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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

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IN RE:	)	
	)	
	)	Case No. MS 07-6236
SUBPOENA ISSUED PURSUANT TO	)	
THE DIGITAL MILLENIUM	)	<b>REPLY TO RESPONSE BRIEF</b>
COPYRIGHT ACT TO:	)	
	)	
43SB.COM, L.L.C.	)	
	)	

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Subpoena Recipient 43SB.COM, L.L.C. (“43SB”), by and through its attorneys, submits the following brief as a Reply to Melaleuca’s Response to 43SB’s 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. REBUTTAL**

**A. Melaleuca Has Not Presented Sufficient Evidence of a Prima Facie Case of Copyright Violation**

Melaleuca insists that by submitting a take-down notice to 43SB’s counsel,<sup>1</sup> it has automatically met the requirements of pleading a prima facie copyright case.<sup>2</sup> However, there is

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<sup>1</sup> The take-down letter may have been sent to 43SB’s counsel but was addressed to A Small Orange Software.

<sup>2</sup> Melaleuca’s Response Brief at 8.

no evidence within the take-down notice, subpoena or certification to the clerk of the court that Melaleuca has ownership of a valid and exclusive copyright covering a letter purportedly authored by Ken Sheppard dated April 6, 2007 (“Sheppard Letter”).

Melaleuca has provided no evidence that it holds, or has sought a copyright for the allegedly infringed material, the Sheppard Letter. The Sheppard Letter is a form take-down letter, directed to 43SB. The notion that a take-down notice itself could later comprise the copyrighted material at issue in a Digital Millennium Copyright case is ridiculous on its face. Melaleuca has failed to provide prima facie evidence that it is, in fact a copyright owner, and has therefore failed to meet the first prong of the test necessary to obtain a pre-litigation subpoena.<sup>3</sup>

Melaleuca has also failed to meet the second prong of the test, namely by making a showing or demonstrating by some evidence that the *alleged infringers* were the persons who violated at least one exclusive right granted to copyright holders pursuant to 17 USC §106. Melaleuca has presented no evidence linking “d2” and “Tom Paine”, both named in the June 7 subpoena, to the infringement. The only mention of the alleged infringers occurs in an e-mail to Darryl Davidson, a member of the limited liability company which owns 43SB, stating “attached is a subpoena directed to you, compelling the production of information in your possession sufficient to permit us to identify those individuals associated with the screen names ‘d2’ and ‘Tom Paine,’ as those screen names are used at 43rdstateblues.com and as they were used in connection with the acts of copyright infringement complained of in the Take-Down Notice.”<sup>4</sup> Simply because Melaleuca’s counsel asserted in an e-mail (which counsel now submits as an exhibit to Melaleuca’s response brief) that users of the Website operated by 43SB (“Website”)

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<sup>3</sup> See, e.g. In Re: Verizon Internet Services, Inc., 257 F. Supp. 2d, 244 (U.S. Dist. 2003).

<sup>4</sup> Melaleuca’s Response Brief, Exhibit G.

“d2” and “Tom Paine” were infringers, there was no evidence whatsoever presented by Melaleuca that the alleged infringers violated at least one exclusive right under Section 106.

**B. Creative Work and Fair Use Doctrine Are Applicable**

Melaleuca insists that the issue of whether or not a work has sufficient creativity to qualify for protection under the Copyright Act is irrelevant to 43SB’s Motion to Quash. Melaleuca further argues that the fair use doctrine need not be considered in reviewing whether a pre-litigation subpoena has been or could be properly issued. Neither of those assertions is correct. The issue of creativity in a work is important in interpreting 17 USC §512(h) and deciding whether a plaintiff has a validly issued subpoena. This is so because the copyright laws are promulgated to protect only creative work.<sup>5</sup> If the copyright laws are promulgated to protect only creative work, then all the provisions of the Copyright Act, including the provisions of Section 512(h), must be interpreted within that paradigm. Here, Melaleuca asks for the protection of the provisions of the Copyright Act and for a subpoena issued pursuant to the provisions of the Act [Section 512]. Thus, as Melaleuca has clearly invoked the provisions of the Copyright Act and seeks succor from Section 512 for rights claimed to the Sheppard Letter, the question of whether said letter contains enough creativity to qualify for protection is a valid question in deciding whether the subpoena provisions of Section 512 should be applied.

