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FILED

2008 MAY 14 P 2:35

FILED IN THE SUPERIOR COURT  
COUNTY OF SANTA CLARA, CALIFORNIA  
BY: [Signature] Zenzen

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11 Aventura, FL 33180  
12 Telephone: (305) 937-4242  
13 *Admitted Pro Hac Vice*

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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.

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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**

**I. 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.eclipsecriticizing.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

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2 Commission, 514 U.S. 334, 357 (1995). Anonymous speech is deemed by the Supreme Court  
3 of the United States to be:

4 [n]ot a pernicious, fraudulent practice, but an honorable tradition  
5 of advocacy and of dissent. . .  
6 [s]peech exemplifies the purpose behind the Bill of Rights, and  
7 of the First Amendment in particular: to protect unpopular  
individuals from retaliation - and their ideas from suppression -  
at the hand of an intolerant society.

8 Speech is specifically afforded first amendment protection:

9 Through the use of chat rooms, any person with a phone line can  
10 become a town crier with a voice that resonates farther than it  
11 could from any soap box. Through the use of Web pages, mail  
12 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.  
13 Reno v. American Civil Liberties Union, 521 US 844, 870  
(1997).

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

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

4 2. The Deposition Subpoena is legally deficient:

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

16 Both to be sure that the speech in question actually falls within  
17 the unprotected category and to confine the perimeters of any  
18 unprotected category with an acceptably narrow limits in an  
19 effort to ensure that protected expression will not be inhibited.  
20 Quoting Bose Court v. Consumers Union of U.S., inc., 466 U.S.  
21 485, 505 (1984).

22 Krinsky then proceeds to exhaustively survey existing the field dealing with First Amendment  
23 protections and the various attempts to breach them for the purposes of ascertaining the  
24 identity of internet speakers. Beginning at Page 239, Krinsky documents and examines the  
25 “applicable balancing tests utilized by a variety of courts to this date”. The previous California  
26 decisions, Mitchell v. Superior Court, 37 Cal.3d 268, 208 Cal.Rptr 152 (1984) (a libel action),  
27 Grady v. Superior Court, 139 Cal.F4th 1423, 44 Cal Rptred 72 (2006) (misappropriation of  
28 trade secrets e-mail correspondence) and Rancho Publications v. Superior Court, 68 Cal.F4th

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2 1538, 81 Cal. Reprtr 274 (1999) (defamation) and determines that the issue at hand is somewhat  
3 different, since the concern in this case concerned the right of an individual to communicate  
4 freely with others while still balancing rights of an injured party to seek redress.

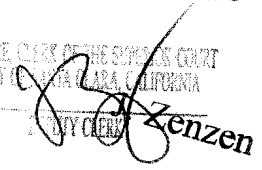
5 The Krinsky opinion then reaches toward the most current decisions involving  
6 individuals and makes specific reference to Dendrite International, Inc. v. John Doe #3, 372  
7 N.J.Super. 134 (2001) (a defamation action) Immuno Medics, Inc. v. Doe, 342 N.J. Super 160  
8 (2001) (breach of confidentiality agreement) and Highfields Capital Management, LP v. Doe,  
9 385 F.Supp 2d 969, N.D. Cal. 2005 (defamation, commercial disparagement and trademark  
10 and unfair competition violation). The Krinsky report then distills the various requirements  
11 out of these previous decisions and established a series of criteria:

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

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

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KIRI TORRE, CLERK OF THE SUPERIOR COURT  
COUNTY OF SANTA BARBARA, CALIFORNIA  
BY:  Zenzen

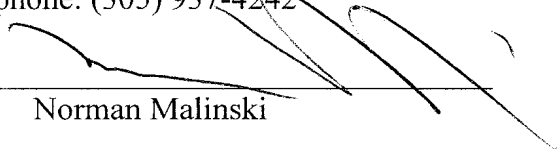
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2 3. The proponent is required to seek relief which would be less intrusive than  
3 disclosure. The Plaintiff has done nothing to explore alternative relief which would not  
4 impinge on First Amendment rights. All of the citations preceding the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

11 **CONCLUSION**

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

15 Dated: May 7, 2008

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19 Suite 508  
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21 Telephone: (305) 937-4242

22 By:   
23 Norman Malinski


24 **CERTIFICATE OF SERVICE**

25 I hereby certify that on the 7<sup>th</sup> day of May, 2008, the foregoing *Motion to Quash*  
26 *and Supporting Memorandum of Points and Authorities* was served on the party(ies) by  
27 faxing and mailing of same in the United States mail, postage prepaid thereon, addressed as  
28 follows:

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Angela F. Sotrey, Esquire  
MILLER, MORTON, CAILLAT & NEVIS, LLP  
25 Metro Drive, 7<sup>th</sup> Floor  
San Jose, CA 95110

Warren Stephen Jacobson, Esquire  
THE JACOBSON LAW GROUP  
433 North Camden Drive, #960  
Beverly Hills, CA 90210

