UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TREATY ENERGY CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 2:11-cv-01314-CJB-ALC
	)	Sec. J, Div. 5
JOHN DOES,	)	
	)	
Defendants.	)	

DEFENDANTS SMITHSD7's AND XYLAN's MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA

INTRODUCTION

The defendants are seven participants on a message board dedicated to serious investors who wish to discuss one investment possibility: plaintiff Treaty Energy Corporation (TECO). In the back-and-forth chatter characteristic of such message boards, the defendants have criticized TECO for not being forthright in its press releases. They have also discussed at length TECO's principal shareholders; unsurprisingly, past criminal convictions and present allegations involving those shareholders have drawn some attention. TECO claims that several of the defendants' comments are tortious. It does not, however, provide this Court any support for its claims; indeed, it does not even provide this Court the allegedly defamatory comments. Based on its unsupported allegations, TECO now seeks to subpoena the identities of the defendants. But the defendants have a First Amendment right to criticize TECO anonymously, provided their remarks are not defamatory. By permitting TECO to subpoena their identities before it has made a showing that it is likely to succeed on the merits, this Court will infringe the defendants' First Amendment rights and allow TECO to silence those who dare to criticize it.[1]

STATEMENT OF THE CASE

iHub is a membership-only "forum for serious investors to gather and share market insights in a dynamic environment using an advanced discussion platform."[2] iHub has 283,294 members who share information about investment decisions on 17,883 message boards, organized by industry.[3] For example, iHUB has 804 message boards grouped under "Oil/Gas/Natural Energy Production."[4] One of those message boards is devoted solely to the

[1] Although counsel represent only defendants smithsd7 and xylan, the arguments in this memorandum apply equally to all seven defendants.
[2] http://investorshub.advfn.com/boards/about.aspx.
[3] *Id.*
[4] http://investorshub.advfn.com/boards/hubstocks.aspx.

plaintiff, TECO. The defendants are seven iHub members who have posted comments on the TECO message board under their iHub usernames.

On June 2, 2011, TECO filed a complaint in the Eastern District of Louisiana alleging that comments made by the defendants are defamatory. TECO made the following accusations against defendant Smithsd7:

> Defendant John Doe 2 aka "smithsd7" has also posted a number of defamatory comments on iHub concerning TECO, its officers, and employees. "smithsd7" also accuses TECO of using "smoke and mirror" and "a curtain of corporate smoke;" not being "transparent;" and playing a "'Pea and Shell' game." "smithsd7" accuses TECO of misleading investors as to the true nature of TECO's transactions, stating that the "actual deal particulars probably wouldn't look too good to the investors, so I guess they decided to cloak it in secrecy."

Complaint ¶ 13.

> "smithsd7" also accuses TECO, its officers, and employees of a number of illegal activities. Regarding Andrew Reid, "smithsd7" posted a libelous article from the Times Picayune, a newspaper from New Orleans, Louisiana, that states that Mr. Reid has a "history of fraud" despite the fact that Mr. Reid has never been found guilty of criminal or civil fraud. "Smithsd7" maintains that Mr. Reid is guilty of fraud because "he hadn't been found innocent either," stating that "just because someone doesn't have a judicial finding of quilt (sic) against them, that doesn't mean that they are innocent . . . ." "smithsd7" predicts that "maybe somebody will go to jail." "smithsd7" also declares that "some of the principals" of TECO have "shady pasts."

Id. ¶ 14 (alteration in original).

> "smithsd7" also posted other defamatory comments concerning TECO, its officers and employees that were removed by iHub moderators.

Id. ¶ 15. TECO made the following accusations against defendant Xylan:

> Defendant John Doe 5 aka "Xylan" has also posted a number of defamatory comments on iHub concerning TECO, its officers, and employees. "Xylan" states that "TECO is not a real company" and declares that "I got my hands on 67 plus pages of court documents that detail a tangled web of deceit, lies, illicit gains and many other items." "Xylan" suggests that TECO uses "ploys to move cash around" and is engaged in a "potential shell game that might be happening with TECO." "Xylan" also accuses TECO of being a "pump machine," that is "without a shadow of a doubt" "not fully transparent." "Xylan" additionally declares that

> TECO is seeking to artificially inflate its price per share through the issuance of "vague" and "misleading" press releases.

Id. ¶ 25.

