E. W. Pike (ISB #650)
Erika Lessing (ISB# 6797)
E. W. PIKE & ASSOCIATES, P.A.
151 N. Ridge Ave., Suite 210
P.O. Box 2949
Idaho Falls, ID 83403-2949
Telephone: 208/528-6444
Telefax: 208/528-6447

Attorneys for 43SB.COM, L.L.C.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

IN RE: SUBPOENA ISSUED PURSUANT TO THE DIGITAL MILLENIUM COPYRIGHT ACT TO: 43SB.COM, L.L.C.	Case No. MS 07-~~6736~~ 6236 **BRIEF IN SUPPORT OF MOTION TO QUASH SUBPOENA**

Subpoena Recipient 43SB.COM, L.L.C ("43SB"), by and through its attorneys, submits the following brief in support of its Motion to Quash Subpoena, pertaining to the subpoena issued by the United States District Court for the District of Idaho on or about June 7, 2007.

I. BACKGROUND

On or about June 7, 2007, Melaleuca, Inc., ("Melaleuca") through its counsel, Brad R. Frazer of Technology Law Group, caused a pre-litigation subpoena, issued pursuant to the Digital Millennium Copyright Act of 1998 ("DMCA"), to be served upon legal counsel for 43SB.[1] The subpoena demanded that 43SB produce "all server logs, IP address logs, account information,

1 This is a second attempt by Melaleuca; the first subpoena it allegedly issued under the DMCA was not issued by the clerk of the court, nor did it meet other requirements under the DMCA. Counsel for 43SB accepted service of the second subpoena.

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user IDs, subscriber IDs, screen name logs, e-mails, correspondence, or other material, whether physically or electronically stored, that may serve to identify, i.e., provide real names and addresses for, those persons who posted the infringing content identified in the Take-Down Notice, including but not limited to those persons using or associated with the screen names 'd2' or 'Tom Paine' as found at the website 43rdstateblues.com and as more specifically set forth in the Take-Down Notice." [underscoring added]. Served contemporaneously with the subpoena was a document, in letter form, from Technology Law Group, entitled "Take-Down Notice Under the Digital Millennium Copyright Act."[2] The letter addressed to A Small Orange Software did not directly identify the works or posting in which Technology Law Group's client claimed a copyright. This letter was not directed to 43SB, but to a Small Orange Software and Timothy Dorr, Administrative Director of A Small Orange Software.[3] At no point did Technology Law Group issue a take-down notice to 43SB.

The website overseen by 43SB, 43rdstateblues.com, (the "Website"), allows anonymous contributors to post comments or "blogs" on the site for others to view and likewise comment. The purpose of the site is to allow participants a forum where they can express their political opinions and freely exchange ideas. Participants or posters and others viewing the Website are clearly aware that the comments appearing on the Website are "solely the opinions of those who write them."[4]

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2 See copy of the undated letter from Technology Law Group, **Exhibit A**, attached hereto.

3 A Small Orange Software and 43SB are separate entities; neither has any ownership interest in the other.

4 This disclaimer is clearly posted on the Website.

II. ARGUMENT

A. The Subpoena and the Notification of Claimed Infringement Fail to Comply With the Provisions of 17 U.S.C. § 512(c)(3)(A).

The DMCA is intended to serve as a means to better protect copyrights in the digital age.[5] Its purpose is also, in part, to spur and promote free expression. Congress was concerned that "copyright owners [would] hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."[6] However, the DMCA was not designed to prohibit the fair use of copyrighted works, nor to inhibit free speech.[7]

The DMCA has provisions which allow a copyright owner to identify an individual who has allegedly infringed upon the owner's copyright online. As allowing private parties to use the power of the federal courts to gather private information in the absence of litigation is an extraordinary event, [8] the DMCA has strict requirements which must be substantially met before a DMCA subpoena can issue to an online service provider. 17 U.S.C §512(h) provides that before the request for a subpoena can be made, a notification of infringement must be served upon the service provider. Per 17 U.S.C. §512(c)(3)(A)(ii), the notice of infringement must, among other things, clearly identify the copyrighted work which the owner claims was infringed. Compliance with §512 is not "substantial" if the notice provided complies with only some of the requirements of §512(c)(3)(A). [9]

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5 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440 (2d Cir. 2001).

