CIRCUIT COURT OF BUCKINGHAM COUNTY, VIRGINIA

THOMAS L. GARRETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CL08000197-00
	)	
BETTER PUBLICATIONS, LLC, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF WALDO JAQUITH IN OPPOSITION TO MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

STATEMENT OF THE CASE

Local celebrity Thomas Garrett has sued the publisher of "*The Hook*" and two reporters who allegedly defamed Garrett through articles written in February 2007 and February and April 2008, about criminal charges against Garrett. Garrett runs a public relations firm for Hollywood stars, has written a book and hosted radio and television programs, and put himself in the public eye by filing a sensational lawsuit accusing a local funeral director of both racist and outrageous conduct. Garrett is a public figure; his activities are a worthy subject of journalistic coverage and public comment.

The day after Garrett sued *The Hook*, a story about the lawsuit appeared in the December 23, 2008 edition of *The Daily Progress*, a Charlottesville newspaper. Waldo Jaquith followed up on the *Daily Progress* story with a story of his own on his blog, *cvillenews.com*. *cvillenews.com* is an online periodical, with new articles appearing several times each week, that focuses on news occurring in and near Charlottesville. The periodical appears online in typical blog format, with the most recent posting at the top, and the stories then descending in reverse chronological order. Many of the articles begin by noting that a particular story has been addressed in a local print publication, such as *The Daily Progress* or *The Hook*, adding facts obtained by Jaquith by interviewing the protagonists or by obtaining or reviewing additional documents and sources; Jaquith also includes his personal analysis of the situation. Jaquith Affidavit ¶ 4. Some of the investigative articles on the blog have had significant impact on public issues. For example, following up on a fact that first appeared in the comment section of his blog, a two-part series revealed that the "state climatologist" was not, in fact, filling that function, leading to his precipitous retirement. *Id.* ¶ 5.

Like many other news web sites, Jaquith's news site allows readers to discuss the story, adding their own observations. Frequently the posts include useful new facts, insights and analysis, and a discussion may ensue, which Jaquith will often join. The comment feature increases the extent

of community interest in his news blog, as well as providing him with useful information that he can use both to inform his coverage of that story and to provide ideas for future stories. Jaquith believes that many Internet users post on his web site – and view his site – expecting to remain anonymous, and that if he cannot protect their anonymity, he will lose readers and commenters. The comment feature on each article automatically turns off 21 days after the article first appears. *Id.* ¶ 6.

No registration is required to post a comment, but each poster is required to provide an email address and a name. Some posters provide what purports to be a real name, and some provide what is plainly a pseudonym. Posters are also permitted to provide a URL for their own blogs, and it appears that a number of posters are local bloggers. Jaquith does nothing to verify that either the email address or the name is accurate, however. Each comment is displayed with the date and time of the posting, and the poster's name. *Id.* ¶ 7. In response to the subpoena to identify the posters, Jaquith would be able to provide the Internet Protocol ("IP") addresses recorded in the datebase on his web site, which show the computers that each poster was using to gain access to the Internet at the time he or she visited Jaquith's site (the date and time he could provide for each post already appear on the blog), as well as the email address provided when posting.[1] Some IP addresses could themselves reveal the identity of posters, because occasionally Internet users use "static" IP addresses that do not change every time they are online. More commonly, Internet users gain access

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[1]Jaquith cannot, however, provide IP addresses for visitors to his web site who only look at articles and do not post. Web servers can record such information, but he does not know whether the service that hosts his blog does record such data; if it does, he does not have the information. *Id.* ¶ 12. Accordingly, Jaquith does not have information responsive to ¶ 1(b) of the subpoena. If he did have such access, he would oppose the subpoena because it infringes his viewers' First Amendment right to read anonymously, which follow ineluctably from the constitutional right to receive information. *See Bd of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). If plaintiff seeks to subpoena the information from Jaquith's web host, he will intervene to protect that First Amendment right.

to the Internet (and hence have the ability to post comments) by using "dynamic" IP addresses that are assigned to them temporarily by their Internet Service Providers. Obtaining the IP address for such a poster is only the first step in gaining their true identity, because the discovering party must then send a subpoena to the ISP who controls that IP address, seeking records identifying the specific customer who was using that IP address at the specific date and time of the posting.[2] *Id.* ¶ 10.

Like most *cvillenews.com* articles, the article on the Garrett defamation action, entitled "*The Hook* Sued for Defamation," contained both original reporting, including a quotation from Hawes Spencer, the editor of *The Hook*, and a discussion of the legal and factual context, including earlier libel suits and Garrett's own web sites, as well as providing Jaquith's opinion about the lawsuit. Some 81 comments were posted about Jaquith's article. Several of the posters (for example, the first and second posters) identified themselves by providing links to their own blogs. Several posts expressed support for Garrett's position in the case, while others criticized him. Several of the posters criticized each other or criticized Jaquith. Pursuant to the normal practice, the comment feature was automatically disabled 21 days after it first appeared. *See* attachment to the subpoena.

On January 15, 2009, Garrett sent a subpoena to Jaquith demanding all documents that could be used to identify both all persons who posted comments on "*The Hook* Sued for Defamation" as well as all person who even **looked** at the article (subpoena ¶ 1); all written communications including emails relating to Jaquith's article on *cvillenews.com*, to comments on the article, to Garrett himself, to the defamation action against *The Hook*, or to any other blogs or articles about

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[2] Sometimes it is impossible to identify the poster, because he or she uses an "anonymizer" to disguise the actual address from which the posting is made. For example, among the identities being subpoenaed in this case, Jaquith had noticed that there is a series of comments, all very favorable to Garrett, that appear to have been made using an anonymizer to make it impossible to identify the user(s). Jaquith Aff. ¶ 11.

those subjects (subpoena ¶ 2); documents "relating to information obtained, generated or created in writing the [*cvillenews.com*] article" (subpoena ¶ 3); and documents reflecting comments posted by Jaquith on web sites other than *cvillenews.com* (subpoena ¶ 4). Plaintiff sent a virtually identical subpoena to each defendant. Jaquith moved to quash the subpoena, arguing *pro se* that it infringed his First Amendment rights and the rights of his users and viewers, as well as violating a Virginia law, Va. Code § 8.01-407.1, creating special procedures for subpoenas identifying anonymous speakers who are alleged to have engaged in tortious speech violating the plaintiff's rights.[3]

Garrett has opposed that motion and filed a cross-motion to compel that makes several key concessions, which frame the arguments set forth in this memorandum. First, in response to Jaquith's arguments about the right of proposed defendants to remain anonymous unless the plaintiff makes out a prima facie case that their speech was wrongful, and to Jaquith's invocation of section 8.01-407.1, Garrett specifically disclaimed any assertion that he is entitled to identify the commenters so that he can file defamation actions against them. Indeed, in response to a call from Jaquith's lead counsel, Mr. Levy, Garrett's lead counsel, James Creekmore, agreed to stipulate that he would not file suit against any poster who is identified pursuant to his discovery unless that person is a member of *The Hook*'s staff. Indeed, Mr. Creekmore added that the only purpose of discovery is to determine whether the posters were associated with *The Hook*, and that he has no desire to identify any other poster. Levy Affidavit ¶ 2. Second, although much of Garrett's brief is devoted to sniping at supposed inaccuracies in Jaquith's *cvillenews.com* article, Garrett does not contend that he has any defamation claim against Jaquith, or that Jaquith's article has hurt his reputation. He argues only that is discovery is needed to show " malice" on the part of *Hook* staff

[3]Jaquith did not mention ¶ 4 of the subpoena because he does not have any such documents.

and the impact of *The Hook* articles on his reputation.

As we now show, however, this discovery is not only irrelevant to the issues in the litigation, but seeks disclosure that would violate the qualified First Amendment privileges protecting journalists and protecting the right to speak anonymously.[4]

I. THE DOCUMENTS SOUGHT ARE IRRELEVANT TO THE ISSUES IN THE CASE.

The requested recovery should be denied because the documents at issue are largely if not entirely irrelevant to the issues in the litigation between Garrett and *The Hook* and its two reporters.

