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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

QUIXTAR INC.,)	3:07-CV-505-ECR-RAM
)	
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
SIGNATURE MANAGEMENT TEAM,)	
LLC d/b/a TEAM,)	
)	
Defendant.)	
)	

Plaintiff Quixtar is a company that was formerly known as Amway. Defendant Signature Management TEAM ("TEAM") is a company that was started by former "Independent Business Operators" ("IBOs") with Quixtar. Plaintiff's Complaint (#1), filed on October 23, 2007, states causes of action against Defendant for (1) violation of the Lanham Act, (2) trade secret misappropriation, (3) tortious interference with existing contracts, 4) tortious interference with advantageous business relations, and (5) a declaratory judgment regarding the viability of claims brought against Quixtar in Collin County Texas. Defendant's Counter-Claim (#15), filed on November 14, 2007, states causes of action for (1) tortious interference with existing and advantageous business relations, (2) defamation, and

1 (3) a declaratory judgment both that TEAM is not in violation of the
2 Quixtar rules of conduct and that Quixtar's "IBO" contracts are
3 unenforceable.

4 Currently pending before the Court is Defendant's Motion to
5 Transfer the Case to the Eastern District of Texas, Sherman
6 Division, Based on 28 U.S.C. § 1404(a) (#22). Also pending is
7 Benjamin Dickie's Objection to [the] Magistrate Judge's April 7,
8 2008 Order (#124). Defendant TEAM has concurred (#125) in that
9 objection. For the reasons stated below, the motion (#22) to
10 transfer is **DENIED** and Dickie's objection (#124) is **SUSTAINED** in
11 part.

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13 **I. Defendant TEAM's Motion to Transfer**

14 Defendant TEAM moves the Court to transfer this case to the
15 Eastern District of Texas. "For the convenience of parties and
16 witnesses, in the interest of justice, a district court may transfer
17 any civil action to any other district or division where it might
18 have been brought." 28 U.S.C. § 1404(a). The burden of
19 demonstrating that transfer is appropriate under section 1404(a)
20 falls on the movant. Commodity Futures Trading Comm'n v. Savage, 611
21 F.2d 270, 279 (9th Cir. 1979).

22 The basic framework for deciding whether to transfer a case
23 pursuant to section 1404(a) requires weighing (1) the convenience of
24 the parties, (2) the convenience of the witnesses, and (3) the
25 interests of justice. Miracle Blade, LLC. v. Ebrands Commerce
26 Group, LLC, 207 F. Supp. 2d 1136, 1155-56 (D.Nev. 2002). A non-
27 exclusive list of related considerations includes (1) the

1 plaintiff's choice of forum; (2) the parties' contacts with the
2 forum, and the extent to which the contacts are related to the
3 pending action; (3) access to proof; (4) the cost of litigating in
4 the two forums; (5) the availability of compulsory process, (6)
5 judicial economy; (7) the court's familiarity with the governing
6 law; and (8) the public policy of the forum state. See Jones v. GNC
7 Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000); Decker Coal
8 Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986).

9 Transfer under section 1404(a) "should not be freely granted."
10 In re Nine Mile Ltd., 692 F.2d 56, 61 (8th Cir. 1982), overruled on
11 other grounds by Mo. Hous. Dev. Comm'n v. Brice, 919 F.2d 1306, 1311
12 (8th Cir. 1990). "The defendant must make a strong showing of
13 inconvenience to warrant upsetting the plaintiff's choice of forum."
14 Decker Coal, 805 F.2d at 843. Indeed, normally the plaintiff's
15 choice of forum is given paramount consideration. Galli v.
16 Travelhost, Inc., 603 F. Supp. 1260, 1262 (D.Nev. 1985). Some
17 courts have afforded less deference to a plaintiff's choice of forum
18 where the plaintiff has not chosen its home forum. See, e.g.,
19 Bryant v. ITT Corp., 48 F. Supp. 2d 829, 832 (N.D.Ill. 1999) ("where
20 the plaintiff's chosen forum is not the plaintiff's home forum or
21 lacks significant contact with the litigation, the plaintiff's
22 chosen forum is entitled to less deference"). Cf. Iragorri v.
23 United Technologies Corp., 274 F.3d 65, 72 (2d Cir. 2001) (adopting
24 a sliding scale approach towards forum non conveniens).

25 Here, Defendant TEAM is organized under the laws of the State
26 of Nevada and TEAM is also apparently owned by several Nevada
27 corporations. TEAM's principal place of business is in Michigan.

