SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of LESLIE HALL and JERMAINE HALL,	)	
Petitioners,	)	Index No. 07-102063
-against-	)	**RESPONSE TO ORDER TO SHOW CAUSE WHY LIPSTICK ALLEY SHOULD NOT BE ORDERED TO IDENTIFY ANONYMOUS USER**
LIPSTICKALLEY.COM	)	
Respondent.	)	

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In this proceeding, petitioners obtained an order to show cause why LipstickAlley.com, an out-of-state Internet message board where an anonymous user posted allegedly defamatory statements about petitioners, should not be ordered to provide identifying information about the user. As explained below, however, no such order should be issued for two independent reasons.

First, the Court lacks personal jurisdiction of Lipstick Alley, under either the Fourteen Amendment's Due Process Clause or New York's long-arm statute; hence the Court cannot order Lipstick Alley to submit to discovery. Second, petitioners have not met the legal requirement that before a court may authorize discovery that would deny someone's First Amendment right to speak anonymously, they must do more than baldly allege that they have been defamed. It is well established that **mere allegations** of defamation do not provide a compelling basis sufficient to overcome the well-established First Amendment right to anonymity. Instead, petitioners must make an evidentiary showing in support of their claims, and must do so upon notice to the anonymous speaker that her anonymity is at risk so that she has an opportunity to protect her rights. Petitioners have done neither; consequently, their request for discovery should be denied.

STATEMENT

A. Facts

Respondent LipstickAlley.com is a message board forum, aimed particularly at an audience of African-American women but open to all members of the public. Charity Affidavit ¶ 6. By completing a free registration, members of the public can choose a unique username and, eventually, a unique avatar or image and post messages about issues of interest to themselves and other readers. *Id.* There is no charge for posting or for reading content, or indeed for any of the other activities that are open either to the general public or only to registered members, such as creating "threads" or topics for comment, and sending private messages among members. *Id.*

Lipstick Alley is owned and operated by Verve Hosting, a Michigan company whose principal place of business is in Pontiac, Michigan. *Id.* ¶ 2. Neither Lipstick Alley nor Verve has any office, any property, or any mailing address or phone number in New York; they have no employees, agents, or business representatives in New York, do not target New York for business development, and are not registered to do business in New York. None of their servers are in New York either. *Id.* ¶ 3. Lipstick Alley is entirely supported by advertising, which is sold via a California company. *Id.* ¶ 5.

Petitioner Jermaine Hall is the editor of Vibe Magazine, a music and entertainment magazine, and the former editor of King Magazine, a Playboy-style magazine aimed at an African-American audience and known for its photographs of scantily clad women. Petitioner Leslie Hall is his wife. Affirmation in Support of Order to Show Cause ¶¶ 9-10. In November and December 2010, an anonymous user of Lipstick Alley using the pseudonym BETonBlack posted a series of comments criticizing both Halls, charging Jermaine Hall with being an "Uncle Tom" because he is a black executive who has married a white woman (Leslie Hall), who is, according to the posts, unattractive, and because he arranged for his wife to get contracts and clients instead of providing those opportunities to African-American media professionals. The posts also asserted that Leslie Hall had a former business that closed and went bankrupt and that she doesn't know about being black. The posts included photographs of Leslie Hall with Jermaine Hall and with their child. *Id.* ¶¶ 11-14 and attached posts.

Verve Hosting and its employees maintain Lipstick Alley but are not actively involved in posting there. Verve did not place the posts about petitioners on its message board and did not know about the posts until it received the subpoena in this case. After Lipstick Alley received a copy of

the Order to Show Cause, it removed the photograph of the Halls' child. Charity Affidavit ¶ 8.

