COURT OF APPEAL

STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOHN DOE, aka "LASHWR45" on Yahoo!, Appellant, vs. H.B. FULLER COMPANY, Respondent.	Sixth District Civ. No.: H030099 Santa Clara County Superior Court No. 1-05-CV-053609 (Hon. Socrates Peter Manoukian, Presiding)

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

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I. INTRODUCTION

The right to speak anonymously – a right firmly rooted in the First Amendment and the California Constitution – has been expressly and repeatedly recognized by the United States Supreme Court and the courts of California. By allowing Respondent H.B. Fuller Company ("Fuller") to uncover the identity of an anonymous critic through a civil subpoena without applying the appropriate stringent test for reviewing such subpoenas set forth by the leading cases and commentators, the lower court seriously undervalued this fundamental right and set a perilously low threshold for stripping a speaker of his or her anonymity.

As set forth below, Amici respectfully urge this Court – as the first California appellate court to decide this issue – to join the many state and federal courts that have applied a strong speech-protective standard to attempts to breach Internet anonymity. Specifically, this Court should hold that a civil litigant seeking to use the judicial process to discover the identity of an anonymous Internet speaker must first show that: (1) reasonable efforts have been taken to notify the individual whose identity is sought of the attempt to breach his or her anonymity; (2) no reasonable alternative means exist to discover the source of harm; (3) there is competent evidence to support each necessary element of plaintiff's claim; and, if the first three factors are satisfied, (4) the balance of harms strongly favors the litigant's interest in disclosure over the anonymous speaker's free speech rights. By adopting such a test, this Court would vindicate the constitutionally-protected right of every individual "to express most effectively and anonymously, without fear of expensive adverse consequences, his views about matters

in which many other members of the public are interested." *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969, 974-5 (N.D. Cal. 2004).

II. ARGUMENT

A. The First Amendment And The California Constitution Protect The Right To Speak Anonymously.

1. The Right to Speak Anonymously is Well Established.

"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." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995); *see also Vogel v. Felice*, 127 Cal. App. 4th 1006, 1024 (2005) ("[T]he First Amendment right of freedom of speech includes the right to remain anonymous") (quoting *Hunter v. Public Util. Comm.*, 69 Cal. 2d 67, 73 (1968)). In addition, the California Constitution independently protects the right to remain anonymous. *See Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538, 1547-8 (1999) (recognizing a right to speak anonymously "grounded in the free speech and privacy provisions of the United States and California Constitutions.").

Speakers may choose to remain anonymous for many different reasons. In *McIntyre*, the United States Supreme Court explained:

> The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. . . . On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be

> personally unpopular to ensure that readers will not prejudge
> her message simply because they do not like its proponent.

514 U.S. at 341-342. Absent the protective cloak of anonymity, such speakers would likely choose to remain silent. Thus, "[t]he ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

For all of these reasons, anonymous speech has a long and proud tradition in the history of the United States, "most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed 'Publius.'" *McIntyre*, 514 U.S. at 343. As the court noted in *Rancho Publications*, 68 Cal. App. 4th at 1541, "the anonymous pamphleteer is one of the enduring images of the American revolutionary heritage." *See also Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("anonymous speech is a great tradition that is woven into the fabric of this nation's history"). Indeed, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *McIntyre*, 514 U.S. at 341 (quoting *Talley v. California*, 362 U.S. 60, 64 (1960)). Accordingly, "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent." *Id.* at 357.

Of course, the freedom to speak anonymously – like other freedoms – may be abused. But as the Supreme Court has squarely held, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*,

514 U.S. at 357. Thus, the Court has repeatedly struck down laws that infringed on the right to anonymity notwithstanding what the Court recognized to be important state interests favoring disclosure. *See, e.g., id.* at 349-50 (holding that statutory prohibition on distributing anonymous campaign literature violated the First Amendment notwithstanding a state's legitimate interest in preventing fraud and libel which "carries special weight during election campaigns"); *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150, 164-5 (2002) (holding that ordinance requiring individuals engaging in door-to-door advocacy to display permit with identifying information on demand violated First Amendment notwithstanding town's "important interests" in "preventing fraud, preventing crime, and protecting residents' privacy"); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 204-5 (1999) (striking down portions of Colorado law requiring, *inter alia*, petition circulators for ballot initiatives to wear identification badges despite state's "substantial interests in regulating the ballot-initiative process"); *cf. Talley*, 362 U.S. 60 (striking down, without discussing the relevant state interests, a Los Angeles ordinance that prohibited distribution of handbills that did not include the names of the writers and distributors).[1]

