Paul Alan Levy, *pro hac vice* to be sought
email: plevy@citizen.org
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Telephone: (202) 588-1000

Phillip R. Malone (CA Bar No. 163969)
Jef Pearlman (CA Bar No. 254759)
Stephen Liu (CA Certified Law Student No. 39493)
email: pmalone@law.stanford.edu
Director, Juelsgaard Intellectual
Property and Innovation Clinic
Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 725-6369

Attorneys for Doe

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

DR. GORDON AUSTIN, Plaintiff, v. JOHN DOES 1-10, Defendants.	No. 2015-1-cv-288372 Hon. Maureen A. Folan **DEFENDANT'S MEMORANDUM SUPPORTING MOTION TO QUASH AND FOR AWARD OF ATTORNEY FEES** DATE: February 23, 2016 TIME: 9 AM PLACE: Department 8

MEMORANDUM OF JOHN DOE IN SUPPORT OF MOTION TO QUASH SUBPOENA

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

This case involves a Georgia dentist who, in 2008 and 2009, was indicted for assaulting several of his patients, many of them children, when they made noise during dental procedures after the anesthesia he administered proved insufficient to suppress their pain. In 2009, a local news station ran a two-part series about the dentist and the indictment; defendant Doe found the series on the station's web site and reposted it to YouTube. Six years later, in the fall of 2015, however, the dentist filed a lawsuit against Doe claiming that the video is defamatory and intentionally interferes with his business. This motion seeks to quash a subpoena to Google seeking to identify Doe, who is worried about potential ramifications in her small town if she is identified as the critic.[1/]

It is settled law that, when a subpoena seeks to identify an anonymous Internet speaker so that the speaker can be served as a defendant in a lawsuit, the plaintiff has the burden of showing both that he has filed a valid complaint and that he has admissible evidence establishing the elements of his claims. *Krinsky v. Doe 6*, 159 Cal. App.4th 1154 (Cal. App. 6 Dist. 2008). No such evidence has been provided here. Moreover, settled law also establishes that the complaint cannot possibly succeed for several reasons, including that the suit was filed six years after the allegedly defamatory statements were made, long after the statute of limitations expired, and that, because Doe only posted a video that somebody else had created, section 230 of the Communications Decency Act immunizes him from being sued.

STATEMENT OF THE CASE

1. The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in London's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to read them. As the Supreme Court explained in *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997), "From the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide

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[1/] Pursuant to the standard practice of undersigned counsel Mr. Levy in litigating cases involving anonymous speech, pronouns referring to the Doe use the female gender. They should not be understood as disclosing the Doe's actual gender.

audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer." The Court held, therefore, that full First Amendment protection applies to speech on the Internet. *Id.*

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. Yahoo!, for example, has message boards about every publicly traded company, and Google hosts Blogspot, where members of the public may create their own blogs and invite comment from the world, and YouTube, which allows members of the public to post videos and to comment on each other's videos.

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

Many message boards have a significant feature that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use a message board to express his point of view; a person who disagrees with something that is said on a message board for any reason—including the belief that a statement contains false or misleading information—can respond to those statements immediately at no cost, and that response can have the same prominence as the offending message. A message board is thus unlike a newspaper, which cannot be required to print a response to its

criticisms, and often, indeed, lacks space for regular responses. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, on most message boards companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. Because many people regularly revisit message boards about a particular topic, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, is the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

2. As his complaint alleges, plaintiff Gordon Austin was formerly a dentist working in Carrollton, a small community in western Georgia. In 2008, he was indicted for misconduct in his dental practice. In the words of the Georgia Court of Appeals: "The state brought a 12–count indictment against Gordon Trent Austin, charging him with multiple counts of simple battery, aggravated assault, and cruelty to children." *State v. Austin*, 297 Ga. App. 478, 677 S.E.2d 706, 707 (2009); a copy of this decision is attached as Exhibit F. For example, one of the counts of the indictment recited as follows: "that on or about February 22, 2008, Austin, who apparently is an oral surgeon,

> did make an assault upon the person of Corey Beasley, with a metal object, to wit: a dental elevator, which, when used offensively against a person, is likely to result in serious bodily harm by striking Corey Beasley on the head with said dental elevator . . ..

Id. at 707-708.

