UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

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

MOTION TO REVIEW MAGISTRATE JUDGE'S ORDER

NOW INTO COURT, comes The Times-Picayune, L.L.C. ("The Times-Picayune"), through undersigned counsel, which, pursuant to Federal Rule of Criminal Procedure 59, respectfully moves this Court to review the Magistrate Judge's order issued on February 14, 2013, which granted in part and denied in part the motion to quash filed by The Times-Picayune.[1] As explained in the memorandum in support submitted herewith, the Magistrate Judge's order is contrary to the law and clearly erroneous.

Respectfully Submitted,

By: */s/Loretta G. Mince*

LORETTA G. MINCE #25796
REBECCA SHA #35317
FISHMAN HAYGOOD PHELPS
WALMSLEY WILLIS & SWANSON, L.L.P
201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170
Telephone: (504) 586-5252
Facsimile: (504) 586-5250
Attorneys for The Times-Picayune, L.L.C.

[1] Rec. Doc. No. 47.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 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

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 MOTION TO REVIEW THE MAGISTRATE JUDGE'S ORDER

MAY IT PLEASE THE COURT:

The Times-Picayune, L.L.C. ("The Times-Picayune"), through undersigned counsel, respectfully submits this memorandum in support of its motion to review the Magistrate Judge's order, issued on February 14, 2014, which granted in part and denied in part the motion to quash filed by The Times-Picayune.[1]

OVERVIEW

Rule 59 of the Federal Rules of Criminal Procedure provides that for non-dispositive matters before a magistrate judge, "[t]he district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous."[2] An order is contrary to law "when it fails to apply or misapplies relevant statutes, case law, or rules of procedure."[3] A court's finding is "clearly erroneous when although there is evidence to support

[1] Rec. Doc. No. 47.
[2] *See also* 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law").
[3] *United States v. Melton*, 948 F.Supp.2d 998 (N.D. Iowa 2013) (citing *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002)).

it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[4]

The Magistrate Judge's February 14, 2014 order is clearly erroneous and contrary to law. The Magistrate Judge readily acknowledged that the subpoena requested by Stacey Jackson ("Defendant") implicates important First Amendment rights of anonymous speech.[5] "[Anonymous speech] 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."[6] However, the Magistrate Judge wrongly found that Defendant's showing in support of her request for a subpoena *duces tecum* to The Times-Picayune compelling production of private, identifying information regarding Nola.com posters "aircheck" and "jammer 1954" was sufficient to overcome the posters' First Amendment rights of anonymous speech. Specifically, the Magistrate Judge erroneously accepted the Defendant's unsupported assumptions that "aircheck" and "jammer 1954" are likely to be federal officials and that their comments were likely to be unlawful, in violation of her due process rights.

First, the Magistrate Judge erroneously relied on evidence of prosecutorial misconduct in unrelated cases pending before this Court – namely, *U.S. v. Bowen, et al.*, No. 10-203, *U.S. v. Fazzio*, No. 11-157, and *Heebe et al. v. U.S.*, No. 10-3452 – as evidence that "aircheck" and "jammer1954" are likely to be federal officials, notwithstanding the Magistrate Judge's express acknowledgment that the evidence of prosecutorial misconduct in those cases was irrelevant to

[4] *In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 603 (5th Cir. 2013); see also United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); *In re of Grand Jury Empaneled April 24, 2008*, 601 F. Supp. 2d 600, 603 (D.N.J. 2008) (applying the "clearly erroneous" definition from United States Gypsum Co. to the review of a magistrate judge's decision under Rule 59).

[5] *See* Rec. Doc. 46 at p. 4 ("Concerning the First Amendment interest asserted by The Times-Picayune on behalf of the commenters who use its Nola.com site, '[a]s a general proposition, anonymous speech is protected by the First Amendment.'").

[6] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342, 357 (1995).

Defendant's allegations of prosecutorial misconduct in the instant case. Second, and respectfully, the Magistrate Judge's conclusion that the timing and "lingo" of comments made on Nola.com by "aircheck" and "jammer1954" indicates that they were likely made by federal officials is pure speculation, and in fact is belied by even a cursory review of comments routinely made by hundreds of other posters. Third, even assuming that a proper showing had been made by Defendant that the comments cited by Defendant were likely made by federal officials and that the content of those comments caused actual prejudice to Defendant sufficient to justify her claims for relief, the Magistrate Judge's conclusion that Defendant's Fifth Amendment rights should trump the First Amendment rights of "aircheck" and "jammer1954" because this is a criminal, not civil, matter is not supported by the law. Finally, the solution ordered by the Magistrate Judge – requiring production of the requested information for *in camera* review – is not likely to lead to identification of the posters as federal officials or as private citizens, but will likely require additional subpoenas to the Internet Service Providers used by the posters.[7] For the foregoing reasons, which are discussed in more detail below, the Magistrate Judge's findings and order should be set aside and The Times-Picayune's motion to quash should be granted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

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 and Defendant's conduct in July 2008. Numerous articles and editorials were published on Nola.com regarding the matter.[8]

[7] And those subpoenas also may not lead to identification of the posters, since posters on online forums frequently use *wifi* networks that cannot be traced to an individual user.

