ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

July 6, 2017

VIA E-FILE AND FED-EX

Hon. David B. Cohen
Civil Court of the City of New York
New York County
111 Centre Street
New York, NY 10013

Re: *Jane Doe v. Tumblr*, No. 153709-2017 (NY Sup. Ct.)

Dear Hon. David B. Cohen:

I am local counsel for the Electronic Frontier Foundation (EFF), a nonprofit organization dedicated to defending digital rights. EFF learned just last week that this Court had ordered the disclosure of account information of hundreds of Tumblr user who re-blogged allegedly pornographic content. We write to express our deep concerns about that order, and respectfully request that the Court revisit its decision.[1]

Although anonymous speakers do not enjoy an absolute right to keep their identity secret, the First Amendment does not permit judicial unmasking orders without adequate justification. Based on the publicly available information, it does not appear that the Court has considered whether plaintiff's request to unmask nearly 300 Tumblr users

[1] EFF has notified counsel for both parties of its intention to file this letter. Defendant Tumblr's counsel takes no position on the filing of this letter. Plaintiff's counsel does not consent to EFF's requested 14-day extension of this Court's order to notify affected Tumblr users on the grounds that any additional delay could cause substantial prejudice to the Plaintiff. Plaintiff's counsel further states that there is no legal requirement to provide Tumblr users with any notice and that Plaintiff does not believe the First Amendment right to anonymity is applicable to this case.

815 Eddy Street • San Francisco, CA 94109 USA
voice +1 415 436 9333 fax +1 415 436 9993 web www.eff.org email information@eff.org

would violate the users' First Amendment rights. Loss of anonymity irreparably harms speakers and discourages other speakers from exercising their own anonymous speech rights.

Accordingly, while the underlying allegations at issue in this case are disturbing, this Court should still pause to consider whether unmasking anonymous Tumblr users would violate the First Amendment. In addition, we respectfully ask that the Court delay identifying any Tumblr user for an additional 14 days to afford those individuals reasonable time to identify counsel and consider whether to contest the order. That delay will not harm the plaintiff—the conduct at issue apparently occurred months ago—and will help ensure that the constitutional and procedural rights of the users in question are protected.

I. EFF's Interest in This Case.

EFF is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 35,000 dues-paying members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

The First Amendment's protections for anonymous online speakers touches on a significant issue central to EFF's work. EFF has repeatedly represented anonymous online speakers and appeared as *amicus curiae* in cases where the First Amendment's

protections for anonymous speech are at issue. *See, e.g.*, *Signature Mgm't v. Doe*, No. 16-2188 (6th Cir. 2017); *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (serving as counsel to Doe); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. Sup. Ct. 2015) (serving as *amicus curiae* in support of anonymous speaker); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (serving as counsel to Doe).[2]

EFF takes no position on whether, having applied the legal test required by the First Amendment, the Court should proceed to authorize the disclosure of account information for the users in question. Instead, we simply urge the Court to take seriously the constitutional implications of its order, and apply a now well-established process designed to balance the needs of plaintiffs and defendants in Doe cases such as this one.

II. The First Amendment Provides Strong Protection for Anonymous Speakers.

The right to speak anonymously is deeply embedded in the political and expressive history of this country. Our founders believed that anonymous speech was an essential tool to provide critical commentary and to foster public debate.

Today, anonymous and pseudonymous speech has become an essential feature of our online discourse. "Internet anonymity facilitates the rich, diverse, and far ranging

[2] A complete list of anonymous speech cases EFF has participated in is available at https://www.eff.org/issues/anonymity.

exchange of ideas. The ability to speak one's mind on the Internet without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." *2TheMart.com Inc.*, 140 F. Supp. 2d at 1092. "Indeed, courts have recognized that the Internet, which is a particularly effective forum for the dissemination of anonymous speech, is a valuable forum for robust exchange and debate." *Art of Living v. Does*, 2011 WL 3501830 *2 (N.D. Cal. Aug. 10, 2011) (*Art of Living I*).

III. First Amendment Scrutiny Must Be Applied to Unmasking Requests to Ensure that Litigation is Not Used to Harass or Punish Speakers.

Litigants who do not like the content of Internet speech by anonymous speakers may seek their identities to punish or silence them, rather than vindicate substantive rights or pursue legitimate claims. Litigants can often misuse "discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 771 (N.J. App. Div. 2001). Similarly, "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics." *Doe v. Cahill*, 884 A.2d 451, 457 (Del. Sup. Ct. 2005).

Unmasking anonymous online speakers without first considering their First Amendment rights can irreparably harm them. *Art of Living v. Does 1-10*, 2011 WL 5444622 *9 (N.D. Cal. Nov. 9, 2011) (*Art of Living II*) (citing *McIntyre v Ohio Elections Com'n*, 514 U.S. 334, 342 (1995)). This is especially true of those who would be subject to political or other persecution were their identities known. Unmasking a speaker can lead to serious

personal consequences—for the speaker or even the speaker's family—including public shaming, retaliation, harassment, physical violence, and loss of a job. *See Dendrite*, 775 A.2d at 771 (recognizing that unmasking speakers can let other people "harass, intimidate or silence critics"). In the analogous context of identifying individuals' anonymous political activities, the Supreme Court has recognized how unmasked individuals can be "vulnerable to threats, harassment, and reprisals." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 97 (1982).