First of all, the subpoena to Jaquith is recklessly overbroad, in ways that Garrett never deigns to explain in his motion to compel. Garrett has served almost identical subpoenas on the named defendants and on Jaquith – they are different largely because they identify different articles as the subject of the subpoena. Several things sought from Jaquith would seem relevant only if obtained from the defendants. For example, Garrett demands the notes and drafts for Jaquith's article about the lawsuit against *The Hook*, which might bear on Jaquith's editorial process and hence on whether he was aware of false facts, but Jaquith's editorial process is not an issue in the case. Nor does the motion to compel explain how this information is relevant to his case. Similarly, perhaps one could follow the rationale for seeking the IP addresses for readers of the stories alleged to be defamatory, on the theory that this might enable Garrett to interrogate the readers of the stories about how they perceived the story, or whether it changed their opinion about Garrett. This would raise difficult questions about the right of Internet **readers** to remain anonymous, but Jaquith's story is not alleged to be defamatory, so reader reaction to his story is absolutely irrelevant to the issues in this case.

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[4]Apart from the electronic documents reflecting IP and email addresses for the anonymous posters to the blog, each of the documents being withheld, apart from documents exchanged between Jaquith and his undersigned counsel, is identified in the attached objections log.

Again, Garrett never explains why they **are** relevant. As Jaquith's affidavit reflects, he does not have either notes or drafts of his story or IP numbers of his blog's readers, but the overbreadth of the subpoena is telling.

The subpoena to identify the anonymous commenters is similarly and vastly overbroad, even under a simple test of relevance, because many of the posts either do not reflect an adverse opinion of Garrett, or simply comment on the discussion about the subject of Jaquith's article without relating to Garrett at all. Indeed, a number of the posts reflect positive opinions about Garrett. Garrett has simply sent an overbroad subpoena rather than confining his discovery to the identification of the authors of posts that are consistent with his legal theory. Garrett's motion to compel should be denied in its entirety based on its vastly overbroad and oppressive nature.

The main stated purpose of the motion to compel identification of the anonymous commenters on the *cvillenews.com* blog, and to obtain Jaquith's communications with his sources, is to determine whether the staff for *The Hook* made statements hostile to Garrett which would, Garrett claims, show that they had a malicious attitude toward him. However, the question of whether defendants bore him ill-will is at best tangential to this case. Garrett is a limited-purpose public figure – according to his complaint, ¶¶ 8-9, he "enjoy[s] a burgeoning career as a publicist, talent agent, author, editor, actor, and radio personality," and recently "made his national television debut." News organizations have covered his activities, not least because he was a defendant in connection with criminal charges. In addition, he holds himself out to the public as a publicist for Hollywood personalities. Garrett was fundamentally involved in the controversy that gave rise to his defamation claim. *The Hook* reported on his criminal charges, reported on past litigation that focuses the public eye on Garrett, and subsequently commented on the accuracies of his self-aggrandizement. Garrett responded with a lawsuit.

As a public figure, Garrett cannot recover for defamation unless he shows that each allegedly defamatory statements was made with "'actual malice,' meaning that it was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Hatfill v. The New York Times Co.*, 532 F.3d 312, 317 (4th Cir. 2008), citing *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964). It appears that Garrett is seeking discovery about other things that the defendants – or other members of the staff of *The Hook* – have said about him in order to establish that they are guilty of "common law malice" which includes not only "knowledge of falsity or reckless indifference to falsity . . . but also matters related to the speaker's motive and mental state," such as "some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff." *Great Coastal Exp. v. Ellington*, 230 Va. 142, 150, 334 S.E.2d 846, 851 (Va. 1985). But although evidence of motive can conceivably bear some relation to the actual malice inquiry, "proof of a media defendant's ill will toward a public figure plaintiff is, without more, insufficient to establish knowledge of falsity or reckless disregard for the truth." *Jackson v. Hartig*, 274 Va. 219, 231, 645 S.E.2d 303, 310 (Va. 2007)

Second, even if other statements by the named defendants were relevant to the liability of those defendants, that does not justify discovery seeking to obtain statements by other staff members of *The Hook*. Even **if** other staff at *The Hook* resented the suit filed against their paper and their fellow reporters, and hence made unflattering comments about Garrett on Jaquith's blog nine months or more after the last of the allegedly defamatory articles, the fact that they made such comments has no logical bearing on the mental state of the two named defendants, the reporters who wrote stories about Garrett, at the time they wrote those articles. Nor can statements by *Hook* staffers who were not assigned to work on the Garrett stories, or the mental state of such staffers, be attributed to *The Hook* itself. This plain irrelevance is heightened by Garrett's acknowledgment that he is seeking

discovery from Jaquith instead of demanding access to emails on the computer system of defendant Better Publications because he want to find out anything that staff members of *The Hook* may have written on their own time. Neither *The Hook* nor the defendant authors bear responsibility for what other *Hook* employees may have thought or said about Garrett on their own time.

A second reason given by Garrett for his discovery – this time confined to his efforts to identify the anonymous commenters on Jaquith's blog – is to ascertain whether the allegedly defamatory articles injured his reputation. Garrett never explains, however, why he needs to know the names of the posters in order to obtain this information. To the extent that some of the comments reflect that the posters believed the facts set forth in accused articles, Garrett can rely on that evidence of impact on reputation without knowing who wrote them.

II. THE QUALIFIED PRIVILEGE FOR JOURNALISTS PROTECTS AGAINST THE DISCLOSURES THAT PLAINTIFF SEEKS.

Virginia courts recognize a qualified reporter's privilege, as "an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment." *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431 (1974); *Clemente v. Clemente*, 56 Va. Cir. 530, 2001 WL 1486150 (Arlington Cy. Nov. 9, 2001). (A similar privilege should be recognized under Article 1, Section 12 of the Virginia Constitution). As set forth in detail in the defendants' Motion to Quash, the privilege applies to both confidential and non-confidential information relating to a reporter's news-gathering function. *E.g.*, *Church of Scientology v. Daniels,* 992 F2d 1329, 1335 (4th Cir. 1993); *Hatfill v. New York Times Co.*, 242 F.R.D. 353, 356-357 (E.D. Va. 2006). In the only cases of which we are aware, the reporter's privilege (or shield law) has been applied to the identity of anonymous commenters on a message board attached to the reporter's articles. *Beal v. Calobrisi*, Case No. 08-CA-1075 (Fla. Cir. Okaloosa Cy., Oct. 9, 2008); *Doe v. TS*, Case No.

08036093 (Ore. Cir. Clackamas Cy., Sept. 30, 2008) (copy attached); *Doty v. Molnar*, No. DV 07-022 (Mont. Dist. Yellowstone Cy., Sept. 3, 2008) (transcript attached).

Waldo Jaquith may assert the reporter's privilege because he engages in the traditional journalistic functions of gathering information on matters of public concern and disseminating them to the public. The Supreme Court has recognized that "liberty of the press is the right of the lonely pamphleteer just as much as the large, metropolitan publisher," *Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972), and courts have declined to limit the reporter's privilege to the regular employees of major news organizations. Rather, "an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press," *von Bulow v. von Bulow*, 811 F.2d 136, 142 (1987), so long as "the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation." *Id.* at 143. *Accord In re Madde*n, 151 F.3d 125, 129-30 (3d Cir. 1998).

Consistent with this functional understanding of journalism, courts have applied the reporter's privilege to nontraditional journalists engaged in newsgathering. *See, e.g.*, *Silkwood v. Kerr-McGee*, 563 F.2d 433, 436 (10th Cir. 1977) (applying the privilege to a documentary filmmaker); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (author of book about a family feud over ownership of a company); *Alexander v. FBI*, 186 F.R.D. 21, 50 (D.D.C. 1998) (former presidential aide gathering information for a book); *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (academic involved in pre-publication research); *In re Petroleum Products Antitrust Litigation,* 680 F.2d 5 (2d Cir. 1982) (trade newsletter compiling oil prices);*United States v. Garde*, 673 F. Supp. 604 (D.D.C. 1987) (non-profit organization could conceal names of whistleblowers).

More recently, courts have recognized that the reporter's privilege extends to bloggers and

website operators like to Jaquith. For example, *Blumenthal v. Drudge*, 186 FRD 236 (DDC 1999), applied the reporter's privilege to the blog "The Drudge Report," which the court had characterized in a prior opinion as "a gossip column focusing on gossip from Hollywood and Washington, D.C." *Blumenthal v. Drudge*, 992 F. Supp. 44 (DDC 1998).

