

1 Louis J. Hoffman (Ariz. State Bar #009722)
2 HOFFMAN & ZUR
3 11811 North Tatum Boulevard, Suite 2100
4 Phoenix, Arizona 85028
5 Tel.: (480) 948-3295
6 Fax: (480) 948-3387
7 Attorney for Defendant

8 **SUPERIOR COURT OF ARIZONA**
9 **COUNTY OF MARICOPA**

10 Montana Holdings Ltd.) Case No. CV2007-014436
11 a Bahamanian corporation,)
12 Plaintiff,) **MOTION TO DISMISS AND TO**
13 vs.) **QUASH SUBPOENAS AND**
14) **MEMORANDUM IN SUPPORT**
15 John Does I-X,)
16 Defendants.)

17 **INTRODUCTION**

18 Counsel is entering a special appearance on behalf of defendant John Doe for the
19 purpose of challenging personal jurisdiction and moving to quash two subpoenas
20 issued by plaintiff on August 10, 2007, to GoDaddy.com, Inc. and Domains by Proxy,
21 Inc. Doe is the sole person responsible for creating and registering the website at issue
22 in this case and does not claim Arizona residency.

23 The complaint should be dismissed for lack of personal jurisdiction because
24 plaintiff filed suit in a foreign jurisdiction where no party resides. Doe is not alleged to
25 have any significant connection to this forum, and the Arizona presence of the third-
26 party registrar does not create minimum contacts sufficient for personal jurisdiction in
27 this state with respect to a case brought by a third party (*i.e.*, not the registrar) based on
28 the content of the website, under clear case law.

1 Wishing to remain anonymous, Doe registered that website through Domains By
2 Proxy, Inc., a domain-name registrar formed to protect anonymity, and hosted the
3 website through that company's parent, GoDaddy.com, Inc., which apparently is the
4 largest domain-name registrar in the world. GoDaddy and its subsidiary are based in
5 Scottsdale, Arizona. Complaint, ¶¶9-10.

6 The subpoenas seek to require the registrar/hosting service to disclose the
7 identity of those persons responsible for posting the website as well as certain
8 information concerning the website's traffic and content. Montana did not sue the
9 registrars or claim that any Arizona party was involved in the complained-of conduct.

10 Montana's Complaint does not allege that Montana has any connection with the
11 State of Arizona. Nor does the Complaint allege that the website statements had any
12 harm or impact in Arizona. Montana is a non-Arizona (and non-U.S.) entity, and the
13 website concerns real estate in the Bahamas. *See* Complaint, ¶¶2, 8.

14 Montana did not plead (and has no evidence) that Doe is resident in Arizona or
15 took any action in Arizona related to the complained-of postings, such as posting while
16 in this state. Indeed, Montana has no knowledge as to whether Doe resides in the
17 United States or not. For all Montana (and this Court) knows, this case involves a
18 dispute between two non-U.S. parties over postings about non-U.S. realty.

19 Immediately upon being hired, Arizona counsel wrote Montana's counsel citing
20 the key cases showing that there is no personal jurisdiction and highlighting the First
21 Amendment considerations. Gold Decl., Ex. 7. The letter invited Montana to dismiss
22 the case or at least withdraw the subpoenas. *Id.* The letter alerted Montana that
23 attorneys' fees would be sought and noted that the absence of harm in withdrawing the
24 subpoenas for a time sufficient to allow counsel to consider the matter. *Id.*

25 **I. THIS COURT LACKS PERSONAL JURISDICTION OVER DOE.**

26 To be subject to personal jurisdiction in Arizona, Doe must have "certain
27 minimum contacts with [the state] such that the maintenance of the suit does not
28 offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v.*

1 *Washington*, 326 U.S. 310, 316 (1945) (quotation omitted); *Bils v. Bils*, 200 Ariz. 45, 47, 22
2 P.3d 38, 40 (Ariz. 2001). A court may exercise either general or specific jurisdiction over
3 a defendant. See *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 414-15 nn. 8-9
4 (1984). In either case, a defendant's connection with the state must be such that "it
5 should reasonably anticipate being haled into court" in the state in the event of a
6 dispute. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980); *Bils, supra*.
7 Here, Montana cannot meet its burden of establishing either form of jurisdiction by
8 showing that Doe lives in Arizona or any relevant events occurred inside this state.

