IN THE INDIANA COURT OF APPEALS

Appellate Court Cause:. 49A02-1103-PL-00234

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| IN RE: INDIANA NEWSPAPER, INC., d/b/a THE INDIANAPOLIS STAR | ) | Appeal from the Marion Superior Court 14 |
| Appellant-Non-Party | ) | Honorable S.K. Reid |
| JEFFREY M. MILLER and CYNTHIA S. MILLER, | ) | Trial Court Cause No. 49D14-1003-PL-014761 |
| Appellees-Plaintiffs, | ) | |
| JUNIOR ACHIEVEMENT OF CENTRAL INDIANA, INC.; JENNIFER BURK, Individually and in her Official Capacity; CENTRAL INDIANA COMMUNITY FOUNDATION, INC.; BRIAN PAYNE, Individually and in his Official Capacity, | ) | |
| Appellees-Defendants | ) | |

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**BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER INDIANAPOLIS STAR on behalf of Lee Enterprises, Incorporated (*The Times* of Northwest Indiana); LIN Television Corporation, d/b/a LIN Media; The E.W. Scripps Company; Gray Television, Inc.; Hoosier State Press Association; The Electronic Frontier Foundation**

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## INTEREST OF AMICI CURIAE

The following *amici curiae* have individualized and collective interests in the issues in the pending appeal, and its outcome, arising from their status as companies that gather and publish news through their Indiana newspapers, websites, television stations, and other media, or as non-profit associations or entities that foster and promote freedom of speech and freedom of the press. *Amici curiae* employ hundreds of journalists who provide around-the-clock news and information to Hoosiers, in all 92 Indiana counties, by newspapers, broadcast and cable television, and websites available on the Internet.

Lee Enterprises, Incorporated publishes 49 daily newspapers nationwide. It is the publisher of *The Times* of Northwest Indiana, serving a region of 51 towns and cities over seven counties and the southeast Chicago suburbs. Founded in 1906, *The Times* is Indiana's second-largest daily newspaper, second only to the *Indianapolis Star* whom it supports in this appeal.

LIN Television Corporation, d/b/a LIN Media, is a multimedia company that owns, operates, or services 32 network-affiliated broadcast television stations in 17 U.S. markets, and is a leader in interactive television and niche websites, mobile platforms, and performance-based advertising services. In Indiana, LIN Media owns and operates: WISH-TV and WIIH-CA, Indianapolis; WNDY-TV, Marion; WANE-TV, Ft. Wayne; WTHI-TV, Terre Haute and WLFI-TV, Lafayette.

The E.W. Scripps Company is a diverse media concern with interests in newspaper publishing, broadcast television stations, licensing and syndication. Scripps operates daily newspapers in 14 markets, including the *Evansville Courier*, and 10 broadcast television stations. Scripps also operates Scripps Howard News Service.

Gray Television, Inc., is a television broadcast company operating 36 television stations serving 30 U.S. markets. Gray Television owns and operates WNDU-TV, South Bend. Founded

over 50 years ago by the University of Notre Dame as an NBC affiliate, WNDU broadcast the first local telecast of a Notre Dame football game, and continues to serve the greater South Bend community.

The Hoosier State Press Association, founded in 1933, is a non-profit trade association representing 175 daily and weekly paid circulation newspapers in Indiana. The HSPA provides information and services to its members, and advocates for the rights of the free press in Indiana.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect individual rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy and openness in the information society. Founded in 1990, EFF has members all over the United States and maintains one of the most linked-to Web sites in the world (http://www.eff.org). More than 900 Indiana residents currently subscribe to EFF's weekly email newsletter, EFFector. As part of its mission, EFF has served as counsel or amicus in key cases addressing the public's right to remain anonymous when they post comments on the Internet, as well as making sure that anonymous speakers' due process rights are respected.

For the reasons that follow, these *Amici Curiae* support the position of the Appellant, Indiana Newspapers, Inc., d/b/a The Indianapolis Star, that the trial court erred in refusing to quash the subpoena issued by Plaintiffs, seeking disclosure of the identity of individuals who anonymously posted statements on the *Indianapolis Star* website.

