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FROM: C. Dunham Biles

DATE: December 4, 2007

TIME: _____

CLIENT/MATTER NO.: 1714-03

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December 4, 2007

VIA HAND-DELIVERY

Stephanie Gomez, Clerk
160th District Court
600 Commerce St., Box 640
Dallas, TX 75202

Re: *In Re Petition of M.P.*; Cause No. 07-07934-H; In the 160th District Court of
Dallas County, Texas.

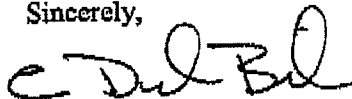
Dear Ms. Gomez:

Enclosed please find the original and six (6) copies of Petitioner's Response to Movant's Motion to Quash Discovery and Opposition to First Amended Rule 202 Petition Requesting Deposition to Reveal J. Doe's Identity in connection with the above-referenced action. Please file among the papers of the Court and return file-marked copies to the undersigned via the awaiting courier.

By copy of this correspondence, all counsel of record have been served with the foregoing pleading in accordance with the Texas Rules of Civil Procedure.

As always, if you have any questions, please do not hesitate to contact me.

Sincerely,



C. Dunham Biles

CDB:sxs

Enclosures

cc: Dennis Lynch (via facsimile)

Stephanie Gomez, Clerk
December 4, 2007
Page 2

Donald Colleluori (via facsimile)
Peter D. Kennedy (via facsimile)
Paul A. Levy (via facsimile)
David Broiles (via facsimile)

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1714-03

CAUSE NO. 07-07934-H

IN RE:

PETITION OF M.P.

REQUESTING A DEPOSITION OF

CORPORATE REPRESENTATIVE

FOR GOOGLE, INC.

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

160TH JUDICIAL DISTRICT

**PETITIONER'S RESPONSE TO MOVANT'S MOTION TO QUASH
DISCOVERY AND OPPOSITION TO FIRST AMENDED RULE 202
PETITION REQUESTING DEPOSITION TO REVEAL J. DOE'S IDENTITY**

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TABLE OF CONTENTS

	<u>Page</u>
I. PRELIMINARY STATEMENT	1
II. PROCEDURAL HISTORY.....	1
III. SUMMARY OF ARGUMENT	4
IV. ARGUMENT AND AUTHORITIES.....	5
A. Applicable Standards	5
1. Standing for seeking a protective order regarding discovery	5
2. Verification of a petition under Texas Rule of Civil Procedure 202	5
3. Libel under Texas law.....	6
4. Texas standard for disclosure of the identity of anonymous defamers.....	8
B. Movant Lacks Standing To Object To The Outstanding Discovery.....	10
1. Movant has not established that its identity is sought.....	11
2. Movant does not allege, much less establish, reasonable fear of reprisal.....	12
C. Petitioner Has Satisfied The Requirements Of Rule 202.....	12
D. The First Amendment Does Not Bar The Requested Discovery.....	14
1. The Second Motion should be denied because the Petition satisfies the standard in Texas.	14
2. Regardless, the Second Motion should be denied because Petitioner has even satisfied the requested heightened standard that Texas does not recognize.	16
a. Movant clearly has notice	16
b. Petitioner has stated a claim for libel.....	17
V. CONCLUSION.....	20

Petitioner M.P. ("Petitioner") files this Response to Movant's Motion to Quash and Opposition to First Amended Rule 202 Petition Requesting Deposition to Reveal J. Doe's Identity (the "Second Motion"), as follows:

I.

PRELIMINARY STATEMENT

Movant created an internet blog site for the specific purpose of injuring Petitioner; he then proceeded to publish cruel, inaccurate and libelous statements concerning Petitioner. Libel is probably not the only tort that this spiteful, vindictive and cowardly person committed. He also potentially engaged in an actionable civil conspiracy, interfered tortiously with Petitioner's contractual agreements with others, disparaged Petitioner's business, in addition to engaging in slander. Although Petitioner only seeks Movant's identity by its Rule 202 discovery request in order to investigate potential claims against Movant and others, Movant cries for the Court's protection, claiming a constitutional right to do everything he has done and, in the process, prevent his name from disclosure. Movant's meritless motion to quash the deposition should be denied without further time, expense and judicial intervention.

II.

PROCEDURAL HISTORY

On August 2, 2007, Petitioner filed a Petition Requesting Deposition to Investigate Potential Claim or Suit seeking the deposition of a corporate representative of Google, Inc. ("Google") as authorized by Texas Rule of Civil Procedure 202.1(b).¹ Specifically, Petitioner

¹ See Petition Requesting Deposition to Investigate Potential Claim or Suit.

sought to elicit from Google the names and addresses of those responsible for certain very disparaging statements regarding Petitioner posted on blogs Google hosted.²

Electing to conserve time and resources rather than proceeding with a deposition of a corporate representative in California, Petitioner and Google agreed to utilize written discovery. Accordingly, on August 24, 2007, Petitioner filed an agreed order³ authorizing Petitioner to serve discovery on Google requiring it to identify those responsible for the derogatory statements regarding Petitioner.⁴ Then on September 21, 2007, after a hearing at which Google appeared through its counsel and stated that it agreed to the requested relief,⁵ the Court entered the agreed Order Authorizing Discovery.⁶

Accordingly, on September 27, 2007, Petitioner served M.P.'s First Set of Interrogatories to Google, Inc. and M.P.'s First Request for the Production of Documents to Google, Inc.⁷ On

² See *id.*; see also Letter from C. Dunham Biles to Decker Cammack, dated August 2, 2007, enclosing draft notice of deposition, attached as Exhibit 1 to the Affidavit of C. Dunham Biles filed herein on November 14, 2007 ("Biles Affidavit").

