

CAUSE NO. GN2-02048

DYNACQ INTERNATIONAL, INC.	§	IN THE DISTRICT COURT OF
	§	
Petitioner,	§	
	§	TRAVIS COUNTY, TEXAS
v.	§	
	§	
YAHOO! INC. d/b/a TEXAS YAHOO!	§	
	§	
Respondent.	§	53 rd JUDICIAL DISTRICT

**SPECIAL APPEARANCE OF JOHN DOE REPRESENTED
BY BANKSTON & RICHARDSON, L.L.P., TO
PRESENT MOTION OBJECTING TO JURISDICTION**

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, John Doe, represented by Bankston & Richardson, L.L.P., proceeding under a Motion to Appear by Pseudonym made Subject to this Special Appearance, and hereby files this Special Appearance pursuant to Texas Rule of Civil Procedure 120a for the sole purpose of objecting to the jurisdiction of the Court over the person of this John Doe. Further, this John Doe would respectfully show that each and every statement, request, plea, application, or motion by this John Doe or his attorneys of record in this action is hereby made expressly subject to this Special Appearance and is to be interpreted in a manner wholly consistent with this written objection to the court's jurisdiction over the person of this John Doe.

I.

For the reasons stated above, this Special Appearance is made to the entire proceeding whereby the Petitioner, Dynacq International, Inc. (hereinafter "Dynacq") seeks to obtain the identity, addresses, telephone numbers, and other identifying information about persons, including this John Doe, who have

engaged in free speech on the Internet message board of Yahoo! Inc. (hereinafter “Yahoo”) relating to Dynacq. The unbelievably broad subpoena requested by Dynacq also includes a demand for computer files, accounting records, email messages, faxed communications, records of telephone conversations, minutes of meetings or conferences, lists of persons attending meetings or conferences, opinions, investigation summaries, and even opinions of legal counsel retained by anonymous persons. See Notice of Deposition on Written Questions, at 2.

II.

This Special Appearance is made as to Petitioner’s allegation that it is investigating possible claims against all persons who engaged in free speech on the Yahoo message board for Dynacq, of which this John Doe is only one person. This Special Appearance is filed prior to a motion to transfer or any other plea, pleading, or motion filed by this John Doe.

III.

By way of background, and subject to this Special Appearance, Yahoo maintains hundreds of Internet message boards on a variety of topics whereby thousands of persons like John Doe anonymously exercise their undisputed and protected right of free speech and expression by posting public messages that are frequently read and replied to by other anonymous persons interested in the public expression of ideas on the identical subject. One of Yahoo’s many Internet message board’s is devoted to the lively expression of ideas by persons interested in Dynacq, including but not limited to such company’s corporate management, its finances, its stock, and its position in the national and international marketplaces. A review of Yahoo’s message board for Dynacq reveals hundreds of anonymous messages and replies, many of which are positive, neutral, or negative in tone.

IV.

Subject to this Special Appearance, John Doe would show that he anonymously engaged in free speech on Yahoo's message board for Dynacq in a state other than Texas. Dynacq allegedly received those and hundreds of similar messages by other anonymous persons on Yahoo's message board by means of a personal computer located in the State of Texas. As a consequence, Dynacq now claims the right to invoke the jurisdiction of Texas courts over the person of John Doe and other anonymous individuals who have no minimum contacts with the State of Texas. This chilling effect on free speech, if not a complete elimination of protected public speech and debate about Dynacq, arises from Dynacq's threat in this lawsuit to invoke the power of Texas courts to identify and commence expensive and time-consuming litigation against any anonymous persons misfortunate enough to have made a negative public comment about Dynacq that was reviewed by anyone in Texas – regardless whether such public comment was true. Simply stated, Dynacq wishes to curtail any negative public debate about its company. Moreover, a review of Yahoo's message board for Dynacq following the filing of this lawsuit reveals that this tactic has been successful and that many users have dramatically curtailed their comments about Dynacq in the fear of being haled into court in Texas.

V.

This Special Appearance is made as to all of Dynacq's alleged claims and allegations and is filed because John Doe is a real party in interest whose constitutionally protected right of free speech is imperilled by Dynacq's action. Subject to this Special Appearance, John Doe would show that this action is a subterfuge to invade and extinguish John Doe's legal rights by an Order of this Court affecting the rights of John Doe by compelling Yahoo to divulge information with respect to which this person and others like

him also enjoy a constitutional right of protection. This John Doe and others like him also enjoy a constitutional right to anonymity which Plaintiff seeks to subvert by this action.

VI.

This Court does not have jurisdiction over this John Doe because John Doe is not amenable to process issued by the courts of Texas. In this connection John Doe would respectfully show the following:

(1) This John Doe is not a resident of Texas and is not required to and does not maintain a registered agent for service in Texas. Additionally, this John Doe does not maintain a place of business in Texas and does not have agents or employees within Texas;

(2) This John Doe has not engaged in business or committed a tort in Texas. This John Doe did not contract by mail or otherwise with a Texas resident, which contract is to be performed by either party in whole or in part in Texas; commit a tort in whole or in part in Texas; or recruit a Texas resident, directly or through an intermediary located in Texas, for employment in or out of Texas;

(3) This John Doe engaged in free speech by posting anonymous messages that could be reviewed by anyone in the world with Internet access. If anyone in Texas happened to read the messages, such an occurrence would be “merely fortuitous” and could not provide grounds for personal jurisdiction absent any other contacts between this John Doe and the forum state. This John Doe has “not purposefully availed himself of the benefits of the forum state and its laws.” Subject to this Special Appearance, the Rule 202 proceeding cannot investigate any alleged claim against this John Doe that can be pursued in Texas because there is no jurisdiction in Texas over the person of this John Doe.

