IN THE
COURT OF APPEALS OF MARYLAND

No. 109

September Term, 2006

FORENSIC ADVISORS, INC., et al.

Petitioners,

vs.

MATRIXX INITIATIVES, INC., et al.

Respondents.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, ASSOCIATION OF AMERICAN PUBLISHERS, ELECTRONIC FRONTIER FOUNDATION, ELECTRONIC PRIVACY INFORMATION CENTER, AND FREEDOM TO READ FOUNDATION, INC. IN SUPPORT OF PETITIONERS TIMOTHY MULLIGAN AND FORENSIC ADVISORS, INC.

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INTRODUCTION

This case concerns a motion to quash a subpoena seeking the identities of a reporter's sources, a list of his readers, and information he collected in the course of reporting. *Amici* Public Citizen, American Civil Liberties Union of Maryland, American Booksellers Foundation for Free Expression, American Civil Liberties Union of the National Capital Area, Association of American Publishers, Electronic Frontier Foundation, Electronic Privacy Information Center, and Freedom to Read Foundation, Inc. file this brief to address the First Amendment rights of the anonymous readers whose identities were sought in the subpoena and who are unrepresented before the Court.

Taking into account the First Amendment right to read anonymously, *amici* set forth a test for determining whether a party in civil litigation should be allowed discovery into the identities of anonymous readers and conclude that the non-party reporter in this case should not be required to testify about the identities of his publication's subscribers. The interests of each *amicus* are described in the Motion of Public Citizen et al. for Leave to File Brief *Amicus Curiae* filed concurrently herewith.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. Factual Background

Matrixx Initiatives, Inc. ("Matrixx") sells an over-the-counter nasal decongestant that has been widely alleged in litigation and the press to cause the permanent loss of the sense of smell. (E 71-74). The company has also been criticized for several forms of mismanagement. (E 108-131).

On December 12, 2002, Matrixx sued numerous anonymous individuals ("Does") in Arizona state court, alleging defamation, interference with contractual relations and business expectancies, and trade libel, all based on statements that the Does had posted on Internet discussion boards. *See* Sixth Am. Compl., *Matrixx Initiatives, Inc. v. Dick et al.*, No. CV2002–23934 (Ariz. Super. filed July 8, 2004) (E 26-33). The Arizona case appears to be a strategic lawsuit against public participation, or SLAPP suit, designed to squelch criticism rather than to remedy legally cognizable grievances. *See* Md. Cts. & Jud. Proc. Code § 5-807 (Maryland's anti-SLAPP statute). For example, although Matrixx amended its complaint five times over the course of two years, the complaint still fails to identify a single allegedly defamatory remark or a single contract with which the Does allegedly interfered.

Petitioner Timothy Mulligan published a stock newsletter called *The Eyeshade Report.* On August 26, 2003—more than two years after the Does allegedly began defaming Matrixx and six months after Matrixx filed suit—Mulligan published a negative report on Matrixx. (E 108-131). On November 4, 2003, Matrixx subpoenaed Mulligan and his company, Forensic Advisors, Inc., seeking broad discovery of Mulligan's sources, notes, and drafts for the report on Matrixx and any information he might have concerning the defendants in the Arizona litigation. (E 85-94). Mulligan produced 383 pages of documents in response to the subpoena. *See* Mulligan Aff. ¶ 5 (E 57). In August, 2004, Matrixx obtained a second Maryland subpoena that sought similarly broad discovery and also demanded that Mulligan disclose the names of every person who *received* the report on Matrixx. (E 132-138).

In opposition to Mulligan's motion to quash, Matrixx explained that it sought

discovery from Mulligan because some of the statements in *The Eyeshade Report* "bear a striking resemblance" to "the types of statements and information which formed the basis for Matrixx's lawsuit in Arizona" and "[t]he timing and content of these statements led Matrixx to believe that *The Eyeshade Report* had been commissioned as part of the defamation and short-selling scheme that is the subject of Matrixx's lawsuit in Arizona." Matrixx Opp. 3 (E 96-97). However, Matrixx has provided no evidence to suggest that Mulligan has any connection to, or any information about, the Doe defendants whom it is suing in Arizona, nor has it rebutted Mulligan's testimony that he knows nothing about the Does. *See* Mulligan Aff. ¶ 6 (E 57). And notably, the company has neither sued Mulligan nor alleged that *The Eyeshade Report* contained defamatory statements.

B. Procedural Background

The circuit court denied Mulligan's motion to quash the subpoena, and he timely appealed to the Court of Special Appeals. *Amici* filed a brief with the Court of Special Appeals urging the Court to quash the subpoena because all of the information Matrixx seeks is protected either by Maryland's news media privileges or by the First Amendment.