> "Xylan" also accuses TECO, its officers, and employees of a number of illegal activities. "Xylan" states that "I am still not sold that TECO is not a scam" and further states that TECO "might not be 100% legit." "Xylan" states that TECO is run by "scammers" who are seeking to "dump all their shares onto the unsuspecting then move on to there (sic) next play." "Xylan" states that TECO's Belize project is "scam." Regarding Mr. Blackburn, "Xylan" accuses him of being "a proven scam artist" with "past indiscretions" of having "orchestrated" a number of fictional deals." Regarding Mr. Reid, "Xylan" posted a libelous article from The Times Picayune that states that Mr. Reid has a "history of fraud" despite the fact that Mr. Reid has never been found guilty of criminal or civil fraud. "Xylan" also posted excerpts from accusations of fraud against TECO found in certain court documents without providing the reader with the source of the accusations, thus rendering such accusations those of "Xylan."

Id. ¶ 26 (alteration in original).

> "Xylan" also posted other defamatory comments concerning TECO, its officers and employees that were removed by iHub moderators.

Id. ¶ 27.

Because TECO did not know the defendants' actual identities, it filed an ex parte motion seeking permission from this Court to conduct early discovery. Although notice to opposing parties is required even when a motion is filed before service, *see* Wright, Miller & Marcus, 8A *Fed. Prac. & Proc.: Civil* § 2046.1 (3d ed. 2010), at 288-89; *Edgenet, Inc. v. Home Depot U.S.A.*, 259 F.R.D. 385, 386-87 (E.D. Wis. 2009); *Cecere v. County of Nassau*, 258 F. Supp. 2d 184, 186 (E.D.N.Y. 2003), TECO made no effort to notify the Does about its motion, such as by posting a message on the iHub message board. The Court granted TECO's motion, and on July 6, TECO subpoenaed iHub for the identities of the defendants.

ARGUMENT

I. Because the defendants have a First Amendment right to speak anonymously, this Court should require a preliminary showing on the merits before compelling iHub to identify the defendants.

A. The First Amendment protects the right to speak anonymously. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995); *Watchtower Bible and Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999). From the literary efforts of Mark Twain to the authors of the Federalist Papers, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). As the Supreme Court wrote in *McIntyre*:

> [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.

514 U.S. at 341-42 (1995). "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 356.

The right to communicate anonymously on the Internet falls within the scope of the First Amendment's protections. *See In re Baxter*, 2001 WL 34806203, No. 01-00026-M (W.D. La. Dec. 20, 2001). The Supreme Court has treated the Internet as a forum of preeminent importance because it provides any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away at virtually no cost.

Reno v. ACLU, 521 U.S. 844, 868-70 (1997). "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas," and therefore "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded." *McMann v. Doe*, 460 F. Supp. 2d 259, 266 n.35 (D. Mass. 2006) (internal quotation omitted).

Speakers might wish to remain anonymous online for several reasons. They might be concerned that their identities—whether because of their occupation, race, gender, or political persuasion—would influence how others perceive their views. They might wish to express a view in conflict with the interests of an organization with which they are associated. Or they might wish to take a position that would anger others and expose them to retaliation. These risks are enhanced in the modern era, in which nearly all of our activities can be tracked online. Any speaker who sends an e-mail or visits a website leaves an electronic footprint that starts a path that can be traced back to the original sender. *See* Lawrence Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-05 (1999). Without proper safeguards for online anonymity, anyone could file a meritless lawsuit and, through the power to compel disclosure, learn who is saying what to whom.

B. A court order, even if granted for a private party, is a form of state action and is thus subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). An order to compel production of a person's identity in a situation that threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the right to speech, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names.

NAACP, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-63; *Bates*, 361 U.S. at 524.

Based on these principles, there has been a growing consensus among courts that civil subpoenas seeking information regarding anonymous speakers raise First Amendment concerns. *See SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214-15 (W.D. Wash. 2010) (listing cases). These courts recognize that "[i]f Internet users could be stripped of [their] 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).

In *Baxter*, 2001 WL 34806203 (W.D. La. 2001), this court addressed the competing interests at stake when the subject of online comments wishes to unmask its critics. The court recognized that "the widespread use of pseudonyms online is responsible for many of the abuses perpetrated by internet speakers. But revelation of identity has negative consequences as well—it may subject the user to ostracism for expressing unpopular ideas, invite retaliation or have other negative consequences." *Id.* at *11 (internal alternations and quotation marks omitted). Regarding the First Amendment values at stake, the Court stated that "[i]f the goal of making public discourse more participatory and ultimately more democratic is to be realized, the speech of ordinary John Does merits a very wide expanse of 'breathing space,' wider than it currently receives." *Id.* at *4. In particular, it singled out "many of the new libel plaintiffs [that] are corporate Goliaths suing to punish and deter their critics." *Id.*

