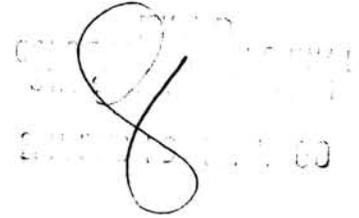


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No. 72321-9

In the Court of Appeals
of the State of Washington
Division I

DEBORAH THOMSON,

Appellant,

v.

JANE DOE *et al.*,

Respondent.

RESPONSE BRIEF OF JANE DOE

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TABLE OF CONTENTS

Table of Authorities	iii
STATEMENT	2
A. Background	2
B. Facts and Proceedings Below	5
Summary of Argument	12
ARGUMENT	16
THE FIRST AMENDMENT REQUIRES A SHOWING OF MERIT ON BOTH THE LAW AND THE FACTS BEFORE A SUBPOENA TO IDENTIFY AN ANONYMOUS SPEAKER IS ENFORCED	16
A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers	17
B. Many Courts Now Require a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff	23
C. Thomson Did Not Make the Showing Required Before Identification of the Jane Doe Speaker May Be Ordered	33
1. Although Thomson Did Not Follow the Constitutionally Required Notice Procedures, This Failure Was Corrected by Avvo's Giving Notice to the Doe	33
2. Thomson Pleaded Verbatim Only a Portion of Doe's Statement	35
3. Thomson Should be Required to Plead a Proper Claim for Defamation Against Doe	37
4. Thomson Presented No Evidence That the Doe Defendant Made Any False Statements	39

5.	The Court Should Adopt the <i>Dendrite</i> Balancing Test	43
	Conclusion	46
	Certificate of Service	49

TABLE OF AUTHORITIES

Cases

<i>AF Holdings, LLC v. Does 1-1058</i> , 752 F.3d 990 (D.C. Cir. 2014)	21
<i>Alvis Coatings v. Does</i> , 2004 WL 2904405	30, 31
<i>In re Anonymous Online Speakers</i> , 661 F.3d 1168 (9th Cir. 2011)	30, 46
<i>Art of Living Foundation v. Does 1-10</i> , 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011)	29, 45
<i>Asay v. Hallmark Cards</i> , 594 F.2d 692 (8th Cir. 1979)	37
<i>In re Baxter</i> , 2001 WL 34806203 (W.D. La. Dec. 20, 2001)	29, 31
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<i>Bose Corp. v. Consumers Union</i> , 466 U.S. 485 (1984)	31
<i>CPC International v. Skippy Inc.</i> , 214 F.3d 456 (4th Cir. 2000)	31
<i>Call of the Wild Movie v. Does 1-1,062</i> , 770 F. Supp. 2d 332 (D.D.C. 2011)	45
<i>Cervantes v. Time</i> , 464 F.2d 986 (8th Cir. 1972)	40
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<i>Davis v. Avvo, Inc.</i> , 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012)	40

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<i>Doe v 2theMart.com</i> , 140 F. Supp. 2d 1088 (W.D. Wash. 2001)	18, 23
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<i>Federal Land Bank of Baltimore v. Birchfield</i> , 173 Va. 200 (1939)	36
<i>Flowers v. Carville</i> , 310 F.3d 1118 (9th Cir. 2002)	36
<i>Fodor v. Doe</i> , 2011 WL 1629572 (D. Nev. Apr. 27, 2011)	29, 31
<i>Fuste v. Riverside Healthcare Association</i> , 265 Va. 127 (2003)	36
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	22
<i>Ghanam v. Does</i> , 845 N.W.2d 128 (Mich. App. 2014)	28
<i>Harris v. City of Seattle</i> , 2003 WL 1045718 (W.D. Wash. Mar. 3, 2003), <i>aff'd</i> , 152 Fed.Appx. 565 (9th Cir. 2005)	36
<i>Highfields Capital Management v Doe</i> , 385 F. Supp. 2d 969 (N.D. Cal. 2005)	29

<i>Hoppe v. Hearst Corp.</i> , 53 Wash. App. 668, 770 P.2d 203 (1989)	8
<i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988)	8
<i>Immunomedics v Doe</i> , 775 A.2d 773 (N.J. App. 2001)	31
<i>Independent Newspapers v. Brodie</i> , 966 A.2d 432 (Md. 2009)	18, 26
<i>In re Indiana Newspapers</i> , 963 N.E.2d 534 (Ind. App. 2012)	26
<i>Jones v. Flowers</i> , 547 U.S. 220 (2006)	33
<i>Koch Industries v. Doe</i> , 2011 WL 1775765 (D. Utah May 9, 2011)	29
<i>Krinsky v. Doe 6</i> , 72 Cal. Rptr. 3d 231 (Cal. App. 2008)	26
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<i>Missouri ex rel. Classic III v. Ely</i> , 954 S.W.2d 650 (Mo. App. 1997)	43

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<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	22
<i>Nissan Motor v. Nissan Computer</i> , 378 F.3d 1002 (9th Cir. 2004)	31
<i>On The Cheap, LLC v. Does 1-5011</i> , 280 F.R.D. 500 (N.D. Cal. 2011)	22
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<i>Patrick Collins v. Doe 1</i> , 288 F.R.D. 233 (E.D.N.Y. 2012)	21
<i>In re Petroleum Prod. Antitrust Litigation</i> , 680 F.2d 5 (2d Cir. 1982)	40
<i>Pilchesky v. Gatelli</i> , 12 A.3d 430 (Pa. Super. 2011)	26
<i>Reno v. American Civil Liberties Union</i> , 521 U.S. 844 (1997)	2, 18
<i>Richards of Rockford v. PGE</i> , 71 F.R.D. 388 (N.D. Cal. 1976)	40
<i>Royal Palace Homes v Channel 7 of Detroit</i> , 197 Mich. App. 48, 495 N.W.2d 392 (Mich App 1992)	36
<i>SaleHoo Group v. Doe</i> , 722 F. Supp. 2d 1210 (W.D. Wash. 2010)	29
<i>Schultz v Reader's Digest</i> , 468 F. Supp. 551 (E.D. Mich. 1979)	40

