IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EUCLID DISCOVERIES LLC, J. ROBERT WERNER and RICHARD Y. WINGARD, Plaintiffs, v. MARK NELSON, SACHIN GARG and JOHN DOES 1-150, all of whose true names are unknown, Defendants.	Case No. 1:11-cv-11393-DJC **DEFENDANT MARK NELSON'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Fed. R. Civ. P. 12(c), Defendant Mark Nelson respectfully moves for judgment on the pleadings dismissing all counts of Plaintiffs' Complaint against him, on the following bases: (i) lack of subject-matter jurisdiction due to the presence of John Doe defendants; (ii) lack of personal jurisdiction; (iii) improper venue; (iv) failure to state a claim for which relief may be granted because Plaintiffs' claims are barred by the applicable statute of limitations; (v) failure to state a claim because the statements of which Plaintiffs complain are non-defamatory as a matter of law; (vi) failure to state a claim based on statements made by others because Nelson has absolute immunity for such statements as a matter of federal law; and (vii) the Texas anti-SLAPP statute, which is applicable here under accepted choice of law principles, mandates dismissal and an award of attorney fees, costs, and deterrent sanctions.

In support of this Motion, Defendant Nelson relies on the accompanying Memorandum in Support, as well as the Memorandum in Support of co-Defendant Sachin Garg's contemporaneous Motion for Judgment on the Pleadings, as incorporated by reference herein.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(e), Defendant Nelson respectfully submits that oral argument may assist the Court in resolving this motion, and therefore requests oral argument.

Respectfully submitted,

MARK NELSON,
By his attorney,

/s/ Mitchell J. Matorin
Mitchell J. Matorin (BBO #649304)
MATORIN LAW OFFICE, LLC
200 Highland Avenue Suite 306
Needham, MA 02494
(781) 453-0100
mmatorin@matorinlaw.com

Dated: January 12, 2012

Local Rule 7.1 Certification

I certify that I have conferred with counsel for Plaintiffs in a good faith attempt to resolve or narrow the issues presented in this motion.

/s/ Mitchell J. Matorin

Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 12, 2012.

/s/ Mitchell J. Matorin

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EUCLID DISCOVERIES LLC, J. ROBERT WERNER and RICHARD Y. WINGARD, Plaintiffs, v. MARK NELSON, SACHIN GARG and JOHN DOES 1-150, all of whose true names are unknown, Defendants.	Case No. 1:11-cv-11393-DJC **MEMORANDUM IN SUPPORT OF DEFENDANT MARK NELSON'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Respectfully submitted,

MARK NELSON,

By his attorney,

/s/ Mitchell J. Matorin
Mitchell J. Matorin (BBO #649304)
MATORIN LAW OFFICE, LLC
200 Highland Avenue Suite 306
Needham, MA 02494
(781) 453-0100
mmatorin@matorinlaw.com

Dated: January 12, 2012

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Defendant Mark Nelson ("Nelson") respectfully moves for judgment on the pleadings on several bases: (i) lack of subject-matter jurisdiction under 28 U.S.C. § 1332 because the John Doe defendants destroy diversity; (ii) lack of personal jurisdiction; (iii) improper venue; (iv) the applicable statute of limitations bars Plaintiffs' claims as to all but six of the allegedly defamatory statements; (v) those remaining six statements are non-defamatory as a matter of law; (vi) Nelson is immune as a matter of law under Section 230 of the Communications Decency Act to claims based on statements made by anyone other than himself; and (vii) the Texas anti-SLAPP statute, applicable here under the doctrine of *depeçage*, requires dismissal and an award of attorney fees, costs, and deterrent sanctions.[1]

Background

For purposes of this Motion, Defendant Nelson accepts as true the following allegations of the Complaint.

Plaintiff Euclid Discoveries LLC ("Euclid") is a Delaware corporation with a principal place of business in Concord, MA. Plaintiff J. Robert Werner ("Werner") is a citizen of the Commonwealth of Kentucky, residing in Louisville, KY, and is Euclid's President. Plaintiff Richard Y. Wingard ("Wingard") is a citizen of the Commonwealth of Massachusetts, residing in Carlisle, MA, and is Euclid's CEO. (Complaint § I, ¶¶ 1-4.)[2] Euclid purports to be "a

[1] Subordinate to his arguments with respect to the Court's lack of subject-matter jurisdiction, Nelson further moves pursuant to Fed. R. Civ. P. 12(e) and the Court's Order of October 28, 2011 ("Order"), that the Court strike the Complaint. The Court directed Plaintiffs to "identify each comment or article … that contains an allegedly defamatory statement and who made that statement." Despite this requirement, Plaintiffs explain that the MDS is directed only to Nelson and Garg. (MDS at 1, n.1.) Contrary to the Order, Plaintiffs have not identified a single statement made by anyone other than Nelson or identified the author of any such statement.

[2] Euclid's state of incorporation is disclosed in its annual report filed with the Commonwealth, of which the Court may take judicial notice. http://corp.sec.state.ma.us/corp/corpsearch/display_pdf.asp?CORP_DRIVE1/2011/0126/000346178/0057/201124624170_1.pdf (last visited Dec. 15, 2011).

research and technology development company" focused on "creating next-generation video processing and compression technologies." (Complaint § III ¶1.)