³ See Letter from C. Dunham Biles to Shirley Gomez, dated August 24, 2007, attached to Petitioner's Response to Movant's Motion to Quash and for Protective Order as Exhibit B ("[C]ommercial litigation counsel for Google, Inc., Hilary Ware, is being provided with a copy of this Order. I have conferred with Ms. Ware concerning this Order. Google, Inc. does not oppose immediate entry of the order."); see also e-mail from Hilary Ware to Dunham Biles, dated September 19, 2007, attached to the Biles Affidavit as Exhibit 2 ("I'll let you know who your compatriot in agreeing to a court order directing us to produce the information we have on the blogger (deposition off calendar) will be.").

⁴ See Order Authorizing Discovery.

⁵ See, e.g., e-mail from Don Colleluori to C. Dunham Biles, dated September 21, 2007, attached to the Biles Affidavit as Exhibit 3 ("I just forwarded the order to her, noting that I assumed she will deal directly with you on the production. If you don't hear differently from me by Monday, go ahead and contact her directly."). The "her" refers to Ms. Hilary Ware, in-house counsel for Google.

⁶ See Order Authorizing Discovery.

⁷ See M.P.'s First Set of Interrogatories to Google, Inc., attached to the Biles Affidavit as Exhibit 4; M.P.'s First Request for the Production of Documents to Google, Inc., attached to the Biles Affidavit as Exhibit 5.

October 25, 2007, Movant—hoping to maintain its status as an anonymous defamer⁸—filed a Motion to Quash and for Protective Order (the “First Motion”),⁹ seeking to thwart Petitioner’s efforts to discover the identity of those responsible for publishing the despicable comments about Petitioner anonymously over the internet.¹⁰ On November 14, 2007, Petitioner filed Petitioner’s Response to Movant’s Motion to Quash and for Protective Order (“First Response”) establishing its entitlement to the requested discovery.¹¹

On November 16, 2007, the Court held a hearing on Movant’s First Motion. The Court suggested the potential for additional pleading and briefing and continued the hearing to December 6, 2007. On November 21, 2007, Petitioner filed its First Amended Petition Requesting Deposition to Investigate Potential Claims (“Petition”) seeking to depose Google to obtain the names and addresses of those who published defamatory statements regarding Petitioner.¹² On November 30, 2007, without request or permission from the Court, Public Citizen Litigation Group filed a brief in support of Movant.¹³ On November 30, 2007, Movant filed the Second Motion, primarily rehashing arguments previously set forth in the First Motion.¹⁴

⁸ Movant boldly admits that “Movant is the individual who created the Google account and blog at issue.” See Motion to Quash Discovery and for Protective Order at 2, which is neither verified nor supported by an affidavit.

⁹ See First Motion.

¹⁰ See *id.* at 10.

¹¹ See First Response at 14. Petitioner incorporates its First Response by reference as if fully set forth herein.

¹² See Petition at 2 (“The substance of the testimony expected to be elicited from Google involves obtaining the names and addresses of entities and/or individuals who hosted and posted defamatory statements concerning M.P. on the Blog.”).

¹³ Petitioner has not received a filed-marked copy of the brief.

¹⁴ See Second Motion.

III.

SUMMARY OF ARGUMENT

Movant asserts three arguments in support of the Second Motion, all of which are unavailing. First, Movant takes the position that it has satisfied the applicable standing requirements.¹⁵ Second, Movant argues that the Petition is not adequately verified.¹⁶ Third, Movant incorrectly asserts that in order for Petitioner to pursue the investigation of potential claims—including identifying anonymous tortfeasors—Petitioner must: (i) provide notice; (ii) be able to prevail on a motion for summary judgment; and (iii) show a balance of interests that favors disclosure over the First Amendment.¹⁷

Movant's motion is without merit for three reasons. First, Movant has failed to establish it has standing to object to the outstanding discovery. Second, the Petition is verified in conformity with Texas Rule of Civil Procedure 202. Third, under the circumstances of this case, the First Amendment does not bar Petitioner from discovering the identity of the anonymous tortfeasor(s). Petitioner has more than satisfied the standard in Texas, as well as the requested heightened standard that Texas does not require. Accordingly, the Second Motion should be denied.

¹⁵ See *id.* at 14-15.

¹⁶ See *id.* at 9-11.

¹⁷ See *id.* at 3-9.

IV.

ARGUMENT AND AUTHORITIES**A. Applicable Standards****1. Standing for seeking a protective order regarding discovery**

Only “[a] person from whom discovery is sought, and any other person affected by the discovery request, may move . . . for an order protecting that person from the discovery sought.”¹⁸ Moreover, in order to object to discovery seeking the identification of an individual on First Amendment grounds, the movant bears the burden of establishing, through evidence, a reasonable probability that disclosure of its identity will subject it to threats, harassment, or reprisals from either government officials or private parties. Mere subjective fears not supported by specific evidence of threats or harassment are insufficient.¹⁹

2. Verification of a petition under Texas Rule of Civil Procedure 202

Texas Rule of Civil Procedure 202 permits a party to petition the Court for an order authorizing the taking of a deposition either: (i) to perpetuate testimony before an anticipated suit; or (ii) to investigate a potential claim or suit.²⁰ If the petitioner seeks to investigate a potential claim or suit, as in this case, the petition must be verified²¹ and set forth: (a) that the petitioner seeks to investigate a potential claim;²² (b) the subject matter of the anticipated action,

¹⁸ See, TEX. R. CIV. P. 192.6(a)

¹⁹ See, e.g., *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 377 (Tex. 1998) (“As opposed to mere subjective fears and testimony that some donors would refuse to donate, BACALA’s evidence demonstrates that individuals opposed to BACALA’s agenda had boycotted the business establishments of persons affiliated with BACALA and encouraged others to do the same. . . . The evidence shows actual, non-speculative hostility and demonstrates a reasonable probability of economic reprisals that may burden First Amendment rights.”).