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<i>Solers v. Doe</i> , 977 A.2d 941 (D.C. 2009)	27
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<i>Swiger v. Allegheny Energy</i> , 2006 WL 1409622 (E.D. Pa. May 19, 2006), <i>aff'd</i> , 540 F.3d 179 (3rd Cir. 2008)	21
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<i>Tendler v. www.jewishsurvivors.blogspot.com</i> , 164 Cal. App. 4th 802, 79 Cal. Rptr. 3d 407 (2008)	8, 40
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<i>United States v. Alvarez</i> , 132 S. Ct. 2537 (2012)	32
<i>Vantassell-Matin v. Nelson</i> , 741 F. Supp. 698 (N.D. Ill. 1990)	37
<i>Watchtower Bible & Tract Society v. Village of Stratton</i> , 536 U.S. 150 (2002)	17
<i>Whitehouse v. Cowles</i> , 48 Wash. 546, 93 P. 1086 (1908)	37
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Constitution and Statutes

United States Constitution
 First Amendment passim

California Anti-SLAPP Statute,
 Code of Civil Procedure § 425.16 8

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 10 Business Law Today No. 1 (Sept.-Oct.2000) 21

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This litigation arises out of three separate online reviews that criticized the legal services provided by a Florida divorce lawyer, Deborah Thomson, to some of her clients. Two of the reviews were posted on Yelp and Google, respectively, companies that are based in California, where controlling precedent require a would-be defamation plaintiff to make an evidentiary showing that she has a likelihood of prevailing on the merits before she can obtain a court order compelling the comment's host to provide identifying information about the critic. The lawyer, who claims that each of the three reviews contains false and defamatory statements, chose to pursue discovery instead from Avvo, the host of the third negative statement, perhaps hoping to take advantage of the fact that the courts of this state have not yet decided whether to require evidence supporting a tort claim before an anonymous online speaker can be identified through an exercise of government power.

There are now twelve states, including the District of Columbia, where courts demand a showing beyond the filing of a facially valid complaint before a plaintiff can deprive an anonymous speaker of the First Amendment right to speak anonymously; many federal courts, including a federal court in Washington, have reached the same conclusion. This Court should hold, in agreement with courts elsewhere as well as with the trial court below, that the right to speak anonymously cannot be breached without a sufficient showing that the discovering party has valid reasons to seek such identification.

STATEMENT

A. Background

Protection for the right to engage in anonymous communication is fundamental to a free society. Indeed, as electronic communications have become essential tools for speech, the Internet in all its forms—web pages, email, chat rooms, and the like—has become 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.

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. For example, Yahoo! and Raging Bull host message boards for every publicly traded company where investors, and other members of the public, can post

discussions about the company. Blogspot, WordPress and TypePad give individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, companies, or other topics while leaving it open for visitors to post their own comments. Other web sites, such as Yelp and Angie's List, have organized forums for consumers to share their experiences with local merchants. And still other sites are organized by industry, such as Trip Advisor that hosts reviews of hotels, restaurants and tourist venues, 800Notes where recipients of telemarketing calls can describe their experiences with cold marketing calls, and RateMD's which provides a forum for patients to review medical professionals. Avvo is a web site of the latter class, where consumers, and indeed other lawyers, can provide feedback about their experiences with lawyers.

The individuals who post messages on such web sites often do so under pseudonyms—similar to the old system of truck drivers using “handles” when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the forum at issue here will reveal, many people choose nicknames that protect the writer's identity from those who disagree with him or her, and hence encourage the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature—and Avvo is typical in that respect—that makes them very different from almost any other form

of published expression. Subject to requirements of registration and moderation, any member of the public can use the forum to express his point of view; a person who disagrees with something that is said on a message board for any reason—including the belief that a statement contains false or misleading information—can respond to that statement immediately at no cost, and that response can have the same prominence as the offending message. Most online forums are thus unlike a newspaper, which cannot be required to print responses to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, on most Internet forums, companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong.

Avvo, indeed, enables any lawyer whose services are reviewed to place her reply directly under the review to which she is replying; Ms. Thomson, the appellant in this case, took advantage of this feature to respond to the anonymous review whose author she seeks to identify through its subpoena to Avvo. And, because many people regularly revisit message boards, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about

the truth of disputed propositions of fact and opinion.

B. Facts and Proceedings Below.

Deborah Thomson is a Tampa lawyer who currently conducts business through a law firm called The Women's Law Group. Before forming this firm, according to a statement that she posted on Avvo, she worked for a different law firm where "any cases were not [her] own." Clerk's Record 94. Ms. Thomson's work has been reviewed by three users on the Google web site; two of the three are highly positive, but there is one negative review posted, under the name Tosha Green. Clerk's Record 17-18. There is one review of Ms. Thomson on the Yelp web site, a negative review posted by someone calling herself "Wanda G." Clerk's Record 15. Finally, Thomson's work has been rated by roughly a score of Avvo users, several identifying themselves as former clients and a few identifying themselves as lawyers providing peer reviews. Every one of the Avvo reviews, save one, praised Thomson. Clerk's Record 87-97. There was one negative post on Avvo, however, posted in September, 2013, entitled "Things to consider," and posted by someone who identified herself only as "a Divorce client." This review stated as follows:

I am still in court five years after Ms. Thomson represented me during my divorce proceedings. Her lack of basic business skills and detachment from her fiduciary responsibilities has cost me everything. She failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any

documents at all. My interests were simply not protected in any meaningful way.

Clerk's Record 94.

Although Ms. Thomson did not respond either to Tosha Green on Google or to Wanda G. on Yelp, in approximately January 2014, she posted an extensive response to "Divorce client" on Avvo; according to the motion to compel that she filed in the court below, that response "describ[ed] how it [the review] was false and inaccurate." Clerk's Record 7 n.2. Ms. Thomson began the response, which appears in several locations in the Clerk's Record but most legibly at page 94, by asserting that she knew who the reviewer was, and that the reviewer was not really a client: "The writer of this review was not an actual client of mine, This is a personal attack from someone that I know."¹ She went on to challenge five different aspects of the review, including (1) that insofar as the review says that Thomson represented her five years ago, "[f]ive years ago, I was employed by a law firm, and any cases were not my own"; (2) that it is an impossibility for a divorce litigant to be in court for five years because "[t]he court has procedural safeguards to ensure that a case does not drag on"; (3) that if a case is still going on five years later "my involvement would have been far removed"; (4) that a mediation would not occur if the attorney did not attend, and in any event "[m]ediations are not scheduled for a specific time"; and (5)

¹ See also Clerk's Record at 102 ("I am pretty certain I am aware who wrote it").