Defendant Nelson is a citizen of the State of Texas, residing in Plano, TX. (Complaint § I ¶ 5.) Nelson is one of several individuals who have, at various times, written brief articles or posts that have appeared on the web log entitled "Data Compression News Blog" hosted at the Internet domain www.c10n.info ("the Blog"), which provides a forum for discussion about the computer data compression industry and technology. Nelson is one of many individuals who have, at various times, written and responded to comments on the Blog as part of extensive online discussions. (*See* Complaint § III ¶¶ 2-4.) The Blog is hosted on the Scottsdale, AZ computer servers of the GoDaddy Internet registrar ("GoDaddy"). (*See* Complaint § II, ¶ 3.)

The Complaint also names as Defendants "John Does 1-150" and alleges that they are "citizens of the United States" of unknown residence and that Plaintiffs will seek to identify them through subpoenas. (Complaint § I ¶ 7.) The Complaint alleges that each of these John Does has published defamatory content on the Blog for which they are individually liable, and that all of the defendants are jointly and severally liable for statements made by all other defendants. (Complaint, Count I, ¶ 15, *ad damnum* ¶¶ 1-2.)

ARGUMENT

I. The Presence of Indispensable "John Doe" Defendants Deprives the Court of Subject-Matter Jurisdiction Over this Original Diversity Case

Subject-matter jurisdiction in this case is premised entirely on an allegation of diversity of citizenship under 28 U.S.C. § 1332. (Complaint § II ¶ 1.) Complete diversity is required, such that no plaintiff and defendant are citizens of the same state. Incomplete diversity "deprives the federal courts of jurisdiction over the lawsuit." *Casas Office Machines, Inc. v. Mita Copystar America, Inc.*, 42 F.3d 668, 673 (1st Cir. 1994). For diversity purposes, a limited liability

corporation is treated as an unincorporated entity rather than a corporation under 28 U.S.C. § 1332(c)(1). Euclid's citizenship must be "determined by the citizenship of all of its members." *D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra* 661 F.3d 124, 126 (1st Cir. 2011).

According to Euclid's latest annual report, its members are Werner and Wingard. *See supra*, fn. 1. Thus, for diversity purposes Euclid is a citizen of Massachusetts and Kentucky. So far, so good, since Nelson is a citizen of Texas and Garg is a citizen of India. However, the 150 John Doe defendants of unknown citizenship destroy diversity and mandate dismissal.

This Court has previously observed that "many courts are wary of entertaining John Doe diversity suits," because of the "very troubling possibility that the court could order John Doe unmasked, simply to discover that … there was no diversity and that the court acted without subject matter jurisdiction." *McMann v. Doe*, 460 F. Supp. 2d 259, 264 (D. Mass. 2006). Courts almost universally hold that the presence of John Doe defendants defeats original diversity jurisdiction, and the leading treatise agrees. *See, e.g., Howell v. Tribune Entertainment Company*, 106 F.3d 215 (7th Cir. 1997) ("because the existence of diversity jurisdiction cannot be determined without knowledge of every defendant's place of citizenship, 'John Doe' defendants are not permitted in federal diversity suits"); 13E Wright & Miller, *Federal Practice and Procedure* ("*FPP*") § 3611 (3d ed.) ("Since the citizenship of the parties must be pleaded in order to confer diversity jurisdiction on the federal courts, the utilization of 'John Doe' defendants whose citizenship—by definition—is unknown, will not succeed for actions originated in federal court.").[3]

[3] *See also Meng v. Schwartz*, 305 F. Supp. 2d 49 (D.D.C. 2004); *Automotive Finance Corp. v. Automax of N. Ill., Inc.*, 194 F. Supp. 2d 796 (N.D. Ill. 2002)*; Johnson v. General Motors Corp.*, 242 F. Supp. 778, 779 (D. Va. 1965); 5 *FPP* § 1208 and n. 22 (collecting cases)("it is insufficient to allege that a party is a 'citizen of the United States' without alleging citizenship in a given state because a person can be a citizen of the United States but not be a citizen of any state, in

Although the First Circuit has not addressed this precise question, its decisions in similar cases are entirely consistent with the foregoing. In *Casas Office Machs. v. Mita Copystar Am.*, 42 F.3d 668 (1st Cir. 1994), the court held that although the presence of John Doe defendants is disregarded for purposes of removal from state court under 28 U.S.C. § 1441(a), the later identification of those defendants as non-diverse destroys diversity jurisdiction, whether those defendants are deemed dispensable or indispensable. Similarly, in *American Fiber & Finishing, Inc. v. Tyco Healthcare Group, LP* 362 F.3d 136, 142 (1st Cir. 2004), the court held that where the complaint initially named a diverse corporate entity as the defendant, diversity was destroyed when the complaint was later amended to substitute a related but non-diverse partnership.[4]

Nor may the court entertain Plaintiffs' desire to subpoena information to identify the John Does, in the hope that they might turn out to be diverse. *See McMann*, 460 F. Supp. 2d at 265 n. 21 ("This court must, therefore, either dismiss the case, or issue a[n] order allowing subpoenas when there might not be proper subject matter jurisdiction.").

Unlike in *American Fiber*, the Court may not simply dismiss the John Does to establish complete diversity. There, the case had been removed to federal court pursuant to 28 U.S.C. § 1441(a), which provides that the diversity of fictitious defendants is ignored for purposes of removal. The court thus had subject-matter jurisdiction from the outset and the question was

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which event diversity jurisdiction does not exist.") 13F *FPP* § 3642 (3d ed.) ("The *Howell* result, of course, is consistent with certain norms of statutory construction.").