The local media covered the story, in part because Austin was (and remains) a prominent figure in the community.[2/] Copies of these news stories are attached to the Levy Affidavit as

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[2/] *Oral Surgeon Accused of Hitting Patients*, WSB-TV 2 Atlanta (April 2, 2008), http://www.wsbtv.com/news/news/oral-surgeon-accused-of-hitting-patients/nJTQ4/ (last visited January 7, 2016); Heather L. Finley, *Oral Surgeon's Assault, Battery Trial Delayed until Nov. 3*, Times-Georgian (August 2008), https://web.archive.org/web/20101215213715/http://times-georgian.com/view/full_story/3282095/article-Oral-surgeon-s- assault--battery-trial- delayed-until-Nov--3? (last visited January 7, 2016); Amanda Kramer, *Carrollton Oral Surgeon Faces New Charges*, Times-Georgian (July 2009), https://web.archive.org/web/

Exhibit E.

Moreover, the local Fox television affiliateran a two-part series that detailed the nature of the accusations and featured interviews with some of the victims and, indeed, with a member of the dentist's staff who confirmed the accusations. The series can be seen on YouTube at https://www.youtube.com/watch?v=vtCVHcT2mB0; the attached affidavit of Samantha Hoilett provides a transcript of the programs. Exhibit I. According to the broadcast, Austin would perform dental procedures on patients who had been given anesthesia, but on some occasions, at least, the anesthesia was insufficient to deaden the pain. When patients moaned, or even cried out, during the procedures, loudly enough to be heard by other patients in the waiting room, Austin would tell the patient to stop making noise and, if the patient failed to obey his command, the claim was that Austin would then strike them with a dental instrument to reinforce the command. Hoilett Affidavit ¶ 2 and Exhibit I.

Austin eventually pleaded guilty to six counts of Medicare fraud and agreed not to practice dentistry on civilian patients for ten years, but the assault counts were dismissed as part of the deal. *In re Gordon Trent Austin, D.M.D.*, 2009-2250, State Board of Dentistry, at 1-3; State of Georgia Department of Law: *Carrollton Oral Surgeon Pleads Guilty to Thefts from Medicaid Program* (2009), http://law.ga.gov/press-releases/2009-08-06/carrollton-oral-surgeon-pleads-guilty-thefts

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20100105001748/ http://times-georgian.com/pages/full_story/push?article-Carrollton+oral+surgeon+faces+new+charges%20&id=2913965. (last visited January 7, 2016); Amanda Kramer, *Austin Pleads Guilty to Six Theft Counts; Other Criminal Charges against Oral Surgeon Dropped in Plea Deal*, Times-Georgian (August 2009), https://web.archive.org/web/20100104215021/http://times-georgian.com/pages/full_story/push?article-Austin+pleads+guilty+to+six+theft+counts-+other+criminal+charges+against+oral+surgeon+dropped+in+plea+deal%20&id=3114770 (last visited January 7, 2016); Amanda Kramer, *North Carolina Denies License to Austin*, Times-Georgian (August 2009), https://web.archive.org/web/20100105001716/http://times-georgian.com/pages/full_story/push?article-North+Carolina+denies+license+to+Austin%20&id=3196615 (last visited January 7, 2016); Dale Russell, *I-Team: Carroll Dentist Loses License*, Fox 5 Atlanta (January 14, 2010), https://web.archive.org/web/20100122211616/http://www.myfoxatlanta.com/dpp/news/i-team%3A-carroll-dentist-loses-license-011410 (last visited January 7, 2016); *Dentist Accused of Bludgeoning Patients*, Dr.BiCuspid.com (January 19, 2010), https://www.drbicuspid.com/index.aspx?sec=log&URL=http%3a%2f%2fdrbicuspid.com%2findex.asp%3fsec%3dnws_n%26sub%3drad%26pag%3ddis%26ItemID%3d303673 (last visited January 7, 2016)).

-medicaid-program (last visited January 7, 2016). These documents are attached to the Levy Affidavit as Exhibits G and E. The state dental board rescinded his license to practice dentistry. *In re Gordon Trent Austin, D.M.D.*, 2009-2250, State Board of Dentistry, at 5. And lawsuits by some of his victims were settled on confidential terms. Levy Affidavit ¶ 10. Despite his convictions and the loss of his license, Austin remained a sufficiently prominent member of the Carrollton community that he led the 2012 presidential campaign of former Georgia Congressman Newt Gingrich in Georgia's third congressional district. Winston Jones, *Newt's Visit to Carrollton set for Feb. 28*, Times-Georgian (February 21, 2012), https://web.archive.org/web/20120223175604/http://times-georgian.com/view/full_story/17595823article-Newt-s-visit-to-Carrollton-set-for-Feb--28? (last visited January 7, 2016) Levy Affidavit, Exhibit E.

