

**IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT  
CUMBERLAND COUNTY ILLINOIS**

|   |   |                     |
|---|---|---------------------|
| <b>PEOPLE OF THE STATE OF ILLINOIS,</b> | ) |                     |
|   | ) |                     |
| <b>Plaintiff,</b>                       | ) |                     |
|   | ) |                     |
| v.                                      | ) | <b>No. 02-CF-23</b> |
|   | ) |                     |
| <b>PRISCILLA SCHROCK,</b>               | ) |                     |
|   | ) |                     |
| <b>Defendant.</b>                       | ) |                     |

**REPLY MEMORANDUM IN SUPPORT OF  
CUMBERLAND INTERNET'S MOTION TO QUASH SUBPOENA**

Defendant Priscilla Schrock responds to Cumberland Internet, Inc.'s motion to quash by asserting that her Constitutional rights under the Sixth Amendment are the only pertinent rights before this Court and by refusing to acknowledge the First Amendment rights of the message board participants and customers of Cumberland Internet to post messages anonymously to the Cumberland Internet message board. Contrary to Defendant's position, the message board participants and Cumberland Internet's customers have a core First Amendment right to maintain their anonymity and that right can be overcome only by the application of "exacting scrutiny" to the purpose and effect of the subpoena, the very highest standard of First Amendment protection that courts apply.

Rather than address how her request might meet review under an exacting scrutiny analysis (and it would not), Defendant attempts to divert the Court's attention by recharacterizing Cumberland Internet's claim as a Fourth Amendment claim and by applying other, unrelated First Amendment standards. As a result, due in large part to her

inconsistency in identifying the true goals of the subpoena, and to her basic position that her right to gather information entirely negates any competing First Amendment rights, Defendant has failed to identify a sufficiently compelling need to overcome any applicable First Amendment standard.

Finally, aside from evading the critical First Amendment issues raised by Cumberland Internet, Defendant mischaracterizes the information available to Cumberland Internet and its implications on complying with the subpoena. Not Only are the First Amendment rights of many Cumberland County citizens at stake, but, as shown in Section II below, Item 3 is unduly burdensome and expensive for Cumberland Internet to comply with.

**I. EXACTING SCRUTINY REQUIRES THE COURT EITHER TO QUASH THE SUBPOENA OUTRIGHT OR TO ALLOW ONLY LIMITED ENFORCEMENT ONLY AS ABSOLUTELY NECESSARY TO AVOID VIOLATING DEFENDANT'S RIGHT TO A FAIR TRIAL**

**a. Exacting Scrutiny Applies**

As Cumberland Internet explained in its Memorandum in Support of Motion to Quash ("Initial Memorandum") at 6-11, message board participants and Cumberland Internet's customers have a fundamental First Amendment right to post messages anonymously. Earlier this very week, the Supreme Court reaffirmed the fundamental nature of the First Amendment right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, \_\_ U.S. \_\_, 2002 WL 1305851, \*8 (2002). The Court recognized that a city ordinance requiring registration of door-to-door solicitors inappropriately compromised the fundamental right of speakers to maintain even the

limited level of anonymity door-to-door solicitation allowed, in part because the ordinance required them separately to reveal their identity to the city government. *Id.*<sup>1</sup>

Based on this case and the others cited by Cumberland Internet in its Initial Memorandum (at 6-11), "exacting scrutiny" applies to the subpoena issued by Defendant because she is seeking to remove the anonymity of citizens who are posting messages that discuss and, in general, criticize one of their elected officials. The stated purpose of the subpoena is to identify persons biased against that elected official. Thus, the Defendant is explicitly targeting statements on the basis of their content and their criticism of her -- statements that are clearly core political speech. There can be no more important speech than the discussion among citizens of their elected officials and their right to criticize those officials. As the Supreme Court stated in *McIntyre*:

No form of speech is entitled to greater constitutional protection than [political speech].

When a law burdens core political speech, we apply "exacting scrutiny" and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.

*Id.* at 347.

Defendant asserts that no First Amendment rights are involved simply because the subpoena is not an ordinance or statute. Memorandum In Support of Response to Motion To Quash Subpoena by Cumberland Internet, Inc. ("Response Memorandum") at 6.