---

An Employee of Norman Malinski, P.A.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): <b>Angela F. Storey, Esq. (State Bar # 217942)</b> <b>Miller, Morton, Caillat &amp; Nevis, LLP</b> <b>25 Metro Drive, 7th Floor</b> <b>San Jose, CA 95110</b> TELEPHONE NO.: (408) 292-1765 FAX NO. (Optional): (408) 436-8272 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): <b>Plaintiff Eclipse Aviation Corporation</b>	FOR COURT USE ONLY           CASE NUMBER: <b>108CV110380</b>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF <b>SANTA CLARA</b> STREET ADDRESS: <b>191 North First Street</b> MAILING ADDRESS: CITY AND ZIP CODE: <b>San Jose, CA 95113</b> BRANCH NAME:	
PLAINTIFF/PETITIONER: <b>Eclipse Aviation Corporation</b> DEFENDANT/RESPONDENT: <b>John Doe; Jane Doe; et al.</b>	
<b>DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS</b>	

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address and telephone number of deponent, if known):  
**Google Legal Support, Blogger CMCA Complaints**

**1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:**

To (name of deposition officer): <b>Angela F. Storey, Esq., Miller, Morton, Caillat &amp; Nevis, LLP</b> On (date): <b>May 14, 2008</b> At (time): <b>10:00 a.m.</b> Location (address): <b>25 Metro Drive, 7th Floor, San Jose, CA 95110</b> <b>Do not release the requested records to the deposition officer prior to the date and time stated above.</b>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

- a.  by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
  - b.  by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
  - c.  by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.
2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.
3. The records to be produced are described as follows:  
 See Attachment 3

Continued on Attachment 3.

4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL COSTS RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued: **April**, 2008  
**APR 14 2008**  
 (TYPE OR PRINT NAME) **Kim Torre**  
**Chief Executive Officer**  
 (Title) **Chief Executive Officer**  
 (Signature) **B. CHOPOFF**  
 (Signature of Person Issuing Subpoena)  
**Clerk of the Santa Clara County Superior Court**  
 (TITLE)

EXHIBIT A



Eclipse Aviation Corporation v. John Doe; Jane Doe, et al.  
Santa Clara County Superior Court

DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

ATTACHMENT 3

Subscriber, Poster, or Member information and details from the Web Log  
(BLOG) account of ECLIPSE AVIATION CRITIC NG  
([HTTP://WWW.ECLIPSECRITICNG.BLOGSPOT.COM/](http://www.eclipsecriticng.blogspot.com/)) for the individual or individuals  
using the posting identity/identities of:

TURN-AND-BURN  
COLDWETMACKARELOFREality  
NINER ZULU  
BLACKTULIP  
FLIGHTCENTERGADFLY  
AIRTAXIMAN  
FLIGHTGUY  
ECLIPSO  
RINGTAIL  
METALGUY  
TURBOPROP\_PILOT  
BRICKLINNG  
FREEDOMSJAMTARTS  
EXEAC  
EASYBAKEPLANE  
PLUMER  
VOVA\_K  
AIRSAFETYMAN  
CARLOS  
FRED  
BILL E.GOAT  
MOUNTAINHIGH  
PLASTIC\_PLANES  
AGROTH  
EXPILOT  
THE REAL FRANK CASTLE  
WHYTECH  
ISPACE

including, but not limited to: first name, last name, zip code, and email address given when registering the account and also any and all records pertaining to user login information including, but not limited to: all remote IP addresses with corresponding dates and times logged by your system on each occurrence of the account being accessed, and remote IP address, date and time logged by your system when the account was created and all other information pertaining to the account in the custody of Google, Inc. and/or Blogger.com.

PLAINTIFF/PETITIONER: Eclipse Aviation Corporation DEFENDANT/RESPONDENT: John Doe; Jane Doe, et al.	CASE NUMBER: <b>108CV110380</b>
--------------------------------------------------------------------------------------------------------	------------------------------------

**PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**

1. I served this *Deposition Subpoena for Production of Business Records* by personally delivering a copy to the person served as follows:

- a. Person served (*name*):
- b. Address where served:
- c. Date of delivery:
- d. Time of delivery:
- e. (1)  Witness fees were paid.  
           Amount: ..... \$ \_\_\_\_\_
- (2)  Copying fees were paid.  
           Amount: ..... \$ \_\_\_\_\_
- f. Fee for service: ..... \$ \_\_\_\_\_

2. I received this subpoena for service on (*date*):

3. Person serving:

- a.  Not a registered California process server.
- b.  California sheriff or marshal.
- c.  Registered California process server.
- d.  Employee or independent contractor of a registered California process server.
- e.  Exempt from registration under Business and Professions Code section 22350(b).
- f.  Registered professional photocopier.
- g.  Exempt from registration under Business and Professions Code section 22451.
- h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

\_\_\_\_\_  
(SIGNATURE)

(For California sheriff or marshal use only)  
I certify that the foregoing is true and correct.

