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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

PAUL McMANN, a Massachusetts resident, Plaintiff, vs. JOHN DOE, an Arizona resident; JOHN DOE II, a Massachusetts resident; Defendants.	Cause No. CV2006-092226 **RESPONSE TO MOTION TO QUASH SUBPOENA AND MOTION TO DISMISS** (Assigned to the Honorable Christopher Whitten)

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COMES NOW Plaintiff PAUL McMANN, (hereinafter "McMann"), by and through counsel undersigned responds to Defendants' Motion to Quash Subpoena and Motion to Dismiss.

MOTION TO QUASH SUBPOENA

Defendants rely heavily upon supposed "findings" of Judge Tauro of the federal District Court of Massachusetts. Judge Tauro denied jurisdiction in his Court, dismissing it without prejudice. Because the decision had been reached, the [rather unorthodox] second half of his decision consists of a series of statements amounting to ***dictum*** and applying ***Massachusetts law*** (which may or may not even be applicable here). Defendants' repeated references to Judge Tauro's decision are unwarranted.

Defendants next vilify Plaintiff by reciting that Plaintiff's "counsel has refused to cooperate in Doe's efforts to file a timely motion to quash [and that he] would not give Doe's…counsel a

copy of the complaint or subpoena until Doe had retained Arizona counsel…" **This statement is untrue.**

Defense counsel, Greg Beck,[1] initially called undersigned counsel on November 14, 2006, requesting copies of various documents because he was **thinking about** entering an appearance on behalf of Does. No explanation was given as to whether Mr. Beck actually represented Does or if he even knew of their true identity. Additionally, it was unknown who[m] contacted Mr. Beck or from whence his loyalties derived.[2] Undersigned counsel subsequently simply informed Mr. Beck that given the nature of the case and Plaintiff's interest in ensuring that the derogatory statements are not widely dissipated, he [undersigned counsel] was not authorized by his client to turn over, produce, or publish documents relating to the case unless and until such persons made a formal appearance in the case. Mr. Beck was told over and over that documents would be produced if and when he made an appearance and not before.

Undersigned counsel never suggested that Defendants had to obtain counsel (in Arizona or otherwise) before he would turn over documentation—only that an appearance had to be made.

Notice of the Subpoena to Defendants. In a continued accusation of unclean hands on the part of Plaintiff, Defendants claim that McMann acted unscrupulously by failing to notify them and give them a meaningful opportunity to oppose the subpoena prior to subpoenaing records that would reveal the true identity of Defendants. It appears that according to Defendants, McMann should have demanded that Defendants identify themselves, then notify them that he would seek out their identity thorugh use of legal process, identify where suit was being brought, and provide a

[1] Mr. Beck is not licensed to practice in Arizona. However, in fairness it is believed that Mr. Beck is in the process of seeking Pro Hac Vice admission with this Court.

[2] Mr. Beck stated that he was with the ACLU and a group called "Public Citizen" and that they were interested in ensuring that anonymous posters on the internet be permitted to remain anonymous. Undersigned counsel remained yet uncertain whether Mr. Beck's interest in representing Does would continue after their identity was revealed or not.

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copy of the subpoena, all before serving a subpoena on the internet service providers. The only conceivable way of accomplishing this would have been to post each demand/statement on the very website from which the defamatory remarks are published.

Plaintiff McMann is the victim of a defamatory, derogatory, and slanderous website, the sole purpose of which is to cause public distrust and disfavor toward him. Plaintiff McMann has a special interest in ensuring that the claims made on the website are not any more publicized than have already taken place. The requested actions could only have given Defendants added 'ammunition' in their quest to ruin McMann's reputation.

In Fitch v. Doe, 869 A.2d 722, 732 (Maine 2005), the Supreme Court of Maine recognized that the plaintiff did not give notice to the defendants, John Does who had made defamatory remarks over the Internet. However, the court took notice of a federal statute, 47 U.S.C. §551, that required the Internet service providers (ISP's) to notify users before contact information could be disclosed. Additionally, in holding that there was not error on the part of plaintiff in failing to notice defendants, the court recognized that John Does were, in fact, notified and given an opportunity to object.

