

1 PAUL ALAN LEVY, *pro hac vice* pending  
Email: plevy@citizen.org  
2 Public Citizen Litigation Group  
1600 20th Street, NW  
3 Washington, DC 20009  
Telephone: 202/588-1000  
4 Facsimile: 202/588-7795

5 ANN BRICK (No. 65296)  
American Civil Liberties Union Foundation  
6 of Northern California, Inc.  
Email: abrick@aclunc.org  
7 39 Drumm Street  
San Francisco, California 94111  
8 Telephone: 415/621-2493  
Facsimile: 415/255-8437

9 Attorneys for Movant

10 UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 PARKMERCED INVESTORS PROPERTIES )  
LLC, *et al.*, )

14 Plaintiffs, )

15 v. )

16 DOES 1-18, INCLUSIVE )

17 Defendants. )

No. CV-0800434-MEJ

**MOTION FOR PROTECTIVE  
ORDER AND TO STRIKE AND  
SUPPORTING MEMORANDUM  
OF POINTS AND AUTHORITIES**  
Fed R. Civ. P. 26(c), C.C.P. § 425.16

Date: January 15, 2009  
Time: 10 AM  
Place: Courtroom B, 15th floor  
Judge: James

19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

Table of Authorities ..... iii

NOTICE OF PROPOSED MOTION AND MOTION ..... 1

STATEMENT OF THE CASE ..... 2

    A. Factual Background ..... 2

    B. Proceedings to Date ..... 4

SUMMARY OF ARGUMENT ..... 5

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT WAS SERVED BEFORE THE TIME PERMITTED FOR COMMENCING DISCOVERY. .... 8

II. THE FIRST AMENDMENT BARS THE DISCOVERY SOUGHT. .... 8

    A. The First Amendment Protects Against the Compelled Identification of Anonymous Internet Speakers. .... 8

    B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard for the Identification of John Doe Defendants. .... 11

    C. Plaintiffs Have Not Followed The Steps Required Before Identification of John Doe Speakers May Be Ordered in This Case. .... 15

        1. Require Notice of the Threat to Anonymity and an Opportunity to Defend It ..... 15

        2. Demand Specificity Concerning the Statements ..... 16

        3. Review the Facial Validity of the Complaint After the Statements Are Specified ..... 17

        4. Require an Evidentiary Basis for the Claims ..... 19

        5. Balance the Equities ..... 22

III. THE STATE-LAW COUNTS IN THE COMPLAINT SHOULD BE STRICKEN UNDER THE SLAPP STATUTE. .... 24

Conclusion ..... 25

**TABLE OF AUTHORITIES**

**2 CASES**

3 *Alvis Coatings v. Doe*,  
 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) ..... 13

4 *Anti-Monopoly v. General Mills Fun Group*,  
 5 611 F.2d 296 (9th Cir. 1979) ..... 17

6 *Asay v. Hallmark Cards*,  
 594 F.2d 692 (8th Cir. 1979) ..... 16

7 *Bates v. City of Little Rock*,  
 8 361 U.S. 516 (1960) ..... 10

9 *Best Western Int'l v. Doe*,  
 2006 WL 2091695 (D. Ariz. July 25, 2006) ..... 13

10 *Blatty v. New York Times Co.*,  
 11 42 Cal. 3d 1033 (1986) ..... 18

12 *Braun v. Chronicle Publishing Co.*,  
 52 Cal. App. 4th 1036 (1997) ..... 23

13 *Bruno v. Stillman*,  
 14 633 F.2d 583 (1st Cir. 1980) ..... 22

15 *Buckley v. American Constitutional Law Foundation*,  
 525 U.S. 182 (1999) ..... 8

16 *Carey v. Hume*,  
 17 492 F.2d 631 (D.C. Cir. 1974) ..... 11

18 *Carver v. Bonds*,  
 135 Cal. App. 4th 328 (2005) ..... 18

19 *Cervantes v. Time*,  
 20 464 F.2d 986 (8th Cir. 1972) ..... 11, 20

21 *Columbia Insurance Co. v. Seescandy.com*,  
 185 F.R.D. 573 (N.D. Cal. 1999) ..... 14, 15

22 *Damon v. Ocean Hills Journalism Club*,  
 23 85 Cal. App. 4th 468 (2000) ..... 24

24 *Dendrite v. Doe*,  
 775 A.2d 756 (N.J. Super. App. Div. 2001) ..... 11, 12, 13, 15, 22

25 *Doe v. 2theMart.com*,  
 26 140 F. Supp. 2d 1088 (W.D.Wash. 2001) ..... 11

1 *Doe v. Cahill*,  
884 A.2d 451 (Del. 2005) ..... 9, 13

2 *In re Does 1-10*,  
242 S.W.3d 805 (Tex.App.-Texarkana 2007) ..... 13

3 *Dowling v. Zimmerman*,  
85 Cal. App. 4th 1400 (2001) ..... 24

4

5 *Ealy v. Littlejohn*,  
560 F.2d 219 (5th Cir. 1978) ..... 10

6 *Elrod v. Burns*,  
427 U.S. 347 (1976) ..... 23

7

8 *FEC v. Florida for Kennedy Committee*,  
681 F.2d 1281 (11th Cir. 1982) ..... 10

9 *Gertz v. Robert Welch, Inc.*,  
418 U.S. 323 (1990) ..... 18

10

11 *Gilbert v. Sykes*,  
147 Cal. App. 4th 13 (2007) ..... 16

12 *Global Telemedia International v. Doe 1*,  
132 F. Supp. 2d 1261 (C.D. Cal. 2001) ..... 21

13

14 *Highfields Capital Management v. Doe*,  
385 F. Supp. 2d 969 (N.D. Cal. 2005) ..... 9, 13, 22

15 *Hustler Magazine v. Falwell*,  
485 U.S. 46 (1988) ..... 18

16

17 *In re Baxter*,  
2001 WL 34806203 (W.D. La. Dec. 20, 2001) ..... 13

18 *Jack Russell Terrier Network v. American Kennel Club*,  
407 F.3d 1027 (9th Cir. 2005) ..... 20

19

20 *Kids Against Pollution v. California Dental Association*,  
108 Cal. App. 4th 1003 (2003) ..... 24

21 *Krinsky v. Doe 6*,  
159 Cal. App. 4th 1154 ( 2008) ..... 9, 13, 21

22

23 *L.S. Heath & Son v. AT&T Information System*,  
9 F.3d 561 (7th Cir.1993) ..... 21

24 *Lee v. Department of Justice*,  
413 F.3d 53 (D.C. Cir. 2005) ..... 11

25

26 *Ludwig v. Superior Court*  
37 Cal. App. 4th 8 (1995) ..... 24

27

1 *McIntyre v. Ohio Elections Committee*,  
514 U.S. 334 (1995) ..... 8, 10

2 *McMann v. Doe*,  
460 F. Supp. 2d 259 (D. Mass. 2006) ..... 14

3 *Melvin v. Doe*,  
49 Pa. D. & C. 4th 449 (2000) ..... 13

4 *Melvin v. Doe*,  
836 A.2d 42 (Pa. 2003) ..... 9, 13

5 *Miami Herald Public Co. v. Tornillo*,  
418 U.S. 241 (1974) ..... 3, 4, 5

6 *Miller v. Transamerican Press*,  
621 F.2d 721 (5th Cir. 1980) ..... 11

7 *Missouri ex rel. Classic III v. Ely*,  
954 S.W.2d 650 (Mo.App. 1997) ..... 21

8 *Mobilisa v. Doe*,  
170 P.3d 712 (Ariz. App. Div. 1 2007) ..... 13, 22

9 *NAACP v. Alabama*,  
357 U.S. 449 (1958) ..... 10

10 *Navellier v. Sletten*,  
29 Cal. 4th 82 (2002) ..... 24

11 *New York Times Co. v. Sullivan*,  
376 U.S. 254 (1964) ..... 10

12 *Oja v. Army Corps of Engineers*,  
440 F.3d 1122 (9th Cir. 2006) ..... 18

13 *Original Appalachian Artworks v. Toy Loft*,  
684 F.2d 821 (11th Cir. 1982) ..... 17