“I had a different last name at this time, and an actual client would not have referred to me as Ms. Thomson.” Thomson concluded by complaining that “AVVO does not verify the information contained in a negative client review, nor does it verify that a person was, in fact, an actual client.”

On May 21, 2014, Thomson sued Jane Doe in the Florida Circuit Court for Hillsborough County, alleging that a single person, whom Thomson alleged “has never been a client of Plaintiff,” had made “misleading, false and defamatory statements” in postings on Yelp, Google, and Avvo. Clerk’s Record 9, ¶ 2. The complaint quoted the following allegedly false statement from Yelp: she “not only did not advocate for me or support my side of the divorce, she actually was more proactive in supporting my spouse’s side of the proceedings.” The allegedly false post on Google was quoted thus: she “does not advocate for her clients and is ineffectual with dealing with opposing lawyers.” Finally, the following quoted words posted on Avvo were alleged to be false: she “failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any documents at all.” Clerk’s Record 12, ¶ 20. The complaint alleged claims for defamation, defamation per se, defamation by implication, and intentional infliction of emotional distress.²

²Because the Supreme Court has held that a defamation plaintiff cannot evade the constitutionally required elements of a defamation claim by changing the label of the tort to intentional infliction of emotional distress;

Because both Yelp and Google are located in California, discovery to identify the authors of the reviews posted on those companies' forums would have required Thomson to make an evidentiary showing, sufficient to support the prima facie elements of her defamation claim; section 1987.2(c) of the California Code of Civil Procedure provides that when a motion to quash a subpoena for the identity of an anonymous Internet speaker in aid of an out-of-state lawsuit is denied, attorney fees can be awarded against the discovering party.³ The record does not reflect that Thomson undertook any motions to compel discovery to identify Tosha Green and Wanda G, the reviewers on Yelp and Google, considering the obstacle that California law would have posed to success on such a motion.⁴ However, plaintiff took advantage of the fact that the appellate courts of **this** state have not yet

Hustler Magazine v. Falwell, 485 U.S. 46 (1988), *Hoppe v. Hearst Corp.*, 53 Wash. App. 668, 675, 770 P.2d 203, 208 (1989), the emotional distress count of the complaint is not discussed further in this brief.

³If a California subpoena is sought to identify anonymous speaker in aid of a California lawsuit, the California anti-SLAPP statute can be used to seek dismissal of the case and an award of attorney fees if the plaintiff cannot make a showing of probability of success. The state anti-SLAPP statute does not apply, however, if the underlying action is pending in a different state. *Tendler v. www.jewishsurvivors.blogspot.com*, 164 Cal. App. 4th 802, 79 Cal. Rptr. 3d 407 (2008).

⁴Informal inquiries indicate to counsel that Yelp objected to an effort by Thomson to obtain identifying information, and that Thomson elected not to force the issue. There is also no evidence that the Doe in this proceeding, who posted a review on Avvo, also posted anything about Thomson on either Yelp or Google. Doe specifically denies that she had any involvement in those reviews.

addressed the question of what showing must be made to compel identification of anonymous Internet speakers who are alleged to have engaged in tortious speech and issued a subpoena on the authority of the Superior Court of King County, seeking “all subscriber information” about the Avvo review that the complaint alleged as defamatory. Clerk’s Record 51-54.

Avvo responded to the subpoena by notifying the Doe about the threat to her anonymity; in response, the record reflects that Doe supplied Avvo with correspondence showing that, contrary to Thomson’s assertions on Avvo and to Thomson’s complaint, the Avvo reviewer, at least, in fact “was or had been” a client of Thomson’s. Clerk’s Record 79 ¶ 8.⁵ Avvo then wrote to Thomson to let her know that her assumption was mistaken, asking her to consider withdrawing her subpoena as a result; in the alternative, Avvo told her, it was ready to assert its user’s First Amendment right to remain anonymous unless Thomson could produce evidence establishing a prima facie case of defamation based on statements that asserted potentially defamatory facts rather than constitutionally protected statements of opinion. Clerk’s Record 100-101.

Thomson then moved to compel discovery, relying on the liberal

⁵This brief uses female pronouns to refer to the Doe defendant, consistent with Thomson’s having filed suit against Jane Doe, and consistent as well with the general practice of undersigned counsel to refer to all Doe clients using female-gender pronouns, without implying the Doe’s actual gender.

approach to discovery that generally obtains in the Washington courts, *id.* 3, and arguing that the First Amendment provided no protection for Doe because, she contended, false statements of fact enjoy no constitutional protection. *Id.* 3-4. She argued that her complaint alleged statements by Doe that were defamatory per se, and provided the following enumeration of allegedly false statements of fact along with characterization of the ways in which they were false, all appearing on page 5 of the Clerk's record:

1. "I am still in court five years after Ms. Thomson represented me during my divorce proceedings."

Although this statement is not alleged in the complaint as false, Thomson's brief asserted that the statements that Jane Doe is "still in court" and that the presentation was "five years ago" are false.

2. "Her lack of basic business skills and detachment from her fiduciary responsibilities has cost me everything."

Although this statement is not alleged in the complaint as false, Thomson's brief asserted that the statements that Jane Doe "lost [sic] everything" and that this was Thomson's fault are false statements.

3. "She failed to show up for a nine hour mediation because she had vacation days."

Thomson's brief asserted that it is false that Thomson did not come to a mediation because she had vacation.

4. "She failed to subpoena documents that are critical to the division of assets in any divorce proceeding."

Thomson's brief asserted that it is false that she did not subpoena critical documents.

5. "In fact, she did not subpoena any documents at all."

Thomson's brief asserted that it is false that Thomson subpoenaed no documents.

6. "My interests were simply not protected in any meaningful way."

Although not this statement is not alleged in the complaint as false, Thomson's brief asserted that this is a false statement of fact, but does not indicate precisely what the false statement of fact is.

