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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF SANTA CLARA

15 LISA KRINSKY

16 Plaintiff,

17 vs.

18 DOE 1 a/k/a aampus,  
19 DOE 2 a/k/a dave\_martin\_7777,  
20 DOE 3 a/k/a dwentzl,  
21 DOE 4 a/k/a milliecrowe,  
22 DOE 5 a/k/a richardtonline1,  
23 DOE 6 a/k/a Senor\_Pinche\_Wey,  
24 DOE 7 a/k/a siouxp2000,  
25 DOE 8 a/k/a silviosmail@verizon.net  
26 DOE 9 a/k/a Bill\_Wexler,  
27 DOE 10 a/k/a lisamd33010,

28 Defendants.

) Case No.: 1-06-CV-059796

) PLAINTIFF'S FURTHER BRIEFING AS  
) ORDERED BY THE COURT

) DATE: April 28, 2006

) TIME: 8:30 a.m.

) DEPT. "7"

) JUDGE: Hon. Socrates Manoukian

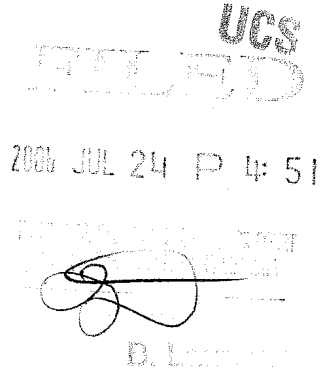
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**INTRODUCTION**

On July 5, 2006, the Court entered an Order requiring the parties to submit further briefs on two questions submitted by the Court: 1) whether there is any issue in the case that falls under the influence of O'Grady et al. v. Superior Court of Santa Clara County (23 June 2006) 139 Cal.App.4th 1423, 2006 Cal. App. Lexis 802 (Cal. App. 6<sup>th</sup> Dist. 2006)<sup>1</sup>, which discussed the Stored Communications Act (the "SCA"); and 2) whether there was any consideration of whether the actions of the defendants violated any State or Federal securities laws. The short answer is "yes" to both questions as explained below.

**I. Whether this case falls under the influence of O'Grady**

Yes, because the SCA, which is the statute the court discussed in O'Grady, relates to the type electronic communication in this case. But the parties, facts, and subpoena in this case are different from the parties, facts, and subpoena in the O'Grady case, and thus, warrant a different result; that is, an Order denying the Motion to Quash the subpoena to Yahoo!.

In O'Grady, NFox.com ("Nfox"), the host of an e-mail service for its "subscriber" PowerPage.org ("PowerPage"), received a subpoena from Apple Computer, Inc. ("Apple"). The Apple subpoena sought account identity information for unknown person(s) Doe(s) 1 - 25, who were not NFox "subscribers". The O'Grady court found Apple was really seeking information from NFox about the "authors" and "content" of e-mails sent to PowerPage, which effectively sought the "content" of e-mails and, therefore, the subpoena was prohibited by the SCA and quashed.

In this case, Ms. Krinsky's subpoena truly seeks account identifying information from Yahoo! about one of its "subscribers", namely Doe 6, who intentionally posted messages on the

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<sup>1</sup> The June 23, 2006 opinion modified the prior appellate opinion dated May 26, 2006, to which this cite is directed.

1 Yahoo! message board about Ms. Krinsky for public consumption worldwide. The SCA and/or  
2 the Yahoo! Terms of Service Agreement (“TOS Agreement”) with Doe 6 authorize Yahoo!’s  
3 disclosure of all the information requested by the Plaintiff’s subpoena to Yahoo!.

4  
5 **A. The Subpoena in This Case Seeks Discovery of the Identity of a Yahoo!  
6 “Subscriber”**

7 What is important about O’Grady and its influence on this case is the Court’s recognition  
8 that the SCA permits the disclosure of certain information relating to “subscribers” of an internet  
9 service<sup>2</sup>. In so doing, the O’Grady Court discussed the decision in Jessup-Morgan v. America  
10 Online, Inc., 20 F. Supp. 2d 1105 (E.D. Mich. 1998), which held that “the SCA did not prevent a  
11 service provider from disclosing the identity of a subscriber who had ‘post[ed] publicly on the  
12 internet’ a malicious message about another person”. O’Grady at 1448 - 1449. The Court held  
13 that Apple’s subpoenas went beyond what was authorized by the SCA, Id., and implied that the  
14 subpoena in this case would be lawful.  
15

