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

10 Montana Holdings Ltd.  
11 a Bahamian corporation,  
12 Plaintiff,

13 vs.

14 John Does I-X,  
15 Defendants.

) Case No. CV2007-014436

) **REPLY MEMORANDUM IN SUPPORT**  
) **OF MOTION TO DISMISS AND**  
) **TO QUASH SUBPOENAS**

) (Assigned to Hon. Edward O. Burke)

) Oral Argument: Nov. 6, 2007, 9:15 a.m.

) Courtroom 103, 1<sup>st</sup> Floor, OCH

16 **INTRODUCTION**

17 Unidentified defendants (“Doe”) have specially appeared to contest personal  
18 jurisdiction and quash subpoenas. There is no evidence presented (or cause to believe)  
19 that defendant Doe resides in Arizona, nor is Doe alleged to have any significant  
20 connection to Arizona. Plaintiff, too, resides outside of Arizona, and plaintiff’s resort  
21 development, which Doe’s website criticized, likewise is in the Bahamas. Apparently,  
22 this suit was filed here for the main purpose of breaching Doe’s anonymity through  
23 subpoenas issued to third parties – the Arizona-based domain-name registrar and web-  
24 hosting company, Go Daddy, and its subsidiary that promises anonymity, Domains By  
25 Proxy – with which no party to this case has any dispute.

26 Montana’s opposition does not dispute the case law cited in the motion showing  
27 that it must demonstrate a *prima facie* case before proceeding with discovery and  
28 breaching Doe’s anonymity. Most significantly, Montana entirely failed to make **any**  
*prima facie* showing of **personal jurisdiction**. Also, Doe shows below why Montana’s  
purported showing on the **merits** is incomplete, over-general, and misleading.

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

2 The case is easily subject to dismissal (without prejudice), and the subpoenas  
3 quashed, under clear and now undisputed case law holding that the Arizona presence  
4 of a third-party Internet registrar or host does not create minimum contacts sufficient  
5 for personal jurisdiction in this state, with respect to a case brought by a third party  
6 (*i.e.*, not the registrar) based on the content of the website.

7 **A. Montana Does Not Challenge the Cited Law on Personal Jurisdiction.**

8 Montana’s opposition does not challenge the core elements of the personal-  
9 jurisdiction analysis. None of the following principles, set forth in the motion, appears  
10 challenged by the opposition; indeed, some are expressly seconded.

11 (1) Doe must have “certain minimum contacts with [the state] such that the  
12 maintenance of the suit does not offend traditional notions of fair play and substantial  
13 justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted); *Bils v.*  
14 *Bils*, 200 Ariz. 45, 47, 22 P.3d 38, 40 (Ariz. 2001).

15 (2) There is no ***general*** jurisdiction, because Doe does not have “substantial”  
16 or “systematic and continuous” contacts with Arizona.

17 (3) Specific jurisdiction over Doe in Arizona would require a showing that (a)  
18 Doe purposefully availed himself of the privilege of conducting activities in the forum;  
19 (b) the claim arises out of Doe’s forum-related activities; and (c) the exercise of  
20 jurisdiction is reasonable, in that it comports with fair play and substantial justice. *See*  
21 *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

22 (4) As to the last element, “fair play,” defendant’s connection must be such  
23 that “it should reasonably anticipate being haled into court” in the event of a dispute.  
24 *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980); *Bils, supra*.

25 (5) A “passive Web site,” like Doe’s, “that does little more than make  
26 information available to those who are interested in it is not grounds for the exercise of  
27 personal jurisdiction.” *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124  
28 (W.D. Pa. 1997); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997).

1 (6) Doe did not purposefully direct his website at activity or persons in  
2 Arizona, such as to cause the brunt of its harm here. *Id.* at 416; *Panavision Int'l, L.P. v.*  
3 *Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) *Dahn World Co. Ltd. v. Chung*, No. CV 05-  
4 3477, 2006 WL 1794758 (D. Ariz. June 27, 2006).

5 (7) Doe “conducted no commercial activity over the Internet in Arizona.”  
6 *Cybersell*, 130 F.3d at 419.

7 (8) Doe’s site had a “strongly local character” involving out-of-state activity.  
8 *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 401 (4th Cir. 2003);  
9 *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (“decidedly local”); *Bible*  
10 *& Gospel Trust v. Wyman*, 354 F. Supp. 2d 1025 (D. Minn. 2005).

11 (9) The First Amendment to the U.S. Constitution, and the free-speech  
12 provision of the Arizona Constitution, protect the right to anonymous speech and the  
13 right to remain anonymous, including on the Internet, and including “gripe sites.” *Best*  
14 *Western Int'l, Inc. v. Doe*, No. cv-06-1537, 2006 WL 2091695 at \*3 (D. Ariz. July 25, 2006);  
15 *see Watchtower Bible and Tract Soc’y. of New York v. Village of Stratton*, 536 U.S. 150, 166-67  
16 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v.*  
17 *Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960);  
18 *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm’n*, 160 Ariz. 350, 354-55, 773 P.2d  
19 455, 462 n.13 (1989); *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005).

