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9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 SAN JOSE DIVISION
12 **CV 06 - 80236 MISC. RMV**

13 **EMBROIDERY SOFTWARE PROTECTION**
14 **COALITION**

15 **Plaintiffs,**

16 **v.**

17
18 **JANET EBERT and VICTORIA WEAVER,**

19 **Defendants.**

No. Misc.

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

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

Date: Sept. 22, 2006

Time: 9:00

Dept.: Courtroom 6, Hon. Ronald M. Whyte

Trial Date: Not set

Complaint Filed: June 28, 2006

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

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

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

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

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

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

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

4 **II. BACKGROUND AND FACTS**

5 Plaintiff Embroidery Software Protection Coalition ("ESPC") is a purported coalition of
6 embroidery software and design companies formed to "protect and prosecute" members copyrights
7 and trademarks. Complaint, Declaration of Corynne McSherry in Support of Motion to Quash
8 ("McSherry Decl."), Ex. A at ¶¶ 2, 10.¹ The coalition's principal place of business appears to be
9 Dallas, Texas. *Id.* ESPC uses its website, <http://www.embroideryprotection.org/>, and threatening
10 letters (sent to hundreds if not thousands of individuals) to accuse online purchasers of embroidery
11 software and designs of engaging in copyright piracy. Those individuals are advised to contact
12 ESPC to "resolve the violation" if the recipient has not used the software or designs he or she
13 allegedly purchased, ESPC will agree to settle the matter in exchange for payment of a "fine." *See*
14 <http://www.embroideryprotection.org/faqs.html>, visited August 6, 2006. Website visitors are also
15 encouraged to join an "amnesty program," under which they will be released from any possible
16 liability for purchasing allegedly counterfeit designs in exchange for a payment of \$300.00.
17 Amnesty Program Statement, McSherry Decl. Ex. B.

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

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

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

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

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

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

28 ² Defendants’ subsequently amended their Motion. McSherry Decl. Ex. F. On August 7, 2006, the

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

4 **III. ARGUMENT**

5 **A. Plaintiff's Subpoena Is Procedurally Improper**

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

15 **B. The First Amendment Requires That Plaintiff Show He Has a Viable Case,** 16 **Serious Need for the Discovery and No Other Avenue of Vindicating His Rights** 17 **Before an Online User's Anonymity May Be Pierced.**

18 1. The First Amendment to the U.S. Constitution Protects the Right to 19 Anonymous Online Communication.

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

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

1 *Legislative Investigative Comm’n*, 372 U.S. 539, 544 (1963) (“[I]t is ... clear that [free speech
2 guarantees] . . . encompass[] protection of privacy association”); *Talley v. California*, 362 U.S. 60,
3 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional,
4 and noting that “anonymous pamphlets, leaflets, brochures and even books have played an
5 important role in the progress of mankind”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449,
6 462 (1958) (compelled identification violated group members’ right to remain anonymous;
7 “[i]nviolability of privacy in group association may in many circumstances be indispensable to
8 preservation of freedom of association”).

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

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

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

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

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

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

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

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

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

11 Recognizing as much, courts in online defamation situations similar to the one at hand have
12 “adopt[ed] a standard that appropriately balances one person’s right to speak anonymously against
13 another person’s right to protect his reputation.” *Cahill*, 884 A.2d at 456. These courts have
14 recognized that “setting the standard too low w[ould] chill potential posters from exercising their
15 First Amendment right to speak anonymously,” *id.* at 457, and have required plaintiffs to
16 demonstrate that their claims are valid, they have suffered a legally recognizable harm, and they
17 have a serious need for the requested discovery before the court will allow disclosure of the
18 speaker’s anonymity. *Id.*; *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal.
19 2004); *2theMart*, 140 F. Supp. 2d 1088.

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

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

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

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

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

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

7 Keeping in mind the above unifying principle, and following the lead of *Highfields, Cahill*
8 and *2themart*, Movants submit that this court should evaluate Plaintiff's discovery request in light
9 of the following factors: (1) whether Plaintiff has demonstrated that he has viable claims; (2) the
10 specificity of the discovery request; (3) the existence of alternative means of discovery; (4) the
11 seriousness of the Plaintiff's need for the information; and (5) whether the Plaintiff has attempted
12 to notify the individuals whose information is sought of the pending loss of anonymity. *See*
13 *2themart.com*, 140 F. Supp. 2d at 1095; *Highfields*, 84 A.2d. at 463; *Cahill*, 84 A.2d. at 463.
14 Finally, the Court should balance the magnitude of harms to the competing interests of the plaintiff
15 and the anonymous individual he seeks to unmask. *Highfields*, 385 F. Supp. 2d at 976.

