PUBLIC CITIZEN LITIGATION GROUP
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BY TELECOPIER: (202) 478-0371

April 16, 2008

Montgomery Blair Sibley, Esquire
Suite 300
1629 K Street, NW
Washington, D.C. 20006

Dear Mr. Sibley:

On behalf of Democraticunderground.com and the Doe defendant "mzmolly," and pursuant to Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure, I write to explain why we object to your subpoena seeking documents that would identify defendant mzmolly for the purpose of suing her for criticizing Larry Sinclair.[1] Sinclair, by his efforts to publicize certain sensational allegations about presidential candidate Barack Obama, such as on his various blogs and through a story that he gave to a tabloid magazine, the *Globe*, has unquestionably made himself a voluntary public figure, and criticism of his allegations are directed to an issue of public concern. However, you have established no reason to believe that your client can overcome the First Amendment right to speak anonymously under the well-established test drawn from cases such as *Krinsky v. Doe 6*, 159 Cal. App.4th 1154, 72 Cal.Rptr.3d 231 (Cal. App. 6 Dist. 2008), *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *In re 2TheMart.com, Inc. Securities Litigation*, 140 F. Supp.2d 1088 (W.D. Wash. 2001); *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); and *Melvin v. Doe*, 49 PaD&C4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003).

Moreover, it is apparent from the face of your complaint that the Court lacks jurisdiction in this case. First, your complaint asserts only state law claims against three unknown defendants, who are identified as John Doe. You say in your complaint that you expect to be able to establish through discovery that each of the three defendants each lives in a state other than Minnesota, and consequently you assert diversity jurisdiction. However, it is your burden to affirmatively plead the

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[1]The female gender is used generically, pursuant to our usual practice in Doe cases. It does not connote the actual gender of mzmolly.

citizenship of each of the defendants, in order to show the basis for complete diversity, and it is well-established, in this district as elsewhere, that a diversity claim cannot be brought against Doe defendants. *Menzies v. Doe*, 194 F.3d 174 (D.C. Cir 1999) (mem.); *Howell by Goerdt v. Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1997); *McMann v. Doe*, 460 F.Supp.2d 259, 264 (D.Mass.2006); *Meng v. Schwartz*, 305 F. Supp.2d 49 (D.D.C. 2004).

Second, given the fact that your client lives in Minnesota, and that you do not know where the three Doe defendants live, your complaint shows no basis for believing that the district court has personal jurisdiction of the defendants. It is well-established that the mere fact that information posted for passive review on a web site can be downloaded in Washington, DC, is not a sufficient basis for suing the person who posted that information in Washington. *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 511-512 (D. C. Cir. 2002). Indeed, so far as I can tell, the only reason why this case has been filed in federal court here in Washington is that you yourself live here.

Moreover, your complaint is not verified, and not only have you not sufficiently pleaded the elements of a defamation claim under the common law and the First Amendment, but I have no reason to believe that you can meet the standard for overcoming the First Amendment right to speak anonymously. For example, there is no reason to believe that your client has suffered any damages, as required for a libel plaintiff under Minnesota law (which presumably applies under District of Columbia choice of law rules). *E.g.*, *McClure v. American Family Mut. Ins. Co.*, 29 F. Supp.2d 1046, 1056, 1057 (D. Minn.1998); *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977). According to the story that your client gave the *Globe,* your client is a convicted felon whose past includes credit card fraud, drug-dealing and smuggling; he also apparently claims that he provided sex in return for drugs, and so it is hard to believe that anything mzmolly may have said about your client could have further injured his reputation. Nor is there any evidence that what mzmolly said about Sinclair is false, or was stated with actual malice.

In short, your client has neither pleaded any valid defamation claim, nor given any reason to believe he can present evidence showing a valid claim, and even if he did, he brought it in the wrong court. I urge you to withdraw the subpoena and dismiss the case, to avoid the need for motions practice to protect our clients' rights and compensate them for the expense of the motion practice.

Sincerely yours,

Paul Alan Levy