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Joseph Pilchesky, Plaintiff, v. JUDY GATELLI, as President of Scranton City Council; as Councilwoman; and, in her Individual capacity, Defendant-Counterclaim and Joinder Plaintiff, v. JOANNE PILCHESKY and JOHN DOES, Additional Defendants.	In the Court of Common Pleas of Lackawanna County, Pennsylvania CIVIL ACTION No. 2007-CV-1838

OPPOSITION OF DOE DEFENDANTS TO GATELLI'S MOTION TO COMPEL DISCLOSURE OF THEIR IDENTITIES

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MISCELLANEOUS

This motion involves claims of defamation, and other torts that depend on the validity of the defamation claims, brought by Judy Gatelli, the president of the Scranton City Council, against nearly one hundred of her constituents who have used an Internet message board to criticize her conduct in office. Although many of the criticisms are vitriolic, they are largely expressions of opinion, and there is no evidence that any factual statements are false. Nevertheless, Gatelli has asked the Court to compel the proprietors of the message board to identify each of the posters, despite the danger that, once identified, they could suffer official retaliation. In this memorandum, several of the anonymous posters (aquamg, bigdaddy, bo peep, jimbu15, katie, MistyMtTop, and newgirl) urge the Court to protect them, and the other anonymous posters, by following the consensus approach followed by other state and federal courts, including in Pennsylvania, which requires a public official to provide admissible evidence establishing a prima facie case of defamation, and then balancing the citizens' right to remain anonymous against the official's right to proceed. In the circumstances of this case, this approach will require denial of the request for disclosure.

STATEMENT OF THE CASE

The Internet is a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997),

> From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

Full First Amendment protection applies to speech on the Internet. *Id.*

Knowing that people have personal interests in news developments, and that people love to share their opinions with anyone who will listen, many companies have organized outlets for the expression of citizen opinions. Yahoo!, for example, has separate "message boards" for each publicly traded company.[1] Many newspapers provide "blogs" for citizens to discuss particular topics or the affairs of particular communities.[2] Other web site operators offer their own opinions, but also provide message boards or guest books where any member of the public can post reactions to things they see on the web site or in previous guest book comments. Typically, these outlets are electronic bulletin board systems where individuals can discuss major companies, public figures, or other topics at no cost by posting comments for others to read and discuss.

The individuals who post messages in such forums generally do so under pseudonyms – similar to the system of truck drivers using "handles" speaking on their CB's. Nothing prevents an individual from using a real name, but the message board at issue here is typical in that most people choose nicknames. These often colorful monikers protect the writer's identity from those who express disagreement, and they encourage uninhibited exchange of ideas and opinions. Such exchanges can be very heated; as seen from the messages and responses in the message board at issue here, they are sometimes filled with invective and insult, often directed at other posters. Most, if not everything, said on message boards is taken with a grain of salt.

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[1] *See. e.g.*, *Dendrite v Doe,* 342 N. J. Super. 134, 775 A.2d 756 (2005); *Highfields Capital v. Doe,* 385 F. Supp.2d 969 (N.D. Cal. 2005).

[2] *E.g.*, *Doe v Cahill*, 884 A.2d 451 (Del. 2005).

One aspect of message boards makes them very different from almost any other form of published expression: Because any member of the public can express a point of view, a person who disagrees for any reason with something that is said – including the belief that a statement contains false or misleading information – can respond immediately at no cost. That response can have the same prominence as the offending message. Such a forum is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). The reply can provide facts or opinions to controvert the criticism and persuade the audience that the critics are wrong. And because many people regularly revisit the message board, the response is likely to be seen by much the same audience as those who saw the original criticism. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, is the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

The message board at issue here is annexed to a web site maintained by plaintiff-counterclaim defendant Joseph Pilchesky called dohertydeceit.com. The web site criticizes Chris Doherty, the mayor of Scranton, and his administration, and carries numerous specific articles addressed to particular local issues that Pilchesky desires to discuss. In addition, attached to the web site is the "Scranton Political Times Message Board,' accessible at http://www.activeboard.com/forum.spark?forumID=65524. The message board is divided into numerous "threads," or topics, addressing a variety of issues selected by the active participants in the messaging system. *See* Levy Affidavit, Exhibit B. Any member of the public can read the messages posted to the board. Members of the public can also post messages to the board, so long as they register. *Id.*

Exhibits A, B. In the course of registration, a would-be poster picks the user name, or pseudonym, that will be provided with each message posted by that user, and also provides an email address through which communications can be sent to that person. *Id.* Exhibit C. A successful registrant receives a confirmation email at the address that is given during the registration process. *Id.* Perusal of the message boards reveal that they display a great variety of opinions about the elected leadership of Scranton, many of them expressing hostility toward the elected officials, but others supporting the administration and attacking their critics, including Pilchesky individually.

In 2005, messages were posted on the message board that attacked Sara Hailstone, a Scranton official. Hailstone's sister, a local judge, complained to the Pennsylvania State Police who, at the suggestion of a local prosecutor, contacted the Internet Service Provider ("ISP") that hosted the message board to "request" that the message board be removed from the Internet, knowing that a request from a law enforcement agency would be enough to suppress the message board. *Id.* Exhibit D. After the ISP complied with this "request," Pilchesky sued in federal court for a violation of his First Amendment rights. Following that suit, the request to take the web site down was withdrawn. A motion to dismiss the complaint on a theory of qualified immunity was denied in substantial part. *Pilchesky v. Miller*, 2006 WL 2884453 (M.D.Pa. Aug. 8, 2006). That case has since been settled**.**

