CAUSE NO. 342-228333-08

BNSF RAILWAY COMPANY, Plaintiff, JOHN DOE 1, JOHN DOE 2, and NETWORK54 CORPORATION, Defendants.	)	IN THE DISTRICT COURT TARRANT COUNTY, TEXAS 342nd Judicial District

MOTION TO DISMISS COMPLAINT AGAINST NETWORK54 CORPORATION

Based on the accompanying affidavit of Steven Roussey and attached exhibit, defendant Network54 moves to dismiss the complaint against it for lack of personal jurisdiction and subject matter jurisdiction.

Respectfully submitted,

Paul Alan Levy

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

David Broiles

Suite 220
100 N Forest Park
Fort Worth, Texas 76102
(817) 335-3311

Attorneys for Defendant

March 26, 2008

The foregoing motion is true to the best of my knowledge, information and belief.

_____
Paul Alan Levy

Subscribed and Sworn before me this 27th day of March, 2008

AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS COMPLAINT
AGAINST NETWORK54 CORPORATION

This is a defamation action against two employees who posted satirical newspaper articles on a message board, poking fun at the state of labor relations between plaintiff BNSF and two unions representing its employees. In addition to suing its two employee critics, the railroad has joined Network54 Corporation, the message board host, as a defendant, alleging that it is obligated by its own Terms of Use and Privacy Statement to provide information to BNSF identifying the two critics, and seeking a declaratory judgment requiring such disclosure. However, Network54 is a California corporation that has no ties to Texas and cannot be sued there, and even assuming that BNSF is a third-party beneficiary of the Terms of Use and so can sue for breach of contract, the terms of the contract on which BNSF purports to sue expressly require that any suit over the contract be brought in Los Angeles, California. Moreover, BNSF does not come close to meeting the legal requirements to sue as a third-party beneficiary, and in any event there is nothing in the contract that requires disclosure. Accordingly, Network54 should be dismissed as a defendant, and pursuant to the Texas declaratory judgment act, BNSF should be required to pay the attorney fees of Network54 in opposing this aspect of the complaint.

FACTS AND PROCEEDINGS TO DATE

Plaintiff BNSF Railway Company ("BNSF") is a national railway company headquartered in Fort Worth that employs about 40,000 workers, many of whom belong to either United Transportation Union ("UTU") or the Brotherhood of Locomotive Engineers ("BLE"). In 2007, it completed negotiations for a new collective bargaining agreement with a coalition of unions representing its staff. During the closing days of the membership referendum to ratify the agreement, two employees posted satirical newspaper articles on the "United Underground Railroad's Message Board," an unofficial online message board hosted by defendant Network54 Corporation.

Nothing prevents an individual from using a real name, but the message board is typical in that most people choose to comment anonymously, which encourages the uninhibited exchange of ideas and opinions. Most of the postings on the message board are jokes or insults. *See generally* http://www.network54.com/Forum/41973/. BNSF has had a historically stormy relationship with each of the two unions, as the unions have had with one another. The message board contains numerous posts critical of BNSF and other railroads, as well as posts critical of both unions.

Each of the articles on which BNSF sues parodies the relationship between BLE, UTU, and BNSF. John Doe 1 authored the first article, Exhibit A to the Complaint (available online at http://www.network54.com/Forum/41973/message/1182302842/BREAKING+NEWS%21%21%21%21++Sleepy+gone+July+1st%21), which appeared on June 19, 2007, and is entitled "BREAKING NEWS!!!! Sleepy gone july 1st!." The article is offered under the pseudonym "Xtra!!!! Xtra!!!!," and announces the introduction of one-man trains, an objective that BNSF has been trying to achieve through bargaining for several years in order to make its services more economical. The article announces that only BLE members "who were hired before October 31, 1985 will be able to remain on the train after July 1st." The date is significant; on October 31, 1985, an agreement was reached between UTU and the National Carriers Conference Committee that drastically changed the compensation and rights of future railroad employees. Although BLE members rejected the agreement, they were forced into binding arbitration with the carriers, resulting in lower compensation for their future trainmen. The parody, which plays on the fact that BLE is bound by the "Halloween Agreement," is inherently critical of both the UTU and BNSF. In the parody, the BNSF spokesman is eager to point out that the company is "not obligated to staff the position for anyone hired after that date," and the UTU spokesman stonily states that the union is "looking into every legal option at [its] disposal." The article contains typographical errors, and is

posted at "15:55 a.m." The article was posted on June 20, 2007, which was several days before the date for counting the ballots in the employee-wide referendum to ratify the proposed new collective bargaining agreement. The one reaction posted online recognized that the post was a joke, stating "Nicely Done, But false Nonetheless. LOL." http://www.network54.com/Forum/41973/message/1182305953/Nicely+Done.

