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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EMBROIDERY SOFTWARE PROTECTION COALITION

Plaintiffs,

v.

JANET EBERT and VICTORIA WEAVER,

Defendants.

No. Misc.

Eastern District of Missouri Case No:
4:06-CV-00991-CAS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF NONPARTY DOES TO QUASH SUBPOENA TO YAHOO! INC.

Date: Sept. 22, 2006
Time: 9:00
Dept.: Courtroom 6, Hon. Ronald M. Whyte

Trial Date: Not set
Complaint Filed: June 28, 2006

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an effort to misuse the discovery process in order to discourage free speech and association by revealing the identities and private communications of anonymous third parties. Plaintiff, a purported coalition of embroidery design companies, is engaged in a campaign of sending legally suspect demand letters to purchasers of embroidery designs and software. These letters were sent to hundreds, if not thousands, of purchasers of these designs, demanding payment based on the claim that the purchasers were liable for copyright infringement. Some recipients of these letters started an internet discussion group to discuss the controversial campaign.

In response, Plaintiff sued the group organizers and immediately issued a tremendously overbroad subpoena demanding the identities of all persons who subscribed to the discussion group, regardless of whether those persons had even posted any messages, much less any defamatory messages. Plaintiff's shotgun approach is aimed not at redressing defamation, but at intimidating those who have sought to raise public awareness of Plaintiff's heavy-handed copyright lawsuit campaign. This misuse of the judicial process in order to silence critics should not stand.

The First Amendment forbids such abusive use of the courts and the discovery process. Courts around the nation—including this Court—have recognized that discovery requests that seek to pierce the anonymity of online speakers must be carefully scrutinized in order to prevent exactly the kinds of abuses that have already been put into motion by Plaintiff in this case. Following this growing judicial consensus, the important yet fragile anonymity interests of the internet users targeted in this case must be shielded unless and until Plaintiff makes a showing of competent evidence of viable claims, significant discovery interests and the absence of alternative means of vindicating its rights. The Court's obligation to impose this shield is critical; once a target's anonymity and privacy has been eviscerated, it cannot be repaired or the speaker made whole.

Specifically, Movants respectfully submit that the Court should carefully evaluate Plaintiff's discovery request in light of the following factors: (1) whether the Plaintiff has demonstrated that it has viable claims; (2) the specificity of the discovery request; (3) the existence of alternative means of discovery; (4) the seriousness of the Plaintiff's need for the information; and (5) whether the Plaintiff has attempted to notify the individuals whose information is sought of

the pending loss of anonymity. In addition, the Court should assess and compare the magnitude of the harms that the requested production would cause to the competing interests.

Plaintiff's subpoena cannot survive this scrutiny and must therefore be quashed.

II. BACKGROUND AND FACTS

Plaintiff Embroidery Software Protection Coalition ("ESPC") is a purported coalition of embroidery software and design companies formed to "protect and prosecute" members copyrights and trademarks. Complaint, Declaration of Corynne McSherry in Support of Motion to Quash ("McSherry Decl."), Ex. A at ¶¶ 2, 10.[1] The coalition's principal place of business appears to be Dallas, Texas. *Id.* ESPC uses its website, http://www.embroideryprotection.org/, and threatening letters (sent to hundreds if not thousands of individuals) to accuse online purchasers of embroidery software and designs of engaging in copyright piracy. Those individuals are advised to contact ESPC to "resolve the violation" if the recipient has not used the software or designs he or she allegedly purchased, ESPC will agree to settle the matter in exchange for payment of a "fine." *See* http://www.embroideryprotection.org/faqs.html, visited August 6, 2006. Website visitors are also encouraged to join an "amnesty program," under which they will be released from any possible liability for purchasing allegedly counterfeit designs in exchange for a payment of $300.00. Amnesty Program Statement, McSherry Decl. Ex. B.

Nonparty Movants—referred to by their Internet pseudonyms muddbuggz and dmsptggds – are members of an online discussion group, embroideryorganizationinformation.com ("EOI"), that was created to share information with members of the embroidery community about Plaintiff's use of threats of legal action to intimidate and coerce payment from online purchasers of embroidery designs and software. Defendants in the underlying action are Janet Ebert and Torie Weaver, citizens of Missouri and organizers of EOI.

