

In her opening memorandum, defendant Carla Virga showed that this case is Terminix' second effort to suppress her criticisms. She urged the Court to deny the requested preliminary injunction, and to dismiss the suit outright, on several grounds, including the First Amendment, lack of personal jurisdiction and venue, res judicata, lack of any valid claim under the state and federal trademark laws on which plaintiffs rely, and untimeliness under both the statute of limitations and the doctrine of laches.

Plaintiffs' Reply Memorandum ("P. Rpy.") acknowledges that they do not like the content of Virga's expression, but claim that this lawsuit not only is not motivated by the content of her speech, but does not seek to suppress it. Instead, plaintiffs attempt to recast their claims. Although the effort is understandable, plaintiffs' retrenchment only further exposes the fundamental weakness of their claims.

I. PLAINTIFFS' CONCESSIONS UNDERMINE THEIR REMAINING CLAIMS.

The complaint asserts that Virga violated plaintiffs' trademark rights not only through her use of plaintiffs' names in her meta tags but also through her use of their names in banners, links, and even in the mere text of various pages on her web site. *E.g.*, ¶¶ 30, 32. However, plaintiffs' now their claim to her meta tag use. P. Rpy at 3, 4, 7, 21. This represents a major curtailment of their claims in this case, because, if Virga's only alleged trademark violation is her use of plaintiffs' trademarks in the meta tags, and not in the visible portions of Virga's web site, then a number of plaintiffs' legal arguments must fail.

For example, plaintiffs now make much of the fact that there are banner advertisements on the guest book feature to which Virga's web site links at the very bottom right-hand corner of her home page. This, it is argued, demonstrates that she is actually running a commercial web site. We

show below that this claim is incorrect; but in any event the guest book feature does not include any meta tags. Similarly, plaintiffs' new expert complains that defendant's expert did not conduct a search for plaintiffs' names on Yahoo; in response to this failure, he avers that he searched for Terminix using Yahoo and found that this method listed Virga's web site close to the top (namely, the fifth identified link). However, as we discuss at greater length below, neither the selection nor the ranking of web sites in Yahoo searches is affected in any way by the presence or absence of meta tags on a web site.

Plaintiffs also assert in their new memorandum that their lawsuit is not at all directed to compelling the defendant to remove either her web site or the criticisms of the plaintiffs on her web site, but rather to prevent Virga from misleadingly using their trademarks to lure unsophisticated web users to her site by tricking them into believing that links to her site in search engine results are actually links to an official web site of one of the plaintiffs. There are two major problems with this argument. The first, and most fundamental, is that no reasonable person looking at any of the links in any of the search engine results placed in evidence, could possibly believe that by clicking on the link they would be going to an official web site of one of the plaintiffs. For example, although plaintiffs' expert Mr. Rakoff expounds at some length on his view of what a reasonable consumer might think on viewing the fifth link of his Yahoo search for Terminix, he ignores the facts that the description that he deems misleading was written by Yahoo, not Virga, and that the category in which the link appears is not one for official company web sites, but rather a category entitled "consumer opinion." Thus, it is clear that Virga's meta tags are not misleading.

Moreover, simply allowing Virga to criticize the plaintiffs by name, without allowing her to use their names to index her site, is not much of a concession to Virga's free speech rights, despite

what plaintiffs would like the Court to believe. The “concession” is akin to allowing Virga to speak about Terminix as much as she likes so long as she stays inside the walls of her own home. The amount of information available on the Internet is so vast that the right of any speaker to express opinions by simply mounting a web site is virtually meaningless unless the speaker has a fair opportunity to call the existence of that web site to the attention of persons looking for information about her topic.¹

The most important factual question in the case, controlling the outcome of most of the trademark issues, is whether there is any reason to believe that Internet users are being confused by Virga's use of plaintiffs' names in her meta tags. We address this issue at greater length below, but for now we call the Court's attention to this singular fact – even though Virga has been using the Terminix name in her meta tags for nearly 2-1/2 years, and the names of the remaining plaintiffs in her meta tags for more than 1-1/2 years, plaintiffs have been unable to identify even a single Internet user who came to Virga's web site believing that it was the site for any of the plaintiffs. To be sure, the test is likelihood of confusion and not actual confusion, but the absence of even a single instance of actual confusion, or any other evidence of confusion, is fatal to plaintiffs' trademark claims in this case.

A third concession in plaintiffs' reply is particularly damaging to their own case. Plaintiffs object to Virga's treating all the plaintiffs as one in her res judicata argument. Rather, they insist, each of them is a separate corporate entity, whose responsibility for Terminix' lost litigation against Virga in the California state courts must be established individually (through the doctrine of privity)

¹ Rakoff's assertion that meta tags do not matter is directly contradicted by plaintiffs' complaint and motion papers, which allege that Virga's use of meta tags is causing millions of dollars of damages as well as irreparable injury by diverting web users to her web site.

before their claims may be precluded. But plaintiffs' response to the res judicata argument comes back to haunt them with respect to almost every one of their other arguments.

For example, in attempting to justify their trademark claims, plaintiffs invariably refer to themselves as a group, and claim that Virga's violative meta tag is the string citation listing all of their names combined – a meta tag that appears only on her ServiceMaster page. In fact, however, if each of the plaintiffs is a separate corporate entity, then each has standing only to complain about Virga's alleged misuse of its **own** name. And none of the individual plaintiffs is able to overcome all of the defenses set forth by Virga in her opening memorandum. For example, it is only Terminix that has been able to make any showing that Internet users conducting a search using its name as a search term will find Virga's web site even in the top 20 results, a fact that is a necessary (albeit insufficient) predicate for a finding of likelihood of confusion. Searches for the other plaintiffs' names do not reveal Virga's site anywhere close to the top of any results listings. Yet it was Terminix that first acknowledged in September 1997 that it knew that Virga was using its trademarks on her web site, and in March 1998 that Virga was using its trademarks as part of her meta tags, thus drawing Internet users to her web site. Accordingly, Terminix is particularly vulnerable to Virga's statute of limitations and laches defenses. Moreover, Terminix was the named plaintiff that lost the first suit over Virga's web site, thus making it particularly vulnerable to her res judicata defense. In sum, plaintiffs' own reply memorandum shows the emptiness of their individual claims against Virga.

