CAUSE NO. 03-11571

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

SPECIAL APPEARANCES OF DEFENDANT JOHN DOE A/K/A lil_twist_2003 AND MOVANTS JOHN DOE A/K/A roy_mercer2003 AND JOHN DOE A/K/A hasp000_ok TO PRESENT MOTION OBJECTING TO JURISDICTION AND EXPRESSLY SUBJECT THERETO MOTIONS OF PERSONS AFFECTED BY A DISCOVERY REQUEST FOR PROTECTION AND TO QUASH SUBPOENA TO YAHOO! UNDER TEXAS RULE OF CIVIL PROCEDURE 192.6 (a) AND TO APPEAR ANONYMOUSLY AS lil_twist_2003, roy_mercer2003 and hasp000_ok ON MOTION FOR PROTECTION AND TO QUASH

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, John Doe a/k/a lil_twist_2003 (hereinafter referred to as "Doe/twist") one of the Defendants in the above entitled cause and John Doe a/k/a roy_mercer2003 (hereinafter referred to as "Doe/mercer") and John Doe a/k/a hasp000_ok (hereinafter referred to as "Doe/hasp") non-parties to this case but who are individuals whose property and person Plaintiff's attempt to affect by the issuance of a Subpoena, and for cause therefore would show unto the Court the following:

I.

Doe/twist, Doe/mercer and Doe/hasp file this special appearance pursuant to Rule 120a of the Texas Rules of Civil Procedure and objects to Plaintiff's attempt to invoke this Court's jurisdiction over the persons and property of these Movants.

1. Doe/twist, Doe/mercer and Doe/hasp make this Special Appearance to the entirety

of the Plaintiff's Original Petition ("Petition") to the extent the Petition alleges any liability on the part of or seeks relief against Doe/twist, Doe/mercer and Doe/hasp.

2. Doe/twist, Doe/mercer and Doe/hasp file this Special Appearance prior to any other plea, pleading, or motion presented by Doe/twist, Doe/mercer and Doe/hasp, and any other pleading or motion is expressly subject to this Special Appearance.

3. Plaintiff failed to plead jurisdictional allegations that Doe/twist, Doe/mercer and Doe/hasp committed any act in Texas or elsewhere that would subject Doe/twist, Doe/mercer and Doe/hasp to the personal jurisdiction of the courts of Texas.

4. Doe/twist, Doe/mercer and Doe/hasp each and severally are not amenable to the process issued by the courts of Texas for the following reasons:

   A. Doe/twist, Doe/mercer and Doe/hasp each and severally are not a residents of Texas and are not required to maintain a registered agent for service of process in Texas.

   B. Doe/twist, Doe/mercer and Doe/hasp each and severally do not maintain a place of business in Texas and do not have agents or employees in Texas.

   C. Doe/twist, Doe/mercer and Doe/hasp each and severally specifically deny that at any time material to this action or the events, alleged in the Petition, each or severally have done or are "doing business" in the State of Texas as that term is defined in Section 17.042 of the Texas Civil Practice & Remedies Code sufficient to subject Doe/twist, Doe/mercer and Doe/hasp each and severally to personal jurisdiction under the Texas Long Arm Statute or the United States Constitution.

D. Doe/twist, Doe/mercer and Doe/hasp each and severally engaged in free speech by posting anonymous messages that could be reviewed by anyone in the world with internet access. If anyone in Texas happened to read the messages, such an occurrence would be merely fortuitous and could not provide grounds for personal jurisdiction absent any other contacts between Doe/twist, Doe/mercer and Doe/hasp and Texas.

E. Doe/twist, Doe/mercer and Doe/hasp each and severally lack the constitutionally required minimum contacts with the State of Texas necessary to support personal jurisdiction.

F. Doe/twist, Doe/mercer and Doe/hasp each and severally have not at any time material to this action or the events alleged in the Petition purposefully availed themselves, each and severally of the privileges and benefits conferred by the laws of Texas sufficient to subject them to personal jurisdiction under the Texas Long Arm Statute or the United States Constitution.

G. The assumption of jurisdiction over Doe/twist, Doe/mercer and Doe/hasp each and severally would offend traditional notions of fair play and substantial justice, depriving Doe/twist, Doe/mercer and Doe/hasp of due process as guaranteed by the Constitution of the United States.

H. Doe/mercer and Doe/hasp are not named Defendants in this action, but Plaintiff attempts to obtain, through Subpoena, personal information regarding them and to strip them of their constitutionally protected right to speak anonymously on issues in the public domain. Doe/mercer and Doe/hasp therefore have also made this Special Appearance to object to

the Court's exercise of jurisdiction over them or their property or their constitutionally protected rights of free speech.