14 *In re Petroleum Prod. Antitrust Litigation*,  
680 F.2d 5 (2d Cir. 1982) ..... 20, 22

15 *Procter & Gamble Co. v. Amway Corp.*,  
242 F.3d 539 (5th Cir. 2001) ..... 17

16 *Rancho Publications v. Superior Court*,  
68 Cal. App. 4th 1538 (1999) ..... 8

17 *Reno v. ACLU*,  
521 U.S. 844 (1997) ..... 2, 9

18 *Richards of Rockford v. PGE*,  
71 F.R.D. 388 (N.D. Cal. 1976) ..... 20

19

20

21

22

23

24

25

26

27

28

1 *Rocker Mgmt. v. Does*,  
2003 WL 22149380 (N.D. Cal. May 29, 2003) ..... 14

2 *Shelley v. Kraemer*,  
334 U.S. 1 (1948) ..... 10

3 *Shoen v. Shoen*,  
4 5 F.3d 1289 (9th Cir. 1993) ..... 11

5 *Silicon Knights v. Crystal Dynamics*,  
983 F. Supp. 1303 (N.D.Cal. 1997) ..... 16

6 *Smith v. Chanel, Inc.*,  
7 402 F.2d 562 (9th Cir. 1968) ..... 17

8 *Sony Music Entertainment v. Does 1-40*,  
326 F. Supp. 2d 556 (S.D.N.Y. 2004) ..... 13

9 *Southwell v. Southern Poverty Law Center*,  
10 949 F. Supp. 1303 (W.D. Mich. 1996) ..... 22

11 *Stanfield v. Osborne Industrial*,  
52 F.3d 867 (10th Cir. 1995) ..... 20

12 *1-800-Contacts v. Steinberg*,  
13 107 Cal. App. 4th 568 (2003) ..... 24

14 *Swiger v. Allegheny Energy*,  
2007 WL 442383 (E.D. Pa., Feb. 7, 2007),  
15 *aff'd* 540 F.3d 179 (3d Cir. 2008) ..... 19

16 *Talley v. California*,  
362 U.S. 60 (1960) ..... 8

17 *Tuchscher Development Enterprises v. San Diego Unified Port District*,  
18 106 Cal. App. 4th 1219 (2003) ..... 24

19 *United States v. Lockheed Missiles & Space Co.*,  
171 F.3d 1208 (9th Cir.1999) ..... 23

20 *Watchtower Bible & Tract Society of New York v. Village of Stratton*,  
21 536 U.S. 150 (2002) ..... 8

22 *Zerilli v. Smith*,  
656 F.2d 705 (D.C. Cir. 1981) ..... 22

23 **CONSTITUTION, STATUTES AND RULES**

24 United States Constitution, First Amendment ..... *passim*

25 28 U.S.C. § 1367 ..... 5

26

27

28

	Lanham Act	
1	15 U.S.C. §§ 1051 <i>et seq.</i> . . . . .	4, 7
2	Section 43(a), 15 U.S.C. § 1125(a) . . . . .	4, 5, 7
3	Section 43(a)(1), 15 U.S.C. § 1125(a)(1) . . . . .	17, 18
	Section 43(a)(2), 15 U.S.C. § 1125(a) . . . . .	17
4	California Code of Civil Procedure	
5	Section 340(c) . . . . .	19
6	Section 425.16 . . . . .	1
7	Section 425.16(b)(1) . . . . .	23
	Section 425.16(e) . . . . .	24
8	Federal Rules of Civil Procedure	
9	Rule 26(d) . . . . .	8
	Rule 26(f) . . . . .	1, 5, 7, 8
10	<b>MISCELLANEOUS</b>	
11	Eisenhofer & Liebesman, <i>Caught by the Net</i> ,	
12	10 Business Law Today No. 1 (Sept./Oct.2000) . . . . .	20
13	Furman, <i>Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John</i>	
14	<i>Does as Strategic Lawsuits Against Public Participation</i> ,	
	25 Seattle U.L.Rev. 213 (2001) . . . . .	12
15	Lessig, <i>The Law of the Horse</i> ,	
	113 Harv. L. Rev. 501, 504-505 (1999) . . . . .	9
16	Lidsky & Cotter, <i>Authorship, Audiences and Anonymous Speech</i> ,	
17	82 Notre Dame L. Rev.1537 (2007) . . . . .	12
18	O'Brien, <i>Putting a Face to a Screen Name: The First Amendment Implications of Compelling</i>	
19	<i>ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases</i> ,	
	70 Fordham L. Rev. 2745 (2002) . . . . .	12
20	Reder & O'Brien, <i>Corporate Cybersmear: Employers File John Doe Defamation Lawsuits</i>	
21	<i>Seeking the Identity of Anonymous Employee Internet Posters</i> ,	
	8 Mich.Telecomm. & Tech. L. Rev. 195 (2001) . . . . .	12
22	Spencer, <i>Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and</i>	
23	<i>Accountability in Cyberspace</i> ,	
	19 J. Marshall J. Computer & Info. L. 493 (2001) . . . . .	12
24	Thompson, <i>On the Net, in the Dark</i> ,	
	California Law Week, Volume 1, No. 9 (1999) . . . . .	19
25	Werthammer, <i>RNN Sues Yahoo Over Negative Web Site</i> ,	
26	Daily Freeman, November 21, 2000, <a href="http://www.zwire.com/site/news.cfm?newsid=1098427&amp;BRD=1769&amp;PAG=461&amp;dept_id=4969&amp;rfti=8">www.zwire.com/site/news.cfm?</a>	
27	<a href="http://www.zwire.com/site/news.cfm?newsid=1098427&amp;BRD=1769&amp;PAG=461&amp;dept_id=4969&amp;rfti=8">newsid=1098427&amp;BRD=1769&amp;PAG=461&amp;dept_id=4969&amp;rfti=8</a> . . . . .	20

**NOTICE OF MOTION AND MOTION**

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 Please take notice that, on Thursday, January 15, at 10 AM, or as soon thereafter as the matter may  
3 be heard by this Court, located at 450 Golden Gate Avenue, San Francisco, California, John Doe  
4 will and hereby moves the Court,, pursuant to Rule 26 of the Federal Rules of Civil Procedure, for  
5 a protective order barring the enforcement of plaintiffs’ subpoena to ApartmentRatings.com  
6 seeking to identify anonymous Internet posters. The subpoena, which is Exhibit A to the Levy  
7 Affidavit, seeks information subject to the qualified privilege to speak anonymously Doe also  
8 moves under section 425.16 of the California Code of Civil Procedure to strike the complaint on  
9 which that subpoena is predicated because it is addressed to the exercise of the right of free speech  
10 in connection with a public issue and plaintiffs have not and cannot show a probability that they  
11 will prevail on their claims.

12 This motion seeks the following relief — a protective order quashing the plaintiffs’  
13 subpoena to identify persons criticizing the plaintiffs on the ApartmentRatings.com message  
14 boards, and striking the state-law claims.

15 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
16 **MOTION FOR PROTECTIVE ORDER AND SPECIAL MOTION TO STRIKE**

17 This case involves tenants who posted comments about their apartment buildings on an  
18 online ratings forum, ApartmentRatings.com. Without showing any basis to believe that they have  
19 claims within federal court jurisdiction, and without permission to conduct discovery before the  
20 Rule 26(f) conference, plaintiffs issued a subpoena to the host of the rating site, seeking to identify  
21 several anonymous speakers. Under well-established law, courts do not order identification of  
22 anonymous Internet speakers, even when the speakers are named as defendants in a lawsuit, unless  
23 plaintiffs can show good reason to believe that the suit has a reasonable probability of success and  
24 thus that the need for disclosure outweighs the First Amendment right to speak anonymously. Doe  
25 is therefore entitled to a protective order barring enforcement of the subpoena. Indeed, as we show  
26 in the course of our argument, the Court lacks subject matter jurisdiction, and the state law counts  
27 in the complaint should be stricken as a SLAPP (Strategic Lawsuit Against Public Participation).