20 (10) Civil subpoenas seeking information regarding anonymous individuals  
21 raise First Amendment concerns. *McMann v. Doe*, CV2006-092226 (Gold Decl., Ex. 1);  
22 *Mobilisa*, No. CV 2005-012619, at 2 (Gold Decl., Ex. 4); *Best Western, supra*; *Doe v.*  
23 *2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

24 (11) To satisfy the First Amendment interest in speaking anonymously, “the  
25 Plaintiff must show that its claim would survive a motion for summary judgment  
26 before being entitled to discover the identity of an anonymous speaker through any  
27 compulsory discovery process.” *McMann v. Doe, supra*; *Best Western, supra* (plaintiffs  
28 must specifically submit sufficient evidence to establish a *prima facie* case, for each

1 essential element of the claim within plaintiff's control, before gaining access to the  
2 identity of an anonymous speaker); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756  
3 (App. Div. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

4 (12) The *prima facie* showing must include a showing on the subject of personal  
5 jurisdiction. *McMann v. Doe*, 2006 WL 3102986 (D. Mass. Oct. 31, 2006); *see In re Consol.*  
6 *Zicam Prod. Liab. Cases*, 212 Ariz. 85, 89-90, 127 P.3d 903, 907-08 (Ariz. App. Ct. 2006)  
7 (even without First Amendment issue, plaintiff must come forward with facts  
8 establishing personal jurisdiction and may not rest on bare allegations of a complaint).

9 **B. Montana's Claims Do Not Arise from Doe's Contract with the Registrar.**

10 Montana's opposition asserts (A) that there is a relatively low threshold to make  
11 a *prima facie* showing of jurisdiction (although its cases establishing such are not First  
12 Amendment cases involving anonymous speech, where the threshold is higher), and  
13 (B) that Montana has met such a threshold – thereby showing special jurisdiction –  
14 based on Doe's contracts with the Internet registrar/host. Opp., pp. 8-10. Specifically,  
15 Montana relies nearly exclusively on those entities' form contracts and argues that Doe  
16 thereby "purposely availed [himself] of the benefits of doing business in Arizona" and  
17 "consented to the jurisdiction of this court." Opp., pp. 2, 6, 8, 9, 10.

18 Montana's argument is easily rebutted: Montana's opposition mischaracterizes  
19 the contracts, suggesting that they show that Doe consented to Arizona jurisdiction  
20 generally. Assuming Doe's contract matches the forms, however, Doe consented to  
21 jurisdiction only for "*any action relating to or arising out of [the] Agreement*" between  
22 Doe and Go Daddy/Domains and "the adjudication of domain name registration  
23 disputes." Opp., Ex. 3, p. 7 (similar at Opp., Ex. 4, p. 9 and Opp., Ex. 5, p. 8).

24 Montana's Complaint alleges torts arising out of supposedly false statements that  
25 Doe posted. Montana's claims plainly do not arise out of the contract between Doe and  
26 the Arizona registrars nor is any domain-name being disputed. Montana is not a party  
27 to the domain-registration or site-hosting contracts, and it is not even a third-party  
28 beneficiary. Montana did not plead any contract claims.

1 Recall that Montana relies on special jurisdiction only, which requires it to show  
2 that its Complaint arises out of Doe’s forum-related activities. See point (4), *supra*;  
3 *Bancroft & Masters, supra*, 223 F.3d at 1086. Here, Montana’s argument suggests that  
4 Doe might be subject to special jurisdiction in Arizona for contract claims between Doe  
5 and the host companies, but it does not show that Doe did anything in Arizona that  
6 caused Montana’s tort claims (or that damaged Montana in Arizona). Accordingly,  
7 Doe is not subject to special jurisdiction in Arizona for the claims of this complaint.

8 **C. Further, Contracting with a Website Host Is Not Enough for Jurisdiction.**

9 Doe extensively discussed *Austin v. Crystaltech Web Hosting*, 211 Ariz. 569, 575,  
10 125 P.3d 389, 395 (Ariz. App. Ct. 2005), which held that a contract with a host is not  
11 enough to subject a defendant to jurisdiction in the host’s state: Even “assum[ing],  
12 without deciding, that Daniels purposefully availed himself of our laws by contracting  
13 with CrystalTech and sending the offending article to Arizona for publication on the  
14 website, and that this claim arises out of those contacts,” *Austin*, ¶21, there was still no  
15 jurisdiction, because: “it would be unreasonable for Arizona to exercise jurisdiction  
16 over this internet defamation case” where “neither [of the parties] are Arizona  
17 residents, and neither lives here,” where “Arizona has no real interest in resolving [the]  
18 dispute” given its local character elsewhere, and where the law of another forum  
19 “governs the dispute.” *Austin*, ¶24. The opening memorandum cited other cases  
20 denying jurisdiction as “unreasonable.” *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs.,*  
21 *Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) (contract with web server company in forum is a  
22 “*de minimus*” contact); *Amberson Holdings LLC v. Westside Story Newspaper*, 110 F. Supp.  
23 2d 332, 335 (D.N.J. 2000) (“unimaginable that such a contract” could create jurisdiction).