In opposition to the motion to compel, Avvo urged the trial court to follow appellate courts around the country that have adopted a rule, drawn from the leading cases of *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), that before a plaintiff can use court process to compel the identification of anonymous Internet speakers, the plaintiff must come forward with evidence, and not just allegations, establishing that the plaintiff can establish a prima facie case on the elements of her defamation claim. Clerk's Record 68. Avvo further argued that many of the statements on which Thomson was suing were opinions, not potentially actionable factual statements that were capable of being proved true or false. Clerk's Record 70-74. Having been confronted with this argument, and having been informed that her motion to compel might well be denied if she

failed to present admissible evidence in support of her claims, Thomson chose to submit no evidence of falsity and no evidence of damages, resting instead on her legal argument that her **allegations** were a sufficient basis for enforcing the subpoena. Clerk's Record 106-109.

The trial court agreed with Avvo and signed its proposed form of order denying the motion to compel discovery. It added the handwritten ruling that Thomson "failed to make a prima facie showing re: defamation claim." Clerk's Record 111. Thomson has now appealed. *Id.* 113. Although defendant Jane Doe did not participate in the proceedings in the lower court, gratefully relying on Avvo to advocate her First Amendment right to speak anonymously, she has retained undersigned counsel to represent her interests on appeal.

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 complains about the content of material posted online and seeks relief against its author, including an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Moreover, 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 it to employ extra-judicial self-help measures to counteract both the speech and the speaker; identification 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 punish 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. Indeed, a client might well be concerned that being identified as somebody who publicly criticized her lawyer, or some other professional, might find it more difficult to hire other professionals who may not appreciate having their friends and colleagues denounced publicly. There is evidence that access to identifying information to enable extra-judicial action may be the only reason some plaintiffs bring such suits (*infra* 15-17).

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 granting 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 deliberate defamers to hide behind pseudonyms, nor too easy for a company or a public figure to unmask critics simply by filing a complaint that purports to state an untested claim for relief under some tort or contract theory.

Although the standard for resolving such disputes is an issue of first impression in this Court, the Court will not be writing on an entirely clean slate because many appellate courts in other jurisdictions have considered this question in light of the principle that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Consequently, those courts have ruled that a trial judge faced with a demand for discovery to identify an anonymous Internet speaker so that he may be served with process 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 his 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 his claims; and, in many jurisdictions (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. Applying these requirements, a court can 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. However, everything that the plaintiff must do to meet this test, it must also do to prevail on the merits of her case. So long as the test does not demand more information than a plaintiff would reasonably be able to provide shortly after filing the complaint, without taking any discovery—and other cases show that plaintiffs with valid claims are easily able to meet such a test—the standard does not unfairly prevent the plaintiff with a legitimate grievance from securing redress against an anonymous speaker.

In arguing against a requirement of producing evidence, appellant contends that Doe enjoys no constitutional protection because false speech is not protected. That argument overstates the constitutional point, because false speech **can be** protected unless the plaintiff make several showings in addition to falsity, but the more important point is that, at this juncture, plaintiff has only put forward allegations of falsity, and allegations of the other elements of a libel claim. But allegations are not enough to avoid the force of the constitutional protection for anonymous speech. Thomson also points to the lower level of constitutional protection for commercial speech,

but there is no evidence and indeed no reason to believe that the speech at issue in this case is commercial.

ARGUMENT

THE FIRST AMENDMENT REQUIRES A SHOWING OF MERIT ON BOTH THE LAW AND THE FACTS BEFORE A SUBPOENA TO IDENTIFY AN ANONYMOUS SPEAKER IS ENFORCED.

Appellate courts in many other states have addressed the same question on which the decision in this case turns—what showing should a plaintiff have to make before it may be granted access to the subpoena power to identify an anonymous Internet user who has criticized the plaintiff? As shown below at pages 23 to 30, those courts have decided that it is not enough for the plaintiff to show that it is only **possible** that the plaintiff has a valid claim, or to put forward a good faith belief in the rightness of its cause. Other appellate courts have held, whether under the First Amendment or under state procedures, that anonymous defendants are entitled to demand that the plaintiff make a factual showing, not just that the anonymous defendant has made critical statements, but also that the statements are actionable and that there is an evidentiary basis for the prima facie elements of the claim such as falsity and, in many jurisdictions, damages. Some appellate courts have required as well an express balancing of the plaintiff's interest in prosecuting its lawsuit against the anonymous defendant's reasons for needing to stay anonymous.

A defamation plaintiff is uniquely in a position to know why the statement that it alleges to be false is, in fact, false and defamatory. Unlike,

for example, a personal injury plaintiff, who may know only that she or he is suffering in some way, without knowing why, the defamation plaintiff typically knows, before it decides to file suit, the evidence that would show the defendant's accusation to be false and defamatory. There is typically no reason why, at the outset of a case, a lawyer about whom false statements have been made cannot present evidence of falsity. In light of the constitutional protection for anonymous speech, and the value that society places on that right, this Court should join the broad judicial consensus in requiring such a showing.

A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

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

concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

* * *

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 US at 341-342, 356 (emphasis added).

The right to speak anonymously is fully applicable online. The Supreme Court has treated the Internet as a public 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. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *In re Does 1-10*, 242 SW3d 805 (Tex. App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001); *Doe v 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. 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 group feels

the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. For example, a client who is reviewing experiences with a lawyer, or a patient who is discussing experience with a doctor, may well have occasion to discuss intimate or confidential details about herself that she may not want to have associated with her own name in a way that is visible to anybody who does a Google search for her name or, indeed, for the name of the reviewed professional. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

Experience has taught that, when courts do not create sufficient

barriers to subpoenas to identify anonymous Internet speakers named as defendants, the subpoena can be the main point of the litigation, in that plaintiffs may identify their critics and then seek 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 admit that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.*, Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily Freeman, Nov. 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfi=8. An early advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, 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 & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* Indeed, in *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006), *aff'd*, 540 F.3d 179 (3rd Cir. 2008) a company

represented by the largest and most respected law firm in Philadelphia filed a Doe lawsuit, obtained the identity of an employee who criticized it online, fired the employee, and then dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity.

Indeed, companies that make pornographic movies have recently been bringing mass copyright infringement lawsuits against hundreds of anonymous Internet users at a time, without any intention of going to trial, but hoping that embarrassment at being subpoenaed and then publicly identified as defendants in such cases will be enough to induce them to pay thousands of dollars in settlements. *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014) *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012); *Patrick Collins v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012).⁶ Doe does not suggest that Deborah Thomson has brought this lawsuit to shake down former clients, but the rules governing subpoenas must be crafted with the recognition that not every lawyer serving such subpoenas, nor every pro se plaintiff, will be properly motivated.