II.

ARGUMENTS AND AUTHORITIES

A court may only exercise personal jurisdiction over a foreign defendant if the exercise of personal jurisdiction is consistent with the due process guarantees of the United States Constitution. Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002). Such exercise is only possible when (1) a defendant has "purposely availed himself of the benefits and protections of the forum state by establishing 'minimum contacts' with the form state; and (2) the exercise of jurisdiction over that defendant does not offend 'traditional notions of fair play and substantial justice.'" Id. at 470. Where an out-of-state participant posts internet messages on an open forum on an out-of-state website, "minimum contacts" cannot be established merely by the fact that the statements concern a defendant who resides in the forum state. Id. at 472-76. Specifically, where the messages at issue do not mention the forum state, do not concern activities by plaintiff in the forum state, are directed "presumably at the entire world," and are not targeted at an audience in the forum state, "minimum contacts" cannot be established. Id.

Here, the only pseudonym who has been sued for disparagement is Doe/twist who is not a Texas resident. In posting to the Yahoo board Doe/twist did not "purposefully avail" itself of the benefits of Texas (and on the contrary submitted to the jurisdiction of California). The statements at issue were in response to the postings of another pseudonymous poster of unknown geographic location, and concerned ACS's activities outside of Texas and, indeed, outside the United States. Insofar as the statement could be read by others visiting the chatroom it was aimed at the "entire world." Moreover, as explained in Defendant's Motion to Quash filed subsequently to this Special Appearance, Doe/twist cannot by any stretch of the imagination be

construed to have intended to injure ACS by the statement at issue (since the statement merely stated that ACS has an obligation to maximize profits for shareholders), Doe/twist cannot be deemed to have purposely targeted the statement at ACS in Texas. All these arguments apply *a fortiori* to Doe/mercer and Doe/hasp as to whom ACS does not even allege that their statements were actionable.

CONCLUSION

For these reasons, Doe/twist, Doe/mercer and Doe/hasp request that the Court grant this motion by entering a final judgment to dismiss the entire proceeding for want of jurisdiction.

Respectfully submitted,

STRADLEY & WRIGHT

_____

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Doe/mercer and Doe/twist ONLY

VERIFICATION

THE STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned Notary Public, on this day personally appeared Henry S. Wehrmann, known by me to be the person whose name is subscribed below, and upon being duly sworn, stated under oath that he is the lead and local attorney, together with others attorneys for the Doe/twist, Doe/mercer and Doe hasp in the above-referenced cause; that he has read the Special Appearances of Doe/twist, Doe/mercer and Doe/hasp to Present Motion Objecting to Jurisdiction; that in such capacity he possesses personal knowledge of the statements contained in such Special Appearance; and that every statement contained therein is within his personal knowledge and is true and correct.

_____
Henry S. Wehrmann

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS _____ DAY OF DECEMBER, 2003.

_____
Notary Public in and for the State of Texas

My Commission Expires On:

_____

AFFIDAVIT OF HENRY S. WEHRMANN

BEFORE ME, the undersigned authority, personally appeared HENRY S. WEHRMANN who, being by me duly sworn on his oath states:

1. I am over 21 years of age and fully competent to make this statement, which is based on personal knowledge and is true and correct.

2. I am the lead and local attorney for the Movants identified in this Special

Appearance who are referred to herein as "Doe/twist, Doe/mercer and Doe/hasp." They have made known to me their desire to keep their identities secret.

3. I have seen their driver's licenses. They are current and identify them as citizens of states other than Texas.

4. I have called them at phone numbers that have an area code consistent with the address on their driver's licenses.

5. I am aware of no contacts that these individuals have with Texas, much less any that would render them subject to Texas' jurisdiction in this suit.

6. Requiring them to appear and answer a lawsuit in the State of Texas would be prohibitively expensive and unfair.

7. They have each informed me that they possess no real property in the State of Texas, they do not "conduct business" in the State of Texas, nor do they have an agent for service of process in Texas.

FURTHER AFFIANT SAYETH NOT.

_____
Henry S. Wehrmann

SUBSCRIBED AND SWORN TO before me on this _____ day of December, 2003.

