UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERIC A	**CRIMINAL ACTION**
VERSUS	**NO. 13-131**
STACEY JACKSON	**SECTION "S" (2)**

MOTION TO QUASH

NOW INTO COURT, through undersigned counsel, comes The Times-Picayune, L.L.C., who respectfully moves this Honorable Court for an order quashing the subpoena issued pursuant to the Court's January 21, 2014 Order granting Defendant Stacey Jackson's Ex Parte Motion for Issuance of Subpoena Duces Tecum and Production Prior to Trial.[1]

Federal Rule of Criminal Procedure 17(c)(2) provides that "the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." The speakers Defendant seeks to "out" (*i.e.*, the individuals posting under the fictitious names "aircheck" and "jammer1954") possess a First Amendment right of anonymous speech, a right that has been embraced in this country for more than two hundred years. For the discussed in the attached memorandum, Defendant has not made a sufficient showing to outweigh the constitutional right of anonymous speech, and therefore The Times-Picayune prays that the Court grants this Motion to Quash pursuant to Rule 17(c)(2).

[1] The Order was issued pursuant to an *ex parte* motion and without notice to The Times-Picayune.

Respectfully Submitted,

By: */s/Loretta G. Mince*
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a copy of the foregoing pleading to all counsel of record by notice of electronic filing.

/s/Loretta G. Mince

CERTIFICATE OF COMPLIANCE WITH LOCAL CRIMINAL RULE 12

Pursuant to Local Criminal Rule 12, undersigned counsel certifies that the parties have conferred but were unable to resolve this dispute.

/s/Loretta G. Mince

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**NO. 13-131**
STACEY JACKSON	**SECTION "S" (2)**

MEMORANDUM IN SUPPORT OF MOTION TO QUASH

MAY IT PLEASE THE COURT:

This memorandum is respectfully submitted by The Times-Picayune L.L.C. ("The Times-Picayune") in support of its Motion to Quash the subpoena issued pursuant to the Court's January 21, 2014 Order granting Defendant Stacey Jackson's Ex Parte Motion for Issuance of Subpoena Duces Tecum and Production Prior to Trial.[1]

Federal Rule of Criminal Procedure 17(c)(2) provides that "the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." As set forth below, the speakers Defendant seeks to "out" (*i.e.*, the individuals posting under the fictitious names "aircheck" and "jammer1954") possess a First Amendment right of anonymous speech, a right that has been embraced in this country for more than two hundred years. Because there is a significant chance that these speakers have not violated any law, and because Defendant has not made a sufficient showing to outweigh the constitutional right of anonymous speech, The Times-Picayune moves this Court to quash the subpoena.

[1] The Order was issued pursuant to an *ex parte* motion and without notice to The Times-Picayune.

The Times-Picayune brings this motion both to protect its own interest in fostering vigorous and uninhibited debate on its website and to protect the rights of the posters whose identities are being sought. Courts recognize that a media outlet has standing to assert the First Amendment anonymous speech rights of individuals who post comments under pseudonyms on their online forums. *Enterline v. Pocono Medical Center*, 751 F. Supp. 2d 782, 786 (M.D. Pa. 2008); *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645, 651 fn. 7 (S.C. 2013) ("Although neither of the parties addresses the issue of whether WLTX had standing to assert a First Amendment challenge on behalf of the anonymous commenter, other courts have found a news station has standing in similar circumstances."); *In re Drasin*, 2013 WL 3866777 (D. Md. 2013) (finding that the owner of an online blog had standing, in response to a subpoena, to assert the rights of unnamed defendants who engaged in protected, anonymous speech on the blog).

OVERVIEW

Defendant has been charged in a four-count indictment alleging conspiracy, solicitation of bribes, theft of federal funds, and obstruction of justice arising from her public employment as the executive director of the New Orleans Affordable Homeownership agency ("NOAH").

The public first learned of possible corruption within NOAH in July 2008. Not long after NOAH's director, Defendant Stacey Jackson, resigned in June 2008, it was widely reported that there were significant inconsistencies in how funds designated for remediation of storm-damaged properties in the City were spent, and further that there appeared to be conflicts of interest regarding which contractors were awarded the work.[2] Coverage of the allegations of improper conduct within NOAH continued, and on August 1, 2008, it was reported that an FBI and U.S.

