Aaron Mackey (SBN 286647)
amackey@eff.org
Naomi Gilens (SBN 315813)
naomi@eff.org
Sophia Cope (SBN 233428)
sophia@eff.org
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Attorneys for Non-Party J. Doe

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

PAYWARD, INC., d/b/a Kraken, a California corporation,

Plaintiff,

v.

DOES 1 through 10, inclusive,

Defendants.

Case No.: CIV 1902105

J. DOE'S NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA

Date: JUN 03 2020
Time: 1:30 PM
Dept: Courtroom B
Judge: Hon. James T. Chou

Action Filed: May 30, 2019

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Movant J. Doe ("Doe") will and hereby does move to quash a subpoena issued to non-party Glassdoor, Inc. ("Glassdoor") requiring it to identify former Payward, Inc., d/b/a Kraken ("Payward" or "Plaintiff") employees it laid off, including Doe, for posting reviews on Glassdoor that Payward does not like. Doe's review did not disclose Payward's confidential information and did not disparage Payward. Nor did it violate any other term of the Severance Agreement Doe signed with Payward. Instead, Doe's review opined about Doe's experiences working for Payward—speech that is protected by the First Amendment and of interest to Glassdoor users who want to learn more about Payward's treatment of its employees.

Payward's suit would (1) punish former employees for exercising their First Amendment rights and (2) chill others—including current Payward employees—from engaging in similar, legitimate constitutionally protected speech. The Court should provide more robust protections for anonymous speakers, specifically, by adopting additional requirements that Plaintiff must meet before it is permitted to unmask Doe or any other anonymous defendant in this case.

Notwithstanding this Court's previous order compelling Glassdoor to comply with Payward's subpoena, this Court should not allow Payward to violate Doe's First Amendment rights and identify Doe as a defendant in a meritless suit. Besides being unable to establish a prima facie case that Doe's review breached the Severance Agreement, Payward cannot demonstrate that it is entitled to obtain any of the relief it seeks because the Severance Agreement compels Plaintiff to submit to binding arbitration, rather than litigation, with Doe and all others who signed similar agreements. Doe thus respectfully asks that this Court quash the subpoena for their identifying information and that of all other anonymous Glassdoor users subject to the subpoena.

Doe's motion is based upon this notice of motion, the following memorandum of points and authorities, Doe's accompanying declaration, the declaration of Aaron Mackey, the declaration of Joseph M. Freeman, and any associated exhibits, any reply filed in support of this motion, all other papers filed and proceedings had in this action, oral argument of counsel, and such other matters as the Court may consider.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case calls into question the wisdom of solely relying on the standard announced in *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (2008), to shield anonymous speakers' identities when their underlying speech is fully protected by the Constitution. In light of the protected nature of Doe's speech and Doe's belief that this litigation is designed to chill, harass, and silence Doe and other former Payward employees, this Court should adopt more robust protections for anonymous speakers. Specifically, the Court should (1) require Payward to demonstrate it can make a prima facie showing on its breach of contract claims and, if it does, (2) conduct a multi-factor balancing test to determine whether Doe can nonetheless remain anonymous. The balancing weighs, among other factors, the harm to Doe from being identified against Payward's need for Doe's identity to pursue its case. This more comprehensive test—with the second prong's balancing—better protects Doe and others in Doe's position. Payward cannot meet its prima facie burden and, even if it could, the relevant factors weigh strongly in favor of quashing the instant subpoena.

Krinsky established that where a plaintiff alleges that a speaker is engaged in defamation—a category of speech that is not protected by the First Amendment—the plaintiff must make a prima facie showing of the elements of defamation in order to uncover the speaker's identity. In limiting its test to requiring only a prima facie showing, *Krinsky* reasoned that once a party establishes a prima facie case of defamation, no further protection for anonymous speech is warranted because the underlying speech would fall outside the First Amendment. 159 Cal. App. 4th at 1172. In those circumstances, according to the court, no further balancing of interests is necessary to overcome a person's right to speak anonymously. *Id.*

Where speakers are alleged to be engaged in speech that *is* constitutionally protected, however, this Court should ensure that public discourse remains "uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), by additionally balancing the harm that the anonymous users would face from being unmasked against the plaintiffs' need to identify them. *Dendrite Intern., Inc. v. Doe No. 3*, 775 A.2d 756, 760-761 (N.J. 2001). In short, *Krinsky*'s rationale for rejecting a second-step balancing of interests does not apply here because Doe's

review remains fully protected by the First Amendment. The *Krinsky* court also erred when it conflated two distinct First Amendment rights—to engage in protected speech and to speak anonymously. Thus, this Court should follow the lead of other courts that have adopted stronger anonymous speech protections that require additional interest balancing.

