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In re
Our Lady of the Magnificat
Roman Catholic Church

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION: CIVIL PART
: MORRIS COUNTY
:
: Docket No. MRS- L-2036-10
:
: CIVIL ACTION

MOVANT JOHN DOE'S BRIEF IN SUPPORT OF
MOTION FOR RECONSIDERATION OF ENTRY OF
COURT'S JUNE 28, 2010, ORDER ENTITLED "PRE-COMPLAINT
ORDER FOR DISCOVERY" AND FOR OTHER RELIEF

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PRELIMINARY STATEMENT

On June 22, a local church, Our Lady of the Magnificat Roman Catholic Church (“OLM Church”), filed a petition for pre-litigation discovery under Rule 4:11-1, claiming that it needed identifying information before it could file a defamation suit against a pseudonymous individual who sent an email criticizing the management of the “OLM School.” To that end, it sought an order commanding CSC Holdings, LLC (Cablevision) to produce documents revealing the identity of a user whom it charged with responsibility for the email. However, that procedure constitutes an improper and impermissible method of obtaining an anonymous Internet speaker’s identity that, if permitted, would violate the free speech and due process rights of the anonymous speaker.

The New Jersey Appellate Division, in *Dendrite v. Doe*, 342 N.J. Super. 134 (App. Div. 2001), set forth the proper procedure for a person who was allegedly defamed to seek the identity of an anonymous Internet speaker. Simply put, that process was not followed here.

Since the seminal decision in *Dendrite*, while New Jersey has allowed suits to be filed against anonymous Internet speakers as Doe defendants, the courts balance the right to redress of defamation against the First Amendment right to speak anonymously. In *Dendrite*, the court struck a balance by determining that discovery of the identity of such speakers would be foreclosed unless and until notice has been given, valid claims have been plead, a prima facie case of defamation has been presented, the court has determined plaintiff’s case is strong, and there has been an opportunity to defend the anonymity of the speakers. *Id.*

In the present case, not only is the proceeding for pre-litigation discovery not available because the Church could file suit against the Doe posters (see Point III below), but the Church’s

verified petition omits allegations that would have been required to survive a motion to dismiss standard applied by *Dendrite*. As such, this court erred when it granted leave to take the discovery before the Doe email sender had any opportunity to oppose the petition. The error was understandable given that OLM Church failed to apprise the court that the *Dendrite* case is applicable. However, now that the error has been brought to the court's attention, it should be corrected.

This very issue was recently litigated in the case of *In the Matter of Slava Lerner To Perpetuate The Testimony of Michael R. DeLuca*, Docket No. HUD-L-672-10, (N.J. Super. Ct. Law Div. March 19, 2010) (not reported, copy attached hereto as Exhibit "A"). In that case, The Honorable Hector Velasquez, J.S.C., squarely held that a Rule 4:11-1 pre-litigation petition cannot be pursued when the petitioner is seeking to discover the identity of online anonymous speakers claiming defamation. Rather, the would-be plaintiff must **file suit** against the John Doe defendant and follow the *Dendrite* procedure. Likewise, the order granting the petition for pre-litigation discovery in the present case should be reconsidered and the petition should be denied, without prejudice to OLM Church filing a lawsuit against the Doe poster and then, in accordance with *Dendrite*, OLM must make a motion for discovery before service of the complaint. In the alternative, the Court should grant a stay pending appeal of the Court's discovery order.

STATEMENT OF THE CASE

Until recently, the Diocese of Paterson operated a school called Our Lady of the Magnificat School, so named because it operated in connection with petitioner Our Lady of the Magnificat Roman Catholic Church. The school has been the subject of disturbing reports over the past few years, for example when the agency collecting its tuition payment went into

bankruptcy holding millions of dollars of tuition money. (*See, Alloway, Collection agency's bankruptcy leaves 5 N.J. Catholic schools \$1.1M short* http://www.nj.com/news/index.ssf/2009/01/collection_agencys_bankruptcy.html.) Like several other schools in the Paterson Diocese, OLM School closed after experiencing loss of revenues and declining enrollment. (*See, Alex, Paterson diocese shutting two more elementary schools in Clifton, Kinnelon*, http://www.northjersey.com/news/Paterson_diocese_shutting_down_two_more_elementary_schools_in_Clifton_Kinnelon.html.)