Thomson is a private individual, but her subpoena invoked judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is

⁶Indeed, some pornographic films are now being made not to be sold, but to be used as the basis for subpoenas to identify alleged downloaders who can then be pressured to “settle” to avoid the embarrassment of being named publicly as defendants in such litigation. *On The Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011).

subject to constitutional limitations. That is why, for example, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), and why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347.

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, “If Internet users could be stripped of . . . 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). See also *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999):

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.

(emphasis added).

B. Many Courts Now Require a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff.

The fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Cahill*, 884 A.2d at 457.

Courts have drawn on the media's privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, established a five-part standard that became a model followed or adapted throughout the country:

- 1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
- 2. Require Specificity:** Courts require the plaintiff to allege

with specificity the speech or conduct that has allegedly violated its rights.

3. Ensure Facial Validity: Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.

4. Require An Evidentiary Showing: Courts require the plaintiff to produce evidence supporting each element of its claims.

5. Balance the Equities: Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

Although some jurisdictions employ the fifth prong, and some do not, the record in this case does not require the Court to decide whether to adopt it. But the first four parts of the test represent the minimum protections required by the First Amendment. Washington should require no less, and, explained below, the trial court's decision should therefore be reversed based on the first four parts of the test alone.

The leading authority for rejection of the fifth, explicit balancing stage of the analysis is the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451. In *Cahill*, the trial 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 evidence that the statements are false.

We argue in the final section of this brief for the adoption of the original *Dendrite* standard rather than the *Cahill* variation, but for the present purposes it is sufficient to note the many other appellate courts that have adopted either *Dendrite* or *Cahill*.

The following state appellate courts have endorsed the *Dendrite* test, including the final balancing stage:

Mobilisa v. Doe, 170 P.3d 712 (Ariz. App. 2007): A private company sought to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following *Dendrite*, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court analogized an order requiring identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.

Independent Newspapers v. Brodie, 966 A.2d 432 (Md. 2009): The court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, balanc[ing of] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." *Id.* at 457.

Mortgage Specialists v. Implode-Explode Heavy Industries, 999 A.2d 184 (N.H. 2010): A mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the *Dendrite* test is the appropriate standard

by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." *Id.* at 193.

Pilchesky v. Gatelli, 12 A.3d 430 (Pa. Super. 2011): The court required a city council chair to meet the *Dendrite* test before she could identify constituents whose scabrous accusations included selling out her constituents, prostituting herself after having run as a reformer, and getting patronage jobs for her family.

In re Indiana Newspapers, 963 N.E.2d 534 (Ind. App. 2012): The Court reversed on order allowing the recently retired head of a local charity to identify an anonymous individual who had commented on a newspaper story about the financial problems of the charity by asserting that the missing money could be found in the plaintiff's bank account, because he had provided no evidence that the accusation was false.

Several other state appellate courts have followed a *Cahill*-like summary judgment standard without express balancing:

Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. App. 2008): The appellate court reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as "a management consisting of boobs, losers and crooks."

In re Does 1-10, 242 S.W.3d 805 (Tex. App. 2007): The court granted mandamus reversing a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog.

Solers v. Doe, 977 A.2d 941 (D.C. 2009): The court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.

Doe v. Coleman, 436 S.W.3d 207, 211 (Ky. Ct. App. 2014): The Kentucky Court of Appeals granted a writ or prohibition, overturning a trial court order that refused to quash a

subpoena seeking to identify anonymous speakers who had criticized the chairman of the local airports board, because the trial court had not required the plaintiff to set forth a prima facie case for defamation under the summary judgment standard.

Intermediate appellate courts in two other states have refused to create special procedures pursuant to the First Amendment because they concluded that existing state procedural rules provided equivalent protections, giving Doe defendants the opportunity to avoid being identified pursuant to subpoena if the plaintiff cannot establish a prima facie case. In Illinois, two appellate panels relied on Illinois court rules that already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe. *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 2010); *Stone v. Paddock Pub. Co.*, 961 N.E.2d 380 (Ill. App. 2011). In Michigan, a panel of the Court of Appeals said that an anonymous defendant could obtain a protective order against discovery, deferring enforcement of an identifying subpoena while he pursued a motion for summary disposition either on the face of the complaint or for failure to produce sufficient evidence of defamation. *Thomas M. Cooley Law School v. John Doe 1*, 833 N.W.2d 331 (Mich. App. 2013). Because the court deemed these state-law procedures adequate to meet First Amendment standards, and accordingly reversed the trial court's order enforcing the plaintiff's subpoena, it declined to decide whether special First Amendment procedures might be needed in some cases. The court recognized that a later case might impel it to adopt the *Dendrite* approach, or that rulemaking by the

state supreme court might provide a good basis for the adoption of that standard. A second appellate panel expressly endorsed *Dendrite* but declined to impose it directly because of the prior panel holding. *Ghanam v. Does*, 845 N.W.2d 128 (Mich. App. 2014). A petition from the losing plaintiff for discretionary review of the *Ghanam* decision is pending.

Only one state appellate court has parted company with the *Dendrite* / *Cahill* line of analysis. In *Yelp, Inc. v. Hadeed Carpet Cleaning*, 752 S.E.2d 554 (2014), appeal granted, No. 140242 (Va. Sup. Ct.) the Virginia court of appeals declined to apply the First Amendment tests required in other states because it concluded that a special Virginia statute regulating subpoenas to identify anonymous Internet speakers set a somewhat lower standard. The court affirmed a trial court order enforcing a subpoena to identify anonymous reviewers in light of the plaintiff's "evidence. . . that it made a thorough review of its customer database to determine whether all of the Yelp reviews were written by actual customers,[and that] after making such a review, Hadeed . . . could not match the seven Doe defendants'" reviews with actual customers in its database. Thus, the evidence presented by Hadeed was sufficient to show that the reviews are or may be defamatory, if not written by actual customers of Hadeed." That scenario is at odds with the record in this case, where the evidence is that Avvo had verified that Jane Doe **was** one of Thomson's clients. *Hadeed* is currently on review before the Virginia Supreme Court. <http://www.courts.state.va.us/courts/scv/appeals/140242.html> (visited December 18, 2014).