Earlier this year, City Council President Judy Gatelli cancelled a City Council meeting citing concern about "threats" against her on the dohertydeceit.com message board. Subsequently, Pilchesky brought this action against Gatelli for defamation, and Gatelli counterclaimed against Pilchesky for defamation. Gatelli also filed a joinder action against

Joanne Pilchesky, Joseph Pilchesky's wife, and approximately ninety Doe defendants, identifying each by the pseudonyms that they used for posting comments to the Scranton Political Times Message Board. The first count of the joinder complaint enumerates 130 different postings and alleges, in general terms, that they are false and defamatory. However, the complaint does not specify which posting was made by which defendant and, in fact, it appears that there are some pseudonyms listed in the caption of the complaint that did not post any of the specific statements enumerated in the complaint. Count II and III of the complaint allege that the Doe defendants engaged in a civil conspiracy with Pilchesky by posting defamatory messages, and that the Doe defendants and Pilchesky engaged in a campaign of intentional infliction of emotional distress on Gatelli, knowing of her "publicized sensitivity to criticism." Neither count specifies which of the enumerated messages allegedly implicates the torts alleged in that count. Gatelli verified her complaint, but only "to the best of her knowledge, information and belief." The complaint does not allege that Gatelli suffered any economic harm as a result of the allegedly actionable statements.

Gatelli then filed a Petition to compel Pilchesky to identify each of the anonymous defendants. The court set a briefing schedule requiring respondents to file and serve a brief opposing the Petition no later than September 21, 2007. We understand that the Pilchesky defendants intend to file a brief opposing the petition in its entirety; this brief is filed on behalf of seven of the Doe defendants who are identified in the Joinder complaint – aquamg, bigdaddy, bo peep, jimbu15, katie, MistyMtTop, and newgirl – who have asked undersigned counsel to represent them in an effort to protect their First Amendment right to speak anonymously.

SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs, against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables him to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to speak anonymously, but may be exposed to efforts to restrain or oppose his speech. For example, an employer might discharge a whistleblower, and a public official might use his powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. Similar cases across the country, and advice openly given by lawyers to potential clients, demonstrate that access to identifying information to enable extrajudicial action may be the only reason for many such lawsuits. On the other hand, some

individuals may speak anonymously because they fear the entirely proper consequences of improper speech, such as the prospect of substantial damages liability if they tell lies about somebody they do not like for the purpose of damaging her reputation.

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for vicious defamers to hide behind pseudonyms, nor too easy for a big company or a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

This Court should embrace the developing consensus among those courts that have considered this question – including other Pennsylvania courts – by relying on the general rule that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Specifically, when faced with a demand for discovery to identify an anonymous speaker, a court should (1) provide notice to the potential defendant and an opportunity 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.

The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying its anonymous critics – and that the defendant is not denied important First Amendment rights, unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria can require time and effort on a plaintiff's part and may delay her quest for redress. However, everything that the plaintiff must do to meet this test, she must also do to prevail on the merits of her case. So long as the test does not demand more information than a plaintiff will be reasonably able to provide shortly after filing the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

Moreover, most cases of this kind primarily involve demands for monetary relief. Only in the rare case will a plaintiff have a sound argument for being granted a preliminary injunction, notwithstanding the strong rule against prior restraints of speech, and in any event Pennsylvania does not allow injunctions as a remedy for defamation. Accordingly, although applying this standard may delay service of the complaint, it will not ordinarily prejudice the plaintiff. On the other hand, the fact that after the defendant is identified, his right to speak anonymously has been irretrievably lost, counsels in favor of caution and hence in favor of allowing sufficient time for the defendant to respond and requiring a sufficient showing on the part of the plaintiff.

On the record of this case, plaintiff has not presented evidence sufficient to warrant compelled identification of any of the Doe defendants. However, the Court's denial of discovery should be without prejudice to Gatelli's presentation of another petition that is properly supported by admissible evidence. A proposed order setting a schedule for notice to the Doe defendants not represented by undersigned counsel, and for responses to the petition, is submitted

with this brief.

ARGUMENT

I. The First Amendment Protection Against Compelled Identification of Anonymous Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (2003); *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.,* 514 U.S. 334 (1995). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the United States Supreme Court said 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.
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> * * *
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> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

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

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. Accordingly, First

Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

Internet speakers speak anonymously for various reasons. They may wish to avoid having their views stereotyped according to their race, ethnicity, gender, or class characteristics. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the individual speaks for the group. They may be discussing embarrassing subjects and may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. Speakers who send e-mail or visit a website leave behind electronic footprints that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original senders. Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom.

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 threaten 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 rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. These rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524.

Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of speakers to remain anonymous, justification for incursions on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).

In a closely analogous area of law, courts have developed a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In such cases, many courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of the plaintiff's case; (2) disclosure of the source is "necessary" to prove the issue because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *United States v. Driden*, 633 F.2d 346, 358 (3d Cir. 1980); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972). The

Pennsylvania courts have specifically upheld this analysis. *Commonwealth v. Bowden*, 576 Pa. 151, 176, 838 A.2d 740, 755 (Pa. 2003); *Davis v. Glanton*, 705 A.2d 879, 885 *et seq.* (Pa. Super. 1997); *McMenamin v. Tartaglione*, 139 Pa. Comwlth. 269, 287, 590 A.2d 802, 811 (1991). This standard must be applied on an individualized, case-by-case basis. *Davis*, 705 A.2d at 885.

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to defense against a shareholder derivative action, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

II. Applying the Qualified Privilege for Anonymous Speech to Develop a Standard for the Identification of John Doe Defendants.

Several courts have enunciated standards to govern identification of anonymous Internet speakers. The first appellate decision in the country remains the leading case: a company sued four individuals who had criticized it on a Yahoo! bulletin board. *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which we urge the Court to apply in this case:

> We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable

conduct of the anonymous, fictitiously-named defendants.

