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John Doe

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN UNION COMPANY Plaintiff, v. SOUTHWEST GAS CORPORATION, et al., Defendants.	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF JOHN DOE TO QUASH THIRD PARTY SUBPOENA TO YAHOO! INC. Date: _____ Time: _____ Dept: _____

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES

INTRODUCTION

"People should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discovery their identities." *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (discussing standards for allowing discovery to reveal a Defendant's identity in a domain name dispute).

Here, Defendant Southwest Gas (hereinafter "Southwest") has issued a subpoena to an online service provider Yahoo! Inc. (hereinafter "Yahoo") seeking to have Yahoo reveal the identity and online correspondence of Movant John Doe, a third party whose only known connection to this case is that he participated in a public discussion concerning Defendant's business held on a Yahoo! message board. The subpoena arises out of litigation currently pending in the Federal District Court in Arizona between Southwest and Southern Union Company.

The apparent basis for this subpoena is Southwest's conjecture that someone posting to the message board may have been doing so in breach of a Standstill Agreement in place between Plaintiff and Defendant during merger discussions. Based upon this generalized suspicion, Plaintiff subpoenaed all thirty-eight participants in the public discussion group who posted during the existence of the Standstill Agreement. The Subpoena seeks not only the identities of the posters, but also "any messages sent or received" by them through Yahoo and "any other information" about them held by Yahoo.

Thus, although it has made no allegations of any liability against Doe, Southwest seeks to invoke this Court's authority in a way that would infringe irreparably Doe's First Amendment right to speak anonymously. It is attempting to employ the discovery process in a fishing expedition that would invade the privacy and anonymity of a large number of third parties in the hope that it could turn up evidence that one of them is actually affiliated with its opponent. Under these circumstances, enforcement of the subpoena would terminate defendant's right to engage in anonymous speech, and would impose undue burdens under the First Amendment. Accordingly, this Court should quash the subpoena[1].

Additionally, given the growing problem of third party civil subpoenas issued to Internet service providers in order to breach the anonymity of their users, and the uncertainty about the legal standards applicable, petitioner here urges the court to announce a test that can be used by these parties and others in this District to evaluate such subpoenas. Given the First Amendment issues at stake here, alleviation of the current uncertainty in this area of the law can give much needed clarity and breathing room to speakers and service providers, while still maintaining the ability of litigants to receive specific, relevant information about anonymous posters when that information is central to their claims, when those claims are viable and when they can acquire it in no other manner.

STATEMENT OF FACTS

John Doe is an individual who has unwittingly been caught up in a $750,000,000 breach of contract claim between two mammoth corporations. According to the Complaint, Southern Union Company (hereinafter "Southern Union") is claiming that Southwest engaged in multiple acts of fraud and misrepresentation designed to prevent Southwest's merger with Southern Union and forward Southwest's merger with ONEOK, Inc. (hereinafter "ONEOK"). John Doe happened to post on Yahoo's Southwest Message Board during a period where a Standstill Agreement (hereinafter "the Agreement") was in place between those parties pending merger discussions between Plaintiff and Defendant.

I. The Merger

According to its complaint, Southern Union claims that it expressed its interest in merging with Southwest in May 1998. Southwest told Southern Union that it was not interested in merging at that time, however, it initiated talks with ONEOK about merging their two companies in September 1998 and subsequently announced their intent to merge. On February 1, 1999, Southern Union formally made an offer to purchase all of Southwest's stock at a price significantly higher than the OKONE offer. Southwest and Southern Union entered into the Agreement on February 21, 1999, "based on Southwest's explicit representations that it would thoroughly review the Sounthern Union offer." The Agreement, which stated that it was for the purpose of allowing the parties to make an "evaluation" of the Southern Union offer, including a confidentiality provision.

The battleground then shifted to the regulatory arena, where Southern Union alleges that Southwest engaged in further acts of misrepresentation and fraud in "encouraging" state regulators to cast shadows on Southern Union's offer and promote the merger with OKONE.[2] On April *25,* 1999, the Southwest Board finally voted to reject the Southern Union offer, and in an April 26 press release, Southwest stated that its Board had responded to perceived "regulatory" difficulties with that offer. Southern Union subsequently filed a complaint in the United States District Court for the District of Arizona alleging fraud and misrepresentation in the contracting of the Agreement and requesting that it be declared void.

