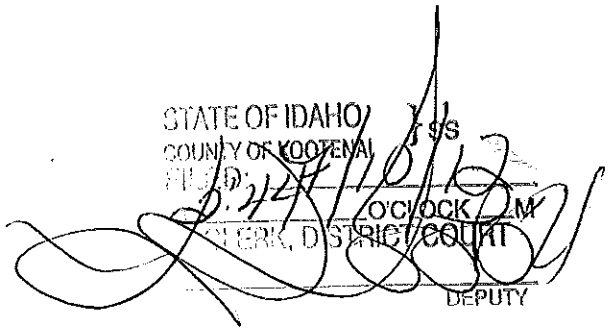

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

TINA JACOBSON, Plaintiff, v. JOHN DOE and/or JANE DOE, Defendant.	)	**CASE NO. CV - 12-3098** MEMORANDUM OPINION AND ORDER RE: COWELS PUBLISHING COMPANY'S MOTION TO QUASH SUBPOENA DUCES TECUM

C. MATTHEW ANDERSEN, WINSTON & CASHATT, for Plaintiff.

DUANE SWINTON and JOEL P. HAZEL, for Cowles Publishing Company.

SUMMARY OF FACTS AND PROCEDURE

The Plaintiff Tina Jacobson was the chairperson of the Kootenai County Republican Central Committee on February 14, 2012. (Affidavit of Tina Jacobson, ¶ 3.) On April 23, 2012, the Plaintiff filed a complaint against the Defendant "John Doe and/or Jane Doe," alleging that on February 14, 2012, the Defendant committed the "tort of libel by publishing, via the internet, a malicious defamation about Mrs. Jacobson with an intended and actual impact in Kootenai County, State of Idaho." (Complaint, ¶ 1.2.) The statements involved an accusation that the Plaintiff, a controller by trade, stole

approximately $10,000 from the Kootenai County Republican Central Committee. (Stipulation of Plaintiff Cowels Publishing Company, ¶ 9, Exhibit 6; Aff. Jacobson, ¶ 25.)

The alleged defamatory statements appeared on a blog identified as the "HuckleberriesOnline," address http://www.spokesman.com/blogs/hbo ("the Blog") (Stipulation, ¶ 2). A person using the name "almostinnocentbystander" allegedly posted the statements. (Complaint, ¶ 2.3). The Plaintiff alleges that two other individuals witnessed the statements, and that they identified themselves on the Blog as "Phaedrus" and "OutofStaterTater." (Complaint, ¶ 2.8.)

Reporter and employee of Cowels Publishing Company, d/b/a/ "The Spokesman Review" ("the Spokesman"), Mr. Dave Oliveria, administers and facilitates the Blog for the Spokesman. (Affidavit of Dave Oliveria, ¶ 3.) On April 25, 2012, the Plaintiff filed a "Subpoena Duces Tecum" ("Subpoena") directed to the Spokesman, a non-party to this case. (Stipulation, ¶ 1.) Counsel for the Plaintiff served the registered agent for the Spokesman with the Subpoena on April 25, 2012. (The Spokesman's Memorandum, p.4.) The Subpoena commands the Spokesman to:

> *produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below.*
>
> 1. *The documents establishing the identity, e-mail address and IP addresses of "almostinnocentbystander," "Phaedrus," and "OutofStaterTater," as identified on the Huckleberries blog dated February 14, 2012.*
>
> 2. *A copy of any communication, no matter what media format and no matter how denominated, by and between a representative of the Spokesman-Review or its employees and/or agents and any of the three above identified bloggers and the e-mail address used for such communication.*
>
> 3. *Any document which confirms that "almostinnocentbystander" has not reestablished a blog link using an alternate blog name on any blog page operated by the Spokesman-Review, its affiliates and/or agents.*

(Subpoena, pp.1-2.) The Subpoena sets the time and place for the production as "May 4, 2012, 12:00 a.m. at the offices of Winston & Cashatt, 250 Northwest Blvd., Suite 206, Coeur d'Alene, Idaho, 83814."

On April 30, 2012, the Spokesman filed a "Motion to Quash Subpoena Duces Tecum" ("Motion to Quash"), "Memorandum of Points and Authorities in Support of Cowels Publishing Company's Motion to Quash Subpoena Duces Tecum" ("Spokesman's Memorandum"), and "Affidavit of Dave Oliveria in Support of Motion to Quash Subpoena Duces Tecum."

