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5	Attorneys for Movant: ANONYMOUS POSTER ON YAHOO!, AKA: harry3866			
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8	UNITED STATES DISTRICT COURT			
9	FOR THE NORTHERN DISTRICT OF CALIFORNIA			
10	SAN FRANCISCO DIVISION			
11				
12	ROCKER MANAGEMENT LLC,)		
13	Plaintiff,) Case No. CV 03-033 CRB) U.S. District Court (D. NJ)) Case No. 02-4081 (JAP)		
14	V.			
15	JOHN DOES 1 THROUGH 20,		REPLY TO OPPOSITION TO	
16	Defendants.) HARKY	73866'S MOTION TO QUASH	
17		ORAL ARGUMENT REQUESTED		
18))	May 9, 2003 10:00 a.m.	
19) Dept.:	Hon. Charles R. Breyer Courtroom 8, 19th Floor	
20))	Courtion of 17th Floor	
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I. INTRODUCTION

Rocker Management ("Rocker") sues for defamation and restraint of trade based on messages posted by movant, "harry3866," at the Yahoo! message board for Take-Two Interactive Software (TTWO). The messages contain caustic and occasionally vulgar attacks on Marc Cohodes ("Cohodes"), a Rocker hedge fund manager who has been highly critical of TTWO.

On March 20, 2003, Rocker issued a subpoena to Yahoo! by which it seeks to obtain the identifying information for the screen name harry 3866. Movant now asks this court to preserve his right to anonymously express his opinion over the Internet by quashing the Yahoo! subpoena.

II. SUPPLEMENTAL FACTS

Since the filing of harry3866's motion to quash, several additional new facts have come to light in connection with this matter. On April 14, 2003, the *Wall Street Journal* published an article about this case, entitled "Hedge Fund Finds Dark Side to Message Boards" The article reveals that Cohodes himself was also posting messages on the TTWO and ESST bulletin boards during the time period of which he complains. Plaintiff's general partner David Rocker told the *Journal* that the firm actually encourages its fund managers to engage in online debate. "It's a source of research for us," Rocker explained. Opposition Exhibit F.

As it turns out, Cohodes – using the screen name "mccohodes" – was fully engaged in a heated online debate with harry3866 in and around September, 2002. Wollack supplemental decl., ¶5-6. The debate started out with "playful insults . . . about their favorite football teams and each other's spelling mistakes." Opposition Exhibit F. However, it soon escalated into a full-scale online cat-fight, with both parties engaged in name-calling and accusations. In one post, for instance, Cohodes called movant a "coward and a lowlife." Exhibit O. In another, he responded to a group of posters at the ESST board, by stating, "MAY YOU EAT CAT FOOD UNDER A BRIDGE. You lowlifes...." Exhibit P. And in still another, he called harry3866 a "crackpot," proclaimed that Rocker would spend big money to silence other posters, and threatened any Yahoo! posters who, like himself, were involved in "the mutual fund business." Specifically, Cohodes wrote:

The article is submitted as Exhibit F to Rocker's opposition.

Irwin [Jacobs] has never said he was sorry.. He cost a lot of people alot of money, and I had to put up with the lies. He is a very very bad person and is a coward. I don't like going public a lot, because it opens up the door for crackpots like Harry and others who abuse me. Look no further than the posts on this board a week after the BARRONS article. I am sick of it.. (Rocker Partners) will spend alot of \$\$\$\$ to go after those posters one by one.. I hope none of those people work for a public company or are in the mutual fund business.. Then and only then will abuse stop... Kind of tired of it... Exhibit O.²

Moreover, Cohodes has not stopped posting as a result of this lawsuit. At the TTWO and ESST boards, his most recent posting, entitled "just had to say hello..." is dated May 1, 2003. The message appears to allude to the *Wall Street Journal* article, stating "terrible picture of me... How is the market treating everyone?" Exhibit R.