The Court of Special Appeals held that *The Eyeshade Report* is a member of the news media for purposes of Md. Cts. & Jud. Proc. Code § 9-112, which provides the news media with an absolute privilege for information about sources and a qualified privilege for information gathered in the process of reporting. Matrixx did not seek certiorari on that issue, and it is therefore not before this Court. However, the Court of Special Appeals did not address whether Matrixx could obtain the names of the readers of *The Eyeshade Report*,

and it declined to quash the subpoena, holding that Mulligan's deposition could go forward but that he could object to questions on a question-by-question basis. Mulligan petitioned for certiorari, and his petition was granted.

QUESTION PRESENTED

This *amicus* brief addresses the following question:

In light of the First Amendment interests at stake, what factors should the court take into account in deciding whether to quash a civil subpoena to a non-party reporter and publisher seeking information relating to the identities of his readers and subscribers?

ARGUMENT

The First Amendment protects the right to receive information anonymously. Allowing discovery into readers' identities irrevocably destroys the readers' anonymity, leaving them susceptible to harassment, embarrassment, stereotyping, and social stigma based on their choice of reading material. When a party in civil litigation seeks an order compelling discovery into readers' identities, the readers' right to remain anonymous comes into conflict with the party's right to obtain redress in the courts. The Court should balance these competing rights and ensure that readers are not denied their First Amendment rights where the plaintiff has not shown a realistic chance of success on the merits of its case and a connection between the readers and the underlying claims.

On the record before this Court, Matrixx's subpoena and its Arizona litigation bear the hallmarks of a strategic lawsuit against public participation, or SLAPP suit, designed to silence critics rather than to vindicate real legal claims. Maryland recently enacted a statute

to deter SLAPP suits and enable defendants to defeat them expeditiously, *see* Md. Cts. & Jud. Proc. Code § 5-807, and it has no interest in encouraging such actions by enforcing subpoenas for SLAPP plaintiffs in foreign jurisdictions. The recipient of the subpoena is himself a Matrixx critic with no connection to the underlying lawsuit and, as a non-party to the underlying lawsuit, he cannot move to dismiss the underlying claims. And his subscribers are even further removed from the original claim. Especially in a situation such as this, the Court should institute standards to ensure that anonymous readers' First Amendment rights are not unnecessarily trammeled.

A. The First Amendment Protects Against the Compelled Identification of Anonymous Readers.

It is "well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This right "follows ineluctably from the *sender*'s First Amendment right," and "[m]ore importantly, . . . is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (emphases in original). As Justice Brennan stated in his concurrence in *Lamont v. Postmaster General*, "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating provisions of law that "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another").

It is similarly well-established that individuals have the right to engage in First Amendment-protected activity anonymously. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002) (invalidating permit requirement for door-to-door canvassing in part on anonymity grounds); *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 199-200 (1999) (invalidating requirement that petition signature collectors wear name badges); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (invalidating restriction on anonymous political leafleting); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (invalidating restriction on all anonymous leafleting); *Bates v. City of Little Rock*, 361 U.S. 516, 523-25 (1960) (invalidating requirement that organization disclose its membership list). First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," *Bates*, 361 U.S. at 523, and the disclosure of the identities of individuals who exercise First Amendment rights anonymously chills their expressive activity.

Accordingly, this Court has recognized that individuals have the right to read anonymously. *Lubin v. Agora*, 389 Md. 1, 882 A.2d 833 (2005). In *Lubin*, the Maryland Securities Commissioner served two subpoenas *duces tecum* on Agora, Inc., a publisher of investment newsletters, asking for, among other things, its subscriber lists. After setting forth the Supreme Court precedent on the right to receive information and the right to associational privacy, this Court concluded that, "[t]o the extent that the Commissioner's subpoenas require Agora, a publisher, to disclose the identities of those who subscribe to or

purchase its materials, the subpoenas seek information within the protective umbrella of the First Amendment." *Id*. at 22, 882 A.2d at 847. It explained:

> Enforcement of the subpoenas would intrude upon the First Amendment rights of Agora's subscribers and customers because disclosure of their subscriber status and purchase of the Report would destroy the anonymity that the Supreme Court has recognized as important to the unfettered exercise of First Amendment freedoms. If the names of Agora's readers were disclosed to the government, they might be subjected to questioning from investigators about their reading habits. Agora's subscribers may be discouraged from reading its materials if they are interviewed by government personnel investigating potential securities violations, even if the readers are told that, individually, they are not under investigation.

