

SUPREME COURT OF THE STATE OF NEW YORK
COUNT OF NEW YORK

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In the Matter of the Application Pursuant to
CPLR 3102 of

PAMELA GREENBAUM,

Index No: 102063/07

Petitioner,

-against-

GOOGLE, INC., d/b/a BLOGGER and
BLOGSPOT.COM,

Respondent.

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**MEMORANDUM OF LAW OF PROPOSED INTERVENOR "ORTHOMOM"
IN OPPOSITION TO PETITIONER'S APPLICATION FOR
PRE-COMMENCEMENT DISCLOSURE**

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STATEMENT OF THE CASE

This case involves a vague claim of defamation advanced by Pamela Greenbaum, a public official on the eve of her campaign for re-election to the Lawrence, New York school board, against a blogger who has discussed a variety of issues arising in her community. Among other issues, the blogger has discussed whether the public schools should provide financing for educational services to children who attend private religious schools. In reaction to her statements, other people have posted comments on the blog accusing the official of being a bigot. Instead of suing her critics for defamation as Doe defendants, the official initiated a prelitigation discovery petition against Google, which provides the servers where the blog is hosted, asserting that the blogger and her commenters either had accused her of being a “bigot” or had implied that her positions reflected anti-Semitism.

Because federal law immunizes the blogger herself from suit over comments that others post on her blog, because the statements at issue are not defamatory, and because the public official’s showing in support of discovery fails to meet the consensus standard for overcoming the First Amendment right to speak anonymously, the Court should deny the petition.

* * * *

The Internet is a democratic institution in the fullest sense. It is the modern equivalent of Speakers’ Corner in England’s Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997),

From a publisher’s point of view, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

Full First Amendment protection applies to speech on the Internet. *Id.*

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. Google's Blogspot gives individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, major companies, or other topics while leaving it open for visitors to post their own comments.

The individuals who post messages in such forums generally do so under pseudonyms – similar to the system of truck drivers using “handles” speaking on their CB's. Nothing prevents an individual from using a real name, but the blog at issue here is typical in that most choose nicknames. These monikers protect the writer's identity from those who express disagreement, and encourage uninhibited exchange of ideas and opinions. Such exchanges can be very heated. As on the blog here, they are sometimes filled with invective and insult, often directed at other posters.

One aspect of message boards and blogs makes them very different from almost any other form of published expression: Because any member of the public can express a point of view, a person who disagrees for any reason with something that is said – such as because she believes that a statement contains false or misleading information – can respond immediately, at no cost. Levy Affirmation, ¶ 19. That response will often have the same prominence as the offending message. A blog is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). The response can provide facts or opinions to controvert the criticism and persuade the audience that the critics are wrong. And because many people regularly revisit the same blog, the response is likely to be seen by much the same audience as those who saw the original criticism. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, is the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

The blog at issue here, orthomom.blogspot.com, is devoted to issues within both the Five Towns community on Long Island and the larger community of Orthodox Jewry, and provides current, and sometimes outspoken, social commentary and criticism. The blog's main author is Orthomom, who identifies herself as an Orthodox Jewish parent of school-age children in the Five Towns. Orthomom herself posts the main articles, but any reader can post a comment just under the article about which he desires to comment.^{1/}

An important issue facing the Five Towns has been the division between Orthodox Jewish families, who make up a growing part of the population in Lawrence but send their children to private religious schools, and the rest of the population, whose children form the majority of the public school population. The Orthodox residents want the school system to spend some of its resources on providing certain educational services for their children, but some members of the school board have resisted those requests because they do not believe that the uses are constitutional or socially desirable. The popular majority has, in turn, rejected proposed school budgets and voted off the school board members who did not support their interests. *See Levy Affirmation, Exhibit E.*

Pamela Greenbaum is an elected member of the Board of Education of the Lawrence Public Schools, Union Free School District 15. Greenbaum has opposed the use of public school funds to provide educational services to private school children. Greenbaum has been criticized for this position, including on the Orthomom blog. On January 11, 2007, in the one article by Orthomom that Greenbaum specifically identifies as being defamatory, Orthomom took issue with Greenbaum's

^{1/} A comment poster has the option of posting under an existing Google or Blogger account, in which case the commenter's pseudonym will be hyperlinked to the commenter's own blog profile; or under another name (or pseudonym) of the commenter's own choosing, in which case the name used can be hyperlinked to the commenter's own web site; or as an entirely anonymous commenter. Every posting on the blog, both the blogger's articles and each of the comments, displays the time of posting. *Levy Affirmation ¶ 19.*

position, as quoted in a local newspaper, that private school children could only be allowed to use public school facilities if the public school's teachers were not involved in teaching those children at the public's expense. Order to Show Cause ("OSC") Exhibit A, page 10. Orthomom argued that such expenditures would be legal and that Greenbaum should not object simply as a matter of personal preference. *Id.*^{2/} Orthomom also disputed Greenbaum's statement that the school board president was being buffeted by too many "factions pulling at him," and that he should "stop listening to everyone else and start listening to his heart." Orthomom argued that it is **desirable** for a school board president to try to listen to everyone. *Id.*^{3/}

