Cause No .0311571

AFFILIATED COMPUTER SERVICES, INC., *Plaintiff*,	§ § §	IN THE DISTRICT COURT
v.	§ §	95TH JUDICIAL DISTRICT
JOHN DOES NUMBERS 1-13, *Defendants*.	§ §	OF DALLAS COUNTY, TEXAS

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO QUASH
PLAINTIFF'S SUBPOENA TO YAHOO! INC.

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Defendant Doe No. 11, identified in the Petition by the pseudonym "offshores7," (herinafter, "Offshores7") files this motion to quash the subpoena issued by plaintiff Affiliated Computer Services, Inc. ("ACS") to third-party Yahoo! Inc. ("Yahoo") that seeks to require Yahoo to disclose information about Offshores7's identity (the "Subpoena"). Offshores7, who is not a resident of Texas and has no contacts with Texas, files this motion subject to a Special Appearance in this matter, filed contemporaneously with this motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff ACS has filed a Petition charging thirteen people with "business disparagement" for posting anonymous comments critical of the company on a Yahoo Internet message board. In an attempt to learn the identity of these speakers, ACS simultaneously issued a subpoena to Yahoo seeking disclosure of their identities.

Although the Petition does not identify, quote, attach or even refer to any message by Offshores7 (or any of the other defendants) alleged to be disparaging, it suggests the disparagement occurred on a Yahoo message board. Offshores7 has posted only one message on the Yahoo message board in question. Offshores7's entire message reads:

> I've been with ACS 7 yrs+. It's been OK, but they have gotten much worse at treating people like people. Their policies are anti-family and pro $$$. Their health insurance is 2nd rate. Use your vacation the year you accrue it, or you lose it. You won't get paid for unused leave if you leave the company. Don't like it? Tough. You're just a number to them. I have real issues with this company and am looking forward to being with LockHeed, I hope.

Under no conceivable legal theory, let alone the sole claim in ACS's Petition – for "business disparagement" – can Offshores7 be held liable for this message. Offshores7's comments are the sort of off-the-cuff, harmless remarks made everyday by individuals across the country – and protected by the First Amendment. If this ordinary speech were sufficient to give rise to liability, all critical speech – which has been a hallmark of our country from its inception – would cease to exist. The First Amendment – and common sense – forbids such a result.

ACS's claim against Offshores7 is frivolous, and will eventually be dismissed. Among other things, ACS does not allege that it has suffered the "special damages" necessary to bring a

business disparagement claim or that Offshores7 has made any false statements of fact, as opposed to non-actionable statements of opinion. ACS's attempt to treat the thirteen speakers as one speaker is also defective as a matter of law because Offshores7 is not liable for any message – even if false and disparaging – made by another speaker.

In addition to the fact that ACS has not alleged a facially actionable claim against Offshores7, this Court has no personal jurisdiction over Offshores7, a non-Texas resident with no minimum contacts with Texas. For that reason, Offshores7 has simultaneously filed a Special Appearance.

The potential impact of this case on Offshores7 – and on other Internet speakers – is far from frivolous. Based on its purely conclusory and facially deficient Petition, ACS has attempted to utilize the power of this Court to compel the disclosure of Offshores7's identity by issuing a subpoena to Yahoo. The right to engage in anonymous speech, especially critical anonymous speech, is a historically valued and constitutionally protected right. A subpoena seeking to strip an anonymous speaker of this vital right should not, accordingly, be permitted unless the subpoenaing party first demonstrates – before disclosure is compelled – that it has a compelling and narrowly tailored interest that outweighs the right to anonymous speech. Because, as detailed below, ACS has not come close to making this showing, the subpoena should be quashed. Moreover, even if the subpoena did not violate Offshores7's constitutional rights, it would still need to be quashed because this Court has no jurisdiction over Offshores7 and the subpoena is procedurally deficient.

FACTUAL BACKGROUND

The rise of the Internet has created an opportunity for dialogue and expression on a scale and in a manner previously unimaginable. Now, alongside the traditional print and broadcasting media – largely controlled by corporations – individuals can utilize the Internet to convey their opinions, thoughts or ideas whenever they want, and to anyone who cares to read them. As the Supreme Court has recognized, the Internet is a new and powerful "vast democratic fora," *Reno v. ACLU*, 521 U.S. 844, 867 (1997), that allows anyone to become a "pamphleteer" or "a town

crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U.S. at 870. The press, in other words, is no longer free only to those who can afford one.

Internet message boards, such as the Yahoo message board at issue here, are a vivid example of this phenomenon. To organize these Internet town criers and pamphleteers so that they can find each other, Yahoo and many other websites have created "message boards" or "chat rooms" in which people can express themselves and their opinions on specified topics. These message boards are essentially electronic bulletin boards or water-coolers where individuals freely discuss issues related to the topic of the message board by making (or "posting") comments for others to read and respond to. Yahoo maintains a series of message boards focusing on major companies, including a message board for every publicly-traded company, including ACS. Anyone who signs up and acquires a user name is permitted to post messages to these boards. Although nothing prevents individuals from using their real names, most individuals who post messages on these boards generally do so under pseudonyms – similar to the old system of truck drivers using "handles" when speaking on their CBs. Those who choose one of these colorful monikers do so for a number of reasons, including the fact that that this privacy encourages the uninhibited exchange of ideas and opinions. At least in part because the posters are anonymous, most, if not all, messages are taken with a grain of salt. *See, e.g.,* Jonathan Zittrain, *The Rise and Fall of Sysopdom*, 10 Harv. J.L. & Tech. 495, 508 (Summer 1997) ("A comment encountered without attribution on the Net is simply not taken as seriously as, and if false therefore does less damage than, the lead of a front-page story in the *New York Times* or even the *National Enquirer* – even if the Net lie enjoys greater circulation than the *Times*'s and the *Enquirer*'s put together.").

An important aspect of message boards that distinguishes them from almost any other form of published expression is that a person or corporation who disagrees with something that is said on a message board can, for any reason – including the belief that a statement contains false or misleading statements – immediately respond to those statements at little or no cost. Importantly, that response will have the same prominence as the offending message. Indeed,

because many people regularly revisit the same message boards, the response is likely to be seen by many of the people who saw the original criticism.[1] Because of this unique feature of the Internet, and message boards in particular,[2] the harm, if any, from even clearly false statements in an original post will be avoided. Thus, in this case, if ACS thought there were errors in the posting by Offshores7, ACS could have posted an immediate reply to correct those alleged errors.

