

1 Your name: Alan P. Petrofsky, ^{for} ~~with~~ Eclipse-us-Does.blogspot.com
2 Your address: 3618 Alameda Apt 5
3 City/State/Zip: Menlo Park CA 94085
4 Your phone number: (650) 520-0626
5 Attorney /Pro Per for Eclipse-us-Does.blogspot.com

FILED
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CLERK
A. Pacheco

7 SUPERIOR COURT OF CALIFORNIA,
8 COUNTY OF SANTA CLARA
9 CIVIL DIVISION

11 Case No.: ~~1-08-CV-110380~~ 1-08-CV-110380

12 Pleading Title:
Reply in Support of
Mediq Request,

16 Judge: Manoukian, Dept 7
Hearing date: 6/6/2008 10:00 A.M.

12 Eclipse Aviation Corp.

13 Plaintiff,

14 and

15 John Doe et. al.

16 Defendant

Alan P. Petrofsky
Publisher of Eclipse-vs-Does.blogspot.com
Web: <http://eclipse-vs-does.blogspot.com>
Email: al@petrofsky.org
Voice: 650-520-0626
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3618 Alameda Apt 5
Menlo Park CA 94025

Wednesday, June 4, 2008

By Hand Delivery and by Electronic Mail
The Honorable Socrates Peter Manoukian
Santa Clara County Superior Court, Department 7
Email: smanoukian@scscourt.org
191 N 1st St
San Jose CA 95113

Re: *Eclipse Aviation Corp. v. John Doe et al.*, No. 1-08-CV-110380,
Requests to record audio of June 6, 2008, 10:00 A.M. hearing

Dear Judge Manoukian:

This letter is both:

1. A reply to the letter from Plaintiff Eclipse Aviation Corporation, dated June 3, 2008 (the "Response Letter", copy attached hereto as **Exhibit 1**), which responded to my Media Request to Photograph, Record, or Broadcast, dated May 30, 2008, regarding the hearing on June 6, 2008 (the "Media Request", **Exhibit 2**), which seeks permission to create and publish an audio recording of the hearing, per CRC 1.150(**e**); and
2. A request, in the alternative to the Media Request, for permission to create an audio recording of the hearing for use as my personal notes, per CRC 1.150(**d**) (the "Personal Recording Request").

The Media Request should be granted because: (a) I am, in fact, a "Media Agency" as defined in the rule; (b) the Sixth District has recently stated that this is precisely the type of case to which public access is important; (c) I cannot provide public access by way of simply publishing a copy of the official transcript, because doing so is prohibited by statute; and (d) the recording will not cause any harm or inconvenience to the parties, nor to the Court, nor to anyone else.

Definition of Media Agency

A “media agency” is broadly defined as “any *person* or organization engaged in news gathering or reporting” (CRC 1.150(b)(2), emphasis added). The Letter Response states, “While Mr. Petrofsky’s blog does contain information regarding this case, including links to various court documents, it does not appear to be an organization engaged in news gathering or reporting”. My work scanning and electronically publishing the filed documents in this case is, in itself, a legitimate act of news gathering and reporting. Even if that were not so, the actual factual situation is that I have also been publishing traditional news content.

The Sixth Appellate District and the Judicial Council have both expressed the view that providing the public with access to complete documents and recordings is a more important media function than the traditional function of merely providing spin, snippets, and sound bites:

A reporter who uncovers newsworthy documents cannot rationally be denied the protection of the law because the publication for which he works chooses to publish facsimiles of the documents rather than editorial summaries. ... Courts ought not to cling too fiercely to traditional preconceptions, especially when they may operate to discourage the seemingly salutary practice of providing readers with source materials rather than subjecting them to the editors’ own “spin” on a story.

(*O’Grady et al. v. Superior Court (Apple)* (2006), 139 Cal.App.4th 1423, 1457-1458)

Related to the issue of whether to recommend a complete ban on media coverage, the task force also unanimously voted not to ban live, contemporaneous electronic photographing, broadcasting, and recording from California courtrooms. It was suggested to the task force that delaying broadcast would work to reduce the commercialization and frenzy surrounding live media coverage. Task force members, however, also believed that a rule to delay broadcast would eliminate from the courtroom those media agencies offering the more responsible, educational, gavel-to-gavel coverage, leaving the public only with “snippets” and “sound bites” on the evening news.

(Judicial Council meeting materials (Feb. 23, 1996), tab 6, p. 10-11, quoted in *Photographing, Recording, and Broadcasting in the Courtroom: Guidelines*

for *Judicial Officers*, at 18 (Judicial Council of California, 1997)¹)

Furthermore, as can be seen in the following articles, I have also been publishing traditional reporting, with narrative and analysis, rather than just copies of documents: “The initial filings in the *Eclipse Aviation vs. Does* case”, dated May 1, 2008 (**Exhibit 3**) (discussing specifics of the subpoena and the procedural history of the litigation); “Motion to quash subpoena to be heard June 6 by Judge Manoukian”, dated May 19, 2008 (**Exhibit 4**) (discussing the opening brief on the motion to quash); and “Transcripts of the *H.B. Fuller* and *Krinsky* hearings before Judge Manoukian” dated May 29, 2008 (**Exhibit 5**) (discussing two similar past cases in which motions have been heard in this department).

