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LAW REVIEW 2018–2019

ARTICLE

UNMASKING ANONYMOUS INTERNET SPEAKERS: BALANCING THE RIGHT OF FREE SPEECH AGAINST THE RIGHT TO SEEK REDRESS FOR INJURY FOR WRONGFUL ONLINE SPEECH

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Introduction

There is an inherent tension between an online speaker's right to free speech and the right of a harmed party to seek redress for wrongful online speech. This memo explores the applicable standards available for unmasking an anonymous online speaker and proposes a bright-line test that seeks to achieve the right balance between an anonymous speaker's right to engage in free speech and a harmed party's right to seek redress for demonstrable online injury.

I. First Amendment Right to Anonymous Online Free Speech

A court order, even when issued at the behest of a private party, is state action and is subject to constitutional limitations.[1] Court orders that compel the production of an individual's identity in a situation that threatens fundamental rights are "*subject to the closest scrutiny*."[2] The First Amendment protects anonymous speech.[3] The Supreme Court has noted that "[a]nonymity is a shield from the tyranny of the majority."[4] Indeed, "*[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.*"[5]

The protections of the First Amendment extend to the Internet.[6] "Courts have recognized the Internet as a valuable forum for robust exchange and debate."[7] "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."[8] Courts have also recognized that anonymity is a particularly important component of Internet speech:

> *Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas . . . the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.*[9]

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[1] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

[2] NAACP v. Ala*. ex rel.* Patterson, 357 U.S. 449, 461 (1958); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (emphasis added).

[3] *See* Buckley v. Am. Const. L. Found., 525 U.S. 182, 200 (1999).

[4] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

[5] *Id.* (emphasis added).

[6] *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).

[7] Sony Music Ent., Inc. v. Does 1-40, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004).

[8] *Reno*, 521 U.S. at 870.

[9] Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092, 1097 (W.D. Wash. 2001) (emphasis added).

However, the right to speak anonymously is *not absolute*.[10] These principles make clear that John Doe defendants have a First Amendment right to anonymous Internet speech, but the right is not absolute and must be weighed against the need for discovery of the identity to redress alleged wrongs.[11]

"[C]ourts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns."[12] To ensure that the First Amendment rights of anonymous online speakers are not lost unnecessarily, courts typically require parties to make some showing before obtaining discovery of the speakers' identities.[13] Courts have recognized a range of possible showings.[14] As the Delaware Supreme Court explained:

> *[a]n entire spectrum of "standards" . . . could be required, ranging (in ascending order) 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.*[15]

Courts applying the more stringent hurdles have also imposed *a balancing test which balances the First Amendment right to anonymous free speech against the strength of the prima facie case presented and the necessity for disclosure of the anonymous speaker's identity to allow the petitioner to proceed*.[16]

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[10] *See McIntyre*, 514 U.S. at 357; Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection.").

[11] *See* Best Western Int'l, Inc. v. John Doe, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014, at *9 (D. Ariz., July 25, 2006).

[12] *Sony*, 326 F. Supp. 2d at 563 (discussing NAACP v. Ala. *ex. rel.* Patterson, 357 U.S. 449, 462 (1958); NLRB v. Midland Daily News, 151 F.3d 472, 475 (6th Cir. 1998); L.A. Mem'l Coliseum, Comm'n v. Nat'l Football League, 89 F.R.D. 489, 494–95 (C.D. Cal. 1981)).

[13] *See Best Western*, 2006 U.S. Dist. LEXIS 56014, at *10.

[14] *Id.*

[15] *Cahill*, 884 A.2d at 457 (emphasis added). The earlier cases, such as *In re* Subpoena Duces Tecum to Am. On-Line, Inc., 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000), apply a good faith pleading standard. However, courts have held petitioners to higher and higher burdens of proof before ordering the disclosure of an anonymous speaker's identity since online posting began to explode in the 1990s. *See* Craig Buske, *Note: Who is John Doe and Why Do We Care?: Why a Uniform Approach to Dealing with John Doe Defamation Cases is Needed*, 11 MINN. J.L. SCI. & TECH. 429 (Winter 2010).

[16] *See* Salehoo Group, Ltd. v. ABC Co., 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010) (stating the case law has begun to coalesce around the basic framework of the test articulated in *Dendrite*); *see also* Craig Buske, *Note: Who is John Doe and Why Do We Care?*, 11 MINN. J.L. SCI. & TECH. 429 (Winter 2010).