²⁰ See TEX. R. CIV. P. 202; TEX. R. CIV. P. 202.1.

²¹ See TEX. R. CIV. P. 202.2(a).

²² See TEX. R. CIV. P. 202.2(d)(2).

if any, and the petitioner's interest therein;²³ and (c) the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and petitioner's reasons for desiring to obtain the testimony of each.²⁴

3. Libel under Texas law

In a libel action involving private litigants and speech concerning private issues, the plaintiff must show that the defendant published a defamatory statement²⁵ about the plaintiff.²⁶ Falsity is presumed and truth is a defense, for which the defendant bears the burden of proof.²⁷

²³ See TEX. R. CIV. P. 202.2(e); see also *City of Houston v. U.S. Filter Wastewater Group, Inc.*, 190 S.W.3d 242, 245, n.2 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (“Rule 202 does not require a petitioner to plead a specific cause of action; instead, it requires only that the petitioner ‘state the subject matter of the anticipated action, if any, and the petitioner’s interest therein.’”).

²⁴ See TEX. R. CIV. P. 202.2(f)-(g).

²⁵ In determining whether a publication is libelous, a court must “view the publication from the point of view it would have on the mind of an ordinary reader, and must construe it as a whole, in light of all surrounding circumstances.” *Bradbury v. Scott*, 788 S.W.2d 31, 36-7 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

²⁶ See TEX. CIV. PRAC. & REM. CODE § 73.001 (“A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person’s reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person’s honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.”); see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990); *Bentley v. Bunton*, 94 S.W.3d 561, 579, 586, 590 (Tex. 2002); *WFAA-TV v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Additionally, a statement that injures a person in her office, profession, or occupation is considered libel per se. See, e.g., *Bradbury*, 788 S.W.2d at 38 (“Both letters were libelous per se because they accused her of conduct that affects a person injuriously in his or her office, profession, or occupation.”); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 151 (2d Cir. 2000) (Description of a lawyer as an “ambulance chaser” implied he “engaged in unethical solicitation.”).

²⁷ See, e.g., TEX. CIV. PRAC. & REM. CODE § 73.005 (“The truth of the statement in the publication on which an action for libel is based is a defense to the action.”); *Randall’s Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) (“In suits brought by private individuals, truth is an affirmative defense.”); *Walters v. Columbia/St. David’s Healthcare Sys., L.P.*, No. 03-03-00582-CV, 2005 WL 1240968, at *8 (Tex. App.—Austin 2005, pct. denied) (not reported in S.W.3d) (“In defamation suits brought by private individuals, truth is an absolute

Further, “[i]n actions of libel per se, the law presumes the existence of some actual damages, requiring no independent proof of general damages.”²⁸

Additionally, contrary to Movant’s assertion,²⁹ the First Amendment does not require inquiry into whether a statement is fact or opinion.³⁰

For example, “[i]f a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”³¹

Therefore, a statement, whether expressed as fact or opinion, may be libelous if it expressly or impliedly asserts objective facts.³² Indeed, Texas courts have upheld defamation claims based on opinions.³³

defense, upon which the defendant has the burden of proof.”). Nonetheless, Movant erroneously asserts that Petitioner must establish that the statements are false. See Second Motion at 12.

²⁸ *Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App.—Corpus Christi 2000, no pet.).

²⁹ Notably, Movant misrepresents the law by stating “[s]tatements of opinion are *not* actionable” and citing *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989) and *Brewer v. Capital Cities/ABC, Inc.*, 986 S.W.2d 636, 643, (Tex. App.—Fort Worth, 1998, no pet.) which are no longer controlling on this point of law in light of *Milkovich*, 497 U.S. at 18-19, and *Bentley*, 94 S.W.3d at 579-80.

³⁰ See *Milkovich*, 497 U.S. at 18-19 (“[W]e do not think this passage from (a prior case) was intended to create a wholesale defamation exemption for anything that might be labeled ‘opinion.’ Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of ‘opinion’ may often imply an assertion of objective fact. . . . [W]e think the ‘breathing space’ which ‘freedoms of expression require in order to survive’ is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between ‘opinion’ and fact.”) (citations omitted); *Bentley*, 94 S.W.3d at 579 (adopting the standards in *Milkovich*, stating that “[t]o distinguish between fact and opinion, we are bound to use as our guide the United States Supreme Court’s latest word on the subject, *Milkovich v. Lorain Journal Co.*”).

³¹ See *Bentley*, 94 S.W.3d at 583 (quoting *Milkovich*, 497 U.S. at 18-19).

³² See *Milkovich*, 497 U.S. at 18-19; *Bentley*, 94 S.W.3d at 579-80.

³³ See, e.g., *Marshall v. Mahaffey*, 974 S.W.2d 942, 948 (Tex. App.—Beaumont 1998, pet. denied) (“I don’t trust her. I think she’s sleazy . . . I think she’s a slut and she’s just after his

4. The Texas standard for disclosure of the identity of anonymous defamers

Texas has a compelling interest in allowing full discovery upon a showing of need, including the investigation of potential defamation claims, even in the face of assertions of First Amendment rights.³⁴ Consequently, a First Amendment objection is overcome by a plaintiff's need to identify those responsible for making alleged defamatory statements.³⁵ Similarly, other jurisdictions have held that disclosure of an internet defamer's identity is appropriate where the victim has a "good faith" basis for a claim and disclosure is necessary in order for the claimant to

money and she's --she's a gold digger."); *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 920-921 (Tex. App.—Corpus Christi 1991, writ dismissed w.o.j.) ("This Court has held that an opinion may be actionable in a defamation case if the statement contains an implied assertion of fact. . . . Even assuming, that the statements could be characterized as opinions, the statements clearly imply the existence of undisclosed facts that Tucker had engaged in serious misconduct, which adversely reflected upon his reputation and fitness as a stockbroker."); *Flournoy v. Story*, 37 S.W.2d 272, 273 (Civ. App.—Fort Worth 1930, no writ) ("A libel is a defamation . . . we think it sufficient that, among other things, it in effect charged that plaintiff was a liar, a thief, and a swindler.").