The fair use doctrine is also applicable. The prima facie factors, as cited by Melaleuca, require that the complaining party demonstrate the alleged infringers *violated* at least one exclusive right granted to copyright holders under Section 106. If a person has

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<sup>5</sup> Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1200 (Dist Ct. ND CA 2004). Emphasis added.

used a document in a fair manner protected under the fair use doctrine, then that person cannot have violated one of the exclusive rights granted to copyright holders and the second prong of a prima facie factors is not and cannot be met.

**C. This Court Lacks Jurisdiction Over This Matter**

**1. Registration of a copyright is required pursuant to 17 USC §411(a) before a court can have proper jurisdiction; Melaleuca failed to comply with 17 USC §411(a).**

Melaleuca insists that it has a copyright in the Sheppard Letter. Even if Melaleuca were to possess a general common-law copyright in the Sheppard Letter, such common-law rights are not capable of being addressed yet by this Court. What we are dealing with in this case is, at best, an unregistered copyright, if the work is copyrightable at all. Melaleuca has presented no evidence that the supposed copyright in the Sheppard Letter has been registered with the United State Copyright Office (“Copyright Office”).<sup>6</sup> While registration of a copyright with the Copyright Office is not a requirement to establish rights in a work, under 17 USC §411, registration *is required* as a preliminary matter in order for a federal court to establish subject matter jurisdiction over a copyright case. 17 USC §411 provides that no action for infringement of the copyright in any United States work shall be instituted until pre-registration or registration of the copyright claim has been made in accordance with federal copyright law.<sup>7</sup>

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<sup>6</sup> The requirements for filing a copyright are found at 17 USC §§407-410.

<sup>7</sup> The full language of 17 USC §411(a) reads as follows:

§ 411. Registration and infringement actions:

(a) Except for an action brought for a violation of the rights of the author under section 106A(a) [17 USC § 106A(a)], and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party

The case law which has followed since the issuance of Section 411 almost unanimously adheres to the threshold requirement that in order for the federal court to have subject matter jurisdiction over a copyright case or issue, the complaining party [typically the plaintiff] must establish that either the work at issue has been fully registered with the Copyright Office, or, in some federal circuits, that application has at least been made to said office.<sup>8</sup> Although there is

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to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501 [17 USC § 501], fully subject to the remedies provided by sections 502 through 506 [17 USC §§ 502 through 506] and sections 509 and 510 [17 USC §§ 509 and 510], if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

- (1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and
- (2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

<sup>8</sup> RDF Media Ltd. V. Fox Broad. Co., 372 F. Supp. 2d 556, 562 (Cent. Dist. Cal. 2005) [Plaintiff, British television producer was allowed to pursue claims for copyright infringement against producers of reality show where American copyright registration under 17 USC §411(a) had issued].; Berry v. Penguin Group, Inc., 448 F. Supp. 2d 1202, 1202-03 (W.D. WA 2006) [Only those who have applied and obtained a copyright registration and those who have applied and failed have the right to file suit in federal court for infringements of copyright]; Lennon v. Seaman, 84 F. Supp. 2d 522, 523-24 (S.D. NY 2000) [Copyright must be registered or application submitted as a jurisdictional prerequisite to filing of infringement action]; Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 365 (5<sup>th</sup> Cir. Ct. App. 2004) [Although some circuits require that a plaintiff actually obtain a certificate from the Copyright Office before bringing suit, the Fifth Circuit requires only that the Copyright Office actually receive the application, deposit, and fee for the copyright before a plaintiff files an infringement action.]; Lexmark Int'l Inc. v. Static Control Components, Inc., 387 F3d 522, 533-34 (6<sup>th</sup> Cir.Ct. App. 2004) [Registration of copyrighted work with Copyright Office is infringement suit prerequisite and constitutes prima facie evidence of copyright's validity]; La Resolana Architects v. Clay Realtors Angel Fire, 416 F.3d 1195, 1199 (10<sup>th</sup> Cir. Ct. App. 2005) [The most important step necessary before instituting an infringement action is registering one's copyright]; M.G.B. Homes v. Ameron Homes, 903 F.2d 1486,1488 (11<sup>th</sup> Cir. Ct. App. 1990) [The copyright act provides that no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with the copyright act. The registration requirement is a jurisdictional prerequisite to an infringement suit.]; McCormick v. Ferguson, 34 USPQ2d 1735, (E.D. PA 1995) [Copyright infringement action filed without registration of copyright is dismissed for lack of subject matter jurisdiction]; Rene Perez & Assoc. v. Almeida, 39 USPQ2d 2010 (S.D. Fla. 1996) [Action for injunction under unregistered copyright is dismissed for lack of jurisdiction since registration of copyright is prerequisite to enforcement of copyright]; compare IMS Inquiry Mgmt. Sys. V. Berkshire Info. Sys., 307 F. Supp 2d 521, 526 (S.D. NY 2004) [Court did not possess subject matter jurisdiction to entertain plaintiff's copyright infringement claims, as plaintiff's registration pertained to difference work.]