In response, on May 21, 2012, the Plaintiff filed a "Stipulation of Plaintiff and Cowels Publishing Company" ("Stipulation") with multiple exhibits and case law, as well as her "Memorandum in Response to Motion to Quash Subpoena" ("Plaintiff's Memorandum"), "Affidavit of Tina Jacobson in Support of Memorandum in Response to Motion to Quash Subpoena," "Affidavit of C. Matthew Anderson." The Spokesman replied with a "Reply Memorandum of Cowels Publishing Company in Support of Motion to Quash Subpoena Duces Tecum" ("Spokesman's Reply").[1]

This Court heard from the parties on June 1, 2012, before taking the matter under advisement. This Court, after carefully reviewing the record and arguments of the parties, and otherwise being fully advised, enters the following Order:

LEGAL STANDARD

As set forth in I.C. § 9-201, "all persons, without exception . . . who, having organs of sense, can perceive, and perceiving, can make known their perception, to others, may be witnesses." Moreover I.C. § 9-1301 states that "[a] witness, served with

[1] The Plaintiff also filed a Motion and Memorandum to Strike Portions of the Affidavit of Dave Oliveria in Support of Motion to Quash." This Court ruled on that motion during the June 1, 2012, hearing.

a subpoena, must attend at the time appointed, with any papers under his control, required by the subpoena, and answer all pertinent and legal questions, and unless sooner discharged, must remain until the testimony is disclosed." Idaho Rule of Civil Procedure 45(b)(2) governs subpoenas directed at a non-party:

> *A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents, electronically stored information, or tangible things, or to permit inspection of premises may be served at any time after commencement of the action. Unless otherwise specified by the court, the party serving the subpoena shall serve a copy of the subpoena on the opposing party at least seven (7) days prior to service on the third party. The party serving the subpoenas shall pay the reasonable cost of producing or copying the documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.*

Once a subpoena is properly served, the party required to produce the documents, etc., may seek to quash all or part of a subpoena as per Rule 45(d):

> *The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable, oppressive, fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden or (2) condition compliance with the subpoena upon the advancement of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things by the person in whose behalf the subpoena is issued.*

When deciding whether to grant or deny a subpoena, a court must consider the nature of the information sought, and the applicable law, to determine whether compliance with the subpoena is required.

DISCUSSION

The parties seem to agree that the First Amendment allows for anonymous speech, including anonymous speech on the internet. Buckley v. American

Constitutional Law Found., Inc., 525 U.S. 182, 200 (1999); Talley v. California, 362 U.S. 60, 65 (1960); see, e.g. Reno v. ACLU, 521 U.S. 844, 845 & 870 (1997). However, neither the First Amendment nor Article I, Section 9 of the Idaho Constitution protects an anonymous person's defamatory speech posted on the internet or uttered in public. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942).

The Spokesman moves to quash the Subpoena arguing that it requires:

> *. . . identification of the purveyors of anonymous speech, thereby stifling the free flow of information and communication, and further requires disclosure of privileged and confidential information obtained by Cowels Publishing and, as such, violates the reporter's privilege of Cowels Publishing under the First Amendment to the United States Constitution, and Article I, Section 9 of the Idaho Constitution.*

(Motion to Quash, p.2.) Thus, the Spokesman argues that it is entitled to an order quashing the subpoena because it "requires disclosure of privileged or other protected matter and no exception or waiver applies." (I.R.C.P. 45(d).) Specifically, the Spokesman asserts that the information is privileged because the information is protected by the First Amendment and Article 1, Section 9 of the Idaho Constitution via the reporter's privilege. Additionally, the Spokesman argues that the Plaintiff cannot meet all the elements of the disclosure tests in Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super.2001) and Doe v. Cahill, 884 A.2d 451 (Del. 2005).

Conversely, the Plaintiff argues that the information sought is not protected by a reporter's privilege because Mr. Oliveria was not acting as a reporter when managing the Blog on February 14, 2012. The Plaintiff also asserts that she can and has met each of the elements in the Dendrite and Cahill cases.

The first issue, then, is whether the identities, e-mail addresses, and IP addresses of "almostinnocentbystander," "Phaedrus," and "OutofStaterTater," are

"privileged or other protected matter and no exception or waiver applies." Another issue presented is whether Mr. Oliveria was acting as a reporter gathering news at the time the statements were made. After reviewing the extensive materials provided by the parties, this Court finds that the Spokesman's Motion to Quash must be granted in part and denied in part.

