CAUSE NO. 219-04483-2014

JEREMY WAGES and THE RHODES TEAM	)	IN THE DISTRICT COURT
	)	
Plaintiffs,	)	
	)	
v.	)	219th JUDICIAL DISTRICT
	)	
LIN L.	)	
	)	
Defendant.	)	COLLIN COUNTY, TEXAS

YELP INC.'s OPPOSITION TO MOTION TO COMPEL, AND MEMORANDUM IN SUPPORT OF SPECIAL APPEARANCE

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

Texas Rules of Civil Procedure

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MISCELLANEOUS

Yelp Inc. ("Yelp") hereby opposes the motion filed by plaintiffs Jeffrey Wages and The Rhodes Team ("Rhodes") seeking to enforce a subpoena that they have served on Yelp's registered agent in Delaware, and seeking sanctions for non-compliance. Yelp also seeks reimbursement of the reasonable expenses that it incurred, and continues to incur, in opposing the motion, pursuant to Texas Rule of Civil Procedure 215.1(d), as well as any other sanctions the Court deems appropriate. In support of Yelp's opposition and request for sanctions, as well as in support of its special appearance, Yelp shows as follows:

MEMORANDUM IN SUPPORT

Yelp maintains the popular website www.yelp.com ("Yelp site"), where members of the public can read and write reviews—both free of charge—about their experiences with local businesses. On June 3, 2013, a Yelp user, using the screen name "Lin L." posted a review on the Yelp business listing for plaintiff Rhodes, in which she described her experience as a customer of Rhodes, a real estate firm, and with plaintiff Jeremy Wages, a Rhodes agent identified in correspondence from his counsel as "d/b/a Russell Rhodes Team."[1] Well over a year later, on November 6, 2104, plaintiffs brought suit in this Court against defendant Lin L.; this proceeding arises out of a Texas subpoena that plaintiffs served on Yelp's registered agent in Delaware, seeking to identify Lin L. and to obtain other information relating to her. But Texas lacks jurisdiction to enforce subpoenas to non-party foreign corporations for records maintained outside the State of Texas. Plaintiffs have also failed to meet the constitutional requirements for stripping an anonymous speaker of the First Amendment right to speak anonymously, such as making an evidentiary showing that the statements about plaintiffs are false; indeed, this lawsuit is frivolous in that all of plaintiffs'

[1]Yelp uses the female pronoun generically when referring to Lin L., without intending to describe her actual gender.

claims sound in libel, and the statute of limitations for libel suits is one year. Consequently, the subpoena should not be enforced. Indeed, because plaintiffs' motion fails to comply with Texas law in every respect, a fact that Yelp repeatedly brought to the attention of plaintiffs' counsel both before the motion was filed, and after the filing but before a hearing was set on the motion, Yelp asks the Court to order plaintiffs to reimburse Yelp's expenses in opposing plaintiffs' motion. Tex. R. Civ. Proc. 215.1(d).

FACTS AND PROCEEDINGS TO DATE

Yelp is a corporation organized under the laws of Delaware, with a headquarters in San Francisco, California. Yelp has no offices or real property in Texas. MacBean Affidavit ¶¶ 5, 7. To write reviews on Yelp, a user must register for a free Yelp account. *Id.* ¶ 3. In the registration process, users must provide a first name, last name, valid email address and zip code. *Id.*. Users may choose any screen name they like, and may also designate any zip code as their "location." There is no requirement that the user's actual name or actual place of residence be identified (although Yelp encourages users to provide real names, and requires real names for membership in its Elite user program). *Id.* Information that Yelp obtains about its users is typically stored in Yelp's administrative database, and is accessible to Yelp's user operations team located in San Francisco, California. *Id.* ¶ 4. Yelp's Terms of Service and Content Guidelines require reviewers to have actually had a consumer experience with the business reviewed, and to base their posts on personal experiences. *Id.* ¶ 8 and Exhibit A. Posts that Yelp deems in violation of these requirements are subject to removal. *Id.*