More robust protections beyond *Krinsky*'s prima facie prong are needed here because Payward's actions typify the type of vexatious and chilling behavior the First Amendment right to anonymity is supposed to prevent. Payward, one of the largest cryptocurrency exchanges in the market, seeks to punish Doe and other former employees who posted on Glassdoor. Payward cannot bring defamation or disparagement claims against Doe because Doe's review is protected opinion or is otherwise incapable of defamatory meaning. The company instead seeks to make an example out of Doe and other former employees, as their public identification and addition to this lawsuit sends a clear message to current and former employees: speak out at your own peril.

Yet the First Amendment protects anonymous speakers from these threats. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). There can be significant risks when individuals lose their anonymity, including making them "vulnerable to threats, harassment, and reprisals." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 97 (1982). Courts have thus recognized that attempts to unmask anonymous speakers can directly harm those speakers' First Amendment rights and chill others from relying on anonymity. *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005). Thus, fearing the many costs of losing anonymity, would-be online speakers will likely choose to not speak. *Id*. at 981. Payward attempts to put that high price on Doe's constitutionally protected speech.

Even under *Krinsky*, however, Payward has failed to make out a prima facie case against Doe for violating the Severance Agreement. Doe thoughtfully composed their Glassdoor review to avoid breaching the Agreement while providing their opinion for anyone interested in learning what it is like to work at one of the largest employers in the innovative and fast-developing market of cryptocurrency exchanges. Doe did not disclose confidential information in any sense, nor did Doe

disparage or defame Payward or any of its goods or services. Because Payward cannot establish a prima facie case of contract breach with respect to Doe, Doe respectfully asks this Court to quash the subpoena for their identifying information. Doe acknowledges that this Court granted Payward's motion to compel Glassdoor to comply with the subpoena, but submits that the Court did not analyze Payward's claims with respect to Doe's specific review and find that Plaintiff had satisfied its burden under *Krinsky* and *Glassdoor, Inc. v. Superior Court*, 9 Cal. App. 5th 623 (2017).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Payward lays off Doe and the parties sign a severance agreement compelling arbitration based on any dispute arising from the contract.

Payward laid off J. Doe and numerous others in January 2019 for reasons having nothing to do with their performance. Declaration of J. Doe ("Doe Decl.") ¶¶ 4-5.[1] Doe signed Payward's Severance Agreement and received a sum of money to mitigate the financial hardship and lengthy job search Doe anticipated. *Id*. at ¶¶ 6-8.

The Severance Agreement contained several terms relevant to this lawsuit and Payward's subpoena, including confidentiality and non-disparagement provisions. Doe Decl., Ex. A. The agreement also included an arbitration clause:

> Arbitration: Except for any claim for injunctive relief arising out of a breach of your obligations to protect the Company's proprietary information, **the parties agree to arbitrate**, in San Francisco County, California through the American Arbitration Association, **any and all disputes or claims arising out of or related to the validity, enforceability, interpretation, performance or breach of this Agreement**, whether sounding in tort, contract, statutory violation or otherwise, or involving the construction or application or any of the terms, provisions, or conditions of this Agreement. Any arbitration may be initiated by a written demand to the other party. The arbitrator's decision shall be final, binding, and conclusive. The parties agree that in the event of arbitration, each party shall bear its own costs and fees at initiation and during the term. The parties further agree that this Agreement is intended to be strictly construed to provide for arbitration as the sole and exclusive means for resolution of all disputes hereunder to the fullest extent permitted by

[1] Counsel for Doe has on file copies of Doe's declaration and Doe's Severance Agreement signed in Doe's legal name. Declaration of Aaron Mackey, ¶¶ 2-3. Individuals can sign declarations under fictitious names. *See Doe v. Superior Court*, 194 Cal. App. 4th 750, 754-56 (2011).

