IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

JERRY BURD,	)	
	)	
Plaintiff,	)	**Case No. CJ 2006 03717**
	)	
vs.	)	**Judge Ronald L. Shaffer**
	)	
LORI COLE, an individual,	)	
JOHN DOE NOS. 1-57, individuals,	)	
JANE DOE NOS. 1-57, individuals	)	
	)	
Defendants.	)	

MOTION TO QUASH BY ANONYMOUS SPEAKERS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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Pursuant to Oklahoma Rule of Civil Procedure § 12-2004.1, two anonymous third parties implicated by the Plaintiff's subpoena of June 22, 2006 (collectively, the "Movants") in the above captioned action[1] – the first referred to in the subpoena as the web site "originator" and the second referred to by his/her Internet pseudonym "Bareback" – move to quash on the grounds that the subpoena violates their First Amendment rights to speak and associate anonymously.

I. INTRODUCTION

This case involves an effort by a public official to misuse the discovery process in order to reveal the identities and private communications of anonymous critics and their associates. Plaintiff, a school superintendent, initiated this lawsuit not with the narrowly-tailored objective of challenging speech that could be shown to be defamatory but instead with a shotgun approach that could only be aimed at intimidating opponents and chilling the speech of members of the community who dared to disagree with him or even associate with those who do. Fortunately for supporters of rigorous public debate about issues of public importance such as public education, the First Amendment prevents him from doing so.

Court after court has now recognized that discovery requests that seek to pierce the anonymity of online speakers must be carefully scrutinized in order to protect anonymous participants from precisely the kinds of abuses that have already been put into motion by Plaintiff in this case. Following this growing judicial consensus, the important yet fragile anonymity interests of the Internet users targeted in this case must be shielded unless and until Plaintiff makes a minimal showing to demonstrate that he has viable claims against particular

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[1] Plaintiff's Petition is unclear as to both its claims and to its targets. The Petition cites 114 Doe Defendants who allegedly "maintain, participate in, post statements and otherwise communicate to third parties on a message board for purposes, at least in part, to post false statements regarding" Plaintiff. *See* Third and Fourth Causes of Action, Petition at 4, 5. However, Plaintiff does not seek judgment against or relief from any of the 114 Does. Moreover, as will be discussed in more detail below, Plaintiff has neither identified any supposedly libelous statements on the web site in question, nor identified with any particularity whatsoever any Doe speakers who allegedly made any statement. Nevertheless, as their Constitutionally-protected rights are threatened by Plaintiff's subpoena, the Movants have been compelled to file this Motion to protect their interests.

Defendants. Once a target's anonymity and privacy has been eviscerated, it cannot be repaired or the speaker made whole. Due process dictates that Defendants – much less third parties – should not be forced to undergo the harm of losing their anonymity unless and until the subpoenaing party has submitted at least some competent evidence as to the viability of its claims.

Specifically, as set forth by a growing judicial consensus that is discussed below, Movants respectfully submit that the Court should carefully evaluate Plaintiff's discovery request, weighing several factors:

(1) whether Plaintiff has demonstrated that he has viable claims,

(2) the specificity of the discovery request,

(3) the existence of alternative means of discovery,

(4) whether the Plaintiff has attempted to notify the alleged infringer of the pendency of the identification proceeding, and

(5) the magnitude of the Plaintiff's need for the information.

In addition, the Court should assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of Movants.

Plaintiff's subpoenas cannot survive this scrutiny and must therefore be quashed.

II. BACKGROUND AND FACTS

On June 13, 2006, Plaintiff filed suit against Defendant Lori Cole and 114 Doe Defendants, alleging slander and libel. Plaintiff accuses Ms. Cole of slander based on an alleged statement by Ms. Cole, made after an elementary school booster club meeting, accusing Plaintiff of embezzlement. Plaintiff's libel allegations, by contrast, accuse not only Ms. Cole but also anonymous Doe Defendants of making "false statements" about Plaintiff that were allegedly posted on the sperrypublic.com web site.[2]

[2] The specific web site in question is not identified in the Petition, but the subpoenas issued by Plaintiff on June 22, 2006, have since identified the web site as "sperrypublic.com".

