

1 Mark Goldowitz  
CALIFORNIA ANTI-SLAPP PROJECT  
2 2903 Sacramento Street  
Berkeley, CA 94702  
3 Telephone: (510) 486-9123 x301  
Facsimile: (510) 486-9708  
4

Cindy A. Cohn, Esq. (State Bar No. 145997)  
5 ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell Street  
6 San Francisco, CA 94110  
Telephone: (415) 436-9333 x108  
7 Facsimile: (415) 436-9993

8 Special Counsel for the Defendant  
Sued as JOHN DOE  
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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF SANTA CLARA  
12 (UNLIMITED CIVIL JURISDICTION)

13 FIRST CASH FINANCIAL SERVICES, INC., ) No. CV002135  
14 Plaintiff, )  
15 vs. ) **DEFENDANT'S REPLY BRIEF IN**  
16 JOHN DOE A/K/A KNOWFCFS, ) **SUPPORT OF HIS MOTION TO FILE**  
17 Defendant. ) **HIS SIGNATURE UNDER SEAL TO**  
18 ) **PRESERVE HIS ANONYMITY**  
19 ) Date: November 20, 2003  
20 ) Time: 8:30 a.m.  
21 ) Dept: 2  
22 ) Complaint filed 8-19-03  
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21 **I. INTRODUCTION**

22 Pursuant to California Rule of Court 243.1, Defendant John Doe seeks an Order Sealing the  
23 signature and other identifying information in his<sup>1</sup> Declaration while the very question of whether  
24 his anonymity should be protected is considered by this court. Plaintiff First Cash Financial  
25 Services, Incorporated's ("First Cash") opposition to this straightforward request makes an  
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27 <sup>1</sup> Since Plaintiff has sued Defendant as "John Doe," this brief should refer to Defendant in  
28 masculine gender. The use of the masculine pronoun is for ease of reading, however, and should  
not be interpreted as revealing Doe's actual gender.

1 outrageous proposition: that a Defendant who is seeking to protect his anonymity cannot present  
2 facts known by his own personal knowledge to support his position without breaching his  
3 anonymity. The law does not put parties into such Catch-22 situations. The question of John Doe’s  
4 anonymity should be decided on the merits by this Court in the pending Special Motion to Strike; it  
5 should not be compromised by Doe’s need to present evidence to this court.

6 The Motion to file John Doe’s signature under seal should be granted.

7 **II. STATEMENT OF FACTS**

8 Plaintiff First Cash, a Texas-based chain of pawn shops and check cashing services, has  
9 sued Defendant John Doe in Texas alleging a single cause of action for breach of contract.  
10 Plaintiff has alleged that Doe is a current or former employee who signed a confidentiality  
11 agreement. It bases this claim on two thin assertions, neither of which is supported by any  
12 evidence: first, that an internet post by Doe revealed the “frequency of the preparation of board  
13 minutes” and that only employees would know how often board minutes are created, and second,  
14 that the unspecified “general context” of other Internet postings indicated that Doe was an  
15 employee who had signed the confidentiality agreement. Opposition to Special Motion to Strike at  
16 7:6-11.

17 Based upon the Texas Petition, Plaintiffs has invoked the power of *this court* to require  
18 Yahoo to provide it with information that would remove the Defendant’s anonymity. Thus the  
19 question of whether the Constitutionally-protected anonymity of John Doe should be preserved or  
20 removed based upon the allegations made by the Plaintiff is squarely before *this court*, even while  
21 the ultimate question of liability may be later decided in Texas.<sup>2</sup>

22 In support of his attempt to protect his anonymity, Doe wishes to present a simple

23 \_\_\_\_\_  
24 <sup>2</sup> Defendants note that in many of these cases, the underlying lawsuit is not pursued once the  
25 question of whether the anonymity of the Defendant may be breached is answered. “The primary  
26 purpose of many of these suits is not to pursue a defamation cause of action, however, but to reveal  
27 the identity of the poster and quiet criticism.” Joshua R. Furman, *Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 *Seattle U. L. Rev.* 213, 217 (2001). Defendants’ co-counsel, the Electronic Frontier Foundation, has handled several cases of this ilk. See <http://www.eff.org/Privacy/Anonymity/> and the case information therein about cases entitled: *Hritz v. Doe*; *Medinex v. Awe2bad4mdnx, et. al.*; *RuralMetro v. Doe*; *Southern Union v. SW Gas*.

1 declaration asserting that he is not employed by First Cash and did not sign the confidentiality  
2 agreement. *See* Doe Decl. ¶¶3-4. Since First Cash has also indicated that it may also file a libel or  
3 business disparagement claim, he also wishes to assert that he is a shareholder and had no interest  
4 in lowering the stock price of First Cash stock. Doe Decl. ¶5. In order to preserve his anonymity,  
5 he seeks to provide his signature and identity under seal.