[1] While all of these cases involved legislative action, there is no question that a court order, such as the subpoena that Fuller seeks to enforce here, also "constitutes state action and as such is therefore subject to Constitutional limitations." *2TheMart.com*, 140 F. Supp. 2d at 1091-2 (citing *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) and *Shelley v. Kraemer*, 334 U.S. 1 (1948)); *see also Rancho Publications*, 68 Cal. App. 4th at 1548 (noting that the qualified constitutional privilege against compelled disclosure of a speaker's identity applies to "civil discovery that impinges upon free speech or privacy concerns").

2. The Right to Speak Anonymously Extends to the Internet.

It is also well settled that the protections of the First Amendment, including the right to speak anonymously, apply fully to speech on the Internet. In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), the Supreme Court held unequivocally that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." S*ee also Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) ("It is clear that speech over the internet is entitled to First Amendment protection. This protection extends to anonymous internet speech"); *2TheMart.com*, 140 F. Supp. 2d at 1092 ("The right to speak anonymously extends to speech via the Internet").

This conclusion is appropriate given the revolutionary impact of the Internet on the very nature of free speech. Indeed, "it has been suggested that the Internet may be the 'greatest innovation in speech since the invention of the printing press.'" *Id.* at 1091 (citation omitted). As the Supreme Court has recognized, the "vast democratic forums of the Internet" provide unprecedented opportunity for otherwise voiceless citizens to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U.S. at 868, 870; *see also Cahill*, 884 A.2d at 455 ("The internet is a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate"). As one widely-cited article explained, "the Internet promises to eliminate structural and financial barriers to meaningful public discourse, thereby making public discourse more democratic and inclusive, less subject to the control of powerful speakers, and, at least potentially, richer and more nuanced. It

therefore promises to make the marketplace of ideas more than just a hollow aspiration." Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 894 (Feb. 2000).

Anonymity plays a critical role in this unprecedented experiment in democratic discourse and debate. "The ability of individual users to log onto the Internet anonymously, undeterred by traditional social and legal restraints, tends to promote the kind of unrestrained, robust communication that many people view as the Internet's most valuable contribution to society." *Patentwizard, Inc. v. Kinko's Inc.*, 163 F. Supp. 2d 1069, 1071-2 (D. S. D. 2001); *see also 2TheMart.com*, 140 F. Supp. 2d at 1092 ("Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas . . .").

Yet just as the Internet is uniquely accessible to speakers who might otherwise lack the financial or political capital to participate in public debates, so too are such speakers uniquely vulnerable to attempts to intimidate and harass them into silence through lawsuits aimed at uncovering their identities. While the Internet allows ordinary individuals with limited financial resources to participate in public discourse to an unprecedented degree, those individuals "typically lack the resources necessary to defend against" frivolous lawsuits. Lidksy, 49 Duke L.J. at 861. Thus, lawsuits aimed at uncovering the identities of anonymous posters "threaten to reestablish existing hierarchies of power, as powerful corporate Goliaths sue their critics for speaking their minds." *Id.*

Courts faced with subpoenas seeking to uncover the identity of anonymous Internet posters have taken note of the dangerous chilling effect that enforcement of such

subpoenas can have. In *Highfields*, for example, a corporate plaintiff sought the identity of an anonymous Yahoo! message board poster who had allegedly defamed the corporation and infringed its trademark. In quashing the subpoena, the court observed that

> [e]nforcing a subpoena in this kind of setting poses a real threat to chill protected comment on matters of interest to the public. Anonymity liberates. . . [I]f the court were to enforce plaintiff's subpoena, the court would be enabling plaintiff to impose a considerable price on defendant's use of one of the vehicles for expressing his views that is most likely to result in [his] views reaching the intended audience. That 'price' would include public exposure of [defendant's] identity and the financial and other burdens of defending against a multi-count lawsuit – perhaps in a remote jurisdiction. Very few would-be commentators are likely to be prepared to bear costs of this magnitude."

