COPY

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JOHN DOE NO. 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DISTRICT

NM (CTx)

ANSWERTHINK CONSULTING GROUP, INC. a Florida Corporation,

Plaintiff,

vs.

JOHN DOE #1, aka "ansr_sucks,"
JOHN DOE #2, aka "bobkaus_daddy,"
JOHN DOE #3, aka "aquacool_2000,"
JOHN DOES #4-12, individuals whose names are presently unknown,

Defendants.

CASE NO. 00-0340Z

U.S. District Court, Southern District of Florida
CASE No. 00-00709-CIV-MOORE

NOTICE OF MOTION AND MOTION TO MODIFY SUBPOENA

DATE: April 24, 2000
TIME: ~~10:00 a.m.~~ 2pm
CRTM: K

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 24, 2000 at ~~10:00 a.m.~~ 2pm in Courtroom K of the above entitled Court, defendant John Doe No. 3 will and hereby moves pursuant to Federal Rule of Civil Procedure 45 to modify the subpoena that plaintiff caused to be served on Earthlink Network, a non-party witness. John Doe is requesting that compliance with the subpoena be staid pending the parties' compliance with Rule 26 and the resolution of several issues by the Southern District of Florida, where this action is pending. The motion is made on the grounds that there has

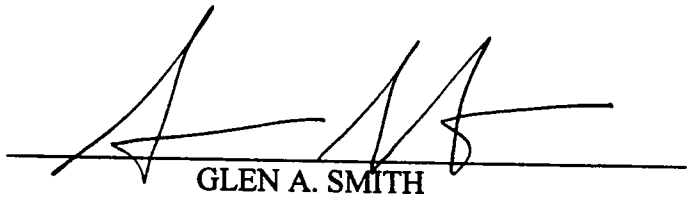
not been compliance with Rule 26, the subpoena is too broad, and that it invades the privacy interests of John Doe No. 3 without adequate justification.

The motion is based on this Notice, the attached Memorandum of Points and Authorities, the Court files and records for this proceeding, and such further evidence and argument as the Court may allow at the hearing.

Dated: March 31, 2000

Respectfully submitted,

GLEN A. SMITH
MEGAN E. GRAY
BAKER & HOSTETLER LLP



GLEN A. SMITH

Attorneys for Defendant and Moving Party
JOHN DOE NO. 3

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am, and at all times herein mentioned was, a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding. My business address is 600 Wilshire Boulevard, Los Angeles, California 90017, and I am employed in the offices of **BAKER & HOSTETLER LLP**, by a member of the Bar of this Court, at whose direction the service mentioned hereinbelow was made.

I am readily familiar with the regular mail collection and processing practices of my employer for the collection and processing of correspondence and other materials for mailing with the United States Postal Service. In the ordinary course of business, any materials designated for mailing with the United States Postal Service and placed by me for collection in the office of my employer is deposited the same day with the United States Postal Service.

On **March 31, 2000**, I served the foregoing document(s) described as: **NOTICE OF MOTION AND MOTION TO MODIFY SUBPOENA** on the interested parties in this action, by placing a true copy thereof enclosed in a sealed envelope in the office of my employer at 600 Wilshire Boulevard, Los Angeles, California, for collection and mailing with the United States Postal Service on the same date, addressed as follows:

S. DANIEL PONCE, ESQ.
WALLACE, BAUMAN, LEGON, FODIMAN, PONCE & SHANNON, P.A.
1200 BIRCKELL AVENUE, SUITE 1720
MIAMI, FL 33131

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **March 31, 2000**, at Los Angeles, California.

Rosa Nelly Villaneda

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE

Pursuant to the Local Rules Governing Duties of Magistrate Judges, the following Magistrate Judge has been designated to hear discovery motions for this case at the discretion of the assigned District Judge:

- ☐ Robert N. Block (RNBx)
- ☐ Rosalyn M. Chapman (RCx)
- ☐ Elgin Edwards (EEx)
- ☐ Charles F. Eick (Ex)
- ☐ Stephen J. Hillman (SHx)
- ☐ Ann I. Jones (AIJx)
- ☐ Jeffrey W. Johnson (JWJx)
- ☐ James W. McMahon (Mcx)
- ☐ Margaret A. Nagle (MANx)
- ☐ Arthur Nakazato (ANx)
- ☐ Brian Q. Robbins (BQRx)
- ☑ Carolyn Turchin (CTx)
- ☐ Andrew J. Wistrich (AJWx)
- ☐ Carla M. Woehrle (CWx)
- ☐ Ralph Zarefsky (RZx)

Upon the filing of a discovery motion, the motion will be presented to the United States District Judge for consideration and may thereafter be referred to the Magistrate Judge for hearing and determination.