The Rhodes Team ("Rhodes") is a real estate company whose office is located in Flower Mound, Texas. On June 3, a Yelp user using the screen name "Lin L." posted the following review:

> I would never use the Rhodes team again. Jeremy Wages is by far the worst deceitful and money greedy sales agent you would ever deal with. He failed to represent us as clients, never explained our contracts to us and not once did he ever ask us what we wanted to keep or take in our home. We lost so much and he sold our home in two weeks because our house was extremely under priced. He was more concerned with making money than taking our needs into consideration. They don't work for you. They are just in it for the money and getting the highest number of sales. As long as they get their cut that's all that matters. He does not update you with information and is terrible at keeping in touch. You have to hunt him down and make the effort to call him if you want any information. We had the worst experience and would not want anyone else to go through the same. It's just not worth it. His sales pitch is bogus because he will sell your home for way less than what you purchased it for.
> Attachment to Original Petition

On October 24, 2013, Rhodes registered for a free business-owner account with Yelp. MacBean Affidavit ¶ 9. A free Yelp business account allows the account holder, among other features, to communicate publicly or privately with consumers on Yelp's web site, post information about its business, including photos, and track visits to its business's Yelp page. *Id.* Plaintiffs therefore were actively managing their Yelp listing as of October 24, 2013, and presumably were aware of defendant Lin L.'s review no later than this date.

On May 30, 2014, a representative of Rhodes contacted Yelp, demanding that Lin L.'s review be removed from the Yelp Site. *Id.* ¶ 11 and Exhibit D. Yelp examined the review and responded to plaintiff's inquiry on June 2, 2014, stating that it had reviewed the review and decided to leave it up because it appeared to reflect the user's personal experience and opinions, consistent with Yelp's Terms of Service and Content Guidelines. *Id.*

Several months later, on August 15, 2014, Rhodes again contacted Yelp, this time through its counsel, Robert D. Wilson. Mr. Wilson sent a letter to Yelp announcing that he had been retained by "Jeremy Wages d/b/a Russell Rhodes Team" "to seek enforcement of their lawful remedies for the FULL DISCLOSURE of 'Lin L' review." (emphasis in original). *Id.* ¶ 12 and Exhibit E. The letter contended that the review "is false, never occurred, nor was Lin L EVER a client of the Rhodes

Team," (emphasis in original), and warned that if Yelp did not "immediately remove this review and disclose the full identity of this individual," he would file a lawsuit seeking damages and attorney fees against Yelp. *Id* . On August 29, 2014, Yelp responded to Mr. Wilson, informing him that Yelp would not remove the review because Lin L.'s review appears to reflect the opinions and experience of the reviewer, but that Yelp would reconsider its decision about removal if there were a final judicial determination that the review was defamatory. Yelp further said that it would not produce identifying information without a valid subpoena. *Id.* and Exhibit F.

On November 6, 2014, plaintiffs filed this action, alleging claims for defamation, civil conspiracy, and exemplary damages against defendant Lin L. Yelp was not named as a party. The following day, on November 7, 2014, without the ten-day notice required by Rules 205.2 and 205.3, Mr. Wilson issued a Texas subpoena to Yelp and mailed it to National Registered Agents, Inc. ("NRAI"), in Dover Delaware. NRAI received the subpoena on November 10, 2014. Sardo Affidavit ¶ 4. The subpoena not only demands production of the identifying information sought by Mr. Wilson's August 15 demand letter, but also seeks "all records and documents in your possession pertaining to LIN L." The subpoena set a response date of December 4, 2014.

Pursuant to Rule 176.6(d) of the Texas Rules of Civil Procedure, Yelp promptly served written objections to the subpoena on November 20, 2014; the letter was signed by "Connie Sardo, Corporate Counsel." Sardo Affidavit ¶ 5 and Exhibit H. Yelp's objections included the following:

> Yelp objects to the Subpoena because it seeks documents located in California through a Texas Subpoena, and purports to have Yelp produce such materials in Texas. The Texas Subpoena is insufficient for such requests. Instead, subpoenas for information located in California must be domesticated in California. See Cal. Code Civ. Proc. §§ 2029.100, et seq. (Interstate and International Depositions and Discovery Act); Tex. R. Civ. Proc. 176.3 ("A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served.").