One of Yahoo's message boards pertains to plaintiff ACS. The opening page of the ACS message board explains the ground rules:

> This is the Yahoo! Message Board about [ACS], where you can discuss the future prospects of the company and share information about it with others. This board is not connected in any way with the company, and any messages are solely the opinion and the responsibility of the poster.

See http://finance.messages.yahoo.com/bbs?.mm=FN&action=m&board=4687217&tid=acs&sid=4687217&mid=1.

Each message posting which follows is accompanied by a similar warning that all messages should be treated as the opinions of the poster, and taken with a grain of salt:

> Reminder: This board is not connected with the company. These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose.

See, e.g., http://finance.messages.yahoo.com/bbs?.mm=FN&action=m&board=4687217&tid=acs&sid=4687217&mid=2.

Many members of the public use the Yahoo message board as a source of information about ACS. To date, almost 4,500 messages have been posted on the ACS board, covering an enormous variety of topics and posters. Investors and members of the public discuss the latest news about the company, what new businesses it may develop, the strengths and weaknesses of the company's operations, and what its managers and employees might do better. Many of the highly opinionated messages praise ACS, some criticize it, and some are neutral.

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[1] Thus, had the Internet existed when James Madison published The Federalist Papers anonymously, his critics could have responded anonymously and reached a similar audience.

[2] For this reason, a message board is unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Offshores7 is among the many members of the public that have visited the Yahoo message board for ACS. Unlike many of the other participants, Offshores7 is not a regular contributor. In fact, Offshores7 has only posted one message to the board. That message, while perhaps critical of ACS, can hardly be said to be unlawful – under any legal theory. The entire message, as it appeared on the message board, is:

Re: ACS Aquistions 09/17/03 09:31 am
by: offshores7 Msg: 4239 of 4430
Long-Term Sentiment: **Hold**

I've been with ACS 7 yrs+. It's been OK, but they have gotten much worse at treating people like people. Their policies are anti-family and pro $$$. Their health insurance is 2nd rate. Use your vacation the year you accrue it, or you lose it. You won't get paid for unused leave if you leave the company. Don't like it? Tough. You're just a number to them. I have real issues with this company and am looking forward to being with LockHeed, I hope.

Posted as a reply to: Msg 4232 by lessjob_2003

Aside from the fact that there are no false factual statements in this message and that the other statements are purely non-actionable statements of opinion, one other notable aspect of this message is that, unlike some of the other statements that appear to be the purported basis for ACS's Petition and Subpoena, Offshores7's single message does not discuss any ACS executives, any alleged corporate malfeasance, or any existing or potential governmental investigations. In fact, as the caption to the post indicates, Offshores7's stock recommendation is to "Hold," not sell, ACS's stock.

PROCEDURAL BACKGROUND

ACS filed its Petition against thirteen Doe defendants, including Offshores7, on October 29, 2003. That very same day, ACS issued a subpoena to Yahoo requiring Yahoo to produce, among other things, information and documents relating to the name, address, telephone number and IP address of thirteen individuals alleged to be authors of posts on the Yahoo message board

for ACS. A copy of this subpoena is attached as Exhibit A to Offshores7's Motion to Quash, filed with the Court on December 5, 2003.

In its bare-boned Petition, ACS summarily asserts that the thirteen Doe Defendants "'post' defamatory and/or misleading statements" about ACS. Petition, ¶ 6. ACS's Petition does not identify, quote, attach or even refer to any message post to support its claims, let alone a statement or post by Offshores7. Nor does it identify even generally what statements are false, defamatory or misleading. Similarly, although ACS alleges that the "messages consist of rumors regarding alleged governmental investigations as to executive personnel at ACS" and "consist of allegations of breach of fiduciary duty on the part of certain executives," (Petition, ¶ 7), there is no allegation – nor could there be – that Offshores7 has made any such statement. Nor is there any allegation that the allegedly defamatory statements are statements of fact, rather than non-actionable statements of opinion. Finally, although ACS summarily asserts that it has "suffered damages" from all of the "Defendants' actions," (Petitition, ¶ 11), it does not allege that it has suffered the "special damages" – i.e., specific pecuniary damage – necessary to state a claim for business disparagement or that Offshores7's statements played a substantial part in causing such special damages. Indeed, even with respect to the general "damages" allegedly suffered, ACS fails to specify or even generally identify the nature of these claimed damages or explain how they were supposedly caused by anything Offshores7 did.

Based on this conclusory and fact-free petition, ACS issued a subpoena to Yahoo – issued, not coincidentally, on the very same day – claiming the right to force Yahoo to reveal identifying information about the Doe defendants, including Offshores7, and other information and communications Yahoo may have about or with those individuals. *See* Subpoena, ¶¶ 1-5. The subpoena provides no more details about Offshores7's alleged wrongdoing or disparaging statements than the Petition. Although it lists Offshores7, under the screen name "offshores7," as one of "the authors of the posts ('Posting Parties') on the Yahoo! Finance message board titled Yahoo! Message Boards: ACS described further on the chart attached hereto as Exhibit '1,'"

(Subpoena, ¶ 1), the subpoena and its Exhibit 1 do not identify or contain any reference to any allegedly unlawful message or posting by Offshores7. *See* Subpoena, Exhibit 1.

Even though no message posted by Offshores7 is identified or referred to in the subpoena, because Offshores7's name appears in the Subpoena, Yahoo subsequently informed Offshores7 by e-mail of the subpoena and stated that it will disclose Offshores7's identity and other personal information unless Offshores7 files a motion to quash the subpoena. Offshores7 now brings this motion to quash the subpoena to Yahoo to protect his[3] First Amendment rights and to ensure that his identifying information is not turned over absent the constitutionally required showing to justify such disclosure.

STATEMENT OF ISSUES

The issue before the Court is whether ACS should be permitted to use the procedures of this Court to force the disclosure of the constitutionally protected identity of an individual who spoke anonymously on an Internet message board, where ACS has made no showing that the anonymous speaker acted unlawfully or in any way violated ACS's rights, where the Court has no jurisdiction over the speaker, and where the subpoena is procedurally deficient.