discrepancy among the federal circuits as to whether the registration needs to have been fully issued, i.e. whether a plaintiff must have an official certificate issued by the Copyright Office or whether making mere application to the Copyright Office prior to proceeding with legal action, the consensus of the federal courts has held that there must be at least some effort towards registration in order for an Article III court to have subject matter jurisdiction over a copyright dispute or issue.

The Ninth Circuit has had the opportunity to review the subject of jurisdiction under Section 411 and concurs with the findings of the majority of the federal courts, namely, that some efforts towards registration with the Copyright Office are necessary before a federal court can have subject matter jurisdiction over a copyright matter. In Perfect 10, Inc. v. Amazon.com, Inc. et al.,<sup>9</sup> several nude photos allegedly owned by the plaintiff were at issue as the plaintiff claimed a copyright in the materials. The plaintiff alleged that the display of said images on the Websites of two internet giants, Amazon.com and Google Inc., violated its rights. The plaintiff sought a preliminary injunction against Google and Amazon to cease all the infringement of all plaintiff's purportedly copyrighted images. Google, argued that the court lacked jurisdiction over the matter because the images were not all registered with the Copyright Office. The evidence presented was that some of the allegedly infringed nude photographs had been registered with the Copyright Office and some had not.<sup>10</sup> The Perfect 10 Court held that copyright registration is generally a jurisdictional pre-requisite to a suit for copyright infringement.<sup>11</sup> It further held that once a court has jurisdiction over an action for copyright

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<sup>9</sup> Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9<sup>th</sup> Cir. Ct. App. 2007).

<sup>10</sup> Id. at 710 FN1.

<sup>11</sup> Id.

infringement under Section 411, the court only then may grant injunctive relief to restrain infringement of any copyright.<sup>12</sup> The Perfect 10 Court went on to rule that “because at least some of the Perfect 10 images at issue were registered, the district court did not err in determining that it could issue an order that covers unregistered works.”<sup>13</sup> Thus, the preliminary injunction in Perfect 10 was held to have been properly issued only after it was established that the Perfect 10 Court had jurisdiction under Section 411 due to the registration of at least a portion of the images with the Copyright Office. While the ruling in the Perfect 10 shows the Ninth Circuit to be the one of most lenient circuits for plaintiffs concerning the issue of registration prior to the establishment of jurisdiction, it provides that even the Ninth Circuit requires some effort toward registration of at least some of the materials at issue in a copyright dispute before a court can have proper subject matter jurisdiction under Section 411.

Melaleuca has made absolutely no showing that it either has a registered copyright in the Sheppard Letter or that it has made efforts toward obtaining such a copyright. Indeed, there has been no reference to registration nor application for registration of the Sheppard Letter in the Response Brief or any supporting materials submitted by Melaleuca. The only information presented regarding copyright are Melaleuca’s bare assertions that Melaleuca does have a copyright because the author, Ken Sheppard, is a Melaleuca employee, and that he wrote the letter at issue.<sup>14</sup> Melaleuca’s bare assertions, without showing of evidence that it has made efforts to register the Sheppard Letter or that it has, in fact, registered the Sheppard Letter, do not

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<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Melaleuca’s Response Brief at 2 FN1.

satisfy the requirements of Section 411(a). Therefore, where the requirements of Section 411 are not met, this Court cannot have proper subject matter jurisdiction over infringement disputes.