Internet discussion groups are forums for the exchange of information and ideas. They fulfill the same function in modern America as local newspapers and printed broadsides in colonial America, and coffee house publications like the *Tatler* and *Spectator* in Seventeenth Century

[1] Plaintiff's Complaint in the underlying action fails to identify its members with any specificity, offering instead vague assertions that it represents "some of the major manufacturers and distributors of embroidery software and designs." McSherry Decl., Ex. A at ¶¶ 2, 10.

England. Participants sometimes use their own names, but often use pseudonyms, just as Benjamin Franklin used "Silence Dogood" and many other pseudonyms. *See H. W. Brands, The First American: The Life and Times of Benjamin Franklin* 203 (2000). Internet discussion groups may also be a problem-solving counterpart to class action lawsuits, since they provide an opportunity for persons who individually have small interests at stake to get together, share information, and formulate collective strategies against abusive behavior – problem-resolution strategies that no single victim could effectively carry out alone, just as consumers with tiny damage amounts could not effectively litigate such claims without the group remedy of the class action suit.

On June 28, 2006, Plaintiff sued Defendants in the Eastern District of Missouri for defamation and business interference, alleging that Defendants have used "internet bulletin boards and chat groups" to engage in a "terrorist" defamation campaign "similar to Hitler's march across Europe." Complaint, McSherry Decl. Ex. A at ¶¶ 11, 19, 26. Less than two weeks later, Plaintiff issued a subpoena to Yahoo! Inc., the internet service provider that hosts EOI, seeking all documents and records relating to EOI, including "identifying information, names addresses of members or posters, owners, moderators . . . account information, postings, activity logs, transaction logs, messages, email addresses, IP addresses, [and] email lists . . . ." Subpoena, McSherry Decl. Ex. C. In other words, Plaintiff seeks detailed personal information about every single person who has participated in the EOI discussion group—whether or not they have ever posted a single message, much less an allegedly defamatory message, whether or not these third parties have engaged in or contemplated a business relationship with ESPC, and whether or not they had any relationship to the defendants in the underlying actions.

On July 20, 2006, Yahoo! notified EOI members that it had received the subpoena, but a Yahoo! staff member then told members, incorrectly, that the subpoena notice was a hoax. See McSherry Declaration, Ex. D. Just before close of business on July 24, 2006, Yahoo! corrected the misimpression via a message sent to the entire group, *see id.*, at which point Movants promptly began a search for pro bono legal counsel. In the meantime, Defendants moved to quash the subpoena on the procedural grounds. McSherry Decl. Ex. E.[2] On July 31, 2006, Movants were

[2] Defendants' subsequently amended their Motion. McSherry Decl. Ex. F. On August 7, 2006, the

assured, through counsel, that Yahoo! would not produce their information while a ruling on a motion to quash was pending. McSherry Decl. ¶ 7. Movants file this Motion independently to defend their First Amendment interests in anonymous speech and association.

III. ARGUMENT

A. Plaintiff's Subpoena Is Procedurally Improper

As set forth in greater detail in Defendants' Motion to Quash, ESPC's subpoena is procedurally defective. Plaintiff issued the subpoena without prior notice to Defendants, in violation of Federal Rule of Civil Procedure 45(b)(1). *See Firefighter's Inst. for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000); *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1173 (10th Cir. 2003). Further, ESPC issued its subpoena just eleven days after filing suit, well in advance of the scheduling and case management conferences required by the Federal Rules of Civil Procedure and the Eastern District of Missouri's local rules. See Fed. R. Civ. P. 16, 26; E.D. Local Rules 16-5.03, 16-5.04, 26-3.01, McSherry Decl. Ex. G. Plaintiff's disregard for the basic rules of civil procedure alone justifies quashing the Yahoo! subpoena.

B. The First Amendment Requires That Plaintiff Show He Has a Viable Case, Serious Need for the Discovery and No Other Avenue of Vindicating His Rights Before an Online User's Anonymity May Be Pierced.

