once again, has failed to do so. In his response to Doe's motion to dismiss and to quash, McMann produced no evidence supporting personal jurisdiction over Doe in Arizona. Moreover, McMann did not even attempt to make the preliminary evidentiary showing required to justify piercing Doe's First Amendment right to anonymity. McMann has thus presented no basis on which to allow his subpoena of GoDaddy to go forward. Accordingly, the subpoena should be quashed, and the case should be dismissed.

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over Doe.

A. McMann Has Shown No Basis for His Allegation that Doe Lives in Arizona.

In answering Doe's argument that personal jurisdiction in Arizona is lacking, McMann complains that Doe has not substantiated his position with admissible, non-hearsay evidence. Pl.'s Resp. at 7-8. McMann presumably realizes that Doe cannot personally testify in this case without revealing his identity and rendering his motion to quash moot. It is not the defendant's burden, however, to prove a lack of jurisdiction. *In re Consol. Zicam Prod. Liab. Cases*, 212 Ariz. 85, 89-90, 127 P.3d 903, 907-08 (Ariz. App. Ct. 2006). Rather, once a defendant challenges personal jurisdiction, it is the *plaintiff* who must come forward with facts establishing jurisdiction in the state, and, in doing so, the plaintiff may not rely on the bare allegations of the complaint. *Id.* Here, McMann's only basis for alleging that a second Doe defendant lives in Arizona is the implausible assumption that Doe must live near the corporate headquarters of GoDaddy to take advantage of its services. *See* Def.'s Mem. at 7-8. This sort of baseless speculation does not satisfy McMann's burden to show personal jurisdiction.

To be sure, as the District of Massachusetts recognized in McMann's earlier case, McMann could not at this stage in the litigation be expected to know Doe's identity and state of residency. *McMann v. Doe*, ___ F. Supp. 2d ___, 2006 WL 3102986, at *2 (D. Mass. Oct. 31, 2006). But McMann is not without recourse. For example, if he primarily does business in Massachusetts, he may be able to allege in good faith that the dispute giving rise to Doe's website probably occurred there. McMann need not make a definitive showing; once he makes a prima facie case for personal jurisdiction, the burden of producing rebuttal evidence would shift to Doe. *Zicam Prod. Liab. Cases*, 212 Ariz. at 89-90; 127 P.3d at 907-08. However, because McMann does not claim to

reside or do business in Arizona, he cannot make a good-faith allegation that Doe is subject to jurisdiction here.[1]

B. Doe's Website Does Not Create Specific Jurisdiction in Arizona.

Instead of arguing that Doe purposefully directed his allegedly defamatory speech at Arizona, McMann argues as a basis for specific jurisdiction that Doe's contract with GoDaddy constituted intentional availment of the privilege of conducting business in the state. Pl.'s Resp. at 9. As his brief recognizes, however, specific jurisdiction exists only when the cause of action arises out of the defendant's specific connection to the forum. *Id.* at 8. Thus, "[i]f the non-resident defendant's forum-related activities are not sufficiently connected for the court to conclude that the plaintiff's claim arises out of those activities, dismissal is warranted." *Rollin v. William V. Frankel & Co.*, 196 Ariz. 350, 354, 996 P.2d 1254, 1258 (Ariz. App. Ct. 2000) (quotation and alteration omitted). Here, McMann's defamation claim does not arise out of Doe's contract with GoDaddy; it arises out of Doe's creation of the allegedly defamatory website from outside the state. As explained in Doe's opening brief, the website is entirely unrelated to Arizona, and the fortuity of GoDaddy's physical location in the state is essentially irrelevant to the nature of the Internet-based services it provides. Def.'s Mem. at 9-12.

Even if Doe's contract satisfied the personal availment test, the exercise of personal jurisdiction would still have to satisfy the independent constitutional requirement of reasonableness. *See Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322-23 (9th Cir. 1998). To be reasonable, a court's exercise of jurisdiction must comport with notions of fair play and substantial justice. *Id.* at 1322. The mere act of entering

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[1] McMann claims that "jurisdiction has been declined in Massachusetts." Pl.'s Resp. at 8. However, the District of Massachusetts did not address the question of personal jurisdiction; it held only that federal *subject-matter* jurisdiction was lacking because McMann could not show that Doe lived in another state. *McMann v. Doe*, 2006 WL 3102986, at *2-3. It was the possibility that Doe was domiciled in Massachusetts that led the court to dismiss the case for lack of diversity. *Id.* at *2.

into a contract in a foreign jurisdiction, without more, does not satisfy this requirement. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-82 (1985); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996). Rather, the contract must create a connection with the state substantial enough that the defendant "should reasonably anticipate being haled into court there." *Burger King*, 471 U.S. at 474-75.