³⁴ See, e.g., *In re Maurer*, 15 S.W.3d 256, 261 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("In *Tilton*, the Texas Supreme Court recognized the importance of open discovery even in the face of a claim of First Amendment associational rights. While the court never stated that the interest in open discovery is a compelling one, it concluded that such an interest might justify disclosure of narrow limited groups of individuals based on a particularized showing of need. Here, . . . they seek the identity of only a limited group of individuals: those individuals who were responsible for the ads that appeared in the *Katy Times*. Without this information, Sheriff Thomas and Deputy Burton cannot prove who defamed them and cannot obtain full redress on their claims. The general purpose of discovery is to allow the parties to obtain full knowledge of the facts and issues prior to trial. This purpose would be completely thwarted if we were to allow relator to shield her answers behind the First Amendment. . . .").

³⁵ See, e.g., *id.*; see also *Doe v. Haddock*, No. 2-06-402-CV, 2007 WL 940761, at *3 (Tex. App.—Fort Worth 2007, no writ) (not reported in S.W.3d) (holding that a trial court's Rule 202 order that authorized the petitioner "to obtain [the alleged defamers'] names, addresses, and phone numbers from Yahoo!, Inc. as opposed to from [the alleged defamers]" was "not appealable by [the alleged defamers]"). The Court, having found that mandamus relief, as opposed to an appeal, was proper, did not reach the merits. The Court, however, noted that mandamus relief was denied. See *id.* and its predecessor that denied mandamus relief, *In re Doe(s)*, No. 2-06-329-CV, 2006 WL 3114458, at *1 (Tex. App.—Forth Worth October 27, 2006, no pet.) (not reported in S.W.3d).

determine the identity of the alleged tortfeasor.³⁶ In other words, courts have ordered the disclosure of the identities of anonymous defamers where, based on the allegations, the plaintiff has set forth a prima facie claim.³⁷ Moreover, where as here, pre-suit discovery is sought, courts have consistently applied this "good faith" standard.³⁸

³⁶ See e.g., *Polito v. AOL Time Warner, Inc.*, No. Civ.A. 03CV3218, 2004 WL 3768897 at *7 (Pa. Com. Pl. 2004) (not reported in A.2d) ("[W]e conclude that Polito is entitled to obtain the identity of the AOL subscribers in question provided that she: (1) satisfactorily states a cognizable claim under Pennsylvania law entitling her to some form of civil or criminal redress for the actionable speech of the unknown declarant(s); (2) demonstrates that the identifying information is directly related to her claim and fundamentally necessary to secure relief; (3) is seeking the requested information in good faith and not for some improper purpose such as harassing, intimidating or silencing her critics; and (4) is unable to discover the identity of the anonymous speaker(s) by alternative means. . . . Polito's filings do not assert a particular cause of action against the anonymous subscribers. Nevertheless, our independent review of her submissions reflect that she does have a bona fide basis for imposing liability upon the anonymous declarants."); *In re Baxter*, No. 01-00026-M, 2001 WL 34806203, at *12 (W.D. La. Dec. 20, 2001) (not reported in F. Supp. 2d) (After expressly rejecting cases cited by Movant, the court held that "the proper standard should be, depending upon whether the statements involve public concern or private concern, a showing of at least a reasonable probability or a reasonable possibility of recovery on the defamation claim."); *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000) (not reported in S.E.2d), *rev'd on other grounds*, *America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) ("[T]his Court holds that, when a subpoena is challenged . . . a court should only order a non-party, Internet service provider to provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim.").

³⁷ See *id.*

³⁸ See *Haddock*, 2007 WL 940761, at *3; *In re Doe(s)*, 2006 WL 311458, at *1; *In re Baxter*, 2001 WL 34806203, at *12; *Public Relations Soc'y of Am., Inc. v. Road Runner High Speed Online*, 799 N.Y.S.2d 847, 850 (N.Y. Sup. Ct. 2005) ("Before a petitioner can obtain [pre-suit] discovery, however, he or she must demonstrate that they have a meritorious cause of action and that the information sought is material and necessary to the actionable wrong.") (internal citations omitted).

B. Movant Lacks Standing To Object To The Outstanding Discovery.³⁹

Under Rule 192.6(a), as set forth above, Movant does not have standing to object to the discovery unless it establishes that: (1) the discovery was propounded on him; or (2) he is affected by the discovery.⁴⁰ Moreover, where as here, the movant objects to the discovery on the basis of the First Amendment, through evidence, the Movant must establish an objective fear of reprisal by either the government or the petitioner.⁴¹ Here, Movant lacks standing to object to the propounded discovery because: (1) the discovery is not sought from him,⁴² (2) Movant has not established that it is affected by the discovery; and (3) Movant has not alleged, much less proved, reasonable fear of reprisal. Indeed, to date, Movant has not even filed a petition in intervention, the consequence of which would be that Movant would be forced to establish that he has a justiciable interest in the suit.⁴³ As set forth below, Movant cannot meet such a burden. Accordingly, the Second Motion should be denied because Movant has not satisfied his obligation to establish that he has standing to object to the proposed Rule 202 discovery.

³⁹ Tellingly, Movant attempts to hide his lack of standing by addressing the issue at the end of his Second Motion. Petitioner addresses standing first, because it is a threshold issue and is dispositive here.

