

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:)	
)	
DR. LEAH N. TORRES,)	
)	
Plaintiff,)	
)	
vs.)	Case No.
)	2:19-CV-00175BSJ
THE WESTERN JOURNAL,)	
LIFTABLE MEDIA, THE)	
DAILY CALLER,)	
)	
Defendants.)	
)	
-----)	

BEFORE THE HONORABLE BRUCE S. JENKINS

September 25, 2019

Motion for Leave to File Supplemental Briefing on
Motion to Dismiss and Memorandum in Support
Motion for Discovery and Memorandum in Support

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1 Salt Lake City, Utah

September 25, 2019

2 * * * * *

3 THE COURT: Good morning and let's look at
4 *Torres versus Western Journal and others*, it's
00:10:01 5 19-C-175 here today on a motion for discovery and a
6 motion to file supplemental materials.

7 Those who are making appearances, if you will
8 be good enough to make a record. Tell us who you are
9 and whom you represent.

00:10:24 10 MS. BYINGTON: Erin Byington for plaintiff
11 Leah Torres.

12 THE COURT: Okay.

13 MR. HUNT: Good morning Your Honor, Jeff Hunt
14 and Sara Nielson on behalf of the defendants Western
00:10:34 15 Journal and Liftable.

16 THE COURT: Okay.

17 MR. GLAUSER: Good morning Your Honor. David
18 Glauser on behalf of The Daily Caller.

19 THE COURT: All right. And you go ahead.

00:10:46 20 MS. BYINGTON: Your Honor, I think, um, the
21 plaintiff -- we understand the jurisdictional
22 requirements. It's pretty typical that plaintiffs in
23 these cases are at a disadvantage out of the gate
24 when we're dealing with diversity jurisdiction
00:11:13 25 because we don't have access to all of the

1 information sometimes required to establish personal
2 jurisdiction and minimum contacts is largely the
3 focus of this particular case.

4 We understand a mere posting on an internet
00:11:28 5 website with public access about a Utah resident is
6 not enough. We understand that residence in Utah by
7 the plaintiff or harm to the plaintiff in Utah by
8 itself is also not enough. That said, defamatory
9 postings if directed at Utah or otherwise making Utah
00:11:46 10 the focal point of the message can be enough. And
11 that gives reference to the *Johnson, Romell, Young*
12 and *Shrader* cases. The forum state must be the focal
13 point. That's laid out by *Dudnikov* and its progeny.

14 Every time -- the issue we're having here,
00:12:06 15 Your Honor, is that a simple Google search of
16 Dr. Leah Torres or the accessing of the Twitter feed
17 that Western Journal did publish about, accessing any
18 of those things immediately reveals that Dr. Leah
19 Torres at the time that that article was published is
00:12:24 20 a Utah resident. And paying attention to any of the
21 fall out thereafter you also see where a lot of the
22 threats and the impact on Dr. Torres and her medical
23 career as a doctor impacted the Utah residents and
24 her Utah employment and quite frankly we believe that
00:12:44 25 should be sufficient.

1 Claims that they didn't actually know that
2 she was a Utah resident at the time they published an
3 article they reasonably should have known. It takes
4 30 seconds to figure that out with a Google search or
00:12:58 5 less. Her Twitter feed that they would have accessed
6 to pull the infamous post from is replete with
7 references to Utah, to Salt Lake City, to abortion
8 issues in Utah. Google searches will reveal that
9 Dr. Torres advocated at the Utah legislature in favor
00:13:17 10 of abortion rights in the state.

11 Because of that, we believe that minimum
12 contacts should be established. We don't want to go
13 on a fishing expedition but what we do need is
14 something along the lines of access to website
00:13:32 15 analytics. *The New York Times* article that is what
16 is -- which is what made us bring the motion for
17 either supplemental briefing or an additional request
18 for jurisdictional discovery is all tied back to *The*
19 *New York Times* article indicating how sophisticated
00:13:52 20 of analytics and sales tactics *The Western Journal*
21 and these websites utilized. So much so that it got
22 them in some trouble with Google and Facebook which
23 was a primary method of advertising.

24 The other concern, Your Honor, is on -- there
00:14:07 25 are some public analytics on websites such as

1 Quantcast. They're not the most accurate of
2 analytics but they do reflect that out of 10,000
3 worldwide cities that where viewers are accessing *The*
4 *Western Journal* from, that Utah ranks in the thirties
5 out of over 10,000 global cities. In fact, a third
6 of the Utah users that access this website are
7 centered in Salt Lake City which happens to be the
8 location of residence of Dr. Torres at the time in
9 question.

00:14:28
10 The biggest -- so the fishing expedition is
11 not what we want to do, but we want access to the
12 analytics to show how much of this site is focused on
13 Utah. Again searching just the term Utah on *The*
14 *Western Journal's* own website, reflects dozens, I
00:15:00
15 mean even in 2019, dozens and dozens of articles
16 focused at Utah, focused on Utah residents, focused
17 on Utah interests and these are not just
18 regurgitations from general press releases from the
19 associated press. These are actual articles written
00:15:17
20 by writers with *The Western Journal* itself.

