IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 02621

September Term, 2004

FORENSIC ADVISORS, INC., et al.

Appellants,

vs.

MATRIXX INITIATIVES, INC., et al.

Appellees.

Appeal from the Circuit Court for Montgomery County
(The Honorable Eric M. Johnson, Presiding)

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

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INTRODUCTION

This case concerns a motion to quash a subpoena seeking the identities of a reporter's sources, a list of his readers, and information he collected in the course of reporting. *Amici* Public Citizen, American Civil Liberties Union of Maryland, American Booksellers Foundation for Free Expression, American Civil Liberties Union of the National Capital Area, Association of American Publishers, Electronic Frontier Foundation, Electronic Privacy Information Center, Freedom to Read Foundation, Inc., and Reporters Committee for Freedom of the Press file this brief primarily to address the First Amendment rights of the readers, as they otherwise lack representation in this litigation.

Anonymity has a long and celebrated history in the United States, beginning with pseudonymous advocates of the United States Constitution. People choose to maintain anonymity regarding what they read for many reasons, including forestalling assumptions about their beliefs and associations, maintaining privacy, and avoiding harassment, threats, frivolous litigation, or social stigma. In the absence of anonymity, some would decline to read certain publications altogether. Disclosure of readers' identities therefore chills the exercise of First Amendment rights.

Amici argue that the Maryland news media privileges bar disclosure of sources and information collected in the course of reporting, and that the First Amendment right to read anonymously bars disclosure of readers' identities. The interests of each *amicus* are described in the Motion of Public Citizen, American Civil Liberties Union of Maryland, American Booksellers Foundation for Free Expression, American Civil Liberties Union of

the National Capital Area, Association of American Publishers, Electronic Frontier Foundation, Electronic Privacy Information Center, Freedom to Read Foundation, Inc., and Reporters Committee for Freedom of the Press for Leave to File Brief Amicus Curiae filed concurrently herewith.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. Factual Background

Matrixx Initiatives, Inc. ("Matrixx") sells an over-the-counter nasal decongestant that has been widely alleged in litigation and the press to cause the permanent loss of the sense of smell. (E 99-117). The company has also been criticized for several forms of mismanagement. (E 189-212).

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

Appellant Timothy Mulligan publishes a stock newsletter called the *Eyeshade Report*.

On August 26, 2003, Mulligan published a negative report on Matrixx. (E 189-212). Among other things, the article discussed evidence that Matrixx may have been shipping products too quickly and under-reserving for returns (E 191-92), may have lost a contract with a key manufacturer (E 196), engaged in aggressive accounting and may have violated Generally Accepted Accounting Principles (E 196-99, 201-03), may have been dishonest in press releases (E 204-05), and may have lacked sufficient scientific data to withstand FDA scrutiny, (E 205-09).

On November 4, 2003, Matrixx subpoenaed Mulligan and his company, Forensic Advisors, Inc., seeking broad discovery of Mulligan's sources, notes, and drafts for the report on Matrixx and any information he might have concerning the defendants in the Arizona litigation. (E 41-51). Mulligan produced 383 pages of documents in response to the subpoena. *See* Mulligan Aff. ¶ 5 (E 9). In September, 2004, Matrixx obtained a second subpoena to Mulligan. The second subpoena sought similarly broad discovery and also demanded that Mulligan disclose the names of every person who *received* the report on Matrixx. (E 217).

Matrixx provided no evidence to suggest that Mulligan has any connection to, or any information about, the Doe defendants whom it is suing in Arizona. The company explained that it sought discovery from Mulligan because some of the Does' statements, which it has not specified, "bear a striking resemblance" to statements in the *Eyeshade Report* and "[t]he timing and content of these statements led Matrixx to believe that *The Eyeshade Report* had been commissioned as part of the defamation and short-selling scheme that is the subject of

Matrixx's lawsuit in Arizona." Matrixx Opp. 3 (E 178). Notably, the company has neither sued Mulligan nor alleged that the *Eyeshade Report* contained defamatory statements. Moreover, Matrixx's Arizona complaint alleges that the defamation began two years before the publication of the relevant issue of the *Eyeshade Report*. Sixth Am. Compl. ¶ 13 (E 28). Finally, Matrixx has not rebutted Mulligan's testimony that he knows nothing about the Does. *See* Mulligan Aff. ¶ 6 (E 9).