> law. **The parties expressly waive any entitlement to have such controversies decided by a court or a jury**.

Id. (emphasis added).

B. Doe posts a review on Glassdoor and complies with the Severance Agreement.

Doe took their confidentiality and non-disparagement obligations under the Severance Agreement seriously. Doe Decl. ¶¶ 9-12. Doe recognized that although the agreement prohibited them from disclosing confidential information or disparaging/defaming Plaintiff, it did not prohibit them from opining about their experiences as an employee. *Id*. at ¶¶ 11-12. Doe gave considerable thought to what they could say publicly about Payward before posting their February 15, 2019 review:

> **Title:** It is my opinion that having 'The Kraken' represent your firm is very apt.
>
> I worked at Kraken Digital Asset Exchange full-time.
>
> **Pros**
>
> Good benefits
> Many skilled, knowledgeable and nice colleagues in various departments
> the industry is interesting
>
> **Cons**
>
> I personally had a deep sense of trepidation much of the time. Could that be considered a con? I can only say how I felt so maybe it was just me and not the company.
>
> **Advice to Management**
>
> Would management want to hear my constructive advice if I decided to give it?

Complaint, Ex. B at 15. Doe also checked several boxes available to Glassdoor reviewers, including that Doe "Doesn't Recommend" Payward, has a "Neutral Outlook" on the company, and "Disapproves of CEO." *Id*. The general thrust and specific content of Doe's review was pure opinion and conveyed their own feelings about working for Payward. The review did not mention anything about being laid off.

Payward apparently agreed, posting a reply to Doe's review on March 1:

> Thank you for your feedback and for noting our skilled, nice, and knowledgeable team. We're sorry to hear that you felt a "sense of trepidation" during your time with Kraken. We are always open to

> feedback and looking for ways to improve, not just for our clients but for our team members. Kraken believes in empowering its team members to express their thoughts, ideas, and concerns, because we believe that diversity of thought is what makes us strong. In fact, we seek out individuals who want challenge the status quo and inspire change. We truly wish you the best and would [sic] to thank you for your work at Kraken.

Doe Decl. Ex. B; Declaration of Joseph M. Freeman ("Freeman Decl.") ¶ 6.

C. Doe deletes review in abundance of caution after Payward complains; Glassdoor notifies Doe of this Court's ruling requiring disclosure of Doe's identity.

Doe learned that Payward objected to several online reviews via an emailed letter the company sent to former employees in early June 2019. Doe Decl. ¶ 17. In that letter, Payward demanded that former employees delete any reviews that Payward alleged constituted a breach of the Severance Agreement. *Id.* at ¶ 17. Despite Doe's firm belief that the review did not breach any provision of the Severance Agreement, Doe deleted the review immediately after receiving Payward's June letter. *Id.* at ¶ 19; Freeman Decl. ¶ 8.

Doe first learned of Payward's suit on November 13, 2019 when Glassdoor notified Doe of this Court's tentative order that would require the website to turn over identifying information about them. Doe Decl. ¶ 20. Glassdoor informed Doe on December 16, 2019 that this Court had ordered Glassdoor to turn over Doe's identifying information within 60 days. *Id.* at ¶ 21.

III. ARGUMENT

A. Payward has failed to make a prima facie showing that Doe breached the Severance Agreement.

1. Payward has failed to specify which of Doe's statements amount to a breach of the Severance Agreement.

As a threshold matter, Payward's failure (1) to clearly specify which of Doe's statements breached the Severance Agreement and (2) to explain or present evidence showing how Doe's review amounts to a breach requires that the court quash Payward's subpoena with regard to Doe. *Krinsky*, 159 Cal. App. 4th at 1172; *Glassdoor*, 9 Cal. App. 5th at 634-35. A plaintiff is not "entitled to compel the disclosure of an anonymous poster's identity without first clearly identifying, on the

record, the *specific statements* claimed to have given rise to liability," and articulating how those statements establish liability. *Glassdoor*, 9 Cal. App. 5th at 636 (emphasis added).

Where, as here, a plaintiff seeks to unmask the identity of an anonymous online reviewer, the plaintiff must make clear "the exact statements" within the review that it alleges give rise to liability. *Id*. It is not sufficient to merely quote the review in full. *Id*. "Moreover, if it is not obvious from the face of the statements that they indeed conveyed an actionable meaning, the plaintiff must clearly specify the meaning it contends was conveyed by them, and any extrinsic facts necessary to lend them that meaning." *Id*.