## ARGUMENT

### I. ANONYMOUS SPEAKERS HAVE BEEN AN IMPORTANT VOICE IN PUBLIC AFFAIRS SINCE INDIANA WAS A TERRITORY.

Anonymous commentary on public affairs has a rich and storied tradition in our nation's history. The Founders, through anonymous works such as the *Federalist Papers*, shared their visions for a society based on freedom of expression, assembly, and religion. These anonymous works were the sounding boards for the freedoms later enshrined in the Declaration of Independence and the Constitution of the United States.

Anonymous commentary on public affairs in Indiana also has a long tradition, which predates the state's admission to union. In the early 1800s, as Indiana organized for statehood, the debate over slavery became increasingly hostile after Congress abolished it here. The anonymous *Letters of Decius* were among the dissenting voices to then-territorial Governor William Henry Harrison's push to make Indiana a slave state and the territorial legislature's enactment of laws of indentured servitude. In 1805, "Decius's" anonymous writings accused Harrison and his political operatives of cronyism, favoritism, and supporting slavery to curry political favor. Decius's letters were published by Indiana newspapers and distributed in pamphlet form to members of the Indiana legislature.[1] Just over ten years later, in 1816, Indiana became a state and constitutionally outlawed slavery. Within five years of statehood, the Indiana Supreme Court freed the state's remaining slaves.[2]

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[1] John D. Barnhart, *The Letters Of Decius*, 43-3 Indiana Magazine of History 263-296 (September 1947); Robert Martin Owens, *MR. JEFFERSON'S HAMMER: WILLIAM HENRY HARRISON AND THE ORIGINS OF AMERICAN INDIAN POLICY*, 105-117 (2007).

[2] *In re Clark*, 1 Blackf. 122 (Ind. 1821) (denying specific enforcement of a contract for indentured servitude entered into by a free woman of color, and discharging her from involuntary servitude upon writ of *habeas corpus*).

Indiana now provides even stronger protection for free expression than the First Amendment to the U.S. Constitution. Article I, Section 9 of the Indiana Constitution broadly guarantees "the right to speak, write, or print, freely, on any subject whatever." Under the state Constitution, on matters of general public concern or interest, Indiana courts now provide even stronger protection under the "actual malice" doctrine than that required under the First Amendment. Indiana law, through its "anti-SLAPP" statute, furnishes further sanctuary for free speakers and publishers by fostering early disposition of unwarranted defamation lawsuits and providing for an award of attorney's fees against plaintiffs seeking to chill public criticism.

The Indiana courts should continue to foster free expression through the Internet and other emerging media. Just as Decius's letters influenced public opinion on matters of great moment in his time, forums like the *Indianapolis Star*'s web site and the web sites operated by the *Amici Curiae* afford all citizens, such as the anonymous poster identified as "DownWithTheColts" in this action, with enhanced ability to voice opinions on matters of current concern to their communities. As the U.S. Supreme Court has recognized, Internet chat rooms permit anyone to "become a town crier with a voice that resonates further than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Because the Internet has become a modern town square, courts uniformly require a heightened evidentiary showing from the subpoenaing party prior to stripping anonymous Internet speakers of their anonymity. This Court should take the opportunity, in adjudicating the rights of the *Indianapolis Star* and DownWithTheColts, to provide Internet speech with a level of protection that is consistent with the existing foundation, and the rich history, of free expression in this state.

## II. INDIANA PROVIDES SOME OF THE STRONGEST PROTECTIONS FOR FREE EXPRESSION IN THE NATION.

### A. The Indiana Constitution provides broader protections for free expression than the First Amendment to the U.S. Constitution.

Since 1851, the Indiana Constitution has provided Hoosiers with even greater protection for free speech than the First Amendment:

> "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."

Ind. Const. Art I, Sec. 9. The Indiana Supreme Court has explained that Article I, section 9 "contemplates a broad notion of expressive activity" which "includes, at least, the protection of any words in any manner." *Whittington v. State*, 669 N.E.2d 1363, 1368 (Ind. 1996). This state's Constitution "more jealously protects freedom of speech guarantees than does the United States Constitution." *Mishler v. MAC Systems, Inc.*, 771 N.E.2d 92, 97 (Ind. Ct. App. 2002) (quoting *Lach v. Lake County,* 621 N.E.2d 357, 362 n. 1 (Ind. Ct. App. 1993)). *See also* Randal T. Shepard, *Second Wind for the Indiana Bill of Rights,* 22 IND. L .REV. 575, 581 n. 39 (1989) (Indiana's Constitution "affirm[s] the rights of expression in language much more comprehensive than the first amendment.").