Toward this end, the *Baxter* court considered the approaches of several courts. It first found elements of tests propounded by two courts to be unhelpful because they do not focus on the "balancing of a plaintiff's right to protect his good name versus the defendant's First

Amendment right to free speech." *Id.* at *12 (considering *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 2d 1088 (2001), and *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999)). On that balance, the Court considered two approaches. First, it discussed and rejected the "legitimate, good faith" test from *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, No. 40570 (Va. Cir. Ct. Jan. 31, 2000), finding it insufficiently protective of the defendant speaker. *Id.* Then, the Court considered two New Jersey cases, *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756 (2001), and *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (2001). It found that "the *Dendrite* and *Immunomedics* cases come closest to setting forth a useful standard by requiring a showing of the ability to withstand a motion to dismiss or to prove a prima facie case before a subpoena is issued." *Baxter*, 2001 WL 34806203, at *12. It rejected the motion to dismiss standard as inadequate and the prima-facie-case requirement as too onerous, adopting a middle approach: "depending upon whether the statements involve public concern or private concern, [the plaintiff must show] at least a reasonable probability or a reasonable possibility of recovery on the defamation claim." *Id.* "Reasonable probability" is the preferred standard, the Court concluded, but where the plaintiff is a public figure and therefore must show actual malice, a slightly more relaxed "realistic possibility" showing would suffice. *Id.*

Baxter's analysis is generally consistent with the development in this area of the law over the past decade. Whether the standard is a prima facie case or reasonable or realistic probability of success on the merits, courts agree that a plaintiff must make an *evidentiary* showing on the merits before unmasking its critics.[5] Indeed, the framework around which the case law has

[5] Although *Baxter* did not expressly mention that the plaintiff must make an evidentiary showing, it rejected the motion-to-dismiss standard because "the requirement there is only that plaintiff can prove no set of facts in support of his claim." *Baxter*, 2001 WL 34806203, at *12. Any showing more onerous than a motion to dismiss standard requires some evidentiary showing.

"begun to coalesce" is the "test articulated in *Dendrite*," *SaleHoo*, 722 F. Supp. 2d at 1214, a case on which *Baxter* relied heavily. In *Dendrite*, a company sued four anonymous defendants who had criticized it on a Yahoo! bulletin board. 775 A.2d at 759-60. The court set out a five-part standard for evaluating subpoenas that seek to identify anonymous Internet speakers, under which the court should:

> **1. Give Notice:** Require reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena;
>
> **2. Require Specificity:** Require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights;
>
> **3. Ensure Facial Validity:** 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:** Require the plaintiff to produce evidence supporting each element of its claims; and
>
> **5. Balance the Equities:** 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.[6]

Other courts have adopted slight variations on *Dendrite*. In *Doe v. Cahill*, for example, the Delaware Supreme Court ruled that an elected official who sued over statements attacking his fitness to hold office could identify the anonymous online speakers only if he could put forward

[6] *See also, e.g.*, *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010); *Solers Inc. v. Doe*, 977 A.2d 941 (D.C> 2009); *Indep. Newspapers v. Brodie*, 407 Md. 415 (2009); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp. 2d 249 (D. Conn. 2008); *London-Sire Records v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008); *Krinsky*, 159 Cal. App. 4th 1154 (Cal. Ct. App. 2008); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. Ct. 2007); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Sony Music Entm't v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

sufficient evidence to establish a prima facie case on all elements of a defamation claim within his control, including evidence that the statements were false. 884 A.2d 451, 460, 461 (Del. 2005). Under the *Cahill* standard, plaintiffs should only obtain the requested discovery if they can put forth at least enough evidence to survive a motion for summary judgment. *Id.* at 457. The District of Arizona applied *Cahill*'s summary-judgment test in refusing to enforce a subpoena to identify the authors of postings criticizing the Best Western motel chain where the plaintiff did not present any evidence that the Doe defendants had written anything false. *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. July 25, 2006). And in *McMann v. Doe*, the District of Massachusetts relied on *Cahill* and *Best Western* in rejecting a lawsuit by a homebuilder against the anonymous operator of another critical website. 460 F. Supp. 2d 259 (D. Mass. 2006). The court denied a motion for leave to subpoena the website's host, holding that the plaintiff had failed to state a claim for any cause of action that justified violating the defendant's First Amendment right to speak anonymously. *Id.* at 268.

