Bradlee R. Frazer (ISB #3857)
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 Main Street, Suite 1000
Boise, ID 83701
Telephone: (208) 344-6000
Fax: (208) 342-3829
E-mail: bfra@hteh.com

Attorneys for MELALEUCA, INC., an Idaho corporation and the entity issuing the DMCA Subpoena

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN RE: SUBPOENA ISSUED PURSUANT TO THE DIGITAL MILLENNIUM COPYRIGHT ACT TO: 43SB.COM, L.L.C.	Case Number: MS 07-6236 **RESPONSE TO MOTION TO QUASH FILED ON JUNE 25, 2007, BY 43SB.COM, L.L.C.** All information herein is designated as confidential.

Melaleuca, Inc., ("Melaleuca") by and through its undersigned counsel, hereby opposes the motion to quash filed by 43SB.COM, L.L.C. ("43SB") on or about June 25, 2007, ("Motion"). The Motion seeks to quash a subpoena issued by this court pursuant to the Digital Millennium Copyright Act, the relevant portions of which are found at 17 U.S.C. Section 512 ("DMCA"), and served by Melaleuca on counsel for 43SB ("Subpoena"). Melaleuca

respectfully requests that the court deny the Motion and compel 43SB to respond to the Subpoena under 17 U.S.C. Section 512(h)(5).

STATEMENT OF FACTS

At some point prior to April 6, 2007, an anonymous individual(s) posted comments on the website located at www.43rdstateblues.com ("Website") defaming Melaleuca and its CEO. In response to those comments, Melaleuca's General Counsel, Ken Sheppard, wrote and sent a letter dated April 6, 2007, to the apparent administrator of the Website demanding that the defamatory comments be removed ("Letter"). *See* Exhibit A hereto. Subsequently, an anonymous individual(s), without any authorization from Melaleuca, posted Melaleuca's Letter on the Website.

With the objective of obtaining the identity of the individual(s) who had posted the Letter so that it might seek redress for copyright infringement,[1] Melaleuca, through counsel, utilized the Domain Name System and other customary means to search for the service provider(s) for the Website. Through these efforts, Melaleuca identified an entity called A Small Orange Software ("ASO") as the service provider which hosted the Website and on whose servers the infringing post of the Letter was located.[2] On or about April 26, 2007, counsel for Melaleuca prepared and sent, under 17 U.S.C. Section 512(c)(3), a DMCA "Take-Down Notice" directed to ASO (the "Take-Down Notice"). *See* Exhibit C hereto. ASO subsequently responded via e-mail that it had removed the offending image of the Letter. *See* Exhibit D hereto.

---

[1] By virtue of the fact Melaleuca's employee Ken Sheppard wrote the Letter, it was and is a work made for hire, and Melaleuca owns the copyright in and to the Letter. *See* 17 U.S.C. Section 101; Section 201(b). The act of posting the Letter without Melaleuca's permission constitutes copyright infringement. *See* 17 U.S.C. Section 106.

[2] Specifically, counsel performed a "WHOIS" search on the 43rdstateblues.com domain name and determined that the subject Website and the Letter were hosted on servers identified by the Domain Name System ("DNS") as "NS1.ASMALLORANGE.COM" and "NS2.ASMALLORANGE.COM." *See* Exhibit B hereto. Note that the identity of the domain name registrant was hidden, as indicated by the fact the registrant shows on Exhibit B as "Domains By Proxy." Counsel subsequently located contact information for the DNS host, A Small Orange Software.