[4] The *McMann* court's recognition of the "very troubling possibility" that the court might order identification of a John Doe only to determine that it lacked the subject matter jurisdiction that gave it the authority to do so, is not an abstract possibility. Plaintiffs are certainly aware that at least some, if not many or all of the John Does are investors in Euclid. Yet, Plaintiffs themselves know – and have touted the fact – that many of their investors are local. Plaintiff Werner, for example, has stated: "I'm proud of the fact that 75% of the investors, angel investors in this company are from Kentucky."*See* http://radio-weblogs.com/0144216/2005/10/19.html (last visited Dec. 15, 2011), containing a link to download a 2005 radio interview with Werner, available directly at http://rogerwoodproductions.com/20051019ez.mp3 (the quoted statement may be heard at timestamp 8:04 in the recording).

whether naming non-diverse John Does would destroy it. The court held that the John Does could be dismissed pursuant to 28 U.S.C. § 1447(e) in order to *retain* subject-matter jurisdiction. Here, by contrast, the presence of the John Does destroyed diversity *ab initio*. Rather than restoring previously-existing subject-matter jurisdiction, dismissal of the John Does would require the Court to exercise subject-matter jurisdiction that it does not have, in order to *create* it.

Moreover, even if the Court initially had had subject-matter jurisdiction, the *American Fiber* court observed that only dispensable defendants may be dismissed in order to retain jurisdiction. Although parties generally are not indispensable simply because they are alleged joint tortfeasors, the Supreme Court has emphasized that the authority to dismiss dispensable parties "should be exercised sparingly," and only after considering "whether the dismissal of a non-diverse party will prejudice any of the parties in the litigation." *American Fiber*, 42 F.3d at 677 (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837-38 (1989)). The prejudice inquiry focuses on those parties who would remain as well as to those who would be dismissed. *Id.* Here, any effort to create subject-matter jurisdiction by dismissing the John Does would seriously prejudice both Nelson and the John Does by depriving each of the opportunity to defend himself by challenging the merits of the defamation claims based on statements made by the others and by challenging the basis for joint and several liability for those statements.

II. <u>The Court Lacks Personal Jurisdiction Over Defendant Nelson</u>

Even if the Court had subject-matter jurisdiction, dismissal is required because Nelson is not subject to personal jurisdiction here under either the Massachusetts long-arm statute or the Due Process Clause. In the interest of brevity, Nelson incorporates by reference and relies upon Section I of the analogous contemporaneous Motion filed by Defendant Garg, *mutatis mutandis*. For the reasons there stated, the long-arm statute does not authorize personal jurisdiction over Nelson in Massachusetts and the Court need go no further to dismiss on that basis.

Turning to the Due Process analysis, for the reasons stated in Garg's motion, the first two prongs of the First Circuit's tripartite test preclude personal jurisdiction because Nelson is not accused of committing any in-forum activities and thus cannot have purposefully availed himself of conducting the non-alleged in-forum acts. Furthermore, as with Garg, the "gestalt" factors need not be considered because this is not a "close case," and Plaintiffs have not shown that the first two prongs of the Due Process test apply.

To the extent that the "gestalt" factors are relevant, the fact that Nelson resides in Plano, TX rather than India does not affect the "primary" factor, the burden on Nelson of defending himself in Massachusetts. Plano, TX is approximately 1,500 air miles from Boston, imposing a significant and undue burden on Nelson, an individual, to participate in litigation in this District.

Moreover, Massachusetts has no greater interest in resolving this dispute than Kentucky or Delaware, and a substantially lesser interest than Texas.[5] Texas has a compelling interest in protecting its citizens in the exercise of their right of free speech and shielding them from baseless allegations of defamation in distant venues. That profound state interest is codified in Chapter 27 of the Texas Civil Remedies and Procedures Code discussed in further detail in Section VII, below. The Texas legislature deemed it necessary to enact this statute in order to "encourag[e] public participation by citizens by protecting a person's … right of free speech, … from meritless lawsuits arising from actions taken in furtherance of those rights." (*See* Tex. Civ. Rem. & Proc. Code, ch. 27, preamble, attached hereto as **Exh. A**.) As discussed below, Courts frequently apply such anti-SLAPP statutes from a defamation defendant's state as a defense to defamation claims under the law of the forum. Texas's compelling interest in protecting its

[5]Kentucky has a greater interest than Massachusetts in resolving any claims by Plaintiff Werner, who resides there, and Delaware has at least as great an interest as Massachusetts in resolving any claims by Plaintiff Euclid, which is organized under Delaware law.

citizens strongly outweighs any general interest of Massachusetts in resolving Plaintiffs' claims especially where one of them (Werner) does not reside here and a second (Euclid) is organized under the laws of a state with an interest as great as that of Massachusetts.

To be clear, neither the Complaint nor the MDS alleges that Nelson intentionally directed his conduct toward any of the Plaintiffs *in Massachusetts*, that he intended "the brunt of the harm" to be felt *in Massachusetts*, or even that Nelson knew that either Wingard or Euclid was located *in Massachusetts*. And, necessarily, the Complaint does not allege that Nelson directed his conduct toward Werner in Massachusetts, because the Complaint recites that he resides in Kentucky. Under circumstances such as these, where allegedly defamatory statements are published on the Internet and the only contact with Massachusetts is the happenstance that some of the plaintiffs allegedly felt the "effect" of the statements here, it is well-established that the purposeful availment prong of the Due Process analysis is not satisfied. *See* discussion and cases cited at pages 6-9 of Defendant Garg's contemporaneous motion.