[2] *Council seeks files on home cleanups*, The Times-Picayune (July 24, 2008), http://www.nola.com/news/index.ssf/2008/07/council_seeks_files_on_home_cl.html; *NOAH's site is sunk*, Gambit (July 25, 2008) http://www.bestofneworleans.com/blogofneworleans/archives/2008/07/25/noahs-site-is-sunk; *New Orleans house gutting program under a microsope*, The Times-Picayune (July 30, 2008) http://www.nola.com/news/index.ssf/2008/07/new_orleans_house_gutting_prog.html.

Department of Housing and Urban Development probe into NOAH was focused on the links between Jackson and the contractors who earned the most money during the program.[3] Over the next week, additional articles and editorials were published on Nola.com further elaborating on the matter.[4]

On August 8, 2008 at 6:09 PM, Nola.com published an online news article concerning the NOAH investigation under the headline, "N.O. Council Members Get Subpoenas for NOAH records."[5] Forty-four individuals posted anonymous comments under the August 8 news article, including one who posted under the fictitious name "campstblue." It was later revealed during a separate investigation of prosecutorial misconduct in *U.S. v. Bowen, et al.*, No. 10-203 (E.D. La. 2013) (Rec. Doc. 1137), that "campstblue" was one of several fictitious names used by a former Assistant United States Attorney to post comments on Nola.com.

Nearly five years later, on June 6, 2013, Defendant was indicted. On September 20, 2013, Defendant filed a Motion to Compel Discovery (Rec. Doc. 17) wherein she requested

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[3] *New Orleans home rehab operation suspended*, The Times-Picayune (August 1, 2008), http://www.nola.com/news/index.ssf/2008/08/new_orleans_suspends_home_reha.html.

[4] *Gutting mess fails smell test*, The Times-Picayune (August 3, 2008), http://www.nola.com/opinions/index.ssf/2008/08/gutting_mess_fails_smell_test.html; *Waiting for answers on NOAH*, The Times-Picayune (August 8, 2008); http://blog.nola.com/editorials/2008/08/waiting_for_answers_on_noah.html; *NOAH chief allowed her own property to molder*, The Times-Picayune (August 4, 2008), http://www.nola.com/news/index.ssf/2008/08/noah_chief_allowed_her_own_pro.html (reporting that Jackson purchased four blighted properties through a City sponsored program but allowed them to remain blighted); *City paid to gut houses set for razing*, The Times-Picayune (August 5, 2008), http://www.nola.com/news/index.ssf/2008/08/city_paid_to_gut_houses_set_fo.html; *Relief group saw no shortage of volunteers*, The Times-Picayune (August 6, 2008), http://blog.nola.com/updates/2008/08/relief_group_saw_no_shortage_o.html; *Mayor says NOAH probe reveals some "discrepancies,"* The Times-Picayune (August 7, 2007), http://www.nola.com/news/index.ssf/2008/08/mayor_says_noah_probe_reveals.html (reporting on the ongoing probe and numerous inconsistencies between the work which was paid through NOAH and the work in fact done); *NOAH caught with its fancy drawers down*, The Times-Picayune (August 8, 2008), http://blog.nola.com/jamesgill/2008/08/noah_caught_with_its_fancy_dra.html (commenting on Ms. Jackson's personal and business ties to the top three highest paid contractors, including one who was her partner in an intimate male apparel venture).

[5] *See* Exhibit to Defendant's Motion to Compel Discovery (Rec. Doc. 17-2). As an aside, the article does not disclose any confidential information, or information that would be protected by Rule 6. All statements in the article are attributed to official sources.

discovery and production of the "Horn Reports"[6] and all other government information related to Department of Justice investigations of Assistant United States Attorneys for blogging and/or grand jury leaks. Defendant argued that the information sought was material to her defense because it suggested possible violations of grand jury secrecy requirements under Federal Rule of Criminal Procedure 6 and other possible prosecutorial misconduct.[7] After this Court conducted in camera review of the "Horn Reports," the motion was denied in part and ruled premature in part.[8] However, in its Order and Reasons, this Court *sua sponte* referenced comments made by two of the other 43 posters who commented underneath the August 8 Nola.com article. Specifically, the Court quoted two posts made by "aircheck" and "jammer1954," respectively, and stated:

> If that person or those persons who posed as "aircheck" or "jammer1954" were management-level Justice Department prosecutors or law enforcement officers responsible for office-wide policy making, or other Justice Department personnel involved directly in this case, the investigation and/or grand jury proceedings concerning Jackson or NOAH, especially if they were persons engaged in making public posts of the type quoted above, his or her identity might lead to the conclusion that there was a pattern, policy or practice of pre-indictment prosecutorial misconduct in the accusatory process material to Jackson's defenses alleging violations of her due process rights. [9]

In early January, counsel for Defendant contacted undersigned counsel to discuss the possibility that he might seek to obtain, through a subpoena, information related to "aircheck" and "jammer1954." Undersigned counsel candidly discussed the constitutional issues that such a subpoena would implicate and advised that, depending on what was requested and the showing made, The Times-Picayune would likely oppose a subpoena seeking to "out" an anonymous commenter. A week later, in contravention of his assurance that notice would be provided of any

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[6] The Times-Picayune presumes that no additional description of the "Horn Reports" is needed.

[7] *See* Defendant's Motion to Compel Discovery (Rec. Doc. 17).

[8] *See* Court's Orders and Reasons on Motion to Compel Discovery (Rec. Doc. 33).

[9] *See* Ex Parte Motion for Issuance of Subpoena Duces Tecum (Rec. Doc. 39), pg. 2.

attempt to issue a subpoena to The Times-Picayune, counsel for Defendant filed an *ex parte* motion for the issuance of a subpoena to The Times-Picayune ordering production of:

> All documents related to the identity of the user names, "aircheck," and "jammer1954," including but not limited to (1) registration information, documents that provide all names, mailing addresses, email addresses, downstream and upstream email chains, phone numbers, billing information, date of account creation, account information, passwords, and all other identifying information associated with "aircheck," and "jammer1954," and all names, aliases, identities or designations related to "aircheck," and "jammer1954," and (2) the usage/login information related to "aircheck," and "jammer1954," including but not limited to documents that provide IP [Internet Protocol] logs, IP address information at time of registration and subsequent usage, computer usage logs, or other means of recording information concerning the usage of "aircheck," and "jammer1954," from January 1, 2008, to the present.

In the motion, Defendant argued that ***if*** the two pseudonymous posters are revealed to be management-level Department of Justice prosecutors or law enforcement officers, their comments ***could*** demonstrate a pattern, policy or practice of pre-indictment prosecutorial misconduct and be material to her due process defense.[10] Because of the ***possibility*** that the two posters could be federal officials, Defendant argued that The Times-Picayune should provide her with private information about the identity of the two pseudonymous posters.

On January 21, 2014, this Court signed an Order granting Defendant's Motion, and on January 23, 2014, The Times-Picayune was served with a subpoena ordering production of the above referenced materials on or before February 3, 2014.[11] The Times-Picayune now files this Motion to Quash under Federal Rule of Criminal Procedure 17(c)(2) because the subpoena would violate fundamental First Amendment protections of anonymous speech and Defendant has not made a sufficient showing to outweigh that right.

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[10] Memorandum in Support of Ex Parte Motion for Issuance of Subpoena Duces Tecum (Rec. Doc. 39-1), pg. 2.

[11] The return date on the subpoena is February 3, 2014; however, counsel for the Defendant has agreed to extend the return date pending a ruling on the instant motion.

It is beyond dispute that the First Amendment protects anonymous speech, which has a long and celebrated tradition that continues today to contribute significantly to the promotion of public discourse on the Internet and elsewhere. To that end, courts across the country have acknowledged that "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded,"[12] and therefore careful scrutiny of a request for disclosure of the identity of an anonymous speaker is necessary to safeguard the First Amendment values inherent in anonymity. Courts have accordingly held that the party seeking such disclosure must make a showing sufficient to overcome the right of anonymous speech. Here, there has been no such showing. Defendant has failed to demonstrate that the pseudonymous posters are likely to be federal officials; indeed, logic suggests that it is significantly more likely that they are not. Furthermore, even assuming that the posters are federal officials, Defendant has failed to show that the content of the comments had (or will have) any impact on Defendant's due process rights. The interests articulated in favor of obtaining the private information of the pseudonymous posters are far outweighed by the First Amendment values at stake. Accordingly, and as more fully discussed below, the Court should grant The Times-Picayune's motion and quash the subpoena.

DISCUSSION

A. Federal Rule of Criminal Procedure 17(c)

Pre-trial production under a Rule 17(c) subpoena is limited to those documents which are relevant, specifically designated, and admissible. *United States v. Lang*, 766 F. Supp. 389, 402 (D. Md. 1991). Further, Rule 17(c)(2) provides that a subpoena may be quashed if compliance would be unreasonable or oppressive:

[12] *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008).