Id. The Court held that, to compel production of the subscriber information, the Commissioner had to "establish a substantial relation between the information sought and an overriding and compelling state interest." *Id*. at 23, 882 A.2d at 847; *see also Bates*, 361 U.S. at 524 ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

Here, as in *Lubin*, the subpoena at issue seeks the subscriber list of an investment newsletter. And, as in *Lubin*, enforcement of the subpoena would intrude on the subscribers' First Amendment rights by denying them their right to receive information anonymously. This Court should adopt a test for determining when to allow discovery into readers' identities in civil litigation to ensure that readers' First Amendment rights are protected.

B. This Court Should Require Plaintiffs to Make a Preliminary Showing Before Allowing Infringement of the Right to Read Anonymously.

To protect against infringement of First Amendment rights when a party seeks the identities of anonymous readers or subscribers, this Court should adopt a test that weighs the

harm to readers from losing their right to remain anonymous against any potential harm to the plaintiff from being unable to proceed. In particular, *amici* urge the Court to require the party seeking disclosure to establish a *prima facie* case, supported by evidence, and to demonstrate that the information sought is central to the claim and unavailable from other sources. Where the plaintiff fails to make this showing, the Court should deny discovery into the readers' identities. On the other hand, where the plaintiff *is* able to satisfy these standards, the Court should then consider whether the need for disclosure outweighs the First Amendment rights implicated. Only if the party seeking discovery is able to make the initial showing and demonstrate that the balance of the equities favors disclosure should the Court require disclosure of the readers' identities.

The test proposed by *amici* reflects the concerns of discovery rules, Maryland's qualified privilege against disclosure of reporting information, the federal qualified privilege against disclosure of media sources, and cases concerning government investigations that implicate the right to read anonymously. It provides for case-by-case assessments and avoids the false choice between protecting anonymity and vindicating the rights of tort plaintiffs. Courts around the country have already successfully adopted variations on the test to assess motions to quash subpoenas to Internet Service providers ("ISPs") served by plaintiffs seeking to discover the names of people—such as the Doe defendants sued by Matrixx in Arizona—who have posted anonymous comments on Internet message boards. Below, *amici* discuss these legal sources to explain the rationale for the proposed test. We then apply the factors of the test to this case and demonstrate that Matrixx's subpoena fails to satisfy them.

1. The Proposed Test is Supported By Discovery Rules, the Qualified Privilege Protecting Media Sources, and Cases Involving Government Investigations.

Discovery Rules. The Maryland Rules require courts to limit discovery when information could be obtained by other means or when the burdens of a particular discovery outweigh its likely benefits. *See* Md. Rule 2-402(b) ("The court *shall* limit . . . discovery . . . if it determines that (1) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive . . . or (3) the burden or expense of the proposed discovery outweighs its likely benefit[.]") (emphasis added); *see also* Md. Rule 2-403 (permitting the court to prohibit discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). A subpoena seeking readers' identities may oppress or burden First Amendment rights too much to be justified by the likely benefits of discovery.

Federal cases have similarly required balancing, including in the First Amendment context. For example, in *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987), the Tenth Circuit stated:

> [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. . . . Among the factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information. The trial court must also determine the validity of the claimed First Amendment privilege. Only after examining all of these factors should the court decide whether the privilege must be overborne by the need for the requested information.

Id. at 1466-67 (citation omitted) (requiring balancing test for discovery of organization's membership list, mailing lists, and certain attendance records); *see also Hastings v. N.E. Indep. Sch. Dist*., 615 F.2d 628, 632 (5th Cir. 1980) ("Where, as here, constitutionally protected rights are infringed by the disclosure order, the party seeking discovery must demonstrate 'an interest in obtaining the disclosures . . . which is sufficient to justify the deterrent effect which . . . these disclosures may well have .'" (quoting *NAACP v. Alabama*, 357 U.S. 449, 463 (1958))).

Qualified Privilege for Media. Maryland's qualified privilege for information collected by media organizations also supports use of the test outlined above. The privilege bars disclosure of information that was gathered by a member of the news media for communication to the public, but was not so communicated, unless the party seeking the information shows that "(i) The news or information is relevant to a significant legal issue before any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas; (ii) The news or information could not, with due diligence, be obtained by any alternate means; and (iii) There is an overriding public interest in disclosure." Md. Cts. & Jud. Proc. Code § 9-112(d)(1). This test recognizes that a party seeking information must make a preliminary showing about the need for that information and pass a stringent balancing test before it can receive information that implicates First Amendment rights.