III. <u>The Court Should Dismiss Because Venue Does Not Lie in this District</u>

Federal venue is strictly limited in diversity cases. 28 U.S.C. § 1391(a). The plaintiff bears the burden of proving that venue is proper, and where there are multiple defendants, venue must be proper as to each. *Stars for Art Prod. FZ, LLC v. Dandana, LLC*, 2011 WL 3678931 at *6 (D. Mass. Aug. 22, 2011); *Berklee College of Music, Inc. v. Music Indus. Educators, Inc.*, 733 F. Supp. 2d 204, 211 n. 49 (D. Mass. 2010). On a motion to dismiss for lack of venue, the court need not accept the pleadings as true. *Berklee*, 733 F. Supp. 2d at 211, n.49.

This case falls into none of the statutory categories. First, Nelson does not reside in Massachusetts, the residence of the John Does is unknown, and in any event all defendants do

not reside in the same state.[6] Second, no part of the events giving rise to the claims occurred in Massachusetts, let alone the required *substantial* part. Rather, all of the alleged events occurred in Texas, where Nelson resides and where he wrote and posted the complained-of statements on the Blog, which is hosted on computer servers in Scottsdale, AZ. The fact that the alleged injury may have occurred – partially – in Massachusetts is insufficient to support venue. *See, e.g.*, *Dobrick-Peirce v. Open Options, Inc.*, 2006 WL 2089960 (W.D. Pa. 2006) ("Venue will not be proper in a district for a defamation claim if injury is the only event occurring in that district."); *Kolodziej v. Gosciak*, 2008 WL 786326, at *6 (W.D. Mich. March 20, 2008), *quoting* 14D *FPP* § 3806.1 at 215-16 (3d ed. 2007) ("Most courts have found that the suffering of economic harm within a district is not sufficient without more to warrant transactional venue in that district. This is probably the correct view, because otherwise venue most always would be proper at the place of the plaintiff's residence, an option that Congress explicitly removed with the 1990 amendments to the diversity portion of the statute."). Third, neither of the named defendants is subject to personal jurisdiction in this District; but even if they were, there is certainly at least one other district in which this case might otherwise be brought—the Eastern District of Texas.

The Court has discretion to transfer the case to a district in which it might properly have been brought, 28 U.S.C. § 1404, but the interests of justice weigh against that here. First, transfer assumes that the Court has subject-matter jurisdiction, which it does not. Second, the transferee court would face the same threshold legal barriers and would be required to dismiss the case, a highly inefficient process. Third, transfer would unfairly prejudice Nelson (and Garg)

[6] As an alien, Defendant Garg may be sued in any district. 28 U.S.C. § 1331(d). This does not affect the conclusion that venue is improper as to the claims against Nelson and provides no basis for arguing that the lack of venue as to those claims should be ignored. To the contrary, assuming that the Court could hear the claims against Garg, Fed. R. Civ. P. 21 may be used to sever the claims against Nelson and dismiss them for improper venue. *See, e.g.*, *Stars for Art Prod. FZ, LLC v. Dandana, LLC*, 2011 WL 3678931 at *6, n. 99 (D. Mass. Aug. 22, 2011).

by imposing on them the burden and cost of obtaining new counsel and relitigating the very issues they have raised here. There is no basis for imposing such a burden on Nelson and Garg.

IV. The Applicable Statute of Limitations Bars Plaintiffs' Claims[7]

A complaint must be dismissed where the applicable statute of limitations bars the claims. *See Schwartz v. Independent Appraisals, LLC*, 2011 WL 5593108 (D. Mass. Nov. 17, 2011); *Stanley v. CF-VH Assocs., Inc.*, 956 F. Supp. 55, 58 (D. Mass. 1997). In this case, there are four possibly applicable statutes: (i) Massachusetts, where Werner resides and Euclid has a place of business; (ii) Kentucky, where Wingard resides; (iii) Delaware, where Euclid is incorporated; and (iv) Texas, where Nelson resides. Massachusetts has a three-year statute of limitations, Delaware has a two-year statute, and both Kentucky and Texas have one-year statutes. *See* M.G.L. c. 260, § 4; 10 Del. Stat. c. 81, § 8119; KY Rev. Stat. § 413.140(1)(d); Tex. Civ. Prac. & Rem. Code, Ch. 16, § 16.002.

Massachusetts follows the "functional" approach to determining the applicable statute of limitations. *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 631, 473 N.E. 2d 662 (1985). The applicable law is determined on a case by case basis, depending on the significance of (i) the relationship between the state and the occurrence that is the basis for liability, and (ii) the relationship between the state and the parties:

> A trial judge should dismiss a defamation claim if it would be barred by "the state which, *with respect to the issue of limitations*, is the state of most significant relationship to the occurrence and to the parties."

Stanley, 956 F. Supp. at 58 (quoting *New England Tel. & Tel. Co. v. Gourdeau Constr. Co.*, 419 Mass. 658 (1995), in turn quoting *Restatement (Second) of Conflict of Laws* § 142 comment e).[8]

[7] Nelson incorporates by reference the discussion of the legal standard for evaluating motions for judgment on the pleadings. *See* Section II.A of Defendant Garg's contemporaneous motion.