Further, unmasking diminishes the power of speaker's speech when their true identities are unpopular, as others may be more dismissive of the speakers' statements, and speakers may be chilled from continuing to speak publicly on that same topic. *See Doe v. Harris*, 772 F.3d 563, 581 (9th Cir. 2014) (anonymity "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.") (internal quotations omitted); *Art of Living II*, 2011 WL 5444622 at *9 (recognizing that unveiling speakers' true identities "diminishes the free exchange of ideas guaranteed by the Constitution.").

IV. Before Courts Unmask Anonymous Speakers, Plaintiffs Must Meet a High Evidentiary Burden and Show that Unmasking is Justified.

Given the importance of anonymous speech to our public discourse, and the potential impact of unmasking, no court should effectively pierce anonymity without weighing the First Amendment interests at stake – no matter how distasteful the alleged conduct giving rise to the action. Accordingly, many courts have developed a two-step test for

determining when plaintiffs are entitled to unmask anonymous online speakers. *Highfields Capital Management, L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal 2005); *see also Dendrite*, 775 A.2d 756. This Court should follow suit, and explicitly analyze whether Plaintiff's request to unmask nearly 300 Tumblr users comports with the First Amendment.

In step one, courts require plaintiffs to meet some significant evidentiary burden to show the legitimacy of their case, prior to the actual merits stage of the case. *Highfields*, 385 F. Supp. 2d at 975-76.

Step two requires courts, once plaintiffs meet their evidentiary burden, to balance competing interests. *See, e.g.*, *Dendrite*, 775 A.2d at 760; *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. Ct. App. 2009); *Highfields*, 385 F. Supp. 2d at 976; *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. App. 2007).

a. Plaintiffs Must, at Minimum, Make a *Prima Facie* Showing Before a Court Can Consider Whether to Unmask a Speaker.

This Court must require Plaintiff to meet a higher burden to prove her claims before considering whether to unmask the anonymous Tumblr users here.

Although the Supreme Court has yet to announce a canonical First Amendment standard for piercing anonymity, its decisions in *McIntyre* and *Talley v. California*, 362 U.S. 60 (1960), provide guidance. In particular, the Court has made clear that unmasking must

serve a compelling need. *McIntyre*, 514 U.S. at 348. In actions brought against anonymous online speakers, numerous state and federal courts have considered how to apply this compelling need requirement and have overwhelmingly endorsed tests demanding the production of a sufficient evidentiary basis to support the underlying legal theories prior to the piercing of anonymity.

Critically, according to the vast weight of authority, merely articulating the *plausible* existence of a valid claim is insufficient to support compelled disclosure. *See* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?* 50 B.C.L. Rev. 1373, 1377-78 (2009). Although courts have employed a variety of evidentiary standards at this step, EFF believes the summary judgment standard properly provides the proper protection for anonymous speakers. *Highfields*, 385 F. Supp. 2d at 975.[3]

Regardless of which evidentiary standard this Court uses, however, it must give practical effect to First Amendment interests in anonymity and guard against abuse by holding that the First Amendment requires sufficient evidence rather than conjecture in order to unmask. Under CPLR 3102(c), New York courts require plaintiffs to put forth "a strong

[3] Inasmuch as *Cahill* holds that no further balancing is necessary should plaintiffs meet a summary judgment standard, *see* 884 A.2d 461, that proposition is dubious. First, such proceedings are inappropriate when there are disputed facts (such as the nature of the speech at issue). Second, without a balancing test, a court would fail to adequately scrutinize whether a plaintiff actually needs a speaker's identity.

showing that a cause of action exists." *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 697-700 (Supreme Court, New York County 2007). Some New York courts appear to hold that CPLR 3102(c)'s requirements satisfy the First Amendment's protections for anonymous speakers. *See id.*; *Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 426-29 (Supreme Court, New York County 2009).

The "strong showing" standard under CPLR 3102(c) is too relaxed and potentially invites the very abuse of the discovery process described above, to the detriment of anonymous speakers. Similar lower evidentiary standards—such as a "good faith basis" for the plaintiff's claim—fail to require such evidence and impermissibly risk chilling speech. *See Cahill*, 884 A. 2d at 457 ("Plaintiffs can often initially plead sufficient facts to meet the good faith test . . . even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision."); *see also Brodie*, 966 A.2d at 456 (*"*The lower good faith basis or motion to dismiss thresholds. . . would inhibit the use of the Internet as a marketplace of ideas, where boundaries for participation in public discourse melt away, and anyone with access to a computer can speak to an audience larger and more diverse than any [of] the Framers could have imagined.") (quotations and footnotes omitted).

b. Even With a Sufficient Evidentiary Showing, Plaintiffs' Need to Unmask Must Outweigh Harm to Speakers.

The First Amendment further requires that, after plaintiffs meet their evidentiary burden, they must show that the balance of equities favor unmasking the speaker. Courts have distilled four interests they must analyze and balance to determine whether plaintiffs.