Payward has satisfied none of these requirements. Rather, Payward simply attaches Doe's review of the company in its entirety to the Complaint, *see* Compl. Ex. B at 30, and references portions of Doe's statements in its Separate Statement. Separate Statement in Support of Motion to Compel at 18. Payward fails to specify which particular statements within the review are allegedly actionable, much less specifying what actionable meanings the statements convey or providing evidence sufficient to sustain a finding that the statements were capable of any actionable meanings. The vagueness of Payward's claims "is redolent with the possibility that greater specificity might not disclose" confidential information or disparaging/defamatory remarks, "but a lack of merit in the claims themselves." *Glassdoor*, 9 Cal. App. 5th at 637.

These requirements are essential to allow the court to examine "the exact statements on which liability is predicated," to determine whether the plaintiff made a prima facie showing of actionable statements. *Id.* at 636. Both Payward and this Court failed to conduct a particularized assessment as required by *Glassdoor*.

2. Doe's review did not disclose any confidential information about Payward.

Even if this Court were to overlook Payward's failure the specify the exact statements claimed to be actionable and consider the review in its entirety, the review discloses no confidential information about Payward. The confidentiality clause of the Severance Agreement prohibits separated employees from sharing confidential information not already in the public domain. Compl. ¶ 10. It defines confidential information as including "the Company's policies and

procedures, consultant or employee headcount, hires, termination, layoffs, salaries, bonuses, or separation compensation." Compl. ¶ 10.

None of this information is included in Doe's review. Instead, Doe's review consists overwhelmingly of statements of opinion. Compl. Ex. B at 15 ("It is my opinion that having 'The Kraken' represent your firm is very apt [. . .] Many skilled knowledgeable and nice colleagues in various departments [. . .] I personally had a deep sense of trepidation much of the time."). The only statement of fact contained in the review is that Doe "worked at Kraken Digital Asset Exchange full-time." *Id.* And, again, Payward has not identified that statement or any other statement as the one on which it bases its claims for breach of the Severance Agreement.

3. Doe's review did not disparage or defame Payward or its leadership.

Neither did Doe's review violate the Severance Agreement's non-disparagement clause. The non-disparagement clause provides, in relevant part, that separated employees must "not disparage or defame Releasees or their products, services, agents, representatives, directors, officers, shareholders, attorneys, employees, consultants, vendors, affiliates, successors or assigns, or any person acting by, through, under or in concert with any of them, with any written or oral statement." Doe Decl. Ex. A. The agreement does not define the word "disparage" and it is ambiguous and vague. Given that ambiguities in contract terms are to be construed against the drafter, the term should be given its legal meaning under California law. Cal. Civil Code § 1654 (mandating that ambiguities in contracts must be interpreted against their drafters); *see also Sandquist v. Lebo Automotive, Inc.*, 1 Cal. 5th 233, 247-48 (2016).

In this state, a breach of contract claim for disparagement requires a plaintiff to show (1) a false or misleading statement that (2) specifically refers to the plaintiff's product or business and (3) clearly derogates that product or business, thereby (4) causing the plaintiff special damages. *Hartford Casualty Ins. Co. v. Swift Distrib., Inc.*, 59 Cal. 4th 277, 284, 294 (2014); *see also* Restatement (First) of Torts ch. 28, Introductory Note (noting that, "[i]n disparagement, the person whose property in goods or the quality of whose goods has been attacked must prove that the disparaging statement of fact is untrue or that the disparaging expression of opinion is incorrect" and that the disparaging matter must have caused "financial loss").

Defamation requires publication of a false and unprivileged statement that exposes a person to hatred, contempt, ridicule, or obloquy and causes damage. Cal. Civil Code § 45; *Baker v. L.A. Herald Exam'r*, 42 Cal. 3d 254, 259 (1986).