B. Proceedings to Date

On February 10, 2011, petitioners filed their application for an order to show cause, supported by an affirmation by their counsel, David Fish. Petitioners assert that they have in mind to file a defamation claim against BETonBlack, and that the statement "[Leslie Hall] has a business called Iced Media where [Jermaine Hall] has hooked her up with contracts and clients" amounts to a "false statement attacking Jermaine Hall's honesty in his profession." Affirmation ¶¶ 11, 12. The affirmation further contends that the characterizations of Leslie Hall as "ugly," using such terms as "heifer" and "wilderbeest" as well as variety of nasty adjectives, is "evidence of the malice behind the false statement." *Id.* The petition avers that petitioners want to file a defamation complaint against BETonBlack, but could not do so without obtaining her identity.[1] The affirmation also avers that the Court could exercise personal jurisdiction over Lipstick Alley because the proposed lawsuit "relates to on-line chats and the posting of Petitioners' personal information," because Lipstick Alley carries paid advertising visible to users in New York, and because "Lipstickalley.com allows users from New York to register with its site for certain premium content." *Id.* ¶¶ 3-6. Although the affirmation purports to be made on personal knowledge, there is no showing that Mr. Fish has any personal knowledge about whether Jermaine Hall enabled his wife to obtain "contracts and clients" or, indeed, about what benefits users obtain when they register as members of Lipstick Alley. Levy Affidavit ¶ 3.

The Court issued an Order to Show Cause that was served on Lipstick Alley through its

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[1]Undersigned counsel do not know the Doe's actual gender. However, pursuant to Mr. Levy's longstanding practice to refer to Does generically in the female, this brief uses female gender pronouns when referring to the Doe.

domain name registrar. Lipstick Alley's counsel Paul Alan Levy promptly contacted Mr. Fish to point out that the authority cited in the application for the order to show cause did not, in fact, support the exercise of personal jurisdiction, and to discuss the evidentiary basis for the contention that Doe had made a false statement about the Halls. Mr. Levy urged Mr. Fish both to withdraw the Order to Show Cause and request instead a letter rogatory to the Michigan courts to obtain discovery from Lipstick Alley, and to comply with the *Dendrite* procedure, *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), by providing notice to the Doe that compulsory process was sought to take away her First Amendment right to speak anonymously, and by submitting admissible evidence showing that the defamation claim in this case is a viable one. Levy Affidavit ¶ 2. Because petitioners did not do so, Lipstick Alley submits this brief in response to the Order to Show Cause.

ARGUMENT

I. THE ORDER TO SHOW CAUSE SHOULD BE DISCHARGED BECAUSE THE COURT LACKS PERSONAL JURISDICTION OF LIPSTICKALLEY.COM.

The first reason why the order to show cause should be discharged is that the Court lacks personal jurisdiction of Lipstick Alley. Consequently, at most the Court should, on a proper request from petitioners, decide whether to issue a letter rogatory or commission to the state courts of Michigan asking those courts to authorize discovery to Lipstick Alley.

As the parties asserting jurisdiction, petitioners have the burden of proving that New York's long-arm statute confers jurisdiction over Lipstick Alley. *SPCA of Upstate New York v. American Working Collie Ass'n*, 74 A.D.3d 1464, 1465, 903 N.Y.S.2d 562 (3d Dept. 2010), *leave to appeal granted*, 15 N.Y.3d 716, 940 N.E.2d 923, 915 N.Y.S.2d 217; *Copp v. Ramirez*, 62 A.D.3d 23, 28, 874 N.Y.S.2d 52 (1st Dept. 2009); *O'Brien v. Hackensack Univ. Med. Center*, 305 A.D.2d 199, 200,

760 N.Y.S.2d 425 (1st Dept. 2003). The affidavit of Christine Charity establishes that Lipstick Alley is headquartered in Michigan, where it is operated by Verve Hosting, a Michigan corporation. Thus, petitioners' assertion of personal jurisdiction rests squarely on CPLR 302(a)(1), which requires a showing both that Lipstick Alley transacts business within the state, and that the defamation claim arose from its transaction of that business. *Camel Investments Ltd. v. Transocean Capital*, 195 A.D.2d 533, 600 N.Y.S.2d 471 (2d Dept. 1993). CPLR 302(a)(2) and 302(a)(3) cannot be invoked because both exclude defamation actions; even under CPLR 302(a)(1), "New York courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation." *SPCA of Upstate New York*, 74 A.D.3d at 1465, citing *Best Van Lines v. Walker*, 490 F.3d 239, 248 (2d Cir. 2007).