The Magistrate Judge's initials should be used on all documents filed with the Court so that the case number reads as follows:

CV- 00-03407 NM (CTx)

NOTICE TO COUNSEL

A COPY OF THIS NOTICE MUST BE SERVED WITH THE COMPLAINT ON ALL DEFENDANTS.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DISTRICT

ANSWERTHINK CONSULTING GROUP, INC. a Florida Corporation,

Plaintiff,

vs.

JOHN DOE #1, aka "ansr_sucks," JOHN DOE #2, aka "bobkaus_daddy," JOHN DOE #3, aka 'aquacool_2000," and JOHN DOES #4-12, individuals whose names are presently unknown,

Defendants.

CASE NO. 00-03407 NM (CTx)

U.S. District Court, Southern District of Florida
CASE NO. 00-00709-CIV-MOORE

Memorandum of Points and Authorities in support of Motion to Modify Subpoena

DATE: April 24, 2000
TIME: ~~10:00 a.m.~~ 2p
CRTM. 2

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I. Introduction.

Plaintiff AnswerThink Consulting Group, Inc. ("AnswerThink") is a publicly traded company that has filed a lawsuit for defamation in the Southern District of Florida. Various participants on a Yahoo! message board devoted to discussing AnswerThink have complained that its stock has not performed well and have questioned the competency of AnswerThink's management team. AnswerThink filed its lawsuit against twelve John Doe defendants, alleging that some of their postings are defamatory. A copy of AnswerThink's Complaint is attached hereto as Exhibit A. AnswerThink's ultimate object is, of course, to limit the discussion of AnswerThink on the Internet.

Immediately after filing its lawsuit, AnswerThink began issuing subpoenas around the country, ostensibly pursuant to Rule 45 of the Federal Rules of Civil Procedure. These subpoenas were issued without notice to the Court or any defendant in this matter. One subpoena was directed to internet service provider Earthlink Network, Inc.("Earthlink" and the "Earthlink Subpoena"); Earthlink has not yet responded, and that subpoena is the genesis of this motion. A true and correct copy of the Earthlink Subpoena is attached as Exhibit B. It is suspected that other subpoenas have been issued as well.

John Doe #3 moves to modify the Earthlink Subpoena and seeks a protective order against future similar discovery on the basis that the subpoena: 1) was issued in a matter in which the federal courts lack subject-matter jurisdiction; 2) has been issued as part of an untenable lawsuit in a transparent effort to punish speech; 3) is prohibited under Federal Rule of Civil Procedure 26(d); and 4) is an unwarranted invasion of John Doe's constitutional and statutory rights to privacy and anonymous speech. Compliance with the subpoena should be stayed pending resolution of these issues in the Southern District of Florida.[1] The relief requested in this Motion will not prejudice AnswerThink.

[1] The Movant is currently preparing, and will shortly file, a Motion to Dismiss Plaintiff's Complaint in the Southern District of Florida.

A. **Yahoo! Message Boards.**

The Internet is a democratic institution in the fullest sense.[2] It is the modern equivalent of Speakers' Corner in England's Hyde Park, where the common man may voice his opinion, however silly, profane, or brilliant it may be, to all who choose to listen. Knowing that people have personal and economic interests in the corporations that shape our world, and in the stocks that will hopefully provide for a secure future, and knowing, too, that people love to share their opinions with anyone who will listen, Yahoo! organized a section of its website as an outlet for the expression of opinions on these topics. This section, called the Message Boards, is an electronic bulletin board system where individuals freely discuss major companies.

Yahoo maintains a Message Board for every publicly traded company and anyone can post messages to it. The individuals posting messages here do so under a "handle" -- similar to the old system of CB's with truck drivers. Nothing prevents the individual from using his real name, but usually the person chooses an anonymous nickname. These typically colorful nicknames protect the writer's identity from those that disagree with him. The exchange of opinions is often very heated and, as seen from the various messages and the responses, and is often filled with invective and insult. Most, if not everything, that is said is taken with a grain of salt.