Importance of Public Access to Free Speech Cases

The Sixth Appellate District has stated that cases like this one are precisely the type of cases in which “public scrutiny” and “deep[ening] the public’s understanding” is important, so as to “encourage judicial actors to take pains to act with solicitude for cherished constitutional rights, and ... help would-be anonymous speakers to ascertain the standards which will govern a judicial decision to strip them of anonymity”:

At the heart of some discovery motions are questions of great significance to members of the public. The present case is one of them. While it may be said to arise from a “discovery motion” – a motion to quash a discovery subpoena – the discovery in question is not merely ancillary or preliminary to some larger litigation but is the whole end and purpose of the case, at least insofar as California courts are concerned. Moreover, the information sought is invested with a substantial constitutional interest, i.e., the First Amendment right to speak anonymously. (See *Rancho Publications v. Superior Court* (1999) 68 Cal.App.4th 1538, 1547.) The court’s denial of the motion to quash did not merely determine some ancillary procedural point but, if affirmed by this court, inflicts upon a citizen an irrevocable loss of that constitutional interest. While no historical analog for such a proceeding comes readily to mind, the structural utility of allowing public access in a case of this kind is at least as great as that of allowing public access to a routine civil trial. Public scrutiny will encourage judicial actors to take pains to act with solicitude for cherished constitutional rights, and will help would-be anonymous speakers

¹<http://www.courtinfo.ca.gov/reference/documents/photo.pdf>

to ascertain the standards which will govern a judicial decision to strip them of anonymity. The deeper the public's understanding of judicial treatment of these issues, the better equipped the public will be to, for instance, seek legislative modification of the governing rules and procedures. A court's decision to lift the constitutionally infused shield of anonymity is, in short, a matter of deep and legitimate public concern, and that concern is significantly impaired whenever such a decision is made, as it was here, upon secret evidence.

(*H.B. Fuller v. Doe* (2007), 151 Cal.App.4th 879, 893-894)

Transcript alternative not available

It would seem that an alternative to publishing a complete audio recording of the hearing would be to purchase a transcript from the court reporter and publish it. Unfortunately, doing so is prohibited by statute:

Any court, party, or person who has purchased a transcript may, without paying a further fee to the reporter, reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, but shall not otherwise provide or sell a copy or copies to any other party or person.

(California Government Code 69954(d))

Thus, purchasing a transcript is not an available means for me to provide the public with a complete, spin-free account of what occurred at the hearing.

Also, a transcript would in some ways be inferior to a sound recording. Transcripts often contain passages whose meaning is difficult or impossible to discern without knowing the timing, inflection, and tone in which the words were spoken.

Recording will cause no harm

The recording will not cause any harm or inconvenience to the parties, the Court, nor anyone else. There will be no jurors present at this motion hearing. As far as I am aware, there will not be any witnesses either. It will just be lawyers arguing.

As for possible inconvenience to the court and the attorneys: I am only proposing to use a single, small, battery-operated device. I can even just hold it in my lap in the gallery, if need be. Ideally, however, the Court would allow me to place the device in the jury box. I certainly have no intention of

asking anyone to sit around while I perform extensive sound checks. I simply wish to be allowed to place the device and turn it on, and then be allowed to retrieve it once the hearing has concluded².

The plaintiff's letter noticeably lacks any assertion that allowing the recording would cause any harm to anyone. The plaintiff instead asks the Court to deny the request on the sole basis that allowing it would allegedly cause metaphysical violence to "the definition of media".

The "parties' support of or opposition to the request" (CRC 1.150(e)(3)(C)) is only one of the 18 factors that a judge must consider, and the weight accorded to this particular factor should surely be minimal when the party is unable to articulate any possible harm that would come to it if the request were granted.

Alternative Personal Recording Request

If my CRC 1.150(e) Media Request is denied, then I hereby request, in the alternative, that the Court grant me advance permission to create a recording for use as personal notes, per CRC 1.150(d):

The judge may permit inconspicuous personal recording devices to be used by persons in a courtroom to make sound recordings as personal notes of the proceedings. A person proposing to use a recording device must obtain advance permission from the judge. The recordings must not be used for any purpose other than as personal notes.

I am not aware of any precedents that elucidate exactly what purposes are encompassed by "personal notes". My understanding is that if I were to personally listen to the recording (in lieu of consulting my personal shorthand notes) for the purpose of creating and publishing an unofficial written transcript of the proceeding (without ever allowing anyone else to listen to the recording), I would not be violating CRC 1.150(d).

²I am not a sound engineer, and I would not be terribly surprised if I were to discover after the hearing that the entire recording was completely inaudible. If that were to occur, then I would have wasted my time, but no significant inconvenience would have befallen the parties or the Court.

I thank the Court for its attention to these requests.

Yours truly,

A handwritten signature in black ink, appearing to read "Alan P. Petrofsky". The signature is written in a cursive, slightly slanted style.

Alan P. Petrofsky

cc: by electronic mail, to: Norman Malinski <nmpa@att.net>, counsel for Defendant John Doe; and David T. Thuma <dthuma@jtwlawfirm.com> and Angela F. Storey <astorey@millermorton.com>, counsel for Plaintiff Eclipse Aviation Corporation.

Exhibit 1: Letter Response, dated June 3, 2008

EST. 1929
MILLER MORTON CAILLAT & NEVIS, LLP

ATTORNEYS AT LAW

June 3, 2008

David L. Nevis
Frank J. Hughes
Peter A. Kline
Stevan C. Adelman
Joseph A. Scanlan, Jr.
William K. Hurley
Peter V. Dessau
David I. Kornbluh
Katherine S. Pak
Christopher J. Hersey
Anthony F. Ventura
Amber S. Crothall
Daniel J. Nevis
Roger F. Liu
Angela F. Storey
Autumn E. Casadonte
Eric C. McAllister

Harvey C. Miller
1906-1993
Richard W. Morton
1916-1975
Charles V. Caillat
1920-1990

HAND DELIVERED

The Honorable Socrates Manoukian
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

Re: *Eclipse Aviation Corp. v. John Doe, et al.*
Santa Clara County Superior Court Case No. 108CV110380
Hearing Date: June 6, 2008; 10:00 a.m., D. 7
Our File Number 10613-0801

Dear Judge Manoukian:

This letter is in response to a Media Request to Photograph, Record or Broadcast the June 6, 2008, 10:00 a.m., Motion to Quash Hearing in your department in the above-referenced matter. While we have not received official notice from the Clerk regarding this request, a courtesy copy was sent to us by Alan P. Petrofsky. This letter is to object to Mr. Petrofsky's request on the grounds that Mr. Petrofsky and *Eclipse vs. Does.blogspot.com* do not fall within the definition of media or media agency pursuant to CRC 1.150(b)(2). While Mr. Petrofsky's blog does contain information regarding this case, including links to various court documents, it does not appear to be an organization engaged in news gathering or reporting, nor is it a newspaper, radio, television station, news service, magazine, trade paper, in-house publication, professional journal or other news reporting or news gathering agency as required by CRC 1.150(b)(2).