Similarly, federal courts have developed standards for the compelled disclosure of media sources. In such cases, many courts require the party seeking the identity of the anonymous speaker to show that (1) the issue on which the material is sought is not just

relevant to the action, but goes to the heart of the plaintiff's case; (2) there is a compelling need for the information; and (3) the discovering party has exhausted all other means of proving the relevant part of its case. *See United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972); *see also* Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 Ariz. L. Rev. 815, 851 (1984) ("It is now well established in all federal circuits and in most states that journalists have a qualified privilege to refuse to disclose confidential sources when requested in civil litigation."). Some courts have applied similar tests to journalists' resource materials. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993). All of these cases recognize that the need for discovery must be balanced against the First Amendment interests at stake. *See, e.g., Carey*, 492 F.2d at 636 ("[T]he court will look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired.").

Government Investigations. Courts have required a connection to a compelling need in cases addressing attempts to identify anonymous readers during government investigations. As discussed above, in *Lubin v. Agora*, this Court concluded that the Commissioner of the Maryland Division of Securities, which enforces the Maryland Securities Act, could not compel a publisher to produce its subscriber lists and purchaser information in an investigation into whether the publisher had violated securities law. 389

Md. 1, 882 A.2d 833. The Court held that the Commissioner had to "establish a substantial relation between the information sought and an overriding and compelling state interest," *id*. at 23, 882 A.2d at 846, and that the Commissioner had failed to do so. It determined that because the Commissioner had not alleged that Agora gave subscribers individualized investment advice, and because questions about whether Agora communications contained false or misleading statements could be answered by looking at the communications themselves, the Commissioner had not established a sufficient nexus between the investigations and the subscriber lists, and therefore had not shown a compelling need for the lists. *Id*. at 23-24, 882 A.2d at 847. With regard to the names of people who purchased the report, the Court concluded that although learning the purchasers' identities might be useful in investigating whether they were offered brokerage services, "the Commissioner's suspicions in this regard lack any meaningful foundation," *id*. at 26-27, 882 A.2d at 849, and "the speculative nature of the purchaser information [did] not outweigh the burden that compelled disclosure would place on the First Amendment interests of the individuals identified." *Id*. at 26, 882 A.2d at 848.

Similarly, in *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002), the Colorado Supreme Court blocked a search warrant seeking the identity of a customer who had books on clandestine drug laboratories delivered to a methamphetamine lab and a customer's thirty-day purchase history. *Id*. at 1058-59. Relying on the state constitution, but citing federal case law, the court held that the government must show a compelling need for the specific information sought, *id*., and found that the police could not meet that standard.

See also In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc., 26 Med. L. Rptr. 1599 (D.D.C. 1998) (refusing to enforce subpoena to bookstore seeking list of Monica Lewinsky's purchases absent government showing of (1) compelling need for information sought and (2) sufficient connection between information and criminal investigation).

2. Cases Addressing Disclosure of "Doe" Speakers Apply Standards Similar to Those Proposed by *Amici*.

Standards such as those proposed by *amici* to govern identification of anonymous readers have already been adopted by a growing number of courts in an analogous context: the identification of anonymous Internet speakers. Courts confronted with motions to quash subpoenas to ISPs from plaintiffs seeking the identities of online speakers have adopted multi-part tests that balance the rights of plaintiffs alleging defamation or similar claims against the right of defendants to speak anonymously on the Internet. The leading case is *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo!. There, the New Jersey appellate court adopted a five-part standard that requires plaintiffs to (1) notify the accused of the identification proceeding and provide an opportunity for him to defend his anonymity; (2) quote verbatim the allegedly actionable statements; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation; and (5) show that, on balance and in the particulars of the case, the right to identify the speaker outweighs the First Amendment right to anonymous speech. *Id.* at 760-61. The court explained that this test "strik[es] a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its

proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants." *Id*. at 760.

Similarly, in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the Delaware Supreme Court ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters only if he could put forward evidence sufficient to establish a *prima facie* case on all elements of a defamation claim within his control, including evidence that the statements are false. Under the *Cahill* standard, plaintiffs may only obtain the requested discovery if they can put forth at least enough evidence to survive a motion for summary judgment. *Id*. at 457. Quoting *Cahill* and *Dendrite*, the District Court of Arizona, in *Best Western International, Inc. v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), set forth a five-factor test that included whether the plaintiff would be able to survive summary judgment. The court refused to enforce a subpoena to identify authors of postings criticizing the Best Western motel chain because the plaintiff had not presented any factual support for its claims of wrongdoing by the Doe defendants. *Id*. at *5.

