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JOSEPH PILCHESKY,)	
)	
Plaintiff,)	In the Court of Common Pleas
)	of Lackawanna County, Pennsylvania
v.)	
)	CIVIL ACTION
JUDY GATELLI, as President of Scranton)	No. 2007-CV-1838
City Council; as Councilwoman; and, in)	
her Individual capacity,)	
)	
Defendant-Counterclaim and)	
Joinder Plaintiff,)	
)	
v.)	
)	
JOANNE PILCHESKY and JOHN DOES,)	
)	
Additional Defendants.)	

**OPPOSITION OF DOE DEFENDANTS TO
GATELLI’S AMENDED PETITION TO COMPEL
DISCLOSURE OF THEIR IDENTITIES**

For the reasons set forth in this brief, the Court should hold that Judy Gatelli has not made a sufficient showing to warrant an order that Joseph Pilchesky identify any of the “additional defendants” in this case, and especially not the six additional defendants represented by undersigned counsel on this brief.

STATEMENT OF THE CASE

This proceeding arose when Judy Gatelli, a defendant in a defamation action filed by Joseph Pilchesky, filed a counterclaim for defamation against Pilchesky and more than one hundred additional defendants, identified as “John Doe,” who had made statements that Gatelli claimed were defamatory, or constituted a “civil conspiracy” against her, or intentionally inflicted emotional distress on her. On behalf of seven Doe defendants, we argued that Gatelli had not made a sufficient

legal or evidentiary showing requiring that **any** of the Does be identified. We argued that much of what Gatelli claimed to be defamatory was non-actionable name-calling or opinion, and that, at least when a public official is the plaintiff, the additional torts of “conspiracy” or intentional infliction of emotion distress cannot be established unless the plaintiff has already met the requirements for pleading and proving defamation.

On October 10, the Court denied without prejudice Gatelli’s petition to compel disclosure because there had not been sufficient notice to the Does, and because she had not provided evidence of wrongdoing sufficient to override the Does’ First Amendment right to speak anonymously. The Court ruled that she could renew her petition after she supplied more information and evidence sufficient to permit the Court to assess the validity of her claims, and the validity of the Does’ contention that disclosure would violate their qualified First Amendment right to speak anonymously. The Court ruled that Gatelli could renew her petition if she specified which Does were being sued for which statements, specified the cause(s) of actions that she alleges based on those words, and provided “evidence sufficient to establish a prima facie case against each additional Defendant supported by affidavit.” Plaintiff Pilchesky was ordered to provide notice of the renewed petition to each of the additional defendants, and then the Doe defendants were allowed thirty days to file an objection to the disclosure.

On March 20, 2008, Gatelli filed an amended petition that significantly cut the number of Doe defendants she seeks to identify, from over 100 to 42 posters, including five of the seven originally represented by undersigned counsel – aquamg, bigdaddy, bopeep, jimbu15, and

MistyMtTop.¹ Several days later, she provided an affidavit of service of the petition and supporting materials. She has specified a limited number of allegedly actionable statements by each of the posters, and has attached a short affidavit that never addresses each statement individually and explains why it is false and how it has caused her actual damage. Instead, somewhat confusingly, Gatelli simply avers that five categories of statement are false in light of the fact that she meets, or does not meet, a certain characterization. For example, she swears that she has never been convicted of a crime, hence any post calling her a “thief,” or “crook,” and so forth must be false, She never specifies which of the many posts listed in her Amended Petition is false for this reason. Similarly, she swears that she is “not a racist,” hence one who labels her “Nazi” must be making a false statement. She never specifically identifies the posts that are false for this reason. On the subject of actual harm, Gatelli similarly provides no evidence about how each specific statement caused any specific form of harm. Instead, she lumps together all of the allegedly actionable “Statements” and avers that the “Statements” collectively caused certain actual harms.