On November 21, 2014, Mr. Wilson sent a letter to Yelp via email, claiming (without supporting authority) that Yelp's written objections were "past the deadline (after service) [sic], fatally deficient and not in proper form recognized by Texas Courts per the Texas Rules of Civil Procedure and other statutes." Sardo Affidavit ¶ 6 and Exhibit I. The letter further demanded that Yelp "comply" with the subpoena or face a motion to compel. Counsel for Yelp responded to Mr. Wilson's letter via email that same day, stating that she was "available to discuss [the subpoena] and Yelp's objections thereto," and asking to schedule a meet and confer teleconference the following week. *Id.* ¶ 7 and Exhibit J. Mr. Wilson did not respond to Ms. Sardo's email or to her request to meet and confer. Instead, in violation of the Texas Rules of Civil Procedure and the Local Rules of the District Courts of Collin County, Mr. Wilson filed this motion on December 10, 2014. His legal assistant emailed a copy of the Motion to Ms. Sardo on December 11, 2014. *Id.* ¶ 8. The motion seeks compliance with the subpoena and, further, requests an award of $2500 in attorney fees for having had to file the motion to compel.

Ms. Sardo emailed Mr. Wilson on December 11, 2014, stating that his motion was improper, offering again to meet and confer, and advising that if Mr. Wilson did not withdraw the Motion, Yelp would oppose it and seek reimbursements for its costs in so doing. *Id.* ¶ 9 and Exhibit K. Mr. Wilson refused to schedule a meet and confer conference, or to withdraw the motion. *Id.* ¶ 10 and Exhibit K. Yelp thereafter engaged the undersigned counsel, Mr. Levy, to represent Yelp in opposing the motion to compel. In a final effort to meet and confer, Mr. Levy called Mr. Wilson to try to discuss the subpoena, as well as the flaws in plaintiffs' motion, before Yelp began incurring expenses to oppose the motion. Mr. Wilson did not return his call. Levy Affidavit ¶ 2.

SUMMARY OF ARGUMENT

There are two main reasons why the subpoena to Yelp should be quashed. First, plaintiffs sought their discovery in the wrong court because Texas lacks subpoena jurisdiction over Yelp; and even assuming that they could pursue discovery in the Texas courts, the subpoena was served improperly, because it purports to command compliance in a location that is much more than 150 miles from the place where Yelp resides and where the subpoena was served. Second, even assuming that the subpoena is otherwise enforceable, plaintiffs have not satisfied the procedural and substantive requirements demanded by courts across the country, including in Texas, before government power may be used to strip anonymous Internet speakers of their First Amendment right to speak anonymously.

Indeed, the underlying complaint—and therefore plaintiffs' subpoena and motion—is frivolous on its face because plaintiffs' papers acknowledge that the allegedly defamatory review was posted more than one year before the action was filed, even though the statute of limitations for libel claims is one year. The motion is also frivolous because plaintiffs' counsel not only failed to meet and confer before filing, but rejected the efforts of Yelp's counsel to meet and confer both before the motion was filed and after filing, but before Yelp incurred expenses to respond and before plaintiffs imposed this discovery proceeding on the Court's docket. And the motion is based on the false assumption that Yelp failed to respond timely to the subpoena because it did not file its written objections with the Court.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO SUBPOENA DOCUMENTS FROM YELP, AND IN ANY EVENT THE SUBPOENA DID NOT SEEK PRODUCTION IN A LOCATION WITHIN A PROPER GEOGRAPHIC RANGE.