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1 Plaintiff Quixtar is a Virginia corporation, headquartered in
2 Michigan. Although Plaintiff has not brought this actions in its
3 home forum, Plaintiff's decision to litigate this case in Nevada was
4 not arbitrary. Further, it is readily apparent that this is not a
5 dispute that is local in scope; no forum will be without its
6 inconveniences. The Court finds that Plaintiff's choice of forum in
7 this case is entitled to substantial, but certainly not dispositive
8 weight.

9 Defendant's principal argument is that this case should be
10 transferred due to ongoing litigation in state and federal courts in
11 Texas, either on the grounds of judicial economy or for the
12 convenience of the witnesses who may be called to testify in those
13 cases. Defendant, however, has not made a substantial showing that
14 judicial economy will be facilitated by transferring this action.
15 With respect to litigation in federal court, one related federal
16 action in Texas (Simmons v. Quixtar, 4:07-CV-389-MHS-DDB) has been
17 referred to arbitration and a second (Simmons v. Quixtar, 4:07-CV-
18 487-MHS-DDB) has been stayed on the basis of the Colorado River
19 doctrine. Consolidation is thus unavailing. Neither has Defendant
20 made any substantial showing that the litigation in Texas state
21 court renders transfer appropriate. Indeed, beyond the obvious fact
22 that state and federal cases cannot be consolidated, one related
23 case in Texas state court was dismissed on the basis of forum non
24 conveniens. The assertion that discovery could be coordinated
25 between state and federal cases is too speculative to be given
26 significant weight. Finally, while Defendant contends that some of
27 its important witnesses reside in Texas, Plaintiff has identified

1 other witnesses it intends to call who reside in Nevada.¹ See Graff
2 v. Qwest Commc'ns Corp., 33 F. Supp. 2d 1117, 1121 (D.Minn. 1999)
3 ("[T]ransfer should not be granted if the effect is simply to shift
4 the inconvenience to the party resisting the transfer.") (citing Van
5 Dusen v. Barrack, 376 U.S. 612, 646 (1964)), Gherebi v. Bush, 352
6 F.3d 1278, 1303 (9th Cir. 2003) (same), vacated on other grounds,
7 542 U.S. 952 (2004).

8 The Court gives significant weight to the fact that Plaintiff
9 seeks a declaratory judgment related to TEAM's dismissed state law
10 claims in Collin County Texas. Texas courts obviously have more
11 expertise with issue of Texas law than Nevada courts, and this issue
12 on its own makes the matter of whether to transfer this case quite
13 close. By contrast, because no issue of corporate law is pleaded or
14 otherwise apparent in this case, the Court does not give any weight
15 at all to Plaintiff's contention that Defendant has abused Nevada
16 corporate law.

17 All in all, the balance is close to equipoise. Accordingly,
18 the motion (#22) to transfer this case to the Eastern District of
19 Texas, Sherman Division, is **DENIED**.

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24 ¹In general, the convenience that a transfer would have for
25 counsel is not a relevant consideration under section 1404(a). See
26 Grubs v. Consol. Freightways, Inc., 189 F. Supp. 404, 410 (D.Mont.
27 1960). Even if it were relevant, it would not be given significant
weight here. Defendant has retained competent counsel in Nevada and
has not demonstrated any significant prejudice in defending this case
in Nevada on this basis.

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1 **II. Dickie and TEAM's Objection**

2 Benjamin Dickie and Defendant TEAM object (##124, 125) to the
3 Magistrate Judge's second Order (#111) granting Plaintiff Quixtar's
4 motion (#54) to compel. The objection presents novel questions of
5 law and will be sustained to the extent outlined below.²

6

7 **A. Background**

8 Plaintiff contends that TEAM has waged a wrongful, illegal
9 internet campaign to induce Quixtar's "IBOs" to defect from Quixtar.
10 In connection with Plaintiff's causes of action for tortious
11 interference with business relations and tortious interference with
12 an existing contract, Plaintiff took Benjamin Dickie's deposition on
13 January 18, 2008. (Ex. P to P. Quixtar's Opp. (#141).) According
14 to Dickie, a part of his duties as a TEAM employee has been to work
15 as a content manager for TEAM's web sites and blogs.³ Dickie
16 testified that these sites include "www.the-team.biz,"
17 "www.chrisbrady.com," "orinwoodward.com," "www.launching-a-
18 leadership-revolution.com," "orinwoodward.mindsay.com,"
19 "orinwoodward.tripod.com," and possibly others. When Plaintiff's
20 counsel inquired whether there were other blogs that Dickie had set

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22 ²The Magistrate Judge gave quite careful attention to these novel
23 issues, but did not have the opportunity to address the issue of
24 standing because it was not raised. The Court is obliged to review
the parties' legal contentions de novo, and does so in this Order.