On April 11, Joseph Pilchesky certified that he had provided notice to the Doe defendants. In addition to the five original clients whom we represented in our original papers, the Doe defendant Powertothepeople has requested our representation and we have agreed to provide representation in opposing the Amended Petition for Disclosure. In this memorandum in opposition, we explain why Gatelli’s amended petition and supporting affidavit do not support her demand for the identification of any of our clients, or, indeed, for identification of most of the other anonymous additional

¹No statements have been identified by either of two other Does whom we previously represented – katie and newgirl. Accordingly, the Court should not require Pilchesky to provide any information about them, and those Does are not discussed any further in this memorandum. Gatelli lists “Joe Pilchesky” as one of the anonymous posters whom she seeks to identify, but we assume that this is an error.

defendants. We begin by listing the statements identified by Gatelli with respect to each of our clients, and explain either why the statements are not defamatory, or why her evidence of falsity does not support identification of those speakers (or both). We then explain more generally why Gatelli's showings are inadequate to support identification of most of the remaining defendants, and finally argue that defendants are entitled to take discovery to pierce Gatelli's very general, somewhat contradictory averments about her supposed harm.

I. GATELLI HAS NOT DEMONSTRATED THAT THE DOES' STATEMENTS ON WHICH SHE RELIES ARE BOTH DEFAMATORY AND FALSE.

Under the Court's Order, as well as the prevailing consensus about the standard to be applied before a would-be plaintiff may compel the identification of anonymous speakers whom she wishes to sue, Gatelli must show that the specific statements are actionable statements of fact, and not merely rhetorical statements of opinion such as name-calling. *Feldman v. Lafayette Green Condominium Ass'n*, 806 A.2d 497, 501 (Pa. Cmwlth. 2002). The question whether a statement is one of fact or opinion is a legal issue for the Court. *Mathias v. Carpenter*, 402 Pa. Super. 358, 362-363, 587 A.2d 1 (1991); *Nanavati v. Burdette Timlin Mem. Hosp.*, 857 F.2d 96, 106-108 (3d Cir. 1988). The raucous and free-wheeling atmosphere of the Doherty Deceit Message Board, full of exaggerations of venom and vulgarity, strongly counsels in favor of construing statements as opinion and not fact. *See Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231, 249-250 (Cal. App. 6 Dist. 2008); *Highfields Capital Management v. Doe* 385 F.Supp.2d 969, 973 (N.D.Cal.2005) ("messages are crude, indecent, or transparently laughable Many of the postings include misspellings, grammatical errors, and/or incomplete thoughts and sentences. . . . Messages on this board reflect considerable venting, much tongue-in-cheek, little pretense at sophistication or

thoughtfulness, and an ample and obvious sense of irreverence). Gatelli herself has admitted that the Doherty Deceit message board is engaged in “incessant ranting” about her. Gatelli Answer to Pilchesky Interrogatory No. 9 (attached). A “rant” is inherently an opinionated statement, not a discourse on fact.

Second, the plaintiff must make a specific and non-conclusory showing that any statements that **are** actionable are false – not just a vague affidavit asserting falsity or using negative pregnant, but a specific showing of the **facts** that make a given criticism false as well as defamatory. For example, we attached to our opening brief the affidavit that was filed in *Alvis Coating v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), as an example of the proper sort of showing, and the opinions in such cases as *Sony Music and Immunomedics v. Doe*, 342 N. J. Super. 160, 775 A.2d 773 (N.J. Super. 2001) (companion case to *Dendrite*) describe the level of detail of the affidavits on which the courts there relied. Because the plaintiff here is a public official attempting to sue her constituents, a particularly detailed showing of the elements of the prima facie case should be required.

Not a single one of the statements of the six Does represented by undersigned counsel meets that standard, and very few of the other statements on which Gatelli seeks identifying information meet that standard either. In the sections below, we discuss, defendant by defendant and statement by statement, Gatelli’s failure to show defamatory statements of fact and failure to show falsity.

A more general point that is applicable to **all** the defendants is that, as a public official, Gatelli must allege and prove actual malice – knowledge that the stated facts were false, or reckless disregard for the probable falsity of the statements. In effect, this standard requires that the defendant had “subjective awareness of probable falsity,” *Herbert v. Lando*, 441 U.S. 153, 156

(1979), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n. 6 (1974), or “a high degree of awareness of . . . probable falsity.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), quoting *Garrison v. State of Louisiana*, 379 U.S. 64, 74(1964). The Amended Petition nowhere alleges that the statements identified in the Petition were published with actual malice. Instead, her only allegation pertaining to “malicious” or “reckless” action is that Defendants allegedly “acted with malicious intent and in reckless disregard of the fact that their Statements and Subsequent Statements would produce severe emotional distress in Gatelli.” Amended Petition ¶ 15, at 44-45. But this sort of “malice” does not support a finding of liability for defamation.

