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ORIGINAL
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RICHARD W. WIEKING
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Attorneys for
JANE DOE (a.k.a. MUDDBUGGZ) and
JANE DOE (a.k.a. DMSPTGGDS)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CV 06 - 80236 MISC. RMW

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

DECLARATION OF CORYNNE
MCSherry 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

I, Corynne McSherry, declare as follows:

I am an attorney at law duly admitted to practice before this Court. I am a staff attorney at the Electronic Frontier Foundation, counsel of record for Nonparties Jane Doe (a.k.a. muddbuggz) and Jane Doe (a.k.a. dmsptggds). I submit this declaration in support of the attached Motion of NonParty Does to Quash Subpoena to Yahoo! Inc. The facts stated here are known to

1 me of my own personal knowledge, except where otherwise stated. If called upon to testify thereto
2 I could and would competently do so.

3 2. Attached hereto as Exhibit A is a true and correct copy of the Complaint in
4 *Embroidery Software Protection Coalition v. Janet Ebert and Victoria Weaver*, United States
5 District Court for the Eastern District of Missouri, Case No. 4:06-CV-00991-CAS (the “Missouri
6 Case”).

7 3. Attached hereto as Exhibit B is a true and correct copy of a document entitled
8 “Embroidery Software Protection Coalition Amnesty Program,” which I downloaded from the
9 website www.embroideryprotection.org on August 6, 2006.

10 4. Attached hereto as Exhibit C is a true and correct copy of a Subpoena issued by the
11 United States District Court for the Northern District of California to Yahoo! Inc. in connection to
12 the aforementioned action.

13 5. Attached hereto as Exhibit D is a true and correct copy of a message that appeared
14 on the Embroidery Organization Information discussion group board on July 24, 2006, which I
15 caused to be printed from the message board archive on August 4, 2006.

16 6. Attached hereto as Exhibit E is a true and correct copy of Defendants Janet Ebert
17 and Victoria Weaver’s Motion to Quash the aforementioned Subpoena to Yahoo! Inc., filed July
18 27, 2006 in the United States District Court for the Eastern District of Missouri.

19 7. On July 31, 2006, I spoke with Emily Hancock, counsel for Yahoo! Inc. Ms.
20 Hancock told me that Yahoo! would not respond to the aforementioned Subpoena while a motion
21 to quash that Subpoena was pending.

22 8. Attached hereto as Exhibit F is a Defendants Janet Ebert and Victoria Weaver’s
23 Amended Motion to Quash the aforementioned Subpoena to Yahoo! Inc., filed August 5, 2006 in
24 the United States District Court for the Eastern District of Missouri.

25 9. Attached hereto as Exhibit G is a true and correct copy of United States District
26 Court for the Eastern District of Missouri Local Rules 16-5.03, 16-5.04 and 26-3.01.

27 ///

28 ///

10. Attached hereto as Exhibit H is a true and correct copy of an Order in the Missouri Case granting, inter alia, defendants' motion for leave to file their amended motion to quash, dated August 7, 2006.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed in San Francisco, California.

DATED: August 8, 2006

By Corynne McSherry

Exhibit A

ORIGINAL

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
ST. LOUIS DIVISION**

FILED

JUN 28 2006

EMBROIDERY SOFTWARE PROTECTION
COALITION aka ESPC, and their unnamed
Representatives

U. S. DISTRICT COURT
EASTERN DISTRICT OF MO.

Plaintiff,

CIVIL ACTION NO.:

v.

JANET EBERT and VICTORIA WEAVER
Defendants

4 : 06CV00991CAS

ORIGINAL COMPLAINT

COMES NOW, EMBROIDERY SOFTWARE PROTECTION COALITION aka ESPC and their unnamed representatives (herein after referred to as "Plaintiff" or "ESPC") and files it's Complaint against JANET EBERT (herein after referred to as "Defendants" or "EBERT") and VICTORIA WEAVER (herein after referred to as "Defendants" or "WEAVER ") and would respectfully show the Court, as follows:

NATURE OF THE ACTION

1. This is a complaint for defamation and tortuous interference in business relations and potential business relations.

THE PARTIES

2. Plaintiff Embroidery Software Protection Coalition, ("ESPC"), is a coalition formed by embroidery software companies to protect and prosecute infringements of the members federally registered copyrights and trademarks, with its principal place of businesses and representatives in Dallas, Texas and Monroeville, PA.

3. Defendant JANET EBERT is an individual who resides at 3524 West Fork Drive, House Springs, MO 63051 and may be served with process there or wherever she may be found.
4. Defendant VICTORIA WEAVER is an individual and who resides at 6346 State Road H, De Soto, MO, 63020 and may be served with process there or wherever she may be found.

JURISDICTION AND VENUE

5. Jurisdiction in this Court is founded upon 28 U.S.C. §1332, diversity of citizenship, Plaintiff and Defendants are entities and citizens of different states. The amount in controversy against each defendant exceeds seventy five thousand dollars (\$75,000.00) exclusive of interest and costs.
6. This Court has personal jurisdiction over Defendants because the Defendants reside in this district.
7. Venue is proper in the St. Louis Division of the Eastern District of Missouri pursuant to 28 U.S.C. §1391, Defendants are residents of this district and a substantial part of the events or omissions giving rise to the claim occurred in this division of the Eastern District of Missouri.
8. The cause of action is for defamation and the county of Plaintiffs residence or principal place of business is Dallas County, Texas. Therefore, venue for the claim is also proper in

Dallas county pursuant to Texas Civil Practice and Remedies Code §15.001 due to the fact the cause of action arose in Dallas County, Texas.

GOVERNING LAW

9. This action is for Defamation and Interference in Business Relations against the Plaintiff and their representatives located in Texas. The acts of defamation and interference had a substantial impact on the representatives and the Plaintiff in Texas. Texas substantive law should govern this action. It is clearly state substantive law where the defamed parties lie that should govern the issues of this dispute. The Courts of Texas have determined that they do not have personal jurisdiction over these Defendants; Therefore, Plaintiff has come to the U.S. District Court in Missouri to seek recourse against these Defendants and their despicable behavior.

FACTUAL ALLEGATIONS

10. ESPC is a coalition of some of the major manufacturers and distributors of embroidery software and designs. The software and designs owned by the members are copyrightable subject matter under the laws of the United States. The members of the Coalition have registered the embroidery software and designs with the U. S. Copyright Office and the registration covers the embroidery software and designs counterfeited by the Defendants. Plaintiff holds power of attorneys from its members to pursue and prosecute any persons or entities that are involved in the counterfeiting of embroidery software and designs. The members of the ESPC have complied in all respects with the Copyright Act, 17 U.S.C. §101 and with all other laws governing copyrights. The members of the ESPC are

the sole proprietors of all rights, title, and interest in and to the copyrights on their embroidery designs and software that the ESPC protects. Defendants hold no legal right, title, or interest in and to the embroidery designs and software which are owned by the members of the ESPC.

11. Based on information and belief the during 2004 and 2005, Defendants were producing, distributing and selling counterfeit copies of embroidery designs owned by Great Notions, a member of this Coalition. In 2005, Great Notions instituted suit against the defendants originally in the U.S. District Court in the Northern District of Texas. These cases were re-filed on June 21, 2006 in the U.S. District Court in the Eastern District of Missouri, Action Numbers. 4:06-CV-00959-DDN (Ebert) and 4:06-CV-00960-CEJ (Weaver). After the original filing of the litigations in Texas, the Defendants began a malicious campaign of slander and libel that marched across the internet bulletin boards and chat groups similar to Hitler's march across Europe against not only Great Notions, but the ESPC and their representatives, including their chairman, Gary Gardner, their attorney Carole Faulkner, their director, Joyce Perhac and their head paralegal, Donna McCauley. The Defendants persecuted the Plaintiffs as a direct result of the ESPC and their members enforcing their legal rights against the Defendants and others for illegally selling and distributing counterfeit copies of copyrighted designs. The Defendants were the persons who were actively participating in organized illegal activities for monetary gain and now seek approval for those illegal activities instead of the punishment they are due. Defendants' publications have harmed the Plaintiff and their representatives' business reputation and goodwill such that Plaintiff could not be made whole by any

monetary award, and Defendants wrongful conduct, and the resulting damage to Plaintiff, is continuing. If the Court does not intervene and restrain the defendants the Plaintiff has no adequate remedy at law and the harm will continue. Plaintiff is also entitled to recover its attorneys' fees and costs of suit.

12. Based on information and belief, Defendants, jointly and/or independently own and/or control several bulletin boards, chat rooms or groups on the World Wide Web ("internet"), for which they continuously and systematically publish false information and statements regarding and relating to the Plaintiff and their representatives. Beginning during May 2006 and continuing thereafter, the Defendants conspired with each other and other third parties to create, publish and distribute numerous false statements relating and referring to the Plaintiff and their representatives. Such conspiracy was intentional and willful by the Defendants and other third parties. The purpose of the conspiracy was to publish the false statements and to disparage the business of the Plaintiffs and their representatives. Defendants' actions proximately caused damage to Plaintiff. ESPC has suffered damages as a result of Defendants' intentional and willful actions. Defendants' actions have caused damage to Plaintiff in the amount in excess of the minimum jurisdictional limits of the Court.
13. The risk that the allegedly defamatory statements that were published by the Defendants would be communicated to others was almost certain. Defendants were aware by virtue of the internet group board that its adverse publications would be sent or forwarded by members and, from there the information contained in the publications would be

transmitted to any person requesting it or other unknown third parties. Defendants' conducts in publishing the false statements were extreme or outrageous. Defendants' actions proximately caused damage to Plaintiff. The Plaintiff has suffered damages as a result of Defendants' intentional actions. Defendants' actions have caused damage to Plaintiff in the amount in excess of the minimum jurisdictional limits of the Court.

