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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED JURISDICTION

ECLIPSE AVIATION CORPORATION,
Plaintiff,
vs.

JOHN DOE; JANE DOE; ET AL.

Defendants.
Case No.: 108CV110380
Dept. No.: 7

MOTION TO QUASH AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

JOHN DOE (identified herein without regard to gender) moves the Court to quash the Deposition Subpoena for business records issued on behalf of ECLIPSE AVIATION CORPORATION in its claims against JOHN DOE and JANE DOE. Such Deposition Subpoena is directed to Google, Inc. And/or Blogger.com. A copy of this Depositions Subpoena is attached hereto as Exhibit "A".

1. The Deposition Subpoena seeks discovery, returnable on May 14, 2008, of first name, last name, zip code, e-mail address and related information with respect to a series of individuals (identified in the underlying Complaint as JOHN DOES or JANE DOES) using the posting identity or identities enumerated on Page 2 of the Deposition Subpoena.

2. Disclosing the identification of such posting identities violates the constitutional protection guaranteed by the First Amendment to the United States Constitution.

3. To the extent that the guarantee of anonymity implicated in the First Amendment to the United States Constitution are qualified privileges, the Plaintiff and proponent of the Deposition Subpoena has made no showing that the speech in question falls outside the protected category of free speech.

4. The Plaintiff and proponent of the Deposition Subpoena has made no showing, either in this action or in the underlying claim brought in the District Court of Albuquerque, New Mexico, which would establish a basis to exempt the requested disclosure from the protection of the First Amendment.

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction:

This JOHN DOE and others are the subject matter of a Subpoena for Deposition seeking to disclose the identities maintained behind the blogger identities used to post information on a website identified as Eclipse Aviation Critic NG or http://www.eclipsecriticng.blogspot.com. Whatever those postings have been, whether critical or otherwise, the speakers are protected in their anonymous speech by the First Amendment. Unmasking anonymous internet speakers invokes a higher standard than ordinary discovery that does not invoke these constitutional rights. McIntyre v. Ohio Elections Commission, 514 U.S. 334, 357 (1995). Anonymous speech is deemed by the Supreme Court of the United States to be:

[n]ot a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. . .

[s]peech exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation - and their ideas from suppression - at the hand of an intolerant society.

Speech is specifically afforded first amendment protection:

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 soap box. Through the use of Web pages, mail exploders, and news groups, the same individual can become a pamphleteer . . . [o]ur cases provide no basis for qualifying the level of First Amendment scrutiny to be applied to this medium.

Reno v. American Civil Liberties Union, 521 US 844, 870 (1997).

The use of civil subpoenas to strip an anonymous of that anonymity would necessarily have a chilling effect on internet communication and thus on basic First Amendment rights. Doe v. 2 The Mart.Com, Inc., 140 F.Supp 2d 1088 (W.D. Wash 2001); Columbia Insurance Company v. Seescandy.Com, 185 F.R.D. 573 (N.D. Cal 1999).

Thus, in order to permit a subpoena directed to the disclosure requested an exceptional case must be shown where a compelling need for the discovery is demonstrated to the extent that it outweigh any First Amendment right inherent in the anonymous speaker. *See* Doe v. 2 The Mart.Com, Inc., supra, and Columbia Insurance Company v. Seescandy.Com, supra.

2. The Deposition Subpoena is legally deficient:

The instant subpoena does not meet any requirements which would outweigh the First Amendment privilege of the speakers. In the history of First Amendment privilege, the advent and increasing popularity of the internet has, in truth, been a very fast-moving fall. Most jurisdictions that have considered the issue, whether related to defamation, to stock manipulation, trademark infringement or unqualified disclosures of confidential materials, have imposed, in keeping with the previously cited former Supreme Court Opinions, a relatively high standard governing the requirement to produce documents under such subpoenas. The latest expression of the rules surrounding such disclosure is contained in Krinsky v. Doe 6, 59 Cal.F4th 1154, 72 Cal.Rptr 3d 231 (6th Dist. 2008). Krinsky uses, as its point of departure, the First Amendment stricture that in reviewing protection afforded by the First Amendment to

Both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category with an acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.
Quoting Bose Court v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 (1984).

Krinsky then proceeds to exhaustively survey the existing field dealing with First Amendment protections and the various attempts to breach them for the purposes of ascertaining the identity of internet speakers. Beginning at Page 239, Krinsky documents and examines the "applicable balancing tests utilized by a variety of courts to this date". The previous California decisions, Mitchell v. Superior Court, 37 Cal.3d 268, 208 Cal.Rptr 152 (1984) (a libel action), Grady v. Superior Court, 139 Cal.F4th 1423, 44 Cal Rptred 72 (2006) (misappropriation of trade secrets e-mail correspondence) and Rancho Publications v. Superior Court, 68 Cal.F4th 1538, 81 Cal. Reptr 274 (1999) (defamation) and determines that the issue at hand is somewhat different, since the concern in this case concerned the right of an individual to communicate freely with others while still balancing rights of an injured party to seek redress.

The Krinsky opinion then reaches toward the most current decisions involving individuals and makes specific reference to Dendrite International, Inc. v. John Doe #3, 372 N.J.Super. 134 (2001) (a defamation action) Immuno Medics, Inc. v. Doe, 342 N.J. Super 160 (2001) (breach of confidentiality agreement) and Highfields Capital Management, LP v. Doe, 385 F.Supp 2d 969, N.D. Cal. 2005 (defamation, commercial disparagement and trademark and unfair competition violation). The Krinsky report then distills the various requirements out of these previous decisions and established a series of criteria:

1. The proponent of the subpoena must first attempt to notify the defendant (or speaker). (This requirement is deemed satisfied by virtue of the fact that Google has already notified the JOHN DOE speakers and given them an opportunity to defend against the subpoena.)

2. The proponent of the subpoena must make a prima facia showing that a claim exists. This requirement is completely absent in this case. The subpoena does not make any factual showing and the underlying litigation, pending in the District Court in Albuquerque, New Mexico, is completely under seal, disclosing no information, other than the fact that the action is brought as a contract and injunction action (significantly, *not* as a tort action). A copy of the New Mexico Docket Sheet, together with the commission authorizing the issuance of a subpoena in California is attached hereto as Exhibit "B". In establishing a prima facia showing that the claim has merit, again without regard to the fact that the claim has been sealed, and there are no factual showings made to date, the Court is required to determine whether any statements are statements of fact, statements of opinion, satirical statements or otherwise. *See* Highfields, supra.

3. The proponent is required to seek relief which would be less intrusive than disclosure. The Plaintiff has done nothing to explore alternative relief which would not impinge on First Amendment rights. All of the citations preceding the Krinsky decision, including Krinsky, make specific reference to the requirement which clearly implicates the First Amendment: that any invasion of that right be by the least intrusive methods. In this case, no attempt has been shown to secure the relevant information other than the issuance of the subpoena. There are, of course, a myriad of avenues available to discover the information which may be necessary in this mysterious contract and injunction claim, not the least of which would be discovery directed to known and existing persons and personnel.

CONCLUSION

The subpoena directed to Google, Inc. and Bloggers.com requiring disclosure of the identity of its anonymous speakers is illegally insufficient, constitutionally insufficient and premature. For these reasons, the Deposition Subpoena should be quashed.

Dated: _____, 2008

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By:_____
Norman Malinski

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of May, 2008, the foregoing ***Motion to Quash and Supporting Memorandum of Points and Authorities*** was served on the party(ies) by faxing and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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