III. <u>DISCUSSION</u>

A. Movant need not certify that he is not "John Doe (Towson)."

As an initial matter, Rocker asks that this court not consider the instant motion to quash until undersigned counsel certifies that the person using the screen name harry 3866 is not the same as the person moving to quash in the New Jersey District Court, under the name "John Doe (Towson)." Rocker's theory, apparently, is that, in order "to increase the expense to Rocker of pursuing the present lawsuit" movant might be bringing motions to quash in two different courts and under two different identities. Opposition, p. 3.

Although it is a moot point – since harry3866 is **not** John Doe (Towson)³ – there is a certain *chutzpah* to Rocker's suggestion that movant is the one who is seeking to drive up the costs of this litigation. Movant did not ask to be sued for exercising his First Amendment right to post his opinion at Yahoo! message boards. Conversely, the reason he is in court seeking to prevent disclosure of his identifying information is because a large, deep-pocketed corporation is using its vastly superior resources in an effort to bully him into silence. Indeed, Cohodes even admitted as much in one of his postings on the ESST message board – warning posters such as harry3866 that Rocker "will spend a lot of \$\$\$\$ to go

Unless otherwise noted, all posts cited in this reply will contain the same grammar, spelling, and punctuation as the original Yahoo! post.

Wollack supplemental decl., ¶ 2-4; Movant's Exhibits M and N.

after [them] one by one." Exhibit Q. To now suggest that movant is the one trying to use economic blackmail against Rocker – when Cohodes's own boasts show just the opposite – is beyond absurd.

B. Movant has a First Amendment privilege to post his opinions on the Internet and to do so anonymously.

Rocker argues that this court should refuse to quash the Yahoo! subpoena because movant has not demonstrated any "personal right or privilege with respect to the subject matter requested in the subpoena." Opposition, p. 4, citing Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 635 (D.Kan. 1999). In fact, movant has demonstrated that the subpoena would interfere with perhaps the most personal right of all those guaranteed by our Constitution: the right to freely express his opinion on matters of public concern. As discussed in movant's original motion to quash, and as is well-established by Supreme Court precedent, the right to express one's opinion also includes a corollary right to do so anonymously. Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999); McIntyre v. Ohio Elections Commission, 514 U.S. 334, 341-342 (1995); Talley v. California, 362 U.S. 60 (1960).

C. Because Rocker cannot satisfy the third prong of the four-part <u>Seescandy.com</u> test, this court must quash the Yahoo! subpoena.

As discussed in harry3866's original moving papers, <u>Columbia Ins. v. Seescandy.com</u>, 185 F.R.D. 573 (N.D.Cal. 1999) set forth a four-part test for determining whether to order discovery against anonymous defendants. The third prong of this test – and the only one which movant relies on – requires the plaintiff to demonstrate, under something akin to a probable cause standard, that the underlying cause of action is actually viable. <u>Id.</u>, at 580; <u>Dendrite International</u>, <u>Inc. v. John Doe</u>, <u>No.3</u>, 342 N.J. Super 134, 155-156 (App.Div. 2001).

In establishing this four-part test, Judge D. Lowell Jensen – the author of the <u>Seescandy.com</u> opinion – pointed out that the reason such a threshold test was necessary was to prevent people who had committed no wrong from having their identities discovered through the filing of a frivolous lawsuit and the subpoenaing of their online screen names. <u>Seescandy.com</u>, <u>supra</u>, 185 F.R.D. at 578. Rocker now takes Judge Jensen's rationale and flips it on its head – arguing that, because harry3866 is not someone who has "committed no wrong," the four-part <u>Seescandy.com</u> test does not apply to him. Opposition, p. 7. Under Rocker's rationale, then, the <u>Seescandy.com</u> test would never come into play, as a plaintiff's mere

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allegation of wrongdoing would be sufficient to take it out of operation. Of course, one of the very purposes of the four-part test is to determine – at least at a threshold level – whether the party whose identifying information is sought has indeed committed some wrongdoing which could potentially give rise to liability. If not, then disclosure of the person's identifying information would needlessly infringe on his First Amendment right to speak anonymously.