14. The Defendants posted and published numerous statements relating to the Plaintiff's representatives that were defamatory *per se*. Specifically, the statements unambiguously and falsely imputed criminal conduct to the plaintiff. Contained in the statement itself is a single meaning so obviously harmful to the Plaintiff and their representatives that all proof of damages must be dispensed with and presumed damages must be awarded to the Plaintiff in an amount to deter such contemptible behavior in the future. Defendants' actions proximately caused damage to Plaintiff. The ESPC and their representatives have suffered damages as a result of Defendants' intentional and willful actions. Defendants' actions have caused damage to Plaintiff in the amount in excess of the minimum jurisdictional limits of the Court.
15. In addition, the Defendants posted and published statements that were defamatory *per quod*, when they posted statements alleging that Plaintiff and their representatives were frauds and crooks using innuendo and further, the Defendants insinuated that Plaintiff's representatives had committed a crime.
16. Specifically, Defendants published false and damaging information relating to the ESPC and their representatives on the internet boards and groups. These libelous statements

consisted of false information regarding ESPC's business practices, legality, and purpose. These libelous statements were distributed to all persons coming into contact with Defendants' website and at various bulletin boards controlled by the Defendants. Defendants were targeting persons that the Plaintiff had a potential business relationship with to disparage the business of the Plaintiff and to publish false statements about the Plaintiff. Defendants' actions were for the purpose of interfering in the potential business relations of the Plaintiff and to damage the Plaintiff and their representatives. Defendants' were publishing, among other statements, that the ESPC was conducting illegal activities, were frauds, crooks and running a scam. Further, Defendants were misleading as to character, reputations and personam of the Plaintiffs, including but not limited to, statements that, "the attorney for the Plaintiff never proves to the Courts that there are copyrights, does not state which member 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". These are but a very small example of the false statements that were published by the Defendants and that the Defendants continue to publish as of this date. The statements mislead persons to believe that ESPC is unstable, illegal and unsafe to trust. It was a blatant attempt to persuade all persons, that the ESPC was not legally justified in their actions and conduct relating to the protection and prosecution of persons, both sellers and buyers, whom are involved in the violation of the intellectual property rights owned by the members of the ESPC. The Defendants' continuing actions and conduct have damaged the ESPC and their representatives in an amount in excess of the minimum jurisdictional limits of the Court.

17. If the Court does not intervene and if Ebert and Weaver are not restrained from publishing and distributing false information about ESPC, utilizing the trade name of the ESPC, or from interfering with potential customers, Plaintiff will suffer immediate and irreparable harm whereby there is no adequate remedy at law. Due to the Defendants continuing conduct the Plaintiffs damages continue to escalate on a daily basis.
18. Such published statements were made by Defendants with malice, viciousness, willfulness, callousness, contemptibly or wantonness toward ESPC. Plaintiff's reputation and standing in the embroidery community, along with their representatives have suffered irreparable damage. The ESPC and their representatives have been humiliated, degraded and disgraced before their peers, associates, and members due to Defendants' false, malicious and vicious statements.
19. Defendants have violated Texas Civil Practice and Remedies Code § 73.001 by publishing false and defamatory information relating to the ESPC and its representatives to third parties. Defendants' actions have caused financial injury to the Plaintiff. Defendants have impeached ESPC's reputation in the embroidery community and exposed them to ridicule and financial injury. Defendants published false information to third parties in an attempt to defraud Plaintiff and destroy the Plaintiff's reputation and standing through false means. The Plaintiff has suffered damages as a direct result of the Defendants terrorist behavior. If the Court does not intervene and if Ebert and Weaver are not restrained from publishing and distributing false information about the ESPC and their representatives, Plaintiff will suffer immediate and irreparable harm whereby there is no adequate remedy at law.

20. Defendants knowingly disseminated false and injurious information, and continue to disseminate the false and injurious information to third parties. Defendants' actions threaten to erode the ESPC's reputation and goodwill. Such published statements and interference were made by Defendants with malice, viciousness, willfulness, callousness, contemptibly or wantonness toward ESPC. Defendants' actions and conduct have damaged the ESPC in an amount in excess of the minimum jurisdictional limits of the Court. If the Court does not intervene and if Defendants are not restrained from publishing or distributing false information relating, regarding or pertaining to the ESPC, Plaintiff will suffer immediate and irreparable harm whereby there is no adequate remedy at law.
21. Upon information and belief, beginning in May 2006 and continuing thereafter through the date of filing the Original Petition, Defendants have maliciously and intentionally published false information relating to Plaintiff to numerous Third Parties whom had a business relationship or potential business relations with the ESPC. This business relations or potential business relationship was gained through the filing of litigation by ESPC members against third parties. Defendants had knowledge of the relations between Plaintiff and the third parties. The Defendants interfered with the relationships to the detriment of the ESPC. Such interference by the Defendants was intentional, willful and malicious. Defendants have harmed Plaintiff's relationships through this interference.
22. The third parties did not solicit the information from the Defendants and had no previous relationship to the Defendants until such time as the Defendants unilaterally contacted the

third parties by the publication of the false statements on internet websites and boards owned and controlled by the Defendants for the purpose of the interference in the relations or potential relations of the Plaintiff. The Defendants had no business reason for such interference except for the deliberate intent to cause harm to the Plaintiff. Such published statements and interference were made by Defendants with malice, viciousness, willfulness, callousness, contemptibly or wantonness toward ESPC. Defendants' actions proximately caused damage to Plaintiff. ESPC has suffered damages as a result of Defendants's intentional actions. Defendants' actions have caused damage to Plaintiff in the amount in excess of the minimum jurisdictional limits of the Court.

23. Defendants intentionally, willfully, and maliciously published the false and misleading information relating to the Plaintiff, which prevented the Plaintiff from entering into the agreements with the third parties. Defendants' intent was to cause harm to Plaintiff and prevent them from entering into their agreements. Plaintiff has suffered damages as a result of Defendants actions and interference.
24. Plaintiff is entitled to a temporary restraining order and injunctive relief against the continuing publication of false statements and information by the Defendants. Plaintiff has no adequate remedy at law for Defendants wrongful conduct because, among other things, (a) Plaintiff's and their representatives' reputations and goodwill are unique and valuable property that have no readily determinable market value, (b) Defendants defamation harms Plaintiff's business reputation and goodwill such that Plaintiff could not be made whole by

any monetary award, and (c) Defendants wrongful conduct, and the resulting damage to Plaintiff, is continuing. If the Court does not intervene the Plaintiff has no adequate remedy at law and the harm will continue. Plaintiff is also entitled to recover its attorneys' fees and costs of suit.

25. Plaintiff is also entitled to a temporary restraining order and injunctive relief for their tortuous interference in the business relations of Plaintiff. If the Court does not intervene and if Ebert and Weaver are not restrained from contacting third parties whom have a relationship or potential relationship to the Plaintiff, their representatives or members, the ESPC will continue to suffer immediate and irreparable harm whereby there is no adequate remedy at law.
26. The Defendants have conspired to intentionally and willfully create a campaign of terrorism against the Plaintiff and their representatives, by publishing false statements about the Plaintiff, they have deliberately and intentionally inflicted emotional distress against the Plaintiffs' representatives, they have intentionally interfered in the relationships and potential relationships of the Plaintiff, disparaged the business of the Plaintiff, all because the Defendants were caught and prosecuted for their organized illegal activities of counterfeiting designs owned by the members of the ESPC. Defendants' continuous actions and conduct against the ESPC and their representatives, have damaged the ESPC in an amount in excess of the minimum jurisdictional limits of the Court. There is no adequate remedy at law for the Defendants' actions and conduct as set forth above. Further, if this

Court does not intervene and if Defendants are not restrained from these terrorist activities relating, regarding or pertaining to the ESPC and their representatives, Plaintiff will suffer immediate and irreparable harm whereby there is no adequate remedy at law.

COUNT I
DEFAMATION

27. Paragraphs 1 through 26 are hereby incorporated by referencing the same as if fully copied and set forth at length.
28. ESPC asserts that Defendants made false and libelous statements regarding ESPC's business practices, legality and purpose to third parties. The Defendants have violated Texas Civil Practice and Remedies Code § 73.001 by defaming the citizens, associations and businesses of Texas. Plaintiff and their representatives have suffered damage to their reputation and standing in the community as a result of Defendants' defamatory actions. Such published statements made by Defendants were made with malice, viciousness, willfulness, callousness, contemptibility and wantonness.
29. As a result of the foregoing false, malicious, and vicious statements made and published by Defendants, Plaintiff and their representatives have suffered irreparable damage to their reputations and standing in the community, in addition to financial injury in an amount in excess of the jurisdictional limits of the Court. Further, ESPC would show that the actions by Defendants, as alleged herein, allows Plaintiffs to seek any and all damages allowed by law against Defendants.

