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 **COMBINED REPLY IN SUPPORT OF DEFENDANTS MARK NELSON'S AND SACHIN GARG'S MOTIONS FOR JUDGMENT ON THE PLEADINGS, AND REQUEST FOR ATTORNEY FEES** (Leave to file granted January 31, 2012)

Respectfully submitted,

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By their attorney,

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Plaintiffs' briefs in opposition to Nelson's and Garg's respective motions for judgment on the pleadings confirm that this case should be dismissed. Plaintiffs' cursory arguments are legally and factually unwarranted and provide no real argument against what the well-established law requires: dismissal. In view of the absence of substantive arguments in Plaintiffs' opposition and the weakness of the claims, Defendants respectfully ask the Court to order Plaintiffs to pay Defendants' attorney fees pursuant to 28 U.S.C. § 1927 and the Court's inherent power.

I. The Court Must Dismiss for Lack of Subject-Matter Jurisdiction

Plaintiffs do not contest that the Court lacks original diversity jurisdiction, but argue that they may "moot" the defect by forcing Nelson to identify the John Does and then amending their Complaint to dismiss those that reside in Massachusetts. Plaintiffs cite no authority for this remarkable procedure, and there is none. To boot, it would accomplish nothing.

First, the John Does destroy diversity jurisdiction *ab initio*, and Plaintiffs' proposed procedure would attempt to create that diversity retroactively. This is impermissible: "Jurisdiction cannot be created retroactively." *New Bank of New England, N.A. v. Tritek Comm'ns, Inc.*, 143 F.R.D. 13, 19-20 (D. Mass. 1992).[1]

Second, a court's power "is circumscribed by its jurisdiction; where it has no jurisdiction, it has no power, and cannot order discovery." *Savis, Inc. v. Warner Lambert, Inc.*, 967 F. Supp. 632, 641 (D.P.R. 1997) (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938)). This is particularly true where the discovery is requested to establish subject-matter jurisdiction. *Savis*, 967 F. Supp. at 641. Moreover, a party invoking diversity "must have a solid factual basis

[1] Plaintiffs do not cite (and have waived any argument based on) 28 U.S.C. § 1653, which addresses "only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves," and does not apply "where diversity jurisdiction does not, in fact, exist." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989); *Boelens v. Redman Homes, Inc.*, 759 F.3d 504, 512 (5th Cir. 1985).

supported by evidence in order to assert that the parties are indeed diverse," and cannot abuse the court's power "as a tool to fish for that solid factual basis." *Id.*

Nor could the Court consider a motion to amend the complaint or to dismiss non-diverse John Does, which would "necessarily implicate[] a district court's authority to grant or deny the motion," an improper exercise of hypothetical jurisdiction. *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 96 (1st Cir. 2008). *See, e.g., New Bank of New England, supra* (cannot cure lack of diversity by substituting defendant to create federal question jurisdiction); *Day v. Joyce*, 1999 WL 33117141, at *7 (D. Me. Aug. 10, 1999)("show-stopping point" that court could not grant motion to substitute to cure lack of standing). Even if Plaintiffs' procedure would work (see below), the absence of diversity precludes the Court from ordering discovery to identify non-diverse John Does. *See McMann v. Doe*, 460 F. Supp. 2d 259, 265 n.21 (D. Mass. 2006).

Third, Plaintiffs' procedure is flawed. It is Plaintiffs' burden to allege and prove subject-matter jurisdiction, not Defendants'. Further, Plaintiffs *assume* that Nelson knows the identity and states of residence of the John Does, an assumption for which they provide no support (and there is no reason to believe there might be any support). That facile assumption is no basis for subjecting Nelson to discovery. Moreover, it would be *impossible* for Nelson to know which posters are amongst the John Does because he does not know which of the 1,600 comments Plaintiffs contend are defamatory– Plaintiffs refused to identify them, in violation of the Court's Order on Nelson's motion for a more definite statement. Additionally, even if Nelson could identify some of them, the presence of even one he could not identify would destroy diversity.