> (2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

Fed. R. Crim. Pro. 17. When a party challenges a Rule 17(c) subpoena, courts apply the test announced in *United States v. Nixon*, 418 U.S. 683, 697-702 (1974), for which the party seeking access to material under Rule 17 must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992).

Courts have held that a Rule 17 subpoena is not a "discovery device" and should not be used to gain knowledge that the moving party otherwise could not obtain under Rule 16(A)(1). *Id.; see United States v. Najarian*, 164 F.R.D. 484, 487 (D. Minn. 1995) ("We have yet to uncover any authority to support the proposition that Rule 17(c) is a broad adjunct to Rule 16, Federal Rules of Criminal Procedure, in ferreting out information which may be either relevant or admissible. . . Rather, the authority is compelling to the contrary."). Further, "mere hope" does not justify enforcement of a subpoena under Rule 17(c). *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980).

First Amendment rights and privileges must also be considered in determining whether compliance with a subpoena issued under Rule 17 would be unreasonable or oppressive. *E.g., United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (upholding a motion to quash under Rule 17(c)(2) on the basis of First Amendment reporter privilege); *see In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992) (recognizing that if a grand jury subpoena under Rule 17(c) potentially implicates First Amendment freedoms, district courts

should apply with special sensitivity the traditional rule that grand juries are not licensed to engage in arbitrary fishing expeditions); *Matter of Wood*, 430 F. Supp. 41, 45 (S.D.N.Y. 1977) (finding that when First Amendment rights are validly asserted on a motion to quash under Rule 17(c), the burden shifts to the government to demonstrate a compelling interest sufficient to outweigh the possibility of the infringement). Courts also have found that First Amendment interests are not diminished because the nature of the underlying proceeding is criminal, rather than civil. *Cuthbertson*, 630 F.2d at 147; *see Burke*, 700 F.2d at 77 ("We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence.")

B. The First Amendment protects anonymous speech.

The value of anonymous speech has long been recognized. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342, 357 (1995), the United States Supreme Court observed 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." The Court offered as an example anonymous pamphleteering, which it called an "honorable tradition":

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society.

Id. at 357; *see also Talley v. California*, 362 U.S. 60, 64-65 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published

under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."); *Justice for All v. Faulkner*, 410 F.3d 760, 764 (5th Cir. 2005) ("As a general proposition, anonymous speech is protected by the First Amendment.").

The right of anonymous speech is equally recognized when it appears on the Internet. News outlets everywhere use the Internet to communicate with their readers and to facilitate their readers' communications with each other. Community members use these online forums to discuss issues of concern. *See Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) ("[S]peakers on internet chat rooms and blogs can speak directly to other people with similar interests."). And many do so anonymously. *See Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 438, 456 (Md. 2009) ("Since the early 1990's, when Internet communications became available to the American public, anonymity or pseudonymity has been a part of the Internet culture. . . . With the Internet, users can bypass commercial publishers and editors to speak to one another across the boundaries of divergent cultures, and thereby forge consensus on issues of public concern. These concepts, not theoretical but practical, promote public discourse and must be guaranteed the protection of the First Amendment." (citations and internal quotation marks omitted)). Courts have recognized that failing to protect such anonymous postings "will compromise the vitality of the newspaper's online forums, sparking reduced reader interest." *Enterline* 751 F. Supp. 2d at 786 (observing that a newspaper has sufficient injury to "assert the First Amendment rights of the anonymous commentators").

For these reasons, "anonymity is a particularly important component of Internet speech. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas[;] ... [T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded." *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254

(D. Conn. 2008) (internal quotation marks omitted); *see also In re Baxter*, 01-00026-M, 2001 WL 34806203, at *5 (W.D. La. Dec. 20, 2001) ("courts have recognized that anonymity on the internet, to a certain extent, is valuable"); *Cahill*, 884 A.2d at 456 (noting that the ability to speak anonymously on the internet "promises to make public debate in cyberspace less hierarchical and discriminatory than in the real world because it disguises status indicators such as race, class, and age" (internal quotation marks omitted)); *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate.").