30. Defendants' defamatory acts have caused and will continue to cause ESPC to suffer substantial and irreparable injuries, loss, and damage to its reputation, standing in the community and its goodwill. Plaintiff has suffered damages proximately caused by Defendants' continuous publication of false facts and statements. Plaintiff seeks damages from Defendants for these unauthorized publication and dissemination of false information and statements. Defendants' activities have also damaged ESPC's business reputation, standing in the community, and caused a substantial loss of goodwill, all in an amount not yet ascertained but estimated in an amount in excess of \$200,000.00.
31. As a result of the foregoing acts by Defendants, ESPC has suffered damages proximately caused by Defendants' action in an amount in excess of the minimum jurisdictional limits of this Court.

COUNT TWO
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

32. ESPC refers to and incorporates by reference the factual allegations contained in Paragraphs 1 through 26 of the Complaint
33. Defendants intentionally and recklessly posted and distributed numerous statements of false information relating to the Plaintiff and their representatives. The Defendants conduct was extreme and outrageous in the postings and distribution of the defamatory statements. Such actions by the Defendants caused the Plaintiff and their representatives' emotional distress and the resulting emotional distress was severe. Defendants' actions

have constituted intentional infliction of emotional distress against the Plaintiff and their representatives.

35. As a result of the foregoing acts by Defendants, ESPC and their representatives have suffered damages proximately caused by Defendants' action in an amount in excess of the minimum jurisdictional limits of this Court. Such conduct by the Defendants caused harm to the Plaintiff. Defendants' actions and conduct have damaged Plaintiff in an amount in excess of \$200,000.00.

COUNT THREE
CONSPIRACY

36. ESPC refers to and incorporates by reference the factual allegations contained in Paragraphs 1 through 26 of the Complaint.
37. The Defendants conspired with each other and other third parties to create, publish and distribute numerous false statements relating and referring to the Plaintiff, their representatives and members. In addition, the parties conspired to intentionally interfere in the business relations and/or potential business relations of the Plaintiff and to disparage the business of the Plaintiff and their representatives. Such conspiracy was intentional and willful by the Defendants and other third parties. Defendants' actions proximately caused damage to Plaintiffs. The ESPC, their representatives and members

have suffered damages as a result of Defendants' intentional and willful actions.

Defendants' actions have caused damage to Plaintiffs in the amount in excess of the minimum jurisdictional limits of the Court.

COUNT FOUR
BUSINESS DISPARAGEMENT

38. ESPC refers to and incorporates by reference the factual allegations contained in Paragraphs 1 through 26 of the Complaint.
39. Defendants have published false and defamatory statements against the Plaintiff. Such statements were disparaging of the Plaintiff's business. By their actions Defendants are causing irreparable harm to Plaintiff's business. Defendants' actions proximately caused damage to Plaintiff. The ESPC has suffered damages as a result of Defendants' intentional actions. Defendants' actions have caused damage to Plaintiffs in the amount in excess of the minimum jurisdictional limits of the Court.

COUNT FIVE
REQUEST FOR INJUNCTIVE RELIEF

40. ESPC refers to and incorporates by reference the factual allegations contained in Paragraphs 1 through 26 of the Complaint.

41. Defendants have published false and defamatory statements against the Plaintiff and their representatives. By their actions Defendants are causing irreparable harm to Plaintiff's business. Plaintiff seeks to enjoin the Defendants and their agents and representatives, during the pendency of this action and thereafter permanently from posting, publishing, discussing, disseminating and/or otherwise distributing any false statements relating, referring or pertaining to the Plaintiff and/or any of their members, representatives or associates.
42. Defendants have tortuously interfered with the business relations of ESPC and numerous third parties. Such interference is causing irreparable damage to ESPC of such a magnitude as to be incalculable. If the Court does not intervene the Plaintiff has no adequate remedy at law and the harm will continue. Plaintiff seeks to enjoin the Defendants, their agents and representatives, during the pendency of this action and thereafter permanently from interfering in any business relation or potential business relations that relate, refer or pertain to the Plaintiff and/or any of their members, representatives or associates.
43. Such actions were undertaken by Defendants with malice, viciousness, willfulness, callousness, contemptibly and wantonness toward Plaintiff. There is substantial likelihood that Plaintiff will prevail on the merits of this case. Plaintiff has proof of the publication of the false and defamatory statements and the intentional interference in the business and/or potential business relations of the Plaintiff. If the Court does not grant a

preliminary injunction, Defendants will continue her activities that defame and interfere with the relations of the Plaintiff. If the Court does not intervene and if Defendants are not restrained from conspiring, publishing and distributing false and defamatory statements, and interfering in the business relations and potential business relations of the Plaintiff, the ESPC and their representatives will suffer immediate and irreparable harm whereby there is no adequate remedy at law. Defendants will not suffer undue hardship or loss as a result of the issuance of a preliminary injunction as more specifically set forth in the following paragraph, and the injunction will prevent irreparable injury to the Plaintiff. The Plaintiff asks the Court to set their request for preliminary injunction for hearing at the earliest possible time and after hearing the request, issue a preliminary injunction against the Defendants.

44. ESPC requests that the Court issue a preliminary and permanent injunction enjoining and restraining Defendants, their agents, employees, associates, representatives, partners and any person acting in concert with them or participation who receive actual notice of the restraining order and/or injunction by personal service or otherwise, from doing, abiding, causing, or abetting any of the following:
- (a) engaging or interference in business relations and/or potential business relations of ESPC or their representatives.
 - (b) participating in any website, internet service, Usenet, e-mail group, peer to peer, or other computer or computer-assisted methodology for the purpose of posting, communicating any false or defamatory statements relating or referring to ESPC or any member, employee or representative, in any manner whatsoever.

COUNT SIX
INTERFERENCE IN BUSINESS RELATIONS and/or
POTENTIAL BUSINESS RELATIONS

45. ESPC refers to and incorporates by reference the factual allegations contained in paragraphs 1 through 26 of the Complaint.
46. Upon information and belief, beginning in May 2006 the Defendants interfered with the relationship to the detriment of ESPC. Such interference by the Defendants was intentional, willful and malicious.
47. Plaintiff will show that Ebert and Weaver had knowledge of the relations between Plaintiff and third parties. Moreover, Plaintiff will show that Defendants induced the third parties to terminate their relationship with Plaintiff. A reasonable probability existed that a contractual relationship would have been created with the third parties. Plaintiff will show that in persuading the third parties to terminate their relationship with Plaintiff, Defendants' motive was solely to deprive Plaintiff of the benefits of its relationships and to undermine Plaintiff's opportunities.
48. Plaintiff will show that they had prospective relationships that Defendants interfered with and but for Defendants' interference, Plaintiff would have had the agreements. Defendants' intent was to harm Plaintiff and interfere in Plaintiff's prospective relationships. As a result of the foregoing acts by Defendant, Plaintiff has suffered

damages proximately caused by Defendant's action in an amount in excess of the minimum jurisdictional limits of this Court.

49. As a result of the foregoing acts by Defendants, ESPC has suffered damages proximately caused by Defendants' action in an amount in excess of the minimum jurisdictional limits of this Court. Such conduct by the Defendants caused harm to the Plaintiff. Defendants' actions and conduct have damaged Plaintiff in an amount in excess of \$100,000.00.

COUNT SEVEN
PUNITIVE AND EXEMPLARY DAMAGES

50. ESPC refers to and incorporates by reference the factual allegations contained in paragraphs 1 through 26 of the Complaint.
51. Plaintiff asserts the conduct of Defendants, as set out above, was willful, deceitful and malicious. Therefore, Plaintiff seeks to recover punitive and exemplary damages in an amount sufficient to deter such willful, deceitful and malicious conduct in the future.

ATTORNEY'S FEES

52. As a result of the wrongful action of Defendant, Plaintiff has retained the undersigned attorney to represent them in this matter, and to prosecute this claim on their behalf.
- Pursuant to the Texas Civil Practice and Remedies Code, Plaintiff is entitled to recover

their reasonable and necessary attorney's fees incurred by them in connection with the prosecution of their claims through trial.

53. Plaintiff would further show that in the event the case is appealed to the Court of Appeals that Plaintiff would be entitled to reasonable attorney's fees in an amount not less than \$70,000.00. In the event the case is appealed to the U.S. Supreme Court, Plaintiff would be entitled to a reasonable attorney's fees of not less than an additional \$75,000.00.