24 Montana’s opposition completely fails to cite, discuss, or even attempt to  
25 distinguish those cases. Nor is there an attempt to show that substantive Arizona  
26 defamation or other tort law should apply. Montana’s opposition argues (p. 11) that  
27 Arizona has an interest in enforcing Arizona contracts, but, as noted above, Montana’s  
28 complaint does not seek to enforce the contracts between Doe and the registrars.

1 In sum, Montana’s attempt to meet its admitted burden of making a *prima facie*  
2 case of personal jurisdiction relies nearly entirely on mischaracterizing Doe’s actions in  
3 contracting with Arizona Internet companies as having consented to jurisdiction  
4 generally. Montana’s showing does not work, because *either* (1) it has not shown *any*  
5 contact between Doe and Arizona out of which its claims arise, *or* (2) the presumed  
6 Doe-host/registrar contracts are *de minimus* contacts that does not support jurisdiction.

7 **D. Montana’s Miscellaneous Jurisdiction-Related Points Lack Merit.**

8 Montana’s opposition makes a few other supporting points regarding personal  
9 jurisdiction, which can be rebutted quite briefly:

10 1. Montana’s opposition (pp. 6 n.5 & 9) calls counsel’s representations that  
11 Doe is not an Arizona resident and has no contact with Arizona “unsubstantiated” and  
12 notes that Doe did not submit a supporting declaration. If the Court would agree to  
13 accept proof of Doe’s residency without disclosing his identity, such as through an *in*  
14 *camera* inspection of a sealed affidavit with a redacted version served on defendant,  
15 Doe makes an offer of proof to support the representations. However, as explained  
16 above, proof should not be needed, because *Doe* need not *disprove* residency – the  
17 purpose of counsel’s statements is simply to raise a challenge to jurisdiction, thereby  
18 shifting the burden to *Montana* to *prove* jurisdiction. *See Zicam, supra.*

19 2. Montana mentions (p. 11) that jurisdiction might also be reasonable  
20 because Doe has “Arizona counsel who can protect [his] interest.” The fact that Doe  
21 needed to hire counsel here to “specially appear” and respond to an improperly filed  
22 case does not support personal jurisdiction. If such were a consideration, no court  
23 could ever dismiss for lack of personal jurisdiction.

24 3. Montana makes much of an argument (Opp., pp. 10-11) that, without  
25 Arizona jurisdiction, there might be none in any other U.S. state. But that is not a valid  
26 consideration. There is no evidence that Doe is a U.S. resident. If this Court accepts  
27 jurisdiction, it would be judging a dispute between two non-U.S. persons, concerning  
28 statements made about Bahamian real estate, under non-U.S. law, which supposedly

1 damaged a Bahamian corporation, through harming Montana's connections with  
2 foreign investors. If no other U.S. state could assert jurisdiction, so what? Montana  
3 does not assert, much less show, that it lacks any remedy *anywhere* else, because it fails  
4 to discuss whether it could sue in Bahamian court, or any other non-U.S. forum.

5 4. The opposition briefly asserts (p. 2, n.1) that Doe's motion is late, even  
6 though it was served on the same day as the subpoena return, because it was filed at a  
7 later *hour*. No case is cited holding that quashing a subpoena is improper when filed  
8 the same day at a later hour. Here, Doe's attorney advised the representative of Go  
9 Daddy and Domains By Proxy that a motion would be filed that day, and the  
10 subpoenaed parties agreed to defer compliance with subpoena until a Court decision if  
11 Doe's motion was filed, at any hour on that day. *See* Gold Supp. Decl., Ex. 8.

12 **E. Montana's Unjustified Persistence Should Subject It to Sanctions.**

13 Doe's motion included a request for attorneys' fees, to which Montana's  
14 opposition did not respond. Despite learning in advance (Gold Decl., Ex. 7) of the key,  
15 controlling cases, from various Arizona-based courts, uniformly demonstrating the lack  
16 of personal jurisdiction, including *McMann*, *Austin*, and *Best Western*, Montana did not  
17 withdraw its subpoenas. In view of the emphasis on those key cases and requested  
18 sanctions, one would have expected Montana to try to distinguish them, yet its  
19 opposition says literally nothing about *McMann* or *Austin* and agrees (pp. 11-12) with  
20 *Best Western*. Instead, Montana's opposition focuses nearly exclusively on Doe's  
21 supposed "consent" to jurisdiction, and, even there, leaves the text of the supposedly  
22 supporting contractual provision unquoted and buried in lengthy exhibits.