> We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.
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> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
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> The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted . . ., the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
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> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

342 N.J. Super. at 141-142, 775 A.2d at 760-761.

Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. In reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action (836 A.2d at 50):

> [C]ourt-ordered disclosure of Appellants' identities presents a significant

> possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.[3]

Since *Melvin* was decided, several cases in the Court of Common Pleas have recognized that disclosure turns on whether the plaintiff can produce sufficient evidence to carry her claim against a Doe defendant through summary judgment. In *Reunion Industries v. Doe*, 80 Pa. D.&C. 4th 449 (Com. Pl. Allegheny Cy. 2007), Judge Wettick, who also decided *Melvin*, reaffirmed his commitment to the summary judgment standard, and denied the requested discovery to support the plaintiff's defamation claim. In *Polito v. Doe*, 78 Pa. D. & C. 328 (Pa. Com. Pl. Lackawanna Cy. 2004), Judge Nealon held that the plaintiff had shown a prima facie case supporting her claim that insulting and pornographic emails sent directly to her AOL account, despite her efforts to change her address and avoid the messages, constituted harassment and stalking by communication under Pennsylvania law. And in *Klehr Harrison v. JPA Development*, 2006 WL 37020 (Pa Com. Pl. Philadelphia Cy. Jan. 4, 2006), the court agreed with a law review article stating that a defendant "may oppose the discovery request by establishing

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[3]Although the Supreme Court's holding was that the Superior Court had wrongly dismissed the appeal for lack of appellate jurisdiction, it did not simply reverse the order quashing the appeal, and it did not simply hold that, on remand, the Superior Court had to decide whether actual economic harm is an element of the cause of action for defamation. Rather, the Supreme Court implicitly accepted the lower court's analysis of the procedures for deciding whether to order the identification of an anonymous Internet speaker, and remanded for the Superior Court to decide whether one of the elements of "a prima facie case" that a defamation plaintiff must "establish" is the existence of economic harm. 575 Pa. at 278, 836 A.2d at 50. The remand order would not have included this element, which commands production of "evidence," unless, at the very least, the Supreme Court was endorsing the trial court's application of a summary judgment standard before allowing the discovery.

that he or she is entitled to summary judgment. [This standard] would permit discovery of a defendant's identity when the plaintiff had evidence supporting all elements of his claim . . .." *Id*. at *9. The Court had already issued a preliminary injunction based on a finding that the statements were defamatory and false, an order reversed on other grounds. *Klehr Harrison v. JPA Development*, Superior Court Docket No. 2095 EDA 2004 (December 21, 2005).

In *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the Delaware Supreme Court became the third appellate court to establish standards for identifying anonymous Internet speakers who are accused of defamation, and as in *Dendrite* and *Melvin*, the Court required a substantial showing. In *Cahill*, the Delaware Superior Court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including that the statements are false. The Court rejected the final "balancing" stage of the *Dendrite* standard.

In addition to these appellate decisions, numerous reported decisions from federal district courts adopt standards similar to either *Dendrite* or *Cahill*. In *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005), the court required first that the plaintiff "adduce competent evidence . . . address[ing] all of the inference of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts." *Id.* at 975. If the plaintiff makes that evidentiary showing, "the court [must] assess and compare the magnitude of

the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." *Id.* In *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), the court refused to enforce a subpoena to identify the authors of several postings by Best Western franchisees that criticized the Best Western motel chain, because the plaintiff had not presented any evidence of wrongdoing on the part of the Doe defendants. The court suggested that it would follow a five-factor test drawn from *Cahill*, *Dendrite* and other decisions. *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001), similarly expressed a preference for the *Dendrite* approach, requiring a showing of reasonable possibility or probability of success. In *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), the Court weighed the limited First Amendment interests of alleged file-sharers but upheld discovery to identify them after satisfying itself that plaintiffs had produced evidence showing a prima facie case that defendants had posted online hundreds of copyright songs. And in *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), the court ordered the identification of a commercial competitor of the plaintiff who posted defamatory comments on bulletin boards only after considering a detailed affidavit that explained how certain comments were false.

A similar approach was used in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants for registering Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect of such discovery (*id.* at 578):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that

> someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Accordingly, the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and give them notice that suit had been filed against them, thus providing them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against the defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the plaintiff's trademark claims against the anonymous defendants. *Id.* at 580.

Although each of these cases sets out a slightly different test, each court weighed plaintiff's interest identifying the people who allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity. [4]

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[4] The one appellate case that some have cited as pointing in a different direction is *Lassa v. Rongstad*, 294 Wis. 187, 718 N.W.2d 673 (2006), a non-Internet case in which a political candidate sued a political organization over a leaflet, written by several unidentified members, that denounced the candidate for her relationship with a recently indicted political leader. After the known defendant was sanctioned for lying under oath to avoid giving information identifying the other, anonymous authors, the parties settled the case on terms that allowed Rongstad to appeal. On appeal, he presented an argument, not made below, that the court should have considered his motion to dismiss the complaint before ruling on the pending discovery motions. A plurality opinion joined by only two of the four justices participating in that case stated that Wisconsin's detailed pleading requirement met the First Amendment concerns raised by the court in *Cahill*. However, one of the other justices concurred on other grounds but declined to reach the First Amendment issues; the fourth justice dissented on First Amendment grounds; and three justices disqualified themselves. The plurality opinion does not state Wisconsin law, however, because a majority of justices must join an opinion for it to "have any precedential value." *State ex rel. Ziervogel v. Washington Cy.*

