

CAUSE NO. 416-00886-05

CITADEL SECURITY SOFTWARE INC.)	DISTRICT COURT OF
)	
Plaintiff,)	
)	
v.)	COLLIN COUNTY, TEXAS
)	
JOHN DOES 1-5,)	
)	
Defendants.)	416 th JUDICIAL DISTRICT

SPECIAL APPEARANCE OF DEFENDANT ONLYMYBUSINESS99

Defendant onlmybusiness99, proceeding under a Motion to Appear by Pseudonym made subject to this Special Appearance, 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.

Facts

This action alleges that five anonymous individuals, who posted messages to a bulletin board under pseudonyms, defamed plaintiff Citadel Security Software and disparaged its business. Although the Petition does not identify the message board, plaintiff’s suit against the users of five screen names that posted several messages on the Yahoo! message board for CDSS, coupled with the fact that Citadel has subpoenaed Yahoo! to identify each of those speakers, reveals that it is Yahoo!’s CDSS message board that is at issue.

Onlymybusiness99 is the pseudonym that defendant used to post messages to the Yahoo! CDSS message board. As his posts reflect, onlymybusiness99 is a Minnesotan,¹ who purchased stock in Citadel in the fall of 2004.²

ARGUMENT AND AUTHORITY

To be subject to in personam jurisdiction, onlymybusiness99 must have “certain minimum contacts with [Texas] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted); *Guardian Royal Exch. Assur. v. English China Clays*, 815 S.W.2d 223, 226 (Tex. 1991). The minimum contacts test requires “in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Guardian Royal*, 815 S.W.2d at 226; see *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996). A defendant’s connection with the state must be such that “he should reasonably anticipate being haled into court” in the state in the event of a dispute. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Minimum contacts analysis generally requires assessment of whether the court is exercising “general” or “specific” jurisdiction. *Guardian Royal*, 815 S.W.2d at 227-28. The exercise of general jurisdiction requires that a defendant’s contacts with the forum be “continuous and systematic.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408,

¹finance.messages.yahoo.com/bbs?.mm=FN&board=1609129190&tid=cdss&sid=1609129190&action=m&mid=1245. See also Affidavit of Paul Alan Levy.

²finance.messages.yahoo.com/bbs?.mm=FN&board=1609129190&tid=cdss&sid=1609129190&action=m&mid=250.

416 (1984); *Guardian Royal*, 815 S.W.2d at 226; *Siskind v. Villa Found. For Educ., Inc.*, 642 S.W.2d 434, 438 (Tex.1982). Even “continuous activity of some sorts within a state is not enough to support [general jurisdiction].” *International Shoe*, 326 U.S. at 318. However, as defendant’s posts make clear, he lives in Minnesota, not Texas. Citadel does not even allege in its petition that defendant owns property in Texas nor does business there.³ General jurisdiction cannot, therefore, be the basis for the Court’s proceeding against onlmybusiness99.

Specific jurisdiction is proper when the defendant’s contacts with the forum are related to the controversy underlying the litigation. *See Helicopteros*, 466 U.S. at 414 n.8. To maintain specific personal jurisdiction, Citadel must show that: (1) onlmybusiness99 has purposely directed activities toward or purposely availed himself of the privilege of conducting business in in Texas; (2) the cause of action arises from his activities in Texas; and (3) his conduct has a substantial enough connection with Texas to make the exercise of jurisdiction reasonable. The defendant’s contacts with the forum state must have been sufficiently purposeful that the defendant should have had fair warning that he would be subject to suit there. *National Indus. Sand Ass’n v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990); *see Helicopteros*, 466 U.S. at 414; *Guardian Royal*, 815 S.W.2d at 227.