As stated above, Eclipse Aviation Corporation objects to Mr. Petrofsky's request to record the June 6, 2008 hearing and asks that the Court deny the request pursuant to CRC 1.150(e)(3)(C).

Very truly yours,

MILLER, MORTON, CAILLAT & NEVIS, LLP

By:


ANGELA F. STOREY

AFS/wc

cc: Alan Petrofsky (Via Email)

All Counsel (Service List Attached – Via Email and Facsimile)

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Warren Stephen Jacobson, Esq.
The Jacobson Law Group
433 N. Camden Drive, #960
Beverly Hills, CA 90210
Fax: 310-550-0912

Norman Malinski, Esq.
Law Offices of Norman Malinski, P.A.
2875 Northeast 191st Street, Suite 508
Aventura, FL 33180
Fax: 305-937-4261

David T. Thuma, Esq.
Jacobvitz, Thuma & Walker
500 Marquette N.W., Suite 650
Albuquerque, NM 87102
Fax: 505-766-9287

Exhibit 2: Media Request, dated May 30, 2008

MEDIA AGENCY (name): Eclipse-vs-Does.blogspot.com CHANNEL/FREQUENCY NO.: http://eclipse-vs-does.blogspot.com PERSON SUBMITTING REQUEST (name): Alan P. Petrofsky ADDRESS: 3618 Alameda Apt 5, Menlo Park CA 94025 TELEPHONE NO.: 650-520-0626	FOR COURT USE ONLY
Insert name of court and name of judicial district and branch court, if any: Superior Court of California, County of Santa Clara	
TITLE OF CASE: Eclipse Aviation Corp. v. John Doe et al.	
NAME OF JUDGE: Hon. Socrates Manoukian (Dept. 7)	
MEDIA REQUEST TO PHOTOGRAPH, RECORD, OR BROADCAST	
CASE NUMBER: 1-08-CV-110380	

1. PORTION OF THE PROCEEDINGS TO BE COVERED (e.g., particular witnesses at trial, the sentencing hearing, etc.):
 Haring on Friday, June 6, 2008 at 10:00 A.M. in Department 7, on John Doe's motion to quash subpoena

2. DATE OF PROPOSED COVERAGE (specify): Friday, June 6, 2008, 10:00 . (File this form at least five court days before the proposed coverage date. If not feasible, explain good cause for noncompliance):

3. TYPE OF COVERAGE

a. <input type="checkbox"/> TV camera and recorder	d. <input checked="" type="checkbox"/> Audio
b. <input type="checkbox"/> Still camera	e. <input type="checkbox"/> Other (specify):
c. <input type="checkbox"/> Motion picture camera	

4. SPECIAL REQUESTS OR ANTICIPATED PROBLEMS (specify):

5. INCREASED COSTS. This agency acknowledges that it will be responsible for increased court-incurred costs, if any, resulting from this media coverage (estimate): \$ zero
 Amount unknown

6. PROPOSED ORDER. A completed, proposed order on Judicial Council form MC- 510 is attached (required by Cal. Rules of Court, rule 1.150).

CERTIFICATION

I certify that if the court permits media coverage in this case, all participating personnel in this media agency will be informed of and will abide by the provisions of California Rules of Court, rule 1.150, the provisions of the court order, and any additional restrictions imposed by the court.

Date: Friday, May 30, 2008

Alan P. Petrofsky
(TYPE OR PRINT NAME)

▶
(SIGNATURE)

Telephone No.: 650-520-0626

 Publisher
(SUPERVISORY POSITION IN MEDIA AGENCY)

NOTICE OF HEARING (A hearing is optional.)

A HEARING will be held as follows:

Date:	Time:	Dept./Div.:	Room:
Address of the Court:			

Clerk, by _____, Deputy

MEDIA AGENCY (name): Eclipse-vs-Does.blogspot.com CHANNEL/FREQUENCY NO.: http://eclipse-vs-does.blogspot.com PERSON SUBMITTING REQUEST (name): Alan P. Petrofsky ADDRESS: 3618 Alameda Apt 5, Menlo Park CA 94025 TELEPHONE NO.: 650-520-0626	FOR COURT USE ONLY
Insert name of court and name of judicial district and branch court, if any: Superior Court of California, County of Santa Clara	
TITLE OF CASE: Eclipse Aviation Corp. v. John Doe et al.	
NAME OF JUDGE: Hon. Socrates Manoukian (Dept. 7)	
ORDER ON MEDIA REQUEST TO PERMIT COVERAGE	CASE NUMBER: 1-08-CV-110380

AGENCY MAKING REQUEST (name): Eclipse-vs-Does.blogspot.com

1. a. No hearing was held.
 b. Date of hearing: _____ Time: _____ Dept./Div.: _____ Room: _____
2. The court considered all the relevant factors listed in subdivision (e)(3) of California Rules of Court, rule 1.150 (see reverse).
3. **THE COURT FINDS** (findings or a statement of decision are optional): Attached As follows:

THE COURT ORDERS

4. The request to photograph, record, or broadcast is
- a. **denied.**
- b. **granted** subject to the conditions in rule 1.150, California Rules of Court, **AND** the following:
- (1) The local rules of this court regulating media activity outside the courtroom (copy attached).
- (2) The order of the presiding or supervising judge regulating media activity outside the courtroom (copy attached).
- (3) Payment to the clerk of increased court- incurred costs of (specify): \$ _____ to be determined.
- (4) The media agency shall demonstrate to the court that the proposed personnel and equipment comply with California Rules of Court, rule 1.150, and any local rule or order.
- (5) Personnel and equipment shall be placed as directed as indicated in the attachment as follows (specify): _____
- (6) (i) The attached statement of agreed pooling arrangements is approved.
 (ii) A statement of agreed pooling arrangements satisfactory to the court shall be filed before coverage begins.
- (7) This order
 (i) shall not apply to allow coverage of proceedings that are continued.
 (ii) shall apply to allow coverage of proceedings that are continued.
- (8) Other (specify): _____
5. Coverage granted in item 4b is permitted in the following proceedings:
- a. All proceedings, except those prohibited by California Rules of Court, rule 1.150, and those proceedings prohibited by further court order.
- b. Only the following proceedings (specify type or date or both): Motion to quash, Friday, June 6, 2008, 10:00 AM
6. The order made on (date): _____ is terminated modified as follows (specify): _____

7. Number of pages attached:

Date: _____

(See reverse for additional information)

JUDGE

Page 1 of 2

CASE NAME: Eclipse Aviation Corp. v. John Doe et al.	CASE NUMBER: 1-08-CV-110380
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FACTORS CONSIDERED BY THE JUDGE IN MAKING THIS ORDER (Rule 1.150)

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Importance of maintaining public trust and confidence in the judicial system 2. Importance of promoting public access to the judicial system 3. Parties' support of or opposition to the request 4. Nature of the case 5. Privacy rights of all participants in the proceeding, including witnesses, jurors, and victims 6. Effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding 7. Effect on the parties' ability to select a fair and unbiased jury 8. Effect on any ongoing law enforcement activity in the case 9. Effect on any unresolved identification issues 10. Effect on any subsequent proceedings in the case | <ol style="list-style-type: none"> 11. Effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness 12. Effect on excluded witnesses who would have access to the televised testimony of prior witnesses 13. Scope of the coverage and whether partial coverage might unfairly influence or distract the jury 14. Difficulty of jury selection if a mistrial is declared 15. Security and dignity of the court 16. Undue administrative or financial burden to the court or participants 17. Interference with neighboring courtrooms 18. Maintaining orderly conduct of the proceeding 19. Any other factor the judge deems relevant |
|---|--|

PROHIBITED COVERAGE (Rule 1.150)

This order does not permit photographing, recording, or broadcasting of the following in the court:

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. The jury or the spectators 2. Jury selection 3. A conference between an attorney and a client, witness, or aide 4. A conference between attorneys | <ol style="list-style-type: none"> 5. A conference between counsel and the judge at the bench ("sidebars") 6. A proceeding closed to the public 7. A proceeding held in chambers |
|---|---|

MEDIA PERSONNEL AND EQUIPMENT (Rule 1.150)

NOTE: These requirements apply unless the judge orders otherwise. Refer to the order for additional requirements.

- | | |
|--|--|
| <ol style="list-style-type: none"> 1. No more than one television camera 2. No more than one still photographer 3. No more than one microphone operator and no obtrusive microphones or wiring 4. No operator entry or exit or other distraction when the court is in session 5. No moving equipment when the court is in session | <ol style="list-style-type: none"> 6. No distracting sounds or lights 7. No visible signal light or device that shows when equipment is operating 8. No disruption of proceedings, nor public expense, to install, operate, or remove modifications to existing sound and lighting systems 9. No media agency insignia or marking on equipment or clothing |
|--|--|

SANCTIONS FOR VIOLATING THIS ORDER (Rule 1.150)

Any violation of this order or rule 1.150 is an unlawful interference with the proceedings of the court. The violation may result in an order terminating media coverage, a citation for contempt of court, or an order imposing monetary or other sanctions.

Exhibit 3: Blog Article dated May 1, 2008

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ECLIPSE VS. DOES LITIGATION

I CREATED THIS BLOG TO HAVE A PLACE TO POST SOME DOCUMENTS AND OTHER INFORMATION ABOUT ECLIPSE AVIATION CORPORATION VS. JOHN DOE ET AL., AND OTHER CASES THAT MAY BE OF INTEREST TO PEOPLE FOLLOWING THE ECLIPSE CASE.

THURSDAY, MAY 1, 2008

The initial filings in the *Eclipse Aviation vs. Does* case

The primary subject matter of this blog is *Eclipse Aviation Corporation v. John Doe et al.*, No. D-202-CV-2008-02624, New Mexico Second Judicial District Court, Bernalillo County, filed March 18, 2008.

I'm not sure that there will ever be more than one or two entries in this blog. I created it mostly just to have a place to post some documents I had obtained that I wanted to share with anyone else who was interested in the case. I first threw them into a directory under my petrofsky.org domain, but I thought I should also make them available through an URL that's easier to spell and remember. A blogspot URL seemed appropriate for this case.

I would like to start by giving a summary of the plaintiff's complaint. Unfortunately, the complaint is sealed, and all I really know about it is that the [case information from the court's website](#) lists the causes of action as "Breach of Contract" and "Injunction - Not Contract/Tort". I believe the order sealing the complaint is a public document, and I imagine it gives at least a cursory reason for the sealing, but I have not seen that order yet.

The main document that I *have* seen is the "Deposition Subpoena for Production of Business Records" that was issued on April 14, 2008 from California Superior Court, Santa Clara County, under case number 1-08-CV-110380.