[8] *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*

Relevant to the instant motion, 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."[9] Forty-four individuals posted anonymous comments under the August 8 news article; 55 comments were made in total, including one comment 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. No. 1137), that "campstblue" was one of several fictitious names used by former Assistant U.S. Attorney Sal Perricone to post comments on Nola.com.

Defendant was indicted on June 6, 2013, nearly five years after the publication of the August 8, 2008 article. On September 20, 2013, Defendant filed a Motion to Compel Discovery (Rec. Doc. No. 17) wherein she requested the "Horn Reports"[10] and information related to Department of Justice ("DOJ") investigations of Assistant U.S. Attorneys for blogging and/or grand jury leaks. Defendant argued that the information sought was material to her defense because it suggested selective prosecution based upon Defendant's race, possible violations of grand jury secrecy requirements under Federal Rule of Criminal Procedure 6, and other possible

---

gutting program under a microscope, The Times-Picayune (July 30, 2008) http://www.nola.com/news/index.ssf/2008/07/new_orleans_house_gutting_prog.html; *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;*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; *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; *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.

[9] *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.

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

prosecutorial misconduct.[11] In support of her motion, Defendant submitted the August 8, 2008 Nola.com article and the 55 comments posted under the article. After the Magistrate Judge conducted an *in camera* review of the "Horn Reports," the motion was denied in part and ruled premature in part.[12] The Magistrate Judge denied Defendant's request to view the "Horn Reports," finding that nothing in the reports was relevant to Defendant's claim of violations of grand jury secrecy or prosecutorial misconduct.[13] However, in his Order and Reasons, the Magistrate Judge *sua sponte*[14] singled out two of the other 44 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.[15]

On January 16, 2014, 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

[11] *See* Defendant's Motion to Compel Discovery (Rec. Doc. 17).
[12] *See* Court's Orders and Reasons on Motion to Compel Discovery (Rec. Doc. 33).
[13] *Id*.
[14] Defendant did not cite specifically to the posts made by "aircheck" or by "jammer1954" in her motion.
[15] *See* Ex Parte Motion for Issuance of Subpoena Duces Tecum (Rec. Doc. 39), pg. 2.

> logs, or other means of recording information concerning the usage of "aircheck," and "jammer1954," from January 1, 2008, to the present.[16]

In the motion, Defendant argued that ***if*** the two pseudonymous posters are revealed to be management-level DOJ 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.[17] Because of that ***possibility***, Defendant argued that The Times-Picayune should provide her with private information about their identity.

On January 21, 2014, the Magistrate Judge 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. The Times-Picayune filed a motion to quash under Federal Rule of Criminal Procedure 17(c)(2) arguing that the subpoena would violate First Amendment protections of anonymous speech and that Defendant has not made a sufficient showing to outweigh that right.[18] Defendant filed her response on February 7, 2014, arguing that she had made a sufficient showing and that The Times-Picayune lacked standing.[19]

On Friday, February 14, 2014, the Magistrate Judge issued an order that The Times-Picayune's Motion to Quash be granted in part and denied in part. *Id*., Pg. 3. The Magistrate Judge rejected Defendant's standing arguments, finding that The Times-Picayune had standing to assert the First Amendment claim. However, the Magistrate Judge denied The Times-Picayune's request that the subpoena be quashed in its entirety, and instead ordered an *in camera* review. *Id*., Pg. 12. Pursuant to the Magistrate Judge's order, the "Place for Production" and "Date for Production" was modified to require that The Times-Picayune produce all information

[16] Rec Doc. No. 39.
[17] Memorandum in Support of Ex Parte Motion for Issuance of Subpoena Duces Tecum (Rec. Doc. 39-1), Pg. 2.
[18] Rec. Doc. No. 42.
[19] Rec. Doc. No. 45.

responsive to the subpoena directly to the Magistrate Judge in his chambers. *Id*. Further the order stated that:

> If I determine based upon my in camera review that aircheck and jammer1954 are citizens without connection to the prosecution, their First Amendment right to anonymous speech will outweigh the Due Process rights of the defendant and no further disclosure, production or inspection of the information will be permitted. Otherwise, whether and, if so, how and when the responsive information may be made available to the parties for inspection will be established by further order of the court.