On June 22, 2006, following a hearing before this Court, Plaintiff issued subpoenas *duces tecum* to godaddy.com and domainsbyproxy.com (collectively, the "Registrars"), Internet companies who perform domain name registration services for their clients.[3] These extremely broad subpoenas seek "any and all information pertaining to the website/message board 'sperrypublic.com,'" including the identities and communications of the web site "originator," every person who posted messages on sperrypublic.com, and every person who even *registered* at the site. In other words, Plaintiff seeks not to uncover information related to any specific allegedly defamatory statement or speaker (Plaintiff has made no effort to identify either) but instead to reveal the identities and communications (public and private) of everyone who ever created an account on the sperrypublic.com message board, "from its inception to the present," regardless of whether or not the Internet user posted any messages referring to the Plaintiff or, indeed, posted any messages at all. Plaintiff submitted materials to the court at the June 22 hearing purporting to reflect the allegedly defamatory statements made on the message board, although he did not specifically identify any statement as defamatory.

Movants – the website operator and a registered user of the site – are among the persons Plaintiff apparently seeks to unmask.

III. ARGUMENT

A. The First Amendment to the U.S. Constitution Protects the Right to Associate Freely and Anonymously, Including the Right to Anonymous Online Communication.

Courts have long recognized protection under the First Amendment for the right to engage in anonymous communication – to speak, read, listen, and/or associate anonymously – as fundamental to a free society. The Supreme Court has consistently defended such rights in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority ... [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from

[3] Specifically, godaddy.com, is a domain name registrar that allows individuals to register the domain names of web sites (e.g., sperrypublic.com). Domainsbyproxy.com provides additional domain name-related services, primarily the ability to shield the identity and other personal information of individuals registering Internet domain names.

retaliation … at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (holding that 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"); *see also Gibson v. Florida Legislative Investigative Comm'n*, 372 U.S. 539, 544 (1963) ("[I]t is ... clear that [free speech guarantees] ... encompass[] protection of privacy association"); *Talley v. California*, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, and noting that "anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (compelled identification violated group members' right to remain anonymous; "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association").

These fundamental rights enjoy the same protections whether the context for speech and association is an anonymous political leaflet or an Internet message board. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet); *see also, e.g., Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas"); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004) ("The Internet is a particularly effective forum for the dissemination of anonymous speech").

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts to pierce such anonymity are subject to a qualified privilege. Courts must "be vigilant . . . [and] guard against undue hindrances to … the exchange of ideas." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (U.S. 1999). This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery.[4] Oklahoma Rule of Civil Procedure § 12-2004.1(C)(3)(a)(3) (subpoena may be quashed if it "requires disclosure of privileged or other protected matter and no exception or waiver applies"). *See also Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987), *citing Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure"). "People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).[5]

This consideration is particularly appropriate where the requested discovery will unmask not only anonymous speakers, but also the creator of the online forum in question. The operation of a web site by itself does nothing more than indicate some degree of association with the anonymous speakers who posted messages on the web site, association which is Constitutionally protected.[6] "Freedom to engage in association for the advancement of beliefs is an inseparable aspect of the liberty assured by the due process clause of the First Amendment." *Patterson*, 357 U.S. at 460. Where, as here, that forum is designed to encourage commentary on matters of public controversy, it is not surprising that the creator, like the speakers on that forum, would wish to remain anonymous. Stripping the creator of that anonymity based solely on vague allegations of defamation by third parties on the message board would strongly discourage the creation of similar forums, stifling a vibrant and growing vehicle for speech and association.

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[4] *See Sony*, 326 F. Supp. 2d at 565 ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns").

[5] *See also 2theMart.com*, 140 F. Supp. 2d at 1093 (W.D. Wash. 2001) ("[D]iscovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts").

[6] Note that under 47 USC § 230, a web site operator cannot be held liable for the contents of messages posted to the site by third party users.

The same analysis applies to registered users of a message board where, as here, those users are not accused of making a single defamatory statement. The Supreme Court has long since held that compelled disclosure of membership lists may constitute an impermissible restraint on freedom of association. *Id.* A registered user list for a message board is the Internet equivalent of a membership list and deserves equal protection. *2theMart.com*, 140 F. Supp. 2d at 1092 (First Amendment protections for speech and association, including the right to anonymous group membership apply to Internet message boards); *see generally Reno v. ACLU* at 851 (applying, generally, all First Amendment protections to "'listservs' …, 'newsgroups', 'chat rooms', and the 'World Wide Web'").