⁴⁰ See TEX R. CIV. P. 192.6(a).

⁴¹ See, e.g., *In re Bay Area Citizen Against Lawsuit Abuse*, 982 S.W.2d at 376-77 (“The evidence shows actual, non-speculative hostility and demonstrates a reasonable probability of economic reprisal against contributors that may burden First Amendment rights.”).

⁴² Discovery is sought from, and in fact has been served on, Google, not Movant. See Petition; see also Exhibits 4 and 5 to the Biles Affidavit.

⁴³ See, e.g., *Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982) (Once a party objects to the intervention, “[t]he intervenor bears the burden to show a justiciable interest, legal or equitable, in the lawsuit.”).

1. **Movant has not established that his identity is sought.**

Movant has failed to establish that he is affected by the requested discovery. Indeed, despite a second chance,⁴⁴ Movant has failed to provide any evidence that he is an anonymous defamer whose identity is sought. In fact, the only evidence provided on behalf of Movant is a verification from his counsel.⁴⁵ This feeble attempt to establish standing must be rejected for at least two reasons.

First, the statement within the verification that: "my client represented to me that he/she created and posted to the blog" is inadmissible hearsay that is offered to prove the truth of the matter asserted. Therefore, Movant has not established that he created the blog or posted to it.⁴⁶

Second, Movant's reliance on a redacted e-mail attached to his counsel's verification is misplaced.⁴⁷ On its face, the e-mail is from Movant to his counsel, not from Google to Movant as implied in the verification;⁴⁸ therefore, the e-mail is not a true and correct copy of an alleged e-mail sent by Google to Movant.⁴⁹ Indeed, there is no evidence that the e-mail was authored by Google or that it was originally sent to Movant.⁵⁰ In fact, as it must, the verification admits its own limitation—hearsay—in that it states merely that attached is "a true and correct copy of an email forwarded to me by my client."⁵¹ It does not, because it cannot, state that what is attached

⁴⁴ Petitioner raised Movant's lack of standing in the First Response. *See* First Response at 8-9.

⁴⁵ *See* Verification to Movant's Second Motion.

⁴⁶ *See* TEX. R. EVID. 801(d); TEX. R. EVID. 802.

⁴⁷ *See* Verification to Movant's Second Motion.

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

was in fact sent to Movant by Google.⁵² Simply put, there is no evidence that Movant's identity is sought through the outstanding discovery. Accordingly, Movant lacks standing to object to the discovery, and the Second Motion should be denied.⁵³

2. Movant does not allege, much less establish, reasonable fear of reprisal.

To assert a First Amendment objection, as set forth above, Movant must establish through evidence a reasonable fear of reprisal.⁵⁴ Here, not only has Movant failed to establish through admissible evidence that Movant has a justifiable fear of reprisal from the government or Petitioner, but Movant does not even allege such fear.⁵⁵ Therefore, Movant lacks standing to object to the discovery, and the Court should deny the Second Motion.

C. Petitioner Has Satisfied The Requirements Of Rule 202.

Inexplicably, Movant asserts that the Petition is insufficiently verified.⁵⁶ Movant's bald, unsupported assertions to the contrary notwithstanding, the Petition satisfies the verification requirement of Texas Rule of Civil Procedure 202.2(a). As set forth above, Rule 202.2(d)-(g) merely requires that the Petitioner plead that it seeks to investigate a claim, whom it seeks to depose and what it expects to learn, and, if there is an anticipated action, the subject matter of

⁵² See *id.* Further, even if Google did send such an e-mail and that e-mail was in fact received by Movant, the e-mail would not establish that Movant created the blog or posted to it.

⁵³ See TEX. R. CIV. P. 192.6(a).

⁵⁴ See *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d at 376-77.

⁵⁵ See Second Motion.

⁵⁶ See Second Motion at 10. Movant erroneously asserts that the verification is not sufficient, because it lacks "personal knowledge, however, of the *facts* that would be required to prove a libel claim." Apparently, Movant would have the Court believe that the entire Petition must be verified. Rule 202, however, "does not require a petitioner to plead a specific cause of action; instead, it requires only that the petitioner 'state the subject matter of the anticipated action, if any, and the petitioner's interest therein.'" *City of Houston v. U.S. Filter Wastewater Group, Inc.*, 190 S.W.3d 242, 245 n.2 (Tex. App.—Houston [1st Dist] 2006, no pet.); see also TEX. R. CIV. P. 202.2(e) ("The petition must: . . . state the subject matter of the anticipated action, if any, and the petitioner's interest therein.").

such anticipated action.⁵⁷ The required allegations are contained in sections III and VI of the Petition⁵⁸ and are verified.⁵⁹ Moreover, as more fully set forth in the First Response, only Google, from who discovery is sought, has standing to object to any perceived failure under Rule 202.⁶⁰ Accordingly, the Petition satisfies all the requirements of Rule 202.

⁵⁷ See TEX. R. CIV. P. 202.2(d)-(g).