Despite minor variations in the tests, each of the cases seeks to ensure that First Amendment rights are not trammeled unnecessarily by "strik[ing] a balance between free speech and the preservation of civility." *Baxter*, 2001 WL 34806203, at *4. Thus, courts must, at a minimum, review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a sufficient basis for piercing a speaker's anonymity.

II. Because TECO has not made a preliminary showing on the merits, the subpoena must be quashed.

TECO has not made a sufficient preliminary showing on the merits to warrant infringing the defendants' First Amendment rights. First, TECO has not provided evidentiary support for any of its claims. Second, it has not provided a single post containing an allegedly defamatory remark; rather, the complaint strings together pieces of text removed from their context. Third,

TECO's complaint is facially invalid because it does not allege that the defendants acted with actual malice; it instead relies on a theory of defamation per se that is unavailable to public figures such as TECO. Finally, the balance of equities favors quashing the subpoena.

A. All of TECO's claims are without evidentiary support.

Whether the required showing on the merits is a prima facie case, reasonable probability, or reasonable possibility, TECO "must produce sufficient evidence supporting each element of its cause of action . . . prior to a court ordering the disclosure of the identity of the unnamed defendant." *Dendrite*, 775 A.2d at 760. TECO has supplied no evidentiary support for its claims and therefore its subpoena must be quashed.

B. TECO has not sufficiently identified the allegedly defamatory comments.

Under the *Dendrite* standard, a court "shall require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech." *Dendrite*, 775 A.2d at 760. Without the full remarks and their context, a Court cannot possibly determine whether the allegations have any merit. TECO has not met this requirement with respect to Smithsd7 or Xylan, or for that matter any one of the defendants. As explained further below, TECO offers fragments of sentences out of context and refers generally to allegedly defamatory statements without referring to specific posts or the specific language used.

TECO's allegations against the defendants are rarely more than two or three quoted words, stripped of all context. Context reveals that many of the allegedly defamatory statements are not statements of fact at all. For example, TECO states that "'Xylan' suggests that TECO uses "'ploys to move cash around.'" Complaint ¶ 25. In context, it is clear that Xylan was not accusing TECO of anything, but rather "hop[ing]" that a press release was accurate.

> Another PR met with a thud where volume and PPS are concerned. Looks like TECO money (if they ever make any money) can now be shuffled to yet another LLC… Hope these are not just ploys to move cash around…(if they actually start making any cash)
>
> IMO Only
>
> Xylan

Exh. 1.

Similarly, Xylan's references to TECO shareholder Ronald Lee Blackburn "as a proven scam artist" with "past indiscretions" are all in the context of Xylan's—and other posters'—extensive discussion of allegations made against Blackburn in an ongoing bankruptcy case in the Eastern District of Louisiana, *In re Alonzo & Alonzo v. Blackburn et al.*, No. 10-10176.[7] For example, at the beginning of the post in which Xylan refers to Blackburn as a proven scam artist, Xylan states: "I have court docs that imply that some of these 'properties acquired by the company' was just a scam and never took place." In the post in which Xylan refers to Blackburn's past indiscretions, he states:

> My opinions are based upon factual court documents, where there can be no dispute, where the main character in these cases is most likely still the majority shareholder in TECO thus mostly (sic) likely making many of the decisions, or at least influencing those decisions.
>
> Why do you want to cover the past indiscretions of a past majority shareholder who could very well be in the same position currently.
>
> All this information on both sides is pure speculation . . . .

Exh. 3 (alteration in original).

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[7] *See also* Mike Jones, "Former Sylvania Man Sentenced to 37 Months in Income Tax Case," *Toledo Blade*, Sept. 10, 1999, at 16, attached as Exh. 3 (stating that according to United States attorneys working on the case, Blackburn established a company through which he concealed assets and owned a majority interest in a company from which he received hundreds of thousands of dollars in cash to prevent the funds from being seized to satisfy tax liabilities); *United States v. Blackburn*, N.D. Ohio, No. 3:99-cr-753 (case referred to in Toledo Blade article).

Another example of TECO's misleading allegations is its claim that "'Smithsd7' maintains that Mr. Reid is guilty of fraud because 'he hadn't been found innocent either,' stating that 'just because someone doesn't have a judicial finding of quilt (sic) against them, that doesn't mean that they are innocent . . . .'" Complaint ¶ 14 (alterations in original). Read in context, Smithsd7 stated only that a finding of not guilty is not the same as a finding of innocence.