STATEMENT OF THE CASE

1 **A. Factual Background**

2 1. The Internet is a democratic institution in the fullest sense. It serves as the modern  
3 equivalent of Speakers' Corner in London's Hyde Park, where ordinary people may voice their  
4 opinions, however silly, profane, or brilliant, to all who choose to read them. As the Supreme  
5 Court explained in *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997), "From the publisher's point of  
6 view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide  
7 audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of chat  
8 rooms, any person with a phone line can become a town crier with a voice that resonates farther  
9 than it could from any soapbox. Through the use of Web pages, . . . the same individual can  
10 become a pamphleteer." The Court held, therefore, that full First Amendment protection applies  
11 to speech on the Internet. *Id.*

12 Knowing that people have personal interests in news developments, and that people love to  
13 share their views with anyone who will listen, many companies have organized outlets for the  
14 expression of opinions. Yahoo!, for example, has messages boards about every publicly traded  
15 company, and Google hosts Blogspot, where members of the public may create their own blogs  
16 and invite comment from the world, and YouTube, which allows the public to post their own  
17 videos and to comment on others' videos. ApartmentRatings.com is a message board that invites  
18 discussion about residential apartment buildings in various locations throughout the United States.

19 Those who post messages generally do so under pseudonyms – similar to the old system of  
20 truck drivers using "handles" when they speak on their CB's. Nothing prevents posters from using  
21 real names, but, as inspection of the message board at issue in this case will reveal, most people  
22 choose nicknames. These monikers protect the writer's identity from those who disagree with him  
23 or her, and they encourage the uninhibited exchange of ideas and opinions. Indeed, every message  
24 board has regular posters who persistently complain about companies or individuals under  
25 discussion, others who persistently praise them, and others whose opinions vary between praise  
26 and criticism. Such exchanges are often very heated, and they are sometimes filled with invective  
27 and insult. Most, if not everything, that is said on message boards is taken with a grain of salt.

1 Many message boards have a significant feature that makes them very different from  
2 almost any other form of published expression. Subject to requirements of registration and  
3 moderation, any member of the public can use a message board to express his point of view; a  
4 person who disagrees with something that is said on a message board for any reason – including  
5 the belief that a statement contains false or misleading information – can respond to those  
6 statements immediately at no cost, and that response can have the same prominence as the  
7 offending message. A message board is thus unlike a newspaper, which at best selects criticisms  
8 that it publishes, and often refuses to publish any contrary views. *Miami Herald Pub. Co. v.*  
9 *Tornillo*, 418 U.S. 241 (1974). By contrast, on most message boards companies can reply  
10 immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly,  
11 persuading the audience that they are right and their critics are wrong. Because many people  
12 regularly revisit message boards about a particular topic, a response is likely to be seen by much  
13 the same audience as those who saw the original criticism; hence the response reaches many, if not  
14 all, of the original readers. In this way, the Internet is an ideal proving ground for the proposition  
15 that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution  
16 of disagreements about the truth of disputed propositions of fact and opinion.

17 2. Plaintiffs Parkmerced Investors Properties LLC and Stellar Larkspur Partners LLC are  
18 Delaware limited liability companies that own properties in San Francisco and Larkspur,  
19 California, which include, respectively, more than 3000 and more than 300 residential units. Since  
20 2001, comments have been posted on ApartmentRatings.com about these two properties,  
21 addressing such issues as construction noise, the degree of upkeep of their buildings, rising rents  
22 and other expenses, as well rapacious management companies. Levy Affidavit ¶¶ 4-5, Exhibits B,  
23 C. The comments range from the very positive to the very negative.

24 Movant Doe is a current tenant at Larkspur. See Levy Affidavit ¶ 7 and Exhibit E. In  
25 response to a statement posted about a construction project that had begun at the Larkspur  
26 apartment complex, which allegedly was producing unpleasant noise, one tenant posted a  
27  
28

1 comment stating that utility bills had not gone up very far, and movant John Doe posted the  
2 following comment on January 22, 2008, using the moniker “Anonymous”<sup>1/</sup>:

3 Yes, darling, they did. If you look at your first double bill it represents 55 days. Do  
4 the math. In our case, our water/trash bill was \$37-42/month. It is now \$65/month;  
either prorate your double bill or look at the new single monthly bill; although  
many residents haven’t even received it yet.

5 See Exhibit A, attached to Levy Affidavit.

6 It is this posting that is the basis for the subpoena seeking movant’s identity.

7 So far as appears on ApartmentRatings.com, plaintiffs made no effort to explain these  
8 increases. Indeed, although the web site gives apartment managers an opportunity to respond to  
9 comments about their properties, *id.* Exhibit D, there do not appear to be any responses posted  
10 from the managers of either of plaintiffs’ properties.

11 **B. Proceedings to Date**

12 On September 23, 2008, plaintiffs filed this action, claiming that false and misleading  
13 statements had been made about them on ApartmentRatings.com. The complaint enumerates  
14 eighteen different posts, which are quoted in the complaint, that were posted by “one or more  
15 Defendants,” and that are allegedly false and misleading. Complaint ¶¶ 12-24, 26-30. The  
16 complaint further alleges that the defendants “either knew that the statements were false or  
17 misleading, or were reckless and indifferent as to whether they were false and misleading.” *Id.*  
18 The posting by movant Doe was not among the allegedly actionable posts that were quoted in the  
19 complaint. In addition to these quoted statements, the complaint alleges more generally that  
20 “defendants may also be responsible for posting or publishing additional false, misleading and  
21 defamatory statements that are currently unknown to Plaintiffs.” *Id.* ¶¶ 23, 31.

22 Plaintiffs do not claim diversity, but rather assert that they are bringing a Lanham Act  
23 claim under section 43(a) of the Lanham Act. Plaintiffs allege, solely on information and belief,  
24 that

25 Defendants include employees, agents or representatives of competing residential  
26 apartment communities in the Bay Area, parties or their agents adverse to the

---

27 <sup>1/</sup> As undersigned counsel generally do in defending Doe cases, defendant Doe is identified here  
28 generically by female pronouns without any implication of her actual gender.

1 Apartments in other proceedings, other persons who are not current or former  
tenants of the Apartments, and/or persons misrepresenting their identities.

2 *Id.* ¶ 11.

3 Plaintiffs allege that the actionable postings constitute “false or misleading descriptions of fact and  
4 false or misleading representations of fact under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).”

5 *Id.* ¶ 33. Additional counts allege state law claims for interference with contract and libel, which  
6 are allegedly within this Court’s supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

7 Without waiting for the Rule 26(f) conference, and without filing any motion for leave to  
8 take discovery before the Rule 26(f) conference, plaintiffs issued a subpoena dated October 3,  
9 2008, demanding that ApartmentRatings.com produce documents identifying the users responsible  
10 for posting several comments, including but not limited to the eighteen comments that were quoted  
11 in the complaint. Exhibit A. Pursuant to its standard procedure, ApartmentRatings.com attempted  
12 to notify its customers about the attempt to obtain their identities, and identified for undersigned  
13 counsel the specific post for which Doe’s identity is sought. *Id.* Undersigned counsel conferred  
14 with Terence Ross, Esquire, counsel for plaintiffs, and asked him to withdraw the subpoena and  
15 dismiss the complaint to avoid the need for this motion for a protective order and to strike. Levy  
16 Aff. ¶ 8. Because Mr. Ross declined to do so, *id.*, Doe now seeks a protective order and moves to  
17 strike the state-law claims under the anti-SLAPP statute, Cal. Code Civ. P. § 425.16.

18 **SUMMARY OF ARGUMENT**

19 The Internet has the potential to be an equalizing force within our democracy, giving  
20 ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public  
21 concern to all who will listen. Full First Amendment protection applies to communications on the  
22 Internet, and longstanding precedent recognizes that speakers have a First Amendment right to  
23 communicate anonymously, so long as they do not violate the law in doing so. Thus, when a  
24 complaint is brought against an anonymous speaker, the courts must balance the right to obtain  
25 redress from the perpetrators of civil wrongs against the right of those who have done no wrong to  
26 remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff

1 seeks an order compelling disclosure of a speaker's identity, which, if successful, would  
2 irreparably destroy the defendant's First Amendment right to remain anonymous.