Although this allegation is apparently advanced in support of Gatelli’s claim of intentional infliction of emotional distress, as shown in our original opposition to the Petition for disclosure, the Pennsylvania courts have specifically held that public figures cannot sue for intentional infliction of emotional distress. *Reiter v. Manna*, 436 Pa. Super. 192, 200, 647 A.2d 562, 567 (Pa. Super. 1994); *Jones v. City of Philadelphia*, 73 Pa. D. & C.4th 246, 270 (Pa. Com. Pl. 2005), *aff’d*, 893 A.2d 837, 845-846 (Pa. Cmwlth. 2006). *Hustler v. Falwell*, 485 U.S. 46 (1988), itself was a case in which a claim for intentional infliction of emotional distress under Virginia law was held barred by the First Amendment because the plaintiff could not meet the constitutional standards for a defamation claim.² Consequently, her Amended Petition for disclosure stands or falls on whether she established the elements of her defamation claim against each Doe defendant.

² Similarly, courts have repeatedly held that a claim for “civil conspiracy” to harm a public figure plaintiff by publishing damaging statements about him or her must meet the full constitutional standards for a defamation claim. *Barr v. Clinton*, 370 F.3d 1196, 1202-1203 (D.C. Cir. 2004); *Tierney v. Vahle*, 304 F.3d 734, 743 (7th Cir. 2002); *Windsor v. The Tennessean*, 719 F.2d 155, 162 (6th Cir. 1983).

A. GATELLI HAS NOT ESTABLISHED HER RIGHT TO IDENTIFY THE INDIVIDUALLY REPRESENTED DOE DEFENDANTS.

We address the individually represented Doe defendants in the order that they appear in the Supplemental Petition.

1. bigdaddy

Gatelli seeks to identify the poster “bigdaddy” for placing the following statement on the message board:

bigdaddy

Re: Tax bills rolling in...Thank you MCGoff Gatelli Fanucci and Doherty!!

Hey, "leave McGoff Alone" you are kidding right?????? We are all picking on him because he is on council?????? Last time I checked he was one of the votes that screwed us including you on our taxes!!!! If you do not live in Scranton then you should read up on what has happened to this city in the last 5 yrs or so and then you can just shut the F%\$k up....If you do live in Scranton then you need to pull your head out of McGoof's ass and read your tax bill ass*^, if your taxes did not go up then please tell us your secret...In the mean time if you feel that you need to defend the scumbags that are rapping and piliging our city then go over to that other site and leave us alone....Like your buds before you I ask....

If you can come to this table and debate these facts with facts then please do, we will welcome the discussion, but if you are only going to put your 2 cts in then shut up and go away becasue really there is no defense for what this fuc%\$#@ Scum bags have done to the residents of Scranton.....

I would like to see the 3 rats on council, the head douche bag and his merry band of puppets stand up to the people and have a open meeting to debate the crisis in the city, then we can stone the fuc%\$#^ Nazis like the French did when paris was liberated.....

Judy, Sherry, Bob, Chris, you can all GO FU\$# YOURSELVES for none of you will ever see office again.....

As we understand it, the entire statement has been set forth in the Amended Petition, as required by the Court’s October 10 order; the italicized portion reflects the allegedly defamatory statements.

The first paragraph is not at all about Gatelli (and hence would not be “of and concerning”

Gatelli, a constitutional requirement for defamation liability, *New York Times v. Sullivan*, 376 U.S. 254, 288 (1964)). And, in any event, none of that paragraph is italicized, and hence cannot be the basis for Gatelli's defamation claim against this anonymous speaker.

Gatelli's affidavit, Exhibit A to the Amended Petition, suggests that there are two respects in which she believes that bigdaddy's statement about her (the italicized words) are false. First, she asserts that she is "not a 'political puppet' for the Administration of the City of Scranton," hence any statements that she is are false. Thus, she takes issue with the statement, "I would like to see the 3 rats on council, the head douche bag and his merry band of puppets stand up to the people and have a open meeting." However, the word "puppet" is plainly an epithet that expresses opinion – an unquantifiable expression of view that she casts her vote with the mayor too frequently, and does not vote against his positions often enough, a controversy that has been reported in the local press. *E.g.*, Brown, *City Council adjourns amid corruption cries*, http://www.thetimes-tribune.com/site/index.cfm?newsid=18634322&BRD=2185&PAG=461&dept_id=590572&rfi=8. And quite properly, courts refuse to entertain defamation claims based on the accusation of being a political "puppet." *E.g. Jaliman v. Selendy*, 7 Misc.3d 1007, 801 N.Y.S.2d 235 (N.Y. Sup. Westchester Cy. 2005), at *10 (calling a candidate a "puppet," among other things, "constitute[s], in the context uttered, rhetorical, loose, figurative or hyperbolic speech that is not actionable"); *Pusch v. Pullman*, 11 Misc.3d 1074, 816 N.Y.S.2d 700 (N.Y. Sup. N.Y Cy. 2003) at *5 (reference to "puppet" in condo election is non-actionable "loose, figurative, or hyperbolic statement").