23 Nor does Montana's opposition counter Doe's showing that the standards of  
24 Ariz. R. Stat. §§ 12-341.01(C), 12-349(A) and Ariz. R. Civ. P. 11(a) apply.

25 Because Montana lacked any good-faith basis to assert jurisdiction, and because  
26 Montana has made no *prima facie* showing of jurisdiction, including failing to argue any  
27 distinction of cases brought to Montana's attention in advance, an award of attorneys'  
28 fees is warranted. The Court should invite Doe to file evidence of fees and costs.

1 **II. MONTANA'S OPPOSITION FAILS TO MAKE A PROPER PRELIMINARY**  
2 **SHOWING OF ELEMENTS OF SUBSTANTIVE DEFAMATION, WHICH IS**  
3 **NEEDED BEFORE OBTAINING DISCOVERY OF DEFENDANT'S IDENTITY.**

4 Montana's opposition contains a page-and-a-half table (at pp. 13-14) purporting  
5 to establish a *prima facie* case of defamation, supported by the cited Mittens Affidavit.

6 Discussing the standard for its showing, Montana's opposition suggests (p. 10,  
7 top) that "all factual disputes must be resolved in Montana's favor." To the contrary,  
8 the Supreme Court recently discussed what constitutes a *prima facie* showing on a  
9 motion to dismiss in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (May 21, 2007), holding:

10 "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to  
11 relief' requires more than labels and conclusions, and a formulaic  
12 recitation of the elements of a cause of action will not do, see *Papasan v.*  
13 *Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts 'are not  
14 bound to accept as true a legal conclusion couched as a factual allegation').  
15 Factual allegations must be enough to raise a right to relief above the  
16 speculative level, see 5 C. Wright & A. Miller, *Federal Practice and Procedure*  
17 §1216, pp. 235-236 (3d ed. 2004) ('[T]he pleading must contain something  
more ... than ... a statement of facts that merely creates a suspicion [of] a  
legally cognizable right of action')."

18 In this case, Montana's showing fails because it does not clearly identify – and correctly  
19 quote – factual statements (as opposed to opinion or other non-actionable matters) that  
20 Montana wishes to challenge, nor does its "showing" provide admissible *prima facie*  
21 proof of falsity and resulting damages.

22 First, Montana cannot hope to make a *prima facie* showing without identifying the  
23 source of law and elements of its case. Yet nowhere does Montana's opposition lay out  
24 the elements of a defamation case and the choice of law. Montana's opposition (pp. 12,  
25 15) appears to assume that Arizona law would apply, but no reason is given – nor is  
26 one apparent – for that conclusion. Even assuming Arizona personal jurisdiction, it  
27 seems likely that substantive Bahamian (or other) defamation law would apply instead.  
28



1 Second, Montana's table purports to quote "statements" from Doe's website  
2 (Complaint, Ex. A; Mittens Aff., Ex. A), but the table paraphrases and mischaracterizes  
3 the website, considering its original statements and their context. Regardless of choice  
4 of law, it is hard to imagine that any jurisdiction would find defamation arising from  
5 statements that are (1) true, (2) opinion rather than fact, or (3) founded on reported  
6 information that a reasonable reporter could believe was true. Cf. *Yetman v. English*,  
7 168 Ariz. 71, 811 P.2d 323 (1991); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

8 The discussion below directly quotes Doe's website statements that Montana's  
9 table purports to challenge, shows how Montana's table has miscast Doe's statements  
10 in many instances, and points out numerous deficiencies in Montana's supposed  
11 showing that any cited statements was (1) factual, (2) untrue, and (3) unfounded.

12 **A. The Queensgate Subdivision.**

13 Actual website statement: "I came across a complaint from someone who had  
14 purchased one before and was very upset that the lot he purchased, in a subdivision of  
15 the Rum Cay project, is no longer part of the project, the subdivision has miraculously  
16 disappeared, and he was never advised. This subdivision was called 'Queensgate'..."

17 Montana's table re-characterization: "One of the Rum Cay subdivisions,  
18 Queensgate, 'miraculously' disappeared without notice to investors and is 'no longer  
19 part of the project.'"

