

NO. 10-0366

**In the
Supreme Court**

**IN RE
JOHN DOES 1 AND 2,
RELATORS**

**FROM THE NINTH COURT OF APPEALS
AT BEAUMONT**

Trial Court Cause No. E-184,784

**RELATORS' REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

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NO. 10-0366

IN RE JOHN DOES 1 AND 2, RELATORS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Relators submit this reply brief in support of their petition for writ of mandamus. Relators are again referred to as “Relators;” real parties-in-interest www.operationkleinwatch.blogspot.com and www.samtheeagleusa.blogspot.com as “the Blogs;” real parties-in-interest PRK Enterprises, Inc., and Klein Investments, Inc., as “Klein;” real party-in-interest Google, Inc., as “Google;” and Respondent, the Honorable Donald J. Floyd, as “Respondent.”

REPLY ISSUE PRESENTED FOR REVIEW

Reply Issue 1: Whether Respondent abused his discretion when he disregarded the procedures of Rule 202 and ordered a form of pre-suit discovery *other than* a deposition—the only discovery authorized by that rule.

- A. Mandamus is available to review Respondent’s order refusing to quash Klein’s subpoena duces tecum and compelling Google to produce documents destroying Relators’ anonymity.
- B. Rule 202 does not permit Respondent to enforce Klein’s subpoena duces tecum.
- C. A Rule 11 agreement between Klein and Google cannot waive the procedural or substantive rights of Relators, who were not parties to the agreement.
- D. The Blogs’ failure to appear at the January 15, 2010, hearing on the Blogs’ motions to quash does not excuse Respondent’s abuse of discretion.
- E. Respondent’s order was “state action” depriving Relators of their First Amendment right to anonymous speech.
 - 1. When does a plaintiff have a right to discover the identity of the writer in light of the constitutional right to anonymous free speech?
 - 2. Did Relators make an assertion of fact about Klein?
 - 3. Is Klein a public figure?

SUMMARY OF THE ARGUMENT

First, Klein does not respond to the arguments and authorities of Relators' petition that mandamus is available to review Respondent's order compelling Google to release documents that would destroy Relators' anonymity. The arguments and authorities of the corresponding section of Relators' petition for writ of mandamus are not repeated.

Second, Klein does not respond to the arguments and authorities of Relators' petition that Klein's subpoena was not only impermissible under Rule 202 but also unenforceable under both Rule 176.3(a) and 176.8(b). The arguments and authorities of the corresponding section of Relators' petition for writ of mandamus are not repeated.

Third, Relators show that Rule 202 cannot be nullified by an agreement to which the persons whose substantive rights Rule 202 protects are not a party. Klein's subpoena goes far beyond the discovery Klein would have been permitted if Rule 202 had been followed. When Respondent ordered Google to comply with Klein's subpoena, he ordered the destruction of the anonymity of *every* contributor of "money or literary content" to the Blogs since their inception. Respondent did so without the unnamed "persons affected by the procedure" ever having an opportunity to assert their First Amendment rights in the required hearing (which was never held). This was an abuse of discretion.

Fourth, Klein ignores entirely Relators' showing that failure to appear at the January 15, 2010, hearing on the Blogs' motions to quash Klein's subpoena did not excuse Respondent's abuse of discretion. The arguments and authorities of the corresponding section of Relators' petition for writ of mandamus are not repeated.

Fifth, Relators show the quantum of evidence of the alleged defamation Klein must have in order to compel disclosure of Relators' identities. Klein does not have it. The record is devoid of even one statement by Relators that is alleged to be defamatory. Klein himself proves that he is a public figure, but the record contains not a scintilla of evidence of actual malice by Relators.

ARGUMENT

Klein makes numerous factual assertions without *even one* citation to the record, and refers to apparently nonexistent trial court documents.¹ Klein includes no appendix with his brief and does not cite to Relators' appendix. Relators challenge all factual statements of Klein's brief under TEX. R. APP. P. 38.1(f).