_____
Notary Public in and for the State of Texas

My Commission Expires On:

_____

CAUSE NO. 03-11571

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

SUBJECT TO THE PREVIOUSLY FILED SPECIAL APPEARANCE THE MOTION OF JOHN DOE A/K/A lil_twist_2003, JOHN DOE A/K/A roy_mercer2003 AND JOHN DOE A/K/A hasp000_ok TO APPEAR ANONYMOUSLY IN ALL PROCEEDINGS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, individuals affected by a discovery request, who have posted anonymous messages as lil_twist_2003, roy_mercer2003 and hasp000_ok on an internet message board operated by Yahoo Inc.! (hereinafter "Yahoo!") and files this Motion to Appear Anonymously In All Proceedings and in support thereof respectfully shows as follows:

I.

These individuals affected by a discovery request to Yahoo! respectfully seek permission to proceed anonymously in all proceedings. These individuals respectfully request the right to proceed anonymously because the Subpoena to Yahoo! constitutes state action that would infringe upon a constitutionally protected right of free speech and debate. That is, a Subpoena with the force of law that would by its terms require Yahoo! to identify and produce documents relating to persons who engaged in public debate and who posted messages or other materials on online message boards under pseudonymous user names. Proceeding anonymously is necessary in order to vindicate these individuals constitutional rights to speak anonymously on Yahoo's! internet message board for Affiliated Computer Services, Inc. This persons right to speak

anonymously and the numerous compelling grounds for quashing the deposition subpoena are addressed in the motion for protection and to quash subpoena to Yahoo!, filed contemporaneously herewith and incorporated by reference for all purposes.

WHEREFORE, PREMISES CONSIDERED, these individuals affected by a discovery request hereby seek permission to proceed anonymously in all proceedings.

Respectfully submitted,

STRADLEY & WRIGHT

_____

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Doe/mercer and Doe/twist ONLY

CAUSE NO. 03-11571

AFFILIATED COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT
Plaintiff	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	

JOHN DOES NUMBERS 1-13 §
§
Defendants. § D-95th JUDICIAL DISTRICT

SUBJECT TO MOVANTS SPECIAL APPEARANCE PREVIOUSLY ON FILE HEREIN MOTION OF JOHN DOE A/K/A lil_twist_2003, JOHN DOE A/K/A roy_mercer2003 AND JOHN DOE A/K/A hasp000_ok , AS PERSONS AFFECTED BY A DISCOVERY REQUEST, TO QUASH SUBPOENA TO YAHOO! AND SEEK PROTECTIVE ORDER UNDER TEXAS RULE OF CIVIL PROCEDURE 192.6(a)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, John Doe a/k/a lil_twist_2003 (hereinafter referred to as "Doe/twist") one of the Defendants in the above entitled cause and John Doe a/k/a roy_mercer2003 (hereinafter referred to as "Doe/mercer") and John Doe a/k/a hasp000_ok (hereinafter referred to as "Doe/hasp") non-parties to this case but who are individuals whose property and person Plaintiff's attempt to affect by the issuance of a Subpoena, and for cause therefore would show unto the Court the following:

I.

INTRODUCTION

Doe/twist is named as a Defendant in this suit. Doe/mercer and Doe/hasp are not parties to this matter. However, all Movants are individuals affected by a discovery request. The discovery request accompanies Plaintiff's Original Petition filed in this matter on October 29, 2003. It names as Defendants 13 John Does, who are identified under pseudonyms. The same day as the filing of Plaintiff's Original Petition, Plaintiff issued a Subpoena to Yahoo! Inc. d/b/a Texas Yahoo! Inc. in which it requests five categories of documents geared primarily to obtain the identities of the posting parties identified in Plaintiff's Original Petition as John Does 1 - 13. Although not named in Plaintiff's Original Petition, by pseudonym, or otherwise, Doe/mercer and Doe/hasp are identified as posting parties to Exhibit 1 to the Subpoena in question and seeks

registration data on Movants. Similar information is sought by Plaintiff for Doe/twist who is a named Defendant. Movants are identified as posting parties lil_twist_2003, roy_mercer2003 and hasp000_ok. Movants adopt these pseudonyms for purposes of this proceeding, as well.

II.

FACTUAL BACKGROUND

This is a SLAPP Lawsuit. SLAPP is an abbreviation for: "Strategic Litigation Against Public Participation" and such suits are filed for the sole purpose of chilling or squelching any attempt at free speech that may reflect negatively on how a public company manages or mismanages its business. Global Telemedia Int'l, Inc. v. Doe 1, 132 F.Supp.2d 1261 (C.D. Cal. 2001). Affiliated Computer Services, Inc. (hereinafter "ACS") filed this lawsuit for the sole purpose to stifle constitutionally protected speech through the coercive threat of forcing innocent people to hire attorneys to defend themselves in meritless litigation. In this particular circumstance, Plaintiff is seeking to impermissibly obtain constitutionally protected information through abuse of the court system. The purpose of these lawsuits are not to vindicate any wrong which the Plaintiff has suffered, rather, the sole purpose is to attempt to identify the true identities of anonymous internet critics in order to intimidate these individuals.