In *O'Grady v. Superior Court*, 139 Cal. App.4th 1423, 44 Cal. Rptr.3d 72 (2006), the court applied both California's statutory privilege and the constitutional reporter's privilege to bloggers who published information about forthcoming Apple computer products against subpoenas by Apple. The court rejected the view that the bloggers "were engaged not in 'legitimate journalism or news,' but only in 'trade secret misappropriation' and copyright violations." 97 Cal. Rptr 3d at 97.

The court further decided that the bloggers were engaged in "legitimate newsgathering" even when they "merely reprinted 'verbatim copies' of Apple's internal information while exercising 'no editorial oversight at all.'" *Id.* The court found that there was no rationale for "[t]he primacy Apple would grant to editorial function," and that, in any case, "an absence of editorial judgment cannot be inferred merely from the fact that some source material is published verbatim." *Id.*

> We decline the implicit invitation to embroil ourselves in questions of what constitutes "legitimate journalis[m]." The shield law is intended to protect the gathering and dissemination of news, and that is what petitioners did here. We can think of no workable test or principle that would distinguish "legitimate" from "illegitimate" news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.
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> 139 Cal. App.4th at 1457, 44 Cal. Rptr.3d at 97.

Waldo Jaquith unquestionably engages in "activities traditionally associated with the gathering and dissemination of news." His articles not only provide quotations and links to articles in other publications, but original material obtained from interviews or other sources, as well as

original analysis and opinion. Jaquith Aff. ¶ 3. In the best traditions of a free press, his investigative reporting has uncovered governmental wrongdoing and resulted in corrective action. Jaquith Aff. ¶ 5. The article at issue here, "*The Hook* Sued for Defamation," included a factual description of the case, a quotation from the editor of *The Hook* as well as an analysis of the case in relation to other defamation cases. The reporter's privilege is consistently applied to journalistic coverage of litigation. *Ashcraft v. Conoco*, 218 F.3d 282, 285 (4th Cir. 2000). Like several other articles on *cvillenews.com*, the article criticized a different publication, *The Daily Progress,* for its faulty coverage of the litigation, which is another classic journalistic function. In an era when an increasing amount of news coverage can exclusively be found online, and when even traditional newspapers like the *Christian Science Monitor* are moving to an exclusively online publication, there is no basis for drawing an artificial line confining the reporter's privilege to print and broadcast publications while excluding bloggers like Jaquith.

The qualified reporter's privilege requires the plaintiff to meet each of the following three prongs of the test: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986); *Clemente v. Clemente*, *supra*. As shown in the final section of this brief, Garrett has not met any of the prongs here.

III. THE FIRST AMENDMENT CREATES A QUALIFIED PRIVILEGE AGAINST DISCOVERY FOR ANONYMOUS INTERNET SPEAKERS

The First Amendment protects the right to speak anonymously. *Watchtower Bible & 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); *Talley v. California*, 362 U.S. 60 (1960); *Green v. City of Raleigh*, 523 F.3d 293,

301 (4th Cir. 2008); *Jaynes v. Commonwealth*, 276 Va. 443, 461, 666 S.E.2d 303, 312-13 (2008). 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. The Supreme Court has stated:

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

McIntyre, 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 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). Many courts have expressly upheld the right to communicate anonymously through Internet blogs, message boards and emails.[5]

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[5] *Independent Newspapers v. Brodie*, — A.2d —, 2009 WL 484956 (Feb. 27, 2009); *Sinclair v. TubeSockTedD*, — F. Supp.2d —, 2009 WL 320408 (DDC Feb. 10, 2009); *Quixtar v. Signature Management Team*, 566 F. Supp.2d 1205 (D. Nev. 2008); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal.App. 6 Dist. 2008), *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Sony*

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. And they may wish to say things that might make other people angry and stir a desire for retaliation.

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 to discover his or her identity. The technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind an electronic footprint that, if saved by the recipient, provides the beginning of a path that can be followed 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 the disclosure of the information, can learn who is saying what to whom. As a result, many observers argue that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

Music Entertainment v. Does 1-40, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *In re 2TheMart.com, Inc. Securities Litigation*, 140 F. Supp.2d 1088 (W.D. Wash. 2001); *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); *Melvin v. Doe*, 49 PaD&C4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003); *In re Subpoena Duces Tecum to AOL*, 52 Va. Cir. 26, 2000 WL 1210372 (2000), *rev'd on other grounds sub nom. AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (Va.2001).

A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *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. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524. As the Supreme Court has held, 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 anonymous speakers to remain anonymous, justification for an incursion 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).

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). Article 1, Section 12 of the Virginia Constitution should similarly be construed to protect that right.

As a court said in quashing a subpoena to identify anonymous Internet speakers whose identities were sought in a shareholder derivative suit, "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). Other courts endorse this analysis. The court in *Quixtar Mgmt.* said, "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. To fail to protect anonymity is, therefore, to chill speech." 566 F. Supp.2d at 1214 (punctuation omitted). And the Delaware Supreme Court said in *Doe v. Cahill*,

> We are concerned that setting the standard [for deciding whether to allow discovery to identify anonymous Internet speakers] 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. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes.. . . After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.
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> 884 A.2d at 457

The Arizona Court of Appeals similarly expressed concern about setting the standard for identifying anonymous speakers too low. *Mobilisa v. Doe*, 217 Ariz. at 111, 170 P.3d at 720. *Accord Independent Newspapers v. Brodie*, — A.2d —, 2009 WL 484956 (Md. Feb. 27, 2009), at *19.

Most anonymous free speech cases have addressed the issue in the context of subpoenas to identify Doe defendants so that they can be served as defendants – in those cases, the consensus standard holds that the necessary "compelling interest" and "narrow tailoring" requirements are met if the plaintiff shows both that he has a legally valid cause of action against each such anonymous posters and that he has enough evidence to establish a prima facie case against each. Plaintiff has

sought to avoid meeting **that** standard – as well as the procedural requirements set forth in Va. Code § 8.01-407.1 — by stipulating that he does not seek his discovery for the purpose of identifying any potential additional defendants, with the possible exception of **other** *Hook* staff members. (To the extent that the discovery does seek to identify additional defendants, the *Dendrite* / *Cahill* standard as well as section 8.10-407.1 would apply, and plaintiff has simply not met that standard).

In other cases, parties have sought discovery identifying anonymous posters for the purpose of obtaining additional evidence to use against the existing parties. In those cases, the courts have borrowed from the rich vein of case law governing compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In those cases, as discussed in the previous section of this brief, 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 his case; (2) disclosure of the source to prove the issue is "necessary" 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 his case.[6] Accordingly, in both *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001), and *Enterline v. Pocono Medical Center*, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008), the courts applied the three-part standard to decide whether to allow discovery identifying anonymous Internet posters as potential witnesses.[7]

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[6]*Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Clemente v. Clemente*, 56 Va. Cir. 530, 2001 WL 1486150 (Va.Cir.Ct.).

[7]Jaquith unquestionably has standing to represent the First Amendment rights of those who post on his web site. The courts generally recognize the standing of an operator of a service that allows members of the public to engage in anonymous speech to protect those speakers' rights. For

As shown in the last part of this brief, plaintiff does not come close to meeting this standard.

IV. PLAINTIFF'S ARGUMENTS IN SUPPORT OF ITS REQUESTED DISCOVERY DO NOT SATISFY THE TEST FOR BREACHING THE QUALIFIED PRIVILEGES THAT PROTECT JOURNALISTS AND/OR ANONYMOUS SPEAKERS.

Garrett's expressed reasons for seeking Jaquith's emails with sources and identifying information about each of the anonymous posters who commented on the article do not surmount the qualified privilege against disclosure.