ARGUMENT

I. BECAUSE THE COURT HAS NO PERSONAL JURISDICTION OVER OFFSHORES7, THE SUBPOENA SHOULD BE QUASHED.

As detailed in Offshores7's Special Appearance, this Court does not have personal jurisdiction over Offshores7, a non-resident who has no contacts with Texas whatsoever. *See* Offshores7's Special Appearance, filed with the Court on December 5, 2003. As a result, ACS's claim against Offshores7 must be dismissed. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). Because there is no jurisdictional foundation in Texas for ACS's claim against Offshores7, the Subpoena should be quashed with respect to Offshores7. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (courts need to carefully supervise discovery because,

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[3] Offshores7 uses the male gender in this motion solely for purposes of simplification; no assumption about Offshores7's gender should be made from this usage.

"There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.").[4]

II. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT IS PROCEDURALLY DEFICIENT.

The subpoena should also be quashed for an equally simple reason: the subpoena is procedurally deficient. Texas Rule of Civil Procedure 176.1 clearly states that a subpoena must contain, among other things, the cause number of the underlying action. Absent identification of the cause number, the subpoena is invalid. Here, the subpoena issued to Yahoo does not contain the correct cause number. *See* Subpoena, p. 1 (listing the incorrect cause number, "03-311571"). For this reason alone, the subpoena should be quashed, and ACS should be forced to reissue a proper subpoena with the correct cause number. *See Hough v. Johnson*, 456 S.W.2d 775, 777-78 (Tex. App.-Austin 1970) (reversing trial court's order issuing sanctions against party for failing to comply with subpoena because the subpoena, which did not comply with all of the statutory prerequisites for issuance and service of a subpoena, was invalid).

The subpoena is also deficient because Exhibit 1 to the Subpoena – which details the date, time, message number and user name of the allegedly unlawful statements about which ACS seeks information from Yahoo – does not include any reference to any allegedly unlawful statement made by Offshores7. Each of the categories of "Documents Requested" in the Subpoena expressly seeks information concerning the "posts described in the chart attached hereto as Exhibit '1.'" *See* Subpoena, ¶¶ 1-5. Because no post by Offshores7 is described in Exhibit 1, the Subpoena does not require Yahoo to provide any information regarding Offshores7. Nevertheless, because Offshores7's name appears in the Subpoena (*see* ¶ 1),

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[4] The purported basis for ACS's subpoena is that Offshores7 is one of the individuals named as a Doe defendant in ACS's lawsuit and that ACS needs to know who he is to serve the Petition and proceed against Offshores7. That premise is not applicable where, as here, the claim against Offshores7 must be dismissed for lack of jurisdiction. In any event, as discussed below, even if ACS were eventually justified in needing to know Offshores7's identity, ACS does not need to know it now to proceed with this action. *See infra* at pp. 27-28.

Offshores7 is concerned that Yahoo may disclose information regarding him. Absent any information – such as the date or time – about a specific message, Yahoo cannot know what information about Offshores7 is relevant to this case, and Yahoo may provide information about Offshores7 that is completely irrelevant to this case – such as information regarding messages made by Offshores7 on completely different message boards, having nothing to do with ACS or this case. That should obviously not be permitted.

III. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT VIOLATES THE FIRST AMENDMENT RIGHTS OF OFFSHORES7.

A. Internet Speakers Have A Constitutionally Protected Right To Anonymous Expression.

It is well-established that the First Amendment protects the right to engage in anonymous speech. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 342 (1995) ("anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent"); *see also Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204 (1999) (striking down a law requiring those who circulate political petitions to wear name tags); *State v. Doe*, 61 S.W.3d 99, 103 (Tex. App.–Dallas 2001), aff'd 112 S.W.3d 532 (Tex. Crim. App. 2003) ("Freedom of speech includes the right to engage in the dissemination of ideas without being publicly identified."). This right to anonymity is more than just one form of protected speech; it is part of "our national heritage and tradition." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton,* 536 U.S. 150, 166 (2002).

The Supreme Court first documented the historical value and importance of anonymous speech, especially anonymous critical speech, in *Talley v. California,* 362 U.S. 60 (1960):

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . 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.

Id. at 65.

The Supreme Court has subsequently explained that the right to anonymity is necessary to encourage a diversity of voices and to shield unpopular speakers:

> 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 . . . at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 514 U.S. at 357 (citation omitted).

This long-standing right to anonymous speech is especially critical to a thoroughly modern medium of expression: the Internet. The unique nature of the Internet enables anyone – with or without an education, expertise or money – to express themselves on a previously unimaginable and unlimited range of issues. Another unique feature of the Internet, however, is that all Internet speakers leave behind an electronic footprint that can be traced back to the original sender. *See* Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1225, 1233 (1998). In order to access the Internet, would-be participants must register (typically with a variety of personal, identifying information) with an Internet Service Provider. A subpoena directed to that provider will uncover the identity of almost any anonymous speaker. Many companies have, unfortunately, tried to take advantage of this powerful and previously unavailable weapon over the past few years, by filing scores of lawsuits – and accompanying subpoenas – designed to uncover the names of their anonymous Internet critics. *See, e.g.,* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 858 n.6 (Feb. 2000) (listing numerous examples of such cases); Miller, "*John Doe" Suits Threaten Internet Users' Anonymity*, L.A. Times, June 14, 1999, at A1 ("the growing volume of these suits – and the subsequent dropping of them in some cases after identities have been disclosed – makes some experts fear that the legal process is being abused by organizations seeking only to 'out' online foes"); Elstein, *Defending Right to Post Message: 'CEO Is a Dodo,'* Wall St. J., Sept. 28, 2000, at B1 (discussing cases).