Finally, Plaintiffs propose only to dismiss "all John Does who reside in Massachusetts," ignoring that Plaintiff Wingard proudly touted the fact that 75% of the investors live in his home state of Kentucky – an assertion that Plaintiffs do not question.

II. The Court Lacks Personal Jurisidictional and Discovery is Inappropriate

As an initial matter, Plaintiffs' contention that Defendants waived personal jurisdiction by filing counterclaims has no legal basis. Defendants asserted personal jurisdiction as an affirmative defense and explicitly preserved it in the very first sentence of their counterclaims. Moreover, counterclaims do not waive jurisdictional objections. *General Contracting & Trading Co. v. Interpole, Inc.*, 940 F.2d 20, 24 (1st Cir. 1991); *Media Duplication Servs. Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1233 & n.2 (1st Cir. 1991).

Conceding that Section 3(d) of the Massachusetts long-arm statute does not apply, Plaintiffs suggest that Sections 3(a) and 3(c) do. But Plaintiffs' "argument" is simply a statement of legal principals and authorities rather than an application of those principals to the facts of this case. Plaintiffs fail to allege a single act "within this commonwealth" that could even theoretically constitute "transacting business." (Pl. Opp. to Garg Motion at 4-5.) Similarly, Plaintiffs recite the law of Section 3(c), but do not explain how it applies here. (*Id.* at 5.) To the extent that Plaintiffs intimate that the visibility of the Blog or the presence of Plaintiffs here is sufficient, this is contrary to the abundant case law cited in Garg's opening brief.

As for Due Process, Plaintiffs recite the law, but their application of it to this case is inscrutable. Plaintiffs assert that Defendants "directed" comments into Massachusetts, but ignore the extensive case law cited in Defendants' Motions. They then reproduce a statement by Nelson, which provides no support for their position with respect to Garg. (Pl. Opp. to Garg Motion at 7.) Plaintiffs did not include any statement by Garg in their MDS, and the statement by Nelson that they reproduce in both briefs was not included in the MDS. Accordingly, that statement may not be considered. *Phantom Touring, Inc. v. Affiliated Pubs.*, 953 F.2d 724, 724 n.6 (1st Cir. 1992); *Veilleux v. Nat'l Broadcasting Co.*, 8 F. Supp. 2d 23, 35-36 (D. Me. 1998).

Moreover, the statement to which they refer dates to May 2007 and is time-barred even under Massachusetts law. In any event, there is nothing defamatory in the comment that could satisfy the "relating to" prong of the Due Process analysis to create specific personal jurisdiction over that comment. As for Plaintiffs' reference to "Garg's libels to date" (*id.* at 8), they refer to the MDS and the exhibits to the Complaint that did not identify any alleged Garg libel at all.

Plaintiffs contend that Nelson "admits to have attempted contact *[sic]* Plaintiffs/Counterclaim Defendants in his professional capacity, and therefore a majority of the publications appear to be drawn from Defendants'/Counterclaim Plaintiffs' contact with Massachusetts." (Pl. Opp. to Nelson Motion at 10.) Plaintiffs do not explain, but this assertion may refer to comments that Nelson wrote on May 25, 2006 and May 10, 2007. *See* Exh. A to Complaint, pp. 7 (comment 2) and 17-18 (comment 41). These comments refer to a discussion that Nelson had with his superior at Cisco, David Corley, in 2006, about an article Mr. Corley had read about Euclid in the Boston Globe. Afterward, Corley (not Nelson) contacted Euclid to invite them to meet with Cisco. *See* Supplemental Nelson Decl. in Support of his Motion, filed herewith, and Exh. A to Nelson Decl. in Support of his Motion.

In any event such an isolated contact in 2006, especially when it was not made by Nelson, would not have made it foreseeable or reasonable that Nelson would be hauled into court in Massachusetts in 2011, for statements he made three or four years later in 2009 and 2010. *See, e.g., Sawtelle v. Farrell*, 70 F.3d 1381, 1391 (1st Cir. 1995) (purposeful availment requirement assures that jurisdiction is not based on "random, isolated, or fortuitous" contacts). Moreover, that isolated and indirect contact could not create specific jurisdiction for a claim arising not out of that contact but out of the statements Nelson made years later: "To determine purposeful availment, only contacts related to the Plaintiffs' claims are considered." *Alicea v.*

LT's Benjamin Records, 762 F. Supp. 2d 299, 309 (D. Mass. Jan. 11, 2011) (citing *Phillips Exeter Academy v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999)).