First, as argued above in Section I of this brief, Garrett's demand for discovery does not even meet the ordinary test for relevance, for several reasons. First, because he is a public figure, Garrett will have to prove that the defendants wrote false things about him with actual malice – that is, knowledge of falsity or reckless disregard of probable falsity – but none of the posted comments suggests that the posters believed that statements in the accused articles in *The Hook* were false. Certainly, none of the withheld emails shows any such knowledge on the part of authors of the emails. Instead, Garrett seeks to show that the authors of the anonymous comments bore ill will toward him, but such ill will would relate at most to common law malice. Second, although Garrett claims that he needs to find out whether employees of *The Hook* who are **not** named as defendants (and who were not involved in writing the articles) have said mean things about him, the mental state of such non-defendants when posting in December 2008 and January 2009 has no bearing on the mental state of the authors of the articles as of February 2007, February 2008, or April 2008. Third,

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example, the Virginia Supreme Court allowed AOL to seek to protect the First Amendment rights of the user whose identity was subpoenaed in *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (Va.2001). In this case, Jaquith explains in his affidavit, ¶ 6, how his interests would be adversely affected by an order stripping his anonymous posters (and his email correspondents) of the right to remain anonymous. Moreover, given the fact that plaintiff seeks to identify the anonymous posters of more than 80 different comments, it is far more efficient to allow Jaquith – whose counsel are very experienced on the issue – to litigate the First Amendment issue.

although Garrett claims that he wants to identify anonymous posters to show that the accused articles hurt his reputation, in fact he does not need to know the names of the posters in order to be able to show that his reputation has suffered (if, indeed, it has). Fourth, many of the anonymous comments whose authors Garrett seeks to identify did not even express views about the truth or falsity of *The Hook*'s statements about Garrett, but simply expressed negative opinions about Garrett's decision to file a libel suit against a newspaper, or even expressed **positive** opinions about Garrett. At best Garrett's subpoena is vastly overbroad as a means of accomplishing his stated purposes.

Even if the Court concludes that some of the documents sought have some marginal value to Garrett's prosecution of the litigation, they certainly do not go to the heart of his case. None of the emails that Jaquith has withheld shows that anybody connected with *The Hook* entertained any doubts about the veracity of factual statements made in the articles. Although some of the anonymous commenters may have believed what they read about Garrett in *The Hook,* Garrett has not shown that he needs to identify anonymous Internet speakers in order to show that his reputation has suffered since *The Hook*'s articles were published. Presumably, Garrett filed his lawsuit alleging a diminution of his reputation because he already knew people who now have a lower opinion of him, and he should be expected to rely on **that** evidence instead of imposing a burden on the First Amendment rights of those who have dared to criticize him publicly on Jaquith's blog.

Moreover, Garrett has not met the test of showing that he has exhausted alternate means of proving the facts that he claims the subpoenaed document are intended to prove. He claims that the only purpose of identifying anonymous posters is that he suspects that **some** of them may be staffers of *The Hook* about whose mental state he is legally entitled to inquire. But in order to obtain the limited information, Garrett proposes to breach the right of all the other posters to speak anonymously. Assuming that there is a limited number of *Hook* staff members whose online

postings he is trying to obtain, there is no reason why he cannot seek discovery directly from those staff members, first by taking depositions of the named defendants, and by obtaining access to work computers controlled by the defendants, and then by taking the depositions of other *Hook* staff members, and inspecting **their** computers (assuming that he can persuade the Court that the mental state of specific staff members other than the named defendants is relevant). But we are advised that Garrett has yet to take a single deposition, even of the named defendants, and has yet to obtain production of documents (or inspection of computers, if justified) from the named defendants. Until he completes such discovery, he has no basis to disturb the First Amendment rights of anonymous posters, even if he satisfies the Court that such evidence is relevant and goes to the heart of his case.

Also relevant in the calculus of burdens versus benefits is the fact that Garrett seeks discovery, not from a journalist who is a named defendant in the libel litigation, but from a third-party journalist who has simply reported on the controversy involving the journalist defendants. Courts grant third-party discovery targets greater protection from burdens on their privacy than defendants whose incentive to resist discovery might be to protect themselves against liability. *O'Grady v. Superior Court*, 139 Cal. App.4th 1423 (Cal. App. 2006), *citing Mitchell v. Superior Court,* 37 Cal.3d 268, 279, 690 P.2d 625 (1984); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998). Because Garrett is not suing Jaquith, but only seeking to obtain discovery from Jaquith for use in imposing liability on *The Hook*, Jaquith is entitled to more protection from imposition on his sources and his anonymous commenters.

V. MANY OF THE EMAILS ARE PROTECTED BY THE ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES.

Finally, most of the emails that refer to this litigation or to Garrett are being withheld because they represent trial preparation materials protected by the work product doctrine, and/or because they

reflect communications in which Jaquith sought and received legal advice. With the exception of emails that Jaquith has exchanged with his attorneys listed below, these emails are listed in the accompanying privilege log. Jaquith claims the privilege for lawyers whom he consulted for their legal advice without ultimately retaining them to represent him in this litigation. *Grand Jury Proceedings Under Seal v. United States,* 947 F.2d 1188, 1190 (4th Cir. 1991). He also claims the work product privilege for his lawyers' communications with him about the case. Because the work product privilege extends to documents created by non-lawyers in anticipation of litigation, *Duplan Corp. v. Deering Milliken,* 540 F.2d 1212, 1219 (4th Cir. 1976), he also claims the work product privilege for his communications with friends and colleagues in the course of thinking through his response to the subpoena, as well as communications with a law student who offered her assistance in opposing the subpoena.[8]

CONCLUSION

The motion to compel compliance with the subpoena should be denied.

Respectfully submitted,

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March 5, 2009

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[8]Like Federal Rule 26(b)(3), which was amended to apply expressly to **all** preparation materials prepared by or for a party, Wright Miller & Marcus, *Fed. Prac. & Proc.: Civil* 2d. § 2024, at 357-259 (1994), Virginia Supreme Court Rule 4:1(b)(3) also applies to preparation by nonlawyers.

ATTACHMENTS

Beal v. Calobrisi, Case No. 08-CA-1075 (Fl. Cir. Okaloosa Cy., Oct. 9, 2008 (Court Order)

Doe v. TS, Case No.08036093 (Ore. Cir. Clackamas Cy., Sept. 30, 2008)

Doty v. Molnar, No. DV07-022 (Mont. Dist. Yellowstone Cy., Sept. 3, 2008 (transcript)

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

TIMOTHY BEAL,

Plaintiff,

v.

Case No. 08-CA-1075

COSMO J. CALOBRISI,
a/k/a kielbasa32542,

Defendant.

ORDER

THIS MATTER CAME ON FOR HEARING before the undersigned Judge of the Circuit Court, First Judicial Circuit, on October 1, 2008, upon the Motion to Quash Subpoena filed by Movant Florida Freedom Newspapers, Inc. d/b/a Northwest Florida Daily News ("Florida Freedom"). The Motion is in the nature of a motion to quash a subpoena issued by Plaintiff to Florida Freedom's "Records Custodian/Webmaster." The Plaintiff was represented at the hearing by Bruce A. Haught, Esq., and the Movant was represented by John A. Bussian, Esq. The Court, having considered the subpoena issued by the Plaintiff, the Motion and Memorandum in Support of Motion to Quash filed by the Movant, and the arguments of counsel, makes the following findings of fact:

1. The Records Custodian/Webmaster was at all material times a professional journalist employed by Florida Freedom, a daily newspaper of general circulation in Okaloosa County that also publishes news on its Internet website. The Records Custodian/Webmaster is regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, and

obtained the information sought by Plaintiff while working as a salaried employee of, or independent contractor for, the newspaper.

2. The content posted on Florida Freedom's website is information of public concern relating to local, statewide, national, or worldwide issues or events.

3. The subpoena directed the Records Custodian/Webmaster to appear and produce information and records related to an Internet poster to Florida Freedom's website including, but, not limited to, the user's e-mail and IP addresses and other identifying information.

4. Neither the Records Custodian/Webmaster nor Florida Freedom is a party in this defamation action.

The Court's conclusions of law are as follows:

1. The Florida Shield Law applies to the facts recited above. Fla. Stat. § 90.5015. The Records Custodian/Webmaster and Florida Freedom have a qualified privilege against compelled disclosure of the Internet poster's e-mail and IP addresses and other identifying information.

2. Plaintiff failed to meet the burden required to overcome the qualified privilege by demonstrating clearly and specifically that (1) the information is relevant and material to unresolved issues that have been raised in the proceeding, (2) the information cannot be obtained from alternative sources, and (3) a compelling interest exists for requiring disclosure of the information. Fla. Stat. § 90.5015(2)(a)-(c); *McCarty v. Bankers Ins. Co.*, 195 F.R.D. 39, 46-47 (N.D.Fla.1998).

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Movant's Motion for Order to Quash Subpoena is GRANTED.