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<sup>1</sup> Defendant attached to her Response Memorandum a posting made by Cumberland Internet explaining to its customers the limits of anonymity. That notice accurately put participants on notice that the account information related to their postings is "available to *one person* at Cumberland Internet and *we are required by law not to disclose who is posting which message.*" Attachment to Response Memorandum at ¶ 3 (emphasis added). However, as the Court pointed out in *Watchtower Bible and Tract Soc. Of New York*, the fact that a speaker's identity is disclosed to some is not the same as having to disclose it to governmental officials. *Id.* at 2002 WL 1305851 at \*8.

The notice also advised that postings can be the subject of criminal subpoenas and that Cumberland Internet must comply with a properly issued subpoena. However, that notice does not reduce

However, a subpoena clearly qualifies as state action subject to First Amendment strictures. *See New York Times v. Sullivan*, 376 U.S. 254, 265, 84 S. Ct. 710 (1964); *Shelley v. Kramer*, 334 U.S. 1, 68 S. Ct. 836 (1948). Numerous cases have analyzed the impact of the First Amendment on the issuance of subpoenas. *E.g.*, *NAACP v. Alabama ex re. Patterson*, 357 U.S. 449, 461, 78 S. Ct. 1163 (1958) (First Amendment implications of a subpoena to disclose membership in NAACP); *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 489 (C.D. Cal. 1981) (First Amendment implications of a subpoena to disclose name of journalistic sources); *Snedigar v. Hoddersen*, 114 Wash. 2d 153, 786 P.2d 781 (1990) (First Amendment implications of a subpoena to disclose meeting minutes of a political association). Defendant's attempt to divert the Court's attention from this clearly applicable right has no basis in law.

Defendant also asserts that the First Amendment does not apply because those who might be identified through the subpoena are only witnesses, not parties. Defendant does not explain why persons who are only witnesses should have lesser First Amendment rights than potential parties to the litigation. Moreover, the Court in *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), explicitly relied on the fact that the subpoenas at issue sought to identify potential *witnesses* rather than parties as a basis to impose a *higher* standard on the proponent of the subpoena. *Id.* at 1094-95. In the words of that court, "[t]he standard for disclosing the identity of a non-party *witness* must be higher than that articulated in *Seescandy.com* and *America Online, Inc.* [which dealt with the identity of potential parties]." *Id.* at 1095 (emphasis in original).

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Cumberland Internet's right (or any participant's or customer's right) to contest the propriety of a subpoena or reduce a customer's expectation that usernames will not be publicly associated with particular postings.

Defendant further attempts to divert the Court's attention to the Fourth Amendment by analogizing message board participants and Cumberland Internet customers to Internet child pornographers. Not only is this offensive, it is another red herring. The point here is not a Fourth Amendment privacy issue that can be overcome through an appropriate warrant. Neither the message board participants nor Cumberland Internet's customers stand accused of any crime nor is there any suggestion that the postings or the identities of those making them are part of any crime or will uncover any crime. The fact that the participants and Cumberland Internet's customers may *also* have a Fourth Amendment right of privacy to maintain their anonymity in no way limits their clearly applicable right under the First Amendment to maintain that anonymity.

Defendant engages in a further diversion by discussing her Fifth Amendment Due Process rights in relation to a group of First Amendment cases dealing with prior restraints on the ability of courts to control the news media's access to information before and during a case and ethical cannons controlling lawyers' comments about pending investigations and cases. Response Memorandum at 2. These cases, however, discuss the controls, limited by the First Amendment, a court can place around the conduct of a trial. They have no application to the ability of a criminal defendant -- particularly an elected official -- to reach out from the trial and take affirmative steps that have the effect of infringing the First Amendment rights of those wishing to criticize her to do its anonymously. In short, none of these cases require this Court to place one Constitutional right blindly over another, particularly where as here, the Defendant has failed to show that quashing the subpoena would rise to the level of denying her Constitutional rights.

In fact, contrary to the Defendant's assertion, the Supreme Court has specifically declined to establish a definitive hierarchy of Constitutional rights, and has specifically declined to rank the First and Sixth Amendments:

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.

*Nebraska Press Association v. Stuart*, 427 U.S. 539, 561 (1976). While a defendant's right to a fair trial may supersede the right of the press to report that trial or the right of attorneys to discuss it publicly, the Defendant's right to a fair trial does not require the Court to ignore absolutely the competing First Amendment interests of citizens to criticize their elected officials anonymously.