Applying the <u>Seescandy.com</u> test to the instant case, this court must grant harry3866's motion to quash, as plaintiff has failed to demonstrate a viable case against harry3866.

1. <u>No reasonable viewer could believe that message board postings constitute anything other than the poster's personal opinions.</u>

Rocker does not dispute the fact that anonymous speech is part of the First Amendment's protections. Instead, it argues that the right to speak anonymously does not include the right to anonymously defame someone. (Opposition, p. 5). Movant has never contended otherwise. His point is simply that a statement cannot constitute defamation if no reasonable fact finder could interpret it as asserting "a provably false factual assertion." Rodriguez v. Panayiotou, 314 F.3d 979, 985 (9th Cir. 2002). "[P]ure opinions are protected by the First Amendment." Partington v. Bugliosi, 56 F.3d 1147, 1153 (9th Cir. 1995).

Rocker characterizes movant's argument as an "everybody's doing it" defense which would insulate people from liability for defamatory statements made over the Internet. Opposition, p. 5. This argument misses the point. The issue is not that "everybody's doing it;" the issue is that context is critical in determining whether a statement is an assertion of fact or an expression of opinion. Rodriguez, supra, 314 F.3d at 986. For instance, a statement which might be defamatory if it appeared in *Time* magazine would be "rob[bed] of defamatory meaning" if it appeared in *Hustler*. Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1193 (9th Cir. 1989). Similarly, a statement made in the front page of the newspaper would be far more likely to be understood as an assertion of fact than one which appears in the opinion-editorial page. Morningstar, Inc. v. Superior Court, 23 Cal.App.4th 676, 693 (1994); Ollman v. Evans, 750 F.2d 970, 986 (D.C. Cir. 1984), cert. den., 471 U.S. 1127 (1985). Since "the reasonable reader who peruses a column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news

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... readers can be expected to discount the statements made in that context as more likely to be the stuff of opinion than fact." Morningstar, Inc., supra, 23 Cal.App.4th at 693.

As with a newspaper's editorial section, most reasonable viewers who go to an Internet message board would intuitively understand that the postings made on those boards represent only the opinions of those doing the posting. If anything, this point is far more obvious at an Internet message board than in a newspaper editorial section, for whereas newspaper editorial writers use their own names and follow general rules of grammar, spelling, and punctuation, message board posters use pseudonyms and write in a slapdash and disorganized fashion – often with no regard for the rules of grammar and punctuation. harry3866 is no exception to this rule, as his posts are usually sloppily written, often in all lower-case letters, with little punctuation and no spacing between sentences. Thus, just as the pornographic context of *Hustler* served to attenuate the otherwise defamatory statements against Andrea Dworkin, Dworkin, supra, 867 F.2d at 1193, the "general cacophony of an Internet chat-room" eliminates any reasonable possibility that viewers could take postings to be anything other than the personal views of the poster. Global Telemedia y. Doe, 132 F.Supp.2d 1261, 1268 (C.D.Cal. 2001).

To be sure, the mere fact that a statement takes place over the Internet does not eliminate the possibility that it could be viewed as an assertion of fact. For instance, a board open only to those with specialized knowledge or expertise on the subject, who post messages using their real names and who carefully conform with the rules of grammar, punctuation, and basic etiquette, might very well be a place where viewers would take the posters seriously. TTWO's, however, is not this kind of message board. Rather, it is far more like the one in Global Telemedia, in that the postings are informal, vulgar, sensationalistic, and lacking in polish. As Rocker has made no effort to address the Global Telemedia decision – let alone to explain why its rationale should not apply to this case – this court should follow the Central District's lead and quash the subpoena on the grounds that harry3866's statements cannot reasonably be interpreted as assertions of fact.