25 ³"Blog" is short for "web log," which may be defined as follows:
26 "A frequently updated web site consisting of personal observations,
27 excerpts from other sources, etc., typically run by a single person,
and usually with hyperlinks to other sites; an online journal or
diary." Oxford English Dictionary, <http://dictionary.oed.com> (last
visited June 24, 2008).

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1 up, he responded in the affirmative and his counsel objected.
2 Dickie's counsel then instructed Dickie not to answer questions
3 regarding a pending lawsuit in Ottawa County (Michigan) on the basis
4 of First Amendment privilege. The limited record indicates that
5 this lawsuit was filed by Quixtar against unnamed Doe defendants.
6 Dickie refused to answer any questions regarding whether he had any
7 role in establishing or maintaining "freetheibo.com," "drinkxs.biz,"
8 "theiborebellion," "qreilly," "freetheibo blog,"
9 "quixtarlostmycents," "saveusdickdevos," "teamfoundingfathers,"
10 "quixtartoday," "integrityisteam," or "quixtatic." He also refused
11 to answer whether he knew who posted videos on the internet under
12 the titles "Hooded Angry Man," "Hooded Angry Man 2," "The New Amway
13 Highlights," "Stevie goes to China," "Shameus McSteeley Quixtar
14 versus Meijer," "Rich DeVos, Who's Running Your Company?," "Amway
15 Yesterday," "Quixtar Tell Me Sweet Little Lies," and "Boston
16 Teaberry Party."⁴ Dickie also refused to answer if there were other
17 sites that he believed were covered by the privilege, and he refused
18 to answer if he had ever posted under a pseudonym. Dickie's counsel
19 explained that the privilege extended to his involvement or non-
20 involvement with all of these web sites. At the time, the Michigan
21 court had not addressed the issue of the discoverability of the
22 identities of the Does, and there is no indication in the record

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25 ⁴As is true with any evidence, the Court will not independently
26 research any of these web sites and will only consider evidence that
27 is in the custody of the Clerk of the Court. A citation to a web site
is insufficient to put the contents of that site into the Court's
record.

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1 that it has done so since. There is no information in this record
2 regarding any subsequent rulings of the Michigan court.

3 Plaintiff filed a motion to compel (#54) responses from
4 Benjamin Dickie. The Magistrate Judge held a hearing on February 2,
5 2008, to address these and other pending motions. At the hearing,
6 the Magistrate Judge stated that Plaintiff must be afforded the
7 ability to ask about whether Dickie established various web sites to
8 support its cause of action for tortious interference with a
9 contract. (Hearing Tr., p. 46, Ex. B to P. Quixtar's Opp. (#141).)
10 Shortly thereafter, however, Quixtar's counsel posed the following
11 question:

12 Mr. Chao: Let me ask you a question. We've already
13 established, I think, through the questioning of the Court and
14 Mr. O'Brien's answer, that if there's tortious conduct there's
15 no First Amendment protection; so if there's a website out
there, and let's say it's not affiliated with TEAM but he knows
who it is, there's no First Amendment protection, and we should
be allowed, should we not, to inquire into that?

16 The Magistrate Judge responded:

17 The Court: Well, no, not right now, because right now you have
18 not shown me what's on every one of those websites that you
believe is tortious. The answer to that is no.

19 (Hearing Tr., p. 46, Ex. B to P. Quixtar's Opp. (#141).) Quixtar's
20 counsel then distinguished between Dickie's role as a potential
21 independent author and his role as an employee of TEAM, and further
22 asserted that under the most demanding precedents, Quixtar had made
23 the showing necessary to compel Dickie to answer. (Id. at 76.)

24 The Magistrate Judge focused primarily on whether Plaintiff's
25 questions could be addressed to Dickie as an individual or merely in
26 his capacity as an employee; the ultimate minute order granted
27 Quixtar's motion, as follows:

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1 IT IS ORDERED that the Motion to Compel Responses from Deponent
2 Benjamin Dickie (Docket #54) is GRANTED to the extent that Mr.
3 Dickie shall respond to Quixtar's questions about his knowledge
4 regarding the Internet sites, blogs, and videos that contain
5 statements about Quixtar; both in his individual capacity and
6 as an employee of TEAM.

7 (Order of February 21, 2008 (#72).) Dickie then filed a motion for
8 clarification (#84), in which TEAM joined (#85). The Magistrate
9 Judge granted the motion for clarification, issuing the following
10 revised ruling:

11 Mr. Dickie is to answer questions on the following:

12 1. Websites, blogs and videos which Mr. Dickie created or on
13 which he posted content, as an individual or as a TEAM
14 employee;

15 2. Websites, blogs and videos which other TEAM employees
16 created or on which they posted content;

17 3. Websites, blogs and videos which TEAMS management and
18 leaders (founders of TEAM, policy council members and other
19 TEAM-identified "leadership") created or on which they posted
20 content.