Unlike traditional media speakers, Internet speakers typically do not have professional training to judge the credibility of the information they post, editors to peruse their posts for problems, lawyers to advise them of the complexities of the multitude of laws possibly implicated by their statements, or insurance to protect themselves from potential lawsuits. Faced with the threat of having to defend against costly litigation, many legitimate speakers may simply decide that using the Internet as a forum for their communications is not worth the risk of being accused of defamation or business disparagement either because of a mistake or because a powerful company or organization – with lots of money and lots of attorneys – sees an easy way of intimidating and silencing its consumers or critics. In addition, for many online speakers, such as critics of a company, the protection of anonymity is essential to their willingness to speak. *See McIntyre*, 514 U.S. at 342 ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation or by concern about social ostracism"); *State v. Doe*, 61 S.W.3d at 103 ("Anonymity allows individuals to discuss matters of public importance without fear of reprisal."). The threat of the loss of anonymity would, thus, have a substantial chilling effect on the free exchange of ideas that otherwise takes place in this vast democratic forum. *See, e.g., Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously."); Lidsky, "Silencing John Doe: Defamation and Discourse in Cyberspace," 49 Duke L.J. at 896 ("Many participants in cyberspace discussions employ pseudonymous identities . . . This unique feature of Internet communications promises to make public debate in cyberspace less hierarchical and discriminatory than real world debate to the extent that it disguises status indicators such as race, class, gender, ethnicity, and age which allow elite speakers to dominate real-world discourse").

Recognizing the speech-enhancing and equalizing features of the Internet, the Supreme Court has accorded it the highest degree of constitutional protection. *Reno*, 521 U.S. at 870 (noting that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"). This rigorous protection extends to speech conducted anonymously on

the Internet. *See, e.g., 2theMart.com*, 140 F. Supp. 2d at 1093 ("the constitutional rights of Internet users, including the right to speak anonymously, must be carefully safeguarded"); *Columbia Ins. Co. v. Seescandy.com,* 185 F.R.D. 573, 578 (N.D. Cal. 1999) (noting the "legitimate and valuable right to participate in online forums anonymously or pseudonymously"); *ACLU v. Johnson,* 4 F. Supp. 2d 1029, 1033 (D. N.M. 1998), aff'd 194 F.3d 1149 (10th Cir. 1999) (striking down law that "prevents people from communicating and accessing information anonymously"); *ACLU v. Miller*, 977 F. Supp. 1228, 1232 (N.D. Ga. 1997) (striking down law prohibiting anonymous Internet speech "because 'the identity of the speaker is no different from other components of [a] document's contents that the author is free to include or exclude'") (quoting *McIntyre*, 514 U.S. at 348).

These First Amendment interests apply with full force to the discovery process, including requested subpoenas. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (a court order, even when issued at the behest of a private party, constitutes state action that is subject to constitutional limitations, including the First Amendment); *Herbert v. Lando*, 441 U.S. 153, 178 (1979) (Powell, J., concurring) ("in supervising discovery . . . a district court has a duty to consider First Amendment interests as well as the private interest of the plaintiff"); *Britt v. Superior Court*, 20 Cal.3d 844, 857 (Cal. 1978) (*en banc*) ("Indeed, in some respects, the threat to First Amendment Rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential.").

B. ACS Must Overcome Strict Scrutiny To Justify Issuance Of This Subpoena Seeking To Disclose The Identity Of An Anonymous Internet Speaker.

Because individuals like Offshores7 have a constitutional right to engage in anonymous speech, a subpoena seeking to uncover the identity of an anonymous speaker "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (an order compelling production of individuals' identities in a situation that would threaten the exercise of

fundamental rights is "subject to the closest scrutiny"); *see also McIntyre*, 514 U.S. at 347 ("exacting scrutiny" required); *State v. Doe*, 61 S.W.3d at 103 (same). A party requesting such a subpoena must, therefore, demonstrate a compelling interest in obtaining the speaker's identity that justifies overcoming the First Amendment right to anonymity and that cannot be accomplished through less intrusive means. *McIntyre*, 514 U.S. at 347; *State v. Doe*, 61 S.W.3d at 103.

Recognizing these well-established principles, several courts that have considered similar subpoena requests to disclose the identity of anonymous Internet speakers have required plaintiffs to satisfy heightened scrutiny by demonstrating that their claims have merit – and are not merely a pretext for obtaining discovery – *before* permitting the plaintiffs to use subpoenas to strip the speakers of their anonymity. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), was one of the first decisions to address this situation. In that case, the plaintiff filed an action for trademark infringement against unidentified individuals because of their alleged unlawful use of the web domain names "seescandy.com" and "seescandys.com." *Id.* at 575, 576. The court refused to issue a temporary restraining order, explaining that the plaintiff's ability to seek redress for tortious acts committed against it,

> . . . must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. 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. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People who have committed no 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.

Id. The court therefore concluded that before an Internet speaker's identity could be disclosed, strict procedural safeguards must be imposed to "prevent use of [civil discovery mechanisms] to harass or intimidate anonymous Internet speakers." *Id.* at 579-80. Specifically, the party seeking to discover the identity must first: (1) identify the anonymous person to the Court with sufficient specificity; (2) identify all previous steps taken to locate the anonymous individual; (3)

"establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss"; and (4) provide the Court with a statement of reasons justifying the requested discovery. *Seescandy*, 185 F.R.D. at 579-80. Importantly, the court evaluated whether the plaintiff had met this test not simply by accepting its allegations, but by evaluating the evidence. *Id.* at 579.

One year later, a Virginia court set forth similar standards to balance the plaintiff's right to seek judicial redress for an alleged tort with the defendant's right to engage in anonymous speech. *In re Subpoena Duces Tecum to America Online, Inc*., 2000 WL 1210372, *4 (Va. Cir. Ct. 2000) ("AOL"), *rev'd on other grounds sub nom. American Online, Inc. v. Anonymous Publicly Traded Co.,* 542 S.E.2d 377 (Va. 2001). The *AOL* court framed the issue as follows:

> Ultimately, this Court's ruling on the Motion To Quash must be governed by a determination of whether the issuance of the *subpoena duces tecum* and the potential loss of the anonymity of the John Does, would constitute an unreasonable intrusion on their First Amendment rights. In broader terms, the issue can be framed as whether a state's interest in protecting its citizens against potentially actionable communications on the Internet is sufficient to outweigh the right to anonymously speak on this ever-expanding medium.

Id. at *5. The court held that, "before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made" by the plaintiff. *Id.* at *7. The court then articulated a specific test that requires, among other things, a plaintiff to provide allegations or evidence sufficient to establish a "legitimate, good faith basis" for the suit before identity may be disclosed. *Id.* at *8.