II. BECAUSE VIRGA'S WEBSITE CONTAINS ONLY NON-COMMERCIAL SPEECH, IT ENJOYS MAXIMUM PROTECTION UNDER THE FIRST AMENDMENT AND AVOIDS THE APPLICATION OF THE FEDERAL AND STATE TRADEMARK LAWS.

In her first memorandum, defendant Virga showed that her web site generally, and her meta tags in particular, constituted noncommercial speech and hence were protected against defendants' lawsuit by the First Amendment, as well as being outside the scope of the federal and state trademark laws that have been invoked by the plaintiffs. Plaintiffs now insist that this litigation is directed only at defendant's meta tag use which, according to plaintiffs, is not speech at all; that there is no requirement of commercial character before speech may be regulated by the trademark laws; and that Virga's web site either is now, or someday might become, commercial. None of these arguments is sound.

With respect to the question of whether the contents of Virga's meta tags are speech, plaintiffs ignore the cases cited by Virga in her opening memorandum, at 18, expressly holding that trademarks do constitute speech, enjoying greater or lesser protection under the First Amendment depending on whether they are commercial in character. The proposition that the use of particular words is not speech if their only purpose is to denote the source of the speech is simply not correct. There are numerous cases in which courts have held, for example, that signs or billboards indicating the presence of a particular vendor are speech protected by the First Amendment. *E.g.*, *Metromedia v. San Diego*, 453 U.S. 490 (1981); *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987). *See also Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989) (striking down ordinance regulating signs identifying businesses in foreign language). Similarly, there are many cases in which the desire of a professional or other business person to use a particular name for its operation has been treated as a First Amendment issue, although in some such cases the First Amendment rights have been overcome by other government interests. *E.g.*,

Friedman v. Rogers, 440 U.S. 1 (1979). And the many trademark cases cited in Virga's opening memorandum, holding that the titles of books and other artistic works have First Amendment implications insofar as they indicate the subject of the work, also support the proposition that a meta tag, like the ones that Virga uses on her web site, is speech protected by the First Amendment. D. Mem. 18. Indeed, as Virga's opening memorandum showed, *id.* 18, the leading case on which plaintiffs relied for the proposition that the use of meta tags can constitute trademark infringement, *West Coast Video*, specifically stated that a meta tag is analogous to a sign or billboard advertising the presence of a particular commercial entity. To be sure, that court went on to hold that the use of meta tags there constituted trademark infringement, but that was because the defendant in that case was a commercial video vendor that was using the trademark of a rival vendor as a meta tag for its web site notwithstanding that the web site had nothing to do with the rival vendor.

Nor are plaintiffs correct that meta tags are necessarily used solely to identify the source or author of a web page. That is one possible use for meta tags, but scarcely the most common use. This fact is apparent from the various articles about meta tags cited in our opening memorandum, and it is not contradicted even by plaintiffs' own expert. And the fact that meta tags are primarily used to describe the subject rather than the source of a web page is confirmed by a review of plaintiffs' own web pages. For example, although the meta tags for Terminix' own web page include both the name Terminix itself and several possible misspellings of the name, the vast majority of the more than 30 keywords for Terminix' home page consist of words like "pest," "roaches," "rats," and various other terms denoting the sorts of things that Terminix tries to find and exterminate for its customers. Cunniffe Second Affidavit ¶ 12 and Exhibit AA. Similarly, the meta tags for ServiceMaster's home page include not only the company name, but various words relating to the

subjects of the businesses of ServiceMaster itself and of its corporate subsidiaries such as Terminix and the other plaintiffs. *Id.* Similarly, Virga uses the names of Terminix, ServiceMaster, and the other corporate affiliates as the meta tags for the page that she started in June 1998 to accumulate her own and other persons' criticisms of these companies. By doing so, Virga is no more claiming to be Terminix than Terminix is claiming to be a pest, roach, or rat.

Plaintiffs contend that the contents of the ServiceMaster page reveal that Virga is not really using the meta tags to attract possible viewers to examine criticisms of the various plaintiffs because, they say, the page contains very little information about some of the more obscure subsidiaries. The evidence does not support that contention. After all, when Virga started her Terminix web site, she knew only of her own criticisms based on her own experience with Terminix; she was able to add the criticisms of other persons only after they had visited her Terminix pages and related their experiences to her. So, too, Virga started her page related to Terminix's various corporate siblings with information about ServiceMaster itself, but little information about ServiceMaster's other subsidiaries. As Virga accumulates information about those subsidiaries, she regularly adds it to her site. By the time plaintiffs filed their suit on October 4, 1999, she had links to criticisms of two more ServiceMaster subsidiaries. Shortly after filing her opposition to the motion for a preliminary injunction in this case, she added several other links to criticisms of additional ServiceMaster subsidiaries, which had come to her attention in the interim. Virga Second Affidavit, ¶ 8.

There is simply no support for plaintiffs' wild claim that Virga has used the names of the various corporate affiliates of Terminix as meta tags for her ServiceMaster page for any reason other than to promote her objective of criticizing ServiceMaster and its subsidiaries. To be sure, Virga's aims in creating and publicizing her web site are not conducive to plaintiffs' objectives in building

their own business, but that scarcely means that she is creating her meta tags with the objective of pretending that she is one of the plaintiffs.

Plaintiffs also take issue with Virga's explanation of the "commercial use" requirement for coverage by both the federal trademark laws and the Tennessee Consumer Protection Act. In her opening memorandum, at 47-49, 52-53, Virga showed that each of those statutory provisions either required a "use in commerce," a phrase defined by the Lanham Act as meaning "commercial use in the ordinary course of trade," or required a "commercial" use of the trademark, or contained an explicit exception for noncommercial uses of the trademark.

