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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SANTA CLARA**

MARK AND RHONDA LESHER,

Plaintiffs,

vs.

JOHN AND/OR JANE DOES 1-178,

Defendants.

Case No. 109CV134190

**PLAINTIFFS' OPPOSITION TO MOTION TO QUASH PLAINTIFFS' DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS, OR IN THE ALTERNATIVE FOR A PROTECTIVE ORDER**

DATE: March 27, 2009
TIME: 9:00 a.m.
DEPT: 22

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22. Affidavit of Mark Lesher, submitted with the original petition;

23. Affidavit of Rhonda Lesher, submitted with the original petition;

24. Affidavit of Katrina Fourd, submitted with the original petition;

25. Plaintiffs' Original Petition, filed with the Tarrant County District Court on Feb. 3, 2009, styled "Mark and Rhonda Lesher v. John and Jane Does 1-178."

Plaintiffs Mark and Rhonda Lesher hereby oppose Non-Party Topix, LLC's motion:

## I. THE FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH IS NOT ABSOLUTE

Plaintiffs agree that: 1) the right to speak anonymously is well-established within First Amendment jurisprudence; 2) the right to speak anonymously applies to speech over the internet; and 3) "***a rule*** that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas and valuable contributions." (Topix Memo, at 3, emphasis added). In the case at bar, however, Plaintiffs are not requesting that the court fashion such a rule. Rather, Plaintiffs are seeking a rule that balances the right to speak anonymously with their right to pursue a remedy for libelous statements accusing them of rape, spreading sexually transmitted diseases, selling drugs, participating in sex orgies, and other reprehensible behavior. The internet is not a fantasy land in which the substantive laws of our country cease to operate. Plaintiffs have a right to hold the John Doe Defendants in this case accountable for libel, regardless of the medium; no case within our jurisprudence suspends liability for libel simply because it takes place online.

### a. *The Court Should Reject Topix's Assertion That The Case At Bar Needs to Be Analyzed Under "The Closest Scrutiny" Standard*

Topix has argued that "a court order to compel production of individuals' identities in a situation that ***threatens the exercise of fundamental rights*** 'is subject to the closest scrutiny.'" (Topix Memo, at 3 (emphasis added)). Topix's argument fails because the precedents cited therein are clearly distinguishable. In *Bates v. City of Little Rock*, the petitioner sought to protect a list of members who were engaged in ***lawful*** conduct. Similarly, in *NAACP v. Alabama* , the Court wrote that, "[W]e think it apparent that compelled disclosure of [the NAACP's] Alabama membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to ***foster beliefs which they admittedly have the right to advocate***." (357 U.S. 449, 462-463 (1958)). Here, Defendants are not exercising any right, much less a fundamental one.

### *b. Defendants Have No Fundamental Right to Anonymously Defame Plaintiffs*

In the case at bar there is no "exercise of fundamental rights." (Topix Memo, at 3). Just as there is ***no right*** to defame persons in other mediums without repercussion, there is nothing within our laws saying that a right to do so somehow exists in cyberspace. (*Beauharnais v. Illinois*, 343

U.S. 250, 266 (1952) ("Libelous utterances [are] not…within the area of constitutionally protected speech…"). *See also In Re: Does 1-10*, 242 S.W.3d 805, 820 (Tex.App.—Texarkana 2007) ("As in other venues…anonymous (electronic) speakers may not freely defame individuals without facing civil responsibility for their acts."), *citing McMann v. Doe*, 460 F.Supp.2d 259, 263 (D. Mass. 2006); and *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231, 238 (Cal. App. 4th 2008) ("[w]hen vigorous criticism descends into defamation…constitutional protection is no longer available.")). Thus, Topix's reliance on cases concerning the exercise of fundamental rights is clearly misplaced.

Plaintiffs aver that Topix lacks standing to make this argument on behalf of the Defendants; in the event that Topix avers otherwise, Plaintiffs demand strict proof thereof. Assuming *arguendo* the Court finds that fundamental rights are threatened and that Topix has standing, Plaintiffs have a compelling interest in seeking a remedy for the injustice that has been perpetrated by countless cowards from the shadows that Topix has cast both purposefully (*see* Decl. of Demond, Exhibit 12) and knowingly (*see* Decl. of Demond, Exhibit 13, at frame 8, where Chris Tolles, CEO of Topix, writes: "Anonymity enables certain bad behaviors [including j]umping onto hot button issues with an 'oh yeah' [and p]ersonal attacks when everyone knows each other.").