VII.

In sum, Texas Courts do not have jurisdiction over this John Doe because this John Doe did not purposefully establish “minimum contacts” with Texas. This John Doe did not commit any act that would have placed him on notice that he was subject to the call of a Texas Court; and the exercise of jurisdiction over the Defendant would offend the traditional notions of fair play and substantial justice that the Texas long-arm statute and the United States Constitution seek to protect.

VIII.

The Court’s assumption of jurisdiction over the person of this John Doe would offend traditional notions of fair play and substantial justice and is inconsistent with the constitutional requirements of process. This John Doe did not purposefully establish “minimum contacts” with Texas and did not avail itself of the benefits and protection of the laws of Texas. Accordingly, this John Doe could not reasonably anticipate being haled into court in Texas. The Court should forego jurisdiction over this John Doe.

WHEREFORE, PREMISES CONSIDERED, this John Doe respectfully requests that this Special Appearance be in all things sustained.

Respectfully submitted,

BANKSTON & RICHARDSON, L.L.P.
400 West 15th Street, Suite 710
Austin, Texas 78701
Telephone: 512/499-8855
Telecopier: 512/499-8886

By: _____
James M. Richardson
State Bar No. 16864500

ATTORNEYS FOR JOHN DOE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by hand-delivery in accordance with the Texas Rules of Civil Procedure, on this 15th day of July, 2002, as follows:

Mr. Larry Vaselka
Mr. Asim Bhansali
SMYSER KAPLAN & VESELKA, L.L.P.
700 Louisiana, Suite 2300
Houston, Texas 77002

James M. Richardson

VERIFICATION

THE STATE OF TEXAS

COUNTY OF TRAVIS

BEFORE ME, the undersigned Notary Public, on this day personally appeared James M. Richardson, known by me to be the person whose names is subscribed below, and upon being duly sworn, stated under oath that he is the attorney for John Doe in the above-referenced cause; that he has read the Special Appearance of John Doe Represented by Bankston & Richardson, L.L.P. to Present Motion Objecting to Jurisdiction; that in such capacity he possesses personal knowledge of the statements contained in such Special Appearance; and that every statement contained therein is within his personal knowledge and is true and correct.

James M. Richardson

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS THE 15TH DAY OF JULY, 2001.

Notary Public in and for
the State of Texas

CAUSE NO. GN2-02048

DYNACQ INTERNATIONAL, INC.	§	IN THE DISTRICT COURT OF
	§	
Petitioner,	§	
	§	TRAVIS COUNTY, TEXAS
v.	§	
	§	
YAHOO! INC. d/b/a TEXAS YAHOO!	§	
	§	
Respondent.	§	53 rd JUDICIAL DISTRICT

**MOTION OF JOHN DOE REPRESENTED BY BANKSTON & RICHARDSON,
L.L.P. TO PROCEED UNDER PSEUDONYM AND MOTION FOR
PROTECTION, FILED SUBJECT TO SPECIAL APPEARANCE
TO PRESENT MOTION TO JURISDICTION**

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, John Doe, represented by Bankston & Richardson, L.L.P., who has posted anonymous messages on message boards operated by Yahoo Inc.! d/b/a Texas Yahoo! Inc. (hereinafter “Yahoo”), and, subject to a Special Appearance filed prior to any other plea, pleading, or motion, respectfully requests the following:

I.

Subject to the Special Appearance, this John Doe respectfully seeks permission to proceed under a pseudonym, i.e., John Doe, for purposes of the previously filed Special Appearance and Motion for Protection Subject to Special Appearance. Proceeding anonymously is necessary in order to vindicate this John Doe’s right to speak anonymously on Yahoo’s message board for Dynacq International, Inc.

II.

Subject to the Special Appearance, this John Doe seeks limited protection from discovery consistent with the Special Appearance. Specifically, this John Doe’s rights are affected by the Verified

Petition for Deposition Before Suit to Investigate Claims Pursuant to Tex.R.Civ.P. 202.1 because such lawsuit requests “state action” that would infringe a constitutionally protected right of free speech and debate, i.e., a court order that would by its terms require Yahoo to identify and produce documents relating to persons who engaged in public debate and who posted messages or other materials on online message boards under pseudonymous user names. Hence, subject to the Special Appearance, this John Doe, as an “affected person,” respectfully requests only the limited relief and protection afforded by Rule 192.6 of the Texas Rules of Civil Procedure to persons affected by a discovery request. In this instance, the protection sought is subject to, in furtherance of, and consistent with the Special Appearance.

WHEREFORE, PREMISES CONSIDERED, John Doe, represented by Bankston & Richardson, L.L.P., a person affected by a discovery request within the meaning of Rule 192.6 of the Texas Rules of Civil Procedure, hereby respectfully requests only the limited protection referenced above, subject to, in furtherance of, and consistent with the previously filed Special Appearance. This John Doe does not invoke the general jurisdiction of this Court over his person.

Respectfully submitted,

BANKSTON & RICHARDSON, L.L.P.
400 West 15th Street, Suite 710
Austin, Texas 78701
Telephone: 512/499-8855
Telecopier: 512/499-8886

By: _____
James M. Richardson
State Bar No. 16864500

ATTORNEYS FOR JOHN DOE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by hand delivery, in accordance with the Texas Rules of Civil Procedure, on this 15th day of July, 2002, as follows:

Mr. Larry Vaselka
Mr. Asim Bhansali
SMYSER KAPLAN & VESELKA, L.L.P.
700 Louisiana, Suite 2300
Houston, Texas 77002

James M. Richardson