The procedural safeguards necessary before anonymity can constitutionally be breached were perhaps most fully articulated in *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001). In that case, which involved claims of defamation and misappropriation of trade secrets based on an anonymous speaker's postings on a website, the New Jersey appellate court established a four-part test to "strike[] a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation." *Id.* at 760. Consistent with the rulings in *Seescandy.com* and *AOL*, the four-part test

requires the subpoenaing party: (1) to make an effort to notify the anonymous posters that they are the subject of a subpoena seeking to uncover their identity; (2) to identify, verbatim, the precise statements giving rise to the alleged liability; (3) to produce sufficient evidence to the court to support each element of the cause of action; and 4) to demonstrate to the court that, on balance, the right to identify the speaker outweighs the First Amendment right of anonymity. *Id.* at 760-61.

A more recent federal district court decision considering a subpoena seeking to disclose the identity of an anonymous third-party witness in an online defamation dispute formulated even more rigorous standards. *See Doe v. 2themart.com, Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001), *petition for mandamus denied sub. nom In re Magliarditi*, 2001 WL 747835 (9th Cir. 2001). Recognizing that the "free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously," the court held that "discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts." *Id.* at 1093. Specifically, before disclosure can be permitted, the party seeking the information must demonstrate, "by a clear showing on the record," that:

> (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or disprove that claim or defense is unavailable from any other source.

Id. at 1097.

Although the standards adopted by these courts are slightly different, each requires the court to weigh the plaintiff's interest in obtaining the name of the person that allegedly violated its rights against the fundamental interests that would be implicated by a violation of the right to anonymity, thus ensuring that First Amendment rights are not unnecessarily curtailed. This analysis requires a court to review a plaintiff's claims and the evidence supporting them before

allowing the subpoena to be absolutely sure that the plaintiff has a sufficient basis for piercing the speaker's anonymity.[5]

C. ACS Has Failed To Establish That Offshores7's Constitutional Right To Anonymity Should Be Overcome.

As the foregoing discussion makes clear, the Court should require a subpoenaing party to make the following five-part showing to justify disclosure of an anonymous speaker's identity. Because ACS has failed to make this showing necessary to overcome Offshores7's constitutional right to anonymity, ACS's subpoena should be quashed.

1. ACS Failed To Make A Reasonable Effort To Notify Offshores7 Of The Subpoena.

As a preliminary matter, the subpoenaing party must reasonably attempt to notify the speaker that he or she is the subject of a subpoena and to notify the speaker of what the claims are. *See Seescandy*, 185 F.R.D. at 579; *Dendrite*, 775 A.2d at 760. Notice is a basic, yet critical, requirement of due process. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") Although the plaintiff will not know the name or address of the speaker, the plaintiff can easily attempt to provide such notice by posting a copy of the notice on the message board in question and/or replying to the allegedly offensive message.

In this case, ACS failed to undertake any such efforts to provide notice to Offshores7 or the other Doe defendants. Fortunately, Yahoo's policy, unlike those of some other ISPs, is to

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[5] The standards implemented by these cases involving anonymous Internet speech are consistent with, and build upon, prior case law establishing similar threshold tests before permitting subpoenas to be used to unmask the identity of anonymous speakers. *See, e.g., National Labor Relations Bd. v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998) (affirming district court's denial of NLRB's motion to enforce subpoena seeking to force newspaper to identify the party who had placed an anonymous classified ad on ground that the subpoena violated the First Amendment because NLRB sought subpoena before it had developed "any factual support for its action" and that "if this court permitted the Board to obtain the identity of the [newspaper's] advertiser, without demonstrating a reasonable basis for seeking such information, the chilling effect on the ability of every newspaper and periodical to publish lawful advertisements would clearly violate the Constituion"); *Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538, 1541 (Cal. App. 1999) (declining to permit discovery of identity of anonymous advertisers because plaintiff had failed to demonstrate "compelling need" for the information).

notify its users of the pendency of these subpoenas. Although Yahoo notified Offshores7 of the subpoena, the notice did not inform Offshores7 of the nature of the claims against him; Offshores7 received that information only after contacting attorneys. Before an individual's right to anonymity can be breached, he or she must, at a minimum, be provided with this basic information.

2. ACS Did Not Identify Any Statements by Offshores7 That Allegedly Violate ACS's Rights.

Second, the plaintiff must file a complaint or petition that specifies the exact statements by each anonymous speaker that allegedly violate its rights. *See Seescandy*, 185 F.R.D. at 579-80; *Dendrite*, 775 A.2d at 760. Without this basic information, the anonymous speaker has no real notice of the claims against him or her and no full opportunity to challenge the subpoena or defend his or her rights. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citation omitted). For example, without knowing what he or she is accused of saying, a speaker cannot prove that he or she did not make such comments, or that the comments are truthful. In addition, requiring plaintiffs to specify the statements made by each speaker will likely decrease the filing of abusively issued petitions and subpoenas, as a plaintiff will not be able to obtain the identity of multiple individuals simply by filing a generic and conclusory complaint against numerous individuals, many of whom may not have made any false or disparaging comments, but all of whose identities the plaintiff would like to obtain.

Equally important, without knowing what specific statements are at issue, it is impossible for the Court to review a plaintiff's claim to determine if the plaintiff has a valid and compelling reason sufficient to justify piercing the speaker's anonymity; again, absent that showing, the fundamental right to anonymity cannot be overcome. *McIntyre*, 514 U.S. at 347. Indeed, without identifying the particular statements alleged to be unlawful, the claim could not withstand a motion to dismiss. *See, e.g., Granada Biosciences, Inv. v. Barrett*, 958 S.W.2d 215, 222 (Tex. App.-Amarillo 1997), *rev'd on other grounds*, *Granada Biosciences, Inv. v. Forbes,*

Inc., 49 S.W.3d 610 (Tex. App.-Houston 2001) (plaintiff must identify specific disparaging words or statements to state claim for business disparagement).