The second article, Exhibit B to the complaint (available online at http://www.network54.com/Forum/41973/message/1183051763/BREAKING+SUPREME+COURT+NEWS), authored by John Doe 2, was posted on the United Underground Railroad's Message Board on June 28, 2007, and is an obvious parody of the then-recent Supreme Court decision in *Leegin Creative Leather Products v. PSKS*, 127 S.Ct. 2705 (2007), which overruled the 96-year-old rule that minimum retail prices established by manufacturers are per se antitrust violations. The article, posted the same day that the Supreme Court announced its decision in *Leegin*, is entitled "Breaking Supreme Court News." In the article, the speaker proclaims that the lawsuit was originally brought by the BLE to collude with management to obtain lower wages for union employees. The article does not mention BNSF except to state that its CEO praised the decision.

On June 28, 2007, BNSF filed a petition for prelitigation discovery in the District Court of Tarrant County, 96th Judicial District, which, as amended, sought to identify both posters. Subsequently, BNSF issued a subpoena to Network54 and served it on Network54 at its offices in California. Network54 refused to accept the subpoena, however, because it is a California company and does no business in Texas. As more fully set forth in the accompanying affidavit of Steven Roussey, Network54's CEO, Network54 is an interactive computer service that hosts message boards established by its users. It is located in Los Angeles, has no property in Texas, and in no way targets Texas for its business; in fact, only a small fraction of its users are in Texas. Accordingly,

Network54 informed BNSF that it would respond only to process from a California court.

BNSF's Texas counsel then asked the Superior Court for Los Angeles, California, to approve a subpoena in support of out-of-state discovery. Although the Clerk's Office in Los Angeles issued that requested subpoena, Network54 moved to quash the subpoena both because BNSF had not followed the proper procedures to obtain pre-litigation discovery under California law and because identification of the anonymous posters would violate their First Amendment rights. *See Krinsky v. Doe 6*, 159 Cal. App.4th 1154, 72 Cal. Rptr.3d 231 (Cal. App. 6 Dist. 2008), *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007). Among other things, BNSF argued that California was required to honor the decision of the judge in the 96th District Court allowing pre-litigation discovery; Network54 rebutted this argument, in part, on the ground that a Texas order could not bind Network54 because Network54 is not subject to personal jurisdiction in Texas. On October 12, 2007, the Superior Court in Los Angeles quashed the subpoena for failure to follow the proper California procedures.

On January 17, 2008, BNSF filed this action against the two John Doe posters, alleging that the two postings constituted "business disparagement/injurious falsehood," and seeking damages from the two Doe defendants. In addition to suing the two Doe posters, BNSF joined Network54 as a defendant. The complaint does not allege that Network54 is liable for the allegedly defamatory messages place on the message board hosted on its web site; nor could such an allegation be sustained, because the courts uniformly hold that a federal statute, 47 U.S.C. § 230, immunizes the providers of interactive computer services from liability for content placed on their services by others. *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, Inc.*, 2008 WL 681168 (7th Cir. March 14, 2008); *Universal Communications Systems v. Lycos*, 478 F.3d 413 (1st Cir. 2006); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Zeran v. America Online,* 129 F.3d 327,

331 (4th Cir.1997); *Doe v. MySpace, Inc.,* 474 F. Supp.2d 843, 848-850 (W.D. Tex. 2007). Instead, BNSF seeks a declaratory judgment establishing that Network54 is obligated to provide identifying information to BNSF. BNSF alleges that the Network54 Terms of Use forbid the posting of "material that violates . . . any applicable . . . state . . . law [and] that may be deemed by Network54 to be libelous or offensive to another individual or organization." Complaint ¶ 9. The Complaint further alleges that the Terms of Use include a provision that Network54 "may disclose any post or resource to fulfill what is required by law or is needed to comply with legal processes; or ... to protect the rights (including copyrights), property ot personal safety of anyone." *Id.* Contending that the two John Doe postings "violate Network54's 'Terms of Use' and Texas law," *id.*, BNSF seeks a declaratory judgment against Network54 as follows:

> 17. Declaratory Judgment. Because Network54 has disputed BNSF's right to obtain identifying information as to John Doe 1 and John Doe 1 [sic] in a manner inconsistent with the 'Terms of Use' of the Network54 website, BNSF seeks declaratory judgment that Network54 must provide identifying information as to both defendants. In bringing this action for declaratory relief, BNSF seeks recovery of its reasonable and necessary attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*

The complaint was served on Network54 in early March; Network54 now seeks to dismiss the complaint against it both because the case was filed in the wrong court and because the complaint does not state a viable claim against Network54.