385 F. Supp. 2d at 980-81. Other courts have reached the same conclusion. *See, e.g., Cahill,* 884 A.2d at 457 ("[t]he possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all"); *Seescandy.com*, 185 F.R.D. at 578 ("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"); *2TheMart.com*, 140 F. Supp. 2d at 1093 ("If Internet users could be stripped of [their] anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights"); *cf. Rancho Publications*, 68

Cal. App. 4th at 1547 (compelled disclosure "runs afoul of the First Amendment because some speakers may be chilled into silence without the cover of anonymity").

Unfortunately, there is strong reason to believe that many of the myriad subpoenas aimed at uncovering the identity of anonymous posters over the past decade have been issued precisely to harass and intimidate through public exposure, rather than to pursue a meritorious claim. To cite just one notorious example, in 1999, Raytheon Co. sued 21 anonymous message board posters, asserting dubious claims for breach of contract and disclosure of confidential information, and subpoenaed Yahoo! for their identities. After obtaining the identifying information, Raytheon dropped the lawsuit. *Raytheon Co. v. John Does 1-21*, Civ. No. 99-816 (Mass. Super. Ct. 1999). As one commentator noted, "the facts suggest that the company's sole objective was to unmask the anonymous posters, and that filing suit and obtaining subpoena power was the most expedient means of realizing that goal." David L. Sobel, *The Process That 'John Doe' is Due*, 5 Va. J.L. & Tech. 3, ¶15 (2000).

Other companies have filed defamation suits against anonymous employee posters and, upon obtaining the employee's identity, have fired the worker and dropped the lawsuit, suggesting that the goal was to silence critics rather than to pursue any actionable claim. *See, e.g.,* Margo E. K. Reder and Christine Neylar O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. L. Rev. 195, 198 (2001).

With this background in mind, courts throughout the country have fashioned high standards that a plaintiff must satisfy before using the power of the courts to compel

disclosure of an anonymous poster's identity. These standards – discussed at Section B, *infra* – are designed to ensure that the right to speak anonymously cannot be breached lightly.

Unfortunately, the lower court here failed to apply the appropriate standards, instead trivializing Doe's motion to quash as a mere "discovery matter" and stating that "calling this case a speech case misses the mark." *H.B. Fuller Company v. John Doe, a.k.a. LASHWR45 on Yahoo!*, No. 1-05-CV-053609, slip op. at 1, 6 (Cal. Super. Unrep. Feb. 10, 2007) (order denying motion of Defendant to quash out-of-state subpoena). In fact, speech is precisely what this case is about, and as set forth below, Fuller should be required to satisfy a stringent standard that takes account of the threat that Fuller's subpoena poses to Doe's free speech rights.

B. To Protect The Constitutional Right To Speak Anonymously, Courts Have Imposed Heightened Standards Before A Party Can Pierce Online Anonymity.

Plaintiffs in appropriate situations are permitted to 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); *Cahill*, 884 A.2d at 446 ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection). However, litigants are not permitted to abuse the subpoena power to discover the identities of people who have simply made statements the litigants dislike. The risk of irreparable harm is simply too great, for once an online user's anonymity and privacy have been eviscerated, they cannot be repaired or the user made whole.

Thus, courts must strike the appropriate balance between the competing interests of subpoenaing parties and the anonymous speakers they seek to unmask, keeping in mind that "setting the standard too low w[ould] chill potential posters from exercising their First Amendment right to speak anonymously." *Cahill* 884 A.2d at 457*; see generally Dendrite Int'l v. Doe No. 3,* 775 A.2d 756, 771 (N.J. Super. Ct. App. Div., 2001) (strict procedural safeguards must be imposed on subpoenas to ensure that "plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet"); *Seescandy.com,* 185 F.R.D. at 578 (plaintiff's desire to seek redress for injury must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously).