1. The First Amendment to the U.S. Constitution Protects the Right to Anonymous Online Communication.

Liberal protection for the right to engage in anonymous communication – to speak, read, listen, and/or associate anonymously – is fundamental to a free society. The Supreme Court has consistently defended such rights in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342, 357 (1995) (an "author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment"). *See also Gibson v. Florida*

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court accepted and set a briefing schedule for Defendants' Amended Motion, and denied the first motion as moot. McSherry Decl. Ex. H.

Legislative Investigative Comm'n, 372 U.S. 539, 544 (1963) ("[I]t is ... clear that [free speech guarantees] . . . encompass[] protection of privacy association"); *Talley v. California*, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, and noting that "anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (compelled identification violated group members' right to remain anonymous; "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association").

Moreover, these fundamental rights enjoy the same protections whether the context for speech and association is an anonymous political leaflet or an Internet message board. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet). *See also, e.g., Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004) ("The Internet is a particularly effective forum for the dissemination of anonymous speech").

2. Discovery Requests That Seek to Pierce Anonymity Are Subject to A Qualified Privilege

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts to pierce such anonymity are subject to a qualified privilege. Courts must "be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (U.S. 1999). This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

And, just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. Fed. R. Civ. P. 45(c)(3)(A) (subpoena may be quashed if it "requires disclosure of privileged or other protected matter and no exception

or waiver applies"). "People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

Careful review is particularly appropriate where, as here, the requested discovery will unmask not only anonymous speakers who are not alleged to have defamed anyone, but also members of a group who have never even posted a message. Membership in a group web site by itself does nothing more than indicate some degree of association with persons who have posted messages, association that is constitutionally protected. The Supreme Court has long since held that compelled disclosure of membership lists may constitute an impermissible restraint on freedom of association. "Freedom to engage in association for the advancement of beliefs is an inseparable aspect of the liberty assured by the due process clause of the Fourteenth Amendment, which embraces freedom of speech." *Patterson*, 357 U.S. at 460. A blanket request for names and addresses of Internet discussion group members is the Internet equivalent of a demanding a membership list and deserves equal censure. *2theMart.com*, 140 F. Supp. 2d at 1092 (holding that First Amendment protections for speech and association, including the right to anonymous group membership apply to Internet message boards). *See generally Reno v. ACLU*, 521 U.S. at 851 (applying, generally, all First Amendment protections to "'listservs,' . . . 'newsgroups,' 'chat rooms,' and the 'World Wide Web'").

Where, as here, a forum is designed to encourage commentary on matters of public concern such as a copyright lawsuit campaign, it is not surprising that the group members would wish to remain anonymous. Particularly where a party making claims (the plaintiff "coalition" here) appears to be powerful, and the parties against whom claims are being made are relatively powerless individuals, individuals may be unwilling to share information or ideas, for fear of retaliatory action (a fear that the instant subpoena suggests may be warranted). Stripping group members of anonymity based solely on vague allegations of defamation and business interference would strongly discourage participation in similar forums, stifling a vibrant and growing vehicle for speech and association.

3. The Qualified Privilege Does Not Impede Viable Claims But Instead Limits Abuse of the Discovery Process.

The privilege to remain anonymous is qualified and permits plaintiffs in proper situations to seek information necessary to pursue reasonable and meritorious litigation. *Seescandy.com*, 185 F.R.D. at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); *Doe v. Cahill*, 884 A.2d 451, 446 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection"). However, litigants must not be permitted to abuse the subpoena power to discover the identities of people who have simply made statements the litigants dislike, joined groups critical of Plaintiff's activities, or put themselves in a place to hear others report on possible misconduct by Plaintiff.

Recognizing as much, courts in online defamation situations similar to the one at hand have "adopt[ed] a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation." *Cahill*, 884 A.2d at 456. These courts have recognized that "setting the standard too low w[ould] chill potential posters from exercising their First Amendment right to speak anonymously," *id.* at 457, and have required plaintiffs to demonstrate that their claims are valid, they have suffered a legally recognizable harm, and they have a serious need for the requested discovery before the court will allow disclosure of the speaker's anonymity. *Id.; Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004); *2theMart*, 140 F. Supp. 2d 1088.