PRAYER FOR RELIEF

WHEREFORE, Plaintiff request that Defendants be cited to appear and answer herein, that on final hearing hereof, the Court enter judgment in its favor and against each of the Defendants, jointly and severely, for the following:

1. Plaintiff is awarded monetary damages against each of the Defendants, for defamation, defamation *per se*, defamation *per quod*, in an amount in excess of the minimum jurisdictional limits of this Court;
2. Plaintiff is awarded monetary damages against each of the Defendants for intentional infliction of mental anguish, in an amount in excess of the minimum jurisdictional limits of this Court;
3. Plaintiff is awarded monetary damages against each of the Defendants, for interference in business relations and/or potential business relations, in an amount in excess of the minimum jurisdictional limits of this Court;
4. Plaintiff is awarded monetary damages against each of the Defendants for business disparagement, in an amount in excess of the minimum jurisdictional limits of this Court;
5. Plaintiff is awarded monetary damages against each of the Defendants for conspiracy, in an amount in excess of the minimum jurisdictional limits of this Court;

6. Preliminary and Permanent Injunctive relief against each of Defendants, jointly and severely for their interference in business relations, potential business relations and internet postings of defamatory remarks or statements Specifically, that Defendants their agents, employees, associates, representatives, partners and any person acting in concert with them or participation who receive actual notice of the injunction by personal service or otherwise, from doing, abiding, causing, or abetting any of the following:
 - (a) engaging or interference in business relations and/or potential business relations of ESPC or their representatives.
 - (b) participating in any website, internet service, Usenet, e-mail group, peer to peer, or other computer or computer-assisted methodology for the purpose of or posting, communicating any false statements relating or referring to ESPC or any employee or representative, in any manner whatsoever.
7. Punitive and exemplary damages for the malicious conduct of Defendants in their dealings with Plaintiff in an amount not less than \$2,000,000.00;
8. Prejudgment and post judgment interest which may be allowed by law;
9. Reasonable attorney fees as set forth herein;
10. Costs of Court; and
11. Such other and further relief, at law or in equity, to which Plaintiff may show itself to be justly entitled.

SIGNED this the 26th day of June, 2006 in Dallas Texas.



Carole A. Faulkner
TSB # 06855150
2751 Electronic Lane
Dallas, TX 75220
Telephone 214.352.6940
Facsimile 214.352.7249
cfaulkner@greatnotions.com
ATTORNEY FOR PLAINTIFF

Exhibit B

**Embroidery Software Protection Coalition
AMNESTY PROGRAM**

Are you an innocent? Have you been hijacked by the Pirates while you were surfing the high seas of the internet? Do you possess pirated or counterfeit embroidery designs or software and not know what to do with them? Do you want to surrender them before you are caught?

The ESPC is aggressively pursuing the Pirates and Counterfeiters and any persons who are involved in the purchase of counterfeit or pirated goods. These persons will be caught and prosecuted. This is your chance to surrender the counterfeit and pirated goods and obtain a release from prosecution by the ESPC and its members. Join the ESPC Amnesty Program today and sleep at night without worry of being caught with the Pirates or their counterfeit goods.

You are eligible for the Amnesty Program only one time. If you have not received a letter from the ESPC then you are eligible for the Amnesty Program. If you have received a letter from the ESPC, you are not eligible for a release through this program. You must contact the Legal Department at 214.350.1892.

The cost for a full release and assurance from the ESPC members who own the copyrights to the designs that were counterfeit is \$300.00, plus the return of the counterfeit embroidery designs and software with the documents which show the purchase of the designs. Regardless of the number of designs you have in your possession, all are to be returned under this program for a full release.

Join now: Provide the information below, including your name, address, telephone number with a copy of this page and the Amnesty fee, counterfeit designs and documents to the ESPC, P.O. Box 1312, Monroeville, PA 15146, Attention LEGAL DEPARTMENT. Upon receipt of your Amnesty information, it will be processed and you will receive a release from liability from the ESPC. The Amnesty fee can be paid in check, money order or cashier's check. The release will cover all counterfeit purchases through the mailing date of the information to the ESPC.

NAME: _____

ADDRESS: _____

TELEPHONE NUMBER: _____

DESCRIPTION OF ITEMS BEING SURRENDERED. _____

Exhibit C

Issued by the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EMBROIDERY SOFTWARE PROTECTION
COALITION

V.

JANET EBERT and VICTORIA WEAVER

SUBPOENA IN A CIVIL CASE

Case Number:¹ 4:06-CV-00991-CAS

E. District of MISSOURI

TO: Yahoo! Inc.
Custodian of Records
701 First Avenue, Sunnyvale, CA 94089

- ☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

- ☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME

- ☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below: ANY AND ALL DOCUMENTS AND RECORDS which reflect or relate to the yahoo chat group known or registered as embroideryorganizationinformation@yahoo.com or embroideryorganizationinformation@yahoo.com including but not limited to identifying information, names, addresses of members or posters, owners, moderators, account information, postings, activity logs, transaction logs, access logs, messages, email addresses, IP addresses, mail lists and all information stored on your servers or servers under your control

PLACE: Great Notions
2751 Electronic Lane, Dallas, TX 75220
Facsimile 214.352.7249

DATE AND TIME

July 28, 2006 5:00pm cst

- ☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE

Carole A. Faulkner

Attorney for Plaintiff, Great Notions

July 10, 2006

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Carole A. Faulkner, Attorney for Plaintiff, California State Bar # 229559
2751 Electronic Lane, Dallas, TX 75220 214.352.6940 facsimile 214.352.7249

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on next page)

If action is pending in district other than district of issuance, state district under case number.

AOR3 (Rev. 1/94) Subpoena in a Civil Case

Exhibit D

Yahoo! My Yahoo! Mail

Search
the Web

Search

YAHOO! GROUPS

Welcome, **janicebking**
[Sign Out, My Account]

Groups Home - Help

Yahoo! Groups News

janicebking · jbking23@bellsouth.net | Group Member - Edit Membership

Start a Group | My Groups

EmbroideryOrganizationInformation · Embroidery Organization Information

Home
Messages
Post
Files
Photos
Links
Database
Calendar

Promote

Yahoo! Groups Tips

Did you know...
Try out something new.
Introducing the new
Yahoo! Groups email.

Yahoo! 360°

Keep connected to
your friends and
family through blogs,
photos and more.
Create your own 360°
page now.

Improved Message Search. Now you can quickly sort through message archives with the new Yahoo! Groups message search. With the "advanced search" feature, find message by date or author.

Messages

Messages Help

Message #

Go

Search:

Search

Advanced

Start Topic

Yahoo! Groups - Customer Care Embroideryorganizationinformation
Subp

Message List

Reply | Forward

Message #1935 of 2102 < Prev | Next

Members of Yahoo! Group Embroidery Organization Information:

Mon Jul 24, 2006 4:53 pm

We understand that there is a certain amount of confusion concerning an email notification sent to all members of the Yahoo! Group Embroidery Organization Information. We apologize for that confusion. Yahoo! is in fact in receipt of a subpoena requesting subscriber data about the members of this Yahoo! Group, and the email notifying Group members about this subpoena was from a valid Yahoo! Inc. email address: notice-user@...

Show Message Options

Yahoo! Groups
<groups-abuse@...>
groups-abuse@...
Send Email

When a member of the Group inquired about this notice to a Yahoo! Customer Care agent, that agent mistakenly stated that email was a hoax. That Customer Care agent was in error, and Yahoo! has taken steps to ensure that such a misunderstanding is not repeated in the future.

Yahoo! is legally required to comply with valid legal process. In this instance, we believe the subpoena is valid. While Yahoo! is not legally required to notify its users when Yahoo! receives civil subpoenas for subscriber information, Yahoo! does, as a general practice, provide such notice to users because we believe our subscribers would appreciate receiving such information so they may make decisions about any possible next steps.

In this case, a subpoena was issued in an action entitled: Embroidery Software Protection Coalition v. Janet Ebert and Victoria Weaver, Case No. 4:06-CV-00991-CAS (pending in the United States District Court, Eastern District of Missouri) issued by the: United States District Court, Northern District of California.

The subpoena, dated 7/10/2006, requires that Yahoo! produce documents and communications related to the Yahoo! Group, embroideryorganizationinformation and its members. Please be aware that your communications with Yahoo! may also be discoverable.

The attorney for the subpoenaing party, Embroidery Software Protection Coalition, is:
Carole A. Faulkner, Esq.

Great Notions
2751 Electronic Lane
Dallas, TX 75220
214-352-6940 (phone)
214-352-7249 (fax)

Please be advised that Yahoo! will respond to the subpoena 15 days from The date of the original July 19, 2006 user notice, unless we have notice that a motion to quash the subpoena (or other legally appropriate challenge to the subpoena) has been filed, or the matter has been otherwise resolved.

Please note that Federal law prohibits Yahoo! from disclosing non-public electronic communications to a private party unless Yahoo! has consent of the subscriber, addressee, intended recipient, or agent of an addressee or intended recipient. Federal law does permit Yahoo! to disclose non-content subscriber information in response to legal process such as the subpoena named herein.

You may wish to consult an attorney to advise you about the foregoing.

Please contact the subpoenaing party to obtain a copy of the subpoena. If you wish to contact Yahoo! regarding this matter, please direct your correspondence to notice-user@...

Again, we apologize for the earlier confusion about this email.