Even if the Court finds that the speech in question is a fundamental right, "[S]peech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas." (*Davenport v. Washington Educ. Ass'n*, 127 S.Ct. 2372, 2381 (2007), *citing R.A.V. v. City of St. Paul, Minn*., 505 U.S. 377, 382-84 (1992)). Plaintiffs aver that if the speech in question is a right, this is a case where it should be proscribed.

## II. PLAINTIFFS HAVE SATISFIED THE "CONSENSUS TEST" OUTLINED IN *DENDRITE*

Topix has invoked the consensus test outlined in *Dendrite*. Plaintiffs will now demonstrate how they have preemptively met each prong of the *Dendrite* test as adapted by the California Court of Appeals for the Sixth District in *Krinsky v. Doe 6, infra.*

a. *Plaintiffs Have Used the "Best Efforts Available" to Notify John Doe Defendants of the Suit and Plaintiffs' Efforts To Pierce Anonymity* (*1st Prong of* Dendrite)

"First, when asked to subpoena anonymous Internet speakers, a court should ensure that the plaintiff has undertaken the best efforts available to notify the speakers that they are the subject of a subpoena…" (Topix Memo, at 7, *citing Cahill*, 884 A.2d at 461; *Seescandy*, 185 F.R.D. at 579). Topix has admitted that it is incapable of monitoring every post that is made to its website. (*See* Decl. of Demond, Exhibit 12: "If you have a human pre-screening every comment, you are going to spend a lot of money if you get any volume… and if you do this by proxy by eliminating anonymous comments, what you're really doing is just limiting the scalability of your system…and you open yourself to becoming displaced by someone with a more open editorial policy.").

This inability and/or unwillingness to responsibly monitor the contents of its boards is clearly evidenced by its claim that, "Plaintiffs have posted a notice in an entirely separate forum…This one time posting in a separate forum, which does not reveal which identities are being sought, is far from the notice necessary to make potential defendants aware that their identities could be revealed." (Topix Memo, at 7). Contrary to Defendant's assertion, Plaintiffs have used every practical means to notify the Defendants that they are subject to a subpoena seeking to uncover their identity. More specifically, Plaintiffs have posted FOUR (not one) notices of their suit in FOUR separate threads on Topix.com (*see* Decl. of Demond, Exhibits 14, 15, and 16). Plaintiffs also posted the same notice within the most active of the threads ("Attorney Arrested on Sexual Assault Charges") (*see* Decl. of Demond, Exhibit 17). This is clearly sufficient under *Dendrite.* (*See Dendrite v. Doe,* 342 N.J. Super. 134, 136 (App. Div. 2001); *see also Krinsky,* 72 Cal. Rptr.3d at 243). Topix's claim that, "Plaintiffs should have posted in each separate forum" is utterly unsupported by the law, especially given the fact that many of the other threads referred to by Topix had been abandoned and were not reasonably calculated to provide notice to anyone.

Plaintiffs' notice clearly reached members of its target audience. The information posted by Plaintiffs was further spread to the Texarkana, Texas forum by a Topix user who was one of the

named pseudonymous Defendants in the case at bar (*see* Decl. of Demond, Exhibit 18). Furthermore, Plaintiffs' attempts to uncover Defendants' identities made "headline news" in the forum of the case at bar. Fox News' Dallas/Fort Worth affiliate broadcast a story about the case on February 9, 2009 (*see* Decl. of Demond, Exhibit 19). At the end of this broadcast, the announcer said, "We do have a link [on our website] www.myfoxdfw.com, that's to the entire suit, you can just click on the links section at the top of the page." (*KDFW Fox 4 News: Online Postings Lead to Libel Lawsuit* (FOX television broadcast, Feb. 9, 2009) (*available at* http://www.myfoxdfw.com/dpp/news/Online_Postings_Lead_to_Libel) (last visited March 3, 2009)). This story aired in the forum of the case at bar 6 days after filing and can be reasonably interpreted to have provided notice to Defendants in the North Texas area.