The Indiana Court of Appeals also has applied Article I, Section 9 broadly, holding that it requires plaintiffs to do more than just plead a cause of action in a defamation case before punishing speech. In 2002, in *Mishler v. MAC*, the Court struck down as an unlawful prior restraint a trial court's preliminary injunction barring property owners from posting signs criticizing the quality of a contractor's services. 771 N.E.2d at 98. Applying only the Indiana Constitution, the *Mishler* court ruled that the preliminary injunction entered in the contractor's defamation counterclaim prevented the property owners from exercising their state constitutional right to speak "on any subject whatever" by the means they deemed most appropriate. *Id.* The

Court noted that requiring the contractor to merely establish a prima facie case for its defamation counterclaim was too low of a threshold in light of the Indiana Constitution. *Id.* Rather, the Court held that the contractor's remedy lies in a suit for damages for any wrong to them, and not in a restraint of speech. *Id.* In other words, the Court held that the contractor in *Mishler* had to prove its defamation claim before silencing his critics, and that its remedy may only be proven damages, and not censorship.

As in *Mishler*, the Plaintiffs[3] here persuaded the trial court to strip DownWithTheColts of his rights under the state and federal constitutions based on mere allegations, without the backing of a sworn factual basis that would demonstrate a countervailing interest. *Mishler* illustrates that, before exposing speakers to the burden and punishment of costly and chilling litigation, plaintiffs must do more than plead a prima facie case. Accordingly, in line with the Indiana constitutional right to speak "on any matter whatever," this Court should now adopt the same type of a test as all of the other jurisdictions and require Plaintiffs here to present evidence to support every element of their claim.

### B. The Indiana Supreme Court applies strict First Amendment standards to limitations on speech on matters of public or general concern.

In the specific context of defamation actions, the Indiana courts have applied the state Constitution to embrace speech more expansively than the protections afforded in the First Amendment decisions of the U.S. Supreme Court.[4] In conformity with the state's commitment to

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[3] Plaintiff Jeffrey M. Miller is the only defamation plaintiff in this case. His wife's loss of consortium claim rises and falls with her husband's defamation claim.

[4] Because of this country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the First Amendment will not permit a public official or public figure to prevail on a claim arising out of an allegedly false and injurious publication absent proof of "actual malice." *New York Times v. Sullivan*, 376 U.S. 254, 270, 279-80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). This constitutional level of fault requires a plaintiff to establish that those responsible for publishing an alleged

robust discussions of public affairs, the Indiana Supreme Court has held that the actual malice standard applies in all "matters of public or general concern" irrespective of whether the plaintiff is a public or private individual. *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 452 (Ind. 1999) (adopting actual malice standard of *Aafco Heating & Air Cond. v. Northwest Publications,* 321 N.E.2d 580 (Ind. Ct. App. 1974). "A matter of general or public interest is one in which '(t)he public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct.'" *Fazekas v. Crain Consumer Group Div. of Crain Comms., Inc.*, 583 F.Supp. 110, 114 (S.D.Ind.1984) (quoting *Rosenbloom v. Metromedia Inc.,* 403 U.S. 29, 43 (1971)).

In Indiana, "the public interest is necessarily broad," and the case law reveals a "panoply of topics within the scope of 'public interest.'" *Moore v. Univ. of Notre Dame*, 968 F.Supp. 1330, 1338 n. 11 (N.D. Ind. 1997). The Indiana appellate courts' recognition of the need for maximum public debate has led to decision after decision extending legal protections to a vast array of issues. Issues of public or general concern are frequently found in cases involving the management of public facilities, such as: control of a television broadcasting channel, *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 483 (7th Cir. 1986); the management of a public sewer, *St. John v. Town of Elletsville*, 46 F.Supp.2d 834, 849 (S.D.Ind.1999); public health in a local restaurant, *Bandido's*, 712 N.E.2d at 451-52; the possible causes of fatal residential fire matter, *Aafco Heating*, 321 N.E.2d 580, 582 (Ind. Ct. App. 1974); and the safety of pharmaceuticals purchased from Canada via the Internet *CanaRx Services, Inc. v. LIN Television Corp*, 2008 WL

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defamation knew the information was false or published with "reckless disregard" – defined as subjective entertainment of serious doubts or high degree of awareness of probable falsity. *Jean v. Dugan*, 20 F.3d 255, 263-64 (7th Cir. 1994) (applying Indiana law).