B. Procedural Background

Mulligan moved to quash the 2004 subpoena in the Circuit Court for Montgomery County, Maryland. He asserted that service was improper, that the identities of his subscribers are trade secrets, that his sources and other materials are protected by Maryland's news media privileges, and that enforcement of the subpoena would violate his subscribers' First Amendment rights. The court denied Mulligan's motion, and he timely appealed.

QUESTIONS PRESENTED

This *amicus* brief discusses the following questions:

1. Do Maryland's privileges for "[a]ny printed, photographic, mechanical, or electronic means of disseminating news and information to the public" protect a newsletter that reports on publicly traded companies and is available to any member of the public who subscribes?

2. In light of the First Amendment rights implicated, should the Court allow discovery into the identities of a publication's subscribers when the party seeking disclosure has failed to show any connection between the subscribers and its underlying claims?

ARGUMENT

The circuit court erred in denying Mulligan's motion to quash the subpoena. All of the information Matrixx seeks is protected either by Maryland's news media privileges or by the First Amendment.

I. MARYLAND'S NEWS MEDIA PRIVILEGES BAR DISCLOSURE OF MULLIGAN'S SOURCES AND INFORMATION COLLECTED IN THE COURSE OF REPORTING.

The Maryland news media privileges bar disclosure of Mulligan's sources and information collected in the course of his reporting. The privileges are broad, applying to "[a]ny printed, photographic, mechanical, or electronic means of disseminating news and information to the public." Md. Cts. & Jud. Proc. Code § 9-112(a)(9). Maryland provides an absolute privilege for information about sources. *Id*. § 9-112(d)(2). And it protects information gathered in the process of reporting with a qualified privilege. *Id*. § 9-112(c)(2). A party may lift the qualified privilege only by showing by clear and convincing evidence that "(i) The news or information is relevant to a significant legal issue before any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas; (ii) The news or information could not, with due diligence, be obtained by any alternate means; and (iii) There is an overriding public interest in disclosure." *Id*. § 9-112(d)(1).

Mulligan's *Eyeshade Report*—which disseminates news and information regarding publicly traded companies—falls squarely within the scope of the material covered by the privileges. Both privileges therefore apply here. As to the qualified privilege, Matrixx cannot meet the standard set forth in the statute. As discussed in more detail below, *see infra*

at II.B., the company has not shown that the information it seeks is relevant to a significant legal issue because it has failed to state a *prima facie* case in the underlying litigation, to provide evidence supporting its claims, or to show that Mulligan has information relevant to its claims. Matrixx has also failed to show that information it seeks from Mulligan is unavailable elsewhere. And the public interest weighs decisively against chilling news media sources unnecessarily and encouraging SLAPP suits.

Below, Matrixx cited case law from other jurisdictions to suggest that the privileges do not apply here because the *Eyeshade Report* is available only to subscribers. *See* Matrixx Opp. Mem. 9-10. Maryland law provides no basis for this distinction. Like many other news services, including legal publications such as BNA reports and cable television news such as CNN, the *Eyeshade Report* is available to any member of the public who subscribes. Maryland law does not require that Mulligan make the *Eyeshade Report* available on newsstands or give it away for free.

II. THE FIRST AMENDMENT BARS DISCLOSURE OF MULLIGAN'S SUBSCRIBER LIST.

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

The First Amendment protects the right to receive information. *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982) ("[W]e have held that in a variety of contexts the Constitution protects the right to receive information and ideas.") (internal quotes and citation omitted); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well-established that the Constitution protects the right to receive information and

ideas.") (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating provisions of law that "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another"); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("[T]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

Disclosure of the identities of individuals who exercise First Amendment rights anonymously inherently chills their expressive activity. *See, e.g., Watchtower Bible & Tract Soc. of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166-167 (2002) (invalidating permit requirement for door-to-door canvassing in part on anonymity grounds); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999) (invalidating requirement that petition signature collectors wear name badges); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995) (invalidating restriction on anonymous political leafleting); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (invalidating restriction on all anonymous leafleting); *Bates v. City of Little Rock*, 361 U.S. 516, 523-25 (1960) (invalidating requirement that organization disclose its membership list); *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960) (invalidating requirement that teachers disclose names and addresses of all organizations with which they were affiliated within past five years). The right to receive information anonymously stems from three constitutional bases: free speech, free association, and privacy.