II. The *Dendrite* Test

In *Dendrite International, Inc. v. John Doe No. 3,* Dendrite sought discovery of the identity of John Doe No. 3 based on alleged defamatory comments Doe posted on a Yahoo! Message Board about the Company.[17] The *Dendrite* Court affirmed the trial court's denial of Dendrite's motion because Dendrite failed to establish the harm resulting from Doe's allegedly defamatory statements.[18] The *Dendrite* Court articulated a five-part test, which is the one most often used by courts across the county for unmasking anonymous online speakers.[19] Under *Dendrite*, a plaintiff seeking such discovery must: (1) give notice; (2) identify the exact statements that constitute allegedly actionable speech; (3) establish a *prima facie* cause of action against the anonymous speaker based on the complaint and all information provided to the court; and (4) produce sufficient evidence supporting each element of its cause of action, on a *prima facie* basis, prior to a court ordering the disclosure of the unnamed defendant's identity.[20] If the petitioner makes out a *prima facie* cause of action, the court must also (5) balance the anonymous speaker'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 speaker's identity to allow the petitioner to properly proceed.[21]

III. *In re Does 1-10* Test (Texas Test)

Only one reported Texas case addressed the quantum of proof necessary to strip an anonymous online speaker of his First Amendment rights against a complaining party's right to discover the speaker's identity for demonstrable injury.[22] In *In re Does 1-10*, a hospital sued ten John Does who had allegedly defamed the Hospital by posting "many scurrilous comments that unfairly

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[17] Dendrite Int'l, Inc. v. John Doe No. 3, 775 A.2d 756, 759, 769–70 (N.J. Ct. App. 2001).

[18] *See id.* at 759.

[19] *Id.* at 760–61.

[20] *Id.* at 760.

[21] *Id.* at 760-61. Many courts have adopted the *Dendrite* test, *see e.g.*, Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184, 239 (N.H. 2010), and Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 456 (Md. 2009), while other courts have adopted streamlined versions of the *Dendrite* test, *e.g.*, Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005) ("the plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard"), USA Techs., Inc. v. Doe, 713 F. Supp. 2d 901, 907 (N.D. Cal. 2010) (requiring (1) "the plaintiff to adduce, without the aid of discovery, competent evidence addressing all of the inferences of fact essential to support a *prima facie* case on all elements of a claim;" and (2) the court to balance the competing interests), and Highfields Capital Mgmt., L.P. v. Doe, 385 F. Supp. 2d 969, 975–76 (N.D. Cal. 2005) (same). *See also* Pilchesky v. Gatelli, 12 A.3d 430, 444–46 (Pa. Super. Ct. 2011) (applying the *Dendrite* test plus requiring an affidavit from the petitioner stating the information is sought in good faith and fundamentally necessary to secure relief).

[22] *See In re* Does 1-10, 242 S.W.3d 805, 819–23 (Tex. App.—Texarkana 2007, no pet.).

disparage the Hospital, its employees, and the doctors" on an Internet site.[23] The Hospital asked the Internet provider to disclose the identities of the Does pursuant to the Cable Communications Act.[24] The trial court ordered the Internet provider to disclose the names and addresses of the Internet posters.[25]

Doe 1 filed a mandamus seeking to set aside the trial court's order.[26] The Texarkana Court of Appeals conditionally granted Doe 1's petition because the trial court failed to follow the Texas discovery rules.[27] The Court, citing *Cahill*, held that if the trial court was presented with this matter again, it should require the Hospital to present a *prima facie* case on each element of the claim within its control before ordering the disclosure of the Does' identities. The Texarkana Court said:

> To obtain discovery of an anonymous defendant's identity under the summary judgment standard, *a defamation plaintiff must submit sufficient evidence to establish a prima facie case for each essential element of the claim in question*. In other words, the defamation plaintiff, as the party bearing the burden of proof at trial, *must introduce evidence creating a genuine issue of material fact for all elements of a claim within plaintiff's control.*[28]
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> Adapting the summary judgment standard to Texas procedure, the trial court should view the matter as if Doe 1 had filed a traditional motion for summary judgment establishing its defense by alleging that his identity was protected from disclosure by virtue of the First Amendment right of free speech. To obtain the requested discovery, the Hospital would then be required to produce evidence which would be sufficient to preclude the granting of a summary judgment. [29]

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[23] *Id.* at 810.

[24] *Id.*

[25] *Id.* at 811.

[26] *Id.* at 810.

[27] *Id.* at 819.

[28] *Id.* at 822 (quoting Best Western Int'l, Inc. v. John Doe, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014, at *12 (D. Ariz., July 25, 2006) (quoting Doe v. Cahill, 884 A.2d 451, 465 (Del. 2005)).