II. Yahoo Message Boards

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union,* 521 U.S. 844, 853, 870 (1997), "From a publisher's standpoint, it constitutes a vast platform from which to address and hear from a world-wide audience of millions or readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a

pamphleteer." The Court held that the Internet is a fully protected medium of expression. *Id.*

In line with the Supreme Court's observations about the nature of the Internet, Yahoo has organized public outlets for the expression of opinions about major companies. These are based upon the idea that people have personal and economic interests in the corporations that shape our world, and in the stocks they hope will provide for a secure future. They also recognize that people love to share their opinions with anyone who will listen. These outlets, called the Message Boards, are an electronic bulletin board system where individuals freely discuss major companies by posting comments for others to read and respond to.

Yahoo maintains a message board for every publicly traded company and permits anyone to post messages to it. The individuals who post messages generally do so under a "handle" - similar to the old system of CB's with truck drivers. Nothing prevents an individual from using his real name, but, as an inspection of the message board at issue in this case will reveal, most people choose anonymous nicknames. These typically colorful monikers protect the writer's identity from those who disagree with him or her, and encourage the uninhibited exchange of ideas and opinions. Such exchanges are often very heated and, as seen from the various messages and responses on the message board at issue in this case, they are sometimes filled with invective and insult. Most, if not everything, that is said on message boards is taken with a grain of salt.

One of Yahoo's message boards pertains to Southwest. Many members of the public regularly turn to the Yahoo message board as a source of information about Southwest. As of the date this brief is filed, 379 messages have been posted on the board; 88 were posted during the period the Agreement was in effect. A casual review of those messages reveals an enormous variety of topics and posters. Movant John Doe is one of the many members of the public who have visited the Yahoo message board for Southwest and participated in the discussion. He used the the screen name "BindlePete."

In order to sign up for a message board, a person must give Yahoo their birthday, zip code, gender and an alternate e-mail address. In addition, in order to have a regular Yahoo e-mail address (which BindlePete does) Yahoo gathers a name, address, occupation and industry from each user.[3]

III. The Yahoo Subpoena

On September 26, 2000, Southwest issued a subpoena in the Northern District of California requesting "[A]ny and all documents in hard copy or electronic format in Yahoo!'s possession or which can be created from Yahoo! records relating to the following Yahoo IDs" and included a list of 39 IDs including that of "BindlePete." A true and correct copy of the subpoena is attached hereto as Exhibit "A".

Based on conversations with Southwest's counsel, Movant understands that the 39 individuals whose information is sought in the subpoena were chosen simply because

they posted on the Southwest message board during the period where the Agreement was in force. The subpoena states that the request:

includes but is not limited to, any and all information including but not limited to the registration of the Yahoo! ID; any and all postings made under the Yahoo! ID, including but not limited to all financial message boards; any messages either sent or received under the Yahoo! ID; any action taken by Yahoo! related to the Yahoo! ID; any other information related to the Yahoo! IDs listed above.

On Wednesday October 11, 2000 Doe received an email from Yahoo notifying him that Yahoo had received the subpoena and intended to turn over the requested information unless they received notice that a motion to quash the subpoena had been filed, or the matter had been otherwise resolved. Doe subsequently filed this Motion to prevent the highly personal information he has given to Yahoo from being released. Here, this includes:

1. Doe's name, address, birthday, occupation and gender.
2. The content of all of the messages he has sent or received through his Yahoo account, and
3. Other non-content information that Yahoo maintains about him (including the Internet Protocol address showing where his postings originate).

Movant seeks to quash the subpena as it would apply to all three categories of information.

ARGUMENT

I. THIS COURT SHOULD QUASH THE SUBPOENA TO YAHOO BECAUSE IDENTIFICATION OF RESPONDENT DOE WOULD DESTROY HIS RIGHT TO SPEAK ANONYMOUSLY.