Id., Pgs. 12-13. The Magistrate Judge reasoned that Defendant's prior submission of evidence in support of her prosecutorial misconduct defense,[20] buttressed by the recent experience of this Court in three, unrelated, proceedings,[21] and the Magistrate Judge's own *in camera* review of the Horn Reports, supported a finding that Defendant had made the required threshold showing to overcome the First Amendment rights of "aircheck" and "jammer1954." The Magistrate Judge concluded that the comments were likely to be made by federal officials because (1) the comments were made in close proximity to a comment made by former Assistant U.S. Attorney Sal Perricone under the pseudonym "campstblue"; (2) the comments used the same kind of "cop jargon lingo" sometimes employed by Mr. Perricone; and (3) "aircheck" was a frequent commenter, making approximately 500 posts, including 11 specifically targeting Stacey Jackson and NOAH. [22] Because the Magistrate Judge's findings are clearly erroneous, the Times-Picayune files this objection to the Magistrate Judge's order pursuant to Rule 59.

DISCUSSION

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

[20] The Magistrate Judge cites to Rec. Doc. No. 17-2, the August 8, 2008 Nola.com and the 55 comments posted.
[21] *Bowen, supra*, *United States v. Fazzio*, Crim. No. 11-157"C"(5), Record Doc. Nos. 293-294, and *Heebe et al. v. United States*, Civil Action No. 10-3452"C"(5).
[22] Rec. Doc. No. 47, Pg. 10.

acknowledged that "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded,"[23] 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 accordingly have 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.

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.[24] Further, Rule 17(c)(2) provides that a subpoena may be quashed if compliance would be unreasonable or oppressive.[25] 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."[26]

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).[27]

[23] *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008).
[24] *United States v. Lang*, 766 F. Supp. 389, 402 (D. Md. 1991).
[25] Fed. R. Crim. Pro. 17. "(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."
[26] *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992).
[27] *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 . . . 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).[28] 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.[29] Courts also have found that First Amendment interests are not diminished because the nature of the underlying proceeding is criminal, rather than civil.[30]

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.[31]

---

[28] *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980).

[29] *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 infringement).

[30] *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.").

[31] *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.[32] And many do so anonymously.[33] Courts have recognized that failing to protect such anonymous postings "will compromise the vitality of the newspaper's online forums, sparking reduced reader interest."[34] 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."[35]

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."[36] 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.[37] In one of the earliest,

[32] *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.").
[33] *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. . . 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)).
[34] *Enterline v. Pocono Medical Center*, 751 F. Supp. 2d 782, 786 (M.D. Pa. 2008) (observing that a newspaper has sufficient injury to "assert the First Amendment rights of the anonymous commentators").
[35] *Doe I*, 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 anonymous speech 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.").
[36] *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 131 (D.D.C. 2009) (citations omitted).
[37] *In re Baxter*, 01-00026-M, 2001 WL 34806203 at *11.

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 seeking identification of anonymous posters would be proper.[38]

First, the seeking party must "undertake efforts to notify the anonymous posters that they are the subject of a subpoena . . . 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 she alleges constitutes actionable speech. *Id*. Third, the seeking party must make a concrete showing as to each element of a prima facie case 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 and the necessity for the disclosure of the anonymous individual's identity. *Id.* at 142.

Since *Dendrite* was decided, courts have generally followed its formulation or have formulated similar tests and standards.[39] 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

[38] 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."

[39] *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).

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.[40]

C. There has been an insufficient showing that the two commenters in question are likely to be federal officials or that the speech in question is unlawful.

As noted above, the Magistrate Judge acknowledged that the First Amendment protects anonymous speech. However, the Magistrate Judge nonetheless ordered *in camera* production on the basis that the right of anonymous speech is not without limit, and that "[l]imitations on the right to anonymous speech apply even more stringently to federal prosecutors and other government agents and officials engaged in criminal investigation and prosecution." Rec. Doc. 47 at p. 5. The Magistrate Judge erred because the threshold showings – that "aircheck" and "jammer1954" are **likely** to be federal officials or that the speech in question is unlawful, in violation of Defendant's due process rights. – has not been made. Further, the Magistrate Judge finds Defendant's subpoena reasonable because she did not seek the identity of **all** of the commenters who posted about her or her organization, NOAH.[41]

These findings would have a disastrous effect and grant blanket authority to criminal defendants in this Court to pick and choose which among the tens, possibly hundreds, of thousands of Nola.com commenters they want to publicly expose, simply by invoking *Bowen* and the Horn Reports to support the suspicion that other commenters on Nola.com may be

[40] *Seescandy.com*, 185 F.R.D. at 579 (requiring seeking party to establish that it has a cause of action against anonymous person that can withstand a motion to dismiss); *Doe I*, 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)).