21 If following entry of this Order Quixtar learns of websites,
22 blogs and videos containing potentially [tortious] content, the
23 parties will submit letter briefs of no more than two (2)
24 pages, exclusive of the excerpt of the potentially [tortious]
25 content, for resolution by the court. If the court concludes
26 that such additional content is potentially [tortious] then Mr.
27 Dickie will be directed to answer questions regarding such
28 websites, blogs and videos.

(Order of April 7, 2008 (#111).) Dickie filed his objection (#124)
on April 24, 2008, which TEAM joined (#125). Quixtar filed its
opposition (#141) to the objection on May 19, 2008.

B. Standard of Review

"A district judge may reconsider any pretrial matter referred
to a magistrate judge in a civil or criminal case pursuant to LR IB
1-3 where it has been shown that the magistrate judge's ruling is

1 clearly erroneous or contrary to law." Local Rule IB 3-1; see 28
2 U.S.C. § 636(b)(1)(A). The "contrary to law" standard only applies
3 to the Magistrate Judge's legal conclusions, which are reviewed de
4 novo.

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6 **C. Relevant Authority in Analogous Circumstances**

7 Dickie and Defendant TEAM argue that this Court should apply
8 the standard articulated in Doe v. Cahill, 884 A.2d 451 (Del. 2005)
9 and Dendrite International, Inc. v. Doe No. 3, 775 A.2d 756 (N.J.
10 Super. Ct. App. Div. 2001), and vacate the Magistrate Judge's order.
11 Plaintiff Quixtar, on the other hand, argues that (1) the First
12 Amendment is not implicated because tortious speech is not protected
13 by the First Amendment; (2) the First Amendment affords no
14 protections to anonymity in the context of "commercial speech"; (3)
15 Quixtar has met any of the standards various courts have announced
16 for requiring the disclosure of anonymous internet authors,⁵ which
17 Plaintiff also asserts are inapplicable here because this case does
18 not involve a subpoena to an internet service provider ("ISP"); and
19 finally, (4) Dickie lacks standing to object to discovery based on
20 the purported rights of anonymous third parties.

21 Typically, analogous situations to the one presented here arise
22 when a plaintiff seeks to compel an ISP to disclose the identity of
23 a "Doe defendant" who wishes to remain anonymous. See generally
24 Krinsky v. Doe 6, 159 Cal. App. 4th 1154 (6th Dist. 2008)
25 (collecting and reviewing cases); Michele McCarthy, Right of

26
27 ⁵We consider authors writing under a pseudonym to be anonymous
28 for the purposes of the issues raised in this Order.

1 Corporation, Absent Specific Statutory Subpoena Power, to Disclosure
2 of Identity of Anonymous or Pseudonymous Internet User, 120 A.L.R.
3 5th 195 (2004) (same); Michael Vogel, Unmasking "John Doe"
4 Defendants: The Case Against Excessive Hand-Wringing Over Legal
5 Standards, 83 Or. L. Rev. 795 (2004); Lyrissa Barnett Lidsky,
6 Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke L.
7 J. 855 (2000). This is, apparently, the posture of the related case
8 in Michigan. Several approaches have arisen in these circumstances.
9 Despite differences, the weight of authority holds that courts must
10 adopt procedures that strike a balance between the plaintiff's need
11 to destroy the Doe's anonymity and the anonymous speaker's First
12 Amendment rights. Moreover, no decision this Court has encountered
13 has simply rejected procedural precautions on the basis that the
14 anonymous speech was commercial in nature.

15 In the approach taken by the court in In re Subpoena Duces
16 Tecum to America Online, Inc., 52 Va. Cir. 26, 2000 WL 1210372
17 (2000), rev'd on other grounds by Am. Online v. Anonymous Publically
18 Traded Co., 542 S.E.2d 377 (Va. 2001), disclosure will only be
19 compelled if the evidence is required for the case and "the party
20 requesting the subpoena has a legitimate, good faith basis to
21 contend that it may be the victim of conduct actionable in the
22 jurisdiction where suit was filed" Id. at *8. This
23 approach has been faulted for "offer[ing] no practical, reliable way
24 to determine the plaintiff's good faith and leav[ing] the speaker
25 with little protection." Krinsky, 159 Cal. App. 4th at 1167
26 (modification supplied).