Free Speech. Readers may be deterred from receiving certain ideas if they cannot remain anonymous. Disclosing a reader's identity therefore infringes both the speaker's right to disseminate ideas and the reader's right to receive them. *Pico*, 457 U.S. at 867 ("[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them. . . . More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."). Thus, in *Lamont v. Postmaster General*, the Supreme Court invalidated a requirement that people affirmatively notify the Postmaster of their desire to receive "communist political propaganda" because the requirement was "almost certain to have a deterrent effect" on people's receipt of ideas and was "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." 381 U.S. at 307 (citing *New York Times Co. v. Sullivan*, 364 U.S. 254, 270 (1964)). And in *United States v. Rumley*, 345 U.S. 41 (1953), the Supreme Court construed narrowly a congressional resolution authorizing the investigation of lobbying activities to avoid "serious" and "grave" constitutional concerns presented by the disclosure of the identities of literature purchasers. *Id*. at 45, 48. The concurrence elaborated on those concerns: "Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. . . . The purchase of a book or pamphlet today may result in a subpoena tomorrow." *Id*. at 57 (Douglas, J., concurring). *See also Fabulous Assocs., Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 785-86 (3rd Cir. 1990) (regulation that prevented adult telephone service customers from remaining anonymous unduly chilled

exercise of the right to hear communications).

Free Association. The right to receive information anonymously also stems from associational rights. Knowledge of an individual's reading habits may lead to inferences about her affiliations. Here, for example, Matrixx claims that people may be members of a conspiracy merely because they read the *Eyeshade Report*. Compelled disclosure of the identities of readers infringes associational rights by chilling readership on the basis of people's desire to maintain the privacy of their associations. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-63 (1958) (reversing order of the Arkansas Supreme Court requiring NAACP to disclose its membership list).

Privacy Rights. The right to read anonymously also flows from privacy rights. In *Stanley v. Georgia*, the Supreme Court affirmed the "right to satisfy [one's] intellectual and emotional needs in the privacy of [one's] own home" and the "right to be free from state inquiry into the contents of [one's] library." 394 U.S. at 565. This privacy right is so strong that it shields even the receipt of unprotected speech. In *Stanley*, the state of Georgia attempted to prosecute a man who possessed obscene materials. Although the state was free to bar obscene speech outright, *id*. at 560-61, it could not bar anyone from consuming the speech privately because it could not inquire into personal reading habits. *Id*. at 565-66.[1] *See also McIntyre*, 514 U.S. at 341-42 ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by

[1]The Supreme Court has departed from *Stanley* only with respect to child pornography, because of the severe harm it causes children and the difficulty of policing it. *See Osborne v. Ohio*, 495 U.S. 103, 108-11 (1990).

a desire to preserve as much of one's privacy as possible.").

An order to disclose the identities of individuals exercising fundamental rights is "subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. at 461; *Bates*, 361 U.S. at 524. Due process requires the showing of a "subordinating interest which is compelling." *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. And the disclosure must be tailored to burden rights no more than necessary to serve the compelling interest. *McIntyre*, 514 U.S. at 347.

People may choose to read anonymously for a variety of reasons. They may wish to avoid being stereotyped on the basis of their reading habits or to avoid the assumption that they are associated with particular organizations. They may fear harassment, threats, frivolous litigation, or social stigma. Likewise, some publishers would lose much of their audience if the audience could not maintain anonymity. A rule that makes it too easy to remove the cloak of anonymity would bring unnecessary harm to both speakers and readers by chilling speech and preventing valuable contributions to the marketplace of ideas.