2266348 (S.D. Ind. 2008).[5] Even more lighthearted matters have also qualified for the stringent protections for commentary on public affairs, including stock car racing scandals, *Fazekas*, 583 F. Supp at 114; and college football, *Moore*, 968 F.Supp. at 1338 ("[I]t is this court's opinion that football, and specifically Notre Dame football, is a matter of public interest.").

In this same context of a defamation case, an Indiana court has recognized that the quality of leadership of local public-private partnerships seeking to educate Indiana youth has also been held to be a matter of general public concern. *Filippo v. Lee Publications, Inc.*, 485 F. Supp. 2d 969, 973–74 (N.D. Ind. 2007). The *Filippo* court held that the drunk driving arrest of the vice-chair of an anti-drug partnership was of particular public import due to the partnership's emphasis on educating youths about substance abuse. *Id.*

As in *Filippo*, this case involves a matter of high moment for a local community and a public-private venture. The *Indianapolis Star*'s Internet pages contained reporting and commentary regarding potential mismanagement of funds by the director of the Junior Achievement program, which seeks to educate and inspire Indianapolis youth to value free enterprise, business, and economics to improve the quality of their lives. As this case involves a matter of public concern, and a public figure,[6] the speaker here deserves the utmost protections

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[5] *See also Shephard v. Schurz Communications, Inc.*, 847 N.E. 2d 219, 224 (Ind. Ct. App. 2006) (alleged violation of privacy by local government); *Ratcliff v. Barnes*, 750 N.E.2d 433, 437–38 (Ind. Ct. App. 2001) (theft of public property); *Kitco, Inc. v. Corporation for General Trade*, 706 N.E.2d 581, 587–90 (Ind. Ct. App. 1999) (fired employees walking off because of excessively hot working conditions); *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1087–88 (7th Cir. 1990) (scientist offered money to sell trade secrets to competitor); *Containment Technologies Group, Inc. v. American Soc. of Health System*, 2009 WL 838549 (S.D. Ind. 2009) (safety of medical devices); *Davis v. City of Greenwood*, 2000 WL 33309816, at *12 (S.D. Ind. 2000) (arrest based on misconduct in public park); *Schaefer v. Newton,* 868 F. Supp. 246, 252 (S.D. Ind. 1994), *aff'd*, 57 F.3d 1073 (7th Cir. 1995) (escapades of serial murderer).

[6] Here, defamation Plaintiff Jeffrey M. Miller is also a public figure. Public figures are people who invite attention and comment because they "have assumed roles of especial prominence in the affairs of society" by "thrust[ing] themselves to the forefront of particular public

of the law. Yet, under the trial court's order, the anonymous speaker DownWithTheColts will be stripped of his or her anonymity without any proof that the Plaintiffs can meet any part of their extremely high burden under Indiana law. The trial court's order therefore is entirely inconsistent with the protection Indiana law extends to all statements on matters of public concern. In keeping with this well-established law, the Court should adopt a clear and exacting standard to vigorously protect the rights of anonymous Internet speakers.

### C. The Indiana Anti-SLAPP law also provides maximum protections for free expression.

In harmony with the courts' protection of free expression, Indiana's legislative branch has similarly guaranteed free speech rights for all Hoosiers. Enacted by the Indiana legislature in 1998, the state's "anti-SLAPP"[7] statute, Ind. Code §34-7-7-1 *et seq.*, was intended to transfer the financial burden of groundless anti-speech litigation to "the party abusing the judicial system" by shifting litigation costs onto those people "seeking to 'chill the valid exercise of the constitutional rights of free speech[.]'" *Poulard v. Lauth*, 793 N.E.2d 1120, 1125 (Ind. Ct. App. 2003) (quoting *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001)). Indiana's anti-SLAPP law serves the