Finally, Plaintiffs' request for jurisdictional discovery falls flat. Plaintiffs have made no colorable claim for personal jurisdiction, and have not alleged specific contacts relevant to establishing jurisdiction, explained in detail (or at all) what discovery they need or how it would be directly relevant to jurisdiction, or presented facts "which show why jurisdiction would be found if discovery were permitted." *U.S. v. Swiss Am. Bank, Ltd.*, 274 F.2d 610, 626 (1st Cir. 2001); *Stars for Art Prod. FZ, LLC v. Dandana, LLC*, 2011 WL 3678931, at *8 (D. Mass. Aug. 22, 2011); *Pettengill v. Curtis*, 584 F. Supp. 2d 348, 361 (D. Mass. 2008).[2]

III. Venue Does Not Lie in This District

Plaintiffs chide Defendants for relying on *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201 (1st Cir. 1994), asserting that it is inapposite to this case. Defendants agree. *Ticketmaster* is inapposite to venue because it is a personal jurisdiction case; as such, Defendants did not rely on it in their venue arguments. Rather than making an argument based on the personal jurisdiction consideration of contacts with the forum, Plaintiffs could have made an argument for proper venue. Having failed to do so, they have waived any argument that venue is proper.

[2] Plaintiffs state repeatedly that the allegedly defamatory statements remain available to the public on the Blog. (Pl. Opp. to Nelson Motion at 5 and 8; Pl. Opp. to Garg Motion at 3 and 9; Exh. A.) In fact, Plaintiffs are aware that the comments were removed from the Blog shortly after Plaintiffs filed their Complaint, as a good faith gesture. Plaintiffs' private investigator apparently was able to access the comments indirectly (which is why they are printed separately from the articles, unlike the exhibits to the Complaint). However, after stating that "[t]he documents attached hereto are true and accurate hardcopy printouts of what I personally witnessed on my computer's web browser on January 26, 2011," and that he converted them to .pdf format so that they are "closer to how the content appears online as of today, January 26, 2011" (Lopez. Aff. ¶¶ 2-3), Mr. Lopez attaches (at pages 34-47 of Exh. A) printouts of web pages that he obtained from the Internet Archive (a/k/a "Wayback Machine"), www.archive.org. Those pages bear explicit markings showing their origin (at pages 34, 37, and 39) and make clear that they represent the pages as they existed on August 24, 2007. To the extent that Mr. Lopez or Plaintiffs mean to suggest that they reflect the Blog on January 26, 2012, the suggestion is false.

As for 28 U.S.C. § 1406, Plaintiffs misguidedly suggest that transfer is appropriate to avoid statute of limitations issues. Assuming that the Court were to deem it necessary to reach the venue issue and were to resolve it within the next four months, and further assuming that the Texas court would apply the Massachusetts limitations period, the only statement that would be time-barred is Mr. Nelson's January 15, 2009 comment reproduced at MDS ¶ 17. If Plaintiffs wished to proceed with this case in Texas despite the anti-SLAPP penalties, they could re-file before May 21, 2012, three years after the next-latest comment, reproduced at MDS ¶ 18.

Assuming that the court would apply the Texas statute, Plaintiffs' argument is still misplaced. The six remaining statements are all non-defamatory as a matter of law, as discussed in Nelson's opening brief. (Nelson Br. at 12-16.) Plaintiffs do not even attempt to argue otherwise. Justice does not require that the Court transfer the case to protect Plaintiffs, and doing so would only compound the harm to Defendants and waste judicial resources. *See Britell v. United States*, 318 F.3d 70, 75 (1st Cir. 2003) ("[I]f an action … is fanciful or frivolous, it is in the interest of justice to dismiss it rather than keep it on life support (with the inevitable result that the transferee court will pull the plug.)"); *Phillips v. Seiter*, 173 F.3d 609, 611 (7th Cir. 1999) (if court's jurisdiction to decide whether to transfer reveals that "the case is a sure loser" in the transferee court, then the court should dismiss "rather than waste the time of another court."); *Mantos v. U.S.*, 2002 WL 1013812, at *3 (D. Me. Feb. 7, 2002) (court "is authorized to consider the consequences of a transfer by taking 'a peek at the merits' to avoid raising false hopes and wasting judicial resources that would result from transferring a case which is clearly doomed.").