Instead of grappling with the adverse statutory language, plaintiffs ignore it and instead invoke a line of cases holding that non-profit uses of trademarks are subject to the Lanham Act, and may constitute infringement or dilution under that statute. But these cases are not inconsistent with Virga's argument. In most of the cases on which the plaintiffs rely, the defendant was using the plaintiff's trademark for the purpose, inter alia, of soliciting donations or selling books or other material containing expressive material. The courts held that this constituted commercial use of the trademark which was therefore subject to the Lanham Act. But not a single one of the cases cited by the plaintiffs held that the Lanham Act does not contain a requirement of commercial use.²

² *United We Stand America v. United We Stand America, NY Chapter*, 128 F.3d 86 (2d Cir. 1997) (chapter raised money for political campaigns using trademarked name); *Jews for Jesus v. Brodsky*, 993 F. Supp. 282 (D.N.J. 1998) (web site was conduit to another web site that sold books and audio tapes promoting its point of view and "is commercial in nature"); *Planned Parenthood v. Bucci*, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997) (web site urged purchase of book); *Brach van Houten v. Save Brach's Coalition*, 856 F. Supp. 472 (N.D. Ill. 1994) (group using company's logo solicited donations, and distributed buttons and stickers). *MGM-Pathé Communications v. Pink Panther Control*, 774 F. Supp. 869 (S.D.N.Y. 1991), states that the mere fact that the defendant organization is engaged in political speech does not save it from the trademark laws. The decision mentions that the group issued T-shirts and buttons bearing the plaintiff's logo, but does not discuss whether it sells those items, whether the group was engaged in commercial activity, or whether the Lanham Act

Plaintiffs also cite language from two cases stating that a particular trademark use, complaining about the behavior of a commercial entity and attempting to injure the interests of that entity, could be deemed “commercial.” But each of those cases involved speakers who were trying to raise money for their own causes; the discussions of the “commercial attack” were mere dicta. Indeed, if this were the law, then Congress’ recent amendment of the anti-dilution laws to create an exception for “non-commercial” uses of trademarks to criticize commercial entities, cited in Virga’s opening memorandum at 48, would be completely nugatory, because the mere act of attacking a commercial company’s interests would render the trademark use “commercial” and thus unprotected. The dicta on which plaintiffs rely, therefore, are of little consequence.

Nor have plaintiffs cast doubt on Virga’s demonstration that the Tennessee Consumer Protection Act ("TCPA") covers only “commercial” transactions. The plaintiffs vague and conclusory reference, in footnote 15 of their brief, to earlier argument relying on federal trademark cases as supporting its contention that the TCPA does not containing a requirement of commercial use does not save their TCPA claims from dismissal.

As a result, plaintiffs are reduced to arguing that Virga's web site is a commercial one. But their only evidence to support that proposition is the presence of banner advertisements, not on her own web site, but on the guest book, to which she provides a link in the bottom right-hand corner of her home page. Virga Second Affidavit ¶ 7. The guest book is a common means for small time, noncommercial individuals to create a facility for viewers to leave their own comments about the contents of the web site. Virga’s guest book is not maintained by her own Internet service provider, SYIX, but by a separate operation which is in the business of providing free guest books to web site

has a requirement of commercial use.

operators like Virga. The separate nature of her guest book is revealed, for example, by the fact that its web address, or URL, is completely different from SYIX. Plaintiffs have concealed this fact in the exhibit submitted to the Court because, in the course of copying the pages of the guest book, plaintiffs conveniently failed to reproduce the URLs which were printed in the upper right hand corner of each page. *Id.* ¶ 4 and Exhibit W, show that she has no control over the guest book operator's advertisements, and derives no revenue from them.³

Elsewhere in their brief, plaintiffs implicitly recognize that Virga's own web site and the guest book are separate and distinct. Thus, they repeatedly complain about Virga's having "suppressed" a criticism of Orkin, another pest control company, by refusing to post that criticism "on her web site." P. Rpy. 2, 38. In fact, the criticism of Orkin remains on Virga's guest book exactly where the visitor to that web site placed it; what Virga decided not to do was to create a competitors' complaint page, comparable to her Terminix consumer and Terminix employee complaint pages, by including on her own web site comments that she has moved over from the guest book operator's web site. Thus, plaintiffs' argument that Virga maintains a commercial web site that is subject to regulation under the Lanham Act, is completely untenable.

Several other arguments contained elsewhere in plaintiffs' reply memorandum show how far-fetched plaintiffs' "commercial use" argument really is. For example, by re-characterizing their complaint as alleging a violation of the Lanham Act only by Virga's use of a string citation of their names as a meta tag, plaintiffs completely undercut their contention that Virga's unlawful use of their

³ Similarly, plaintiffs' objection to the fact that the "guest book" provides a space for each visitor to list his web site, and that one visitor who owns a rival pest control company included his business web site, is misplaced. Not only does the link not appear on Virga's own site, but as her affidavit makes clear, the space for the web site is part of the format supplied by the guest book operator, and is not controlled by Virga.

trademarks is commercial. After all, the pages on which the banner ads appear -- that is, the guest book -- do not contain any meta tags at all. Indeed, there no reference or link to the guest book on the ServiceMaster page, the only page bearing the string citation meta tag. The only link to the guest book appears at the very bottom of Virga's home page, which includes only Terminix and ServiceMaster in its meta tags. Moreover, according to plaintiffs' new "expert" affidavit, the guestbook link appears so far down on the page that hardly any viewers who were drawn to the page by the Terminix or ServiceMaster meta tags would scroll down far enough to see the link to the guest book. Rakoff Affidavit, ¶ 11 (few web users scroll down from the first screen they see), ¶ 12 (few web users have the patience to read text-heavy web pages). Thus, plaintiffs' contention that Virga is using their trademarks in her meta tags for commercial purposes is completely inconsistent not only with the web pages themselves, but also with a variety of plaintiffs' other arguments in their reply brief.

Recognizing the slender reed on which their "guest book banner ad" argument rests, plaintiffs are compelled to fantasize about ways in which Virga might seek to derive commercial benefits from her web site in the future. P. Rpy. 12-13. Suffice it to say, Virga does not currently, has not in the past, and does not intend in the future to acquire the financial benefits that plaintiffs are suggesting for her. Virga Affidavit ¶ 5. Virga's web site is a social cause for her, and not a business or a source of revenue. Obviously, should Virga go back on her word in this regard, plaintiffs will be free to return to court to argue about the legal significance of any such change.⁴

⁴ In this regard, we note that it is not at all clear that, if the banner ads were on her web site, this would make her Web site "in commerce," or would transform the expression on her web site into "commercial speech." After all, the New York Times carries advertisements, but that does not make its news articles or editorials commercial speech, subject to lesser protection under the First Amendment; nor does it mean that the Times' criticisms using the trademarked names of commercial

Finally, defendants seek to distinguish Virga's web site from each of the other uses of trademarks that the courts have held to be non-commercial, and thus protected from trademark scrutiny, saying that these cases involve artistic titles, and parody, and comparative advertising by commercial competitors, all of which Virga is not. Plaintiffs never explain why commercial competitors' criticisms of product should enjoy greater First Amendment protection from trademark litigation than consumers' criticism, but even more important, apart from denying that Virga belongs to these various other categories, plaintiffs never explain why they believe that consumer complaints about Terminix and its corporate siblings should not be treated as non-commercial speech.