Petitioners have not made any such showing. Their only basis for arguing that Lipstick Alley transacts business in New York is that the web site can be viewed in New York, that it carries advertising, and that NewYorkers can register to participate in its discussions. But this is not nearly enough. New York follows the *Zippo* sliding scale analysis, *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F Supp 1119 (W.D. Pa. 1997), under which the propriety of personal jurisdiction depends on the degree of commercial interactivity of the web site. If the web site simply makes information available for others to see, then personal jurisdiction cannot be predicated on the site. If the web site provides a manner through which the site's owner regularly engages in commercial transactions with residents of the forum, then personal jurisdiction may be exercised. And if the web site has an intermediate degree of interactivity, where a user can exchange information with the host computer, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Grimaldi v. Gunn*, 72 A.D.3d

37, 48, 895 N.Y.S.2d 156 (2d Dept. 2010). The mere fact that defamatory comments appear on a web site that can be viewed in New York is not a sufficient basis for personal jurisdiction under CPLR 302(a)(1) unless the defendant purposefully directed those comments "toward a New York audience," even when coupled with actual visits to New York. *SPCA of Upstate New York*, 74 A.D.3d at 1466.

Petitioners rely on the fact that the web site carries advertising that New Yorkers can read, which not only falls short of purposeful direction towards the forum but elides the fact that the ads are placed by a third party, Charity Aff. ¶ 5. Consequently, the ads do not provide any way for New Yorkers to interact with Lipstick Alley. Petitioners also rely on the fact that the web site enables users to comment and then debate each other, or to engage in "online chat," but the interactivity is among the users, and not between the users and LipstickAlley. Finally, petitioners assert that participants in Lipstick Alley can register to obtain access to "premium content." The Charity Affidavit, however, shows that the assertion is incorrect. In fact, the only way to post to Lipstick Alley is to register, and registration is freely available without charge to any member of the public. *Id.* ¶ 6. Consequently, registration is not a **commercial** exchange of information with the web site and does not support the exercise of personal jurisdiction in this case. The Charity Affidavit is the only admissible evidence before the Court on this score; Mr. Fish does not provide any basis for believing that he has any personal knowledge about what registration actually entails, and indeed Mr. Fish himself, whose testimony is the sole basis of the petition for discovery, has not registered. Charity Affidavit ¶ 9. Consequently, even if the arguments about registration provided a basis for personal jurisdiction over Lipstick Alley, which they do not, they are factually erroneous.

The only case that petitioners cite to support their assertion of personal jurisdiction over

Lipstick Alley is *Citigroup v. City Holding Co.*, 97 F. Supp.2d 549 (S.D.N.Y. 2000), but far from supporting jurisdiction here, the case shows why the Court lacks personal jurisdiction. The *Citigroup* court applied the *Zippo* sliding scale and held that because City Holding's web site was **commercially** interactive, allowing its customers in New York to apply for loans online and engage in online chat about their **commercial** relationship with City Holding,

> the interactivity of the City Lending site brings this case within the middle category of internet commercial activity. Moreover, the interaction is both significant and unqualifiedly commercial in nature and thus rises to the level of transacting business required under CPLR § 302(a)(1).
>
> 97 F. Supp.2d at 565.

Moreover, the cause of action arose from that commercial interaction because it was the use of the "City" name that allegedly infringed plaintiff's trademark. *Id.* at 566. Here, by contrast, the message board allows interaction not between the board's owner and its users, but rather among the board's users, and that interaction is strictly non-commercial. In fact, Lipstick Alley's rules forbid the use of the message board for advertising. http://www.lipstickalley.com/view.php?pg=rulebook. The registration that is required for message board use is a non-commercial transaction. Charity Affidavit ¶ 6. Consequently, there is no commercial interactivity and hence no basis for treating Lipstick Alley as transacting business in New York.[2]

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[2]Other jurisdictions apply *Zippo* analysis under the Fourteenth Amendment's Due Process Clause . *E.g.*, *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010); *Gator.Com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079-1080 (9th Cir. 2003). *See also Shrader v. Biddinger*, — F.3d —, 2011 WL 678386 (10th Cir. Feb. 28, 2011) (holding that the operation of an interactive message board on which allegedly defamatory statements were posted did not make the operator of the message board subject to personal jurisdiction in Oklahoma). Therefore, even if New York's long-arm statute allowed personal jurisdiction here, jurisdiction would be constitutionally proscribed.

II. THE ORDER TO SHOW CAUSE SHOULD BE DISCHARGED BECAUSE PETITIONERS HAVE NOT SHOWN A PROPER BASIS, UNDER EITHER CPLR 3102(c) OR THE FIRST AMENDMENT, TO STRIP DOE OF HER RIGHT TO SPEAK ANONYMOUSLY.

