

*XYZ Corp. v. United States: A Company by Any Other Name*

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I. OVERVIEW

XYZ Corporation commenced an action against the U.S. Government and the U.S. Customs and Border Protection (The Government) to obtain judicial review of the U.S. Customs and Border Protection’s decision to grant Duracell Lever-Rule protection.<sup>1</sup> XYZ Corporation imports and distributes gray market batteries that are marked “Duracell.”<sup>2</sup> Duracell’s Lever-Rule protection would restrict certain imports of gray market batteries with its trademark.<sup>3</sup> Here, the issue was whether XYZ Corporation may keep its identity confidential in the judicial proceedings by using the pseudonym “XYZ Corporation.”<sup>4</sup> XYZ Corporation asked to keep its identity confidential for fear of commercial retaliation.<sup>5</sup> In XYZ Corporation’s action, it filed an application for a protective order that allowed counsel of the parties to know its identity, but there were limitations to sharing this information.<sup>6</sup> Duracell then moved to intervene in this action.<sup>7</sup> The U.S. Court of International Trade granted this intervention.<sup>8</sup> When Duracell intervened, the parties filed a joint motion to amend the protective order so Duracell’s counsel could have access to confidential information.<sup>9</sup> The amended protective order included the following terms:

(1) proprietary, business, financial, technical, trade secret, or commercially sensitive information; (2) information that any party is prohibited from releasing publically pursuant to contractual obligations, applicable statutes, applicable regulations, or directives from the

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1. XYZ Corp. v. United States, 264 F. Supp. 3d 1348, 1350 (Ct. Int’l Trade 2017).  
2. *Id.* at 1349.  
3. *Id.* at 1349-50.  
4. *Id.*  
5. *Id.* at 1350.  
6. *Id.*  
7. *Id.*  
8. *Id.* at 1350-51.  
9. *Id.*

Government; (3) private information that is otherwise protected from disclosure under applicable law including, but not limited to, personnel files; and (4) other confidential research, development, or commercial information as set forth in USCIT Rule 26(c)(1)(G).<sup>10</sup>

Duracell filed comments claiming that XYZ Corporation did not have a factual or legal basis to conceal its identity.<sup>11</sup> XYZ Corporation argued that it needed to have anonymity to protect itself from commercial and legal retaliation from Duracell, so it did have justification to use a pseudonym.<sup>12</sup> XYZ Corporation also argued that its interest in anonymity to protect itself from retaliation outweighed any interest Duracell may have in the disclosure of its identity.<sup>13</sup> The Government also filed comments that stated that it would defer to the court's discretion in determining whether XYZ Corporation's interest in protecting itself from retaliation outweighed countervailing interests in public disclosure of the party's identity.<sup>14</sup> Because the amended protective order did not include names of the parties, the court had to decide whether it could use its discretion to allow XYZ Corporation to proceed anonymously.<sup>15</sup> There are no Rules of the Court or Rules of Civil Procedure that explicitly allow a litigant to proceed anonymously.<sup>16</sup> There is also no precedent for the issue of a court allowing a litigant to proceed anonymously in the U.S. Court of Appeals for the Federal Circuit.<sup>17</sup> The U.S. Court of International Trade *held* that XYZ Corporation could not use a pseudonym to proceed anonymously. *XYZ Corp. v. United States*, 264 F. Supp. 3d 1348, 1353 (Ct. Int'l Trade 2017).

## II. BACKGROUND

The Federal Rules of Civil Procedure state that an action must be prosecuted in the name of the real party in interest.<sup>18</sup> Rule 10 specifically states that the complaint's title must name all the parties.<sup>19</sup> The reason for Rule 10 is not just for administrative purposes—the rule exists to allow the opposing party to know the name of the opposition and to protect the

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10. *Id.* at 1351-52.

11. *Id.* at 1351.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1351-52.

16. *Id.* at 1352.