21 And so *The Western Journal* does focus on a
22 Utah population. The majority of its readership
23 seems to be elder Caucasian males and conservative,
24 that's a well known fact that they focus on
00:15:38
25 conservative contingents, but at least one percent we

1 believe of *The Western Journal's* readership comes out
2 of Utah and there is significant focus on Utah and
3 articles that are not of global or national
4 interests, but articles that are focused on Utah such
5 as the Mackenzie Lueck case and investigations about
6 police drawing guns on children in Utah.

7 A Utah man accused of threatening to kill
8 members of congress. There is a lot of Utah specific
9 articles. So we do believe that that type of
10 jurisdictional discovery as to their analytics would
11 be necessary and we believe fully that it would
12 provide us with enough information to nail down that
13 personal jurisdiction and the minimum contacts. They
14 are there and the same. So we want to look at
15 analytics and we want to know who the advertisers
16 are. The site is publicly acknowledged as being
17 solely funded through advertising and people who pay
18 to post ads on its site and if you get onto that site
19 even today you will see the analytics used to drive
20 that site and focus advertising directly to the
21 readership you see things such as looking for, you
22 know, nursing homes or clothing or something like
23 that. So we know there are sophisticated analytics
24 being used to drive this site and focus the paid
25 advertising on the particular individuals reading.

1 And we know that at least 53,000 people,
2 unique 53,000 people from the State of Utah, are
3 accessing that site and viewing that site at least
4 within the -- and that 53,000 is for -- it covers the
5 time period over the past month to month and a half.
6 So there is significant contact with Utah readers.

7 If we took defendant's argument at face
8 value, basically what they're trying to say is every
9 time they publish, as long as they don't refer
10 specifically to a state or otherwise, they claim that
11 jurisdiction can only be in Arizona. So they can
12 publish an article about anyone in the United States
13 and not come under jurisdiction as long as they're
14 not referring to the state itself. That's not what
15 minimum contacts and that's not what is intended by
16 *Dudnikov* and the progeny.

17 Again, significant harm in the State of Utah
18 of a Utah resident, that's the easy party. We
19 request the jurisdictional discovery to fill in some
20 of that other part, those analytics that we believe
21 are very sophisticated.

22 THE COURT: Now, who would be your source of
23 that information?

24 MS. BYINGTON: As far as the analytics?
25 Well, as the source of the information I -- we would

1 like to propound a request for production of
2 documents or interrogatories to the defendants
3 specifically for that information. Most who are
4 administering websites or even social media pages,
00:18:49 5 there is analytics associated with those things.
6 Sometimes it's provided by the platform of use which
7 is why we need an interrogatory to see exactly where
8 their analytics are coming from. There are multiple
9 sites that provide analytics.

00:19:05 10 For example, GoDaddy or a lot of those other
11 platforms, SquareSpace which is, you know, website
12 hosts, so to speak, those hosts provide analytic
13 services so you can see what types of people and what
14 demographics are accessing those sites. So the
00:19:22 15 analytics that -- the public analytics that I have
16 been able to get on WesternJournal.com have come from
17 Quantcast, it's a free access. They don't claim to
18 be extremely accurate simply because as I said it is
19 a public access and it is not necessarily the one
00:19:40 20 that *Western Journal* is tied to. But whoever is
21 hosting those domains and whoever is running those
22 analytics, I believe you would see exactly what kind
23 of demographics and geographic areas the readership
24 is focused on. And some of those analytics even
00:19:56 25 break it down per article. I know for example like

1 when you are -- when you post on Facebook as a
2 business, Facebook runs its very own analytics that
3 you can access through your own administrator
4 settings to see who accessed that particular post and
00:20:12 5 what that demographic is, the geographic area they're
6 from. This is all traceable through IP addresses and
7 sophisticated analytics. That's how advertising
8 largely works in the modern technology era. So that
9 is the type of information that is very focused on
00:20:28 10 these analytics and those specific contacts with
11 Utah, the demographics accessing the site and from
12 what geographic area. We believe there is a
13 significant volume coming from Utah and we also
14 believe that the *Western Journal* targets Utah,
00:20:45 15 otherwise why would it write dozens and dozens and
16 dozens of articles based on Utah specific news like
17 Mackenzie Lueck and there is Torrey Green, there's
18 all kinds of things that are very Utah specific
19 written by *Western Journal* authors.

00:21:02 20 So that's why we believe that a little bit of
21 appropriate and limited jurisdictional discovery
22 would be extremely useful in this case prior to a
23 full hearing on the motion to dismiss. And *The New*
24 *York Times* article prompted this extra motion simply
00:21:21 25 because it kind of threw in the face what we already

1 had believed was happening which is the sophisticated
2 analytics and the site hopping and how they're
3 targeting various demographics in various geographic
4 locations.