Courts have evaluated the strength of that demonstration according to a variety of factors. For example, in a defamation and trademark action (among other claims), this Court held that the protected interest in speaking anonymously requires a plaintiff seek to pierce a Doe defendant's anonymity must first adduce competent evidence that "if unrebutted, tend[s] to support a finding of each fact that is essential to a given cause of action." *Highfields*, 385 F. Supp. 2d at 975. If the first component of the test is met, the court should then "assess and compare the magnitude of the harms that would be caused to the competing interests" and enforce the subpoena only if its issuance "would cause relatively little harm to the defendant's First Amendment and privacy rights [and] is necessary to enable plaintiff to protect against or remedy serious wrongs." *Id.* at 976; *see*

also, e.g., Seescandy.com, 185 F.R.D. at 578-79 (requiring demonstration of viable claims and good faith effort at notice before anonymity could be pierced); *Sony*, 326 F.Supp.2d at 564-65 (evaluating enforcement of subpoena for identifying information of anonymous defendant based on, *inter alia*, showing of actionable harm, specificity of discovery request, and serious need for information) (internal citations omitted).

State appellate courts have adopted similar tests. In *Doe v. Cahill*, for example, the Delaware Supreme Court held that a defamation plaintiff seeking to discover an anonymous defendant's identity must make reasonable efforts to notify the anonymous defendant, and "submit sufficient evidence to establish a prima facie case for each essential element of the claim in question." 884 A.2d. at 463; *see also, e.g., Dendrite*, 775 A.2d at 761 (defamation plaintiff seeking to pierce anonymity of Doe defendant required to attempt to notify defendant, quote actionable speech verbatim, allege all elements of claim and submit evidence in support thereof; court would then balance "defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure.").

In addition, courts have recognized the need for a particularly high level of protection where, as here, the discovery request seeks information about a *nonparty*. In *2themart.com*, the defendant in a shareholder class action lawsuit issued a subpoena request seeking identifying information for twenty-three participants in a internet message board similar to the EOI, ostensibly because messages posted on the board, rather than any action by the defendant, had caused defendant's stock to drop. *2themart.com,* 140 F. Supp. 2d at 1090. The court found that because litigation can go forward without disclosure of an anonymous nonparty's identity, "the standard for disclosing the identity of a nonparty witness must be higher . . . Nonparty disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." *Id*. at 1095. The court held that the requested information should not be produced unless the subpoena was issued in good faith, the information sought was related to a core claim or defense, the information sought was directly and materially relevant to a core claim or defense, and information sufficient to establish or disprove that claim or defense was unavailable from any other source. *Id.*

While courts have balanced civil and litigation rights using slightly different tests, a strong unifying principle is clear: a plaintiff must show that he has a viable case, a serious need for the requested information and no other avenue of vindicating his rights before a court will allow him to pierce an online user's veil of anonymity.

C. The First Amendment Qualified Privilege Requires the Evaluation of Plaintiff's Discovery Request in Light of Five Key Factors

Keeping in mind the above unifying principle, and following the lead of *Highfields*, *Cahill* and *2themart*, Movants submit that this court should evaluate Plaintiff's discovery request in light of the following factors: (1) whether Plaintiff has demonstrated that he has viable claims; (2) the specificity of the discovery request; (3) the existence of alternative means of discovery; (4) the seriousness of the Plaintiff's need for the information; and (5) whether the Plaintiff has attempted to notify the individuals whose information is sought of the pending loss of anonymity. *See 2themart.com*, 140 F. Supp. 2d at 1095*; Highfields*, 84 A.2d. at 463*; Cahill*, 84 A.2d. at 463. Finally, the Court should balance the magnitude of harms to the competing interests of the plaintiff and the anonymous individual he seeks to unmask. *Highfields*, 385 F. Supp. 2d at 976.

With respect to the first factor, recognizing the serious due process concerns raised in *Highfields* and *Cahill*, the court should require that Plaintiff submit some competent evidence sufficient to raise a fact dispute as to each element of the causes of actions claimed. *Highfields*, 385 F. Supp. 2d at 975 ("Because of the importance and vulnerability of those [constitutional] rights ... the plaintiff [must] persuade the court that there is a real evidentiary basis for believing that the defendant has engaged in wrongful conduct that has caused real harm to the interests of the plaintiff . . . ."); *Cahill*, 884 A.2d at 460 ("[T]he summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously"). Only if this threshold element is met should the court proceed to the remaining factors.