Other courts have reached similar results. In *Melvin v. Doe*, 49 Pa. D.&C. 4th 449 (Pa. 2000), the trial court ordered disclosure only after finding that the "information (1) is material, relevant, and necessary, (2) it cannot be obtained by alternative means, and (3) it is crucial to plaintiff's case." *Id*. at 477. Despite the trial court's sensitivity to First Amendment concerns, the Pennsylvania Supreme Court vacated and remanded for an *additional* determination whether the First Amendment requires a *prima facie* showing of actual economic harm prior to discovery of a defamation defendant's identity. 836 A.2d 42,

50 (Pa. 2003). And in *Highfields Capital Management, L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005), the court quashed a subpoena seeking the identity of an anonymous Internet poster because the plaintiff had not shown it had an evidentiary basis for believing that the defendant had engaged in wrongful conduct causing harm. *See also Sony Music Entertainment v. Does 1-40*, 326 F. Supp. 2d 556, 564-55 (S.D.N.Y. 2004) (setting forth five-factor test that included whether plaintiffs had a *prima facie* claim); *Doe v. 2TheMart.Com*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash 2001) (inquiring whether "(1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source"); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579-80 (N.D. Cal. 1999) (requiring plaintiff to demonstrate by specific evidence that it had viable trademark claims against anonymous defendants before disclosure could be compelled).

Although these cases set forth slightly different tests, each conducts the essential step of weighing the plaintiff's interest in identifying the speakers against the First Amendment right to anonymity, thus ensuring that First Amendment rights are not unnecessarily infringed. The same First Amendment right to anonymity at issue in the ISP cases is implicated when a party seeks disclosure of the identities of anonymous readers. Indeed, that Matrixx seeks information from Mulligan purportedly to assist in identifying the Doe defendants in Matrixx's underlying Arizona litigation makes application of the standards

employed when a subpoena seeks the identities of Doe defendants particularly appropriate here. As is true when a plaintiff subpoenas ISPs, the individuals whose rights are actually at stake—in those cases, anonymous speakers, and in this case, anonymous readers—cannot defend their anonymity rights *after* the subpoenaed party discloses their identities. Moreover, the subpoena at issue here threatens rights even more broadly than do subpoenas in Doe speech cases. Unlike a subpoena seeking the identities of Doe defendants, a subpoena for a list of readers or subscribers will almost invariably be overbroad, sweeping in individuals against whom the plaintiff asserts no claim. The subpoena here, for example, almost certainly seeks to identify people who have no connection with Matrixx's underlying Arizona litigation. Application of the *Dendrite* factors, as modified to reflect the difference between speakers who are defendants in the underlying litigation and readers, many if not all of whom are not connected to the underlying litigation, will ensure that the readers' First Amendment rights are not overridden unless necessary to allow Matrixx to proceed with valid claims.

3. Matrixx Has Failed to Justify Disclosure of the Identities of Mulligan's Readers and Subscribers.

Based on the legal doctrines described above, *amici* urge the Court to protect the rights of readers by considering whether Matrixx has (1) established a *prima facie* case supported by evidence; (2) shown that the information sought is central to the claim and unavailable from other sources; and (3) demonstrated that the need for disclosure outweighs the First Amendment interests at stake. Matrixx fails at each step.

(a) Matrixx Has Failed to Establish a *Prima Facie* Case Supported By Evidence.

Matrixx claims that the names of *The Eyeshade Report* readers are relevant to its Arizona litigation, in which it alleges defamation and intentional interference with contract. However, the company has neither alleged facts supporting each element of its claims nor produced evidence sufficient to show a realistic chance of winning the underlying lawsuit. Without those facts, the Court cannot review the claims to determine whether the plaintiff has a valid reason for piercing the readers' anonymity.

Plaintiffs often claim that they seek to identify people merely to proceed with their cases, but the identification of anonymous individuals is a major form of "relief" in some cases. It is often the plaintiff's sole objective. Indeed, some lawyers who bring cases like Matrixx's have admitted that they desire only identification of their clients' anonymous critics. *See, e.g.*, Cynthia Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily Freeman, Nov. 21, 2000. And lawyers who represent plaintiffs in these cases have also urged companies to bring suit even if they do not intend to pursue the action to a conclusion because "[t]he mere filing of the John Doe action will probably slow the postings." Jay Eisenhofer & Sidney S. Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. They have also suggested that clients should decide whether it is worth pursuing claims only after learning the identity of the defendant. *Id.;* Bruce D. Fischman, *Protecting the Value of Your Goodwill from Online Assault* (2000), http://www.fhdlaw.com/html/bruce_article.htm. Requiring a plaintiff to allege facts for each

element of its claim and support the claim with evidence prevents the plaintiff from infringing rights simply by filing a complaint.