III. THE ACTION CANNOT BE MAINTAINED AGAINST VIRGA IN THIS FORUM.

In her opening memorandum, Virga challenged both the exercise of personal jurisdiction and the propriety of venue in this Court. As she explained, the case law that has developed in the past several years provides that the mere maintenance of an Internet site that are accessible anywhere in the world is not a sufficient contact with a forum half-way across the country to justify dragging a defendant there to defend a lawsuit over the content of an Internet posting. P. Mem. 27-28 and n.6. *Accord, GTE New Media Svces. v. BellSouth Corp.*, 2000 U.S. App. LEXIS 257 (D.C. Cir., Jan. 11, 2000).

Plaintiff argues that "the posting of a Web site . . . [i]s a sufficient basis for invoking jurisdiction of the court over a non-resident defendant." D. Reply 32. Although this statement is

entities are subject to the Lanham Act. Even speech by commercial competitors of an entity whose name is trademarked may be deemed "noncommercial" speech fully protected by the First Amendment and immune from regulation by the Lanham Act, even though the competitor hopes to make money by taking business from the criticized adversary. *See* cases cited in D. Mem. 17, 19-20. Because such facts are not presented here, we leave a discussion of such issues to another day.

followed by an impressive-looking, two-page, string citation of district court decisions, not a single one of these decisions justifies jurisdiction in this case. **None of those cases actually rests jurisdiction solely on the maintenance of a web site or the placement of actionable material on a web site that could be accessed in the forum state.** The great majority of the cases involved commercial web sites, which were maintained in order to secure business in the forum state, and by businesses that, in fact, derived substantial economic benefits from residents of the forum state.⁵ In most of these cases, the defendants had a number of non-Internet related business contacts with the forum state, so that the case did not turn on Internet contacts alone;⁶ indeed, in some of the cases the

⁵ *Coolsavings.com v. IQ Commerce Corp.*, 53 F.Supp.2d 1000 (N.D. Ill. 1999); *GTE New Media v. Ameritech Corp.*, 21 F. Supp.2d 27 (D.D.C. 1998), *rev'd sub nom. GTE New Media Svces. v. BellSouth Corp.*, 2000 U.S. App. LEXIS 257 (D.C. Cir., Jan. 11, 2000); *Thompson v. Handa-Lopez*, 998 F. Supp. 738 (W.D. Tex. 1998); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Playboy Enterprises v. Asia Focus Int'l*, 1998 U.S. Dist. LEXIS 10460 (E.D. Va. 1998) (case was decided by default, without any briefing by defendant); *Superguide Corp. v. Kegan*, 987 F.Supp. 481 (W.D.N.C. 1997); *American Network v. Access America*, 975 F. Supp. 494 (S.D.N.Y. 1997); *Digital Equip. Corp. v. Altavista Technology*, 960 F. Supp. 456 (D. Mass. 1997); *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 W.D. Pa. 1997); *Edias Software Int'l v. Basis Int'l*, 947 F. Supp. 413 (D. Ariz. 1996); *see also Heroes, Inc. v. Heroes Foundation*, 958 DF. Supp. 1 (D.D.C. 1996) (web site and other communications to forum solicited donations to defendant). A few cases involved defendants whose commercial web sites had repeatedly solicited business in the forum state, although there was no evidence that they had had yet derived revenue from those solicitations. *Bochan v. LaFontaine*, 68 F.Supp.2d 692 (E.D. Va. 1999) (in libel case, defendant Harris was subject to jurisdiction not based on tort committed elsewhere but only based on doing business in forum); *Telco Communications v. Apple a Day*, 977 F. Supp. 404 (E.D. Va. 1997); *Maritz v. CyberGold*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Systems v. Instruction Set*, 937 F. Supp. 161 (D.Conn. 1996).

⁶ *E.g.*, *Coolsavings.com, supra* (forum contacts made in person and on telephone; defendant also used marketing firm based in forum state; technology supplied for Illinois residents); *Thompson, supra* (contract with forum resident required payment to be sent there); *Blumenthal, supra* (defendant “reporter” visited forum in person, sat for an interview there, solicited and obtained donations there); *Telco, supra* (allegedly defamatory press releases were given to distribution outlets in Virginia, including the AOL server and several businesses); *American Network, supra* (defendant mailed goods and contracts to customers in forum state); *Digital Equip., supra* (enforcement of contract with company in forum state; defendant’s web site could be accessed by thousands of revenue-

Court expressly disclaimed holding that even a business-related Internet contact with the forum state is alone sufficient to find “purposeful availment” of the benefit of transacting business in the forum state, thus warranting a finding of minimum contacts.⁷

The handful of cases that do not fit this mold (defendants who obtained economic benefits from the forum states), are libel cases in which the defendant made defamatory statements about residents of the forum state. But the defamation cases are inapposite for several reasons. In each case, the defendants had numerous, deliberate contacts with the forum state that were directly related to the actions over which they had been sued.⁸ Moreover, the injury from defamation is suffered disproportionately in the state in which the individual resides, because that is where the individual bears the greatest consequences of impacts on his or her reputation. Obviously, plaintiffs cannot sue for defamation because that claim has already been rejected by the California courts. But the injury from defamation is quite distinct from trademark rights, which in the case of national operations like

producing customers in forum); *Zippo, supra* (defendant sold access to 3000 individual subscribers in forum, and to seven ISP’s in forum for resale to their customers); *Edias, supra* (defendant visited forum and contracted with plaintiff company located there, then sold \$800,000 to customers elsewhere through plaintiff, \$58,000 to customers in forum independently); *Heroes, supra* (defendant advertised for donations in major daily in forum); *Inset Systems, supra* (defendant was willing to undertake telephone solicitations across nearby border into forum state).

⁷ *E.g., Digital Equipment, supra*, 960 F. Supp at 463; *Heroes, supra*, 958 F. Supp. at 1.