A. The Law Denies Texas Courts Jurisdiction to Subpoena Out-of-State Non-Parties.

When jurisdiction is challenged, the plaintiff bears the burden of pleading a sufficient basis for jurisdiction. *Kelly v. General Interior Const.*, 301 S.W.3d 653, 658 (Tex. 2010); *Camac v. Dontos*, 390 S.W.3d 398 (Tex. App.-Dallas 2012, no pet.). The motion to compel says nothing about subpoena jurisdiction, even though Yelp's written objection specifically raised that issue.

As the United States Court of Appeals for the Fourth Circuit said in *ALS Scan v. Digital Service Consultants*, 293 F.3d 707, 712-713 (4th Cir. 2002), predicating personal jurisdiction on the mere fact that Yelp enables its users to make statements accessible in a particular state would offend traditional principles of state sovereignty:

> [T]he Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.
> * * *
> In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet.

Although *ALS Scan*, like *Kelly* and *Camac*, involved personal jurisdiction to bring suits against out-of-state companies, there is no basis for extending jurisdiction to subpoena further than jurisdiction to sue.

Moreover, unlike personal jurisdiction to impose liability on a party under state long-arm statutes, which is now regulated by the "minimum contacts" analysis of the Fourteenth Amendment's Due Process Clause, jurisdiction to enforce subpoenas directed to non-parties remains limited to individuals and companies subject to the state's sovereign power under *Pennoyer v. Neff*, 95 U.S. 714 (1877). Under that power, subpoenas can only be served on persons who are present in the jurisdiction, for documents that are located in the jurisdiction. So far as counsel have been able to discover, every state whose courts have finally resolved the question has limited its subpoena jurisdiction in that manner.[2] That is why every state has adopted some version of the Uniform Interstate Depositions and Discovery Act. In Texas, the relevant provision is Rule 201 of the Texas Rules of Civil Procedure; in California the provisions are contained in sections 2029.100 *et seq.* of the California Code of Civil Procedure.

California has made it particularly easy for out-of-state parties to obtain California process in aid of civil suits in their own jurisdictions by providing that a request for an issuance of a

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[2] *Colorado Mills v. SunOpta Grains & Foods*, 269 P.3d 731, 733-734 (Colo. 2012); *CMI, Inc. v. Alejandro Ulloa*, 133 So.3d 914 (Fla. 2013); *Laverty v. CSX Transp.*, 404 Ill. App. 3d 534, 538, 956 N.E.2d 1 (2010); *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121 (Miss. 2005); *In re National Contract Poultry Growers' Ass'n*, 771 So. 2d 466 (Ala. 2000); *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okl. App. 1995); *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So.2d 1186, 1187-1188 (La. 1994); *Armstrong v. Hooker*, 135 Ariz. 358, 359, 661 P.2d 208, 209 (Ariz. App. 1982); *John Deere Co. v. Cone*, 239 S.C. 597, 603, 124 S.E.2d 50, 53 (S.C. 1962). *See also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623-624 (5th Cir. 1973) (subpoena cannot command production of documents in federal district court different from the one in which the documents are maintained); *Chessman v. Teets*, 239 F.2d 205, 213 (9th Cir. 1956), *rev'd on other grounds,* 354 U.S. 156 (1957) (same); *Wiseman v. American Motors Sales Corp.*, 103 A.D.2d 230, 479 N.Y.S.2d 528 (N.Y. A.D. 1984) (trial court subpoena to non-party witness could not be enforced; proper procedure is to secure commission to seek discovery under authority of court in witness's own state). The Virginia Court of Appeals has held otherwise, *Yelp, Inc. v. Hadeed Carpet Cleaning*, 752 S.E.2d 554 (Va. App. 2013), *review granted*, No. 140242 (May 29, 2014), but that ruling is currently under review in the state supreme court.

subpoena in aid of out-of-state proceedings "does not constitute making an appearance in the courts of this state," California Code of Civil Procedure § 2029.300(a), and hence may be effected by the party's out-of-state attorney. The out-of-state attorney need only present the Texas subpoena, § 2029.300(a), along with an application and the appropriate fee, § 2029.300(b), to the clerk's office of a California circuit court. The clerk is then obligated to issue a California subpoena that incorporates the terms of the foreign subpoena. §§ 2029.300(c), (d). These provisions would rarely be needed if plaintiffs in other states expand their states' power to subpoena anybody who communicates through nationally accessible Internet web pages and to any company that is engaged in interstate commerce including other states.