This case is a perfect example of why this requirement is necessary. As discussed earlier, neither ACS's Petition nor the Subpoena identifies, quotes, attaches or refers to any allegedly unlawful statement made by Offshores7. Absent this information, the Court cannot evaluate the merits of ACS's claim against Offshores7, and the Court cannot determine if there is a sufficient basis for overcoming Offshores7's right to anonymity. Offshores7 is similarly without the ability to challenge ACS's allegation; Offshores7 needs to know what statements he made are allegedly unlawful so that he can defend himself by, for example, demonstrating that such statements are true or that he did not make such statements. ACS's failure to identify any specific statements does not mean that ACS should be able to avoid scrutiny and thereby breach Offshores7's anonymity; to the contrary, it demonstrates that ACS's subpoena should be quashed without further analysis. *See Seescandy*, 185 F.R.D. at 579-80; *Dendrite*, 775 A.2d at 760.[6]

3. ACS Has Not Demonstrated That Its Business Disparagement Claim Against Offshores7 Is Facially Actionable.

Third, the plaintiff must demonstrate to the Court that each identified statement is facially actionable – i.e., that the plaintiff has stated a *prima facie* case. This requirement is necessary to ensure that a plaintiff's claim against an anonymous speaker – the underlying basis for the subpoena – is not frivolous and that a speaker's constitutionally protected right to anonymity will not be breached unnecesarily. *See Seescandy*, 185 F.R.D. at 578 ("People who have committed no 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."); *AOL*, 2000 WL 1210372, *8 ("a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made"); *Dendrite*, 775 A.2d at 760-61 (same). If the plaintiff has not even stated a facially viable cause

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[6] That Offshores7 has, in this motion, identified a statement he made, does not matter. For all Offshores7 knows, ACS may be accusing Offshores7 of making other, separate – and non-existent – statements. In any event, a statement made in a defendant's motion cannot cure a fatal defect in a plaintiff's petition. On its face, ACS's Petition is deficient as a matter of law.

of action, the action will be dismissed, and there is no need – let alone a compelling need – to breach the anonymity of the speaker.

This requirement will also dissuade corporations from filing frivolous lawsuits for the real purpose of unmasking and retaliating against their anonymous critics – especially in cases where the speaker is believed to be an employee. Unfortunately, as discussed earlier, that situation has happened all too often over the past few years in courts across the country as corporations are attempting to silence and intimidate their online critics. *See, e.g.,* Lidsky, 49 Duke L.J. at 858 n.6 (listing numerous examples of such cases); Miller, L.A. Times, June 19, 1999, at A1; Elstein, *Defending Right to Post Message: 'CEO Is a Dodo,'* Wall St. J., Sept. 28, 2000, at B1.[7]

The only claim in the Petition against Offshores7 is for business disparagement. ACS has failed even to allege the necessary elements of such a claim. To state a claim for business disparagement under Texas law, the plaintiff must establish (1) publication of disparaging words, (2) falsity, (3) malice, (4) lack of privilege, and (5) special damages. *See, e.g., Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). Although similar to a claim for defamation, the purpose of a claim for business disparagement (also known as "injurious falsehood") is to protect the economic interests of the injured party against pecuniary loss, as opposed to defamation, which seeks to protect the personal reputation of the injured party. *Id.* For this reason, "More stringent requirements have always been imposed on the 'plaintiff seeking to recover for injurious falsehood in three important respects – falsity of the statement, fault of the defendant and proof of damage.'" *Id.*

Leaving aside the first four elements, it is clear that plaintiff has not alleged the "special damages" necessary to state a business disparagement claim. The element of special damages "requires that plaintiff establish pecuniary loss that has been realized or liquidated, as in the case of specific loss of sales." *Id.* at 767. Moreover, "the communication must play a substantial part

[7] Some suits against anonymous speakers are, of course, brought for legitimate purposes. In those cases, the plaintiff will have no problem making the required showing.

in inducing others not to deal with the plaintiff with the result that special damage, in the form of the loss of trade or other dealings, is established." *Hurlbut*, 749 S.W.2d at 767. Although ACS summarily asserts that it has "suffered damages" from all of the "Defendants' actions," (Petitition, ¶ 11), it does not allege that it has suffered any specific, direct pecuniary loss as a result of Offshores7's allegedly unlawful statements. Nor has ACS alleged in any manner that Offshores7's statement – which is not even identified in the Petition – played "a substantial part in inducing others not to deal with" ACS. As a result, ACS's business disparagement claim is not even facially valid. *Id.*; *see also Newsom v. Brod*, 89 S.W.3d 732, 735 (Tex. App.-Houston 2002) (rejecting claim for business disparagement because plaintiff did not claim he suffered a direct loss of business or property separate from personal harm).

Even if ACS adequately plead special damages, the Petition would still be deficient because ACS has failed to allege that Offshores7 made any false statements of fact, as opposed to non-actionable statements of opinion. *See* Petition, ¶¶ 6, 7, 9. That omission is fatal because the First Amendment provides protection for "statements that cannot 'reasonably [be] interpreted as stating actual facts.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (statements that do "not contain a provably false factual connotation will receive full constitutional protection") (citation omitted); *see also Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 122 (Tex. 2000) (the Texas Constitution protects statements of opinion that do not connote false facts). Indeed, given the forum in which Offshores7's comments were made – an Internet message board with an express disclaimer that all statements are the opinion of the poster and should not be relied upon for their factual accuracy – ACS would have more than a difficult time establishing that any such statements were actionable factual statements. *See, e.g., Milkovich*, 497 U.S. at 16-17 (context in which statements made is critical to determining whether statements are actionable); *Rocker Management LLC v. John Does*, 2003 WL 22149380, * 2-3 (N.D. Cal. 2003) (granting motion to quash subpoena seeking to uncover anonymity of anonymous poster on Yahoo message board because, in part, in the setting of an anonymous Internet message board, "readers are unlikely to view messages posted anonymously as assertions of fact"); *Global Telemedia*

Int'l, Inc. v. Doe No. 1, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) ("the general tenor, the setting and the format" of statements made on an Internet message board "strongly suggest that the postings are opinion"). The Court need not even consider this issue, however, because ACS has not even alleged that Offshores7's message contains statements of fact.

Because ACS has failed to state a facially actionable claim against Offshores7, ACS's subpoena should be quashed.[8]

4. ACS Has Failed To Present Any Evidence, Let Alone Sufficient Evidence, To Establish That It Has An Actionable Claim Against Offshores7.

