

1 Mark Goldowitz
California Anti-SLAPP Project
2 2903 Sacramento Street
Berkeley, CA 94702
3 Telephone: (510) 486-9123 x 301
Facsimile: (510) 486-9708
4
5 Special Counsel for the Defendant
Sued as John Doe
6

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA
10 (UNLIMITED JURISDICTION)

11 FIRST CASH FINANCIAL)
SERVICES, INC.)
12 Plaintiff,)
13 vs.)
14 JOHN DOE A/K/A KNOWFCFS,)
15 Defendant.)
16
17
18
19
20
21
22
23
24
25
26
27
28

No. CV002135
**DEFENDANT JOHN DOE'S NOTICE OF
MOTION AND MOTION TO FILE A
RECORD UNDER SEAL;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF;
DECLARATION OF MARK
GOLDOWITZ IN SUPPORT THEREOF**

Date: November 20, 2003
Time: 8:30 a.m.
Dept: 2

Complaint filed 8-19-03
BY FAX

TABLE OF CONTENTS

DEFENDANT JOHN DOE’S NOTICE OF MOTION AND MOTION TO FILE A RECORD UNDER SEAL ii

MEMORANDUM OF POINTS AND AUTHORITIES 1

DECLARATION OF MARK GOLDOWITZ 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **DEFENDANT JOHN DOE’S NOTICE OF MOTION AND**
2 **MOTION TO FILE A RECORD UNDER SEAL**

3 TO PLAINTIFF AND ITS ATTORNEYS:

4 Please take notice that on November 20, 2003, at, 8:30 a.m., or as soon thereafter as
5 counsel may be heard, in Santa Clara Superior Court, Department 2, the defendant sued herein as
6 JOHN DOE a/k/a KNOWFCFS will move the Court for an order allowing the signature and true
7 name on Doe’s declaration in support of special motion to strike pursuant to C.C.P. § 425.16 to
8 be filed under seal.

9 This motion will be made pursuant to the First Amendment to the U.S. Constitution and
10 Rules 243.1 and 243.2 of the California Rules of Court, on the grounds that defendant’s
11 overriding First Amendment right to speak anonymously supports sealing the record and the
12 other requirements in Rule 243.1(d) are met.

13 This motion will be based on this notice of motion and motion; the memoranda of points
14 and authorities and declaration and any other documents which are being or will be filed or
15 lodged in support thereof; all other materials on file herein; and on such other and further
16 matters as the Court may consider at the hearing.

17
18 Dated: October 29, 2003

Respectfully submitted,

19
20 _____
21 Mark Goldowitz
22 Special Counsel for Defendant John Doe
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant has been sued herein as JOHN DOE a/k/a KNOWFCFS. KNOWFCFS is the
3 screen name under which defendant posted messages on the Yahoo! financial message board
4 relating to plaintiff. Defendant has filed a special motion to strike plaintiff's complaint pursuant
5 to C.C.P. section 425.16, scheduled for hearing on November 20, 2003.

6 Whether or not defendant's true name should be made known to plaintiff is the issue to
7 be decided in defendant's special motion to strike. If defendant's special motion to strike is
8 granted, plaintiff has no basis for requiring disclosure of defendant's true identity. If the motion
9 is denied, plaintiff will suffer no prejudice as he will be entitled to pursue discovery regarding
10 defendant's identity. As defendant's special motion to strike asserts, plaintiff First Cash
11 Financial Services has not stated any actionable claims against defendant. and should not be
12 allowed to require John Doe to reveal John Doe's identity.

13 In light of plaintiff's opposition, defendant John Doe wishes to file a declaration in
14 support of defendant's special motion to strike, but to remain anonymous, as is defendant's right
15 under the First Amendment. The Supreme Court has repeatedly upheld the First Amendment
16 right to speak anonymously. (*Buckley v. American Constitutional Law Foundation* (1999) 119
17 S. Ct. 636, 645-646; *McIntyre v. Ohio Elections Comm.* (1995) 514 U.S. 334; *Talley v.*
18 *California* (1960) 362 U.S. 60.) These cases celebrate the important role played by anonymous
19 or pseudonymous writings through history, from the literary efforts of Shakespeare and Mark
20 Twain through the explicitly political advocacy of the Federalist Papers. As the Supreme Court
21 said in *McIntyre*:

22 [A]n author is generally free to decide whether or not to disclose his or her true identity.
23 The decision in favor of anonymity may be motivated by fear of economic or official
24 retaliation, by concern about social ostracism, or merely by a desire to preserve as much
25 of one's privacy as possible. Whatever the motivation may be, ... the interest in having
26 anonymous works enter the marketplace of ideas unquestionably outweighs any public
27 interest in requiring disclosure as a condition of entry. Accordingly, an author's decision
28 to remain anonymous, like other decisions concerning omissions or additions to the
content of a publication, is an aspect of the freedom of speech protected by the First
Amendment. . . . Under our Constitution, anonymous pamphleteering is not a pernicious,
fraudulent practice, but an honorable tradition of advocacy and of dissent.

(*McIntyre*, 514 U.S. at 341-342, 357 [emphasis added].) The United States Supreme Court has

1 held that a court order to compel production of individuals' identities in a situation that would
2 threaten the exercise of fundamental rights "is subject to the closest scrutiny." (*NAACP v.*
3 *Alabama* (1958) 357 U.S. 449, 461.)