### 6 III. ARGUMENT

#### 7 A. Doe Has Satisfied the Requirements of California Rule of Court 243.1

8 California Rule of Court 243.1 provides for a five part test for sealing court records that has  
9 plainly been met here:

10 1. An overriding interest to overcome the right of public access. Here, Doe has presented a  
11 Constitutionally supported interest in seeking to provide his signature under seal: his First  
12 Amendment right to engage in anonymous speech.

13 First Cash responds by claiming that Doe’s right to anonymous speech is incorrectly  
14 characterized as a speech right rather than a privacy right and that no caselaw supports the right of  
15 anonymous speech online. Both of these are incorrect. It is well-established that the First  
16 Amendment protects the right to anonymous speech. *See McIntyre v. Ohio Elections Comm’n*  
17 (1995) 514 U.S. 334, 342 (“anonymous pamphleteering is not a pernicious, fraudulent practice, but  
18 an honorable tradition of advocacy and dissent”). This right to anonymity is more than just one  
19 form of protected speech; it is part of “our national heritage and tradition.” *Watchtower Bible &*  
20 *Tract Soc’y of New York, Inc. v. Village of Stratton* (2002) 536 U.S. 150, 166.

21 This caselaw has regularly been applied to internet speech, including anonymous speech on  
22 internet message boards.<sup>3</sup> In *Columbia Insurance Company v. Seescandy.com* (N.D. Cal. 1999) 185  
23 F.R.D. 573, a subpoena sought the identity of the defendant, an alleged trademark infringer. The  
24 court ruled that the party seeking the subpoena needed to satisfy certain standards of proof at a pre-

25 <sup>3</sup> As one commentator has pointed out, “[n]ondisclosure of identity is thus critical for websites,  
26 message boards and chat areas devoted to many topics, including corporate and governmental  
27 whistleblowing; labor organizing; dissident movements in repressive countries; gay and lesbian  
28 issues; and resources dealing with addiction, alcoholism, diseases and spousal abuse.” David L.  
Sobel, The Process that ‘John Doe’ is Due: Addressing the Legal Challenge to Internet  
Anonymity, 5 Va. J.L. & Tech. 3 (2000).

1 disclosure hearing, explaining that:

2 This ability to speak one’s mind without the burden of the other party knowing all  
3 the facts about one’s identity can foster open communication and robust debate.  
4 Furthermore, it permits persons to obtain information relevant to a sensitive or  
5 intimate condition without fear of embarrassment. People who have committed no  
6 wrong should be able to participate online without fear that someone who wishes to  
harass or embarrass them can file a frivolous lawsuit and thereby gain the power of  
the court’s order to discover their identity. Thus some limiting principles should  
apply to the determination of whether discovery to uncover the identity of a  
defendant is warranted.

7 *Id.* at 578. In *Doe v. 2theMart.com* (W.D. Wash. 2001) 140 F. Supp. 2d 1088, a case involving an  
8 Internet message board, the court similarly recognized the need to protect the right to engage in  
9 anonymous online speech before a subpoena could be issued: “If Internet users could be stripped  
10 of . . . anonymity by a civil subpoena enforced under liberal rules of civil discovery, this would  
11 have a significant chilling effect on Internet communications and thus on basic First Amendment  
12 Rights.” *Id.* at 1093. *See also Dendrite v. Doe* (N.J. App. 2001) 775 A.2d 756, 771 (message  
13 board case holding that strict procedural safeguards must be imposed “as a means of ensuring that  
14 plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in  
15 order to harass, intimidate or silence critics in the public forum opportunities presented by the  
16 Internet”). Thus, Doe’s First Amendment right to anonymous speech is an “overriding interest” for  
17 purposes of Rule 243.1(d)(1).

18 First Cash claims that it has a First Amendment interest in access to Doe’s identity because  
19 Doe is giving evidence. Yet the Supreme Court long ago held that a Court has broad discretion to  
20 protect litigant privacy through protective orders and that “a litigant has no First Amendment right  
21 of access to information made available only for purposes of trying his suit.” *Seattle Times v.*  
22 *Rinehardt* (1984) 467 U.S. 20, 34 (no First Amendment violation in protective order preventing  
23 dissemination of information obtained during discovery). The Court continued, referring to the  
24 federal rules of civil procedure:

25 Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is  
26 necessary for the trial court to have the authority to issue protective orders conferred  
27 by Rule 26(c). It is clear from experience that pretrial discovery by depositions and  
28 interrogatories has a significant potential for abuse. This abuse is not limited  
to matters of delay and expense; discovery also may seriously implicate privacy  
interests of litigants and third parties.

1 *Id.* at 34-35. This Court has broad discretion to issue orders to protect privacy, anonymity and  
2 other interests during discovery. There is no First Amendment violation in an order that merely  
3 grants Doe the right to file his signature on a factual declaration under seal.

4 2. The overriding interest supports sealing the records. Doe’s interest in remaining  
5 anonymous supports protecting Doe’s identity. Without this protection, Doe’s identity will be  
6 revealed not on the merits of his claim of anonymity, but as a side effect of his need to provide  
7 evidence in support of his anonymity. Again, the law does not require a litigant to suffer such a  
8 “Catch-22” fate.