Under this standard, Texas' one-year statute of limitations applies to all of Plaintiffs' claims. All of the complained-of events occurred within the State of Texas, when Nelson wrote and posted the allegedly defamatory content on the Blog. That two of the plaintiffs are located in Massachusetts and the injury allegedly occurred – partially – in Massachusetts does not mean that Massachusetts has a more significant relationship than Texas.[9] *See, e.g.*, *Nierman v. Hyatt Corp.*, 441 Mass. 694, 697, 808 N.E. 2d 290, 293 (2004). In *Nierman*, the SJC held that the Texas statute of limitations barred a tort claim brought by Massachusetts residents based on acts in Texas. The Court held that Massachusetts's generalized interest in compensating its residents for injuries was less than the specific judgment of the Texas legislature as to the proper limitations period: "Texas has the dominant interest in having its own limitations statute enforced." *Id.* The SJC went on to state that, where the defendant's state has a more significant relationship, "the forum should entertain the claim only in extreme and unusual circumstances." *Id.* at n. 9 (quoting *Restatement (Second) of Conflicts of Law*s § 142, cmt. g).

This Court has also applied the statute of limitations of the defendant's domicile where the plaintiff was a resident of Massachusetts, holding that although Massachusetts has "*some* interest in this litigation, it cannot be said that its interest is *substantial*. In short, Plaintiff's status as a Massachusetts resident is simply not enough." *Travelers Supply, Inc. v. Hilton Head Labs., Inc.*, 2008 WL 5533434, at *6 (D. Mass. Dec. 23, 2008) (emphasis in original).

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[8] Although Nelson is not subject to personal jurisdiction, personal jurisdiction would not establish that Massachusetts' statute of limitations would apply: "If the nexus that established personal jurisdiction over the parties alone sufficed to create the substantial interest necessary for application of the forum State's statute of limitations, the conflict of laws analysis would be an empty ritual." *Nierman*, 441 Mass. at 696, n. 7, 808 N.E. 2d at 292.

[9] Even if the Court were to conclude that a plaintiff's residence alone is sufficient to establish a "substantial relationship" that outweighs Texas's interest, all of Wingard's claims based on statements prior to August 4, 2010 are time-barred under Kentucky law and must be dismissed.

Plaintiffs filed their Complaint on August 4, 2011. Under the applicable one-year Texas statute of limitations, all of Plaintiffs' claims are barred as a matter of law to the extent that they are based on allegedly defamatory statements made prior to August 4, 2010.[10] This excludes *all but six* of the statements identified in the MDS. *See* MDS ¶¶ 17-40. The remaining six are non-defamatory as a matter of law, as discussed below.

It bears noting that application of Texas's statute of limitations will work no injustice. The statute of limitations began running when the statements were published, *see Collins v. Nuzzo*, 244 F.3d 246, 253 (1st Cir. 2001), and Plaintiffs admit that have been aware of the statements "beginning on or about June 11, 2008 and continuing to the present." (Complaint ¶¶ 7-8.) Plaintiffs have thus had every opportunity to raise and litigate their claims but deliberately chose to "lie in wait." As this Court held in *Stanley*:

> "Here, both plaintiff's own home state and the home state of the alleged defamer would have required relatively prompt filing—that is, within one year of publication. This requirement worked no unfairness on plaintiff; no extensive investigation was needed to draft the complaint. Indeed, plaintiff's affidavit confirms that he *knew* he was libeled in 1990 but deliberately waited nearly three years before initiating this suit.

Stanley, 956 F. Supp. at 59 (emphasis in original).[11]

In these circumstances, Texas's interest in protecting its citizens against stale and baseless lawsuits is especially strong. Conversely, Massachusetts's interest in providing redress for its citizens (other than Wingard) is substantially lessened by the fact that Plaintiffs have

[10] Even under Massachusetts' 3-year statute, Plaintiffs' claim based on Nelson's comment posted on June 11, 2008 is barred as a matter of law. *See* MDS ¶ 16.

[11] To the extent that *Stanley* may be distinguished on the basis that the plaintiffs' state of domicile also had a one-year statute, the distinction would make no difference to the claims of Wingard, who is in precisely the same position. At the very least, the Court must dismiss all of Wingard's claims based on statements prior to August 4, 2010, because both Kentucky and Texas impose a one-year limitations period. *See Stanley*, 956 F. Supp. at 59.

known for years that they had supposedly been defamed, but deemed it insufficiently important for them to file suit. The Court should apply Texas's one-year statute of limitations and dismiss the Complaint as to all claims based on statements made prior to August 4, 2010.

V. The Complained-Of Statements are Non-Defamatory as a Matter of Law

To the extent that the Complaint is based on the six statements within the applicable one-year statute of limitations (MDS ¶¶ 41-46), it fails to state a claim for relief because the statements are non-defamatory as a matter of law.

"Statements of fact may expose their authors or publishers to liability for defamation, but statements of pure opinion cannot." *King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987). The threshold question whether the statements as a whole and taken in context are reasonably susceptible of a defamatory meaning is a question of law for the Court, and Massachusetts law favors the use of dispositive motions to resolve defamation cases. *Augat, Inc. v. Collier*, 1996 WL 110076, *42 (D. Mass. Feb. 8, 1996) (citing cases); *Nolan v. Krajcik*, 384 F. Supp. 2d 447, 473 (D. Mass. 2005); *Foley v. Lowell Sun Pub. Co.* 404 Mass. 9, 11 (Mass. 1989); *Reilly v. AP*, 59 Mass. App. Ct. 764, 770 (2003). Each of the statements was a statement of opinion, but if any were statements of fact, truth is an absolute defense, and substantial truth is sufficient. *Nolan*, 384 F. Supp. 2d at 473. Plaintiffs bear the burden of proving falsity. *Gilbert v. Bernard*, 1995 WL 809550 at *1, *3-*4 (Mass. Super. Ct. 1995).[12]

[12] Initially, to the extent that the Complaint alleges that Wingard and Werner have been defamed by statements about Euclid, it fails to state a claim for relief. "A corporate officer 'who is not personally defamed has no right to recover damages for defamation published about the corporation.'" *Augat*, 1996 WL 110076 at *42 (citing *Elm Med. Lab., Inc. v. RKO General, Inc.*, 532 N.E. 2d 675, 679 (Mass. 1989). Thus, while Plaintiffs suggest that statements about Euclid defamed them personally, the Complaint must be dismissed with respect to each and every claim of personal defamation based on a statement that refers not to Wingard and Werner but to Euclid.