The Internet address for the AnswerThink Message Board is http://messages.yahoo.com/?action=q&board=ansr. The messages on this Message Board are typical of those on other Message Boards – they are comprised of hyperbole and rhetoric - the type of statements that are routinely held to be nonactionable. For example, on March 14, 2000, a pseudonymous writer known only as safebet001 wrote:

> Friend,
>
> The smell in the air is my skin frying. I got suckered in believing that I was dead wrong and had misjudged the management so I bought a position at twenty nine. Was I right when I said that management sucks? or (sic) more obvious was I stupid to buy into the hype.

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[2] See Reno v. ACLU, 521 U.S. 844 (1997), where the Supreme Court describes the internet as "vast democratic fora" and affirms lower court opinion describing internet as "the most participatory form of mass speech yet developed and is entitled to the highest protection."

Either way my A** (sic) is frying.
I guess now we can't say anything to the bald one and have to beg Dr. Spock[3] (Alan) to right the course. Yeah, Good Luck Suckers!

See http://messages.yahoo.com/bbs?action=m&board=9029796&tid=ansr&sid=9029796&mid=2326.

B. The AnswerThink Complaint.

The AnswerThink Complaint was filed in the Southern District of Florida. It includes pro forma allegations of defamation and makes the incredible request for an injunction to restrain speech. Some, but not all, of the postings on which the Complaint is based are attached as exhibits. There is no indication from the Complaint which, if any, of the specific statements are false. The "examples" about which AnswerThink complains are, in fact, typical of the majority of the message on that board -- non-actionable hyperbole and rhetoric.

II. The Subpoena Was Issued in A Case Over Which The Federal Courts Lack Subject Matter Jurisdiction.

In order for a federal court to exercise subject-matter jurisdiction under 28 U.S.C. §1332, there must be complete diversity among the plaintiff(s) and defendant(s) in the matter. That is, none of the defendants can reside in the same state in which the plaintiff(s) reside. In cases where there is not complete diversity, the complaint must be dismissed.

The complete diversity requirement mandates that the identity and citizenship of all defendants be determined at the commencement of the action. See Garter-Bare v. Munsingware, Inc., 622 F. 2d 416, 423 (9th Cir. 1980); Molnar v. National Broadcasting Co., 231 F.2d 684 (9th Cir. 1956). Where John Doe defendants have been named, this is impossible. Accordingly, cases such as this are subject to immediate dismissal. Id.

In this case, AnswerThink's Complaint names John Does *exclusively* – it fails to name even a single, identifiable defendant. Moreover, AnswerThink implicitly admits that it does not know

[3] The "bald one" and "Dr. Spock" presumably refer to Ted Fernandez and Alan Frank, respectively, AnswerThink's CEO and President.

where any of the defendants reside. Despite this, AnswerThink makes the blanket assertion that complete diversity of citizenship exists.

While the Southern District of Florida will have to decide whether the Complaint should be dismissed based on lack of jurisdiction, or based one of the other grounds discussed below, the jurisdiction issue provides an independently sufficient basis to stay, and perhaps even quash, the Earthlink Subpoena. Plaintiff's Complaint fails, on its face, to establish subject matter jurisdiction, a necessary prerequisite to the issuance of a subpoena in the first instance.

III. The Subpoena Was Issued in Contravention of the Mandatory Stay on Discovery.

Federal Rule of Civil Procedure 26(a) places a hold on discovery "from any source" until several conditions have been satisfied, including an initial meeting of counsel. Earlier discovery may be allowed by court order, but there is no indication that AnswerThink has obtained such relief from the Southern District of Florida. Such relief is unavailable unless and until the plaintiff has made an adequate showing of an immediate need for discovery and demonstrated the existence of a prima facie case. See, Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D.Cal. 1999).

At a minimum, compliance with the subpoena should be stayed pending the initial meeting. John Doe No. 3 has appeared in this action and is prepared to contest several key issues. Following Rule 26 should not present any problems for AnswerThink.

IV. The Complaint Is Subject to a Motion to Dismiss For Failure To State A Claim.

Even if subject matter jurisdiction exists, AnswerThink's complaint is vulnerable to a motion to dismiss. The pro forma allegations of defamation against the Doe defendants are vague and inconclusive. The specific defamatory statements are not identified, nor is there any indication as to how or why they are false. See , Complaint at ¶¶ 18, 23 and 24. The examples of the postings, attached as exhibits to the Complaint, are insufficient to support a libel claim. They deride management and lament the company's financial performance, but in colorful language and through the use of hyperbole that simply is not actionable.