This, the 9 day of October, 2008.

G. ROBERT BARRON

The Honorable G. Robert Barron
Circuit Court Judge Presiding

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FIFTH JUDICIAL DISTRICT

COUNTY OF CLACKAMAS
COUNTY COURTHOUSE, OREGON CITY, OREGON 97045

September 30, 2008

Daniel Skerritt
Attorney at Law
VIA E-Mail:

Kevin Kono
Attorney at Law
VIA E-Mail:

Jessica Goldman
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VIA E-Mail: jessicag@summitlaw.com

RE: Doe v. TS *et al*
Case No: CV08030693
Plaintiff's Motion to Compel Production of Information Identifying the Author of Anonymous Blog Comment

Dear Counsel:

Thank you for your excellent presentations before me on Monday, September 29, 2008.

In the present action, plaintiff has brought a motion to compel the production of information helpful to identify the authors of anonymous web blog comments. Web host Willamette Week's response argued that the information sought was protected from compelled disclosure by Oregon's 'Media Shield Law', ORS 44.510 *et seq*. Web host Portland Mercury argued that the information sought was protected by Oregon's Media Shield Law and the First Amendment of the U.S. Constitution. In his Motion to Compel, plaintiff argued that (1) the Communications Decency Act does not preclude discovery, (2) Oregon's Media Shield Law does not apply to the information sought, and (3) reporter's privilege does not bar discovery. Since there appears to be no disagreement regarding the nondispositive nature of the CDA to the present controversy this argument will not be addressed.

The core questions is, then, whether Oregon's Media Shield Law governs the present controversy. Both the Portland Mercury and the Willamette Week fall within the purview of ORS 44.520 (1) in that they are "***person(s) connected with, employed by or in engaged in any medium of communication to the public***".

A related question is whether the discovery sought is protected under ORS 44.510. The first prong of ORS 44.510 (1) protects information defined as follows:

> "Information has its ordinary meaning and includes, but is not limited to, any written, oral pictorial, or electronically recorded news or other data".

The e-mail addresses and IP address of the blog comment posters are information both within the ordinary meaning of "information" and also are "electronically recorded. . .data" which is specifically referenced in the statutory definition.

ORS 44.520 (1)(a) protects:

> "The source of any published or unpublished information obtained by the person in the course of gathering, receiving, or processing information for any medium of communication to the public".

Plaintiff's Motion to Compel seeks unpublished information that was obtained for a medium of communication to the public. While plaintiff does not tie his argument to this particular statutory language, it would appear that plaintiff's position is that the language "in the course of gathering, receiving, or processing information for a medium of communication to the public" is synonymous with 'in the course of gathering news'.

The statutory language, however, deliberately protects not only news but also "data" and what is commonly understood as information. It would seem clear that Oregon's Media Shield Law is intended to have a wider scope than "news gathering". The posting on the Portland Mercury Website titled "Busy Day at City Hall, Part 2" discussed actions taken by Sho Dozono to qualify for public financing in his run for mayor of the City of Portland. The Portland Mercury invited readers to comment on the blog post. An anonymous reader calling himself "Ronald" responded with a comment related to Mr. Dozono's candidacy which was allegedly defamatory of plaintiff. If the comment had been totally unrelated to the blog post, then the argument could be made that the Portland Mercury did not receive it in the "course of gathering, receiving, or processing information for any medium of communication to the public".

The Oregon Media Shield Law is broadly written and it is intended to protect a broad range of media activity, not simply news gathering. This court feels compelled to follow the broad statutory language in regard to plaintiff's motion to compel and therefore denies plaintiff's motion to compel.

The court requests that attorney Kevin Kono prepare and submit, within ten days of the date of this letter, an order reflecting the court's ruling.

Very truly yours,

James E. Redman
Clackamas County Circuit Court Judge, Pro Tem

JER/jk

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

RUSSELL L. DOTY, PLAINTIFF, vs. BRADLEY MOLNAR, DEFENDANT.	CAUSE NO. DV 07-022

Taken at the Yellowstone County Courthouse
Billings, Montana
Wednesday, September 3, 2008

MOTION TO QUASH
Before the Honorable G. Todd Baugh
Thirteenth Judicial District Judge

A P P E A R A N C E S

FOR THE PLAINTIFF:
RUSSELL L. DOTY, pro se, P.O. Box 30457, Billings, Montana 59107-0457.

FOR THE DEFENDANT:
JACK SANDS, ESQ., Attorney at Law, 100 North 27th St., Suite 250, Billings, Montana 59101.

FOR THE BILLINGS GAZETTE:
MARTHA SHEEHY, ESQ., Sheehy Law Firm, P.O. Box 584, Billings, MT 59103.

WEDNESDAY, SEPTEMBER 3, 2008

THE COURT: DV 07-022 Doty versus Molnar, *Gazette's* motion to quash a subpoena or something. Y'all have come to some understanding and have agreed to a resolution of the issues?

MS. SHEEHY: We haven't, Your Honor.

THE COURT: Okay. You can proceed.

MS. SHEEHY: Judge, I put a copy of the Media Confidentiality Act on your tray there because I'll be referring to it.

THE COURT: Thank you.

MS. SHEEHY: That's just the statute. This case arises because Mr. Doty, as part of his civil action, has issued a subpoena requesting that the *Gazette* produce IP addresses, e-mail addresses, and other identifying information about a number of anonymous posters. Mr. Doty identifies these posters by their on-line nicknames and asks the *Gazette* to accumulate data concerning their identities.

I would like to present a little bit, as was further explained in Mr. Prosinski's affidavit, about the on-line edition.

(Whereupon, the reporter asked counsel to slow down.)

MS. SHEEHY: The *Gazette* on-line edition allows

readers to post comments after each story and these comments are anonymous. The posters can choose to have a nickname or a posting name that reflects their identity, or they can remain anonymous. In allowing these postings, the *Gazette* asks that the posters register. And in the registration, the *Gazette* obtains the IP address, which I believe to be computer-specific, the e-mail address, and the nickname. The *Gazette* does not require and does not obtain information concerning their identities.

The *Gazette* moves to quash this subpoena on very simple grounds. The Media Confidentiality Act found at 26-1-901 through 903. The Media Confidentiality Act is very specific and very broad. It has a provision stating extent of privilege. It says, subsection 1, Without his or its consent, no person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service, or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news, may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received or processed in the course of his employment or

its business.

The *Gazette* has presented the affidavit of Steve Prosinski to establish that the on-line message service is indeed part of the *Gazette*'s business. It's an integral part of the business and a growing part of the business. All the information requested in the subpoena is obtained as part of this business, which is the *Gazette*'s business. As such, the subpoena falls squarely within the broad privilege allowed by the Media Confidentiality Act and the subpoena must be quashed. By the terms of Act, no one from the *Gazette* may be compelled to testify or to provide this information.

Mr. Doty claims in his briefing that the *Gazette* has waived its privilege. The *Gazette* has not waived its privilege, and Section 26-1-903 speaks specifically to this. The privilege encompassed in the Act can only be waived by knowing, voluntarily, and stated waiver. Mr. Prosinski has provided information for the purposes of this motion. None of the information provided is responsive to the subpoena. And Mr. Prosinski stated in the affidavit that he specifically did not waive the privilege.

Mr. Doty also asserts that this privilege is somehow limited to old technology. Technology that was in place at the time the statute was enacted. He cites

no authority for this position, and I looked, I don't think there is any authority. All of the privileges that exist, for the most part, were put into place prior to these technological advances of e-mail, on-line posting. No one would claim that correspondence from an attorney to a client by e-mail somehow doesn't fall within the attorney/client privilege because it's new technology. Same with doctor/patient privilege or any of the privileges. The privilege enacted by the statute is very broad and it must be read as written.

We've also in our briefing talked a little bit about the First Amendment rights to speech and to anonymous speech, in particular. We provided the Court with a number of cases where the courts have held that this kind of information can't be compelled by subpoena and that it is protected by the First Amendment. I would like to point out that while we argue that the First Amendment applies here and we believe that our authority makes that case, the Court doesn't need to reach that issue. And, in fact, the Court should exercise restraint. When a case can be decided on statutory grounds, the Court should not look to the constitutional issues. The case for that is *State ex rel Wilcox, 208 Mont 351, 678 P2nd 209.*

Today Mr. Doty has presented us with a case out

of Connecticut. The title was *Doe versus* -- I'm not sure what the Defendant's name was. And that case was decided so that after weighing the constitutional rights, a newspaper was required to produce information. I haven't had a chance to fully look at that case; however, in my short review, it appears that the Court weighed constitutional issues and there was no statutory privilege at issue.