On February 4, 2010, Movant John Doe sent an email to parents in the OLM School community, using a pseudonym to protect her¹ anonymity, expressing the opinion that the school was being badly run and that enrollment at the school was declining because of such problems. The letter expressed concern about a particular incident involving a student at the school, and expressed the hope that both OLM Church and OLM School would get new leadership.

On June 21, petitioner OLM Church filed a petition for pre-complaint discovery, accompanied by a certification attested by Ted Howard, the parish business administrator, as being accurate “to the best of my knowledge.” Howard averred that the February 4 email was “slanderous” and claimed that OLM Church wants a retraction or apology for the email. The verification further stated that OLM was “concerned about the harmful effect that the email may have on its reputation.” (emphasis added). Finally, Howard averred that OLM Church “cannot bring any action until it is able to ascertain the identity of the responsible party or parties.” The

¹Counsel use the female gender to identify Movant John Doe generically, without intending to indicate Doe’s actual gender.

verification does not allege, or prove, that any statements in the email about OLM Church are false, or that any such false statements have caused any actionable harm to OLM Church.

Without calling the court's attention to the controlling precedent of *Dendrite*, OLM Church presented the court with a proposed order compelling Cablevision to produce documents identifying the Cablevision user who had used a Cablevision IP address to send the allegedly slanderous email. The court signed the order, and when Cablevision received the order, it notified Doe so that she could oppose disclosure if she desired to do so.

ARGUMENT

POINT I

RESPONDENT'S MOTION FOR RECONSIDERATION HAS BEEN PROPERLY BROUGHT PURSUANT TO RULE 4:49-2.

A motion for reconsideration pursuant to Rule 4:49-2 "shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." *Id.* Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either: (1) the court has expressed its decision based upon palpably incorrect or irrational bases; or (2) it is obvious that the court either did not consider or failed to appreciate the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). Further, a motion for reconsideration must contain a statement of controlling decisions that counsel believes the court has overlooked. *See Lahue v. Pio Costa*, 263 N.J. Super. 575, 598 (App. Div. 1993). Alternatively, if a litigant wishes to bring to the court's attention new or additional information that it could not have provided on first application, the court should, in the

interest of justice and in exercise of sound discretion, consider such evidence. *See* R. 4:50-1.

In this case, petitioner filed its petition papers on June 21, 2010, and gave notice to Cablevision but gave no notice to Doe. Moreover, petitioner's counsel skirted his obligations to the court by presenting an ex parte motion to the court while failing to inform the court of the controlling authority. *Maine Audubon Soc. v. Purslow*, 907 F.2d 265, 268-269 (1st Cir. 1990); *Jorgenson v. County of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988); *Cedar Crest Health Center v. Bowen*, 129 F.R.D. 519, 525 (S.D. Ind. 1989). By proceeding in this manner, Petitioner foreclosed Movant Doe from submitting opposition papers or presenting arguments opposing petitioner's application, and deprived the court of the information it needed to consider the Petition properly. The court thereby "overlooked" all of the Movant Doe's arguments, which are set forth below in Point II, III, IV, and V. Moreover, for the reasons set forth below, the court erred by entering an order in violation of Doe's First Amendment and *Dendrite* rights. Reconsideration should, therefore, be granted, and the discovery order should be vacated.

POINT II

THE APPELLATE DIVISION HAS DETERMINED THAT THE PROPER WAY TO PROCEED AGAINST ALLEGED DEFAMATION COMMITTED ANONYMOUSLY IN AN EMAIL IS TO FILE A COMPLAINT AGAINST DOE DEFENDANTS AND MAKE SHOWINGS BEFORE OBTAINING ANY DISCOVERY.

A series of New Jersey Appellate Division cases make clear that OLM Church can bring suit over an anonymous email that it deems defamatory, but that a federal statute, the Communications Decency Act, 47 U.S.C. § 230, and the First Amendment, constrain the manner in which it can do so. *Donato v. Moldow*, 374 N.J. Super. 475, (App. Div. 2005); *Dendrite v. Doe*, *supra*. The Appellate Division held last spring that these decisions, which discussed anonymous postings on a message board, apply to anonymous emails as well. *A.Z. v. Doe*, 2010 WL 816647 (N.J. Super. Mar. 8, 2010) (not reported, copy attached hereto as Exhibit “A”). *Accord Solers, Inc. v. Doe*, 977 A.2d 941 (DC 2009); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007).