In Milkovich v. Lorain Journal, 497 U.S.1 (1990) the Court held that speech "must be provable as false before there can be liability under state defamation law . . ." The Court ruled that if

the statement "cannot reasonably be interpreted as stating actual facts, then it is not actionable." Id. at 20. The Court held that one must examine the language in context to determine whether it is the type of "loose, figurative or hyperbolic" speech which would negate the impression that the speaker was stating fact, given the "general tenor of the article." Id. at 21. The Court also reaffirmed earlier decisions that held that the use of invective and insult normally is not actionable.

Criticism relating to corporate management and falling stock prices is rarely actionable. Courts from a variety of jurisdictions have reached this conclusion. See, Biospherics v. Forbes, 151 F.3d 180 (4th Cir. 1998); Jefferson County School District v. Moody's Investor Services, 988 F.Supp. 1341 (D.Colo. 1997); and Morningstar v. Los Angeles Superior Court, 29 Cal.Rptr. 2d 547 (1994). These cases recognize that financial analysis is inherently speculative and that criticism of management should not be constrained by defamation claims. Message board postings are necessarily statements of opinion. Their status as such is evident by their very audience, substance, organization, and the variety of policies placed by Yahoo! to preface the postings. No reasonable person can consider a statement in this message-board context to be anything more than an opinion.

The plaintiff in Biospherics had been the subject of scorn in a column published in Forbes Magazine under the headline "Sweet-Talking Guys." The column stated that Biospherics' stock price was based on "hype and hope" and that "investors will sour on Biospherics when they realize that Sugaree [its main product] isn't up to the company's claims." Biospherics, 151 F.3d at 182. The court found that this language was not actionable, in part because "the context and tenor of the article thus suggests that it reflects the writer's subjective and speculative supposition." Id., at 184.

In Morningstar v. Superior Court, 29 Cal. Rptr. 2d 547 (1994), an advertisement touting the plaintiff's mutual funds was ridiculed in a column published under the headline "Lies, Damn Lies, and Fund Advertisements." The article went on to severely criticize the advertisement. Among other statements, the article observed that "it's ironic that such a misleading ad should be circulated just when the fund industry is appealing for the right to sell shares directly off the page. . ." Id. at 551. Placing these statements within the context of the commentary, the court held that the use of loose and figurative language in a forum where the reader expects subjective value statements and opinion is not actionable.

This approach is consistent with Florida law. In Colodney v. Iverson, Yoakum, 936 F.Supp. 917 (M.D. Fla. 1996), one of the defendants had written a letter to the editor stating, in part, that plaintiff's book would be exposed "as a fraud." The court held that given the context of the letter (in a setting similar to a Yahoo! Message board), the statement was not actionable. Similarly, in Pullum v. MacJohnson, 647 So. 2d 254 (Fla. Ct. App. 1994), the court found that calling the plaintiff a "drug pusher" was not actionable because, when placed in context, it was a case of rhetorical overkill in the course of a heated debate.

John Doe's messages fit neatly into this line of cases. They employ heated rhetoric in a forum where one expects expressions of opinion. Most of the statements are hyperbolic and could not possibly be true. Overall, it is extremely doubtful that the present complaint could survive a full-fledged motion to dismiss.

V. The Subpoena Violates John Does Constitutional And Statutory Rights.

A. The Constitutional Right to Free Speech and to Privacy Protects Anonymous Statements.

John Doe enjoys a clear constitutional right to speak anonymously. "The right to speak anonymously draws its strength from two separate constitutional wellsprings: the First Amendment's freedom of speech and the right of privacy in Article I, section 1 of the California Constitution. The anonymous pamphleteer is one of the enduring images of the American revolutionary heritage." Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538, 1540-41 (1999).[4]

The United States Supreme Court has held that the First Amendment protects anonymous speech. McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995). The Court gives an impressive listing of important anonymous contributors, from Shakespeare to The Federalist Papers. Id. at 342-44. After extensive discussion, the Court concluded that anonymity "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." Id. at 357.

[4] The U.S. Supreme Court has described Internet posters as "pamphleteers." Reno v. ACLU, 521 U.S. 844, 1997 U.S. LEXIS 4037, *46 (1997).

The Court was not blind to the possibility that anonymous speech could hide fraudulent conduct. Nonetheless, the Court determined that "our society accords greater weight to the value of free speech than to the dangers of its misuse." Id. at 357. See also, Talley v. California, 362 U.S. 60 (1960) (anonymous advocacy of economic boycott); Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) (reiterating Supreme Court's support for McIntyre's holding of First Amendment right to anonymous speech). As the McIntyre court said, quoting J. Holmes:

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is `responsible,' what is valuable, and what is truth. Id., at 348 n.11 (citations omitted).