We're in a unique situation here in Montana because our legislature has already done that weighing. Our legislature has determined that the First Amendment interests and the freedom of press interests require the application of a privilege, just as the legislature has made that determination with respect to communications between attorneys and clients and with respect to communications between doctors, counselors and other professionals.

The -- Mr. Doty encourages this Court to weigh constitutional issues. That weighing favors the *Gazette* because the principles of the First Amendment are so important. However, I'd encourage this Court not to conduct that way. While recognizing those First Amendment privileges, there is no need to go to constitutional issue in this case, because the statute has already done the weighing, the legislature has

already enacted the policy, and the policy is very broad. The privilege extends to, quote, Any information obtained or prepared or gathered, received or processed in the course of the *Gazette*'s business, unquote. I did input the *Gazette* into the statute.

All of the information that is subpoenaed was indeed obtained and gathered in the course of the *Gazette*'s business. This Court need look no further before quashing this subpoena. Thank you.

THE COURT: Mr. Doty.

MR. DOTY: May I approach the bench, Your Honor?

THE COURT: You may.

MR. DOTY: Here's some things I'll be referring to. (Hands documents to the Court.)

Your Honor, I would like to cut to the chase and address the constitutional issue first. With regard to the brief filed by the *Billings Gazette*, it was said by counsel that I did not deal with the *Best Western* case or the *2Mart* (sic) case. Both of those cases concede the right to speak anonymously is not absolute. And, therefore, it would not be absolute in the case of the statute that they cite, either.

I'll refer you to the first case that they cited. Basically, on the quote, To certain classes of

speech, including defamatory and libelous speech, are entitled to no constitutional protection. Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from being -- from hiding behind an illusory shield of purported First Amendment rights.

Now, in order to prevail on a motion to quash, courts have required various standards to show that defamations existed. As the *Best Western* court laid out, those have varied from a good faith basis to assert a claim to pleading sufficient facts to survive a motion to dismiss to a showing of *prima facie* evidence sufficient to withstand a motion for summary judgment, and beyond that, hurdles even more stringent. Let's take those.

Attached to my affidavit is *prima facie* evidence of defamation and false light in the instance of each person whose pseudonym I have in good faith requested information on. Those attachments and my affidavit provide enough evidence to withstand a motion for summary judgment. I have to be able to prove the elements within my control -- only the elements within my control. What are the elements of those claimed? As you know, a defamatory statement made by the Defendant, a statement about me. It has to be published, and the

Defendant can lose a qualified privilege through excess repetition and secondary publishers, which these people are. It has to -- or at least two of them are: The CutiePie and the High Plains Drifter. It has to damage my reputation. And when it is *libel per se*, damages are imputed. *Per se* means, in this case, defamation in my job or accusations of a crime.

If public figure, I would also have to prove falsely. And I don't know whether or not the *Gazette* is including me in the public figure category, because I haven't run for office for four years.

Also, in the public figure, you would have to prove fault on the Defendant's part, which is really a misnomer. That means you have to prove malice of scienter. The statement was made with reckless disregard for the truth, or the prospective Defendant must have known that the statement was false. The statement is *libel per quod* that is needed to look at intrinsic facts to establish defamatory content.

Now, let's take a look at attachment 3, which was attached to my material. And I'm assuming, Your Honor, I'm not trying not to repeat what I've put in my brief, because I'm assuming that the Court can read that and has.

If you take a look at the document No. 3. The

statement about me -- there's a statement about me. It was published. General damages are imputed because it was *libel per se*. It's false? Yes. I paid 279 -- excuse me, $2,927 in back dues and late fees and was reinstated at the beginning of April 2007. Proof of that, I've just laid on your desk, shows my admission card. Malice? Certainly it was reckless disregard because whoever did this -- this guy by the name of Always Wondering -- did not even check on-line as two people who called him to task. You'll see on page three, Good Old Boy and DDW, whom I don't even know who they are. They call him to task for not checking better. And then he came back and continued to try to libel me and even repeated false information after I had corrected him in a lengthy correction found on page four and the other particular things.

So that takes care of the first qualification in the *Best Western* case to show, at least with regard to this particular person that I want information on, to show a *prima facie* case. The *Best Western* case can be distinguished because the person seeking the subpoena identifies -- identities did not allege a specific false statement or other elements of the proposed lawsuit. However, that was -- when that was alleged, the Court did allow the identities to be revealed. And that's the

second case that counsel for the *Gazette* has referred to that I have put on your desk, which I Shepardized and found that the Court, in that particular case, went ahead and did allow the identities to be revealed.

You'll note, I think, in the headnote ten of the first *Best Western* case, there are five or six other things that have to be proven. You have to have a concrete showing of a *prima facie* claim, which we've just discussed in this one instance. And I'll come back to the others.

The specificity of the discovery requests. My discovery request is very specific. It's not overbroad. There's no claim in here that it had. The absence of the alternative means to obtain the subpoenaed information. In a deposition taken very recently, I asked Mr. Molnar if he was Always Wondering, High Plains Drifter, and CutiePie. He said he was not. I asked him whether he knew who those folks were. And Mr. Sands, who's here today, objected and told Mr. Molnar not to answer. So I've exhausted the alternative ways of obtaining that particular information.

And the fourth part that is required in the *Best Western* case is an essential need for the subpoenaed information to advance the claim. Certainly, I would have to have the name of the person with regard to Always

Wondering because of his *libel per se*. The other two people are potential witnesses in this case for reasons that we'll discuss, and they are referring to libelous things that would be included in the *libel pro quod* category, which requires extrinsic evidence in order to be able to prove the libel.

And with regard to the Does Defendants, whether or not they have an expectation of privacy. I've attached to my affidavit, attachment 4, which is some things in terms of what the *Gazette* policy is with regard to postings on their Internet site. I would just say that one of the things is, on page one, the *Gazette* encourages people to be civil. They also, on page one, require all information you provide is true, accurate, current, complete, and does not violate these terms of service. That's a contract. I'm a third-party beneficiary of that contract and the case that was first cited by the *Gazette*, that the *Best Western* case, indicates what happens in terms of a contract. And in that particular contract case at least, the privacy was overcome.

Now, there's some other things on the -- on the *Gazette* that I've highlighted, in terms of -- but I'd just refer you, also, to the last page, and they say basically they -- they'll try to protect the -- or they

don't say "try," but they say, We believe that the greater protection of personal privacy on the Web will not only protect consumers, but also increase consumer confidence and ultimately their participation in on-line activities. The purpose of our policy is to inform you about the types of information we gather when you submit a comment using the talkback feature. And then up above they say they're committed to protecting consumer privacy on-line.

They don't guarantee that, however, and they couldn't. Because if you take a look at the *Best Western* case with regard to the one that I just sent out, the subsequent *Best Western* case, you'll see in -- it's towards the last, I think it's the second to the last page. You'll see on page 21 about the Does Defendant, and 21 isn't a reference to the case, it's just a reference to what I passed out in the upper right-hand corner. See, the Does Defendant expectation of privacy. The *Gazette* cannot guarantee any expectation of privacy because there is none. And it's been well-established by the case law that's cited there.

Now, what's required -- what else is required by these cases? One of the things that seems to be required is that the potential Defendants, or the potential people who are going to get their identity

revealed, have to be notified with regard to this. This has been done in a couple of ways. It's been done with posting on the Web site in this particular case, and apparently in this particular case there have been some things where people have always been notified. I don't know whether or not the Defendant or the *Gazette* has tried to notify the people. I don't know whether some of these people are even in this room. And -- but they would, in terms of having their right to participate, have a right to -- some of them under some courts, they would have a right to appear anonymously, under some courts they wouldn't. I'm not contesting whether or not they would have a right to appear anonymously to contest whether or not their identity ought to be revealed to the extent the *Billings Gazette* can do that.