Fourth, a plaintiff must present sufficient evidence to establish that it has a reasonable or realistic chance of prevailing in its action against the anonymous speaker. Because the First Amendment right to engage in anonymous speech is so indispensable and deserving of exacting scrutiny, a plaintiff cannot overcome this vital right merely by making a conclusory facial allegation of the elements necessary to state a claim. *See Seescandy*, 185 F.R.D. at 579 ("A conclusory pleading will never be sufficient to satisfy this element."); *Dendrite*, 775 A.2d at 770 (holding that a motion to dismiss standard alone is inadequate to analyze a request for disclosure in light of the Doe defendant's "right of anonymity in the exercise of his right of free speech"). Instead, a plaintiff must also present sufficient evidence to support each of the elements of its claim – at least with respect to those elements where the evidence is within its own control, such as damages, for which the defendant's identity, and any evidence the defendant may have, are irrelevant. If a plaintiff cannot present such evidence, there is, again, no need to breach the anonymity of the defendant.

This requirement is part and parcel of the well-established requirement, developed in libel cases where the identity of anonymous sources is at issue, that the party seeking such

[8] Because Offshores7 believes it unnecessary for purposes of this motion to brief these issues further, Offshores7 will not address the remaining deficiencies in ACS's Petition. To the extent the Court does not dismiss this case for lack of jurisdiction based on Offshores7's Special Appearance, Offshores7 reserves the right, at the appropriate time, to move to dismiss the case for failure to state a cause of action. At such time, Offshores7 will thoroughly brief these issues, including a discussion of how ACS cannot establish the element of malice as a matter of law in these circumstances.

disclosure must introduce substantial evidence to establish that its claim "is not frivolous, a pretense for using discovery powers in a fishing expedition. In this case, plaintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980); *see also Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 681 (Tex. App.-San Antonio 1991) ("The burden to refute the 'frivolousness' of a libel suit" and thereby to obtain the identity of an anonymous individual "is neither a minimal nor a trivial one; it requires the plaintiff to establish by substantial evidence that the informants' statements are false and defamatory"); *Miller v. Transamerican Press Co*, 621 F.2d 721, *as amended on rehearing*, 628 F.2d 932, 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) ("the plaintiff must show: substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources has been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case"); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1310-11 (W.D. Mich. 1996) ("ordering disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of state libel laws").

Thus, even if ACS had plead a facially actionable claim, ACS's subpoena should still be quashed because ACS has completely failed to present any evidence – let alone sufficient evidence – to establish that it has a realistic or reasonable chance of prevailing on its claim against Offshores7. Again, all that is necessary is to focus on the necessary element of special damages. ACS has failed to present any evidence that it has suffered a direct, pecuniary loss as a result of Offshores7's allegedly unlawful statements. *See Hurlbut*, 749 S.W.2d at 767 (finding plaintiff's claim to be deficient because "[n]o evidence was offered of damages resulting from loss of business expected from any particular customer or prospective customer to whom

disparaging statements were made by defendants"). Indeed, in these circumstances – where Offshores7's message indicated that his stock recommendation was to "hold" ACS and where the allegedly unlawful statement was made by an anonymous poster on an Internet message board – ACS could not make such a showing even if it attempted to do so. *See, e.g., Dendrite*, 775 A.2d at 772 (rejecting plaintiff's defamation claim because plaintiff had failed to produce evidence establishing that, among other things, plaintiff's stock price had decreased because of defendant's Internet postings); *see also Global Telemedia*, 132 F. Supp. 2d at 1270 (dismissing complaint where plaintiffs failed to demonstrate that defendants' postings in Internet chat room caused a decrease in stock price).[9] Nor has ACS produced any evidence that Offshores7's statements "play[ed] a substantial part in inducing others not to deal with the plaintiff with the result that special damage, in the form of the loss of trade or other dealings, is established." *Hurlbut*, 749 S.W.2d at 766; *Global Telemedia*, 132 F. Supp. 2d at 1270. Given that Offshores7's statement is of the most ordinary, innocuous and everyday variety, this omission is hardly a surprise. Absent any such evidence, ACS's claim against Offshores7 is without merit and cannot stand. In such circumstances, there is no need, let alone a compelling need, to override Offshores7's fundamental right to anonymity. *See Dendrite*, 775 A.2d at 772 (holding that subpoena should be quashed because, although plaintiff's defamation claim was sufficient to withstand a motion to dismiss, plaintiff failed to present proof of damages necessary to establish defamation claim).

ACS has similarly failed to introduce any evidence establishing that Offshores7's statements – again, unidentified by ACS – are defamatory, false, made with malice or without privilege – the other elements of a business disparagement claim. Without that evidence, ACS has failed to satisfy the exacting scrutiny necessary to overcome Offshores7's right to anonymity. *See, e.g., Dallas Morning News*, 822 S.W.2d at 681 (party cannot obtain identity of

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[9] In fact, ACS's stock price has remained virtually the same since Offshores7 posted his message. *See* 3-Month Basic Chart of ACS Stock Price, available at http://finance.yahoo.com/q/bc?s=ACS&t=3m&l=on&z=m&q=l&c=.

anonymous speaker absent presentation of "substantial evidence" demonstrating that speaker's statements were false and defamatory).

5. The Balance Of Equities Overwhelmingly Establishes That Disclosure Of Offshores7's Identity Is Not Warranted.

Finally, a plaintiff must persuade the Court that the balance of equities warrants disclosure of the anonymous speaker's identity. This requirement ensures that the plaintiff not only has an actionable and potentially meritorious claim, but an interest so compelling and so narrowly tailored that it justifies piercing a speaker's fundamental right to anonymity. *McIntyre*, 514 U.S. at 347 (right to anonymity can only be overcome if party demonstrates compelling interest that is narrowly tailored and does not cause more harm to speech than necessary); *Dendrite*, 775 A.2d at 760-61 ("the court must balance the defendant'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 defendant's identity to allow the plaintiff to properly proceed"). Requiring a plaintiff to make this showing ensures that a speaker's anonymity will not be breached – and that the speaker will not suffer any irreparable harm – before it is absolutely necessary to do so. *See Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). It also acts "as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Dendrite*, 775 A.2d at 771. At the same time, it ensures that if a plaintiff actually has a critical need for immediate disclosure, the plaintiff can obtain that information. If the plaintiff cannot make such a showing, there is no reason to justify the loss of anonymity. *See, e.g., Missouri ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 659 (Mo. App. 1997) ("If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . . On the other hand, if a case is strong and the information sought goes to the heart of it and is

not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.").