⁸ *Nicosia v. DeRooy*, 1999 U.S. Dist. LEXIS 17451 (N.D. Cal. 1999) (defendant sent 11 separate messages directly to forum residents, urging them to examine libelous internet postings); *Bochan v. LaFontaine*, 68 F. Supp.2d 692 (E.D. Va. 1999) (LaFontaine defendants subject to jurisdiction because they used a forum-based service, AOL, to post their defamatory statements). *See also Blumenthal v. Drudge, supra* (libel case brought by individual against Internet gossip columnist). These cases involved fact patterns strikingly different from the two or three messages from Tennessee to which plaintiffs point in arguing that Virga’s site is sufficiently interactive to constitute purposeful availment of the benefits of doing business in the forum state to warrant the exercise of personal jurisdiction.

plaintiffs' bring benefits wherever the plaintiffs are doing business.

Indeed, plaintiffs repeatedly argue that they would have been entitled to bring suit against the plaintiff anywhere in the country where customers look for their trademarks. Nor is this merely a theoretical point, because one of the plaintiffs in this very case, ServiceMaster, is headquartered not in Tennessee but in Illinois. Under plaintiffs' own argument, ServiceMaster's action against Virga cannot be predicated on the notion that it suffers its injury primarily in Tennessee.

Apart from their reliance on Virga's maintenance of a nationally available web site, plaintiffs cite a few cases which, they say, stand for the proposition that a defendant may be sued in the forum state, even if she has no other contacts with that state, so long as some of the effects of her tortious activity are felt there. P. Rpy. 37. But that is not the law. Each of the cases cited by plaintiffs for this proposition actually involves effects in the forum state **in addition to** transaction of business in that state. These cases are by no means inconsistent with Virga's argument. None rested solely on the impact of out-of-state activities on a resident of the forum state.⁹

⁹ Most of the cases cited at pages 38-40 of plaintiffs' memorandum have previously been discussed in the footnotes on the foregoing pages. The cases not discussed in those footnotes are *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) (defendant sold between 10,000 and 15,000 magazines in forum state each month); *Calder v. Jones*, 465 U.S. 783 (1984) (defendant sold about 600,000 copies of its weekly newspaper in the forum state); *Compuserve v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (defendant contracted with an in-state plaintiff and placed its software on plaintiffs' server in the forum state); *American Greetings Corp. v. Cohn*, 839 F.2d 1164 (6th Cir. 1988) (defendant repeatedly contacted plaintiff in forum by telephone and mail, as well as through agents living in the forum); *InterCity Products Corp. v. Willey*, 149 F.R.D. 563 (M.D. Tenn. 1993) (defendant contracted with plaintiff company to have products shipped from forum state; contract's choice of law and choice of forum clauses designated Tennessee); *California Software v. Reliability Research*, 631 F. Supp. 1356 (C.D. Cal. 1986) (defendant contacted forum residents by mail, urged them not to buy from plaintiff). Moreover, in each of these cases, the principal or sole issue was whether the nonresident had violated the law of the forum state, which was deemed to give the forum state a special interest in having the litigation conducted there. Here, the state law cause of action is subject to dismissal as untimely, and due to the absence of any "consumer transaction." Tennessee does not have any special interest in enforcing plaintiffs' rights under federal law.

In her opening brief, Virga did not argue that her alleged violation (any use of the trademarks in her Internet transmissions) was unrelated to her contacts with the forum. However, now that plaintiffs have limited their claimed violation to Virga's use of meta tags, this becomes a viable ground for dismissal. After all, plaintiffs acknowledge that Virga is not subject to the Court's general personal jurisdiction, but only to specific jurisdiction, and that they must therefore prove that the cause of action arises from her activities there. Def. Rpy. 31. Meta tags are used **only** in web pages, not in e-mail transmissions. Thus, Virga's use of meta tags does not contribute to her ability to send or receive e-mail messages from individuals in Tennessee (or elsewhere). Indeed, the persons who contact Virga with information about their own struggles with Terminix and the other plaintiffs are people who share her feelings about them, not the hypothetical web users who have reached Virga's site because the meta tags have confused them about whether her web site is published by Terminix. Thus, the alleged trademark violations are not related to Virga's individual e-mail contacts with residents of the forum state, or to any confusion that viewers looking only for Terminix are alleged to have suffered, and accordingly this condition of specific jurisdiction is not satisfied.

Finally, in deciding whether the defendants' contacts with the forum are great enough to warrant hauling her into court there, the Court must balance the interests of the forum state against the value, quantity and character of the products that ultimately find their way to the forum state, recognizing the impact that compelling such defendants to litigate so far away may have on the ability to engage in commerce in such products. *See Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 115-116, 122 (1987). It can scarcely be questioned that the ability of mega-corporations like the plaintiffs to drag individual consumers into court 2000 miles from their homes,

if they dare to voice their criticisms on the Internet, will have a severe chilling effect on such speech. Unlike a merchant or a commercial publisher that is making a profit from interstate sales, which can be balanced against the possible costs of litigation – not to speak of being able to obtaining insurance coverage which itself can provide for a legal defense – individual consumers are likely to be completely unprotected from suit, and they have no countervailing financial incentive to continue their activities. If plaintiffs are able to force Virga to defend herself in this Court, the result will be to send a chilling message to other individuals who might want to speak out against wrongs that they believe have been done to them. The Court should not allow that to happen, but should dismiss for lack of jurisdiction or venue.

IV. RES JUDICATA, LIMITATIONS, AND LACHES

For the most part, the respective positions of the two sides are adequately presented by the existing briefs on both sides on the issues of res judicata, limitations, and laches. We do, however, wish to point out that plaintiffs' responses to these defenses both misrepresent the chronology underlying this case, and misstate the relevant law when they insist that Virga's use of "the offending meta tag" did not occur until June 1998, and add the studiously narrow assertion that "there is no evidence" that plaintiffs even knew of her use of that meta tag for more than a year before the complaint was filed.