B. The First Amendment Qualified Privilege Requires the Evaluation of Multiple Factors Prior to Subpoena Enforcement.

1. The Qualified Privilege Does Not Impede Viable Claims But Instead Limits Abuse of the Discovery Process.

A qualified privilege to remain anonymous is not an absolute privilege. Plaintiffs may properly seek information necessary to pursue reasonable and meritorious litigation. *Seescandy.com*, 185 F.R.D. at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); *Doe v. Cahill*, 884 A.2d 451, 446 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection").

However, litigants must not be permitted to abuse the subpoena power to discover the identities of people who have simply made statements the litigants dislike. Recognizing as much, courts in online defamation situations similar to the one at hand have "adopt[ed] a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation." *Cahill*, 884 A.2d at 456. These courts have recognized that "setting the standard too low w[ould] chill potential posters from exercising their First Amendment right to speak anonymously," *id. at* 451, and have required plaintiffs to demonstrate that their claims are valid and that they have suffered a legally recognizable harm *before* the

court will allow disclosure of the speaker's anonymity. *Id.*; *Dendrite*, 775 A.2d at 760-61; *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004).

Two state appellate courts – still the only appellate courts to address the issue – have adopted such tests. In *Dendrite*, a New Jersey appeals court required the plaintiff in a defamation action against Doe defendants to (1) use the Internet to notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the allegedly actionable online speech; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation; and, "[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." 775 A.2d at 761. In *Cahill*, the Delaware Supreme Court held that, after making reasonable efforts to notify the anonymous defendant, "to obtain discovery of an anonymous defendant's identity … a defamation plaintiff 'must submit sufficient evidence to establish a prima facie case for each essential element of the claim in question.'" 884 A.2d. at 463.

Several federal courts have followed suit. *See e.g., 2theMart.com*, 140 F. Supp. 2d at 1095 (identities should not be turned over unless the subpoena is issued in good faith, the information sought is related to – and directly and materially relevant to – a core claim or defense and information sufficient to establish or disprove that claim or defense is unavailable from any other source); *Seescandy.com*, 185 F.R.D. at 578-79 (requiring defamation plaintiff to (1) identify the missing party with sufficient specificity that the court could determine whether the defendant could be sued in federal court; (2) make a good faith effort to provide anonymous defendants with notice that the suit had been filed against them; and (3) demonstrate that it had viable claims against such defendants); *Sony* 326 F. Supp. 2d at 564-65 (denying motion to quash subpoena to Internet service provider seeking identifying information for anonymous defendant; summarizing and applying the following criteria: "(1) a concrete showing of a prima

facie claim of actionable harm... (2) specificity of the discovery request ... (3) the absence of alternative means to obtain the subpoenaed information... (4) a central need for the subpoenaed information to advance the claim ... and (5) the party's expectation of privacy") (internal citations omitted).

Most recently, in a defamation and trademark action (among other claims), a federal district court held that the protected interest in speaking anonymously requires a plaintiff to adduce competent evidence that "if unrebutted, tend[s] to support a finding of each fact that is essential to a given cause of action." *Highfields*, 385 F. Supp. 2d at 975. If the first component of the test is met, the court should then "assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant," and enforce the subpoena only if its issuance "would cause relatively little harm to the defendant's First Amendment and privacy rights [and] is necessary to enable plaintiff to protect against or remedy serious wrongs." *Id*. at 976.

2. The First Amendment Requires That Plaintiff Show He Has a Viable Case and No Other Avenue of Vindicating His Rights Before an Online User's Anonymity May Be Pierced.

While the aforementioned courts balanced legal rights and discovery mechanisms with First Amendment protections using slightly different tests, a strong unifying principle is clear: a plaintiff must show that he has a viable case and no other avenue of vindicating his rights before a court will allow him to pierce an online user's veil of anonymity. Keeping in mind this unifying principle, and following the lead of *Dendrite*, *Sony*, *Cahill* and *Seescandy.com*, this court should evaluate Plaintiff's discovery request in light of the following factors: (1) whether Plaintiff has demonstrated that he has viable claims, (2) the specificity of the discovery request, (3) the existence of alternative means of discovery, and (4) whether the Plaintiff has attempted to notify the alleged infringer of pendency of the identification proceeding. *See Dendrite*, 775 A.2d at 760-61; *Sony*, 326 F. Supp. 2d at 565; *Seescandy.com* 185 F.R.D. at 578. Finally the Court should (5) balance the magnitude of harms to the competing interests of the plaintiff and the anonymous individual he seeks to unmask. *Highfields*, 385 F. Supp. 2d at 976.