III.

Plaintiff ACS is a publicly traded company listed on the New York Stock Exchange. As ACS explains to the public on its website, among its major services are to provide its clients with "Offshore production facilities" for "Business Process Outsourcing" ("BPO"), i.e. facilities outside the United States that "feature skilled professionals able to meet clients' ever changing needs." [www.acs-inc.com/bpo/partner.html]; ACS's website directs visitors to articles that describe its offshore BPO services in greater detail, and which note that substantial cost-savings are provided by having such services performed abroad.

{www.informationweek.com/story/IWK2002040420016; www.outsourcing-journal.com/issues/mar 2003/acs.html).

Yahoo!, Inc. is a corporation based in Sunnyvale CA that creates a website that posts, among other things, financial information regarding publicly traded companies, including ACS. On its website for each publicly-traded company, Yahoo! provides a "chat room" in which users can post (anonymously if they wish) comments about the company.[1] One feature of such chatrooms is that a user may respond to the message of another. When a user does so, the user's message will indicate, via a "hyperlink," the message to which he or she is responding. By clicking on the hyperlink, a reader can trace back the "thread" of messages in order to understand the dialogue that preceded a given message. As in Microsoft Outlook, a message posted in reply to another message will contain title "Re: …" and then the title of the message to which it is responding. Yahoo!'s websites post "terms of use" whereby participants stipulate to the selection of California as a forum.

On October 1, 2003, at 11:50 a.m., poster "lmpop2001" (a defendant herein but not a movant) posted message 4275, which stated:

> ACS now plans to build a data center in India and start moving jobs offshore. They are planning layoffs in the US for the jobs they are moving. The ex-employee who was charged[2] will most likely tell all. I have read a lot of post [sic] on this board about how people shouldn't complain about the compay [sic] but until you have lived in it, you can't imagine how bad it is. They are simply unethical.[3]

The next day, Doe/twist -- who is a movant herein and also a defendant -- posted message 4276, responding to and disagreeing with Message 4275:

> Don't they already have a Datacenter in India? I thought that's where the Gateway jobs are going. [¶] Unethical? They have a fiduciary responsibility to maximize profits for shareholders and that's where their priorities are. [4]

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[1] Internet chatroom for ACS *is available at* http://finance.yahoo.com/q/mb?=ACS

[2] This appears to be a reference to allegations made by another poster not a party to this motion

[3] This post is attached as Exhibit A

[4] This post is attached as Exhibit B

A few hours later, in response to that message, "acslimbo" posted message 4277, responding to and disagreeing with Doe/twist:

> In my opinion, the whole idea of company [sic] existing only to satisfy their fiduciary responsibility to the share holders is the reason why corporate governance is in the terrible shape that it is in today. This is not to say ACS and their corporate governance is in the crapper, but if you treat an enterprise as if it's [sic] sole function is to increase the wealth of its share holders, the focus on core competencies shifts away from service and/or product delivery. However, if there is enough focus on delivering a quality product or service that is competitively priced, and the delivery and/or production of those goods and services is performed by people who feel as if they are part of something bigger, and not just a disposable asset, the fiduciary responsibilities should fall nicely into place. [¶] Once again, just my opinion…"[5]

A few hours later, "fitthebilll109" (neither defendant nor movant) posted Message 4280, responded to acslimbo's Message 4277: "Nicely Put! Couldn't agree more!"[6]

[5] This post is attached as Exhibit C

[6] This post is attached as Exhibit D

In response, about an hour later, Doe/mercer (a movant herein but not a defendant), posted Message 4281, responding to and disagreeing with fitthebill1109 (and echoing Doe/twist's comments): "We need these offshore deals to keep the price of the stock up!"[7]

On October 29, 2003, ACS complaint filed the complaint in this action for "Business Disparagement," alleging that certain posters on the Yahoo! ACS chatroom had made postings under various pseudonyms. Plaintiff's Original Petition ¶ 6. The Petition listed the pseudonyms lil_twist_2003 and lmpop2001, but did not include roy_mercer2003 or hasp000_ok. The Petition did not set forth any specific messages that were at issue but stated only that "Defendants continuously publish false statements regarding Plaintiff … in an effort to injure Plaintiff's economic interest, and/or, upon information and belief, enhance their own." The statements at issue "consist of rumors regarding alleged governmental investigations as to executive personnel at ACS. Such messages also consist of allegations of breach of fiduciary duty on the part of certain executives as well as corporate malfeasance." Petition, ¶ 7. Plaintiff did not plead that the messages at issue had caused it to suffer any pecuniary loss.