Payward must thus show that all elements for either disparagement or defamation are present to establish a prima facie case for breach of the non-disparagement clause ("disparage or defame")—a burden it cannot meet.[2] Doe states that "[i]t is my opinion that having '[t]he Kraken' represent your firm is very apt," and that Doe "personally had a deep sense of trepidation much of the time." Compl. Ex. B at 15. The first is a statement of opinion, and the second is an introspective statement about Doe's own experience. The boxes Doe checked—that Doe "Doesn't Recommend" Payward, has a "Neutral Outlook" on the company, and "Disapproves of CEO"—are similarly protected opinion. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (limiting liability only to statements that express or imply a fact capable of being proven true or false); *Baker*, 42 Cal. 3d at 259 (similarly recognizing that the *sine qua non* of defamation requires the existence of a falsehood). None of the statements are "false or misleading," and Payward makes no attempt to show otherwise.

Neither does Payward prove that Doe's review caused damage. First, because Doe did not breach the Severance Agreement, Payward's claims based on lost payment of the severance fails. Second, Payward has not specifically shown how it has suffered reputational or other damages.

4. Doe agrees with Glassdoor that California law voids the Severance Agreement should it prohibit Doe from opining about Doe's personal experiences as a Payward employee.

To the extent that Payward seeks to interpret the non-disparagement clause to broadly prohibit all discussion of Payward or its employees, Doe joins Glassdoor's arguments that the clause is unenforceable. *See* Glassdoor Opp'n to Mot. to Compel at 11-12 (arguing that Severance Agreement is void to the extent that it restrains anyone from engaging in a lawful profession of any kind under Cal. Bus. & Prof. Code § 16600).

---

[2] Again, Payward has failed to identify the exact statements in Doe's review on which its claims for liability are based.

Doe respectfully asks this Court to reconsider this issue because an indefinite prohibition on any criticism of the company would prevent Doe from truthfully discussing Payward's products or practices, even if that speech is based on information gained *after* the termination of Doe's employment. It would, for example, prevent Doe from opining that Doe's present and/or future employers' workplace, pay, or benefits are superior to Payward's in the course of any other employment at any time in the future. This prohibition would burden Doe's ability to recruit or solicit employees or others from Payward, even fifteen, twenty, or thirty years in the future. This lawsuit has chilled Doe's speech and Doe fears reprisals should they talk about their work for Payward. Doe Decl. ¶ 27. These restrictions chill competition, burden Doe's right to practice a lawful profession, and are not enforceable in California. *See AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal. App. 5th 923, 936 (2018) (holding invalid a non-solicitation clause preventing former employees from recruiting employees from former employer for one year after termination and citing cases); *Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564, 575 (2009) (holding invalid a non-solicitation clause prohibiting employees, for 18 months after their employment, from soliciting business from customers or clients with whom they had contact during their employment).

B. The Court should balance the interests of the parties in addition to applying the *Krinsky* standard because the *Krinsky* prima facie prong alone fails to adequately protect Doe's First Amendment rights.

The court in *Krinsky* did not address the question at issue in this case—what showing is required for a plaintiff to unmask an anonymous speaker engaged in constitutionally protected speech. In *Krinsky*, the plaintiff issued a subpoena to identify an anonymous online speaker alleged to have defamed the plaintiff. 159 Cal. App. 4th at 1159-60. After reviewing the various tests courts have created to determine when an anonymous speaker can be identified, the Sixth District held that the plaintiff had "to make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity." *Id.* at 1172. Crucially, it reasoned that the prima facie standard offered sufficient protections for anonymous speakers in cases involving defamation claims because, "[w]hen there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment. [. . .]

Accordingly, a further balancing of interests should not be necessary to overcome the defendant's constitutional right to speak anonymously." *Id*. *Krinsky* thus rejected a further balancing analysis *because* the plaintiff had met its burden to show that the speech that formed the gravamen of its complaint was defamatory and outside the First Amendment's protections. *Accord Glassdoor*, 9 Cal. App. 5th at 634-35. Because *Krinsky* and *Glassdoor* are distinguishable from this case, it remains an open question in California what test courts should employ to allow a plaintiff to unmask an anonymous speaker engaged in constitutionally protected speech.