On or about May 1, 2007, Melaleuca sent a subpoena issued under 17 U.S.C. Section 512(h) to ASO.[3] *See* Exhibit E hereto. ASO responded via e-mail on May 2, 2007, and identified Darryl Davidson as the person associated with the 43rdstateblues.com Website. *See* Exhibit F hereto. On or about May 14, 2007, Melaleuca sent a second, substantially identical DMCA subpoena to Darryl Davidson, as well as a copy of the original Take-Down Notice. *See* Exhibit G hereto. Mr. Davidson did not respond to that Subpoena, and on May 29, 2007, counsel for Melaleuca received a letter dated May 25, 2007, from E.W. Pike advising that his firm represented 43SB.com, L.L.C., "the owner of the 43rdstateblues.com website" and instructing Melaleuca to "direct all future communications regarding the website or postings on said site to [Mr. Pike's] office." *See* Exhibit H hereto.

On June 11, 2007, Melaleuca served on 43SB the Subpoena at issue, along with copies of the Take-Down Notice and sworn Declaration (*see* 17 U.S.C. Section 512(h)(2)(C)), by sending it and the supporting materials to Erika Lessing of Mr. Pike's office, as directed by Mr. Pike's May 25, 2007, letter. *See* Exhibit A attached to 43SB's Brief ("43SB Ex. A").[4] The Subpoena, which is substantively identical to those served on ASO and Daryl Davidson previously, seeks identifying information for the individuals who have used the screen names "d2" and "Tom Paine" to post comments on the Website. "Tom Paine" and "d2" are also ostensibly those individuals who posted the Letter, and thus are the likely defendants in a copyright infringement action, should Melaleuca elect to so proceed. Melaleuca's objective in serving the Subpoena was to learn the identity of the individual(s) who infringed its copyrights in order to protect itself

---

[3] Melaleuca, through counsel, conducted several discussions with Chief Deputy Clerk Tony Anastas prior to serving the DMCA subpoena on ASO to make sure that it was properly issued. The subpoenas served on ASO and Daryl Davidson (Exhibits E and G) comported with all the requirements specified by Mr. Anastas at that time.

[4] After further discussions with Clerk Anastas, the June 11, 2007, Subpoena was actually issued by the Clerk with an assigned case number, Clerk's signature, and raised seal after Melaleuca submitted the items delineated in 17 U.S.C. Section 512(h)(2) to Mr. Anastas. This is the Subpoena that was sent to Mr. Pike's office and the one that is the subject of the instant Motion. A true and correct copy of that issued Subpoena is submitted herewith as Exhibit I.

against such infringement and seek injunctive and other relief, valid purposes under the DMCA. 43SB should now be compelled to follow 17 U.S.C. Section 512(h)(5) and "expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification." 17 U.S.C. Section 512(h)(5) (emphasis added).

ARGUMENT

As a preliminary matter, the Subpoena at issue here is exactly the sort of subpoena Congress intended to authorize by enacting the DMCA. Congress struck a delicate balance among a variety of important and competing interests with the DMCA, and Melaleuca's interest in serving the Subpoena is completely consistent with the purposes of the DMCA. As recognized by the District Court for the District of Columbia:

> [T]he DMCA was enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement for 'passive' actions. . . . Congress thus created trade-offs within the DMCA: service providers would receive liability protections in exchange for assisting copyright owners in identifying and dealing with infringers who misuse the service providers' systems.
>
> In re: VERIZON INTERNET SERVICES, INC., Subpoena Enforcement Matter, Recording Industry Association of America v. Verizon Internet Services, 240 F. Supp. 2d 24, 37 (D.D.C. 2003) (internal quotation marks and citation omitted).

Essentially, before enactment of the DMCA, copyright holders often were powerless to protect their copyrights against infringement by anonymous Internet users. This problem was caused by the absence of any effective means for copyright holders to identify the anonymous infringing users. Section 512(h) addresses this problem by permitting copyright holders to use pre-litigation subpoenas to obtain identifying information from Internet service providers. Consistent with the DMCA's purpose, Melaleuca served the Subpoena at issue here to seek

43SB's assistance in identifying users who have misused the Website to infringe Melaleuca's copyrights.

The Subpoena at issue is essentially a routine measure within the framework of the DMCA, notwithstanding the general rarity of subpoenas issued outside the context of litigation. *See* S. Rep. No. 105-190, at 51 (1998) ("The issuing of the [subpoena] should be a ministerial function performed quickly for this provision to have its intended effect.").