What I'm saying is requesting this Court at this particular time to go ahead and give the *Gazette* time to notify the anonymous Defendant and give a chance to respond or post it on their Web site or both, so that they folks can respond. And if the Defendants do not give notice that they're moving to quash within ten days, an order should issue compelling discovery. Or in the alternative, and with regard to Mr. Molnar, the information that I want from him, in terms of their cross-referencing the IP addresses with his particular

name, that's something that wouldn't be protected with regard to this in any event.

Now, let's talk for just a minute about the Shield law. Oh, before we do that, I would ask the Court to also grant a motion to protect the data in the -- I'm making it at this time -- to the *Billings Gazette*, to protect the data that I'm requesting so that it doesn't get deleted in some fashion.

Let's talk about the Shield law. I've addressed the particular issues under the Montana Rules of Civil Procedure 26, 30, 34 and 45. And basically with regard to what happens when you subpoena third-parties. It has to be relevant and it has to be not privileged, it has to be reasonable and not unduly burdensome.

The first brief in this action, and the present brief that were filed by the *Gazette*, there was no claim involving relevancy. In the second brief, the *Gazette* raises claims on burdensomeness and unreasonableness. I've pointed out in an affidavit -- or excuse me, in attachment 5 to my affidavit that there's a very simple SQL query that can be made to obtain most of this data, and they can run it once or -- queries once or twice and get it. It's not burdensome. And in addition, they could -- they could charge me, under the rules of the court, for whatever it is that they have to do. No

evidence backs up their claims that it's unreasonable or burdensome. I address them specifically in my affidavit and in my brief.

Now, with regard to the Shield law specifically. The reason for the Shield law, as I understand it, and I go way back with the journalistic community. I write myself. My mother was a journalist. I've been married to a journalist. And so I understand these things.

The reason for the Shield law is to protect people who are either news gatherers, you know, like reporters, or editorialists, or possibly guest editorialists. They're not to protect people who come on-line later on and make some kind of a comment. And it was said, I think, that I would want to extend -- or that my argument goes to the argument -- the distinction between old and new technology. While there's a piece of that, you have to make a distinction. The Court cannot add a new protection because of the new technology. If you go and take a look at the doctor/patient privilege and the attorney/client privilege statutes that were cited by counsel in her brief, you will find that there's nothing in either statute that would prevent, you know, attorneys giving information back and forth between themselves and their clients or doctors on-line or using

electronic kinds of devices. It's just the way the statutes happen to be written. So that that particular argument is not an argument that I made, nor could it be made to be extended if you adopted my position in this particular case.

So basically, then, I think I briefed the idea that the Court cannot extend the privilege to the computer people. I just want to address some loose wording that's been used in this proceeding and that's with regard to Mr. Prosinski's -- I hope I'm pronouncing that name correctly -- affidavit. He says, in part, paragraph 13 -- he says in paragraph 13, and I quote, The on-line story comments have become an integral and necessary part of the *Gazette* business of gathering and disseminating news and information. Two things: He doesn't go beyond that and say that they have become a necessary -- that they do gather information through these things, news and information through these things, as is asserted by the *Gazette*'s attorney on page five of her brief, where she says, The allegation is referred by Mr. Prosinski's affidavit, which states that the message boards are used to gather and disseminate news and information. Nor could I test him by calling him for a witness here now and ask him to say, you know, whether that is done generally, or whether that has been done

specifically with regard to High Plains Drifter, the -- specifically with regard to CutiePie, or specifically with regard to Always Wondering, which I think is their burden to have to be able to demonstrate. And they just haven't demonstrated it.

You know, I can't completely rule out the fact that some reporter might go into a blog or a comment section, but -- and find something, but that's their burden to show, and I don't think they've shown it in the affidavit of Mr. Prosinski because of the wording that he's chosen to use.

Now, if you take a look at what's happened on the *Billings Gazette* Web site, if you go into the blogs, you'll see very quickly that there are -- there are ads throughout the comment section. They're in the middle of them. They're on both sides of them. And what's really -- you know, you can see that from this particular one with the X crossed out, the one that I just happened to comment on just recently. And, again, I asked the *Gazette* to take my name off of this particular -- or take the adverse post off of this particular one and they haven't responded. They didn't do it. I have no reason to know why, but it's certainly -- they've posted some things that, you know, that -- that are upsetting to me, frankly. And there's no way that I can seem to bring an

end to this.

Now, just in closing -- well, I guess I should go through the -- the other affidavits as well, or the other attachments as well, because I have to prove a *prima facie* case with regard to them. Taking the attachment 1 and attachment 2, CutiePie indicates that I'm quite possibly the most discredited person in Montana politics or legal circles. That's basically one of the issues in this particular case as to what's happened to my reputation as a result of all the false things that were said. CutiePie goes on to say about, Goofy arguments were rejected by the commissioner of political practices. And then he says by -- appointed by Marc Racicot and the commissioner appointed by Brian Schweitzer. They weren't -- that's another false statement, as you can see by the material that I placed on your desk. Mr. Higgins, who made the determination, was picked by Governor Judy Martz, Republican. Also refuted by Attorney General Mike Grath (sic). That's false. It was one of the assistant attorney generals and whatnot. So basically my need for this particular witness is to -- is a witness with regard to what's happened to my ongoing reputation in this community.

With regard to attachment 2, that deals with Mr. High Plains Drifter. And after I had made a blog

comment, he comes back and says, You didn't have credibility then and you don't now. We don't care -- and above that part he says, We don't care what kind of propaganda you vomit. And then he makes reference *libel pro quod*, How's the weather in Colorado, which is a reference to the issue of whether or not I tried to hide my return from Colorado; and also, Do you still live in that post office box, which is a reference, again, to issues in that -- in this particular case.

So those are things that I need to know. And in addition, I have a right to test whether or not Mr. Molnar is telling the truth when he says in his deposition that he is not either of these people. He has refused to sign a waiver, which I have placed before you; three different waivers, he refused to sign them. I've signed a waiver. I would sign a waiver in regard to the *Gazette*, if it is requested, but I've signed a waiver for the commissioner of political practices. He's not signed a waiver with regard to any of those documents, so there's a reason for me -- I can't get it in any other way, except for the Court, to go forward with trying to demonstrate whether or not we're getting a straight story from Mr. Molnar or whether he's continuing to malign me and make the community think that I'm a discredited person because of the many things that he said that were

false.

Now, Mr. Molnar has a new campaign brochure. And it -- on the front of it, it says -- I thought I had it here. I guess it's over here. On the front of it, Your Honor, as you can see it says, Integrity and experience. And below that it says, What else is there?

THE COURT: It says what?

MR. DOTY: What else is there? Integrity and experience. In this particular case, it's my integrity and my experience that are on the line, and I would hope that you would give me the opportunity to be able to bring forth the evidence that I need in order to prove my case. Thank you, Your Honor.

THE COURT: When it comes to defamatory statements, published, is there any requirement that they have any credibility?

MR. DOTY: That the statements have any credibility? You mean, that nobody would believe them?

THE COURT: Yeah, I mean, who would believe anything or pay any attention to anything that somebody posts anonymously that if they don't have the gumption to put their name behind it, who would give it any credence?

MR. DOTY: Well, it seems to be rampant on the Internet.

THE COURT: Well, who pays any attention to

that stuff? No one.

MR. DOTY: I would respectfully submit that that's not a criteria.

THE COURT: That's what I was asking about. I mean, because I can't imagine that an anonymous comment has any credence whatsoever. Now, if it's not required, I suppose that's something else. And so if you knew the identity of these folks, you could sue them, or I think you believe, really, that the person is Mr. Molnar, who is using a false name?

MR. DOTY: Yes. And with regard to two of them, the CutiePie and High Plains Drifter, my ideas is that they are witnesses in this particular case -- should be made witnesses in this particular case with regard to what they thought happened to my reputation.

THE COURT: Okay. Rebuttal?

MS. SHEEHY: Did you want to say anything, Jack?

THE COURT: Oh, we've got another party.

MR. SANDS: I'm Jack Sands and I represent Brad Molnar.

THE COURT: Right.

MR. SANDS: And we have not filed a brief in this case because this is fundamentally an issue between the *Billings Gazette* and Mr. Doty. However, I would

inform the Court that Mr. Doty indicated that Mr. Molnar had made objections to certain questions that he asked in the deposition.

THE COURT: I think he said you instructed Molnar not to answer the question as to whether or not Molnar knew who really was the true identity of High Plains Drifter and CutiePie.