In the context of a defamation claim, the Court should require plaintiffs to quote the statements that allegedly violated their rights and to demonstrate that those statements are facially actionable. *See Dendrite*, 775 A.2d at 760; *cf. Metromedia, Inc. v. Hillman*, 285 Md. 151, 400 A.2d 1117 (1979) ("Where extrinsic facts must be shown in order to establish the defamatory character of the words sued upon, the omission to plead them makes the complaint demurrable for failure to state a cause of action."); *Aldabbagh v. Arizona Dep't of Liquor Licenses & Control*, 783 P.2d 1207, 1213 (Ariz. Ct. App. 1989) (dismissing claims where complaint stated only "a legal conclusion that [defendant] made defamatory remarks to the press" with "no facts . . . to support a claim for injurious falsehood"). Such basic requirements in the context of third-party discovery do not place an undue burden on plaintiffs, who will eventually be required to prove their claims on the merits anyway, and they allow the courts to determine whether, as a matter of law, the claims have merit.

Moreover, if the plaintiff cannot come forward with evidence sufficient to meet a summary judgment standard on all issues in the case that are within its control, there is no need to breach the readers' identities. In suits for defamation, several elements of the claims are based on evidence to which the plaintiff likely has ready access. For example, the plaintiff will likely have ample means of proving that a statement is false. Thus, it is not unduly burdensome to require the plaintiff to present proof of this element before compelling the identification of anonymous individuals. The same is true with respect to damages. *See*

Doe v. Cahill, 884 A.2d at 464 ("Given that the plaintiff will have easy access to proof of five of the six elements of a defamation claim, it is not overly burdensome to require the plaintiff to submit a verified complaint or affidavits to substantiate that claim.").

Here, Matrixx has failed to identify a single allegedly defamatory statement, either in this litigation or in the sixth version of the complaint it filed in the Arizona Superior Court, much less to demonstrate that the statements were false or explain why criticisms voiced in the mainstream American media were somehow particularly harmful when also voiced on Internet message boards. It has also failed to show any evidence of damages. To the contrary, just two months after serving Mulligan with a second subpoena, Matrixx reported "record third quarter sales and earnings" and stated that "Zicam has continued to be one of the fastest growing OTC brands." *See Maker of Zicam Products Reports Third Quarter Results*, Obesity, Fitness & Wellness Wk. 177, Nov. 27, 2004. Similarly, although Matrixx alleges intentional interference with contract, it has not identified any specific contractual relationship with which the Does allegedly interfered. *See* Sixth Am. Compl. ¶ 33-37 (E 31). Absent a showing by Matrixx that the underlying Arizona litigation has merit, it should not be permitted to uncover the identity of the anonymous readers.

(b) Matrixx Has Failed to Demonstrate That the Information Sought Is Central to the Party's Claims and Unavailable from Other Sources.

The Court should also require a subpoenaing party to show that information identifying readers or subscribers is central to its claims and not reasonably available by other means. *See Best Western Int'l, Inc. v. Doe*, 2006 WL 2091695, at *5. Accordingly,

disclosure of the identities of anonymous readers should not be required when many, and likely all, of the people to be identified have no relationship to the underlying lawsuit. *See In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir. 1982) (improper to compel disclosure of the names of sources that bear "at most a tenuous and speculative relationship" to plaintiff's claims); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-91 (N.D. Cal. 1976) (barring, in defamation action, disclosure of identities of individuals whom a professor interviewed where there was "absolutely no evidence" that the individuals had defamed the plaintiff).

Matrixx fails to satisfy this factor as well. The company has provided no evidence that learning the identities of Mulligan's readers will help identify defendants in the Arizona litigation or assist its case in any other way. Mulligan has attested that he knows nothing about the defendants, Mulligan Aff. ¶ 6 (E 57), and Matrixx has not shown any connection between Mulligan's readers and the underlying litigation.[1]

Moreover, Matrixx could instead seek the identifying information from the Does' ISPs. Requests to ISPs could at least target the particular individuals who made the comments at issue rather than people who have no connection to Matrixx's case. Matrixx alleges that *one* of twenty-five Does "is utilizing identity-obfuscation software" to "conceal his or her identity and to temporarily evade the United States Subpoena process." Sixth Am.

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[1]In its Answer to Petition for Certiorari, at 3, Matrixx claimed, for the first time, that *The Eyeshade Report* on Matrixx was referenced in one of the anonymous postings on the Internet. Matrixx has provided no support for that claim. Even if it is true, however, that assertion does not mean that the Does are themselves subscribers to *The Eyeshade Report* and does not support a connection between the majority of subscribers and the underlying litigation.