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1 A second approach requires the court to evaluate the
2 plaintiff's need to identify the speaker, and requires that the
3 plaintiff's allegations of illegality be able to withstand a motion
4 to dismiss. See Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573,
5 578-80 (N.D.Cal. 1999) (requiring plaintiff to (1) "identify the
6 missing party with sufficient specificity such that the Court can
7 determine that the defendant is a real person or entity who could be
8 sued in federal court"; (2) "identify all previous steps taken to
9 locate the elusive defendant"; (3) "establish to the Court's
10 satisfaction that the plaintiff's suit against the defendant could
11 withstand a motion to dismiss"; and (4) "file a request for
12 discovery with the Court, along with a statement of reasons
13 justifying the specific discovery requested as well as
14 identification of a limited number of persons or entities on whom
15 discovery process might be served and for which there is a
16 reasonable likelihood that the discovery process will lead to
17 identifying information about defendant that would make service of
18 process possible"). The motion to dismiss approach has also been
19 criticized by some courts for offering insufficient protections to
20 anonymous speakers. See Highfields Capital Mgmt., L.P., v. Doe, 385
21 F. Supp. 2d 969, 975 & 975 n.8 (N.D.Cal. 2005) ("It is not enough
22 for a plaintiff simply to plead and pray. Allegation and
23 speculation are insufficient. The standards that inform Rule 8 and
24 Rule 12(b)(6) offer too little protection to the defendant's
25 competing interests.").

26 A third, more demanding approach requires a plaintiff to submit
27 evidence sufficient to overcome a limited motion for summary
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1 judgment attacking the actionability of the allegedly defamatory
2 statements. See Cahill, 884 A.2d 451 (embracing and clarifying the
3 standard applied in Dendrite Int'l, 775 A.2d 756). The "prima
4 facie" or "summary judgment" procedure is limited to evidence that
5 is or should be in the possession of the plaintiff. Thus, whether
6 or not the plaintiff is a public figure, he or she need not present
7 evidence of "actual malice" as this would require evidence that the
8 plaintiff does not have.⁶ Cahill, 884 A.2d at 464. The Dendrite
9 standard, as summarized by Cahill, requires a plaintiff:

- 10 1) to undertake efforts to notify the anonymous poster that he
11 is the subject of a subpoena or application for an order of
12 disclosure, and to withhold action to afford the anonymous
13 defendant a reasonable opportunity to file and serve opposition
14 to the application. In the internet context, the plaintiff's
15 efforts should include posting a message of notification of the
16 discovery request to the anonymous defendant on the same
17 message board as the original allegedly defamatory posting;
18 (2) to set forth the exact statements purportedly made by the
19 anonymous poster that the plaintiff alleges constitute
20 defamatory speech;
21 (3) to satisfy the prima facie or "summary judgment standard";
22 [and]
23 (4) [to] balance the defendant's First Amendment right of
24 anonymous free speech against the strength of the prima facie
25 case presented and the necessity for the disclosure of the
26 anonymous defendant's identity in determining whether to allow
27 the plaintiff to properly proceed.

19 Cahill, 884 A.2d at 460 (modifications supplied); see also
20 Highfields, 385 F. Supp. 2d at 974 n.6, 975 n.8 (relying on
21 Dendrite); Best Western Int'l., Inc. v. Doe, CV-06-1537-PHX-DGC,
22 2006 WL 2091695 (D.Ariz. 2006) (unreported) (following Cahill);
23 Krinsky, 159 Cal. App. 4th at 1170-72 & 1172 n.14 (reviewing
24 authority and adopting a "prima facie" test equivalent to that in
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27 ⁶Dickie and Quixtar ask the Court to adopt Cahill, but ignore
28 this component of the Cahill opinion.

1 Cahill). The Cahill court shortened the test, retaining the notice
2 requirement but opining that the second requirement and the fourth
3 requirement should both be considered implicit in the third
4 requirement. 884 A.2d at 461. Thus, Cahill requires that the
5 plaintiff give notice, or attempt to do so,⁷ and that the plaintiff
6 satisfy a "prima facie or 'summary judgment standard'." 884 A.2d at
7 460-61.

8 Finally, Matrixx Initiatives, Inc. v. Doe, 138 Cal. App. 4th
9 872 (6th Dist. 2006), allowed discovery to proceed without inquiring
10 into the protections required by the First Amendment on the basis
11 that the party who opposed discovery was not, or at least did not
12 admit to being, the anonymous author. There, the plaintiff traced
13 postings made under two pseudonyms on an internet financial bulletin
14 board to a hedge fund, and the hedge fund's manager refused to
15 answer any questions regarding the identities of the anonymous
16 authors at his deposition on the grounds that their anonymity was
17 protected by the First Amendment. Id. at 876. The California Court
18 of Appeal held that under these circumstances the non-party lacked
19 standing to raise the issue of the anonymous speaker's First
20 Amendment rights. Id. at 879-81. Although the California Court of
21 Appeal is not an Article III court, the Court relied on Article III
22 jurisprudence, id. at 878 n.4 , and found that the party seeking to
23 quash discovery did not have the "close relationship" with the

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26 ⁷Cahill appears to insist that the plaintiff post a message on
27 the web site at issue. This poses numerous problems, including the
28 fact that the internet site may no longer exist. See Krinsky, 159
Cal. App. 4th at 1170 & n.11.