I. THE ACTION SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION AND LACK OF STANDING.

The first reason why this action should be dismissed is that the Court lacks personal jurisdiction over Network54. To be subject to in personam jurisdiction, Network54 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); *Ellicott Machine Corp. v. John Holland Party*, 995 F.2d 474, 477 (4th Cir. 1993). 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). A defendant's connection with the state must be such that "it should reasonably anticipate being haled into court" in the state in the event of a dispute. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980).

The minimum contacts analysis generally requires assessment of whether the court is exercising "general" or "specific" jurisdiction. There is neither general or specific jurisdiction here because the only conduct at issue — Network54's creation in California of a web site that hosts online message boards where Internet users can express opinions — occurred outside Texas and entailed no contact by Network54 with Texas. Roussey Affidavit ¶ 4.[1]

A. General Jurisdiction Is Lacking.

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, 416 (1984); *BMC Software Belgium v. Marchand*, 83 S.W.3d 789 (Tex. 2002). Even "continuous activity of some sorts within a state is not enough to support [general jurisdiction]." *International*

[1] Texas authority provides that once a plaintiff pleads facts purporting to show personal jurisdiction, the defendant has the burden to negate the elements of the type of personal jurisdiction pleaded by the plaintiff, *American Type Culture Collection v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002), unlike other authorities that place the burden of proof on the plaintiff to show the existence of personal jurisdiction. *Young v. FDIC*, 103 F.3d 1180, 1191 (4th Cir. 1997). Because defendant meets the burden of showing that there is no personal jurisdiction in this case, there is no need for this Court to reach the question of whether due process permits the assertion of personal jurisdiction without proof. Defendant reserves the right to press this point at the appellate level.

Shoe, 326 U.S. at 318. "This is a fairly high standard in practice." *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990). *Accord*, *Nichols v. GD Searle Co.*, 991 F.2d 1195, 1199-1200 (4th Cir. 1993). For Texas to assert general jurisdiction over a non-resident defendant, its contacts with Texas must be of such a "continuous and systematic" nature that personal jurisdiction is proper even if the action is unrelated to the defendant's contacts with the state. *Id.* Where a defendant is not licensed to do business in the forum state, does not maintain offices or employees there, and owns no property in the forum, the facts do not support general jurisdiction.

The complaint alleges that Network54 "regularly do[es] business with Texas residents" and "is engaged in business with Texas residents," ¶ 5, which is apparently an attempt to plead general jurisdiction, but the record does not support general jurisdiction. Network54 is not headquartered in Texas. Roussey Affidavit ¶ 2 . It owns no property in Texas, has no employees or offices in Texas, and has no contacts with Texas. *Id.* Network54 is a California corporation whose office and servers are located only in California. *Id.* Network54 is a California company having its principal place of business in Los Angeles County, California. *Id.* Network54 does not now, and has not ever, targeted the State of Texas for business development. *Id.* ¶ 5. Network54 does not now, and has not ever, had an employee, agent, or business representative of any kind in the State of Texas. *Id.* ¶ 2. Indeed, Network54's Terms of Use provide for personal and exclusive jurisdiction in the State of California. *Id.* ¶ 2 and Exhibit A.

Nor does the fact that Network54 maintains a web site that is accessible in Texas subject it to general jurisdiction. The Texas courts apply the so-called *Zippo* sliding scale, *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa.1997), to determine whether a web site creates "continuous and systematic" contacts with Texas:

At one end of the spectrum, jurisdiction exists where one clearly does business over

> the Internet by entering into contracts and through the repeated transmission of computer files. . . . At the other end, personal jurisdiction would not be appropriate where one "passively" posts information on the Internet. . . . Courts evaluate the "middle ground" contacts based on the level of interactivity and the commercial nature of the exchange of information.
>
> *Experimental Aircraft Ass'n v. Doctor*, 76 S.W.3d 496, 506-507 (Tex. App. - Hous. 2002, no pet.)