III. Procedures That This Court Should Follow in Deciding Whether to Compel Identification of John Doe Defendants.

A. Give Notice of the Threat to Anonymity and an Opportunity to Defend Against the Threat.

First, 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 a subpoena, and then withhold any action for a reasonable period of time until the defendants have had the time to retain counsel. *Cahill*, 884 A.2d at 461; *Seescandy*, 185 F.R.D. at 579. Thus, in *Dendrite*, the court required the plaintiff to post on the message board a notice of its application for discovery. The notice identified the four screen names that were sought to be identified, and gave information about the local bar-referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved of this requirement and ordered trial judges in New Jersey to follow it. 342 N.J. Super. at 141, 775 A.2d at 760. Because, in a suit over anonymous speech, preliminary injunctive relief would ordinarily be barred by the rule against prior restraints, and the only relief sought is damages, there is rarely any reason for expedition that counsels against requiring notice and opportunity to object. The purpose of requiring notice to the anonymous defendant and identification of the specific statements alleged to be actionable can be served only by allowing 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, plus enough

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Bd. of Adjustment, 263 Wis.2d 321, 328, 661 N.W.2d 884, 888 (Wisc. App. 2003); *Doe v. Archdiocese of Milwaukee*, 211 Wis.2d 312, 334 n. 11, 565 N.W.2d 94 (1997). Moreover, *Cahill* was decided after briefing was complete, and it is not clear that any party argued for the application of *Cahill*'s summary judgment standard, not to speak of *Dendrite*'s balancing standard.

time to take into account the fact that the Doe probably does not yet have a lawyer.

In this case, so far as we are aware, plaintiff has taken no steps to notify any Doe defendant that they are the subject of suit in this case, or, for that matter, on what basis they have been sued. The Pilchesky defendants, for their part, did post the Rule to Show Cause on the Doherty Deceit web site at http://www.dohertydeceit.com/Identityrule.PDF#page=1, with a link from the message board at http://scrantonpoliticaltimes.activeboard.com/forum.spark?forumID=65524&p=3&topicID=12213552. Although the caption of the Rule lists the Doe defendants, nothing in that posting sets forth the messages that are alleged to be unlawful. Moreover, there is no guarantee that each of the Doe defendants has seen this message or understood that they had the right to oppose the petition for disclosure.

Investigation by the undersigned counsel revealed that, in the process of registration to post on the message board, the Pilchesky defendants collect an email address to which a "confirmation email" is sent once registration is complete. *See* Levy Affidavit, ¶ 3. We urge the Court to order the Pilchesky defendants to send an email notice to the email address provided by each of the Doe defendants, telling them that they are Doe defendants. This message should contain further information, provided by the plaintiff, setting forth the basis for the lawsuit against each defendant, as further discussed in the next section of this brief. Recognizing the possibility that email addresses may have changed after registration for the message board, the Court should also order Gatelli to publish a notice in the Scranton Times-Tribune identifying pseudonyms whose owners she seeks to identify, and informing them where they can, without revealing their identities, obtain a copy of plaintiff's filing specifying the statements on which each defendant was sued. A proposed order containing such a procedure is attached for the

Court's consideration.

B. Require Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that she does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, courts should require the plaintiff to quote the exact statements by each anonymous speaker that are alleged to have violated her rights. Where the plaintiff has sued many different anonymous speakers, the plaintiff should be required to specify which statements she is attributing to which anonymous speaker, as a basis for discovery the identity of that speaker. Unless the plaintiff has linked the specific basis for suit with the specific defendant being sued for that statement, the Doe defendant cannot decide whether he or she has a sound basis for opposing discovery, and the court cannot evaluate the propriety of the requested discovery.

Plaintiff here has quoted 130 different message board postings, but has not specified which statements were posted under which of the pseudonyms whose owners her discovery request seeks to identify. This problem would have been obviated had Gatelli complied with Rule 1019(i) of the Pennsylvania Rules of Civil Procedure, which requires that when an action is based on a writing, a copy of the writing should be attached to the complaint. In addition, because plaintiff has not specified which posting goes with which defendant, or identified the location on the message board where each posting appears, it is impossible even to be certain that each of the pseudonyms identified as a defendant made at least **one** of the 130 enumerated statements. Thus, Gatelli **may** be seeking to identify at least some Does who have not made **any** statement that Gatelli alleges to be actionable. Moreover, some of the postings are quite long, and Gatelli does not specify which parts of the statements are allegedly actionable (and

under which of her three causes of action).

Gatelli should be ordered to specify that information and to provide it in both hard copy and electronic form, so that the Pilchesky defendants can include it in their court-ordered notice to the Doe defendants. The Court should further order that Gatelli may not pursue the identification of any anonymous person whose specific words have not been alleged to be actionable and provided for the Court's review.

C. Review the Facial Validity of the Claims After the Statements Are Specified.

The court should review each statement to determine whether it is facially actionable. In this regard, some of the claims advanced by Gatelli appear highly dubious.

