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March 17, 2009

**By Hand Delivery**

Mr. Garland Pinkston, Jr.  
Clerk, District of Columbia Court of Appeals  
Moultrie Courthouse  
500 Indiana Avenue, N.W., Sixth Floor  
Washington, DC 20001-2131

Re: *Solers, Inc. v. Doe, et al.* (Appeal No. 07-CV-00159)

Dear Mr. Pinkston:

Appellant Solers, Inc. ("Solers") respectfully submits this response to the Notice of Supplemental Authority filed by Intervenor-Appellee Software & Information Industry Association ("SIIA") on March 4, 2009. Solers submits this letter pursuant to Rule 28(k).

SIIA's submission discusses a decision recently issued by the Maryland Court of Appeals in *Independent Newspapers Inc. v. Brodie*, No. 63, Sept. Term 2008. Like the case cited by SIIA in its previous Notice of Supplemental Authority, *Brodie* does not support SIIA's legal arguments in this appeal.

Solers has consistently argued that an important distinction exists between defamatory statements published privately via e-mail and those published publicly via Internet chat rooms, message boards, and the like. See Brief of Appellant, § V.C.1; Reply Brief, § II.C. Public communications in an Internet discussion forum are more likely to trigger First Amendment concern, whereas private communications via e-mail are entitled to no greater protection than defamatory statements in any purely private context, such as over the telephone or in a private letter. In *Brodie*, the Maryland Court of Appeals recognizes this distinction, referring to e-mails and instant messages as "a first category of such communications, where users generally know with whom they are communicating," whereas "[b]logs, chatrooms and discussion forums constitute a different category of Internet communications, in which users often post statements to the world at large without specification." See *Brodie* at 4, 6.

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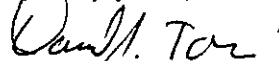
Since the defamation at issue in this case was published via e-mail by Defendant John Doe to SIIA, and since there is no dispute that SIIA is aware of Doe's identity, the communications at issue in this case clearly fall into the "first category" discussed in *Brodie*. The communications at issue in *Brodie*, however, involved the second category, *i.e.*, statements made through an Internet discussion forum. Indeed, the result in *Brodie* only makes sense in light of this distinction. To ensure that defendants who have allegedly published defamatory statements anonymously in a public Internet forum are adequately protected, *Brodie* advises that such defendants should receive notice of the request for their identity via a posting on the relevant message board. *See Brodie* at 44. Such notice can be provided when the relevant communications in fact occur on an Internet message board, but such notice is not possible here, where Solers has neither contact information for Doe nor access to an Internet forum through which Doe published his defamatory statements.

The *Brodie* opinion recognizes the importance of "appropriately balanc[ing] a speaker's constitutional right to anonymous Internet speech with a plaintiff's right to seek judicial redress from defamatory remarks." *See Brodie* at 41. However, the *Brodie* Court would not have reached this issue if the facts were like those underlying this appeal. Here, Defendant Doe did not engage in "anonymous Internet speech" in a public Internet forum; Doe instead sent defamatory e-mails. For all of the reasons discussed in Solers' briefs, these circumstances trigger neither constitutional protection nor proper consideration of an appropriate balancing test. *See* Brief of Appellant, §§ V.B., V.C.1; Reply Brief, § II.C.

In sum, the Maryland Court of Appeals in *Brodie* merely recognized that a plaintiff may not obtain discovery where the alleged defamation either did not pertain to him or had not been asserted timely in light of Maryland's statute of limitations. *See Brodie* at 28-29. To provide prospective guidance to courts dealing with similar circumstances, the Court of Appeals advised that future plaintiffs should be required "to notify the anonymous posters . . . including posting a message of notification of the identity request on the message board[.]" *Brodie* at 44. Such circumstances simply have no relevance to the facts at issue in this appeal, which involve neither an Internet message board nor some other public forum. Accordingly, the guidance offered by the Maryland Court of Appeals in *Brodie* is inapposite to resolution of the issues before this Court.

Per Rule 28(k), enclosed are the original and three copies of this letter.

Very truly yours,



Daniel J. Tobin

DJT/jl

Enclosures

cc: Charles D. Tobin, Esq.  
Robert A. Long, Esq.