Defendant Doe is a concerned resident who located the Fox coverage on the station's web site and, on March 1, 2009, posted it to YouTube using the pseudonym "gordonaustinsacoward." https://www.youtube.com/watch?v=vtCVHcT2mB0; Levy Affidavit ¶ 5, Exhibit D; Hoilett Affidavit Exhibit I; Doe Affidavit ¶ 2. Doe provided a summary of the allegations and updated them on a couple of occasions, most recently the following year to note that, in January 2010, the Georgia Dental Board pulled Austin's license. *Id.* And in 2011, Doe posted a comment that said nothing about Austin himself, but only defended the integrity of the dental assistant whistleblowers and the victims. *Id.*

3. On August 21, 2015, Austin filed a complaint against Doe, alleging that by posting the video, Doe "maliciously defame[d] Dr. Austin and his dentistry practice via various false accusations and statements." Levy Affidavit Exhibit C, ¶ 6. The complaint repeatedly refers to "false" statements but never specifies what the alleged falsities are and how they are false. And although the complaint alleges actual malice in very conclusory terms, it never explains why an ordinary citizen would not be justified in accepting the word of the prosecution as well as Fox News in repeating the gist of the indictment and republishing the TV story. In any event, based on these allegations, the complaint alleges claims for defamation and tortious interference with business relations, and seeks an award of compensatory damages, punitive damages, and attorney

fees. In an apparent attempt to comply with Georgia's anti-SLAPP statute, Austin amended his complaint on August 31, 2015, by verifying the complaint "to the best of his knowledge, information and belief." *Id.* Exhibit C. Austin then issued a Georgia subpoena to Google, demanding identification of the owner of the YouTube account on which the video was posted, making clear that his only claim was for information about activity on or before March 1, 2009. Austin domesticated his subpoena in this Court on November 23, 2015. Exhibit B. After being served with this subpoena, Google notified its user on November 30, 2015, that Google would comply with the subpoena unless it was satisfied no later than December 19, 2015, that Doe has moved to quash the subpoena. Exhibit A.

In an effort to avoid the need for this motion, Doe's counsel Paul Alan Levy conferred with John Autry, the Georgia lawyer who signed the subpoenas. Levy Affidavit, ¶ 11 and Exhibit H. Mr. Autry agreed to postpone the effective date of the subpoena until January 15, 2016, so that he could confer with his client about Mr. Levy's suggestion that it be withdrawn. *Id.* Mr. Autry subsequently responded to Mr. Levy's inquiry about whether the subpoena would be withdrawn by saying that he had not yet conferred with his client, and has not further responded. *Id.*

ARGUMENT

I. THE FIRST AMENDMENT BARS ENFORCEMENT OF THE SUBPOENA.

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

> [A]n author is generally free to decide whether or not to disclose his or her true identity. 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. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

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

Moreover, courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 560 F.2d 219, 226-230 (5th Cir. 1978). As one court stated in refusing to identify anonymous Internet speakers, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D.Wash. 2001).

In a number of recent cases, courts have drawn on the privilege against revealing sources in civil cases to enunciate a similar standard for protecting against the identification of anonymous Internet speakers. Consequently, over the past fifteen years, a consensus approach has been developed among state appellate courts about the showings that a plaintiff who seeks to identify an anonymous speaker must make in order to proceed with litigation claiming that the speech was tortious. The leading case is *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. 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!. That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which we urge the Court to apply in this case:

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

> well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.
>
> We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.
>
> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
>
> The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to [New Jersey's rules], the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must 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.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite v. Doe*, 775 A.2d at 760-761.