Under Rule 201, the proper way for petitioners to seek discovery from an entity located in California is to obtain a letter rogatory from this Court, asking the California courts to summon the California company to provide discovery in aid of the proceeding pending in this case. The Texas Court of Appeals for Fort Worth reached an analogous result in *Reader's Digest Ass'n v. Dauphinot*, 794 S.W.2d 608, 610 (Tex. App. – Ft. Worth 1990, no pet.), directing that a subpoena for testimony in a criminal case be quashed for failure to employ the procedures established for depositions of foreign witnesses in criminal cases (in that case, Tex. Code Crim. Proc. art. 24.28, the Uniform Act to Secure Attendance of Witnesses From Without State). The corporation that was subpoenaed is a well-known national publication that is widely read in Texas, but the fact that it is engaged in interstate commerce was scarcely a basis for requiring it to appear as a witness in response to a Texas subpoena. Here, the relevant procedure was set forth in Rule 201, and plaintiffs' failure to follow it should lead to the same result as it *Reader's Digest Ass'n*.

B. The Subpoena Seeks to Compel Compliance with Discovery Outside the Geographic Range Authorized by the Texas Rules of Procedure.

Even if the Texas courts had jurisdiction to compel a California company that is not a party to this action to comply with a subpoena, Rule 176.3 provides that subpoena recipients "may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served." *Schippers v. Mazak Properties*, 350 S.W.3d 294, 298 (Tex. App. 2011, rev. denied). Yelp has its corporate headquarters in San Francisco, California, which is more than **1500** miles from Collin County. Additionally, even assuming that service on a registered agent could be sufficient to comply with the range limitation of Rule 176.3, service was made on Yelp's registered agent in Delaware, about 1400 miles from Collin County. For this reason alone, the motion to compel compliance with the subpoena should be denied.

II. PLAINTIFFS HAVE NOT MET THE CONSTITUTIONAL REQUIREMENTS FOR USING STATE POWER TO IDENTIFY THEIR ANONYMOUS CRITIC.

A. First Amendment Protection for the Right to Speak Anonymously.

Even if this dispute is properly resolved in Texas, Yelp's constitutional objections should be upheld because the First Amendment limits the compelled identification of anonymous Internet speakers. The First Amendment protects the right to speak anonymously. *E.g., Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995):

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, **an author's decision to remain anonymous, like other**

> **decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment**.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 U.S. at 341-342, 356 (emphasis added).

A court order, even when issued at the behest of a private party, is state action and hence subject to constitutional limits. That is why, for example, an action for damages, even when brought by an individual, must satisfy First Amendment scrutiny, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), and why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347.

The right to speak anonymously is fully applicable online. The Internet is a public forum of preeminent importance that enables any individual to reach the public hundreds or even thousands of miles away at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *In re Does 1-10*, 242 SW.3d 805 (Tex. App. – Texarkana 2007, no pet.); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007).

Internet speakers may choose to speak anonymously for many reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their

gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves— for instance, information about medical procedures—that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, Cal. Law Week, Volume 1, No. 9, at 16, 18 (1999). The federal Fifth Circuit has sanctioned a Texas lawyer who used subpoenas to identify anonymous defendants, not with any intention of litigating against them but in the hope of extorting quick settlements through the threat of public shaming. *Mick Haig Productions v. Does 1-670*, 687 F.3d 649, 652 (5th Cir. 2012). The Court noted that other courts

had encountered similar misuse of subpoenas by other lawyers. *Id.* n.2. *Accord AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014).