I. THE INFORMATION IS NOT PROTECTED VIA THE "REPORTER'S PRIVILEGE.

The Spokesman claims that Mr. Dave Oliveria was acting as a reporter on February 14, 2012, when operating the Blog, and that "almostinnocentbystander," "Phaedrus," and "OutofStaterTater" should be considered confidential news sources. As a result, the Spokesman claims that as per the First Amendment and Article I, Section 9 of the Idaho Constitution, the "reporter's privilege" applies and the Spokesman need not disclose the identities, e-mail addresses, and IP addresses of the individuals.

The First Amendment to the United States Constitution provides that:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The "reporter's privilege," also known as the "journalist's privilege" is defined as "a reporter's protection, under constitutional or statutory law, from being compelled to testify about confidential information or sources." Black's Law Dictionary, Ninth Ed. In 1972, the United States Supreme Court held that a reporter may not use the First Amendment as a "shield" to protect the reporter from testifying before a court of law. Branzburg v. Hayes, 408 U.S. 665 (1972). While there is some discussion amongst federal appellate courts that the Branzburg decision was limited to only that case (*see*

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981), the Ninth Circuit has recognized that Branzburg limits the ability of federal circuit courts to recognize even a "qualified reporter's privilege." See, In Re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993); *see also* McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (affirming Branzburg's holding). Thus, the First Amendment does not provide for a reporter's privilege.

However, state and federal statutes, known as "shield's laws," allow for a reporter's privilege. Idaho Code, however, does not contain such a shield law upon which the Spokesman may rely. Instead, the Idaho Supreme Court has recognized that a reporter's privilege lays in Article I, Section 9 of the Idaho Constitution. Section 9 states:

> *Freedom of speech. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty.*

The Idaho Supreme Court recognized a qualified reporter's privilege exists in the case of In Re Contempt of Wright, holding that reporters may protect the identities of confidential sources that provide the reporters with information and assist in the task of gathering and reporting news. 108 Idaho 418, 700 P.2d 40 (1985); State v. Salsbury, 129 Idaho 307, 924 P.2d 208 (1996).

Idaho appellate courts have not declared that the reporter's privilege applies to an anonymous internet commenter, and therefore this Court is presented with a question of first impression. However, it is a question that this Court need not answer as it is clear from the record that the reporter's privilege does not apply because Mr. Dave Oliveria was not acting as a reporter when the statements were made, but instead was acting as a facilitator of commentary and administrator of the Blog.

This Court recognizes that the collection, creation, and dissemination of news has of late taken different form, as depicted by Mick Stevens in the New Yorker:[2]

"Shall I just stop bringing the newspaper?"

This Court also recognizes that within this shift the job description of a "reporter" has come to encompass additional duties, such as administering a blog or managing a webpage.

As stated in his own affidavit, Mr. Dave Oliveria works for the Spokesman as a "reporter, administrator, and facilitator" of the Blog. Clearly, Mr. Dave Oliveria posts his own opinion/editorial commentary and news reports on the Blog, and has a long history of working for the Spokesman and other papers as a reporter. (Aff. Oliveria, ¶ ¶ 2-4.) However, Mr. Oliveria did not state in his affidavit that on February 14, 2012, that he was acting as a reporter gathering information from "almostinnocentbystander," "Phaedrus," or "OutofStaterTater" that was pertinent or to be used in news reporting. The evidence in the record supports the conclusion that Mr. Oliveria was acting as a

[2] Published in the New Yorker , and is reproduced in compliance with the copy right laws of the United States. *See*, Judge Boyle's use of "Peter Steiner's . . . now iconic cartoon" of two dogs at a computer, first published in the New Yorker on July 5, 1993." SI03 v. Bodybuilding.com, CV-07-6311, p.4, ftn.1.

facilitator of conversation and commentary on the Blog regarding a visit from presidential candidate Rick Santorum. (Aff. Oliveria, ¶¶7-10; Stipulation, ¶9, Ex. 6(comments at 12:35p.m., 12:57p.m., 1:21p.m.)). Further, it is clear that Mr. Oliveria acted as an administrator of the Blog when he removed the subject postings by "almostinnocentbystander." (Aff. Oliveria, ¶11.) Most notably, there is no indication that Mr. Oliveria, or any other person, viewed the information as "newsworthy" or intended to use the information to create a news story or editorial opinion about the Plaintiff on the subject of missing funds from the Kootenai County Republican Central Committee, but on the contrary, considered the information merely "ad hominem comments" about the Plaintiff that should be "discouraged." (Id.)

Thus, because Mr. Oliveria was not acting as a reporter who was gathering newsworthy information at the time the statements were made, but instead acted as a facilitator or administrator of the Blog, any qualified reporter's privilege does not apply. As a result, the Spokesman's Motion to Quash must be denied in regards to all three individuals.