A somewhat less exacting standard requires the submission of evidence to support the plaintiff's claims, but not an explicit balancing of interests after the evidence is deemed otherwise sufficient to support discovery. *Doe v. Cahill,* 884 A.2d 451 (Del. 2005). At this point the other appellate courts of a dozen states that have addressed the issue of subpoenas to identify anonymous Internet speakers, as well as several federal district courts, have adopted some variant of the *Dendrite* or *Cahill* standards. The California Court of Appeals for the Sixth District endorsed the *Cahill* approach in *Krinsky v. Doe 6*, 159 Cal.App.4th 1154 (Cal.App. 6 Dist. 2008), while similarly rejecting the *Dendrite* balancing stage.

Other states whose appellate courts follow the *Cahill* approach are Texas, *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); Kentucky, *Doe v. Coleman*, 436 S.W.3d 207 (Ky. Ct. App. 2014), and the District of Columbia. *Solers v. Doe*, 977 A.2d 941 (D.C. 2009). The Washington Court of Appeals followed the *Cahill* approach while postponing until another day the question whether to adopt *Dendrite* balancing. *Thomson v. Doe,* 189 Wash.App. 45 356 P.3d 727 (Wash. Ct. App. 2015). State appellate and Supreme Courts have endorsed the full *Dendrite* approach in Arizona, *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007), Indiana, *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012), Maryland, *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009), New Hampshire, *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010), and Pennsylvania, *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011). The United States District Court for the Northern District of California has also adopted *Dendrite* balancing. *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005); *Art of Living Foundation v. Does 1-10*, 2011 U.S. Dist. LEXIS 88793 (N.D. Cal. Nov. 9, 2011). Because *Krinsky* is binding precedent in this Court, although Doe reserves the right to pursue the *Dendrite* approach should this case reach an appellate stage at which that is an open question, the balance of this brief proceeds on the assumption that *Krinsky* is authoritative.

Applying *Krinsky*, the subpoena should be quashed. First, the complaint never specifies which of the words in the YouTube video over which plaintiff has sued are false. And yet it is apparent from the attached transcript that many of the statements in the video express opinions and not facts,[3/] and that there are a number of factual statements that are not "of and concerning" Austin.[4/] Without specificity in the complaint, the Court cannot be confident that the allegation of falsity pertains to statements that would properly be actionable under the First Amendment or state law.

[3/] Statements of opinion cannot be the subject of a libel suit, *Copp v. Paxton*, 45 Cal. App.4th 829, 837 (Cal. App. 1 Dist. 1996), because under the First Amendment, there is no such thing as a false idea. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974).

[4/] The First Amendment bars libel claims that do not meet the "of-and-concerning" requirement. *Blatty v. New York Times Co.,* 42 Cal.3d 1033, 1042, 728 P.2d 1177 (1986)

Second, the complaint cannot possibly succeed, as a matter of law, in at least two respects. First, under both Georgia law and California law, the statute of limitations for libel claims is one year, Cal. Code of Civil Procedure §340(c), O.G.C.A. § 9-3-33, and both jurisdictions apply the single publication rule, under which the cause of action for libel begins to run when a statement is first published. *Boston v. Athearn*, 329 Ga. App. 890, 896 n.9, 764 S.E.2d 582, 587 (2014), citing *McCandliss v. Cox Enterprises*, 265 Ga. App. 377, 379, 593 S.E.2d 856 (2004), overruled on other grounds, *Infinite Energy v. Pardue*, 310 Ga. App. 355, 363, 713 S.E.2d 456, 464 (2011); *Christoff v. Nestle USA*, 47 Cal. 4th 468, 482, 213 P.3d 132, 141 (2009). Unlike California, Georgia law would apply a four-year limitations period to Austin's claim for tortious interference with business relations, *Lee v. Gore*, 221 Ga. App. 632, 634, 472 S.E.2d 164, 167 (1996), but even that claim is untimely because both the web site itself, and Austin's subpoena, make clear that this action has been filed over a video that was posted in March 2009, more than six years before this lawsuit was filed.