6 S. Rep. No. 105-190, at 8 (1998).

7 *See* Online Policy Group v. Diebold, Inc., 337 F.Supp 1195 (U.S. Dist. 2004).

8 Recording Industry Assoc. of America v. University of North Carolina at Chapel Hill, 367 F.Supp.2d 945, 957 (N.C. D. 2005).

9 Perfect 10, Inc. v. CC Bill, LLC., 481 F.3d 751, 761 (Ct. App. 9th Cir. 2007). (Reversed and remanded on other grounds)

In this instance, a notification of infringement was never given to 43SB. While a letter addressed to A Small Orange Software was sent to 43SB, no take-down notice was ever issued directly to 43SB. Further, even if the purported "take-down letter" had been addressed to 43SB, said letter did not provide 43SB with sufficient information to identify the work in which Melaleuca was claiming a copyright; neither the date of the infringed work, the author of the infringed work, nor the contents of the infringed work were described. Indeed, while paragraph (1), page 2, of the take-down letter sent to A Small Orange Software stated that a PDF image of the "infringed content" accompanied the letter, no such image was ever provided to 43SB.[10] For these reasons, the take-down letter is not sufficient notification of infringement to 43SB.

The facts of this case are similar to those in Online Policy Group v. Diebold, Inc.[11] In Diebold, the plaintiff was attempting to gain access to the defendant's database for purposes of proving that defendant Diebold had knowledge that the its products were defective. The defendant asserted that its email archive contained material which was copyrighted in order to block access to the database by the plaintiff. The plaintiff requested more specific identification of copyrighted materials; Diebold's only response was that the entire database itself was copyrighted. Diebold could not and did not identify specific copyrighted material, nor did the defendant provide evidence of copyright. The Diebold Court held that the material was not subject to copyright law.[12]

Federal courts have stressed the importance of compliance with the notification

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10 Exhibit A.

11 Online Policy Group, 337 F.Supp2d 1195 (San Jose Div. Dist. CA. 2004).

12 Id., 337 F.Supp.2d at 1203.

requirement under the DMCA. As a District Court of the Fourth Circuit recently stated: [t]here is no doubt that the notification document contains valuable and necessary information in order for a subpoena to be issued. Without the contents of the notification, there would not be a basis for the subpoena, except for a conclusory allegation that the subpoena is sought to obtain the identity of an alleged infringer. Thus, notification information is a crucial part of the subpoena process."[13] In this case, the notification information is completely lacking, and the subpoena should be quashed for failing to comply with the provisions of 17 U.S.C. § 512(c)(3).

B. Melaleuca Has Not Established A Prima Facie Case of Copyright Infringement.

Federal courts have held that in order to obtain a subpoena under the DMCA, a copyright owner must "in effect, plead a prima facie case of copyright infringement"[14] or prove that a defendant violated an exclusive right of a copyright owner. As an initial matter, Melaleuca has not properly identified to 43SB the work in which they are asserting an exclusive copyright interest. While 43SB has speculated that a letter appearing on the Website signed by a Mr. Ken Sheppard of Melaleuca and dated April 6, 2007 is the material that Melaleuca is asserting a copyright interest in, this is not entirely confirmable by the materials received by 43SB. In order to assert that a violation of copyright has occurred, a plaintiff must clearly identify the derivative work or other work which violated the exclusive copyrights. Melaleuca has not clearly identified to 43SB the infringing work, therefore the prima facie case cannot be established.

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13 Recording Industry Assoc. of America, 367 F.Supp.2d at 952.