In light of the foregoing, "the Supreme Court has required both proof of a compelling interest and a narrowly tailored restriction serving that interest where compelled identification of speakers threatens the First Amendment right to remain anonymous." *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 131 (D.D.C. 2009) (citations omitted). Because of the importance of the rights associated with anonymous speech and the competing interests of disclosure in certain situations, courts across the country have formulated various, but similar, approaches when deciding whether invasion of that right is warranted. *In re Baxter*, 01-00026-M, 2001 WL 34806203 at *11. In one of the earliest, and most influential, cases that addressed the issue of unveiling the identity of an anonymous Internet speaker, *Dendrite Int'l, Inc. v. Doe No. 3*, the court set out a four-factor test for determining whether a subpoena to an Internet service provider seeking identification of anonymous posters would be proper. 342 N.J. Super. 134, 151, 775 A.2d 756, 767 (N.J. Super. Ct. App. Div. 2001). The requirements were formulated "to ensure that this unusual procedure will only be employed in cases where the [party seeking the information] has in good faith exhausted traditional avenues for identifying a [an anonymous poster] pre-service, and will prevent use of this method to harass or intimidate." *Id.*

First, the seeking party must "undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application." *Id.* at 141. Second, the seeking party must identify and set forth the exact statements purportedly made by each anonymous poster that he or she alleges constitutes actionable speech. *Id.* Third, the seeking party must also make a concrete showing as to each element of a prima facie case against the anonymous individual for the allegedly unlawful conduct. *Id.* at 141. Finally, after the seeking party has presented a prima facie cause of action, the court should balance the anonymous individual'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 individual's identity to allow the seeking party to properly proceed. *Id.* at 142.

Since *Dendrite* was decided, courts have generally followed its formulation or have formulated similar tests and standards. *See Doe I,* 561 F. Supp. 2d at 256 (applying the four *Dendrite* factors)*; Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.,* 160 N.H. 227, 239, 999 A.2d 184, 193 (2010) (holding that the trial court should have applied the *Dendrite* test to strike the balance between the rights of anonymous speech and the rights of the party seeking the identity); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999) (requiring seeking party to: identify the anonymous person with sufficient specificity; identify all previous steps taken to locate the anonymous person; establish that seeking party has an actionable cause of action against the anonymous person that can withstand a motion to dismiss; and file a request with the court along with a statement of the reasons justifying the specific discovery requested); *Sony Music Entm't Inc,* 326 F. Supp. 2d at 565 (applying the four *Dendrite* factors along with a fifth factor which considered the expectation of privacy by the parties);

Highfields Capital Management, L.P. v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2005) (relying on the standards articulated in *Dendrite* and *Seescandy.com*); *Cahill*, 884 A.2d at 460 (applying the notice and prima-facie *Dendrite* requirements); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1211 (D. Nev. 2008) (analyzing the *Dendrite* and *Cahill* standards); *Pilchesky v. Gatelli*, 2011 PA Super 3, 12 A.3d 430, 442 (Pa. Super. Ct. 2011) (applying a four-part test under the *Dendrite* and *Cahill* standards).

With respect to the requirement that the seeking party demonstrate that the underlying speech is in fact unlawful or actionable, courts have held that, at minimum, the party seeking to "out" an anonymous speaker whose speech concerns an issue of public concern must show "a reasonable probability" that the speech at issue is unlawful. *Seescandy.com*, 185 F.R.D. at 579 (requiring seeking party to establish that it has an actionable cause of action against anonymous person that can withstand a motion to dismiss); *Doe I v. Individuals*, 561 F. Supp. 2d at 256 (requiring plaintiff to establish a prima facie case of libel in order to unveil the identity of anonymous defendant); *Sony Music Entm't Inc.*, 326 F. Supp. 2d at 564 (requiring plaintiff to make a concrete showing of a prima facie claim for copyright infringement to identify anonymous defendants); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (Ca. 2008) (requiring plaintiff to make a prima facie showing of defamation to reveal identity of anonymous internet commenters); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 450 (2009) (requiring plaintiff to establish enough facts to support his claim as to survive a motion for summary judgment); *In re Baxter*, 01-00026-M, 2001 WL 34806203 at *12 (finding that the "proper standard should be. . . a showing of at least a reasonable probability or reasonably possibility of recovery on the [claim]") (citing *Global Telemedia Intern., Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001)

(requiring a showing of a probability of success on the merits where free speech on a public issue is involved)).

C. Defendant's subpoena should be quashed because she has not made a sufficient showing that the speech in question was unlawful or violated her due process rights.