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1 anonymous author required to raise the third party's rights.⁸ Id.
2 at 880-81 (citing NAACP v. Ala., 357 U.S. 449, 458-460 (1958)).

3 4 **D. Analysis of Dickie and TEAM's Objection**

5 While a pseudonym can certainly be expressive, more important
6 than the expression of the pseudonym, at least in general, is the
7 condition of expression that anonymity affords.⁹ Anonymity can
8 focus the audience on the speech rather than the speaker, and more
9 pragmatically, it is a useful antidote to reprisal and the other
10 potential inconveniences and adversities of publicity. "Anonymity,"
11 the Supreme Court has noted, "is a shield from the tyranny of the
12 majority," McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357
13 (1995), and "[t]he decision in favor of anonymity may be motivated
14 by fear of economic or official retaliation, by concern about social
15 ostracism, or merely by a desire to preserve as much of one's
16 privacy as possible." Id. at 341-42.¹⁰ Where speakers may remain

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18 ⁸The Matrixx court's factual reasoning is not entirely clear.
19 The court noted that the postings could be traced to a hedge fund, but
nevertheless considered the anonymous authors to be "presumably
unrelated third parties." 138 Cal. App. 4th at 881.

20 ⁹The distinction is significant: As a condition of speech,
21 rather than pure speech, anonymity is unique in that it can be
22 subsequently destroyed through negligence, or for that matter, an
intentional act of the speaker.

23 ¹⁰On numerous occasions the Supreme Court has held that anonymity
24 must be afforded some amount of First Amendment protection, albeit in
25 cases primarily involving prior restraints. See Buckley v. American
26 Constitutional Law Found., 525 U.S. 182, 200 (1999) (invalidating a
27 statute that required circulators of an initiative petition to wear
identification badges); McIntyre, 514 U.S. at 357 (overturning law
28 that prohibited distribution of campaign literature that did not
contain the name and address of the distributor); Talley v.
California, 362 U.S. 60, 65 (1960) (invalidating law prohibiting the
distribution of "any handbill in any place under any circumstances")

1 anonymous, ideas are communicated that would not otherwise come
2 forward. See Doe v. 2TheMart.Com, Inc., 140 F. Supp. 2d 1088, 1092
3 (W.D.Wash 2001) ("The right to speak anonymously extends to speech
4 via the Internet. Internet anonymity facilitates the rich, diverse,
5 and far ranging exchange of ideas."). To fail to protect anonymity
6 is, therefore, to chill speech. Yet where speakers remain anonymous
7 there is also a great potential for irresponsible, malicious, and
8 harmful communication, and the lack of accountability that anonymity
9 affords is anything but an unqualified good. This is particularly
10 true where the speed and power of internet technology makes it
11 difficult for the truth to "catch up" to the lie. See Lidsky,
12 Silencing John Doe, 49 Duke L. J. at 864. Anonymity thus presents
13 benefits, risks, and problems. To the extent that Courts take on
14 the task of protecting it, balancing is inevitable.

15 With this in mind, caution is warranted with respect to
16 purported per se rules. In particular, a per se assertion that the
17 First Amendment does not protect tortious speech is not terribly
18 helpful for the purposes of legal analysis.¹¹ First, the scope of
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20 that did not contain the name and address of the person who prepared
21 it, on the grounds that the law would chill "perfectly peaceful
22 discussions of public matters of importance"; NAACP v. Ala., 357 U.S.
23 449, 462 (1958) (holding that discovery order requiring NAACP to
24 disclose its membership interfered with freedom of association). But
cf. Branzburg v. Hayes, 408 U.S. 665, 695-708 (1972) (White, J.,
writing for a plurality) (concluding that a reporter does not have a
First Amendment right not to reveal unnamed sources to a grand jury).

25 ¹¹Compare Beauharnais v. People of State of Ill., 343 U.S. 250,
254-255 (1952) (libelous utterances are unprotected speech);
26 Chaplinsky v. State of N.H., 315 U.S. 568, 572 (1942) (same), with New
York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (holding that
27 prohibitions against libel "can claim no talismanic immunity from
constitutional limitations").