⁵⁸ See Petition at 2-4 ("The substance of the testimony expected to be elicited from Google involves obtaining the names and addresses of entities and/or individuals who hosted and posted defamatory statements concerning M.P. on the Blog. . . . With the identity of those responsible for the above-referenced false and libelous statements, Petitioner will be able to further investigate potential claims resulting from those statements, including, but not limited to: statutory libel under Texas Civil Practice & Remedies Code § 73.001; tortious interference with contract; tortious interference with prospective business relations; business disparagement; and civil conspiracy. This investigation and the information determined therefrom are necessary in order for Petitioner to: (1) request that such defamatory and otherwise wrongful conduct cease; (2) determine the extent and nature of damages suffered; (3) determine what causes of action Petitioner may properly bring; and (4) determine whether to file claims against those responsible. Without knowing who made the libelous statements, Petitioner cannot determine to whom those statements were made and the nature and extent of the resulting consequential damages. For example, if the libelous statements were viewed by, or repeated to, current or potential members of Petitioner's club and those libelous statements influenced membership decisions, not only will Petitioner have suffered special damages, but Petitioner and/or her club may have additional claims (e.g., tortious interference and business disparagement). The burden of this procedure is outweighed by the fact that this deposition may help avoid litigation. For example, Petitioner may determine that the defamatory bloggers are mainly malcontented reprobates whose opinions are so largely devalued by persons of reason that no damages were sustained by Petitioner. Considering the premises, Petitioner requests that the Court set a date for a hearing on this petition, and after the hearing find that the likely benefit of allowing Petitioner to take the requested deposition, or other form of discovery to which the parties agree, in order to investigate potential claims outweighs the burden or expense of the procedure. Petitioner further requests that the Court issue an order authorizing Petitioner to take the discovery of a corporate representative for Google to be taken at a time and place to be specified by Petitioner in a deposition notice or other form of discovery as required by the Texas Rules of Civil Procedure.").

⁵⁹ See Petition at 6 ("The factual statements contained in the first sentence of Section III and Section VI are true and correct.").

⁶⁰ See First Response at 8-9; *Calder v. Cass*, 310 S.W.2d 649, 650 (Tex. Civ. App.—Dallas 1958, no writ) (holding that even a person served with a deposition request could not complain about failure to follow proper procedure in regards to a deposition request to another person).

D. The First Amendment Does Not Bar The Requested Discovery.

1. The Second Motion should be denied because the Petition satisfies the standard in Texas.

Consistent with the purposes of Rule 202 and discovery in general, Texas permits discovery of the identity of anonymous defamers despite assertions of First Amendment rights.⁶¹ Movant, however, conveniently ignores Texas case law in an attempt to fabricate a heightened standard of pleading necessary to obtain, in pre-suit discovery, disclosure of an anonymous speaker's identity.⁶² It is illuminating that Movant fails to cite a single Texas authority⁶³ supporting its purported standard and no authority concerning pre-suit discovery.⁶⁴ Given the rationale for Rule 202 (i.e., to provide an opportunity for potential plaintiffs to gather

⁶¹ See, e.g., *supra* n. 34, 35.

⁶² See Second Motion at 3-9. Movant disregards directly applicable cases such as *In re Maurer*, 15 S.W.3d 256; *Doe v. Haddock*, 2007 WL 940761; and *In re Doe(s)*, 2006 WL 3114458.

⁶³ Not only has Texas (and the countless other jurisdictions intentionally ignored by Movant) not adopted Movant's proposed heightened standard, but several courts have specifically rejected such a standard in favor of pre-existing discovery rules. See, e.g., *McMann v. Doe*, 460 F. Supp. 2d 259, 268 (D. Mass. 2006) ("While there may therefore be problems with the mechanics of a summary judgment test, it is reasonable to apply some sort of a screen to the plaintiff's claim before authorizing the subpoena."); *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Development, Inc.*, No. 0425, 2006 WL 37020, at *9 (Pa. Com. Pl. Jan. 4, 2006) (not reported in A.2d) ("[T]his court will not apply the *Dendrite* or the *Cahill* standards. Instead, it will analyze defendants' Motion for a Protective Order under existing Pennsylvania discovery rules."); *Polito*, 2004 WL 3768897, at *7; *In re Baxter*, 2001 WL 34806203, at *12; *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, at *8.

⁶⁴ See *In re Baxter*, 2001 WL 34806203, at *12 ("[T]he proper standard should be, depending upon whether the statements involve public concern or private concern, a showing of at least a reasonable probability or a reasonable possibility of recovery on the defamation claim."); *Road Runner High Speed Online*, 799 N.Y.S.2d at 850 ("Before a petitioner can obtain (pre-suit) discovery, however, he or she must demonstrate that they have a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." In determining that the standard was met, the court looked solely to the pleadings.); see also *id.*

information to assist them in determining whether or not to file suit), a summary judgment standard would be entirely incompatible.⁶⁵

The standard in Texas is clear: Texas permits discovery to investigate the identity of anonymous defamers who attempt to cloak themselves in the wrappings of the First Amendment.⁶⁶ In fact, recently, the Fort Worth Court of Appeals in an unpublished opinion but nearly identical case rejected an appeal and denied a mandamus of an order, under Rule 202, authorizing the petitioner "to obtain appellants' names, addresses, and phone numbers from Yahoo!."⁶⁷ Other jurisdictions addressing pre-suit discovery have similarly held that disclosure of an internet defamer's identity is appropriate where the victim has a "good faith" basis for a claim and disclosure is necessary to pursue that claim.⁶⁸

Here, Petitioner was stated to be, among other things, a fraud, a gold digger, and one of ill-repute while being accused of violating the bylaws of her business, breaching her fiduciary

⁶⁵ See Hecht & Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions*, 1998, at G-17, available at: <http://www.supreme.courts.state.tx.us/rules/tdr/discle37.pdf> ("Plaintiffs' lawyers . . . urged that investigatory depositions under Rule 737 had proven to be a useful device by which plaintiffs could investigate a potential claim, a step that, they contended, has become increasingly necessary in an era of sanctions for frivolous lawsuits, 'no evidence' summary judgment motions, and other heightened burdens on plaintiffs. Several practitioners commented that the results of bill of discovery depositions frequently lead them not to file suit or not to pursue a potential defendant, thereby reducing the number of lawsuits and overall litigation costs. To address . . . concerns, Rule 202 expressly permits pre-suit investigatory depositions but limits the extent to which they can be used in a subsequent lawsuit if an eventual party did not receive notice of the deposition. A Rule 202 deposition ordinarily can be used to the same extent as a sworn statement; that is, solely for impeaching the witness from whom the deposition was taken. But if a party attempts to use Rule 202 abusively and/or to circumvent deposition notice requirements — such as to 'set up' a target rather than for good faith investigation of a potential claim — Rule 202.5 authorizes the trial court to forbid the use of the deposition for any purpose, including impeachment.").