Federal courts have repeatedly followed *Cahill* or *Dendrite*. E.g., *Highfields Capital Mgmt. v Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005) (required an evidentiary showing followed by express balancing of “the magnitude of the harms that would be caused to the competing interests”); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) (endorsing the *Highfields Capital* test); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011) (following *Highfields Capital*); *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) (“The case law . . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*,” quoting *SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)); *Best Western Int’l v Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress).

In the trial court, and again in its brief to this Court, Thomson relied on the decision of the United States Court of Appeals for Ninth Circuit in *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011), but that case does not help Thomson here. There, the criticisms were set forth in a forum created for the sellers of products of Quixtar (the successor to the Amway) to discuss their commercial dealings with Quixtar; plaintiff sought to identify five anonymous speakers in that forum. Although the Ninth Circuit did not reach the question whether the speech at issue was commercial, it was satisfied that the anonymous comments were “speech related to the non-competition and non-solicitation provisions of Quixtar's commercial contracts.” The Ninth Circuit held that the nature of the speech at issue affects the level of protection afforded to the anonymous speaker. Moreover, far from deciding that neither the *Dendrite* or *Cahill* standards applied in that case, the court denied a petition for a writ of mandamus because it was not an abuse of discretion for the district court to apply the *Cahill* standard.

Thomson argues that Doe’s criticism of her lawyer constitutes commercial speech, but this argument is erroneous. Just as full First Amendment protection applies to reviews of a consumer product, *see Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), so too a former client’s review of her dealings with a lawyer enjoy full protection under the First Amendment. Certainly the fact that criticism might injure the plaintiff’s business interests does not make it commercial speech. *CPC Int’l v. Skippy*

Inc., 214 F.3d 456, 462-463 (4th Cir. 2000); *Nissan Motor v. Nissan Computer*, 378 F.3d 1002, 1017 (9th Cir. 2004).

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to obtain enforcement of a subpoena to identify Doe defendants is too onerous a burden, because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. E.g., *Fodor v. Doe*, *supra*; *In re Baxter*, *supra*; *Does v. Individuals whose true names are unknown*, *supra*; *Alvis Coatings v. Does*, *supra*. Indeed, in *Immunomedics v Doe*, 775 A.2d 773 (N.J. App. 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery. Moreover, this argument fails to acknowledge the fact that an order identifying the anonymous defendant is a form of relief, relief that can injure the defendant (by exposing the defendant to retaliation at the hands of the plaintiff and/or its supporters), and relief that can benefit the plaintiff by chilling future criticism as well as by identifying critics so that their dissent can be more easily addressed. Courts do not and should not give relief without proof.

Finally, Thomson argued below, and appears to argue again in this Court, that there is nothing to balance on the anonymous defendant's side of the scale because defamation is outside the First Amendment's protection and

the speech at issue in this case is defamatory. But this argument begs the question, and courts in other states, facing precisely the same argument, have understood that the argument is fundamentally unsound. Indeed, the United States Supreme Court has held that even in the defamation context, false speech can be protected by the First Amendment unless the speech is shown to have been knowingly or recklessly false. *United States v. Alvarez*, 132 S.Ct. 2537 (2012). At this point, Thomson has made only unsworn **allegations** about defamation, and the issue in the case is what showing a plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power. As we show in the next part of the brief, although Thomson has claimed that some false statements have been made, she submitted no evidence in support of those claims, nor has she shown that the statements on which the suit is based are a proper basis for a defamation action.

C. Thomson Did Not Make the Showing Required Before Identification of the Jane Doe Speaker May Be Ordered.

The superior court properly ruled that Thomson had not overcome Jane Doe's First Amendment right to speak anonymously.

1. Although Thomson Did Not Follow the Constitutionally Required Notice Procedures, This Failure Was Corrected by Avvo's Giving Notice to the Doe.

The first requirement in the *Dendrite / Cahill* consensus approach is for the plaintiff to notify the Doe of its efforts to take away his anonymity.

Indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Thus, courts have held that when they receive a request for permission to subpoena an anonymous Internet poster, the plaintiff must undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Seescandy.com*, 185 F.R.D. at 579; *Dendrite*, 775 A.2d at 760. In *Dendrite*, for example, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided 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 this requirement. 342 N.J. Super. at 141, 775 A.2d at 760.

In many cases, posting will not be the only way of giving notice to the Doe. If a subpoena is sent to the ISP that provides Internet access to the Doe, then the ISP will commonly have a mailing address for its customer. Or if the host of the web site requires registration as a condition of posting, and requires the provision of an email address as part of registration, then sending a notice to that email address can be an effective way of providing notice. To be sure, such notice is not always effective, because Internet users sometimes adopt new email addresses, and either drop or stop using their old addresses; they do not always think to notify all of the web sites where they have given

their old addresses. For example, in the 2009 *Brodie* case in Maryland, undersigned counsel's client, Independent Newspapers, gave email notice that it had received a subpoena to identify the owners of certain pseudonyms; one of those owners did not receive the message and, in fact, did not learn that there were proceedings to identify her until she read an account of the case in the Washington Post that mentioned her pseudonym, which had figured in the oral argument. The Court should require plaintiffs to use multiple means to notify the anonymous defendants, to maximize the chance that at least one technique will be successful.

In this case, Thomson took no steps to notify the anonymous speaker, even though the response she posted on Avvo implied that she knew who her critic was. Moreover, considering that Avvo allows a lawyer to post a response, Thomson could have provided notice of her subpoena in that statement. In this case, Avvo itself provided notice to its user, and the more responsible Internet Service Providers, following a protocol recommended by a coalition of civil liberties groups, routinely provide such notice. See <http://cyberslapp.org/about/page.cfm?pageid=6>. The Virginia statute discussed in the *Hadeed* case, indeed, provides a detailed protocol for notification, requiring the plaintiff to furnish with its subpoena a complete set of the materials on which it relies to show a basis for identification of the anonymous speaker, at least thirty days before the return date on the subpoena, Virginia Code section 8.01-407-1(A)(1); the ISP receiving the subpoena and accompanying materials must provide it to the Doe within five

days of receiving these materials. Virginia Code section 8.01-407-1(A)(2). For those Does who have been required to provide contact information to the ISP as a condition of receiving services, this procedure meets the First Amendment's notice requirement.

To the extent that the Court takes the opportunity to enunciate a general standard for adjudicating subpoenas to identify anonymous internet speakers, it is urged to address the issue of notice even though notice has been given in this case.