Lawyers who represent plaintiffs in cases against anonymous detractors have also urged clients to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* In *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006), a company filed a Doe lawsuit, obtained the identity of an employee who criticized it online, fired the employee, and dismissed the suit without obtaining any judicial remedy other than removal of anonymity. Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

We certainly do not suggest that plaintiffs have any improper purpose in seeking to identify Lin L. But well-intentioned plaintiffs must nevertheless meet the same standard for overcoming an individual's First Amendment right to speak anonymously as those less well-intentioned. This standard must not be one that makes it too easy to identify anonymous critics. "[T]he chilling effect on the First Amendment right of free speech that results from making such 'confidential' information too easily accessible is apparent." *In re Does 1-10*, 242 S.W.3d 805, 821 (Tex. App. – Texarkana 2007). As one court said in denying identification of anonymous Internet speakers, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic

First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

See also Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal 1999):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

The fact that a plaintiff has filed suit does not create a compelling government interest in taking away a defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

B. The First Amendment Requires Plaintiffs to Meet Procedural and Substantive Standards Before Using State Power to Identify Their Critics.

Courts have drawn on the media's privilege against revealing sources in civil cases, *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980), to form a similar rule protecting identity of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), established a five-part standard that became a model followed or adapted throughout the country:

1. Give Notice: Courts require the plaintiff, and sometimes the Internet Service Provider ("ISP"), to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.

2. Require Specificity: Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.

3. Ensure Facial Validity: Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.

4. Require An Evidentiary Showing: Courts require the plaintiff to produce evidence supporting each element of its claims.

5. Balance the Equities: Courts weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

Appellate courts in ten states and the District of Columbia, including Texas, have endorsed the first four parts of the *Dendrite* standard; five of them have also adopted *Dendrite*'s final balancing stage: *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011); *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012). Five state appellate courts, including the Texarkana Court of Appeals, have followed a summary judgment or prima facie evidence standard that is limited to the first four parts of the *Dendrite* rule. *Doe v. Coleman*, 436 S.W.3d 207 (Ky. Ct. App. 2014)*; Solers v. Doe*, 977 A.2d 941 (D.C. 2009); *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).[3] The

[3] *See also Stone v. Paddock Pub. Co.*, 961 N.E.2d 380 (Ill. App. 2011) (Illinois rules require verified complaint, specification of defamatory words, determination that valid claim was stated, and notice to Doe). In Michigan, the first panel to address the question chose to address the issue only under the state rules of court, *Thomas M. Cooley Law School v. Doe 1*, 833 N.W.2d 331 (Mich. App. 2013); the second panel endorsed the *Dendrite* approach and invited the Michigan Supreme Court to resolve the difference. *Ghanam v. Does*, 845 N.W.2d 128 (Mich. App. 2014), review denied. 856 N.W.2d 691 (2014). In Virginia, the intermediate court of appeals held that a state statute had to be applied in lieu of the First Amendment, but the state supreme court granted review, and a final decision about whether that state's courts will follow *Dendrite* is pending. *Yelp, Inc. v. Hadeed Carpet Cleaning*, 752 S.E.2d 554 (Va. App. 2013), *review granted*, No. 140242 (May 29, 2014).

federal and state courts for San Francisco, California, where Yelp has its office and where it maintains the documents whose production is sought, and where, as argued above, the subpoena should properly be pursued, apply either the *Dendrite* balancing test, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011), or its *Cahill* variant without express balancing. *E.g.*, *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008).

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to secure enforcement of a subpoena to identify Doe defendants is too onerous a burden because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. *E.g.*, *Fodor v. Doe*, 2011 WL 1629572 (D. Nev Apr. 27, 2011); *Does v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); *see also In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (following "reasonable possibility or reasonable probability of success" standard derived from *Dendrite*). Indeed, in *Immunomedics v. Doe*, 775 A.2d 773 (N.J. App. 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery.[4]

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[4]*Dendrite* also includes an express balancing stage. The balancing stage is comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities. After all, an order of disclosure is an injunction, and not even a preliminary one at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker's name is published to the world, she loses her anonymity and can never get it back. Any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). But in some cases, identification

Parties seeking to identify their online critics often argue that subpoenas to identify alleged anonymous defamers do not even implicate the First Amendment because false speech is unprotected. But that argument fails, not least because the Supreme Court of the United States has held that even false speech can be protected by the First Amendment unless the plaintiff shows that the statements can overcome the various hurdles imposed by the First Amendment for defamation liability. *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012). The filing of a complaint is not tantamount to a showing of liability for defamation; plaintiffs have done no more than file a complaint **alleging** that false negative statements have been made about them.