Additionally, Plaintiffs clearly and adequately notified the John Doe Defendants subject to their subpoena by posting that, "[The Plaintiffs] are in the process of identifying the persons who have made these postings. In particular, we are serving a subpoena on Topix.com seeking certain documents, electronically stored information, and associated metadata." (*See* Decl. of Demond, Exhibits 14-17). Plaintiffs' post provided a link to a copy of the petition that organized the Defendants in alphabetical order for their convenience. (*See* Decl. of Demond, Exhibit 25).

Finally, anyone who has visited www.topix.com since at least February 17, 2008 has seen a banner ad advising them of the suit and providing links to the relevant threads (*see* Decl. of Demond, Exhibit 20). Topix's attempt to advertise this matter on its front page while both 1) arguing that the John Doe Defendants in this case have not received sufficient notice and 2) expressly requesting that Plaintiffs stop sending correspondence to the Texas court under the pretense that conduct which "drives the media attention to this case…only creates more issues and distractions for all of us" (*see* Decl. of Demond, Exhibit 6) should preclude Topix from invoking any arguments concerning lack of notice to John Doe Defendants. Due to the facts that 1) over 3,700 comments have been ***posted*** in the "Tell everyone what you think about this issue" thread (Decl. of Demond, Exhibit 21), 2) not everyone who visits these threads posts responses thereto, 3) Topix does not appear to have standing to object on behalf of the Defendants in this case, and/or 4) there can be remarkably little that could conceivably generate more attention on Topix than a

banner ad inviting ***every*** visitor to become aware of the case at bar, the Court should preclude Topix from arguing that the Defendants have not had adequate notice.

b. *Plaintiffs Have Identified Defendants' Defamatory Statements with Specificity* (*2d prong of* Dendrite)

"The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, courts should require plaintiffs to quote the exact statements by each anonymous speaker that are alleged to have violated its rights." (Topix Memo, at 7-8). Topix's argument that "Plaintiffs have not quoted the exact statement by each anonymous speaker" is utterly unfounded (*see* Topix Memo, at 8). Under both United States Supreme Court and Texas Supreme Court decisions, a plaintiff is only required to show that a statement expressly or impliedly asserts facts that are objectively verifiable (*Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990); *Bentley v. Bunton*, 94 S.W.3d 561, 580 (Tex.2002)). Plaintiffs have identified statements that are *prima facie* defamatory under Texas law in their petition (*see generally* Decl. of Demond, Exhibit 25). Further, Topix should be precluded from arguing that the portions cited by Plaintiffs are insufficient because Topix expressly requested that Plaintiffs only provide a representative sample of the each post. (Decl. of Demond, ¶ 4). There can be little question that the honorable Court is capable of identifying defamatory speech in this case, Topix's assertions to the contrary notwithstanding (Topix Memo, at 8: "The Court can not [sic] ascertain whether a particular post is defamatory by only viewing select pieces of the entire post.")

Plaintiffs have invited Topix to identify posts deemed questionable (*see* Decl. of Demond, Exhibit 5); Topix has failed to do so. Further, not a single Defendant has filed an objection. In addition, the petition, motion for a letter rogatory, and subpoena have been reviewed and approved by a Texas judge applying the laws of Texas. These laws clearly permit Plaintiffs to bring defamation suits based on individual statements (*see, e.g., Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 855 (Tex.2005)) as opposed to entire publications (*see, e.g., Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 120-21 (Tex.2000)). Thus, Plaintiffs have complied with the law of the land and the Court should disregard any claim to the contrary.

*c. Plaintiffs' Allegations of Defamation are Facially Valid* (*3d prong of* Dendrite)

The Court of Appeals for the Sixth District has observed that, "Common to most courts [in cases of this type] is the necessity that the plaintiff make a prima facie showing that a case for defamation exists." (*Krinsky,* 72 Cal. Rptr. 3d at 244-45). Plaintiffs have clearly established that their defamations claim are viable and facially valid.