3 Suits against anonymous speakers are unlike most tort cases, where identifying an  
4 unknown defendant at the outset of the case is merely the first step toward establishing liability for  
5 damages. In a suit against an anonymous speaker, identifying the speaker gives an important  
6 measure of relief to the plaintiff because it enables it to employ extra-judicial self-help measures to  
7 counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker,  
8 who not only loses the right to speak anonymously, but may be exposed to efforts to restrain or  
9 oppose her speech. For example, an employer might discharge a whistleblower, a public official  
10 might use his powers to retaliate against the speaker, and a landlord might evict a complaining  
11 tenant and decline to provide a positive reference. Similar cases across the country, and advice  
12 openly given by lawyers to potential clients, demonstrate that access to identifying information to  
13 enable extrajudicial action may be the only reason for many such lawsuits.

14 Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the  
15 cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our  
16 legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis,  
17 absent proof that the relief is justified because success is likely and the balance of hardships favors  
18 the relief. The challenge for the courts is to develop a test for the identification of anonymous  
19 speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too  
20 easy for a big company or a public figure to unmask critics simply by filing a complaint that  
21 manages, under liberal pleading standards, to state a claim for relief under some tort or contract  
22 theory.

23 This Court should embrace the developing consensus among courts that have considered  
24 this question – including federal and state courts in California – by relying on the general rule that  
25 only a compelling interest is sufficient to warrant infringement of the free speech right to remain  
26 anonymous. Specifically, when faced with a demand for discovery to identify an anonymous  
27 speaker, a court should (1) provide notice to the potential defendant and an opportunity to defend  
28 her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights;

1 (3) review the complaint to ensure that it states a cause of action based on each statement and  
2 against each defendant; (4) require the plaintiff to produce evidence supporting each element of  
3 her claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being  
4 unable to proceed against the harm to the defendant from losing her right to remain anonymous, in  
5 light of the strength of the plaintiff's evidence of wrongdoing. The court thus ensures that  
6 plaintiffs do not obtain important relief – identifying anonymous critics – and that defendants are  
7 not denied important First Amendment rights, unless plaintiffs have a realistic chance of success  
8 on the merits.

9 Meeting these criteria can require time and effort on plaintiffs' part and may delay their  
10 quest for redress. However, everything that plaintiffs must do to meet this test, they must also do  
11 to prevail on the merits. So long as the test does not demand more information than plaintiffs  
12 would be reasonably able to provide shortly after filing the complaint, the standard does not  
13 unfairly prevent plaintiffs with legitimate grievances from achieving redress against anonymous  
14 speakers.

15 Moreover, most cases of this kind primarily involve demands for monetary relief. Only in  
16 the rare case will a plaintiff have a sound argument for being granted a preliminary injunction,  
17 given the nearly insurmountable rule against prior restraints of speech. Accordingly, although  
18 applying this standard may delay service of the complaint, it will not ordinarily prejudice the  
19 plaintiff. On the other hand, because, once the defendant is identified, her right to speak  
20 anonymously has been irretrievably lost; this fact counsels in favor of caution and hence in favor  
21 of allowing sufficient time for the defendant to respond and requiring a sufficient showing on the  
22 part of the plaintiff.

23 Here, plaintiffs come into federal court hoping that some of the complaining posters may  
24 turn out to be agents of competitors, thus justifying suit based on a Lanham Act theory, but this  
25 Court's discovery powers should not be invoked based simply on hope that the facts may establish  
26 subject matter jurisdiction. Here, in violation of the Federal Rules of Civil Procedure, plaintiffs  
27 issued a subpoena without waiting for the Rule 26(f) conference and without seeking leave of  
28 Court. Nor have plaintiffs presented the **evidence** of wrongdoing that the Court would have

1 required before granting leave to take such discovery. Accordingly, the Court should grant a  
2 protective order against enforcement of the subpoena and should also grant the special motion to  
3 strike the complaint.

4 **I. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT WAS SERVED BEFORE  
5 THE TIME PERMITTED FOR COMMENCING DISCOVERY.**

6 The subpoena should be quashed as premature. Rule 26(d) of the Federal Rules of Civil  
7 Procedure prohibits discovery “from any source before the parties have conferred as required by  
8 Rule 26(f).” Plaintiffs may argue that they cannot confer until they have identified the parties, but  
9 the Rules provide for that circumstance by allowing discovery “when authorized . . . by Court  
10 order.” But plaintiffs did not seek leave of Court. If they choose to seek such leave, the standards  
11 articulated in the remaining pages of this brief should be applied to deny such leave unless and  
12 until plaintiffs are able to make a proper showing of a legal and factual basis for discovery.

13 **II. THE FIRST AMENDMENT BARS THE DISCOVERY SOUGHT.**

14 **A. The First Amendment Protects Against the Compelled Identification of  
15 Anonymous Internet Speakers.**

16 The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract*  
17 *Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American*  
18 *Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*,  
19 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960); *Rancho Publications v. Superior*  
20 *Court*, 68 Cal. App.4th 1538, 1545, 1547, 1549 (1999). These cases celebrate the important role  
21 played by anonymous or pseudonymous writings over the course of history, from Shakespeare and  
22 Mark Twain to the authors of the Federalist Papers. The Supreme Court has stated:

23 [A]n author is generally free to decide whether or not to disclose his or her  
24 true identity. The decision in favor of anonymity may be motivated by fear  
25 of economic or official retaliation, by concern about social ostracism, or  
26 merely by a desire to preserve as much of one’s privacy as possible.  
Whatever the motivation may be, . . . the interest in having anonymous  
works enter the marketplace of ideas unquestionably outweighs any public  
interest in requiring disclosure as a condition of entry. Accordingly, an  
author’s decision to remain anonymous, like other decisions concerning  
omissions or additions to the content of a publication, is an aspect of the  
freedom of speech protected by the First Amendment.

\* \* \*

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

4 *McIntyre*, 514 U.S. at 341-342, 356.

5 These rights are fully applicable to speech on the Internet. The Internet is a public  
6 forum of preeminent importance because it places in the hands of any individual who  
7 wants to express his views the opportunity to reach other members of the public who are  
8 hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S.  
9 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate  
10 anonymously over the Internet. *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969  
11 (N.D. Cal. 2005); *Krinsky v. Doe 6*, 159 Cal. App.4th 1154 (2008); *Doe v. Cahill*, 884  
12 A.2d 451 (Del. 2005); *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003).

13 Internet speakers choose to speak anonymously for many reasons. They may wish  
14 to avoid having their views stereotyped according to their racial, ethnic or class  
15 characteristics, or their gender. They may be associated with an organization but want to  
16 express an opinion of their own, without running the risk that, despite the standard  
17 disclaimer against attribution of opinions to the group, readers will assume that the group  
18 feels the same way. They may want to say or imply things about themselves that they are  
19 unwilling to disclose otherwise. And they may wish to say things that might make other  
20 people angry and stir a desire for retaliation. Whatever the reason for wanting to speak  
21 anonymously, the impact of a rule that makes it too easy to remove the cloak of anonymity  
22 is to deprive the marketplace of ideas of valuable contributions, and potentially to bring  
23 unnecessary harm to the speakers themselves.

24 Moreover, at the same time that the Internet gives individuals the opportunity to  
25 speak anonymously, it creates an unparalleled capacity to monitor every speaker and to  
26 discover his or her identity. The technology of the Internet is such that any speaker who  
27 sends an e-mail or visits a website leaves behind an electronic footprint that, if saved by  
28 the recipient, provides the beginning of a path that can be followed back to the original  
sender. See Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus,



1 anybody with enough time, resources and interest, if coupled with the power to compel the  
2 disclosure of the information, can learn who is saying what to whom.