C. Plaintiffs Have Neither Followed the Required Procedures Nor Made the Requisite Showing.

Plaintiffs have not met the *Dendrite/Cahill* test. First of all, they made no effort to give notice to defendant Lin L. that they demanded her identifying information, and did not provide the grounds for identification in advance so that Lin L. can respond. Yelp, to be sure, has given notice to its user, but considering how many courts have endorsed the notice requirement, plaintiffs' attempt to obtain identifying information without using any of the readily available mechanisms to tell the anonymous critic that her identity had been subpoenaed undercuts plaintiffs' claim for relief here.

Moreover, plaintiffs have produced no evidence that any of the statements made about them are false, or that they have caused the slightest damage to their business reputation.

Moreover, plaintiffs concede in their original petition, as well as in their subpoena, that the allegedly defamatory statement was posted on June 3, 2013. Plaintiffs did not file suit until

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of the Does may expose them to significant danger of extra-judicial retaliation. If there is evidence suggesting the possibility of retaliation, the *Dendrite* balancing approach allows the Court to weigh that evidence in the Doe's favor in deciding whether to quash a subpoena. On the current record, there is no basis for applying the balancing stage one way of the other.

November 6, 2014, well beyond Texas' one-year statute of limitations for defamation actions, and for other torts that turn on injury to reputation. *Martinez v. Hardy*, 864 S.W.2d 767, 774, 776 (Tex. App. – Houston [14th Dist.] 1993, no writ); *Caufield v. El Paso Times*, 280 S.W.2d 766, 770 (Tex. App. – Austin 1955, no writ). *See also Hamad v. Center for Jewish Community Studies*, 265 Fed. Appx. 414, 416-417 (5th Cir. 2008) (applying Texas law). Although plaintiffs have sued for "civil conspiracy," the one-year statute applies to tort claims that are "inextricably intertwined with and dependent upon [a] claim for slander," *Martinez*, 864 S.W.2d at 776, including conspiracy claims, as in *Caufield*. Moreover, plaintiffs cannot argue that the alleged defamation is a continuing violation as long as Lin L.'s post remained on Yelp's web site, because Texas applies the single publication rule, under which the alleged tort was complete on the day it was first published, and the mere fact that viewers could still see it at a later date does not allow them to sue more than one year from the date of first posting. *Holloway v. Butler*, 662 S.W.2d 688, 691-692 (Ct. App. – Houston [14th Dist.] 1983, writ ref'd n.r.e); *Nationwide Bi-Weekly Admin.. v. Belo Corp.,* 512 F.3d 137, 142 (5th Cir. 2007). This rule applies to Internet publications as well. *Mayfield v. Fullhart*, 444 S.W.3d 222, 227-230 (Tex. App. – Houston [14th Dist.] 2014, pet. denied); *Nat'l Bi-Weekly Admin*, 512 F3d at 142.

Nor can plaintiffs invoke the discovery rule, because that rule does not apply to statements that are maintained on a publicly available web site. *Velocity Databank v. Shell Offshore*, — S.W.3d —, 2014 WL 7473797, at *3 (Tex. App. – Houston Dec. 30, 2014, n.p.h.); *Mayfield*, 44 S.W.3d at 230; *see also Holloway*, 662 S.W.2d at 693 (discovery rule does not apply in **any** cases of mass publication). Moreover, because plaintiffs registered a business account at Yelp on October 24, 2013, which enabled them to place their own content on the Yelp web page about their business,

they were plainly aware by that date that Yelp was maintaining the page.[5] Yet they did not commence this action for more than a year after October 24, 2013. Their lawsuit is therefore untimely.