See also Karstetter v. Voss, 184 S.W.3d 396, 404 (Tex. App. - Dallas 2006, no pet.); *Gessmann v. Stephens*, 51 S.W.3d 329, 338 (Tex. App. - Tyler 2001, no pet.). Indeed, Texas courts have never held that even a commercially interactive web alone suffices to establish general jurisdiction. *Weldon-Francke v. Fisher*, 237 S.W.3d 789, 800 n.4 (Tex. App. - Houston 2007, no pet.).

Although Network54's web site is interactive, in the sense that users of its message boards interact with each other, such interactivity does not subject Network54 to personal jurisdiction in Texas for two reasons – first, these interactions are not commercial and do not involve entering into contracts with Texans, and second, the interactions are among the users, not between Network54 and its users. Indeed, Network54 does not run an e-commerce site in the traditional sense. Users do not buy and sell things through the Network54 site, nor does Network54 itself sell anything online. Roussey Affidavit ¶ 3. Network54 runs a community site. Users engage in online discussion and communication about topics of interest to them. *Id.* Network54 derives the bulk of its revenue from the sale of advertisements which are placed on the web sites and forums it hosts and viewed by users of the site. None of the advertising companies with which Network54 contracts are located in Texas. *Id.* ¶ 6.

Additionally, Network54 derives a small amount of revenue from "premium" customers who pay for the privilege of having the message boards that they have created be viewed without advertisements. *Id.* ¶ 5. There are only a handful of such users in Texas – eight in all. These eight

users are fewer than 1% of all of Network54's users, and the $191.16 that they paid in the past month was less than 1% of Network54's revenues for that month. *Id.* Taken together, these facts do not constitute "substantial and not isolated" activity such that Network54 has subjected itself to jurisdiction under the Long-Arm Statute, and they are simply not enough to subject Network54 to personal jurisdiction in Texas. *See Web.com v. The Go Daddy Group*, No. 1:06-cv-01461-TCB (N.D. Ga., Aug. 30, 2007) (copy attached) (plaintiff could not sue ISP in Georgia where only 3% of its customers are located in Georgia).

B. Specific Jurisdiction Is Lacking.

Specific jurisdiction is proper when a defendant has sufficient contacts with the forum that are related to the controversy underlying the litigation. *See Helicopteros*, 466 U.S. at 414 n.8; *BMC Software, supra.* To maintain specific personal jurisdiction, BNSF must show that: (1) Network54 has purposely availed itself of the privilege of conducting business or causing consequences in Texas; (2) the cause of action arises from its activities in Texas; and (3) its 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. *Id.*

BNSF's complaint alleges that "this lawsuit arises out of the business conducted in whole or in part in Texas." Complaint ¶ 5. However, the mere maintenance of a web site accessible in Texas does not amount to conducting business in Texas, as discussed above. Although Network54 allows forum creators to pay a premium so that the forums that they host on Network54's web site will not carry advertisements, the message board at issue in this case, the "United Underground Railroad's Message Board," is advertisement-supported, and hence is not hosted by a user who pays for premium services. Roussey Affidavit ¶ 5. Moreover, a review of the Internet addresses of the

person who posted the satirical articles that BNSF claims are defamatory revealed that the posters were not located in Texas. *Id.* ¶ 7. And, even if the posters and the Network54 customer that created this message board were aware that BSNF was headquartered in Texas, Network54 was unaware of that fact until it received a complaint about the postings from BNSF. *Id.* ¶ 4.

In order to sue a party in Texas in connection with defamatory statements made about a resident of Texas, plaintiff would have to show that the defendant intentionally targeted speech to Texas, intending to have impact in Texas. *Fielding v. Hubert Burda Media,* 415 F.3d 419, 426-427 (5th Cir. 20050, *cited with approval in Abdel-Hafiz v. ABC, Inc.*, 240 S.W.3d 492, 503 (Tex. App. – Ft. Worth 2007, no pet.), yet such intentional taregting is not even alleged in the complaint, not to speak of being shown in the record. In *Abdel-Hafiz*, 240 S.W.3d 492 at 501-504, the Court of Appeals held that defendants cannot be sued in Texas over allegedly libelous statements pertaining to a Texas resident unless those defendants knew that the plaintiff resided in Texas and made statements relating to his Texas activities. The record here establishes that Network54 was unaware that these articles were being posted on its web site about a Texas company. Roussey Affidavit, ¶ 4. That is sufficient to preclude BNSF's claim of personal jurisdiction over Network54.