[29] *In re Does 1-10*, 242 S.W.3d at 823 n.13. The Texas Anti-SLAPP Statute requires the petitioner to produce clear and specific evidence of a *prima facie* case for each essential element of a potential claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)–(c). "Clear and specific evidence" is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004) (per curiam) (citations omitted). Therefore, the Anti-SLAPP statute, effective in 2011, is consistent with *Does*

IV. ***Krinsky v. Doe 6*** **(California Test)**

In *Krinsky v. Doe 6*, Lisa Krinsky, the president, chairman, and CEO of a publicly traded company, sued Doe 6 seeking his identity by subpoena for allegedly defaming and disparaging her on message boards and other websites and for interfering with her business and contractual relationships.[30] Doe 6's posts stated Krinsky had a "fake medical degree," "poor feminine hygiene," and was a "crook."[31] The trial court ordered the disclosure of Doe 6's identity, but Doe 6 appealed, contending that he had a First Amendment right to speak anonymously on the Internet.[32] The appellate court agreed and refused to order the disclosure of Doe's identity pursuant to the First Amendment.[33]

In reaching its holding, the Court conducted an exhaustive review of the then state of the law with respect to the standard of proof necessary to order the disclosure of an anonymous online speaker's identity for wrongful conduct and injury, including *Dendrite*, *Cahill*, *Best Western*, and *Highfields*.[34] In arriving at its own test, the Court agreed with a notice requirement,[35] and a requirement that the plaintiff make a *prima facie* showing of the elements of libel.[36] The Court stated that when there is a *factual and legal basis for believing libel may have occurred*, the writer's message will not be protected by the First Amendment, and no further balancing of interests is necessary to overcome the defendant's constitutional right to speak anonymously.[37] The Court then reviewed the law applicable to libel and found the messages, "*viewed in context, cannot be interpreted as asserting or implying objective facts*."[38] More specifically, the Court said:

> Rather, they fall into the category of crude, satirical hyperbole which, while reflecting the immaturity of the speaker, *constitute protected opinion under the First Amendment*. It hardly need be said that this conclusion should not be interpreted to condone Doe 6's rude and childish posts; indeed, his intemperate, insulting, and often disgusting remarks understandably offended plaintiff and possibly many other readers. Nevertheless, *the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed,*

1-10, which was decided prior to the passage of the Texas Anti-SLAPP statute.

[30] Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 234–35 (Cal. Ct. App. 2008).

[31] *Id.* at 236.

[32] *Id.* at 234.

[33] *Id.* at 234, 251–52.

[34] *Id.* at 237–247.

[35] *Id.* at 244.

[36] *Id.* at 245.

[37] *Id.* at 245–46 (emphasis added).

[38] *Id.* at 248 (emphasis added).

> *if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.*[39]

"Because plaintiff stated no viable cause of action that overcame Doe 6's First Amendment right to speak anonymously, the subpoena to discover his identity should have been quashed."[40]

V. ZL Technologies, Inc. v. Does 1-7 (July 19, 2017)

In *ZL Technologies, Inc. v. Does 1-7*, the Court framed the issue as:

> "[T]his case presents a conflict between a plaintiff's right to employ the judicial process to discover the identity of an allegedly libelous speaker and the speaker's First Amendment right to remain anonymous."[41] *Neither the United States nor the state Supreme Court has established a standard for resolving this conflict*. In California, however, after surveying case law from this and other jurisdictions, our colleagues in the Sixth Appellate District, in *Krinsky*, "agree[d] with those courts that have compelled the plaintiff to make a *prima facie* showing of the elements of libel" to obtain compulsory disclosure of a defendant's identity.[42]

ZL argued the trial court erred in denying its motion to compel which thereby prohibited ZL from identifying the Doe defendants that, it argued, defamed it on Glassdoor's website.[43] The Court of Appeals reversed and held that the anonymous online reviews provided a legally sufficient basis for the defamation claim, and thus, supported discovery of the Doe defendants' identities despite First Amendment concerns.[44] The Court found the reviews contained statements that declared or implied provably false assertions of fact.[45] For example, the statements included that the employer purposefully hired inexperienced personnel, paid below industry standards, publicly disparaged staff, and had high staff turnover rates.[46] Applying the *Krinsky* Test, the Court stated:

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[39] *Id.* at 250 (citations omitted) (emphasis added).

[40] *Id.* at 251.

[41] ZL Techs., Inc. v. Does 1-7, 220 Cal. Rptr. 3d 569, 578 (Cal. Dist. Ct. App. 2017) (citing John Doe 2 v. Superior Court, 1 Cal. App. 5th 1300, 1310 (Cal. Ct. App. 2016).

[42] *Id.* at 578 (emphasis added) (citing *Krinsky*, 72 Cal. Rptr. 3d at 245–46).

[43] *Id.* at 575.

[44] *Id*. at 593.

[45] *Id.* at 590.

[46] *Id.* at 592.