The subpoena seeks:

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 [... a list of twenty-eight different aliases ...] 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.

(Deposition subpoena, at attachment 3)

Oddly, the deponent at whom the subpoena is directed is not the well-known legal person named Google Inc. ([Delaware corporation #3582691](#)), but is, instead, "Google Legal Support, Blogger CMCA [sic] Complaints":

COURT DOCUMENTS

Eclipse Aviation vs. Does: court documents and links

BLOG ARCHIVE

▼ 2008 (4)

▼ June (1)

Eclipse Aviation vs. Does: court documents and lin...

► May (3)

ABOUT ME

AL PETROFSKY

VIEW MY COMPLETE PROFILE

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:

This wording is apparently traceable to the page at google.com/blogger_dmca.html, which says that Digital Millennium Copyright Act notices (a category of documents to which this subpoena clearly does not belong) should be sent to "Google, Inc., Attn: Google Legal Support, Blogger DMCA Complaints".

The other documents on file in Santa Clara are the "Declaration of Angela F. Storey in Support of Order to Issue Subpoena in California For Action Outside State" (dated April 14) and the attached "Commission to Issue and/or Obtain Subpoena in California" (dated April 10) from the New Mexico Court.

There was almost a month's delay from when the case was opened (on March 18) until the California subpoena was issued (on April 14), and you can see that this was partly because Eclipse's New Mexico counsel first served Google with a New Mexico subpoena and was apparently surprised to learn that that wasn't going to get him anywhere. As Eclipse's California counsel declares:

3. On or about March 21, 2008 ECLIPSE'S New Mexico attorney, David T. Thuma of Jacobvitz, Thuma & Walker, P.C., issued a subpoena to Google, Inc. located in Mountain View, California, Santa Clara County.
4. On or about March 26, 2008, Google, Inc. objected to the above subpoena on the grounds that said subpoena [was] not valid as it was not issued from the Santa Clara County Court.
5. ECLIPSE thereafter retained this law firm as local counsel to assist in obtaining a subpoena from the Santa Clara County Superior Court.

(Storey Declaration, at page 2)

Documents:

- New Mexico case: *ECLIPSE AVIATION CORPORATION, a Delaware Corporation vs. JOHN DOE; JANE DOE; And various other unknown individuals designated VARIOUS DOES*, No. D-202-CV-2008-02624, SECOND JUDICIAL DISTRICT COURT, COUNTY OF BERNALILLO, STATE OF NEW MEXICO
 - Docket listing, as of May 1, 2008
 - "Commission to Issue and/or Obtain Subpoena in California", filed April 10, 2008
- California case: *ECLIPSE AVIATION CORPORATION, a Delaware Corporation vs. JOHN DOE; JANE DOE; and various other unknown individuals designated VARIOUS DOES, and DOES 1 through 500*, No. 1-08-CV-110380, SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY
 - "Civil Case Cover Sheet", dated April 14, 2008
 - "Declaration of Angela F. Storey in Support of Order to Issue Subpoena in California For Action Outside State", dated April 14, 2008
 - "Deposition Subpoena for Production of Business Records", dated April 14, 2008

Links:

- Plaintiff: Eclipse Aviation (eclipseaviation.com)
- Subpoena recipient: Google Inc. (google.com)
- Blog specified in the subpoena: Eclipse Aviation Critic NG (eclipsecriticng.blogspot.com)
- New Mexico counsel for Plaintiff: Jacobvitz Thuma & Walker PC (jtwlawfirm.com);
 - David Tenbroeck Thuma (first bar admission: Indiana, #2200-49, admitted 1984)
 - Robert H. Jacobvitz (New Mexico Bar, admitted 1979)

- California counsel for Plaintiff: Miller Morton Caillat & Nevis (millermorton.com)
 - Angela Foster Storey (California Bar #217942, admitted 2001)
- Florida counsel (according to news reports) for potential movants whose aliases are listed in the subpoena: Norman Malinski (Florida Bar #182344, admitted 1974)
- Judge assigned to New Mexico case: Hon. Linda M. Vanzi (votevanzi.com) (New Mexico Bar, admitted 1995; appointed to bench in 2004)
- New Mexico court case information: <http://www.nmcourts.gov/caselookup>
- California court case information:
 - http://sccaseinfo.org/pa5.asp?full_case_number=1-08-CV-110380
 - http://sccaseinfo.org/pa5.asp?process_name=process_calendar_case_number&end_date=3000&case_number=108CV110380

The latter page doesn't show any information right now. However, if and when a motion to quash is filed, this is the page that would show the department number of the judge who has been assigned to hear the motion. The motion would likely be assigned to Department 7, Judge Socrates Peter Manoukian (California Bar #77289, admitted 1977; appointed to bench in 1993), who normally hears all civil discovery matters. (See <http://www.sccsuperiorcourt.org/civil/Dept7rulings.htm>.) Two years ago, Judge Manoukian heard a motion to quash a subpoena in a case that had several similarities to *Eclipse vs. Does*. He denied the motion, but the subpoena was ultimately withdrawn anyway. You can find most of the story of that case in the published opinion *H.B. Fuller v. Doe*, 151 Cal.App.4th 879 (May 31, 2007). I've put some other documents from that case in the directory at <http://petrofsky.org/misc/legal-docs/H-B-Fuller-vs-Doe/>. I'll try to write another blog entry here sometime with more information about the Fuller case.

POSTED BY AL PETROFSKY AT 10:04 PM

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Exhibit 4: Blog Article dated May 19, 2008

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ECLIPSE VS. DOES LITIGATION

I CREATED THIS BLOG TO HAVE A PLACE TO POST SOME DOCUMENTS AND OTHER INFORMATION ABOUT ECLIPSE AVIATION CORPORATION VS. JOHN DOE ET AL., AND OTHER CASES THAT MAY BE OF INTEREST TO PEOPLE FOLLOWING THE ECLIPSE CASE.