Similarly, California courts have given great deference to the right to anonymous speech. The idea of what constitutes speech entitled to anonymity is not limited to speech regarding candidates for political office. See, Ghafari v. Municipal Court, 87 Cal. App. 3d 255, 264-65 (1978) (rejecting as unconstitutional the distinction between "political" and "unpolitical" speech). Furthermore, anonymous speech is not automatically stripped of its protection whenever it is related to a complaint for defamation.

In one recent case, the California Court of Appeal held that the right to anonymous speech was present in criticism about a large commercial hospital that was seeking to name Doe defendants in a defamation lawsuit. In Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538 (1999), a community hospital, which severely criticized after it became affiliated with for-profit insurance providers, filed several defamation lawsuits. When a weekly newspaper ran a series of anonymous advertisements that were critical of the hospital, the hospital responded with a subpoena to learn the identity of the anonymous advertisers. The Court of Appeals held that the subpoena must be quashed because of a nonstatutory qualified immunity, grounded in the free speech and privacy provisions of the United States and California Constitutions, that limits what courts can compel through civil discovery. The court further held that the hospital failed to meet its burden to defeat the qualified constitutional privilege by showing a compelling need to disclose the names of the

anonymous authors, even though the express intent of the hospital was to identify Doe defendants to add to its defamation claims. Id., at 1550.

As the court stated, "disclosure is `by no means automatic in libel cases.' It depends on a weighing of a variety of interrelated factors, including...whether plaintiffs have made a prima facie case of falsity, and whether the information sought 'goes to the 'heart' of their suit.'" Id. at 1550. The fact that a plaintiff is seeking information for a defamation claim does not end the analysis. As the U.S. Supreme Court noted in McIntyre, the "ancillary benefits" of laws that "serve as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators" cannot support the disclosure of otherwise constitutionally protected information. McIntyre, at 446. The Rancho court further recognized that anonymity might be used to conceal "dirty tricks" but that the public interest in having anonymous works enter the marketplace of ideas "unquestionably outweighs any public interest in requiring disclosure..." Rancho, at 1547, citing McIntyre.

Anonymity on the Internet is given particular weight. As the Supreme Court has held, the Internet is a special medium of communication, entitled to the greatest protection. Reno v. ACLU, 521 U.S. 844 (1997). Because the Internet is so easily used by anyone with a computer and modem and thereby empowers anyone to speak his mind and be heard, it has become the focal point for legislation aimed at controlling the outspoken masses. Such laws, however, have been uniformly struck down as unconstitutional impingements of the First Amendment. See, ACLU v. Zell Miller, 977 F.Supp. 1228, 1230 (N. D. Ga. 1997) (recognizing constitutional right to communicate anonymously and pseudonymously on the Internet, and discussing frequent practice of Internet users in falsely identifying themselves); ACLU v. Johnson, 4 F.Supp. 2d 1029, 1033 (D. N.M. 1998) (upholding First Amendment right to communicate anonymously over the Internet); ApolloMEDIA Corp. v. Reno, 119 S.Ct. 1450, __U.S.__ (1999), affirming 19 F.Supp. 2d 1081 (C.D. Cal. 1998) (Supreme Court affirms protection of the activities of the anonymous denizens of a website at www.annoy.com, a site "created and designed to annoy" legislators by sending them annoying email anonymously).

John Doe's privacy interests are significant enough to warrant careful consideration by the Court where this action is pending. Enforcement of the subpoena will arguably violate those rights before the efficacy of the complaint and personal jurisdiction issues have been properly resolved. Delaying compliance until after these issues have been resolved will not prejudice AnswerThink's rights.

B. The Subpoena Violates Defendant's Privacy and Free Speech Rights under the Constitution.

Any subpoena that AnswerThink serves on Earthlink regarding John Doe, based on the current complaint for defamation, arguably violates John Doe's state and federal constitutional rights to privacy and free speech. This provides additional justification for delaying compliance until these issues can be resolved in the Southern District of Florida.