As such, OLM Church must file suit against the individual sender of the email, naming her as a Doe defendants. It may then seek the court’s leave to take pre-service discovery. But that discovery is not available just for the asking, because anonymous Internet speakers — even anonymous speakers who have been accused of abusive speech — have a First Amendment right to speak anonymously. That right to speak anonymously (and remain anonymous) cannot be taken away unless and until the court, based on a legal and factual showing of a valid claim, has made a determination, after notice to the Doe and an opportunity to respond, that there is good reason to believe that plaintiff can succeed in his lawsuit and that the plaintiff’s interest in obtaining redress outweighs the speaker’s right to remain anonymous.

In *Dendrite*, 342 N.J. Super. at 141, the Appellate Division enunciated a multi-part test that any plaintiff must meet before obtaining discovery of the identity of anonymous posters:

1. Notice of the requested discovery must be given to the anonymous speaker, and the Court must defer deciding whether to allow discovery until there has been a fair opportunity to respond to the request for discovery.
2. The plaintiff must identify, verbatim, the precise words alleged to be actionable, and explain why those words are actionable.
3. The court must apply a motion to dismiss standard to the complaint's allegations based on the specified words, and determine that they state a valid claim.
4. The plaintiff must supply evidence sufficient to establish a prima facie case on the elements of his claim – or, at least, those elements with respect to which the facts would be available to the plaintiff without discovery from the defendant.
5. Once the plaintiff meets each of these tests, the Court must balance the plaintiff's interest in going forward with his suit against the defendant's interest in remaining anonymous, taking into account any special circumstances such as the defendant's possible exposure to extra-judicial self-help measures by the plaintiff.

[*Dendrite*, 342 N.J. Super. at 149]

Dendrite does not simply provide a standard for judging motions to quash subpoenas to Internet Service Providers (“ISP’s”); it bars a court from even authorizing the service on ISP’s of discovery requests until the *Dendrite* standard has been met. The Appellate Division’s *Dendrite* decision has since become the leading decision in the country, followed by appellate courts in many other states, as well as by many federal courts.²

²*Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (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); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Sinclair v. TubeSockTedD*, 596 F.Supp.2d 128 (DDC 2009); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005).

POINT III

BECAUSE AN AGGRIEVED PARTY LIKE OLM CHURCH CAN SUE ANONYMOUS SPEAKERS EVEN BEFORE IT KNOWS WHO THEY ARE, PRE-COMPLAINT DISCOVERY IS NOT AVAILABLE.

The very fact that *Dendrite* and its progeny authorize the filing of a complaint against an anonymous Internet speaker as a Doe defendant, followed by the use of discovery to obtain the defendants' addresses so that they can be served, condemns the use of Rule 4:11-1 to obtain pre-complaint discovery. Rule 4:11-1 demands six discrete showings in the verified petition, the first of which is "that the petitioner expects to be a party to an action cognizable in a court of this State but is presently unable to bring it or cause it to be brought." In *Petition of Hall v. Hall*, 147 N.J. 379 (1997), the New Jersey Supreme Court held that the rule must be strictly construed as limited to this purpose, drawing on cases under Rule 27 of the Federal Rules of Civil Procedure, on which Rule 4:11-1 was modeled. As the Supreme Court explained, the rule

was not designed to assist plaintiffs in framing a cause of action, but was intended for cases in which there existed a genuine risk that testimony would be lost or evidence destroyed before suit could be filed and in which an obstacle beyond the litigant's control prevents suit from being filed immediately. . . . [T]he litigant must not only show that he has a cause of action, but also that he is presently unable to commence that action, not because he is worried about the phraseology of the complaint, but because there is some obstacle beyond his control that prevents him from bringing it.

147 N.J. at 385.

Here, *Dendrite* holds that a plaintiff in OLM Church's shoes **can** file a complaint without knowing the names of the Doe defendants. Therefore, it has no basis for proceeding under Rule 4:11-1 to obtain discovery to identify the posters of those comments.

POINT IV

EVEN IF OLM CHURCH MAY PROCEED UNDER RULE 4:11-1, ITS VERIFIED PETITION DOES NOT MEET *DENDRITE*'S STANDARDS.

Regardless of whether OLM Church may properly proceed under Rule 4:11-1, its verified petition, even if treated as a complaint for defamation, contains neither allegations sufficient to state a claim for relief, nor evidence sufficient to show a prima facie case as required by *Dendrite*.