[41] Rec. Doc No. 47, pg. 10-11: "Some courts have identified the characteristics of subpoenas that constitute impermissible "fishing expedition" discovery devices in criminal cases . . . The subpoena issued by Jackson suffers from no such shortcomings. It did not request – nor would I permit – a request for the identity of every person who ever commented bout Stacey Jackson and/or NOAH on Nola.com. "

federal officials. By these standards, the conduct of Mr. Perricone and Ms. Mann has resulted in the forfeiture of every other Nola.com poster's right of anonymous speech. Certainly, the law does not support such a forfeiture of First Amendment rights. To the contrary, the law is clear that forfeiture of the right of anonymous speech is only proper where a specific showing has been made that the comments in question are unlawful.[42] Here, since Defendants' entire theory is premised on her assumption that the posters are federal officials, there must be some evidence that the specific posters here are in fact federal officials and that the speech on its face is unlawful, in violation of her due process rights. This showing has not been made.

1. The Magistrate Judge's findings are based upon general information, not those specific to "aircheck" and "jammer1954."

The Magistrate Judge improperly found that there is sufficient support for Defendant's request to investigate the identity of "aircheck" and "jammer1954" based on (1) Defendant's prior evidence of prosecutorial misconduct;[43] (2) the findings of this Court in three unrelated proceedings, *Bowen, United States v. Fazzio*, Crim. No. 11-157, Record Doc. Nos. 293-294, and *Heebe et al. v. United States*, Civil Action No. 10-3452; and (3) the Horn Reports, which the Magistrate Judge previously held were irrelevant to Defendant's due process defense. These reasons are wholly insufficient to overcome the First Amendment protections afforded to anonymous speakers and only support a generalized suspicion that there may be unknown online posters who are federal officials, not that these two specific posters are federal officials.

a. The Magistrate Judge should not have given weight to Defendant's prior evidence.

The Magistrate Judge improperly found that the "prior evidence" Defendant produced supported a finding that "aircheck" and "jammer1954" are federal officials. Defendant's "prior

[42] *Dendrite Int'l*, 342 N.J. Super. 134 at 151; *Cahill*, 884 A.2d at 456; *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d at 438, 456; *Doe I v. Individuals*, 561 F. Supp. 2d 249; *In Re Baxter*, 01-00026-M, 2001 WL 34806203.
[43] The Magistrate Judge cites to Rec. Doc. No. 17-2: Defendant's attachment of the August 8, 2008 Nola.com and the 55 comments below the article.

evidence" of prosecutorial misconduct consisted only of the August 8, 2008 Nola.com article, "N.O. council members get subpoenas for NOAH records," and the 55 comments posted under the article.[44] Defendant did not draw attention to the comments made by "aircheck" and "jammer1954." Rather, she was focused on the comment made by "campstblue," the former Assistant US Attorney Perricone, as proof of selective prosecution based upon Defendant's race. In particular, Defendant was interested in showing:

> Pervasive racial blogs and remarks, within the United States Attorney's Office, will show and bolster that this grand jury indictment was racially motivated. This is relevant, because the decision to prosecute may not be deliberately based upon an unjustifiable standard, such as race, religion or other arbitrary classification.[45]

Campstblue's post on August 9, 2008 at 5:48 p.m. under the August 8, 2008 Nola.com article was proffered by Defendant as an example:

> well, man – you know, man. I didn't know anything about dis stuff, man, you hear what I'm saying man. You know, man, like you always looking for something negative to write about, man. How's dis going to help the racovery, man, you hear what I'm saying, man. We just trying to make it back, man. Didn't you hear what I said man, dis is a chocolate city, man and we do things the chocolate way, -- man you hear what I'm saying, man?
> TRANSLATION: It's our turn to steal. We got the power. You can't do anything to us.
> God Bless the US Attorneys office!!!!!!!!!!

Defendant described the comment as "a racial attack against Ms. Jackson, an African American, and the black community,"[46] in support of her attempt to construct a due process defense of selective prosecution based upon race. The Magistrate Judge found Defendant's argument of selective prosecution unavailing because the law is clear that "a selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."[47]

[44] Rec. Doc. No. 17-2.
[45] Rec. Doc. No. 17-1, Pg. 18.
[46] Rec. Doc. No. 17-1, Pg. 2.
[47] Rec. Doc. No. 33, pg. 6.

Only after the Magistrate Judge, *sua sponte*, singled out "aircheck" and "jammer 1954" for what he called "most egregious" comments[48] did Defendant seek a subpoena to "out" their identities. Importantly, for the comments made by the two posters, Defendant no longer argues that they are racially charged or evidence of selective prosecution based upon race. Indeed, she could not, as the content of the comments clearly do not concern race:

"Aircheck" on August 8, 2008 at 10:26 p.m. commented:

> 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 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.

"Jammer1954" on August 9, 2008 at 9:48 p.m. commented:

> 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 every one, 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.
> RayRay 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."