> As we have already discussed, an author's decision to remain anonymous is an aspect of freedom of speech that is protected by the Constitution.[47] We must also give weight to an anonymous speaker's right to protect his or her privacy interest, which is safeguarded by our state Constitution.[48] "This express right is broader than the implied federal right to privacy. *The California privacy right 'protects the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret,' and 'limits what courts can compel through civil discovery.'*"[49]
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> *. . . constitutional protections weigh in favor of requiring the plaintiff to make a prima facie evidentiary showing of the elements of defamation, including falsity, before disclosure of a defendant's identity can be compelled*. This is congruent with the analysis in *Krinsky* and is tempered by the caveat that a plaintiff need only "*produce evidence of . . . those material facts that are accessible to [it]*."[50] Further, in cases where the statements are libelous *per se*, as defined in Civil Code § 45a, actual damage or injury need not be proven at all[51] and therefore would not be required in the preliminary evidentiary showing, unless the alleged libel involves a *matter of public concern, in which case the plaintiff would be required to produce evidence of malice*.[52]

Finally, relying on California's Anti-SLAPP statute, the Court held:

> *The burden placed upon a plaintiff in these circumstances is neither heavy nor unfamiliar*. The anti-SLAPP statute provides similar protections in lawsuits arising out of a defendant's exercise of the right to speak or petition.[53] In such cases, a plaintiff can be required,

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[47] *Id.* (citing *Krinsky*, 72 Cal. Rptr. 3d at 238).

[48] *Id.* (citing Cal. Const., art. I, § 1).

[49] *Id.* (citing Dig. Music News LLC v. Superior Court, 226 Cal. App. 4th 216, 288 (Cal. Ct. App. 2014)).

[50] *Id.* (quoting *Krinsky*, 72 Cal. Rptr. 3d at 245). This is the same analysis as set forth in *In re Does* 1-10 where the Texarkana Court only required a plaintiff to introduce evidence creating a genuine issue of material fact on the elements of the plaintiff's claim that were in his control. *See* In re Does 1-10, 242 S.W.3d 805, 822–23 (Tex. App.—Texarkana 2007, no pet.).

[51] *ZL*, 220 Cal. Rptr. 3d at 596 (citing Hawran v. Hixson, 209 Cal. App. 4th 256, 290 (Cal. Ct. App. 2012)).

[52] *Id.* (emphasis added) (citing Brown v. Kelly Broad. Co., 48 Cal. 3d 711, 747 (Cal. 1989)).

[53] *Id.* at 597–98 (citing Cal. Civ. Proc. Code § 425.16 (West 2017)).

> at the outset, to demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.[54] We think the same prophylactic conditions are an appropriate and measured counterbalance to a defendant speaker's constitutional rights to privacy and anonymous speech.[55]

VI. Yelp Inc. v. Superior Court, (Nov. 13, 2017)

In *Yelp Inc. v. Superior Court*, Yelp filed a petition for writ of mandate seeking to overturn a court order compelling it to produce documents that could reveal the identity of an anonymous reviewer on its site.[56] Yelp also appealed from a separate order imposing $4,962.59 in monetary sanctions against it for failing to comply with the subpoena requiring production of the documents.[57] Yelp argued the orders must be reversed because: "(1) the trial court erroneously concluded Yelp lacked standing to assert the First Amendment rights of its anonymous reviewer as grounds for resisting the subpoena; and (2) the trial court further erred by concluding plaintiff Gregory M. Montagna made a *prima facie* showing the review posted on Yelp's site by 'Alex M.,' the anonymous reviewer, was defamatory."[58]

The Court began its analysis by acknowledging "the dynamic nature of this area of the law" and noting "the primary cases it relies upon in making its decision were decided *after* the trial court issued its ruling" in December 2016.[59] Plaintiffs Montagna (an accountant) and Montagna & Associates, Inc. (Montagna's accounting firm) prepared a tax return for Sandra Jo Nunis.[60] Montagna quoted Nunis a price of $200.00 to prepare a simple return for her.[61] Montagna charged her $400.00 allegedly because the tax return was more complicated than she represented.[62] Nunis paid Montagna $200.00.[63] Montagna sent Nunis a collection letter.[64] Then, Nunis allegedly went online to the Yelp website under the pseudonym Alex M. and posted the following review of Montagna, using the alias Alex M.:

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[54] *Id.* (citing Jarrow Formulas, Inc. v. LaMarche 31 Cal. 4th 728, 741 (Cal. 2003)).

[55] *Id.*

[56] Yelp Inc. v. Superior Court, 224 Cal. Rptr. 3d 887, 890 (Cal. Dist. Ct. App. 2017).

[57] *Id.*

[58] *Id*. at 890–91.

[59] *Id.* at 891.