9 3. A substantial probability exists that the overriding interest will be prejudiced if the  
10 record is not sealed. Doe more than meets this burden. His interest in anonymity will not only be  
11 prejudiced, it will be completely lost if he is unable to file his signature under seal. Alternately, if  
12 Doe is forced to forego filing his Declaration, he will be unable to present the key evidence he has  
13 in support of his defense to First Cash’s sole claim of breach of contract – that he is not an  
14 employee and has never entered into a confidentiality agreement with First Cash. Doe Decl. ¶¶3-4.

15 4. The proposed sealing is narrowly tailored. Doe seeks only to protect his identity and  
16 that is the only part of his declaration that he seeks to file under seal.

17 5. No less restrictive means exists to achieve these ends. Finally, Doe seeks only to protect  
18 his identity. No less restrictive means exist to protect his identity than filing his signature and  
19 identifying information under seal. First Cash responds by asserting, incredibly, that Doe should  
20 not be allowed to file a declaration with evidence to support his request to protect his anonymity,  
21 asserting that Doe’s evidence “should be properly dealt with in the Texas Court.” Opposition to  
22 Motion to File Under Seal 6:12-22. But this elides the central issue before *this court* – the question  
23 of whether the deposition subpoena issued by the clerk of this court should be stricken. First Cash  
24 is plainly seeking Doe’s identity from this court, not the Texas court, and Doe’s Declaration  
25 supports his request to preserve his anonymity. It should be allowed.<sup>4</sup>

26 \_\_\_\_\_  
27 <sup>4</sup> Curiously, most of the rest of First Cash’s Opposition rests upon the assertion that Doe is failing  
28 to acknowledge that “true issue” in this case, the fact that his actions constitute defamation under  
Texas law. Opposition at 6:23-24. The assertion is strange, since First Cash’s Complaint does not  
allege defamation; it alleges only breach of contract. Nonetheless, Doe’s Declaration and Reply

1           **B. First Cash's Additional Arguments Against Protecting Doe's Identity Fail**

2           First Cash claims that Doe's Declaration will not satisfy California Evidence code and that  
3 it will be more prejudicial than probative. Neither is true. First Cash complains that it will have no  
4 right to cross-examination (Opp. at 7:5-6), but motions are decided on declarations and not live  
5 testimony. Rule of Court 323(a). While a declarant's identity is normally part of a declaration,  
6 courts are familiar with circumstances where this is not the case. In cases involving personal or  
7 danger or embarrassment to a declarant, for example, the identity of the party testifying is routinely  
8 protected. *See e.g. Roman v. Superior Court* (November 5, 2003) -- Cal.Rptr.3d ----, 2003 WL  
9 22504505, (Cal.App. 2 Dist.) (protected identities of two witnesses, victim of alleged child abuse  
10 and his mother). Here, good cause has been shown, since the constitutionally-protected anonymity  
11 of the Defendant is the central issue before this court.

12           First Cash also claims that a declaration signed under seal fails the requirements of Code of  
13 Civil Procedure §2015.5, but this is also nonsense. Doe will sign the declaration, under penalty of  
14 perjury and in accordance with all of the rules applicable under California law. The only difference  
15 is that First Cash will not be able to see Doe's actual name. The court, of course, will.

16           Finally, because the Doe Declaration text was not filed until the Reply brief in this case,  
17 First Cash claims that Doe's Declaration is late filed and therefore violates its due process rights.  
18 But, the declaration supports the Reply papers, not the opening brief. Doe's declaration was  
19 occasioned by First Cash's evidence in opposition, namely the alleged confidentiality agreement.  
20 This argument also fails to recognize the fundamental two-step process of a Motion to Strike under  
21 C.C.P. 425.16. *Nevelier v. Sletten* (2003) 106 Cal.App.4th 763, 775. Under this process, upon a  
22 prima facie showing that the statute applies, the burden shifts to the plaintiff to provide evidentiary  
23 support for its claim. Response to evidence presented in Opposition papers is properly introduced  
24 upon reply. *See e.g.*, Reply to Special Motion to Strike at footnote 6.

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papers demonstrate that First Cash would not meet its burden under the California SLAPP statute  
or Texas law for a hypothetical defamation or trade disparagement claim either. Doe's assertion  
that he is a shareholder and has no interest in reducing the share value of First Cash supports his  
defense on both claims. Doe Decl. ¶5.

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**IV. CONCLUSION**

Based upon the foregoing, Doe respectfully requests that the Court grant his motion to file his signature and other identifying information in his Declaration under seal.

DATED: November 14, 2003

By   
Cindy A. Cohn, Esq. (SBN 145997)  
ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell Street  
San Francisco, CA 94110  
Telephone: (415) 436-9333 x108  
Facsimile: (415) 436-9993

Special Counsel for the Defendant  
Sued as JOHN DOE