First, although Gatelli purports to be bringing three separate causes of action, for defamation, "civil conspiracy," and intentional infliction of emotional distress, each cause of action depends on Gatelli's establishing the elements of her defamation claim. For example, Gatelli alleges that the Doe defendants have engaged in a "civil conspiracy" to defame her; but the United States Supreme Court has held that a public figure cannot avoid the constitutional minimum requirements for defamation claims simply by changing the label that they place on the tort for which they are suing. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Courts have repeatedly held that a claim for "civil conspiracy" to harm a public figure plaintiff by publishing damaging statements about him or her must meet the full constitutional standards for a defamation claim. *Barr v. Clinton*, 370 F.3d 1196, 1202-1203 (D.C. Cir. 2004); *Tierney v. Vahle*, 304 F.3d 734, 743 (7th Cir. 2002); *Windsor v. The Tennessean*, 719 F.2d 155, 162 (6th Cir. 1983). Moreover, the Pennsylvania courts have specifically held that public figures cannot

sue for intentional infliction of emotional distress. *Reiter v. Manna*, 436 Pa. Super. 192, 200, 647 A.2d 562, 567 (Pa. Super. 1994); *Jones v. City of Philadelphia*, 73 Pa. D. & C.4th 246, 270 (Pa. Com. Pl. 2005), *aff'd*, 893 A.2d 837, 845-846 (Pa. Cmwlth. 2006). *Hustler v. Falwell* itself was a case in which a claim for intentional infliction of emotional distress under Virginia law was barred by the First Amendment.[5]

Second, many defamation cases are derailed by the rule that expressions of opinion are not actionable for defamation, *Feldman v. Lafayette Green Condominium Ass'n*, 806 A.2d 497, 501 (Pa. Cmwlth. 2002), and the issue of whether a statement is opinion or fact is one for the Court to resolve as a matter of law. *Mathias v. Carpenter*, 402 Pa. Super. 358, 362-363, 587 A.2d 1 (1991); *Nanavati v. Burdette Timlin Mem. Hosp.*, 857 F.2d 96, 106-108 (3d Cir. 1988). Moreover, just as readers will anticipate that newspaper commentators "will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere as a news reporting column," *Riley v. Moyed*, 529 A.2d 248, 252 (Del. 1987), so, too, statements on a message board are typically exaggerated and most readers will take them with a grain of salt rather than anticipating complete objectivity. The very context thus militates against a finding of defamatory meaning.

In this case, many of the statements set forth in the Joinder Complaint are highly rhetorical; indeed, many of them largely express antipathy toward Gatelli and some of her fellow incumbents. For example, at page 19 of her complaint, Gatelli charges an unspecified Doe

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[5]Gatelli's request for disclosure cites *Polito v. Doe, supra*, as supporting disclosure, but the case is inapposite. Polito was not a public figure; she was complaining about emails that were sent to her personally, not messages posted on a message board; and Polito's complaint alleged both stalking and harassment, causes of action not alleged in the Joinder Complaint.

defendant with making the following statement, which she labels as statement (x):

> I would like to see the 3 rats on council, the head douche bag and his merry band of puppets stand up to the people and have a open meeting to debate the crisis in the city, then we can stone the fuc%$#^ Nazis like the french did when paris was liberated.....
>
> Judy, Sherry, Bob, Chris you can all Go FU$# YOURSELVES for none of you will ever see office again.....

This statement was, in fact, posted by defendant bigdaddy to the Scranton Political Times Message Board on February 8, 2007, as part of a longer message, http://scrantonpoliticaltimes.activeboard.com/forum.spark?forumID=65524&p=3&topicID=10208419. Although this statement certainly expresses anger and disdain, it does not contain any actionable statements of fact.

Similarly, at page 17 Gatelli accuses an unspecified Doe defendant of making the following statement about her, which she labels as statement (i):

> You arrogance blows me away .....You screwed us & when you get yours, don't think that anyone in this town will feel anything but disgust for you. You didn't just screw the adults in this town, you screwed the children of Scranton, Yep all those innocent children now have to do w/out because Mommy & Daddy have to figure out how to pay the bills & not lose the roof over there head ... Thanks Judy

This statement was posted to the message board by defendant MistyMtTop on January 5, 2007 http://scrantonpoliticaltimes.activeboard.com/forum.spark?forumID=65524&p=3&topicID=9802563, but again this is a highly rhetorical posting that simply expresses the opinion that Gatelli's official decisions about official spending and taxation are bad for the adults and children in Scranton; it contains no actionable statements of fact.

At pages 20 and 23 of her complaint, Gatelli accused unspecified Doe defendants of

making the following statements about her:

> The only way "Nazi" Gatelli{Sieg Hiel} is giving up her Council seat is when her fat, Nazi, A$$ doesn't fit in it anymore!!! Hey Ursula, why don't you shove another Cannoli down your fat pie-hole and decide whose rights your'e gonna violate this week!!!...Jimbu15...

and

> Ursula is a Nazi, plain and simple!!!

These statements were posted on February 13 and March 23 by defendant jimbu15, *see* http://scrantonpoliticaltimes.activeboard.com/forum.spark?forumID=65524&p=3&topicID=10264580; http://scrantonpoliticaltimes.activeboard.com/forum.spark?forumID=65524&p=3&topicID =1086 0914. Courts have consistently held that calling somebody a "Nazi" is figurative and rhetorical speech that is not actionable as libel. *Konop v. Hawaiian Airlines*, 302 F.3d 868, 882-883 (9th Cir. 2002); *Dunn v. Gannett New York Newspapers*, 833 F.2d 446, 454 (3d Cir.1987) ("Such name calling, in the context of public debate, is protected speech because of the profound national commitment that debate on public issues should be uninhibited, robust, and wide open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

Similar objections may be interposed to other specific statements attributed to the Doe defendants. Indeed, many of these statement are so plainly protected by the First Amendment that, in our view, plaintiff risks sanctions under the Dragonetti Act. 42 Pa. C.S.A. § 8351.

D. Require an Evidentiary Basis for the Claims.

Fourth, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of the

cause of action to show a realistic chance of winning a lawsuit against each Doe defendant. The requirement of presenting evidence prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need identification of defendants simply to proceed with the case. However, the Court should recognize that identification of an otherwise anonymous speaker is itself a major form of relief in cases like this one, and relief is generally not awarded to a plaintiff absent evidence in support of the claims. Withholding relief until evidence is produced is particularly appropriate where the relief may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who bring cases like this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. E.g., http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=74969&rfi=8. In a recent case, a major Pennsylvania energy company filed a John Doe case against an employee who had criticized it on a Yahoo! message board on theories that would not have withstood a motion for summary judgment; obtained a subpoena and thereby the poster's identifying information; dismissed the lawsuit; and fired the employee. *See Swiger v. Allegheny Electric*, No. 05-5725-JCJ, 2006 WL 1409622 (E.D. Pa. May 19, 2006).