II. THE PLAINTIFF HAS MET THE REQUIREMENTS FOR DISCLOSURE AS TO "almostinnocentbystander"; THE PLAINTIFF HAS NOT MET THE REQUIREMENTS FOR DISCLOSURE AS TO "Phaedrus" AND "OutofStaterTater."

A. APPLICABLE LAW

This case appears to be a matter of first impression for Idaho state courts, but the federal U.S. District of Idaho addressed the disclosure of the identity of otherwise anonymous internet posters in SI03 v. Bodybuilding.com, CV-07-6311.[3] In that case, SI03 sought the names of twenty-two pseudonymous persons who "engaged in a

[3] A copy of SI03 v. Bodybuilding.com is attached to the Spokesman's Memorandum.

'campaign and conspiracy' to defame and disparage [SI03] and its Syntrax-brand products on [Bodybuilding.com's] message board." Bodybuilding.com, CV-07-6311, pp.1-2. SI03 served Bodybuilding.com with a subpoena seeking information similar to the information requested by the Plaintiff in this case. Id.

The parties in Bodybuilding.com, like the Plaintiff and the Spokesman in this case, advocated for the application of two tests set forth in two cases: Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super.2001) which provides a four step test, and Doe v. Cahill, 884 A.2d 451 (Del. 2005), which provides for a three part test. Id. at pp.6-8. After evaluating the elements of the individual tests, the court in Bodybuilding.com applied the following modified standard: ". . . a court may order the disclosure of an anonymous poster's identity if a plaintiff: (1) makes reasonable efforts to notify the defendant of a subpoena or application for an order of disclosure; and 2) demonstrates that it would survive a summary judgment motion . . ." and 3) "the court must balance the anonymous poster's First Amendment right of anonymous free speech against the strength of the plaintiff's case and the necessity of the disclosure to allow Plaintiff to proceed." Id. As noted by the Spokesman, the Ninth Circuit recently adopted Cahill in In re Anonymous Online Speakers, 661 F.3d, 1168, 1176 (9th Cir. 2011). (Spokesman's Memorandum, pp.7-8.)

Even though this issue is one of first impression for an Idaho State court, it is not for this Court, the trial court, to adopt one test over another, but instead adoption is the purview of Idaho Supreme Court. Further, while the Ninth Circuit and U.S. District of Idaho case law does not dictate this Court's decisions in the same manner as decisions from the Idaho Supreme Court, a federal court's interpretation of the First Amendment

of the United States Constitution is controlling. In regards to Article I, Section 9 of the Idaho Constitution, the case law of a federal court located in the State of Idaho may be considered highly persuasive.

Given this particular circumstance, this Court does not adopt either the Cahill or Dendrite standards whole cloth, but finds that the modified standard of Bodybuilding.com accounts for all the elements of the Cahill and the Dendrite tests. Moreover, as the tests appear to address both First Amendment and Article I, Section 9 concerns, this Court shall apply the modified standard of Bodybuilding.com.

B. LEGAL ANALYSIS

1. The Plaintiff Made Reasonable Efforts to Notify the Defendant "almostinnocentbystander" of the Subpoena and/or Give Adequate Notice to the Three Individuals in Question that She Sought Their Identity.

Dendrite requires that "the plaintiff must attempt to notify the anonymous poster by posting a notice in the forum where the offending comment was made, that a disclosure of his or her identity is being sought." Cahill requires that the Plaintiff "make reasonable efforts to notify the defendant of a subpoena or application for an order of disclosure." The Plaintiff must meet this first step in each test to proceed.

As of April 25, 2012, the date that the Plaintiff served the Subpoena, the Plaintiff had not notified "almostinnocentbystander," "Phaedrus," and "OutofStaterTater" that she sought their identities. Between April 25, 2012, and May 17, 2012, the Plaintiff had not on her own accord attempted to notify these persons of the Subpoena.

However, as noted by the Plaintiff, on May 5, 2012 and May 14, 2012, the Spokesman posted the Spokesman's Motion to Quash Subpoena and other pleadings on the Blog. (Affidavit of C. Matthew Andersen, ¶¶ 3 and 4, Exhibits 1 and 2.) Further,

on May 17, 2012, the Plaintiff, through the Spokesman, posted on the Blog a "Notice to Anonymous Bloggers on this Website Who Identify Themselves As 'Almostinnocentbystander,' 'Phaedrus,' and 'OutofStaterTater' Concerning Upcoming Court Hearing." (Aff. Andersen, ¶¶ 8 and 9, Exhibit 3.) Given that the May 17, 2012, notice, as well as Spokesman's pleadings, were posted at least two weeks in advance of the June 1, 2012, hearing, this Court must conclude that, even though remedial in nature, notice of the Subpoena and that the Plaintiff sought the identities of the three individuals, was timely given.