With respect to the first factor, recognizing the serious due process concerns raised in *Cahill* and *Highfields* over the lack of notice given to the anonymous user whose identity is at issue, and the possibility that plaintiffs' claims might be invalid as a matter of law, the court should require the Plaintiff submit some competent evidence sufficient to raise a fact dispute as to the validity of his claims. *Cahill*, 884 A.2d at 460 ("[T]he summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously"); *Highfields*, 385 F. Supp. 2d at 975 ("Because of the importance and vulnerability of those [constitutional] rights ... the plaintiff [must] persuade the court that there is a real evidentiary basis for believing that the defendant has engaged in wrongful conduct that has caused real harm to the interests of the plaintiff ..."). Only if this threshold element is met should the court proceed to the remaining factors.

Application of this test will do much to mitigate the risk of improperly invading First Amendment "rights that are fundamental and fragile – rights that the courts have a special duty to protect against unjustified invasion." *Highfields*, 385 F. Supp. 2d at 975. Moreover, litigants who have been truly harmed and made an appropriate pre-litigation investigation into the nature of, and appropriate targets for, their claims should have little difficulty crafting discovery requests that can survive the required scrutiny.

C. Plaintiff's Discovery Request Cannot Survive the Scrutiny Required Under the First Amendment.

For this Court to enforce Plaintiff's subpoena of June 22, Plaintiff must meet the heightened discovery standard discussed above. Considering everything submitted to the Court, Plaintiff falls far short. In addition to the subpoena being dramatically overbroad, burdensome, and designed to harass – it seeks "all information pertaining to" sperrypublic.com, including the identities and complete communications of the web site operator and anyone who ever registered on the site – Plaintiff has not made even the most rudimentary showing that he can satisfy the requirements imposed by the First Amendment.

1. Plaintiff Has Failed to Submit Competent Evidence as to the Viability of His Libel Claims Which Implicate the Anonymous Online Statements.

Plaintiff must first produce at least some competent evidence as to the validity of his defamation claims under Oklahoma law. Plaintiff cannot satisfy even this threshold element with respect to his third and fourth causes of action, the only claims that would theoretically implicate the statements of the anonymous users alluded to in the Petition and therefore would provide some basis for the issuance and subsequent enforcement of the June 22 subpoena.

As a public school superintendent, Plaintiff is a "public official" and therefore held to a higher burden of proof. *See Johnston v. Corinthian Television Corp.*, 1978 OK 88, ¶ 4, 583 P.2d 1101, 1103 (Okla. 1978) (public official includes "government employee with such responsibility that the public has an independent interest in his position and performance").[7] Specifically, he is required to allege and prove that any defamatory statement is false and that the falsehood was made with actual malice, i.e., that his alleged defamers knew that their defamatory statements were false or acted in reckless disregard of their truth or falsity.[8] *See Miskovsky v. Tulsa Tribune Co.*, 1983 OK 73, ¶ 8, 678 P.2d 242, 246 (Okla. 1983) ("as a public figure in order to maintain an action in libel generally …[, t]he plaintiff must show: … (1) The publication of a defamatory statement; (2) That the defamatory statement was false; (3) That the defamatory

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[7] Oklahoma state courts and federal courts applying Oklahoma law have consistently recognized a very broad range of defamation plaintiffs as "public officials." *See, e.g.*, *Hart v. Blalock*, 1997 OK 8, 932 P.2d 1124 (Okla. 1997) (judge running for reelection); *Jurkowski v. Crawley*, 1981 OK 110, 637 P.2d 56 (Okla. 1981) (former police chief); *Johnston* (volunteer high school wrestling coach); *Luper v. Black Dispatch Publ'g Co.*, 1983 OK CIV APP 54, 675 P.2d 1028 (Okla. Ct. App. 1983) (public school teacher); *Tilton v. Capital Cities/ABC Inc.*, 905 F. Supp. 1514 (N.D. Okla. 1995) (televangelist).