[60] *Id*.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

> Too bad there is no zero star option! I made the mistake of using them and had an absolute nightmare. Bill was way more than their quote; return was so sloppy I had another firm redo it and my return more than doubled. If you dare to complain get ready to be screamed at, verbally harassed and threatened with legal action. I chalked it up as a very expensive lesson, hope this spares someone else the same.[65]

Montagna filed a lawsuit against Nunis for defamation and served Yelp with a deposition subpoena seeking the identity of Alex M.[66] Yelp objected to the subpoena arguing it violated the anonymous Alex M.'s free speech rights.[67] The trial court denied Yelp's objections finding it did not have standing to raise Alex M.'s free speech rights.[68] The trial court also entered sanctions against Yelp.[69] Finally, the trial court found Montagna was entitled to discovery from Yelp disclosing Alex M.'s identity because Montagna had alleged facts sufficient to demonstrate that Alex M. had made a defamatory statement about Montagna on Yelp.[70] Yelp appealed the sanctions order and filed a petition for writ of mandate to challenge the order requiring it to reveal Alex M.'s identity.[71]

Addressing the standing issue, the court held Yelp had standing to represent Alex M.[72] The court reviewed the holdings in two cases that found the interests of the Internet Service Providers (ISPs) to be sufficiently intertwined with those of their subscribers such that it was proper to accord the ISPs standing to assert their subscribers' First Amendment rights.[73] The Court also explained that Yelp had a substantial interest in protecting the right of its users to maintain their anonymity when posting reviews because, in part, its business model relied on such reviews.[74]

In addressing whether the trial court's order compelling the production of Alex M.'s identity from Yelp was correct on the merits, the court relied on *ZL Technologies* (which relied on *Krinsky*) decided in July 2017.[75]

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[65] *Id.*

[66] *Id.* at 892.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 897.

[73] *Id.* at 892–97.

[74] *Id.* at 894.

[75] *Id.* at 898.

> Thus, *a plaintiff seeking discovery of the anonymous person's identity must first make a prima facie showing the comment at issue is defamatory*.[76] Adopting the test in *Krinsky v. Doe 6*, the court stated that an appropriate showing requires "evidence 'that . . . will support a ruling in favor of [the plaintiff] if no controverting evidence is presented. It may be slight evidence which creates a reasonable inference of [the] fact sought to be established but need not eliminate all contrary inferences.'"[77]

With respect to the notice requirement, the court placed the burden on Yelp stating:

> The court acknowledged that often the plaintiff's only means of contacting the anonymous commenter would be to post a notice on the same website where the original comment had been posted, and requiring the plaintiff to do that would effectively be compelling it to "exacerbate its own injury" by republishing the alleged defamation.[78] Instead, "the trial court should direct the subpoenaed party to provide [the notice]."[79]

Finally, the Court agreed with *ZL Technologies'* rejection of the requirement that even after the plaintiff has made a *prima facie* showing of defamation, the court should be required to apply a final "balancing test, weighing '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.'"[80] The court stated: "a further balancing should not be required '[w]here it is clear to the court that discovery of the defendant's identity is necessary to pursue the plaintiff's claim,' and the plaintiff makes a *prima facie* showing that a libelous statement has been made."[81] In reversing the trial court's orders, the court stated:

> Here, as Yelp points out, even the trial court expressly acknowledged—both in its tentative and at the hearing—*that the law governing Montagna's motion to compel was an "evolving"*

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[76] *Id.* (citing ZL Techs., Inc. v. Does 1-7, 220 Cal. Rptr. 3d 569, 611 (Cal. Dist. Ct. App. 2017)) (emphasis added).

[77] *Yelp*, 224 Cal. Rptr. 3d at 898 (quoting *ZL*, 220 Cal. Rptr. 3d at 579 (quoting Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 245 n. 14 (Cal. Ct. App. 2008))).

[78] *Yelp*, 224 Cal. Rptr. 3d at 898 (quoting *ZL*, 220 Cal. Rptr. 3d at 582 (quoting the language the plaintiff used to explain the practical obstacles in posting a notice on the same website that the defamation occurred.)).

[79] *Yelp*, 224 Cal. Rptr. 3d at 898 (quoting *ZL*, 220 Cal. Rptr. 3d at 582).

[80] *Id.* at 899 (quoting *ZL*, 220 Cal. Rptr. 3d at 583 (quoting Dendrite Int'l., Inc. v. Doe No. 3, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001))).

[81] *Id.* at 899 (quoting *ZL*, 220 Cal. Rptr. 3d at 584 (quoting *Krinsky*, 72 Cal. Rptr. 3d at 245)).

> *and "unsettled" area of law*. We certainly agree with that observation. In fact, *the case law we have relied upon most heavily in this opinion*, including *Glassdoor, ZL Technologies*, and *Williams, was decided after the trial court issued its ruling. The evolution continues.*[82]
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> In the circumstances of this case, we conclude *Montagna has demonstrated a sufficient prima facie case of defamation to justify an order compelling Yelp to produce information regarding the identity of Alex M*. We consequently deny Yelp's petition for a writ of mandate overturning the trial court's order compelling it to comply with Montagna's deposition subpoena.[83]
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> In light of the *complex issues presented in this case, the evolving state of the applicable law*, and the fact the trial court erred in concluding Yelp lacked standing to make the arguments it did, we conclude the trial court erred by imposing monetary sanctions against it.[84]