The allegations of the verified petition are insufficient to meet a motion to dismiss standard for several reasons. First, although the petition alleges that the entire email is “slanderous,” it is not clear exactly which parts of the email are at issue in this case. *Dendrite* requires that the *specific* statements alleged to be defamatory be identified. *Dendrite*, 342 N.J. Super. at 141. A number of the statements are plainly matters of opinion; yet the First Amendment does not allow defamation claims over opinions because, under our jurisprudence, “[t]here is no such thing as a false idea.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). The New Jersey courts distinguish between defamatory statements of fact, which are actionable as defamation, and mere insults, which are treated as non-actionable opinion. *Ward v. Zelikovsky*, 136 N.J. 516, 529-530, 643 A.2d 972 (1994). As the New Jersey Supreme Court said in *Lynch v. New Jersey Educ. Ass’n*, 161 N.J. 152, 735 A.2d 1129 (1999):

Statements of opinion, like unverifiable statements of fact, generally cannot be proved true or false. Opinion statements reflect a state of mind. Although they do not enjoy a wholesale defamation exemption, opinion statements do not trigger liability unless they imply false underlying objective facts. [Consequently], insults, epithets, name-calling, and other forms of verbal abuse, although offensive, are not defamatory.

[161 N.J. at 167 (punctuation and citations omitted).]

Second, the email contains statements about several different individuals and institutions, but OLM Church may sue only about statements made about itself. New Jersey law and indeed the First Amendment only allow defamation actions to be filed over statements that are “of and concerning” the plaintiff. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964); *Taj Mahal Travel v. Delta Airlines*, 164 F.3d 186, 189 (3d Cir. 1998); *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 768 563 A.2d 31 (N.J. 1989). The OLM School, for example, was owned by the Diocese of Paterson, not by OLM Church, and so if suit is to be filed over statements allegedly defaming the school, a different plaintiff is required.

Third, although the verified petition alleges that the email is “slanderous,” it never alleges that any of the statements are false; yet falsity is a key element of the prima facie case for defamation. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775-777 (1986); *Salzano v. North Jersey Media Group*, 201 N.J. 500, 511, 993 A.2d 778 (N.J. 2010); *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 585, 969 A.2d 1097 (N.J. 2009).

Fourth, as an established church with a substantial congregation, OLM Church is a public institution that must show actual malice to prevail in a defamation action. *Gospel Spreading Church v. Johnson Pub. Co.*, 454 F.2d 1050, 1051 (D.C. Cir. 1971). The First Amendment requires a public figure to allege that any defamatory statements about him were posted with actual malice — that is, with knowledge the statements were false, or with reckless disregard of the probability that they were false. *Id.*, citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) and *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). The verified petition contains no such allegation. Even statements about a teacher at a private school have been held to be matters of public concern to which the requirement of alleging actual malice applies, absent

specific proof of damage. *Rocci v Ecole Secondaire*, 165 N.J. 149, 155-57, 755 A.2d 583 (2000). Although generally speaking *Dendrite* excuses a plaintiff from having to present **evidence** of actual malice at the subpoena stage, given the plaintiff's inability to take a Doe defendant's deposition to explore her knowledge of falsity or probable falsity, a would-be plaintiff must at least allege actual malice, and OLM Church has not done so; hence its discovery petition is legally deficient for that reason as well.

Fifth, *Dendrite* held that allegation and proof of actual harm is required for a motion for leave to pursue pre-service discovery to succeed. 342 N.J. Super. at 158-159. Yet the verified certification alleges only that petitioner OLM Church "is concerned about the harmful effect that the email **may have** on its reputation." (emphasis added). That was not enough in *Dendrite* — the plaintiff in that case was plainly worried about the possibility of damage, but its quest for pre-service discovery was denied for lack of evidence that there really was damage. *Id.* Additionally, in the recent case of *Juswiak v. Doe*, the Appellate Division reaffirmed the principle that a court should not allow a plaintiff to use discovery procedures to ascertain the identities of unknown defendants in contravention of the defendant's First Amendment rights without sufficient proof of harm. *Juswiak v. Doe*, ____ N.J. Super. ____ (App. Div. 2010) (approved for publication, but not yet reported; a copy of the opinion is attached hereto as Exhibit "A").