The clear impact (whether or not it was the purpose) of issuing the subpoena was to put those who have exercised or may have intended to exercise their Constitutional right to express anonymous opinions critical of the Defendant on notice that she means to identify them. An order by the Court enforcing the subpoena (the precedent of which could potentially extend to follow-on subpoenas through the completion of Ms. Schrock's trial (and perhaps related cases) will essentially end the right of anonymous speech through Cumberland Internet's message board, at least until a verdict in Ms. Schrock's case.

Whether or not their concerns are well founded, message board participants have expressed concern about the Defendant's performance of her official duties as the elected

County Clerk in charge of important documents such as the land deeds in and the voting records for Cumberland County.

Others have stated their beliefs that anonymous conversations are a useful way -- if not the only way -- to discuss the sort of issues involved in the Defendant's case in a community the size of Cumberland County has been stated as follows:

there are things happening in casey that are very interesting. But the rr1 board [Cumberland Internet's message board] has brought about an unusual aspect of the internet,in small town ther are always certain groups that all of us choose to associate with, yet in the middle of what amounts to a moral and legal crisis it lets us discuss our feelings without breaking normal barriers or actually renouncing old friendships

Posted By: snwht grann (12.147.57.142) on Saturday, June 15 2002, at 1:09 a.m. to the EIS Discussion Board (<http://discuss.eis.net/config.pl?read=5084>).

The Message board participants are clearly within the groups discussed by Justice Stevens in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 431-42, 115 S. Ct. 1511 (1995):

The decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.

This Court should quash the subpoena as unduly interfering with the First Amendment rights of the message board participants and Cumberland Internet's customers. Under any circumstances, the Court is bound to apply "exacting scrutiny" in determining the extent to which the subpoena should be enforced.

**b. Defendant's Right To A Fair Trial Does Not Require The Court To Ignore Competing First Amendment Rights**

Defendant argues that she is entitled to the requested information to show bias of the jury pool in Cumberland County in order to move the trial and to show bias of particular witnesses in order to impeach those witnesses. Defendant's right to a fair trial, however, does not require the Court to ignore competing First Amendment rights. Rather, to avoid the unnecessary infringement of First Amendment rights, the Defendant must show that the specific information requested is critical to her obtaining a fair trial and unavailable from any other source. If (or to the extent) the information is unnecessary or there are other ways to obtain similar evidence that do not infringe Constitutional rights, the Court should quash the subpoena.

For example, there is a far simpler method for the Defendant to demonstrate that the postings identified in the attachment to her subpoena were likely generated by citizens (and potential jurors) in Cumberland County. First of all, the mere fact that all but four postings were originated on Cumberland Internet accounts strongly implies that they originate in Cumberland County, which is the primary service area of Cumberland Internet. To confirm the logic of that conclusion, the Defendant would need to know only whether the account names associated with the 33 postings Cumberland Internet can identify<sup>2</sup> have billing addresses in Cumberland County. Cumberland Internet would not object to providing a statement as to how many of the 33 postings originated from accounts with billing addresses in Cumberland County, but without stating the addresses.

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<sup>2</sup> As Cumberland Internet stated in its Initial Brief (at 5), it cannot identify any information about postings 1, 2, 7 or 26 since they originate with ISPs other than Cumberland Internet. Cumberland Internet also cannot identify any information about three other postings (3, 11 and 13) because of the configuration of the modems serving those log in sessions. *See* Initial Brief at 5.

Any attempt to get further information in support of the motion to change the location of the trial would be superfluous and unnecessary.

The Court can also judge which (if any) of the posted statements would even be probative of bias of the author. As indicated in one of the cases Defendant cites, while a defendant may offer evidence of bias, "nevertheless, a trial court may exercise its discretion in precluding evidence to show bias that is too remote or uncertain." *People v. Friday*, 232 Ill. App. 3d 1047, 598 N.E.2d 302, 174 Ill. Dec. 105 (4th Dist. 1992).