00:21:35

5 They're obviously using that sophisticated
6 technology. That's what *The New York Times* article
7 points out, so we would like to do some discovery on
8 those specific things because they are following
9 those analytics. And it was, as I said, it would
10 have been extremely easy, 30 second or less search
11 revealed that Dr. Torres was a Utah resident at the
12 time. Any other questions, Your Honor?

00:21:47

13 THE COURT: No.

14 MS. BYINGTON: Thank you.

00:22:00

15 MR. HUNT: Good morning Your Honor. It is
16 the plaintiff's burden to establish personal
17 jurisdiction. It is also plaintiff's burden to make
18 a showing to the court that jurisdictional discovery
19 is warranted in this case. And to do that, plaintiff
20 needs to come forward and identify some specific
21 discovery, explain why it is necessary, and show how
22 it would be relevant to the jurisdictional issue
23 before the court. That is what is at issue today.

00:22:28

24 Plaintiff has not made a general jurisdiction
25 theory of jurisdiction over Liftable and *Western*

00:22:46

1 *Journal*. That is not their theory. Their theory is
2 specific jurisdiction which requires minimum contacts
3 with the forum, requires my clients to have purposely
4 directed their activities to the forum, and for
5 Dr. Torres' alleged injuries to arise out of those
6 activities.

7 The problem with the papers that were
8 submitted articulating the basis for jurisdictional
9 discovery and the argument is that none of that
10 information that they seek to discover is relevant to
11 that inquiry. The fact that there are analytics that
12 are discussed in *The New York Times* article about
13 driving traffic to their site, by the way, the New
14 York Times Article says nothing about Utah, it says
15 nothing about using those analytics to drive traffic
16 from Utah or advertising from Utah, but the fact of
17 the matter is that has nothing to do. Their claim is
18 based on an article published in a national online
19 news and commentary website. It's not based on
20 advertising.

21 So at most, the advertising issue would go to
22 general jurisdiction which would be one factor among
23 many in the general jurisdiction analysis and I think
24 what I heard was that at best one percent, they
25 believe, it is not in the papers that were submitted

1 to the court or to us, one percent of the readership
2 in the last month they believe, based on this
3 Quantcast, which who knows what the methodology is,
4 is from Utah. Less than one percent. So that goes
5 into the general jurisdiction mix of all of the other
6 factors of whether, you know, you're essentially at
7 home in the forum. That is not enough to get general
8 jurisdiction but certainly has nothing to do with
9 specific jurisdiction. And the problem that we have,
10 Your Honor, in the papers and with the presentation
11 is, that, you know, the idea that there is national
12 advertising on the website. Of course there is.
13 That is how *Western Journal* stays in business. They
14 have a broker that they hire that gets national
15 advertising. Oftentimes, *Western Journal* doesn't
16 even know who those advertisers are. But to their
17 knowledge, a significant portion of them are not from
18 Utah. But yeah, national advertising, that goes to
19 general jurisdiction. And they say well we would
20 like to get into some discovery to find out what
21 portion of that national advertising comes from Utah.

22 What are the facts that support that other
23 than this one percent viewership which has nothing to
24 do with advertising. It's you have to have some
25 hook, some reason, to connect up the discovery you're

1 seeking with your jurisdictional theory. And their
2 jurisdictional theory here is that you published an
3 article that harmed my client in Utah. The article
4 says nothing about Utah, it doesn't identify
00:25:50 5 Dr. Torres as a Utah doctor. The clients who
6 submitted declarations said that they in fact did not
7 know that she was from Utah. The argument back is
8 well they should have known. But that's not --
9 should have known is not relevant to the
00:26:05 10 jurisdictional inquiry. The jurisdictional inquiry
11 is "purposely directed your activities." You knew,
12 as in the *Calder* case with Shirley Jones where the
13 *National Enquirer* was doing a story on Shirley Jones,
14 they knew that that actress resided in California,
00:26:22 15 that she made her living in California, they used
16 California sources for the story, they knew that the
17 harm if any would be felt in California and the
18 Supreme Court said yeah. That's -- that's the
19 something more to establish jurisdiction.

00:26:35 20 Here we don't have that. We have a national
21 online news publication. It's not directed at Utah.
22 If you get on there and look I imagine there are
23 stories from Utah within the past 12 months. What
24 does that have to do with anything? There are
00:26:51 25 probably stories relating to New York, Oklahoma,

1 Idaho as well. That doesn't mean that the Journal is
2 targeting a Utah audience. And the fact that the
3 particular focus of this publication is on
4 conservative readers and that they would have some
5 stories relating to Utah is not a surprise. That is
6 part of their audience. But there is nothing in the
7 article or in the website, Your Honor, that is
8 focused on the forum. There is just not. So that is
9 the -- that's the primary problem. And, you know,
10 the discovery that has been identified, Website
11 Analytics, the Website Analytics discussed in the *New*
12 *York Times* article, the allegation was that they were
13 tweaking their websites to make it appear that they
14 were more popular than they were. An allegation they
15 deny. But that has nothing to do with Utah or
16 driving traffic from Utah. The other hook is who are
17 the advertisers? And again, that just -- those are
18 the two areas that were identified.