17. *Id.*

18. FED. R. CIV. P. 17.

19. FED. R. CIV. P. 10.

public's interest in open judicial proceedings.<sup>20</sup> In *Cox Broad. Corp. v. Cohn*, the U.S. Supreme Court recognized the importance of open judicial proceedings.<sup>21</sup> The Supreme Court stated that trials were events for the public, in which the judiciary cannot suppress or censor what happens.<sup>22</sup> However, in "special circumstances," a court may use its discretion to allow a party to proceed anonymously.<sup>23</sup> Courts look to a number of factors when deciding whether to allow a party to proceed anonymously using a pseudonym, particularly whether using the party's real name would cause physical or mental injury.<sup>24</sup> There is no express rule for justification of use of a pseudonym.<sup>25</sup> However, common reasons for courts allowing the use of a pseudonym have been abortion, homosexuality, transsexuality, personal safety, illegitimate children, and mental illness.<sup>26</sup> These reasons all have had either a social stigma or fear of physical harm that would be associated with or threaten the parties if they had to use their real names.<sup>27</sup> Courts have a "judicial duty" to look into the circumstances of a case to determine whether anonymity is warranted.<sup>28</sup> Courts should not allow use of a pseudonym to protect a party's professional or economic interests.<sup>29</sup> Also, simple embarrassment is not enough to justify the use of a pseudonym.<sup>30</sup>

The ultimate test courts have used for determining whether a party may proceed with a pseudonym is balancing the party's interest in anonymity and the public's interest in disclosure of the party names.<sup>31</sup> For the Eleventh Circuit Court of Appeals, the rule is that the party must have a substantial privacy right that outweighs the customary constitutional right of public judicial proceedings.<sup>32</sup> The Tenth Circuit Court of Appeals also weighs the party's right to privacy against the

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20. *Doe v. Rostker*, 89 F.R.D. 158, 160 (N.D. Cal. 1981).

21. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 470 (1975).

22. *Id.* (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

23. *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 573 (S.D.N.Y. 2004) (quoting *EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108, 110 (E.D.N.Y. 2003)).

24. *Id.*

25. *Rostker*, 89 F.R.D. at 161.

26. *Id.*

27. *Id.*

28. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (quoting *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)).

29. *Guerrilla Girls*, 224 F.R.D. at 573 (quoting *Doe v. United Servs. Life Ins. Co.*, 123 F.R.D. 437, 439 n.1 (S.D.N.Y. 1988)).

30. *Rostker*, 89 F.R.D. at 162.

31. *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 186-87 (2d Cir. 2008).

32. *Sealed Plaintiff*, 537 F. 3d at 189; *see Roe v. Aware Woman Ctr. for Choice*, 253 F.3d 678, 685 (11th Cir. 2001).

public's right to open judicial proceedings.<sup>33</sup> The Ninth Circuit Court of Appeals considers whether the party's right to privacy outweighs both prejudice to the other party and the public's right to open judicial proceedings.<sup>34</sup>

In *Guerrilla Girls, Inc. v. Kaz*, the U.S. District Court for the Southern District of New York held that a pseudonym could not be used to protect a purely economic interest.<sup>35</sup> Here, the Guerrilla Girls were a group of female artists and art professionals that protested restrictions on women in art and promoted women in art.<sup>36</sup> The group spreads its message through various forms of media.<sup>37</sup> Group members maintain anonymity in their messages to draw attention to the group's purpose, rather than to the individuals involved in the group.<sup>38</sup> Three new groups had developed from the original Guerrilla Girls by the time of the lawsuit.<sup>39</sup> Guerrilla Girls, Inc. filed a complaint against the derivative Guerrilla Girls groups, alleging trademark infringement, trademark dilution, unfair competition, and copyright infringement.<sup>40</sup> The defendants, the derivative Guerrilla Girls groups, moved to proceed anonymously<sup>41</sup> to protect themselves from economic harm.<sup>42</sup> In this case, the court held that the defendants could not proceed anonymously.<sup>43</sup> The court reasoned that economic harm alone was not enough to justify anonymity<sup>44</sup> and that the economic injury would affect the organization, rather than the individuals involved in this lawsuit.<sup>45</sup> Finally, the defendants were unable to show likelihood of injury.<sup>46</sup> Without being able to show likelihood of injury or any injury beyond an economic one, the defendants could not proceed anonymously.<sup>47</sup>

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33. See *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998).