In this case, even if ACS had met all of the other requirements, ACS should still not be permitted to pierce Offshores7's anonymity because ACS has not and cannot demonstrate that its interest in obtaining Offshores7's identity outweighs Offshores7's fundamental right to anonymity. ACS has an interest in obtaining redress against individuals it believes have caused it harm. Even if ACS could demonstrate some harm caused by Offshores7, that harm is unquestionably not so significant and so pervasive as to justify the immediate disclosure of Offshores7's identity. Indeed, as discussed earlier, because of the unique characteristics of Internet speech and message boards in particular, anonymous online posts such as Offshores7's are taken with a grain of salt, and are, thus, much less likely to cause injury than a traditional newspaper or broadcast report. *See, e.g., Global Telemedia*, 132 F.Supp.2d at 1267. The potential harm from such comments is also significantly reduced by the fact that ACS, the criticized party, has an opportunity to respond and rebut the criticism immediately if it deems it necessary. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (access to channels of effective communication that permit a response to one's critics is a factor in how vulnerable one is to injury from false statements). That ACS did not take – and still has not taken – advantage of this ability to respond to Offshores7's posting indicates that ACS does not believe the statement to be that damaging, and is certainly not causing the type of irreparable harm sufficient to justify the immediate disclosure of Offshores7's identity. Moreover, it is not as if Offshores7 is a pervasive figure on the Yahoo message board, posting constant messages that need to be stopped – Offshores7 posted only one isolated – and harmless – message.

As discussed below, there is also no need for ACS to know Offshores7's identity right now. Although ACS purportedly needs Offshores7's identifying information to effect service, service is not necessary where, as here, the case will likely be dismissed and, if not, Offshores7 will make a general appearance in this matter.

ACS's minimal interests in obtaining Offshores7's identity are overwhelmingly outweighed by Offshores7's interest in maintaining his anonymity. As the Supreme Court has made clear, even the temporary loss of First Amendment rights constitutes irreparable harm. *Elrod*, 427 U.S. at 373-74. That is particularly the case where a speaker's anonymity is at stake. *See, e.g., Rancho Publications*, 68 Cal.App.4th at 1541 ("anonymity, once lost, cannot be regained").

Given the frivolousness of the claim against Offshores7, and the fact that ACS has not alleged – and knows it cannot establish – that it suffered a direct, pecuniary loss attributable to Offshores7's one posting, Offshores7 has a very real fear that ACS is pursuing this matter for reasons other than that it expects to prevail at trial. Whether that is true or not is not important; what is important is that Offshores7 has a significant fear, and thus a great interest, in not being improperly retaliated against for engaging in legitimate and protected speech.

The harm from stripping Offshores7's anonymity will not just be felt by Offshores7. All Internet speakers would be affected. Indeed, if a plaintiff with claims as conclusory and deficient – and without evidentiary support – as ACS's could compel the disclosure of the identity of a speaker like Offshores7, who made only the most everyday and innocuous comments, an untold number of present and future Internet town criers and pamphleteers would likely disappear. *See 2theMart.com*, 140 F. Supp. 2d at 1093 ("If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights."); Lidsky, at 861 (the filing of lawsuits simply as a pretext to compel the disclosure of a speaker's identity "threaten[s] not only to deter the individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora."). The First Amendment precludes such a result. *See, e.g., New York Times*, 376 U.S. at 270 (discussing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Thus, even if ACS might be harmed slightly by a ruling protecting Offshores7's right to anonymity, that interest is far outweighed by Offshores7's – and our country's – interest in protecting the right to anonymous speech and preserving the "breathing space that gives life to the First Amendment." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984); *McIntyre*, 514 U.S. at 357 ("The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.").

D. ACS Does Not Need To Know Offshores7's Identity At This Time.

Even if ACS could somehow demonstrate that it deserves to obtain Offshores7's identity, the Court should not permit ACS to unmask Offshores7 at this point in time. ACS does not need to know Offshores7's identity right now for this case to proceed. Offshores7 has filed a Special Appearance. Because Offshores7 is not a Texas resident and does not have any minimum contacts with Texas, the claim against Offshores7 will be dismissed. If the action is not dismissed for lack of jurisdiction, Offshores7 will make a general appearance and file a motion to dismiss based on the fact that ACS's Petition is facially deficient and fails to state a claim. Offshores7's identity is irrelevant to those motions. If the action is dismissed, there will, of course, be no need to disclose Offshores7's identity, and Offshores7's fundamental right to anonymity will have been preserved. Even if the case were not dismissed, there is no reason why ACS could not continued to proceed with its claim against Offshores7 as a Doe defendant until such time as Offshores7's identity became relevant to the case. For example, Offshores7's identity is completely irrelevant to the issue of whether ACS has suffered special damages. Any discovery ACS believes necessary regarding such damages can proceed prior to disclosing Offshores7's identity, without any prejudice to ACS. Because Offshores7's identity need not yet be known for this case to proceed, even if the Court determines that ACS is entitled to learn Offshores7's identity, the Court should still not permit ACS to obtain Offshores7's identity now.

Deferring disclosure would, thus, protect Offshores7's right to anonymity without unfairly prejudicing ACS's right to proceed.

CONCLUSION

The First Amendment protects Offshores7's right to engage in anonymous speech. Because ACS has failed to make the showing necessary to overcome this fundamental right, and because this Court has no jurisdiction over Offshores7, the subpoena issued by ACS to Yahoo should be quashed.

Respectfully submitted,

By: ______________________________

MICHAEL F. LINZ, P.C.
Michael F. Linz
State Bar No. 12393800
400 Katy Building
701 Commerce Street
Dallas, Texas 75202-4599
Phone: (214) 748-1948
Fax: (214) 748-9449

Aden J. Fine (*pro hac vice* application pending)
Christopher A. Hansen (*pro hac vice* application pending)
American Civil Liberties Union
125 Broad Street
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2651

Attorneys for Defendant Doe No. 11, pseudonym "offshores7"