[8] Through the Petition's very language, Plaintiff has implicitly conceded that he is a "public figure," since Plaintiff repeatedly alleged that the anonymous statements in question were made with "reckless disregard," an element that would only be relevant in this context to meet the higher defamation proof requirement demanded of public figures. *See Washington v. World Publ'g Co.*, 1972 OK 166, ¶ 5, 506 P.2d 913, 915 (Okla. 1972) ("[T]the admission by Washington that he was, at the time of publication of the news article in question, in fact, such a [public] figure seems tacitly implied from the language in the first sentence in the last paragraph of the amended petition").

falsehood was made with 'actual malice' -- made with knowledge that it was false, or with reckless disregard of whether it was false or not").[9]

a. Plaintiff Has Introduced No Competent Evidence to Show That Any Statement Made on the Web Site in Question is Either Defamatory or Untrue.

Plaintiff has introduced no competent evidence to support a claim of falsity with regards to any statements on the online message board. Indeed, Plaintiff has not even articulated what the underlying statements or what the supporting evidence might potentially be. Instead, Plaintiff has identified one allegedly slanderous statement made by the only named defendant – Lori Cole – in order to support his first two claims (although he has similarly not identified any evidence that would go to show that her alleged statement was false) and goes on to assert that 114 other Doe Defendants have made unspecified "false statements" on an Internet message board to support his third and fourth claims. Plaintiff has submitted certain papers to the court purporting to show allegedly libelous messages, but it is not clear which messages he believe are libelous.

Even assuming that Plaintiff intends to base his libel claim on the materials that were presented following the June 22 hearing, the messages contained in those papers do not represent "an extreme departure" from typical Internet message board standards.[10] Recognizing the freewheeling nature of Internet message board discussions, courts have repeatedly found allegedly defamatory message board posting to be "opinions" rather than asserted "facts" and therefore not properly the subject of a defamation claim. *See, e.g., Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (allegedly defamatory message board posting "lack[ed] the formality and polish typically found in documents in which a reader would

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[9] *See New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Hodges v. Oklahoma Journal Publ'g Co.*, 1980 OK 102, 617 P.2d 191 (Okla. 1980).

[10] Whether a statement is an assertion of fact or opinion is a question of law for the court. *See Magnusson v. New York Times*, 2004 OK 53, ¶ 15, 98 P.3d 1070, 1076 (Okla. 2004).

expect to find facts …. In short, the general tone and context of these messages strongly suggest that they are the opinions of the posters."[11]

The content of the messages Plaintiff has presented to the Court as originating on the sperrypublic.com web site similarly demonstrates that the posters were either expressing their opinions or raising questions about the effectiveness of school officials, not making any factual representations that would support a defamation claim. The general tone and context of these messages confirms this: the collection of "sperrypublic.com" messages copied and supplied by Plaintiff were found in such discussion areas as "Rumor" and "Teacher Watch: Tell us know what you think" [sic]; messages are posted under an umbrella disclaimer that explicitly states that the "SPERRY PUBLIC.COM Message Board is intended to promote the exchange of information, experiences, **opinions** and support among users of these pages" [emphasis added]; messages repeatedly include caveats such as "I heard a rumor, and haven't been able to verify it" and "I have heard (and this is just rumor, so don't quote me)"; messages repeatedly include misspellings and grammatical errors; and posters chose onscreen identities (as specifically identified in Plaintiff's subpoena) that indicate a lack of seriousness on their part such as "Dubya," "Wonder Woman," and "Wanna_be_a_pirate."

In any case, despite the revealing tone and context of the overall collection of messages supplied to the Court, Plaintiff has not identified any allegedly libelous statement. It is not up to the Court – or the Doe Defendants or anonymous web site speakers – to divine the specifics of Plaintiff's claims for him.

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[11] *See also Rocker Mgmt. v. John Does*, 2003 U.S. Dist. LEXIS 16277 (N.D. Cal. 2003), a case in which a court similarly found that readers were unlikely to view anonymously posted messages on a message board as assertions of fact. Specific indicia identified by the *Rocker Mgmt.* court that led to a finding that the allegedly defamatory statements were non-actionable opinions included the facts that the statements were made anonymously, that a disclaimer appeared on the message board noting that the postings were solely the opinion and responsibility of the author, that the statements "are replete with grammar and spelling errors," that "most posters do not even use capital letters," that "[m]any of the messages are vulgar and offensive, and are filled with hyperbole," and that posters used screen names like "marc_choades_anal_warts" and "lawyers_are_all_satans_children." *Id.* at *5. The "sperrypublic.com" messages include similar indicia, as discussed below.

b. Plaintiff Has Introduced No Competent Evidence to Show That Any Statement Made on the Internet Web Site in Question Was Made With Actual Malice.