⁶⁶ See, e.g., *In re Maurer*, 15 S.W.3d at 261; *Doe v. Haddock*, 2007 WL 940761 at *3; *In re Doe(s)*, 2006 WL 311458, at *1.

⁶⁷ See *Haddock*, 2007 WL 940761, at *3; *In re Doe(s)*, 2006 WL 3114458, at *1.

⁶⁸ See, e.g., *In re Baxter*, 2001 WL 34806203, at *12.

duties, and committing fraud.⁶⁹ In Texas, these statements constitute actionable libel, not to mention other torts.⁷⁰ Pursuant to the Petition, Petitioner seeks the identity of those responsible for such statements in order to “further investigate potential claims resulting from those statements, including, but not limited to: statutory libel under Texas Civil Practice & Remedies Code § 73.001; tortious interference with contract; tortious interference with prospective business relations; business disparagement; and civil conspiracy.”⁷¹ Therefore, Petitioner has stated good faith claims. Accordingly, the Second Motion should be denied.

2. **Regardless, the Second Motion should be denied because Petitioner has even satisfied the requested heightened standard that Texas does not recognize.**

Movant requests that this Court ignore Texas cases and other more applicable decisions in favor of the standard applied by the New Jersey Court of Appeals, which requires that Petitioner show that: (i) Movant has notice; (ii) it has a viable libel claim; and (iii) the strength of the claim outweighs First Amendment rights.⁷²

a. **Movant clearly has notice.**

Movant has no basis to argue that it did not receive notice of Petitioner’s discovery request. In fact, Movant, by filing: (1) its First Motion; and (2) its Second Motion, admits that it has notice. Any contention to the contrary is frivolous. Accordingly, the requested notice requirement is satisfied.

⁶⁹ See Exhibit 1 to the Affidavit of Dale Martin filed on November 21, 2007.

⁷⁰ See *supra* pp. 6-7.

⁷¹ Petition at 3.

⁷² See Second Motion at 5. The New Jersey standard urged by Movant also requires that the petitioner set forth the statements at issue. See *id.* Movant, however, obviously does not contest that this requirement has been satisfied.

b. Petitioner has stated a claim for libel.

As set forth above, Petitioner must show that the Movant published a defamatory statement concerning the plaintiff.⁷³ While Petitioner would not be surprised if additional defamatory statements are discovered once the identity of the anonymous tortfeasor(s) is known, the anonymous tortfeasor(s) has committed libel based solely on the statements contained on the blog at issue.⁷⁴

Movant, however, attempts to defeat Petitioner's potential libel claim by incorrectly asserting that "[s]tatements of opinion are not actionable."⁷⁵ Both the United States Supreme Court and Texas Supreme Court have abolished inquiry into whether a statement is one of fact or opinion; instead, the rule now is that statements, whether fact or opinion, that expressly or impliedly assert objective facts are actionable.⁷⁶ Not surprisingly, Texas courts have upheld defamation claims where: (i) the plaintiff was referred to as "sleazy," "a slut," and "a gold digger,"⁷⁷ (ii) the defendant defamed the plaintiff through innuendo;⁷⁸ (iii) statements that could

⁷³ See *supra* p. 6.

⁷⁴ See Exhibit 1 to the Affidavit of Dale Martin filed on November 21, 2007. Inexplicably, Movant erroneously asserts that there is no evidence that the blog was published. See Second Motion at 10. However, by its own admission the blog at issue "permit[ted] persons who visit the site to add their own comments" but that "[t]he blog itself has been removed." See First Motion at 2, 10. Moreover, Movant admits "the ability for readers to leave comments in an interactive format is an important part of many blogs." First Motion at 1.

⁷⁵ See Motion at 9.

⁷⁶ See *Milkovich*, 497 U.S. at 18-19; *Bentley*, 94 S.W.3d at 579-80; TEX. CIV. PRAC. & REM. CODE § 73.001 ("A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.").

⁷⁷ See *Marshall*, 974 S.W.2d at 948. Accordingly, Movant's reliance on *Knafel v. Chicago Sun-Times, Inc.*, 413 F.3d 637 (7th Cir. 2005), to contend that the phrase "gold digger" cannot be libelous, is misplaced. See Second Motion at 13.

be characterized as opinions implied the existence of undisclosed defamatory facts;⁷⁹ and (iv) the plaintiff was referred to as “a liar, a thief, and a swindler.”⁸⁰

Here, a few examples of the defamatory statements include: (i) Petitioner “is a fraud of a club owner (albeit she ‘earned’ her ownership on her knees)”; (ii) Petitioner “continues to break the bylaws” of a country club;⁸¹ and (iii) “A lawsuit is imminent” [sic] against Petitioner for “breach of fiduciary responsibility and apparently some fraud.”⁸² Those statements are defamatory, assert objective facts, and are false.⁸³

⁷⁸ See *Guisti v. Galveston Tribune*, 105 Tex. 497, 504 (Tex. 1912) (“It is immaterial that the publication complained of is not libelous per se, it is libelous and actionable, nevertheless, if by such innuendoes as may not extend but simply explain the effect and meaning of the language used and the identity of the person libeled, the publication is of such character as tends to injure the reputation of plaintiff and expose her to public hatred, contempt or ridicule, or tends to impeach her honesty, integrity, virtue or reputation.”); see also *Druckel v. Saint Joseph Hosp.*, 78 S.W.3d 576, 585 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (“To prove a defamation claim, a plaintiff may use innuendo to explain the statements.”).