Applying *Krinsky* would result in unmasking Doe without finding that Doe's underlying speech lacks First Amendment protections. It punishes Doe and other Glassdoor users for exercising their First Amendment rights and chills other current and former Payward employees' speech. To avoid this result, this Court should follow the lead of several other jurisdictions that have required an additional balancing after plaintiffs meet their prima facie burden. In this stage, courts balance the "defendant's First 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." *Dendrite*, 775 A.2d at 760-61; *see also Signature Mgmt., LLC v. Doe*, 876 F.3d 831, 838 (6th Cir. 2017); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456 (Md. 2009); *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. App. Div. 1 2007); *Highfields*, 385 F. Supp. 2d at 976.[3]

This second-step balancing is a valuable and necessary safeguard to protect the right to free speech that the First Amendment guarantees. Requiring only that the plaintiff establish a prima facie showing of a tort or contract claim to unmask any anonymous speaker, even when the unmasking is not necessary to vindicate a plaintiff's interests, would unduly punish speakers for exercising their

---

[3] These cases call into question *Krinsky*'s First Amendment analysis. *Krinsky*'s dismissal of a second-stage balancing inquiry conflates two distinct First Amendment rights: the right to engage in protected speech and the right to speak anonymously. 159 Cal. App. 4th at 1172. *Krinsky* conditions the protections for anonymous speech on whether the speech itself is protected by the First Amendment. *Id.* Yet other courts have treated these rights as distinct concerns because requiring a prima facie showing and a balancing test "most appropriately balances a speaker's constitutional right to anonymous Internet speech with a plaintiff's right to seek judicial redress from defamatory remarks." *Brodie*, 966 A.2d at 455.

First Amendment rights. It would also open the door to plaintiffs' abuse of "discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics." *Dendrite*, 775 A.2d at 771. And the threat of being publicly identified in litigation would significantly chill individuals from engaging in constitutionally protected speech. This is because unmasking anonymous speakers exacts "a considerable price on defendant's use" of their First Amendment rights and "[v]ery few would-be commentators are likely to be prepared to bear costs of this magnitude." *Highfields*, 385 F. Supp. 2d at 980-81.

Balancing interests also provides "the court with the flexibility needed to ensure a proper balance is reached between the parties' competing interests on a case-by-case basis." *Mobilisa*, 170 P.3d at 720.

C. The balancing of the interests tips decidedly in favor of quashing the subpoena.

As explained above, Doe disagrees with the Court that Payward has made a prima facie showing on its breach of contract claims—that is, Doe did not reveal confidential information, nor did Doe disparage or defame the company. Even if Payward did make such a showing, however, the subpoena should still be quashed because the harm of unmasking Doe and other factors in Doe's favor outweigh Payward's need to obtain Doe's identity.

Courts applying second-step balancing have considered several factors to weigh the parties' interests. These factors include the context of the speech involved, *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011), the harm to the anonymous speaker and others that would result from disclosure, *Highfields*, 385 F. Supp. 2d at 980-81, the strength of the plaintiff's case, *Dendrite*, 775 A.2d at 760, the plaintiff's need to identify the speaker to advance the litigation, *id*. at 761, and the availability of alternatives to the discovery or publicly identifying the speaker, *Mobilisa*, 170 P.3d at 720. *See also Signature Mgmt. Team, LLC v. Doe*, 323 F. Supp. 3d 954 (E.D. Mich. 2018) (holding that a Doe defendant could remain anonymous even after being adjudicated as a copyright infringer because multiple factors tipped in his favor). These factors weigh decidedly in Doe's favor.

1. Doe faces severe consequences if Doe is identified publicly or even if Doe's identity is shared only with Payward.

Publicly identifying Doe or permitting Payward to learn Doe's identity will harm Doe in multiple respects. The disclosure of an anonymous speaker's identity can irreparably and directly harm them, including through public shaming, retaliation, and loss of a job. *See McIntyre*, 514 U.S. at 341-42 ("[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible"); *Dendrite*, 775 A.2d at 771 (recognizing that unmasking speakers can let other people "harass, intimidate or silence critics").

First, unmasking Doe has the potential to irrevocably link Doe's identity to Payward's meritless allegations in a public record. This heavy price "would include public exposure of plaintiff's identity and the financial and other burdens of defending against a multi-count lawsuit—perhaps in a remote jurisdiction." *Highfields*, 385 F. Supp. 2d at 981. Doe is very concerned that they will be forever associated with Payward's allegations merely for voicing their opinions in a review that they deleted months ago. Doe Decl. ¶¶ 22-24.