MONDAY, MAY 19, 2008

Motion to quash subpoena to be heard June 6 by Judge Manoukian

A motion to quash the subpoena has been noticed to be heard at 10:00 A.M. on Friday, June 6, 2008 before Judge Socrates Peter Manoukian in Department 7 of the Santa Clara County Superior Court (third floor of the new courthouse, 191 North First Street, San Jose). See the notice and motion that were filed on May 14 in *Eclipse Aviation Corporation v. John Doe et al.*, Case No. 1-08-CV-110380. (There is a listing of more court documents below.)

Eclipse's written opposition to the motion is due on Friday, May 23 (per CCP 1005(b) and GC 6700(g)).

The memo argues — principally citing the recent opinion in *Krinsky v. Doe* 6, 159 Cal.App.4th 1154 (6th Dist., February 6, 2008) — that Eclipse must "make a prima facia showing that a claim exists" (memo at p. 5) and "explore alternative relief" that "would be less intrusive than disclosure" (*Id.* at p. 6).

A couple notes:

1. It's not exactly clear to me on whose behalf attorney Norman Malinski filed this motion. He says that the motion is being made by "JOHN DOE", singular, with no indication of which of the 28 Google accounts named on the subpoena (Turn-and-Burn, et al.) have been used by his client(s). He also states that the Defendants who were sued in the underlying case in New Mexico (Doe, et al.) are the same set of people as those who used the Google accounts (Turn-and-Burn, et al.):

The Deposition Subpoena seeks ... 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.

(memo at p. 1). I don't think this is necessarily correct. As far as I can see, it is possible that the defendants are people who have entered into some contract with Eclipse (most likely current or former employees), whom Eclipse alleges breached the contract by providing some information to a completely different set of people (Turn-and-Burn, et al.), who then posted the information to the EclipseCriticNG blog. If so, then in that respect this case may be more like *O'Grady et al. v. Superior Court (Apple)*, 139 Cal.App.4th 1423 (6th Dist., 2006), in which the anonymous person who sought to quash the subpoena was not, himself, a defendant (*Id.* at sec. V(b)(1), slip op. p. 52-54).

Eclipse may need to make it clear who is or is not a defendant. The *O'Grady* court wrote:

Apple cannot have it both ways. If it is unprepared to charge petitioners with liability

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Eclipse Aviation vs. Does: court documents and links

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for trade secret misappropriation, it cannot count in its favor their status vis á vis the litigation, however culpable it may claim them to be.

... To accept Apple's position on the present point would empower betrayed employers to clothe themselves with the subpoena power merely by suing fictitious defendants, and then to use that power solely to identify treacherous employees for purposes of discipline, all without any intent of pursuing the underlying case to judgment. An employer pursuing such an objective might prefer not to join any defendants lest it expose itself to negative consequences up to and including a countersuit for malicious prosecution or abuse of process. Our sympathy for employers in such a position cannot blind us to the gross impropriety of using the courts and their powers of compulsory process as a tool and adjunct of an employer's personnel department.

(*O'Grady*, slip op. p. 53-54)

2. The memo asserts that, as part of the prima facie claim analysis, "the Court is required to determine whether any statements are statements of fact, statements of opinion, satirical statements or otherwise. See *Highfields [Capital Management, LP v. Doe]*, 385 F.Supp 2d 969 (N.D. Cal. 2005)]" (memo at p. 5). I don't see how such a determination would be relevant, because Eclipse (unlike the plaintiffs in *Highfields* and *Krinsky*) has not sued anyone for defamation. Eclipse's sealed complaint is "for breach of contract and injunctive relief", according to the New Mexico docket, and while making "statements of fact" cannot constitute defamation, it can certainly constitute a breach of contract when the contract is a non-disclosure agreement (which is what I am guessing the contract in this case is).

3. I assume Eclipse will soon be providing the court and the movant with the specifics of the alleged breach of contract, and that most of these specifics will be put in the public record — especially as to any information that was allegedly wrongly disclosed, and was allegedly confidential at the time of disclosure, but which is clearly not confidential at the present time (i.e., it's out of the bag). A year ago, the Sixth District wrote the following about H.B. Fuller Company, an employer that sought to unmask a Yahoo poster by way of a California subpoena. Fuller did not provide much detail about its allegations to the court or to the defendant, and it provided even less detail to the public:

If plaintiff specified the particular disclosures of which it complains, it would ease defendant's task of refuting the claim that those disclosures concerned "confidential information" as defined in the nondisclosure agreement. It would also open plaintiff's allegations to the response that even if a given disclosure fell within that definition, the matter disclosed was already or otherwise available to the public, such that the disclosure did not proximately cause plaintiff to sustain recoverable damages. The very nebulousness of the claimed breach suggests the possibility that plaintiff's objective was never to pursue a cause of action to judgment but only to employ the process of the court to aid an investigation into what it supposes to be a breach of corporate security. We have previously noted "the gross impropriety of using the courts and their powers of compulsory process as a tool and adjunct of an employer's personnel department."
(*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1470.)