Application of this test will do much to mitigate the risk of improperly invading First Amendment "rights that are fundamental and fragile – rights that the courts have a special duty to protect against unjustified invasion." *Highfields*, 385 F. Supp. 2d at 975. Moreover, litigants who

truly have been harmed and have made an appropriate pre-litigation investigation into the facts supporting their claims should have little difficulty crafting subpoenas that can survive the required scrutiny.

D. Plaintiff's Discovery Request Cannot Survive the Scrutiny Required Under the First Amendment.

For this Court to enforce Plaintiff's subpoena of July 10, Plaintiff must meet the heightened discovery standard discussed above. It has not done so.

1. Plaintiff Has Not and Cannot Establish Viable Claims`

Plaintiff must first produce competent evidence as to the validity of its claims. Plaintiff has not and cannot satisfy even this threshold element.

Although Plaintiff's Complaint includes causes of action for everything from conspiracy to intentional infliction of emotional distress, the gravamen of Plaintiff's complaint appears to be its causes of action for defamation and tortious interference with business relations. Plaintiff has not submitted competent evidence of these or any of its other claims.

Indeed, Plaintiff's claims may not even survive a motion to dismiss. As an initial matter, Plaintiff has not adequately alleged standing to bring its claims. Plaintiff's Complaint does not identify any member of the purported coalition, much less specified how any individual member has been injured. These allegations are essential to establish standing for an unincorporated association. *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977) (an association has standing on behalf of its members only when "its members would otherwise have standing to sue in their own right").

Further, Plaintiff has failed to meet the applicable pleading standard with respect to its core claim, for defamation. Rather than pleading its defamation claim with specificity, Plaintiff relies instead on broad allegations, including accusing defendants of a "malicious campaign of slander and libel . . . similar to Hitler's march across Europe." In *Missouri Church of Scientology v. Adams*, 543 S.W.2d 776 (Mo. 1953), the Missouri Supreme Court held that a Petition for libel and slander is invalid if it does not set forth the specific words claimed to be defamatory:

> A petition seeking recovery for libel per se should recite in the petition the specific words or statements alleged to be libelous. . . . The reason for the rule we state is obvious. To do otherwise requires a court to search lengthy articles or books to discover whether they contain words which are libelous per se. Plaintiff knows the words claimed to be libelous and for which recovery is sought and should be required to specify them with particularity.

Id. at 777 (citation and footnote omitted). *See also, e.g., Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 313 (Mo. Banc 1993) ("[I]n a libel case it is not unreasonable to expect a verbatim reproduction of the offending statement to assist the court in determining whether it is capable of defamatory meaning."); *Tindell v. Holder,* 892 S.W.2d 324, 327 (Mo. App. 1994) ("To state a cause of action for libel, a plaintiff must make his allegations . . . in the exact words alleged to be defamatory."; holding that it was no error to dismiss libel count that did not quote the defamatory statement); *Tri-County Retreading, Inc. v. Bandeg, Inc.*, 851 S.W.2d 780, 785 (Mo. App. 1993) ("It is necessary to state the specific words which are argued to be defamatory in order to state a cause of action.").

The policy behind the rule set forth in *Missouri Church of Scientology* is so sound that Missouri federal courts have usually followed it, despite the generally more liberal pleading requirements of the Federal Rules of Civil Procedure. For example, in a case on this precise point, the Eighth Circuit held that "the use of *in haec verba* pleadings on defamation charges is favored in the federal courts because generally knowledge of the exact language is necessary to form responsive pleadings." *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698-699 (8th Cir. 1979) (citations omitted); *accord, Holiday v. Great Atlantic & Pacific Tea Co.*, 256 F.2d 297, 302 (8th Cir. 1952). Federal district courts in the Eighth Circuit regularly follow this rule. *See, e.g., Cimijotti v. Paulsen*, 269 F.Supp. 621, 623 (N.D. Iowa 1963) ("In a defamatory case, the plaintiff must prove his case in the statements alleged as no other statements may be used to prove defamation. Defamation is not a favored cause of action and must always be specifically alleged.") (citation omitted).