Section 1406(a) does not "give plaintiffs an end run around the rules of personal jurisdiction and venue," *Pedzewick v. Foe*, 963 F. Supp. 48, 51 (D. Mass. 1997), or provide *carte blanche* to disregard the finality assured by statutes of limitations. The "interest of justice"

limitation requires "at the very least" a good faith mistake in believing that the court had personal jurisdiction or that venue was proper, and transfer is inappropriate where a plaintiff does not "exercise proper diligence or does not act in good faith in deciding where to file suit." *Id.* at 51-52. *See also Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1201 (4th Cir. 1993) (interest of justice not served by allowing a plaintiff whose attorney committed an obvious error in filing in the wrong court to transfer to proper court).

Plaintiffs knew of the statute of limitations and must have known that their jurisdictional and venue arguments were tenuous at best. It was their obligation to "determine where [they] can get personal jurisdiction over the defendant[s] before, not after the statute of limitations runs; otherwise they court disaster." *Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986).

IV. The Statute of Limitations Bars Claims Based on All But Six of the Comments

Plaintiffs argue for the Massachusetts statute of limitations with a bare *ipse dixit* that Massachusetts has a greater interest than Texas. This is not enough, especially in view of the extensive contrary authority. *See Martinez v. Cohen*, 54 F.3d 980, 990 (1st Cir. 1995).

Plaintiffs suggest that the Texas statute of limitations is avoided by the supposed "republication" of the comments. (Pl. Opp. to Nelson Motion at 13.) But Massachusetts and Texas follow a "single publication" rule, under which the limitations period commences when the statement is first available, including statements continuously available on the Internet. *See Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 216 (D. Mass. 1986); *Abate v. Maine Antique Digest*, 2004 WL 293903, at *1 (Mass. Super. Ct. Jan. 26, 2004); *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 142 (5th Cir. 2007).

V. The Six Non-Time-Barred Statements Are Non-Defamatory as a Matter of Law

In response to Defendants' item-by-item discussion of the merits of Plaintiffs' claims based on the remaining six statements, Plaintiffs offer only bullet points reciting general legal

principles, untethered to the allegedly defamatory statements themselves. It is not the Court's responsibility to "cast about blindly for a basis to deny" Defendants' motions. *Boyle v. Barnstable Police Dept.*, 2011 WL 4443426, at *24 (D. Mass. Sept. 22, 2011). The Court should disregard Plaintiffs' arguments and conclude that the statements are non-defamatory as a matter of law. *See, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 260 (1st Cir.1999) ("district court is free to disregard arguments that are not adequately developed").

There is no basis for Plaintiffs' request for discovery "so that their Opposition to the Rule 12(c) motion can be fully and fairly presented." (Pl. Opp. to Nelson Motion at 15.) This is not a motion for summary judgment subject to Fed. R. Civ. P. 56(f), and Plaintiffs do not explain what discovery could be needed or what it could accomplish.

VI. Plaintiffs Concede that Section 230 of the Communications Decency Act Renders Defendants Immune From Claims Based on Statements By Others

Plaintiffs concede that they may not hold Nelson liable for third-party statements. (Pl. Opp. to Nelson Motion at 15, n. 3.) Although they do not explicitly concede the same as to Garg, it obviously applies to him as well. This confirms that Plaintiffs have failed to state a claim against Garg. Plaintiffs did not allege any statement by Garg in the Complaint or MDS. Now, they obliquely refer to an article he wrote about a different data compression company, NearZero. (Pl. Opp. to Garg Motion at 9; Exh. A at 34.) Plaintiffs may not rely on that article because they did not list it in their Complaint or MDS. *See Phantom Touring*, 953 F.2d at 724 n.6; *Veilleux*, 8 F. Supp. 2d at 35-36. Moreover, it was posted on June 14, 2007, so it is time-barred, and it would not lift Garg's immunity as to statements made by others anyway.