3 A court order, even when issued at the behest of a private party, constitutes state  
4 action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*,  
5 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has  
6 held that a court order to compel production of individuals' identities in a situation that  
7 would threaten the exercise of fundamental rights "is subject to the closest scrutiny."  
8 *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516,  
9 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may  
10 inevitably follow from varied forms of governmental action," such as compelling the  
11 production of names. *NAACP v. Alabama*, 357 U.S. at 461. First Amendment rights may  
12 also be curtailed by private retribution following such court-ordered disclosures. *Id.* at  
13 462-463; *Bates*, 361 U.S. at 524. As the Supreme Court has held, due process requires  
14 the showing of a "subordinating interest which is compelling" where, as here, compelled  
15 disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at  
16 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on  
17 the First Amendment right of anonymous speakers to remain anonymous, justification for  
18 an incursion on that right requires proof of a compelling interest, and beyond that, the  
19 restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections*  
20 *Comm.*, 514 U.S. 334, 347 (1995).

21 The courts have recognized the serious chilling effect that subpoenas to reveal the  
22 names of anonymous speakers can have on dissenters and the First Amendment interests  
23 that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681  
24 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 560 F.2d 219, 226-230 (5th Cir.  
25 1978). In a closely analogous area of law, the courts have evolved a standard for the  
26 compelled disclosure of the sources of libelous speech, recognizing a qualified privilege  
27 against disclosure of such otherwise anonymous sources. In those cases, courts apply a  
28 three-part test, under which the person seeking to identify the anonymous speaker has the

1 burden of showing that (1) the issue on which the material is sought is not just relevant to  
2 the action, but goes to the heart of his case; (2) disclosure of the source to prove the issue  
3 is “necessary” because the party seeking disclosure is likely to prevail on all the other  
4 issues in the case; and (3) the discovering party has exhausted all other means of proving  
5 this part of his case. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005);  
6 *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Miller v. Transamerican Press*, 621 F.2d  
7 721, 726 (5th Cir. 1980); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v.*  
8 *Time*, 464 F.2d 986 (8th Cir. 1972).

9 As one court stated, “If Internet users could be stripped of that anonymity by a civil  
10 subpoena enforced under the liberal rules of civil discovery, this would have a significant  
11 chilling effect on Internet communications and thus on basic First Amendment rights.”  
12 *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

13 **B. The Qualified Privilege for Anonymous Speech Supports a  
14 Five-Part Standard for the Identification of John Doe  
15 Defendants.**

16 In a number of recent cases, courts have drawn on the privilege against revealing  
17 sources in civil cases to enunciate a similar standard for protecting against the  
18 identification of anonymous Internet speakers.

19 The leading case is *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001),  
20 where a company sued four people who had written about it on a bulletin board  
21 maintained by Yahoo!. That court enunciated a five-part standard for cases involving  
22 subpoenas to identify anonymous Internet speakers, which we urge the Court to apply in  
23 this case:

24 We offer the following guidelines to trial courts when faced with an  
25 application by a plaintiff for expedited discovery seeking an order  
26 compelling an ISP to honor a subpoena and disclose the identity of  
27 anonymous Internet posters who are sued for allegedly violating the rights  
28 of individuals, corporations or businesses. The trial court must consider and  
decide those applications by striking 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.

1 We hold that when such an application is made, the trial court should first  
2 require the plaintiff to undertake efforts to notify the anonymous posters  
3 that they are the subject of a subpoena or application for an order of  
4 disclosure, and withhold action to afford the fictitiously-named defendants  
a reasonable opportunity to file and serve opposition to the application.  
These 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.

5 The court shall also require the plaintiff to identify and set forth the exact  
6 statements purportedly made by each anonymous poster that plaintiff  
alleges constitutes actionable speech.

7 The complaint and all information provided to the court should be carefully  
8 reviewed to determine whether plaintiff has set forth a prima facie cause of  
9 action against the fictitiously-named anonymous defendants. In addition to  
10 establishing that its action can withstand a motion to dismiss for failure to  
11 state a claim upon which relief can be granted pursuant to [New Jersey's  
12 rules], the plaintiff must produce sufficient evidence supporting each  
13 element of its cause of action, on a prima facie basis, prior to a court  
14 ordering the disclosure of the identity of the unnamed defendant.

15 Finally, assuming the court concludes that the plaintiff has presented a  
16 prima facie cause of action, the court must balance the defendant's First  
17 Amendment right of anonymous free speech against the strength of the  
18 prima facie case presented and the necessity for the disclosure of the  
19 anonymous defendant's identity to allow the plaintiff to properly proceed.

20 The application of these procedures and standards must be undertaken and  
21 analyzed on a case-by-case basis. The guiding principle is a result based on  
22 a meaningful analysis and a proper balancing of the equities and rights at  
23 issue.

24 *Dendrite v. Doe*, 775 A.2d at 760-761.<sup>2f</sup>

25 A somewhat less exacting standard requires the submission of evidence to support  
26 plaintiffs' claims, but not an explicit balancing of interests if the evidence is otherwise  
27 sufficient to support discovery. *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

---

28 <sup>2f</sup> *Dendrite* has received a favorable reception among commentators. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007); O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U.L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001).

1 All of the other appellate courts that have addressed the issue of subpoenas to  
2 identify anonymous Internet speakers, as well as several federal district courts, have  
3 adopted some variant of the *Dendrite* or *Cahill* standards. Several courts have expressly  
4 endorsed the *Dendrite* test, requiring notice and opportunity to respond, legally valid  
5 claims, evidence supporting those claims, and finally an explicit balancing of the reasons  
6 supporting disclosure and the reasons supporting continued anonymity. In *Highfields*  
7 *Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005), Judge Brazil required an  
8 evidentiary showing followed by express balancing of “the magnitude of the harms that  
9 would be caused to the competing interests,” and held that plaintiff’s trademark and  
10 defamation claims based on sardonic postings about plaintiff’s chief executive did not  
11 support discovery. *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007), involved a  
12 subpoena by a private company seeking to identify the sender of an anonymous email  
13 message who had allegedly hacked into the company’s computers to obtain information  
14 that was conveyed in the message. Directly following the *Dendrite* decision, and  
15 disagreeing with the Delaware Supreme Court’s rejection of the balancing stage, the court  
16 drew an analogy between an order requiring identification of an anonymous speaker and a  
17 preliminary injunction against speech, and called for plaintiff to present evidence  
18 sufficient to defeat a motion for summary judgment, followed by a balancing of the  
19 equities between the two sides. *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20,  
20 2001), similarly expressed a preference for the *Dendrite* approach, requiring a showing of  
21 reasonable possibility or probability of success.

22 Several courts have followed a *Cahill*-like standard, including the California Court  
23 of Appeal in *Krinsky v. Doe 6*, 159 Cal. App.4th 1154 (2008), which reversed a trial court  
24 decision allowing an executive to identify several online critics who allegedly defamed her  
25 by such references as “a management consisting of boobs, losers and crooks.” *Accord In*  
26 *re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007); *Melvin v. Doe*, 49 Pa. D&C  
27 4th 449 (2000), *rev’d on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003) (trial court  
28 ordered disclosure only after finding genuine issues of material fact requiring trial;

1 Pennsylvania Supreme Court expressly recognized the right to speak anonymously and  
2 sent the case back to address need to prove actual economic harm under Pennsylvania  
3 law). Among the federal decisions following *Cahill* are *Best Western Int'l v. Doe*, 2006  
4 WL 2091695 (D. Ariz. July 25, 2006) (court said it would follow a five-factor test drawn  
5 from *Cahill*, *Dendrite* and other cases); *Sony Music Entertainment v. Does 1-40*, 326 F.  
6 Supp.2d 556 (S.D.N.Y. 2004); *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec.  
7 2, 2004); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006).

8 A similar approach was used in *Columbia Insurance Co. v. Seescandy.com*, 185  
9 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants for registering  
10 Internet domain names that used the plaintiff's trademark. The court expressed concern  
11 about the possible chilling effect of such discovery (*id.* at 578):

12 People are permitted to interact pseudonymously and anonymously  
13 with each other so long as those acts are not in violation of the law. This  
14 ability to speak one's mind without the burden of the other party knowing  
15 all the facts about one's identity can foster open communication and robust  
debate . . . . 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 identities.