1. Overwhelming State and Federal Precedent Requires Parties Seeking Discovery to Show Notice, Evidence Tending to Support a Finding of Fact As to Each Essential Element of the Claim, and that The Balance of Harms Favors Disclosure.

To date, there are no published California state court decisions setting out the applicable standard for balancing the competing interests of litigants and anonymous subpoena targets. However, guidance may be taken from the numerous courts in other jurisdictions that have explored the issue. These courts have repeatedly noted that, at the outset of the litigation, the plaintiff has done no more than allege wrongdoing, and free speech rights are generally not overcome by mere allegations. They have further recognized that a serious chilling effect on anonymous speech would result if Internet speakers knew they could be identified by persons who merely allege wrongdoing,

without necessarily having any intention of carrying through with actual litigation. *See, e.g., Seescandy.com.*, 185 F.R.D. at 578; *see also 2TheMart.com,* 140 F. Supp. 2d at 1093.

Core components of the appropriate standard were outlined in the seminal case of *Dendrite Int'l v. Doe No. 3*, 775 A.2d 771 (N.J. Super. Ct. App. Div., 2001). In that case, the plaintiff filed a defamation action against an anonymous defendant who posted critical comments on a Yahoo! company message board. *Id.* at 763. Recognizing that it is "well-established that rights afforded by the First Amendment remain protected even when engaged in anonymously" (*Id.* at 765 (citing *Buckley*, 525 U.S. at 197-99), the court articulated a four-part test for disclosure of the identity of an anonymous Internet poster, including: (1) notice to the anonymous poster that his or her identity has been sought; (2) identification of specific defamatory statements; (3) production of evidence sufficient to establish a prima facie basis for each element of the causes of action; and, (4) evaluation of the balance of harms to the competing interests of the anonymous speaker and the party seeing to unmask that speaker. *Id.* at 760-761.[2] Applying this standard, the *Dendrite* court refused to allow the plaintiff access to Doe No. 3's identity because the plaintiff had failed to demonstrate a prima facie cause of action. *Id.* at 771-772.

Applying this test to a companion breach of employment contract case, *Immunomedics v. Jean Doe*, 775 A.2d 773 (N.J. Super. App. Div. 2001), the court found that the *Dendrite* standard was met where the plaintiff presented evidence establishing its

[2] Because the underlying claim was for defamation, the court also required the plaintiff to identify and set forth the exact statements that plaintiff alleged constituted actionable speech. *Id.*

prima facie case, including direct and unrefuted evidence that the defendant was an employee – namely, an admission to that effect in one of the anonymous postings. *Id.* at 777.

Subsequent appellate court decisions have refined the *Dendrite* standard, culminating in the leading state case, *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). In *Cahill*, the Delaware Supreme Court held that a defamation plaintiff seeking to discover an anonymous defendant's identity must make reasonable efforts to notify the anonymous defendant and "submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question." 884 A.2d. at 463. With respect to the first component, the *Cahill* court recognized that due process requires both reasonable efforts to notify the anonymous defendant of the discovery request[3] and a minimal waiting period to allow the defendant an opportunity to respond. *Id.*; *accord Dendrite*, 342 N.J. Super. at 141 ("notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board). Such a requirement, the court held, "imposes very little burden on the defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond." *Id.*

With respect to the viability of the claims, the *Cahill* court specifically rejected lesser "good faith" and motion to dismiss standards as insufficiently protective of the free speech interests at stake. Under such lenient standards, the court wrote, a plaintiff who

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[3] In the Internet context, the plaintiff should be required to post a message notifying the anonymous defendant of the discovery request on the same message board where the original statement was posted. *Cahill*, 884 A.2d at 461.

loses its case or fails to pursue a lawsuit would be "free to engage in extrajudicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution." *Id.* Instead, the court concluded, "the 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." *Id.* at 460 (emphasis added); *see also McMann v. Doe*, 2006 WL 3102986 (D. Mass. 2006) (endorsing *Cahill* test) ; *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. 2006) (same).