**2. The court must have subject matter jurisdiction before it can issue a subpoena.**

A very basic concept in the Federal Rules of Civil Procedure (“FRCP”) is that before a district court may hear a plaintiff’s claim, it must have jurisdiction. Indeed, the introduction to the FRCP at §2.1 provides that “before a federal district court may hear a plaintiff’s claim, it must satisfy three prerequisites. These are: (1) jurisdiction over persons or things; (2) subject matter jurisdiction; and venue.” Therefore, whenever a court hears any claim of a plaintiff and subsequently makes a ruling or order, said ruling or order is only valid from the issuing court if that court has subject matter jurisdiction to hear the matter. It follows, then, that a court would need to have proper jurisdiction before it could validly hear any complaint of a plaintiff and issue any order or directive. Indeed, the U.S. Supreme Court has held that the subpoena power of a court cannot be more extensive than its jurisdiction.<sup>15</sup>

In USCC v. Abortion Rights Mobilization, a nonparty witness sought to challenge a federal court's lack of subject matter jurisdiction in defense of a civil contempt citation.<sup>16</sup> In ruling on the contempt citation, the Court held that subpoena power of a court cannot be more extensive than its jurisdiction. The Court further held that it “follows that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void...”<sup>17</sup> The Court further noted, “the

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<sup>15</sup> United States Catholic Conf. v. Abortion Rights Mobilization, 487 U.S. 72, 76 (1988).

<sup>16</sup> Id. at 76. The subpoena issued to the nonparty witness was issued pursuant to FRCP 45 which grants a district court the power to issue subpoenas as to witnesses and documents. A primary issue in the case was whether a non-party witness had standing to challenge the court’s lack of subject matter jurisdiction.

<sup>17</sup> Id. at 76-77.

judicial subpoena power not only is subject to specific constitutional limitations, . . . but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." <sup>18</sup> The Court concluded further that it is a central principle of a free society that courts have finite bounds of authority which exist to protect citizens from the excessive use of judicial power and that the courts must respect the limits of their authority.<sup>19</sup>

The ruling of the Supreme Court is clear – a federal court, indeed, any court, may not exceed the boundaries of the grant of authority given it. In matters relating to copyright, the jurisdiction conferred on an Article III courts to hear and rule upon matters relating to copyright and disputes therein is limited by 17 USC §411. Where Section 411 provides, and caselaw further supports, that issues relating to copyright infringement may only be properly heard before a court and subject matter jurisdiction conferred *after* the infringed items have been registered or pre-registered with the Copyright Office, and where the subpoena power of a court cannot be more extensive than its jurisdiction, the issuance of a subpoena in a copyright case where there has been no compliance with Section 411 is outside the jurisdictional powers of a federal court.

This lack of jurisdiction is precisely the situation that occurred in the instant case. This Court as represented by its personnel [clerk] was bound by the provisions of Section 411 which limited its power to grant a DMCA subpoena in instances where there was a showing of either registration of the Sheppard Letter or pre-registration of said letter so as to not exceed its grant of jurisdictional power. Where there has been no showing that the Sheppard Letter was registered nor application made to the Copyright Office, the subpoena in this case was not properly issued in accordance with Section 411. As such, the subpoena issued in this case on June 7, 2007

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<sup>18</sup> Id. at 77.

<sup>19</sup> Id.

should be quashed as the Court lacks subject matter jurisdiction to make any issuance in this case.

**3. Lack of subject matter jurisdiction may be raised at any time.**

The lack of subject matter jurisdiction is such a critical and fundamental basis an issue which may be raised at anytime. The Ninth Circuit has held that the defense of lack of subject matter jurisdiction cannot be waived and may be raised at any time during the proceedings.<sup>20</sup> Therefore, even though the issue of lack of subject matter jurisdiction was not addressed in 43SB's original brief in support of its motion to quash, it is permissible to address the issue at this time as the issue of lack of subject matter jurisdiction may be addressed at any time.