For example, posting nos. 15 and 16 are no more than a posting and a reposting (half an hour later) of a quote widely attributed to Mark Twain: "It is better to remain silent and be thought a fool than to speak up and remove all doubt." The Defendant makes no attempt to show how this statement would show bias against her personally. Cumberland Internet would invite the Court to review the postings reproduced in the Attachment to Cumberland Internet's Initial Memorandum and draw its own conclusions as to which (if any) would unambiguously demonstrate the author's bias against the Defendant.

The Court can also judge which statements of bias are likely to be cumulative. For example, given the statements attributed to Mervin Wolfe in Exhibit F to the Defendants motion to change the location of the trial, it is unlikely that any of the statements identified in the subpoena, even if appropriately attributed to Mr. Wolfe, would add to the implication that he holds strong opinions about the Defendant's guilt or innocence. The Court can also consider whether it would allow a witness to be confronted with statements made through an account that the witness did not own on the mere chance that the witness had access to someone else's account. Conversely, the

Court can consider whether it would allow a witness to be confronted with a statement made from an account registered to the witness but used in conjunction with a widely available computer, for example, a computer kept in a workplace.

Every trial court is entitled to make decisions regarding the admission of evidence. A court is not absolutely bound by the federal or state Constitution or any other authority to allow evidence solely on the basis that a defendant thinks it may be important. Normally those decisions are not made until trial. Due to the core First Amendment interests triggered by this subpoena, however, it is incumbent on the Court to make as many of those determinations as possible now to avoid unnecessarily compromising First Amendment rights only to tie authors to anonymous statements that have no relevance or bearing at trial.

**c. The Defendant Has Not Provided Sufficient Information To Allow The Court To Properly Apply Exacting Scrutiny**

Rather than clarify why the information subpoenaed is sufficiently critical to the Defendant's case to merit disclosure despite the fundamental First Amendment interests being compromised, the Defendant repeatedly alternates between two inconsistent theories for enforcing the subpoena. On the one hand, the Defendant contends that the subpoena is narrow because it seeks information about only the forty persons listed in Item 3, thirty-five of whom have already been identified by the prosecution as potential witnesses. *E.g.*, Response Memorandum at 4-5. Similarly, after quoting the full text of the subpoena, the Defendant summarizes its request by asserting that "the Defendant's subpoena specifically identifies the individuals for whom information is requested." *Id.* at 5. And, in fact, one way that Cumberland Internet proposed to narrow the subpoena -- if the Court finds against Cumberland Internet's contention that it should be quashed in

total -- was to limit disclosure to identifying only postings that originate from the accounts of one of the forty listed potential witnesses.

On the other hand, Defendant asserts that she needs the information about all anonymous postings identified in Items 1 and 2 because:

by providing this information requested in the subpoena, the Defendant may be able to identify additional individuals who are witnesses at trial. Even those who are not ultimately identified as potential witnesses may have an evidentiary link to the specifically identified persons in the subpoena. . . .

Response Memorandum at 7. In essence, the Defendant is demanding information to identify non-witnesses on the off chance that it might lead to the identity of other witnesses or might tie a witness to a statement made from a user account other than his or her own. Whether or not this would be an appropriate standard for general discovery, it is not an appropriate basis to ignore the First Amendment rights of citizens who have no relationship to this trial.

**d. Cumberland Internet Has Identified An Appropriate Standard To Apply To The Subpoena In This Case**

In its Initial Brief, Cumberland Internet submitted the standards articulated by the Court in *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001). The Defendant has provided no compelling reason to avoid that approach. Although the Defendant attempts to fit her request to the standards stated by that court, she repeatedly fails to appreciate the fundamental and important nature of the First Amendment rights at issue here. The Defendant's flippant reaction to the fundamental Constitutional rights of the message board participants and Cumberland Internet's customers and her refusal to

make any reasonable attempt to narrow the request must cast some doubt onto the good faith basis of the subpoena.

For example, Defendant correctly points out that the first element of the test in *2TheMart.com* is whether the subpoena was issued in good faith or for a proper purpose and that the fourth element requires a showing that the testimony is unavailable from other sources. *2TheMart.com*, 140 F. Supp at 1094-95. As Cumberland Internet has acknowledged, attempting to establish witness bias is normally a proper purpose. Attempting to establish that the potential pool of jurors in a given location is tainted by media attention or public opinion might also be a proper purpose. Defendant attempts to shift the Court away from this standard by asserting that once any good faith basis can be identified this "requires no further analysis." Response Memorandum at 12. First Amendment rights, however, should not be so lightly regarded. Moreover, the Defendant completely overlooks the less onerous means of establishing evidence of either issue. For example, she demands to know the full identity of anonymous authors when her only need is to ascertain whether they are more likely than not citizens of Cumberland County.