After all, how much voting support for a political leader is too much? 95% of the time? 80% of the time? Not always, but 100% of the time on the really important votes? Supporting the mayor's budget when some citizens think it costs too much? No reader of this statement could know

exactly what bigdaddy's criticism means, hence it is simply a derogatory statement of opinion, not an actionable statement of fact. Otherwise, a Democratic candidate could sue any time her Republican opponent campaigned on the argument that the Democrat is a "puppet" for the unions, or a Republican could sue whenever a Democrat said that she was a Big Business puppet.

Second, Gatelli apparently seeks to sue over the use of the word "Nazi" in the passage, "then we can stone the fuc%\$#^ Nazis like the French did when paris was liberated." Gatelli claims that the falsity of this statement is shown by the fact that "I am not a racist [hence a]ny and all statements likening me to Hitler are all equally defamatory and equally untrue." This claim falls both because the statement is not defamatory and because Gatelli's evidence does not show that it is false. Nothing in the statement accused Gatelli of being a racist. If anything, it is a reference to the controversy over whether, during her tenure as City Council President, Gatelli was unduly abusive to speakers and quashed free speech at City Council meetings by ruling speakers out of order, and by adopting security measures for the alleged purpose of intimidating her critics. Brown, *Hearing highlights divisions in council*, http://www.thetimes-tribune.com/site/index.cfm?newsid=18629295&BRD=2185&PAG=461&dept_id=590572&rfi=8; Brown, *ACLU takes closer look at City Council meetings*, http://www.thetimes-tribune.com/site/index.cfm?newsid=18603174&BRD=2185&PAG=461&dept_id=590572&rfi=8. Thus, her denial of being a racist does not show that the statement is false. And, in any event, modern courts consistently hold that calling somebody a "Nazi" is figurative and rhetorical speech that is not actionable as libel. *Konop v. Hawaiian Airlines*, 302 F.3d 868, 882-883 (9th Cir. 2002); *Dunn v. Gannett New York Newspapers*, 833 F.2d 446, 454 (3d Cir.1987) ("Such name calling, in the context of public debate, is protected speech because of the profound national commitment that debate on public issues should be uninhibited, robust, and wide

open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

Gatelli cites a 1947 decision that supposedly held that being called a “Naziphile” is defamatory. Amended Petition at 4 n.3. But even if that is what the case held, it would be distinguishable – during World War II, calling someone a Nazi had a rather different connotation than it does today. And, in any event, Gatelli significantly overstates the holding of that case.³

Moreover, the entirety of bigdaddy’s statement shows that it states opinions, not facts. Bigdaddy begins with a rant about Council Member McGoff (which is not said to be actionable), which not only describes him using foul language, but also uses foul language to address the previous poster to which this message replies. Replete with spelling errors, bigdaddy moved on to refer figuratively to members of the Council as “rats” and to the mayor as a “douche bag”; to incorporate the word “puppets” into the phrase “the head douche bag and his merry band of puppets”; to include the word “Nazis” into the phrase, “stone the fuc%\$#^ Nazis”; and to end his message with the words “Judy, Sherry, Bob, Chris, you can all GO FU\$# YOURSELVES for none of you will ever see office again.....” Bigdaddy made clear that he was simply expressing opinions about Gatelli and her Council colleagues, not making the defamatory statements of fact that Gatelli