Looking at the six non-time-barred statements, it is clear that as a matter of law, none are defamatory.[13]

MDS ¶ 41: Plaintiffs allege that Nelson engaged in "a malicious effort to mislead online visitors of the Blog that Euclid is a scheme to defraud investors and that there is a 'smoking gun' that is yet to be found." The complained-of comment was a direct response to a statement by "WalkingAway," which in turn was a response to a statement by "Earl Colby Pottinger," who had raised the possibility of a lawsuit by investors. (*See* Complaint Exh. A-7 at 52, cmt. 206.)

208. *WalkingAway* Says:
August 9th, 2010 at 4:01 pm

Earl, as bad an investment as this has been, the boys have not bought the houses, cars, and other things you mention. So the way I see it, you who say you were just here to warn future investors, are now here to motivate the angels to bring on a law suit. I myself will not be participating and I don't think many will. I don't think they are crooks, maybe liars and a lot naive, but not criminals. How many years are they going to get for missing "deadlines"? I knew the risk and I accepted it. Unlike some others who thought it was a sure thing, of which there's no such thing. Give it up everyone.

209. *Mark Nelson* Says:
August 9th, 2010 at 6:02 pm

@WalkingAway:

It's very hard to distinguish between bad breaks, poor strategy, and criminal fraud. In order to prove the latter, you really need some kind of smoking gun, and I don't know that anyone has any such thing in this case.

So yeah, if the money all disappears one day and they just close up shop, it's very unlikely that there will be any repercussions. And the odds are, the successful strategy that kept ED afloat all these years will then be played out again with a new round of angels/chumps, at some new venture. Corista, perhaps.

- Mark

As the context makes clear, WalkingAway stated his belief that Euclid was not run by crooks or criminals, but merely by naïve liars. In response, Nelson stated his opinion that it is hard to distinguish between bad breaks, poor strategy, and criminal fraud, and explicitly ***stated that he***

[13] In focusing on the six statements within the applicable Texas limitations period, Nelson does not suggest that Plaintiffs state a claim based on any of the time-barred statements. Even if the 3-year Massachusetts statute applied, the complained-of statements are non-defamatory as a matter of law on their face. For reasons of space, we do not discuss them in detail here. However, just as with the six statements discussed, Plaintiffs attribute meanings that are directly contrary to the plain language of the statements, complain about statements that are explicitly pure opinion, and distort Nelson's comments to the point that they are unrecognizable as referring to his actual statements. *See also* fn. 14, *infra*.

knew of nothing to suggest criminal activity. Far from imputing unlawful activity and suggesting the existence of a "smoking gun," Nelson stated the exact *opposite*. Nor may Nelson's comment be reasonably taken as defamatory by its mere reference to "criminal fraud," since Nelson was simply responding to prior comments that raised the issue of criminality.

MDS ¶ 42: Importantly, Plaintiffs **do not allege that the referenced statement is defamatory**, but merely that it was "proof of Nelson's malicious intent to excessively publish [other] defamatory content" on the Internet. The Complaint therefore fails to state a claim for defamation based on this statement. In any event, the statement is objectively non-defamatory, as it does no more than call into question the ability of unknown hypothetical investors to use Internet search engines and says nothing about Plaintiffs.

MDS ¶ 43: Plaintiffs' allegations about the statement identified in this paragraph of the MDS bear no relationship to the statement itself. Rather, the allegations appear to refer to a different comment, possibly the time-barred comment reprinted in paragraph 37 of the MDS. The MDS therefore fails to comply with the Order because Plaintiffs do not identify which portion of the comment contains an allegedly defamatory statement.[14]

It is difficult to divine what the allegedly defamatory statement might be. The comment raises an explicit hypothetical ("Let's say for the sake of argument … If …. In this scenario…"), which establishes that he is stating only his opinions. *See, e.g., Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 265 (1993) (statements prefaced by the word "apparently" let the reader know that the statements were not based on fact but were simply opinion). Nelson then states his

[14] This disconnect between the identified statements and Plaintiffs' arguments as to the basis for their defamation claims is unfortunately common throughout Plaintiffs' More Definite Statement. (*See* MDS ¶¶ 22, 25, 28-29, 43.) The MDS fails to comply with the Order in each such instance, and Nelson should not be put to the task of attempting to identify the basis for Plaintiffs' claims.

opinion that the only solution is for a large shareholder to "fund legal action" because "the little guys can't afford it, and certainly don't have enough pull to get a criminal action started." In context, it is clear that Nelson was restating what he had said on other occasions, that it might require civil litigation for investors to gain control of the Board in order that they might be able to get accurate information about Euclid. Nor may Nelson's statement that "little guys … don't have enough pull to get a criminal action started" be reasonably construed as imputing criminal activity to Plaintiffs, especially considered – as it must be – in the overall context of Nelson's repeated statements that he knew of no evidence of criminal activity. Rather, Nelson stated that it would require substantial "pull" to convince a prosecutor even to investigate, emphasizing Nelson's oft-stated lack of information suggesting criminality. To the extent that Plaintiffs might argue that the reference to a big investor "funding" legal action suggests that the legal action might be criminal rather than civil, such an argument would ignore the fact that investors – large or small – do not, and cannot, fund criminal investigations.