Date:

\_\_\_\_\_  
(SIGNATURE)

**ECLIPSE VS DOE J ET AL**

**CASE DETAIL**

CASE #	CURRENT JUDGE	FILING DATE	COURT
D-202-CV-200802624	VANZI LINDA M	03/18/2008	ALBUQUERQUE District

**PARTIES TO THIS CASE**

PARTY TYPE	PARTY DESCRIPTION	PARTY #	PARTY NAME
D	DEFENDANT	1	DOE JOHN (C)
D	DEFENDANT	2	DOE JANE (C)
D	DEFENDANT	3	VARIOUS DOES
P	PLAINTIFF	1	ECLIPSE AVIATION CORPORATION

ATTORNEY: ROBERT H. JACOBVITZ

**CIVIL COMPLAINT DETAIL**

COMPLAINT DATE	COMPLAINT SEQ #	COMPLAINT DESCRIPTION	DISP	DISP DATE
03/18/2008	1	OPN: COMPLAINT	Pending	

COA SEQ #	COA DESCRIPTION	PARTY NAME	PARTY TYPE	PARTY #
1	BREACH OF CONTRACT	DOE JOHN (C)	D	1
2	INJUNCTION - NOT CONTRACT/TORT	DOE JANE (C)	D	2
		VARIOUS DOES	D	3
		ECLIPSE AVIATION CORPORATION	P	1

**REGISTER OF ACTIONS ACTIVITY**

EVENT DATE	EVENT DESCRIPTION	EVENT RESULT	PARTY TYPE	PARTY #	AMOUNT
03/18/2008	ORD: ORDER FILING ORDER GRANTING ECLIPSE AVIATION CORPORATION'S MOTION TO SEAL VERIFIED COMPLAINT FOR BREACH OF CONTRACT AND INJUNCTIVE RELIEF, AND TO SEAL THIS MOTION				
03/18/2008	SEALED DOCUMENT FILING ECLIPSE AVIATION CORPORATION'S MOTION TO SEAL VERIFIED COMPLAINT FOR BREACH OF CONTRACT AND INJUNCTIVE RELIEF, AND TO SEAL THIS MOTION (PL)				
03/18/2008	ARB: CERT NOT SUBJECT FILING COURT-ANNEXED ARBITRATION CERTIFICATION (PL)				
03/18/2008	SUMMONS ISSUED OPN: COMPLAINT FILING VERIFIED COMPLAINT FOR BREACH OF CONTRACT AND INJUNCTIVE RELIEF <ATTACHMENT> <SEALED PER ORDER FILED 03-18-08>				
03/18/2008	ASM: CIVIL FILING W/ ARBITRAT		P	1	122.00

**JUDGE ASSIGNMENT HISTORY**

ASSIGNMENT DATE	JUDGE NAME	SEQ #	ASSIGNMENT EVENT DESCRIPTION
03/18/2008	VANZI LINDA M	1	INITIAL ASSIGNMENT

SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO  
STATE OF NEW MEXICO

ECLIPSE AVIATION CORPORATION,  
a Delaware corporation,

Plaintiff,

vs.

Case No. CV 2008 02624

JOHN DOE; JANE DOE;  
And various other unknown individuals designated  
VARIOUS DOES,

Defendants.

**COMMISSION TO ISSUE AND/OR OBTAIN SUBPOENA IN CALIFORNIA**

This matter came before the Court on Eclipse Aviation Corporation's ("Eclipse's") Motion For Commission to Issue and/or Obtain Subpoena in California (the "Motion") and the Court, being duly advised in the premises,

HEREBY FINDS that the Motion is well taken and should be granted;

THE COURT FURTHER FINDS that Google, Inc., Google Blogspot, and/or affiliates thereof (together "Google") may have information that is relevant to the action current pending in this Court between Eclipse and John Doe, et al.;

THE COURT FURTHER FINDS that Google has refused to comply with a subpoena issued in this action, a copy of which is attached hereto as Exhibit A (the "New Mexico Subpoena"), and insists that it will only respond to a subpoena issued by the Superior Court of California, County of Santa Clara;

IT IS THEREFORE ORDERED, that in confidence of your prudence and fidelity, the Court appoints Eclipse (acting through its California counsel, Miller, Morton, Caillat & Nevis, LLP, 25 Metro Drive, 7th Floor, San Jose, California 95110), to issue and/or request the issuance

ENDORSED  
FILED IN MY OFFICE THIS

APR 10 2008

*Quantita M. Duran*  
CLERK DISTRICT COURT

KENDRA GOERS

EXHIBIT A

of a subpoena from the Superior Court of California, County of Santa Clara, in accordance with the law and practice of said court, in the general form and with the general content of the New Mexico Subpoena.

IT IS FURTHER ORDERED that this Commission will expire three months from the date hereof.

**LINDA M. VANZI**

Hon. Linda M. Vanzi, Second Judicial District Court Judge

Submitted and approved:

JACOBVITZ, THUMA & WALKER  
a Professional Corporation

By: \_\_\_\_\_  
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(505) 766-9272  
Attorneys for Eclipse Aviation Corporation