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controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. Mr. Miller was the President and CEO of Junior Achievement of Central Indiana, a position he held for fifteen years. (Original Complaint, ¶15). Junior Achievement is an international program partnering the business community with educators, educating youth on business, economics, and the global economy. Junior Achievement of Central Indiana serves 30 counties, partnering with public and private elementary, middle, and high schools. As President and CEO, Mr. Miller was the public face of this prominent organization affecting the lives of countless Indiana youth. In Plaintiff's own words, his "identity as the 'former president' is readily known to many in the Indianapolis and [Junior achievement] community." Plaintiff's Motion for Order Compelling Non-Party Discovery, Jan. 31, 2011 at ¶1.

[7] SLAPP is an acronym for a Strategic Lawsuit Against Public Participation. To combat the chilling effects of SLAPP suits, twenty-nine states, including Indiana, have enacted anti-SLAPP statutes, creating procedural hurdles for a SLAPP plaintiff to overcome before putting the defendant to the expense and burden of responding to an otherwise frivolous complaint. Two additional states have recognized the doctrine through case law. *See* The Public Participation Project, http://www.anti-slapp.org/?q=node/12.

important goal of countering the chill on speech by creating a "chilling effect on abusive lawsuits." *Shepard v. Schurz Communications*, 847 N.E.2d 219, 223 (Ind. Ct. App. 2006). The protections of the statute broadly apply to speech "in connection with a public issue or an issue of public interest." Ind. Code §34-7-7-1.

This action is a classic SLAPP suit. DownWithTheColts posted his comments on a public message board about a matter of public concern. The Plaintiffs did not like the comments, and—with no demonstration of a cognizable injury—now vindictively seek to sue the commenter into silence. In a seminal anonymous Internet speech case, the Delaware Supreme Court recognized that "many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics." *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005). Similarly, the addition of DownWithTheColts in the Second Amended Complaint is so clearly intended to silence him that this Court must safeguard his interest in remaining anonymous under Indiana's strong anti-SLAPP law as well.[8]

## III. AS A MATTER OF FIRST IMPRESSION IN INDIANA, A QUALIFIED PRIVILEGE UNDER BOTH THE FIRST AMENDMENT AND INDIANA CONSTITUTION APPLIES TO DISCOVERY REQUESTS SEEKING TO STRIP THE ANONYMITY OF ANONYMOUS INTERNET COMMUNICATORS.

### A. The right to speak anonymously is constitutionally protected.

The U.S. Supreme Court has recognized that the First Amendment right to speak anonymously is woven into the fabric of this nation's history.[9]

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[8] Importantly, the Second Amended Complaint was filed well after the original non-party request was served on the *Indianapolis Star* (and as explained below, after the trial court ordered the *Star* to comply). Thus, at the time the *Star* received the request, no cause of action had even been pleaded against "DownWithTheColts," further demonstrating the penal nature of plaintiff's lawsuit against the anonymous speaker.

[9] The *Federalist Papers*, authored by James Madison, Alexander Hamilton and John Jay, were written anonymously under the name "Publius." Their opponents, the Anti-Federalists, also

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind[,] the freedom to publish anonymously extends beyond the literary realm.

*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). In *McIntyre*, the Court struck a state law that criminally proscribed the distribution of anonymous campaign literature. In doing so, the Court recognized the value of unsigned commentary to our public debate, and the valid reasons why some speakers might fear being identified with their expressions. "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." *Id.* Regardless of the speaker's motivations, "[a]nonymity is a shield from the tyranny of the majority." *id.* at 357.

Internet anonymity facilitates the wide-ranging exchange of ideas, especially those that may expose the unpopular speaker to chilling reprisals. 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.'" *Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (citing *Columbia Ins. Co., v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)). State supreme courts and other appellate courts around the country therefore have recognized, in cases just like this one, that anonymous Internet speakers suffer irreparable harm when a web host like the *Indianapolis Star* is forced prematurely to reveal their name. "[I]t is clear that once [anonymous speakers'] identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure disclosure." *Melvin v. Doe*, 836 A.2d 42, 50 (Pa. 2003). The use of subpoenas to unmask anonymous Internet speakers in civil lawsuits is on the rise. *See generally* Ashley I. Kissinger & Katharine

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published anonymously, cloaking their real identities with pseudonyms such as "Brutus," "Centinel," and "The Federal Farmer." *See McIntyre*, 514 U.S. at 341-42 (1995).