Thus, the Magistrate Judge gave improper weight to Defendant's "prior evidence" because Defendant originally expressed no interest in "aircheck" and "jammer1954" and instead proffered a comment by "campstblue" as evidence of racial animus in prosecution.

b. The Magistrate Judge erroneously relied upon Bowen and the Horn Reports.

The Magistrate Judge also wrongly relied on *Bowen* and the Horn Reports, particularly given the Magistrate Judge's prior conclusion that the Horn Reports were **wholly unrelated** to Defendant's claim of pattern of prosecutorial misconduct and grand jury leaks. As the Magistrate Judge provided in his prior order and reasons on Defendant's motion to compel:

> [T]here is nothing in the Horn materials that supports or can be characterized as

[48] Rec. Doc. No. 33, pg. 4.

> material to Stacey Jackson's defense. The Horn materials contain nothing but denials by all who were interviewed concerning any grand jury leaks. They make no findings, conclusions or even intimations that any grand jury leak ever occurred. Apart from the misconduct of those already identified in the Bowen opinion, which related primarily to the Danziger Bridge incident and police matters addressed in that case, the Horn materials make no findings, conclusions or even intimations that any institutional pattern, practice, policy or concerted engagement in prosecutorial misconduct that might extend (and therefore be material) to Stacey Jackson's defenses existed, occurred or was systematic or approved by top management in the local United States Attorney's Office. Neither Stacey Jackson nor NOAH are even vaguely alluded to in the Horn materials.[49]

Furthermore, the Magistrate Judge found with regards to the relevancy of the Horn Reports to the unveiling of the identities of the two posters:

> Thus, **the Horn material contains nothing addressing whether "jammer1954" or "aircheck" was a federal law enforcement agent or prosecutor**.[50]

After drawing these conclusions, the Magistrate Judge did an about-face and found on the instant motion that the Horn Reports did support a finding that the two posters were federal officials.

While The Times-Picayune is not privy to the content of the Horn Reports, it can surmise that what the Magistrate Judge found persuasive in the reports[51] are the same lacking and generalized arguments raised by Defendant, including suggestions that Sal Perricone and Jan Mann used many different user names and do not recall all of them, that Jan Mann was certain that other attorneys in the United States Attorney's Office blogged, and that the full extent of Internet posts by the United States Attorney's Office is unknown.[52] These reasons do not address the realistic probability of whether "jammer1954" or "aircheck" are federal prosecutors, especially as further demonstrated by the fact that the comments appear almost indistinguishable from the other 53 comments in tone, content, and language.

[49] Rec. Doc. No. 33, Pg. 7.
[50] *Id*, Pg. 8-9 (emphasis added).
[51] The Magistrate Judge described as "the evidence, tone, and tenor of the Horn Reports." (Rec Doc. No. 47, Pg. 8).
[52] Rec. Doc. No. 39-1, Pg. 4.

c. The Magistrate Judge improperly considered the 11 other suspected US Attorney's office commenters in the Bowen investigations.

The Magistrate Judge further drew the unsupported inference that the existence of 11 additional suspected Nola.com commenters in the *Bowen*-initiated investigations lends support that these two posters are likely to be federal officials. [53] The Magistrate Judge originally noted in the prior order denying Defendant's motion to compel that "aircheck" and "jammer1954" were not among these 11 suspected commenters, implying that his suspicions as to the identity of the two commenters were unsupported by this fact.[54] But the Magistrate Judge now uses this information to bolster the reasons for Defendant to be granted her subpoena. Because "aircheck" and "jammer1954" are not among the 11 posters previously sought by the DOJ, the existence of the 11 suspected commenters is of no probative value on the issue presented here, namely whether Defendant has made a sufficient showing that these two posters are likely to be federal officials and that their comments were unlawful, in violation of her due process rights..

Additionally, the DOJ decided against proceeding with investigation of the 11 commenters because The Times-Picayune requested a showing that the postings were unlawful or that the commenters were federal officials, the same showing requested of Defendant in this case. Unable to provide sufficient evidence, the DOJ decided against further pursuit. Accordingly, the existence of the 11 suspected commenters should not be used to bolster a finding that "aircheck" and "jammer1954" are likely to be federal officials

d. Bowen, Fazzio, and Heebe should be given limited consideration.

Further, the Magistrate Judge's reliance on the three, very different cases – *Bowen*,

[53] Rec Doc. No. 47, Pg. 8:"The Horn Reports establish that Justice Department investigators had sufficient factual basis to send a subpoena to The Times-Picayune seeking the identities of 11 other Nola.com commenters, whom they suspected to be federal prosecutors and/or investigating agents; yet, the investigators simply "deferred" their request for this information in response to The Times-Picayune's resistance and made no subsequent attempt to enforce the subpoenas, despite the fact that one of the suspected commenters, an FBI agent calling himself "thewizard," later admitted his actual identity to investigators."
[54] Rec. Doc. No. 33, Pg. 8.