In the case at hand, the facts are identical. The best evaluation of Defendants assertions that insufficient notice was permitted them to enter an appearance is the history of this case, itself. Defendants did make an appearance and are in the midst of opposing the discovery subpoenas that would reveal their identities. Therefore, any failure of McMann to notify Defendants was harmless error. Defendants allege "Domains by Proxy has stressed to Doe's counsel that no law required it to provide notice; Domains by Proxy did so solely as a 'courtesy'." Irrespective of this assertion, 47 U.S.C. §551(h) remains in force, requiring notice to be given prior to dissipating identification information.

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Content of the Website. Plaintiff's causes of action do not apply to anonymous posters on the website other than Does. 47 U.S.C. §230(c) prohibits such a claim when posted on the internet (even though under common law, such claims were permitted against newspaper and magazine editors). Therefore, the statements cited by Defendants from such posters as "*beingscrewed*" and others is irrelevant to the claims represented in this lawsuit.

Defendants make outlandish assertions that Plaintiff cannot make out an actionable claim because the contents of the website are essentially opinion and therefore cannot constitute defamation.

The Arizona Supreme Court has often noted that, in the absence of contrary Arizona law, our courts generally follow the Restatement. Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 482 Ariz. Adv. Rep. 3, ¶41 (2006) (citing Espinoza v. Schulenburg, 212 Ariz. 215, 217 P9, 129 P.3d 937, 939 (2006)).

Restatement (Second) of Torts, §566, Comment (c) clarifies the distinction between opinion and fact-based statements in a defamation context:

> A simple expression of opinion based on **disclosed** or assumed **nondefamatory** facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. **But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently**. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.

Restatement 2d of Torts, §566(c) (emphasis added).

This is also the law in the majority of states (including Massachusetts). Integrated Healthcare Holdings, Inc. v. Fitzgibbons, 140 Cal. App. 4th 515 (2006); Franklin v. Dynamic Details, Inc., 116 Cal.App.4th 375, 387 (2004) (The statement, 'I think Jones is an alcoholic,' for

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example, is an expression of opinion based on implied facts, because the statement gives rise to the inference that there are undisclosed facts that justify the forming of the opinion. Readers of this statement will reasonably understand the author to be implying he knows facts supporting his view--e.g., that Jones stops at a bar every night after work and has three martinis. If the speaker has no such factual basis for his assertion, the statement is actionable, even though phrased in terms of the author's personal belief.); Ortiz v. Time Warner, Inc., 2003 Mass. Super. LEXIS 257, 10; 16 Mass. L. Rep. 766; Affolter v. Baugh Construction Oregon, Inc., 51 P.3d 642, 183 Ore. App. 198 (2002); Feldman v. Lafayette Green Condo. Assoc., 806 A.2d 497 (Penn. C.D. 2002); Carozza v. Blue Cross & Blue Shield of Mass., Inc., 14 Mass. L. Rep. 88, 2001 Mass. Super. LEXIS 506, 40-42; Goodrich v. Waterbury Republican American Inc., 188 Conn. 107, 118, 448 A.2d 1317 (1982).

It is not necessary that the statements, themselves be based in fact, because even if the statements are essentially opinions, they will support a defamation claim if they are alleged to be supported by facts. In this case, there can be little doubt that the substance of the website posting is actionable! Defendants promise to post future information (specific facts) about McMann that will verify the derogatory statements. Statements that "I will be laying out the evidence"[3] and "information provided is either an opinion or can be backed up with public records"[4] remove the purely unsupportable opinions from the freedom of speech realm.

Weighing of Interests with First Amendment. Citing to Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n, 160 Ariz. 350, 773 P.2d 455, Defendants claim that the Arizona Constitution affords even greater protections for anonymous speech and privacy than the First Amendment. In so stating, Defendants have intentionally sought to mislead this Court as to the true meaning of the Mountain States decision. Nowhere in the entire opinion are the words "privacy"

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[3] See Exhibit 2 of Affidavit of Gregory Beck (filed with Defendants' Motion to Dismiss).