Even if the Court had personal jurisdiction, the requested discovery should be denied because plaintiff has not made a sufficient showing of a meritorious cause of action to warrant taking away BETonBlack's First Amendment right to speak anonymously. Even where constitutional interests are not at stake, the proponent of pre-action disclosure must demonstrate that it has a meritorious cause of action. CPLR 3102(c). The burden of making such a showing is all the greater when the discovery sought would run counter to the qualified First Amendment right to speak anonymously. Neither standard is met here.

A. The Procedure and Showings Required by the First Amendment

It is well-established that the First Amendment protects the right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the United States Supreme Court said in *McIntyre*:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an

aspect of the freedom of speech protected by the First Amendment.

* * *

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a forum of preeminent importance because it places in the hands of any individual who wants to express views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. Accordingly, First Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

Internet speakers speak anonymously for various reasons. They may wish to avoid having their views stereotyped according to their race, ethnicity, gender, or class characteristics. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the individual speaks for the group. They may be discussing embarrassing subjects and may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover the speaker's identity. Speakers who send e-mail or visit a web site leave behind electronic footprints that can,

if saved by the recipient, provide the beginning of a path that can be followed back to the original senders. Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom.

A court order, even if granted for a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel production of individuals' identities in a situation that threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. These rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524.

Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of speakers to remain anonymous, justification for incursions on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 347 (1995).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identities were allegedly relevant to defense against a shareholder derivative action, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus

on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001). Similarly, in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), the court expressed concern about the possible chilling effect of such discovery:

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate .... People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Several courts have enunciated standards to govern identification of anonymous Internet speakers. The first appellate decision in the country remains the leading case. In *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), a company sued four individuals who had criticized it on a Yahoo! bulletin board. The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which we urge the Court to apply in this case and require of petitioners assuming, arguendo, a basis for personal jurisdiction were found here:

> 1. **Give Notice:** Require reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena;
>
> 2. **Require Specificity:** Require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights;
>
> 3. **Ensure Facial Validity:** Review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant;
>
> 4. **Require An Evidentiary Showing:** Require the plaintiff to produce evidence supporting each element of its claims; and
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> 5. **Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

In *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the Delaware Supreme Court became the second appellate court to establish standards for identifying anonymous Internet speakers who are accused of defamation, and as in *Dendrite*, the Court required a substantial showing. In *Cahill*, the Delaware Superior Court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including that the statements are false, although it rejected the final "balancing" stage of the *Dendrite* standard.

Other appellate courts that have addressed the issue of subpoenas to identify anonymous Internet speakers, as well as several federal district courts, have adopted some variant of the *Dendrite* or *Cahill* standards. Several recent state appellate decisions have expressly endorsed the *Dendrite* test, requiring notice and opportunity to respond, legally valid claims, evidence supporting those claims, and finally an explicit balancing of the reasons supporting disclosure and the reasons supporting continued anonymity. *Pilchesky v. Gatelli*, 2011 PA Super 3, 12 A.3d 430 (2011); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 160 N.H. 227, 999 A.2d 184, 192 (2010); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432, 456-457 (2009). *See also Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007). Federal district courts that have embraced *Dendrite* equitable balancing are *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005), and *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001).

Several other courts have followed a *Cahill*-like summary judgment or prima facie evidence standard. *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal.App. 6 Dist. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App. - Texarkana 2007). Among federal district courts that required evidentiary showings but not equitable balancing are *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009), *Doe I and Doe II v. Individuals whose true names are unknown*, 2008 WL 2428206 (D. Conn. June 13, 2008), *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006); *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), and *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004).

There are no appellate decisions yet in New York addressing the balancing test, but several Supreme Court justices have required a substantial showing of merit. *Cohen v. Google, Inc.*, 25 Misc.3d 945, 887 N.Y.S.2d 424 (Sup Ct., N.Y. Co. 2009); *Greenbaum v. Google, Inc.*, 18 Misc.3d 185, 845 N.Y.S.2d 695 (Sup. Ct., N.Y. Co. 2007); *Public Relations Society of America v. Road Runner High Speed Online*, 8 Misc.3d 820, 799 N.Y.S.2d 847 (Sup. Ct., N.Y. Co., 2005).