B. This Court Should Apply a Five-Factor Test Before Allowing Infringement of the Right to Read Anonymously.

To protect the First Amendment rights at stake when a party seeks the identities of anonymous readers or subscribers, *amici* urge the Court to consider five factors. First, the Court should consider whether the party seeking disclosure has (1) stated a *prima facie* case; (2) supported its claims with evidence; and (3) shown that the information sought is central to the claim and unavailable from other sources. If those standard are met, then the Court should require the party to show that (4) the need for disclosure outweighs the First

Amendment rights of the parties whose identities will be revealed; and (5) an overriding public interest justifies disclosure. If the party cannot satisfy factors one through three, then the Court need not engage in the balancing analysis embodied by factors four and five. That is the case here, where Matrixx has failed to state a *prima facie* case in the Arizona litigation, failed to provide any evidence supporting its underlying allegations and, most important, failed to show any connection between Mulligan's subscribers and the alleged misconduct. That Matixx cannot meet factors one through three illustrates that the company's subpoena is, at best, a fishing expedition and, quite possibly, an attempt to punish Mulligan for publishing a negative report on Matrixx. Neither motivation justifies infringing Mulligan's or his readers' First Amendment rights.

As explained below, the proposed five-factor test is derived largely from the analysis that a growing number of courts use to assess motions to quash subpoenas to Internet Service providers ("ISPs") served by plaintiffs seeking to discover the names of people—such as the Doe defendants sued by Matrixx in Arizona—who have posted anonymous comments on Internet message boards. The factors also reflect the concerns of Maryland's discovery rules, Maryland's qualified privilege against disclosure of reporting information and the federal qualified privilege against disclosure of media sources, and cases concerning law enforcement subpoenas that threaten First Amendment rights. We first discuss these legal sources to explain the rationale for the five factors. Then, we apply the factors and conclude that Matrixx's subpoena fails to satisfy them.

1. Cases Addressing Disclosure of "Doe" Speakers, Maryland Discovery Rules, the Qualified Privilege Protecting Media Sources, and Cases Involving Law Enforcement Investigations Support Consideration of Five Factors Here.

Subpoenas to ISPs. Courts confronted with motions to quash subpoenas to ISPs from plaintiffs seeking the identities of online speakers have adopted multi-part tests that balance the rights of plaintiffs alleging defamation or similar claims against the right of defendants to speak anonymously on the Internet. The leading case is *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo!. There, the New Jersey appellate court adopted a five-part standard that requires plaintiffs to (1) notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the allegedly actionable statements; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation, and (5) show that, on balance and in the particulars of the case, the right to identify the speaker outweighs the First Amendment right to anonymous speech. *Id.* at 760-61. The court explained that this test "strik[es] a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants." *Id*. at 760.

Numerous courts have reached similar results. In *Melvin v. Doe*, 49 Pa. D.&C. 4th 449 (Pa. 2000), the trial court ordered disclosure only after finding that the "information (1) is material, relevant, and necessary, (2) it cannot be obtained by alternative means, and (3)

it is crucial to plaintiff's case." *Id*. at 477. Despite this careful analysis, the Pennsylvania Supreme Court vacated and remanded for an *additional* determination whether the First Amendment requires a *prima facie* showing of actual economic harm prior to discovery of a defamation defendant's identity. 836 A.2d 42, 50 (Pa. 2003).

Similarly, in *2TheMart.Com*, 140 F. Supp. 2d 1088 (W.D. Wash 2001), the court adopted a four-part test inquiring whether "(1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source." *Id*. at 1095. And in *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Conn. Super. 2003), the court compelled disclosure of an anonymous speaker only after reviewing the allegedly defamatory communication, *id*. at *3, taking testimony on the statement's falsity and the harm it caused, *id*., and demanding compliance with Connecticut's ordinary standard for bills of discovery, which requires the proponent of discovery to show that the information sought is material and necessary, that there is no other adequate means of obtaining it, that the proponent is acting in good faith, and that "detailed facts" support probable cause for its claims. *Id*. at *2-3, *6-7. *See also Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579-80 (N.D. Cal. 1999) (requiring plaintiff to demonstrate by specific evidence that it had viable trademark claims against anonymous defendants before disclosure could be compelled); *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 34, 2000 WL

1210372, at *7 (Va. Cir. Fairfax Cy. 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001) (requiring plaintiff to submit communications on which defamation claim was based to show "good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed" and that "identity information is centrally needed to advance that claim").