> lol. Someone was right and someone was wrong . . . that is a fact. The thing about arbitration is no one has to admit to being in the wrong and no one can claim to being proven right. It leaves its open to speculation.
>
> Your own words from post 14109,
>
> "The paper should have stressed M. Reid was never found guilty of these 10 year old allegations. . . . Innocent of all allegations should have been mentioned."
>
> I only point out, using your framework of words, that he hadn't been found innocent either and that your statement that the paper should have mention that Reid was 'innocent of all allegations' was rubbish.

Exh. 4.

TECO also makes numerous vague accusations that do not provide the defendants with enough information to defend their statements. Against Xylan, for example, TECO states that "'Xylan' also posted excerpts from accusations of fraud against TECO found in certain court documents without providing the reader with the source of the accusations, thus rendering such accusations those of 'Xylan.'" Complaint ¶ 26. And against Xylan and Smithsd7—indeed, against all seven defendants—TECO refers generally to "other defamatory comments concerning TECO." Complaint ¶¶ 12, 15, 19, 23, 27, 30, 34. Without more, this Court cannot determine whether these allegations have merit. Accordingly, the subpoena should be quashed.

C. Because TECO is a public figure in the community in which the allegedly defamatory statements were broadcast, TECO has the burden of showing that the defendants acted with actual malice, which it has not alleged in its complaint.

Because TECO's complaint does not allege that defendants acted with actual malice, it is facially invalid. Under Louisiana law, defamation has four elements: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury." *Trentecosta v. Beck,* 703 So. 2d 552, 559 (La. 1997). In cases involving statements about a public figure, "a plaintiff must prove all elements of his cause of action for defamation, including actual malice, and may not rely on any presumption based on the fact that the words are defamatory per se." *Starr v. Bourdreaux,* 978 So. 2d 384, 390 (La. Ct. App. 2007) (citing *Costello v. Hardy,* 864 So. 2d 129, 140-41 (La. 2004)). The actual malice standard is a high bar: "it is not satisfied merely through showing ill will or 'malice' in the ordinary sense of the word" and "may not be inferred from evidence of personal spite, an intention to injure, or a bad motive"; rather, it requires "at the very least" "that the statement was made with a reckless disregard for the truth." *Costello,* 650 So. 2d at 740. "To establish a reckless disregard for the truth, the defamation plaintiff must show that the false publication was made with a 'high degree of probable falsity' or the defendant 'entertained serious doubt as to the truth of his publication.'" *Id.*

Instead of alleging actual malice, TECO relies on a theory of defamation per se that is not available for public figures and contests its status as a public figure. Complaint ¶ 35; TECO TECO Memorandum in Support of *Ex Parte* Motion at 7. In *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1329 (5th Cir. 1993), the Fifth Circuit identified several non-exhaustive factors for determining whether a corporation is a public figure: (1) "the notoriety of the corporation to the average individual in the relevant geographical area"; (2) "the nature of the corporation's

business"; and (3) "the frequency and intensity of media scrutiny that a corporation normally receives." *Id.* at 1329-30.

TECO is a public figure in the context of this case for two reasons: First, the relevant community in which to assess public figure status is the one in which the messages were broadcast. *See Stolz v. KSFM 102 FM*, 30 Cal. App. 4th 195 (Cal. Ct. App. 1994) ("This record sufficiently demonstrates that KWOD [radio station] is an all-purpose public figure by virtue of occupying a position of general fame and pervasive power and influence in the community in which the allegedly defamatory speech was *broadcast*." (emphasis added)). Here, that community consists of the participants on a membership-only message board exclusively about TECO for current and potential TECO investors.

Second, TECO is a publicly traded company that has thrust itself into the public's eye by issuing press releases for the purpose of informing and acquiring new investors. As one court stated:

> [A] publicly traded company with many thousands of investors is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole. This is particularly so when the company voluntarily trumpets its good news through the media in order to gain the attention of current and prospective investors. The fact that a chat-room dedicated to [the company] has generated over 30,000 postings further indicates that the company is of public interest.

Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1265 (C.D. Cal. 2001); *see also Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) ("[The plaintiff] was, at the time of the libel, offering to sell its stock to the public, thereby voluntarily thrusting itself into the public arena, at least as to all issues affecting that proposed stock sale."); *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 721 (2002) (adopting rule of several other states that "because a restaurant is a place of public accommodation that seeks public patrons, it is a public figure for the limited purpose of a food review or reporting on its goods and services").