Petitioner seeks to use the subpoena power of this court to identify[4] an Internet speaker. This type of discovery directly destroys Doe's constitutional right to speak anonymously. On its face, therefore, the release of Doe's identity violates the First Amendment.

A. The First Amendment Protects the Right to Speak Anonymously.

It is well-established that the First Amendment protects the right to speak anonymously. The Supreme Court has repeatedly upheld this right. *Buckley v. American Constitutional Law Found.* 119 S. Ct. 636, 645-646 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain through the authors of the Federalist Papers. As the Supreme Court said in *McIntyre:*

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of 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. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision 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, 356.

As noted above, the Supreme Court has firmly established that Internet speech is fully protected under the First Amendment. Several cases have upheld the right to communicate anonymously over the Internet. *E.g.*, *ACLU v. Johnson*, 4 F.Supp.2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *ACLU v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997).

At the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. That is because the technology of the Internet is such that any speaker who sends an e mail or visits a website leaves behind an electronic footprint that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can snoop on communications to learn who is saying what to whom. As a result, many informed observers have argued that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139.

B. Enforcing this Subpoena Would Violate Defendant's Substantive Constitutional Rights.

Southwest asks this Court to enforce a subpoena to obtain defendant's identity and to terminate once and for all his right to speak anonymously. A court order enforcing a subpoena, even when issued at the behest of a private party, constitutes state action which is subject to constitutional limitations, including the First Amendment. *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960). It has acknowledged that abridgment of the rights to

speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461.

Due process requires the showing of a compelling subordinating interest where, as here, disclosure threatens to impair significantly fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. *See also In re Grand Jury Subpoena: Subpoena Duces Tecum v. John Doe 819*, 829 F.2d 1291 (4th cir. 1987) (court must strictly scrutinize subpoena duces tecum that threatens to chill the exercise of First Amendment rights).

At this stage of the case, it is not known whether Southwest could make a showing that there is a compelling interest for Doe's identity. In informal discussions, however, Southwest's counsel has indicated that it sought to pierce the anonymity of Doe and thirty-eight other speakers simply because they happened to post to a public message board during the period where a standstill agreement between the two parties to this action was in effect.

Regardless of what test this Court may adopt to evaluate the sufficiency of the defendant's claims (which we address below) it is clear that some showing must be made by Southwest before there can be any order compelling production. *See Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). *Cf. Quad Graphics, Inc. v. Southern Adirondack Library System*, 664 N.Y.S.2d 225, 228 (NY Sup. Ct., Saratoga County 1997) (release of identities will not be compelled where doing so would breach protected interests and no criminal or civil charges have been filed).

C. The Appropriate Test For Identification of Persons Participating in Public Message Boards via a Third Party Subpoena Is Test Used to Determine When A Litigant May Receive Confidential Information Gathered by Journalists.

Because compelled identification of anonymous speakers trenches on their First Amendment right to remain anonymous, the First Amendment creates a qualified privilege against disclosure. Movant has been unable, however, to locate authority describing how that privilege is to be applied in the increasingly common situation of a third-party civil subpoena seeking the identity of a nonparty online speaker from his or her Internet Service Provider.

Courts have a great deal of experience in addressing a similar situation, however -- that of a third party journalist subpoenaed for confidential information obtained in the course of reporting. Both journalists and Yahoo gather otherwise confidential information during the normal scope of their activities. Journalists usually require confidential information from speakers, both source information and facts, in order to ensure proper verification of a story. Good journalistic standards and practices require this. Similarly, in its normal technical administration of the message boards, Yahoo gathers identifying information from those who use the message board. In both instances the information is

gathered for a specific purpose that is unrelated to the subsequent litigation where the information is sought.

Furthermore, forcing the release of the information in both instances creates a chilling effect on the speech not only of the persons whose identity is revealed, but on many other persons as well. The risk underlying the journalists' privilege is that, faced with losing their anonymity, persons will refuse to talk to journalists. The risk here is that people will no longer participate in public message boards. Thus, the risk in failing to protect anonymity in both cases is the same: a chill on First Amendment protected expression.