20 Why no prima facie showing: First, the actual website statement reported on a  
21 third-party complaint and the complaint's allegations that the Queensgate subdivision  
22 had "miraculously disappeared" without him being advised. To support a *prima facie*  
23 case, Montana would have to show, but did not, that Doe's website inaccurately  
24 reported that a third party had made the complaint or that Doe had incorrectly  
25 characterized the nature of the complaint. Montana's table and affidavit wholly fail to  
26 discuss the correct issue. Indeed, the website contained a redacted letter from a  
27 "beginning investor" that supports Doe's statement that a complaint existed and the  
28 site's characterization of it, because the letter states, "One of my concerns now, is that

1 the current site plan of the Rum Cay Club does not include Queensgate. I spoke with  
2 Thor Ibsen about it back in January and he was somewhat vague, saying that it's not  
3 included in their current marketing plan because it was an early 'pre-sale' of lots and  
4 they don't want to confuse the current buyers." See Mittens Aff., Ex. A, last two pages.

5 *Second*, Montana's own evidence shows that even the out-of-context snippet that  
6 Montana's table challenged, that Queensgate "is no longer part of the project," is  
7 hardly groundless: As Montana's CEO explains, "because the Queensgate  
8 neighborhood is essentially sold out, this subdivision is not presented as part of the  
9 current development plan that is shown to customers." Mittens Aff., ¶7.

10 **B. Montana's Connection with Neil Bains.**

11 Actual website statement: "Neil Bains Created Montana Holdings Inc and  
12 supposedly 'SOLD' it to John Mittens ...."

13 Montana's table re-characterization: "Montana Holdings is associated with  
14 known 'criminals,' including the Greyling [sic] Family and Niel [sic] Bains, and 'Mr.  
15 Bains was responsible for creating Montana Holdings, Ltd.'"

16 Why no prima facie showing: *First*, Montana says that Bains was a broker, not a  
17 founder, and sold Montana the land, rather than the company. Mittens Aff., ¶8.  
18 Assuming so, those quibbles do not challenge, and indeed confirm, the main point of  
19 the website: Mr. Bains was involved with the creation of the Rum Cay development.  
20 The asserted mistakes concern minor details only; such deviations from precision did  
21 not contribute to any harmful characterization of Montana and are not defamatory.

22 *Second*, the website did not assert that Mr. Bains was a known criminal; as  
23 addressed in the next section, it asserted that Leslie Greyling was a known criminal.

24 **C. Montana's Connection (or Not) with the Greyling Family Companies.**

25 Actual website statements: "One only need to search the Internet (Google) to  
26 learn of all the other people involved with the Greylings; like Neil Bains, Bahamian  
27 Law firms, and others who worked directly or indirectly with the Greyling family. The  
28 Greylings and others involved were previously indicted, imprisoned and Leslie

1 Greyling was deported from the USA by the US Justice Department .... Sunquest  
2 Holdings Inc owned or went by the name of Sterling Worldwide Corp or Koala Capital  
3 Corp or Lasalle Group Ltd or Swiss Arctic Traders Ltd, and are/were either owned or  
4 controlled by Leslie S. Greyling and Anne M.E. Greyling. Sunquest Holdings Inc  
5 Buys/Merges with [certain other companies] which later (year 2000) causes the US  
6 Government to charge the principles and the companies with 'Pump and Dump'  
7 and/or Securities Fraud. Sunquest Holdings Inc Buys/Merges with Neil Bain's  
8 'Platinum Investments Inc' who owned property in the Bahamas (Cat Island and  
9 others) and later in Spain."

10 Montana's table re-characterization: "Montana Holdings is associated with  
11 known 'criminals,' including the Greyling [sic] Family and Niel [sic] Bains ..." and  
12 "Montana Holdings is affiliated with or otherwise connected to Sunquest Holdings,  
13 Inc., Sterling Worldwide Corp., Koala Capital Corp., Lasalle Group Ltd, and Swiss  
14 Arctic Traders, which are companies that are believed to have been part of, or  
15 otherwise affiliated with, a pump and dump scheme in 1991."

16 Why no prima facie showing: Montana again misdescribes the facts recited in the  
17 website. Montana's Mittens Affidavit states (§8), "Montana has never been affiliated  
18 with, nor had any association or contact with any member of the Greyling family" and  
19 (§9) that Mittens has "no knowledge of [the five named companies] or any facet of their  
20 business dealings or associations." However, Montana's and Mittens' assertions do not  
21 contradict any factual statement in the website. The website, instead, asserted: (a) that  
22 Montana is associated with Bains, (b) that Bains is associated with Greyling, (c) that  
23 Greyling is a criminal (see Gold Supp. Decl., Ex. 9, proving this fact), (d) that Sunquest  
24 "owned or went by" four other company names (listed), (e) that Greyling controlled  
25 Sunquest and the four related companies, (f) that the U.S. Government charged  
26 Sunquest and the Greylings with charges arising from a "pump and dump" scheme  
27 involving other subsidiaries (also see Ex. 9), and (g) that Sunquest bought or merged  
28 with Bains' company, Platinum. Montana does nothing to challenge the truth of any of

1 those seven facts. Indeed, Mittens claims to “have no knowledge of” Sunquest (Aff.,  
2 ¶9) and thus is not even in a position to challenge most of those statements.