28

1 First Amendment protections of speech is not, and should not be
2 defined by state law torts.¹² Second, states, including the State
3 of Nevada, have long recognized the importance of the First
4 Amendment in crafting and delimiting the scope of actionable
5 defamation. Third, the tort of interference with a contract need
6 not, at least in theory, be founded in speech at all, but this
7 cannot mean that the First Amendment is not implicated by the cause
8 of action where speech is alleged to be harmful. See Blatty v. New
9 York Times Co., 728 P.2d 1177, 1183 (Cal. 1986) ("The fundamental
10 reason that the various limitations rooted in the First Amendment
11 are applicable to all injurious falsehood claims and not solely to
12 those labeled 'defamation' is plain: although such limitations
13 happen to have arisen in defamation actions, they do not concern
14 matters peculiar to such actions but broadly protect free-expression
15 and free-press values."). Fourth, and relatedly, there is every
16 reason to predict that the Nevada Supreme Court would apply state
17 law privileges designed to protect speech in the context of tortious
18 interference with a contract, just as it has with defamation. Cf.
19 Blatty, 728 P.2d at 1183.¹³ Thus, in sum, the Court must look

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22 ¹²New York Times Co., 376 U.S. at 269.

23 ¹³Notably, there is no First Amendment "opinion privilege,"
24 Milkovich v. Lorain Journal Co., 497 U.S. 1, 3 (1990), but the Nevada
25 Supreme Court recognizes such a privilege. See Pegasus v. Reno
26 Newspapers, Inc., 57 P.3d 82, 87 (Nev. 2002) ("Statements of opinion
27 cannot be defamatory because 'there is no such thing as a false idea.
28 However pernicious an opinion may seem, we depend for its correction
not on the conscience of judges and juries but on the competition of
other ideas.'") (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323,
339-40 (1974)).

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1 beyond a simple recitation of the elements of the torts at issue in
2 this case to determine whether the statements are actionable.

3 Of course, the inquiry is also complicated by the fact that it
4 is impossible on this record to establish whether Dickie or TEAM
5 have standing to raise their objection. See Matrixx, 138 Cal. App.
6 4th 872. The well established rule, subject to pragmatic and
7 important exceptions,¹⁴ is that, "[i]n the ordinary case, a party is
8 denied standing to assert the rights of third persons." Arlington
9 Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977); see,
10 e.g., Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S.
11 947, 955 (1984); Warth, 422 U.S. at 501. "Jus tertii" standing
12 generally requires (1) that the litigant has suffered an injury in
13 fact, (2) that the litigant has a "close relationship" to the third
14 party, and (3) that there is some hindrance to the third party's
15 ability to protect his or her own interests. Powers, 499 U.S. at
16 411. It should be noted that the inquiry into whether there is a
17 "close relationship" is functional in nature, and it is not
18 necessarily required that the parties know, work, or associate with
19 one another. See id. at 413 (juror and criminal defendant have
20 required relationship where "the relationship between [them is] such

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22 ¹⁴E.g. Powers v. Ohio, 499 U.S. 400, 415 (1991) (defendant in a
23 criminal case has standing to raise the third-party equal protection
24 claims of jurors excluded by the prosecution because of their race);
25 Craig v. Boren, 429 U.S. 190, 192-94 (1976) (permitting beer vendors
26 to assert rights of prospective male customers who were barred, unlike
27 females of the same ages, from purchasing beer). Notably, third party
28 standing is a jurisprudential, not a constitutional or jurisdictional
problem. Craig, 429 U.S. at 193-94; see also Warth v. Seldin, 422
U.S. 490, 500-01 (1975) ("In some circumstances, countervailing
considerations may outweigh the concerns underlying the usual
reluctance to exert judicial power when the plaintiff's claim to
relief rests on the legal rights of third parties.").

1 that the former is fully, or very nearly, as effective a proponent
2 of the right as the latter") (modification supplied; quoting
3 Singleton v. Wulff, 428 U.S. 106, 115 (1976)). Even with this
4 observation, however, it is impossible to determine on this record
5 if either of the first two requirements for third party standing are
6 met.

7 Among the many reasons for requiring parties to rely on their
8 own rights in Article III courts is the need to avoid simple
9 obstruction based on speculation regarding the positions of persons
10 not before the court. Dickie has no standing to object to answering
11 questions about what he does not know with respect to internet sites
12 with which he has no involvement. Dickie may or may not have
13 standing to otherwise object, depending upon the facts which he
14 refuses to divulge. Moreover, to the extent that he does have
15 standing, he clearly cannot refuse to answer if he had any
16 involvement with the mere administration of a website without
17 articulating why this administration implicates his First Amendment
18 rights.

19 Plaintiff is correct that the authors of the internet postings
20 at issue could have contested the discovery of their identities
21 using pseudonyms in this Court. See Doe v. Bolton, 410 U.S. 179,
22 187 (1973) (use of a pseudonym in litigation is permissible and does
23 not destroy standing). Again, this is the typical posture of
24 similar cases. Nevertheless, the fact that the third parties may
25 not have been put on notice that their identities may be divulged
26 via discovery is certainly a potential "hindrance to the third

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1 party[ies'] ability to protect [their] interests." Powers, 499 U.S.
2 at 411 (modification supplied).