2. The fact that Cohodes could, and did, respond to criticism with his own posts is a key factor in assessing the reasonable expectations of the audience.

Rocker spends considerable time addressing a relatively small point in harry3866's moving papers

– that Internet message boards allow those who are the targets of criticism to respond to their critics

immediately and with equal notoriety. Unfortunately, Rocker badly misstates movant's argument as one based on the premise that a statement cannot be defamatory provided the recipient has the chance to respond. Opposition, p. 5. Rocker then argues that harry3866 is attempting "to project onto Rocker an obligation to respond to his libelous statements" – a position which Rocker describes as "not law, but lunacy." Opposition, p. 5.

Contrary to Rocker's argument, harry3866 does not contend that a statement cannot be defamatory provided the target of criticism has a chance to respond. He does contend, however, that the free and convenient opportunity to respond with equal notoriety is one of the factors to consider in evaluating whether a statement is defamatory. "The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974). Indeed, this is one of the key reasons behind the heightened requirement of "actual malice" in defamation cases involving public figures. In such circumstances, the Court has recognized that the policies behind the defamation laws are less pressing, since public figures "usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements." Wolston v. Reader's Digest Association, Inc., 443 U.S. 157, 164 (1979).

Here, Cohodes was aware of the postings at the TTWO message board and had a full opportunity to respond to them. Not only that, he **did** respond, posting several messages on the TTWO and ESST boards using the screen name "mccohodes." Wollack supplemental decl., ¶¶ 5-6; Opposition Exhibit F. Moreover, the tenor of Cohodes's messages is no more dignified than those posted by harry3866. For example, in one message, Cohodes belittles movant's manhood, invites movant to e-mail him directly, and says that until movant does so, he is "a coward and a lowlife." Exhibit O. In another, Cohodes writes: "DISRESPECT.... EVERYONE GETS WHAT THEY DESERVE...MAY YOU EAT CAT FOOD UNDER A BRIDGE. You lowlifes...." Exhibit P. And in perhaps the most bellicose post of all, Cohodes refers to movant as a "crackpot" and calls Irwin Jacobs (the CEO of Qualcomm) a liar and "a very bad person [who] . . . cost a lot of people a lot of money." He then goes on to tell his critics that Rocker "will

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spend a lot of \$\$\$\$ to go after those posters one by one.. I hope none of those people work for a public company or are in the mutual fund business.." Exhibit Q.

It is bad enough that Cohodes, who makes a living bad-mouthing publicly traded companies – often in the most blunt and disparaging way possible – would then turn around and bring a defamation action when someone does the same to him. But what makes this case even worse is that Cohodes brings this suit after he voluntarily participated in the Yahoo! message boards, conducting "research" at that website by posting antagonistic and even threatening messages directed at harry3866. Yet he now sues harry3866 for statements made during an argument in which Cohodes himself was a willing participant.

The Ninth Circuit has made clear that "the reasonable expectations of the audience" are a factor to be considered in determining whether a statement is an opinion or an assertion of fact. Rodriguez, supra, 314 F.3d at 986. When two persons are engaging in what is essentially a public verbal brawl, onlookers are highly unlikely to receive the participants' statements as assertions of actual fact. Quite conversely, the reasonable onlooker would almost certainly recognize that even the most fiery rhetoric under such circumstances is tantamount to a statement of opinion. Id., at 985; Underwager v. Channel 9 Australia, 69 F.3d 361, 366-367 (9th Cir. 1995). This is particularly true when the argument takes place on an Internet message board – a venue which the recent *Wall Street Journal* article described as, "like a loud bar, with some participants behaving as though they are well past last call." Opposition Exhibit F.