³ Gatelli claims that *O’Donnell v. Philadelphia Record*, 356 Pa. 307, 51 A.2d 775 (Pa. 1947), “hold[s] that referring to another as a ‘Naziphile’ is libel per se.” In fact, the statement held to be libel per se was: “ John O'Donnell is a Naziphile. He makes no secret of it. On numerous occasions, to all friends and bar-flies within hearing, he has broadcast his sympathy with most of Hitler's aims-such as destruction of the British Empire, suppression of labor unions and liquidation of Jews.” The court’s analysis of the statement’s defamatory nature focused on the accusation that O’Donnell supported “liquidation of Jews.” Nothing in bigdaddy’s statement is comparable to that.

seems to assert.⁴

2. bopeep

Gatelli contends that the following statement is actionable:

Bo peep
Re: Tonights Meeting is Officially Cancelled

Nobody, you didn't disappoint me once again. One thing though. This is not Judas hiding anything for herself. It's once again _____ hiding things and being used by DOherty. Fill in the blank. There have been many in the past, her, Fatassica and McGoff now, and numerous waiting in the wings for their turn on the proverbial DObee Diving Board. *Prostitution is the oldest occupation.* And I'm not talking about sex.

Gatelli's only effort to show the falsity of this statement is based entirely on paragraph 6 of her affidavit, which avers that she is a "heterosexual monogamous married woman" who has "never engaged in any type of sexual relations with Mayor Christopher Doherty or any other individual specifically identified or identified by innuendo." ¶ 6.

It is certainly remarkable that Gatelli italicizes the part of the statement that used the word "prostitution," which she alleges is actionable, but not the qualifying phrase that follows: "And I'm not talking about sex," as if that could lead the Court to conclude that bopeep was literally accusing Gatelli of being a streetwalker. Gatelli's affidavit denies sexual activity, but that denial does not make this statement false, not least because bo peep specifies that she is "not talking about sex." Indeed, even without the "And I'm not talking about sex" qualifier, no reasonable reader would understand this phrase, **in context**, as a reference to sexual activity. It is simply a highly opinionated

⁴Gatelli's affidavit includes the word "scumbag" among the characterizations that she swears are "certainly false," ¶ 10, but she does not italicize this word in her quoting of bigdaddy's statement. If, in fact, it is Gatelli's argument that bigdaddy's use of that word is defamatory, the response is that it is mere namecalling – an offensive word, to be sure, but not actionable as libel. No reader would believe that bigdaddy was saying literally that she is a used condom.

was of expressing the opinion that members of the City Council, not only in the present and past, but likely in the future as well, are too willing to do Mayor Doherty's bidding. Whether that opinion is justified is the sort of disagreement that should be settled at the ballot box, and not in the courtroom.

Gatelli also identifies the following statement as defamatory:

Bo peep

Re: "This is your Life, Judy Gatelli", and it's open season on your character.

Here's my little contribution to Judas' lawsuit. I guess Atty, Rino thought I said something wrong.

Nobody, you didn't disappoint me once again. One thing though. This is not Judas hiding anything for herself. It's once again _____ hiding things and being used by Doherty. Fill in the blank. (Meaning many have Done the same) there have been many in the past, her, Fatassica and McGoff now, and numerous waiting in the wings for their turn on the proverbial DObee Diving Board. (meaning many have Done Doherty deeds and got personally caught up in his antics)

Prostitution is the oldest occupation. And I'm not talking about sex. (An analogy nit wit and show me where I'm talking specifically about Judas). Come and get it Atty. DObee. Hey Joe, maybe we should SHED a little light on our new Atty. Friend?

This statement on the message board simply informs readers of what previous statement of hers Gatelli had already put in her complaint. The statement is not actionable (and there is no evidence of falsity) for the same reason as discussed above with respect to the first statement. Certainly bopeep's attack on Gatelli's counsel cannot be condoned, but it does not form a basis for a defamation action by Gatelli.

3. Jimbu15

Gatelli contends that the following statement is actionable:

Jimbu15

Re: Gatelli: "I'll give up my seat if my husband wins"

The only way "Nazi" Gatelli {Sig Hiel} is giving up her Council seat is when her fat, Nazi, A\$\$ doesn't fit in it anymore!! Hey Ursula, why don't you shove another Cannoli down your fat pie-hole and decide whose rights you're gonna violate this week!!!.....Jimbu15.....

Gatelli apparently takes exception to the reference to herself as a Nazi. This reference is not actionable, and has not been shown to be false, for the same reasons as discussed above with respect to bigdaddy. Counsel certainly do not condone the offensive references to Gatelli's personal appearance, but they are not actionable defamation.