Second, Doe believes that publicly identifying them in this case could result in further consequences to their future economic and employment consequences should they be publicly linked to Payward's meritless claims. *Id*. at ¶¶ 23-24; *see McIntyre*, 514 U.S. at 341-42.

Third, Doe is very concerned about consequences they will face even if only Payward learns of their identity. Doe Decl. ¶¶ 25-26. Because Payward has already ignored the arbitration clause of the Severance Agreement and instead filed this case, Doe is worried about what other steps the plaintiff may take to intimidate, harass, or otherwise punish them for doing nothing more than speaking their mind. *Id*.

Finally, Doe has already been harmed merely by the filing of this lawsuit and Payward's efforts to identify them. As a result of this lawsuit, Doe is more hesitant to speak online about their employment at Payward. *Id*. at ¶ 27. Doe is concerned that should they say anything, even acknowledging the bare fact of their employment, Payward will seek further legal action against them or otherwise target them, a prospect that has made them anxious and negatively impacted their

health. *Id.* at ¶¶ 27-30. Doe is thus in the same position as speakers discussed in *Highfields*, whom the court recognized would, upon learning about the high price of anonymous speech, likely not speak. *See* 385 F. Supp. 2d at 981.

2. Doe's Glassdoor review constitutes protected opinion on a matter of public interest: what it is like to work for Payward.

Because Doe's speech does not fall within one of the categories unprotected by the First Amendment, this factor tips strongly in Doe's favor.

Doe's Glassdoor review concerned their opinion on a matter of interest to Glassdoor users and the broader public: what it's like to work for Payward, a leading company in a burgeoning digital currency market. Courts considering whether to unmask anonymous speakers frequently examine the nature of the anonymous speech at issue, as "[t]he specific circumstances surrounding the speech serve to give context to the balancing exercise." *In re Anonymous Online Speakers*, 661 F.3d at 1177. Doe's opinions ranged from praising Payward's skilled and knowledgable employees to sharing how Doe felt a deep sense of trepidation working for Payward. Compl. Ex. B at 15.

The content of Doe's speech was also socially valuable. *See Signature Mgmt.*, 323 F. Supp. 3d at 960 (holding Doe's blog post about company constituted commentary on a public issue was entitled to a "high level of First Amendment protection"). Doe posted a review on Glassdoor because Doe understood that it would reach an audience of readers interested in learning about others' experiences working for Payward. Doe Decl. ¶ 14. Much like the anonymous speaker in *Highfields*, Doe has a First Amendment interest in having their "message reach as many people as possible." 385 F. Supp. 2d at 980. Doe and others' Glassdoor reviews thus provided important commentary on Payward that others, including potential future employees, could use to form their own opinions about Plaintiff. *See Signature Mgmt.*, 323 F. Supp. 3d at 960.

3. Payward's legal claims lack merit because Payward is not entitled to obtain damages or an injunction under the Severance Agreement.

By contrast, Payward's legal claims significantly lack merit. Courts scrutinize the strength of a plaintiff's claims when considering whether to unmask anonymous speakers. *Dendrite*, 775 A.2d at 760. This factor tips in Doe's favor for several reasons.

Most crucially, Payward is not entitled to obtain *any* judicial relief from Doe based on claims that Doe breached the Severance Agreement (which Doe vigorously disputes). The agreement's binding arbitration clause deprives Payward of the ability to obtain relief before this Court or any other. It states that "the parties agree to arbitrate, in San Francisco County, California through the American Arbitration Association, any and all disputes or claims arising out of or related to the validity, enforceability, interpretation, performance or breach of this Agreement." Doe Decl. Ex. A. It further states that "[t]he parties expressly waive any entitlement to have such controversies decided by a court or a jury." *Id.* Because the arbitration clause deprives this Court of jurisdiction to provide the relief Payward seeks, Payward cannot by definition prevail in this case with respect to any of its claims regarding any Glassdoor reviewer who is a former employee who signed the agreement. It thus should not be able to use discovery tools derived from the filing of this case to identify Doe.