34. *Sealed Plaintiff*, 537 F.3d at 189; see *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).

35. *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 573, 575-76 (S.D.N.Y. 2004).

36. *Id.* at 572.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 573.

42. *Id.*

43. *Id.* at 575.

44. *Id.* at 573.

45. *Id.* at 573-76.

46. *Id.* at 573.

47. *Id.* at 575.

In *Doe v. Rostker*, the plaintiffs, the party seeking anonymity, challenged President Jimmy Carter's Proclamation No. 4771, which required male children born in 1961 to register with the Selective Service System.<sup>48</sup> Registration required them to give their names, dates of birth, Social Security numbers, addresses, and other personal information that would not be classified until they were inducted.<sup>49</sup> The plaintiffs argued that giving their personal information to the U.S. Government without the information being classified was a violation of their privacy rights.<sup>50</sup> The plaintiffs feared retaliation from this lawsuit of future rejection of conscientious objector status, so they sought anonymity.<sup>51</sup> The U.S. District Court for the Northern District of California, however, reasoned that this retaliatory injury was speculative and prospective because if these retaliatory measures were taken against the plaintiffs, they could bring an action at that time.<sup>52</sup> The court held that the plaintiffs should not be granted anonymity because the injury was speculative and it was not of a highly sensitive nature.<sup>53</sup> This level of potential harm to the plaintiffs did not outweigh the public's interest in knowing the names of the parties.<sup>54</sup>

Courts have held that names of parties in lawsuits are generally within the scope of public interest and the titles of lawsuits should include the parties' names.<sup>55</sup> However, parties in a lawsuit still can get permission from a court to obtain anonymity.<sup>56</sup> The ultimate test that courts consider is if the party has a substantial privacy right that outweighs the public's interest in knowing the party names.<sup>57</sup>

In *Free Speech v. Reno*, the plaintiffs were radio broadcasters seeking injunctive relief from the U.S. Government's counterclaim enjoining their broadcast.<sup>58</sup> The plaintiffs moved to proceed

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48. *Doe v. Rostker*, 89 F.R.D. 158, 159 (N.D. Cal. 1981).

49. *Id.* at 160.

50. *Id.*

51. *Id.* at 162.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Doe v. United Servs. Life Ins. Co.*, 123 F.R.D. 437, 439 (S.D.N.Y. 1988).

56. *Free Speech v. Reno*, No. 98 Civ. 2680 MBM, 1999 WL 47310, at \*4 (S.D.N.Y. Jan. 27, 1999).

57. *Id.* at \*5; *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981).

58. *Reno*, 1999 WL 47310, at \*1.

anonymously because they could face criminal and civil penalties for violating the Federal Communications Act of 1934.<sup>59</sup> In this case, the court considered five factors for determining whether the plaintiffs could proceed anonymously.<sup>60</sup> These factors were:

- (1) whether the plaintiff is suing the government or a private person;
- (2) whether the plaintiff would be compelled to disclose information of the utmost intimacy;
- (3) whether the plaintiff would be compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution;
- (4) whether the plaintiff would risk injury if identified; and
- (5) whether the party defending against a suit brought under a pseudonym would thereby be prejudiced.<sup>61</sup>