Plaintiffs who assert defamation claims in Texas must prove that the defendants published a defamatory statement concerning the plaintiffs. (*See Carr v. Brashear*, 776 S.W.2d 567, 569 (Tex. 1989)). In addition, a private-figure plaintiff must prove negligence regarding the falsity of defendants' statement while a public-figure plaintiff must prove actual malice—i.e., knowledge or reckless disregard of falsity. As set forth in Plaintiffs' petition, the statements made by Defendants in this case were published on the internet, identified Defendants by name, and were clearly defamatory *per se* under Texas law. (*See*, e.g., *Mustang Athletic Corp. v. Monroe*, 137 S.W.3d 336 (statement imputing crime is defamatory *per se*); *Marshall v. Mahaffey*, 974 S.W.2d 942 (statement imputing sexual misconduct is defamatory *per se*); *Villasenor v. Villasenor*, 911 S.W.2d 411 (statement imputing loathsome disease is defamatory *per se*)). A Texas judge has already applied Texas law and signed off on the order for a letter rogatory (*see* Decl. of Demond, Exhibit 2). While Plaintiffs honor and respect the power of the California court to make determinations concerning California law, said court does not have the authority to overrule a Texas judge interpreting and applying Texas law to a Texas case.

Further, Topix should be precluded from invoking the infamous bootstrapping problem associated with defamation law. More specifically, 1) Plaintiffs cannot identify the John Does, 2) the John Does could be the very person(s) who lodged criminal complaints against Plaintiffs, and 3) our jurisprudence does not permit Defendants to invoke the protections afforded by a Plaintiff's public figure status if that Defendant contributed to or created said status. (*Hutchison v. Proxmire*, 443 U.S. 111, 135 (1979) ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.")).

If the Court chooses to analyze the public versus private nature of Plaintiffs, Topix's counsel has misread either the law of the land or the Plaintiffs' pleading. Specifically, Topix has argued that, "Because they are limited-purpose public figures…[Plaintiffs] must allege and prove actual malice in order to succeed in their libel claim; however their [sic] filings do not contain any assertions that the bloggers made false statements with knowledge of their falsity or reckless disregard of probable falsity." (Topix Memo, at 9). Plaintiffs submit this is a misrepresentation of their pleadings. Specifically, Plaintiffs pled actual malice in every count of defamation (*see* Decl. of Demond, Exhibit 25). Topix cites *New York Times v. Sullivan* as precedent defining "actual malice"; Plaintiffs have unequivocally pled "actual malice" under *New York Times* (*see generally Id*.). Topix's counsel clearly did not read or understand Plaintiff's pleading.

Further, Topix's reliance on the posts listed on page 9 of their memo is misplaced. Specifically, the names of the threads cited by Topix impliedly refer to the Plaintiffs. The comments cited by Topix are found within a thread called "TRIO OF TRASH". This thread clearly and unequivocally refers to Red McCarver (not a party to this matter) and Mark and Rhonda Lesher (Plaintiffs) (*see,* e.g., Decl. of Demond, Exhibit 7, ¶ 7). Plaintiffs clearly stated in their pleading that these statements referred to the Plaintiffs "by name and/or indirectly". (*See,* e.g., Decl. of Demond, Exhibit 25, pp. 31 and 33). Such an allegation clearly comports with Texas law (*see, e.g., Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960); *Davis v. Davis*, 734 S.W.2d 707, 711 (Tex.App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (publication can defame a plaintiff even if the plaintiff is not expressly identified therein); and *Outlet Co. v. International Sec. Group*, 693 S.W.2d 621, 626 (Tex.App.—San Antionio 1985, writ ref'd n.r.e.) (same)). Thus, Topix's claim that the posts do not refer to the Plaintiffs is meritless.

Turning to the actual substance of the statements in question, Topix has cited three examples whereby Red McCarver allegedly confessed to "their" guilt. Red McCarver never confessed to any one's guilt concerning the underlying accusations, thereby making any statement of fact alleging otherwise inherently and verifiably false. The allegation that Red did confess to "their" guilt at the very least implies that the Plaintiffs are guilty of a crime and/or sexual misconduct. Again, these allegations were within threads whose title and substance was primarily