Plaintiff does identify one allegedly libelous statement: an alleged statement that "the attorney for the Plaintiff never proves to the Courts that there are copyrights, does not state which members owns the copyrights, obtains default judgments without the defendant ever receiving

notice of the lawsuit that was filed and that the ESPC had sent out over 170,000 letters and collected millions of dollars with this scam." Complaint, McSherry Decl. Ex. A at ¶ 16. These statements do not appear to meet the essential requirement of libel: defamatory content. The suggestion that ESPC has engaged in a scam, is not defamatory, but would be considered at most "rhetorical hyperbole," particularly in the context of freewheeling Internet message board discussions, and hence not actionable as libel. *See, e.g., Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990) (rhetorical hyperbole and other statements which in context are clearly opinion nonactionable as libel); *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (allegedly defamatory message board posting "lack[ed] the formality and polish typically found in documents in which a reader would expect to find facts … . In short, the general tone and context of these messages strongly suggest that they are the opinions of the posters."); *see also Rocker Mgmt. v. John Does*, 2003 U.S. Dist. LEXIS 16277, *5 (N.D. Cal. 2003) (readers were unlikely to view anonymously posted messages on a message board as assertions of fact where the statements made on board were made anonymously, message board included a disclaimer noting that postings were solely the opinion and responsibility of the author, postings were "replete with grammar and spelling errors," and "filled with hyperbole."). Finally, the allegedly defamatory statement is primarily directed to ESPC attorney, who is not a party to this suit, and fails to set forth when, where or how the statement was made.

To make out its tortious interference with potential business relations claim under Texas law (assuming *arguendo* that, as Plaintiff asserts, Texas law would apply to that claim), ESPC must submit competent evidence of (1) a reasonable probability that the parties would have entered into a contractual relationship; (2) an "independently tortious or unlawful" act by the defendant that prevented the relationship from occurring; (3) the defendant intended to prevent the relationship from occurring; and (4) the plaintiff suffered actual harm or damage as a result of the defendant's interference. *Ash v. Hack Branch Distrib. Co*., 54 S.W.3d 401, 414-15 (Tex. App. 2001).

Plaintiff has not and cannot meet even the first essential element of the tort. To satisfy the first element of the tort, a plaintiff must establish a "reasonable certainty" that a business relationship would have been established but for the defendants' interference. *Exxon Corp. v.*

Allsup, 808 S.W.2d 648, 659 (Tex. App. Corpus Christi 1991). Plaintiff's Complaint does not specify any reasonably certain business relationship with which Defendants' might have interfered. Indeed, the closest Plaintiff comes to identifying a possible relationship is its reference to business relationships "gained through filing of litigation by ESPC members against third parties" and its contention that Defendants' intentionally prevented third parties from "entering into agreements" with ESPC. Complaint, McSherry Decl. Ex. A at¶ 21. If Movants understand this assertion, Plaintiff is claiming that ESPC makes a business out of filing lawsuits, and anyone who criticizes those lawsuits is interfering in that business. This theory is not only absurd, it smacks of abuse of process and should be condemned by this Court.

As for its remaining claims, in addition to failing to submit competent evidence, Plaintiff has again failed to state claims upon which relief may be granted. Plaintiff's second cause of action, for intentional infliction of emotional distress, is nonsensical: a nonhuman entity cannot assert a claim for emotional distress. *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994) ("a corporation cannot suffer emotional distress."); *W.C.H. of Waverly Mo., Inc. v. Meredith Corp.*, 1986 U.S. Dist. LEXIS 18125, *5 (D. Mo. 1986) (same); *Haygood v. Chandler*, 2003 Tex. App. LEXIS 9344, *18 (Tex. App. 2003) ("[T]here is no feasible way a professional association, corporation, or partnership can experience mental suffering as a matter of law."). Its conspiracy claim also fails. Under both Texas and Missouri law, conspiracy comprises: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result. *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005); *Moses.com Securities, Inc. v. Comprehensive Software Sys. Inc.*, 406 F.3d 1052, 1063 (8th Cir. 2005) (applying Missouri law). Plaintiff has failed to allege any meeting of the minds. Moreover, as set forth above, a cause of action for conspiracy is sustainable only after the underlying tort claim has been established. *Hanten v. School Dist. of Riverview Gardens*, 183 F.3d 799, 809 (8th Cir. 1999) ("[A] claim of civil conspiracy does not set forth an independent cause of action but rather is sustainable only after an underlying tort claim has been established . . . .") (internal quotation marks omitted, applying Missouri law); *United States ex rel. Coppock v. Northrop Grumman Corp.*, 2003 U.S. Dist. LEXIS 12626, *48 (D. Tex. 2003) ("A