Even assuming Payward and Doe had not agreed to binding arbitration, Payward's case with respect to Doe is demonstrably weak. Payward has not proven that Doe's review caused damage, for the reasons discussed above. *See Dendrite*, 775 A.2d at 772 (plaintiff failed to establish proof that Doe's speech caused harm). As previously explained, Doe's review did not breach any provision of the Severance Agreement. Further, Doe deleted the review right after learning that Payward objected to its reviews on Glassdoor. Doe Decl. ¶ 19; Freeman Decl. ¶ 8.

Finally, Payward's breach of contract claims are different in kind from Doe's right to share constitutionally protected speech anonymously. In *Highfields*, the court acknowledged a similar gap in reviewing the plaintiff's claims, which primarily sounded in trademark, unfair competition, and commercial disparagement. 385 F. Supp. 2d at 975. "These are, of course, completely legitimate interests," the court acknowledged. *Id.* "It is of some analytical moment, however, that the rights plaintiff seeks to defend are not as vulnerable or precarious as the rights defendant seeks to protect—and not as close to the central societal values that animate our Constitution." *Id.* *Highfield*'s logic applies to Payward's contract breach claims.

4. Disclosure of Doe's identity is not necessary for Payward to proceed with its breach of contract claims.

Disclosure of Doe's identity, either publicly or just to Plaintiff, is unnecessary for Payward to pursue its breach of contract claims. Plaintiffs must demonstrate that they need to identify anonymous defendants to pursue their claims. *Dendrite*, 775 A.2d at 760-61. The need to identify an anonymous speaker operates on a spectrum, as "the presumption in favor of disclosure is stronger or weaker depending on the plaintiff's need to unmask the defendant in order to enforce its rights." *Signature Mgmt.*, 876 F.3d at 837. Payward does not need to identify Doe to pursue its claims.

First, as explained above, because Payward's dispute with Doe is governed by an arbitration clause, it does not have a valid legal basis to pursue these claims in court. Hence it is not necessary for Doe to be identified as a defendant in this suit when the arbitration clause prevents the dispute from being litigated in this Court in the first instance.

Second, because Doe already deleted the review, it is not necessary for Payward to identify Doe to ensure compliance with the injunction Payward seeks. Doe Decl. ¶ 19; Freeman Decl. ¶ 8; *see also Signature Mgmt.*, 876 F.3d at 837 (holding plaintiff has little need to unmask a speaker when the speaker complied with all relief ordered).

Finally, identifying Doe is unnecessary because Doe is represented by counsel who can advocate for Doe's interests in both preserving Doe's anonymity and, if need be, defending against this meritless case, without Doe needing to be identified. *See Superior Court*, 194 Cal. App. 4th at 754 (holding that litigants can use fictitious names).

CONCLUSION

For the foregoing reasons, Movant Doe respectfully requests that this Court grant this motion to quash Payward's subpoena.

Dated: February 10, 2020

Respectfully submitted,

Aaron Mackey
Naomi Gilens
Sophia Cope
ELECTRONIC FRONTIER FOUNDATION

815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Attorneys for Non-Party J. Doe

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen, and not a party to the within action. My business address is: Electronic Frontier Foundation, 815 Eddy Street, San Francisco, CA 94109. I served the within document(s):

J. DOE'S NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA

☑ **Via E-Mail:** by transmitting via electronic mail the document(s) listed above to the person(s) at the email address(es) set forth below on February 11, 2020, by agreement of counsel

☐ **Via Facsimile:** by transmitting via facsimile the document(s) listed above to the fax number (s) set forth below on this date before 5:00 p.m.

☐ **Via Hand:** by personally delivering the document(s) listed above to the person(s) at the addresses set forth below.

☐ **Via U.S. Mail:** by placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for delivery by U.S. Postal Service, as part of the ordinary business practice of Burgoyne Law Group described below, addressed as follows:

William J. Frimel
Seubert French Frimel & Warner LLP
1075 Curtis Street
Menlo Park, CA 94025
bill@ssfwlaw.com

Attorneys for Non-Party Glassdoor

Christopher LaVigne
Andrew Calderon
Pierce Bainbridge Beck Price & Hecht LLP
355 South Grand Avenue, 44th Floor
Los Angeles, California 90071
clavigne@piercebainbridge.com
acalderon@piercebainbridge.com

Attorneys for Plaintiff Payward, Inc., d/b/a Kraken

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed February 11, 2020 at San Francisco, California.

By: _____
Aaron Mackey