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

Maryland Discovery Rules. The Maryland Rules also support application of the factors suggested by *amici*. The rules require courts to limit discovery when information could be obtained by other means or when the burdens of a particular discovery outweigh its

likely benefits. *See* Md. Rule 2-402(b) ("The court *shall* limit . . . discovery . . . if it determines that (1) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive . . . or (3) the burden or expense of the proposed discovery outweighs its likely benefit[.]") (emphasis added). Rule 2-402(b) protects readers' rights to remain anonymous because a subpoena seeking their identities may oppress or burden First Amendment rights—those of both readers and the author, publisher, or bookstore subpoenaed—too much to be justified by the likely benefits of discovery.

This Court has recognized that balancing of interests is appropriate in assessing the propriety of sensitive discovery. For example, in *Blades v. Woods*, 107 Md. App. 178, 667 A.2d 917 (1995), the Court balanced the plaintiff's legitimate need for discovery against the confidentiality interests of both the subpoenaed party and other parties. *Id*. at 185-87, 667 A.2d at 921. And in *Shenk v. Berger*, 86 Md. App. 498, 587 A.2d 551 (1991), in the course of considering an attempt to discover attorney work product, the Court stated that "[e]very need to provide information must be balanced against the need to withhold it." *Id*. at 505, 587 A.2d at 555.

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

> [W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure. . . . Among the factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving

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

Id. at 1466-67 (citation omitted) (requiring four-part balancing test for discovery of organization's membership list, mailing lists, and certain attendance records). *Cf. United States v. R. Enters., Inc.*, 498 U.S. 292, 303 (1991) (Stevens, Marshall, and Blackmun, JJ., concurring) (noting in the context of a motion to quash grand jury subpoena on First Amendment grounds that the Federal Rules of Criminal Procedure require courts "to balance the burden of compliance, on the one hand, against the governmental interest in obtaining the documents on the other").

Qualified Privilege for Media. Maryland's qualified privilege for information collected by media organizations also supports use of the five factors in this case. As discussed above, the privilege bars disclosure unless the party seeking the information shows that "(i) The news or information is relevant to a significant legal issue before any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas; (ii) The news or information could not, with due diligence, be obtained by any alternate means; and (iii) There is an overriding public interest in disclosure." Md. Cts. & Jud. Proc. Code § 9-112(d)(1). Some federal courts apply a similar standard for media *sources*, requiring the party seeking disclosure to show that (1) the information sought is not just relevant, but goes to the heart of the case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the

discovering party has exhausted all other means of proving this part of its case. *See United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Campbell v. Klevenhagen*, 760 F. Supp. 1206, 1210, 1215 (S.D. Tex. 1991). In essence, these standards balance the need for discovery against First Amendment rights.

Law Enforcement Investigations. Finally, courts require a showing of relevance and compelling need before allowing the infringement of First Amendment interests even in the context of law enforcement investigations. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564-65 (1978) (Fourth Amendment requirements for warrants—probable cause, specificity, and reasonableness of search—must be met with "scrupulous exactitude" when First Amendment interests are at stake); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (grand jury could not compel disclosure of identities where government failed to show that its "interest in the subject matter of the investigation is 'immediate, substantial, and subordinating,' that there is a 'substantial connection' between the information it seeks . . . and the overriding governmental interest . . ., and that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interest") (quoting *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 551, 557 (1963)); *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1298 (4th Cir. 1987) ("A court, in deciding to enforce or to quash a subpoena duces tecum that broadly seeks material

presumptively protected by the first amendment, must balance . . . the interest of the public and the government in ferreting out crime [against] the interest of the subpoena's target in conducting a business or any other personal affairs.").