Also, Defendant asserts (Response Memorandum at 4) that "these Internet postings are the strongest evidence of witness bias against the Defendant," but completely ignores the evidence attached as Exhibit F to her motion to change the location of the trial. Similarly, Defendant rejects (Response Memorandum at 13-14) Cumberland Internet's suggestion that she canvass people in Cumberland County about similar statements as unnecessary, given the information Cumberland Internet has. Essentially, Defendant seeks to obtain information from Cumberland Internet without even

determining whether it is otherwise available. Defendant has no basis for asserting this is "strongest evidence" -- only that it's the easiest to come by.

It is undeniable that the effect of a subpoena like the one Defendant has issued is to cast a pall over communications on the message board and inhibit the free flow of anonymous postings critical of the County Clerk -- *i.e.*, to chill Constitutionally protected speech. Under the circumstances, it is insufficient for the Defendant to overcome the First Amendment rights of message board participants and Cumberland Internet customers by simply asserting that the easiest way to gather evidence is to identify anonymous message board participants.

Similarly, the second and third prongs of the test in *2TheMart.com* require a showing that the information relates to a core claim or defense and is materially relevant to that claim or defense. *Id.* at 1096-97. Again, the Defendant has provided no more than conclusory statements about her rights to demonstrate that the jury pool is somehow tainted or to demonstrate witness bias. Defendant's position is well summed up in the statement, "*Any statements . . . by a witness made showing bias toward a party directly relates the credibility of that witness.*" Response Memorandum at 12 (emphasis added). That, however, is a far cry from showing that these particular statements would have a critical bearing on showing whether she is guilty or innocent of misappropriating the Olsen's finances. In essence, Defendant asserts not only that the fundamental First Amendment rights of the message board participants and Cumberland Internet customers must give way to a proven need for information, but that those rights should simply be swept aside and ignored in favor of her rights to examine witnesses. This cavalier response to core First Amendment rights is not a sufficient basis to uphold the subpoena.

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Rather than acknowledge the core First Amendment rights of the message board participants and Cumberland Internet customers, the Defendant has denied the existence of those rights. Consequently, rather than make any attempt to show a strong and fundamental need for the information that the subpoena requests, she has made no more than dismissive and conclusory statements about her right to show bias. As a result, the Defendant has failed to show a need for the subpoenaed information that can withstand the application of exacting scrutiny.

**II. ITEM 3 OF THE SUBPOENA IS UNDULY BURDENSOME TO CUMBERLAND INTERNET AND SHOULD BE QUASHED FOR THAT REASON AS WELL**

**a. Defendant Misunderstands And Misstates What Information Cumberland Internet Actually Has**

At several places in her response, Defendant makes assertions about what information Cumberland Internet has and what it must do to comply with the subpoena. Several of Defendant's statements are premised on a misunderstanding of what Cumberland Internet (or any ISP) has and what it can readily track. For example, Defendant asserts:

However, when registering with an Internet company or a message board, a user creates a username, an alias or a "handle." As Cumberland Internet admits in its Memorandum, these "handles" are assigned to one individual and typically more than one individual is not able to sign up for the same "handle". (Cumberland Memorandum, p. 18).

Response Memorandum at 6. This is a gross mischaracterization of what Cumberland Internet says at page 18 of its Initial Memorandum or anywhere else. Apparently,

Defendant is confusing two very different concepts: "usernames" and "aliases."<sup>3</sup> The difference is critical to what the Defendant is seeking and what Cumberland Internet would have to do to respond to Item 3 of the subpoena.