In this regard, it is first necessary to distinguish between the claims of Terminix and the claims of the remaining parties. Defendant demonstrated in her opening memorandum that plaintiff Terminix was complaining about her misuse of its trademark on her proposed web site as early as September 1997. When Terminix filed suit against her in March 1998, it included in its papers the complaint that Virga was using its name in her "keywords" – that is, the meta tags – to draw

potential viewers to her web site. Thus, with respect to this plaintiff, there can be no question that it knew of Virga's alleged violation of its rights well over a year before this suit was filed. Plaintiffs' reply brief says only that there is no evidence of their knowledge that the string citation meta tag was on the "ServiceMaster" page at the time that page was posted in June 1998. Assuming arguendo that Terminix is not in privity with the remaining plaintiffs, Terminix has standing only to complain about the misuse of its **own** trademark, and so the limitations period for suing over Virga's violation had long expired before this suit was brought. Moreover, its cause of action for use of its name in here meta tags against her arose before its first suit against her was filed, and thus is precluded by the judgment in that case.

Moreover, when suit is brought after the expiration of the limitations period following the accrual of the cause of action, it is the plaintiffs' burden to prove both that they did not know, and that in the exercise of diligence they could not have known, of the violations of their rights within the limitations period. *Adkins v. IUE*, 769 F.2d 330, 335 (6th Cir. 1985); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975); *see also Tagliente v. Himmer*, 949 F.2d 1, 5 (1st Cir. 1991). Thus, the absence of any evidence showing whether or not plaintiffs were aware of Virga's use of their trademarks before October 4, 1998, actually supports dismissal of their state claims.

Unlike the coy stance taken in their papers, Terminix gave a straightforward answer when the press asked when it first learned how Virga was using its trademarks, and why it waited so long to file this suit against her. Terminix vice-president Steven Good did not deny that it had known of Virga's actions more than two years ago; he explained that Terminix did not sue her for trademark violation until now because "it may take time to develop the case law, to develop a little bit more

of a case.” Hanas, *Pest Control*, 565 Memphis Flyer 16, 17 (December 16, 1999) (copy attached). As we have explained elsewhere in this memorandum, Terminix’ suit against Virga is still completely unprecedented, but Good’s statement to the press unmask any pretense that the delay was anything other than deliberate.

Yet plaintiffs now ask the Court to adopt expedited procedures to decide whether they have a likelihood of success on the merits, depriving Virga of the opportunity to take full discovery before she is deprived of the right to use meta tags to fairly describe her web site. And plaintiffs repeatedly ask the Court to accept less than full proofs on their own part, with the explanation that more cannot be expected at the preliminary injunction stage of the case. *E.g.*, P. Rpy. 18. This deprivation of the normal course of litigation is alone sufficient prejudice to warrant application of the doctrine of laches to defeat its preliminary injunction motion.

Terminix’ deliberate delay in filing suit on its trademark claims until long after it had lost its defamation action also supports Virga’s motion to dismiss on res judicata grounds. This is a classic case of claim splitting. In 1998, Terminix sued Virga alleging that her web site contained deliberately false statements that caused it one form of tortious injury – defamation – and that Virga’s use of its name in the keywords heightened that injury (thus warranting a preliminary injunction) because it was drawing web users to her site where they would see the alleged defamation. Long after losing that case, it sued her again, this time alleging that the keywords and web site cause it another form of “tortious injury”, P. Rpy. 38, supposedly deliberately misleading its potential customers in violation of the trademark laws. But Terminix is not free to bring a new case, alleging injuries that could have been asserted in the first case, every time it can conjure up a new legal theory to assert against the same web site and the same key words. *McClain v. Apodaca*,

793 F.2d 1031, 1033 (9th Cir. 1986); *City of San José v. Superior Court*, 12 Cal.3d 447, 464, 525 P.2d 701 (1974); *Panos v. Great Western Packing Co.*, 21 Cal. 2d 636, 134 P.2d 242, 243-244 (1943). *See also Ragsdale v. Rubbermaid*, 193 F.3d 1235 (11th Cir. 1999) (judgment in qui tam action was res judicata of later suit for discharge, allegedly in retaliation for the qui tam suit, that was in existence when first action was filed). Under the doctrine of claim preclusion, the first judgment bars any subsequent case based on a legal theory that could have been advanced, even if it was not. *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 790 F.2d 731, 739 (9th Cir. 1984) (applying California law to determine effect of California judgment). The California courts have not permitted plaintiffs to bring a new claim simply because they assert that the law has evolved in their favor since the first case was decided. *Slater v. Blackwood*, 15 Cal.3d 791, 794, 543 P.2d 593 (1976). Thus, Terminix deliberate decision to withhold its trademark theory while the case law was supposedly developing to support its claims is no basis for avoiding the application of res judicata to bar its claims here.

V. PLAINTIFFS' TRADEMARK CLAIMS ARE WHOLLY LACKING IN MERIT.

In addition to the flaws in plaintiffs arguments discussed above, plaintiffs' trademark claims also fail on their merits. In her opening brief, Virga showed that the complaint should be rejected based on a lack of confusion, lack of dilution, and fair use. In order to try to resuscitate these lifeless claims, plaintiffs now submit an affidavit from Simon Rakoff, who identifies himself as an expert in "internet anthropology." Even assuming that this is a genuine field of expertise and not junk science, neither the Rakoff affidavit, nor plaintiffs' legal argument, warrant the conclusion that plaintiffs have any chance of securing relief in this case.

Before turning to those proofs, it is essential to note a key distinction. There is no evidence

whatsoever that any meta tag is at all likely to call Virga's "ServiceMaster" page to the attention of any web user. Every bit of evidence introduced by the plaintiffs about searches pertains to Virga's Terminix pages. The only evidence introduced pertaining to **any** of the other plaintiffs was introduced by defendant Virga, and it shows that no Virga web page appears in the top twenty search results for the other plaintiffs. Because plaintiffs now confine their trademark argument to Virga's use of meta tags, they cannot prevail on any of their trademark claims unless they can show that the meta tags have the result of calling the attention of members of the public to Virga's web pages. In short, it is only their claim about Terminix that plaintiffs have tried to prove, and that is the claim that we refute in the pages that follow.

A. Virga's Use of Meta Tags Does Not Create Any Actionable Confusion or Likelihood of Confusion

In her opening brief, Virga showed that her use of plaintiffs' names in her web site creates no likelihood of confusion for several reasons – (1) meta tags are used primarily to identify the subject of web pages; (2) there are other ways for users to find a particular company's own web page if that is what they are looking for; (3) only with respect to Terminix itself does her web site come anywhere close to the top of search engine results; (4) search engines provide enough information about the web sites that they identify to permit reasonable users to avoid Virga's site if all they want is an official company site; and (5) once a user reaches her site it is obvious that hers is not an official site, and it is easy to go back to the search engine and look at the next result.