**D. The Subpoena Issued In This Case is Overly Broad; The DMCA and Its Special Pre-Litigation Subpoena Powers Cannot Be Used as a Pre-Trial Discovery Tool for Defamation Suits**

Melaleuca is abusing the subpoena power of 17 USC §512(h) by asking this Court to issue an overly broad subpoena. Indeed, Melaleuca is seeking to discover information about parties which have not abused any purported copyright held by Melaleuca. A discussion of the events leading up to the issuance of the subpoena on June 7, 2007 make this abuse clear.

On April 5, 2007, a Website user, "Tom Paine," posted comments on the Website concerning Melaleuca, its suit against a former employee, and certain unidentified documents involved in that case [which purportedly contained the name of a governmental official in connection with unconfirmed illegal behaviors on the part of Melaleuca employees].<sup>21</sup> The day after the posting by "Tom Paine", the Sheppard Letter was delivered to an owner of 43SB. The

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<sup>20</sup> Lively v. Wild Oats Mkts., Inc., 456 F.3d 933, 941-42 (9<sup>th</sup> Cir. Ct. App. 2007).

<sup>21</sup> See **Exhibit A**, posting made by "Tom Paine" on April 5, 2007 at 10:52 a.m.

Sheppard Letter stated that the Website contained statements “about Melaleuca, Inc.,...its suit with Mr. Jeff Wasden, and its President...which are knowingly and intentionally false.” Mr. Sheppard further wrote in his letter “The Company [Melaleuca] demands that you remove any such defamatory materials within 24 hours form [sic] your receipt of this letter, and will not hesitate to resort to legal action to protect its interests.”<sup>22</sup> In response to Mr. Sheppard’s letter, a Website user, “d2,” posted two entries on April 7, 2007, which said that a takedown letter had been issued by Melaleuca concerning “Tom Paine” and his/her comments made concerning the Melaleuca’s litigation involving Jeff Wasden. A page link (hyperlink) to the Sheppard Letter was then provided in the latter of the two postings at 10:28 a.m. by Website user “d2.”<sup>23</sup> It was clear from the face of the postings, including the 10:28 a.m. posting which contained the link to the Sheppard Letter, that “d2” was the person who had posted the Sheppard Letter and the comments concerning said letter. The identity of the poster is easily ascertained as the by-lines of the postings respectively state “Submitted by d2 on Sat, 04/07/2007 - 7:47 am” and “Submitted by d2 on Sat, 04/07/2007 – 10:28 am.” The link to the Sheppard Letter was associated with “d2” and no other user nor posting. Indeed, it is this hyperlink that Melaleuca believes it identified in its take-down letter written to A Small Orange Software.<sup>24</sup>

Melaleuca then sought a DMCA pre-litigation subpoena on June 7, 2007 seeking the following from 43SB: “all server logs, IP address logs, account information, User IDs, screen name logs, e-mails, correspondence, of other material whether physically or electronically stored that may serve to identify, i.e., provide real names and addresses for, those **persons** who posted

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22 Melaleuca’s Response Brief, Exhibit A. Emphasis in original.

23 See, **Exhibit B**, postings made by “d2” on April 7, 2007.

24 Melaleuca’s Response Brief, Exhibit C.

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’...**<sup>25</sup>

Melaleuca asserts that the June 7 subpoena is “essentially a routine measure within the framework of the DMCA” and that it is necessary “in identifying users who have misused the [43SB] Website to infringe Melaleuca’s copyrights.” Yet, the June 7 subpoena seeks information on a Website user, “Tom Paine,” who was never linked to the posting of the Sheppard Letter and the concurrent copyright infringement. Melaleuca is on a fishing expedition to discover the identity of persons critical of the company, its employees and its policies, and has interests not restricted to identifying a purported copyright infringer. This attempted use of the subpoena power granted under 17 USC §512(h) is clearly outside the stated purpose of the Copyright and Digital Millennium Copyright Acts. Melaleuca is seeking to abuse the subpoena power pursuant to Section 512(h) by asking for the identities of Website users not associated with the posting of the Sheppard Letter.