The *Snead* factors support this conclusion. The first two *Snead* factors look toward whether the corporation is a "household" name in the relevant community. In *Snead*, the issue involved a press release issued in conjunction with a lawsuit accusing a corporation of "international theft," "industrial espionage," and "international piracy." 998 F.2d at 1328. The court found that the majority of Americans had never heard of the plaintiffs—alien corporations with no United States subsidiaries. *Id.* at 1329. Similarly, it found that the plaintiffs' work—mining stone and building railroads—is unlikely to result in public prominence. *Id.* The critical distinction between *Snead* and this case is, as *Snead* puts it, the "relevant geographic area." *Id.* at 1329. Whereas *Snead* involved a press release, presumably accessible to people all over the country, the statements in this case occurred on a membership-only message board exclusively about TECO that targets current and potential TECO investors. The relevant community in this case consists of the people who frequent that message board, all of whom are aware of TECO. *See Reliance Ins. Co.*, 442 F. Supp. at 1348-49 (although not a "household name," "plaintiff is well known among Barron's [a financial magazine in which the allegedly defamatory statements appeared] readership, and a well recognized name in the financial and business community").

The third *Snead* factor should also be considered in the context in which the statements occurred. TECO might receive very little media attention nationally or in Louisiana, but on its message board on iHub, its press releases, stock swings, and business activities are meticulously scrutinized on a daily basis.

The policies underlying the public-private figure distinction also evidence TECO's public figure status. As identified by the *Snead* court, those policies are that, first, public figures "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy," and

second, "public figures normally have thrust themselves into the public eye, inviting closer scrutiny than might otherwise be the case." *Snead,* 998 F.2d at 1329. TECO has significant access to the community that frequents iHub's TECO message board. Because the very purpose of the message board is to assist people in making intelligent investment decisions, any message TECO wishes the public to see will be actively sought out by the message board's participants. Indeed, the very subject matter of this suit involves the defendants' criticisms of TECO's press releases. *See, e.g.*, Complaint ¶ 10 ("'viki' has accused TECO of 'deceit' in lying to investors and potential investors in its press releases, stating that the press releases are deliberately 'vague' and 'fluff'. . . . 'viki' states that 'nobody has EVER stated that treaty's [press releases] had any truth in them, nobody.' 'viki' additionally declares that 'we were lied to in [press releases]' . . . . Finally, 'viki' states that the next press release from TECO 'will be just as vague, maybe even an outright untruth.'" (alterations in original)). And as explained above, as a publicly traded company that issues press releases for the purpose of selling its stock, TECO has "thrust [itself] into the public eye," *id.*, at least the portion of the public considering investing in TECO.

Finally, insofar as the statements at issue were made to help potential TECO investors assess the value of TECO's stock offerings, those statements are of concern to the public. Speech of public concern requires extra "breathing space—potentially incorporating certain false or misleading speech—in order to survive." *See Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (internal quotation marks omitted).

D. The balance of equities favors quashing the subpoena.

The final step of the *Dendrite* standard involves a balancing of the defendants' First Amendment right to speak anonymously against the strength of the plaintiff's case and the plaintiff's need for the defendants' identities. *Dendrite*, 775 A.2d at 760-61. In light of the

weakness of TECO's claims and the public interest in encouraging frank and critical commentary on publicly traded corporations, this balance strongly favors the defendants. Accordingly, the subpoena should be quashed.

CONCLUSION

The Court should quash the subpoena.

Respectfully submitted,

s/ *Michael H. Page*

Michael H. Page, Trial Attorney
PUBLIC CITIZEN LITIGATION GROUP
DC Bar No. 1001154
1600 20th Street NW
Washington, DC 20009
Telephone: (202) 588-1000
Facsimile: (202) 588-7795
mpage@citizen.org

Jennifer J. Rosenbaum
Admitted to Practice in the Eastern District of Louisiana
La. Bar No. 31946
New Orleans Workers' Center for Racial Justice
217 N. Prieur St.
New Orleans, LA 70112
Telephone: (504) 309-5165
Facsimile: (504) 309-5205
jjrosenbaum@nowcrj.org

Attorneys for defendants Smithsd7 and Xylan

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CERTIFICATE OF SERVICE

This document has been served electronically through the CM/ECF system on counsel for plaintiff Treaty Energy Corporation:

Andrew L. Kramer
Binford E. Parker, III
Andrew L. Kramer, LLC
201 St. Charles Avenue
Suite 2504
New Orleans, LA 70170

s/ Michael H. Page
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Michael H. Page