The plaintiffs here argued their complaint fell under factors (1) and (3), meaning they had a basis for anonymity.<sup>62</sup> They argued they had a high private interest that is shielding themselves from having to admit to illegal activity, which would outweigh the public's interest in knowing the names of the parties.<sup>63</sup> There was little public interest in knowing who the actual plaintiffs were because other persons in a similar legal situation could be interchangeable.<sup>64</sup> The public could still be aware of the constitutional claim without knowing the identities of the plaintiffs.<sup>65</sup>

The court agreed with the plaintiffs in *Free Speech Radio*.<sup>66</sup> Because they were suing a government entity and revealing their identities could subject them to criminal and civil penalties, the plaintiffs could proceed anonymously.<sup>67</sup> If the plaintiffs were not allowed anonymity, it would deter them from pursuing this constitutional claim.<sup>68</sup> Also, the U.S. Government would not be worse off with the plaintiffs proceeding under a pseudonym.<sup>69</sup> Because the plaintiffs, here, had a high interest in privacy, the public had a low interest in knowing specifically who the plaintiffs were, and because the plaintiffs using a pseudonym did not disadvantage the U.S. Government, the court held the plaintiffs could continue anonymously.<sup>70</sup>

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59. *Id.* at \*3.

60. *Id.* at \*4-5.

61. *Id.*; see *Doe v. Shakur*, 164 F.R.D. 359, 360-61 (S.D.N.Y. 1996).

62. *Reno*, 1999 WL 47310, at \*5-6.

63. *Id.* at \*6, \*9-10.

64. *Id.* at \*9-10.

65. *Id.* at \*10.

66. *Id.*

67. *Id.* at \*9.

68. *Id.*

69. *Id.*

70. *Id.* at \*9-10.

In *United States v. Microsoft Corp.*, the U.S. Court of Appeals for the District of Columbia Circuit reversed a decision made by a district court judge that allowed a party to proceed anonymously for the reason of commercial retaliation.<sup>71</sup> The court reasoned that the judge, in making this decision, did not adequately weigh the disadvantages to the other party (here, Microsoft) or the public's interest in open proceedings.<sup>72</sup> The district court judge also made comments indicating a distrust of Microsoft, showing a lack of weighing the disadvantages to Microsoft if the plaintiff proceeded anonymously.<sup>73</sup> In cases determining if a party can proceed anonymously, there is a "judicial duty to inquire into the circumstances of particular cases to determine whether the dispensation is warranted."<sup>74</sup> The court said the district court judge's decision was an "extraordinary break with precedent."<sup>75</sup>

### III. COURT'S DECISION

In the noted case, the U.S. Court of International Trade relied on cases with similar issues of law from other circuits, as there was no precedent for the Court of Appeals for the Federal Circuit to determine the standard for granting anonymity.<sup>76</sup> For the issue of the balancing test, the court considered *Advanced Textile Corp.* and *Microsoft Corp.*<sup>77</sup> For the nature of the potential injury from using XYZ Corporation's real name, the court considered *Guerrilla Girls*.<sup>78</sup> Using the holdings from *Advanced Textile Corp.* and *Microsoft Corp.*, the court held that XYZ Corporation's interest in privacy did not outweigh the public's interest in knowing its identity.<sup>79</sup> Using the holding from *Guerrilla Girls*, the court held that the type of injury XYZ Corporation feared from using its real name in the proceedings did not allow for the court to grant it anonymity.<sup>80</sup> Therefore, XYZ Corporation could not proceed in the lawsuit with a pseudonym.<sup>81</sup>

In the noted case, the court used the balancing tests from *Advanced Textile Corp.* and *Microsoft Corp.* to balance XYZ's privacy interest

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71. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464-65 (D.C. Cir. 1995).

72. *Id.* at 1464.

73. *Id.*

74. *Id.* (quoting *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)).

75. *Id.*

76. *XYZ Corp. v. United States*, 264 F. Supp. 3d 1348, 1351-53 (Ct. Int'l Trade 2017).

77. *Id.* at 1352-53.

78. *Id.* at 1353.