The federal courts have recognized that discovery into anonymous speech should not be granted as a matter of course. In Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999), the plaintiff filed a lawsuit for trademark infringement and unfair competition against several Doe defendants. The key issue was whether to allow discovery into the identity of the Doe defendants who were using Internet pseudonyms. The court observed that, "As a general rule, discovery proceedings take place only after the defendant has been served; however, in rare cases, courts have made exceptions, permitting limited discovery to ensue after filing of the complaint to permit the plaintiff to learn the identifying facts necessary to permit service on the defendant. Id., at 577 (citations omitted). But the court also noted that such exceptions to the general rule are rare, and proceeded to enunciate a test to be used before allowing discovery into potentially sensitive areas. The court stated that:

> Thus some limiting principles should apply to the determination of whether discovery to uncover the identity of a defendant is warranted. The following safeguards will ensure that this unusual procedure will only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will prevent the use of this method to harass or intimidate. Id., at 578.

A key element of the test is that the plaintiff "should establish to the court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss." Id., at 579. The court analogized this test to the need for a showing probable cause before the issuance of a warrant and stated that "A conclusionary pleading will never be sufficient to satisfy this element." Id. As previously discussed, the current AnswerThink complaint fails this aspect of the test.

The Columbia Ins. approach is consistent with decisions from other circuits. In National Labor Relations Board v. Midland Daily News, 151 F.3d 472 (6th Cir. 1998), the court was confronted with a newspaper's refusal to comply with a subpoena requiring it to reveal the identity of an advertiser who had posted an anonymous help wanted ad. The court was concerned that the subpoena had been issued in the first instance without any showing that a civil or criminal offense had been committed by the advertiser. The court refused to enforce the subpoena, stating that:

> Indeed, if this court permitted the board to obtain the identity of Midland's advertiser, without demonstrating a reasonable basis for seeking such information, the chilling effect on the ability of every newspaper and periodical that published lawful advertisements would clearly violate the Constitution. Id. at 475.

Similar concerns exist here, where a publicly traded company is attempting to unmask and punish its critics. In the absence of the showing required by Columbia Ins. Co. v. Seescandy.com and National Labor Relations Board v. Midland Daily News, the subpoena should not be enforced.

C. The Subpoena Violates the Electronic Communications Privacy Act.

Under federal law, the content of and information concerning electronic communications, such as email or Internet postings, are strictly protected under the complex regulations of the Electronic Communications Privacy Act of 1986 (ECPA). 18 U.S.C. §§ 2501 et seq. and §§ 2701 et seq. The ECPA applies to all electronic communications, whether inter- or intra-state, and places significant limits on what information may be disclosed, and to whom. The ECPA distinguishes between instances when an electronic communications service (e.g., Earthlink) may disclose user information and when it may disclose the contents of communications. Under Section 2703(c)(1), Earthlink may "disclose a record or other information pertaining to a subscriber to or customer of

such service" to non-governmental entities, but under Section 2702, Earthlink cannot share the contents of communications not readily accessible to the general public.

AnswerThink's subpoena is incredibly broad, and seeks every morsel of information that Earthlink has about John Doe, such as "all documents" concerning the identity of John Doe and other personal and credit card information. By not limiting its subpoena to user information, as defined under the ECPA, the subpoena violates federal law.

VI. Conclusion.

In an age where society is increasingly, and helplessly, identified and tracked by computer databases, social security numbers, and insurance companies -- from the cradle to the grave -- the constitutional protections of the channels of protest become more crucial than ever before.[5] In such an era, the right to anonymity under the First Amendment takes on more significance. Defendant is not claiming that the right to anonymous speech is absolute. Rather, it is Defendant's position that the right to anonymity cannot be ripped away by the mere filing of a lawsuit when that lawsuit shows every indication of being no more than a bullying tactic. The constitutional right to privacy and anonymous speech can not be regarded so lightly, especially in a case when the alleged defamation is suspect, at best. In addition, the Earthlink subpoena was issued without any care given to the mandatory stay on discovery or the requirements of the ECPA. For these reasons, John Doe requests that this Court modify the subpoena on Earthlink and issue a protective order preventing any future discovery into his identity in the absence of an appropriate order from the Southern District of Florida.

DATED: March 31, 2000

GLEN A. SMITH
MEGAN E. GRAY
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Glen A. Smith

Attorneys for Defendant and Moving Party
JOHN DOE NO. 3

[5] Bernstein v. United States Dept. of Justice, 1999 U.S. App. LEXIS 8595, *35-36 (9th Cir. 1999) (supporting anonymous speech in dicta: "In this increasingly electronic age, we are all required in our everyday lives to rely on modern technology to communicate with one another. This reliance on electronic communication, however, has brought with it a dramatic diminution in our ability to communicate in private [which must be greatly protected]").