C. BNSF Lacks Standing to Sue Network54 for Alleged Breach of Its Terms of Use.

A third party may enforce the terms of a contract "only if the parties [to the contract] intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit." *MCI Telecomms. Corp. v. Texas Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex.1999) (emphasis added). This is equally true under California law, *Landale-Cameron Court v. Ahonen*, 155 Cal.App.4th 1401, 1411, 66 Cal.Rptr.3d 776 (Cal. App. 2 Dist. 2007), which applies under the choice-of-law provision of the Terms of Use, Roussey Affidavit, Exhibit A, ¶ 21, and under Texas law. The law creates a strong presumption against finding third-party beneficiary

status, in that the intention of the contracting parties controls, courts "will not create a third-party beneficiary contract by implication," *MCI Telecomms.*, 995 S.W.2d at 651, and the intention to provide a direct benefit to the third party "must be clearly and fully spelled out." *Id.* *Accord Landale-Cameron Court*, *supra*: "The intent to benefit a third party must appear 'on the terms of the contract.' *Bancomer, S.A. v. Superior Court*, 44 Cal.App.4th 1450, 1458, 52 Cal.Rptr.2d 435 [(Cal. App. 2 Dist. 1996)]." In other words, the contract itself "must clearly and fully express an intent" to give rights to a third party." *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002).

In this case, BNSF does not allege that the contract "clearly and fully spell[s] out" its rights, and the contract itself – the Network54 Terms of Use and Privacy Policy, which is in the record – does not contain any such language.[2] At best, the contract between Network54 and its users recognizes the **possibility** that Network54, in its sole judgment and discretion, may decide to reveal identifying information if **it** decides that such disclosure is appropriate (or if disclosure is ordered by a court). Nothing in the contract purports to give enforcement rights to a person who seeks a disclosure. Accordingly, BNSF lacks standing to compel disclosure on the contract theory alleged in its complaint, and its claim against Network54 should be dismissed with prejudice.

II. EVEN IF BNSF IS ENTITLED TO SUE TO ENFORCE THE TERMS OF SERVICE AS A THIRD-PARTY BENEFICIARY OF THE CONTRACT, IT IS BOUND BY THE CHOICE OF FORUM CLAUSE IN THE CONTRACT AND CANNOT SUE IN TEXAS.

Even if the Court had personal jurisdiction of Network 54, this suit cannot be filed against Network54 here because the suit is brought pursuant to a contract, the Terms of Use, that provides for exclusive jurisdiction in courts located in Los Angeles, California. In that regard, as argued *infra*

[2]Although the Complaint recites that the Terms of Use were attached as Exhibit C, that Exhibit was not attached to the Complaint as served on Network54. Accordingly, the entire Terms of Use and Privacy Statement are appended to the Roussey Affidavit as Exhibit A.

at 12-13, Network54 does not agree that BNSF has standing to enforce the contract because it was not contemplated as a third-party beneficiary as required by law. However, even if BNSF had such standing, ¶ 21 of the Terms of Use provides for "personal and exclusive jurisdiction of the courts located within the County of Los Angeles, California." Roussey Affidavit, Exhibit A, ¶ 21.

A third-party beneficiary who claims the right to sue under a contract is obligated to proceed in any forum designated by the contract as the exclusive tribunal for enforcement. *In re FirstMerit Bank*, 52 S.W.3d 749, 755-756 (Tex. 2001). As the Texas Court of Appeals stated in *Nationwide of Bryan v. Dyer*, 969 S.W.2d 518, 520 (Tex.App.-Austin 1998, no pet.), "While attempting to enforce the terms of the . . . contract, [BNSF] cannot pick and choose which provisions apply; [it] is bound by all the contract terms." In *Dyer* and *FirstMerit*, non-signatories who claimed a right to enforce contracts were held to be bound to litigate their claims in the forum identified by the contract. *See also Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir. 2006) (holding that an estoppel theory, specifically direct-benefit estoppel, was sufficient to bind a third party to the forum-selection clause in the contract.) The same is true under California law, *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* 158 Cal. App.4th 1061, 1070-1071, 70 Cal. Rptr.3d 605 (Cal. App. 1 Dist. 2008). Similarly, in this case, even if the Court agrees that BNSF has any right to enforce the Terms of Use, it must bring such a lawsuit in Los Angeles, California. Accordingly, the Complaint should be dismissed, or it should be transferred to the Superior Court for Los Angeles County, California.