As for Plaintiffs' argument that Garg "permitted" the article to be linked to Nelson's more recent posts (Pl. Opp. to Garg Motion at 9), Plaintiffs do not explain what they mean. After our own investigation, it appears that this refers to Nelson's February 23, 2010 article,

"Whitley's Day in Court," reproduced at page 8 of Plaintiffs' Exhibit A, which also discusses NearZero. Nelson links to Garg's 2007 article about NearZero (in the sentence "Sachin wrote about it here a couple of years ago") to provide more background. Thus, it was Nelson rather than Garg who linked the posts, which neither dissolves immunity nor makes the time-barred June 2007 article actionable. *See Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) (no liability where defendant linked to content created by others, even if defendant knew linked material was unlawful); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 700-701 (S.D.N.Y. 2009) (no liability for providing links for users to download copyrighted material provided by third-parties).

VII. The Court Should Dismiss the Complaint and Award Attorney Fees, Costs, and Deterrent Sanctions under the Texas Anti-SLAPP Statute

Plaintiffs correctly point out that the Texas anti-SLAPP statute requires a motion to be brought within 60 days of service of the Complaint. However, the statute explicitly grants the Court the authority to expand that time "for good cause." Tex. Civ. Prac. & Rem. Code, Ch. 27, § 27.003(b). Good cause certainly exists here. The Court agreed that Plaintiffs had not adequately stated their claims, and Nelson filed his Motion well within 60 days of the date on which Plaintiffs finally laid out the supposed basis for their claims.

Plaintiffs' argument that they did not file suit to place a prior restraint on Nelson's speech is off-point for two reasons. First, the statute says nothing about prior restraints, it requires dismissal where a complaint is "based on, relates to, or is in response to" a defendant's exercise of his right of free speech. Tex. Civ. Prac. & Rem. Code, Ch. 27, § 27.005(b). By definition, a defamation case falls within the scope of the statute. Second, as with all defamation cases, Plaintiffs are suing based on *past* statements, not possible future ones.

Finally, Plaintiffs tackle the requirement that they establish by clear and convincing evidence a *prima facie* case for each essential element of their claims. But they do so by reproducing four statements made by *other people*, each of which is time-barred, and bewilderingly state that they are "just one example" of how they have sufficiently met their burden. (Pl. Opp. to Nelson Motion at 18-19.) How time-barred statements made by others could satisfy their burden as to their claims against Nelson is left to the imagination.[3]

Plaintiffs have made no plausible argument against applying the Texas anti-SLAPP statute. In view of the abundant case law establishing that courts routinely apply anti-SLAPP laws of defamation defendants' home states, the Court should do so here.

VIII. The Court Should Dismiss With Prejudice

The rule that lack of subject-matter jurisdiction requires dismissal without prejudice "in no way implies a 'sequencing of jurisdictional issues' that obliges courts to resolve subject matter jurisdiction before investigating other possible bases for disclaiming jurisdiction," such as lack of personal jurisdiction. *Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42, 46 and n.2 (1st Cir. 2003). The Court may, therefore, address personal jurisdiction first.

If the Court does so, then the Court may address the merits of Defendants' arguments that the Complaint fails to state a claim in the context of resolving the personal jurisdiction issue, and may dismiss with prejudice. *See, e.g., North Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 12 (1st Cir. 2009 (where "the substantive merits underlying the

[3] Plaintiffs contrast those four statements to "the following libel published by Nelson," which consists of a single bullet point from some larger post that Plaintiffs do not identify. Putting aside that the comment was not included in Plaintiffs MDS and thus may not be considered, the bullet point expresses Nelson's opinion and is taken from the "My Very Bad Euclid Discoveries Experience" article that was posted on May 25, 2006, for which even the Massachusetts limitations period expired three years ago. And, as previously pointed out, Plaintiffs have not premised their defamation claims on any statement in the articles that Nelson wrote, but exclusively on various comments written in the online discussion that followed the articles.