The complaint does not specify any basis for a finding of specific jurisdiction, but presumably plaintiff will rely on its allegations that Citadel has its headquarters in Dallas, Pet. ¶ 2, and that the Internet is “available . . . in Collin County.” *Id.* ¶ 5. However, a specialized test

³Although onlmybusiness99 does not, in fact, own property or do business in this state, he is not submitting any affidavit on that point lest he have to sacrifice his anonymity to avoid jurisdiction. For that reason, the Special Appearance can be sustained based only on the information about defendant that he has already revealed on the message board. Where the record establishes that the defendant is not a resident of Texas, the plaintiff’s failure even to allege any other basis for personal jurisdiction is sufficient to warrant dismissal. *Siskind v. Villa Found. For Educ., Inc.*, 642 S.W.2d 434, 438 (Tex.1982).

has been applied to claims of personal jurisdiction based on a web site. The courts have adopted a sliding scale, first adopted in *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997), under which, on the one hand, a non-resident defendant's non-commercial web site (or a commercial but passive web site) is not a basis for jurisdiction just because it can be viewed in the forum state. On the other hand, a site that is highly interactive because it was designed to permit the owner to conduct business through the web site in the forum is likely to be a basis for personal jurisdiction in any forum in which commercial activity pertaining to the alleged wrongdoing has been conducted. Finally, when the web site displays some degree of commercial interactivity, the court's task is to examine the quantity and quality of the commercial online interaction to determine whether it is sufficient to warrant subjecting the defendant to personal jurisdiction in the forum. Texas courts have endorsed this sliding scale analysis to decide whether specific jurisdiction was proper. *E.g.*, *W. Gessmann, GmbH v. Stephens*, 51 S.W.3d 329, 339 (Tex.App.--Tyler 2001); *American Eyewear v. Peeper's Sunglasses and Accessories*, 106 F. Supp.2d 895, 901 n.10 (N.D.Tex 2000). *See also Revell v. Lidov*, 317 F3d 467 (5th Cir 2002) (court found a message board to be interactive but in the middle category where the extent of interactivity had to be evaluated).

Although Yahoo! message boards are interactive in the sense that users can post messages, and although the site is commercial in that it carries advertising, the important point is that the web site is not **commercially interactive**. That is, Internet users cannot transact business over the web site with onlymybusiness99 or indeed with any of the other posters. Moreover, plaintiff does not allege that defendant has transacted business with anybody in Texas, over the Yahoo! message board or otherwise. Thus, the sliding scale analysis bars the exercise of personal jurisdiction over defendant onlymybusiness99 in this case.

Likewise, personal jurisdiction over onlymybusiness99 cannot be based on the fact that Citadel has an office in Texas. All of the sliding scale cases involved a plaintiff located in the forum state who could have claimed that the defendant's misconduct affected it in that state, yet the courts repeatedly rejected personal jurisdiction based on torts allegedly committed over the Internet. Moreover, it cannot be argued – and it certainly has not been alleged – that onlymybusiness99,s allegedly defamatory remarks were “aimed” at Texas. Defendant's own messages do not mention Texas, and Texas is not the focus of the discussion on the message board. The discussion is about Citadel's business in general, its efforts to win contracts throughout the nation and the reaction of the investment community to Citadel and its stock.

CONCLUSION

The Court should not exercise personal jurisdiction over defendant onlymybusiness99.

Respectfully submitted,

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April 4, 2005

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VERIFICATION OF FACTUAL BASIS FOR SPECIAL APPEARANCE

As counsel for defendant onlymybusiness99, I verify that the facts stated in my attached affidavit, attesting to the Minnesota residency of onlymybusiness99, and supporting the foregoing Special Appearance, are true and correct.

Paul Alan Levy

SUBSCRIBED AND SWORN BEFORE ME THIS 1st DAY OF APRIL, 2005

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ORDER

Upon consideration of the Special Appearance of onlmybusiness99, and the response of Plaintiff Citadel Security Software, and the materials submitted by the parties in support of their respective positions, the Complaint against the John Doe identified as onlmybusiness99 is hereby dismissed with prejudice as to personal jurisdiction, and otherwise without prejudice.

Chris Oldner, District Judge