EFF PrePaid Legal v. Sturtz et al.

Notice of and Motion by John/Jane Doe to Proceed under Pseudonym and to Quash Deposition Subpoena directed to Yahoo!, Inc.

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<tr><td>RE-PAID LEGAL SERVICES INC., an Oklahoma corporation, and PRE-PAID LEGAL SERVICES, INC. OF FLORIDA, a Florida corporation.

Plaintiffs,

vs.

GREGG STURTZ, VICTORIA STURTZ, STURTZ AND ASSOCIATES, Inc., a Florida corporation, DAVID HUNTSMAN, DIANE HUNTSMAN, and LIBERTY LEGAL, INC., an Indiana corporation,

Defendants.</td><td>)
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NOTICE OF AND MOTION BY JOHN DOE TO PROCEED UNDER PSEUDONYM AND TO QUASH DEPOSITION SUBPOENA DIRECTED TO YAHOO!, INC. AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing: July 13, 2001

Time: 9:00 a.m.

Place: Dept. 18

Judge: Hon. Neil Cabrinha</td></tr>
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NOTICE OF MOTION BY JOHN DOE TO PROCEED UNDER PSEUDONYM AND TO QUASH DEPOSITION SUBPOENA DIRECTED TO YAHOO!, INC. AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

TO PLAINTIFFS PRE-PAID LEGAL SERVICES INC., PRE-PAID LEGAL SERVICES, INC. OF FLORIDA, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the Court will hear Defendants John and/or Jane Doe's ("Does") motion, pursuant to Code of Civil Procedure 1987.1, to quash a subpoena issued to Yahoo!, Inc. on July 13, 2001 at 9:00 A.M. before the Honorable Neil Cabrinha, of the Superior Court for the County of Santa Clara, at 191 North First Street, San Jose, California, 95113. Code of Civil Procedure section 1987.1 provides that "upon motion reasonably made by the party, witness . . . or upon the court's own motion after giving counsel notice and opportunity to be heard," the Court may make an order quashing a subpoena in its entirety . . . ."

Good cause exists to quash the subpoena in that Plaintiffs cannot make a showing that their interest in obtaining the true identity of the Does, sometimes known as "skeptic_ill (F/Land of Make Believe)" and "usetabeanassociateandlong" outweighs their First Amendment right to communicate anonymously on the Internet. The Does also seeks leave of the Court to appear as John Does to avoid disclosure of their true identity and to protect their First Amendment Rights.

This motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities in Support of Motion to Quash, on all papers and records on file herein, and on evidence and argument to be presented at the time of the hearing.

Respectfully submitted,

DATED: July 12, 2001

Electronic Frontier Foundation

By ____________________________

Cindy A. Cohn

Attorneys for John and/ or Jane Does, sometimes known as as

“skeptic_ill (F/Land of Make

Believe)” and

“usetabeanassociateandlong”

TABLE OF CONTENTS

INTRODUCTION …………………………… 1

STATEMENT OF FACTS 3

1. Yahoo Message Boards 3

1. The Yahoo Subpoena 4

LEGAL ARGUMENT 5

I. THIS COURT SHOULD QUASH THE SUBPOENA TO YAHOO BECAUSE IDENTIFICATION OF THE SPEAKERS WOULD DESTROY THEIR RIGHT TO SPEAK ANONYMOUSLY 5

1. The First Amendment Protects the Right to Speak Anonymously 5

1. Enforcing this Subpoena Would Violate Speakers' Substantive Constitutional Rights. 7

I. THIS COURT SHOULD APPLY A BALANCING TEST TO DETERMINE WHETHER PREPAID'S NEED FOR DOE'S IDENTITY OUTWEIGHS DOE'S FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY 8