(*H.B. Fuller v. Doe*, 151 Cal.App.4th 879, slip op. at p. 20 (6th Dist., May 31, 2007))

At the heart of some discovery motions are questions of great significance to members of the public. The present case is one of them. While it may be said to arise from a

"discovery motion" — a motion to quash a discovery subpoena — the discovery in question is not merely ancillary or preliminary to some larger litigation but is the whole end and purpose of the case, at least insofar as California courts are concerned. Moreover, the information sought is invested with a substantial constitutional interest, i.e., the First Amendment right to speak anonymously. (See *Rancho Publications v. Superior Court* (1999) 68 Cal.App.4th 1538, 1547.) The court's denial of the motion to quash did not merely determine some ancillary procedural point but, if affirmed by this court, inflicts upon a citizen an irrevocable loss of that constitutional interest. While no historical analog for such a proceeding comes readily to mind, the structural utility of allowing public access in a case of this kind is at least as great as that of allowing public access to a routine civil trial. Public scrutiny will encourage judicial actors to take pains to act with solicitude for cherished constitutional rights, and will help would-be anonymous speakers to ascertain the standards which will govern a judicial decision to strip them of anonymity. The deeper the public's understanding of judicial treatment of these issues, the better equipped the public will be to, for instance, seek legislative modification of the governing rules and procedures. A court's decision to lift the constitutionally infused shield of anonymity is, in short, a matter of deep and legitimate public concern, and that concern is significantly impaired whenever such a decision is made, as it was here, upon secret evidence.

(*H.B. Fuller*, slip op. at 15)

By the way, Judge Manoukian, who will be presiding at the June 6 hearing in *Eclipse v. Does*, was also the lower-court judge in both the *H.B. Fuller* and *Krinsky* cases.

Documents:

- The New Mexico case: *ECLIPSE AVIATION CORPORATION, a Delaware Corporation vs. JOHN DOE; JANE DOE; And various other unknown individuals designated VARIOUS DOES*, No. D-202-CV-2008-02624, SECOND JUDICIAL DISTRICT COURT, COUNTY OF BERNALILLO, STATE OF NEW MEXICO
 - Docket listing, as of May 19, 2008
 - "Commission to Issue and/or Obtain Subpoena in California", filed April 10, 2008
- The California case: *ECLIPSE AVIATION CORPORATION, a Delaware Corporation vs. JOHN DOE; JANE DOE; and various other unknown individuals designated VARIOUS DOES, and DOES 1 through 500*, No. 1-08-CV-110380, SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY
 - Docket listing, as of May 7, 2008 (as of May 19, 2008, the court's case information website, sccaseinfo.org, is "down for system maintenance until further notice", and has been so for more than 10 days)
 - "Civil Case Cover Sheet", dated April 14, 2008
 - "Declaration of Angela F. Storey in Support of Order to Issue Subpoena in California For Action Outside State", dated April 14, 2008
 - "Deposition Subpoena for Production of Business Records", dated April 14, 2008
 - "Application of Norman Malinski For Admission in Pro Hac Vice", dated May 2, 2008
 - "Notice of Filing" (of letter re: pro hac vice application), served May 2, 2008
 - "Order on Application of Norman Malinski, Esquire For Admission in Pro Hac Vice", dated May 5, 2008
 - "Motion to Quash and Supporting Memorandum of Points and Authorities", dated May 7, 2008 (filed May 14, 2008) (see also this draft version with electronic text, which I found at charterx.com (note: pagination differs from the filed version))
 - "Notice of Motion and Motion to Quash Subpoena", dated May 7, 2008 (filed May 14, 2008)
- A not-necessarily-related New Mexico case: *ECLIPSE AVIATION CORPORATION vs. BRIAN SKUPA*, No. D-202-CV-2008-04029, SECOND JUDICIAL DISTRICT COURT,

COUNTY OF BERNALILLO, STATE OF NEW MEXICO

(According to the docket, this is a case for "breach of contract, breach of covenant of good faith and fair dealing, breach of the duty of loyalty, conversion, [and] misappropriation of trade secrets". I'm just guessing that the contracts at issue in this case and in *Eclipse v. Does* are both non-disclosure agreements between Eclipse and some of its current or former employees.)

- Docket listing, as of May 19, 2008

Links:

- Plaintiff: Eclipse Aviation (eclipseaviation.com)
- Subpoena recipient: Google Inc. (google.com)
- Blog specified in the subpoena: Eclipse Aviation Critic NG (eclipsecriticng.blogspot.com)
- Lawyers:
 - New Mexico counsel for Plaintiff: Jacobvitz Thuma & Walker PC (jtwlawfirm.com):
 - David Tenbroeck Thuma (first bar admission: Indiana, #2200-49, admitted 1984)
 - Robert H. Jacobvitz (New Mexico Bar, admitted 1979)
 - California counsel for Plaintiff: Miller Morton Caillat & Nevis (millermorton.com)
 - Angela Foster Storey (California Bar #217942, admitted 2001)
 - Florida counsel for John Doe: Norman Malinski (Florida Bar #182344, admitted 1974)
 - California counsel for John Doe: The Jacobson Law Group (jacobsonlawgroup.com)
 - Warren Stephen Jacobson (California Bar #61607, admitted 1974)
- Judge assigned to New Mexico case: Hon. Linda M. Vanzi (votevanzi.com) (New Mexico Bar, admitted 1995; appointed to bench in 2004)
- Judge assigned to California case: Hon. Socrates Peter Manoukian (California Bar #77289, admitted 1977; appointed to bench in 1993)
- New Mexico court case information: <http://www.nmcourts.gov/caselookup>
- California court case information (as of May 19, 2008, the court's case information website is "down for system maintenance until further notice", and has been so for more than 10 days, but here are some links that should start working again at some point):
 - <http://sccaseinfo.org/>
 - http://sccaseinfo.org/pa5.asp?full_case_number=1-08-CV-110380
 - http://sccaseinfo.org/pa5.asp?process_name=process_calendar_case_number&end_date=3000&case_number=108CV110380
- California law:
 - From leginfo.ca.gov: Constitution, Statutes, Codes (Code of Civil Procedure)
 - Case law:
 - California Official Reports
This is a free page at lexisnexis.com that provides access to all of California's precedential appellate opinions, going all the way back to the first California Supreme Court opinions in March 1850 (six months before California's admission to the Union). Unfortunately, it does not include any of the page numbers within an opinion, which makes it impossible to generate an official pinpoint citation.
 - California Case Law
This page at findlaw.com is free but requires registration. It provides published opinions back to 1934, and includes the official page numbers.
 - California Rules of Court (from courtinfo.ca.gov)

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Exhibit 5: Blog Article dated May 29, 2008

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THURSDAY, MAY 29, 2008

Transcripts of the H.B. Fuller and Krinsky hearings before Judge Manoukian

Below are edifying and entertaining transcripts of two past hearings before Judge Socrates Manoukian on motions similar to the one that is scheduled to be heard before him on Friday, June 6, 2008, in the *Eclipse Aviation vs. Does* case.