4. MistyMtTop

Gatelli identifies the following statement as being actionable:

MistyMtTop

Why Gatelli does not have to resign

*Agressive speakers, I can't imagine why in the world they would be so aggressive??? She allowed Fanny to make her childish comments & then laugh in the taxpayers faces, She said she wanted McGoof on council because he had no further political agenda, She's looking out for her family & isn't afraid to admit it, She called a resident a liar who has proof that she's a liar, She got into a verbal showdown w/someone who is "limited". There's to much more to type. *The only Judy we saw last week was an overmedicated one (& don't say she wasn't, her head was bobbing more than Fanny's)* As far as not provoking her, Who provoked her??? *Residents go there w/their concerns & she does NOTHING!!!!!! You can't rob people blind, laugh in their faces & demand respect. It doesn't work that way.**

Given Gatelli's claim that she is taking medication for her emotional distress as a result of such statements as this one, it would certainly be odd if she contended that a statement that she was

“overmedicated” was false and defamatory. In any event, nothing in her affidavit seems to aver that that part of the statement is false. Instead, Gatelli apparently takes issue with the clause “You can't rob people blind,” which, according to her affidavit, must be false because “I have never been convicted of a crime.” But even if this statement were properly taken as an accusation of literally having “robbed” money from people, the fact of never having been convicted – which we assume to be true – does not show that the person has never committed a crime. But more important, in context, this statement is a forceful statement of opinion, expressing the view that Gatelli’s votes on the City Council take too much money from the taxpayers without providing enough in return. This is pure opinion and not actionable.

5. Powertothepeople

Gatelli contends that the following statement is actionable:

Powertothepeople

Re: Get back on Gatelli tonight

I disagree with the post advocating dressing up in a suit to speak at Council as means to make your remarks more credible. It is not he speakers who need more credibility....it is the Council. *Fanucci, Gatelli and McGoff could wear Giorgio Armani every week and they would still be liars and thieves.* They have zero credibility. The fact is that no one, with the exception of Janet Evans, is listening and they couldn't care less what speakers say or wear. It was obvious las evening that they were happier than pigs in s*** because Janet wasn't there to “annoy“ them.

This statement is not actionable for reasons similar to our arguments above with respect to MistyMtTop. In context, this is not a literal accusation of stealing money, but simply a rhetorical expression of lack of confidence, comparing the relative credibility (in the poster’s view) of citizens who speak at City Council meetings, as compared to members of the Council themselves. The context of the whole statement – typographical errors, the scatological reference, the reference to

Giorgio Armani – not to speak of the context on this particular message board, which Gatelli herself describes as “ranting,” all tip off the reader to the fact that it is opinions and not facts that are being stated. Referring generally to a group of politicians as “liars and thieves” is a statement of opinion, *e.g.*, *Brewington v. Sheridan Broadcasting Network/American Urban Radio*, 49 Fed. Appx. 319, 320 (D.C. Cir. 2002), just as accusing a developer who drives a hard bargain as engaging in “blackmail” does not amount to an accusation of a crime. *Greenbelt Cooperative Publishing Ass’n v. Bresler*, 398 U.S. 6, 13 (1970). *See also Polish Am. Immigration Relief Comm. v. Relax*, 189 A.D.2d 370, 373-74, 596 N.Y.S.2d 756, 758-59 (1993) (statement about Polish relief organization, that it consisted of “false do-gooders” and “thieves who should have been put to prison long ago” was “clearly rhetorical hyperbole and vigorous epithet”). And even if the statement were a factual accusation of stealing money, the averment that Gatelli has never been **convicted** of a crime does not negate a statement that she has been a “thief.”

6. aquamg

Gatelli contends that the following statement is actionable:

Aquamg

Re: Inside Judy Gatelli’s brain

You asked what makes Judy Gatelli tick? Pure greed and not a moral fiber in her body. One day she will understand that money for herself and her family is not the end all. Especially when she received it by taking from us. Judy Gatellis is all greed and line thy pockets–period!!

Because no part of the statement is italicized, it is not clear precisely which part is claimed to be defamatory. Nothing in Gatelli’s affidavit specifically denies any part of this statement, and, in any event, the opinionated nature of this message is apparent. Moreover, we trust that Gatelli will not dispute the fact that, in addition to the fact that she herself was compensated for her service as City

Council President, both her daughter and her son-in-law have been employed on the public fisc, which quite literally puts money in her own pockets as well as her family's. Aquamg's opinion that Gatelli does not provide benefit to the public commensurate with what she and her family receive from public employment is just that – an opinion – and is not actionable as defamation, even if Gatelli had submitted an affidavit showing that the statement about her was false.