VII. Proposed Test: A Bright Line Unmasking Test Is Necessary

Given the *ZL* Court's acknowledgment in July 2017 that "neither the United States nor . . . [California's] Supreme Court has established a standard for resolving this conflict,"[85] and the *Yelp* Court's further acknowledgment in November of 2017 that this area of the law is "unsettled" and "evolving,"[86] there is an immediate need for a standard that provides clear guidance, stability, reliability, and consistent outcomes with respect to the amount and type of proof necessary before a court orders the unmasking of an anonymous speaker's identity for wrongful online speech. The bright-line test should address the inherent tension between protecting an anonymous online speaker's right to engage in free speech while still allowing an aggrieved party to recover for a demonstrable injury suffered as a result of wrongful speech. To not chill free speech, at a bare minimum, a plaintiff should be required to show (1) that the court has personal jurisdiction over the anonymous online defendant, (2) that the anonymous online defendant engaged in legally

[82] *Id.* at 903–04 (emphasis added).

[83] *Id.* at 903 (emphasis added).

[84] *Id.* at 904 (emphasis added).

[85] *ZL*, 220 Cal. Rptr. 3d at 578.

[86] *Yelp*, 224 Cal. Rptr. 3d at 904.

actionable online speech, and (3) that the plaintiff was harmed as a result of the online speech. The proposed bright-line test[87] that follows strikes the right balance is similar to but not the same as the standards articulated in *Dendrite, Cahill, Krinsky, In re Does 1-10*, and many Anti-SLAPP statues:[88]

First, with the complaint, the plaintiff should be required to file an affidavit (not a verification) stating the anonymous online speaker's identity is sought in good faith, that the plaintiff has suffered harm, and that the identity is fundamentally necessary to secure relief. **Second**, the plaintiff must identify the exact statements that constitute allegedly actionable speech.[89] **Third**, the plaintiff must identify with specificity how the plaintiff has been harmed by the actionable speech. This means the plaintiff should provide admissible and competent (not conclusory) evidence of the amount and type of damages suffered unless the statements are defamatory *per se*.[90] This could be included in the affidavit alleging the complaint is filed in good faith or in other documentary evidence properly authenticated, and not conclusory, attached to the complaint.

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[87] The proposed test is based in part on the author's experiences with respect to what litigants did or did not do when defending anonymous online speakers against lawsuits sought to chill their free speech.

[88] The Ninth Circuit stated that a "SLAPP" lawsuit is an acronym for "strategic lawsuit against public participation." Metabolic Res., Inc. v. Ferrell, 693 F.3d 795, 796 n.1 (9th Cir. 2012) (citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 965 n.2 (9th Cir. 1999)). "A SLAPP lawsuit is characterized as 'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" *Metabolic Res*., 693 F.3d at 796 n.1 (citing John v. Douglas Cty. Sch. Dist., 219 P.3d 1276, 1280 (Nev. 2009)). Thirty-two (32) states, the District of Columbia, and Guam have passed Anti-SLAPP statutes providing protection to a defendant against lawsuits filed by a plaintiff to chill a defendant's free speech. Most Anti-SLAPP laws provide a mechanism for SLAPP defendants who are legitimately exercising their right to free speech, association, and petition to file a motion to dismiss the SLAPP suit. Once the motion to dismiss is filed, discovery on plaintiff's claims is stayed, and the motion is heard within a short period of time. If the SLAPP defendant prevails, he is entitled to attorney's fees and costs from the SLAPP filer. The Anti-SLAPP laws vary, covering different types of speech and providing different standards. *See generally*, https://anti-slapp.org/your-states-free-speech-protection.

[89] This second requirement is critical because it notifies the anonymous online defendant what statements are complained of. In In re Elliott, 504 S.W.3d 455, 458 (Tex. App.—Austin 2016, no pet.), the petitioner did not identify the alleged wrongful statements in his petition. Defendant Chris Elliott and Doe 1 (the anonymous online speaker) did not learn until the very end of the hearing whether the Court would require Elliott to disclose Doe 1's identity or what statements the petitioner claimed were wrongful and harmful. *Id.* at 459. The petitioner never identified the statements (or made reference to the article authored by Doe 1 that the petitioner complained of) in any of the petitioner's pleadings. *Id.* Obviously, not knowing what statements are in issue makes it harder to build a viable defense on behalf of an anonymous online defendant. This is especially true given the more prolific the anonymous defendant is in his online speech. Simply put, the defendant should not have to guess about what online speech the plaintiff/petitioner claims is actionable.

[90] The amount of and type of damages can be supplemented if the identity of the anonymous defendant is unmasked and discovery takes place.