9 **A. This Court Lacks General Jurisdiction Over Doe.**

10 General jurisdiction applies only if "the defendant has substantial or continuous
11 and systematic contacts with the forum state." *Batton v. Tenn. Farmers Mut. Ins. Co.*, 153
12 Ariz. 268, 270, 736 P.2d 2, 4 (Ariz. 1987) (quotations omitted). In this case, the
13 Complaint contains no allegation of general jurisdiction, and there is no reason to
14 suppose that it applies. The website "resortbuyerbeware.com does not offer any goods
15 for sale in Arizona or solicit any business in Arizona. Montana does not allege that Doe
16 owns property in Arizona, has employees or offices in Arizona, or has any other
17 contacts with the state. Doe thus does not have "substantial" or "systematic and
18 continuous" contacts with Arizona so as to support the exercise of general jurisdiction.

19 **B. This Court Also Lacks Specific Jurisdiction over Doe.**

20 Specific jurisdiction over Doe in Arizona would exist only if: (1) Doe
21 purposefully availed himself of the privilege of conducting activities in the forum; (2)
22 the claim arises out of Doe's forum-related activities; and (3) the exercise of jurisdiction
23 is reasonable, in that it comports with fair play and substantial justice. See *Bancroft &*
24 *Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). In tort cases such
25 as this one, the requirement of purposeful availment is shown if the defendant's
26 tortious conduct is purposefully directed at and causes the brunt of its effect in the
27 forum state. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997).

28

1 **1. Doe’s Website Is Not Purposefully Directed at Arizona.**

2 When personal jurisdiction is claimed based on a defendant’s activities on the
3 Internet, the courts — including the Ninth Circuit in *Cybersell*, 130 F.3d at 418 — have
4 followed the lead of the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119
5 (W.D. Pa. 1997), in holding that “the likelihood that personal jurisdiction can be
6 constitutionally exercised is directly proportionate to the nature and quality of
7 commercial activity that an entity conducts over the Internet.” *Id.* at 1124. Under this
8 test, Doe’s website cannot provide the basis for personal jurisdiction.

9 First, Doe’s website is entirely passive in nature. “A passive Web site that does
10 little more than make information available to those who are interested in it is not
11 grounds for the exercise of personal jurisdiction.” *Zippo*, 952 F. Supp. at 1124; *Cybersell*,
12 130 F.3d at 419-20. Something more is needed to “indicate that the defendant
13 purposefully (albeit electronically) directed his activity in a substantial way to the
14 forum state.” *Cybersell*, 130 F.3d at 418. Thus, in *Cybersell*, the Ninth Circuit, applying
15 Arizona law, held that Arizona did not have jurisdiction over a Florida company
16 whose only contact with Arizona was a minimally interactive web page that was
17 “limited to receiving the browser’s name and address and an indication of interest.” *Id.*
18 at 419. The court reasoned that basing personal jurisdiction “on an essentially passive
19 web page advertisement ... would not comport with traditional notions of what
20 qualifies as purposeful activity invoking the benefits and protections of the forum
21 state.” *Id.* at 420.

22 Doe’s website is not only passive but also entirely noncommercial in nature. Doe
23 does not sell any goods or services from his website or make any money from it. Like
24 the defendant in *Cybersell*, Doe is not subject to jurisdiction in this state when he has
25 “conducted no commercial activity over the Internet in Arizona.” 130 F.3d at 419.

26 The allegation that Doe’s website is registered with and hosted by an Arizona
27 company also does not serve as a basis for establishing personal jurisdiction. Binding
28 authority from the Arizona Court of Appeals recognizes that a contract with a hosting

1 company is an insufficient basis on which to subject a defendant to jurisdiction in the
2 host company's home state. *Austin v. Crystaltech Web Hosting*, 211 Ariz. 569, 575, 125
3 P.3d 389, 395 (Ariz. App. Ct. 2005). In *Austin*, plaintiff sued Daniels, a competing travel
4 business in Bali, and its registrar, Crystaltech Web Hosting, an Arizona domain-name
5 registrar, alleging that plaintiff had been defamed by an article that Daniels had posted
6 on a website that Daniels maintained with Crystaltech.