79. *Id.*

80. *Id.*

81. *Id.*

against the interests of fairness of the opposing party and the interest of the public in open judicial proceedings.<sup>82</sup> Referencing *Advanced Textile Corp.*, the court considered the need to “balance the need for anonymity against the general presumption that parties’ identities are public information and the risk of unfairness to the opposing party.”<sup>83</sup> Here, there was potential unfairness to Duracell.<sup>84</sup> Duracell intervened, in this case, to keep XYZ Corporation from proceeding anonymously.<sup>85</sup> The court reasoned that because XYZ Corporation’s concern of injury was for an economic injury, its privacy interests did not outweigh the potential of unfairness to Duracell.<sup>86</sup>

In *Microsoft Corp.*, the court used the rule from *James v. Jacobson*, a preceding case deciding whether a party can proceed anonymously,<sup>87</sup> that a court’s decision to grant anonymity in legal proceedings must be an intensive fact inquiry into the special circumstances of a case to decide if those facts “warrant granting the ‘rare disposition’ of anonymity against the world.”<sup>88</sup> Here, while balancing the parties’ interests, including the public’s interest, the court held that XYZ Corporation’s interest did not outweigh that of Duracell or the public.<sup>89</sup> Like when balancing XYZ Corporation’s interest in privacy against potential unfairness to the opposition, the court reasoned that XYZ Corporation’s potential injury from using its real name was purely economic and that did not outweigh the other parties’ interests.<sup>90</sup>

In *Guerrilla Girls*, the court held that an economic injury did not justify allowing a party to proceed anonymously.<sup>91</sup> In the noted case, the court applied that holding to the facts of XYZ Corporation’s case.<sup>92</sup> XYZ Corporation’s concern was its commercial reputation and retaliatory commercial measures.<sup>93</sup> Because other entities may retaliate against XYZ Corporation after discovering its real name from this lawsuit, XYZ Corporation argued its case for anonymity was justified.<sup>94</sup> If other

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82. *Id.* at 1352-53.

83. *Id.* at 1352 (quoting *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000)).

84. *Id.*

85. *Id.*

86. *Id.*

87. *James v. Jacobson*, 6 F.3d 233, 234 (4th Cir. 1993).

88. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (quoting *James*, 6 F.3d at 238).

89. *XYZ Corp.*, 264 F. Supp. 3d at 1353.

90. *Id.*

91. *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 573 (S.D.N.Y. 2004).

92. *XYZ Corp.*, 264 F. Supp. 3d at 1353.

93. *Id.* at 1352-53.

94. *Id.*



entities did retaliate, they could bring potential lawsuits against XYZ Corporation that would cause great financial hardship to XYZ Corporation and could possibly bankrupt it.<sup>95</sup> However, the court held that even this level of potential financial hardship did not justify the use of a pseudonym by XYZ Corporation.<sup>96</sup> This financial hardship would be an economic injury, and using the rule from *Guerrilla Girls*, an economic injury does not justify a party to proceed anonymously.<sup>97</sup> Because the only injury was economic in nature, the court held that XYZ Corporation did not meet the standard to use a pseudonym.<sup>98</sup>

#### IV. ANALYSIS

In the noted case, the court relied on precedent from other circuit courts to determine whether it should grant XYZ Corporation anonymity.<sup>99</sup> Considering case decisions of those other circuits made prior to this decision, the court's reasoning is consistent with prior jurisprudence.<sup>100</sup> The court decided to be consistent with courts of other circuits by holding that XYZ Corporation cannot be anonymous for a commercial reason, thereby, setting the precedent for the U.S. Court of International Trade.<sup>101</sup> It is important to note that the decision in the noted case created a new precedent.