Even assuming that plaintiffs would be able to establish an adequate evidentiary basis for overriding the First Amendment right to speak anonymously, on the current record, they have not done so. For that reason, as well as because plaintiffs have not obtained subpoenas from a court with subpoena jurisdiction over Yelp, the motion to compel compliance with the subpoena to Yelp for information identifying the Doe reviewer should be quashed.

III. COMPELLED PRODUCTION OF ALL USER ACTIVITY WOULD VIOLATE THE STORED COMMUNICATIONS ACT.

In addition to seeking identifying information about the posters of identified reviews, plaintiffs' subpoena seeks "all records and documents in your possession pertaining to Lin L," which would include private messages sent to or received by Lin L. Although Yelp retains such information, its disclosure is flatly prohibited by the Stored Communications Act, 18. U.S.C. § 2701(a)(1), which forbids unauthorized and unconsented access to "a wire or electronic communication while it is in electronic storage . . .." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004) (email); *Steve Jackson Games v. U.S. Secret Service*, 36 F.3d 457, 462-464 (5th Cir. 1994) (communications through an electronic bulletin board). The statute allows government entities to obtain access to such emails under limited circumstances when approved by a judicial officer, 18 U.S.C. §§ 2703, 2704, but makes no additional provision for access in pursuit of civil

[5] Plaintiffs' correspondence identifies Wages as "d/b/a/ Russell Rhodes Team." Sardo Affidavit, Exhibits G, I. Rhodes' knowledge of the contents of its Yelp page is thus imputed to Wages personally.

discovery. To the extent that the subpoena seeks information relating to the contents of electronic communications, it should be quashed under this federal law.

IV. THE REQUEST FOR SANCTIONS

In addition to seeking to compel compliance with their subpoena, plaintiffs ask the Court to award sanctions on the ground that Yelp has no basis for failing to comply with the subpoena, in part because, although Yelp provided prompt, written objections to the subpoena, those objections were not "timely & properly file[d] with this Court." However, Rule 176.6(d) of the Texas Rules of Civil Procedure provides, "A person commanded to produce or permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena—before the time specified for compliance —written objections to producing any or all of the designated materials. A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court." There is no requirement of filing the objections. Moreover, the email from plaintiffs' counsel on November 21, 2014, acknowledged receipt of Yelp's written objections. Wholly apart from the frivolous nature of the lawsuit against Lin L, the demand for sanctions against Yelp is wholly without basis.

Indeed, it is plaintiffs whose conduct vis-a-vis Yelp merits sanctions. Apart from the frivolous nature of the complaint, and the failure to serve Yelp with a proper subpoena, and plaintiffs' failure to make the showing needed to overcome Lin L.'s right to speak anonymously, plaintiffs' counsel not only failed to meet and confer before filing the motion, but he refused repeated requests from Yelp's counsel to meet and confer before Yelp began to incur unnecessary expenses to respond to the motion to compel. Sardo Affidavit ¶ 7, 9; Levy Affidavit ¶ 2. *But see* Collin County Local Rules, Rule3.2 ("Prior to the filing of a motion, counsel for the movant shall

personally attempt to contact counsel for the respondent to hold or schedule a conference to resolve the disputed matters.").

Plaintiffs had a duty under Rule 176.7 to "take reasonable steps to avoid imposing undue burden or expense on" a third-party witness such as Yelp. The Court is urged to impose sanctions on plaintiffs, in an amount to be shown after plaintiffs' motion to compel is denied.

CONCLUSION

The motion to compel compliance with the subpoena, and to award sanctions, should be denied.

Respectfully submitted,

Paul Alan Levy (pro hac vice admission sought)

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January 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2015, I caused a copy of the foregoing Opposition to be served by first-class mail, postage prepaid, on counsel for plaintiff as follows:

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