One leading advocate of discovery procedures to identify anonymous critics urges corporate executives to use discovery first, and to decide whether to pursue a libel case only after

the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, http://www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault,* http://www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer and Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers similarly suggest that clients decide whether to pursue a defamation action only after finding out who the defendant is. *Id.* When respected members of the Bar are seeking clients by promoting the benefits that can be obtained from subpoenas without winning the lawsuit, the dangers posed by a mere "good faith" standard when libel suits are brought pro se are even more troubling.

To address potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources that require a party seeking discovery of information protected by the First Amendment to show reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F. Supp. 551, 566-567 (E.D. Mich. 1979). In effect, the plaintiff should be required to meet a summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues on which it needs to identify the anonymous speakers, before it gets the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994. As discussed above, this is the approach that courts in Pennsylvania have

already taken in response to subpoenas to identify anonymous Internet speakers.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, the anonymity of the defendants should not be breached. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The requirement that there be sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

The extent of the proof that a proponent of compelled disclosure of the identity should be required to offer may vary depending on the element of the claim that is in question. On many issues in suits for tortious speech, several elements of the plaintiff's claim will be based on evidence to which the plaintiff is likely to have easy access, even access that is superior to the defendants'. For example, the plaintiff is likely to have ample means of proving that a statement is false. Thus, it is ordinarily proper to require a plaintiff to present proof of this element of its claims as a condition of obtaining or enforcing a subpoena for the identification of a Doe defendant.

The same is true with respect to the proof of damages. Courts have traditionally required such proof in at least some cases, and a plaintiff should have ample means of proving its damages or other harm without need of discovery from the defendant. When a defamation action is filed over statements which, like anonymous internet postings, have less potential for damage

– because they are less premeditated or less likely to be perceived as true – courts have traditionally required a higher standard of proof. For example, *Walker v. Grand Central Sanitation*, 430 Pa. Super. 236, 245-46, 634 A.2d 237, 241-42 (1993), changed Pennsylvania law to require at least proof of general damages even in cases of defamation per se. Although *Walker* was a slander case, other courts have read the decision as extending the requirement of proof of general damages to all cases of defamation *per se*. And, indeed, many states now require defamation plaintiffs to show actual harm as a condition of establishing liability. *Dendrite*, 342 N.J.Super. at 158, 775 A.2d at 772; *Jenkins v. Revolution Helicopter Corp.*, 925 S.W.2d 939, 944-45 (Mo. Ct. App. 1996);*Ryan v. Herald Assoc.*,152 Vt. 275, 283, 566 A.2d 1316, 1320-1321 (1989); *Mareck v. John Hopkins University*, 60 Md. App. 217, 223, 482 A.2d 17, 21 (1984); *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1335 (10th Cir. 1996) (New Mexico law). The Supreme Court in *Melvin v. Doe*, 575 Pa. at 278, 836 A.2d at 51, remanded with instructions that the Superior Court decide whether proof of economic harm is a pre-condition for a public official to establish liability for defamation.

In this case, Gatelli has failed to introduce **any** admissible evidence to establish that the statements about her were false, that she has suffered any economic damages (or, indeed any redressable harm at all, of that statements were made about her with actual malice). Although her complaint alleged that statements about her were false, and was verified, the verification was made only "to the best of my knowledge, information and belief." Such a weak verification is not sufficient to establish a prima facie case or to defeat a motion for summary judgment.

On the other hand, there is substantial reason to believe that many of the statements made by the Doe defendants, to the extent that they assert any factual statements that are capable of

being proved false, are true. Although Gatelli has sued aquamg over a posting claiming that Gatelli is a "liar" by virtue of false statements she has made from the podium in her capacity as council president, the record indicates that the accusations of lying may be true. For example, Scranton City Council meetings have been televised for many years, but the cameras were removed last spring for a brief period of time, and there was a controversy about why television cameras were removed. Some members of the public assumed that Gatelli was behind the removal because, they believe, the camera exposed her poor meeting management skills, not to speak of what they regard as her misconduct in office. The local newspaper reported that Gatelli "ordered the removal" of the cameras, Singleton, *Former council members: Civility starts at the top,* http://www.thetimes-tribune.com/site/news.cfm?newsid=18126801&BRD=2185&PAG=461& dept_id=415898&rfi=6. At a council meeting, Gatelli denied that she was responsible for the removal, saying that it was Mayor Doherty who made that decision, but the Mayor said that he had had the cameras removed at Gatelli's direction. Transcript of Scranton City Council Meeting, April 19, 2007, pages 71 *et seq.,* http://www.scrantonpa.gov/council_agendas/2007/4_19_07_minutes.html. At another city council meeting, Gatelli denied having received a certain letter about flood protection for a specific neighborhood, even though, at least according to one speaker before the City Council, the television recording of the meeting showed that, with her hand cupped over her microphone, Gatelli had told another council member that she **had** received the letter and asked whether the other council member had done so. Transcript of Scranton City Council Meeting, March 8, 2007, pages 88 *et seq.*, http://www.scrantonpa.gov/council_agendas/2007/03_08_minutes.html; Transcript of Scranton City Council Meeting, March 15, 2007, pages 158 *et seq.*, http://www.scrantonpa.gov/council_agendas/2007/03_15_

minutes.html. Thus, even if a constituent can be sued for libel for calling a politician a liar – a matter that is scarcely free from doubt – the statement appears to be true with respect to plaintiff Gatelli.