Argument and Authorities—Reply Issue 1

REPLY ISSUE 1: Whether Respondent clearly abused his discretion when he disregarded the procedures of Rule 202 and ordered a form of pre-suit discovery other than a deposition—the *only* discovery authorized by that rule.

A. Mandamus is Available to Review Respondent's Order Refusing to Quash Klein's Subpoena Duces Tecum and Compelling Google to Produce Documents Destroying Relators' Anonymity

Klein does not respond directly to the arguments and authorities of Relators's petition, except for conclusory denials that Respondent abused his discretion. Klein characterizes Relators' challenge to Respondent's failure to adhere to the specific requirements of TEX. R. CIV. P. 202 as "absurd," arguing that this would require Respondent to become an "advocate" on Relators' behalf. How following the law compromises judicial "impartiality" is not explained.

The arguments and authorities of the corresponding section of Relators' petition for writ of mandamus are not repeated here.

¹ See, e.g., (i) "Here [Klein] filed a Motion to Compel and Motion to Strike Objections...." Klein's Brief, p. 5. Relators can find no instrument(s) so denominated. (ii) "Google provided notice to Relators...." *Id.*, p. 7. (iii) "Klein is a private investigator and a professional bodyguard as well as a part-time fireman. He holds no public office, he is not a politician, he has not run for public office...." *Id.*, p. 8. (iv) "The websites at issue contain false information...; accuse Mr. Klein of engaging in sex with an animal; and contain other defamatory contents." *Id.*, p. 11.

**B. Rule 202 Does Not Permit Respondent to Enforce Klein’s
Subpoena Duces Tecum**

Klein never responds to Relators’ showings that Klein’s subpoena (**Tab F** of Relators’ petition) was not only impermissible under Rule 202, but was also unenforceable under both Rule 176.3(a)² and 176.8(b)³. Klein’s response to the fact that Rule 202 permits no forms of discovery except a deposition⁴ is to say that Rule 202 “does not prohibit parties from entering into voluntary, informal discovery.” Klein’s Brief, p. 6. This is true, but academic. As shown below, the fact that Rule 202 does not prohibit Rule 11 agreements does not support Klein’s conclusion that parties may, at will, extinguish Rule 202’s protections for *nonparties* who “have interests adverse to the [Rule 202] petitioner’s.”⁵

The arguments and authorities of the corresponding section of Relators’ petition for writ of mandamus are not repeated here.

² Klein’s subpoena recites that it was served in Dallas County, Texas, (more than 150 miles from the place designated for production of the subpoenaed records). Thus, the Klein subpoena failed to comply with the 150-mile limit of TEX. R. CIV. P. 176.3(a).

³ Klein’s subpoena does not contain “proof by affidavit” that all fees due the witness by law were paid or tendered, as required by TEX. R. CIV. P. 176.8(b).

⁴ “A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions....” TEX. R. CIV. P. 202.1.

⁵ The phrase “persons the petitioner expects to have interests adverse to the petitioner” appears three times in Rule 202, in sections requiring the Rule 202 petitioner to either name such persons or state that their identities “cannot be ascertained by diligent inquiry,” to “describe” such unnamed persons in the petition, and to serve such unnamed persons with both the petition and notice of hearing “by publication.” TEX. R. CIV. P. 202.2(f)(2), 202.3(a), and 202.3(b)(1).

**C. A Rule 11 Agreement Between Klein and Google Cannot Waive
Procedural or Substantive Rights of Relators, Who Were
Not Parties to the Agreement**

It is impossible to ignore the extent to which the drafters of Rule 202 were concerned with the rights of nonparties who might be affected by pre-suit discovery—even if the identities of such persons “cannot be ascertained by diligent inquiry.” TEX. R. CIV. P. 202.2(f)(2) [emphasis added]. The rule requires that (i) such persons be “describe[d]” in the Rule 202 petition;⁶ (ii) they be served “by publication;”⁷ and (iii) they be given notice of the hearing.⁸ The rule also requires that any order granting a Rule 202 deposition “*must contain any protections the court finds necessary or appropriate to protect ... any person who may be affected by the procedure.*” TEX. R. CIV. P. 202.4(b) [emphasis added]. It is undisputed that Respondent ignored these procedures in the case at bar.