(if not solely) concerned with allegations that Red McCarver, Mark Lesher, and Rhonda Lesher were guilty of aggravated sexual assault (*see* Decl. of Demond, Exhibit 7, ¶ 7). Due to the fact that said allegations/implications/innuendo are clearly pled and/or defamatory *per se* under Texas law (*see,* e.g., *Snider v. Leatherwood*, 49 S.W.2d 1107, 1109 (Tex.App.—Eastland 1932, writ dism'd) and *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 115 (Tex.2000)), these statements are defamatory. Thus, Topix's arguments to the contrary are without merit.

d. *Plaintiffs Have Demonstrated An Evidentiary Basis For Their Claims (4th Prong of* Dendrite*)*

As demonstrated above, Plaintiffs have not only shown the facial validity of their claims but have produced evidence of every "material fact that [is] accessible" to them as well. (*Krinsky,* 72 Cal. Rptr. 3d at 245). Topix asserts that *Dendrite* requires Plaintiffs to produce "sufficient evidence supporting each element of the cause of action to show a realistic chance of winning a lawsuit against each Doe defendant." (Topix Memo, at 10). The relevant standard, however, is whether Plaintiffs have produced *prima facie* evidence to support their claim—i.e. "that which will support a ruling in favor of its proponent if no controverting evidence is presented." (*Krinsky*, 72 Cal. Rptr. 3d at 245, n. 14). Plaintiffs have clearly met this standard in this case.

Nonetheless, Topix claims, "The Plaintiffs have not produced any evidence supporting each element of their cause of action." (Topix Memo, at 10). Unfortunately, Topix's California counsel is woefully unfamiliar with the record. Plaintiffs provided the Texas court (and are hereby providing the California court) with affidavits from Mark Lesher (Decl. of Demond, Exhibit 22), Rhonda Lesher (Decl. of Demond, Exhibit 23), and Katrina Fourd (Decl. of Demond, Exhibit 24) outlining the underlying falsity of the allegations in question, the general damages associated therewith, and the reasonable indicia of reliability associated with Plaintiffs' evidence. These affidavits were expressly referenced in Plaintiffs' petition. (*See* Decl. of Demond, Exhibit 25, p. 2). These indicia will be further bolstered upon Plaintiffs' acquisition of documents in Topix's exclusive possession. Topix should be precluded from arguing that Plaintiffs cannot produce the very evidence that 1) is in Topix's exclusive possession and 2) Plaintiffs have secured a subpoena for.

e. *The Court Should Balance The Equities* (*5th prong of* Dendrite)

*Dendrite* did not employ the balancing test from the Missouri Court of Appeals case cited by Topix: "***[I]f a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in the favor of discovery if the harm from such discovery is not too severe***." (Topix Memo, at 10, emphasis added). Due to the fact that this is the type of test normally applied in cases involving reporter's privilege, it is clearly inapposite to the present case. Topix also quotes *Dendrite*: "assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's liability to allow the plaintiff to properly proceed." (Memo at 10-11, *citing* 342 N.J. Super. at 141-142, 775 A.2d at 760-761). However, the balance tips in favor of disclosure of Defendants' identities under either standard.

i. Plaintiffs' Case Is Extremely Strong

Topix has not made any argument that Plaintiffs' case is not strong. Even if they did, Plaintiffs aver that every count of defamation *per quod* is followed by a count of defamation *per se* (*see* Decl. of Demond, Exhibit 25); thus, Plaintiffs need only prove that the Defendants made the statements in order to prove liability (*see, e.g., Morrill v. Cisek*, 226 S.W.3d 545, 549 (Tex.App.—Houston [1st Dist.] 2006, no pet.)). This proof is in Topix's possession and Plaintiffs should not be denied access thereto. Further, the information sought is not available via any other legal means and Plaintiffs have a compelling interest therein.

Further, Plaintiffs have *gone beyond simply proving a* prima facie *case;* they have also pled *per se* allegations that only require proof that the statements were in fact made (*Cisek,* 226 S.W.3d at 549). It is difficult to imagine a *prima facie* case that is stronger than one that simply requires proof that the statements in question were published. Further, Topix is the custodian of records that prove 1) these comments were made and 2) the IP addresses of the individuals that made them. Thus, the balance is arguably tipped in favor of the Plaintiffs to an unquantifiable degree.