Applying the above test to the subpoena issued in this case, Defendant has made no attempt to notify "aircheck" and "jammer1954" that their identities are being sought. As to the remaining elements, the precise statements alleged to have violated Defendant's rights have been identified, but there has been no showing that the statements in fact constituted grand jury leaks or impaired Defendant's due process rights, and the balance of the interests at issue weigh decidedly in favor of the right of "aircheck" and "jammer1954" to participate anonymously in public dialogue about public issues.

As discussed above, courts have recognized that in assessing whether the right of anonymous speech may be overcome, the court must assess whether the party seeking disclosure can make a sufficient showing that the speech in question is unlawful or actionable. Here, Defendant has provided no persuasive evidence to support of her speculation that the commenters are federal law enforcement officials, and even assuming that they are, that the comments at issue are unlawful or infringe upon her due process rights.

(1) There has been no showing that "aircheck" and "jammer 1954 are federal prosecutors or similar employees.

The comments that Defendant draws attention to in her Rule 17(c) motion are:

> aircheck August 08, 2008 at 10:26 PM
>
> The "fun" has just begun. . . Wait until the next round of subpoenas go out, then arrests will follow a little while after that etc. . .
> Can't wait to hear about Stacey "ring leader" Jackson when's (sic) it's her turn to face the music. . . expect to see her rat out a few to minimize prison time she's likely to get.
> Will be most interesting to see what SCUM rises to the top.
> (Ellipses in original.)

and

> jammer1954 August 09, 2008 at 9:48 PM
> Mark my words. The canaries are going to start singing, and Car 54 is going up in smoke.
> Stacey Jackson is going to rat out everyone, every body, and every thing to make the best deal for herself- after all she did this as chief of NOAH so her behavior isn't going to change.
> Ray Ray is going down, as is Cedric and who knows who else.
> What is worse is that RayRay was going to clean up City Hall.
> He is "stuck on stupid."

In support of her conjecture that "aircheck" and "jammer1954" are federal officials, Defendant avers that Mr. Salvadore Perricone and Ms. Jan Mann have both stated that "they did not recall other blogger names that they may have used," and Ms. Mann "was quite sure that others in the office also blogged."[13] Defendant also includes provisions of the findings in *Bowen*, *supra* Doc. 1137, which state that the full extent of Internet posts by the Assistant U.S. Attorney's Office is unknown.[14] Additionally, Defendant argues that "the substance of the blogs obviously indicate government inside action" because it uses "verbiage akin to prosecutorial information and efforts," and amounts to "obvious efforts to pressure suspects and targets of the investigation to cooperate with the government."[15] Finally, Defendant cites to a portion of this Court's Order and Reasons on Motion, quoted at page 4, *supra*.[16]

Defendant's speculation as to the identity of "aircheck" and "jammer1954" is just that, pure speculation. She has offered no persuasive evidence on the likelihood that these two anonymous Internet posters are federal officials. What evidence she does offer is wholly inadequate and would lead to the broad conclusion that any individual who posts anonymously

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[13] *See* Memorandum in Support (Rec. Doc. 39-1), pg 4.

[14] Memorandum in Support (Rec. Doc. 39-1), pg 5.

[15] Ex Parte Motion for Issuance of Subpoena Duces Tecum (Rec. Doc. 39), pg. 3.

[16] Order (Rec. Doc. No. 33), pgs. 8-9.

on the Internet about a criminal defendant and uses some legal lingo in his or her post may be a federal official, entitling the criminal defendant to subpoena the anonymous poster's identity. Her first two reasons, *i.e.* that Mr. Perricone and Ms. Mann do not recall their other anonymous user names and that Ms. Mann was "quite sure" that other federal employees in the office blogged, are highly general, and do not address the realistic probability of whether "aircheck" and "jammer1954" are in fact Internet alter egos of Mr. Perricone and Ms. Mann or their federal colleagues. Her reliance on the findings in *Bowen*, *supra* Doc. 1137, that the full extent of Internet posts by the Assistant U.S. Attorney's Office is unknown is equally general and speculative.