7 On the issue of jurisdiction, the Court of Appeals framed the proper analysis as
8 follows: "[I]n addition to determining whether Daniels had minimum contacts with
9 Arizona, we must consider whether it is reasonable to subject Daniels to Arizona
10 jurisdiction. This requires us to weigh several factors: Daniel's burden of transoceanic
11 litigation, Arizona's interest in resolving this defamation matter, Austin's interest in
12 obtaining relief in Arizona, and another nation's procedural and substantive interests
13 in Arizona's exercise of jurisdiction." *Austin*, ¶20 (brackets and citations omitted).

14 The Court of Appeals held, even "assum[ing], without deciding, that Daniels
15 purposefully availed himself of our laws by contracting with CrystalTech and sending
16 the offending article to Arizona for publication on the website, and that this claim
17 arises out of those contacts," *Austin*, ¶21, there was no jurisdiction, because:

18 "it would be unreasonable for Arizona to exercise jurisdiction over this
19 internet defamation case. First, neither Daniels nor Austin are Arizona
20 residents, and neither lives here. Second, Arizona has no real interest in
21 resolving a dispute between two Bali travel related competitors. Third,
22 Plaintiff does not dispute Daniels' claim that Bali law governs the dispute
23 Consequently, because Arizona has no specific interest in the alleged
24 wrongful conduct or the alleged harm to a British citizen that would
25 compel an Arizona court to protect Austin's interests, personal jurisdiction
26 over Daniels would be unreasonable." *Austin*, ¶24.

25 Courts in other jurisdictions have reached the same conclusion. *See Carefirst of*
26 *Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) ("It is
27 unreasonable to expect that, merely by utilizing servers owned by a Maryland-based
28 company, [the defendant] should have foreseen that it could be haled into a Maryland

1 court and held to account for the contents of its website"); *Amberson Holdings LLC v.*
2 *Westside Story Newspaper*, 110 F. Supp. 2d 332, 335 (D.N.J. 2000) ("It is unreasonable that
3 by utilizing a New Jersey server, defendants should have foreseen being haled into a
4 New Jersey federal court").

5 The reason for this judicial unanimity is that an agreement with an Internet
6 service provider is a brief transaction completed over the Internet with little interaction,
7 no negotiation of terms, and no promise of future interaction other than the payment of
8 recurring fees. *AOL, Inc. v. Huang*, 106 F. Supp. 2d 848, 856-57 (E.D. Va. 2000). Such de
9 minimis contact with the state is not the sort of connection substantial enough to give
10 rise to personal jurisdiction. *Carefirst*, 334 F.3d at 402 ("[W]e have described as 'de
11 minimis' the level of contact created by the connection between an out-of-state
12 defendant and a web server located within a forum"); *Amberson, supra* ("It is
13 unimaginable that such a contract, without any additional contacts, could serve to
14 subject a defendant to personal jurisdiction"); *see also Zippo*, 952 F. Supp. at 1125
15 ("When a consumer logs onto a server in a foreign jurisdiction he is engaging in a
16 fundamentally different type of contact than an entity that is using the Internet to sell
17 or market products or services to residents of foreign jurisdictions").

18 This case is indistinguishable. Neither party is claimed to be a resident of
19 Arizona or have any contacts with Arizona other than contact with an Arizona registrar
20 from outside Arizona. There is no possible argument that substantive Arizona
21 defamation law applies or that Arizona has any interest in applying foreign law.

22 **2. Doe's Website Has No Impact in Arizona.**

23 Arizona has no interest in resolving this dispute, because it does not impact
24 Arizona. In *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998), the
25 Ninth Circuit found personal jurisdiction in California over a defendant in Illinois
26 because the defendant had engaged in a scheme to extort money from a company that
27 the defendant knew had its principal place of business in California and was likely to
28 be injured there. That court noted that the brunt of defendants' tortious activities was

1 felt in the forum state. In contrast, Montana alleges that it resides in the Bahamas and
2 does business there, and the effects of Doe’s allegedly tortious conduct — if any —
3 would therefore not be felt in Arizona. *See Dahn World Co. Ltd. v. Chung*, No. CV 05-
4 3477, 2006 WL 1794758 (D. Ariz. June 27, 2006) (holding that jurisdiction was not
5 proper in Arizona when the plaintiff did not suffer the brunt of the harm there).