MDS ¶ 44: In this statement, Nelson responds to the immediately preceding comment by "Fact & Knowledge" (Complaint, Exh. A-8 at 9-10, cmt. 29), in which "Fact & Knowledge" stated that Euclid was unable to obtain an audience with Cisco to explain its alleged technology. In response, Nelson, a Cisco employee, states that Euclid had turned down an invitation to meet with one of those companies (*i.e.*, Cisco). On its face, there is nothing remotely defamatory about the comment, and, importantly, Plaintiffs ***do not allege that it is defamatory***. Plaintiffs' sole allegation is that Nelson's suggestion that Euclid had turned down an opportunity to meet with Cisco was "false" and probative of Nelson's imagined "malicious intent." Putting aside that a statement that does not impair the plaintiffs standing in the community is not defamatory

simply because it is "false," Nelson's statement is demonstrably true. (*See* Nelson Decl. in Support of Motion for Judgment on the Pleadings, Exh. A.)

MDS ¶ 45: Once again, Plaintiffs ***do not allege that this statement is defamatory***, but only that the statement is somehow proof of Nelsons "malicious intent" because it is "clearly intended to instigated a lawsuit against Plaintiffs without a legitimate protection for doing so." The comment plainly does the opposite of what they contend. Nelson is responding to a comment by "Fact & Knowledge," who had responded to a prior comment by "Just Sayin" identifying a law firm that wanted a $5,000 retainer. (Complaint, Exh. A-8 at 58-59, cmts. 285 and 289.) Nelson agreed with "Fact & Knowledge" that the offer should be viewed skeptically because that retainer would fund only a few hours of investigation. Thus, the import of Nelson's comment is again precisely the opposite of Plaintiffs' allegation. Far from trying to instigate a lawsuit, Nelson warns against it by emphasizing the tremendous cost. Thus, as a matter of law, the comment is neither defamatory (as Plaintiffs seem to agree) or proof of malicious intent.

MDS ¶ 46: Plaintiffs' allegation that Nelson's assertion that "Bill's" (Wingard's) Facebook page was the "semi-official conduit of information to investors" is intended to defame Euclid's "legitimacy as a business" is simply frivolous. Facebook is a recognized mode of official communication for corporations around the world, including among many others, The Coca-Cola Corporation (*see* http://www.facebook.com/cocacola) and General Motors (*see* http://www.facebook.com/generalmotors).

VI. Nelson is Absolutely Immune to Plaintiffs' Claims to the Extent they are Based on Statements Made by Third Parties

Nelson incorporates by reference Section II.B of the contemporaneous motion of Defendant Garg. Under Section 230 of the Communications Decency Act, Nelson is immune from liability as a matter of law for any statement made by anyone other than himself. The

Complaint fails to state a claim for relief to the extent it is based on Nelson's alleged "joint and several" liability for anything said by any other person.

VII. The Applicable Texas Anti-SLAPP Statute Mandates Dismissal and an Award of Attorney Fees, Costs, and Deterrent Sanctions

A. Texas Law Mandates Dismissal

The choice of law principle of *depeçage* provides a framework for the application of the substantive law of different states to different issues arising out of a common nucleus of operative facts, where the factors that influence the choice of law differ. *La Plante v. American Honda Motor Co.*, 27 F.3d 731, 741 (1st Cir. 1994); *Putnam Resources v. Pateman*, 958 F.2d 448, 465 (1st Cir. 1992). Courts often use this principle in defamation cases by applying the substantive law of the forum to the claim but the substantive law of defendant's state to defenses. *See, e.g., Doctor's Data, Inc. v. Barrett*, 2011 WL 5903508 at *3 (N.D. Ill. Nov. 22, 2011) ("Under the doctrine of *depeçage*, the issue of whether a statement is defamatory is distinct from the issue of whether that statement is privileged."); *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 704 (N.D. Ill. 1990) ("the threshold question [of defamation] and the defenses are different issues and call for different analyses").[15]

More specifically, courts apply anti-SLAPP statutes of the defendants' residence while applying the forum's law to the claim of defamation. *See, e.g.*, *Global Relief Found. v. New York Times Co.*, 2002 WL 31045394, at *10 (N.D. Ill. Sept. 11, 2002) (Illinois defamation law but California anti-SLAPP law); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797 (N.D. Ill. May 24, 2011) (Arizona defamation law but Illinois anti-SLAPP law). *Cf. Sharif v. Sharif*, 2010

[15] *Cf. Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 916 (7th Cir. 1994) (observing that in defamation cases where the place of the injury and the place of the conduct are different, "the tort has no place; instead it has contacts, presumably offsetting, with at least two states. If defamatory statements are uttered in Massachusetts and the plaintiff is hurt in Illinois, neither state is the place of the tort.").

WL 3341562 (E.D. Mich. Aug. 24, 2010) (holding Indiana anti-SLAPP statute applicable to Michigan defamation claim but denying summary judgment without prejudice pending discovery on defense). *Compare Competitive Techs. v. Fujitsu Limited*, 286 F. Supp. 2d 1118 (N.D. Cal. 2003) (refusing to apply California anti-SLAPP statute to Illinois defamation claim in case transferred to California, where defendants had no connection to California).