Also, this Court notes that prior to commencement of the June 1, 2012, hearing in this case, the bailiff called for the three individuals, should they be present in the courtroom, to reveal themselves. Had the individuals been in the courtroom or in the hallway outside the courtroom, the individuals would have received notice.

This Court must find that the Plaintiff gave notice to the three individuals prior to the hearing in this matter.

2. The Plaintiff Has Satisfied the Summary Judgment Standard as to "almostinnocentbystander." The Plaintiff Has Not Satisfied the Summary Judgment Standard as to "Phaedrus" and "OutofStaterTater."

Dendrite requires that "the plaintiff must identify the specific statements that are allegedly actionable," and "the plaintiff must proffer evidence supporting each element it would have to establish to prove [her] claim." Cahill merges these parts of the Dendrite test, and instead requires simply that the Plaintiff "demonstrates that [her claim] would survive a summary judgment motion."

This Court notes that applying this particular step in the analysis is difficult without pleadings or evidence presented by the Defendant or an indication of which

party is the moving party such that the this Court can identify which party has the burden of proof. Regardless, for purposes of resolving the Spokesman's Motion to Quash only, this Court shall enter some findings and conclusions. However, should the Defendant appear to defend himself or herself, this Court will revisit the findings and conclusions if and when presented with additional evidence upon summary judgment or trial in this matter.

a. Standard for Summary Judgment

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the "pleadings, depositions, and admissions on file, together with any affidavits." Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 405 (Ct. App. 1987).

In order to make that determination, the court must look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . ." (I.R.C.P. 56.) Supporting and opposing affidavits must set forth such facts as would be admissible in evidence. (I.R.C.P. 56.) Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. Zehm v. Associated Logging Contractors, Inc., 116 Idaho 349, 775 P.2d 1191 (1988). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. Roell v. City of Boise, 130 Idaho 197, 938 P.2d 1237 (1997); Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

The facts in the record are to be liberally construed in favor of the party opposing the motion. The opposing party cannot rest upon mere allegations or denials, but the party's response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue of material fact. (I.R.C.P. 56(e)); Smith v. Meridian Joint School District No. 2, 128 Idaho 714, 918 P.2d 583 (1996); G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991); Edwards v. Conchemco, Inc., 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986).

b. "almostinnocentbystander"

The required proof for a successful defamation claim was most recently set forth in Clark v. Spokesman-Review:

> *In a defamation action, a plaintiff must prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication. See Gough v. Tribune–Journal Co., 73 Idaho 173, 177, 249 P.2d 192, 194 (1952).*

144 Idaho 427, 430, 163 P.3d 216, 219 (2007).

This Court agrees that the Plaintiff has presented sufficient information that "almostinnocentbystander" communicated information to others when he made two statements at 3:31p.m., 5:25p.m. on the Blog that other persons did and could read, and mentioned the Plaintiff by name.[4] (Stipulation, ¶ 9, Exhibit 6.) This Court concludes that no genuine issue of material fact exists on this step, and therefore the Plaintiff would survive summary judgment.

[4] The statements are part of the record in this case. Given the nature of the statements and the high level of public interest in this case, this Court, like the Bodybuilding.com court, chooses to refrain from restating the alleged defamatory statements in its opinion, and instead refers to the time the statements were made and their location in the record.

Next, this Court agrees that the Plaintiff has shown that the statements are *per se* defamatory. A defamatory statement is:

> *A statement that tends to injure the reputation of a person referred to in it. The statement is likely to lower that person in the estimation of reasonable people and in particular to cause that the person to be regarded with feelings of hatred, contempt, ridicule, fear or dislike.*

Black's Law Dictionary, Ninth Ed. Idaho courts consider a statement defamatory if it is one "tending to harm a person's reputation, usually by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting a person's business." Weitz v. Green, 148 Idaho 851, 862, 230 P.3d 743 (2010) (citations omitted). In "Idaho the rule is that in order to maintain a libel action without a plea of special damages, a plaintiff must establish that the words complained of are libelous *per se*." Weeks v. M-P Publications, Inc., 95 Idaho 634, 636, 516 P.2d 193, 195 (1973), *citing* Jenness v. Co-operative Publishing Co., 36 Idaho 697, 213 P. 351 (1923); Gough v. Tribune-Journal Co., 75 Idaho 502, 275 P.2d 663 (1954).