6 Moreover, the subject of Doe’s site has nothing to do with Arizona. In *Carefirst*,
7 the Fourth Circuit found no personal jurisdiction in Maryland based on a website
8 devoted to information about medical care in Chicago. 334 F.3d 390. The court
9 emphasized that “the overall content of [the defendant’s] website has a strongly local
10 character” that made personal jurisdiction in Maryland inappropriate. *Id.* at 401; *see*
11 *also Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (holding that the
12 court had no jurisdiction when “[t]he overall content of . . . [the defendant’s] websites
13 [was] decidedly local”); *Bible & Gospel Tr.*, 354 F. Supp. 2d 1025 (finding no jurisdiction
14 where the subject of the website was directed at a different jurisdiction).

15 Similarly, Doe’s website in this case is devoted exclusively to Montana’s project,
16 which is in the Bahamas. *See Cybersell*, 130 F.3d at 419 (finding no personal jurisdiction
17 in Arizona where the defendant “did nothing to encourage people in Arizona to access
18 its site, and there is no evidence that any part of its business (let alone a continuous
19 part of its business) was sought or achieved in Arizona”). Indeed, Montana makes no
20 allegation that Doe’s website has ever been viewed by anyone in Arizona.

21 Doe’s creation from outside Arizona of a noncommercial website that has no
22 impact within Arizona has not given him reason to “reasonably anticipate being haled
23 into court” here. For the foregoing reasons, the Court should dismiss the Complaint on
24 jurisdictional grounds.

1 **II. DOE'S FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH HEAVILY**
2 **OUTWEIGHS MONTANA'S INTEREST IN PURSUING THIS LITIGATION.**

3 **A. The First Amendment Protects Anonymous Internet Speech.**

4 The First Amendment protects the right to anonymous speech. *Best Western Int'l,*
5 *Inc. v. Doe*, No. cv-06-1537, 2006 WL 2091695 at *3 (D. Ariz. July 25, 2006); *see*
6 *Watchtower Bible and Tract Soc'y. of New York v. Village of Stratton*, 536 U.S. 150, 166-67
7 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v.*
8 *Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).
9 Anonymous or pseudonymous writings have played an important role over the course
10 of history, from the literary efforts of Shakespeare and Mark Twain to the authors of
11 the Federalist Papers. As the Supreme Court wrote in *McIntyre*, 514 U.S. at 341-42, 356:

12 "[A]n author is generally free to decide whether or not to disclose his or
13 her true identity. The decision in favor of anonymity may be motivated by
14 fear of economic or official retaliation, by concern about social ostracism,
15 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
16 works enter the marketplace of ideas unquestionably outweighs any
17 public interest in requiring disclosure as a condition of entry. Accordingly,
18 an author's decision to remain anonymous, like other decisions concerning
19 omissions or additions to the content of a publication, is an aspect of the
20 freedom of speech protected by the First Amendment. ... Under our
21 Constitution, anonymous pamphleteering is not a pernicious, fraudulent
22 practice, but an honorable tradition of advocacy and of dissent."

21 The free speech provision of the Arizona Constitution, art. 2, § 6, has repeatedly
22 been given a broader construction than the First Amendment. *Mountain States Tel. &*
23 *Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 354-55, 773 P.2d 455, 459-60 (1989).
24 Unlike the federal constitution, the Arizona Constitution expressly protects the right of
25 privacy, which includes the right to remain anonymous. *Id.*, 773 P.2d at 462 n.13.

26 As this Court has recognized, the right to anonymity is fully applicable to speech
27 on the Internet. *Mobilisa, Inc. v. John Doe*, No. CV 2005-012619, at 2 (Ariz. Super. Ct. Jan.
28 4, 2006) (Gold Decl., Ex. 4); *see also Best Western*, 2006 WL 2091695, at *3. The U.S.

1 Supreme Court has treated the Internet as a forum of preeminent importance because it
2 provides any individual who wants to express his views the opportunity to reach other
3 members of the public who are hundreds or even thousands of miles away at virtually
4 no cost. *Reno v. ACLU*, 521 U.S. 844 (1997). “Internet anonymity facilitates the rich,
5 diverse, and far ranging exchange of ideas,” and therefore “the constitutional rights of
6 Internet users, including the First Amendment right to speak anonymously, must be
7 carefully safeguarded.” *Best Western*, 2006 WL 2091695, at *3 (quotation omitted).