3 **D. Montana’s Connections with Gold Rock.**

4 Actual website statement: “Montana Holdings connected to Gold Rock Holdings.  
5 ‘V.A.W.T Industries LLC, a subsidiary of Gold Rock Holdings, has finalized the \$1.5  
6 million sale of three turbines to Octagon Resources on the Bahamian Island Rum Cay.  
7 The roughly 3000kW a day generated by the turbines will be used by Octagon  
8 Resources and joint venture partner Montana Holdings as part of a local hotel, casino,  
9 marina and resort housing project ....’ GoldRock Holdings (under the previous name  
10 of Composite Holdings) had a connection to Sunquest Holdings (Owned by the  
11 Greyling Family). See article below and Links.... Montana Holdings Inc, is connected  
12 to Gold Rock Holdings through their announcement of a lucrative contract for three  
13 Turbines for Rum Cay.”

14 Montana’s table re-characterization: “Montana Holdings is connected to or  
15 otherwise affiliated with Gold Rock Holdings, which is affiliated with a company  
16 owned by the Greyling Family.”

17 Why no prima facie showing: *First*, Montana does nothing to deny that Gold Rock  
18 is affiliated with Sunquest or that Sunquest is owned by the Greyling family.

19 *Second*, Montana’s table and Mittens Aff., ¶10 challenge the truth of a statement  
20 that Montana “has done business with Gold Rock Holdings,” but again Montana and  
21 Mittens have mischaracterized what Doe said on the website. The actual facts Doe that  
22 reported are (a) that Gold Rock’s subsidiary had made a sale of wind turbines to  
23 Octagon Resources, (b) that Octagon was Montana’s JV partner, and (c) that power  
24 from the turbines “will be used by Octagon and Montana” for the development project.  
25 Montana submits nothing to deny any of the three actually asserted facts. Every time  
26 the website referred to a “connection” between Montana and Gold Rock it clearly  
27 referenced the contract to sell turbines to Octagon, Montana’s JV partner, as the source  
28 of the connection, which is accurate.

1           *Third*, the Mittens Affidavit asserts, also, that “Gold Rock Holdings issued a  
2 retraction and a letter of apology to Montana Holdings subsequent to prior public  
3 statements made by them regarding their business dealings with Montana.” Mittens  
4 Aff., ¶10. But Mittens does not attach any such letter. Montana makes no showing that  
5 Gold Rock retracted any of the three facts actually asserted on the website. Reading  
6 between the lines, Gold Rock letter likely just clarified that its subsidiary sold the wind  
7 turbines to Montana’s JV partner, for Montana’s development, as opposed to having  
8 sold them to Montana directly.

9           *Fourth*, the Mittens Affidavit refers to Gold Rock’s “prior public statements.” *Id.*  
10 Doe puts those in the record. Gold Supp. Decl., Ex. 10. The Court can see that Doe’s  
11 website quoted Gold Rock’s “public statements” verbatim. Montana does not refer to  
12 any website where Gold Rock’s “retraction letter” was available or announced publicly.  
13 Accordingly, it certainly appears that Doe had ample basis to have published the  
14 announcement, and there is no showing that Doe’s publication was groundless.

15           **E. Montana’s Contract with SAIPH.**

16           Actual website statement: “Another very curious item of thought is that Montana  
17 Holdings (CEO John Mittens) had contracted with a company called SAIPH for a huge  
18 communications Contract on Rum Cay. John Mittens was co-founder of ‘Interoute’  
19 with Nicholas Razey in 1995. Nicholas Razey is the Chairman of SAIPH. but seeing the  
20 history, there is question to this contract’s validity also.”

21           Montana’s table re-characterization: “Montana Holdings’ contract with SAIPH is  
22 an invalid contract, which is a ‘classic example where money can be siphoned out of a  
23 project in the guise of a legitimate contract.’”

24           Why no prima facie showing: Mr. Mittens swears that SAIPH installed certain  
25 telecommunications infrastructure, which has been delivered and is operational, within  
26 budget. Mittens Aff., ¶11. However, no denial is made of any factual statement in, or  
27 implication from, the website. Mr. Mittens does not deny that he had a connection  
28 with Razey as stated or that a contract was made. Nor does the affidavit provide even

1 a conclusory statement, much less submit documents to provide proof, that the contract  
2 was valid and did not pay SAIPH more than appropriate for the services rendered such  
3 that no money was siphoned out.