To overcome the First Amendment privilege asserted by journalists when asked to reveal confidential information, the party seeking the discovery of the information must show "that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." *Farr v. Pitchess*, 522 F.2d 464, 464 (9th Cir. 1975). Stated alternatively, the question is whether "the paramount interest served by the unrestricted flow of public information protected by the First Amendment outweighs the subordinate interest served by the liberal discovery provisions embodied in the Federal Rules of Civil Procedure." *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D.Fl. 1995). In applying this privilege, the 9th Circuit has recognized that "routine court-compelled disclosure of research materials poses a serious threat to the validity of the newsgathering process." *Mark v. Shoen*, 48 F.3d a 415-416 (9th Cir. 1995). Similarly, as noted above, routine court-compelled disclosure of identities of persons participating in message boards could pose a serious threat to the ongoing viability of these public discussions. Thus, given the similar First Amendment interests at stake, Doe maintains that the privilege that allows journalists to maintaining the confidentiality of their sources should be applied to third party subpoenas seeking identifying information about anonymous speakers in publicly available message boards.

The test applicable to subpoenas issued to non-party journalists in civil cases is: (1) that the information is of certain relevance; (2) that there is a compelling reason for the disclosure; (3) that other means of obtaining the information have been exhausted; and (4) that the information sought goes to the heart of the seeker's case. *Los Angeles Memorial Coliseum Commission, v. Nat'l Football League, et al*, 89 F.R.D. 489. (CD. Cal. 1981). *See also Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *United States v. Cuthbertson*, 630 F.2d 139, 146 149 (3d Cir. 1980) (qualified privilege recognized under common law).

Here, in order to meet this test, Southwest would have to demonstrate that it there are no other methods, such as taking the deposition of persons suspected to have violated the standstill agreement or reviewing the documents maintained by the other parties, that they could use to determine whether this particular John Doe was affiliated with Plaintiff. In addition, it would have to demonstrate that the identity of this particular John Doe was of certain relevance and goes to the heart of the issues of the case.

California State Courts have applied a similar First Amendment privilege to protect the privacy rights of individuals who "wish to promulgate their information and ideas in a public forum while keeping their identities secret." *Rancho Publications v. Superior Court* 68 Cal.App.4th 1538, 1545 (1999). In a case quite similar to this one, the Fourth District Court of Appeal quashed a subpoena issued by a hospital in a defamation action. The subpoena sought to compel a newspaper to disclose the names of anonymous authors of nondefamatory advertorials critical the hospital based upon its belief that the authors were actually the Defendants or affiliated with them.

After first noting the long line of federal and state caselaw recognizing the "qualified constitutional privilege to block civil discovery that impinges upon free speech or privacy concerns of the recipients of discovery demands and innocent third parties as well" (*Rancho Publications* at 1547), the Court articulated the balancing test as adopted by California State Courts:

Courts carefully balance the 'compelling' public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights. . . The need for discovery is balanced against the magnitude of the privacy invasions, and the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material.

Id. At 1549. Applying that test to the facts before it, the Court noted that the reason the hospital sought the names was a belief that the persons who wrote the advertorials may have also written or been affiliated with the writers of other, defamatory writings that were at issue in the litigation. The court held that this basis was insufficient to pierce the anonymity of the speakers. It noted:

This is a classic First Amendment example of why the speakers may have chosen anonymity to avoid being swept into litigation purely out of spite for speaking out on a hotly contested issues. The impact of the proposed discovery upon protected constitutional rights is severe.

Id. At 1549.

The situation here is remarkably similar. Southwest seeks to pierce the anonymity of Doe and the other 38 speakers based upon its unsupported belief that those speakers may be persons who were bound by a contractual agreement not to speak on the subject or affiliated with those who were so bound. Revealing the identity of Doe and the others will obviously chill them and others in their speech in the Yahoo public message boards. As in *Rancho Publications*, Southwest's thin rationale should be held insufficient to justify destroying the anonymity of the speakers.