In short, the fact that the message boards provided Cohodes with a free and easy way to respond to harry3866's criticisms is a significant factor weighing against Rocker's claim of defamation. This is especially true in this instance, since Cohodes took full advantage of this opportunity to respond – voluntarily choosing to engage in the game of message board mudslinging. To allow Rocker to sue for defamation under these circumstances would send a message that, in the world of online message boards, the First Amendment protects only those with pockets deep enough to file a federal lawsuit.

- D. Even if this court believes it possible to defame someone at the TTWO message boards, Rocker has still failed to demonstrate probable cause to supports its defamation claim
 - 1. None of harry 3866's posts contains sufficient factual specificity to constitute a provably false factual assertion.

"There can be no recovery for defamation without a falsehood." <u>Seelig v. Infinity Broadcasting Corporation</u>, 97 Cal.App.4th 798, 809 (2002). Thus, "a statement on matters of public concern must be provable as false before there can be liability" for defamation. <u>Milkovich v. Lorain Journal Co.</u>, 497 U.S. 1, 20 (1990). Where a particular allegation "is too vague to be capable of being proven true or false," it cannot give rise to defamation liability. <u>Seelig, supra,</u> 97 Cal.App.4th, at 811.

In <u>Seelig</u>, for example, a participant in the television reality show *Who Wants to Marry a Multimillionaire* brought suit against a San Francisco radio station after the morning hosts referred to her as a "chicken butt," "local loser," and "big skank." The California Court of Appeal acknowledged that these terms were all derogatory but noted that none had any "generally recognized meaning." <u>Seelig, supra,</u> 97 Cal.App.4th at 811. Without such definitive meaning, the terms were "devoid of any factual content" and, thus, "too vague to be capable of being proven true or false." <u>Id.</u>, at 810-811.

While Rocker asserts that this case is not about postings in which movant merely refers to Cohodes as an "asshole," "liar," or "thief," Opposition, p. 6, it is these very types of postings which it submits as examples of "actionable" statements. Opposition, p. 9; Opposition Exhibits C, D, E and N⁴. For example, in the post submitted as Exhibit C to Rocker's opposition, harry3866 accuses Cohodes of such transgressions as "not play[ing] fair," "float[ing] bull shit about a company in the press," and "spreading lies." Similarly, in the first two of the Exhibit N postings, harry3866 accuses Cohodes of being a liar, while in the second two, he refers to the "orange jumpsuit" which Cohodes will soon be wearing. Such allegations lack sufficient factual specificity to be defamatory. As Judge Chesney recently pointed out in a Northern District case involving similar subject matter, "in the context of the heated debate on the Internet, readers are more likely to understand accusations of lying as figurative, hyperbolic expressions." Nicosia v. De Rooy, 72 F.Supp.2d 1093, 1106 (N.D.Cal. 1999). The Ninth Circuit has reached a similar conclusion, noting that "the term 'lying' applies to a spectrum of untruths including 'white lies,' 'partial truths,' 'misinterpretation,' and 'deception.' As a result, [calling someone a liar] is no more than

Rocker's Exhibit N contains seven separate postings – four by harry3866 and three by insince_6. Since the latter name does not belong to him, movant will address only the four messages posted under the former screen name.

nonactionable rhetorical hyperbole, a vigorous epithet" used to express strong disagreement. <u>Underwager</u>, supra, 69 F.3d 361 at 367, internal quotations omitted.

Also falling into the category of nonactionable hyperbole are allegations of cheating, stealing, and bullying. Opposition Exhibits C, D and N. As with charges of lying, these types of allegations are inherently contextual – taking on entirely different meanings in different situations. A charge of "bullying" (Opposition Exhibit D), for example, could connote anything from criminal extortion to aggressive, but entirely legal, business tactics. Similarly, the term "stealing" is often used not in its literal sense, but to convey a particular political or social message. For instance, critics will often attack a particular tax measure as one which "steals" from one group in favor of another. A multi-national corporation might be accused by environmental activists of "robbing" developing countries of their natural resources. A state's exercise of its eminent domain power might be termed by libertarians as "stealing" people's land. A budgetary accounting device might be referred to by deficit-hawks as a "looting" of the Social Security trust fund. When used in such contexts, terms like "stealing" and "cheating" cannot reasonably be understood as alleging literal criminal conduct. Rather, they merely connote the speaker's passionately held view that the target of his speech is engaged in irresponsible and immoral behavior. The First Amendment specifically protects this type of poetic license, particularly on issues of public concern.