16 Accordingly, the court required the plaintiff to make a good faith effort to communicate  
17 with the anonymous defendants and give them notice that suit had been filed against them,  
18 thus providing them an opportunity to defend their anonymity. The court also compelled  
19 the plaintiff to demonstrate that it had viable claims against the defendants. *Id.* at 579.  
20 This demonstration included a review of the evidence in support of the plaintiff's  
21 trademark claims against the anonymous defendants. *Id.* at 580. *Cf. Rucker Mgmt. v.*  
22 *Does*, 2003 WL 22149380 (N.D. Cal. May 29, 2003) (following *Seescandy*, examining  
23 "totality of the circumstances" in ruling that it need go no further than to determine that  
24 the posts were opinion, not fact).

25 Although many of these cases set out slightly different standards, each weighs the  
26 plaintiff's interest in obtaining the name of a person that has allegedly violated its rights  
27 against the interests implicated by the potential violation of the First Amendment right to  
28

1 anonymity, thus ensuring that First Amendment rights are not trammled unnecessarily.  
2 Put another way, the qualified privilege to speak anonymously requires courts to review a  
3 would-be plaintiff's claims and the evidence supporting them to ensure that the plaintiff  
4 has a valid reason for piercing the speaker's anonymity.

5 **C. Plaintiffs Have Not Followed the Steps Required Before**  
6 **Identification of John Doe Speakers May Be Ordered in This**  
7 **Case.**

8 Courts should follow five steps in deciding whether to allow plaintiffs to compel  
9 the identification of anonymous Internet speakers. Because plaintiffs have not met these  
10 standards, they are not entitled to have their subpoena enforced.

11 **(1) Require Notice of the Threat to Anonymity and an**  
12 **Opportunity to Defend It**

13 When a court receives a request for permission to subpoena an anonymous Internet  
14 poster, it should require the **plaintiff** to notify the posters that they are the subject of a  
15 subpoena, and then withhold action for a reasonable period of time until the defendant has  
16 had time to retain counsel. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. at 579. In  
17 *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of  
18 application for discovery to identify anonymous critics. The notice identified the four  
19 screen names that were sought to be identified and provided information about the local  
20 bar referral service so that the individuals concerned could retain counsel to voice their  
21 objections, if any. The Appellate Division specifically approved this requirement. 342  
22 N.J.Super. at 141, 775 A.2d at 760.

23 Here, plaintiffs did nothing to notify the Does of the quest to identify them.  
24 Although ApartmentRatings.com sent email notice to its customers, review of the message  
25 boards reveals that some Does may have registered to post as long ago as 2001, and email  
26 addresses often change; thus there is no reason to be confident that all of the Does have  
27 received the email notification intended for them. The Court should require posting on the  
28 relevant message boards – and perhaps also posting of notices at the apartment buildings

1 in question – to ensure that all of the defendants have a fair opportunity to defend their  
2 right to remain anonymous.

3 **(2) Demand Specificity Concerning the Statements**

4 The qualified privilege to speak anonymously requires a court to review the  
5 plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each  
6 speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact  
7 statements by each anonymous speaker that are alleged to have violated his rights. Indeed,  
8 many states, and many federal courts, require that defamatory words be set forth verbatim  
9 in a complaint for defamation. *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir.  
10 1979). *See also Silicon Knights v. Crystal Dynamics*, 983 F. Supp. 1303 (N.D. Cal. 1997);  
11 *Gilbert v. Sykes*, 147 Cal. App.4th 13, 32 (2007) (allegedly defamatory words “must be  
12 specifically identified, if not pleaded verbatim, in the complaint”).

13 Here, plaintiffs have enumerated eighteen specific statements in their complaint.  
14 In addition, they have complained about other unspecified, possibly defamatory  
15 statements. Complaint ¶¶ 25, 31. The subpoena seeks to identify at least some anonymous  
16 speakers, including movant, whose statements were not specified in the complaint.  
17 Movant was able to identify the post that resulted in notification of the subpoena from  
18 ApartmentRatings.com only by inquiring of ApartmentRatings.com, which provided a  
19 copy of the subpoena and identified the comment with which Doe's account was  
20 associated. It is possible that movant's post may not even be an intended target of the  
21 subpoena, which seeks “the posting [singular] on or about January 22, 2008” in response  
22 to an earlier posting. Exh. A. ¶ 2(b). The complaint, ¶ 27, sets forth verbatim a different  
23 responsive post bearing that date, not Doe's response of the same date. Thus, movant's  
24 situation simply illustrates the need to require that the exact statements at issue be  
25 identified, that permission to take discovery be sought, and that careful consideration be  
26 given to what discovery to allow, if any. Plaintiffs have not satisfied this part of the test  
27 either.  
28

(3) **Review the Facial Validity of the Complaint After the Statements Are Specified**

1  
2 Third, the court should review the complaint to ensure that it states viable claims  
3 against each defendant. In this case, the complaint must be dismissed for several different  
4 reasons, some going to issues of jurisdiction and some to the merits of plaintiffs' claims.

5 Plaintiff allege that this Court has jurisdiction under the Lanham Act, but their  
6 Lanham Act allegations are deficient in several ways. They allege on "information and  
7 belief" that defendants "include" employees agents or representatives of competing  
8 residential apartment communities, and they purport to allege violations of section 43(a) of  
9 the Lanham Act in that defendants' statements allegedly constitute "false or misleading  
10 descriptions of fact."

11 The Court should make no mistake about what is at stake here: If this sort of vague  
12 allegation is sufficient to confer federal question jurisdiction, then any defamation claim  
13 could be filed in federal court regardless of whether there is diversity and regardless of  
14 whether the jurisdictional amount was satisfied. However, a plaintiff should not be  
15 entitled to bring a defamation claim in federal court merely by asserting, without any  
16 apparent basis, that some its critics may represent other commercial companies.

17 Moreover, a false description of fact is not actionable under section 43(a) unless it  
18 either is made about a trademarked name and is **either** likely to cause confusion about the  
19 source of the goods or services in question, section 43(a)(1), *Smith v. Chanel, Inc.*, 402  
20 F.2d 562 (9th Cir. 1968), **or** is made in "commercial advertising or promotion." Section  
21 43(a)(2). *Newcal Industries v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008).  
22 Plaintiffs make none of the required allegations here, hence their Lanham Act claim  
23 cannot be the basis for federal jurisdiction.

24 On reviewing the complaint, undersigned counsel had assumed that the reference  
25 to "competing residential apartment communities," ¶ 11, meant that plaintiffs intended to  
26 bring a false advertising claim, but that claim is not properly pleaded for two reasons.  
27 First, there is no allegation that the comments are "commercial advertising or promotion."  
28



1 Second, to bring a false advertising claim, there must be an allegation (and eventually  
2 proof) that the reason for making the statements is to sell rival goods or services, and not  
3 simply to criticize the plaintiff. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539,  
4 552-553 (5th Cir. 2001). In counsel's meet and confer, plaintiffs' counsel insisted that the  
5 complaint was intended to assert an infringement claim, Levy Aff. ¶ 8, but the "essential  
6 element" of any infringement claim under the Lanham Act is "that the alleged  
7 infringement by the defendant creates a likelihood of confusion on the part of consumers  
8 as to the source of the goods." *Original Appalachian Artworks v. Toy Loft*, 684 F.2d 821,  
9 831 (11th Cir. 1982). *See also Anti-Monopoly v. General Mills Fun Group*, 611 F.2d 296,  
10 301 (9th Cir. 1979) ("It is the source denoting function which trademark laws protect, and  
11 nothing more"). Plaintiffs do not even allege that they have trademark rights in the names,  
12 not to speak of alleging that there is an actionable likelihood of confusion under section  
13 43(a)(1). Indeed, plaintiffs could not credibly allege that any Internet user would visit the  
14 comment pages about Parkmerced or Larkspur Shores and believe that the highly critical  
15 comments on which plaintiffs have sued here were posted by the plaintiffs.