This level of scrutiny has also been applied in a case addressing a law enforcement attempt to identify an anonymous reader. In *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002), the Colorado Supreme Court blocked a search warrant seeking (1) the identity of a customer who had books on clandestine drug laboratories delivered to a methamphetamine lab and (2) the customer's thirty-day purchase history. *Id*. at 1058-59. The court held that the government must show a compelling need for such information, *id*. at 1058-59, and found that the police could not meet that standard. The police argued that the information would help to establish intent, to identify which defendant operated the drug lab, and to connect the defendant to the crime, apparently by drawing the inference that the purchaser of books on manufacturing illicit drugs may have manufactured such drugs. *Id*. at 1061. The court found that the police could use other available evidence to establish intent and identify the defendant, *id*. at 1061-62, and held that the government may not infer that an individual who bought books on illicit drug laboratories operated such a laboratory, *id*. at 1063. *Cf. In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Med. L. Rptr. 1599 (D.D.C. 1998) (refusing to enforce subpoena to bookstore seeking list of Monica Lewinsky's purchases absent government showing of (1) compelling need for information sought and (2) sufficient connection between information and criminal investigation).

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

Based on the legal doctrines described above, *amici* urge the Court to protect the rights of readers and subscribers by considering whether Matrixx has (1) stated a *prima facie* case; (2) provided supporting evidence; (3) shown that the information sought is central to the claim and unavailable from other sources; (4) shown that the need for disclosure outweighs the First Amendment rights of the parties whose identities will be revealed; and (5) shown that an overriding public interest justifies disclosure. Matrixx fails at each step.

(a) State a *Prima Facie* Case.

Matrixx claims that the names of *Eyeshade Report* readers are relevant to its Arizona litigation, in which it alleges defamation and intentional interference with contract. But the company has failed to state *prima facie* claims in that litigation. Therefore, it has not provided a valid reason to pierce the anonymity of Mulligan's readers.

To state a claim for defamation, Matrixx must set forth allegedly harmful statements either verbatim or with enough specificity to permit the court to evaluate the statements and to apprise the defendant of the precise charges. *See* 50 Am. Jur. 2d *Libel & Slander* § 439 (2004); *Aldabbagh v. Arizona Dep't of Liquor Licenses & Control*, 783 P.2d 1207, 1213 (Ariz. App. 1989) (dismissing defamation claims where complaint stated only "a legal conclusion that [defendant] made defamatory remarks to the press" with "no facts . . . to support a claim for injurious falsehood"). The Arizona court may then review each statement to determine whether it is facially actionable. *See, e.g.*, *Bailey v. Sup. Ct. in & for Santa Cruz Co.*, 636 P.2d 144 (Ariz. App. 1981). Matrixx's Arizona complaint fails to state a *prima*

facie case because it does not identify any allegedly tortious statements.

Similarly, a plaintiff claiming intentional interference with contract must prove that the defendant interfered with a specific contract between the plaintiff and a specific individual. Restatement (Second) Torts § 766 cmt. p (1979). Matrixx fails to state a claim for intentional interference with contract because it has not identified any specific contractual relationship with which the Does allegedly interfered. *See* Sixth Am. Compl. ¶ 33-37 (E 31).

(b) Provide Supporting Evidence.

No person should be identified through a court's subpoena power unless, after stating a *prima facie* case, the plaintiff also produces evidence sufficient to show that the underlying lawsuit has merit. This requirement prevents a plaintiff from infringing rights simply by filing a facially adequate complaint. Plaintiffs often claim that they seek to identify people merely to proceed with their cases. But the identification of anonymous individuals is a major form of relief in some cases. In fact, it is often the plaintiff's sole objective. In numerous cases, plaintiffs seek no further relief after identifying certain individuals. Thompson, *On the Net, in the Dark*, California Law Week, Vol. 1, No. 9, at 16, 18 (1999).

Indeed, some lawyers who bring cases like Matrixx's have admitted that they desire only identification of their clients' anonymous critics. *E.g.*, Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily Freeman, Nov. 21, 2000, *at* www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfi=8. One leading advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first and to decide whether to sue for libel only after the critics have been

identified and contacted privately. Fischman, *Your Corporate Reputation Online*, *at* www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, *at* www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit even if they do not intend to pursue the action to a conclusion because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. They have also suggested that clients should decide whether it is worth pursuing claims only after learning the identity of the defendant. *Id*. Even the pendency of a subpoena may deter members of the public from discussing the company that has filed the action. *Id*.