TABLE OF AUTHORITIES-

Cases: **Page**

ACLU v. Johnson, 4 F.Supp.2d 1029 (D.N.M. 1998),

aff'd, 194 F.3d 1149 (10th Cir. 1999) 6

ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) 6

Bates v. City of Little Rock, 361 U.S. 516 (1960) 7

Buckley v. American Constitutional Law Foundation,

119 S. Ct. 636 (1999) 5

Columbia Insurance Company v. Seescandy.com,

185 F.R.D. 573 (N.D. Cal. 1999) 1, 8, 14

Doe v. 2TheMart.com Inc.,

140 F. Supp. 2d 1088 (W.D. Wash. 2001) 9-10

Farr v. Pitchess, 522 F.2d 464, 464 (9th Cir. 1975) 9

In re Grand Jury Subpoena: Subpoena Duces Tecum v. John Doe

819, 829 F.2d 1291 (4th Cir. 1987) 7

Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fl. 1995) 8

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 5, 6

Miami Herald Publ'g. Co. v. Tornilllo, 418 U.S. 241 (1974) 3

NAACP v. Alabama, 357 U.S. 449 (1958) 7

New York Times Co. v. Sullivan, 364 U.S. 254 (1964) 7

Quad Graphics, Inc. v. Southern Adirondack Library System,

664 N.Y.S.2d 225 (NY Sup. Ct., Saratoga County 1997) 8

TABLE OF AUTHORITIES- Continued

Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538 (1999) 11-12

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 2-3, 6

Shelley v. Kraemer, 334 U.S. 1 (1948) 7

Talley v. California,362 U.S. 60 (1960) 5

Codes/Rules:

California Code of Civil Procedure § 1985 9

Articles:

Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). 7

Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139. 7

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, Plaintiff Pre-Paid Legal Services, Inc. (hereinafter "Pre-Paid") has issued a subpoena to an online service provider Yahoo! Inc. (hereinafter "Yahoo") seeking to have Yahoo reveal the identity of Respondents "skeptic_ill (F/Land of Make Believe)" and "usetabeanassociateandlong" (hereinafter referred to as "Speakers"), third parties whose only known connection to this case is that they participated in a public discussion concerning Defendant's business held on a Yahoo message board. The subpoena arises out of litigation currently pending in a Florida state court between Pre-Paid and Gregg Sturz, et al. The underlying causes of action are: Misappropriation of Trade Secrets; Breach of Contract; Unfair Competition; Tortious Interference; Breach of Fiduciary Duty; Negligent Destruction of Evidence; and Intentional Destruction of Evidence.

The apparent basis for this subpoena is Pre-Paid's conjecture that someone posting to the message board may be Gregg Sturz or one of his colleagues. Based upon this generalized suspicion, and without offering any evidence or explanation, Pre-Paid seeks to invoke this Court's subpoena power in a way that would infringe irreparably eight individuals First Amendment right to speak anonymously. Under these circumstances, enforcement of the subpoena would terminate the Speakers' right to engage in anonymous speech, and would impose undue burdens under the First Amendment.

The syndrome of third party civil subpoenas issued to Internet service providers seeking to breach the anonymity of their users is growing increasingly frequent.[1] It has rarely been subjected to judicial scrutiny, however, partly because of the short time frames typically involved in bringing a motion to quash and partly because many internet

service providers do not notify their users before sacrificing their anonymity. This motion presents a good opportunity for the court to clearly explain that the test used in other settings where the First Amendment privileges information against forced disclosure should also be used to evaluate third party subpoenas. The choice to speak anonymously should not be invalidated by judicial process unless it is clearly shown that specifically identified, relevant information about an anonymous poster is central to the claims of the party seeking the information, that those claims are viable, and that the party can acquire the information in no other manner. Since Pre-paid has provided no reason or evidence to the Court that demonstrates why its need for the information outweighs the Speakers' Constitutional rights, this Court should quash the subpoena.[2]

STATEMENT OF FACTS

1. 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 read them. As the Supreme Court opined in *Reno v. ACLU*, 521 U.S. 844, 870 (1997), "[f]rom the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of 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

government's ability to impinge upon speech is stringently limited on the Internet, just as it would be in a traditional public forum. *Id.*

To allow these town criers and pamphleteers to find each other, Yahoo created a series of electronic bulletin boards for the expression of user opinions around the central topic of investment in publicly-traded securities. The Yahoo web site, http://www.yahoo.com, features a series of message boards for various publicly-traded companies, and it permits anyone to post messages to these boards. While nothing prevents individuals from using their real names, most individuals who post messages on these boards generally do so under pseudonyms – similar to the old system of truck drivers using "handles" when speaking on their CB radios. Choosing one of these colorful monikers protects the speaker's identity, and such privacy generally encourages the uninhibited exchange of ideas and opinions.

An important aspect of message boards that distinguishes them from almost any other form of published expression is that a person who disagrees with something that is said on a message board for any reason can respond to those statements immediately, at little or no cost, and that response will have the same prominence as the offending message. A message board is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Publ'g. Co. v. Tornilllo*, 418 U.S. 241 (1974). Corporations and individuals can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong. Because many people regularly revisit the same message boards, the response is likely to be seen by much the same audience as the original criticism. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for resolution of disagreements about the truth of disputed propositions of fact and opinion.