Fourth, the plaintiff should allege sufficient jurisdictional facts to establish that it is reasonable to believe there is personal jurisdiction over the anonymous online defendant. This could include statements made in the online speech that reveal the anonymous defendant's location, the ISP address(es), the location of domain name registration or owner location registration, geolocation services, or other similar technologies. **Fifth**, after the complaint is filed, the plaintiff or the ISP must give the defendant notice of the suit in a manner that is reasonably calculated to provide the defendant with notice of the suit.[91] The complaint, good faith affidavit, and supporting documentation attached to the complaint must be attached to the notice.[92] A non-exhaustive list of how notice can be accomplished is through the ISP, email, service by posting at the courthouse, or service by publication. The plaintiff should not be required to post the notice on the website for the reasons set forth in *Krinsky* and *ZL*.[93] **Sixth**, the defendant must be given a reasonable opportunity to respond to the notice. This reasonable opportunity should be at least 21 to 30 days to allow the defendant to hire a lawyer in the appropriate jurisdiction and to respond appropriately, whether through a motion to dismiss, a motion to quash, a motion for protective order, an Anti-SLAPP motion, or some combination of the above given the procedural rules in the jurisdiction.

Seventh, once notice has been given, the plaintiff must be required to establish a *prima facie* case on each essential element of the causes of action in question that are within the plaintiff's control against the anonymous speaker. The *prima facie* case can be established by the complaint, the good faith affidavit, other affidavits and documentary evidence attached to the complaint, and other admissible evidence the plaintiff provides to the court at an evidentiary hearing, if any.[94] The court should not allow any discovery at this stage other than depositions

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[91] The plaintiff and the service provider, whether Google, Facebook, Twitter, or similar service providers (who may or may not be parties to the suit) should work together to ensure that notice is given to the anonymous online defendant as further described herein unless notice is provided via posting or publication.

[92] It is not enough to notify the anonymous online defendant that a lawsuit has been filed because the defendant should receive service of process. For example, in one case the author worked on, the defendant was served with a subpoena but not a copy of the lawsuit against him on which the subpoena was based.

[93] In *Krinsky* and *ZL*, the Courts rejected the *Cahill* Court's requirement that the notice be posted on the website, chat room, or message board where the alleged defamatory post appeared. *See generally* Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); ZL Techs., Inc. v. Does 1-7, 220 Cal. Rptr. 3d 569 (Cal. Dist. Ct. App. 2017). The courts explained that it did not make any sense to require the plaintiff to post the notice in the same location because: (1) the website, chat room, or message board may no longer exist and (2) if it does still exist, it would reinjure the plaintiff by keeping the false and defamatory assertion alive. *Krinsky*, 72 Cal. Rptr. 3d at 244; ZL, 220 Cal. Rptr. 3d at 615. The *Krinsky* Court also stated it made no sense to serve the anonymous online defendant with the lawsuit if the defendant had appeared in the lawsuit to defend himself. *See Krinsky*, 72 Cal. Rptr. 3d at 244. The author agrees.

[94] In Texas, a court can hold an evidentiary hearing on a motion for protective order. Therefore, depending upon the jurisdiction and the type of motion filed in opposition to the plaintiff's request

on written questions reasonably calculated to lead to the discovery of admissible evidence on personal jurisdiction (without revealing the identity of the anonymous speaker), if jurisdiction is at issue.[95] **Eighth**, once the plaintiff presents *prima facie* proof of each essential element of its causes of action within the plaintiff's control, the burden shifts to the anonymous online defendant to challenge personal jurisdiction, if applicable, or to establish by a preponderance of the evidence each essential element of a valid defense to the plaintiff's causes of action. If the anonymous defendant is able to prove a valid affirmative defense, such as truth or justification, depending upon the type of alleged wrongful online speech at issue, the court should dismiss the case. If no valid defense is established by a preponderance of the evidence, and if the plaintiff has presented a *prima facie* case, the court should unmask the anonymous online defendant.[96]

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for the unmasking of the anonymous online defendant, there may be an opportunity for the presentation of evidence in addition to the petition, affidavits, and documentary evidence attached thereto.

[95] Because the plaintiff is required to present a *prima facie* case on each element of a cause of action demonstrating wrongful online speech and harm, there is no need for discovery other than what is required to establish personal jurisdiction, if any. Whether statements are defamatory is a question of law for the court to decide. *ZL*, 220 Cal. Rptr. 3d at 589. ("[I]t is a question of law for the court whether a challenged statement is reasonably susceptible of [a defamatory] interpretation." (quoting Bently Reserve LP v. Papaliolios, 218 Cal. App. 4th 418, 428 (Cal. Ct. App. 2013))). In deciding the question, "courts use a totality of the circumstances test . . . '[A] court must put itself in the place of an average reader and determine the natural and probable effect of the statement. . . .' Thus, a court considers both the language of the statement and the context in which it is made." *Bently Reserve*, 218 Cal. App. 4th at 427 (quoting ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1011 (Cal. Dist. Ct. App. 2001)) (internal citations omitted). It should be apparent from the online speech and harm whether the plaintiff states a *prima facie* claim for defamation, business disparagement, tortious interference, violation of the right to privacy, or other tort. This also raises the issue of whether *prima facie* proof is required for those elements of a particular cause of action that are not within the plaintiff's control. The *In re Does 1-10* Test and the *Krinsky* Test do not require *prima facie* proof on elements of a cause of action *not* within a plaintiff's control. *See generally* Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *In re* Does 1-10, 242 S.W.3d 805 (Tex. App.—Texarkana 2007, no pet.)