4 **F. Montana's Financial Status; Relationship with HMF and Local Vendors.**

5 Actual website statement: "Here are some tell tale signs that Montana Holdings,  
6 Ltd., may be nearing bankruptcy or closure and is showing the signs of what we have  
7 been talking about. ? A good example proving this is Montana Holdings, inability  
8 and/or maybe never having the intention to pay HMF for work done on their Marina.  
9 It seems that Heavy Marine Foundations, Ltd., (HMF) – Owner/President/CEO  
10 Dwayne Pratt, which is a Bahamian company had a signed \$6 million dollar contract to  
11 dig Montana's new marina but after digging 4 million dollars worth, had to stop  
12 digging, and had taken the equipment off the island due to NON-PAYMENT."  
13 *[Further details, unchallenged by Montana, follow about HMF's history with Montana]* ... The  
14 locals of Rum Cay tell a story of their own about the pull out of Montana. Many people  
15 have not been paid for rental of houses, for work being done (i.e., being owed \$4000.00  
16 since October 2006, and going to Montana office only to receive \$500.00 in March, as  
17 the company did not have any more to give."

18 Montana's table re-characterization: (a) "Montana Holdings is 'nearing  
19 bankruptcy or closure.'" (b) "Montana Holdings did not pay, nor had any intention of  
20 paying, Heavy Marine & Equipment Foundations, Ltd. ('HMF') for work done on the  
21 Marina." (c) "Montana has not paid its local vendors for work done on the project."

22 Why no prima facie showing: Beginning with the supporting facts ("tell tale  
23 signs"), and moving to the conclusion drawn from those facts:

24 *First*, Montana (see part (b) above) has recharacterized the statement about HMF,  
25 from "Montana Holdings, inability *and/or maybe* never having the intention to pay  
26 HMF" to "Montana Holdings did not pay, *nor* had any intention of paying [HMF]."  
27 [Emphasis added] The website does not make a blanket statement that Montana  
28 planned not to pay.

1           *Second*, with respect to HMF, Montana does not submit any evidence, in the  
2 Mittens Affidavit or elsewhere, to rebut the specific factual allegations in the website,  
3 namely that (a) HMF and Montana signed a \$6 million contract to dig a marina, (b)  
4 HMF did \$4 million of work, (c) HMF stopped digging at Montana’s request, and (d)  
5 Montana did not pay HMF. To the contrary, the Mittens Affidavit (¶14) *supports the*  
6 *truth* of factual allegations (a) and (c), because Mr. Mittens refers to “its contract with  
7 HMF” and states that Montana “terminated its contract.” Mr. Mittens’ denial goes only  
8 so far as to allege the conclusion that “Montana paid HMF for all work completed” and  
9 suggests that Montana believes that HMF had not performed. In short, Montana  
10 provides no *prima facie* rebuttal of any factual allegation regarding HMF in the website.

11           *Third*, the statements actually on the website appear quite true. *See* Pratt Aff.,  
12 submitted concurrently, which confirms all four of the points above. (Mr. Pratt also  
13 contradicts Mr. Mittens’ statement, Aff. ¶14, that “Montana terminated its contract with  
14 HMF for non-performance,” but that factual dispute is not necessary to demonstrate  
15 the absence of a *prima facie* case because the website did not mention performance.)

16           *Fourth*, with respect to Montana’s challenge to the website’s statement that “local  
17 vendors,” aside from HMF, had not been paid, the website refers to a specific instance  
18 of a vendor owed \$4000 but paid only \$500 in March because Montana had “no more to  
19 give.” The Mittens Affidavit contains no rebuttal of the website’s specific factual  
20 reporting, instead merely alleging, generally, that “Montana is in good standing with  
21 all Rum Cay vendors ...,” apparently now. There is no denial that Montana owed the  
22 specific vendor \$3500 in March or that the vendor was told that Montana had no more.

23           *Fifth*, with regard to the conclusion, Montana’s purported showing again does  
24 not credit the actual wording of the website, which said, “Here are some *telltale signs*  
25 that Montana Holdings *may be* nearing bankruptcy or closure ....” [Emphasis added]  
26 A conditional statement of that sort is obviously nothing more than the author’s  
27 inference from the above facts (the “signs”), and as such is opinion that cannot be a  
28 false or defamatory statement about an absolute fact.

1           Sixth, Montana submits a blanket denial that Montana is “nearing bankruptcy or  
2 closure.” Mittens Aff., ¶13. However, Mr. Mittens does not state whether the project is  
3 profitable, whether Montana is properly capitalized, the amount of Montana’s debt,  
4 whether Montana’s cash flow is positive or negative, or whether Montana’s net worth  
5 has increased or declined. No balance sheet or any other financial document is  
6 submitted or cited, even though those are clearly available to Montana. As in *Twombly*,  
7 “Factual allegations must be enough to raise a right to relief above the speculative  
8 level,” and a mere assertion of untruth without more is clearly not enough to make a  
9 *prima facie* case. See also *McMann v. Doe*, 2006 WL 3102986 \*16 (D. Mass. Oct. 31, 2006)  
10 (“Bare assertions in an affidavit” that “merely contains an assertion that [a] statement is  
11 not true” are “not adequate to defeat summary judgment” and thus cannot form a  
12 *prima facie* case justifying discovery of an Internet Doe’s identity).