Although each of these cases sets out a slightly different test, each court weighs plaintiff's interest in identifying the people who allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

B. Petitioners Have Neither Given Notice Nor Made the Necessary Showings.

Applying these tests here, it is apparent that petitioners have yet to satisfy the First Amendment and CPLR 3102 tests for pre-litigation discovery. First, the Halls have made no effort

to notify BETonBlack that her identity is at risk. As the Charity Affidavit shows, ¶ 9, any member of the public, including petitioners or their counsel, can register to post on LipstickAlley, but to date no notice has been posted on the message board.

Although the Halls have met the second prong of the test, spelling out the allegedly defamatory words, they have not met the third prong by pleading a complete claim for defamation or showing that they will be able to plead one. They allege that the statement about Jermaine Hall is false, but they do not allege that the statement was made with actual malice — with knowledge that the statement was false or was made with reckless disregard of its probable falsity. As the current editor of a prominent magazine, and the former editor of another prominent magazine, Jermaine Hall is a limited-purpose public figure who cannot sue for defamation without alleging actual malice. *Adler v. Conde Nast Publications*, 643 F. Supp. 1558, 1565 (S.D.N.Y. 1986); *Maule v. NYM Corp.*, 54 N.Y.2d 880, 882-883, 429 N.E.2d 416 (1981). The petition simply asserts that by calling Leslie Hall ugly, BETonBlack showed malice toward both petitioners. But this statement at most shows hostility, and hostility can support the existence of common law malice but does not constitute actual malice. *Mahoney v. Adirondack Pub'g Co.*, 71 N.Y.2d 31, 36 n.1, 517 N.E.2d 1365, 1367 n.1 (1987). Had petitioners sued the Doe under CPLR 1024, they would have had to plead all the elements of a defamation claim; they should not be able to evade this requirement by invoking CPLR 3102(c).

A failure to make proper allegations of malice has been held sufficient to warrant denial of a pre-litigation petition. *Stump v. 209 East 56th Street Corp.*, 212 A.D.2d 410, 622 N.Y.S.2d 517, 518 (1 Dept. 2009). And the assertion that Jermaine Hall made business opportunities available for his wife does not make negative statements about Leslie Hall. Consequently, even if Jermaine Hall

has a cause of action, the defamatory gist of the statements is not "of and concerning" Leslie Hall, and the First Amendment requires actionable statements to be "of and concerning" the plaintiff. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Halls have also failed to satisfy the fourth part of the test because they have not presented admissible evidence either that the statements about them were false or caused them any damages. The affirmation in support of the application for the Order to Show Cause does aver that the statement that Jermaine Hall provided clients and contracts for his wife was false. But that averment was not made by either of the Halls, who could have personal knowledge of these facts, but rather by their attorney, Mr. Fish. Mr. Fish has admitted that he placed that averment in his affidavit based solely on what his clients had told him. Levy Affidavit ¶ 3. Thus, the showing is inadmissible hearsay.

Moreover, nothing in the affirmation shows that the statements have caused damage to the plaintiffs. *Sager v. Hospital Workers Local 1199*, 655 N.Y.S.2d 953, 954, 238 A.D.2d 152, 152 (App. Div. Dept. 1 1997). The affirmation asserts that no showing of damages is needed because the statement accused him of dishonesty. But *Sager* required a showing of pecuniary damage even on the assumption that the statements at issue there accused the plaintiff of criminality. Moreover, BETonBlack stated only that Jermaine Hall helped his wife get business. Nepotism is not dishonest; indeed, it is common practice in many industries. To be sure, the statement criticizes Jermaine Hall for helping his wife economically, **not**, however, because Leslie Hall is unqualified, but only because of her race. That sentiment may be unflattering, and many may think it racist, but it is simply an opinion, not an accusation of dishonesty. Hence, the failure to present evidence of actual injury is fatal to the evidentiary sufficiency of the Halls' showing.

Finally, because Lipstick Alley does not know who the Doe is, its counsel cannot address the balancing of the equities, the fifth part of the *Dendrite* test. If the Doe seeks to quash the subpoena after being notified, she may be able to present argument in this regard, such as by showing a danger of personal retaliation.

For the present, petitioners have not satisfied the first, third and fourth parts of the *Dendrite* test, and hence the Order to Show Cause should be discharged.

CONCLUSION

The Order to Show Cause should be discharged.

Respectfully submitted,

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