Plaintiff has similarly introduced no competent evidence to support a claim of malice with regards to any statements on the online bulletin board. This requirement, it is important to note, applies equally to statements relating to a public official's specific job functions and personal activities that are necessarily intertwined with public abilities; statements about the personal activities of public officials, in other words, are valid subjects of public discussion if they are in some way relevant to the official's job performance. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964) ("Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character").[12]

The actual malice requirement, like the First Amendment anonymity protections, is crucial to protecting the free-ranging public debate and criticism that is essential, in turn, to advancing the public interest in effective and responsive government. *See New York Times v. Sullivan*, 376 U.S. at 279-280 (higher burden essential to avoid dampening the vigor and variety of public debate). That free-ranging debate is particularly important when the subject matter is the public schools; indeed, Oklahoma courts have made clear that they "can think of no higher community involvement touching more families and carrying more public interest than the public school system." *Johnston*, 1978 OK 88, ¶ 4, 583 P.2d at 1103.

Oklahoma courts interpret the Supreme Court standard in *New York Times v. Sullivan* to permit public officials to "recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily

[12] *See also Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) ("[A]s a matter of constitutional law … a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's … fitness for office for purposes of application of the ['public official' rule]"); *Luper*, 1983 OK CIV APP 54, ¶ 8, 675 P.2d at 1031 ("The defamatory allegations of the crimes of adultery, bigamy, and criminal conspiracy have been held as a matter of law to directly relate to a public official's conduct").

adhered to by responsible publishers." *Washington*, 1972 OK 166, ¶ 5, 506 P.2d 913, 915 (Okla. 1972). Thus, to meet the threshold element of the anonymity balancing test, Plaintiff must offer competent evidence not only of the falsity of the allegedly defamatory statements, but also that the posters' messages amounted to "highly unreasonable conduct" and "an extreme departure" from regular, responsible standards, or " so inherently improbable that only a reckless person would have put [them] in circulation." *Id.* at 918.; *accord St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Plaintiff has not done so.

Finally, movants note that under Oklahoma law, "actual malice must be proved separately as to each defendant." *Revell v. Hoffman*, 309 F.3d 1228, 1234 (10th Cir. 2002) (upholding summary judgment in "public figure" defamation case under Oklahoma law). As set forth above, he has offered the Court no evidence that he can meet the standard as to even one Doe defendant, much less 114.

2. Plaintiff Has Failed to Meet the Remaining Elements of the First Amendment Balancing Test.

Because Plaintiff has failed to demonstrate the viability of his defamation claims against the Doe defendants, there is no need for the court to consider the remaining factors of the proposed balancing test. That said, those factors also weigh against Plaintiff. First, Plaintiffs' discovery request is, as discussed above, far from narrowly tailored and specific but rather a woefully over-inclusive fishing expedition: Plaintiff has subpoenaed the identifying information of and communications from each and every registered user of the message board, regardless of what, if anything, they have posted. Further, plaintiff seeks to unmask not only users of the message board but also the website host, who is not alleged to have said anything. Second, alternative discovery channels may additionally exist but they are unknowable at this stage for precisely the same reason: Plaintiff has not adequately indicated any legitimate discovery target. Third, there is no indication that Plaintiff has made any attempt to notify any of the anonymous targets of his Petition and subsequent subpoenas (they may or may not include the same people) and their First Amendment anonymity interests demand that reasonable efforts be made to

contact them so that they may raise objections to discovery attempts as well.[13] As for the extent of the Plaintiff's need for the requested information, absent viable claims it is difficult to identify an urgent need for the identifying information. On the other hand, releasing the requested information would cause significant harm to the anonymous users by forcing them to give up their anonymity and potentially face frivolous litigation, in many cases as a result of nothing more than the innocent act of offering an opinion about the conduct of a local official.

IV. CONCLUSION

Instead of narrowly tailoring discovery requests to pursue specific, identifiable, viable claims, Plaintiff has asked this Court to endorse a fishing expedition aimed instead at exposing his anonymous critics. The Court should decline to do so. For all of the reasons discussed above, Movants respectfully ask this Court to quash the June 22 subpoenas issued to godaddy.com and domainsbyproxy.com.

Respectfully submitted,

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[13] The fact that Movants independently learned of the existence of the filing of the lawsuit has no bearing on this factor as other discovery targets may of course wish to raise their own unique objections.

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