But first, here's a quick update on the *Eclipse* case: My understanding, from my conversations with deputy clerks, is that on Friday, May 23, Eclipse filed an opposition memorandum to John Doe's motion to quash the subpoena. Eclipse also filed supporting documentation and evidence, in the form of two declarations (CCP 2015.5) and a request for judicial notice (EC 453). I haven't seen any of this yet. The court's copies are currently with the research staff, who are preparing a pre-hearing report for Judge Manoukian. Eventually the documents will be returned to the records department, where they will be available for public inspection. I understand that Eclipse is not seeking to file anything under seal, which surprises me a little bit in light of the complaint in the underlying New Mexico case having been sealed. I guess the documentation that Eclipse has filed in California does not include all of the information that was found in the sealed complaint, and Eclipse believes that Judge Manoukian will have sufficient grounds to deny Doe's motion without seeing the full complaint. (Alternatively, Eclipse may have included a full copy of the complaint, after deciding that there is no longer any need for it to be kept under seal.) John Doe's reply papers are due Friday, May 30 (per CCP 1005(b)).

Back to the transcripts: the two prior cases are *H.B. Fuller v. Doe* and *Krinsky v. Does*. In both cases, as well as in the *Eclipse* case: (1) litigation was commenced outside of California, against anonymous defendants, pertaining to statements posted on the internet; (2) a subpoena was issued out of California Superior Court, Santa Clara County, to obtain information about the defendants from Yahoo or Google; and (3) the anonymous defendants filed motions to quash the subpoena, which were heard by Judge Manoukian.

Read the transcripts, and you'll see that Judge Manoukian is very active and free-wheeling at oral argument. His first question to the Fuller plaintiff was "who cares about what some nut case on the Internet wrote about anybody" (Fuller transcript at 4:10), and he asked Krinsky, "First of all, who believes maniacs who post anonymous crap on the internet anyway?" (Krinsky transcript at 14:6). (He quickly clarified: "The word crap, I didn't mean in a pejorative sense in the context of this case, just in general. And I shouldn't use words like that on the record." *Id.* at 14:10-12.)

In both cases, Judge Manoukian denied the Doe's motion. However, neither Doe's identity was ever revealed. In *Krinsky*, Manoukian's decision was reversed on appeal (*Krinsky v. Doe*

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Eclipse Aviation vs. Does: court documents and links

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6 (2008), 159 Cal.App.4th 1154), and in *Fuller*, the plaintiff eventually withdrew the subpoena, after the appellate court ruled that it would not consider any sealed evidence when deciding whether or not to reverse Manoukian's order. *H.B. Fuller v. Doe* (2007), 151 Cal.App.4th 879.

The *Fuller* case has more in common with *Eclipse* than *Krinsky* does, because the underlying complaints in *Fuller* and *Eclipse* are both for breach of contract. The *Krinsky* complaint, in contrast, was for defamation. However, only the *Krinsky* case proceeded to a precedential opinion on the merits from the appellate court, and it is that appellate decision that the *Eclipse* John Doe cited extensively in his opening brief on his motion.

(Regarding the legends on the transcripts that state "Copying Prohibited Pursuant to GC 69954(d)": that code section only prohibits conduct by people who have "purchased a transcript". In cases that have not been appealed, purchasing a transcript from the reporter is usually the only way to obtain a transcript. However, once a case has been appealed and the reporter's transcript has been filed, any member of the public may copy or electronically scan the transcript in the records room at the Court of Appeal (which is how I obtained my copies).)

Documents:

- *H.B. Fuller Company v. John Doe*, No. 1-05-CV-053609, SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY.
 - "Declaration of Shane V. Bohnen in Support of H.B. Fuller Company's Opposition to John Does' Motion to Quash Subpoena", dated February 26, 2006 (includes attached undated, unsigned "Complaint" that Bohnen states he attempted to file in Minnesota on November 29, 2005)
 - "Reporter's Transcript on Appeal From the Judgment of the Superior Court of the State of California in and for the County of Santa Clara Before the Honorable Socrates Peter Manoukian, Judge -- Proceedings Held on February 10, April 18, & April 24, 2006"
 - "Order Denying Motion of Defendant to Quash Out-of-State Subpoena", dated March 15, 2006
 - "Order Granting H.B. Fuller's Ex Parte Application Seeking Yahoo!'s Immediate Compliance [with] the March 15, 2006 Order", dated April 26, 2006
 - Opinion in appeal H030099 (granting a motion to unseal), dated May 31, 2007.
 - "Stipulated Request for Dismissal of Appeal", dated February 25, 2008.
 - "Dismissal of Appeal", dated March 4, 2008.
- *Lisa Krinsky v. Does 1 through 10*, No. 1-06-CV-059796, SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY.
 - "Complaint for Injunctive Relief and Damages", dated January 19, 2006 (filed in Florida 17th Circuit, Case No. 06-000802)
 - "Reporter's Transcript of Proceedings Held on April 28, 2006"
 - "Order for Further Briefing", dated July 5, 2006.
 - "Order on Discovery Motions", dated October 16, 2006.
 - Opinion disposing of appeal H030767 (lower court is reversed), dated February 6, 2008.

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