[4] Id.

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and "anonymity" used except in a concurring opinion by Judge Cameron wherein he speaks of **accessing** speech anonymously, not posting or publishing such speech!

It is conceded that the interests of free speech are to be weighed against a person's right to privacy (implicating rights to be free from defamatory, libelous, slanderous, and otherwise derogatory language placing one in false light). However, Defendants' loose citations are one step away from blatantly claiming that freedom of speech is absolute—an utter and complete falsity.

MOTION TO DISMISS

Defendants claim that dismissal is appropriate because 1) they allege personal jurisdiction is lacking, and 2) they allege McMann has failed to state a claim upon which relief can be granted.

A motion to dismiss is proper only when it appears certain that a plaintiff would be entitled to no relief under any state of facts which is susceptible to proof under the claim stated. San Manuel Copper Corp. v. Redmond, 8 Ariz.App. 422, 453 P.2d 362 (1969). Additionally, motions to dismiss for failure to state a claim are not favored and should not be granted unless it appears certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated. Corbin v. Pickerell, 136 Ariz. 589, 667 P.2d 1304 (1983); Williams v. Williams, 23 Ariz.App. 191, 531 P.2d 924 (1975). Finally, in considering a motion to dismiss, all of the averments of the non-moving party are to be taken as true. Sierra Madre Development, Inc. v. Via Entrada Townhouses Assoc., 20 Ariz.App. 550, 514 P.2d 503 (1973).

No Preliminary Showings are Necessary. Defendants claim that before this case may continue, it is necessary for McMann to make a preliminary showing that he is either entitled to immediate relief or that he will win on the merits. This mentality is derived from what is commonly referred to as an "anti-SLAPP statute." SLAPP is an acronym for "Strategic Lawsuit Against

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Public Participation."[5] These statutes require a litigant to establish a probability of prevailing on the merits at the initial stages of the suit.

Defendants fail to consider, however, that **no anti-slapp statute exists in Arizona**! The legislature has declined to pass such a statute because they see no reason to require one in Arizona.

Defendants are quick to allege that Judge David Campbell's (District Court of Arizona) ruling in Best Western Inc. v. Doe (CV-06-1537-PHX-DGC) is instrumental in determining how this matter should be handled.[6] However, Defendants fail to explain in their motion to dismiss that Judge Campbell, noting that no factual allegations were averred in the Complaint, **explicitly stated that dismissal was inappropriate**. Exhibit 1, Order of Judge Campbell of 7/25/06 at 7:21-22. Judge Campbell's ruling did not dismiss the case (the purpose for which Defendants sight it), but only stated that discovery would be postponed until the plaintiff made a showing of a prima facie case for defamation.

Plaintiff McMann's Complaint is not faulty and has effectively put Defendants on notice of claims presented therein. Therefore, dismissal is inappropriate.

Personal Jurisdiction Exists. A party cannot be made to rely on an opposing party's word alone, especially when the speaker refuses to reveal his/her identity and there is no way to verify the veracity of the statements. Because the judicial process is necessarily an adversarial process, this makes not only good policy, but is sound reasoning.

Defendants' allegation that they are one and the same person and that Arizona courts do not have jurisdiction over them, is little more than a bare, unsupported and unverified [contested]

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[5] Most such statutes were originally enacted as a check on the FOIA law and other laws requiring extensive production of documents when production might require extensive labor and/or resources.

[6] Indeed, Defendants allege that Judge Campbell's decision was instrumental in the Massachusetts decision by Judge Tauro (discussed above).

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statement with no value in a court of law and equity. Defendants try to cure this defect by citing to Defense counsel's "affidavit." This "affidavit," insofar as it is used for the purpose of showing that neither John Doe is an Arizona resident, is not based upon personal knowledge, seeks to transform counsel into a [testifying] fact witness, and constitutes hearsay and cannot be introduced in this proceeding. Simply, if Defendants want to prove that they are as they claim, they must make such a showing in open court. Anything less than such a showing would vitiate the judicial process and make a mockery of evidentiary rules regarding sworn evidence.