The same day as it filed its Petition, ACS served upon Yahoo! a subpoena duces tecum seeking identities of certain posters, including those posters named as defendants and others. The Subpoena is attached hereto as Exhibit "F" and incorporated by reference for all purposes herein. The subpoena specified certain messages that were at issue and, by cross-reference, the identities of those who had posted such messages. Roy_mercer2003 and message 4281 were listed. Most of the postings at issue listed in the subpoena were by defendant "Srkm91," and the postings listed by that poster do allege governmental investigations of and/or malfeasance by, ACS officials.

Movants do not live in Texas. Upon learning of the subpoena, they obtained counsel in California and Texas, who informed plaintiffs' counsel that they would contest personal jurisdiction and move to quash the subpoena on substantive grounds, including

[7] The post is attached as Exhibit E

movant's constitutional rights. Movants made it clear that they would not seek to block discovery as to other pseudonymous posters, such as srkm91, and indeed they have not done so.

Yahoo! had informed counsel that unless a motion to quash were filed forthwith the identifying information as to Movants would be disclosed. See attached Exhibit "G." Counsel for plaintiff courteously granted counsel an extension of time to file the motion, at the same time informing counsel that ACS would be receiving information as to the pseudonymous posters who had not sought to block discovery, and that pending analysis of such disclosures ACS would consider whether to proceed with the subpoena against Movants. Ultimately, however, ACS declined to withdraw the subpoena and movants therefore file the instant motion.

IV.

This motion to quash is filed pursuant to Texas Rules of Civil Procedure 205, 192.6(a) and (b). This motion is made to protect the Movants from undue burden, unnecessary expense, harassment, annoyance and invasion of personal and constitutional rights.

ARGUMENTS AND AUTHORITIES

V.

BASIS FOR THE ARGUMENT

Plaintiff has filed a "bare bones" Petition alleging that certain Defendants engaged in "business disparagement." Movants were named, under pseudonym in a Subpoena to Yahoo! to produce certain personal records on Movants through which Plaintiff could identify Movants. Such actions seek to violate the protection of anonymous speech as provided by the First Amendment to the United States Constitution and by Article 1 Section 8 of the Texas Constitution..

VI.

ARGUMENT

The First Amendment of the Constitution protects an individual's right to speak anonymously. See e.g. McIntyre v. Ohio Election Commission, 514 U.S. 334, 341 (1995). First amendment protection extends to speech on the Internet. See Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). Anonymous speech encourages the free exchange of ideas, and if anonymity is lost, ideas and speech that may have been expressed fall silent for fear of both public and private reprisal. It is this possible chilling effect on the free exchange of ideas that motivates the protection of right to anonymous speech. See e.g. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Plaintiff has invoked the jurisdiction of the courts in order to obtain the requested discovery through subpoena. Utilization of the lawsuit process constitutes State Action, and therefore discovery conducted by Plaintiff must comport with constitutional limits on protected rights. Shelley v. Kramer, 334 U.S. 1 (1948). See also TEX. R. CIV. PROC. 192.6(b).

Courts have held that the affairs of publicly-traded corporation are matters of public concern, and that courts should apply intense scrutiny when anonymous speech concerning such public matters is threatened. Global Telemedia Int'l, Inc. V. Doe 1, 132 F.Supp.2d 1261 (C.D. Cal.2001). In the current climate of the accounting troubles plaguing publicly-held corporations, the open exchange of ideas, information, and opinions concerning these corporations and their financial well-being is vital to the economic health of the nation. Furthermore, Texas courts should be even more protective of freedom of speech, as the Texas Constitution's free speech protections are in some ways "broader than the First Amendment." Davenport v. Garcia, 834 S.W. 2d 4 (Tex. 1992).