8 In particular, courts have granted First Amendment protection to “gripe sites” —
9 noncommercial websites, such as the website at issue here, set up solely for the purpose
10 of criticizing a particular person or company. *See, e.g., Lamparello v. Falwell*, 420 F.3d
11 309 (4th Cir. 2005) (holding that First Amendment concerns limited application of
12 federal trademark law to fallwell.com, a gripe site about the Reverend Jerry Falwell).¹

13 **B. Montana Must Make a Preliminary Showing to Learn Doe’s Name.**

14 A number of Arizona decisions have uniformly recognized that civil subpoenas
15 seeking information regarding anonymous individuals raise First Amendment
16 concerns. *McMann v. Doe*, CV2006-092226 (Gold Decl., Ex. 1); *Mobilisa*, No. CV 2005-
17 012619, at 2 (Gold Decl., Ex. 4); *Best Western*, 2006 WL 2091695, at *3. As another court
18 stated, in refusing to enforce a subpoena to identify anonymous Internet speakers
19 whose identities were allegedly relevant to a defense against a shareholder derivative
20 action: “If Internet users could be stripped of [their] anonymity by a civil subpoena
21 enforced under the liberal rules of civil discovery, this would have a significant chilling
22

23
24 ¹ *See also Taubman Co. v. Webfeats*, 319 F.3d 770, 776 (6th Cir. 2003) (the First
25 Amendment protects the website “shopsatwillowbend.com” from a claim by the
26 “Shops at Willow Bend” shopping mall); *Ficker v. Tuohy*, 305 F. Supp. 2d 569, 572 (D.
27 Md. 2004) (congressional candidate’s website robinficker.com was protected by the
28 First Amendment against claims by opposing candidate Robin Ficker); *Crown Pontiac,
Inc. v. Ballock*, 287 F. Supp. 2d 1256 (N.D. Ala. 2003) (gripe site crownpontiacnissan.com
was protected against claims by car dealer Crown Pontiac Nissan).

1 effect on Internet communications and thus on basic First Amendment rights.” *Doe v.*
2 *2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

3 Arizona’s courts have enunciated standards that must be followed before
4 compelling identification of anonymous Internet speakers. In *McMann v. Doe*, CV2006-
5 092226 (Gold Decl., Ex. 1), the Court dismissed a defamation action for lack of personal
6 jurisdiction, holding that, “the Plaintiff must show that its claim would survive a
7 motion for summary judgment before being entitled to discover the identity of an
8 anonymous speaker through any compulsory discovery process.” The *McMann* Court
9 adopted the briefs of the Doe defendant [Gold Decl., Exs. 2-3], which present
10 arguments on personal jurisdiction substantially copied here.

11 The U.S. District Court for the District of Arizona, in *Best Western, supra*, held that
12 Internet speakers have a qualified First Amendment right to remain anonymous that
13 must be weighed against the plaintiff’s need for discovery to redress alleged wrongs.
14 To protect that First Amendment interest, plaintiffs must make a preliminary showing,
15 specifically submit sufficient evidence to establish a prima facie case, for each essential
16 element of the claim within plaintiff’s control, before gaining access to the identity of
17 an anonymous speaker.

18 Cases around the country likewise have adopted similar standards, the lead
19 cases being *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), and *Doe*
20 *v. Cahill*, 884 A.2d 451 (Del. 2005). Another recent opinion, dismissing a case for lack of
21 prima facie evidence supporting jurisdiction, is *McMann v. Doe*, 2006 WL 3102986 (D.
22 Mass. Oct. 31, 2006).

23 Even in the absence of First Amendment considerations, Arizona law squarely
24 imposes the burden of proof of personal jurisdiction on plaintiff; once a defendant
25 challenges personal jurisdiction, plaintiff must come forward with facts establishing
26 jurisdiction and may not rest on bare allegations of the complaint. *In re Consol. Zicam*
27 *Prod. Liab. Cases*, 212 Ariz. 85, 89-90, 127 P.3d 903, 907-08 (Ariz. App. Ct. 2006). Only
28

1 after plaintiff establishes a prima facie case of jurisdiction does the burden of producing
2 rebuttal evidence shifts to defendant. *Id.*

3 **C. Montana Has Not Made the Required Preliminary Showing.**

4 In this case, Montana has failed to submit any evidence to support its claims.
5 Montana has submitted no affidavits has not clearly identified factually untrue
6 statements and provided proof of falsity, nor has Montana quantified or provided any
7 evidence of damages. There is no prima facie showing that it is possible for Montana to
8 prove all elements of all pleaded claims, sufficient to pass summary judgment.