B. GATELLI HAS NOT SHOWN ENTITLEMENT TO IDENTIFY MOST OF THE REMAINING DOE DEFENDANTS.

Although undersigned counsel represent only six of the additional defendants whom Gatelli now seeks to identify, the foregoing argument shows that most of the remaining Doe defendants are also entitled to remain anonymous. As argued above, Gatelli has not shown any entitlement to proceed against those who have used words similar to “Nazi”; or those who have used such words as “thief” or “crook” in a manner that shows they are stating generalized opinions; or those who have called her a “puppet” or similar references to her being too closely allied with the mayor; or words relating to prostitution or other slang sexual references that are simply derogatory as opposed to actual assertions that Gatelli had sex with Mayor Doherty.⁵ Except for the word “scumbag,” we have not addressed specifically the string of epithets enumerated by Gatelli in paragraph 10 of her affidavit – “hypocrite in practicing my Catholic faith,” ‘lying bitch,’ ‘pig,’ ‘scumbag,’ historically repulsive political figure,’ ‘lunatic,’ ‘cheat,’ ‘corrupt,’ ‘cancer,’ ‘betrayal,’ and/or ‘political maggot.’” But the very placement of these words adjacent to each other in the Gatelli affidavit only serves to

⁵Indeed, some of the words mentioned in paragraph 6 do not even have an apparent sexual connotation. A “bimbo,” for example, is an attractive but clumsy or stupid woman; it does not imply sexual activity with anyone in particular. Calling Gatelli a “dyke” or “butch”, although certainly offensive, does not label her a lesbian; it suggests that she is a masculine or generally unattractive looking woman (rather the opposite of a bimbo).

emphasize how clearly they state opinion rather than fact, and how obvious the opinion-oriented context of the Doherty Deceit message board is. Nor, indeed, does Gatelli's affidavit meet any of these statements directly or even attempt to explain what the contrary truth is, as she at least purported to do in the preceding paragraphs; instead, she contents herself with the bald averment that these epithets are "certainly false."⁶ For these reasons, almost all of the Doe defendants, and not just the six Does represented by undersigned counsel, should be protected against Gatelli's motion to identify them.

II. GATELLI'S SHOWING OF ACTUAL HARM IS INSUFFICIENT BOTH TO SATISFY HER PRIMA FACIE CASE, AND TO OVERRIDE THE DEFENDANTS' INTEREST IN AVOIDING BEING IDENTIFIED TO PUBLIC OFFICIALS WHO CAN HARM THEM, AND DEFENDANTS ARE ENTITLED TO TAKE HER DEPOSITION TO PIERCE HER CONCLUSORY AVERMENTS ON THAT ISSUE.

Even if the Court concludes that Gatelli has made a sufficient showing of both legal merit and factual falsity with respect to one of more statements, her evidence of actual harm is wanting, for several reasons.

First, Gatelli has not made a sufficient showing that any single one of the Statements on which she now basis her claimed right to compel the identification of the Doe defendants caused her actual harm. Her affidavit is phrased at an extraordinary level of generality – all of the statements mentioned in the Amended Petition have, collectively, have allegedly caused her emotional distress and led her to seek medical attention and take medication. Gatelli is, of course, entitled to sue as many critics as she likes, but American justice is individual, not collective. In order to establish a

⁶The assertion that the statement that Gatelli is a "hypocrite in practicing my Catholic faith" is defamatory raises Establishment Clause problems. *See, e.g., Hartwig v. Albertus Magnus College*, 93 F. Supp.2d 200, 218-219 (D. Conn. 2000). No court should be required to decide what tenets or practices are so central to a religion as to make failure to follow them hypocrisy.

prima facie case that a particular defendant's statements have caused her actual harm, Gatelli must present averments showing that **that defendant's** statements are responsible for the harm. In that regard, Gatelli's apparent inability to narrow her complaint down to one or two or three defendants whose statements about her are truly actionable and false simply makes it more difficult for her to prevail against **any** single defendant. Indeed, if, as we predict, the Court excludes many of the statements alleged in the Amended Petition, Gatelli will be faced with the problem that her alleged harm was caused by non-actionable statements.