Moreover, the YouTube video that Doe posted came from the web site of the television station that ran the story, and this action seeks to hold Doe liable as the publisher of information provided by a different Internet user (that is, by the TV station). Such liability is precluded by section 230 of the Communications Decency Act.[5/] In *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41, 146 P.3d 510, 514 (2006), the California Supreme Court held that section 230, which forbids plaintiffs from imposing liability on providers or users of interactive computer services for information provided by another, extends to protect a user of an interactive web site who takes online content from one web site and places it on an interactive web site to facilitate discussion of that content. In *Barrett*, the defendants had posted to a discussion group material from a different web site that allegedly defamed the plaintiff; the California Supreme Court held that, as users of the discussion group's interactive facility, the defendants could not be held liable for the allegedly actionable

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[5/] Section 230(c)(1) provides, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

content of expression that was authored by the writers of the material that they had reposted. Following *Barrett*, the Court of Appeal held in *Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 324, 105 Cal. Rptr. 3d 791, 792 (Cal. App. 4 Dist. 2010) that section 230 protected email users who forwarded an allegedly defamatory email to other users from being held liable for the contents of the email that they forwarded, even though the defendants prefaced the forwarded material with an explanatory paragraph. Similarly, in this case, Doe is a user of YouTube's interactive web site, and she posted a video which, under the reasoning of such cases as *Barrett v. Rosenthal* and *Phan v. Pham*, constitutes "information provided by another information content provider." Doe cannot be sued for the contents of a news report that was originally carried on the Fox affiliate's own web site, even though the Doe posted it to a new location, the interactive YouTube web site.

Moreover, no evidence in the record establishes that any of the factual statements in the YouTube video that are of and concerning plaintiff Austin are false. Although the complaint was belatedly verified, the verification was only based on "the best of [Austin's] knowledge, information and belief." Such averments do not come close to creating a prima facie case of falsity or, indeed, the other elements of Austin's legal claims. "[W]here an affidavit is to serve as evidence those portions which are made on information and belief have no evidentiary value." *Humphrey v. Appellate Div.*, 29 Cal. 4th 569, 574, 58 P.3d 476, 479 (2002). "An affidavit which is based on "information and belief" is hearsay and must be disregarded, and it is "unavailing for any purpose" whatsoever. . . ." *Kahn v. Superior Court*, 188 Cal. App. 3d 752, 770 n.7, 233 Cal. Rptr. 662, 674 (Cal. App. 6 Dist. 1987); *accord Jeffers v. Screen Extras Guild*, 134 Cal. App. 2d 622, 623, 286 P.2d 30, 31 (Cal. App. 2 Dist. 1955) ("An affidavit made upon information and belief is hearsay and not proof of the facts stated therein.") Moreover, a number of the assertions in the You Tube video are plainly true, as shown by various news stories, by the indictment, and by the Georgia Court of Appeals opinion upholding the indictment. Both the First Amendment and the common law elements of the tort of defamation place the burden of proving falsity squarely on the plaintiff. *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 747, 771 P.2d 406, 429 (1989); *Vogel v. Felice*, 127

Cal. App. 4th 1006, 1021, 26 Cal. Rptr. 3d 350, 361 (Cal. App. 6 Dist. 2005).

Moreover, at the time Doe placed the video on YouTube, plaintiff had been indicted for his physical mistreatment of his patients, and that indictment and the underlying facts had been widely reported in the local news media. These facts support treating Austin as an involuntary, limited purpose public figure. *Marcone v. Penthouse Int'l Magazine For Men*, 754 F.2d 1072, 1085 (3d Cir. 1985); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1116 (6th Cir. 1978); *Jones v. Albany Herald Pub. Co*., 290 Ga. App. 126, 131, 658 S.E.2d 876, 881 (2008); *Great Lakes Capital Partners Ltd. v. Plain Dealer Publ'g Co.*, 2008-Ohio-6495, ¶ 21 (Ohio. App. 2008). The Doe defendant here is a member of the public who did no more than post to YouTube a television news report which, in turn, quoted witnesses with personal knowledge of Austin's abusive conduct, which had also been covered by other local news media. There is no reason to believe. and no evidence is provided to show, that Doe entertained sufficient doubt of the truth of the reports that she could be charged with actual malice or even negligence in further publicizing Austin's delicts. Plaintiff's inability to meet constitutionally required standards of proving falsity and actual malice further condemn his defamation claim to failure. Nor can plaintiff evade the constitutional limitations on defamation claims by pleading his claim as a different tort. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 232 Cal. Rptr. 542, 728 P.2d 1177 (1987); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1178, 72 Cal. Rptr. 3d 231, 250 (Cal. App. 6 Dist. 2008).

Certainly if the plaintiff cannot come forward with concrete evidence sufficient to prevail on the key elements of his case required by the First Amendment, there is no basis to breach the anonymity of the Doe defendant. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). Hence, Austin's subpoena to identify Doe for the purported purpose of serving a summons and complaint for a hopeless lawsuit cannot overcome the Doe's First Amendment right to speak anonymously.