19 Well, you know, as far as we know, there is
20 not a significant portion of advertisers that come
21 from Utah. We use a broker so we don't know who the
22 advertisers are. They have not identified any. We
23 don't have sales people that are soliciting
24 advertisers from Utah. We have a declaration in the
25 record that says that. We don't have employees here,

1 we don't have bank accounts. We don't have any
2 connection to the forum and there is no connection to
3 the forum, Your Honor, in this case other than the
4 fact that the plaintiff resides here.

00:28:34 5 As for Arizona, our position is not Arizona
6 is the only place that my clients can be sued. It
7 all depends on the theory of liability that is being
8 asserted and the content of the article. And in this
9 case the content of the article has nothing to do

00:28:51 10 with Utah other than the fact that this doctor
11 happened to reside in Utah. A fact that we did not
12 know at the time. But it is an article aimed at the
13 rhetoric in the abortion debate and criticizing one
14 of the major political party's position on abortion.

00:29:10 15 That is a national topic. It's very unlike the case
16 relied on by the plaintiffs, the *Silver* case, where
17 you're talking about a website, I think that was the
18 case from Oklahoma, yeah, the -- I'm sorry, New
19 Mexico, where the defendant in that case created a

00:29:37 20 blog and posted derogatory messages that were
21 essentially serving as a launch pad to attack this
22 business in New Mexico.

00:29:51 23 Plaintiff knew -- sorry, defendant knew that
24 plaintiff's business was located in New Mexico and
25 they had customers there. And the entire content of

1 the website was designed to disrupt the plaintiff's
2 business in New Mexico. So although the website was
3 nationally accessible just like ours is, there was
4 something more there. The content of it was directed
5 at New Mexico. And in this case the article is
6 simply not directed at New Mexico, it's more like the
7 *Shrader* case and the *Buck* case which we have -- we
8 provided to Your Honor where the Tenth Circuit
9 affirmed dismissals for lack of personal jurisdiction
10 because even though those cases involved a blog and
11 websites that were nationally accessible, and they
12 mentioned the plaintiff, that they -- that the
13 content of the communication was not directed toward
14 the forum. So there is a disconnect and I think that
15 is the gist of our argument between the
16 jurisdictional hook that plaintiffs have asserted and
17 the *New York Times* article and the discovery that
18 they seek.

19 Your Honor has set the matter on the motion
20 to dismiss for a hearing Monday. It has been fully
21 briefed. And we don't think that they're entitled to
22 have two bites at the apple, open up an area of
23 discovery that is not relevant and they haven't made
24 the showing that it is relevant to their
25 jurisdictional theory. We ought to have the argument

1 on the merits of the papers that were submitted and
2 not matters that aren't before the court and in
3 evidence such as these analytics.

4 THE COURT: It is a curious area dealing with
5 the internet and the related technology. The
6 suggestion counsel makes is that if you have a
7 national, as I understand it, if you have a national,
8 that is a website that is available nationally, and
9 you get a response, to whom are you excluding the
10 desire for a response? Are you not suggesting that
11 your audience that you're looking for is wherever the
12 reach of the website happens to embrace, whether it's
13 all 50 states or just one state. Why she suggests
14 that, I don't know the figures, but she suggests that
15 there are 53,000 from her interesting source of folks
16 in Utah who respond. You don't turn them down, you
17 receive them. Well, we didn't really want to have
18 anybody from Utah respond but she suggests that some
19 did.

20 MR. HUNT: I think what she is actually
21 suggesting Your Honor is not that 53,000 Utah
22 residents responded to the article. That is not what
23 I understand. I understand what she said is that
24 53,000 out of the over million people that accessed
25 the website are from Utah. So they're reading from

1 Utah. But that could be said as you say every state
2 will have a certain percentage, will have a certain
3 percentage of readers that are -- that are viewing
4 it. And the Tenth Circuit has made clear that that
5 is not enough. The fact that --

6 THE COURT: Where do they say that?

7 MR. HUNT: Pardon?

8 THE COURT: Where do they say that?

9 MR. HUNT: In the *Shrader* case, Your Honor.

10 In the *Shrader* case they make clear that the forum
11 itself must be the focus of the publication or the
12 website.

13 THE COURT: Focus on more than one forums?

14 MR. HUNT: Well, but in this case it is a
15 national forum that our client is focused on; that's
16 correct.

17 THE COURT: It happens to embrace 50 states.

18 MR. HUNT: Right, it does.

19 THE COURT: And aren't you then targeting
20 every state?

21 MR. HUNT: I don't think so, Your Honor, not
22 under the *Soma* case and the *Shrader* case. It
23 requires more. They said it's very clear that
24 operating a passive website that we do that makes its
25 content accessible in all of the 50 states does not

1 subject you to personal jurisdiction in all 50
2 states. It requires more than that. And I think
3 counsel has conceded that. You have to purposely
4 direct your activities to the forum.