Federal courts have embraced similar tests. Indeed, the trial court below correctly relied, in part, on the leading federal case in California, *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 975 (N.D. Cal. 2004).[4] In that trademark and defamation action (among other claims), the U.S. District Court for the Northern District Court of California, like the *Cahill* court, held that the protected interest in speaking anonymously requires that a plaintiff seeking to pierce a Doe defendant's anonymity must first adduce competent evidence that "if unrebutted, tend[s] to support a finding of each fact that is essential to a given cause of action." *Id.* at 975. Echoing and refining the fourth part of the *Dendrite* test, the court also held that if the viability threshold is met, the court should then "assess and compare the magnitude of the harms that would be caused to the competing interests" 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.

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[4] As set forth below, however, Amici do not endorse the lower court's application of the test to the facts of this case.

2. Federal and California Precedent Also Favors Consideration of Alternative Means of Discovery.

In addition to notice, evidence competent to support a finding of each fact that is essential to a given cause of action and a strict balancing of interests, federal courts have identified an additional factor relevant to evaluating attempts to unmask anonymous speakers: the existence of reasonable alternative means of discovering the source of the alleged harm. In *Sony Entertainment Inc. v. Does*, 326 F. Supp. 2d 556, 564-65 (S.D. N.Y. 2004), for example, the court denied a motion to quash a subpoena to an Internet service provider seeking identifying information for an anonymous defendant based on its evaluation of several factors including "the absence of alternative means to obtain the subpoenaed information." *See also 2TheMart.com*, 140 F. Supp. 2d at 1092 (holding that the Constitution requires, *inter alia*, consideration of whether adequate information is unavailable from any other source before a subpoena can be used to identify anonymous Internet speakers).

Amici submit that this "alternative means" factor merits particular consideration here, in light of California's free speech traditions and recent appellate holdings concerning the analogous reporter's privilege. As the court below acknowledged, the free speech and privacy protections embedded in the U.S. and California constitutions mandate that the ability to compel discovery of an anonymous source's identity is limited in California by a nonstatutory qualified privilege. *H.B. Fuller Company*, No. 1-05-CV-053609, slip op. at 4 (Cal. Super. Unrep. Feb. 10, 2007) (citing *Rancho Publications,* 68 Cal. App. 4th at 1547). In *Rancho Publications*, for example, the court refused to compel

discovery of an anonymous speaker's identity where plaintiff's "rank conjecture" that anonymous authors of advertorials were the same parties who wrote other defamatory statements failed to establish a "compelling need" to uncover their identities. *Id.* at 1550-51. As the court recognized, without the careful balancing of rights, unmasking a Doe could enable harassment and intimidation. *Id.* at 1548. This tradition was affirmed last year in *O'Grady v. Doe*, 139 Cal. App. 4th 1423 (2006) (affirming applicability of reporter's privilege to shield anonymous sources of information published in online magazine).

The motivating principles behind California's protection of anonymous news sources apply to anonymous online speakers as well. The reporter's shield law advances "a fundamental purpose of the First Amendment, which is to identify the best, most important and most valuable ideas . . . through the rough and tumble competition of the memetic marketplace." *O'Grady* at 1457. That memetic marketplace includes Internet discussion groups, which encourage commentary on a wide variety of matters of public concern, from the corporate restructuring of publicly held companies (*see, e.g., Global Telemedia Int'l, Inc. v. Doe*, 132 F. Supp. 2d 1261, 1265 (C.D. Cal. 2001) (granting special motion to strike defamation suit based on comments made on a financial bulletin board)) to local recycling efforts (*see, e.g.* <http://groups.yahoo.com/group/FreecycleEastSFBayArea/>) to the latest developments in Washington (*see, e.g.*, <http://groups.google.com/group/alt.politics.usa.congress>). Indeed, the U.S. Supreme Court has heralded message board participants and other online speakers as the inheritors of a tradition of political pamphleteering that has historically shaped American public

discourse. *See Reno*, 521 U.S. at 870 ("Through the use of Web pages, mail exploders, and newsgroups, the individual can become a pamphleteer."); *see also Cahill*, 884 A.2d at 446 ("Anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering").