To address these abuses, the Court should borrow from the legal sources discussed above and require a party seeking the identities of anonymous readers to provide evidence demonstrating that it has a realistic chance of winning the underlying litigation before compelling disclosure. The extent to which a proponent of disclosure should be required to offer evidence to support its claims at the outset of its case varies with the elements of the claims. In suits for defamation, such as the Arizona litigation on which Matrixx's subpoena is premised, several elements of the claims are based on evidence to which the plaintiff likely has ready access. For example, the plaintiff will likely have ample means of proving that a statement is false. Thus, it is proper, and not unduly burdensome, to require the plaintiff to present strong proof of this element before compelling the identification of anonymous individuals. The same is true with respect to damages.

In this case, Matrixx has yet to introduce evidence that the Internet posters made false statements, much less to explain why criticisms voiced in the mainstream American media were somehow particularly harmful when also voiced on Internet message boards. Matrixx has also shown no evidence of malice on the part of the Internet commentators. And it has failed to show any evidence of damages. To the contrary, just two months after serving Mulligan with a second subpoena, Matrixx reported "record third quarter sales and earnings" and stated that "Zicam has continued to be one of the fastest growing OTC brands." *See Maker of Zicam Products Reports Third Quarter Results*, Obesity, Fitness & Wellness Wk. 177, Nov. 27, 2004. Matrixx has provided no evidence to support the underlying claims.

(c) Show That the Information Sought Is Central to the Party's Claims and Unavailable from Other Sources.

This Court should also require a subpoenaing party to show that information identifying readers or subscribers is central to its claims and not reasonably available by other means. *See 2TheMart.com*, 140 F. Supp. 2d at 1095; *cf. Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972) (grand jury subpoena that causes "unnecessary" impact on First Amendment rights should not be enforced). "Mere speculation and conjecture about the fruits of such examination will not suffice," *Cervantes*, 464 F.2d at 993-94—particularly where many if not all of the people identified have no relationship to the underlying lawsuit. *See In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir. 1982) (improper to compel disclosure of the names of sources that bear "at most a tenuous and speculative relationship" to plaintiff's claims); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976) (barring, in defamation action, disclosure of identities of individuals whom a professor

interviewed where there was "absolutely no evidence" that the individuals had defamed the plaintiff).

Matrixx fails to satisfy this factor as well. The company offers no reason to believe that learning the identities of Mulligan's readers will help identify defendants in the Arizona litigation or assist its case in any other way. Mulligan has attested that he knows nothing about the defendants, Mulligan Aff. ¶ 6 (E 9), and Matrixx has not shown any connection between Mulligan's readers and the underlying litigation. The company only speculates that a fishing expedition into Mulligan's files might lead to relevant information. *See* Matrixx Br. 12 ("Matrixx is entitled . . . to discover what—*if anything*—Mulligan knows[.]") (emphasis added).

Matrixx could instead seek the identity information from the Does' ISPs. Requests to ISPs could at least target the particular individuals who made the comments at issue rather than people who have no connection to Matrixx's case. Matrixx alleges that *one* of twenty-five Does "is utilizing identity-obfuscation software" to "conceal his or her identity and to temporarily evade the United States Subpoena process." Sixth Am. Compl. ¶ 21 (E 29). But Matrixx has failed to show any connection between this Doe and Mulligan or any reason to believe that the Doe even reads the *Eyeshade Report*.

(d) Show That the Need for Disclosure Outweighs the Rights of the Parties Whose Identities Will Be Revealed.

If a party seeking discovery about anonymous readers makes the first three showings, then the Court should require the party to show that its interest in disclosure outweighs the First Amendment rights at stake. *See* Md. Rule 2-402(b); *cf. Blades*, 107 Md. App. at 185-

87, 667 A.2d at 921. This analysis is similar to that used to evaluate requests for preliminary injunctions—consideration of the likelihood of success and balancing of equities. Such a standard is particularly appropriate here because a disclosure order would effectively constitute a permanent injunction causing irreparable harm—the loss of anonymity and the infringement of First Amendment rights. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Courts must undertake this inquiry on a case-by-case basis, engaging in a meaningful balancing of the equities and rights at issue. *Dendrite*, 775 A.2d at 760-61.