⁷⁹ See *Shearson Lehman Hutton, Inc.*, 806 S.W.2d at 920-921 (“This Court has held that an opinion may be actionable in a defamation case if the statement contains an implied assertion of fact. . . . Even assuming, that the statements could be characterized as opinions, the statements clearly imply the existence of undisclosed facts that Tucker had engaged in serious misconduct, which adversely reflected upon his reputation and fitness as a stockbroker.”).

⁸⁰ See *Flournoy*, 37 S.W.2d at 273. Movant erroneously suggests that “fraud” is never actionable, citing a non-occupational case where a husband called his wife a “liar” and a “fraud.” Motion at 12. “Fraud,” however, is actionable in the well-settled injury to occupation context. See, e.g., *Flamm*, 201 F.3d at 151 (holding that a description of a lawyer as an “ambulance chaser . . . reasonably implies that he has engaged in unethical solicitation”).

⁸¹ Citing no legal authority, Movant erroneously asserts that this statement “is hardly the type of specific allegation of wrongdoing that constitutes a libel claim.” Second Motion at 13. Accusations of “fraud” with respect to one’s occupation, however, are actionable. See, e.g., *Flournoy*, 37 S.W.2d at 273. Moreover, Movant simply ignores that Petitioner is accused of breaching fiduciary duties and committing fraud. See Exhibit 1 to the Affidavit of Dale Martin filed on November 21, 2007.

⁸² See Exhibit 1 to the Affidavit of Dale Martin filed on November 21, 2007.

⁸³ Movant desperately attempts to defeat Petitioner’s libel claim by questioning “the context of the statements she complains about.” Second Motion at 11-12. The blog, however, was presented to the Court in its entirety (redacting only a few proper names) and the context is apparent on the face of the blog—these statements can hardly be considered anything less than

In other words, the anonymous defamer(s) have falsely called petitioner: (i) a fraud; (ii) a gold digger; and (iii) one of ill repute, while falsely asserting that she has violated bylaws, committed fraud, and breached fiduciary duties. The actionable defamatory words "sleazy," "slut," and "gold digger" pale in comparison to the statements published in regard to Petitioner.

Simply put, because Petitioner has established a viable libel claim,⁸⁴ and because the disclosure of Movant's identity is necessary to redress this harm, Movant has satisfied the requested balancing test.⁸⁵ Accordingly, even applying Movant's proposed heightened standard (that has received no traction in Texas), Movant's Second Motion should be denied.

defamatory, especially considering that the blog was created "to discuss possible remedies" to "stop" Petitioner from running her business. See Exhibit 1 to the Affidavit of Dale Martin filed on November 21, 2007. Moreover, Petitioner cannot provide any further context without knowing the identity of the defamer(s). Moreover, Movant attempts to argue that it cannot know whether Petitioner has been defamed, because "Petitioner does not even identify herself." See Second Motion at 10. This claim is absurd, considering that Movant allegedly created the blog that defamed her. Regardless, whether Petitioner was "injured in her business reputation . . ." is irrelevant, as damages are not an element of libel. See, e.g., TEX. CIV. PRAC. REM. CODE 73.001.

⁸⁴ It should be noted that Movant asserts a statute of limitations defense, based on the erroneous proposition that "the 'discovery rule' does not toll limitations for media publications or internet publications." Motion at 14. Inexplicably, Movant cites to *Kelley v. Rinkle*, a 1976 case that does not refer to the internet and was obviously written before the internet even existed. *Id.* *Rinkle* held specifically that a court "would not apply the discovery rule where the defamation is made a matter of public knowledge through such agencies as newspapers or television broadcasts." *Kelley v. Rinkle*, 532 S.W.2d 947, 949 (Tex. 1976). The blog at issue can hardly be considered a mass media publication comparable to a newspaper or television broadcast, and thus, the discovery rule indeed applies. See, e.g., *Hebrew Academy of San Francisco v. Goldman*, 28 Cal. Rptr. 3d 515, 520-21 (Cal. Ct. App. 2005) (review granted, depublished) ("No case holds, and the purpose of the single-publication rule does not suggest, that a communication not published in a book, newspaper or magazine and not directed to a mass readership is subject to the rule simply because it is held in a library or otherwise theoretically "available" to a member of the public who may know of its existence.").

⁸⁵ See, e.g., *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 777-78 (N.J. App. 2001) (following the requested heightened standard and holding that "[i]n balancing Moonshine's right of anonymous free speech against the strength of the prima facie case presented and the necessity for disclosure, it is clear that the motion judge struck the proper balance in favor of identity disclosure. With evidence demonstrating Moonshine is an employee of Immunomedics, that employees execute confidentiality agreements, and the content of Moonshine's posted messages providing evidence of the breach thereof, the disclosure of Moonshine's identity, which can be

V.

CONCLUSION

For all the foregoing reasons, Petitioner requests that the Court deny Movant's Motion to Quash Discovery and Opposition to First Amended Rule 202 Petition Requesting Deposition to Reveal J. Doe's Identity, and grant Petitioner all other relief to which Petitioner may be entitled.

Respectfully submitted,

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reasonably calculated to be achieved by information obtained from the subpoena, was fully warranted. Although anonymous speech on the Internet is protected, there must be an avenue for redress for those who are wronged. Individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment."'). Notably, while Movant requests the balancing test, the Second Motion does not refute that Petitioner has met the balancing test. See Second Motion.

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing document to be served upon the following via facsimile on this 4th day of December, 2007.



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