Yours truly,

Yahoo! Groups Abuse

<http://www.yahoo.com/>

 Forward

Message #1935 of 2102 < Prev | Next >

Expand Messages	Author	Sort by Date
Yahoo! Groups - Customer Care Embroideryorganizat ioninformation Subp Members of Yahoo! Group Embroidery Organization Information: We understand that there is a certain amount of confusion concerning an email notification sent...	Yahoo! Groups groups-abuse@... 	Jul 24, 2006 5:12 pm
Re: Yahoo! Groups - Customer Care Embroideryorganizat ioninformation This is fascinating. I received a response from abuse@... (two actually, one for each "subpoena notice" I got) saying that they were forgeries. They...	Nancy norrisnancyj   	Jul 25, 2006 12:01 pm
Re: Yahoo! Groups - Customer Care Embroideryorganizat ioninformation Mine was signed from Gwen, I think and I think each email I've received has had a different name, if a name was even there. Mudd <a href="http://www.txglassa
rtz.com">http://www.txglassa rtz.com ...	muddbugz2000   	Jul 25, 2006 5:23 pm

< Prev Topic Next Topic >

Message #



Search:



Advanced

Start Topic

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www.escrowassociates.com

Protect Your Software - Protexis - **Protect your software from piracy and unauthorized use. Patented licensing and copy protection technology from Protexis.**
www.protexis.com

Free Protection Software - Any Data - Password protect anything on any windows PC using cryptainer ie. Any media. Simple, secure and absolutely free. Lock and encrypt files, folders. Secure email too. Free software.
www.cypherix.com

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[Privacy Policy](#) - [Terms of Service](#) - [Copyright Policy](#) - [Guidelines](#) - [Help](#)

Exhibit E

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

EMBROIDERY SOFTWARE PROTECTION)	
COALITION, A/K/A ESPC,)	
)	
Plaintiffs,)	
)	
v.)	
)	Case No: 4:06 CV 00991 CAS
JANET EBERT and VICTORIA WEAVER,)	
)	
Defendants.)	
)	

DEFENDANTS' MOTION TO QUASH SUBPOENA

COME NOW Defendants Janet Ebert and Victoria Weaver, by and through their attorneys, and pursuant to Federal Rules of Civil Procedure, move to quash a subpoena attempted to be issued by attorney for plaintiff without giving the defendants prior notice. In support, Defendants state that they were not served, or given any notice of a subpoena which attorney for plaintiff, Carol Faulkner, issued out of the U.S. District Court for the Northern District of California directed to Yahoo Inc. See the attached Exhibit A. The subpoena is dated July 10, 2006 and thus counsel for plaintiff had already filed the instant Complaint against the defendants. Counsel for plaintiff did not give plaintiffs the required prior notice. Rule 45(b)(1) requires the plaintiff to serve the defendants with prior notice of commanded production of documents. Failure to do so constitutes grounds to quash the subpoena. See Firefighter's Institute for Racial Equality ex rel. Anderson v. City Of St. Louis, 220 F.3d 898 (8th Cir. 2000) Defendants first received a copy of the subpoena from Yahoo! Inc on July 26, 2006.

In addition, the subpoena request for documents is overbroad and not reasonably calculated to lead to the discovery of admissible evidence. The subpoena seeks irrelevant and immaterial information.

WHEREFORE, Defendants respectfully move this Court for its Order quashing the subpoena issued by counsel for plaintiff to Yahoo! Inc. for good cause shown, and for such further relief this Court deem just and proper.

Respectfully submitted,

/s/ Kurtis B. Reeg
Kurtis B. Reeg #4143
James G. Nowogrocki #3969
Reeg & Nowogrocki, L.L.C.
120 S. Central Ave., Suite 750
St. Louis, MO 63105
Telephone: (314) 466-3350
Facsimile: (314) 446-3360
Attorneys for Defendants.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was electronically filed with the Clerk of Court for the Eastern District of Missouri on this 27th day of July, 2006 with electronic notice to: Carole A. Faulkner, Great Notions, Inc., 2751 Electronic Lane, Dallas, Texas 75220, attorney for plaintiff.

/s/Kurtis B. Reeg

Exhibit F

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

EMBROIDERY SOFTWARE PROTECTION)	
COALITION, A/K/A ESPC,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No: 4:06 CV 00991 CAS
JANET EBERT and VICTORIA WEAVER,)	
)	
Defendants.)	
)	

DEFENDANTS' AMENDED MOTION TO QUASH SUBPOENA

COME NOW Defendants Janet Ebert and Victoria Weaver, by and through their attorneys, and pursuant to Federal Rules of Civil Procedure 16, 26, 45 (c)(3)(A)(iii), the U. S. Constitution, Amdt. 1, and Local Rules 16-5.03, 16-5.04, and 26-3.01, file their amended motion to quash a subpoena attempted to be issued by Plaintiff to Yahoo! Inc. In support of said Motion, Defendants state as follows:

1. Neither Defendants nor their attorneys were served with, nor given any notice of, a subpoena which attorney for plaintiff, Carol Faulkner, purported to issue out of the U.S. District Court for the Northern District of California directed to Yahoo! Inc. See Exhibit 1 attached hereto. The subpoena is dated July 10, 2006 with a return date of July 28, 2006, and thus counsel for plaintiff had already filed the instant Complaint against the defendants. Counsel for plaintiff did not give defendants the required prior notice. Rule 45(b)(1) requires the plaintiff to serve the defendants with prior notice of commanded production of documents. Failure to do so constitutes grounds to quash the subpoena. See *Firefighter's Institute for Racial Equality ex rel. Anderson v. City Of St. Louis*, 220

F.3d 898 (8th Cir. 2000). Defendant Janet Ebert first received a copy of the subpoena from Yahoo! Inc on July 26, 2006.

2. Plaintiff's counsel Carole Faulkner refused to give Defendants, who were acting *pro se* at the time, copies of or any information regarding said subpoena, despite being specifically requested to do so in writing, in an apparent attempt to harass and take advantage of unrepresented persons in the form of the individual defendants. See Exhibit 2 attached hereto.

3. In addition, the subpoena request for documents is overbroad and not reasonably calculated to lead to the discovery of admissible evidence. The subpoena seeks irrelevant and immaterial information.

4. Despite the failure of plaintiff's counsel to advise the Court that the instant case is related to two (2) other lawsuits pending in this District (see Case Nos. 4:06-CV-00960-CEJ; 4:06-CV-00959-DDN), and said counsel's failure to properly prepare the Related Cases Section VII of the Civil Cover Sheet, JS 44 (rev. 3/99) [Doc. 1], this case is related to two (2) other pending cases and is the subject of a motion to consolidate filed by Defendants in the lowest numbered case pursuant to E. D. Local Rule 42-4.03.

5. This Court has not entered an order or granted leave to any party to engage in any early discovery, and Plaintiff was not and has not been required to engage in this subject discovery.

6. Fed.R.Civ.P. 16, 26(a)(1)(e), 26(f), and E.D. Local Rules 16-5.03, 16-5.04 and 26-3.01, all contemplate conferences between counsel, scheduling conferences and the entry of a case management order, and other automatic discovery disclosures, none of the time for which has yet come to pass in this case. Instead, Plaintiff has jumped the gun without

leave of this Court or the courtesy of notification to the opposing parties and their counsel by *ex parte* issuing a subpoena on the west coast of the country.

7. Additionally, the subpoena issued is directed against a third party, a stranger to this litigation, and inquires regarding still yet other third party communicators on the Internet, which exacerbates the situation even more. Defendants have legitimate grounds to quash and contest the validity of and compliance with the subpoena, as do third parties who will soon be lodging their objections as well.

8. The *ex parte* subpoena issued by Plaintiff raises substantial constitutional issues which should be carefully addressed by this Court. In fact, the subject subpoena raises substantial First Amendment free speech, freedom of association and qualified privilege issues.

9. Plaintiff's Complaint is subject to a Motion to Dismiss because none of the purported claims states causes of action and for which Plaintiff can recover. Under the circumstances of this case, Plaintiff must meet a heightened discovery standard and affirmatively adduce competent evidence as to the viability of cognizable, legitimate claims before this Court should permit enforcement of the subpoena.

10. In support of this Motion, Defendants submit their Memorandum in Support of their Amended Motion to Quash.

WHEREFORE, Defendants respectfully pray that this Court enter its Order quashing the subpoena issued by counsel for plaintiff to Yahoo! Inc. for good cause shown, and for such further relief this Court deem just and proper.

Respectfully submitted,

/s/ Kurtis B. Reeg
Kurtis B. Reeg #4143
James G. Nowogrocki #3969
Reeg & Nowogrocki, L.L.C.
120 S. Central Ave., Suite 750
St. Louis, MO 63105
Telephone: (314) 466-3350
Facsimile: (314) 446-3360
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was electronically filed with the Clerk of Court for the Eastern District of Missouri on this 4th day of August, 2006 with electronic notice to: Carole A. Faulkner, Great Notions, Inc., 2751 Electronic Lane, Dallas, Texas 75220, attorney for plaintiff.