United States v. Fazzio, and *United States v. Heebe* – does not provide any support that the posters in this case are likely to be federal officials. On the outset, none of the cases mention "aircheck" and "jammer1954." The three cases do not concern Defendant or her agency, NOAH, and involve instances of known U.S. Attorney's Office conduct that is very different from what Defendant alleges in scale and scope. With respect to *Fazzio* and *Heebe*, regardless of the speculations as to why the case was dropped, there was no finding of prosecutorial misconduct. *Bowen*, the only case of the three where prosecutorial misconduct was formally found, resulted in the granting of a new trial, not the overturning of the original indictment. Further, as the Magistrate Judge has acknowledged, the examples of prosecutorial misconduct in *Bowen* were far more voluminous and egregious than even alleged in Defendant's case.[55] In sum, the findings of *Bowen*, *Fazzio*, and *Heebe* do not support the issuance of the subpoena.

2. The identifying characteristics of the two comments to which the Magistrate Judge points are unpersuasive.

The Magistrate Judge improperly found that two comments by "aircheck" and "jammer1954", on their face, indicate that they were likely made by federal officials. The identifying characteristics of the posts that the Magistrate Judge, *sua sponte*, found to be indicative of federal officials include: (1) that the comments made by "aircheck" and "jammer1954" were made in close proximity to those made by an alias of Mr. Perricone; (2) that the comments were made in the same kind of "cop jargon lingo" sometimes employed by Mr. Perricone; and (3) that "aircheck" showed the kind of persistent comments similar to those made by the Mr. Perricone, totaling about 500 comments, including 11 specifically targeting

[55] Rec. Doc. No. 47, Pg. 2.

Defendant and NOAH.[56] These findings are either plainly incorrect or are overly general and again fail to show that "aircheck" and "jammer1954" are likely to be federal officials.

a. Comments were not made in close succession and do not appear to interact with each other.

Contrary to the Magistrate Judge's findings, the comments are not made in close succession to each other and do not appear to interact with each other as the content of the comments made by "aircheck" and "jammer1954" are radically different from the comment made by "campstblue." The "aircheck" comment at issue was made on August 8, 2008 at 10:26 p.m., the 38th of 55 comments. Almost 19 hours and 14 comments later, "campstblue," Mr. Perricone's alias, made the 52nd comment on August 9, 2008 at 5:48 p.m. "Jammer1954" posted approximately 4 hours after "campstblue" and was the 54th post.

It does not appear that "aircheck," "campstblue," and "jammer1954" are specially interacting with each other,[57] as "aircheck" and "jammer1954's" comments are substantively different from "campstblue's" post. The content of "campstblue's" post criticizes the former Mayor Ray Nagin, mocks Mayor Nagin's highly defensive stance against public criticism, contains racial undertones, *e.g.* "chocolate city," and refers to the abuse of power of African American politicians in his administration in general. "Campstblue" also praises the role of the federal government, the U.S. Attorney's Office, and Jim Letten. Rather than responding to "aircheck's" post which contains no racial elements or mention of Mayor Nagin, it is more likely that "campstblue" is responding to one of several prior comments that criticized Mayor Nagin. For example:

> togozo Post #21 of 55, August 08, 2008 at 8:00 PM
> i can't 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

[56] Rec. Doc. No. 47, Pg. 9-10.
[57] It is almost typical for commenters on a discussion forum to address previous comments.

> an obituary dinner and cocktail on the taxpayer s dime, this should be real cheap "B" drama, ain't gonna miss a moment, another scum bag, bagged , LMFAO.

And:

> 4everatiger Post #6 of 55, August 8, 2008 at 6:27 PM.
> Go ahead Nagin – try that arrogant, indignant (how dare you question me, you are impeding the recovery) act on the feds and see how far it gets you!

Similarly, "aircheck" and "jammer1954's" comments, which reference "singing"[58] and "scum" and "ratting out" appear more likely to be in response to the following comments:

> possomhd, Post #11 of 55, August 8, 2008 at 7:00 PM
> 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. Just today I had a fella from Houston tell me he thinks N.O. is a scum hole. We're famous, folks! We have the best politicians money can buy.

And:

> leveeliar, Post #7 of 55, 6:34 PM August 8, 2008.
> Federal funds for relatives, insider dealings and not dispensing funds according to federal requirements means big problems. Who is going to rat out first.

In sum, the comments were not posted in close proximity, certainly not in time, the content of the comment made by Mr. Perricone as "campstblue" is substantively different from those made by "aircheck" and "jammer1954," and the comments do not appear to interact with each other.

b. Similar "cop jargon lingo" was used in the article and by previous commenters.