II. THE COURT SHOULD AWARD ATTORNEY FEES AGAINST BOTH PLAINTIFF AND HIS COUNSEL BECAUSE THEY FORCED DOE TO FILE THIS MOTION EVEN THOUGH DISCOVERY IS BARRED BY CONTROLLING LAW.

Section 1987.2(c) of the Code of Civil Procedure requires a court to award attorney fees in favor of an anonymous Internet speaker who prevails on a motion to quash a subpoena for identifying information that has been served on an interactive computer service provider:

> (c) If a motion is filed under Section 1987.1 for an order to quash or modify a subpoena from a court of this state for personally identifying information, as defined in subdivision (b) of Section 1798.79.8 of the Civil Code, for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, and that subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service, as defined in Section 230(f)(2) of Title 47 of the United States Code, if the moving party prevails, and if the underlying action arises from the moving party's exercise of free speech rights on the Internet and the respondent has failed to make a prima facie showing of a cause of action, the court shall award the amount of the reasonable expenses incurred in making the motion, including reasonable attorney's fees.

Criticism of a medical professional who has been indicted for beating his patients with a dental instrument when their cries of pain threaten to communicate to other patients in the waiting room that this dentist does not administer sufficient anesthesia is certainly speech on a matter of public interest. *Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1367, 117 Cal. Rptr. 3d 747, 759 (Cal App. 6 Dist. 2010), citing *Carver v. Bonds,* 135 Cal. App.4th 328, 343-344, 37 Cal. Rptr.3d 480 (Cal. App. 1 Dist. 2005), for the proposition that a "newspaper article about medical practitioner involved [an] issue of public interest where information would assist others in choosing doctors." Doe qualifies for a mandatory award of attorney fees under this provision. Moreover, the provision is not limited to awards against discovering parties, but is part of a section that clearly contemplates awards against both parties and counsel. Consequently, this provision provides a sufficient basis for a fee award against both Austin and the attorney who sought identifying discovery on Austin's behalf.

Here, such an award would be justified not only under section 1987.2(c) but also under section 2023.010. The court may "impose monetary sanctions when one party persists, over objection and without substantial justification, in an attempt to obtain information outside the scope of permissible discovery." *Pratt v. Union Pacific R. Co.*, 168 Cal. App. 4th 165, 182 (Cal. App. 3 Dist. 2008). Here, controlling law bars discovery both because no evidence supports Austin's tort

claims, and *Krinsky* requires such evidence**,** and because the subpoena was issued based on a complaint that plaintiff filed some five years after the expiration of the statute of limitations. Yet even after Doe's counsel objected to the subpoena, specifically calling Austin's counsel's attention to the statute of limitations issue, Austin refused to withdraw the subpoena. Indeed, Austin's counsel tried to excuse his pursuit of the litigation by claiming not to have focused on how long ago the allegedly defamatory video was posted, Levy Affidavit, Exhibit H. But counsel knew the complaint was untimely from the outset: the subpoena itself specified that plaintiff was seeking "all log-in and log-out IP addresses for the account from . . . March 1, 2009." Levy Affidavit, Exhibit B. The untimely nature of this lawsuit, and thus the unavailability of discovery under *Krinsky*, is clear on the face of the subpoena, and plaintiff's counsel certainly knew that.

Doe's counsel will submit an application for a specific amount of attorney fees with her reply brief on this motion, once the full amount of time spent on the motion and most of the time spent on the reply brief is known.

CONCLUSION

The court should grant a protective order quashing the subpoena to Google. In addition, the court should award attorney fees in favor of defendant Doe.

Respectfully submitted,

/s/ Paul Alan Levy
Paul Alan Levy (DC Bar No. 946400)
email: plevy@citizen.org
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
Telephone: (202) 588-1000

/s/ Phillip R Malone
Phillip R. Malone (CA Bar No. 163969)
Jef Pearlman (CA Bar No. 254759)
Stephen Liu (CA Certified Law Student No. 39493)
email: pmalone@law.stanford.edu
Director, Juelsgaard Intellectual
Property and Innovation Clinic
Stanford Law School
559 Nathan Abbott Way

Stanford, California 94305-8610
Telephone: (650) 725-6369

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Attorneys for John Doe