

October 3, 2017

ELECTRONICALLY FILED

Blake A. Hawthorne, Clerk of the Court
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Petition for Review in *Glassdoor, Inc., Doe 1 and Doe 2 v. Andra Group, LP*, No. 17-0463

Dear Honorable Justices,

Indeed, Inc. (“Indeed”)¹ submits this letter in support of Glassdoor’s petition for review in *Glassdoor, Inc. v. Andra Grp., LP*, 2017 WL 1149668 (Tex. App.—Dallas 2017). Glassdoor’s petition raises issues that are important to Texas consumers and businesses, including Indeed. The petition seeks to correct an erroneous ruling by the Court of Appeals in Dallas, which determined that a potential litigant could obtain the identity of an anonymous speaker without the meaningful judicial scrutiny required by the Texas Citizens Participation Act (“TCPA”) and the First Amendment. This Court should accept the petition to: correct the Dallas court’s error; provide clarity on this important issue, which is crucial to protect the speech rights of Texas residents; and provide necessary guidance to potential litigants and Texas residents.

The Dallas court erred by holding that a Rule 202 petitioner could obtain the identity of an anonymous critic without establishing the elements of a legal claim against that critic, as required by the TCPA. If not corrected, the decision will provide a roadmap to litigants from both inside and outside Texas on how to circumvent the protections for anonymous speech provided by the TCPA and First Amendment by using Texas Rule of Civil Procedure 202, which permits pre-action discovery to investigate possible claims. This would frustrate the purpose of the TCPA, which is to encourage public participation in matters of general concern and prevent meritless litigation designed to chill speech. This Court should grant the petition and clarify that the TCPA applies to Rule 202 petitions while reinforcing this State’s commitment to robust public discourse guaranteed by the TCPA and First Amendment.

Indeed recognizes that litigants have a right to obtain legitimate discovery, but has seen increasing attempts by litigants to identify people who express critical (but lawful) opinions on its service. If the Court denies Glassdoor’s petition, Indeed is concerned that potential litigants will be further emboldened to misuse Rule 202 petitions to seek to unmask anonymous speakers

¹ *TRAP 11 Fee Disclosure*: Indeed, Inc. is the sole source of the fee paid for preparing this letter brief.

without meaningful judicial oversight—specifically from Indeed, which is located in Texas. The TCPA should work as a legitimate check across the board to discourage frivolous actions or bad faith litigants, and provide a strong deterrent by awarding attorneys’ fees to a party that successfully brings a TCPA motion. Only courts, not litigants, are in a position to determine whether there is sufficient evidence to support unmasking an anonymous reviewer, and must make this finding in *all* legal proceedings that implicate the cherished principles of public participation, whether a Rule 202 petition or a traditional lawsuit.

A. Indeed’s background and interest in Glassdoor’s Petition.

Indeed, with headquarters in Austin, operates the world’s most popular job website, receiving over 200 million unique visitors every month from over 60 different countries, 100 million of which are from the United States. Indeed helps connect employers and jobseekers, by allowing them to post and search for jobs and resumes. It also maintains company pages, where employees can share their experiences and reviews of past and current jobs. All reviews on Indeed company pages are posted anonymously, which is important because it encourages candor and permits users to speak freely about their previous or current employment experiences.

Unsurprisingly, employees sometimes post reviews that are critical of their workplaces. Some employers seek to have these comments removed, and/or to identify the persons responsible for comments they do not like. If an employer is permitted to identify the author of an otherwise lawful comment, that employer can retaliate or take other actions that are likely to chill speech by discouraging people from sharing truthful comments. For example, current employees may refrain from posting critiques of their jobs for fear of being disciplined or even fired if their identity is revealed. Former employees and others may refrain from posting truthful reviews and criticisms because they fear a lawsuit and lack the resources to defend against meritless litigation. Some employers know that defendants may default when confronted with even meritless litigation, and seek to exploit this imbalance by filing lawsuits or pre-action discovery petitions in order to seek the identity of anonymous online critics even though they have no intention of pursuing claims against the posters. As a result, the checks against abusive discovery contained in the TCPA are crucial to protect and encourage a vibrant exchange of speech.