Personal jurisdiction is the power of Arizona courts over a Defendant's person or property. Defendants correctly deduced that personal jurisdiction can be accomplished through several means, including purposeful availment through specific jurisdictional considerations. For due process to be satisfied, a defendant, if not present in the forum, must have "minimum contacts" with the forum state such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 315, 66 S. Ct. 154, 90 L. Ed. 95 (1945). This "minimum contacts" test is satisfied when: (1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable. Pebble Creek Co. v. Caddy, 453 F.3d 1151, 1155 (9th Cir. 2006); Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000).

In this case, there can be little doubt that the 2nd and 3rd prongs have been met since McMann's claims arise out of the registering and hosting of the website, and Arizona is the most reasonable jurisdiction to host this suit in light of the fact that jurisdiction has been declined in Massachusetts.

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Defendants argue that there is no purposeful availment because Defendants did not purposefully direct their activities at the forum state [Arizona]. However, purposeful availment involves more than just directing actions toward a forum state, but also involves invoking the benefits and protections of the forum state. Minimum contacts are established sufficient to show availment when a party took advantage of the benefits of the forum state:

> We have refined [purposeful availment] to mean whether [defendant] has either (1) "purposefully availed" himself of the privilege of conducting activities in the forum, **or** (2) "purposefully directed" his activities toward the forum. Although we sometimes use the phrase "purposeful availment" to include both purposeful availment and direction, availment and direction are, in fact, two distinct concepts.

Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1155 (9th Cir. 2006) [citations omitted].

Defendants have utilized their privilege of conducting activities in Arizona by contracting with Arizona corporations (entities that lay claim to their fictional existence only by and through leveraging Arizona laws) to host their website. Defendants have taken advantage of the benefits of Arizona laws, have benefited from such laws, and it is completely conceivable that they might seek redress under Arizona laws if the internet service providers hosting the website were to violate state laws.

As support for their contention that there is no purposeful availment, Defendants site irrelevant and distinguishable case law dealing with commercial entities fighting over trademark infringements; "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of **commercial** activity that an entity conducts on the Internet." Defendants' Motion to Dismiss at 8:23-25 (citing Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997) and Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997)). Defendants seemingly propose that personal jurisdiction cannot be established unless "the brunt of [the] effect in the forum state" [Id at 8:17.] over the internet involves commercial activities.

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This position effectively obviates the notions of fair play supporting **personal** jurisdictional considerations.[7] Defendants' cited case law is largely irrelevant to a defamation case such as the one at hand. Defendants even admit the inapplicability of the case law in acknowledging that Does' website is entirely noncommercial in nature. Motion to Dismiss at 9:19.

There is No Failure to State a Claim. That Defendants even claim that no relief can be had in this Court of law and equity evidences the absurdity of Defendants' position and ignores the requested relief sought in Plaintiff's Complaint. In addition to seeking damages for several causes of action, Plaintiff has requested equitable relief, including ordering Defendants to withdraw defamatory comments and enjoining Defendants from posting future defamatory comments.

In this case, a Motion to Dismiss is clearly not warranted since Defendants have effectively been put on notice of McMann's causes of action.

CONCLUSION

THEREFORE, because it is improper to either quash a valid discovery tool, not dismiss this action, Plaintiff prays this Court to deny entirely Defendants' requested relief.

DATED this 4th day of December, 2006.

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BY:_____
Joseph E. Holland, Esq.
Attorney for Paul McMann

[7] "***Personal jurisdiction"*** is named such because of the traditional notions that a forum has power over the person of an individual within its jurisdictional boundaries. If the doctrine were to be applied only in situations involving **commercial activities**, the overwhelming majority of situations to which the doctrine would then be applicable would undoubtedly involve non-personal, corporate entities.

ORIGINAL & COPIES of the foregoing mailed this 4th day of December, 2006 to:

Clerk of the Court
Maricopa County Superior Ct
222 E. Javelina Ave.
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Honorable Christopher Whitten
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By stipulation, foregoing e-mailed to:

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