2. Thomson Pleaded Verbatim Only a Portion of Doe's Statement.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated his rights, and to plead just what it is about the statements that are false.. Many states require such pleading as a matter of state law. For example, *Fuste v. Riverside Healthcare Association*, 265 Va. 127, 134 (2003), the Virginia Supreme Court reiterated its previous holding in *Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 215 (1939), that "the exact words [of an alleged libel] must be set out in the declaration in haec verba." Similarly, in Michigan "The law requires the very words of the libel to be set out in the declaration in order that the court or judge may judge whether they constitute a ground of action." *Royal Palace Homes v*

Channel 7 of Detroit, 197 Mich. App. 48, 53, 495 N.W.2d 392 (Mich App 1992). Indeed, “where a plaintiff seeks damages ... for conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.” *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002); *see also Harris v. City of Seattle*, 2003 WL 1045718, at *3 (W.D. Wash. Mar. 3, 2003), *aff’d*, 152 Fed. Appx. 565 (9th Cir. 2005) (“[C]ourts should consider First Amendment concerns even at the pleading stage.”). As a result, courts dismiss defamation complaints that fail to specify which allegedly libelous statements are false. *Whitehouse v. Cowles*, 48 Wash. 546, 548, 93 P. 1086 (1908) (affirming trial court’s ruling sustaining demurrer where plaintiff failed to specify which statements, if any, were false); *Harris*, 2003 WL 1045718, at *4 (dismissing defamation claim for failure to identify the allegedly defamatory statements). Many federal courts also require verbatim pleading, because only then can the court decide whether the statements are fact or opinion, whether the statement is of and concerning the plaintiff, and whether the parts of the statement alleged to be false are potentially damaging to the plaintiff’s reputation. *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979); *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 707-708 (N.D. Ill. 1990)

Here, the complaint alleges verbatim only a portion of Doe’s Avvo review, but the motion to compel discovery invoked additional portions of the

review and asserts that they are false and defamatory. Only those parts of the review that were alleged in the complaint should properly be a basis for an order compelling identification of an anonymous speaker. If Thomson wanted to use additional parts of the review as support for her motion to compel, she first should have amended her complaint to bring a defamation claim based on those additional passages.

3. Thomson Should be Required to Plead a Proper Claim for Defamation Against Doe.

There are several deficiencies in the adequacy of Thomson's effort to plead a legally sufficient claim for defamation. First, the complaint identified only one portion of Jane Doe's Avvo review as defamatory, and hence to the extent that the Court applies a motion to dismiss standard at this stage of the analysis, the Court should take note of the fact that Thomson has only alleged that **those** parts of the review are false and defamatory; her effort to use other parts of the review to support her motion to compel disclosure fails for that reason alone. Second, Avvo's response brief has argued at some length (at 14-21) the ways in which the allegedly defamatory statements quoted on Thomson's papers, such as the conclusory statement at the end of the review that "my interests were not protected in any meaningful way," or the references to Thomson's "lack of basic business skills and detachment from her fiduciary responsibilities" are statements of opinion, rather than statements of actionable fact; we do not repeat those arguments here. As Avvo argues, even if Thomson can isolate passages within the review that

include factual statement, the overall gist of the review, and its inclusion in a web site devoted to lay opinions about services provided by legal professionals, makes clear that the review simply states Doe's personal evaluation of Thomson's work on her behalf, not an authoritative and dispassionate statement of facts. Third, some of the statements are also not defamatory because they are not of and concerning Thomson. For example, even assuming that were false that, when Doe posted her review last year, her case was continuing in court five years after Thomson first represented her, those are not statements "of and concerning" Thomson, but rather statements about a flaw in the Florida court system. As Thomson pointed out in her response to the Avvo review, "if a case is still going on five years later [Thomson's] involvement would have been far removed." Clerk's Record 94.

4. Thomson Presented No Evidence That the Doe Defendant Made Any False Statements..

Even if the Court concludes that defamation has at least been adequately alleged about one portion of each of the challenged statements, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement, which has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, prevents a plaintiff from being able to identify his critics simply by filing a facially

adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward with evidence in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of relief in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is 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 the summary judgment standard of creating genuine issues of material fact on all issues in the case before it is allowed 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 994.⁷

⁷Although Avvo did not seek relief below under the Washington Act Limiting Strategic Lawsuits Against Public Participation, the public policy

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. Particularly in suits for defamation, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false. Thomson apparently takes the position that she has never, even when she was working at a law firm and "my cases were not my own," Clerk's Record 94, and hence might have felt that another lawyer could appear for her, failed to appear at a mediation because she had vacation scheduled; if that is true, she can surely swear that in an affidavit. Thomson

represented by that legislation, including an obligation by plaintiffs who seek relief against speech about issues of public concern to present evidence in support of their claims at an early stage of the litigation, is consistent with the *Dendrite* and *Cahill* approach of requiring the plaintiff to present evidence before compelling disclosure. Indeed, although a California court decided that its anti-SLAPP statute did not apply to subpoena proceedings because they did not qualify as either a "complaint," "cross-complaint" or "petition," the filings to which that statute was limited, *Tendler*, 79 Cal.Rptr.3d at 409-410, the Washington statute, may be broader because it extends beyond "any lawsuit, cause of action, claim, cross-claim, counterclaim" to include any "other judicial pleading or filing requesting relief." RCW 4.24.525(1)(a); A motion to compel compliance with a subpoena could well be construed to be included within the scope of that language. In the event Thomson attempts to pursue any further proceedings in the trial court to seek discovery to identify Doe in light of the appellate rulings in this case, Doe reserves the possibility of seeking relief under the Washington anti-SLAPP statute. Reviews on Avvo are well within the scope of the speech that the anti-SLAPP statute protects. *Davis v. Avvo, Inc.*, 2012 WL 1067640, at *3 (W.D. Wash. Mar. 28, 2012).

apparently contends that Doe's statement that she is still in court five years after Thomson represented her must necessarily be false because a Florida divorce case would never continue for five years in that "the court has procedural safeguards to ensure that a case does not drag on." Clerk's Record 94. If Thomson knows that to be true, there is no reason why she cannot so aver in an affidavit.⁸ And Thomson objects to Doe's assertion that she subpoenaed no documents during the course of her representation of Doe; if Thomson knows that this statement is false because in every divorce case she has handled, she has subpoenaed documents, that too is something that she could aver in an affidavit.