4 These rights are fully applicable to speech on the Internet. The Supreme Court has
5 treated the Internet as a fully protected medium for public discourse, which places in the hands
6 of any individual who wants to express his or her views the opportunity, at least in theory, to
7 reach other members of the public hundreds or even thousands of miles away, at virtually no
8 cost; consequently, the Court has held that First Amendment protections are fully applicable to
9 communications over the Internet. *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844
10 . Several lower court decisions have further upheld the right to communicate anonymously over
11 the Internet. (*ACLU v. Johnson* (D.N.M. 1998) 2 F. Supp.2d 1029, 1033, *aff'd* (10th Cir. 1999)
12 194 F.3d 1149; *ACLU v. Miller* (N.D. Ga. 1997) 977 F. Supp. 1228, 1230, 1232-1233; *see also*
13 *ApolloMEDIA Corp. v. Reno* (1999) 119 S. Ct. 1450, *aff'g* 19 F. Supp.2d 1081 [protecting
14 anonymous denizens of web site at www.annoy.com, a site "created and designed to annoy"
15 legislators through anonymous communications].

16 Thus, a subpoena that strips speakers of their anonymity, such as the one sought by First
17 Cash, infringes on the First Amendment. A court order, even when issued at the behest of a
18 private party, constitutes state action which is subject to constitutional limitations, including the
19 First Amendment. (See *New Your Times Co. v. Sullivan* (1964) 376 U.S. 254, 265.)

20 California Rules of Court Rule 243.2(a) and (b) provide that a record may be filed under
21 seal only under a court order granted pursuant to a noticed motion and facts sufficient to justify
22 the sealing. Rule 243.1(d) provides that the court "may order that a record be filed under seal if
23 it expressly finds that: (1) There exists an overriding interest that overcomes the right of public
24 access to the record; (2) The overriding interest supports sealing the record; (3) A substantial
25 probability exists that the overriding interest will be prejudiced if the record is not sealed; (4)
26 The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the
27 overriding interest."

28 As set forth below, defendant John Doe's request to file the signature to defendant's

1 declaration under seal meets these requirements:

2 • (1) There exists an overriding interest in defendant's right to speak anonymously and
3 to remain anonymous, which overcomes the right of public access and access by plaintiff and its
4 attorneys to the record, which interest supports the sealing of the record. Defendant's interest to
5 remain anonymous is constitutionally mandated. Should defendant's motion to strike be granted,
6 defendant's true identity will be irrelevant to the public as this action will be dismissed. *Should*
7 *his motion to strike be denied, plaintiff may pursue its discovery to learn defendant's true name.*
8 *Defendant's right to speak anonymously should be protected until such time as plaintiff and the*
9 *public have a greater need to know defendant's identity.*

10 • (2) The overriding interest supports sealing the record. If defendant's true name and
11 signature are not filed under seal, defendant's Constitutional right to speak anonymously will be
12 meaningless. A redacted version of the declaration will be provided for public access and access
13 by plaintiff and its attorneys, which contains everything but the actual signature and
14 identification of defendant. (Mark Goldowitz Decl., ¶ 5.)

15 • (3) A substantial probability insists that the overriding interest will be prejudiced if the
16 record is not sealed, because defendant will irrevocably lose the constitutional right to
17 anonymous speech.

18 • (4) and (5) The proposed sealing is narrowly tailored and no less restrictive means exist
19 to achieve the overriding interest of defendant's right to remain anonymous. The substance of
20 defendant's declaration will be available to both the public and plaintiff. (Goldowitz Decl., ¶¶ 4-
21 5.)

22 Defendant therefore requests an order allowing the signature and true name on John
23 Doe's declaration filed in support of defendant's special motion to strike pursuant to C.C.P.
24 section 425.16, scheduled for hearing on November 20, 2003, in Department 2 of this Court, to
25 be filed under seal, pursuant to Rule 243.2(b), with defendant's reply papers, so that it may be
26 considered by the Court in connection with defendant John Doe's special motion to strike.
27 (Goldowitz Decl., ¶ 5.)

28 Defendant's declaration has not yet been finalized and therefore is not being lodged with

1 this motion. However, the original declaration will be lodged, and a redacted version will be
2 filed, with the court with defendant's reply to plaintiff's opposition to defendant's special
3 motion to strike, no later than November 14, 2003. Plaintiff will be served with a redacted
4 version of the declaration, with only defendant's true name concealed, along with defendant's
5 reply papers. Plaintiff will suffer no prejudice as defendant seeks only to seal defendant's true
6 name and signature.

7 Dated: October 29, 2003

Respectfully submitted,

8
9
10

Mark Goldowitz
11 Attorney for Defendant John Doe
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **DECLARATION MARK GOLDOWITZ**

2 I, MARK GOLDOWITZ, declare:

3 1. I am a member in good standing with the California State Bar and am counsel for
4 the defendant in this action. I have personal knowledge of the facts contained in this declaration,
5 and, if called as a witness, I am competent to testify to those facts.

6 2. Whether or not defendant's true identity should be made known is the ultimate
7 issue under consideration in defendant's special motion to strike, scheduled for hearing on
8 November 20, 2003.

9 3. The evidence to be provided in Doe's declaration can not be established by any
10 other means and is necessary to refute, or respond to, plaintiff's opposition to the special motion
11 to strike.

12 4. Only defendant's true name and signature will be sealed from public view and
13 from the plaintiff.

14 5. Defendant will file, and plaintiff will be served with, a redacted version of
15 defendant's declaration, along with defendant's reply to plaintiff's opposition to defendant's
16 special motion to strike. Defendant will also lodge the original, unredacted version of the
17 declaration with the Court.

18 I hereby declare that the above statements are true and correct. Signed under the penalty
19 of perjury under the laws of the State of California, on the date set forth below, in Berkeley,
20 California.

21
22
23 Dated: October 29, 2003

Mark Goldowitz