3 In this Court's view, the fact that there has been an
4 insufficient showing of standing, third party or otherwise, should
5 not simply end the inquiry. First, it is possible that such a
6 showing could be made in this case without creating a situation
7 where there is "nullification of the right at the very moment of its
8 assertion." NAACP, 357 U.S. at 459. Second, the fact that
9 permitting discovery amounts to prospective court action is not
10 insignificant here, and the Court is not without independent
11 authority to adopt procedures to protect against potential
12 violations of third party constitutional rights. To fail to inquire
13 into the merits of this issue, e.g., Matrixx, 138 Cal. App. 4th 872,
14 may well be to decide them in practice, and this is problematic
15 where there is at least good reason to believe that the anonymous
16 authors of the internet postings would object to their identities
17 being revealed without notice.

18 The order of the Magistrate Judge will be vacated in order to
19 allow Dickie and TEAM a reasonable opportunity to notify third party
20 authors that Dickie may be obliged to reveal their identities. Any
21 party, including Dickie, who wishes to oppose the divulgence of his
22 or her identity may do so under a pseudonym,¹⁵ and the Court should

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24 ¹⁵The Court notes that this likely would have been the procedure
25 if the facilitator of the third party internet communication had been
26 a cable ISP. See 47 U.S.C. § 551(c)(2)(B); Cahill, 884 A.2d at 455
27 & n.4. E.g. Warner Bros. Record Inc. v. Does 1-14, No. 07-CV-706
28 (RJL), ___ F. Supp. 2d ___, 2008 WL 60297 (D.D.C. Jan. 4, 2008)
(allowing subpoena of ISP, but also allowing subscriber time to file
motion to quash). The Court sees no reason why this is not analogous
and persuasive authority regarding the principles that should apply

1 refrain from acting for a reasonable amount of time to allow for
2 this possibility. That said, the Court will not consider any
3 further objections based on anonymity unless there is a factual
4 basis for finding that the objecting party has standing to raise the
5 objection.

6 For the guidance of the Magistrate Judge, the Court finds that
7 so long as an objection is raised by a party with standing to raise
8 it, Cahill articulates the correct standard. See Highfields, 385 F.
9 Supp. 2d at 975. Cf. Leatherman v. Tarrant County Narcotics
10 Intelligence and Coordination Unit, 507 U.S. 163, 168-69 (1993)
11 ("federal courts and litigants must rely on summary judgment and
12 control of discovery to weed out unmeritorious claims sooner rather
13 than later"). It appears that the Magistrate Judge tailored the
14 discovery he allowed to the elements of the torts at issue. On the
15 one hand, no tailoring beyond the general restraints of relevance is
16 necessary unless a party with standing makes a proper objection. On
17 the other hand, more particularized tailoring may be necessary if a
18 proper objection is raised. In particular, to the extent that a
19 party with standing raises a meritorious objection, Plaintiff should
20 not be afforded discovery regarding the identity of any anonymous
21 author where the exact statement at issue has not been put into
22 evidence.¹⁶ Nor is discovery warranted into the identity of an
23 anonymous author where it is beyond reasonable dispute that the

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26 here.

27 ¹⁶For example, at present, neither the videos nor any detailed
28 description of their contents is in the Court's record.

1 particular internet postings at issue are subject to a privilege or
2 defense.

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4 **III. Conclusion**

5 **IT IS, THEREFORE, HEREBY ORDERED THAT** the motion (#22) to
6 transfer this case to the Eastern District of Texas is **DENIED**.

7 **IT IS FURTHER ORDERED THAT** Dickie's objection (#124) is
8 **SUSTAINED** to the extent stated in this Order. The Order of April 7,
9 2008 (#111) is **VACATED** and the matter is **REMANDED** to the Magistrate
10 Judge for further proceedings. Dickie's motion (#159) to file a
11 reply brief is **DENIED** as moot.

12 The Magistrate Judge should withhold action for a reasonable
13 period of time (1) to allow Dickie and TEAM to notify interested
14 parties that, if they wish to do so, they may contest the discovery
15 of their identities under pseudonyms, and (2) to allow any such
16 party to file an opposition. Any party that raises an objection
17 must demonstrate that he or she has standing to raise the objection.
18 At present, no such showing has been made. The nature of any
19 further proceedings that may be required is left to the Magistrate
20 Judge's wise discretion.

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23 DATED: This 7th day of July, 2008.

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UNITED STATES DISTRICT JUDGE