In this case, the Plaintiff has not made a claim for special damages (Complaint, ¶¶ 2.19 and 4.3), and therefore she must prove that "almostinnocentbystander"'s statements are libel *per se*. While the Plaintiff argues that Idaho case law has established that a statement imputing a crime such as embezzlement to the Plaintiff is "libel per se," this is not such a foregone conclusion. *See* Barlow v. Int'l Harvester Co., 95 Idaho 881, 891, 552 P.2d 1102. Instead, if a Defendant imputes a crime to the Plaintiff, and the Plaintiff claims defamation, the Defendant will be allowed to raise the defense of truth. The consequence, however, is that the Defendant must then prove that the Plaintiff committed each element of the crime in order to prove its truth. Here,

however, as there is no appearance by the Defendant, the defense of truth has not been raised. Such an issue, then, is for another day.

Instead, at this stage in the proceedings the proper standard of whether a statement is defamation *per se* is set forth in Weeks:

> *In order to be libelous per se, the defamatory words must be of such a nature that the court can presume as a matter of law that they* ***will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule or cause him to be shunned and avoided; in other words, they must reflect on his integrity, his character, and his good name and standing in the community, and tend to expose him to public hatred, contempt or disgrace****. The imputation must be one which tends to affect plaintiff in a class of society whose standard of opinion the court can recognize. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks plaintiff, and subject him to jests or banter, so as to affect his feelings.'*

Weeks, 95 Idaho at 636-37, 516 P.2d at 195-96 (1973) (citations omitted)(emphasis added.)

It is this Court's opinion that based only on the record before this Court at this time, the Plaintiff has presented clear and convincing evidence of defamation *per se* such that she would prevail in a summary judgment proceeding. The poster specifically used the word "embezzlement" and specifically noted the Plaintiff's profession as a "bookkeeper," thereby subjecting the Plaintiff to professional disgrace and negatively affecting her reputation in her personal business. Also, both statements reference the Plaintiff's position of trust and leadership in the Kootenai County Republican Central Committee and that she breached her position by stealing from the group. Also, the additional accusation that the Plaintiff refused to allow others to review the treasurer's reports implied that she was not only dishonest in her handling of the funds, but that she was of the character to hide her crime from others out of guilt. Such accusations would

tend to expose the Plaintiff to public hatred, contempt, and put the Plaintiff into a class in society of thieves and liars.

This Court notes the context and nature of the statements, and after reviewing the Affidavit of Tina Jacobson, this Court concludes that the Plaintiff may very well prevail on this element given the evidence presented and the lack of any evidence to the contrary from the Defendant. Thus, this Court concludes that the Plaintiff has shown that the statements are defamation per se.

The third element is that the Plaintiff is damaged because of the statement. The Plaintiff, through her affidavit and the Complaint states that she is questioned about the blog entries and that she has been required to defend her position at the Kootenai County Republican Central Committee and to her friends, family, employer, church, and other persons. (Aff. Jacobson, ¶¶ 11-15.) More persuasively, the Plaintiff states that she was required to defend her position of trust and leadership by ordering a financial review of the Kootenai County Republican Central Committee books. Also concerning for the Plaintiff is her professional reputation as a controller now and in the future. (Aff. Jacobson, ¶¶ 20, 25-27), and the fact that members of the community and users of the Blog have repeated the allegedly defamatory statements. (Aff. Jacobson, ¶¶ 16-18).

The Plaintiff has presented testimonial evidence about the time and effort expended to respond to the accusations in order to protect her professional and personal reputation. Therefore this Court concludes that the Plaintiff has presented evidence that remains uncontradicted that the Plaintiff has suffered some damage, such that her claim would survive summary judgment. Thus, the Plaintiff has met the last element required for a defamation claim.

The Spokesman additionally argues that the Plaintiff is a public figure, and that she must also prove the element of "malice." As set forth recently in Clark:

> *As a fourth element, when a publication concerns a public official, public figure, or matters of public concern and there is a media defendant, the plaintiff must also show the falsity of the statements at issue in order to prevail in a defamation suit. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775–76, 106 S.Ct. 1558, 1563–64, 89 L.Ed.2d 783, 791–92 (1986). Finally, if the plaintiff is a public figure, the New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964),* ***standard applies, and the plaintiff can recover only if he can prove actual malice, knowledge of falsity or reckless disregard of truth, by clear and convincing evidence****. Steele, 138 Idaho at 252, 61 P.3d at 609; Bandelin v. Pietsch, 98 Idaho 337, 339, 563 P.2d 395, 397 (1977).*

144 Idaho at 430, 163 P.3d at 219 (emphasis added). There is certainly a question as to whether the Plaintiff is a public figure. Arguably, because the statements were made in regards to the Plaintiff's position as a chairman for a large political organization, and made while she was appearing on stage with a potential presidential candidate to represent that political organization, and because the Plaintiff has allegedly suffered public ridicule of such a widespread nature via the internet, this Court certainly can conclude that the Plaintiff is a public figure for purposes of this lawsuit.