This test for subpoenas seeking the identity of third parties is consistent with a test recently applied by Judge Jensen of this Court in a case where the plaintiff was seeking to identify defendants in a trademark action. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). The court required the plaintiff to make a good faith effort

to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus giving them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the trademark claims made against the anonymous defendants.

Here, Southwest's subpoena does not seek the identity of a potential defendant, but instead only the identity of third parties who may later prove to be affiliated with the Plaintiff. In addition, since the targets of the subpoenas are those who were exercising their First Amendment rights to comment on matters of public concern, and since they were doing so in a public forum, the risk of a chilling effect from a less rigorous test is profound. Thus, in order to properly protect the right of third parties to litigation to speak Movant urges this court to adopt the "journalist's privilege" test noted above for consideration of subpoena's issued to online service providers seeking identifying information about their subscribers when those subscribers are not parties to the pending litigation.

II. THE SUBPOENA GREATLY EXCEEDS THE SCOPE OF INFORMATION THAT MAY BE TURNED OVER UNDER SETTLED LAW.

As further evidence of the "fishing expedition" nature of the discovery requests here, Southwest has issued a subpoena that not only seeks the identity of John Doe and the thirty-eight others, but also seeks 1) *all* messages sent or received by John Doe and the thirty-eight others, regardless of whether they bear any relation to this dispute and 2) *all* other information about Doe that Yahoo has, regardless of whether it has any relevance to the subject dispute. Specifically, it seeks:

> any and all information relating to the registration of the Yahoo! ID; any and all postings made under the Yahoo! ID, including but not limited to all financial message boards; any messages either sent or received under the Yahoo! ID; any action taken by Yahoo! relating to the Yahoo! ID; any other information relating to the Yahoo Ids listed above.

Since John Doe (and presumably many others whose information was subpoenaed) uses his Yahoo account for general personal communication, the scope of this request is breathtaking. It could include private discussions with his family members, doctors and even attorneys. It could include private, confidential or embarrassing information that bears no relation to this dispute.

A. The Content of Messages Sent To and From Doe is Protected from Disclosure by the Electronic Communications Privacy Act.

The Electronic Communications Privacy Act prohibits online services such as Yahoo from knowingly disclosing the contents of communications stored, carried or maintained on their systems. 18 U.S.C. § 2702. As one Court has observed, "[W]ith literally the entire world on the world-wide web, enforcement of the ECPA is of great concern to those who bare the most personal information about their lives in private

accounts on the Internet." *McVeigh v. Cohen*, 983 F.Supp. 215, 221 (injunction granted to prevent Navy from discharging officer for violation of "Don't Ask, Don't Tell" policy when identity and other information about officer gained through violation of ECPA). Although the law contains several exceptions, none of them are applicable here. Thus, to the extent that the subpoena seeks the content of any messages, whether sent by Doe or sent by others to him, it must be quashed.

B. The Non-Content Information About Doe Held by Yahoo is Not "Reasonably Calculated" to Lead to the Discovery of Admissible Information.

In addition, the subpoena plainly seeks non-content information that is not reasonably calculated to lead to the discovery of admissible information about Doe or other third parties. Federal Rule of Civil Procedure 26(b)(1). Southwest subpoenaed *all* persons who participated in the Southwest message board, regardless of the individual statements that that each may have made or other evidence of individualized suspicion. It therefore made no "reasonable calculation" about whether Doe was likely affiliated with its opponents. Further, by seeking *all* information that Yahoo had about these subscribers, Southwest obviously made no "reasonable calculation" about what information Yahoo possessed about Doe that would be relevant to the litigation between the parties.

As noted above, the basis for the subpoena is well aside from the core of the underlying breach of contract claim. It is difficult to imagine what possible admissible information could be gleaned from general information concerning Doe's account with Yahoo. At a minimum, the request for non-content information about third party's such as Doe in Yahoo's possession should be quashed unless Plaintiff can demonstrate with specificity both the factual basis for its need for this information about Doe and how that information would materially advance viable issues in the litigation. Alternatively, a protective order should issue to keep this information confidential and only allow access to it by the attorneys for the parties.