00:34:42

5 THE COURT: Well, you know, why don't you
6 exclude Utah in your passive website? We're talking
7 to everybody except Utah.

8 MR. HUNT: Right.

00:34:59

9 THE COURT: We're not directing this, we
10 won't accept any inquiries from Utah, we're not
11 including Utah in our selective group of 49 states.

12 MR. HUNT: I don't -- the internet doesn't
13 work that way. I mean when you put the information
14 out there, it's accessible to anyone who has an
15 internet connection in all 50 states.

00:35:17

16 THE COURT: Even Liberia.

17 MR. HUNT: Exactly. So that's number one.
18 Number two is we want Utah viewers and we want Idaho
19 viewers and New York viewers.

00:35:30

20 THE COURT: Sure.

21 MR. HUNT: But that doesn't mean that we're
22 subject to personal jurisdiction in every single
23 state where someone is able to pull our content to
24 them. They're not -- they're pulling their content
25 from us. We are not -- I guess you could say we're

00:35:43

1 going out to them, we're going out to everyone, but
2 we're not purposely directing our activities at any
3 particular forum.

4 THE COURT: Uh-huh (affirmative).

00:35:55

5 MR. HUNT: Not -- and particularly not Utah
6 and particularly not this article. So I think that's
7 the conceptual difference is you're right.

8 THE COURT: But you published some material
9 on your passive website and somebody in Colorado

00:36:13

10 reads the material and as a result becomes
11 emotionally involved and either in Colorado or
12 elsewhere sounds off. And the information while it
13 may go through one or more locations eventually ends
14 up disturbing the woman who has been purportedly

00:36:43

15 vilified. It is kind of like a game of pool with a
16 side shot. You put things in motion in Colorado and
17 it may eventually end up having a consequence in
18 Utah.

19 MR. HUNT: Right, as any publication would
20 have consequences when it's made available. And I
21 think to extend the notion of personal jurisdiction
22 for website publications to any impact that it has on
23 a resident in the forum state would be contrary to
24 the Tenth Circuit authority. It would also -- it
25 really would enormously expand the concept of

00:37:24

1 personal jurisdiction.

2 THE COURT: Oh, it would. It would because
3 of the nature of technology. And you say well how
4 does one who feels aggrieved find an appropriate
5 forum to -- effort to vindicate the grievance. Where
6 do you go? Well, you suggest they go to Arizona, as
7 I understand it, but you're suggesting --

8 MR. HUNT: Well, that's what the plaintiff is
9 suggesting is a forum, it may be an available forum.
10 It is where the clients are headquartered and it
11 means that they have a forum. This isn't about not
12 providing a forum, it's about has she picked the
13 correct forum.

14 THE COURT: That's the very fascinating
15 little question. It is an interesting question and
16 she suggests that those who advertise from Utah may
17 be of some moment. Their response purportedly is
18 some indication of targeting a particular audience in
19 Utah. You say, well, we haven't done that because we
20 have a broker. Okay. Do you know the name of the
21 broker?

22 MR. HUNT: Well, first of all, I don't think
23 that they have identified in their pleadings or in
24 their papers any Utah residents who vilified her
25 client as a result of the article. That's number

1 one.

2 Number two, the fact that people responded in
3 the way that they did to Dr. Torres's tweet is not
4 unusual. They had that same response to prior tweets
5 to her. She has taken a visible role in the abortion
6 debate and as such you get attacked. And she was
7 attacked by users in Utah and presumably other places
8 for her Twitter posts both before and after the post.
9 But there is no indication that this particular

10 article, the publication of it, incited Utah
11 residents disproportionately to attack her. Twitter,
12 as you know, is a national social media platform.

13 THE COURT: It is one of the interesting
14 pluses or minuses of civilization. It is with great
15 implications, great implications. And the question
16 becomes as you suggest have you rapped on the right
17 door and have you asked for help at the right place?
18 And you suggest that there are limitations as to this
19 forum as I understand your argument.

20 MR. HUNT: That is, Your Honor. I mean I
21 think if you accept their argument it essentially
22 focuses on the plaintiff and not on the defendants'
23 conduct. It is the sole connection to this case to
24 the forum is the fact that the plaintiff apparently
25 resided here at the time. And the Tenth Circuit

1 cases and the Supreme Court cases teach you've got to
2 look at the plaintiff's conduct in directing the
3 article. There needs to be something more than just
4 operating a website that's accessible in Utah. It
00:41:14 5 has to be something more. There needs to be some
6 targeting of Utah that the forum was the focal point
7 of the article or the website and that's simply not
8 the case here.