13           **G. Montana’s Sales and Clear Title.**

14           Just after Montana’s table (Opp., p. 14), Montana tells the Court, “The  
15 Resortbuyerbeware Website further falsely implies that Montana Holdings has not sold  
16 all lands with clear title and with a certificate of title issued by the Supreme Court of  
17 the Bahamas. This too is false. Mittens Aff. ¶12.” The referenced affidavit makes a  
18 number of statements about clear title, available title insurance, and sales timetables.

19           The Opposition does not identify any statement in the website that supposedly  
20 “falsely implies that Montana Holdings has not sold all lands with clear title.” Such is  
21 not *stated* in the website article, and the Court will search the website article in vain for  
22 any statement even *implying* anything of the sort. The website does not contain the  
23 words “title,” “certificate,” “Supreme Court,” or anything similar.

24           **H. General Comments about the Purported Prima Facie Showing.**

25           As explained in parts A-G above, if the Court takes the time (as Doe’s counsel  
26 has done) to compare the actual website with the characterizations in Montana’s  
27 opposition and Mr. Mittens’ sworn affidavit (which purports to swear to what the  
28 “website article states”), it will become amply clear that Montana has submitted, and



1 sworn to, recasted and inaccurate summaries of the website statements. Apparently,  
2 Montana hoped that its characterizations would go without substantive rebuttal or, if  
3 rebutted, would suggest to the Court that factual disputes preclude granting a motion  
4 to dismiss. To the contrary, more careful examination shows why Montana has ***not***  
5 ***made even one prima facie*** showing that any specific factual statement in the brief is  
6 materially untrue and defamatory.

7       It has taken considerable time, pages, and effort for Doe’s counsel to reveal  
8 Montana’s short table, and the statement just after the table, as grossly misleading.  
9 Gross stretches of the sort found in Montana’s opposition and affidavit are shameful  
10 and do not promote the administration of justice. Those repeated mischaracterizations  
11 of Doe’s website provide further support for an award of attorneys’ fees.

12       With regard to all points, further, Montana makes no *prima facie* showing that  
13 any statement resulted in specific damage or was the *cause* of any investor, who had  
14 actually intended to invest, deciding not to do so. Montana submits the Mittens  
15 Affidavit, which (at ¶¶16-17) states that Montana has had to make certain efforts to  
16 demonstrate supposed falsity of the statements, and supposedly lost an investor who is  
17 not named, and Montana submits a supplemental exhibit, unauthenticated, which  
18 purports to describe a review of the website by an investment committee. However,  
19 even ignoring obvious hearsay and speculation into third party state of mind, neither  
20 of Montana’s pieces of “evidence” provide a *prima facie* case that any inventor had  
21 firmly decided to invest but changed his or her mind ***on account of specific factual***  
22 ***misstatements*** in the website, as opposed to true statements on the website or other  
23 factors aside from the website. Indeed, given the ease with which any misstatement on  
24 certain subjects could be rebutted to an otherwise serious investor, it is hard to imagine  
25 that Montana could show any error in the website that was more than harmless.

26       Finally, Montana does not purport to make any showing of the elements of its  
27 causes of action for interference with contract or prospective business relationship or  
28 trade libel. Accordingly, Montana’s final claims should be dismissed forthwith.

1 **III. CONCLUSION.**

2 Montana does not deny that it must make a *prima facie* case before subjecting an  
3 anonymous speaker to compulsory identification. Careful review to ensure compliance  
4 prevents a plaintiff from being able to identify critics, with the possibility of subsequent  
5 retribution, simply by filing a facially adequate complaint and making general  
6 allegations disguised as showings. Montana has not shown that its claims can facially  
7 survive personal jurisdiction and substantive defamation challenges.

8 Accordingly, for the reasons stated above, Doe respectfully requests the Court to  
9 quash the subpoenas issued by Montana to Godaddy.com, Inc. and Domains By Proxy,  
10 Inc., dismiss the Complaint for lack of jurisdiction, and award attorneys' fees to Doe.

11 Respectfully submitted this 9th day of October, 2007.

12 HOFFMAN & ZUR

13  
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1 **CERTIFICATE OF SERVICE**

2 I certify that, on October 9, 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 hand-delivery on:

4 Kimberly A. Warshawsky  
5 GREENBERG TRAURIG  
6 2375 East Camelback Road, Suite 700  
7 Phoenix, Arizona 85016  
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10 Donald Hertz  
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