III. BNSF HAS NO CONTRACT CLAIMS AGAINST NETWORK54.

Finally, even if BNSF's suit for a declaratory judgment has been properly brought in this Court, the contract does not obligate Network54 to make any disclosures.

Indeed, the terms of the contract do not afford any right of disclosure to **anybody.** Far from

being phrased in words of obligation or command, all references to disclosure indicate that Network54 is afforded the power to disclose in appropriate circumstances, while reserving to Network54 the power to decide whether those circumstances exist. The contract protects Network54 from liability based on the content of the web site, or based on any disclosures that it chooses to make, without imposing any obligations on Network54 or given others any right to demand action by Network54.

Thus, paragraph four, entitled "Limitation of Liability," states, "Users should not rely on the authenticity or accuracy of the content posted, and Network54 does not endorse the content, nor does it make any claim as to the reliability, accuracy, or legitimacy of the content that passes through or is stored on its system." This language clearly warns users of the possible unreliability of the material available on the site. Furthermore, paragraph four goes on to state "Network54 is not responsible for any problems that may occur from reading or using content posted on Network54," which appears to indemnify the defendant from any liability related to the posted content.

BNSF's complaint relies in part on paragraph eight of the Terms of Use, pertaining to libelous or offensive material: Users are forbidden to post "any other material that may be deemed by Network54 to be libelous or offensive to another individual or organization." This language applies, however, only if Network54 itself finds the material to be libelous or offensive – it does not create any objective standard for banning posting, and certainly does not give third parties any right to insist on removal of material. Similarly, paragraph twelve of the Terms of Use provides that Network54 "may disclose any post or Resource to 1) fulfill what is required by law or is needed to comply with legal processes; 2) to prove a violation to its Terms of Use; or 3) to protect the rights . . . of anyone." Again, however, this language does not create any obligation to make disclosures; it simply gives Network54 the ability to make disclosure without facing liability to a user.

Paragraph thirteen of the Terms of Use states,

> Users who post false, misleading, or obscene material on a Network54 forum for the purpose of driving users to their own forum or for the purpose of getting a competing forum shut down will be subject to the immediate termination of their own Network54 Resources and login name. They are also subject to prosecution under applicable laws, and should be aware that Network54 will cooperate with any criminal or civil action that is instigated as result.

This is the **only** circumstance in which the Terms of Use even hint at a departure from the use of the discretionary term "may," using instead the stronger term "will cooperate." But even if this provision in some way obligated Network54 to make a disclosure, it refers to a very discrete set of facts, which are not present in the current situation. BNSF does not allege that either of the two satirical postings on which it seeks to sue for libel was made either for the purpose of "driving users to the [posters'] own forum" or to get the "Underground Railroad" forum shut down. And the stark contrast between the language of paragraph 13 and the permissive "may" and "at our option" language used elsewhere in the contract simply drives home the fact that when the material is simply alleged to be defamatory or otherwise offensive, the contract gives Network54 the ability to disclose without fear of liability, without giving anybody a contractual right to compel disclosure.

The Network54 Privacy Statement similarly gives rights to Network54 but does not obligate it to make disclosures. The section entitled "Session and Login Information" provides, in pertinent part, "[i]f users or a resource (such as a forum or chatroom) break our terms of service, we **may, at our option** and at any time show such IP addresses, service providers, and geographic location information of users visiting or posting at this site." (emphasis added). The use of the term "may, at our option" preserves Network54's right to disclose person information of its users only upon its option.

In sum, this contract does not create any obligation to disclose identifying information.

Accordingly, BNSF's complaint for declaratory relief should be dismissed on the merits, with prejudice. Moreover, because BNSF has sued under the Texas Declaratory Judgment Act, which authorizes the court to award attorney fees to a successful litigant, the Court should award Network54 its attorney fees. This action was brought without any colorable basis, and despite plaintiff's awareness that the Court lacks personal jurisdiction over Network54.

CONCLUSION

The motion to dismiss should be granted.

Respectfully submitted,

Paul Alan Levy[3]

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

David Broiles

Suite 220
100 N Forest Park
Fort Worth, Texas 76102
(817) 335-3311

Attorneys for Defendant

March 27, 2008

[3]Counsel are grateful for the assistance of Abby Moynihan, a third-year student at the Franklin Pierce Law Center.