One of Yahoo’s message boards is specifically devoted to Pre-Paid. Many members of the public regularly turn to the Yahoo message board as a source of information about Pre-Paid. As of the date this brief is filed, over 17,000 messages have

been posted on the board. A casual review of those messages reveals an enormous variety of topics and posters. The Speakers are two of the many members of the public who have visited the Yahoo message board for Pre-Paid and participated in the discussion. They used the screen names "skeptic_ill" and "usetabeanassociateandlong."

In order to sign up for a message board, individuals 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 many users do), Yahoo gathers a name, address, occupation and industry from each user.[3]

B. The Yahoo Subpoena

On May 31, 2001, Pre-Paid issued a subpoena in the Superior Court of California, County of Santa Clara County, requesting "[A]ny and all documents referencing or relating to the identity" of eight Yahoo message board posters, "including but not limited to, the Internet Protocol address, the internet service provider used for each such posting, and the name, address, telephone number, date of birth, or other identifying information." A true and correct copy of the subpoena is attached hereto as Exhibit "A".

On Thursday, June 1, 2001, the Speakers received email from Yahoo notifying them that a subpoena from Pre-Paid had been received and that Yahoo 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.

LEGAL ARGUMENT

Established First Amendment doctrine should determine the legal standard for determining whether a subpoena for the identity of a non-party Internet speaker violates the right to speak anonymously. This Court should make clear that the First Amendment rights of individuals like the Speakers are protected from discovery fishing expeditions in the absence of a genuine need that outweighs the constitutionally protected interest. While the law regarding third party Internet subpoenas is new, there is ample precedent

for a court to reject the use of civil discovery tools where the disclosure of information would infringe another party's First Amendment interests. In these lines of cases, courts have balanced the harm to the speaker against the party's need for discovery.

I

THIS COURT SHOULD QUASH THE SUBPOENA TO YAHOO BECAUSE IDENTIFICATION OF THE SPEAKERS WOULD DESTROY THEIR RIGHT TO SPEAK ANONYMOUSLY.

Petitioner seeks to use the subpoena power of this court to identify an Internet speaker. This type of discovery directly destroys Doe's constitutional right to speak anonymously.

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

The Supreme Court has repeatedly upheld the First Amendment right to speak anonymously. *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 celebrate the important role played by anonymous or pseudonymous writings through history, from the literary efforts of Shakespeare and Mark Twain through the explicitly political advocacy 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, <u>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.</u>

McIntyre, 514 U.S. at 341-342 (emphasis added).

Reno v. ACLU firmly established that Internet speech is fully protected under the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1997) Other 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) (upholding preliminary injunction against New Mexico statute prohibiting dissemination of material that is harmful to minors on the Internet); *ACLU v. Miller,* 977 F. Supp. 1228, 1230 (N.D. Ga. 1997) (granting preliminary injunction where parties likely to prove that Georgia criminal statute imposed unconstitutional content-based restrictions on their right to communicate anonymously and pseudonymously over the Internet).

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. The technology of the Internet is such that sending an e mail or visiting a website leaves behind an electronic footprint that can, if saved, 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 of the Courts to compel disclosure of information, can snoop on communications to learn who is saying what to whom. As a result, 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.

2. **Enforcing this Subpoena Would Violate Speakers' Substantive Constitutional Rights.**

Pre-Paid asks this Court to enforce a subpoena to obtain the Speakers' identity and to terminate once and for all their 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).

Regardless of what test this Court may adopt to evaluate the sufficiency of the Speakers' claims (which we address below) it is clear that some showing must be made by Pre-Paid 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). At this stage of the case, Pre-Paid has made no showing that there is a compelling interest for the Speakers' identity.

II

THIS COURT SHOULD APPLY A BALANCING TEST TO DETERMINE WHETHER PREPAID'S NEED FOR DOE'S IDENTITY OUTWEIGHS DOE'S FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY

Because involuntary identification of anonymous speakers trenches on their First Amendment right to remain anonymous, the First Amendment creates a qualified privilege against disclosure. Forced identification of anonymous speakers on the internet

would create a chilling effect on the speech not only of the persons whose identity is revealed, but on many other persons as well.