Yet another example of nonactionable hyperbole is movant's allegation that Rocker and Cohodes "threaten" analysts who are bullish on TTWO. See Complaint, Original Exhibit B, ¶ 10; Opposition Exhibit N, p. 5. While Rocker's complaint identifies this post as defamatory, the facts of this case show precisely why the post is too vague to give rise to liability. For, after all, it was Cohodes whose September 17, 2002 post ominously warned that he hoped none of the Yahoo! posters "are in the mutual fund business" because Rocker "will spend a lot of \$\$\$\$ to go after" them. Exhibit Q. In light of this post, was it really so off-base for harry3866 to later accuse Cohodes of threatening other analysts? Far from being actionable defamation, harry3866's assertion appears to constitute a more than fair characterization of Cohodes's September 17, 2002 post.

In an effort to portray movant's statements as something beyond mere colorful invective, Rocker points to postings in which harry3866 levies allegations against Cohodes, described as coming from "other analysts," "friends at TTWO," and other anonymous sources. Opposition, p. 6. In particular,

Rocker singles out those posts contained in Opposition Exhibits C, D, and E, in which harry 3866 indicates that, either through his own research, his discussions with other analysts, or his discussions with people at TTWO, he has formed the conclusion that Cohodes is engaged in unethical business practices.

In <u>Seelig</u>, the California Court of Appeal rejected the argument that a vague and unspecific allegation could become actionable merely because that allegation was attributed to a third party with insider knowledge. <u>Seelig</u>, <u>supra</u>, 97 Cal.App.4th at 812. The radio show host in <u>Seelig</u> had stated (falsely, as it turned out) that plaintiff was "the ex-wife of someone who works at our sister station down the hall. And uh yeh (sic), he just says what a big skank she is." <u>Id.</u>, at 803. The plaintiff thus argued – as Rocker is arguing here – that the defendant's remarks became actionable because he had attributed the term "big skank" to a specific source, thereby enhancing its credibility and transforming it from a statement of opinion into an assertion of fact. <u>Id.</u> at 811-812. The Court of Appeal rejected this argument, saying that if anyone had an actionable claim it was the person who was falsely quoted, not the person who was the subject of that quote. <u>Id.</u>, at 812.

Seelig's rationale applies with equal force to this case. For example, in Opposition Exhibit C, harry3866 cites his own research, as well as other unidentified contacts, in telling Cohodes that "you do not play fair," you "float bull shit about a company in the press," and you "lie cheat and steal, then get bent out of shape when someone gives it back to you." As previously discussed, however, none of these statements is specific enough to constitute a "provably false factual assertion." Rodriguez, supra, 314 F.3d at 985. Therefore, they cannot become actionable merely because they are represented as coming from knowledgeable sources.

Similarly, in the Exhibit D post, harry3866 specifically disclaims the ability to make particularized allegations against Cohodes, stating, "can i give you any hard evidence that cohodes and rocker bully other analyst....at the moment no." He then asserts that he has spoken with many people, including some analysts, about "rocker tatics," and that "what they had to say . . . was not pretty." These statements are even more lacking in specificity than the "big skank" comments at issue in <u>Seelig</u>. While movant's post refers cryptically to Rocker's "tatics" (sic) and its "bully[ing]" of other analysts, it does not explain how that bullying was accomplished and does not give any examples. Consequently, the statement contains no allegation to be proved true or false; the allegation of "bullying" is far too general and ill-defined to be

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subject to proof or disproof. The same is also true of harry 3866's assertion that Rocker's tactics are "not pretty" – notwithstanding the fact that harry 3866 attributes his beliefs to unidentified third party analysts. For, no matter who the source for movant's "information," the fact remains: what constitutes "pretty" business tactics is obviously a matter of opinion and not something that can be proved true or false.