Just as sources may choose to share information with reporters only with the understanding that their identity will be protected, so too will some speakers choose to participate online without disclosing their identity to the world. *See generally McIntyre*, 514 U.S. at 357 ("[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation"). Depriving those speakers of the protections of anonymity must inevitably chill public exchange of information and ideas.

Accordingly, anonymous online speakers, like anonymous sources, should only be unmasked by strict necessity. Simply put, whether the anonymous speaker is a reporter's source or a dissenting voice on a message board, compulsory discovery of his or her identity should never be the *first* step in an investigation. *See O'Grady*, 139 Cal. App. 4th at 1471 (compulsory disclosure of sources is the "last resort, permissible only when a party seeking disclosure has no other practical means of obtaining the information") (quoting *Mitchell v. Superior Court of Marin County*, 37 Cal.3d 268, 282 (1984)). Requiring a party seeking to pierce anonymity to show that it has first employed reasonable alternative means of investigation, or that no such reasonable mean exists, will help ensure that such compulsory disclosure, with its potentially speech-chilling effects, is truly necessary to the litigation. Equally importantly, in many cases it may eliminate

the need to violate anonymity at all. In this case, for example, such simple processes as interviews with employees at the meeting might have established who, if anyone, posted the disputed information or provided such information to a third party.

Indeed, an "alternative means" requirement will be particularly appropriate where, as is often the case, there is a real risk of unmasking an individual who is not properly a party to the action. For example, the Doe may be a nonparty witness. In *2TheMart.com*, the defendant in a shareholder class action lawsuit issued a subpoena request seeking identifying information for twenty-three participants in a Internet message board, ostensibly because messages posted on the board, rather than any action by the defendant, had caused defendant's stock to drop. *2TheMart.com,* 140 F. Supp. 2d at 1090. Observing that "[n]onparty disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker," the court required the plaintiff show, *inter alia*, that information sufficient to establish or disprove a core claim or defense was unavailable from any other source. *Id.* at 1095. Or, the Doe may be misidentified as the source of an alleged harm, *e.g.*, where, as may be the case here, Doe is improperly identified as a party to a contract that has allegedly been breached. Indeed, if Doe is telling the truth, disclosure of his or her identity will, by definition, eliminate the very cause of action that provided the excuse for that disclosure.

When there is a real risk of unmasking not an alleged wrongdoer, but persons who have nothing whatever to do with the purported harm, it is not too much to ask that the

requesting party show that it has attempted to identify the specific wrongdoer through alternative means.

3. This Court Should Affirm that Parties May Not Pierce Online Anonymity Unless They Can Show Notice, No Reasonable Alternative Means of Discovery, Competent Evidence of Viable Claims and That the Balance of Harms Favors Disclosure.

While courts have balanced civil and litigation rights using slightly different tests, certain unifying principles are clear: basic due process and core free speech rights require some attempt at notice, exploration of discovery alternatives, a strong showing of viable claims and, most importantly, that the balance of harms strongly favors disclosure before a court will allow one to pierce an online user's veil of anonymity. Following these principles, and the lead of *Dendrite, Cahill, 2TheMart.com, Highfields,* and *O'Grady,* Amici submit that this Court should evaluate discovery requests, such as Fuller's, in light of the following factors:

(1) whether the party seeking disclosure has attempted to notify the individual whose information is sought of the pending loss of anonymity;

(2) whether the party seeking disclosure has shown that no reasonable alternative means exist for discovering the source of the alleged harm;

(3) whether the party seeking disclosure has submitted competent evidence sufficient to survive a summary judgment on its claims; and,

(4) whether the balance of harms favors disclosure, *i.e.,* whether the disclosure is "necessary to protect against serious wrongs."

See Highfields, 385 F. Supp. 2d at 976; *2TheMart.com,* 140 F. Supp. 2d at 1095; *Cahill,* 84 A.2d. at 463.