Rakoff does not even attempt to contradict some of these points. For example, he does not dispute that meta tags are used more to identify the subject of a page than to name its source. Nor does he provide any support for plaintiffs' contention that a web user actually viewing Virga's site

will experience any confusion whatsoever about whether hers is an official site of one of the plaintiffs. He limits his discussion to possible confusion at the search stage. And because he addresses only the effect of a search for Terminix, he implicitly acknowledges that persons searching for any of the other plaintiffs are unlikely to come upon Virga's site. Indeed, Rakoff has nothing specific to contribute to the impact of the meta tag that plaintiffs now say is the only issue that concerns them – the string citation to the names of all of the plaintiffs, which appears solely on Virga's ServiceMaster page.

Rakoff does accuse Cunniffe of failing to conduct a search on Yahoo, which he describes as the most popular search engine. He then describes the results of his own search for "Terminix" on Yahoo in a way which is intended to lend support for plaintiff Terminix' argument that Virga's use of meta tags may lead to "initial interest confusion." Rakoff shows the results of a search using Yahoo which, he says, produces a listing of results that has Virga's site as the third item; Rakoff then proceeds to analyze the manner in which the Yahoo results describe Virga's site and states his view that a web user might easily believe from that description that it is an official Terminix site. Rakoff Affidavit ¶ 14. Plaintiffs imply that this is the result of "Virga's meta tag subterfuge." There are, however, several flaws in plaintiffs' argument about confusion based on the Rakoff affidavit.

First, unlike the plaintiffs, Rakoff never avers that the Yahoo search results have anything to do with meta tags, whose use, plaintiffs now assert, is the only trademark violation at issue in the case. Indeed, Rakoff's view is that meta tags have limited impact on which pages web users visit. With respect to Yahoo in particular, there is a very important reason why meta tags do not lead to actual web page results, and that is because Yahoo's search results are completely unaffected by meta tags. Cunniffe Second Affidavit, ¶ 5. Indeed, Yahoo is not, strictly speaking, a search engine

at all – it is a directory of web pages that is compiled, and whose rankings within the directory are determined, by human beings who view the pages and evaluate them, *id.* 4; a search of Yahoo is really a search of the Yahoo directory of web sites. *See id.* 7. Thus, even if, as Rakoff believes they might, viewers decide to visit Virga’s web site because they are confused by what they see in the search that they conducted in manner similar to the one described in Rakoff’s affidavit, that confusion is not the result of her meta tags, and hence it cannot be actionable on plaintiffs’ new theory of their case.

The second problem with applying the facts set forth in Rakoff’s affidavit to find a violation of the trademark laws follows from Rakoff’s assertion that less than 10% of all web users will scroll down below the first screenful of information that appears after the click on the link to a web page. Plaintiffs apparently had Rakoff include this information in his affidavit because they want the Court to infer that a viewer who gets to Virga’s ServiceMaster page will not get all the way down to the end of the page, and may assume from the beginning of the page that it is an official one (plaintiffs never make this argument with respect to the Terminix pages, and we have already explained in our opening brief, at 9-10, why this argument is ill-founded even with respect to the ServiceMaster page).

What Rakoff fails to mention in his affidavit is that the reference to Virga’s page does not appear on the first screen in a Yahoo search – it appears a few lines below the bottom of that first screen. The first listing is for the Yahoo “yellow pages,” giving a viewer the opportunity to “find the Terminix closest to you.” The next listing is for the Yahoo category that Yahoo has decided is most appropriate for a user search for “Terminix.” It appears as follows: “Business and Economy > Companies > Agriculture > Pest Control > Terminix Corporation”; clicking on this link takes the

viewer to the official Terminix corporate web site. Then comes a set of listings of entire web sites that Yahoo has decided are the most responsive to the search; each site is preceded by the Yahoo category in which the site appears. These are listed as follows:

Business and Economy > Companies > Agriculture > Pest Control > Terminix Corporation
Terminix Corporation - commercial and residential pest control services;

Business and Economy > Companies > Home and Garden > Maintenance > Pest Control
Terminix - termite specialists;

Business and Economy > Companies > Agriculture > Pest Control > Terminix Corporation
> Consumer Opinion
Terminix - Consumer Alert! - information intended to prevent home buyers from becoming victims of licensed pest inspection companies or real estate agencies.

All of these listings except Virga's provide links back to Terminix's official site. Thus, the first four links on the page are to Terminix itself. The fifth is to Virga's site, but the key fact is this: neither the link nor the category appears on the first screen. Cunniffe Second Affidavit ¶ 11. Thus, if Rakoff's scrolling assertion is correct, very few users will get enough into the search results to know of Virga's site.

The third problem with Rakoff's affidavit is that neither it, nor plaintiffs' memorandum, fully quotes the listing of Virga's web site in the Yahoo search result. Both quote the language beginning with the words, "Consumer Alert"; we think Rakoff's analysis of the listing is a silly one, but the key points are these: First, regardless of how the words are construed, the fact is that this is Yahoo's own description of Virga's web page, written by the human beings who compose Yahoo's directory; it is not Virga's description (the Court will notice that this is not the language in Virga's "description" meta tag, which recounts that Terminix has sued to have the page removed; in search engines rely on support meta tags, this is the description that appears in the search result listing). Rakoff's

affidavit is written as if this wording, and any resulting confusion, is Virga's fault; **but if it is confusing, it is Yahoo's fault, not Virga's.** Indeed, because Virga's description meta tag includes the fact that Terminix has sued to eliminate the web site, Terminix's supposed interest in accuracy would be benefited if Yahoo did use Virga's meta tags. Moreover, the words quoted by Rakoff and plaintiffs are preceded by the Yahoo category, which concluded with ">Terminix > Consumer Opinion." This places the words quoted by the plaintiffs in context, and makes it hard to believe that any viewer with any sense would believe that this is a site offered by Terminix and not by a consumer expressing an opinion.