\s\Kurtis B. Reeg

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

EMBROIDERY SOFTWARE PROTECTION)	
COALITION, A/K/A ESPC,)	
)	
Plaintiffs,)	
)	
v.)	
)	Case No: 4:06 CV 00991 CAS
JANET EBERT and VICTORIA WEAVER,)	
)	
Defendants.)	
)	

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
AMENDED MOTION TO QUASH SUBPOENA**

COME NOW Defendants Janet Ebert and Victoria Weaver, by and through their attorneys, and pursuant to the Federal Rules of Civil Procedure, Local Rules and the U. S. Constitution, submit their Memorandum of Law in Support of their Amended Motion to Quash a subpoena attempted to be issued by Plaintiff. In furtherance thereof, Defendants state as follows:

I. BACKGROUND AND FACTS

Defendant Janet Ebert is a retired, 61 year old widow who suffers from, among other things, Diabetes and post-stroke symptoms and lives on Social Security Disability. Defendant Victoria Weaver is a recently-retired 11 year Army veteran, the mother of 4 young children, who along with her husband, is unemployed and lives mainly on Food Stamps. In what this Court will come to find is a parade of horrors exacted by Plaintiff and its counsel upon these indigent Defendants, and hundreds if not thousands like them, Plaintiff filed outrageous litigation against these individuals. In the first instance,

litigation was instituted in Texas. So outrageous was the substance and conduct of the Plaintiff and their counsel, who obtained a default judgment against Defendant Ebert, that the Chief Judge of the United States District Court in Dallas vacated said judgment upon the filings of Ms. Ebert who acted on her own behalf *pro se*. See Exhibit 1 attached hereto. Dissuaded not, on June 29, 2006, Plaintiff's counsel filed three (3) connected cases against these Defendants in the Eastern District of Missouri, of which this is but one. The suit makes certain albeit legally insufficient claims: defamation; intentional infliction of emotional distress; conspiracy; business disparagement; and injunctive relief.

Only eleven (11) days after filing suit, before the time to respond had expired and the case was at issue, before the parties had consulted and this Court held its usual scheduling conference and entered its case management order, Plaintiff and its counsel jumped the discovery gun and had issued on July 10, 2006, a horrifically overbroad and unconstitutional subpoena in California against Yahoo! Inc. This subpoena amounts to nothing more than a fishing expedition to serve selfish interests and does not further justice or this litigation. The subpoena request for documents seeks irrelevant and immaterial information, is overbroad and is not reasonably calculated to lead to the discovery of admissible evidence. This extremely broad subpoena seeks

any and all documents and records which reflect or relate to the yahoo chat group known or registered as embroideryorganizationinformation@yahoo.com or embroideryorganizationinformation.yahoogroups.com including but not limited to identifying information, names, addresses of members or posters, owners, moderators, account information, postings, activity logs, transaction logs, access logs, messages, email addresses, IP addresses, mail lists and all information stored on your servers or servers under your control. See Exhibit 2 attached hereto.

In other words, Plaintiff seeks not to uncover information related to any specific allegedly defamatory statement or speaker (Plaintiff has made no effort to identify either) but

instead seeks to reveal the identities and communications (public and private) of everyone who ever created an account on two (2) chat rooms, regardless of whether or not the Internet user posted any messages referring to the Plaintiff or, indeed, posted any messages at all.

II. ARGUMENT

A. Plaintiff's Issuance and Notice of the Subpoena Do Not Comply With the Federal Rules of Civil Procedure.

Neither Defendants nor their attorneys were served with, nor given any notice of, the subpoena by Plaintiff. See Exhibit 1 attached to the accompanying Amended Motion to Quash. Counsel for plaintiff did not give plaintiffs the required prior notice. Fed.R.Civ.P. 45(b)(1) requires the plaintiff to serve the Defendants with prior notice of commanded production of documents pursuant to Fed.R.Civ.P. 5(b) (actual service or mail). Failure to do so constitutes grounds to quash the subpoena. See *Firefighter's Institute for Racial Equality ex rel. Anderson v. City Of St. Louis*, 220 F.3d 898 (8th Cir. 2000).

Defendant Ebert first received a copy of the subpoena from Yahoo! Inc., the subject of the subpoena, on July 26, 2006. Plaintiff's counsel Carole Faulkner affirmatively refused to give Defendants, who were acting *pro se* at the time, copies of or any information regarding said subpoena, despite being specifically requested to do so in writing. Plaintiff's defense is that it has never had to do things this way before and that it had a "good faith belief that [notwithstanding Fed.R.Civ.P. 45]...no prior notice was required." See Doc. No. 14 at p. 2. It is and was contrary to both the letter and spirit of the attorney's oath and the Rules of Professional Conduct for Plaintiff's counsel to have

refused to provide the information requested about the subpoena to Defendant Ebert. See the attached Exhibit 2 to the accompanying Motion to Quash. See Missouri Rules of Professional Conduct 4-3.4, 4-4.3, 4-4.4.

B. The Court Should Not Consider the Issues Regarding the Subpoena in a Vacuum, but in Conjunction with the Cases Connected To It.

At the time of filing, plaintiff's counsel, admitted *pro hac vice* on her own motion, failed to advise the Court that this case is related to two (2) other lawsuits pending in this District (see Case Nos. 4:06-CV-00960-CEJ; 4:06-CV-00959-DDN). Counsel failed to properly prepare the Related Cases Section VII of the Civil Cover Sheet, JS 44 (rev. 3/99) [Doc. 1], advising that this case is related to two (2) other pending cases. This case is now the subject of a Motion to Consolidate filed by Defendants in the lowest numbered case pursuant to E. D. Local Rule 42-4.03.

C. The Issuance of the Subpoena Violates the Post Filing Protocol Established by the Local Rules of This Court and the Federal Rules of Civil Procedure.

To date, this Court has not entered an order or granted leave to any party to engage in any early discovery, and Plaintiff was not and has not been required to engage in this subject discovery. Simply put, this subpoena is, at a minimum, premature. Fed.R.Civ.P. 16, 26(a)(1)(e), 26(f), and E.D. Local Rules 16-5.03, 16-5.04 and 26-3.01, of which this Court can take judicial notice, all contemplate conferences between counsel, scheduling conferences and the entry of a case management order, and other automatic discovery disclosures, none of the time for which has yet come to pass in this case. There is no rush here; the case is just filed and barely at issue. There was and is no need to issue an *ex parte* subpoena out of California at this time.

Additionally, the discovery was not issued to the Defendants, who could now respond via counsel. Rather, the subpoena issued is directed against a third party, a stranger to this litigation, and inquires regarding yet other third party communicators on the Internet, which exacerbates the situation even more. Defendants have legitimate grounds to quash and contest the validity of and compliance with the subpoena, and Defendants are advised that certain of these other third parties will soon be engaged in this litigation as well to protect their own interests.

D. The Subpoena is Unconstitutionally Overbroad and Infirm for Multiple Reasons.

The *ex parte* subpoena issued by Plaintiff raises substantial constitutional issues which should be carefully addressed by this Court. In fact, the subject subpoena raises substantial First Amendment free speech, freedom of association and qualified privilege issues. Plaintiff, a “Coalition” that does not define itself, its membership, does not have standing in any concrete terms to even bring this lawsuit, and which failed to file a Corporate Disclosure Form about itself, initiated this lawsuit to intimidate Defendants who are members of the general and consuming public, to chill their speech merely because they dabble in the same general computer embroidery market and dared to engage in the free enterprise system. Fortunately, the First Amendment prevents the Plaintiff from steam-rolling the Defendants and third parties and abusing the discovery process to pound them into submission.

Court after court has now recognized that discovery requests that seek to pierce the anonymity of online speakers, such as Plaintiff wishes to do via the Yahoo! subpoena, must be carefully scrutinized in order to protect anonymous participants from precisely the kinds of abuses that have already been put into motion by Plaintiff in this case.

Following this growing judicial consensus, the important, anonymity interests of the Internet users targeted in this case must be shielded. For once a target's anonymity and privacy has been eviscerated, it cannot be repaired or the speaker made whole. Due process dictates that Defendants – much less third parties – should not be forced to undergo the harm of potentially losing their anonymity unless and until Plaintiff, the subpoenaing party, has submitted at least some competent evidence as to the viability of its claims.

Specifically, as set forth by a growing judicial consensus that is discussed below, Defendants respectfully submit that the Court should carefully evaluate Plaintiff's discovery request, weighing several factors:

- (1) whether Plaintiff has demonstrated that it has viable claims,
- (2) the specificity of the discovery request,
- (3) the existence of alternative means of discovery,
- (4) whether the Plaintiff has attempted to notify the alleged infringer of the pendency of the identification proceeding, and
- (5) the magnitude of the Plaintiff's need for the information.

In addition, the Court should assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of Plaintiff.

Defendants (according to Plaintiff), as well as Yahoo! Inc., the website operator and registered users of the sites which are the subject of the subpoena, are among the persons Plaintiff apparently seeks to unmask. Defendants have the right to assert protection of their own constitutional rights, and because of the seriousness and ramifications of the constitutional claims at issue, this Court should view this subpoena

with heightened skepticism. Plaintiff's subpoena cannot survive this scrutiny and therefore should be quashed.

E. The First Amendment to the U.S. Constitution Protects the Right to Freely and Anonymously Associate, Including the Right to Anonymously Communicate Online.

Courts have long recognized protection under the First Amendment for the right to engage in anonymous communication – to speak, read, listen, and/or associate anonymously – as 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, 357 (1995) (holding that 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 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”).

An Internet message board enjoys these same protections. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is “no basis for qualifying the level of First Amendment protection that should be applied to” the Internet); *see also, e.g., Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (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”).

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).

Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery.¹ Fed.R.Civ.P. 45(c)(3)(A)(iii) (subpoena may be quashed if it “requires disclosure of privileged or other protected matter and no exception or waiver applies”). *See also Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987), *citing Silkwood v. Kerr-McGee Corp.*, 563 F.2d

¹ *See Sony*, 326 F. Supp. 2d at 565 (“Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns”).