Klein offers no justification for why innocent bystanders should be crushed under the chariot wheels of a Rule 11 agreement between Google and Klein, no matter how “efficient” such an agreement may be. Instead, Klein argues that Relators “have no standing to complain” about the agreement. Klein’s Brief, p. 7. Klein argues that an agreement⁹ for Klein to subpoena¹⁰ documents revealing Relators’ identities without judicial consideration of Relators’ rights “concerns only the procedural rights of Google and [Klein].” *Id.* This is disingenuous.

⁶ TEX. R. CIV. P. 202.2(f)(2).

⁷ TEX. R. CIV. P. 202.3(b)(1).

⁸ TEX. R. CIV. P. 202.3(a); 202.3(b)(1).

⁹ **Tab E** of Relators’ Petition for Writ of Mandamus.

¹⁰ **Tab F** of Relators’ Petition for Writ of Mandamus.

A similar argument was rejected in *In re John Does 1-10*, 242 S.W.3d 805, 812 (Tex. App.—Texarkana 2007, orig. proceeding). There the court noted that the rules of discovery allow any person “from whom discovery is sought, and any other person affected by the discovery request” to move for a protective order. *Id.*; TEX. R. CIV. P. 192.6(a). One of the reasons to ask for such relief is to protect the movant from “invasion of personal, constitutional, or property rights.” *Id.*; TEX. R. CIV. P. 192.6(b). A court may then make any order in the interest of justice that denies or limits the requested discovery. *Id.*; TEX. R. CIV. P. 192.6(b)(1), (2).

In a strangely circular argument, Klein beckons the Court to a harmless error conclusion by contending that Relators were “not harmed or prejudiced” by Respondent’s unlawful order that Google produce documents because Relators “both appealed and filed for mandamus relief in the Ninth Circuit (sic) Court of Appeals and in this Honorable Court.”¹¹ Klein’s Brief, p. 8. Although Rule 202 was clearly ignored here, the Court’s focus in a harmless error analysis sharpens to this—even if erroneous, would Klein’s “agreed” subpoena enable Klein to obtain documents about parties “affected by the procedure” that Klein might not be able

¹¹ In his brief, Klein repeatedly confuses Relators with the Blogs. Relators John Does 1 and 2 are *not* the Blogs. The Blogs are real-parties-in-interest in the instant proceeding. Relators’ Petition for Writ of Mandamus, p. 1. Relators are merely two “*authors of content* on the website addresses www.operationkleinwatch.blogspot.com and www.samtheeagleusa.blogspot.com.” *Id.* [Emphasis added.] *The Blogs*—not Relators—filed motions to quash Klein’s subpoena in the trial court. (Tabs G and H of Relators’ Petition for Writ of Mandamus.) *The Blogs*—not Relators—filed an interlocutory appeal of Respondent’s order denying their motions in the Beaumont Court of Appeals. See *Sam the Eagle Weblog v. PRK Enters.*, 2010 Tex. App. LEXIS 3792 (Tex. App.—Beaumont, May 20, 2010). In separate proceedings, *Relators*—not the Blogs—petitioned the Beaumont Court of Appeals (and later this Court) for a writ of mandamus. See *In re John Does 1 and 2*, 2010 Tex. App. LEXIS 3190 (Tex. App. Beaumont Apr. 29, 2010).

to obtain if Rule 202 were followed? If not, mandamus should be denied even if Respondent erred. On the other hand, if the subpoena enabled Klein to obtain discovery he might not have been able to obtain in a Rule 202 deposition, then the Court must determine whether such discovery would invade the rights of Relators. If so, then mandamus should issue.

The depositions contemplated by Rule 202 are “governed by the rules applicable to the depositions of nonparties in a pending suit”—that is, Rules 199-201. TEX. R. CIV. P. 202.5. Thus, incident to a Rule 202 deposition, Klein would have been allowed to require Google to produce documents just as Klein attempted to do with the “agreed” subpoena (**Tab F** of Relators’ petition) at issue. TEX. R. CIV. P. 199(b)(5); *see also* TEX. R. CIV. P. 205. Therefore, at first glance, it may appear that the Klein-Google agreement and resulting subpoena *duces tecum* give Klein nothing that Rule 202 would not have given him. However, this view ignores the important procedural requirements of Rule 202 detailed above.