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

Balanced against Matrixx's fishing expedition is the permanent harm that would result from infringing Mulligan's and his subscribers' First Amendment rights. For example, two subscribers informed Mulligan that they would cancel their subscriptions if their identities were revealed. Mulligan Aff. ¶ 7 (E 9). The possibility that subscribers would cancel is not surprising. First, the financial industry is highly competitive, and some institutional and individual investors guard the sources of their decision-making closely. Second, companies like Matrixx may assume that some readers of publications like the *Eyeshade Report* are short-sellers and harass them with subpoenas and frivolous litigation. (Companies dislike

short-selling of their stock, although it is both legal and beneficial to financial markets, because short-selling signals that some investors believe a company is overvalued.) For these reasons, disclosure of identities here would infringe First Amendment rights by chilling readership. This harm easily outweighs Matrixx's speculation that disclosure may assist it in the Arizona litigation.

(e) Show That Disclosure Serves an Overriding Public Interest.

Finally, the Court should require a party seeking disclosure of the identities of innocent readers to show that an overriding public interest justifies the infringement of First Amendment rights. Again, Matrixx cannot make this showing. On the record before this Court, Matrixx's subpoena and its Arizona litigation bear the hallmarks of a strategic lawsuit against public participation, or SLAPP suit, designed to silence critics rather than to vindicate real legal claims. Maryland recently enacted a statute to deter such lawsuits and enable defendants to defeat them expeditiously. *See* Md. Cts. & Jud. Proc. Code § 5-807. Maryland has no interest in encouraging such actions by enforcing subpoenas for SLAPP plaintiffs in foreign jurisdictions.

* * *

The principal advantage of the test outlined above is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the anonymity rights of individuals who claim to have done no wrong. It provides for case-by-case assessments and avoids the false choice between protecting anonymity and vindicating the rights of tort victims. We urge the Court to adopt this test to balance the interests of defamation plaintiffs

in vindicating their reputations in meritorious cases against the right of individuals to maintain anonymity when their expressive activity is not actionable.

CONCLUSION

This Court should reverse the circuit court's denial of the motion to quash the subpoena.

Respectfully submitted,

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Dated: June 10, 2005
Font: Times New Roman, 13 point

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES CITED

United States Constitution, Amendment I.

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

Maryland Constitution, Declaration of Rights, Art. 40. Freedom of Speech and Press.

That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

Md. Rule 2-402. Scope of discovery.

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

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

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

(c) Insurance agreement. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning

the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

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

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

(f) Trial preparation - Experts.

(1) Expected to be called at trial.

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

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

(2) Not expected to be called at trial. When an expert has been retained by a party in anticipation of litigation or preparation for trial but is not expected to be called as a witness

at trial, discovery of the identity, findings, and opinions of the expert may be obtained only if a showing of the kind required by section (d) of this Rule is made.

(3) Fees and expenses of deposition. Unless the court orders otherwise on the ground of manifest injustice, the party seeking discovery: (A) shall pay each expert a reasonable fee, at a rate not exceeding the rate charged by the expert for time spent preparing for a deposition, for the time spent in attending a deposition and for the time and expenses reasonably incurred in travel to and from the deposition; and (B) when obtaining discovery under subsection (f) (2) of this Rule, shall pay each expert a reasonable fee for preparing for the deposition.

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

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

(1) Newspapers;

(2) Magazines;

(3) Journals;

(4) Press associations;

(5) News agencies;

(6) Wire services;

(7) Radio;

(8) Television; and

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

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

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

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

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

(i) Notes;

(ii) Outtakes;

(iii) Photographs or photographic negatives;

(iv) Video and sound tapes;

(v) Film; and

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

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

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

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

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

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

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

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 11th day of June, 2005, he caused to be served by U.S. mail, first-class postage prepaid, two copies each of the foregoing Brief of *Amici Curiae* Public Citizen, American Civil Liberties Union of Maryland, American Booksellers Foundation for Free Expression, American Civil Liberties Union of the National Capital Area, Association of American Publishers, Electronic Frontier Foundation, Electronic Privacy Information Center, Freedom to Read Foundation, Inc., and Reporters Committee for Freedom of the Press in Support of Appellants Timothy Mulligan and Forensic Advisors, Inc. on the following:

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