433, 438 (10th Cir. 1977) (“[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure”). “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).²

This consideration is particularly appropriate where the requested discovery will unmask not only anonymous speakers, but also the creator of the online forum in question. The operation of a web site by itself does nothing more than indicate some degree of association with the anonymous speakers who posted messages on the web site, association which is constitutionally protected.³ “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 First Amendment.” *Patterson*, 357 U.S. at 460. Where, as here, that forum is designed to encourage commentary on matters of public interest, such as the tyrannical campaign regarding alleged piracy being perpetrated by Plaintiff, it is not surprising that the creator, like the speakers on that forum, would wish to remain anonymous. Stripping the creator of that anonymity based solely on vague allegations of defamation would strongly discourage the creation of similar forums, stifling a vibrant and growing vehicle for speech and association in the form of the Internet.

² See also *2theMart.com*, 140 F. Supp. 2d at 1093 (W.D. Wash. 2001) (“[D]iscovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts”).

³ Note that under 47 USC § 230, a web site operator cannot be held liable for the contents of messages posted to the site by third party users.

The same analysis applies to registered users of a message board where, as here, those users are not accused of making a single identified or identifiable defamatory statement. The Supreme Court has long since held that compelled disclosure of membership lists may constitute an impermissible restraint on freedom of association. *Id.* A registered user list for a message board is the Internet equivalent of a membership list and deserves equal protection. *2theMart.com*, 140 F. Supp. 2d at 1092 (First Amendment protections for speech and association, including the right to anonymous group membership apply to Internet message boards); *see generally Reno v. ACLU* at 851 (applying, generally, all First Amendment protections to “‘listservs’ ..., ‘newsgroups’, ‘chat rooms’, and the ‘World Wide Web’”).

F. The First Amendment Qualified Privilege Requires the Evaluation of Multiple Factors Prior to Subpoena Enforcement.

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

A qualified privilege to remain anonymous is not an absolute privilege. Plaintiffs may properly 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. 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 451, and have required plaintiffs to demonstrate that their claims are valid and that they have suffered a legally recognizable harm *before* the court will allow disclosure of the speaker’s anonymity. *Id.*; *Dendrite*, 775 A.2d at 760-61; *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004).

Two state appellate courts – still the only appellate courts to address the issue to Defendants’ knowledge– have adopted such tests. In *Dendrite*, a New Jersey appeals court required the plaintiff in a defamation action against Doe defendants to (1) use the Internet to notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the allegedly actionable online speech; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation; and, “[f]inally, assuming the court concludes that the plaintiff has presented a *prima facie* cause of action, the court must balance the defendant’s First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.” 775 A.2d at 761. In *Cahill*, the Delaware Supreme Court held that, after making reasonable efforts to notify the anonymous defendant, “to obtain discovery of an anonymous defendant’s identity ... a defamation plaintiff ‘must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question.’” 884 A.2d. at 463.

Several federal courts have followed suit. *See e.g., 2theMart.com*, 140 F. Supp. 2d at 1095 (“When the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity. Therefore, non-party 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”); *seescandy.com*, 185 F.R.D. at 578-79 (requiring defamation plaintiff to (1) identify the missing party with sufficient specificity that the court could determine whether the defendant could be sued in federal court; (2) make a good faith effort to provide anonymous defendants with notice that the suit had been filed against them; and (3) demonstrate that it had viable claims against such defendants); *Sony* 326 F. Supp. 2d at 564-65.

Most recently, in a defamation and trademark action (among other claims), a federal district court held that the protected interest in speaking anonymously requires a plaintiff to 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 by a ruling in favor of plaintiff and by a ruling in favor of defendant,” 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.

2. The First Amendment Requires That Plaintiff Show It Has a Viable case and No Other Avenue of Vindicating Its Rights Before an Online User's Anonymity May Be Pierced.

While the aforementioned courts balanced legal rights and discovery mechanisms with First Amendment protections using slightly different tests, a strong unifying principle is clear: a plaintiff must show that she has a viable case and no other avenue of vindicating her rights before a court will allow her to pierce an online user's veil of anonymity. Keeping in mind this unifying principle, and following the lead of *Dendrite*, *Sony*, *Cahill* and *Seescandy.com*, this court should evaluate Plaintiff's discovery request in light of the following factors: (1) whether Plaintiff has demonstrated that it has viable claims, (2) the specificity of the discovery request, (3) the existence of alternative means of discovery, and (4) whether the Plaintiff has attempted to notify the alleged infringer of pendency of the identification proceeding. *See Dendrite*, 775 A.2d at 760-61; *Sony*, 326 F. Supp. 2d at 565; *seescandy.com* 185 F.R.D. at 578. Finally the Court should (5) balance the magnitude of harms to the competing interests of the plaintiff and the anonymous individual it seeks to unmask. *Highfields*, 385 F. Supp. 2d at 976.

With respect to the first factor, recognizing the serious due process concerns raised in *Cahill* and *Highfields* over the lack of notice given to the anonymous user whose identity is at issue, and the possibility that plaintiff's claims might be invalid as a matter of law, the court should require the Plaintiff to submit some competent evidence sufficient to raise a fact dispute as to the validity of his claims. *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”); *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 ...”). Only if this threshold element is met should the court proceed to the remaining factors.

Clearly, Plaintiff does not want to and cannot meet this test. Defendants’ responsive pleadings were due on July 27, not July 26 as suggested by Plaintiff. Those responsive pleadings, including a Motion to Dismiss, were timely filed electronically on July 27, not July 28 as Plaintiff again suggests. Plaintiff wants this Court to believe that it could not have timely advised Defendants or their counsel of the return date of the subpoena prior to the occurrence of that event. Clearly, Plaintiff did not immediately supply Defendants’ counsel with the subpoena served, but rather waited until three (3) days after the return date of the subpoena, July 31, to forward the subpoena to defense counsel so that it was received on August 1, 2006. Plaintiff, which has the pleading burden of going forward with sufficient facts to state claims, has essentially admitted that it did not engage in its appropriate pre-filing investigation to have a good faith, reasonable basis to make the claims it asserts by musing: “the information from Yahoo is...necessary for the Plaintiff to defend the Motion to Dismiss filed by Defendants.” See Doc. No. 14 at p. 2.

Application of the requisite constitutional 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 have been truly harmed and made an

appropriate pre-litigation investigation into the nature of, and appropriate targets for, their claims, should have little difficulty crafting discovery requests that can survive the required scrutiny.

G. 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. Considering everything submitted to the Court, Plaintiff falls far short. In addition to the subpoena being dramatically overbroad, burdensome, and designed to harass – it seeks “any and all documents and records” related to two (2) chat rooms, including the identities and complete communications of the web site operator and anyone who ever registered on the site – Plaintiff has not made even the most rudimentary showing that it can satisfy the requirements imposed by the First Amendment.

1. Plaintiff Has Failed to Submit Competent Evidence as to the Viability of His Libel Claims Which Implicate the Anonymous Online Statements.

Plaintiff's Complaint is subject to a Motion to Dismiss because none of the purported claims state causes of action for which Plaintiff can recover. Plaintiff must in the first instance produce at least some competent evidence as to the validity of its defamation claims under Missouri law. Plaintiff only alleges that Defendants made “false and libelous statements;” “false, malicious, and vicious statements.” See Doc. No. 1, Count I, pars. 28, 29. Plaintiff was no more specific than to state that “Defendants began a malicious campaign of slander and libel that marched across the internet bulletin boards and chat groups similar to Hitler's march across Europe...” *Id.* at par. 11. Plaintiff cannot satisfy even this threshold element with respect to its facially inadequate

first (Defamation) and fourth (Business Disparagement) causes of action, the only claims that would theoretically implicate the statements of the anonymous users alluded to in the Complaint, and therefore would provide some basis for the issuance and subsequent enforcement of the July 10 subpoena.

Under the law of Missouri, to prove defamation Plaintiff must show that the alleged communication tended to harm its reputation of another in a manner that lowers the defamed person in the estimation of the community or deterred third persons from associating or dealing the defamed person; it must also plead and prove actual damages. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. banc 1993). The Court first decides whether the statement can have a defamatory meaning, and then the jury decides whether the words were understood to be defamatory. *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. banc 1985); *Ribaud v. Bauer*, 982 S.W.2d 701 (Mo.App. 1998). The question of whether a statement is capable of being understood as a factual assertion, as opposed to opinion, is a question of law for the Court, and whether the statement was actually understood as a factual assertion is for the jury. *Pape v. Reither*, 918 S.W.2d 376 (Mo.App. 1996); *Ampleman v. Schweppe*, 972 S.W.2d 329 (Mo.App. 1998). To be capable of defamatory meaning, the subject statement must be clear as to the person addressed. *Pape, supra*; see also *Chastain v. Kansas City Star*, 50 S.W.3d 286 (Mo.App. 2001). The statement itself must also be precise, and hyperbole or exaggerated rhetoric is too general or imprecise to support a claim of defamation. *State ex re. Diehl v. Kintz*, 162 S.W.2d 152 (Mo.App. 2005). The allegedly defamatory statement must be read in conjunction with the whole publication and cannot be susceptible of innocent interpretation or of being proved true. *Missouri Church of Scientology v. Adams*, 543