Similarly, if Jane Doe's review has caused Thomson discernible harm notwithstanding the glowing reviews that accompany Doe's review on Avvo, there is no reason why Thomson should not be able to present evidence of that harm at the outset of the litigation, before she breaches Doe's right to speak anonymously. Avvo persuasively argues that under Washington law, a libel plaintiff has to prove damages, even if she has alleged libel per se.

⁸There is some reason to doubt that Thomson could truthfully make that averment. See Brixton, *How Long Does a Florida Divorce Take?* <https://www.mydivorcepapers.com/blog/how-long-does-a-florida-divorce-take/> (last visited December 17, 2014) ("Some cases get to trial in five months, and others can take several years. It depends on the volume of issues present and the caseload of the local judge"); Anton, *The divorce from hell, the battle for alimony and emptied pockets*, <http://www.tampabay.com/features/humaninterest/the-divorce-from-hell-the-battle-for-alimony-and-emptied-pockets/2112875> (last visited on December 17, 2014) (article about Tampa divorce case that lasted for five years, citing another that lasted for six years).

Avvo Br. at 22-24.

Considering that a defamation plaintiff can reasonably be expected to have evidence of the falsity of statements that are “of and concerning her,” and evidence of the damage that those statements have caused her, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant.

Here, even if the complaint were facially adequate, Thomson’s subpoena fails because she adduced no evidence in support of her complaint, even after Avvo’s papers put her on notice that the First Amendment requires evidence. There is no evidence that anything said about Thomson in Doe’s review on Avvo is false, or that the statement has caused harm to Thomson’s reputation. Indeed, although Thomson’s complaint, and the response she posted on Avvo to the Doe’s review, asserted that Doe is not one of her actual clients, Thomson has given the Court no reason to believe that Doe is a non-client. Moreover, in light of Avvo’s averment that it has seen documentation of Doe’s having been a Thomson client, Thomson’s moving papers and her brief to this Court appear to back away from that particular allegation in her complaint.

To be sure, no lawyer, and indeed, no other professional or business person, wants to believe that a harsh critic was really one of her customers, but sad to say there are dissatisfied clients in this world and there is no reason not to accept Jane Doe’s assertion that she was, in fact, a dissatisfied client

of plaintiff's.

5. The Court Should Adopt the *Dendrite* Balancing Test.

Even if Thomson had properly alleged a claim for defamation, and even if she had presented evidence in support of that claim,

[t]he 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).

Similarly, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

[A]ssuming 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.

775 A.2d at 760.

A standard comparable to the test for grant or denial of a preliminary injunction, where the court considers the likelihood of success and balances the equities, is particularly appropriate because an order of disclosure is an injunction—not even a preliminary injunction. In every case, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once speakers lose anonymity, they can never get it back.

Moreover, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint. Plaintiffs can renew their motions after submitting more evidence. The inclusion of a balancing stage allows Does to show that identification may expose them to significant danger of extra-judicial retaliation. In that case, the court might require a greater quantum of evidence on the elements of plaintiff's claims so that the equities can be correctly balanced.

On the other side of the balance, a court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. The Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains. The balancing stage allows courts to apply a *Dendrite* analysis to many different causes of action, not just defamation, following the lead of the Arizona Court of Appeals, which in *Mobilisa v. Doe* warned against the consequences of limiting the test to only certain causes of action. 170 P.3d at 719. For example, several courts have held that, although anonymous defendants accused of copyright infringement could be engaged in speech of a sort, the First Amendment value of offering copyrighted recordings for download is low, and the likely impact of being identified as one of several hundred alleged infringers, outside the special cases of litigation over alleged downloading of pornographic movies, is also

likely low. *Call of the Wild Movie v. Does 1-1,062*, 770 F. Supp.2d 332, 349 (D.D.C. 2011); *Sony Music Entertainment v Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *London-Sire Records v Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008). Hence, such courts accept a lower level of evidence to support the prima facie case of infringement. *Call of the Wild*, 770 F. Supp.2d at 351 nn.7, 8. It has been argued that these cases represent a copyright exception to the *Dendrite* rule, but other courts have, more properly, held that the cases turn on the nature of the speech at issue. *Art of Living Foundation v Does 1-10*, 2011 WL 5444622 (N.D. Cal Nov. 9, 2011).

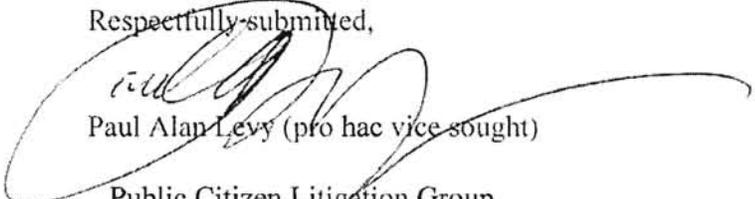
Similarly, in *In Re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011), the court of appeals said that when a Doe lawsuit is filed over commercial speech, the lesser protection that the First Amendment affords for commercial speech should be reflected in a more permissive approach to identifying the defendant. Although these courts do not explicitly invoke the balancing stage of *Dendrite*, they implicitly do so.

In this case, the record does not enable the Court to assess the equitable considerations in the case. But to the extent that the Court uses this case as a vehicle to set the standard for future subpoenas to identify anonymous Internet speakers, it should squarely embrace the final, balancing stage of *Dendrite*.

CONCLUSION

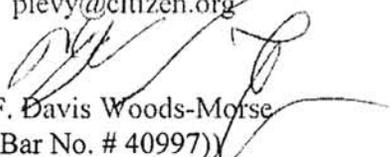
The order denying plaintiff Deborah Thomson's motion to compel compliance with her subpoena to Avvo should be affirmed.

Respectfully submitted,



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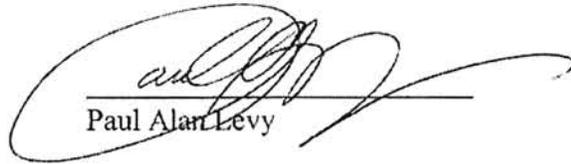
December 19, 2014

Counsel for Jane Doe

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2014, I caused a copy of the brief to be served by first-class mail, postage prepaid, on the pro se plaintiff as follows:

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