This Court may rely on the rules in analogous situations where courts have rejected the use of civil discovery tools where the disclosure of information would be harmful to another party's First Amendment interests. For example, courts have a great deal of experience with third party journalists subpoenaed for confidential information obtained in the course of reporting. The essential 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 this case, California state rules of discovery permit discovery of any relevant matter, as long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *See* CA Code of Civ. Pro. § 2017; Fla. R. Civ. P. 1.280 (b) (1).[4]

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). 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, faced with losing their anonymity, 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.

Although the law relating to anonymity of speech on the internet is still developing, a federal court has recently addressed a remarkably similar set of circumstances to the ones presented here. *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001). In *2TheMart.com*, a large corporation attempted to use a subpoena to obtain the identities of twenty-three anonymous speakers on an internet

message board operated by 2TheMart.com. None of the speakers were parties to the underlying litigation. Since the petitioner had "failed to demonstrate that the identity of these Internet users is directly and materially relevant to a core defense in the underlying securities litigation," the court granted the speakers' motion to quash the subpoena. *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1090 (W.D. Wash. 2001). The court said, "The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously." *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001). Without such ability, people may no longer participate in public message boards. "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *2TheMart.com*, 140 F. Supp. 2d at 1092.

Here, Pre-Paid has attempted to use a subpoena to obtain the identities of eight anonymous speakers on an internet message board operated by Yahoo. Pre-Paid has offered no explanation for requesting this personal information. The nature of the underlying dispute suggests that it is unlikely that these speakers are relevant in any material way to the litigation, much less "directly and materially relevant". *Id.* This subpoena, like the subpoena in *2TheMart.com*, presents no reasonable basis for setting aside the Speakers' First Amendment protections.

In *2TheMart*, the court established the appropriate standard for evaluating the merits of "a civil subpoena that seeks the identity of an anonymous Internet user who is not a party to the underlying litigation". *Id.* The *2TheMart* standard is a balancing test involving four factors, which ask "whether: (1) the subpoena . . . was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) [adequate] information . . . is unavailable from any other source." *Id.*

In order to meet this test, Pre-Paid must first show good faith and a lack of improper purpose in requesting the information. In addition, it must demonstrate that the identifying information of these particular Speakers is of certain relevance and goes to

the very heart of the issues of the underlying litigation. Finally, Pre-Paid must show that the necessary information cannot be obtained from any other source.

In fact, Pre-Paid has done none of these things. Pre-Paid has provided no purpose in requesting the information at all, let alone demonstrated that this subpoena is anything other than a fishing expedition to ferret out its critics. Pre-Paid has given the Speakers no explanation of why their particular identities have been requested. There is no indication in the record that Pre-Paid has attempted to obtain information from any other source. In short, Pre-Paid has nothing more than speculation to prop up this attempt to pierce the Speakers' constitutionally-protected anonymity.

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 Appeals 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. Pre-Paid seeks to pierce the anonymity of these Speakers based upon its unsupported belief that their identities may be relevant to the underlying action. Revealing the identity of the Speakers will obviously chill them and others in their speech on public message boards. As in *Rancho Publications*, Pre-Paid's unstated 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 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.

1. Here, Pre-Paid'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 freely, the Speakers urge this court to adopt the *2TheMart* test noted above for evaluation of subpoenas issued to online service providers seeking identifying information about their subscribers when those subscribers are not parties to the pending litigation.

2. **CONCLUSION**

Based upon the foregoing, the Speakers respectfully request that this motion to quash the subpoena be granted. A form of order is submitted herewith.

Respectfully submitted,

____

Cindy A. Cohn (Cal. Bar #145997)

ELECTRONIC FRONTIER FOUNDATION

454 Shotwell Street

San Francisco, CA 94103

Tel: (415) 436-9993 x 108

Fax: (415) 436-9333

July 12, 2001 Counsel for “skeptic_ill” and “usetabeanassociateandlong”

[1] Records from the Circuit Court in Loudoun County, Virginia, the home of America Online suggest the burgeoning scope of this practice. As of April, 1999, 70 of the 107 applications filed with the court since that January were directed to AOL information. Indeed, serving warrants on AOL is "almost a full-time job" for the Sheriff's process server. Stephen Dinan, *Search Warrants Keep AOL Busy*, Wash. Times, April 27, 1999 at C4.

[2] 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.

[3] *See* *<http://edit.yahoo.com/config/eval_register?.intl=us&new=1&.done=&.src=ym&partner=&promo=&.last=>*

[4] California specifies that discovery requests must state "in full detail the materiality thereof to the issues involved in the case." CA Code of Civ. Pro. § 1985. As this was not done here, the subpoena is on its face, defective.