Larsen, *Untangling the Legal Labyrinth: Protections for Anonymous Online Speech*, 13 No. 9 J. INTERNET L. 1 (2010); Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320 (2008). These subpoenas raise particularly serious concerns because they threaten to cause "a significant chilling effect on Internet communications and thus on basic First Amendment rights." *2TheMart.com Inc.*, 140 F.Supp.2d at 1093.

### B. Indiana courts should require plaintiffs to make a threshold showing that their need for disclosure from a web host outweighs the host's and the anonymous Internet speakers' First Amendment rights.

The courts in this context recognize that both the anonymous poster and the web site host have the same First Amendment interest in promoting and protecting unfettered expression on public issues. For this reason, the First Amendment protections are not limited to the anonymous speaker. Rather, courts have specifically protected online forums, like the *Indianapolis Star*'s web site and the web sites operated by the *Amici Curiae*, from the compelled disclosure of the identity of anonymous Internet posters. *McVicker v. King*, 266 F.R.D. 92 (W.D. Pa. 2010) (denying motion to compel identity of anonymous posters on newspaper's community website message boards); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009) (reversing lower court, adopting rigorous test and quashing subpoena to newspaper); *Sedersten v. Taylor*, 2009 WL 4802567 (W.D. Mo. 2009) (denying motion to compel identity of anonymous poster on newspaper website); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super Ct. App. Div. 2001) (affirming denial of plaintiff's motion for expedited discovery to obtain identity of poster on Yahoo! message board, due to failure to establish prima facie defamation claim).

Given the strength of the protections for anonymous commentary, courts even apply these same considerations to Internet environments hosted by non-media entities. *See e.g.*, *Solers, Inc. v. Doe*, 977 A.2d 941, 951 (D.C. 2009) (establishing test for plaintiff seeking identity of anonymous Internet communicator through website of software industry association,

remanding for plaintiff to proffer evidence to meet test); *2TheMart.com, Inc.*, 140 F. Supp. 2d at 1090 (granting motion to quash subpoena seeking identities of non-party ISP subscribers who posted messages on Internet from Internet service provider); *Mobilisa v. Doe*, 170 P.3d 712, 720-21 (Ariz. Ct. App. 2007) (establishing test for plaintiff seeking identity of sender of anonymous email from email service provider); *Best Western Int'l, Inc. v. Doe*, 2006 WL 2091695 at *5 (D. Ariz. 2006) (denying request for discovery of identity of anonymous Internet message board posters from Internet service providers). Therefore, as here, where a plaintiff demands information that would reveal the identity of an anonymous Internet communicator, the court must weigh, with exacting scrutiny, the fundamental First Amendment right to anonymous Internet expression against the subpoenaing party's need for disclosure. Here, the court below undertook no such analysis.

The leading case for the protection of anonymity on the Internet is *Dendrite*. 775 A.2d 756.[10] In *Dendrite*, the plaintiff brought suit for defamation arising out of postings by anonymous defendants on an Internet message board. The plaintiff sought to compel the Internet service provider to disclose the defendants' identities, and one defendant responded by filing a