Unlike the franchise agreement at issue in *Burger King*, Doe's contract with GoDaddy is a de minimis connection to the state that involves "no ongoing relationship of substance, any more than a magazine subscription creates an ongoing relationship between the publisher and subscriber." *America Online, Inc. v. Huang*, 106 F. Supp. 2d 848, 856-57 (E.D. Va. 2000). Binding authority from the Arizona Court of Appeals recognizes that a contract with a web hosting company is an insufficient basis on which to subject a defendant to jurisdiction in the host company's home state. *Austin v. Crystaltech Web Hosting*, 211 Ariz. 569, 575, 125 P.3d 389, 395 (Ariz. App. Ct. 2005). In *Crystaltech*, the court held that personal jurisdiction in Arizona over an Internet defamation case would be unreasonable even though the web host was located here, noting that, as in this case, neither of the parties lived in Arizona and the state had no interest in resolving the dispute. *Id.* Courts in other jurisdictions have reached the same conclusion. *See Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) ("It is unreasonable to expect that, merely by utilizing servers owned by a Maryland-based company, [the defendant] should have foreseen that it could be haled into a Maryland court and held to account for the contents of its website."); *Amberson Holdings LLC v. Westside Story Newspaper*, 110 F. Supp. 2d 332, 335 (D.N.J. 2000) ("It is unreasonable that by utilizing a New Jersey server, defendants should have foreseen being haled into a New Jersey federal court."); *cf. Compuserve*, 89 F.3d at 1264 (concluding that personal jurisdiction was proper when the defendant marketed and sold his products through his Internet host). For this independent reason, this Court lacks personal jurisdiction over Doe for purposes of this lawsuit.

II. McMann Has Failed to Make the Preliminary Showing Required to Reveal Doe's Identity.

McMann concedes that, in deciding whether to allow his subpoena to go forward, this Court must weigh Doe's interest in his right to free speech against McMann's interest in proceeding with his defamation claims. Pl.'s Resp. at 6-7. He disputes, however, that dismissal of the case is a proper remedy for failing to meet his burden. *Id.* Although, as McMann points out, the District of Arizona in *Best Western International, Inc. v. Doe* postponed discovery rather than dismissing the complaint, the circumstances in that case were very different from those here. No. cv-06-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006). Unlike the plaintiff in *Best Western*, McMann has had multiple opportunities to substantiate his defamation claims and has repeatedly failed to do so. No rule requires this Court to allow McMann to continue to harass Doe with repeated meritless litigation when he has already shown his inability to meet the required standard. In any case, McMann does not dispute that, at the very least, quashing his subpoena of GoDaddy would be a proper remedy.

A. McMann Fails to State a Claim on Which Relief Can be Granted.

In his response brief, McMann makes no effort to assert an invasion of privacy or common-law copyright claim. Moreover, he disclaims reliance on comments posted by third parties on Doe's website message board. Pl.'s Resp. at 4. Therefore, the only claim still at issue is McMann's claim for defamation based on Doe's own statements on his main website. At the same time, McMann no longer appears to assert that Doe's statements of opinion are in themselves defamatory. Instead, he argues that Doe's statement that he will be expanding the site in the future ("I will be laying out the evidence for others to make their own judgments") and his disclaimer ("The information provided on this website is either an opinion or can be backed up with public records") render the opinions defamatory by asserting the existence of undisclosed facts. Pl.'s Resp. at 4-5.

McMann is correct that implying undisclosed facts may, in some cases, give rise to liability for defamation. Restatement (Second) of Torts § 566 (1979). However, not *all* implications of undisclosed facts are defamatory; rather, the implied undisclosed facts must themselves be defamatory to be actionable. *Id.* § 566, cmt. c (1979) (noting that the implied facts "*must be defamatory in character*" (emphasis added)); *Pritsker v. Brudnoy*, 452 N.E.2d 227, 231 (Mass. 1983) ("In order for an opinion to be actionable, the undisclosed facts must be defamatory." (quotation and alteration omitted)). McMann is wrong to assert that an unprovable opinion can somehow become actionable when supported by undisclosed facts. It is the *implied undisclosed facts* that—if shown to be false and defamatory—give rise to liability, *not* the statement of opinion they support. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n.7 (1990) ("[T]he issue of falsity relates to the *defamatory facts implied by a statement*." (emphasis changed)); *Turner v. Devlin*, 174 Ariz. 201, 208, 848 P.2d 286, 291 (Ariz. 1993).[2]