I. The Take-Down Notice And Subpoena Satisfy The Requirements Of 17 U.S.C. Section 512(c)(3)(A)

The Take-Down Notice and Subpoena issued to 43SB satisfy all the requirements of 17 U.S.C. Section 512(c)(3)(A), including the delivery and identification requirements, because the Take-Down Notice was delivered to an authorized agent of 43SB and it identifies the infringed copyrighted work in satisfaction of paragraph (A) subparagraphs (A)(ii) and (A)(iii).

A. Melaleuca's Delivery Of The Take-Down Notice And Subpoena To 43SB Was Sufficient Under The DMCA

Melaleuca's delivery of the Take-Down Notice and Subpoena to 43SB satisfies the delivery requirement of 17 U.S.C. Section 512(c)(3)(A). Section 512(c)(3)(A) requires "a written communication provided to the designated agent of a service provider." *See* 17 U.S.C. § 512(c)(3)(A). Counsel for Melaleuca delivered the Take-Down Notice and Subpoena to the office of E.W. Pike & Associates, P.A. after Mr. E.W. Pike had identified his office as counsel to 43SB. *See* Exhibit H attached hereto; 43SB Brief at 4; Exhibit A attached to 43SB Brief ("43SB Ex. A"). 43SB's argument to the contrary boils down to an assertion that its receipt of the Take-Down Notice is insufficient because the address line on the Take-Down Notice listed the service provider for 43SB's Website (ASO) instead of 43SB, an argument that cannot withstand the plain language of section 512(c)(3)(A). *See* 43SB Brief at 4. The Take-Down Notice

unquestionably was "provided to designated agent of" 43SB, its counsel E.W. Pike & Associates, P.A.

While delivery of the Take-Down Notice to 43SB's counsel alone satisfies the applicable requirement in section 512(c)(3)(A), it is noteworthy that the following additional factors provided unmistakable confirmation that the Take-Down Notice was directed to 43SB: (1) the Take-Down Notice's two underlined references to locations on the www.43rdstateblues.com Website, with accompanying explanations, made it clear that the Take-Down Notice addressed activity on 43SB's Website; (2) the Take-Down Notice was accompanied by the Subpoena addressed to 43SB; and (3) the cover letter for both documents, which was addressed to counsel for 43SB, indicated that the Take-Down Notice and Subpoena were part of a single package containing the materials required by section 512.[5]

Service of the Take-Down Notice on both ASO and 43SB was proper under the DMCA because both entities are "service providers" within the meaning of the DMCA for the Internet user(s) who infringed Melaleuca's copyrighted work. Section 512(c)(3)(A) and 512(h)(1) provide for service of notifications and subpoenas on "a service provider," and section 512(k) defines "service provider" as "a provider of online services or network access." *See* 17 U.S.C. 512 (c)(3)(A), (h)(1), and (k). Here, both ASO and 43SB are service providers for the user(s) who infringed Melaleuca's copyrighted work by posting it on the Website operated by 43SB. Drawing on an analogy from the real estate context, much like the owner of a building might lease the building to an apartment developer, it appears that ASO essentially leases space on its servers to 43SB for the development and operation of its Website. 43SB in turn, much like an

[5] Delivery of the Take-Down Notice and the Subpoena together in a single package to counsel for 43SB was proper under the DMCA, which indicates that an obligation to respond to a subpoena arises "[u]pon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A)." 17 U.S.C. § 512(h)(5) (emphasis added).

apartment developer/landlord that allows tenants to use apartments it has developed, apparently permits users to make use of its Website, including by posting comments anonymously. Without the DMCA, such users would be able to remain anonymous and unaccountable even when they post comments and/or materials that infringe valid copyrights. Instead, the DMCA allows injured copyright holders like Melaleuca to subpoena service providers like ASO and 43SB for the identity of infringing users.