9 Montana must provide a prima facie showing overcoming the rule that
10 expressions of opinion are not actionable for defamation (the issue of whether a
11 statement is opinion or fact is one for the court to resolve as a matter of law). *Yetman v.*
12 *English*, 168 Ariz. 71, 811 P.2d 323 (1991). The First Amendment protects against libel
13 claims based on opinions that do not imply false statements of fact, or on loose,
14 figurative, or hyperbolic language. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).
15 And of course truth is an absolute defense. *Id.*

16 Also, proof of damages is an element of a defamation claim in Arizona. *Morris v.*
17 *Warner*, 160 Ariz. 55, 770 P.2d 359 (Ariz. App. Ct. 1988). Montana's Complaint does not
18 explain what, if any, damage it suffered during the one week that the allegedly
19 defamatory material was posted on the site in question or that it lost even one sale as a
20 result. Montana's Complaint, instead, alleges generally that the website damaged it in
21 unspecified amounts (although less than the threshold for arbitration) in connection
22 with unspecified transactions. Complaint, ¶¶17, 27, 34, 42, 43, 52.

23 Montana has not shown that its claims can pass any, much less all, of these
24 hurdles. No person should be subjected to compulsory identification through a court's
25 subpoena power unless plaintiff produces sufficient evidence to show a realistic chance
26 of winning a lawsuit against that Doe defendant. That requirement prevents a plaintiff
27 from being able to identify critics simply by filing a facially adequate complaint.
28 Identification of an otherwise anonymous speaker is itself a major form of relief

1 because defendant may then be subjected to harassment, economic retaliation, or other
2 forms of retribution. In this case, if convicted criminals are connected to the project (*see*
3 Complaint, ¶13 & Ex. A), identifying the speaker could cause physical harm.

4 Most directly pertinent to this motion, Montana has failed to make a prima facie
5 showing of the necessary element of personal jurisdiction over Doe in Arizona.

6 Paragraphs 2 and 8 of Montana’s subpoenas [Gold Decl., Exs. 5, 6] demand
7 production of the identity of the owner of the domain name resortbuyerbeware.com
8 and all persons involved in its registration, development, and publication, as well as all
9 communications between the web hosts and website owner. The Court should quash
10 those paragraphs of the subpoenas unless and until Montana can make the required
11 preliminary showings that its causes of action can overcome summary judgment.

12 The Court should quash the subpoenas in their entirety, moreover, based on a
13 ruling that the Court lacks any evidence of personal jurisdiction.

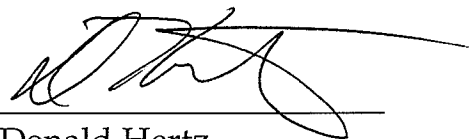
14 **III. DOE SHOULD BE AWARDED ATTORNEYS’ FEES.**

15 Montana and its attorneys ignored clear case law, even after it was brought to
16 their attention. Gold Decl., Ex. 7. Plaintiff and counsel declined a polite invitation to
17 withdraw the subpoena even temporarily, to avoid the need for emergency briefing on
18 this matter. *Id.* For those reasons, attorneys’ fees should be awarded under Ariz. R.
19 Stat. § 12-349(A) (fees for bringing “a claim without substantial justification” or “solely
20 or primarily for delay or harassment,” or “engaging in an abuse of discovery”); Ariz. R.
21 Stat. § 12-341.01(C) (fees if the “claim ... constitutes harassment, is groundless and is not
22 made in good faith); Ariz. R. Civ. P. 11(a) (fees if an attorney does not assure that a
23 pleading or paper is “well grounded in fact and is warranted by existing law”).

1 **CERTIFICATE OF SERVICE**

2 I certify that, on August 27, 2007, I caused a copy of this paper to be delivered to
3 the chambers of Judge Edward O. Burke, and a copy to be served by U.S. mail, postage
4 prepaid, on:

5 Kimberly A. Warshawsky
6 GREENBERG TRAUERIG
7 2375 East Camelback Road, Suite 700
8 Phoenix, Arizona 85016

9 

10 Donald Hertz

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28