The centrally important distinction of a Rule 202 deposition is that before it may be taken, *a trial court has to order it*. TEX. R. CIV. P. 202.1. Before a court may order it, there must be a hearing. TEX. R. CIV. P. 202.3(a). Before there can be a hearing, there must be “service by publication [of the petition and notice of hearing]” on unnamed persons.¹² The service must be at least 14 days before the hearing on whether the petitioner will be permitted to depose any witness:

¹² TEX. R. CIV. P. 202.3(b)(1).

The notice must state the place for the hearing and the time it will be held, [and] must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed.

TEX. R. CIV. P. 202.3(b)(1). After the hearing, the court may order the deposition “if, but only if”¹³ the court first finds either that allowing the deposition “may prevent a failure or delay of justice in an anticipated suit”¹⁴ or that the benefit of allowing the deposition “outweighs the burden or expense of the procedure.”¹⁵ Most importantly, as noted above, the order must contain provisions necessary to protect “any person who may be affected by the procedure.”¹⁶

It has never been contested that anonymous contributors of content to the Blogs—such as Relators and others Klein seeks to unmask in order to sue for defamation¹⁷—are persons with “interests adverse to petitioner’s in the anticipated suit.” Had Relators been served¹⁸ as required by Rule 202.3(b), they would have had an opportunity to persuade Respondent that the First Amendment requires that Klein’s Rule 202 deposition be limited to investigating whether any defamation occurred before Klein is allowed to destroy unnamed parties’ anonymity on the basis of mere naked, conclusory allegations. Had Relators or other contributors to the Blogs (who may *still* be unaware of Klein’s Rule 202 petition, since it has *still*

¹³ TEX. R. CIV. P. 202.4(a). [Emphasis added.].

¹⁴ TEX. R. CIV. P. 202.4(a)(1).

¹⁵ TEX. R. CIV. P. 202.4(a)(2).

¹⁶ TEX. R. CIV. P. 202.4(b).

¹⁷ Klein’s suit seeks to identify “all persons, parties or entities who provide contributions of money or literary content to [the Blogs].” (See **Tab**s C and D of Relators’ petition, at ¶ 9.)

¹⁸ It is undisputed that Klein’s Rule 202 pleading was never served by publication or by any other method, as the pleadings show on their face—“No service is requested at this time.” (See **Tab**s C and D of Relators’ petition, at ¶¶ 4, 5.)

never been served) failed during the required pre-deposition hearing to persuade Respondent to limit the Rule 202 deposition to protect their anonymity, their remedy would have been to make their First Amendment arguments in a petition for writ of mandamus.¹⁹

Instead, by ordering Google to comply with Klein’s subpoena, Respondent ordered the destruction of the anonymity of *every* contributor of “money or literary content” to the Blogs since their inception, and did so *in absentia*—without the unnamed “persons affected by the procedure” ever having had the opportunity to protect their First Amendment rights at the required hearing (which was never held). It was mere serendipity that Relators learned of Respondent’s January 29, 2010, order (**Tab A** of Relators’ petition) in time to obtain emergency relief from this Court staying its enforcement.

But for this Court’s emergency stay, Respondent’s enforcement of Klein’s “agreed” subpoena would have compelled Google to destroy the anonymity of Blog contributors. Had Rule 202’s procedures been followed, Google would not have been forced to reveal such information before affected parties first had the opportunity to assert their constitutional rights at the hearing required to determine whether the deposition should be permitted at all—and, if so, to what extent the scope of the deposition should be limited for such parties’ protection.

¹⁹ Mandamus will lie when appeal is insufficient to protect a relator’s specified constitutional right. *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996). An order destroying the relator’s First Amendment right to anonymous speech falls squarely within this protection. See *In re Does 1-10*, 242 S.W.3d 805, 811-12 (Tex. App.—Texarkana 2007, orig. proceeding).