In addition to being proper under the DMCA, Melaleuca's delivery of the Take-Down Notice first to ASO and subsequently on 43SB was necessary from a practical standpoint. When Melaleuca first sought to identify the operator of the Website, its searches using available and customary means indicated only one entity affiliated with the Website: ASO. Only with its receipt of a May 25, 2007, letter from counsel for 43SB did Melaleuca learn of 43SB's status as owner/operator of the Website.

B. Melaleuca's Identification Of The Infringed Copyrighted Work At Issue In The Take-Down Notice Received By 43SB Is Sufficient Under The DMCA

The Take-Down Notice served on ASO and 43SB provided each with a clear identification of the copyrighted work that was infringed – in satisfaction of section 512(c)(3)(A)(ii). The Take-Down Notice describes the infringed content as follows: "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." A one-page letter from Ken Sheppard of Melaleuca dated April 6, 2007, is the only document fitting that description. As such, the Take-Down Notice provided unmistakable confirmation that this letter was indeed the

infringed work, leaving 43SB with no need to "ha[ve] speculated" that such was the case. *See* 43SB Br. at 5.[6]

43SB's reliance on mistaken hyper-technical arguments regarding the Take-Down Notice's address line and the absence of a PDF copy of the infringed work – in the face of a record making the identity of the infringed work in question perfectly clear – is indicative of the weakness of its overall position in resisting the subpoena. *See* 43SB Brief at 2, 4. In addition to sufficiently identifying the copyrighted work and being properly delivered under subparagraphs 512(c)(3)(A)(ii) and (iii) and paragraph 512(c)(3)(A), the Take-Down Notice meets all other applicable requirements under subparagraphs (i), (iv), (v), and (vi). 43SB's Motion does not contest the satisfaction of the requirements under these four subparagraphs.[7]

C. Melaleuca Satisfied Any Obligation To Plead A Prima Facie Case Of Copyright Infringement

With its submission of a Take-Down Notice satisfying all the requirements of section 512(c)(3)(A), Melaleuca met any obligation arising under DMCA case law to, "in effect, plead a prima facie case of copyright infringement." *See* Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 257 F. Supp. 2d 244, 263 (D.D.C. 2003) (citation omitted). This obligation is satisfied with a pre-subpoena notification that makes two claims: "ownership and unauthorized use," which correspond to the two recognized elements of an infringement claim. *See id.* In the Take-Down Notice provided to counsel for 43SB, Melaleuca claimed ownership, including by referring to "copyrighted works to which Melaleuca owns the exclusive right to reproduce, adapt, display and distribute." *See* 43SB Ex. A. Melaleuca also claimed unauthorized use,

---

[6] For the same reasons, the Take-Down Notice satisfies the requirement in section 512(c)(3)(A)(iii) to identify "the material that is … the subject of infringing activity." See 17 U.S.C. § 512(c)(3)(A)(iii).

[7] In addition to satisfying the notification requirements under section 512(c)(3)(A), the Subpoena satisfied all other requirements of section 512(h). 43SB's Motion does not contest the satisfaction of the requirements of section 512(h).

including by stating that 43SB's "reproduction, adaptation, display and distribution of the materials described . . . is not authorized by Melaleuca, its agents or the law." *See id.*

43SB is obligated to respond to the Subpoena regardless of whether Melaleuca has made any representations about creative work or fair use, notwithstanding 43SB's contrary assertions. 43SB incorrectly asserts these additional so-called elements of an infringement claim in contravention of the case law cited in its own brief. Specifically, 43SB argues that there are three elements to the claim, including assertions "that the work is a creative work" and "that the material being infringed is not used in a manner protected under fair use doctrine." *See* 43SB Br. at 6. However, all of the cases cited by 43SB accurately list only the two recognized elements of ownership and unauthorized use, and make no reference to any required assertion regarding creative work or the fair use doctrine. *See id.* at 6 n.15; Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1366-67 (N.D. Cal. 1995) ("To establish a claim of copyright infringement, a plaintiff must demonstrate (1) ownership of a valid copyright and (2) copying of protectable expression by the defendant.") (internal quotation marks and citations omitted); Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (same); Lulirama Ltd, Inc. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 884 (5th Cir. 1997) (same).