Moreover, in the Exhibit D post, harry 3866 even goes to some length to qualify his statements, assuring his readers that he has no "hard evidence" to support his bullying allegations, but that this is simply the conclusion he has reached based on his assessment of the information available to him. "[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." Partington, supra, 56 F.3d at 1156-1157; see also Nicosia, supra, 72 F.Supp. at 1102. This is precisely the situation with regard to the post in Rocker's Exhibit D.

Finally, Rocker also cites Opposition Exhibit E – a July 10, 2001 post entitled "max payne" – as an example of a post in which harry 3866 purports to possess "insider information" to support his opinion. Opposition, pp. 6, 9. The post, in fact, has nothing to do with either Rocker or Cohodes and does not even mention their names. Rather, the subject matter of the post concerns TTWO's soon-to-be released video game and the "insider information" concerns the status of the game's expected release date. How can this constitute defamation against Rocker?

Exhibit E's sole plausible reference to Cohodes is contained in the post's final sentence, which states that, after the new video game is released, "we will see . . . who is full of shit." Even if this statement could be interpreted as a veiled reference to Rocker or Cohodes, the phrase "full of shit" is even less descriptive than the term "big skank," held unactionable in <u>Seelig</u>. Whereas "big skank" would at least evoke a certain specific imagery in the mind of the average listener, "full of shit" conjures up no such visualization. Were this case some day to proceed to trial, how would Cohodes go about proving that he is **not** "full of shit?"

The most specific allegation which Rocker makes comes not in any of its exhibits, but in the complaint itself – where it claims that harry 3866 "posted messages alleging that Rocker is the subject of a Securities and Exchange Commission investigation." Exhibit B to Original Motion to Quash. On this

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allegation, however, Rocker does not directly quote from harry 3866's posts, but merely paraphrases them. As it turns out, those paraphrases also contain a significant amount of interpretation, for in none of the seven posts submitted with Rocker's opposition does harry 3866 actually claim that Rocker or Cohodes is being investigated by the SEC. Rather, the most he actually says is that, "The sec is sniffing around rocker partners, and asking questions," Exhibit N, p. 6, a statement which could encompass even routine, everyday questions which the SEC asks of any investment management firm. As with other allegations made in harry 3866's posts, the phrase "sniffing around" is not sufficiently well defined to be provably false.

In short, the posts submitted as Rocker's Exhibits are all far too lacking in specificity to constitute defamatory statements. For this reason, Rocker's complaint has little chance of surviving a motion to dismiss – let alone prevailing on the merits. Given the slim likelihood of success, this court should quash the Yahoo! subpoena.

2. Rocker has never alleged that harry 3866's statements were false or that harry 3866 acted with actual malice.

As a final matter, Rocker's opposition fails to address a fundamental defect in its complaint – its failure to allege that movant's statements were false or that he acted with actual malice in making those statements. In light of this fatal defect on the face of the complaint, Rocker's complaint would not even survive a motion to dismiss for failure to state a cause of action. Therefore, this court should grant harry 3866's motion to quash.

IV. CONCLUSION

right to anonymously express his opinion over the Internet.

For all of the foregoing reasons, and the reasons set forth in harry 3866's original moving papers,

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this court should issue an order quashing the Yahoo! subpoena and upholding movant's First Amendment

24 DATED: May 5, 2003

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Respectfully Submitted,

MINAMI, LEW & TAMAKI LLP

SOLOMON WOLLACK

Attorneys for Movant Anonymous Poster on Yahoo!, AKA: harry3866