Electronic Frontier Foundation

April 21, 2005

Stephen D. Hibbard, Esq.
Shearman & Sterling LLP
525 Market St., 15th Floor
San Francisco, CA 94105

RE: Open Letter to Shearman & Sterling regarding *Shearman & Sterling v. Jane Doe*, S.F. Sup. Ct. No. CGC-05-439829

Dear Mr. Hibbard:

The Electronic Frontier Foundation[1] writes this open letter to urge you drop your firm's subpoena to craigslist for the identity of Jane Doe. Shearman & Sterling is attempting to use an invalid subpoena, based upon a complaint devoid of viable legal theories, to obtain the identity of an anonymous speaker on an Internet message board operated by craigslist Shearman's purpose is not to assert a legal claim, but to discipline an employee. This is an improper use of the power of the courts and legal process, and we urge you to drop this unwise and unwarranted subpoena immediately.

The Supreme Court has repeatedly upheld the First Amendment right to speak anonymously. *Buckley v. American Constitutional Law Found.* 119 S. Ct. 636, 645-646 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases assert the important role played by anonymous or pseudonymous writings through history, from the literary efforts of Shakespeare and Mark Twain through the explicitly political advocacy of the Federalist Papers. Accordingly, due process requires that disclosures which impair these fundamental rights only allowed when there is a demonstration of a compelling subordinating interest . *NAACP v. Alabama*, 357 U.S. 449, 463 (1958); *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960).

According to the complaint Shearman filed in San Francisco Superior Court, Jane Doe is a former or current employee who used an anonymous email service to send a message to a Shearman employee. There is no allegation that the message is false or defamatory, nor any claim asserted under harassment law - merely the assertion that the message was offensive.

[1] The Electronic Frontier Foundation is the leading civil liberties organization working to protect rights in the digital world. Founded in 1990, EFF actively encourages and challenges industry and government to support free expression and privacy online. EFF is a member-supported organization and maintains one of the most linked-to websites in the world at http://www.eff.org/.

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Instead, Shearman's lawsuit against Jane Doe alleges that Doe committed a trespass to its computer systems by sending a single email message to one of its employees, and a breach of contract for use of its systems, under the theory that Shearman has a contractual right not to receive offensive email, presumably based upon a standard 'computer use' notice to its employees.

If these were valid causes of action, anyone who sent an email would have to fear legal liability if the recipient were annoyed or offended. Fortunately, however, these claims do not present a claim under California law.

First, Shearman's trespass theory has been soundly rejected by the California Supreme Court in *Intel v. Hamidi*, 30 Cal.4th 1342 (2003). In the *Hamidi* case, Intel alleged that by communicating thousands of messages to its employees over the company's email system Hamidi committed the tort of trespass to chattels. Intel alleged that its technical staff spent time and effort attempting to block the messages, and that some of its employees were upset. The court ruled against Intel, holding "that under California law the tort does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning." *Id.* at 1347.

Similarly, Shearman's complaint does not allege any damage to the computer system or impairment of its functioning, nor is there any allegation that the transmission of the message imposed any marginal cost on the operation of Shearman's computers. In short, there is nothing in the case that would distinguish it from controlling Supreme Court precedent.

Second, Shearman's complaint also alleges a breach of contract claim, contending that the receipt of a single e-mail message was a use of Internet resources "not related to any legitimate Shearman & Sterling business purposes" in violation of an alleged contract. The complaint fails to include a copy of the purported contract. However, as you are aware, an essential element to any contract claim is damages suffered by plaintiff as a result of the defendant's breach. But there are no allegations of damages for this purported breach of contract, nor could there be given the negligible effect of one additional e-mail on Shearman's e-mail systems.

Without a viable cause of action against the Doe defendant, it appears that Shearman's interest is not to pursue a legal claim but instead to identify and subsequently terminate an errant employee. *See* Pam Smith, *Shearman Sues In Bid to Smoke Out Critic*, The Recorder, April 8, 2005 ("'We have a clear process for following up on any activity of that sort through our HR department,' said Shearman's [spokeswoman Jolene] Overbeck. 'We expect that it will be resolved within the firm.'").

California courts, however, have not allowed compelled discovery to be used to identify speakers, no matter how offensive their speech, without a viable underlying claim against the defendants. To the contrary, California courts have required a balancing test to

determine whether a trial court should allow discovery into the identity of an anonymous speaker accused of committing a wrongful or tortious act. *See e.g. Varian Medical Sys. Inc. v. Delfino, et al*., Case No. CV 780187 (Cal. Super. Ct., Santa Clara Cty., 2001) (granting Does' motion to quash subpoena seeking identity of anonymous online speakers where party issuing subpoena failed to show a compelling need for the information that outweighed the speakers' constitutional rights to free speech and privacy); *Pre-paid Legal Services v. Doe*, Case No. CV 798295 (Cal. Sup. Ct. Santa Clara Cty. 2001) (same).

California state courts have long applied this test to balance the need for discovery against the First Amendment interest in protecting the privacy rights of individuals who "wish to promulgate their information and ideas in a public forum while keeping their identities secret." *Rancho Publications v. Superior Court* 68 Cal.App.4th 1538, 1545 (1999). In *Rancho Publications*, the Fourth District Court of Appeals quashed a subpoena issued by a hospital in a defamation action. The subpoena sought to compel a newspaper to disclose the names of anonymous authors of non-defamatory advertorials critical the hospital based upon its belief that the authors were actually the defendants or affiliated with them.

After first noting the long line of federal and state case law recognizing the "qualified constitutional privilege to block civil discovery that impinges upon free speech or privacy concerns of the recipients of discovery demands and innocent third parties as well" (*Rancho Publications* at 1547), the court articulated the balancing test as adopted by California state courts:

> Courts carefully balance the 'compelling' public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights. . . The need for discovery is balanced against the magnitude of the privacy invasions, and the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material.

Id. at 1549.

Throughout the country, courts have applied similar balancing tests in these circumstances. *See e.g. Doe v. 2TheMart.com Inc*., 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Dendrite International, Inc. v. John Doe No. 3*, 342 N.J.Super. 134, 143, 775 A.2d 756 (App.Div.2001); *Rocker Management LLC v. Does*, 2003 WL 22149380, (N.D Cal. 2003); and *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 34 (Va. Cir. 2000).

It is not a proper purpose to invoke the subpoena power of the court to identify an anonymous speaker where there is no viable cause of action. "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil

discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2TheMart.com Inc.,* 140 F. Supp. 2d. at 1092. While it is unfortunate that a Shearman employee received an offensive email message, Shearman cannot manufacture a cause of action out of thin air just so it can identify an anonymous speaker.

Given the California law that refutes Shearman's causes of action and the chilling effect on the First Amendment caused by subpoenas for the identity of online speakers, we urge Shearman to reconsider its legal actions, and drop the subpoena to craigslist immediately.

Yours sincerely,

Kurt Opsahl
Staff Attorney

cc: Craig Newmark, craigslist
Edward Wes, Esq., Perkins Coie LLP
Pam Smith, *The Recorder*