[10] The heightened standard of *Dendrite* or similar guidelines consistently have been followed by federal and state courts nationwide. *See e.g., SaleHoo Group, Ltd. v. ABC Co.*, 722 F.Supp.2d 1210, 1214 (W.D. Wash. 2010); *Mortgage Specialists, Inc. v. Implode–Explode Heavy Industries, Inc.*, 999 A.2d 184, 194 (N.H. 2010); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009); *Solers, Inc. v. Doe*, 977 A.2d 941, 954-57 (D.C. 2009); *Sinclair v. TubeSockTedD*, 2009 WL 320408, at *2 (D.D.C. Feb. 10, 2009); *A.Z. v. Doe*, 2010 WL 816647 (N.J. Super. Ct. App. Div. Mar. 8, 2010); *Krinsky v. Doe 6*, 159 Cal.App. 4th 1154 (Cal. Ct. App. 2008); *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254-56 (D. Conn. 2008); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp.2d 1205, 1216 (D. Nev. 2008); *Mobilisa v. Doe*, 170 P.3d 712, 720-21 (Ariz. Ct. App. 2007); *Greenbaum v. Google*, 845 N.Y.S.2d 695, 698-99 (N.Y. Sup. Ct. 2007); *In re Does 1-10*, 242 S.W.3d 805, 822-23 (Tex. Ct. App. 2007); *Reunion Indus. v. Doe*, 2007 WL 1453491 (Penn. Ct. Comm. Pleas Mar. 5, 2007); *McMann v. Doe*, 460 F. Supp.2d 259, 268 (D. Mass. 2006); *Best Western Int'l v. Doe*, 2006 WL 2091695, at * (D. Ariz. 2006); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 975-76 (N.D. Cal. 2005); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

motion to quash. The plaintiff argued that its defamation claim was sufficient to withstand a motion to dismiss and, accordingly, that discovery of the defendant's identity was warranted. *Id.* at 764. The *Dendrite* court disagreed, holding that a plaintiff seeking such discovery must instead: (1) give notice to the defendant anonymous speaker; (2) identify the exact statements that constitute allegedly actionable speech; (3) establish a prima facie cause of action against the defendant based on the complaint and all information provided to the court; and (4) "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." *Id.* at 760. Additionally, if the plaintiff makes out a prima facie cause of action, the court must (5) "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." *Id.* at 760-61.

Here, just as the Indiana Constitution, the Indiana Supreme Court, and the Indiana legislature have all "jealously protected" free speech in this state, *Mishler*, 771 N.E.2d at 97, this Court should follow *Dendrite* and its progeny. Indiana free speech law fully supports the establishment of a heightened test that all plaintiffs must meet before stripping Internet speakers of their constitutional rights to anonymity. DownWithTheColts engaged in a discussion on the Internet about the conduct of a public figure, the president of Junior Achievement of Central Indiana, on a matter of public concern in his or her community. The *Dendrite* test fits precisely within Indiana's long tradition of vigorously protecting commentary in this precise context, and it should be applied here to safeguard the important constitutional interests at stake in this litigation.

### C. Plaintiffs cannot meet the test to strip DownWithTheColts of his anonymity, and the trial court should have quashed the subpoena to the *Indianapolis Star*.

The Plaintiffs here, who seek to use a subpoena to discover the identity of Defendant DownWithTheColts in connection with anonymous Internet speech, cannot satisfy the five-part test under *Dendrite* to strip him of his anonymity. Thus, the trial court's order enforcing the subpoena issued to the *Indianapolis Star* should be reversed, and the subpoena should be quashed in its entirety.

Initially, the Plaintiffs must undertake reasonable efforts to give DownWithTheColts adequate notice of the attempt to discover his identity and provide a reasonable opportunity to respond. *Mobilisa,* 170 P.3d at 721. This requirement enjoys general acceptance by the courts and promotes a full and fair consideration of the issues. *See, e.g., Dendrite*, 775 A.2d at 760; *Brodie*, 966 A.2d at 456; *Cahill*, 884 A.2d at 461. This has not occurred here. Prior to the trial court's order compelling the *Indianapolis Star* to produce the identity of DownWithTheColts, Plaintiffs made no effort to notify him, nor did they put forward any record evidence to establish for the court that DownWithTheColts had been notified. In fact, DownWithTheColts was not notified until after the trial court ordered the *Star* to comply with the subpoena. Because the trial court enforced the subpoena without the requisite prior notice to DownWithTheColts, the order should be reversed on this ground alone.

Next, the Plaintiffs must, in general, allege a facially valid cause of action and produce prima facie evidence to support all of the elements of the cause of action within their control. *See Dendrite*, 775 A.2d at 760. Although the Plaintiffs here adequately spell out the allegedly defamatory words, courts agree that the strength of a plaintiff's case must still be evaluated before he or she is permitted to strip an anonymous defendant of his First Amendment rights by a discovery subpoena. *See Krinsky*, 72 Cal.Rptr.3d 231, 241-44 (Cal. Ct. App. 2008). As one court

emphasized: "It is not enough for a plaintiff simply to plead and pray. Allegation and speculation are insufficient." *Highfields Capital Mgmt.* 385 F.Supp.2d at 975.