With respect to the third critical factor, recognizing the serious due process concerns raised in *Highfields* and *Cahill,* the court should ensure that Fuller has submitted some competent evidence sufficient to raise a genuine issue of material fact as to each element of its purported breach of contract claim. *See 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 such evidence is presented does the court need to proceed to the key balancing factor. *Id.* at 976.

Application of this four-part 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 truly have been harmed by actionable speech and have made an adequate pre-litigation investigation into the facts supporting their claims should have little difficulty crafting subpoenas that can survive the required scrutiny.

C. The Lower Court Erred By Failing To Sufficiently Protect The Right To Speak Anonymously, And It Does Not Appear That Fuller Satisfied The Heightened Standard Proposed By Amici

At the outset, the lower court devalued the important constitutional rights at issue by characterizing the issue before the court as a mere discovery matter, rather than one centrally implicating the fundamental right of anonymous free speech. *See H.B. Fuller*

Company, No. 1-05-CV-053609, slip op. at 1 (Cal. Super. Ct. Unrep. Feb. 10, 2007) ("This motion is about discovery ...."); *see also id.*, slip op. at 5 ("However, calling this a speech case misses the mark"). From this flawed premise, the lower court proceeded to place the burden of persuasion not on the proponent seeking to pierce the constitutional rights of the anonymous poster but on the individual seeking to vindicate these important rights. *See id.* ("John Doe has the burden of persuading this Court that Plaintiff is not entitled to take his deposition."). By placing the onus on Doe, the lower court failed to apply the requirement properly articulated in *Highfields* – that *the plaintiff* provide a "real evidentiary basis for believing that the defendant has engaged in wrongful conduct...." *Highfields*, 385 F. Supp. 2d at 975. Additionally, the court appears to have given insufficient weight to Doe's interests in conducting the necessarily strict balancing test set forth in *Highfields* and advocated by Amici.

As a preliminary matter, the lower court found the issue of notice to be moot given Doe's appearance, but it did not require a showing as to the existence of reasonable alternative means for discovering the source of the alleged breach of confidentiality. Conceivably, Fuller could have ascertained the source of the alleged leak through a review of its own internal communication systems before serving an out-of-state subpoena on Yahoo! Such reasonable steps can serve to prevent unnecessary harm to a Doe's First Amendment interests and thus should have been explored by the lower court before proceeding on the merits.

As to the threshold viability prong of *Highfields*, the lower court appeared to rely primarily on the timing of the post following the Town Hall meeting. In *Dendrite*, the

court rejected the plaintiff's argument that it should infer essential facts based on coincidental timing alone. 775 A.2d at 769. In that case, the plaintiff submitted that the defendant's anonymous, allegedly defamatory postings coincided with a drop in Dendrite's stock price, and argued that the coincidental timing provided sufficient evidence of the harm element of plaintiff's *prima facia* case. *Id.* The *Dendrite* court affirmed the lower court's refusal to "take the leap to linking messages posted on an Internet message board regarding individual opinions, albeit incorrect opinions, to a decrease in stock prices *without something more concrete*." *Id.*

While Amici are not privy to the entire record in this action, from the lower court's order and the public record there does not appear to be much evidence beyond the circumstantial timing of the postings. For example, Fuller did not specify what confidential information was announced at the Town Hall meeting or which assertions in Doe's postings are allegedly confidential. *See H.B. Fuller Company*, No. 1-05-CV-053609, slip op. at 3 (Cal. Super. Ct. Unrep. Feb. 10, 2007) ("Neither the specific nature of the confidential material nor the postings themselves are provided to this Court."). Doe, on the other hand, provided evidence in his declaration that the information he posted was not confidential. *Id.*, slip op. at 4 ("Defendant declares anonymously . . . that he received the information he posted from Plaintiff's competitors.") Though the lower court stated that it considered Doe's declaration, it appeared to have given more weight to Fuller's assertions on this aspect of its cause of action than to Doe's evidence. *Id.*, slip op. at 5.