The noted case is most similar to *Rostker*.<sup>102</sup> In both cases, the parties seeking anonymity feared retaliatory actions against them if their names were revealed in the lawsuits.<sup>103</sup> However, in both cases, the fear of retaliation is both speculative and prospective.<sup>104</sup> The court, in the noted case, did not specifically say the retaliation is speculative and prospective.<sup>105</sup> Yet, by applying the reasoning from *Rostker*, XYZ Corporation's fear of retaliation could also be considered speculative and

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1352.

100. *See infra* Part II.

101. *XYZ Corp.*, 264 F. Supp. 3d at 1352-53.

102. *See infra* Part II.

103. *XYZ Corp.*, 264 F. Supp. 3d at 1352-53; *Doe v. Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981).

104. *XYZ Corp.*, 264 F. Supp. 3d at 1352.

105. *See id.*

prospective.<sup>106</sup> Like the plaintiffs in *Rostker*, XYZ Corporation feared retaliation that would result in a potential lawsuit.<sup>107</sup> XYZ Corporation feared a lawsuit from Duracell, which would be costly.<sup>108</sup> However, like the plaintiffs in *Rostker*, XYZ Corporation could also take action at a later time if retaliatory measures were to be taken.<sup>109</sup> Also, in both cases, the type of injury feared from the retaliation is economic injury.<sup>110</sup> Even though the noted case and *Rostker* are not in the same circuit, the cases should be decided the same way because the key reasons for seeking anonymity are so similar.

The noted case has a distinguishing factor from the preceding cases.<sup>111</sup> That is, in the noted case, the party disadvantaged by use of a pseudonym was an intervening third party, rather than the initial opposing party.<sup>112</sup> This distinctive factor is significant because it will not only be the precedent for future cases in the U.S. Court of International Trade, but it will also serve as an authority for future cases in other circuits dealing with fairness to an intervening party.<sup>113</sup>

The most significant impact of the noted case is the possible future effects of the court's decision. First, there was no precedent in this circuit regarding granting anonymity to a party claiming retaliatory economic injury.<sup>114</sup> Therefore, the decision in the noted case became the precedent for future cases. Also, the involvement of an intervening party is a different factor from the preceding cases.<sup>115</sup> Thus, for future cases in this circuit, the noted case will be the precedent, and for cases in other circuits, the noted case will still serve as an authority. Even by following authorities in other circuits consistently, the court in the noted case still reached a significant decision for future cases.

## V. CONCLUSION

The noted case synthesizes authority from other circuits to create precedent for granting anonymity in future cases in its circuit.<sup>116</sup> Because there is no explicit rule in any circuit for granting anonymity, it seems

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106. *Rostker*, 89 F.R.D. at 162.

107. *Id.*; *XYZ Corp.*, 264 F. Supp. 3d at 1352-53.

108. *XYZ Corp.*, 264 F. Supp. 3d at 1352-53.

109. *Rostker*, 89 F.R.D. at 162; *XYZ Corp.*, 264 F. Supp. 3d at 1352-53.

110. *Rostker*, 89 F.R.D. at 162.; *XYZ Corp.*, 264 F. Supp. 3d at 1352-53.

111. *XYZ Corp.*, 264 F. Supp. 3d at 1350.

112. *Id.*

113. *Id.* at 1352.

114. *Id.*

115. *Id.*

116. *Id.* at 1352-53.

courts tend to look at this issue on a case-by-case basis by scrutinizing the facts.<sup>117</sup> In the noted case, that is just what the court did.<sup>118</sup> It considered the fairness to everyone involved and to the public and the specific concerns of the party seeking anonymity.<sup>119</sup> By comparing the facts and reasons for seeking anonymity of this case to other cases, the court could not justify granting anonymity to XYZ Corporation.<sup>120</sup>

Emma Dedman\*

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

\* © 2018 Emma Dedman. J.D. candidate 2019, Tulane University Law School; B.S.M. 2016, Tulane University. The author is from Nashville, TN. She would like to thank her parents, Marc and Janna Dedman, for their continued support and encouragement throughout law school.