To demonstrate liability for implied defamatory facts, a plaintiff must therefore show not only that the defendant made an implied statement, but also that the statement is factual in nature, defamatory, and susceptible of being proved true or false. *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1065 (9th Cir. 1998). The example cited in McMann's brief—"I think Jones is an alcoholic"—demonstrates this point. Pl.'s Resp. at 4-5. This statement directly implies a specific and provably false fact: that Jones is an alcoholic. Likewise, the only case McMann cites that found liability for an implied undisclosed fact was based on the defendant's statement that he "thought" the plaintiff

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[2] None of the cases cited by McMann hold otherwise. *See, e.g.*, *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 526-27 (Cal. Ct. App. 2006) ("[A]n opinion or legal conclusion is actionable only if it could reasonably be understood as declaring or implying actual *facts capable of being proved true or false*." (citations omitted)); *Ortiz v. Time Warner, Inc.*, No. 003856, 2003 WL 22285326, at *4 (Mass. Super. Ct. Sept. 3, 2003) ("A mixed opinion statement is actionable if the comment is understood as implying the existence of undisclosed facts about the plaintiff *that must be defamatory in character* in order to justify the opinion." (emphasis changed)).

had too much to drink before coming to work. *Affolter v. Baugh Constr. Or., Inc.*, 51 P.3d 642, 644-45 (Or. App. Ct. 2002). This statement, although phrased as an opinion, implied the provably false fact that the plaintiff was intoxicated on the job. *Id.*; *see also Milkovich*, 497 U.S. at 21 (holding that a statement that the plaintiff lied at a hearing where he was under oath implied the provable fact of perjury); Restatement (Second) of Torts § 566, cmt. b (noting that a statement that someone is a "thief" may, in some circumstances, "imply the assertion that [the person] has committed acts that come within the common connotation of thievery"). In contrast, the Arizona Supreme Court in *Turner v. Devlin* held statements that a police officer was "rude and disrespectful" and that his "manner bordered on police brutality" to be protected opinion because the statements constituted only "subjective impressions" without any "factual connotations that are provable." 174 Ariz. at 207, 848 P.2d at 202.

In this case, McMann does not even attempt to explain what objective facts he believes are implied by Doe's statements that McMann has "turned lives upside down" and that readers should "be afraid," much less why those facts are false. *See Pritsker*, 452 N.E. 2d at 230 (finding no defamation where it was unclear what facts were implied by the defendant's statement and whether those facts were defamatory). Without a particular allegedly defamatory statement at issue, a trial would serve no purpose; there would be "no objective criteria that a jury could effectively employ to determine the accuracy" of Doe's statements. *Turner*, 174 Ariz. at 208, 848 P.2d at 293; *see, e.g.*, *Gilbrook v. City of Westminster*, 177 F.3d 839, 863 (9th Cir. 1999) (holding that a statement that a union official was a "Jimmy Hoffa" could imply a variety of unprovable traits and was therefore protected opinion); *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 367 (9th Cir. 1995) (holding that an accusation that the plaintiff was "lying" was not provably false because it could indicate "a spectrum of untruths including 'white lies,' 'partial truths,' 'misinterpretation' and 'deception.'"); *Phantom Touring, Inc. v. Affiliated*

Pubs., 953 F.2d 724, 728 (1st Cir. 1992) (holding that the words "fake" and "phony" were not provably false because they "admit of numerous interpretations").[3]

As the District of Massachusetts noted, Doe's statements are "bland, vague, and subjective." *McMann v. Doe*, 2006 WL 3102986, at *6. The statement asserts *no* facts—express or implied—on which liability could be based.

B. McMann Has Provided No Evidence to Support His Claims.

Despite the District of Massachusetts's prior rejection of McMann's claims for failure to provide evidentiary support, McMann once again has not presented any evidence, in the form of affidavits or otherwise, to support his defamation claims. In particular, he has not provided evidence that any express or implied statements of fact on Doe's website are false. Although it is difficult to imagine what evidence McMann could present, this problem merely highlights the inherently unprovable nature of McMann's claims. If McMann believes Doe's statements imply a specific fact that is provably false, he should present evidence of the statement's falsehood. Otherwise, there are no factual issues for a factfinder to decide.