16  
17 The decision in Jessup-Morgan is instructive with regard to Doe 6’s Motion to Quash the  
18 Yahoo! subpoena. In Jessup-Morgan, the issue was whether the disclosure of identifying  
19 information of a “subscriber” by AOL violated the SCA. The court held that “identifying”  
20 information is treated differently than “content” under the SCA and that the SCA specifically  
21 allows “identifying” information to be produced. Id.; See also, Hill v. MCI WorldCom  
22 Communs., Inc., 120 F.Supp.2d 1194, 1196 (D. Iowa 2000) (identifying information is not the  
23 same thing as content and is discoverable).

24 The O’Grady court explained that instead of requesting records “pertaining to a  
25 ‘subscriber’ to or ‘customer’ of such service,” Apple’s subpoena sought records that would  
26

27 <sup>2</sup> The relevant portion of the lengthy O’Grady opinion to this case is found at 139 Cal.  
28 App. 4<sup>th</sup> 1423, 1447 - 1452 and attached as Exhibit A.

1 identify the “authors” of various e-mails, which in turn might contain information relating to  
2 Apple’s unreleased product and their communications with the publisher, PowerPage. O’Grady,  
3 at 1448. The O’Grady court distinguished the Apple subpoena from the Jessup-Morgan  
4 subpoena and stated that “the party seeking disclosure [in Jessup-Morgan] already knew the  
5 content of a stored message which an unidentified subscriber had broadcast to the world.” Id. at  
6 1448 - 1449. The only information sought in Jessup-Morgan was the “offending subscriber’s  
7 identity,” whereas the Apple subpoenas before it did not “concern a ‘subscriber’ who ‘posted  
8 anonymously’ on the internet, but the stored private communications of known persons who  
9 openly posted news reports based on information from private sources. Id.  
10  
11

12 The SCA provisions cited in O’Grady govern and distinguish between the disclosure of  
13 the content of stored electronic communications, which is only allowed in certain circumstances,  
14 and the disclosure of mere information that would divulge the identity of a subscriber or user of a  
15 service provider, which is allowed and is unrestricted when divulged to non-government entities.  
16 The SCA specifically permits the disclosure of basic subscriber and identifying records to a non-  
17 governmental entity. Section 2702(c)(6), in relevant part, states:  
18

19 A provider described in subsection (a) may divulge a record or other information  
20 pertaining to a subscriber to or customer of such service (not including the  
21 contents of communications covered by subsection (a)(1) or  
22 (a)(2)) –

23 (c) to any person other than a governmental entity.  
24

25 Thus, the SCA specifically provides for the disclosure of the account identifying records relating  
26 to Doe 6.

27 ///

28 ///

1                   **B.       The Subpoena to the Extent It Seeks “Content” is Lawful<sup>3</sup>**

2           The decision in O’Grady also makes it clear that the SCA allows the disclosure of the  
3 “posts” sought by the subpoena in this case. O’Grady, at 1448 - 1449. Unlike O’Grady, where  
4 the “content” of the communications was unknown, the “content” of the posts by Doe 6 was  
5 intentionally published to the world through the Yahoo! service available to subscribers. In  
6 responding to Amicus Curiae Genentech’s arguments about the scope of Apple’s subpoenas, the  
7 O’Grady Court highlighted the distinguishing features of the type of information sought by the  
8 unlawful Apple subpoena from the type of information sought by the lawful subpoena in this  
9 case. Id.

10           The O’Grady Court’s citation to the “exceptions” to the SCA rule that service providers  
11 may not disclose the contents of stored messages are instructive on any “content” issue that may  
12 be raised by Doe 6 in this case. O’Grady, at 1441; 18 U.S.C. (2702 (b)(1)(8). The relevant  
13 exception is based upon “consent” and found in Section 2702(b)(3) of the SCA, which provides:

14           (b) Exceptions for disclosure of communications. A provider described in  
15 subsection (a) may divulge the **contents** of a communication --

16           (3) with the lawful **consent** of the originator or an addressee or intended recipient of  
17 such communication, or the **subscriber** in the case of remote computing service.  
18 (emphasis added)

19  
20  
21  
22           <sup>3</sup> There is no issue that O’Grady and the SCA permits the disclosure of any documents  
23 requested by the subpoena that were not “electronically” communicated, i.e. sent via US mail  
24 or Fedex, etc. If this Court finds that the subpoena seeks any documents that the SCA prohibits  
25 from disclosure in any way, rather than quashing the entire subpoena, this Court can instead  
26 modify the subpoena. Section 1987.1 of the California Code of Civil Procedure provides in  
27 relevant part that a court may enter an Order with regard to a subpoena modifying it or  
28 directing compliance with it upon such terms or conditions as the court shall declare.