B. Glassdoor’s petition raises important issues regarding the impact of Texas law on speech and participation rights.

Taken together, the TCPA and First Amendment require a litigant to provide evidence sufficient to show it has a legitimate claim against an anonymous online critic before it can compel disclosure of the critic’s identity.

People who write anonymous employer reviews online have a constitutional right to do so. The U.S. Supreme Court has expressly held that the First Amendment protects anonymous speech on

the Internet. *Buckley v. Am. Constitutional Law Found., Inc.* 525 U.S. 182, 199–200 (1999); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). Many state and federal courts throughout the country have required that a litigant seeking to unmask an anonymous online speaker must meet a high standard to do so. Generally, courts adopt either the test articulated in *Dendrite Int’l Inc. v. John Doe No. 3*, 775 A.2d 756 (N.J. Super. A.D. 2001), or the slightly modified test of *Doe v. Cahill*, 884 A.2d 451 (2005). The standard varies slightly among states, but many tests share common factors, such as requiring a court to determine that: the speakers receive notice and an opportunity to object before their identity is disclosed; the party seeking disclosure has made an evidentiary showing of each element of a claim against the anonymous speaker; and the litigant has demonstrated that on balance, the request for discovery outweighs the users’ rights to anonymous speech. This Court has not yet articulated a test for Texas, but at least one Texas appellate court has adopted a modified version of the *Cahill* test, which requires a litigant to provide evidence sufficient to demonstrate a prima facie cause of action for each element of the claim asserted. *See In re Does 1-10*, 242 S.W.3d 805, 818 (Tex. App.—Texarkana 2007, no pet.). This Court should take this opportunity to affirm that the *Cahill* or *Doe* test applies in Texas to protect the rights of anonymous speakers.

Courts throughout the country have also increasingly held that a provider that offers a forum for anonymous speech (such as Indeed) retains its own *independent* right to assert First Amendment objections on behalf of its users. *See Glassdoor, Inc. v. Super. Ct.*, 9 Cal.App. 5th 623 (Cal. Ct. App. 2017) (online provider had standing to assert First Amendment objections to subpoena seeking to unmask anonymous users). This makes sense: a provider must have such a right to give meaningful effect to the First Amendment protection of anonymous speech on the internet. An anonymous user of an online service may lack sufficient time or resources to obtain competent legal counsel or prepare a comprehensive challenge to a subpoena seeking disclosure of the user’s identity. But personal resources and legal acumen should not be determinative of an individual’s substantive speech rights, and courts should not allow litigants to use procedural tactics to circumvent meaningful judicial evaluation of whether a request to reveal a user’s identity complies with constitutional standards.

Moreover, principles of due process require that a provider like Indeed retain its own right to object to a subpoena that implicates a user’s First Amendment rights. Every time Indeed receives a request to disclose user information, it has the potential to affect Indeed’s statutory, contractual, and business obligations. Users who post anonymous reviews on Indeed trust Indeed to respect their decisions and honor their rights to anonymous speech; other Indeed users, meanwhile, maintain an interest in receiving candid reviews that would be chilled if the right to speak anonymously is not protected. *See Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (discussing the Constitutional right to “receive information and ideas,” which is crucial to preserving “an uninhibited marketplace of ideas”).

The TCPA supplements and enhances these core speech rights. When a litigant seeks to identify an anonymous poster responsible for lawful speech, the TCPA ensures that a court considers the rights of the anonymous speaker and strength of the litigant's claims prior to disclosure. If the litigant cannot establish that he or she has a legitimate claim against the poster under the tests of either *Cahill* or *Dendrite*, the court must dismiss the case. This is an important check, and it is most effective when applied as early as possible.

C. There is currently a conflict among Texas appellate courts regarding the application of the TCPA to Rule 202 petitions.

Rule 202 allows a person to conduct limited discovery to perpetuate or obtain testimony for use in an anticipated suit, or to investigate a potential claim or suit, by filing a "petition" to conduct discovery. While this rule permits pre-litigation discovery even where litigation may not follow, it should not allow litigants to avoid constitutional protections or permit an end run around the substantive protections of the TCPA. Indeed supports the approach outlined by Glassdoor, in which litigants must provide "clear and specific evidence" supporting each element of their underlying claim. This standard strikes the correct balance by protecting lawful speech while setting clear standards for discovering a person's identity in a matter involving allegedly unlawful speech.