There, the Appellate Division found *Dendrite* applied to a complaint alleging the tort of intentional infliction of emotional distress arising out of anonymous e-mails. The appellate court reversed the trial court's denial of a Motion to Quash Subpoena, finding that Plaintiff had failed to establish at the *Dendrite* stage that he had made out a prima facie case. *Id.* at 13. The

reviewing court found that there was no context within the e-mail with which to place the message, and that the court should interpret statements objectively: “The test for whether a communication should lose the mantle of First Amendment protection must be an objective one, rather than one based upon the personal and individual reaction of the recipient of the communication.” *Id.* at 10. The court also held that the plaintiff did not establish a need for the information – that the information was not available from other sources. *Id.* at 15. Similarly here, the pre-complaint certification, even if it were treated as a complaint for defamation, simply does not show actual harm, and hence falls short of the *Dendrite* standards in this way as well.

Finally, OLM Church has not shown a basis for discovery under the final stage of *Dendrite* analysis, the balancing stage. The email in question simply comments, to other members of the school community, on a matter of intense interest to all of them, about possible mismanagement of the OLM School. And as parents within the community, they must necessarily worry about retaliation against their children, not to speak of possible ostracism within the church community, should the identity of critics be revealed. At the balancing stage, as with the rest of the *Dendrite* test, OLM Church’s claim for discovery should be denied.

POINT V

IN THE ALTERNATIVE, IF THE MOTION FOR RECONSIDERATION IS DENIED, THE COURT SHOULD STAY ITS DISCOVERY ORDER PENDING APPEAL.

The Court should stay its Order Granting Rule 4:11-1 Discovery to allow Doe to make a motion to the Appellate Division for Leave to Appeal. Pursuant to Rule 2:9-5(b), the application for a stay must first be made to the court which entered the order. The Court's Order Granting Rule 4:11-1 Discovery was entered without Doe having any opportunity to oppose Petitioner's petition seeking Doe's identity. To require the disclosure of Doe's identity under such circumstances would be a miscarriage of justice.

The prejudice to Doe's First Amendment rights would be substantial and absolute if Cablevision were compelled to disclose information leading to the identification of Doe when such information is privileged under the laws of the State of New Jersey and the United States Constitution. The only way to preserve a privilege is to assert it. Once the privileged information is disclosed, the privilege ceases to exist. By stark contrast, there would be little or no prejudice to Petitioner in waiting until the outcome of Doe's Motion for Leave to Appeal.

Much like a motion for a preliminary injunction, a motion for a stay pending appeal calls for a balancing of the equities between the parties as well as an assessment of the likelihood of success on the appeal. *McNeil v. Legislative Apportionment Com'n of State of New Jersey*, 176 N.J. 484, 486, 825 A.2d 1124 (2003) (dissenting opinion). In this case, a failure to grant a stay pending appeal could result in the appeal becoming moot, in that once the identity of the anonymous e-mailer has been disclosed, her First Amendment right to anonymous speech have been lost forever. That irreparable injury is why state appellate courts routinely allow

interlocutory appeals to be taken from orders identifying the Doe defendants. *Fitch v. Doe*, 869 A.2d 722, 726 (Me. 2005); *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42, 46-50 (2003). Moreover, the violation of the Doe's First Amendment rights constitutes irreparable injury sufficient to warrant the grant of preliminary relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Granting a stay would not harm OLM Church because Cablevision has Doe's identity and can be trusted not to discard it pending an appeal. Finally, as the foregoing memorandum shows, there is good reason to believe that Doe could prevail on her appeal, on at least one of the several independent grounds on which the order allowing discovery should be vacated. Accordingly, Doe requests a stay pending Doe's Motion for Leave to Appeal.

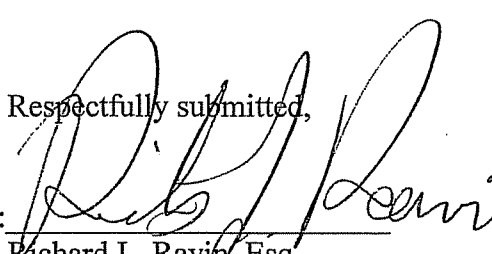
CONCLUSION

The motion to reconsider should be granted, and the court should vacate its order authorizing discovery from Cablevision to identify Doe. In the alternative, the court should grant a protective order, and, failing that, stay the court's order authorizing discovery from Cablevision pending Doe's motion for leave to appeal to the Appellate Division.

August 24, 2010

Respectfully submitted,

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