**D. The Blogs' Failure to Appear at the January 15, 2010, Hearing on the
Blogs' Motions to Quash Does Not Excuse Respondent's
Abuse of Discretion**

Klein ignores this section of Relators's petition entirely. The arguments and authorities of the corresponding section of Relators' petition for writ of mandamus are not repeated here.

E. Respondent’s Order Was “State Action” Depriving Relators of Their First Amendment Right to Anonymous Speech

As noted in Relators’ petition, a court order—even if issued at the behest of a private party—is state action, and is subject to constitutional limitations. *New York Times v. Sullivan*, 364 U.S. 254, 265 (1964). Klein does not respond to this authority other than to flatly contradict it. Klein’s Brief, pp. 2, 8. Relators do not repeat their citations of authority generally holding that the First Amendment protects against compelled identification of anonymous speakers.

1. When Does a Plaintiff Have a Right to Discover the Identity of the Writer in Light of the Constitutional Right to Anonymous Free Speech?

A defamation plaintiff can compel disclosure of a potential defendant’s identity if the plaintiff has sufficient proof of defamation. *In re John Does 1-10*, 242 S.W.3d 805, 820-21 (Tex. App.—Texarkana 2007, orig. proceeding). The issue in the instant proceeding is whether the record reveals that Klein possesses the requisite quantum of proof. It does not.

As in the case at bar, the plaintiff in *In re John Does 1-10* sued ten John Does alleging they had defamed the plaintiff and violated other laws by posting comments on an Internet site. *Id.* at 810. As in the case at bar, the trial court ordered that anonymous contributor John Doe number one be identified by his Internet service provider (ISP). *Id.* The court of appeals granted mandamus ordering the trial court to withdraw its order. *Id.* The *John Does 1-10* court was faced with the same question presented here: “When does a plaintiff have a right to discover the identity of the writer in light of the constitutional right to

anonymous free speech?” *Id.* at 821. Klein proffers the Court an answer to this question by lifting language from the court of appeals’ opinion in *In re John Does 1-10* and transplanting it into his brief with only minor modifications—neglecting to attribute the work to its true author, Justice Jack Carter of the Texarkana Court of Appeals. Justice Carter’s opinion reads:

There are no cases in Texas directly on point. This is, however, far from the first court to be confronted with this problem.... The cases that have decided this issue range from placing an extremely light burden (indeed, virtually no burden at all) on the plaintiff, to requiring the plaintiff to tender proof of its allegations that would survive a summary judgment, or even more stringent requirements. At least one case has essentially concluded that the mere allegation of libel is sufficient. *Alvis Coatings, Inc. v. John Does One Through Ten*, No. 3:04CV374-H, 2004 U.S. Dist. LEXIS 30099 (W.D.N.C. Dec. 2, 2004). Other cases have articulated requirements that are so weak as to essentially require no more than allegations made in good faith (or not in bad faith), with some evidence to support the allegations. See *Polito [v. AOL Time Warner, Inc.]*, 2004 Pa. Dist. & Cnty. Dec. LEXIS 340, 78 Pa. D. & C.4th 328 (Pa. D.& C. 2004)].

Id. at 820-21.

The virtually identical language is found in Klein’s Brief under the heading “**Just a Mere Allegation of Libel is Sufficient.**” Klein’s Brief, p. 10. However, what Klein does not reveal is that the Texarkana Court of Appeals *rejects* the constitutionally flawed approaches of the Pennsylvania and North Carolina trial courts in the paragraph of its opinion immediately following the one Klein lifts:

We cannot agree that either of these formulations is sufficient to survive any form of constitutional balancing.