The characterizations of "aircheck" and "jammer1954" comments by the Magistrate Judge as "cop jargon lingo" and by Defendant as "prosecutorial verbiage akin to prosecutorial information" are highly conclusory. Similar language had already been employed in prior comments. *See, e.g.*, "mohuluu," who posted, "The grapevine still works folks, and I heard through it, the judge's fingers were so cramped from 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 funds according to federal requirements means big problems. Who

[58] "Singing" is a term to mean confessing.

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."

As demonstrated, the comments preceding those of "aircheck" and "jammer1954" appear to be indistinguishable from the other comments in tone, language, and content. Further, the legal "jargons" that they use – "subpoena," "ring leader," "rat out," "Car 54,"[59] "best deal for herself" – are part of common culture and consist of vernacular that is used among law enforcement and private citizens alike. These characteristics that the Magistrate Judge gives weight to are overly general, and are present in hundreds of other posts, and therefore fail to lend support to the speculation that "aircheck" and "jammer1954" are likely to be federal officials.

c. The number of comments made by a particular poster is unrelated to the possibility that a certain commenter is a federal official.

The Magistrate Judge also incorrectly found that the "persistent commenting" "aircheck" engaged in was a trait indicative of a federal official. There is simply no evidence to support the conclusion that federal officials are more likely to be frequent commenters than private citizens. It is not uncommon for a single poster to post hundreds, and even thousands, of comments over a period of time. In fact, at least two of the other commenters below the August 8, 2008 article have posted more comments than "aircheck"; one has posted over 1500 comments.

D. The Magistrate Judge improperly weighed Defendant's speculative Fifth Amendment rights against the First Amendment rights of the anonymous speakers which are clearly implicated.

The Magistrate Judge's finding to the effect that Fifth Amendment rights to due process

[59] *Car 54, Where are You?* Is an American sitcom from the 1960's about two New York police officers based in the fictional 53rd precinct in The Bronx.

and fair proceedings clearly trump First Amendment rights to free speech is unsupported by the law. The Supreme Court, in weighing First Amendment freedom of expression rights against a criminal defendant's Sixth Amendment right to a fair trial, has declined to favor one amendment over the other.[60] Here, the anonymous posters' First Amendment rights are imminently at stake, whereas Defendant's Fifth Amendment rights remain speculative.[61]

The Magistrate Judge also incorrectly focuses on the distinctions between civil and criminal cases insofar as he suggests the standard of review should be lessened because a criminal defendant has more at stake than a civil litigant.[62] In addressing a very similar question regarding the First Amendment right of reporter's privilege in a criminal case, the court in *United States v. Burke* found:

> 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. To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance. Nevertheless, the standard of review should remain the same. Indeed, the important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases.[63]

Again, courts in determining whether a subpoena is unreasonable or oppressive under Federal Rule of Criminal Procedure Rule 17 consider First Amendment rights and privileges.[64] In

---

[60] *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).The Court, faced with the question of whether prior restraint of the press was warranted, evaluated the extent to which the constitutional rights at stake would be served and concluded that breach of First Amendment freedom of speech rights was inappropriate where there were other means available to the trial court to ensure a fair trial. *Id*. at 569. While the First Amendment concerns here are different because they concern anonymous speech, not the right of the press, the same principles apply – there is no per se favoring of the Sixth Amendment rights to trial over First Amendment rights of speech.

[61] Rec. Doc. No. 47, Pg. 8. The Magistrate Judge finds that Defendant has a "colorable claim."

[62] Rec. Doc. No. 47, Pg. 7. The Magistrate Judge found, "[t]he interest that Stacey Jackson seeks to vindicate, her Due Process rights in the accusatory process of this serious criminal case, where her liberty interest in freedom itself is ultimately at stake, is a particularly more compelling interest than those asserted by the civil litigants in the cases cited above."

[63] 700 F.2d 70, 77 (2d Cir. 1983).

[64] *E.g.*, *Burke*, 700 F.2d at 77 (upholding a motion to quash under Rule 17(c)(2) on the basis of First Amendment reporter privilege); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992) (recognizing that First Amendment freedoms can be implicated by a grand jury subpoena under Rule 17(c) and trial courts); *Matter of Wood*, 430 F. Supp. 41, 45 (S.D.N.Y. 1977) (finding that when First Amendment rights are validly

conclusion, the Magistrate Judge improperly weighed the clearly implicated First Amendment rights of the two posters against the speculative Fifth Amendment rights of the Defendant.

E. Magistrate Judge's modification of the subpoena for an *in camera* review is not warranted.

The Magistrate Judge's order for an *in camera* review of the subpoenaed evidence is problematic for two reasons: (1) an *in camera* review would still violate of the two posters' First Amendment rights; and (2) it is very likely that an *in camera* review will not accomplish the Magistrate Judge's goal of identifying whether the posters are federal officials.