MR. SANDS: Basically, I think the --

THE COURT: Is that accurate or not accurate?

MR. SANDS: Well, I think that's what Mr. Doty said --

THE COURT: I know that's what he said.

MR. SANDS: I mean, there were lots of objections made in the deposition.

THE COURT: I get the impression that, from that -- if that is what happened with that particular exchange, that Mr. Molnar probably does know who High Plains Drifter and CutiePie are, but he said it wasn't him.

MR. SANDS: What our point was in the objection and our point here is that none of this information is remotely relevant to the case before the Court. This Complaint, Mr. Doty's Second Amended Complaint, has -- has an allegation containing defamation, libel, and slander. It has to do with the defamation, libel, and

slander that occurred back in 2004. There's no allegation of a continuing level of conduct. There's no allegation about any other people involved, except Mr. Molnar. And since this --

THE COURT: Let me see if I follow this. His Complaint complains about, alleges as having occurred, slander, defamation, whatever that other one was you said, that occurred in 2004?

MR. SANDS: Yes.

THE COURT: And these blogs or postings or this about which he wants information is --

MR. SANDS: Happened long afterwards.

THE COURT: He's talking about things that were posted in, say, 2007? 2008?

MR. SANDS: I understand that some of those occurred then, yes.

THE COURT: Okay.

MR. SANDS: And there is no part of Mr. Molnar's -- or Mr. Doty's Second Amended Complaint that alleges anything with regard to libel, slander, or any of the other counts occurring after 2004. And, therefore, all this -- this discussion is really irrelevant to the case before the Court.

THE COURT: Point taken.

MS. SHEEHY: A couple of points. Mr. Doty

claims that this case begins and ends at the constitutional weighing. That is not what Montana law says. Montana law says you reach the constitutional analysis only if a statute or some other state law case law doesn't resolve the issue. And in this case, the privilege does resolve the issue.

But assuming, for the sake of argument, that you do this weighing, the freedom of speech in this case outweighs the right to conduct discovery in a civil case. Mr. Doty has a civil case against Mr. Molnar. He's deposed Mr. Molnar and he knows what Mr. Molnar has identified as his statements and those that are not his statements. He has not proved a *prima facie* case with respect to reputation, damage, and malice. And as the Court pointed out, the form of public ideas takes care of this problem, because everyone recognizes this for what it is. It's anonymous postings. Just as it would be if someone posted something on your wall on paper.

But the heart of this case is actually the privilege, because Mr. Doty sidesteps the fact that this privilege exists. When you look at the privilege, you don't do the constitutional weighing. There is no need to do that. Privilege is unique to Montana. The cases that we've looked at involving these constitutional analyses, those cases don't deal with common law or

statutory privileges. And Montana's is different than any of the others that I've seen. Mr. Doty attempts to get out of the privilege by saying that it's limited by -- limited to news gatherers, reporters, and editorialists. That is not what this statute says. The statute protects any employee of the business from disclosing any information -- let's find it here -- any information gathered, received, or processed in the course of his employment or its business. It's not the business of news gathering. It's the business. It is a very broad privilege.

Moreover, this business does gather information from these posts. Mr. Prosinski's affidavit states that it's integral to the business of disseminating news and of gathering news.

THE COURT: I hope they're not printing in the paper that there's any credence in these blogs.

MS. SHEEHY: They don't print that in the paper, and I think everyone judges anonymous speech in the same way that you do. That anonymous speech is anonymous speech. It's what it is. And there is a protection that applies to that.

I think it's really important to realize that this privilege has been applied to anonymous speech in the past under old technology. I remember a case in

federal court where we had done an article, the *Gazette* had written an article on an anonymous teen prostitute. The Prosecutor got up that morning and read the paper, subpoenaed the reporter and wanted information about the anonymous teen prostitute and wanted the reporter to testify as to what she learned from the prostitute. The information that our reporter had may have been very useful in prosecuting a large prostitution ring. But the information was privileged, and the fact that it was privileged precluded the interview of our reporter. So this statute does apply to anonymous speech. It has been applied to anonymous speech, whether that speech is posted on a message board or contained in our newspaper makes no difference, and the statute clearly does not draw any distinction, but is broadly worded.

I guess, as to the burden, we're not claiming that it's an undue burden in any one case, but I think the Court can see how this could become a nightmare. Every time someone wanted to know who wrote the little comment, all they would have to do is pay the $100 filing fee, or whatever it is now, file a subpoena, and the *Gazette* would be dealing with this situation and doing this weighing and deciding if people had made their *prima facie* case and going to court every other week when there's a privilege in place that directly addresses

this situation.

I would like to close by commenting on the nature of privilege. I think, as I listened today, the real beef here is that Mr. Doty believes that the privilege can't be enforced because he can't do the discovery that he wants to do in a civil case. But privileges, by their very nature, always impair somebody's opportunity to conduct discovery. And privileges are enforced for that reason. Yes, it may work a hardship, but there is no weighing with a privilege. You look to see if the privilege applies.

There are many examples of how privileges preclude people. I've already given you one, which is the story of Angela, who could not be deposed. There's doctors that are not allowed to testify in civil cases when they have information that might help prove a tort case. Lawyers, obviously, often have information that would help prosecutors solve crimes. They can't be compelled to testify, because the privilege, by its nature, does what Mr. Doty doesn't want it to do. It precludes him from conducting some discovery that he wants to have.

But this weighing has already taken place in the Montana legislature. We have a specific statute. There's no need to do a constitutional weighing. The

legislature determined that the First Amendment privilege to speech outweighs the discovery privileges of both prosecutors and civil litigants alike. The legislature has made that determination of what benefits society, and it's not within this Court's purview to go in and do a constitutional weighing when the legislature has already set the policy of this state.

The subpoenaed items are information gathered in the course of the *Gazette*'s business. They clearly fall within this broad privilege. And the subpoena should be quashed. Thank you, Judge.

THE COURT: Okay. I think the *Gazette* is correct, Mr. Doty, the Shield law does protect that which you seek to have them produce for you. And the Court doesn't even get to the constitutional issue that the legislature has already decided that with this statute. And though technology has advanced since the time of the creation of that law, it, nonetheless, is very broad and it does cover the situation we have here before us today.

Apparently, or at least possibly, Mr. Molnar may know who these folks are. You can pursue that through them -- or through him. Further, apparently, what you're complaining about in the pleadings is something that occurred in 2004, and I'm given to understand that these blogs that you seek to have the

Gazette identify the author is -- are all after that point in time, so they wouldn't have any relevance, I think, anyway. It is possible, I suppose, you could amend your pleadings and we can go through all this again, but the Shield law is going to protect them. What you might do is pursue this information through Mr. Molnar. And if you don't think he has answered your questions, ask him some more questions. It is possible, I don't know if it is likely, but at least it is theoretically possible that the *Gazette* could contact CutiePie and High Plains Drifter and see if they wanted to be identified or would voluntarily be identified. I somewhat hesitate to suggest that while the *Gazette* might be willing to do something of that nature on a one-time basis, they would be setting some precedent for doing this for anybody that wanted to know who it was that wrote this stuff. So the motion to quash has to be granted. And we're adjourned.

(Whereupon, the proceedings duly ended.)

CERTIFICATE

STATE OF MONTANA)
: ss.
County of Yellowstone)

I, Sharon L. Gaughan, RDR, CRR, Official Court Reporter and Notary Public for the State of Montana, residing in Billings, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings in the above-entitled cause;

I further certify that the foregoing 30 pages of this transcript represent a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on this, the 9th day of Sept, 2008.

Sharon L. Gaughan, RDR, CRR
Official Court Reporter and
Notary Public, State of
Montana. Residing in
Billings, Montana. My
Commission expires: 4-12-10

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the enclosed **MEMORANDUM OF WALDO JAQUITH IN OPPOSITION TO MOTION TO COMPEL COMPLIANCE WITH SUBPOENA** with **ATTACHMENTS** were sent both electronically and mailed first-class with postage prepaid on this 5TH day of March 2009, to each of the following:

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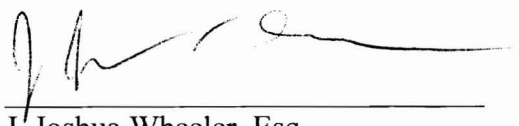

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