[jurisdictional] issue are facilely resolved in favor of the party challenging jurisdiction, the jurisdictional inquiry may be avoided"); *Elkins v. Elkins*, 2010 WL 1935953, at *4 and n.4 (D. Me. May 7, 2010) (same). If the Court reaches personal jurisdiction first, it may "sweep away the hopeless claims and then focus on personal jurisdiction only as to what remains." *North Am. Catholic Educ.*, 567 F.3d at 12. Accordingly, if the Court addresses personal jurisdiction first, Defendants ask the Court to "sweep away" Plaintiffs' baseless claims and dismiss with prejudice.

IX. The Court Should Award Defendants Their Attorney Fees and Costs Pursuant to 28 U.S.C. § 1927 and the Court's Inherent Powers

28 U.S.C. § 1927 provides for an award of attorney fees, costs, and expenses incurred as a result of the unreasonable and vexatious multiplication of proceedings. There is no requirement of bad faith or intentional harassment or conscious impropriety. *Cruz v. Savage*, 896 F.2d 626, 631-32 (1st Cir. 1990); *Galanis v. Szulik*, 2011 WL 6934416 (D. Mass. Dec. 28, 2011). It is sufficient that the actions objectively display a "serious and studied disregard for the orderly process of justice." *Cruz*, 896 F.2d at 631-32.

The Court may also use its inherent powers to award attorney fees for bad faith, vexatious or oppressive conduct. *Galanis*, 2011 WL 6934416, at * 3. Advocacy "simply for the sake of burdening an opponent with unnecessary expenditures of time and effort clearly warrants recompense for the extra outlays attributable thereto," and courts "should not hesitate" to use their inherent powers. *Id.* (quoting *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45–46 (1991)).

Defendants have been forced to expend significant resources litigating a case that never should have been brought. Nelson was forced to go to the extraordinary step of moving for a more definite statement because the Complaint itself was virtually incomprehensible. Given a second chance to lay out the basis for their claims, Plaintiffs submitted a more definite statement that violated the Court's order to describe all of the allegedly defamatory statements by failing to

identify a single statement made by either Garg or any of the John Does. The more definite statement incorporated numerous statements that were non-defamatory on their face, and in several instances Plaintiffs' arguments in the MDS had no relationship at all to the statements. Where they did address the statements, Plaintiffs twisted them beyond recognition. Then, faced with comprehensive motions for judgment on the pleadings, Plaintiffs made cursory efforts to address Defendants' arguments, raised unsupported arguments that in some cases were contrary to the law and often unexplained, leaving Defendants and the Court to decipher them.

All of these factors are compelling evidence that Plaintiffs' motive in filing this lawsuit was to punish Defendants for exercising their free speech rights. Plaintiffs' desire for subpoenas and compelled discovery to identify the John Does is further evidence that Plaintiffs seek to get information enabling them to expand their vendetta to reach their disheartened investors as well.

This goes beyond a disagreement as to the merits of the case or a clash of different, but reasonable, legal analyses. Plaintiffs have cavalierly tossed out ill-considered arguments with no regard for their viability or the substantial impact on Defendants or the Court's resources. Plaintiffs are a corporation and seemingly well-to-do individuals, with far greater resources than Defendants. Accordingly, Defendants respectfully request that the Court award them their attorney fees and costs incurred in connection with this litigation.

CONCLUSION

For the foregoing reasons, as well as those set out in their respective opening briefs, Defendants Nelson and Garg respectfully request that the Court enter judgment on the pleadings and dismiss the Complaint as to each of them, with prejudice. Defendants further request that the Court award them their attorney fees and costs incurred in connection with this litigation, plus a deterrent sanction pursuant to the Texas anti-SLAPP statute.

Respectfully submitted,

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Dated: January 31, 2012

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 31, 2012.

/s/ Mitchell J. Matorin