The concepts of creativity and fair use are irrelevant in the absence of a lawsuit by Melaleuca for infringement because these concepts relate to the merits of an infringement claim. As such, 43SB's arguments regarding creativity and fair use appear to suggest that this Court should pass on the merits of Melaleuca's would-be infringement claim before Melaleuca can learn the identity of the infringer(s).[8] Under such a nonsensical approach, Melaleuca would be required to file, litigate, and win its entire copyright infringement case in order to prevail against

---

[8] 43SB's assertion that Melaleuca "must prove" the elements of an infringement claim seems to confirm 43SB's desire to obtain a ruling on the merits.

43SB's motion to quash Melaleuca's pre-litigation subpoena. As noted above, this is just the sort of scenario the DMCA is designed to prevent.

Fair use is particularly irrelevant here because it is an affirmative defense to claims of copyright infringement such that, even if Melaleuca had already filed an infringement claim, any initial burden relating to fair use would rest with the alleged infringer, not Melaleuca. *See, e.g.,* Sega Enters. Ltd v. Maphia, 948 F. Supp. 923, 933 (N.D. Cal. 1996) ("Because fair use is an affirmative defense, [defendant] carries the burden of demonstrating it.") (citation omitted).

II. Subpoenas Issued Pursuant To Section 512(h) Do Not Violate The First Amendment

A subpoena properly issued under section 512(h), like the Subpoena issued to 43SB, does not violate the First Amendment. 43SB's arguments to the contrary have already been analyzed and dismissed in case law that is directly on point. *See* Recording Indus. Ass'n of Am., 257 F. Supp. 2d at 257 ("the Court concludes that § 512(h) does not offend the First Amendment"). *See also* Recording Indus. Ass'n of Am. v. Verizon Internet Servs., 240 F. Supp. 2d 24, 42 (D.D.C. 2003) ("It is . . . clear that the First Amendment does not protect copyright infringement.") (citation omitted). In a well-reasoned and thorough opinion, the District Court for the District of Columbia addresses the effects of section 512(h) on First Amendment rights to anonymity, including the potential for a chilling effect on anonymous speech, and finds that section 512(h) passes muster. *See* Recording Indus. Ass'n of Am., 257 F. Supp. 2d at 263-64 ("in sum, the Court rejects [the] contention that § 512 does not provide sufficient safeguards or judicial supervision to protect Internet users' First Amendment rights, including anonymity"). 43SB makes its First Amendment arguments without any effort to address this case law and relies completely on cases that address First Amendment issues outside the context of the DMCA. *See* 43SB Br. at 8-9 nn.21-26. For the reasons cited by the District Court for the District of Columbia, this Court should reject 43SB's First Amendment challenge to section 512(h).

Within the context of its First Amendment arguments and elsewhere in its brief, 43SB makes unsupported assertions about Melaleuca's motives in issuing the Subpoena that are irrelevant and untrue, but which warrant a response in order to preserve an accurate record. As noted above, Melaleuca, consistent with the purposes of the DMCA, seeks 43SB's assistance in identifying Internet users who have misused 43SB's Website to infringe Melaleuca's copyrights. 43SB's baseless assertions that Melaleuca has sought to chill political speech with its Take-Down Notice and Subpoena are untrue. Melaleuca recognizes the rights of anonymous users to express opinions on the 43rdstateblues.com Website and elsewhere, as long as such expressions are not defamatory or otherwise illegal. However, Melaleuca does not authorize such users to post Melaleuca's copyrighted works in support of their opinions, and Melaleuca issued the Take-Down Notice and Subpoena for the legitimate, DMCA-approved purpose of protecting itself against such unauthorized use of its copyrighted works.

III. 43SB's Request For Sanctions Under Section 512(f) Should Be Rejected

The Court should reject 43SB's request for sanctions against Melaleuca because the request is misguided and not supported by any evidence. The case law regarding sanctions under section 512(f) clearly indicates that such sanctions can be granted only when the person requesting them has met the burden of showing substantial evidence that the copyright holder to be sanctioned has misrepresented infringement claims and has done so knowingly (typically the sort of evidence that can be gathered only in the context of litigation). See, e.g., Rossi v. Motion Picture Ass'n of Am. Inc., 391 F.3d 1000, 1005 (9th Cir. 2004) ("there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner") (emphasis added); Arista Records, Inc. v. MP3Board, Inc., No. 00 Civ. 4660(SHS), 2002 U.S. Dist. LEXIS 16165, at *45 (S.D.N.Y. Aug. 29, 2002) (the section 512(f) "claim must fail because there is no evidence that any misrepresentation by the [copyright owner] was made knowingly") (emphasis

added); Dudnikov v. MGA Entm't, Inc., 410 F. Supp. 2d 1010, 1018, 2005 U.S. Dist. LEXIS 41521 (D. Colo. 2005) (plaintiffs "have not made a showing that [the copyright holder] knowingly and materially misrepresented [an infringement claim], as required to support an allegation under § 512(f)") (emphasis added). Here, 43SB has not even attempted to cite any evidence, nor could it, that Melaleuca made a knowing misrepresentation regarding the infringement of its copyrighted work. *See* 43SB Brief at 10-11.

43SB's request for sanctions is also faulty because it is raised merely by way of a motion outside the context of any litigation, instead of in a complaint or counterclaim as required. The Ninth Circuit has specified that "[i]n § 512(f), Congress included an expressly limited cause of action for improper infringement notifications." *See* Rossi 391 F.3d at 1004 (emphasis added). Here, 43SB has brought no cause of action against Melaleuca, and its request for sanctions should be denied also for this reason.[9]

43SB's heavy reliance on the opinion in Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195 (N.D. Cal. 2004) throughout its brief, including in support of its request for sanctions, is telling in that the case did not even involve a section 512(h) pre-litigation subpoena like the one at issue here. Instead, the case involved application of totally separate sections of the DMCA at the summary judgment stage of litigation. *See* 43SB Brief at 4-6, 10-11; Online Policy Group, 337 F. Supp. 2d at 1197. In another case cited by 43SB – Recording Indus. Ass'n of Am., 257 F. Supp. 2d 244 – the court analyzed a section 512(h) subpoena and issued an opinion that is much more applicable to the instant situation. More specifically, the court addressed First Amendment challenges to section 512(h) similar to 43SB's, found them

[9] As with its attempt to burden Melaleuca with so-called elements of creative work and absence of fair use, 43SB again, with its request for sanctions, appears to be trying to litigate a hypothetical copyright infringement case rather than addressing its obligations within the pre-litigation framework established by section 512(h).

insufficient, and denied a motion to quash a subpoena issued under section 512(h). See Recording Indus. Ass'n of Am., 257 F. Supp. 2d at 257, 275.

CONCLUSION

For the reasons set forth above, Melaleuca respectfully requests that the court deny 43SB's motion to quash.

DATED this 23rd day of July, 2007.

HAWLEY TROXELL ENNIS & HAWLEY, LLP

By: ____/s/ Bradlee R. Frazer_____________
Bradlee R. Frazer

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July, 2007, I electronically filed the foregoing **RESPONSE TO MOTION TO QUASH FILED ON JUNE 25, 2007 BY 43SB.COM, L.L.C.** using the CM/ECF system, which will send notification of such filing to counsel of record.

HAWLEY TROXELL ENNIS & HAWLEY, LLP

By: ____/s/ Bradlee R. Frazer_______________
Bradlee R. Frazer