S.W.2d 776, 777 n. 2 (Mo. 1976); *Mildovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990); *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995) (the Circuit in which Plaintiff's Yahoo! subpoena was issued). Moreover, as in the instant case, whether a statement is capable of defamatory meaning can be determined on a motion to dismiss. *Jordan v. City of Kansas City*, 972 S.W.2d 319 (Mo.App. 1998). For all of these reasons, the use of *in haec verba* pleadings on defamation charges is favored in the federal courts, including the Eighth Circuit, because generally "knowledge of the exact language is necessary to form responsive pleadings." *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698-99 (8th Cir. 1979). *Accord*, *Holiday v. Great Atlantic & Pacific Tea Co.*, 256 F.2d 297, 302 (8th Cir. 1958); *Missouri Church of Scientology*, *supra* at 777; *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 alleged to be defamatory in order to state a cause of action"); *Angelina Casualty Co., v. Pattonville - Bridgeton Terrace Fire Protection Dist.*, 706 S.W.2d 483, 485 (Mo. App. 1986) ("In order to state a claim for libel or slander the specific words claimed to be defamatory must be alleged in the petition or complaint"); *Brown v. Adams*, 715 S.W.2d 940, 941 (Mo. App. 1986) ("In order to state a cause of action for slander, it is necessary to allege *in haec verba* the exact words which are alleged to be defamatory"); *Bremson v. Kinder-Care Learning Centers, Inc.*, 651 S.W.2d 159, 160 (Mo.App. 1983) ("Missouri law requires that in actions of libel and slander the petition must set forth the words for which the plaintiff claims damages"); *White v. Alfred A. Knopf, Inc.*, 335 F.Supp. 763, 765 (W.D. Mo. 1971); *Lorenz v. Towntalk Pub. Co.*, 261 S.W.2d 952, 954 (Mo. 1953); *Fritschie v. Kettle River Co.*, 346 Mo. 196, 139 S.W.2d 948, 950 (1940). Without even reciting a single

statement directed at Plaintiff itself, there is no way Plaintiff has met even the minimal, requisite notice pleading standard, much less the heightened burden required under the constitutional analysis at play here.

2. Plaintiff Has Introduced No Competent Evidence to Show That Any Statement Made on the Web Sites in question is either Defamatory or Untrue.

Plaintiff has introduced no competent evidence to support a claim of falsity with respect to any statements on the online message boards. Indeed, Plaintiff has not even articulated what the underlying statements or supporting evidence might potentially be. Plaintiff has not identified even one allegedly defamatory statement made by either named defendant in order to support its first or fourth claims (and it has similarly not identified any evidence that would go to show that any alleged statement was false). Plaintiff has not submitted any papers or other form of proof whatsoever to the Court purporting to show allegedly libelous or defamatory messages. Indeed, without case citation or a scintilla of evidentiary support, Plaintiff merely chants: “[A]lot of the information published is false, defamatory and without merit. The persons posting and publishing the false information is [sic] hiding behind alias and false identities, including [but by inference not limited to] the Defendants.” See Doc. No. 14 at p. 3.

Without reference to any identified statement, it is impossible for this Court to determine that any of the alleged messages contained on the web sites at issue represent “an extreme departure” from typical Internet message board standards. Recognizing the freewheeling nature of Internet message board discussions, courts have repeatedly found allegedly defamatory message board posting to be “opinions” rather than asserted “facts” and therefore not properly the subject of a defamation claim. *See, e.g., 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.”⁴

In any case, Plaintiff has not identified any allegedly libelous or defamatory statement. It is not up to the Court, the Defendants or anonymous web site speakers to divine the specifics of Plaintiff’s claims for it.

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

Because Plaintiff has failed to demonstrate the viability of its defamation claims against Defendants or any John Does or other third party posters, there is no need for the court to consider the remaining factors of the proposed balancing test. That said, those factors also weigh against Plaintiff. First, Plaintiff’s discovery request is, as discussed above, far from narrowly tailored and specific but rather a woefully over-inclusive fishing expedition: Plaintiff has subpoenaed the identifying information of and communications from each and every registered user of the message board, regardless of what, if anything, they have posted. Further, Plaintiff seeks to unmask not only users of the message board but also the website host, who is not alleged to have said anything.

⁴ See also *Rocker Mgmt. v. John Does*, 2003 U.S. Dist. LEXIS 16277 (N.D. Cal. 2003), a case in which a court similarly found that readers were unlikely to view anonymously posted messages on a message board as assertions of fact. Specific indicia identified by the *Rocker Mgmt.* court that led to a finding that the allegedly defamatory statements were non-actionable opinions included the facts that the statements were made anonymously, that a disclaimer appeared on the message board noting that the postings were solely the opinion and responsibility of the author, that the statements “are replete with grammar and spelling errors,” that “most posters do not even use capital letters,” that “[m]any of the messages are vulgar and offensive, and are filled with hyperbole.” *Id.* at *5.

Second, alternative discovery channels exist; for starters, Plaintiff will have a chance to serve Defendants with discovery. The entire scope of potential discovery is unknowable at this stage, and Plaintiff has not adequately indicated any legitimate discovery target. Third, there is no indication that Plaintiff has made any attempt to notify any, much less all of, the anonymous targets of its Complaint and related subpoenas (in the related cases similar subpoenas have been served on Ebay and PayPal and they may or may not include the same people) and 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.⁵ As for the extent of the Plaintiff's need for the requested information, absent viable claims it is difficult to identify any urgent need for the identifying information. On the other hand, releasing the requested information would cause significant harm potentially to Defendants and the anonymous users by forcing them to give up their anonymity and potentially face more and similar frivolous litigation.

III. CONCLUSION

Instead of narrowly tailoring discovery requests to pursue specific, identifiable, viable claims, Plaintiff has asked this Court to endorse a fishing expedition aimed instead at exposing its anonymous critics. The Court should decline to do so. Based on the foregoing reasons and authorities, Defendants respectfully ask this Court to quash the July 10 subpoena issued to Yahoo! Inc.

⁵ The fact that Yahoo! Inc. alerted certain individuals (Defendants) of the existence of the filing of the lawsuit has no bearing on this factor as the completeness of that contact is unknown and other discovery targets may of course wish to raise their own unique objections.

Respectfully submitted,

/s/ Kurtis B. Reeg
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Attorneys for Defendants.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was electronically filed with the Clerk of Court for the Eastern District of Missouri on this 4th day of August, 2006 with electronic notice to: Carole A. Faulkner, Great Notions, Inc., 2751 Electronic Lane, Dallas, Texas 75220, attorney for plaintiff.

/s/Kurtis B. Reeg

Exhibit G

III. Disclosure and Discovery.

26 - 3.01. Federal Rule of Civil Procedure 26.

Disclosure Pursuant to Rule 26(a) (1) and (2).

Disclosures shall be made in the manner set forth in Fed.R.Civ.P. 26(a)(1)and(2), except to the extent otherwise stipulated by the parties or directed by order of the Court. Disclosure of documents and data compilations pursuant to Rule 26(a)(1)(B) shall be made by providing a copy to all other parties, except as otherwise ordered by the Court.

Timing and Sequence of Discovery.

Discovery shall commence in accordance with Fed.R.Civ.P. 26(d), except to the extent otherwise stipulated by the parties or directed by order of the Court.

[Amended June 12, 2001, effective August 1, 2001.]

Rule 16 - 5.03. Rule 16 Scheduling Conference.

Scheduling conferences pursuant to Fed.R.Civ.P. 16(a) will be held in cases assigned to Tracks 2 and 3. Rule 16 scheduling conferences may be held at the judge's discretion in actions assigned to other tracks. The Court will inform counsel of their obligation to participate in a conference by issuing an Order Setting Rule 16 Scheduling Conference.

Failure to comply with the order may result in the imposition of sanctions by the Court, including but not limited to dismissal of the action, entry of a default judgment, or restrictions on the admissibility of certain evidence.

Rule 16 - 5.04. Case Management Order.

The Court will issue a Case Management Order (CMO) in each civil case. A CMO is a comprehensive scheduling order issued by the judge reflecting all pretrial case management deadlines, and, if applicable, a trial setting and pretrial compliance requirements. In Tracks 2 and 3 the CMO is issued following the Rule 16 Scheduling Conference. In Tracks 1, 4 and 5 a standardized CMO will be issued early in the proceedings.

Failure to comply with the CMO may result in the imposition of sanctions by the Court, including but not limited to dismissal of the action, entry of a default judgment, or restrictions on the admissibility of certain evidence.

Exhibit H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EMBROIDERY SOFTWARE
PROTECTION COALITION,

Plaintiff,

v.

JANET EBERT, et al.,

Defendants.

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No. 4:06-CV-991 CAS

ORDER

IT IS HEREBY ORDERED that defendants' motion for leave to file amended motion to quash instant is **GRANTED**. [Doc. 15]

IT IS FURTHER ORDERED that plaintiff shall file a response in opposition to defendants' amended motion to quash no later than **August 17, 2006**.

IT IS FURTHER ORDERED that defendants' motion for leave to file memorandum of law in support of amended motion to quash that exceeds the page limit is **GRANTED**. [Doc. 17]

IT IS FURTHER ORDERED that defendants' first motion to quash is **DENIED as moot**. [Doc. 10]



CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 7th day of August, 2006.