Moreover, the complaint puts forward no more than a blanket assertion of falsity. In cases where discovery into the identities of anonymous speakers was allowed because the plaintiffs created a prima facie case on the issue of falsity, the plaintiffs provided detailed affidavits or testimony that explained in what respect particular statements were false or otherwise actionable. For example, the affidavit that was filed in *Alvis Holdings* is attached, Levy Affidavit, Exhibit E, and the opinions in such cases as *Sony Music* and *Immunomedics v. Doe*, 342 N. J. Super. 160, 775 A.2d 773 (N.J. Super. 2001) (companion case to *Dendrite)* describe the level of detail of the affidavits on which the courts there relied. Here, the Court cannot determine, from the "evidence" put forward by Gatelli, just what parts of the statements are supposedly false statements of fact and, with respect to such statements, any reason to find that such statements are false. Accordingly, the petition for discovery should be denied.

E. Balance the Equities.

Even after the Court has satisfied itself that each speaker whose identity is sought has made an actionable statement,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. 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 . . ... On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

Missouri ex rel. Classic III v. Ely, 954 S.W.2d 650, 659 (Mo. App. 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporters' source disclosure case, *Dendrite* called for individualized balancing when a plaintiff seeks to compel identification of an anonymous Internet speaker:

> assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.

The adoption of a standard comparable to the test for evaluating a request for a preliminary injunction – considering the likelihood of success and balancing the equities – is particularly appropriate because an order of disclosure is an injunction, and denial of a motion to identify the defendant does not compel dismissal of the complaint, but only defers its ultimate disposition. Apart from the fact that, under *New York Times*, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters," *Gertz v. Welch*, 418 U.S. 323, 341 (1974), the issue at this stage of the case is not whether the action should be dismissed or judgment granted rejecting the tort claims in the complaint, but simply whether a sufficient showing has been made to overcome the right to speak anonymously. *See also Highfields Captial Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005) ("court [must] assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant").

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to a motion to dismiss or a motion for summary judgment. At the very least, Gatelli could renew her motion after submitting more evidence. In this case, for example, it should be a simple matter for Gatelli to submit affidavits directly controverting allegations on the message board that accuse her of lying from the podium during a council meeting, for example (assuming that this charge is the proper basis for a defamation action), or of benefiting through the patronage employment of her children or their spouses.

In contrast, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury because once a speaker loses her anonymity, she can never get it back. And 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, 373-374 (1976). Indeed, the injury is magnified where the speaker faces the threat of economic or other retaliation. If, for example, the person whom the plaintiff seeks to identify is employed by someone over whom the plaintiff exercises influence or control, the defendant could lose a great deal from identification, even if the plaintiff has a wholly frivolous lawsuit.

Moreover, the nature of the plaintiff and of the criticisms on which suit has been brought here weigh heavily against enforcement of the subpoena. Gatelli is a public official trying to identify several constituents who criticized her conduct in office. The fact that she may be sensitive to criticism – *see* Joinder Complaint ¶ 133, alleging that her critics continued to criticize her publicly even after she was reduced to tears at a public meeting – should not give her any greater right to silence her critics. By holding elective office, Gatelli voluntarily made her conduct a fair subject for comment, even robust and unkind comment; and the comments for

which the Does have been sued are core political speech, for which First Amendment protection is at its apogee.

In her petition for disclosure, Gatelli argued that the Doe defendants have no expectation of privacy because the Pilchesky defendants placed a notice at the home page of the message board warning posters that they might not be anonymous because they could be identified through their IP addresses, and further warning them that they could be held responsible for libelous messages. Reliance on these warnings begs the question, because the question before the Court is whether the messages **are** libelous or otherwise actionable, and whether government power should be invoked to strip the Doe defendants of their anonymity. Moreover, it is quite common for ISP's and message board providers to include warnings about possible identification and cautions against use of the message board to engage in abusive communications. If nothing else, those warnings protect the ISP against liability if it is compelled by a court to provide identifying information; if written strongly enough and displayed prominently, they may also serve as an effective reminder to message board users to take the possibility of litigation into consideration when they post messages.

Such warnings were present on the message boards and blogs in most of the cases cited in Section II of this brief; yet that did not impel those courts to disregard the important First Amendment right to speak anonymously. The fact that the Pilcheskys placed those warnings on the home page of the message boards, as a means to encourage responsible use of the facility, does not undercut the right to remain anonymous of those posters who did **not** violate Gatelli's rights.

It is not difficult to imagine a case in which the plaintiff is able to create a bare prima

facie case for defamation but the equities nevertheless weigh against disclosure. For example, very much in the news as this brief is written are the consequences that have followed when American ISPs with a presence in China have revealed identifying information for persons who sent emails abroad or posted to online discussion sites on topics that the Chinese leadership wishes to censor. *E.g.*, *China's stifling of Web detailed: U.S. firms often cooperate, experts reveal to Congress*, San Francisco Chronicle, February 19, 2006, page http://www.sfgate.com/ cgi-bin/article.cgi?f=/c/a/2006/02/19/ BUGFTHAP1A1.DTL. One of the solutions that is being suggested is that companies might maintain their servers outside China, and hence beyond the reach of that government's power. But imagine what might happen if a foreign figure accused of being responsible for a massacre of dissidents were to sue for libel in the United States, or initiate a proceeding abroad and obtain a commission to take discovery in the United States against a Chinese emigre who maintains a democracy web site in the United States. Suppose further that this leader swears an affidavit denying that he was involved, or even that there was a massacre – after all, what would be the consequences to such a person, living in China and in any event enjoying immunity from prosecution, who lied under oath in an affidavit submitted in the United States? Yet such an affidavit could create a prima facie case and the consequences to the defendant's family back in China could be horrendous. In such a case, the courts might find that the balance of the equities requires a stronger and more reliable showing on the issue of falsity.