9 THE COURT: Well, unless it is one of an
00:41:32 10 array where everybody is the target, this just
11 happens to be a miniscule part of the national effort
12 to interest people in the subject and to generate I
13 suppose funds to justify the website itself through
14 advertising or donations for whatever or whatever.

00:42:00 15 MR. HUNT: But I think, Your Honor, I think
16 you understand our argument. We don't believe that
17 they have made the showing necessary to be entitled
18 to jurisdictional discovery. And I will submit it
19 unless you have any further questions.

00:42:11 20 THE COURT: No.

21 MR. HUNT: Thank you.

22 THE COURT: Counselor?

23 MS. BYINGTON: I think, Your Honor, what
24 bothers me about the argument we just heard is that
00:42:35 25 we can play coy about the knowledge as to

1 Dr. Torres's residency to escape jurisdiction. So
2 they're trying to escape personal jurisdiction
3 specifically minimum contacts due to a lack of their
4 own diligence. That seems problematic to me. Can
00:42:54 5 any website escape that by just simply not doing due
6 diligence on the person they're writing about? I
7 don't think that's appropriate. I think that goes a
8 step too far.

9 The topic of abortion is a national topic.
00:43:08 10 It's interesting --

11 THE COURT: Counsel suggests, as I understand
12 his argument --

13 MS. BYINGTON: Uh-huh (affirmative).

14 THE COURT: -- we're talking about this court
00:43:19 15 as being an appropriate court.

16 MS. BYINGTON: Right.

17 THE COURT: To bring the cause. He at least
18 suggests or acquiesces or the idea that you maybe
19 ought to assume there is some --

00:43:33 20 MS. BYINGTON: Part of the problem with that,
21 Your Honor, and the reason why jurisdiction is
22 important here is all of the evidence of the damages
23 and all of the witnesses about the impact of this
24 article are in Utah.

00:43:45 25 THE COURT: Well, that's a venue question.

1 MS. BYINGTON: Right.

2 THE COURT: You say to an Arizona court
3 please, venue, please. That's a different question
4 as to the power or appropriate power of this court.

00:44:03

5 MS. BYINGTON: Right. And I -- and I do
6 understand that. But I also think that that strikes
7 at the very issue of why the jurisdictional discovery
8 is necessary on the analytics. These websites keep
9 analytics so that they continue to target readers

00:44:18

10 that are interested in that material. And they
11 continue to target advertisers that make money off of
12 that target readership. That's how *Western Journal*
13 makes money, it is through their advertising. They

00:44:35

14 keep the analytics, I assume, and, you know, this is
15 a little bit of an assumption but this is why we need
16 the jurisdictional discovery, is they keep those
17 analytics so that we know what the target audience
18 is. That's why advertisers give them money to

00:44:51

19 advertise on that site. We need to know what amount
20 of that is coming from Utah. 53,000 views from the
21 State of Utah in one month with a third of those
22 coming from the Salt Lake City area, that's a
23 significant number. And this was written about a

00:45:10

24 Utah doctor with a Utah medical license at the time.
25 It impacted her Utah residence and it impacted her

1 Utah employment. I do believe those analytics show
2 that there was an intentional act. The intentional
3 act, in my mind, is simply that they published an
4 article about a tweet of Dr. Torres the Utah target.
00:45:32 5 They had to have, as I said, any amount of due
6 diligence would have exposed very easily that she was
7 a Utah resident. It was all over her Twitter feed.
8 There were so many references to Utah. Hundreds of
9 references to Utah in that time period. Hundreds of
00:45:48 10 references to Salt Lake City. I think that's --
11 that's where the problem is. It is an interesting
12 question, but I believe those analytics if we get
13 some access by way of jurisdictional discovery to the
14 analytics and the advertisers, I think it will show
00:46:04 15 exactly what amount of target I believe they can
16 probably even run analytics on the article itself to
17 see who that target audience actually was. And I
18 believe -- and I also believe that it will show that
19 there was a significant readership in Utah because
00:46:19 20 this is a Utah doctor that we're speaking of.

21 That's why I think jurisdictional discovery
22 is necessary. I believe the site keeps the analytics
23 to control its sales volume to cater to the customer
24 base. We know that there is a significant number of
00:46:34 25 people in Utah that play to that customer base.

1 THE COURT: Let's focus for a moment I asked
2 earlier what source you were looking at in reference
3 to the numbers game.

4 MS. BYINGTON: Yes.

00:46:50

5 THE COURT: And I --

6 MS. BYINGTON: So that numbers game is from
7 Quantcast. Quantcast is a website. It provides both
8 paid analytical services like if I wanted to run
9 byingtonglobal.com for my law firm I could pay

00:47:11

10 Quantcast to keep track of analytics to see who my
11 target audience is for the areas of practice that my
12 firm produces and advertises. Um, that's -- that's
13 where those numbers came from. And as stated,

14 because I was using the free part of that site, it is

00:47:30

15 the public analytics, they are running the analytics
16 the best they can through IP addresses and things for
17 what is in their public access. But whoever it is

18 that is hosting the actual *Western Journal* site and

19 whoever it is that's actually tracking those

00:47:48

20 analytics, it could be the host of that site, it
21 could be a third-party that they're paying to keep
22 track of those analytics.