Second, Gatelli asserts that she has never read the Doherty Deceit Message Board. Gatelli Answer to Joseph Pilchesky Interrogatories, No. 134. That fact makes it highly questionable that she can tie her claimed actual harm to any specific one of the many different statements that she claims are actionable.

Third, there is substantial reason to question the veracity of Gatelli's affidavit. Press reports make clear that Gatelli was in tears as a result of public criticisms, made to her face at City Council meetings, well before the dates of some of the statements on which she now seeks to proceed. Brown, *City Council adjourns amid corruption cries*, http://www.thetimes-tribune.com/site/index.cfm?newsid=18634322&BRD=2185&PAG=461&dept_id=590572&rfi=8. Gatelli's own Amended Petition recites statements on the Doherty Deceit message board that mention this; she accuses some of her detractors of being unduly gleeful about her distress. But that fact simply causes the reasonable observer to question whether the Message Board statements actually had any impact on Gatelli's need for medical attention or medication.

Moreover, considered together with known facts and with Gatelli's statements in other documents in this case, it appears, regrettably, that Gatelli may have signed her affidavit without due

regard for her oath. For example, the first paragraph of Gatelli's affidavit, which was signed on March 20, 2008, recites, "I am currently President of the Scranton City Council." However, the minutes of the Scranton City Council, which are available on the city's web site at http://www.scrantonpa.gov/city_council.html, reflect that as of the City Council meeting dated January 15, Gatelli had been succeeded as Council President by Bobby McGoff; Gatelli then became City Council **Vice** President. [http://www.scrantonpa.gov/council_agendas/2008/01-15-2008% 20 Minutes.html](http://www.scrantonpa.gov/council_agendas/2008/01-15-2008%20Minutes.html). Similarly, although Gatelli's affidavit avers "I have sought medical attention and am currently taking medications for my distress and anxiety," ¶ 15, in answers to interrogatories from Joseph Pilchesky that she signed less than two months before, Gatelli answered a question about the medications that she was allegedly taking by stating that she was **not** taking any medications. Gatelli Answer to Interrogatory No. 7, January 31, 2008 (attached). Either one of her averments is false, or she **began** taking the medications so long after the allegedly actionable statements that the Court may well question whether the statements caused the need for medication. In addition, we have obtained information suggesting that Gatelli may well have been seeing doctors for mental anxiety well before the first date of the statements that she now alleges are responsible for her condition.

In *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003), Judge Wettick ordered disclosure only after finding genuine issues of material fact requiring trial, and then only after he had allowed the Doe defendant there to take the deposition of the plaintiff in order to pierce the general averments of her complaint and supporting affidavit. If the Court concludes that any of Gatelli's claims survive the arguments made in the foregoing section of this brief, defendants intend to ask Gatelli to produce evidence concerning her medical condition since January 1, 2005, including all pharmacists and medical professionals she has visited during that

period, and all documents pertaining to her prescriptions and other medications during that period. Depending on what claims of falsity remain, Gatelli may be asked to produce documents relevant to those claims, as well. Finally, defendants will seek to take Gatelli's deposition with respect to her claims of both falsity and actual harm caused by the Doe defendants whom she seeks to identify.⁷

Finally, once all of this evidence is considered, the Doe defendants will ask the Court to balance the interest of this elected public official in proceeding with her defamation claims against her constituents, against the interest of the constituents in remaining anonymous, in light of the fact that Gatelli and her political allies are well-positioned to do them harm, and in light of the evidence, described in our opening brief, of the abuse of official power to take action against critics. The Court did not reach the issue of whether to adopt the balancing stage of the *Dendrite* test. *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001). No reported decision in Pennsylvania has yet considered that part of the test, which, since we filed our opening brief, was embraced by the Arizona Court of Appeals in *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007). Applying that balancing test, we believe that the only proper outcome here would be to deny Gatelli's Amended Petition to disclose the identity of the Doe defendants.

CONCLUSION

Gatelli's Amended Petition to identify the Doe defendants should be denied outright. In the alternative, the Doe defendants should be allowed to pursue the limited discovery described above.

Respectfully submitted,

⁷Undersigned counsel Mr. Levy has had initial discussions with Mr. Reihner about such discovery. Counsel agreed that further discussions should await the filing of this brief, as well as any further averments or amended petition that Gatelli might choose to make in response.

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