Four principal cases filed in other jurisdictions have dealt with this issue and analyzed the balance of competing interest when courts are asked to pierce anonymity of a speaker on the internet.[8] Those cases are Dendrite Int'l, Inc. v. John Doe No. 3, 775

[8] Although it does not appear that any Appellate Court in Texas has ruled upon the precise

A.2d 756 (N.J. App. 2001); Columbia Ins. Co. v. Seescandy. com, 185 F.R.D. 573 (N.D. Cal. 1999); John Doe v. 2TheMart.com, 140 F.Supp.2d 1088 (W.D.Wash. 2001); In re Subpoena Duces Tecum to America Online, Inc., 52 Va.Cir.26 (Va.Cir.Ct.-Fairfax 2000). All of these cases invoke a heightened scrutiny regarding whether the First Amendment is violated or implicated when subpoenas request the disclosure of the identities of those exercising their right to speech on the Internet. In addition, all of these cases require that the plaintiff demonstrate that its claims underlying the discovery requests are meritorious before the court invokes state power to compel disclosure of the speaker's identity. In one of the seminal cases on this issue Dendrite Int'l, Inc. v. John Doe No. 3, the New Jersey Court of Appeals outlines a four-part test that a Plaintiff must satisfy before the court may invade the anonymity of an internet speaker. Dendrite Int'l, Inc. v. John Doe No. 3, 775 A.2d 756 (N.J. App. 2001).

In Dendrite, the Plaintiff, a publicly-traded company, filed a subpoena against Yahoo! to compel it to reveal the identities of certain John Does who had posted messages on Yahoo!'s internet board devoted to the Plaintiff. Unlike the current case before this court, that Plaintiff made allegations of defamation and tortious interference against the John Does, more serious allegations than the simple business disparagement as alleged in this Petition. However, the court denied that Subpoena and determined not to disclose the identities of the John Does by utilizing a heightened level of scrutiny to analyze Plaintiff's claims prior to determining whether to reveal the identity of the John

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issue pending before this Court, at least one State District Court, the Honorable Margaret Cooper, District Judge, 53rd Judicial District, Travis County, Texas when presented with a nearly identical situation and Cause No. GN2-02048, Styled Dynacq International, Inc. v. Yahoo! Inc. d/b/a Texas Yahoo! (a case involving a verified Petition for Deposition before suit to investigate claims pursuant to Texas Rule of Civil Procedure 202.1) denied Petitioner's application. A true and accurate copy of the Court's Order is attached hereto, marked Exhibit "C" and incorporated by reference for all purposes herein. Although Petitioner filed an appeal to the court's ruling, Petitioner elected to dismiss the appeal, and then proceeded, under the name of a subsidiary, Vista Medical Center, LLC to pursue a similar cause of action, this time naming John Does 1-30, however, Dynacq engaged in forum shopping and filed before the 157th Judicial District in Harris County, Texas and bearing Cause No. 2002-59058. This time, the Dynacq did not even give the court an opportunity to rule when faced with similar motions to quash and amended its Petition to dismiss John Does 1-30.

Does. In doing so, the appellate court developed a four-prong test to ensure that Plaintiffs do not use discovery mechanisms to ascertain the identities of unknown Defendants in order to harass, intimidate or silence critics in the public forum of the internet. Id. At 760. Elements of this test were originally adopted by a Federal District Court in California to protect "the legitimate and valuable right to participate in online forums anonymously or pseudonymously." See Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D.Cal. 1999). The Dendrite court determined that three of the prongs of that test require the Plaintiff to (1) make an effort to notify the anonymous internet "posters" that a subpoena has been issued; (2) identify the anonymous party with specificity by setting forth the exact statements purportedly made by each anonymous poster that constitutes actionable speech; and (3) establish to the court's satisfaction that the claims against the anonymous party are viable causes of action. Dendrite 775 A.2d at 760; *see also* Seescandy.com, 185 F.R.D. at 578-580. The fourth prong of the test requires the court to balance the Defendant's First Amendment right of anonymous free speech against the strength of the prima facie case. In this case, Plaintiff has failed to satisfy all of these requirements and John Doe's First Amendment rights of anonymous free speech are superior to the strength of Plaintiff's prima facie case.

As explained below Plaintiff has neither met the procedural requirements of the first two prongs nor shown even a colorable basis for its substantive claim under the third prong. Thus Plaintiff has shown no basis for this Court to strip Movants of their constitutional right to speak anonymously. Accordingly, Plaintiff's subpoena should be quashed and Movants' identities should be protected for the following reasons.

A. Plaintiff Has Failed to Attempt to Notify John Does.

The Dendrite court requires the Plaintiff to make efforts to notify the anonymous internet posters that a subpoena is sought or has been issued. Dendrite 775 A.2d at 760; *see also* Seescandy.com, 185 F.R.D. at 578-580. In doing so, the Plaintiff must withhold any action for a reasonable time to allow the anonymous person the opportunity to object.