Here, the Plaintiffs have barely pleaded a valid defamation claim, if at all. An Indiana defamation plaintiff must plead and prove four elements: (1) the existence of a communication with defamatory imputation; (2) common law malice; (3) publication; and (4) damages. *Trail v. Boys and Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 136 (Ind. 2006). In the Plaintiffs' Second Amended Complaint (which was not even filed at the time the trial court ordered the *Star* to comply with the subpoena),[11] the Plaintiffs make only a cursory reference to the allegedly defamatory statement attributed to DownWithTheColts:

> On April 6, 2010, Doe #3 a/k/a "DownWithTheColts" posted the following defamatory comment on The Indianapolis Star website (http://www.indystar.com) following an article relating to the Culinary School Project: "This is not JA's responsibility. They need to look at the FORMER president of J A and others on the ELEF board. The 'missing' money can be found in their bank accounts." (¶87).

Second Amended Complaint, ¶87. The Plaintiffs do not state the manner in which DownWithTheColts caused Mr. Miller to suffer reputational harm, and instead generally state that the "defamatory statements made by Defendants have materially damaged Mr. Miller [and his] consulting business." (¶91).

Further, and critically important to meeting the test here, the Plaintiffs have not proffered any evidence establishing a genuine issue of material fact on any element of the defamation claim. In particular, *Bandido's* requires all individuals who bring an action involving an event of public interest to prove actual malice, 712 N.E.2d at 452, and Indiana courts have also held that

[11] The motion for leave to file the Second Amended Complaint was filed on February 21, 2011, just two days before the trial court issued its order. Therefore, at all times pertinent here (when plaintiff issued the subpoena to the *Indianapolis Star*, when the *Star* moved to quash, when DownWithTheColts should have been notified, and when the trial court Ordered the *Star* to comply with the subpoena) DownWithTheColts was not a defendant in the lawsuit.

"proof of 'actual injury'" is required to recover general compensatory damages. *See Stanley v. Kelley*, 422 N.E.2d 663, 668 (Ind. Ct. App. 1981); *Elliott v. Roach*, 409 N.E.2d 661, 685 (Ind. Ct. App. 1980). Plaintiffs furnished no evidence of actual injury before the trial court rendered its order.

Yet, even if the Plaintiffs have met this rigorous standard, which they plainly have not, the Court should balance the First Amendment rights of DownWithTheColts against this punitive effort to sue him or her into silence. The Court should "assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." *Highfields Capital Mgmt.*, 385 F.Supp.2d at 976. Plaintiffs' broad and bald of assertions of liability against DownWithTheColts do not constitute the requisite showing to overcome the weighty rights under Indiana law and the First Amendment to speak anonymously.

Indeed, this case concerns far more than simply protecting the identity of one anonymous Internet communicator. The *amici* represented here reflect the voice of the free press in this state. A ruling by this Court permitting a plaintiff to strip any individual of his First Amendment rights, with no showing of a fact-based claim against the potential defendant, severely threatens to chill a significant segment of open debate in this state. Indiana provides a uniquely healthy environment for free expression, and anonymous speech has played a significant role in public affairs since before the state was formed. This Court should therefore take this opportunity to establish the same test as other jurisdictions for anonymous Internet speakers. Only in this way will the Court ensure that Indiana law remains consistent in supporting the rights of all citizens who enter the debate on important issues in their communities.

## IV. CONCLUSION.

For the foregoing reasons, *Amici Curiae* Lee Enterprises, Incorporated (The Times of Northwest Indiana), LIN Television Corporation, d/b/a LIN Media, The E.W. Scripps Company, Gray Television, Inc., Hoosier State Press Association, and The Electronic Frontier Foundation support Appellant's request that this Court reverse the decision below and hold that the subpoena to the *Indianapolis Star* should be quashed.

June 24, 2011 Respectfully Submitted,

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WORD COUNT CERTIFICATION

I verify that this brief contains no more than 7,000 words.

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CERTIFCATE OF SERVICE

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