McMann has also presented no evidence in support of his assertions that he has been damaged by his inability to sell an unspecified property, and that Doe's website, rather than some other factor like a general decline in the real-estate market, is the cause of his difficulties. *Cf. Dendrite v. Doe*, 775 A.2d 756, 772 (N.J. App. Div. 2001) (refusing, in the absence of other evidence, to draw the inference that the defendant's

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[3] Numerous other cases have rejected liability for defamation for statements of opinion because those statements did not imply the existence of specific defamatory facts. *See, e.g.*, *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970) (characterization of a developer's negotiation position as "blackmail"); *Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005) (statement that the plaintiff was a "pimp"); *Conkle v. Jeong*, 73 F.3d 909 (9th Cir. 1995) (statement that a teacher is "the worst teacher at [the school]"); *Lieberman v. Fieger*, 338 F.3d 1076 (9th Cir. 2003) (statements that the plaintiff was "Looney Tunes," "crazy," "nuts," and "mentally unbalanced"); *Cochran v. NYP Holdings, Inc.*, 210 F.3d 1036 (9th Cir. 2000) (statement that an attorney "will say or do just about anything to win, typically at the expense of the truth"); *Reilly v. Associated Press*, 797 N.E.2d 1204 (Mass. App. Ct. 2003) (statements that a veterinarian was "sloppy" and "lazy").

Internet postings led to fluctuations in the plaintiff's stock prices). Because damages for defamation cannot be presumed in Arizona, McMann's claim must therefore fail. *See Nelson v. Cail*, 120 Ariz. 64, 583 P.2d 1384 (Ariz. App. Ct. 1978). Moreover, McMann's complaint cannot survive solely on his claims for injunctive relief against Doe's website because the First Amendment would prohibit this form of relief as a prior restraint on speech. *See Phoenix Newspapers v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (Ariz. 1966). In the absence of a reasonable likelihood that he will prevail at trial and be entitled to recovery, McMann has no interest that would justify infringing Doe's First Amendment right to anonymous speech.

C. McMann's Failure to Provide Proper Notice Highlights the Importance of Requiring a Preliminary Showing by the Plaintiff.

As Doe has already made clear, the question of notice is not decisive to this motion because Doe has already received notice and filed his motion to quash. However, McMann's failure to provide notice underscores the importance of requiring a preliminary showing prior to allowing discovery into an anonymous defendant's identity.

If not for GoDaddy's voluntary decision to notify Doe of the subpoena, Doe's First Amendment rights would have been irretrievably violated, and he would have been left without recourse. Contrary to McMann's assertion, GoDaddy is not bound to provide notice by the mandatory notification requirements of the Cable Communications Policy Act, 47 U.S.C. § 551, because that statute applies to Internet service providers that provide service through cable connections, not domain name registrars or web hosts. *Fitch v. Doe*, 869 A.2d 722, 725-27 (Me. 2005). Nor can plaintiffs and their counsel be depended on to provide notice. In this case, for example, McMann claims that he could not post notice of the suit on Doe's message board for fear of giving the case unwanted publicity. But, even if this were a valid reason to deny Doe notice of the case against him, McMann could have sent notice to the email address that is prominently displayed on Doe's website. Moreover, McMann's counsel could have

informed the *Court* of the potential First Amendment problem prior to obtaining the subpoena. Indeed, counsel in an ex parte proceeding is obligated to provide notice that relief has already been denied by another court. Maricopa County L.R. 2.12 ("In the event that any ex parte matter or default proceeding has been presented to any judge or judicial officer and the requested relief denied for any reason, such matter shall not be presented to any other judge or judicial officer without making a full disclosure of the prior presentation."). That no such notice occurred here highlights the importance of imposing preliminary requirements on a plaintiff prior to allowing a subpoena against an anonymous defendant to go forward.

CONCLUSION

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

Respectfully submitted this ___th day of December, 2006.

By: _____s_
Louis J. Hoffman (Ariz. State Bar #009722)
HOFFMAN & ZUR
14614 North Kierland Boulevard, Suite 300
Scottsdale, Arizona 85254
Tel.: (480) 948-3295
Fax: (480) 948-3387

Gregory A. Beck
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PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
Tel.: (202) 588-7713
Fax: (202) 588-7795

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that, on December ___, 2006, I caused a copy of this paper to be delivered to the chambers of Judge Christopher Whitten, and a copy to be served by U.S. mail, postage prepaid, to:

Joseph E. Holland
HOLLAND LAW FIRM, PLLC
2500 South Power Road, Suite 217
Mesa, Arizona 85209

_____
Donald Hertz