The real problem here is that plaintiffs and their expert apparently believe that people who go looking for Terminix on the Internet are inept. Rakoff asserts that people looking on the web behave irrationally – in his term, they are guilty of “wild clicking,” and if they don't find what they want in the first few seconds they will give up looking for Terminix and will go looking for Orkin. Interestingly, however, Rakoff does not describe the mechanism that such web users will use to continue their search. As Cunniffe explained in her first affidavit, if a viewer follows a search results listing to a site that he does not want, the easiest thing to do is to click the back button to return to the search results listing. At that point, the user sees more listings pertaining to Terminix, and if the user chooses to conduct a different search rather than look at the next listing, the trademark laws do not protect companies against that degree of fecklessness. In sum, Rakoff's affidavit simply does not provide support for Terminix's arguments on the issue of confusion or likelihood of confusion.

Terminix' legal arguments are as faulty as its factual ones. For example, Virga's opening brief refuted Terminix' argument that “initial interest confusion” is a sound basis for finding a likelihood of confusion. P. Mem. 37-38 & n.7, 44. Terminix' reply brief, at 21, asserts that the

“initial interest confusion” doctrine is “well-established in the Sixth Circuit.” But its only citation for this proposition is to its opening memorandum, at pages 19-20, which in turn cited several cases, only one of which was decided by the Sixth Circuit, and that case, *Ferrari SPA Esercizio v. Roberts*, 944 F.2d 1235 (6th Cir. 1991), did not involve initial interest confusion. Thus, even if the facts supported the proposition that Virga’s use of plaintiffs’ names in her meta tags was the likely source of initial interest confusion, that would not support a finding of trademark infringement.

B. Plaintiffs’ Claim That the Facts Show Virga’s Having Acted with Evil Intent are Both Factually Flawed and Based on an Erroneous Legal Standard.

Plaintiffs repeatedly describe Virga’s use of their names in the meta tags of her web site as being a deliberate infringement, which, they argue, is a significant factor in determining that there is a likelihood of confusion, P. Rpy. 19-20, and that she is not protected by the doctrine of “fair use.” P. Rpy. 26. Their only evidence for the charge of deliberate infringement, however, is the fact that Virga knew that the names she was using were in fact the trademarks of the defendants.

That, however, is not the test for determining the “deliberate misuse” factor. This factor can be met by showing no more than knowledge of the other’s trademark only when there is an attempt to pass off shoddy goods, or to create a trademark that one claims as one’s own but is actually quite similar to the mark of another. *Daddy’s Junky Music v. Big Daddy’s Family Music Ctr.*, 109 F. 3d 275 (6th Cir. 1997) But there are many situations where the defendant is **entitled** to use the trademark of another, such as in cases of parody, or in cases of news reporting or criticism, or, as here, when the trademark is used as a title or indexing device to tell potential readers that this is a discussion of

a particular topic.¹⁰ *E.g.*, *Bally Total Fitness v. Faber*, 29 F. Supp.2d 1161, 1165-1166 (C.D. Cal. 1998); *Yankee Pub. v. News America Pub.*, 809 F. Supp. 267, 275 (S.D.N.Y. 1992). As such cases make clear, the “intent” that is proscribed is the intent to confuse customers. *E.g.*, *Mattel v. MCA Records*, 28 F. Supp. 2d 1120, 1151 (C.D. Cal. 1998). Thus, the only basis for establishing deliberate misuse is if the defendant used the mark in a way that was calculated to suggest that her site was sponsored by Terminix, instead of just being about Terminix. And because most search engines, and most commentators on the subject of meta tags, urge their inclusion as a way of telling potential viewers what the site is about, and not simply who is the sponsor, it is impossible to find evil intent from the use of trademarked names in meta tags. Virga Second Affidavit ¶ 6; Cunniffe Second Affidavit ¶ 14.

In support of their attack on Virga’s intent, plaintiffs provide a lengthy quotation from Professor McCarthy’s treatise on the subject of “cyberstuffing,” which they take as proof that Virga’s use of their names is a deliberate violation of the Lanham Act. P. Rpy. 9-10. But the blocked quotation makes clear that Professor McCarthy condemns only the listing of the rival’s name multiple times (in his example, “hundreds or thousands”, *id.* 10), which can fairly be said to be deceptive. That is not what Virga did, however – each of the plaintiff’s names is listed only once. In our opening brief, we pointed out that this would have a tendency to resemble the repetitive use of a single name **only** if plaintiffs could show that some users were likely to enter a search request

¹⁰ For example, in the Wall Street Journal article that plaintiffs have placed in the record, the title includes the word Terminix. If a subscriber to the Wall Street Journal’s on-line service performed a search for “Terminix” in the newspaper’s archive, that article would be displayed prominently in the list of search results. Surely, Terminix will not sue the Wall Street Journal for using its name to index this article, yet that is basically what Virga has done with her web site, and the result should be the same.

containing all of their names. D. Mem. 44 n.8. Plaintiffs have not even hinted at any reason why anyone might do that, and so this argument also fails.

Finally, plaintiffs and their expert suggest that if Virga can “get away with” using their trademarks a single time in her meta tags, she might try to use them in a variety of different ways, such as in an invisible wallpaper for the web page, or a competitor might use them to lure customers to their sites by creating a comparative advertising page. The simple answer to the hypotheticals is that this is not what Virga has done; if she or a commercial competitor does something similar, the courts will certainly be able to decide whether or not the same result obtains on that different set of facts. We do not think that all these hypotheticals pose legal issue that are as simple as the plaintiffs suggest; but they can be addressed if they arise. In the meantime, Virga need not be deprived of **her** free speech rights in order to prevent other people from violating the plaintiffs’ rights.

CONCLUSION

This is a suit that should never have been filed. Each and every one of plaintiffs’ claims is so seriously flawed that, in addition to dismissing the complaint, the Court should award defendant her reasonable attorney fees, and should also issue a limited injunction requiring plaintiffs to obtain judicial permission before serving her with any further complaints.¹¹

Respectfully submitted,

¹¹ Plaintiffs are wrong to suggest that the anti-suit injunction that Virga asks the Court to enter against them would prevent them from suing her no matter how she violates their rights in the future. P. Rpy. 55. The requested injunction does not forbid them from suing; it simply requires them to explain to a judge that they have sued her before and lost, explain why a new suit is justified, and obtain judicial permission before serving her and thus imposing on her the burden of defending herself a third time.

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