14 Recording Industry Assoc. of America v. Verizon Internet Serv., Inc., 257 F. Supp. 2d 244, 263 (D.C. 2003) (reversed on other grounds, 351 F.3d 1229 (D.C. Cir. 2003).

Even if 43SB were to assume that the alleged copyright violation pertained to the letter signed by Mr. Ken Sheppard and dated April 6, 2007 ("Sheppard Letter"), Melaleuca further fails to establish that they have a valid and exclusive copyright interest in the Sheppard Letter. To establish a prima facie case of infringement, the alleged copyright owner must prove first, that she or he has ownership of a valid and exclusive copyright; second, that the work is a creative work and capable of being copyrighted as an original work; third, the alleged owner must prove that the material being infringed is not used in a manner protected under fair use doctrine.[15]

1. The Sheppard Letter Was Not a Creative Work

The work which Melaleuca claims is being violated does not have any creativity to merit copyright protection. In Diebold, the court looked very closely as to whether the database which was the subject of the action could be considered creative in order to be covered by copyright protections. The Diebold database contained many internal emails exchanged among employees, a discussion of the development of the Diebold computer election system, and information about Diebold employees, including employee contact information.[16] Two persons had posted the contents of the email database on-line and, subsequently, an on-line newspaper had provided a link to the database that was already on-line. Diebold asserted that the information in the database, particularly the emails, was copyrighted. Citing a U.S. Supreme Court decision [17], the Diebold Court held that copyright law protects only creative works. The U.S. Supreme Court has

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15 *See* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995). *See* Feist Publ'ns, Inc. v. Rural Tel. Svc. Co., 499 U.S. 340, 361 (1991); Lulirama, Ltd. v. Axcess Broadcast Svcs., 128 F.3d872, 884 (5th Cir. 1997)

16 Online Policy Group, 337 F. Supp. at 1197.

17 Feist, *supra*, 499 U.S. 340, (1991). holding that a work in order to qualify for copyright protection must at least possess some degree of creativity.

said that a "limited grant [of copyright] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward , and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[18] The Diebold Court did not find that the Diebold database, which contained primarily email communications, contained any "creative works."

In this case, the Sheppard Letter was not a creative work; it was a form 'cease and desist' letter. The Sheppard Letter was drafted, not with an eye toward creativity, but as a written request which attorneys routinely send to allegedly offending parties expecting action in return. It is no more a creative work than a monthly bill or letter stating a debtor owes money to a party. As the Sheppard Letter lacked any degree of creativity, it is not entitled to copyright protection.

2. The Sheppard Letter Falls Under the Protection of the Fair Use Doctrine.

Even if it could be argued that the Sheppard Letter was a creative endeavor, the letter falls squarely under the fair use doctrine and is exempt from a copyright prosecution. Section 107 of the DMCA provides that "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[19] In evaluating whether the use of the material in question is fair use, the following factors are to be considered: (1) the purpose

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18 Sony Corp. of Am. V. Universal City Studios, Inc., 464 U.S. 417 (1984).

19 17 U.S.C. § 107.

and character of the use, including whether it is of a commercial nature or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount of the copyrighted work used in relation to the work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[20]

Under this standard, the posting of the Sheppard Letter on the Website falls within the fair use doctrine. Melaleuca has not alleged the document was used for any commercial purpose, nor was any financial gain expected. The Sheppard Letter was simply a cease and desist letter with no potential market value; the posting of the Sheppard Letter did not and could not affect a later potential market of the allegedly copyrighted work. The Sheppard Letter was posted merely for the purpose of informing the public and used as the subject of the author's criticism and in support of his opinion of Melaleuca.

Thus, as Melaleuca has not established a prima facie case of infringement, as it has not established any creativity in its work, nor shown how the use of the Sheppard Letter does not fall under the fair use doctrine exception, the Subpoena should not have issued.

C. Melaleuca Is Not Entitled to Discover the Identity of 43SB Subscribers.

The First Amendment to the Constitution of the United States protects anonymous expression on the Internet. The United States Supreme Court has recognized that an individual's anonymity may be important for encouraging free expression protected by the First Amendment: "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as

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20 Id.

possible."[21] Indeed, "quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity."[22] As the United States Supreme Court stated in Tally v. California,[23] "anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."[24] As the Website is a forum for the free expression of political speech, it is entitled to broad protection under the First Amendment to the Constitution of the United States which includes the right of individual contributors to anonymity.[25] Federal courts have explicitly recognized that the protections of the First Amendment extend to expression on the Internet.[26]

In this case, Melaleuca is on a fishing expedition to discover the identity of anonymous critics who post on the Website in order to chill the users' free speech/political speech.[27] To chill free speech is not the purpose of the DMCA. The purpose of the DMCA is to allow the holder of a legitimate copyright to find out the identity of an infringer not a critic who is using the work merely as a basis for their criticism. To allow Melaleuca to proceed with its (flawed) pre-litigation subpoena would have the chilling effect of intimidating anonymous posters into self-

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21 McIntyre v. Ohio elections Comm'n, *supra*, 514 U.S. at 341-42.

22 Id. at 342.

23 362 U.S. 60, 65, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960).

24 Id., 362 U.S. at 64.

25 *See* Buckley v. American Constutional Law Found., 525 U.S. 182, 200, 142 L.#d.2d 599, 119 S.Ct. 636 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357, 131 L.3d 2d 426, 115 S.Ct. 1511 (1995).

26 Reno v. ACLU, 521 U.S. 844, 870, 138 L.#d.2d 874, 117 S.Ct. 2329 (1997); Doe v. 2TheMart.com Inc., 140 F.Supp2d 1088, 1092; Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999); ACLU v. Johnson, 4 F. Supp 2d 1029, 1033 (D.N.M. 1998).

27 That is particularly true of its request pertaining to the identity of "Tom Paine," since that contributor is not shown on the 43rdstateblues.com site as having any connection with the alleged infringing document. However, in the past, that contributor has posted blogs critical of Melaleuca and/or its chief executive officer, Frank Vandersloot who is heavily involved in politics in Idaho.

censoring their comments and political views or simply not commenting at all. This, in turn would discourage debate on important issues of public concern. Such an outcome is not desired nor is it in the best interest of the citizens and a citizen's right to political speech.

As stated above, allowing private parties to use the power of federal courts to gather private information *ex parte* in absence of litigation or contemplated litigation is an extraordinary event." [28] Melaleuca is not entitled to unmask its critics and trample their First Amendment rights through the extraordinary remedy of a pre-litigation subpoena based only upon its own conclusory unsupported allegations of copyright infringement which are not grounded in fact nor supported by evidence. Therefore, the Subpoena should be quashed.

D. Attorney Fees and Costs Should Be Assessed Against Melaleuca, Inc. Pursuant to 17 U.S.C. § 512(F).

Melaleuca has misrepresented a claim of copyright infringement, and should be subject to sanctions pursuant to 17 U.S.C. § 512(f). In Online Policy Group v. Diebold,[29] *supra*, the court found Diebold liable under this section for "knowingly" and "materially" misrepresenting that copyright infringement had occurred.[30] The court found that "no reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were protected by copyright."[31] It went on to state that

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28 Recording Industry Assoc. of America, 367 F.Supp.2d at 957.

29 337 F.Supp.2d 1195 (N.D. Calif. 2004).

30 Id., 337 F. Supp.2d at 1204.

31 Id.

Diebold's actions strongly suggested that it sought to use the DMCA "as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property."[32]

In this case, Melaleuca has knowingly and materially represented that copyright infringement occurred. Melaleuca is well aware that the Sheppard Letter is not protected by copyright, but is, instead, merely a form business letter. As in Diebold a corporation is seeking to use the DMCA to suppress embarrassing content and the free exchange of ideas, attempting to employ the power of the federal court to subdue and stifle advocacy and dissent. Such a use of the special powers of the DMCA and the pre-litigation subpoena should not be tolerated.

The language of § 512(f) is mandatory. It provides, in pertinent part, that the misrepresenting party "shall be liable for any damages, including costs and attorneys' fees." As Melaleuca cannot prove a prima facie case of copyright infringement, it should be required to pay attorneys' fees and costs incurred by 43SB in defending against Melaleuca's invalid Subpoena.

II. CONCLUSION

This is an attempt by Melaleuca to misuse the power of the federal court to "out" citizens who are critical of its policies and of the politics of the company and its officers. Obviously, Melaleuca was not happy with criticisms leveled against the company and one of its officers, Frank Vandersloot, which were posted on the Website. However, where a company and its officers have chosen to publicly participate in political campaigns and have financed full-page ads in the local newspaper advocating certain candidates or political positions, such criticism must be borne and tolerated.

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32 Id. at 1205.

While Melaleuca and its officers may not like receiving such criticism, they should not be entitled to manipulate the federal courts and abuse the extraordinary remedy of a pre-litigation subpoena under the DMCA to discover the identity of their anonymous detractors. As the United States Supreme Court noted, "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent."[33]

It is clear from review of the information Melaleuca has not shown that a copyright infringement has occurred. Melaleuca's filing does not comply with the requirements of the DMCA and any publication of the alleged infringing material was fair use and not violative of a copyright. Melaleuca knowingly and materially misrepresented that publication of the letter constituted copyright infringement, and thus should be liable for damages as provided for in § 512(f). Therefore, Melaleuca should be required to pay attorneys' fees and costs incurred by 43SB herein.

DATED: June 22, 2007.

Erika Lessing
E.W. Pike & Associates, P.A.
Attorneys for 43SB.COM, L.L.C.

33 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357, 131 L.Ed.2d 426, 115 S. Ct. 1511 (1995).

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing, to the following, by the indicated method on this 22 day of June, 2007, by U.S. mail, hand delivery or facsimile, with the necessary postage affixed thereto.

Brad R. Frazer
Technology Law Group
8950 W. Emerald Street, Suite 198
Boise, ID 83704

[✓] U.S. Mail
[✓] Fax
[ ] Hand Delivered

Erika Lessing

TECHNOLOGY LAW GROUP LLC

VIA FIRST CLASS MAIL

June 11, 2007

E. W. Pike & Associates, P.A.
ATTN: Erika Lessing
151 N. Ridge Avenue, Suite 210
P. O. Box 2949
Idaho Falls, Idaho 83403-2949

RE: 43SB.com, LLC

Dear Ms. Lessing:

Further to our recent discussions, please find enclosed (1) a subpoena directed to your client 43SB.com, L.L.C., issued from the federal district court for the district of Idaho under 17 U.S.C. Section 512(h); (2) a copy of the original take-down notice; and (3) a copy of the declaration lodged under 17 U.S.C. Section 512(h)(2)(C). I am sending the subpoena to your attention pursuant to May 25, 2007, instructions from Mr. Pike advising that all future communications regarding this matter be directed to his office; I trust that based on that directive you will accept service on behalf of your client.

Please note the due date of June 21, 2007 for responding to the subpoena. Please contact me if this becomes problematic. We also direct your attention to 17 U.S.C. Section 512(h)(5) relative to your client's duties to respond. Thank you for your prompt attention.

Sincerely,

Bradlee R. Frazer
Senior Counsel
Technology Law Group, LLC
Attorneys for Melaleuca, Inc.

BF/bf
Enclosures

cc: Josh Chandler, Esq.

EXHIBIT A

8950 West Emerald Street, Suite 198 • Boise, Idaho 83704 • Telephone: 208.939.4472 • Facsimile: 208.939.5755 • www.technologylawgroup.com

VIA E-MAIL and FACSIMILE (404-627-7789)

Timothy Dorr
Administrative Contact
A Small Orange Software
650 Hamilton Avenue SE
Suite D
Atlanta, Georgia 30312

Re: Take-Down Notice Under the Digital Millennium Copyright Act

Dear Mr. Dorr:

We note as a preliminary matter that we did not find an Interim Designation of Agent filing for A Small Orange Software at the Copyright Office directory located at http://www.copyright.gov/onlinesp/list/index.html. Thus, if you are not the current, correct DMCA Designated Agent for A Small Orange, please advise immediately and please forward this to the correct Designated Agent for A Small Orange.

Our research indicates that your company acts as the web host and service provider for the website associated with the domain name "43rdstateblues.com," (the "Domain") based on a WHOIS lookup that shows the domain resolving to NS1.ASMALLORANGE.COM as the primary DNS. If this is not correct and you do not act as the web host for the Domain, please advise immediately.

We act as intellectual property counsel to Melaleuca, Inc. Pursuant to relevant provisions of the Digital Millennium Copyright Act ("DMCA") found at 17 § U.S.C. 512(c), we hereby: (1) notify you of copyright infringements by those of your clients associated with the Domain (note that they have registered the Domain anonymously through Go-Daddy by using Domains By Proxy, Inc.) and (2) demand the expeditious removal of or prevention of access to the infringing material, as identified below. In the event A Small Orange does not comply with these demands, Melaleuca reserves its right to take all appropriate action against A Small Orange, which may include, but is not limited to, claims of direct and contributory copyright infringement, as well as contributory trademark infringement. We note that A Small Orange's apparent failure to identify a Designated Agent under the DMCA may abrogate the safe harbors it might have otherwise enjoyed as a service provider, and we encourage you to discuss that issue with your copyright counsel.

Pursuant to 17 § U.S.C. Section 512 (c)(3), we hereby provide the following information as elements of a formal DMCA Notification:

(1) Those of your hosting clients associated with the Domain (the "Clients") have infringed and continue to infringe copyrighted works to which Melaleuca owns the exclusive right to reproduce, adapt, display and distribute, including, but not limited to, that certain letter authored by an officer of Melaleuca and posted by the Clients or their agents at http://www.43rdstateblues.com/?q=vandersloot-takedown (the "Infringed Content"). A PDF scan of the Infringed Content accompanies this letter to aid you in locating and identifying it for removal;

(2) We believe in good faith that: (a) the material described in subparagraph (1) above infringes Melaleuca's copyrights in the materials described in subparagraph (1) above, and that (b) your Client's reproduction, adaptation, display and distribution of the materials described in subparagraph (1) above is not authorized by Melaleuca, its agents or the law;

(3) The undersigned states that the information in this Notification is accurate, and under penalty of perjury, that the undersigned is authorized to act on behalf of Melaleuca, who owns the exclusive rights to reproduce, adapt, display and distribute the infringed material described in subparagraph (1) above; and

(4) You may contact me at the following address:

Brad R. Frazer, J.D., M.B.A.
Senior Counsel
Technology Law Group, LLC
8950 West Emerald, Suite 198
Boise, ID 83704
(208) 939-4472 / (208) 939-1690 (direct)
(208) 939-5755 (facsimile)
bfrazer@technologylawgroup.com

Pursuant to the DMCA, A Small Orange's expeditious removal of or prevention of access to the Infringed Content may result in limiting A Small Orange's liability for its direct involvement in and contribution to the above-described infringements.

We also note that A Small Orange's unauthorized use of Melaleuca's trademarks on http://www.43rdstateblues.com/?q=vandersloot-takedown, among others, violates Melaleuca's trademark rights, and may therefore constitute contributory trademark infringement, liability for which may be reduced by A Small Orange's expeditious removal of or suspension of access to the Infringed Content.

We look forward to your prompt compliance and reply.

Very truly yours,

/brad r frazer/ (electronic signature for PDF copy)

Bradlee R. Frazer, J.D., M.B.A.
Senior Counsel
Technology Law Group, LLC
Attorneys for Melaleuca, Inc.

BF/bf
Enclosures

cc: Melaleuca, Inc.