The Plaintiff must also prove "actual malice, knowledge of falsity or reckless disregard of truth, by clear and convincing evidence." As noted by the Idaho Supreme Court in Clark:

> *Actual malice is not defined as an evil intent or a motive arising from spite. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510, 111 S.Ct. 2419, 2429, 115 L.Ed.2d 447, 468 (1991). In a defamation action, actual malice is knowledge of falsity or reckless disregard of truth. Bandelin, 98 Idaho at 339, 563 P.2d at 397. Mere negligence is insufficient; the plaintiff must demonstrate that "the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of ... probable falsity." Masson, 501 U.S. at 510, 111 S.Ct. at 2429, 115 L.Ed.2d at 468 (internal quotations and citations omitted). The standard of actual malice is a subjective one. Wiemer v. Rankin, 117 Idaho 566, 575, 790*

P.2d 347, 356 (1990) (citing Harte–Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562, 577 (1989) (emphasis removed and internal quotations omitted)). However, although actual malice is a subjective standard, self-interested denials of actual malice from the defendant can be rebutted with other evidence. This Court focuses on whether there is sufficient evidence of purposeful avoidance of the truth. Id. at 576, 790 P.2d at 357.

144 Idaho at 431, 163 P.3d at 220.

Because the Plaintiff is a public figure, she must prove by clear and convincing evidence that the statements are false. According to her affidavit, the independent review of the finances of the Kootenai County Republican Central Committee showed that no money was missing from the accounts. (Aff. Jacobson, ¶19.) Thus, based on the record before this Court at this time, the Plaintiff has shown that she did commit the embezzlement that "almostinnocentbystander" stated that she did.

The Plaintiff has also shown malice, meaning that "almostinnocentbystander" had knowledge of the falsity or reckless disregard for the truth, or "entertained serious doubts as to the truth of his publication." The Plaintiff points out that "almostinnocentbystander" recanted his comment and that this recanting shows that the speaker knew the falsity of the statement when he said it. Arguably, "almostinnocentbystander" acted recklessly by not only making the statement once, but on two occasions, the second time providing more a more detailed accusation. These facts amount to sufficient evidence that "almostinnocentbystander" engaged in a "purposeful avoidance of the truth." Because there is no other evidence in the record from the Defendant for this Court to further judge this element of the Plaintiff's claim, this Court concludes that the Plaintiff has met the fourth and final element required to prove a defamation claim.

c. "Phaedrus" and "OutofStaterTater"

The Spokesman argues that "Phaedrus" and "OutofStaterTater" are "witnesses," not defendants. This Court agrees. It is clear that the Plaintiff does not claim that "Phaedrus" and "OutofStaterTater" made statements that defamed her. The context of the statements show that while the individuals appeared to seek out further information from "almostinnocentbystander," the Plaintiff has not named these individuals in the Complaint as potential defendants. Instead, it appears that the Plaintiff seeks their identities as potential witnesses to the alleged defamatory statements made by "almostinnocentbystander." The parties do not, as part of these proceedings, argue differently. As a result, this Court will likewise characterize "Phaedrus" and "OutofStaterTater" as potential witnesses, not as potential defendants. (Spokesman's Memorandum, pp.9-10; Plaintiff's Memorandum, p.3.)

Summary Judgment may only be had between parties to an action, not between a party and a witness. As a result, the Plaintiff cannot meet this step of the Bodybuilding.com test. The Spokesman's Motion to Quash, then, must be granted as to "Phaedrus" and "OutofStaterTater."

3. On Balance, the Plaintiff's Case and Necessity of Disclosure Shall Allow Her to Proceed Against "almostinnocentbystander."

The final step of the Bodybuilding.com modified test that the Plaintiff must meet provides that "the court must balance the anonymous poster's First Amendment right of anonymous free speech against the strength of the plaintiff's case and the necessity of the disclosure to allow Plaintiff to proceed." Id. As stated in Dendrite, "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 proper balancing of the equities and rights at issue." 775 A.2d at 142.