ii. Topix Is Not A Defendant In The Case At Bar

In addition to the *Dendrite* standard, Topix has cited *Highfields Capital Mgmt. v. Doe,* 385 F. Supp.2d 969, 975 (N.D. Cal. 2005) for the proposition that California courts "[must] assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." Here, Topix is not yet a Defendant in the case at bar; thus, *Highfields* is inapposite because it expressly concerns defendants.

iii. Even If The Court Applies *Highfields,* The Harm To Topix If Their Motion To Quash Is Denied Is Substantially Outweighed By The Inevitable Harm To Plaintiffs If Said Motion Is Granted

Notwithstanding the *prima facie* inapplicability of *Highfields,* Plaintiffs cannot prosecute their case without the information in Topix's possession. Topix has alleged that it will be harmed because an employee cannot effectively perform their job; there are several distinct ways around this problem. Plaintiffs have already suggested that Topix acquire a contractor to perform this task (*see* Decl. of Demond, Exhibit 5) and have submitted a check for $6,840 (*see* Decl. of Demond, Exhibit 3) to pay for the 285 hours of work at $24/hour. The harm that would result from Plaintiffs' inability to prosecute their case substantially outweighs any harm that Topix may invoke when they both 1) knew that problems like this could arise (*see* Decl. of Demond, Exhibit 13, frame 8) and 2) have known of Plaintiffs' intent to seek the information in question since October 7, 2008 (*see* Decl. of Demond, Exhibit 1).

iv. Quashing Plaintiffs' Subpoena Is Analogous To A Dismissal Or An Adverse Summary Judgment

Further, Plaintiffs aver that Topix fundamentally misunderstands the stakes of this particular matter. Specifically, Topix argues that, "Denial of a motion to enforce a subpoena identifying the defendant…is not comparable to a motion to dismiss or a motion for summary judgment." (Topix Memo, at 11). Plaintiffs counter that the IP information they seek from Topix is absolutely crucial to the prosecution of their claim. Indeed, there is simply no feasible way for

Plaintiffs to prosecute their claims and/or vindicate their reputation if Topix does not provide the subpoenaed information. Once Plaintiffs acquire these IP addresses, they must subpoena records from the Internet Service Providers (ISPs) that were assigned those IP addresses on the dates they were used to make defamatory comments against the Plaintiffs. Due to the volume of metadata, ISPs generally only keep this information for a limited time; thus, this information is being erased from the relevant ISPs in the course of their respective regular business(es). Therefore, the refusal of the Court to enforce Plaintiffs' subpoena is in fact analogous to a dismissal or an adverse summary judgment insofar as it will effectively preclude Plaintiffs from prosecuting their claims. Thus, Topix's argument that "Plaintiffs have not demonstrated any reason, let alone a compelling reason, why they are entitled to the information requested" is beyond absurd (Topix Memo, at 12).

As Topix concedes, *Dendrite* "ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice." (Topix Memo, at 12). Plaintiffs agree with this assessment and contend that there has been no case brought before a United States court concerning online defamation(s) that involved a greater number of wild and outrageous statements than those in the case at bar. As a result, Plaintiffs both agree with Topix's contention that these individuals should not be immune from justice and aver that they should be entitled to the information they seek.

Topix even goes so far as to admit that the adoption of "strict legal and evidentiary standards [in other states]…have not stood in the way of identifying those who face legitimate libel and other claims." (Topix Memo, at 13). Plaintiffs have asserted legitimate claims and the adoption of said tests should not stand in the way of Plaintiffs prosecuting their claims. Thus, the Court should force Topix to comply with Plaintiffs' subpoena.

Topix has asked the Court to adopt the *Dendrite* test because it "balances the interests of defamation plaintiff [sic] to vindicate their rights in meritorious cases against the right of Internet speaker defendants [sic] to maintain their anonymity when their speech is not actionable." (Topix Memo, at 13). Here, Plaintiffs have clearly demonstrated their ability to prosecute the claims in question under Texas law; therefore, nothing in *Dendrite* prevents the Plaintiffs from acquiring the

information they need to pursue their meritorious claims. Thus, the Court should order Topix to comply with Plaintiff's subpoena.