Compl. ¶ 21 (E 80). But Matrixx has failed to show any connection between this Doe and Mulligan or any reason to believe that the Doe even reads *The Eyeshade Report*.

(c) Matrixx Has Failed to Show That the Need for Disclosure Outweighs the First Amendment Interests at Stake.

If a party seeking discovery about anonymous readers makes the initial showings, then the Court should require the party to show that its interest in disclosure outweighs the First Amendment rights at stake. *See* Md. Rule 2-402(b). This analysis is similar to that used to evaluate requests for preliminary injunctions: consideration of the likelihood of success and balancing of equities. Such a standard is particularly appropriate here because a disclosure order is effectively a permanent injunction causing irreparable harm—the loss of anonymity and the infringement of First Amendment rights. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Courts must undertake this inquiry on a case-by-case basis, engaging in a balancing of the equities and rights at issue. *Dendrite*, 775 A.2d at 760-61.

Here, the balance weighs decisively against Matrixx. The company has not shown *any* need for disclosure. As discussed above, the company has failed to show that it has facially valid claims (much less that it could prove them), failed to show any harm, and failed to provide any evidence that Mulligan's subscriber list would further the pursuit of its claims or that the identities of the Does are unavailable elsewhere. And Mulligan already provided 383 pages of documents in response the company's first subpoena.

Balanced against Matrixx's fishing expedition is the permanent harm that would result from infringing Mulligan's and his subscribers' interests under the First Amendment. For starters, the readers would be denied their anonymity. Moreover, two subscribers informed

Mulligan that they would cancel their subscriptions if their identities were revealed. Mulligan Aff. ¶ 7 (E 57). The possibility that subscribers would cancel is not surprising. First, the financial industry is highly competitive, and some institutional and individual investors closely guard the sources of their decision-making. Second, companies like Matrixx may assume that some readers of publications like *The Eyeshade Report* are short-sellers and harass them with subpoenas and frivolous litigation. For these reasons, disclosure of identities here would chill readership. This harm easily outweighs Matrixx's speculation that disclosure may assist it in the Arizona litigation.

CONCLUSION

For the foregoing reasons, this Court should deny Matrixx discovery into *The Eyeshade Report*'s subscribers. Because Matrixx has failed to articulate any need to depose Mulligan except to receive his subscriber list or information privileged under the news media privileges, the Court should reverse the circuit court's denial of the motion to quash the subpoena.

Respectfully submitted,

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Dated: January 31, 2007
Font: Times New Roman, 13 point

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES CITED

United States Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Md. Rule 2-402. Scope of discovery.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) Generally. A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not ground for objection that the information sought is already known to or otherwise obtainable by the party seeking discovery or that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. An interrogatory or deposition question otherwise proper is not objectionable merely because the response involves an opinion or contention that relates to fact or the application of law to fact.

(b) Alterations. In a particular case, the court, on motion or on its own initiative and after consultation with the parties, by order may limit or alter the limits in these rules on the length and number of depositions, the number of interrogatories, the number of requests for production of documents, and the number of requests for admissions. The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules if it determines that (1) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the complexity of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(c) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(d) Trial Preparation - Materials. Subject to the provisions of sections (e) and (f) of this Rule, a party may obtain discovery of documents or other tangible things prepared in

anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the materials are discoverable under section (a) of this Rule and that the party seeking discovery has substantial need for the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(e) Trial Preparation - Party's or Witness' Own Statement. A party may obtain a statement concerning the action or its subject matter previously made by that party without the showing required under section (d) of this Rule. A person who is not a party may obtain, or may authorize in writing a party to obtain, a statement concerning the action or its subject matter previously made by that person without the showing required under section (d) of this Rule. For purposes of this section, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(f) Trial Preparation - Experts.

(1) Expected to Be Called at Trial.

(A) Generally. A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions. A party also may take the deposition of the expert.

(B) Additional Disclosure With Respect to Experts Retained in Anticipation of Litigation or for Trial. In addition to the discovery permitted under subsection (f) (1) (A) of this Rule, a party by interrogatories may require the other party to summarize the qualifications of a person expected to be called as an expert witness at trial and whose findings and opinions were acquired or obtained in anticipation of litigation or for trial, to produce any available list of publications written by that expert, and to state the terms of the expert's compensation.

(2) Not Expected to Be Called at Trial. When an expert has been retained by a party in anticipation of litigation or preparation for trial but is not expected to be called as a witness at trial, discovery of the identity, findings, and opinions of the expert may be obtained only if a showing of the kind required by section (d) of this Rule is made.