1  
2 In this case, The “subscriber,” Doe 6, “consented” to the disclosure of his/her “identity” and  
3 “content” when he/she subscribed to the Yahoo! service.

4 In order to gain access to Yahoo!’s message boards, Doe 6 had to agree to the terms of  
5 Yahoo!’s TOS Agreement. Pursuant to Section 3 of the TOS Agreement, Doe 6 was required to:

6  
7 (a) provide true, accurate, current and complete information about yourself as  
8 prompted by the Service's registration form (the "Registration Data") and (b)  
9 maintain and promptly update the Registration Data to keep it true, accurate,  
current and complete.

10 In Section 6 of the TOS Agreement, this Court will find Doe 6's “consent” to disclosure to both  
11 his/her “account information” and the “content” of his/her electronic communications:

12 **Yahoo! may access, preserve and disclose your account information and**  
13 **Content** if required to do so by law or in a good faith belief that such access  
14 preservation or disclosure is reasonably necessary to: (a) comply with legal  
15 process; (b) enforce the TOS; (c) respond to claims that any Content violates the  
16 rights of third parties; (d) respond to your requests for customer service; or (e)  
protect the rights, property or personal safety of Yahoo!, its users and the public  
(emphasis supplied).

17  
18 Therefore, Yahoo! has been expressly authorized by DOE 6 to comply with this subpoena, “legal  
19 process”, in order to respond to claims that the content [of Doe 6's posts] violate the rights of the  
20 [Plaintiff], and/or “to protect the rights of its users and the public”, including the Plaintiff.

21 **II. Whether there has been any consideration of the State or Federal Securities Laws**

22  
23 While the Plaintiff believes that the purpose behind the defamatory remarks made by  
24 Doe 6 was to illegally manipulate the price of the stock involved through its postings similar to  
25 what the defendants did in the New York case cited by the Court (see Complaint ¶ 21), the  
26 Plaintiff has not yet asserted claims relating to violations of State and/or Federal securities laws.  
27  
28 The Doe 6 posts suggest a Hedge Fund operator may be one of the anonymous posters. Once the

1 Plaintiff has not yet asserted claims relating to violations of State and/or Federal securities laws.  
2 The Doe 6 posts suggest a Hedge Fund operator may be one of the anonymous posters. Once the  
3 identity of Doe 6 is ascertained, the discovery of Doe 6's securities trading activities may lead to  
4 the filing of additional claims against Doe 6 and others for violation of the Securities Laws.  
5

6 **CONCLUSION**

7 Based upon the O'Grady decision, Yahoo! TOS Agreement, and the SCA, the Plaintiff  
8 respectfully submits that this Court should deny the Defendant Doe 6's Motion to Quash  
9 because:

- 10 1. O'Grady and the SCA permit the disclosure of account information  
11 identifying Doe 6;
- 12 2. The SCA and the Yahoo! TOS Agreement permit disclosure of the content  
13 of Doe 6's Yahoo! posts, which have already been disclosed to the world  
14 and/or Doe 6 gave his/her consent to disclosure; and
- 15 3. The subpoena at issue in this case also seeks documents that are not  
16 electronic communications and, thus, such non-electronic documents are  
17 not protected from disclosure by the SCA.

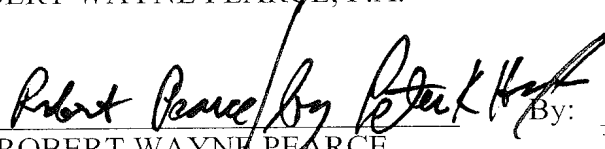
18 The Plaintiff trusts that this further briefing will be helpful to the Court's prompt  
19 resolution of this dispute. The Plaintiff cannot proceed with her Florida Action against Doe 6  
20 without knowledge of his/her identity as the information is necessary to serve the Summons and  
21 Complaint upon Doe 6.  
22

23 DATED: July 21, 2006


24 ROBERT WAYNE PEARCE, P.A.

DE SIMONE & HUXSTER

25  
26 By

  
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