## III. THE COURT SHOULD DISREGARD TOPIX'S ARGUMENTS CONCERNING UNDUE BURDEN

*a. The Subpoena Is Not Unduly Burdensome or Overbroad Under California Law*

The right to discovery in California is construed broadly so as to uphold the right to discovery wherever possible. (*Greyhound Corp. v. Sup.Ct. (Clay)* (1961) 56 C2d 355, 377-78; *Emerson Elec. Co. v. Sup.Ct. (Grayson)* (1997) 16 C4th 1101, 1108). Furthermore, the scope of discovery is extremely broad, requiring the information sought to be (1) "not privileged," (2) "relevant to the subject matter" of the action, and (3) either itself admissible or "reasonably calculated to lead to the discovery of admissible evidence." (CCP §2017.010). Any doubt is generally resolved in favor of *permitting discovery*, particularly where the precise issues in the case are not clearly established. (*Colonial Life & Acc. Ins. Co. v. Sup.Ct. (Perry)* (1982) 31 C3d 785, 790, fns. 7-8).

Information is considered "relevant to the subject matter of the case" if it might reasonably assist the party in evaluating the case, preparing for trial, or facilitating settlement thereof. (*Gonzalez v. Sup.Ct. (City of San Francisco)* (1995) 33 CA4th 1539, 1546). In the present case, the subpoena seeks identifying information (names, IP addresses, etc.) in Topix's possession regarding defamatory posts by anonymous individuals so that plaintiffs can identify the proper defendants in their case. The information sought is clearly relevant to the present case.

The information sought must be considered "reasonably calculated to lead to the discovery of admissible evidence." (CCP §2017.010). Admissibility at trial is *not* required. (*See Davies v. Sup.Ct. (State of Calif.)* (1984) 36 C3d 291, 301). Clearly, information that leads to the identification of the defendants in this case is within the proper scope of discovery.

The information sought by subpoena from Topix LLC is not privileged. Topix LLC has failed to identify any standard privilege from the California Code of Evidence that pertains to the present case. The privileges contained in the Evidence Code are *exclusive* and the Court cannot create a new privilege. (*See* Ev.C. §911; *Valley Bank of Nevada v. Sup.Ct. (Barkett)*(1975) 15 C3d

652, 656). Instead, only the *qualified* privileges based on the 1st Amendment and the California "right of privacy" have been raised by Topix. "Qualified protection," means disclosure may be compelled if the court finds the interests of justice outweigh the interests sought to be protected. Where there is a *prima facie* showing of relevance, the party claiming a qualified privilege, Topix, bears the burden of establishing the preliminary facts essential to claim the privilege. (*Gonzalez v. Sup.Ct. (San Francisco)* (1995) 33 CA4th 1539, 1548). As discussed throughout this brief, the facts weigh heavily in favor of disclosure. Accordingly, the subpoena is not overly broad.

Topix LLC has claimed that production of the requested data is unduly burdensome. However, contrary to Topix's citation of *Calcor*, the costs and burdens of discovery can be placed on nonparties where the parties do not possess the material sought to be discovered. (*Calcor Space Facility, Inc. v. Sup.Ct. (Thiem Industries, Inc.)* (1997) 53 CA4th 216, 225). Clearly, Plaintiffs do not have the identities of the Doe defendants in this case nor has Topix offered any evidence that this information is in Plaintiffs' possession or discoverable from another source.

Moreover, the *Calcor* case is readily distinguishable from the facts in this case. In *Calcor,* the demand on the third party was twelve pages in length and effectively sought every document in existence that related to gun mounts. (*Calcor, supra,* at 222). In the present case, Plaintiffs' demand is stated in 3 paragraphs (approximately one quarter of a page). (*See* Topix's Exhibit A, pg. 6). The remainder of Plaintiffs' subpoena is directed specifically to particularizing the information sought, namely, identifying the post number, screen name, date and text sample *exactly as Topix requested*. (Decl. of Demond, ¶ 4). Plaintiffs aver that they cannot be any more particularized than the specific requests made by Topix. Moreover, Plaintiffs provided Topix with an Excel file so that it could electronically search the subpoena and its own database using the Excel file. (*Id.,* at ¶ 6). Moreover, Plaintiffs provided Topix with a check for $6,840 to pay for the alleged 285 hours of clerical time required (a rate of approximately $24/hour) to produce the information requested in the subpoena. (*Id.* at ¶ 7; *see also* Decl. of Demond, Exhibit 3). Though Topix claims all of its personnel are essential and cannot be spared to search for the responsive information, Topix has failed to explain why it cannot hire another employee or a contractor to fulfill its obligations. Topix's burden is minimal and certainly not undue given Topix's intentional