claim for civil conspiracy is generally not viable without the commission of an underlying wrongful act . . . ."). Because Plaintiff cannot state the underlying claims—for defamation and interference with business relations—it cannot state a conspiracy claim.

Plaintiff's last substantive claim, for business disparagement, fails for lack of specificity for the same reasons discuss above with respect to the defamation claim and because Plaintiff does not allege the essential element of special damages, as required by Texas law. *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) ("To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff."); *50-Off Stores, Inc. v. Banque Paribas (Suisse) S.A.*, 1997 WL 790739, *5 (W.D. Tex 1997) ("[P]roof of special damages is an essential part of the plaintiff's cause of action for business disparagement . . . .)"

Plaintiff has submitted no competent evidence of essential elements of its claims. And, Plaintiff has not managed to state a single claim upon which relief may be granted. Its Complaint is frivolous and its subpoena must be quashed.

2. Plaintiff's Subpoena Request is Overbroad and Seeks Irrelevant and Unnecessary Information

Even if Plaintiff could meet the first element of the balancing test required by the First Amendment—which it cannot—its subpoena request must surely fail as to the second, third, and fourth elements. Plaintiff seeks detailed information, including account information, personally identifying information and messages posted by every member of the EOI group. This information can have no possible relevance to the defamation claim against Defendants. If, as Plaintiff alleges, Defendants have been publishing defamatory content all over the World Wide Web, McSherry Decl. Ex. A at ¶ 12, Plaintiff need not contact Movants or any other nonparty witnesses to confirm the publication of any statements. And, Plaintiff should already have identifying information for any persons as to whom it had an actual or reasonably certain business relationship, as well as the ability to contact those persons directly regarding any additional facts needed to support its allegations. In sum, rather than developing narrowly-tailored discovery requests after exhausting its

alternative sources of information, Plaintiff moved immediately to attempt to obtain broad categories of highly privileged information.

The overbreadth of the Plaintiff's subpoena suggests that the discovery request is designed not to obtain relevant information needed to pursue its claims but rather to unmask and intimidate participants in a discussion group devoted to commentary on its activities. The First Amendment forbids such tactics.

3. Plaintiff Has Failed to Meet the Remaining Elements of the First Amendment Balancing Test.

There is no indication that Plaintiff has made any attempt to notify any of the anonymous targets of its subpoena. Their First Amendment anonymity interests demand that reasonable efforts be made to contact them so that they may raise objections to discovery attempts as well.[3]

As for the balance of harms, given the weakness of Plaintiff's claims, the overbreadth of the subpoena, and the fact that, as the *2themart* court observed, the identity of the nonparty witnesses is not necessary for the litigation to go forward, the harm to Plaintiff of quashing the subpoena is minimal. On the other hand, releasing the requested information would cause significant and irreparable harm to the anonymous speakers by forcing them to give up their anonymity even though they are not accused of anything and Plaintiff has not explained the relevance of that information to the claims at issue in the underlying action.

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[3] The fact that Movants independently learned of the existence of the filing of the subpoena has no bearing on this factor as other discovery targets may of course wish to raise their own unique objections.

IV. CONCLUSION

Instead of narrowly tailoring its discovery to obtain facts necessary to pursue viable claims, Plaintiff has asked this Court to endorse a fishing expedition aimed at anyone who comments on its actions or associates with those who do. For the reasons stated above, this Court should quash Plaintiff's subpoena.

DATED: August 8, 2006

By _____

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