(3) Fees and Expenses of Deposition. Unless the court orders otherwise on the ground of manifest injustice, the party seeking discovery: (A) shall pay each expert a reasonable fee, at a rate not exceeding the rate charged by the expert for time spent preparing for a

deposition, for the time spent in attending a deposition and for the time and expenses reasonably incurred in travel to and from the deposition; and (B) when obtaining discovery under subsection (f) (2) of this Rule, shall pay each expert a reasonable fee for preparing for the deposition.

Md. Rule 2-403. Protective Orders.

(a) Motion. On motion of a party or of a person from whom discovery is sought, and for good cause shown, the court may enter any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had, (2) that the discovery not be had until other designated discovery has been completed, a pretrial conference has taken place, or some other event or proceeding has occurred, (3) that the discovery may be had only on specified terms and conditions, including an allocation of the expenses or a designation of the time or place, (4) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery, (5) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters, (6) that discovery be conducted with no one present except persons designated by the court, (7) that a deposition, after being sealed, be opened only by order of the court, (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way, (9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(b) Order. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

Md. Cts. & Jud. Proc. Code § 5-807 Strategic Lawsuits Against Public Participation.

(a) In this section, "SLAPP suit" means a strategic lawsuit against public participation.

(b) A lawsuit is a SLAPP suit if it is:

(1) Brought in bad faith against a party who has communicated with a federal, State, or local government body or the public at large to report on, comment on, rule on, challenge, oppose, or in any other way exercise rights under the First Amendment of the U.S. Constitution or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights regarding any matter within the authority of a government body;

(2) Materially related to the defendant's communication; and

(3) Intended to inhibit the exercise of rights under the First Amendment of the U.S. Constitution or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights.

(c) A defendant in a SLAPP suit is not civilly liable for communicating with a federal, State, or local government body or the public at large, if the defendant, without constitutional malice, reports on, comments on, rules on, challenges, opposes, or in any other way exercises rights under the First Amendment of the U.S. Constitution or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights regarding any matter within the authority of a government body.

(d) A defendant in an alleged SLAPP suit may move to:

(1) Dismiss the alleged SLAPP suit, in which case the court shall hold a hearing on the motion to dismiss as soon as practicable; or

(2) Stay all court proceedings until the matter about which the defendant communicated to the government body or the public at large is resolved.

(e) This section:

(1) Is applicable to SLAPP suits notwithstanding any other law or rule; and

(2) Does not diminish any equitable or legal right or remedy otherwise available to a defendant in a SLAPP suit.

Md. Cts. & Jud. Proc. Code § 9-112 News Media Privilege.

(a) In this section, "news media" means:

(1) Newspapers;

(2) Magazines;

(3) Journals;

(4) Press associations;

(5) News agencies;

(6) Wire services;

(7) Radio;

(8) Television; and

(9) Any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.

(b) The provisions of this section apply to any person who is, or has been, employed by the news media in any news gathering or news disseminating capacity.

(c) Except as provided in subsection (d) of this section, any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas may not compel any person described in subsection (b) of this section to disclose:

(1) The source of any news or information procured by the person while employed by the news media, whether or not the source has been promised confidentiality; or

(2) Any news or information procured by the person while employed by the news media, in the course of pursuing professional activities, for communication to the public but which is not so communicated, in whole or in part, including:

(i) Notes;

(ii) Outtakes;

(iii) Photographs or photographic negatives;

(iv) Video and sound tapes;

(v) Film; and

(vi) Other data, irrespective of its nature, not itself disseminated in any manner to the public.

(d)(1) A court may compel disclosure of news or information, if the court finds that the party seeking news or information protected under subsection (c)(2) of this section has established by clear and convincing evidence that:

(i) The news or information is relevant to a significant legal issue before any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas;

(ii) The news or information could not, with due diligence, be obtained by any alternate means; and

(iii) There is an overriding public interest in disclosure.

(2) A court may not compel disclosure under this subsection of the source of any news or information protected under subsection (c)(1) of this section.

(e) If any person employed by the news media disseminates a source of any news or information, or any portion of the news or information procured while pursuing professional activities, the protection from compelled disclosure under this section is not waived by the individual.

CERTIFICATE OF SERVICE

I certify that on this 31st day of January, 2007, I caused to be served by U.S. mail, first-class postage prepaid, two copies each of the foregoing Brief of *Amici Curiae* Public Citizen, American Civil Liberties Union of Maryland, American Booksellers Foundation for Free Expression, American Civil Liberties Union of the National Capital Area, Association of American Publishers, Electronic Frontier Foundation, Electronic Privacy Information Center, and Freedom to Read Foundation, Inc. in Support of Petitioners Timothy Mulligan and Forensic Advisors, Inc. on the following:

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