In this case, the primary concern of the Plaintiff is that she cannot proceed with her complaint and obtain her day in court on her claims unless she can successfully serve the Defendant with the Complaint as required by the Idaho Rules of Civil Procedure and Idaho statutes. Similarly, a judgment against the Defendant would be considered useless if the Plaintiff could not execute against an identified Defendant. She cannot serve the Defendant or obtain a proper judgment unless she identifies who the Defendant is and where the Defendant is located. Thus, it is necessary to the Plaintiff's case that she identify the opposing party in order for her to proceed with her claims.

On the other hand, "almostinnocentbystander," as well as "Phaedrus" and OutofStaterTater," have the right of anonymous free speech under the First Amendment of the United States Constitution and Article 1, Section 9 of the Idaho Constitution, to express himself. This right is a sacred and inviolate right enjoyed by all three individuals as a citizen of the United States and resident of the State of Idaho. However, this Court notes that the United States Supreme Court, since 1942, has stated that the First Amendment does not protect defamatory speech. Bodybuilding.com, at p.5, *citing* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942) ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.") Further, the Article 1, Section 9 of the United States Constitution limits the

right of free speech within its own text, stating that persons who write, publish, and speak are "responsible for the abuse of that privilege."

Thus, while the individuals are entitled to the right of anonymous free speech, this right is clearly limited when abused. Importantly, the Plaintiff also has a right to her day in court and must prove that the Defendant in fact abused the right of anonymous free speech. Given the proof presented by the Plaintiff and discussed above, this Court concludes that the necessity of "almostinnocentbystander"'s identity to the Plaintiff's case outweighs the Defendant's right to anonymous free speech in this case. However, the necessity of "Phaedrus" and "OutofStaterTater" as critical witnesses to the statements does not outweigh the individual's right to anonymous free speech. This is because neither "Phaedrus" nor "OutofStaterTater" abused their right to free speech by making defamatory comments. Therefore, this Court concludes that the Plaintiff has met her burden on this third prong of the Bodybuilding.com test as to "almostinnocentbystander," but not to "Phaedrus" or "OutofStaterTater." The Spokesman, then, must comply with the Subpoena issued by the Plaintiff in regards to "almostinnocentbystander."

I. CONCLUSIONS

IT IS HEREBY ORDERED that Cowels Publishing Company's Motion to Quash Subpoena Duces Tecum is GRANTED IN PART and DENIED IN PART. This Court HEREBY ORDERS Cowels Publishing Company, d/b/a The Spokesman-Review, to comply with the April 25, 2012, Subpoena Duces Tecum as follows:

> *1. Give to the Plaintiff any document establishing the identity, e-mail address, and IP addresses of "almostinnocentbystander," as identified on the HuckleberriesOnline Blog on February 14, 2012.*

2. A copy of any communication no matter what media format and no matter how denominated, by and between any representative of the Spokesman-Review or its employees and/or agents and the person identified as "almostinnocentbystander."

3. Any document that confirms that "almostinnocentbystander" has not reestablished a blog link using an alternate blog name on any blog page operated by the Spokesman-Review, its affiliates and/or agents.

IT IS FURTHER ORDERED that the April 25, 2012, Subpoena Duces Tecum is QUASHED AS TO:

1. Any document establishing the identity, e-mail address, and IP addresses of "Phaedrus" and "OutofStaterTater," as identified on the HuckleberriesOnline Blog on February 14, 2012.

2. A copy of any communication no matter what media format and no matter how denominated, by and between any representative of the Spokesman-Review or its employees and/or agents and the persons identified as "Phaedrus" and "OutofStaterTater."

However, Cowels Publishing is HEREBY ORDERED to preserve this information until the resolution of this action or until otherwise Ordered by this Court.

Cowels Publishing Company, d/b/a The Spokesman-Review, shall comply with the Subpoena Duces Tecum within fourteen (14) days of the date of this Order. The Plaintiff and Cowels Publishing Company, d/b/a The Spokesman-Review, shall agree on a location and time of day. As per Idaho Rule of Civil Procedure 45(b)(2), the Plaintiff shall pay the reasonable costs of production and copying, but compliance with this Court's order is not conditioned on the advanced payment of those reasonable costs.

DATED this 10th day of July, 2012.

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER RE: COWELS PUBLISHING COMPANY'S MOTION TO QUASH SUBPOENA DUCES TECUM was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 10 day of July, 2012 to the following:

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CLIFFORD T. HAYES
Clerk of the District Court

By: _____
Deputy Clerk

#3265