The plaintiffs' two interests are the strength of their case (usually as demonstrated by their evidentiary showing) and the necessity of disclosing speakers' identities. *Dendrite*, 775 A.2d at 760. The necessity inquiry includes whether there are less invasive discovery tools available that would satisfy plaintiffs' needs without unmasking anonymous speakers. *See Art of Living II*, 2011 WL 5444622 at *10 (describing discovery alternatives short of an in-person deposition that would unmask Doe, such as depositions by telephone or via written questions).

On the other side of the scale, courts must weigh the nature of the anonymous speech at issue in the case and the harm (or harms) that would result from loss of anonymity. Regarding the nature of the speech at issue, "the specific circumstances surrounding the speech serve to give context to the balancing exercise." *In re Anonymous Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011). Courts have found speakers have high First Amendment interests in anonymous political, religious, or literary speech. *See, e.g., Art of Living II*, 2011 WL 5444622 at *5-6 (finding critical commentary touched on matters of public

concern). *Cf. Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (finding the speech interest in downloading music to be more limited).

Courts must also weigh the harms that result from unmasking speakers—specifically the concrete consequences described above—and whether the disclosure will chill the speech of others. *See Art of Living II*, 2011 WL 5444622 at *7 ("[W]here substantial First Amendment concerns are at stake, courts should determine whether a discovery request is likely to result in chilling protected activity").

Analyzing these competing interests ensures that courts properly assess the "magnitude of the harms that would be caused by competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." *Highfields*, 385 F. Supp. 2d at 976. Further, courts have recognized that focusing their analysis on the necessity of unmasking ensures parties have some justifiable, legitimate litigation need for the information that outweighs the harm to an unmasked speaker. *See Art of Living II*, 2011 WL 5444622 at *6.

V. The Court Should Give Affected Tumblr Users More Time to Potentially Challenge the Unmasking Order.

The Court should delay disclosure of any identifying information of the affected Tumblr users for at least 14 more days so that they have an opportunity to retain counsel and challenge the disclosure. The First Amendment requires that courts afford anonymous speakers adequate time to learn that they may be unmasked so they have a meaningful opportunity to challenge those determinations. The Court's order requiring the near

immediate disclosure of Tumblr users' identifying information fell far short of the protections of the First Amendment. As part of subsequent negotiations, the parties agreed to give Tumblr additional time to notify its users, though the notices were not sent to users until June 28. That resulting in providing Tumblr users a mere 10 days—nearly half of which fell over a holiday weekend—to contest the order, which was also insufficient.

One of the leading cases to articulate the test for unmasking anonymous speakers, *Dendrite,* 775 A.2d 756, established "the appropriate procedures to be followed and the standards to be applied by courts in evaluating applications for discovery of the identity." *Id.* at 758. *See also SaleHoo Group, Ltd. v. ABC CO.*, 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010) (noting that case law "has begun to coalesce around the basic framework of the test articulated in *Dendrite"*).

The *Dendrite* court held that, to comport with the First Amendment, the procedures permitting unmasking require that a plaintiff undertake efforts to notify the affected anonymous speakers that a court may unmask them. *Id*. at 760. While that notification occurs, the court should "withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application." *Id*.

By holding that courts should afford anonymous speakers a reasonable opportunity to challenge attempts to unmask them, the court recognized that process is important to

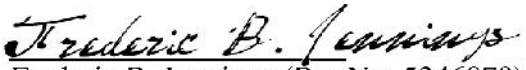
protect the substantive First Amendment rights of anonymous speakers. Requiring a Tumblr user to obtain counsel and consider whether to challenge an order in a potentially foreign jurisdiction within 10 days does not meet that standard.

Instead, a reasonable opportunity to contest an order should mean at least 21 days. The 14-day extension EFF proposes provides slightly more time, though it accounts for the four days surrounding the Fourth of July holiday weekend in which affected Tumblr users were unlikely to have made progress in obtaining counsel. The extension also would not prejudice Plaintiff.

* * *

Wherefore, we urge the Court to rigorously consider the First Amendment interests at stake in this case, apply the required legal test, and, if the Court concludes disclosure is still appropriate, offer the Tumblr users an adequate opportunity to contest disclosure in light of their particular circumstances.

Respectfully Submitted,



Frederic B. Jennings (Bar No. 5246079)
Tor Ekeland (Bar No. 4493631)
Tor Ekeland Law, PLLC
195 Montague Street, 10th Floor
Brooklyn, NY 11201
p: 718.737.7264
fred@torekeland.com
www.torekeland.com
Local Counsel for EFF

Aaron Mackey*
Electronic Frontier Foundation

815 Eddy Street
San Francisco, CA 94109

* Not admitted in New York State

CC:
Daniel Szalkiewicz
7 Dey Street, Suite 900B
New York, NY 10007
daniel@lawdss.com

Counsel for Plaintiff

Hope Garcia
General Counsel
Tumblr
11985 W. Bluff Creek Drive
Los Angeles, CA 90094
hgarcia@yahoo-inc.com

Counsel for Defendant