16 Plaintiffs' defamation claims are also problematic. First, expressions of opinion  
17 are not actionable for defamation, and the issue of whether a statement is opinion or fact is  
18 one for the Court to resolve as a matter of law. *Carver v. Bonds*, 135 Cal. App.4th 328,  
19 346 (2005). "Under the First Amendment there is no such thing as a false idea." *Gertz v.*  
20 *Robert Welch, Inc.*, 418 U.S. 323 (1990). The First Amendment protects against libel  
21 claims based on opinions that do not imply false statements of fact, or on loose, figurative  
22 or hyperbolic language, *Carver v. Bonds, supra*, and there is certainly a good deal of such  
23 language in the criticisms quoted in the complaint.<sup>3/</sup>

---

24  
25 <sup>3/</sup>

26 The fact that plaintiffs also allege interference with contract as well as defamation does not  
27 allow plaintiff to avoid the burden of pleading and proving the elements of a defamation claim.  
28 *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Blatty v. New York Times Co.*, 42 Cal.3d  
1033 (1986).

1 Finally, a few of the comments enumerated in the complaint were posted more than  
2 one year before the complaint was filed on September 23, 2008. The statute of limitations  
3 for defamation claims in California is one year, Section 340(c), Code of Civil Procedure,  
4 and even though those comments can still be viewed today, the single publication rule  
5 applies to Internet web sites. *Oja v. Army Corps of Engineers*, 440 F.3d 1122 (9th Cir.  
6 2006). Thus the statements alleged in ¶¶ 17, 18, 19 and 24 of the complaint cannot  
7 properly be the basis of a defamation claim, and the subpoena to identify those posters should  
8 be quashed.

#### 9 (4) Require an Evidentiary Basis for the Claims

10 No person should be subjected to compulsory identification through a court's  
11 subpoena power unless the plaintiff produces sufficient evidence supporting each element  
12 of its cause of action to show that it has a realistic chance of winning a lawsuit against that  
13 defendant. This requirement, which has been followed by every federal court and every  
14 state appellate court that has addressed the standard for identifying anonymous Internet  
15 speakers, *see* pages 10 to 14, *supra*, prevents a plaintiff from being able to identify his  
16 critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim  
17 that they need to identify the defendants simply to proceed with their case. However,  
18 relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward  
19 with **evidence** in support of his claims, and the Court should recognize that identification  
20 of an otherwise anonymous speaker is a major form of **relief** in cases like this. Requiring  
21 actual evidence to enforce a subpoena is particularly appropriate where the relief itself may  
22 undermine, and thus violate, the defendant's First Amendment right to speak  
23 anonymously.

24 Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics  
25 and then sought no further relief from the court, but simply retaliated against the critic out  
26 of court. *Swiger v. Allegheny Energy*, 2007 WL 442383 (E.D. Pa., Feb. 7, 2007), *aff'd*  
27 540 F.3d 179 (3d Cir. 2008); Thompson, *On the Net, in the Dark*, California Law Week,  
28 Volume 1, No. 9, at 16, 18 (1999). Some lawyers who bring cases like this one have

1 admitted that the mere identification of their clients' anonymous critics may be all that  
2 they desire to achieve through the lawsuit. *E.g.*, Werthammer, *RNN Sues Yahoo Over*  
3 *Negative Web Site*, Daily Freeman, November 21, 2000, [www.zwire.com/site/news.cfm?](http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfti=8)  
4 [newsid=1098427&BRD=1769&PAG=461&dept\\_id=4969&rfti=8](http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfti=8). One of the leading  
5 advocates of using discovery procedures to identify anonymous critics has urged corporate  
6 executives to use discovery first, and to decide whether to sue for libel only after the critics  
7 have been identified and contacted privately. Fischman, *Your Corporate Reputation*  
8 *Online*, [www.fhdlaw.com/html/corporate\\_reputation.htm](http://www.fhdlaw.com/html/corporate_reputation.htm); Fischman, *Protecting the Value*  
9 *of Your Goodwill from Online Assault*, [www.fhdlaw.com/html/bruce\\_article.htm](http://www.fhdlaw.com/html/bruce_article.htm).  
10 Lawyers who represent plaintiffs in these cases have also urged companies to bring suit,  
11 even if they do not intend to pursue the action to a conclusion, because “[t]he mere filing  
12 of the John Doe action will probably slow the postings.” Eisenhofer & Liebesman,  
13 *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers  
14 have similarly suggested that clients decide whether it is worth pursuing a lawsuit only  
15 after finding out who the defendant is. *Id.* Even the pendency of a subpoena may have the  
16 effect of deterring other members of the public from discussing the plaintiff.

17 The unanimous approach of courts that have reached the question, requiring  
18 submission of **evidence** supporting a prima facie case before anonymous Internet speakers  
19 may be identified, is consonant with a more general proposition adopted in cases involving  
20 the disclosure of anonymous sources — a party seeking discovery of information protected  
21 by the First Amendment must show that there is reason to believe that the information  
22 sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9  
23 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976).  
24 In effect, the plaintiff should be required to meet the summary judgment standard of  
25 creating genuine issues of material fact on all issues in the case, including issues with  
26 respect to which it needs to identify the anonymous speakers, before it is given the  
27 opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir.

1 1972). “Mere speculation and conjecture about the fruits of such examination will not  
2 suffice.” *Id.* at 994.

3 The Court’s subject matter jurisdiction depends on plaintiffs’ Lanham Act claims,  
4 which require a showing either of likelihood of confusion about source, or that false  
5 statements were made by **direct competitors** for the purpose of selling their own  
6 competing products. The Ninth Circuit and many other courts hold that standing to bring a  
7 false advertising claim is accorded only to companies whose products compete with the  
8 product of the allegedly false advertiser. *Jack Russell Terrier Network v. American*  
9 *Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005); *Stanfield v. Osborne Indus.*, 52 F.3d  
10 867, 872 (10th Cir. 1995); *L.S. Heath & Son v. AT&T Info. Sys.*, 9 F.3d 561, 575 (7th  
11 Cir.1993). But movant Doe is a current tenant, Levy Affidavit ¶ 7 and Exhibit E. In order  
12 to proceed in federal court against any of the other Does, plaintiffs must provide at least  
13 some evidence showing she is anything other than a current or former tenant. They must  
14 provide the Court with some reason even to believe that their critics are competitors, other  
15 than stating a convenient belief so that they can get into federal court to pursue their  
16 defamation claims. At a minimum, because movant has shown that she is a current tenant,  
17 there is no basis for exercise of federal jurisdiction to obtain discovery identifying her.<sup>4/</sup>

18 In order to proceed on their defamation claims, plaintiffs must prove “a false  
19 statement of fact made with malice that caused damage.” *Global Telemedia Int’l v. Doe 1*,  
20 132 F. Supp.2d 1261, 1266 (C.D. Cal. 2001). In this case, plaintiffs have yet to introduce  
21 **any** evidence that any statements by the Does are false, or that any of the statements  
22 caused plaintiff to suffer **any** damage.

---

23 <sup>4/</sup> Dismissal for lack of subject matter jurisdiction is, of course, without prejudice to refile in  
24 state court. As to the other Does, even if plaintiffs currently lack evidence to support Lanham  
25 Act jurisdiction, they can always refile their libel claims in state court. Of course, if plaintiffs  
26 have valid defamation claims against some of the Does, they will presumably succeed in  
27 meeting the California courts’ test for identifying anonymous Internet speakers, *Krinsky v. Doe*  
28 6, 159 Cal.App.4th 1154 (2008). If they also find evidence that some of the Does are in fact  
agents of their rivals, and that the critical statements were “commercial advertising or  
promotion,” they can dismiss in state court and refile against those defendants in federal court  
based on that evidence.