Such efforts should include posting a message of notification of the subpoena to the anonymous user on the message board where the allegedly actionable speech was posted. Id. Plaintiff has ignored this requirement in its entirety. In fairness, it must stated that counsel for Plaintiff did extend this deadline, but only after being contacted by counsel for Movant and others similarly situated, and this professional courtesy does not obviate the requirement of prior notification.

B. Plaintiff Has Not Identified the John Does with Specificity or Identified the Exact Statements Made by Each Anonymous Poster.

Plaintiff has also failed to satisfy the second prong of the Dendrite test, in that Plaintiff has not "identif[ied] and set forth the exact statements purportedly made by each anonymous poster that the Plaintiff alleges constitutes actionable speech." Dendrite, 775 A.2d at 760. Pursuant to Plaintiff's cause of action for defamation, Plaintiff fails to allege even one defamatory remark attributed to any of the John Does. While Plaintiff lists various generic and allegedly "false disparaging" statements pursuant to its business disparagement cause of action, Plaintiff does not attribute any of these statements to any particular Defendants or John Does. Therefore, Plaintiff clearly fails to identify any statements that were made by a specific John Doe which constitute actionable speech.

C. Plaintiff Has No Viable Cause of Action Against the John Does.

The Dendrite decision, as well as other decisions, emphasizes that the Plaintiff must set forth a prima facie case against the anonymous posters, and that the court should "carefully review" a petition to ensure that a prima facie case exists. Id.; *see also* Seescandy.com, 185 F.R.D. at 573. A prima facie case should include the production of sufficient evidence that supports each element of its cause of action. *See* id.

Furthermore, in the internet context, the court in Seescandy.com held:

> [T]he plaintiff should establish to the Court's satisfaction that the Plaintiff's suit against defendant could withstand a motion to dismiss. A conclusory pleading will never be sufficient to satisfy this element. Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection

> against the use of ex parte proceedings to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent the abuse of this extraordinary application of the discovery process . . . Id. at 578-80.

In this instance, although Plaintiff makes claims against the anonymous John Does alleging business disparagement, none of Plaintiff's claims are pled with sufficient specificity to satisfy Plaintiff's burden to prove that it has viable claims against the anonymous posters.

The elements of "business disparagement" are (1) publication by the defendant of disparaging words, (2) falsity, (3) malice, (4) lack of privilege, and (5) special damages. Prudential Ins. Co. of Am. v. Financial Review Servs., Inc., 29 S.W.3d 74, 81 (Tex. 2000); Hurlbut v. Gulf Atlantic Life Ins. Co., 749 S.W.2d 215, 222 (Tex. App. – Amarillo 1997, pet. denied). The plaintiff must identify specific disparaging words or statements. Granada Biosciences, Inc. V. Barrett, 958 S.W.2d 215, 222 (Tex. App. – Amarillo 1997, pet. denied). The disparagement must play a substantial part in inducing others not to deal with plaintiff, thereby resulting in special damages; plaintiff must show pecuniary loss that has been realized or liquidated, such as specific lost sales. Hurlbut, 749 S.W.2d at 767.

Foremost, Plaintiff's defamation claim fails on its face. As stated above, the Petition does not identify any specific defamatory remarks made by any particular John Does. Doe/twist's statement, considered on its face and certainly in the context of the chatroom "thread" in which it appeared, is not disparaging, let alone actionable. On the contrary, Doe/twist took issue with posters who criticized ACS for its business of outsourcing work to "offshore" facilities. Doe/twist argued that ACS was not only entitled to do so but had a fiduciary duty to do so. Similarly, Doe/mercer's statement merely weighs in support of that statement by Doe/twist. Even if these statements could be construed as disparaging they are inactionable statements of opinion.

"All assertions of opinion are protected by the first amendment of the United

States Constitution and article I, section 8 of the Texas Constitution. Carr v. Brasher, 776 S.W.2d 567, 570 (Tex. 1989). The court may as an initial matter determine that statement is constitutionally protected opinion and thus as a matter of law. Id., Musser v. Smith Protective Services, Inc., 723 S.W.2d 653, 655. In making that initial determination the court should construe the statement "as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." Id., accord Nicosia v. DeRooy, 72 F.Supp.2d 1093, 1101-04 (N.D.Cal. 1999)(determining statements on website and internet discussion groups to be inactionable opinion when considered in context of other hyperlinked statements on websites and other commentary in related discussion groups).