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

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

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

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

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

8 1. Plaintiff Has Not and Cannot Establish Viable Claims`

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

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

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

22 Further, Plaintiff has failed to meet the applicable pleading standard with respect to its core
23 claim, for defamation. Rather than pleading its defamation claim with specificity, Plaintiff relies
24 instead on broad allegations, including accusing defendants of a "malicious campaign of slander
25 and libel . . . similar to Hitler's march across Europe." In *Missouri Church of Scientology v.*
26 *Adams*, 543 S.W.2d 776 (Mo. 1953), the Missouri Supreme Court held that a Petition for libel and
27 slander is invalid if it does not set forth the specific words claimed to be defamatory:
28

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

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

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

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

1 notice of the lawsuit that was filed and that the ESPC had sent out over 170,000 letters and
2 collected millions of dollars with this scam.” Complaint, McSherry Decl. Ex. A at ¶ 16. These
3 statements do not appear to meet the essential requirement of libel: defamatory content. The
4 suggestion that ESPC has engaged in a scam, is not defamatory, but would be considered at most
5 “rhetorical hyperbole,” particularly in the context of freewheeling Internet message board
6 discussions, and hence not actionable as libel. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S.
7 1 (1990) (rhetorical hyperbole and other statements which in context are clearly opinion
8 nonactionable as libel); *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D.
9 Cal. 2001) (allegedly defamatory message board posting “lack[ed] the formality and polish
10 typically found in documents in which a reader would expect to find facts In short, the general
11 tone and context of these messages strongly suggest that they are the opinions of the posters.”); *see*
12 *also Rocker Mgmt. v. John Does*, 2003 U.S. Dist. LEXIS 16277, *5 (N.D. Cal. 2003) (readers were
13 unlikely to view anonymously posted messages on a message board as assertions of fact where the
14 statements made on board were made anonymously, message board included a disclaimer noting
15 that postings were solely the opinion and responsibility of the author, postings were “replete with
16 grammar and spelling errors,” and “filled with hyperbole.”). Finally, the allegedly defamatory
17 statement is primarily directed to ESPC attorney, who is not a party to this suit, and fails to set
18 forth when, where or how the statement was made.

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

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

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

10 As for its remaining claims, in addition to failing to submit competent evidence, Plaintiff
11 has again failed to state claims upon which relief may be granted. Plaintiff's second cause of
12 action, for intentional infliction of emotional distress, is nonsensical: a nonhuman entity cannot
13 assert a claim for emotional distress. *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994) ("a
14 corporation cannot suffer emotional distress."); *W.C.H. of Waverly Mo., Inc. v. Meredith Corp.*,
15 1986 U.S. Dist. LEXIS 18125, *5 (D. Mo. 1986) (same); *Haygood v. Chandler*, 2003 Tex. App.
16 LEXIS 9344, *18 (Tex. App. 2003) ("[T]here is no feasible way a professional association,
17 corporation, or partnership can experience mental suffering as a matter of law."). Its conspiracy
18 claim also fails. Under both Texas and Missouri law, conspiracy comprises: (1) two or more
19 persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of
20 action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result. *Tri v. J.T.T.*,
21 162 S.W.3d 552, 556 (Tex. 2005); *Moses.com Securities, Inc. v. Comprehensive Software Sys. Inc.*,
22 406 F.3d 1052, 1063 (8th Cir. 2005) (applying Missouri law). Plaintiff has failed to allege any
23 meeting of the minds. Moreover, as set forth above, a cause of action for conspiracy is sustainable
24 only after the underlying tort claim has been established. *Hanten v. School Dist. of Riverview*
25 *Gardens*, 183 F.3d 799, 809 (8th Cir. 1999) ("[A] claim of civil conspiracy does not set forth an
26 independent cause of action but rather is sustainable only after an underlying tort claim has been
27 established . . .") (internal quotation marks omitted, applying Missouri law); *United States ex rel.*
28 *Coppock v. Northrop Grumman Corp.*, 2003 U.S. Dist. LEXIS 12626, *48 (D. Tex. 2003) ("A

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

4 Plaintiff’s last substantive claim, for business disparagement, fails for lack of specificity for
5 the same reasons discuss above with respect to the defamation claim and because Plaintiff does not
6 allege the essential element of special damages, as required by Texas law. *Forbes, Inc. v. Granada*
7 *Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) (“To prevail on a business disparagement
8 claim, a plaintiff must establish that (1) the defendant published false and disparaging information
9 about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the
10 plaintiff.”); *50-Off Stores, Inc. v. Banque Paribas (Suisse) S.A.*, 1997 WL 790739, *5 (W.D. Tex
11 1997) (“[P]roof of special damages is an essential part of the plaintiff’s cause of action for business
12 disparagement”)

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

16 2. Plaintiff’s Subpoena Request is Overbroad and Seeks Irrelevant and
17 Unnecessary Information

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

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

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

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

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

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

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

1 **IV. CONCLUSION**

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

6
7 DATED: August 8, 2006

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