This hypothetical is extreme and unlikely, but in many cases, a Doe defendant has real reason to fear the economic or other consequences of being identified, and the example points up the need for a test that affords protection even in cases where a prima facie case can be presented. In this case, the anonymous defendants have severely criticized not only Gatelli herself, but the

mayor of Scranton, whose political connections give him ample opportunity not only to reward his friends but also to punish his critics, through the exercise of the substantial discretionary authority that all public officials enjoy. For example, as discussed above, when the Pilcheskys' message board contained strong criticisms of the Director of Scranton's Office of Economic and Community Development, her sister, a local judge, got the Pennsylvania State Police to open a criminal investigation, and when Pilchesky refused to remove the comments from the message board, the police got the entire message board shut down by sending a "request" for such action to Pilchesky's ISP, knowing that the ISP was willing to honor such "requests" from law enforcement agencies. The Doe defendants, and others who post on the Scranton Political Times Message Board, live in and around Scranton, and have every reason to fear that if they can easily be identified, they could be the subject of official retaliation of various kinds – law enforcement efforts may be directed against them, their children may be punished in school, they may come before a judge who is a relative or ally of somebody they criticized, they may face increased inspections looking for code violations, their requests for zoning variances or business licenses may be denied.

The balancing part of the *Dendrite* test is neither plaintiff- nor defendant-friendly. In many cases, consideration of the strength of the plaintiffs' case, the nature of the speech, and the propensity of the speech to cause serious damage to the plaintiff's legitimate and protected interests may strongly weigh in **favor** of disclosure. *See*, *e.g.*, *Biomatrix v. Costanzo*, Docket No. BER-L-670-00 (N.J. Super., Bergen Cy.) (anonymous poster alleged that head of biotech company was a doctor who had collaborated with the Nazis in their heinous medical experiments); *Hvide v. Doe*, Case No. 99-22831 CA01 (Fla. Cir. Ct, 11th Judicial Cir., Dade Cy.)

(defendant claimed that head of company was guilty of embezzling corporate funds; plaintiff lost his job as a result); *HealthSouth Corp. v. Krum*, Case No. 98-2812 (Pa. Com Pl. 1998) (poster claimed that he was having affair with the CEO's wife). Similarly, in *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), the court considered the relatively low First Amendment value of the speech implicated by "sharing" copyrighted musical recordings as one important reason to grant discovery based on the level of factual showing that the plaintiffs had presented.

In this case, however, the balance of equities tips strongly in favor of the defendants. Even the relatively factual statements, such as accusations that Gatelli's "lied" in a statement at a public meeting, are the sort of charges that are routinely made against politicians in the course of ordinary public discourse, and cannot realistically produce a verdict for defamation. They are not the proper subject of libel litigation.

Suppose that a President wanted to harass critics who claim that he "lied" about the presence of weapons of mass destruction in Iraq, or that he had lied about whether he had sex with a White House intern, using terms like defendant aquamg's "liar liar pants on fire," or who said that political ambition or campaign contributions from special interests were responsible for too many of their decisions, like defendant newgirl's claim that Gatelli "is not for the people, she is for herself." Could Presidents Clinton or Bush have tied their adversaries down in libel litigation over such comments, simply by submitting an affidavit swearing that he didn't lie, and that his decision were purely altruistic? If the comments were made anonymously, could their identities be successfully subpoenaed? Calling the head of the city council a liar or selfishly motivated, even if technically factual and defamatory, is not the proper basis for a libel suit, and

the motion to disclose the Doe defendants' identities should therefore be denied.

IV. Dendrite's Flexible Standard Discourages Frivolous Lawsuits While Allowing Genuine Cases to Proceed.

The main advantage of the *Dendrite* test is its flexibility. The test seeks to balance the relative interests of the plaintiff who claims that her reputation has been unfairly besmirched against the interest in anonymity of the Internet speaker who claims to have done no wrong, and provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of tort victims to be compensated for their losses. It ensures that online speakers who make wild and outrageous factual assertions about public figures or private individuals or companies will not be immune from identification and from being brought to justice, while ensuring at the same time that persons with legitimate reasons for speaking anonymously while making measured criticisms will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic. ISP's reported staggering statistics about the number of subpoenas they have received – for example, AOL's amicus brief in *Melvin* reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! told one judge at a hearing in California Superior Court that it had received "thousands" of such subpoenas.

The adoption of strict legal and evidentiary standards for defendant identification in this

case, like those adopted by courts in other states, will encourage would-be plaintiffs and their counsel to stop and think before they sue, and to ensure that litigation is undertaken for legitimate ends and not just to chill speech. At the same time, those standards have not stood in the way of identifying those who face legitimate libel and other claims. The Court should preserve this balance by adopting the *Dendrite* test that considers both the interests of defamation plaintiffs to vindicate their rights in meritorious cases and the right of Internet speaker defendants to maintain their anonymity. Where, as here, there is no realistic possibility that their speech could be made the basis of a successful action for defamation or any of the other torts that have been alleged here, discovery should be denied.

CONCLUSION

Gatelli's motion to identify the Doe defendants should be denied without prejudice to being renewed following the articulation of a more specific legal and evidentiary basis for proceeding against each of the Doe defendants, and the provision of notice to those defendants, as provided by the accompanying proposed order.

Respectfully submitted,

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