In re John Does 1-10, 242 S.W.3d at 821. The highest Texas court yet to consider this question adopts a formulation that would require the trial court in the case at bar to view the matter as if Relators had filed a traditional motion for

summary judgment establishing a defense by alleging that their identities were protected from disclosure by virtue of the First Amendment right of free speech. *Id.* at 823 and n.13. Under the *In re John Does 1-10* formulation—derived from the Delaware Supreme Court’s opinion in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)—Klein would not be allowed to compel the disclosure of Relators’ identities until Klein had first produced evidence sufficient to preclude the granting of a summary judgment. *Id.*

There is no comprehensive way to state the elements of a cause of action for the now-constitutionalized tort of defamation because there are too many variables—whether the plaintiff is a public figure or private person, whether the defendant is a media or non-media defendant, and whether the allegedly defamatory statement involved a public or private issue all affect the elements, showings, and burdens of proof in a defamation action. *See, e.g., WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) (whether the plaintiff is a public figure or private plaintiff); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 333 (1974) (whether the defendant is a media or nonmedia defendant); *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983) (whether the statement concerned a public or private issue). However, Relators analyze two such elements at issue in the case at bar: (i) whether Relators made an assertion of fact about Klein; and (ii) whether Klein is a public figure. As shown below, Klein fails to make even basic showings necessary to destroy Relators’ anonymity.

2. Did Relators Make an Assertion of Fact About Klein?

For a statement to be actionable, a reasonable fact-finder must be able to conclude that the statement implies an assertion of fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990); *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002); *Thomas-Smith v. Mackin*, 238 S.W.3d 503, 507 (Tex. App.—Houston [14th Dist.] 2007, no pet.). To make this determination, the court must look at the entire context in which the statement was made. *Bentley*, 94 S.W.3d at 581. The court considers the factual setting in which the statement was made (e.g., political, social, or philosophical debate), the format in which the statement appears (e.g., in a review, editorial, or cartoon), the general tenor of the entire work, and the reasonable expectations of the audience in that particular situation. *See Milkovich*, 497 U.S. at 24 (Brennan & Marshal, JJ., dissenting (court employed same factors that lower courts have used to determine whether statement is asserting facts); *Hustler Mag. v. Falwell*, 485 U.S. 46, 54 (1988) (statements made in political cartoons, satires, and parodies are often exaggerated, exploitative, and one-sided); *Id.* at 57 (no reasonable reader could have concluded statements in ad parody were describing actual facts about plaintiff); *New Times, Inc. v. Isaaks*, 146 S.W.3d 144, 161 (Tex. 2004) (no reasonable reader would conclude that the article stated actual facts because of newspaper’s irreverent tone and its semi-regular publication of satire); *Greenbelt Coop. v. Bresler*, 398 U.S. 6, 14 (1970) (no reasonable reader would have perceived the use of the word “blackmail” as charging plaintiff with a crime).

The record reveals no evidence of any *actual statement* ever made or published by Relators or the Blogs about Klein. Therefore, there are no facts upon which the Court can base a determination of whether Relators ever made an assertion of fact about Klein. Until there are, Klein could not survive a motion for summary judgment. Therefore, Klein cannot compel the disclosure of Relators' identities.

Klein offers only his own general and self-serving characterizations of Relators' allegedly defamatory statements—such as that Relators' speech is “filthy defamation;”²⁰ that “the representation made is that Klein is engaging in sexual acts with animals;”²¹ that Relators make “hateful and vicious comments;”²² that the “communications at issue are ... nothing more than defamation with no constitutionally protected content;”²³ and that “the bloggers [allege] false court judgments.”²⁴ Klein's conclusions and unsworn allegations are not evidence. Klein has never shown a scintilla of evidence of even the most basic element of his defamation claim—an assertion of fact about Klein—much less the quantum of proof necessary for Klein to compel Google's disclosure of Relators' identities.

²⁰ Klein's Brief, p. 14.

²¹ Klein's Brief, p. 13.

²² Klein's Brief, p. 14.

²³ *Id.*

²⁴ Klein's Brief, p. 13-14.

3. Is Klein a Public Figure?

The U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), required public officials to prove actual malice when suing for defamation involving public issues. *Bentley v. Bunton*, 94 S.W.3d 561, 590 (Tex. 2002). Later, the court extended the *New York Times* actual-malice standard to public figures. *Curtis Publ'g v. Butts*, 388 U.S. 130, 155 (1967). Thus, whether or not Klein is a public figure is centrally important to whether he will be required to show actual malice by Relators as part of his case for defamation.