An order for production of private information for *in camera* review to the Magistrate Judge is just as offensive to the First Amendment rights of anonymous speakers than an order for production of documents to the general public. Courts have found that forced *in camera* reviews nonetheless inhibit First Amendment right and that the First Amendment privilege prohibits such review absent a preliminary showing of need by the defendant. *See New York Times Co. v. Jascalevich*, 439 U.S. 1331,1335 (1978) (Marshall, J., in chambers) (on reapplication for stay) ("Given the likelihood that forced disclosure even for *in camera* review will inhibit the reporter's and newspaper's exercise of First Amendment rights I believe that some threshold showing of materiality, relevance, and necessity should be required.").[65]

Here, the two anonymous posters have engaged in political speech, which is afforded the highest level of protection, to criticize a public figure, Defendant, about a highly publicized matter. The Magistrate Judge labeled their comments as "most egregious." But speech does not lose its First Amendment protection merely because some may find it "egregious." Indeed, it is

---

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 infringement).

[65] *See also Cuthbertson*, 630 F.2d at 148 ("We agree with CBS that an order for production of privileged materials for in camera review may not be based solely on the defendants' request for the material."); *U.S. v. Gambino*, 741 F. Supp. 412, 415 (S.D.N.Y. 1990) ("It is certain that some threshold showing of materiality, relevance, and necessity should be required before conducting an in camera review.") (internal punctuation excluded).

disagreeable speech that most needs the protections of the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Snyder v. Phelps*, 131 S. Ct. 1207, 1219, 179 L. Ed. 2d 172 (2011) ("[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment") (*quoting Boos v. Barry*, 485 U.S. 312, 322, (1988)).

As demonstrated above, what showing has been made by Defendant and considered by the Magistrate Judge, is wholly inadequate to overcome the rights of anonymous speech of "aircheck" and "jammer1954." Disclosure, even *in camera*, will violate these two posters' First Amendment rights.

Further, contrary to the Magistrate Judge's assumption, review of the information sought will not accomplish the goal of identifying whether the posters are federal officials. It is far more likely that further steps will have to be taken, including but not limited to, additional subpoenas to other Internet Service Providers such as Cox or Email Service Providers such as Yahoo or Google.[66] And in pursuing these additional inquiries, the rights of "aircheck" and "jammer1954" will further be violated by disclosure to the additional recipients of subpoenas that they are responsible for the comments at issue.

Accordingly, an *in camera* review does not offer the convenient solution that the Magistrate Judge suggests. A threshold showing and determination as to the likelihood that these two posters are federal officials or that the comments are unlawful in violation of

[66] In addition, the private information, which includes the Internet Protocol ("IP") addresses associated with every comment made, could come from public sources such as a coffee shop with open internet, or a neighborhood where a dozen or so IP addresses are randomly assigned and reassigned to any individual Internet user at any given time. Information sought may also consist of email addresses created through Email Service Providers such as Yahoo or Google that do not require identifying information and can be made anonymously.

Defendant's due process rights needs to be made now before any type of disclosure is proper. Thus, the Magistrate Judge's order of *in camera* review of the subpoenaed documents will not adequately address the First Amendment rights of the anonymous posters, nor will it offer the easy solution in identifying whether the individuals are federal officials or private citizens.

CONCLUSION

For the reasons set forth above, the Court should hold that the Magistrate Judge's order is clearly erroneous and contrary to the law and quash the Defendant's subpoena duces tecum.

Respectfully Submitted,

By: */s/Loretta G. Mince*

LORETTA G. MINCE #25796
REBECCA SHA #35317
FISHMAN HAYGOOD PHELPS
WALMSLEY WILLIS & SWANSON, L.L.P
201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170
Telephone: (504) 586-5252
Facsimile: (504) 586-5250
Attorneys for The Times-Picayune, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 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

673567v.1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

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

NOTICE OF HEARING

PLEASE TAKE NOTICE that the motion for review of the magistrate judge's order filed by The Times-Picayune, L.L.C. will be submitted to the Court on Thursday, the 20th day of March, 2014 at 2:00 o'clock PM before the Honorable Judge Mary Ann Vial Lemmon at the U.S. Courthouse, 500 Poydras Street, New Orleans, LA 70130.

Respectfully Submitted,

By: */s/Loretta G. Mince*

LORETTA G. MINCE #25796
REBECCA SHA #35317
FISHMAN HAYGOOD PHELPS
WALMSLEY WILLIS & SWANSON, L.L.P
201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170
Telephone: (504) 586-5252
Facsimile: (504) 586-5250
Attorneys for The Times-Picayune, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 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