*Usernames* are assigned to customers when they register for service and are identical to the first half of the customers email address, *i.e.*, the part that comes before the @rr1.net. No two customers have the same username. The username in conjunction with a password is necessary to access an account.<sup>4</sup> By tracking a dial-in session, Cumberland Internet (or any other ISP) can unambiguously identify the username and account information for the account dialed in at that time.<sup>5</sup>

Message board *aliases* are quite different. Contrary to Defendant's understanding, there is no such a thing as "registering with . . . a message board." Aliases are not assigned to customers and it is not necessary to be the customer of a particular ISP to have an alias. Rather, message board participants choose them. Specifically, any participant who wishes to post a message has an opportunity to fill in three information fields associated with the posting: "Your Name," "E-Mail Address," and "Subject." All three fields are optional, *i.e.*, a poster is not required to fill in any of the three. Persons

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<sup>3</sup> Cumberland Internet used the term "handles" in its Initial Memorandum to refer to what it understood the subpoena to request as "aliases." While Cumberland Internet views the terms as interchangeable in this context, Cumberland Internet will consistently refer to these as "aliases" to try and track the subpoena language.

<sup>4</sup> Defendant argues that usernames and passwords are only available to account holders and those with whom the account holders share them. Defendant overlooks the fact that most computers store username and password information automatically and, therefore, anyone with access to a computer holding such information also can access the account. Defendant also overlooks unauthorized sharing of username and password information, most notoriously by kids of the account holder sharing the information with friends. Defendant also overlooks the simple stealing of username and password information.

<sup>5</sup> Defendant cites *United States v. Kennedy*, 81 F.Supp.2d 1103 (Dist. of Kans., 2000), for the proposition that customers have no reasonable expectation of privacy in their IP addresses. However, the IP address in the *Kennedy* case was a static IP address (as explained in Cumberland Internet's Initial Memorandum at 3). Moreover, the Court relied on the fact that user had voluntarily switched on a feature allowing others on the Internet to view and copy files from his computer. *Id.* at 1110. The basis for the

wishing to post anonymously (or, more correctly, pseudonymously) simply decline to fill in their email address and either fill in no name or fill in an alias.

In its Initial Memorandum, Cumberland Internet separately pointed out that even identifying the username and user account information was, at best, circumstantial evidence about who actually made a particular posting. That, however, is a separate matter from identifying aliases. Other than identifying user account information related to particular postings, Cumberland Internet simply has *no* information about the persons who actually made the posts.

**b. Attempting to Establish Connections Between User Accounts and Aliases Would Be Unduly Burdensome For Cumberland Internet**

No record of an alias is made with the ISP other than what appears in a particular posting. The only "record" created is on the participant's own computer where a "cookie" is created and stored that defaults to the previously used alias unless and until the participant chooses some other alias. A participant can choose *a different alias for every posting*. Moreover, *one participant can use the same alias as another participant, even if both are posting simultaneously*. Thus, while each posting has an alias (or a blank space) and Cumberland Internet can only form a conclusion tying many identified postings to particular accounts, there is no way for Cumberland Internet (or any other ISP) to unambiguously or conclusively connect a particular username or account to a particular alias. To infer any connections, an ISP must engage in exhaustive comparisons of postings, dial-in sessions, account information and the tendency for particular accounts to use particular aliases. Cumberland Internet includes as an Attachment A to this Memorandum an explanation of the substantial work involved to engage in such an

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conclusion in the *Kennedy* case has no bearing on the use of dynamic IP addresses to post anonymously to

analysis. Moreover, as is pointed out in that Attachment, there is no time frame placed upon Item 3 and it could continue to generate obligations to match account information or provide such information indefinitely.

Enforcing the actual terms of the subpoena, particularly the information requested under Item 3, would not be nearly so straight forward as the Defendant asserts.

Requiring Cumberland Internet to provide documents that would "identify . . . discussion board aliases" for the persons listed in Item 3 absolutely would force Cumberland Internet to engage in the substantial and time-consuming process necessary to match user accounts and probable aliases or to provide Defendant with continuing access to virtually all of its customer information and dial-in logs. Therefore, in addition to the First Amendment concerns related to disclosing that information, the Court should quash Item 3 of the subpoena as being unduly burdensome to Cumberland Internet.

### **CONCLUSION**

Contrary to the assertions by Defendant, participants in Cumberland Internet's message board and Cumberland Internet's customers have a core First Amendment right to maintain the anonymity of the statements they have made on the message board, and statements they may wish to make, particularly where those statements comment on an elected official. Those rights can not be swept away or cast aside by conclusory assertions that tying certain statements to certain individuals could show some undefined sort of bias at trial.