**(5) Balance the Equities**

1 Even if, in response to this memorandum, plaintiffs submit evidence sufficient to  
2 establish a prima facie case against each Doe defendant,

3 the final factor to consider in balancing the need for confidentiality versus  
4 discovery is the strength of the movant's case . . . . If the case is weak, then  
5 little purpose will be served by allowing such discovery, yet great harm will  
6 be done by revelation of privileged information. In fact, there is a danger in  
7 such a case that it was brought just to obtain the names . . . . On the other  
hand, if a case is strong and the information sought goes to the heart of it  
and is not available from other sources, then the balance may swing in  
favor of discovery if the harm from such discovery is not too severe.

8 *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo.App. 1997).

9 Just as the Missouri Court of Appeals approved such balancing in a reporter's source  
10 disclosure case, *Dendrite* called for such individualized balancing when the plaintiff seeks  
11 to compel identification of an anonymous Internet speaker:

12 [A]ssuming the court concludes that the plaintiff has presented a prima  
13 facie cause of action, the court must balance the defendant's First  
14 Amendment right of anonymous free speech against the strength of the  
prima facie case presented and the necessity for the disclosure of the  
anonymous defendant's identity to allow the plaintiff to properly proceed.

15 The application of these procedures and standards must be undertaken and  
16 analyzed on a case-by-case basis. The guiding principle is a result based on  
a meaningful analysis and a proper balancing of the equities and rights at  
issue.

17 *Dendrite*, 775 A.2d at 760-761.

18 *Accord Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d at 976; *Mobilisa v. Doe*, 170  
19 P.3d at 720.

20 If the plaintiff cannot come forward with concrete evidence sufficient to prevail on  
21 all elements of his case on subjects that are based on information within his own control,  
22 there is no basis to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d  
23 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303,  
24 1311 (W.D. Mich. 1996). Similarly, if the evidence that the plaintiff is seeking can be  
25 obtained without identifying anonymous speakers or sources, the plaintiff is required to  
26 exhaust these other means before seeking to identify anonymous persons. *In re Petroleum*  
27 *Prod. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705, 714  
28

1 (D.C. Cir. 1981) (“an alternative requiring the taking of as many as 60 depositions might  
2 be a reasonable prerequisite to compelled disclosure”). The requirement that there be  
3 sufficient evidence to prevail against the speaker, and sufficient showing of the exhaustion  
4 of alternate means of obtaining the plaintiff’s goal, to overcome the defendant’s interest in  
5 anonymity is part and parcel of the requirement that disclosure be “necessary” to the  
6 prosecution of the case, and that identification “goes to the heart” of the plaintiff’s case. If  
7 the case can be dismissed on factual grounds that do not require identification of the  
8 anonymous speaker, it can scarcely be said that such identification is “necessary.”

9 The adoption of a standard comparable to the test for grant or denial of a  
10 preliminary injunction, considering the likelihood of success and balancing the equities, is  
11 particularly appropriate because an order of disclosure is an injunction – and not even a  
12 preliminary one at that. A refusal to quash a subpoena for the name of an anonymous  
13 speaker causes irreparable injury, because once a speaker loses her anonymity, she can  
14 never get it back. Moreover, any violation of an individual speaker’s First Amendment  
15 rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). In  
16 some cases, identification of the Does may expose them to a significant danger of extra-  
17 judicial retaliation.

18 On the other side of the balance, the most important consideration is that denial of  
19 a motion to identify the defendant based on either lack of sufficient evidence or balancing  
20 the equities does not compel dismissal of the complaint. Plaintiffs can request discovery  
21 after submitting more evidence. Beyond that fact, the Court should plaintiffs interest in  
22 redressing the alleged violations. In this regard, the Court can consider not only the  
23 strength of plaintiffs’ evidence but also the nature of the allegations and the likelihood of  
24 significant damage to the plaintiff. Here, no evidence has been presented supporting any  
25 heightened need to suppress the anonymous criticism of plaintiffs’ buildings.  
26  
27  
28

1 **III. THE STATE-LAW COUNTS IN THE COMPLAINT SHOULD BE**  
2 **STRICKEN UNDER THE SLAPP STATUTE.**

3 The court should not simply grant a protective order, but it should strike the state-  
4 law claims under the California anti-SLAPP statute. The Ninth Circuit has held that  
5 California's anti-SLAPP statute applies to state claims brought in federal court. *United*  
6 *States v. Lockheed Missiles & Space Co.*, 171 F.3d 1208, 1218 (9th Cir.1999).

7 The complaint is within the scope of the SLAPP statute because it has been filed  
8 over an act of defendant in furtherance of the right of petition, and/or the right of free  
9 speech in connection with a public issue. Code of Civil Procedure § 425.16(b)(1); *Braun*  
10 *v. Chronicle Publishing Co.*, 52 Cal. App.4th 1036, 1042-43 (1997). Plaintiffs' claims all  
11 relate to "(3) written . . . statement[s] made in a place open to the public or a public forum  
12 in connection with an issue of public interest; (4) or any other conduct in furtherance of  
13 the exercise of the constitutional right of petition or the constitutional right of free speech  
14 in connection with a public issue or an issue of public interest." Code of Civil Procedure §  
15 425.16(e). As one court has noted, "The definition of 'public interest' within the meaning  
16 of the anti-SLAPP statute has been broadly construed to include not only governmental  
17 matters, but also private conduct that impacts a broad segment of society . . . ." *Damon v.*  
18 *Ocean Hills Journalism Club*, 85 Cal. App.4th 468, 479 (2000). Among the matters that  
19 have been judicially accepted as within the "public interest" are statements and a letter  
20 regarding a landlord-tenant dispute, *Dowling v. Zimmerman*, 85 Cal. App.4th 1400, 1420  
21 (2001); communication to city officials and employees about a proposed development,  
22 *Tuchscher Development Enterprises v. San Diego Unified Port District*, 106 Cal. App.4th  
23 1219, 1234 (2003); views about the safety of dental amalgam, *Kids Against Pollution v.*  
24 *California Dental Association*, 108 Cal. App.4th 1003, 1015(2003); and communications  
25 about possible legislation concerning mail order contact lens sales. *1-800-Contacts v.*  
26 *Steinberg*, 107 Cal. App.4th 568, 583 (2003).

27 There is surely significant public interest in whether an apartment complex is well-  
28 run in the ways discussed on the ApartmentRatings.com message board. Accordingly,

1 defendants' statements on a public forum about the problems in plaintiffs' large apartment  
2 complexes are covered by subsections (e)(3) and (e)(4) of the anti-SLAPP law.

3 Once a defendant has made a prima facie showing that the lawsuit arises from  
4 petition or speech activity covered by section 425.16, as movant has done here, the burden  
5 shifts to plaintiffs to establish a probability of prevailing on their claims, which must be  
6 done by competent and admissible evidence. *Navellier v. Sletten*, 29 Cal.4th 82, 88  
7 (2002); *Ludwig v. Superior Court*, 37 Cal. App.4th 8, 15-16, 21 n.16, 25 (1995). As  
8 discussed above, plaintiffs have not met that test; they have not even shown that the Court  
9 has subject-matter jurisdiction. Accordingly, their state-law claims should be stricken as a  
10 SLAPP.

### 11 CONCLUSION

12 The court should grant a protective order quashing the subpoena to  
13 ApartmentRatings.com in its entirety. The state-law counts in the complaint should be  
14 stricken as a SLAPP, and the complaint dismissed for want of subject matter jurisdiction.

15 Respectfully submitted,

16 /s/ Paul Alan Levy  
Paul Alan Levy (DC Bar No. 946400)

17 Public Citizen Litigation Group  
18 Email: plevy@citizen.org  
19 1600 - 20<sup>th</sup> Street, N.W.  
20 Washington, D.C. 20009  
21 Telephone: 202/588-1000  
22 Facsimile: 202/588-7795

23 /s/ Ann Brick  
Ann Brick (No. 65296)

24 American Civil Liberties Union  
25 Foundation of Northern California,  
26 Inc.  
27 Email: abrick@aclunc.org  
28 39 Drumm Street  
San Francisco, California 94111  
Telephone: 415/621-2493  
Facsimile: 415/255-8437

November 19, 2008

Attorneys for John Doe