and purposeful lack of registration (*see,* e.g., Decl. of Demond, Exhibit 12: "[S]ystems that require registration get an order of magnitude less commentary…If you have a human pre-screening every comment, you are going to spend a lot of money if you get any volume (which means you probably will constrain the volume), and if you do this by proxy by eliminating anonymous comments, what you're really doing is just limiting the scalability of your system and keeping it small – and you open yourself to becoming displaced by someone with a more open editorial policy.").

*b. Even If The Court Finds That Topix Has Met California's Standard For The Invocation Of The Undue Burden Standard, Topix's Arguments Are Vitiated By Its Own Conduct*

Plaintiffs' counsel provided Topix with ***actual notice*** of the individuals and threads requested in its preservation letter (*see* Decl. of Demond, Exhibit 1, at p. 2); Plaintiffs had no reason to suspect that Topix would ever make affirmative representations about their willingness to provide information responsive to Plaintiffs' request (Decl. of Demond, ¶ 3-4) without first reviewing the nature and scope of said request. If Topix had concerns, they had ample opportunity to convey them before Plaintiffs painstakingly compiled the specific details they requested.

## IV. TOPIX HAS FAILED TO FULFILL ITS OBLIGATION TO "MEET AND CONFER" REGARDING THE SUBPOENA AND THIS MOTION

Topix has made no effort to informally resolve the issues regarding this subpoena and this motion while Plaintiffs have complied with each of Topix's requests. More specifically, each offer purportedly made regarding the subpoena has been unilaterally rescinded upon acceptance. (*See generally* Decl. of Demond, ¶¶ 9, 10, and 14).

Plaintiffs first contacted Topix in October of 2008 to request that Topix preserve the electronic data now sought in the subpoena. (Decl. of Demond, Exhibit 1). By phone, Topix's counsel stated that this data was maintained as a matter of course by Topix. (Decl. of Demond, ¶¶ 3-4). Topix's counsel further provided plaintiffs with a series of requests to particularize the posts being sought by number, date, screenname and identifiable content. (*Id.*). Plaintiffs' subpoena complied with Topix's request to the letter. (*See* Topix's Exhibit A).

Upon receipt of the subpoena, Topix claimed that the production would be too costly and that it would cost $24/hour for 285 hours for the production. (Decl. of Demond, ¶ 7). Plaintiffs provided Topix with a check for $6,840. (*Id.; see also* Decl. of Demond, Exhibit 3). Topix reneged. Topix now claims that it cannot spare personnel to comply with the subpoena. (Decl. of Demond, Exhibit 6).

On February 18, Topix's counsel (David Franklin) offered the opportunity to confer with a representative from Topix's IT department. (Decl. of Demond, ¶ 8). The next day, Mr. Keating indicated that this conference would not be possible. (*Id.,* at ¶ 9).

On March 4, 2009, counsel for Plaintiffs and Topix conducted yet another telephonic meeting of counsel. (*Id.,* at ¶ 13). Topix's counsel claimed that the subpoena simply had too many posts and that not all of the posts were defamatory. (*See* Decl. of Gray; *see also* Decl. of Demond, Exhibit 8). In an attempt to compromise, Plaintiffs asked Topix to review the posts and to identify the posts it would be willing to provide information for. (*Id.*). Topix's counsel agreed and said a list of posts would be produced by March 12, 2009. (*Id.*). Again, Topix has failed to comply. (Decl. of Demond, ¶ 14). Topix has not complied with any of its agreements and has failed to provide 1) a single piece of information responsive to the subpoena and/or 2) any subset of data that it could provide. Topix has utterly failed its duty to "meet and confer" regarding the subpoena and the pending motion.

## V. CONCLUSION

For the arguments set forth above, the Court should deny Non-Party Topix, LLC's motion to quash and order Topix, LLC to produce all documents requested in Plaintiffs' subpoena.

DATED: March 13, 2009

CONNOR & DEMOND, PLLC

By: _____

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(*pro hac vice* application pending)