Klein's strained attempt to deny he is a public figure in his brief does more to prove he *is* a public figure than to prove he is *not*. Again without citations to the record or any appendix, Klein claims to be a "private investigator," "professional bodyguard," and "part-time fireman." Klein's Brief, p. 8. Klein forgets that he testified in the case at bar he is actually employed as the owner and editor of an Internet website known as the "Southeast Texas Political Review" (**Tab J** of Relators' petition, 5:10-21). In previous litigation, Klein has admitted that he uses his blog to regularly "publish[] commentary on local issues." *See, e.g., Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist.*, 92 S.W.3d 889, 892 (Tex. App.—Beaumont 2002, pet. denied). Somewhat surprisingly, Klein admits he has appeared on the national television networks CNN and Fox News, the national television program *Dateline NBC*, and that he has regular appearances on local talk radio programs in southeast Texas. Klein's Brief, p. 8. Klein admits he was "active in the tort reform movement" and was

even a *spokesperson* for Citizens Against Lawsuit Abuse. *Id.* As a result, Klein admits he has “drawn the ire of powerful plaintiff attorneys in Southeast Texas.” *Id.*

Klein apparently fails to recognize that to determine whether he is a public figure, courts will examine whether Klein (i) actually sought publicity surrounding the controversy; (ii) had access to the media; and (iii) voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation. *See, e.g., McLemore*, 978 S.W.2d at 572-73 (plaintiff invited public attention by becoming involved in Branch Davidian controversy); *Einhorn v. LaChance*, 823 S.W.2d 405, 411-12 (Tex. App.—Houston [1st Dist.] 1992, writ dismissed) (pilots engaged public’s attention in attempt to influence airborne emergency-medical-services industry). By his own admissions, Klein scores three for three. Furthermore, in at least one previous case in which the litigious Klein sued a local school district and its trustees for defaming him (after the district sued Klein for defamation first), Klein admitted in his brief he was a limited-purpose public figure.²⁵ *Klein & Assocs. Political Relations*, 92 S.W.3d at 897 (“Klein says he is a limited-purpose public figure.”). This admission proved fatal to Klein’s defamation suit, as Klein failed to make the required showing of actual malice. *Id.*

Klein cannot show actual malice in the case at bar, either. Klein’s oversimplified and conclusory argument that malice is shown by Relators’

²⁵ Limited-purpose public figures are public figures for a limited range of issues surrounding a particular public controversy. *McLemore*, 978 S.W.2d at 571.

“hateful and vicious comments”²⁶ (Klein’s Brief, p. 14) betrays an ignorance of the Court’s jurisprudence on this issue. Publishing a statement with ill will, spite, hatred, or wanton desire to injure *does not* constitute malice. *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991); *Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 855 (Tex. 2005). Neither, of course, does satirical parody. *Hustler Mag. v. Falwell*, 485 U.S. 46, 54 (1988); *New Times, Inc. v. Isaaks*, 146 S.W.3d 144, 161 (Tex. 2004).

As even a limited-purpose public figure, Klein must show actual malice on the part of Relators by clear and convincing evidence in order to compel disclosure of documents revealing their identity. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172, (Tex. 2003). Klein cannot show even a scintilla of evidence of actual malice. Therefore, Klein cannot—at this point, at least—compel the destruction of Relators’ constitutionally protected anonymity.

PRAYER

For these reasons, Relators ask that the Court grant a writ of mandamus ordering Respondent to vacate his January 29, 2010, order compelling Google to comply with Klein’s subpoena duces tecum. The Court should order Respondent to conduct all further proceedings strictly in accordance with the procedures and limitations set forth in Rule 202.

²⁶ Klein’s Brief, p. 14.

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CERTIFICATE OF SERVICE

I hereby certify that on 07-30, 2010, a true and correct copy of the foregoing was sent by mail, in accordance with TEX. R. APP. P. 9.5 to the following:

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