It seems obvious that Melaleuca is attempting to get information on an alleged ‘defamer’ not an alleged ‘copyright violator.’ The clear purpose of the pre-litigation subpoena power granted in 17 USC 512(h) is to allow a private copyright holder the chance to obtain the identity of an alleged copyright infringer in order to protect constitutionally recognized rights in creative works.<sup>26</sup> Melaleuca contends that to find infringers is their purpose in seeking a subpoena.<sup>27</sup> Yet, with the absence of any information or evidence that “Tom Paine” was related to the purportedly infringing activity, i.e., that she/he or any other Website user infringed one of the

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<sup>25</sup> Emphasis added.

<sup>26</sup> Recording Industry Assoc. of Am. v. Verizon Internet Svcs., 257 F. Supp. 2d 244 (Dist Ct. DC 2003).

<sup>27</sup> Melaleuca’s Response Brief at 2.

exclusive rights granted to a copyright holder under 17 USC §106, it seems evident that Melaleuca has ulterior motives in seeking the information on “Tom Paine” (or any other Website user). To allow Melaleuca to use a Section 512(h) subpoena to rend the veil of an anonymous speaker who had nothing to do with infringement is an affront to the free speech rights of “Tom Paine” and is clearly outside the allowable limits of a Section 512(h) subpoena. As the subpoena issued in this case is abusive of the special grant of powers under Section 512(h), it should be quashed.

## II. CONCLUSION

An entity seeking a subpoena under 17 USC §512(h) has to make a statement of good faith belief that a copyright is being used in an unauthorized manner – a statement largely to the effect that a copyright action cognizable in federal court should be asserted.<sup>28</sup> Here, Melaleuca could not have an action cognizable in federal court. Because Melaleuca failed to take any action to register the Sheppard Letter with the Copyright Office, it has failed to meet the requirements of Section 411 which are necessary to confer subject matter jurisdiction on a federal court to hear matters relating to copyright disputes. Melaleuca did not make efforts to register its copyright, but now seeks to use this Court and the extraordinary power of Section 512(h) to breach the anonymity of 43SB’s users to assist in discovering infringers of a non-existent copyright. However, Melaleuca has not even presented modest evidence to this Court that either, first, it has a valid ownership interest in the Sheppard Letter, nor second, that the persons named in the subpoena are linked to the infringing. It has failed to show that the Sheppard Letter is copyrighted or copyrightable. This subpoena is without foundation, and should be quashed.

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<sup>28</sup> Verizon; 257 F. Supp 2d at 253.

DATED: August 9, 2007.

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

**ELECTRONIC CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of August, 2007, I caused a true and correct copy of the foregoing Reply to Response Brief to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons:

Brad R. Frazer  
Technology Law Group, LLC  
8950 West Emerald, Suit 198  
Boise, ID 83704

\_\_\_\_\_/s/\_\_\_\_\_  
Erika Lessing

## **EXHIBIT A**



Home B; blogs B; Tom Paine's blog

# \*\*BULLETIN\*\* Rumor of 'Vader'sloot in series of payoffs to Larry Craig

- [view](#)
- [edit](#)
- [track](#)

Submitted by [Tom Paine](#) on Thu, 04/05/2007 - 10:52am.

**\*\*THIS IS UNCONFIRMED\*\***

There's a rumor circulating in the Idaho Falls legal community this afternoon, that court documents now being unsealed in the high-profile lawsuit between Frank Vandersloot & Melaleuca and his ex-Executive Vice President for Marketing Jeff Wasden, will show a deliberate series of payoffs for questionable expenses & honoraria to US Senator Larry Craig.

The Idaho Business Review has an early link to part of this unfolding story at KIDK-3 TV News in Idaho Falls. See link at <http://www.kidk.com/news/local/6878087.html>

Source for the rumor from the legal community is the same one who noted Larry Larocco was running for the Senate. But I do want to emphasize the is **\*\*UNCONFIRMED\*\*** at present.

B; Tom Paine's blog | [write to author](#) | 252 reads

**Drop Us A Note..**



[43sb@43rdStateBlues.com](mailto:43sb@43rdStateBlues.com)

**43SB Book Recoi**



It Can Happen Here: Authority Age of Bush



**43SB Podcasts: A Idaho**

*Click here for audio interview across the Gem State.*

**DFAB/BA**

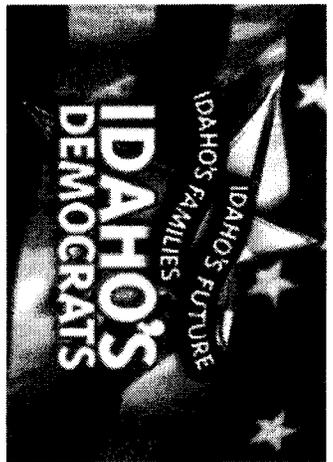
- Democracy for America
- Blog for America

**DNC**

## Comment viewing options

Threaded list - expanded  Date - oldest first  50 comments per page

**EXHIBIT B**



Just the FAQ, Jack!