Additionally, it does not appear that Fuller presented evidence that Doe was a Fuller employee at the time of the Town Hall meeting or that Doe executed a confidentiality agreement with Fuller. Conversely, Doe has denied Fuller's allegations of his employment with Fuller and its subsidiaries at the time of the Town Hall meeting, as well as Fuller's allegations that he was present at the Town Hall meeting. *Id.*, slip op. at 4 ("Defendant declares anonymously that he is not an employee of Plaintiff, nor an employee at the time of the meeting . . . ."); *see also id.*, slip. op. at 2 (Declaration of Doe's lawyer Daniel Taber to same effect).

Based on the preceding, it does not appear that the lower court required strict adherence to *Highfields'* threshold viability test.

Only if Fuller met this strict test need the Court review the lower court's application of the critical balancing prong set forth in *Highfields* and advocated by Amici. *See Highfields*, 385 F. Supp. 2d at 976 ("The court proceeds to the second component of the test if, but only if, the plaintiff makes an evidentiary showing sufficient to satisfy the court in the first component of the test."). However, if no more was shown than that available on the public record, the scales necessarily tip in favor of protecting Doe's First Amendment right to speak anonymously and against Fuller's interest in redressing the alleged harm caused by Doe's allegedly confidential disclosure. Amici recognize the value of Fuller's confidential information and agree that defendants such as Doe should not be permitted to use the First Amendment as a shield to engage in actionable speech and thereby cause great harm to companies like Fuller by exposing their confidential information in breach of an agreement with the company. However, without a stronger

evidentiary showing than that set forth on the public record, it cannot be said that the conduct Fuller attributes to Doe likely caused it any real harm, let alone "serious wrongs." *Highfields*, 976385 F. Supp. 2d at 976.

In summary, the key protections that should be afforded anonymous posters and advocated by Amici appear absent on this record.

III. CONCLUSION

Because the lower court failed to recognize that this case implicates the fundamental First Amendment right of free speech, inaccurately allocated the burden and applied standards insufficiently protective of Doe's free speech interests, this Court should reverse the decision below and, in doing so, adopt the four-part test advocated by Amici.

Dated this 2nd day of May, 2007.

Respectfully submitted,

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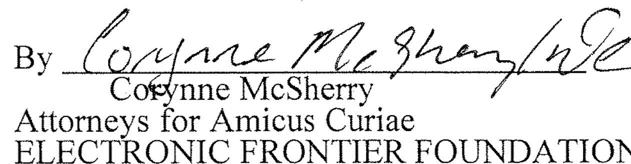
By 
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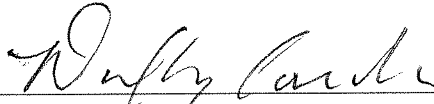
CERTIFICATE OF COMPLIANCE

I, Duffy Carolan, counsel for Amicus Curiae CALIFORNIA FIRST AMENDMENT COALITION in the instant matter, *H.B. Fuller Company v. John Doe, aka "LASHWR45" on Yahoo!*, Case No. H030099, hereby certify that the foregoing document was prepared pursuant to and in compliance with California Rule of Court Section 8.204(c)(1). This brief contains a total of 6,035 words and was formatted in Times New Roman, 13-point typeface.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: May 2, 2007

Respectfully submitted,



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Proof of Service

I, Dann R. Rhone, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533.

I caused to be served the following document:

BRIEF OF AMICUS CURIAE (CALIFORNIA FIRST AMENDMENT COALITION, ELECTRONIC FRONTIER FOUNDATION) IN SUPPORT OF APPELLANT

I caused the above document to be served on each person on the attached list by the following means:

☑ **I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on May 2, 2007, following the ordinary business practice.**
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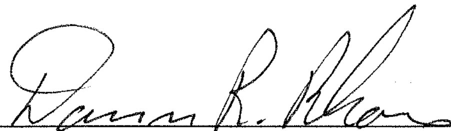

Dann R. Rhone

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[M]	**Clerk of the Court** **Supreme Court of California** **350 McAllister Street** **San Francisco, CA 94102-4797**	**California Supreme Court** **(4 copies)**