Many comments were appended to this article, some criticizing Greenbaum in much stronger terms. One commenter stated, "Pam Greenbaum is a bigot and really should not be on the board." OSC Exhibit B, at 1. Another said, "Greenbaum is smarter than she seems. Unfortunately, there is a significant group of voters who can't get enough of her bigotry." *Id.* at 1-2. Others accused Greenbaum of being an obstructionist and of putting forward the position of the local teachers' association which could support her in the election. *Id.* at 4. Still others took Greenbaum's side,

^{2/} "Um...what? Unless I'm mistaken, there is no law against district private school students being taught on public school property by public school teachers. The reason such an arrangement generally does not occur is a matter of the choice private school parents make to send their children elsewhere to be educated. In this case, we are discussing the prospect of private school students receiving extracurricular education from public school teachers on public school property. There is no connection whatsoever to the religious education these students may receive in another venue during the school day. I just don't see how Greenbaum can object on principle to the concept of district children being taught by district teachers on district property. Anyone remember Super Sunday, the (now-defunct) program where district teachers were paid to provide extracurricular activities to private school students on public school property? That was legal. And if she's discussing her personal preference as opposed to some legal issue with Dr. Mansdorf's suggestion, then...wow. Way to make it clear that you have no interest in helping the private school community in any fashion."

^{3/} "He should stop listening to everyone? In my estimation, a school board president who tries to listen to everyone, and tries to meet everyone in the district's needs, seems like a worthy president indeed." The article is attached to the Levy Affirmation as Exhibit F.

denouncing “pathetic attempts to make the new board members look good” and accusing Orthomom of having “a one-sided blog probably run by those complementing [sic] themselves.” *Id.* at 5. Yet another poster denounced “U PEOPLE” for rejecting school budgets and driving “THE GOOD QUALITY FAMILIES” out of Lawrence. *Id.* at 6. The discussion continues in this vein. The words “anti-semite” and “anti-semitic” do not appear anywhere in either Orthomom’s article or in the comments appended to it.

The Lawrence School Board will hold elections in the spring of 2007 for new three-year terms beginning next summer. <http://www.lawrence.org/district/petitionsavailable.htm>. Greenbaum filed a petition for prelitigation discovery dated February 8, 2007, under CPLR § 3102(c), contending that she needed the information to file a defamation action against Orthomom and the commenters on her blog. The proceeding was brought against Google, which could help identify Orthomom by revealing the Internet Protocol (“IP”) numbers from which she made her postings and registered to create her blog, and the exact times of those acts. Google has similar information about the commenters on the blog. Levy Affirmation ¶¶ 12-14. Those IP numbers can be used to identify the Internet Service Providers (“ISP’s”) whose facilities were used to post the comments; subpoenas could then be served on the ISP’s to identify the Internet users who used particular IP numbers at those particular times, ultimately leading to the identification of the commenters. *Id.*

According to the petition and the affirmations by petitioner and her counsel Adam Feder, Orthomom was responsible for publishing and disseminating “defamatory and untrue statements calling . . . Greenbaum a ‘bigot’ and ‘anti-Semite.’” Feder Affirmation in Support of Request for Emergency Relief (capitalization corrected). Petitioner claimed that “the most recent of these postings” was published on January 11. *Id.* Although Orthomom’s email address is posted on her blog, neither Greenbaum nor her lawyer notified Orthomom that Greenbaum was attempting to

compel disclosure of her identity. However, an article in the New York Daily News about Greenbaum's filing quoted liberally from the filing, and was then sent by a sympathetic member of the community to Orthomom by email. Levy Affirmation ¶ 18 and Exhibit B. The Court set a hearing on the Order to Show Cause for February 19. At that hearing, the Court, with the consent of both Google and Greenbaum, ordered that a hearing be held on April 5, 2007, and that Google provide notice to Orthomom so that she could appear to defend her anonymity.

SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when someone claims to have been damaged by an anonymous speaker's tortious speech, the courts must balance the right to obtain redress from the perpetrators of civil wrongs, against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, irreparably destroying the defendant's First Amendment right to remain anonymous.

Suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables him to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to anonymous speech but is exposed to the plaintiff's efforts to restrain or oppose his speech. The