As Cumberland Internet stated in its Initial Memorandum, the stated purpose of the subpoena is no more than a fishing expedition for information that may not relate to any prospective witness in this case, may not be directly attributable to any prospective

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a message board.

witness in this case, may not be probative of any bias or credibility and may be available from other sources. Unless Ms. Schrock can show that the information she is seeking is of crucial importance to her defense and cannot be obtained from some other source, the Court should quash the subpoena. Under any circumstances, enforcement of the subpoena will absolutely have a direct and substantial chilling effect on the Constitutionally protected right of Cumberland Internet's message board participants and of its customers to engage in anonymous discussion -- including criticism -- of the public officials of Cumberland County. The Court should not compromise that right without a compelling reason.

Dated: June 20, 2002

Respectfully Submitted,  
**CUMBERLAND INTERNET, INC.**

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**CERTIFICATE OF SERVICE**

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned hereby certifies that on June 20, 2002, a copy of the attached document, namely: REPLY MEMORANDUM IN SUPPORT OF CUMBERLAND INTERNET'S MOTION TO QUASH SUBPOENA, was served upon:

Mr. Chad S. Beckett  
Beckett & Webber  
508 South Broadway Avenue  
Urbana, IL 61802

by electronic delivery and via regular U.S. Mail, properly addressed and with proper postage affixed thereto, and to

Edward C. Carter  
Assistant Attorney General  
100 West Randolph, 12th Floor  
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by facsimile and via regular U.S. Mail, properly addressed and with proper postage affixed thereto.

\_\_\_\_\_  
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### **Activities Necessary to Associate Usernames with Message Board Aliases**

Cumberland Internet has analyzed the steps necessary to determine the tendencies of persons logging on through particular accounts to use particular message board aliases as it understands the request under Item 3 of the subpoena. To conduct this analysis it would have to:

1. Collect the approximately 2,324 existing messages (as of approximately June 17, 2002 -- it is unclear from the subpoena whether this demand would be ongoing to identify or corroborate the tendency to use particular aliases).
2. Collect the associated 2,324 IP addresses associated with those messages.
3. Associate those IP addresses with the time stamps on each message, so Cumberland Internet can determine an IP address being used at a specific time.
4. Generate a usage record, including time used and associated IP address for every person listed on the subpoena who happens to be a Cumberland Internet customer. To do this, Cumberland Internet would need to program a script to manipulate the over 300 megabytes of usage records that Cumberland Internet generates each month. The estimated running time for this script will be 1-2 hours for each user for each month. For example, if ten of the identified persons are Cumberland Internet users, to run a script to identify their use for three months, the estimate run time would be 30-60 hours just for computer processing time (programming time would be extra).

This would give Cumberland Internet the IP addresses and the time logged onto its modems and the time logged off of its modems for whatever users match the subpoena list for three months.

5. Cumberland Internet would then need to cross reference that list with the list of IP addresses and time stamps associated with message postings, *i.e.*, the 2,324 records of message listings and addresses referenced above. (That number continues to grow through continued daily use of the message board.) Using the hypothetical ten users from step 4 above, and recognizing each record has multiple fields (IP address assigned, time logged onto modem, time logged off from modem), this will probably result in at least 100 records per month, which Cumberland Internet therefore estimates at 3,000 records, and 9,000 fields. Cumberland Internet then must compare this with message board records, which have two fields (IP address of machine posting to message board, time message posted). Significantly, Cumberland Internet will have to compare the time record in an unusual way, since it won't be a direct match. Rather, a match will have to include a message board time stamp that is defined as between the log-on and log-off time stamp, along with an IP address match. Lots of records will match on just IP address, but Cumberland Internet would have to identify the user of the IP address at a specific time, and must calculate it based on it being between start and stop times.

6. To do this comparison would require a database. Database programmers charge about \$60/hour. Based on its experience, Cumberland Internet calculates a minimum of forty hours of database programming time. Cumberland Internet would also need machines to run this program on, since Cumberland Internet's machines are busy carrying out the work of supporting Cumberland Internet's customers.

7. This would result in a list of all message board aliases used on the Cumberland Internet message board by customer accounts owned by persons identified in Item 3 of the subpoena who happens to be Cumberland Internet customers. It would also identify which messages each customer account posted. That would not, however, tell who actually made the postings or whether any other persons used the same aliases for other messages.