As Glassdoor points out, currently there is a conflict among Texas Appellate courts in applying the TCPA to actions implicating First Amendment protected speech. For example, in *In re Does 1-10*, 242 S.W.3d at 818, the Texarkana Court of Appeals held that the First Amendment independently requires litigants to provide evidence sufficient to support a prima facie cause of action as to each element of the underlying claim before that litigant can unmask an anonymous speaker. In *In re Elliot*, 504 S.W.3d 455 (Tex. App.—Austin 2016, orig. proceeding), the Austin Court of Appeals held that the TCPA applies to Rule 202 Petitions and, consistent with the First Amendment, requires litigants to provide evidence in support of each element of their underlying claim.

By contrast, the subject of this petition, *Glassdoor, Inc. v. Andra Grp., LP*, 2017 WL 1149668 (Tex. App.—Dallas 2017), ignores both *Does* and *Elliot* and allows potential litigants to use Rule 202 to avoid the substantive protections of the First Amendment and TCPA. In *Glassdoor*, the Dallas Court of Appeals questioned whether the TCPA applies to Rule 202 Petitions, but held that even if it did, a litigant does not have to provide prima facie evidence in support of its underlying claim. Instead, the Dallas Court held that all a litigant must show is that it needs discovery to investigate the existence of some portion of a claim (i.e. the identity of a speaker), *without needing to show that any claim actually exists at all*. In fact, the court held that a litigant does not even need to have an underlying claim; in *Glassdoor*, the appellee disclaimed any intent to file a lawsuit at all (despite using the threat of a hypothetical lawsuit to establish jurisdiction in Dallas). In other words, according to the Dallas Court, a potential litigant can invent a pretext

for Texas jurisdiction, and then use Texas law to unmask a critic simply because it wants to, without any underlying legal claim against the speaker. Once the litigant obtains the critic's identity, he or she can resort to extrajudicial remedies to harass or intimidate the employee into suppressing speech.

The Dallas Court's application of Rule 202 petitions eviscerates all protections for lawful anonymous speech and completely ignores the purpose of the TCPA. If left uncorrected, the Dallas court's opinion will have a tangible effect not only on individuals' speech rights, but also on Texas businesses such as Indeed that provide forums for people to speak.

D. The Court should accept Glassdoor's petition to resolve the conflict and provide clarity to Texas courts, litigants, businesses, and consumers.

Resolving this conflict is therefore of particular importance for Indeed. Indeed is located in Texas and Indeed users agree to Indeed's online terms of service (found at www.indeed.com/legal), which state that Indeed users located in the United States agree to Texas choice of law provisions. Additionally, Indeed regularly takes the position that Texas law applies whenever United States litigants (or even potential litigants) seek information from Indeed via third-party subpoena, even if the parties or underlying litigation are outside Texas. This means Texas law will apply to the over 5,000,000 people who have submitted reviews about their current or former employers on Indeed, whether the company is located in Texas or another state. These users have submitted over 8,500,000 employer reviews that are currently available on Indeed's website. Even within Texas, Indeed's company pages host over 800,000 reviews across 325,000 Texas-based companies. All of those reviews are anonymous. Thus, ensuring that these anonymous reviews receive the same protection in Texas that they would receive in states that follow the *Dendrite* or *Cahill* standard will ensure that Texas remains an attractive place for businesses that provide forums to engage in lawful public discourse.

Indeed's concerns are not speculative: it regularly receives discovery requests seeking to identify persons responsible for reviews and other user generated content. Where Indeed has responded to these requests by identifying its concerns and asking the requesting party to follow the proper process, it has faced contempt proceedings and threats of confinement to coerce compliance (presumably, litigants assume Indeed would rather disclose the information than expend time and resources litigating the issue). While those litigants have miscalculated, the lack of clear authority has forced courts to expend unnecessary resources to resolve these matters. Granting Glassdoor's petition, and clarifying the law in this area, will provide the guidance necessary to courts, litigants, consumers, and communications providers—especially Indeed—regarding the guidelines that apply to petitions that seek to discover the identity of anonymous online speakers.

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For all the reasons stated above, we strongly encourage this court to accept Glassdoor's petition for review in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of October 2017, the foregoing letter brief was served on all parties to the proceeding via the Court's electronic filing system. The names and addresses of the persons served are as follows:

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