[96] The proposed balancing test is still not without its flaws. Given the cause of action alleged by the plaintiff, there may need to be some limited discovery for the purposes of establishing a *prima facie* case or a valid defense. Allowing discovery runs the risk of exposing the anonymous online defendant's identity. The mechanism to handle this would be to allow the court to order a specific, very narrow, and limited amount of discovery upon a showing of good cause that is necessary and not obtainable through other reasonable means. This could be handled in a manner similar to the procedure provided for in the Anti-SLAPP statutes. *See generally, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b); s*ee also* Am. Heritage Capital, L.P. v. Gonzalez, 436 S.W.3d 865, 865–69 (Tex. App.—Dallas 2014, no pet.) (limited depositions were conducted); Pickens v. Cordia, 433 S.W.3d 179, 179–83 (Tex. App.—Dallas 2014, no pet.) (trial court allowed limited discovery); Clark v. Hammond, No. 14-12-01167-CV, 2014 WL 1330275, at *1 (Tex. App.—Houston [14th Dist.] Apr. 3, 2014, no pet.) (per curiam) (mem. op.) (trial court allowed discovery); Walker v. Schion, 420 S.W.3d 454, 458–59 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (trial court did not allow requested discovery).

In no event should a court order the disclosure of the anonymous speaker's identity unless it finds it has personal jurisdiction over the anonymous online defendant, and the plaintiff has presented a *prima facie* case on each essential element of at least one of its causes of action to proceed.[97]

This proposed unmasking test strikes the right balance because it ensures the anonymous online defendant receives notice, the defendant has a reasonable opportunity to respond, the defendant knows what statements the plaintiff claims are wrongful, the plaintiff has been the subject of a legally cognizable claim, the plaintiff has been harmed, the court has personal jurisdiction over the defendant, and the plaintiff is not simply trying to chill the defendant's free speech rights because it requires the plaintiff to present *prima facie* proof on each essential element of plaintiff's claims within the plaintiff's control.

This test is also clear, easily applied, and it addresses the differences in pleading and procedure standards among state jurisdictions. As explained in *Krinsky*:

> We find it unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet. California subpoenas in Internet libel cases may relate to actions filed in other jurisdictions, which may have different standards governing pleadings and motions; consequently, it could generate more confusion to define an obligation *by referring to a particular motion procedure*.[98]

Finally, the proposed unmasking test is better suited to strike the right balance between a plaintiff's rights to seek relief for actionable conduct and harm and the anonymous defendant's free speech rights *exactly* because it does not require the *Dendrite* balancing test. **First**, the balancing test does not provide trial courts with clear guidelines on how to apply it. **Second**, it leaves too much discretion to the trial courts. **Third**, it is likely to produce inconsistent results based on the jurisdiction and the court making the determination. **Fourth**, *and most importantly*, when a plaintiff has presented *prima facie* proof on each essential element of the claims within the plaintiff's control and the anonymous online defendant has not established an affirmative defense, the complained of online speech is not protected by the First Amendment. Therefore, there is no need for a further balancing of the rights at stake. "*When there is a factual and legal basis for*

[97] To the extent the plaintiff alleges more than one cause of action and is unable to present *prima facie* proof on all of them, the court should enter an order dismissing the causes of action with prejudice.

[98] *Krinsky*, 72 Cal. Rptr. 3d at 244 (emphasis added).

believing libel may have occurred, the writer's message will not be protected by the First Amendment."[99] This allows a harmed plaintiff to seek redress for wrongful conduct. Giving a court the ability to apply the balancing test after a showing of both wrongful and harmful online speech to prevent a plaintiff from seeking redress goes too far the other way. For all of these reasons, the proposed unmasking test will provide more predictability, reliability, continuity, and stability in the law of online speech than the previously articulated tests in *Dendrite, Cahill, Krinsky,* and *In re Does 1-10*.

Conclusion

As social media is now one of the most important means of communication and as the public increasingly turns to the Internet to communicate and obtain information quickly, reliably, and efficiently, the right to free speech must remain inviolate. Despite this, those who are harmed as a result of wrongful online speech must be able to seek redress. At present, there is a need for guidance, stability, reliability, and predictability when balancing the right to online free speech against the very legitimate need of those harmed by such speech to seek redress for wrongful online speech. One way to accomplish this goal is for courts to apply the proposed bright line unmaking test above.

Respectfully submitted,
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[99] *ZL*, 220 Cal. Rptr. 3d at 580 (citing *Krinsky*, 72 Cal. Rptr. 3d at 245 (emphasis added)).