23 THE COURT: Well let me ask, do you pay
24 somebody to keep track?

00:47:59

25 MR. HUNT: I don't know the answer to that,

1 Your Honor. I don't believe -- I imagine that they
2 know and keep statistics on the amount of people that
3 are viewing their website. They may do that
4 internally. I have never heard of Quantcast, it's
5 not in the papers, I don't know anything about them.
6 But I imagine that they do, either internally or
7 through a third-party, have some information about
8 who their readers are and how many users they have
9 over a given time period and where they come from.

00:48:16
10 THE COURT: Okay.

11 MS. BYINGTON: As I said, we accessed what
12 public information was available and Quantcast was
13 one of those sources that provided that information.

14 THE COURT: My question is who do you target
15 for that information now or do you desire to target
16 for that information now?

17 MS. BYINGTON: Right. We desire to target
18 whoever is maintaining those analytics for the
19 *Western Journal*, the CEO, the owner, COO, whoever it
20 may be that has control of that sort of stuff. I
21 know, you know, for example for my law firm, I'm the
22 one personally that keeps track of the analytics of
23 our website, our Facebook posts and those things.
24 And as the administrator over those things, I can see
25 those. And they're very specific. I can pull up a

1 single post or a single blog or anything like that
2 and see exactly what part of Utah my readers are
3 coming from and that matters and it also matters what
4 their ages are in that demographic.

00:49:37

5 THE COURT: My basic question is who do you
6 want to ask?

00:49:46

7 MS. BYINGTON: Who do I want to ask? I want
8 to ask *Western Journal* specifically which of course
9 under the rules of procedure were prohibited from
10 doing until we get past this motion to dismiss. So
11 that's why we want the jurisdictional discovery. We
12 want to do what is necessary on this specific avenue.

00:50:04

13 So what I envision is some basic interrogatories
14 focused on who provides the analytics, who the
15 advertising broker is, or brokers, if that's the case
16 if there is more than one source. We want to know
17 who they are and then, um, you know if -- if it's
18 them, then obviously they would be subject to
19 answering additional questions about the analytics
20 and producing documents reflecting those analytics.

00:50:20

21 If it's a third-party, then we may need some
22 leeway to issue subpoenas if they're not -- if
23 *Western Journal* is not willingly going to hand those
24 over.

00:50:35

25 So that's kind of what I envision happening

1 is a combination of specific discovery as to
2 analytics and targets and even specifically looking
3 at -- looking over all but also looking at the
4 article itself that was focused on Dr. Torres. They
00:50:54 5 may have the capability to see the analytics on that
6 article itself and see exactly where the focus was
7 around that timeframe.

8 So that's, again, that's where my focus would
9 be on seeking information. And I think that that
00:51:14 10 would be the interesting question. The sales volume,
11 the customer base, and why would you run analytics if
12 you're not using it to target audiences. There is no
13 point of tracking it if you're not using it to target
14 audience. That's what it was designed for.

00:51:36 15 Do you have any other questions, Your Honor?

16 THE COURT: No. You're targeting -- you're
17 talking about an interrogatory or a series?

18 MS. BYINGTON: Yes.

19 THE COURT: Directed to *Western Journal*?

00:51:54 20 MS. BYINGTON: Yes.

21 THE COURT: And that's it?

22 MS. BYINGTON: Unless they are not willing --
23 understand -- so this is -- this is the caveat. If a
24 third-party is running the analytics, we may need to
00:52:08 25 be able to direct some discovery to the third-party

1 by way of subpoena if the *Western Journal* is
2 unwilling to gather the analytics documents
3 themselves. If they point to a third-party we would
4 need some leeway to go to the third-party but it
00:52:23 5 would still be focused on these analytics that we're
6 discussing.

7 THE COURT: What kind of a timeframe are you
8 talking about?

9 MS. BYINGTON: Being of -- I do know, you
00:52:42 10 know, through some basic research, at least one of
11 the advertising brokers because that is public
12 information on their Herman Cain site through the
13 *Western Journal* site. That broker is in Florida so
14 we would need sufficient time to run subpoenas
00:52:57 15 through another state outside of Utah which obviously
16 takes a little bit more time. But I foresee 60 to
17 90 days in hopes of, you know, pushing it as fast as
18 possible.

19 THE COURT: What period of time are you
00:53:18 20 talking about for the analytics?

21 MS. BYINGTON: The way that analytics are
22 tracked, I believe that they would be able to produce
23 analytics from every relevant time period very, very
24 quickly. If you asked me for mine from Facebook from
00:53:38 25 my domain host on my website --

1 THE COURT: We don't go back to the beginning
2 of earth, or things like that.

3 MS. BYINGTON: Right. I could print it the
4 same day. So for the most part the way analytics are
00:53:49 5 tracked, it is typically not information that is
6 overly burdensome or difficult to gather it is just a
7 matter of producing it.