Moreover, plaintiff has not alleged that it has suffered any special damages (e.g. pecuniary loss) as a result of the statement, nor could it do so. The Dendrite court also determined that in terms of causation, it could not link the "messages posted on an internet message board regarding individual opinions, albeit incorrect opinions, to a decrease in stock price without something more concrete. " 775 A.2d at 772. In a cause of action for "business disparagement" Texas law requires proof that the disparagement caused a direct pecuniary loss. There is no pleading as to how Movant's posting caused any direct pecuniary loss. Plaintiff must also plead and prove that the communication played a substantial role in inducing others not to deal with Plaintiff. This has not been alleged. Hurlbut v. Gulf Atlantic Life Ins. Co., 749 S.W.762 (Tex. 1987) and Johnson v. Hospital Corp of Am 95 F.3d 383 (5th Cir. 1996).

As to Doe/mercer and Doe/hasp's statements, plaintiff has not even alleged that the statements at issue in the subpoena are actionable.

D. John Doe's First Amendment Rights Outweigh the Strength of Plaintiff's Prima Facie Case.

As outlined above, the Plaintiff has failed to present a prima facie cause of action in this case. However, even if the Plaintiff had established a prima facie case, Movants'

First Amendment rights to anonymous free speech would still outweigh the strength of the Plaintiff's cause of action. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995). The Dendrite court concluded that where a Plaintiff presents a prima facie case, it is then the court's duty to "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." 775 A.2d 760 . The right to speak anonymously is a fundamental one, and the protection of this right extends to speech on the Internet, and therefore, the balancing tests urged by the courts that have addressed the anonymity of speech on the Internet reflect an unwillingness to allow vague and conclusory accusations to justify stripping speakers of their anonymity. In Seescandy.com, the California Federal District Court stated that: "[P]eople 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." 185 F.R.D. at 578.

Pursuant to the analysis adopted by the court in Dendrite, Plaintiff has not satisfied any of the requirements that are necessary before granting the subpoena compelling Yahoo! to reveal the identity of the John Does here. However, even if the court does find that Plaintiff has a valid prima facie case, that case is only based on conclusory statements which lack evidentiary support. Movants' right to anonymous speech is clear. Allowing unfounded accusations to impair this fundamental First Amendment right is contrary to our long judicial history of zealously guarding this freedom.

It would appear that plaintiff has persisted in pursuing the subpoena against movants not because of any belief that the statements are actionable, but in an effort to use the mechanisms of civil discovery to investigate and intimidate the authors of nonactionable statements. It is inconceivable that plaintiff intends to pursue the matter

against movants to trial.

In Falk v. Mayfield LLP v. Molzan, 974 S.W.2d 821, 823 (Tex. Ct. Appeal—Houston 1998, rev. den.) plaintiff filed a defamation lawsuit, only to voluntarily nonsuit it at a later date. Defendants moved to reinstate the lawsuit to seek Rule 13 sanctions. Id. The trial court awarded treble attorneys fees. Id. The court of appeal affirmed the award despite the fact that the trial court had not held an evidentiary hearing, on the grounds that the pleadings themselves demonstrated as a matter of law that the statements at issue were nonactionable opinion and that the trial court was within its discretion to determine, on the pleadings alone, that the suit was filed for the purpose of harassment. Id. at 827. Here, as there, plaintiff's maintenance of the suit against movants is "so blatantly vacuous, it is hard to conceive that any lawyer, or even a layman, would not immediately discern its absurdity. Having no legal viability, the value of this cause of action rests solely upon its power to intimidate and coerce." Id. at 824.

VII.

PRAYER

Therefore, the Court should grant Movants' Motion for Protective Order and to Quash the Subpoena Duces Tecum pursuant to TEX. R. CIV. P. 192.6(b) by quashing the subpoena seeking to compel the disclosure of Movants' identity and by entering a protective order to ensure that Movants' identity will not be disclosed. These Movants also seek all other and further relief to which it may be entitled.

Respectfully submitted,

STRADLEY & WRIGHT

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CERTIFICATE OF CONFERENCE

Counsel for movant contacted counsel for Plaintiff on the 26th day of November, 2003 at which there was a substantive discussion of every item presented to the Court in this motion and, despite best efforts, counsel have not been able to resolve those matters presented.

Signed this _____ day of _____, 2003.

_____
HENRY S. WEHRMANN, P.C.

CERTIFICATE OF SERVICE

A copy of the foregoing has been provided to Plaintiff's counsel of record via _____on the _____ day of _____, 2003.

_____
HENRY S. WEHRMANN, P.C.