Frequently Asked Questions

Home » blogs » d2's blog

### Vadersloot and Larry Craig rumor: the takedown order

Submitted by d2 on Sat, 04/07/2007 - 7:47am.

I've been served with a formal takedown order for Tom Paine's article mentioning rumors of questionable campaign contributions between Vadersloot (Melaleuca) and Larry Craig (Idaho's senior senator).

Amusingly, they served it Friday night and demand takedown within 24 hours. *Leroy's All-Night Ribs and LegalAid* was predictably unhelpful.

The letter was hand-delivered, signed by Ken Sheppard (of Melaleuca and Concerned Citizens for Family Values... ring any bells?), didn't specify what statements were defamatory, and I'm failing to see a modicum of a case here for them -- all involved authors clearly delineated fact from rumors heard.

Any thoughts?

» **d2's blog** | 928 reads

#### Comment viewing options

Threaded list - expanded  Date - oldest first

50 comments per page  Save settings

Select your preferred way to display the comments and click "Save settings" to activate

Drop Us A Note...



43sb@43rdStateBlues.com

#### DFA/BFA

- Democracy for America
- Blog for America

#### DNC

- Democratic National Committee
- The Democratic Party blog

#### User login

Username:

Password:

- Create new account
- Request new password

#### Who's online

There are currently 0 users and 57 guests online.

#### Please Note:

Anonymous users are allowed to read content and comments.

To be given the opportunity to post comments and stories, and be allowed other access, please register with our site.

**ABOUT OUR SITE: 43rd State Blues: Democracy for Idaho** is a website of, by and for Democrats and those who lean towards Democratic, progressive causes. If you do not fit this broad category, or are simply anti-Democrat, we suggest you find a website more suitable to your ideology. Our house, our rules. Enjoy!

**Recent blog posts**

- **Burn, Baby, Burn - Marvel Inferno!**
- **Abstinence Programmes Still Don't Work**
- **Timmeb stupidifies the debate**
- **Smiling faces tell lies**
- **Never Admitting You're Wrong**
- **Unequal Treatment**
- **Good Out of Tragedy**
- **Incompetent Larry Craig mistakes DOJ for judicial branch of US Government**
- **No Crime?**
- **You are enthusiastically invited...**

[more](#)

your changes.

**Here's the letter, and a few thoughts**

Submitted by d2 on Sat, 04/07/2007 - 10:28am.

Here's the **takedown letter**. You've gotta clickit to see it, though.

When Tom Paine gets on a righteous tear, his opinions and mine start to diverge. However, I've reread his posting and (and other writers' comments) and I don't see anything wrong here.

Vader's takedown letter is too vague. If anyone from Vadersloot's lawyer pool reads this, I ask that Mr. Sheppard assist me in bringing light to this as best we both can by being more specific on what (of 4 posts and half a dozen or more issues) was 'knowingly and intentionally false'. Otherwise, its just another **Chilling Effect**. But being wrong and throwing his weight around like that's why we call him Vader, i'nhit?

I'm travelling for the Easter weekend, so this is the best way to reach me...

» [login](#) or [register](#) to post comments

**Another quick remark about Tom**

Submitted by d2 on Sat, 04/07/2007 - 11:03am.

Tom Paine also \*DID\* help 43sb 'scoop' everyone with the news that **Larry LaRocco was running** in '08 last week. Oh, and kudos again to TomP for that, BTW

So, given the intentionally-misleading, muckraking, partisan, notorious dirty-politics habits of Vader and Sheppard, why should I trust them over TomP?

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**2008 Idaho Democratic Candidates**

*United States Senate*

- **Larry LaRocco**

*United States House of Representatives*

- **Larry Grant**
- **Rand Lewis**

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