The reason for this is that the interests of the respective states differ:

> Though the place of injury is a central factor in determining what law governs a tort claim, in the anti-SLAPP context this factor is less important. The purpose behind an anti-SLAPP law is to encourage the exercise of free speech …. In light of this policy goal, the place where the allegedly tortious speech took place and the domicile of the speaker are central to the choice-of-law analysis on this issue. ***A state has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens, at least when, as in this case, the speech initiated within the state's borders***.

Chi, 787 F. Supp. 2d at 803 (emphasis added). *See also Global Relief*, 2002 WL 31045394, at *11 ("California has a great interest in determining how much protection to give California speakers.... Thus California law has the most significant relationship and the law of California will apply to defenses to defamation.").

The Texas Legislature has emphasized the importance of protecting its citizens against claims based on their exercise of their constitutional rights:

> The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government ***to the maximum extent permitted by law*** and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Tex. Civ. Prac. & Rem. Code, Ch. 27, § 27.002 (emphasis added). As described below, the Legislature deemed these rights so important that it mandated dismissal unless the plaintiff demonstrates the merits of its claims by clear and convincing evidence. Even more, the statute

mandates not only an award of attorney fees and costs, but also financial sanctions as a deterrent. *Depeçage* thus dictates that the Court apply the Texas anti-SLAPP law.

The Texas anti-SLAPP law *requires* dismissal where the defendant shows by a preponderance of the evidence that the lawsuit is "based on, relates to, or is in response to a party's exercise of the right of free speech," unless the plaintiff "establishes by clear and specific evidence a *prima facie* case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code, Ch. 27, § 27.005(b)-(c).[16] "Exercise of the right of free speech" is defined as communications concerning a "matter of public concern," which in turn is defined as including issues related to a good, product, or service in the marketplace. *Id.* § 27.001 (3) and (7)(E).

There is no question but that all of Plaintiffs' claims against Nelson are based on, relate to, or are in response to Nelson's exercise of his right of free speech—Nelson's exercise of that right is the entire basis for the lawsuit. Accordingly, the Court must dismiss the Complaint unless Plaintiffs establish a *prima facie* case for each element of their claims by clear and convincing evidence. In Massachusetts, those elements are: (i) a false statement; (ii) about the plaintiffs; (iii) that either caused economic loss or is actionable without proof of economic loss. *Phelan v. May Dept. Stores Co.*, 443 Mass. 52, 55-56, 819 N.E. 2d 550, 553 (2004). This, Plaintiffs cannot do, for all of the reasons set out above and in the analogous motion filed by Defendant Garg. Specifically (but without limitation), the complained-of statements are not capable of being proven false because they are either protected expressions of pure opinion, mixed expressions of opinion and disclosed non-defamatory facts, or because they are demonstrably true or substantially true. Moreover, as to all claims against Nelson based on

[16] A copy of this statute is attached hereto as **Exh. A**, and may be downloaded online at http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/HB02973F.pdf#navpanes=0 (last visited January 10, 2012).

statements made by others, Plaintiffs' claims fail as a matter of law because he has absolute immunity under federal law. Acordingly, Plaintiffs cannot prove each element of their claims by clear and convincing evidence as required by the Texas anti-SLAPP statute.

B. Texas Law Mandates an Award of Attorney Fees, Costs, and Sanctions

Under the Texas anti-SLAPP statute, a court "shall award" the defendant court costs, reasonable attorney fees, and other expense incurred. In a reflection of the importance that the Legislature attributed to protecting the right of free speech, the statute also *mandates* an award of sanctions "sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." Tex. Civ. Prac. & Rem. Code, Ch. 27, § 27.009(a)(1)-(2).

Accordingly, under the applicable Texas statute, Nelson is entitled to recover his attorney fees and costs incurred in connection with this litigation, as well as sanctions in an amount that the Court deems sufficient to deter Plaintiffs from filing similar actions. Nelson respectfully requests that the Court make such an award.[17]

CONCLUSION

For the foregoing reasons – as well as those reasons set forth in the analogous motion submitted by Defendant Garg incorporated by reference – Defendant Nelson respectfully requests that the Court enter judgment on the pleadings dismissing the Complaint in its entirety as to him. Defendant Nelson further requests that the Court award him his attorney fees and costs incurred as well as a deterrent sanction in an amount the Court deems appropriate.

Respectfully submitted,

MARK NELSON,

By his attorney,

[17] As the litigation is not yet completed, Nelson will provide an accounting of its attorney fees and costs upon the Court's dismissal under the Texas statute, or as required by the Court.

/s/ Mitchell J. Matorin
Mitchell J. Matorin (BBO #649304)
MATORIN LAW OFFICE, LLC
200 Highland Avenue Suite 306
Needham, MA 02494
(781) 453-0100
mmatorin@matorinlaw.com

Dated: January 12, 2012

Local Rule 7.1 Certification

I certify that I have conferred with counsel for Plaintiffs in a good faith attempt to resolve or narrow the issues presented in this motion.

/s/ Mitchell J. Matorin

Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 12, 2012.

/s/ Mitchell J. Matorin

H.B. No. 2973

AN ACT

relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as the Citizens Participation Act.

SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 27 to read as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to

encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the

right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. A hearing on a motion under Section 27.003 must be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element

of the claim in question.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

(c) An appeal or other writ under this section must be filed

on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual

or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

SECTION 3. The change in law made by this Act applies only to a legal action filed on or after the effective date of this Act. A legal action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I certify that H.B. No. 2973 was passed by the House on May 4, 2011, by the following vote: Yeas 142, Nays 0, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 2973 on May 21, 2011, by the following vote: Yeas 141, Nays 0, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2973 was passed by the Senate, with amendments, on May 18, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor