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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 SEPARATE STATEMENT IN SUPPORT OF 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

SEPARATE STATEMENT

Movant J. Doe ("Doe") hereby submits this Separate Statement pursuant to California Rule of Court 3.1345 in support of Doe's motion 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 moves to quash the subpoena seeking their identity because (1) Payward has failed to make a prima facie showing on its claims to justify identifying Doe and (2) additional factors weigh heavily in favor of protecting Doe's anonymity. Doe thus respectfully asks this Court to provide more robust protections for anonymous speakers than recognized under *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (2008) because, unlike the defamatory speech at issue in *Krinsky*, Doe's Glassdoor review of Payward is fully protected by the First Amendment.

Krinsky did not answer the question presented here: what legal test should apply to a subpoena seeking to identify an anonymous online speaker whose speech is protected opinion or otherwise incapable of defamatory and/or disparaging meaning. For the reasons explained below and in Doe's Motion to Quash, this Court should follow other courts' lead and incorporate a second-stage interest balancing on top of requiring Plaintiff to make a prima facie showing on its claims. This balancing stage is necessary to protect anonymous speakers like Doe who complied with the agreement Doe signed with Plaintiff while still providing their opinion on what it was like to work for the company.

In any event, Plaintiff has failed to meet its prima facie burden to show that Doe breached their agreement with the company. Doe's review did not disclose any confidential information—it did not describe any facts about anything the agreement deems confidential. Indeed, the only fact in the review states simply that Doe once worked for Payward. Nor did Doe's review defame or disparage Payward. The non-disparagement clause Payward seeks to enforce is vague and thus should be construed against Payward to incorporate California's well-understood legal definitions of disparagement and defamation. Under those legal standards, Doe's review is incapable of defaming or disparaging Payward because it constitutes opinion or is otherwise incapable of defamatory meaning.

I. The Text of the Subpoena for Documents.

On June 21, 2019, Payward served Glassdoor with the deposition subpoena at issue. The deposition subpoena contained the following request for production:

REQUEST FOR PRODUCTION NO. 1

ALL DOCUMENTS showing the IDENTITY of all USERS whose posts on GLASSDOOR concerned, or referenced KRAKEN between January 1, 2019 and February 28, 2019, including but not limited to the IDENTITY of all the USERS who authored the posts contained in Appendix A.

REQUEST FOR PRODUCTION NO. 2

ALL DOCUMENTS showing the IDENTITY of all USERS who were formers employees of KRAKEN who posted on GLASSDOOR between January 1, 2019 and February 28, 2019, including but not limited to the IDENTITY of all the USERS who authored the posts contained in Appendix A.

REQUEST FOR PRODUCTION NO. 3

ALL DOCUMENTS showing which USERS identified in Request Nos. 1 and 2 made which specific posts on GLASSDOOR.

REQUEST FOR PRODUCTION NO. 4

ALL DOCUMENTS generated by the USERS identified in Request Nos. 1 and 2 on GLASSDOOR.

REQUEST FOR PRODUCTION NO. 5

ALL COMMUNICATIONS between GLASSDOOR and the USERS identified in Requests Nos. 1 and 2.

II. Responses, Answers, and Objections Regarding the Subpoena.

A. Glassdoor's Written Objections of July 9, 2019 and July 31, 2019.

On July 9, 2019, Glassdoor responded to Payward's subpoena with its initial responses and objections. In Glassdoor's response, it noted that its users' anonymity is protected by the First Amendment and objected that Payward had failed to justify the unmasking of those anonymous speakers. Glassdoor also objected on a number of additional grounds not relevant to Doe's motion,

including, for example, on the basis of state and federal electronic privacy laws and on the basis that the subpoena was vague and overly broad.

On July 25, 2019, Payward responded to Glassdoor's initial responses and objections. In response to Glassdoor's First Amendment objection, Payward noted that the First Amendment does not impose a categorical ban on any requests aimed at identifying anonymous users and argued that California trial courts have enforced compliance with subpoena seeking the discovery of the identity of anonymous posters.

On July 31, 2019, Glassdoor responded to Payward's July 25 letter. In its response, Glassdoor emphasized that it did not claim a "categorical ban" on identifying anonymous speakers exists, but rather that Payward had failed to identify the specific statements claimed to be actionable, make a prima facie case that the anonymous reviewers were liable for breach of contract, or demonstrate a compelling need for discovery. In light of these and other objections not relevant to this motion, Glassdoor declined to produce the identifying information requested in the subpoena.

B. Payward's Motion to Compel Glassdoor to Produce Documents in Response to Subpoena.

On September 6, 2019, Payward filed a motion to compel Glassdoor to produce documents in response to the subpoena. In support of its motion, Payward argued first that the reviewers' speech was not political, religious, or literary speech, and that, as a result, Payward need only show that the reviewers engaged in wrongful conduct that caused Payward harm, rather than establishing a prima facie case. Payward next argued that it did, in any case, make a prima facie showing of its breach of contract claim because it identified each review, and identified that the actionable meaning was either disparaging or disclosed confidential information. Payward did not specifically identify which statements were actionable, but stated that "it only takes a quick glance to ascertain the reviews that contain disparaging remarks and reveal confidential information."

In addition, Payward argued that it did not need to demonstrate a "compelling need" for the discovery because only obvious invasions of interests fundamental to personal autonomy require

that plaintiffs show a compelling need to access private information. In the alternative, Payward argued that it did demonstrate a compelling need because it could not obtain the information any other way.

C. Glassdoor's Opposition to Payward's Motion to Compel.

On October 30, 2019, Glassdoor filed its opposition to Payward's motion to compel Glassdoor's compliance with the subpoena. Glassdoor argued, first, that Payward failed to make a prima facie showing of damages because Payward did not show that the reviews damaged Payward, or that Payward had paid or intends to pay severance to any former employees. Next, Glassdoor argued that Payward failed to make a prima showing of breach of contract, because the confidentiality and non-disparagement clauses are both unenforceable in California, and because Payward failed to specify which statements within the reviews breached the Severance Agreement. Additionally, Glassdoor argued that Payward failed to adduce evidence of its own performance, that Payward's near-total redaction of the contract rendered it inadmissible, that Payward failed to prove that the defendants signed the contract, and that Payward failed to adequately pursue alternative means of obtaining the information it sought via subpoena.

D. The Court's November 22, 2019 Order.

On November 13, 2019, the Court entered an order granting in part Payward's motion to compel Glassdoor to produce documents in response to Payward's subpoena.

The Court ordered Payward to deliver to Glassdoor a list of former employees who were laid off in January 2019, who also signed a Severance Agreement and received payments under that Severance Agreement. The Court ordered Glassdoor to analyze the reviews at issue, and, if any of the reviews at issue was authored by an individual on the list, to produce the documents as required by Requests for Production Nos. 1-5, but only as to the specific reviews authored by individuals on the list. Glassdoor's response was due within 60 days after it provided notice to its affected users.

III. Factual and Procedural Background Relevant to Doe's Motion to Quash.

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.") ¶ 5. 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 law. **The parties expressly waive any entitlement to have such controversies decided by a court or a jury**.

Id. (emphasis added).

Doe took their confidentiality and non-disparagement obligations under the Severance Agreement seriously. *Id*. at ¶¶ 9-12. Doe recognized that although the agreement prohibited them from disclosing any information Payward deemed confidential or disparaging/defaming Plaintiff, it did not prohibit Doe 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 that Doe "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 or otherwise disclose confidential information as defined by the Severance Agreement. Nor did Doe's review disparage or defame Payward.

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.

Doe learned that Payward objected to several online reviews via an emailed letter the company sent to former employees in early June 2019. *Id*. at ¶ 17. In that letter, Payward demanded that former employees delete any reviews that Payward alleged constituted a breach of the Severance Agreement. *Id.* Despite Doe's firm belief that their 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 Doe's identifying

information. 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.

IV. Reasons to Quash Subpoena as to Movant Doe's Identifying Information.

This Court should quash the subpoena for Movant Doe's identifying information for two independent reasons. First, Payward has failed to make a prima facie showing that Doe breached the Severance Agreement. Second, where a plaintiff seeking identifying information does not allege that speech falls outside the First Amendment's protections, the Court should balance the interests of the parties in addition to requiring that the plaintiff establish a prima facie case. Here, Payward raises no argument that Doe's speech falls outside the First Amendment's protections, and the balance of the parties' interests strongly favor the preservation of Doe's anonymity.

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.

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, Inc., v. Superior Court*, 9 Cal. App. 5th 623, 636 (2017) (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 15, 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.

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. 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 about the company 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 liability.

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 Severance Agreement fails to define the relevant terms, particularly what it means to defame or disparage Payward. Because the term disparagement is vague, it should be construed against Payward and given its legal meaning under California law. Cal. Civil Code § 1654.

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"). And 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. But none of the statements Doe made in their review are false or misleading, and Payward makes no attempt to show otherwise. 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—"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). These statements of opinions are incapable of being proven true or false.

4. 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 criticism of Payward or its employees, Doe joins Glassdoor's arguments that the clause is unenforceable because it could restrain Doe from engaging in a lawful profession of any kind. Cal. Bus. & Prof. Code § 16600. 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, and benefits are superior to Payward's in the course of any other employment at any time in the future. This lawsuit has chilled Doe's speech and Doe fears reprisals should they talk about anything related to 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 requiring a prima facie case in order to adequately protect Doe's First Amendment rights.

The court in *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (2008), 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. 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 declined to further balance the parties' interests *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. 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.

Where, as here, speakers are alleged to be engaged in speech that *is* constitutionally protected, 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 following 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 Intern., Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. 2001); *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 Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005).[1]

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 in order 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 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 that "[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.

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,

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[1] 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.

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 their 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 v Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) ("[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 deleted months ago. Doe Decl. ¶¶ 22-24.

Second, Doe believes that publicly identifying them in this case could result in future economic and employment consequences should Doe 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 any topic, but particularly 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 included praising Payward's skilled and knowledgeable 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. *Signature Mgmt.*, 323 F. Supp. 3d at 960. Doe posted a review on Glassdoor because Doe understood that it would reach an audience interested in learning about others' experiences working for Payward. Doe Decl. ¶ 14. Much like the anonymous speaker in *Highfields*, Doe "has a real First Amendment interest in having his sardonic 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 consider in forming their own opinions about Plaintiff. *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").

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 explained how Doe's review caused damage. *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 soon after learning of Payward's suit. 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. Team*, 876 F.3d at 837. Payward has no need to publicly identify Doe to pursue its claims.

First, as explained above, because Payward's dispute with Doe is governed by an arbitration clause, Payward 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.

Dated: February 10, 2020

Respectfully submitted,

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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 SEPARATE STATEMENT IN SUPPORT OF MOTION TO QUASH

☑ **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:

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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