

Charles D. Tobin
202 419 2539
charles.tobin@hklaw.com

March 4, 2009

VIA HAND DELIVERY

Clerk, District of Columbia Court of Appeals
Moultrie Courthouse
500 Indiana Ave., N.W.
Washington, D.C. 20001

Re: *Solers, Inc. v. Doe, et al.* (07-CV-00159)
Notice of Supplemental Authority in Support of Intervenor-Appellee's Brief filed on
September 19, 2007 and Oral Argument heard on June 19, 2008

Dear Sir or Madam:

Pursuant to Court of Appeals Rule 28(k), Intervenor-Appellee Software & Information Industry Association ("SIIA") respectfully brings to the Court's attention this supplemental authority to SIIA's brief filed with the Court on September 19, 2007 and its oral argument heard on June 19, 2008.

Last week, in *Independent Newspapers, Inc. v. Brodie*, No. 63, Sept. Term 2008 (Md. Ct. App., Feb. 27, 2009), the Court of Appeals of Maryland held that the trial court abused its discretion in ordering a company that commissioned an Internet forum to identify five anonymous Internet forum participants. This was a case of first impression in that Court.

In instructing the trial court to grant the motion to quash the subpoena and issue a protective order, the Court of Appeals set forth the heightened standard that Maryland plaintiffs must overcome when seeking disclosure of anonymous Internet speakers' identities. *Id.* at 1, 29. The Court recognized that the First Amendment protection for anonymous speech universally has been extended to Internet speech. *Id.* at 15. The Court therefore held that a qualified First Amendment privilege applies to third-party discovery requests seeking the disclosure of anonymous Internet speakers. *Id.* at 43-44.

Citing with approval the test set forth in *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), the Court adopted a multi-part test requiring notice and placing the burden on the plaintiff to specifically identify the allegedly defamatory statements and demonstrate that

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the complaint satisfies the elements of a prima facie defamation action against the anonymous posters. *Id.* The Court further required that, if the plaintiff satisfies its burden, trial courts must balance the anonymous Internet poster's First Amendment rights of free speech against the strength of the prima facie case and the necessity for disclosure of the anonymous defendant's identity. *Id.*


The Court of Appeals specifically rejected the argument that a defamation plaintiff need only demonstrate a "good faith basis" for the claim or satisfy a "motion to dismiss" standard, declining to follow *In re Subpoena Duces Tecum to American Online, Inc.*, 52 Va. Cir. 26, 37 (2006), *rev'd on other grounds sub nom, America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) and *Columbia Insurance Company v. Seecandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). The Maryland Court found that these lower thresholds "would inhibit the use of the Internet as a marketplace of ideas" and would undermine concepts that "promote public discourse and must be guaranteed the protection of the First Amendment." *Id.* at 42.

In this action, the *Independent Newspapers* decision is additional support for SIIA's arguments that (i) the First Amendment protects John Doe's communication with SIIA (Brief of Intervenor-Appellee, Section V.A.1-3, pp. 13-23), (ii) Solers, Inc. failed to establish sufficient actual harm (*id.*, Section V.A.4.a., pp. 24-26), and (iii) Solers, Inc. failed to demonstrate to the Superior Court that it had exhausted alternative sources for the information (*id.*, Section V.A.4.b., pp. 26-27).

We enclose four copies of the *Independent Newspapers* decision and three copies of this letter as required by Rule 28(k). Thank you for your assistance.

Sincerely,

HOLLAND & KNIGHT LLP


Charles D. Tobin DC Bar #455593
Counsel for Intervenor-Appellee
Software & Information Industry
Association

Enclosures

cc: Daniel J. Tobin, Counsel for Appellant Solers, Inc.
Robert A. Long, Counsel for Amicus Business Software Alliance