CONCLUSION

Based upon the foregoing, Movant John Doe respectfully requests that this motion to quash the subpoena be granted.

Respectfully submitted,

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November 2, 2000

Attorneys for Movant JOHN DOE

JOINDER OF JOHN DOE (2) TO MOTION OF JOHN DOE TO TO QUASH THIRD PARTY SUBPOENA TO YAHOO! INC.

JOHN DOE (2), hereby joins in the Motion of John Doe to Quash Third Party Subpoena to Yahoo!Inc. filed in this Court on November 2, 2000.

John Doe(2) is another of the thirty-eight participants whose identity and messages have been sought pursuant to subpoena by Defendant Southwest Gas Corporation in the above-referenced action. He is identified as philn_1998 in the Subpoena, which is attached as Exhibit A to the Motion to Quash filed by John Doe in this action on November 2, 2000.

John Doe (2), who uses the screen name "philn_1998,"is in the exact same position with regard to this subpoena as John Doe, who uses the screen name "bindlepete." Like Bindlepete, John Doe (2) is one of the many members of the public who have visited the Yahoo message board for Southwest and participated in the discussions hosted there. His identifying information is presumably being sought because of Southwest's conjecture that he may have been bound by the Standstill Agreement. He seeks to Quash this Subpoena because:

1. it violates his right to speak anonymously,
2. it seeks information protected by the Electronic Communication Privacy Act, and
3. it is overbroad.

Since both the facts underlying Southwest's subpoena of information about John Doe (2) and the grounds upon which John Doe (2) seeks to quash the subpoena are the same as those for raised in the Motion to Quash brought by John Doe, John Doe (2) seeks to join in that motion.[5]

Accordingly, based upon the legal and factual assertions contained in the Motion of John Doe to quash the subpoena, John Doe (2) respectfully joins in that motion and requests that the motion be granted as to him as well.

ENDNOTES

1. Alternately, at a minimum, the Court should issue a protective order to limit access to this information to only the attorneys for the parties until some basis for liability or an evidentiary link between the poster and the Plaintiff has been established. Should the

Court decline to quash the subpoena as detailed below, we respectfully request that such an order issue to limit the invasion of privacy suffered by Doe and the other participants in the message board.
[back to main text]

2. Notably, the Yahoo message board is not mentioned in the Complaint. Instead, the claims alleged include: (A) unlawfully eliciting the assistance of the then-Chairman of the ACC to lobby for the ONEOK-Southwest deal; (B) attempted to corrupt and influence California's utility regulatory authority against any Southern Union-Southwest merger and in favor of the ONEOK Southwest deal; (C) attempted to corrupt and influence Nevada's utility regulatory authority and the office of the Governor of Nevada against any Southern Union-Southwest merger and in favor of the ONEOK-Southwest deal; (D) fraudulently induced the Director of the Arizona Residential Utility Consumer Office, to present false and misleading statements about the Southern Union offer to the Southwest Board; (E) misleading the Southwest Board with a presentation by Jim Fischer, a former Missouri regulator, that was almost exclusively negative to Southern Union but based on misleading information provided to Fischer by ONEOK; and (F) misleading the Southwest Board by presenting it with, among other things, a letter and recorded telephone call which falsely purported to reflect the views of the ACC.
[back to main text]

3. *See* http://edit.yahoo.com/config/eval_register
[back to main text]

4. The term "identity" here refers to more than simply Doe's name. As noted above, Yahoo gathers additional identifying information from its subscribers in the normal course of its business, including birthday, address, occupation and gender information. Since this information, singly or collectively can be easily used by Defendants to discover Doe's name, it should be withheld as well. Thus, for the remainder of this brief, the term "identity" includes all such identifying information held by Yahoo.
[back to main text]

5. Both John Doe and John Doe (2) will agree to a continuance of the briefing schedule set by the Court in this matter in order to accommodate Southwest or any other party that might wish to oppose this motion. Counsel for John Does will attempt to reach agreement informally with counsel for Southwest on this issue.
[back to main text]