8 THE COURT: Yeah, we're not tracking. What
9 period of time 1918, 1776, you know.

00:54:06 10 MS. BYINGTON: I apologize, Your Honor. No,
11 referring back to the time frame I would go back to
12 probably even January 1st of 2017. That should be
13 more than sufficient time frame. And it's typically
14 tracked at least month to month sometimes daily
00:54:23 15 sometimes weekly just depending on who is running
16 their analytics. But that would get -- that would
17 give a window before the article that would show how
18 much of a target Utah is and so on. I think that
19 would be sufficient at least for purposes of this.

00:54:38 20 THE COURT: Do you know -- do you know the
21 broker? Is he calm as counsel suggests, the broker
22 that they use?

23 MR. HUNT: Yes, Your Honor. My understanding
24 is that there is a national advertising broker. I
00:55:21 25 don't know about the analytics. And in terms of the

1 timeframe, the article was published in March 2018.
2 I don't know why we would go back to 2017. It seems
3 January 2018 to '19 would be the relevant time
4 period. But if Your Honor is inclined to allow some
00:55:40 5 discovery, we would need to find out if the broker
6 could provide the information that the defendant
7 seeks so they wouldn't have to go and subpoena the
8 third-party broker. Whether it's the analytics being
9 handled by a broker or the advertising, I think
00:55:59 10 internally they will have some analytics and so we
11 would be willing to cooperate. I just think it needs
12 to be cabined, the scope, so it is not a free for all
13 into the merits of the complaint.

14 THE COURT: If it goes it has to be very
00:56:17 15 limited. I agree.

16 MR. HUNT: Yeah. And so if it is website
17 analytics about who our users are and what percentage
18 come from Utah and if they can drill down to the
19 article level, okay. And then the advertising.
00:56:32 20 Those are the two areas.

21 THE COURT: That's about it, isn't it?

22 MS. BYINGTON: That's what we're requesting
23 right now.

24 THE COURT: And counsel suggests that the
00:56:48 25 date of the event involving severing cords was a

1 beginning. What year was that? Was that '18?

2 MS. BYINGTON: It was in '18, spring of '18.

3 THE COURT: Okay. Okay. Well, for the very
4 limited purpose of ascertaining analytics --

00:57:22

5 analytics from either the Journal or the Journal's
6 broker, let's use January 1 of '18 as the beginning
7 point. And I think you're entitled to discover the
8 analytics and I think you're entitled to discover
9 Utah footed advertisers.

00:57:58

10 I think that what I ought to do then is to
11 strike the matter set for the 30th. Give you, with
12 the cooperative spirit of counsel, a month to gather
13 your information, and then set the matter on the
14 motion. Why don't we say Friday the 25th of October
15 at 1:30, if that's convenient.

00:58:46

16 MR. HUNT: Unfortunately I will be out of
17 town. Your Honor, I do think it might be a good idea
18 to build in some time for the supplemental briefing
19 because I imagine as a result of the discovery there
20 will be a supplemental brief and we would like an
21 opportunity to respond to whatever discovery she
22 finds.

00:59:01

23 THE COURT: I don't have any trouble with
24 that.

00:59:09

25 MS. BYINGTON: Okay.

1 THE COURT: Assuming that you get the
2 information say by the 25th, if you have a
3 supplement, why don't you file that by the 8th of
4 November. Why don't you respond by the 22nd of
5 November. If there's a reply, get your reply done by
6 the 29th of November if that works for everybody.

7 MR. HUNT: That's fine, Your Honor.

8 MS. BYINGTON: That's fine, Your Honor.

9 MR. HUNT: Did you want to set a hearing date
10 after the 29th?

11 THE COURT: Yeah. Let me take a look at the
12 material. But I ordinarily would set it, and I'm
13 happy to set it now if that is convenient for
14 everybody. Why don't we say Friday the 13th of
15 December at 1:30, if that is convenient.

16 MR. HUNT: That works just fine.

17 MS. BYINGTON: And that's fine for me as
18 well.

19 THE COURT: Good. And if you will send me a
20 simple scheduling order along with a limited form of
21 order, run it by counsel as far as the subject
22 information concerned, if that works. Let's do that.

23 MS. BYINGTON: Okay.

24 THE COURT: I think it is a curious area and
25 we might as well pioneer a little bit just for the

1 fun of it.

2 MS. BYINGTON: Thank you Your Honor.

3 MR. HUNT: Thank you Your Honor.

4 THE COURT: Thanks a lot. Appreciate your
5 help. We'll be in recess.

01:01:15

6 (Whereupon, court adjourned at 11:53 a.m.)

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REPORTER'S CERTIFICATE

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name this 8th day of October, 2019.

Laura W. Robinson
RPR, FCRR, CSR, CP