Additionally, Defendant's argument that the comments must have been made by federal law enforcement officials because they incorporate "prosecutorial verbiage akin to prosecutorial information" is purely conclusory. The legal terms that anonymous poster "aircheck" uses – "subpoena," "ring leader," "rat out" – are part of common vernacular, and "subpoena" is already used in the title and body of the article. Likewise, the legal terms and concepts that anonymous poster "jammer1954" uses – "rat out," "Car 54,"[17] and "best deal for herself" – are not special "prosecutorial verbiage," but language that is commonly used among lawyers and non-lawyers alike.[18]

The nature of the comments are utterly indistinguishable from comments by hundreds – if not thousands – of other posters who use similar language in online posts, a point proven by other posts made under the same August 8 article. *See*, *e.g.*, "mohuluu," who posted, "The grapevine still works folks, and I heard through it, the judge's fingers were so cramped from

[17] *Car 54, Where Are You?* is an American sitcom from the 1960's about two New York police office based in the fictional 53rd precinct in The Bronx.

[18] Further, even if the comments were made by a lawyer, it is a large leap to conclude that of the thousands of lawyers who live in the region, these lawyers are likely to be federal prosecutors.

signing so many warrants/subpoenas he had to take a break...LOL..." Or "leveeliar," who posted, "Federal funds for relatives, insider dealings and not dispersing [sic] funds according to federal requirements means big problems. Who is going to rat out first." Or "69stranger," who posted, "these 'public servant' asses continue to believe that they and theirs are above the law." Or "stormyd," who posted, "CONFIRMED! Nagin was subpoena's [sic] too! Too early to crack the champagne. But if anyone can give us a victory and get that buffoon out of office, Letten can!" And "Katrina115," who posted, "I got information from my sources that nagin got a subpoena, shhhh it's a secret . . . ." Or "minneaux," who posted "I can't wait to see how Nagin's MO comes off with the FEDS... We'll be watching Mayor Wonka." Or "possomhd," who posted "Did I not say this will get a lot better before it's over? If they dig deep enough it's hard telling what will come to the surface. Some people are sweating bullets right now. Nagin's days are numbered. When the singing begins it will be heard all over the U.S.A." Or "togozo," who posted "i cannot wait to see that pompas azz Da trashbag mayor mumble his way out of a FEDERAL investigation, wonder what he and his wife are planning in the way of an obituary dinner and cocktail on the taxpayers dime. . ." Or "misslizzy" who posted "I'm just howling!! These idiots think they can steal that blatantly in front of Justice and FBI offices on hard point and get away with it?"[19]

Finally, although Defendant cites to this Court's statements in its Order and Reasons, the Court made no findings on the likelihood that "aircheck" and "jammer1954" are federal prosecutors; rather, the Court merely noted that ***IF*** "aircheck" and "jammer1954" are federal

[19] Although none of these posts mention Stacey Jackson by name, many of them clearly refer to the federal criminal investigation of NOAH, and it was well known by August 8, 2008 that the federal government was investigating Jackson's conduct as NOAH's director. *New Orleans home rehab operation suspended,* The Times-Picayune, August 1, 2008 (reporting that "the probe appears to focus on two things: links between NOAH's former director, Stacey Jackson, and the contractors who earned the most money under the program; and whether contractors -- particularly those with links to Jackson -- did the work at homes for which they were paid a total of about $1.8 million").

officials, were management-level prosecutors, or personnel directly involved in this case, and ***IF*** these federal officials were making public comment posts of the type quoted above, then their identity ***MAY*** lead to a conclusion material to her defense.

(2) There has been no showing that the comments at issue are unlawful or infringe upon Defendant's due process rights.

In addition to the lack of any concrete evidence to support a finding that "aircheck" and/or "jammer1954" are federal prosecutors or similar employees, the comments do not appear to disclose information that would be protected by Rule 6(e) related to grand jury secrecy or otherwise amount to prosecutorial misconduct in violation of Defendant's due process rights. A prima facie case of violation of Rule 6(e) requires (1) a clear indication that the media reports disclose information about present or future "matters occurring before the grand jury," (2) an indication that the source of the information is one who prescribed from disclosing it (grand juror, government attorney, stenographer, etc), (3) an assumption that all statements in the news report are correct, (4) a consideration of the nature of the relief requested and the extent to which it interferes with the grand jury process, (5) weight of any evidence presented by the government to rebut the assumed truthfulness of report which otherwise make a prima facie case of misconduct. *In re Grand Jury Investigation*, 610 F.2d 202, 219 (5th Cir. 1980). Further, in order to dismiss an indictment on constitutional or supervisory grounds based upon prosecutorial misconduct, a showing of actual prejudice to the accused is required. *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982). The United States Court of Appeals for the Fifth Circuit adopts the approach that "even in the case of the most 'egregious prosecutorial misconduct,' the indictment may be dismissed only 'upon a showing of actual prejudice to the accused.'" *Id.* (quoting *United States v. Merlino*, 595 F.2d 1016, 1018 (5th Cir. 1979)). The Fifth Circuit has further elaborated on the definition of actual prejudice:

> In an attempt to define prejudice in this situation, we have stated that "(i)nflammatory remarks made by a prosecutor justify the dismissal of an indictment if the improper remarks so bias the grand jurors that their votes were based on their bias." In other words, we will dismiss an indictment only when prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury.

McKenzie, 678 F.2d at 219 (internal citations omitted).

Defendant has not offered any support in her Rule 17(c) motion that the comments by "aircheck" and "jammer1954" violate Rule 6(e) or amount to prosecutorial misconduct that would justify dismissal of her indictment. Defendant merely asserts generally that the comments include "prosecutorial verbiage" and attempt to "pressure" suspects and targets of the investigation to cooperate with the government.[20] On their face, however, the comments do not appear to violate Rule 6(e) as they neither concern "matters occurring before the grand jury" nor indicate that the poster is an individual who is prescribed from disclosing information under Rule 6(e). Further, even assuming that the anonymous posters are federal officials, Defendant has not provided any evidence that the two comments demonstrate "a pattern of. . . governmental misconduct, system and intent,"[21] or that the comments "pressured" suspects and targets of the investigation to cooperate with the government. The comments posted on Nola.com merely speculate that the poster believes Jackson is likely to "rat out" others and "cut a deal" with the government. Ironically, it appears neither occurred. But more importantly, no evidence has been presented that the comments by "Aircheck" and "Jammer1954" influenced the investigation or Jackson's indictment, which occurred ***five years after*** the comments in question were posted.

In sum, there is simply no evidence to support that "aircheck" and "jammer1954" are federal law enforcement officials, or that that comments violated Defendant's due process rights.

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[20] Memorandum in Support (Rec. Doc. 39-1), pg 3.

[21] Motion to Compel (Rec. Doc. No. 17-1), pgs. 17-18.

In view of the foregoing, it simply cannot be said that Defendant's interests in the anonymous posters' identities outweighs the First Amendment interests at stake. Defendant has not shown that the comments are unlawful or constitute governmental misconduct, or that she has been prejudiced by the comments. Requiring The Times-Picayune to disclose information relating to the posters' identities, under these circumstances, would unnecessarily affront the First Amendment, which values anonymous, as much as any other, speech.

CONCLUSION

The First Amendment constitutional right of anonymous speech is implicated where a request for information is made regarding an anonymous poster, particularly where there is a significant chance that the poster has not violated any law by virtue of the postings. Based on the information provided, it is significantly more likely that "aircheck" and "jammer1954" are *not* "management-level Justice Department prosecutors or law enforcement officers responsible for office-wide policy making, or other Justice Department personnel involved directly in this case" than that they are. And the mere possibility that "aircheck" and/or "jammer1954" might be federal prosecutors is simply not enough to trample on the First Amendment rights on private citizens to engage in anonymous speech. For these reasons, The Times-Picayune respectfully asks this Honorable Court to grant its Motion to Quash.

Respectfully Submitted,

By: */s/Loretta G. Mince*

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a copy of the foregoing pleading to all counsel of record by notice of electronic filing.

/s/Loretta G. Mince

CERTIFICATE OF COMPLIANCE WITH LOCAL CRIMINAL RULE 12

Pursuant to Local Criminal Rule 12, undersigned counsel certifies that counsel for the parties have conferred but were unable to resolve this dispute.

/s/Loretta G. Mince

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERIC A	**CRIMINAL ACTION**
VERSUS	**NO. 13-131**
STACEY JACKSON	**SECTION "S" (2)**

NOTICE OF SUBMISSION

PLEASE TAKE NOTICE that the Motion to Quash filed by The Times-Picayune, L.L.C. will be submitted to the Court on the 19th day of February at 11:00 o'clock AM before the Honorable Joseph C. Wilkinson, Jr. at the U.S. Courthouse, 500 Poydras Street, New Orleans, LA 70130.

Respectfully Submitted,

By: */s/Loretta G. Mince*

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