To be Argued by:
PAUL LEVY
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

GSB GOLD STANDARD CORPORATION AG,

Petitioner-Respondent,

– against –

GOOGLE LLC and GODADDY INC.,

Respondents.

Behind MLM, The Anonymous Internet Poster Whose Identity is Sought by The Subpoenas,

Non-Party Appellant.

Appellate Case No.: 2023-05565

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INTRODUCTION

This brief addresses a question of first impression in this Court, but well-settled by appellate courts elsewhere: what standard governs judicial evaluation of a request to compel disclosure of information identifying pseudonymous defendants whose online statements are said to be actionable? Courts across the country have held in these kinds of cases that without prima facie evidence that plaintiffs could succeed on their underlying claims, and a balancing of the potential harms to the speaker from being identified and the plaintiff from withholding enforcement of the subpoena, the First Amendment right to speak anonymously bars such discovery.

Plaintiff GSB Gold Standard Corporation AG ("GSB"), which is incorporated in Germany but based in Dubai, sells investments backed by cryptocurrency but has been banned from offering its wares in many jurisdictions in the United States, both because it has never registered to sell securities and because state securities commissions (as well as securities commissions abroad) have deemed it a scam. In this proceeding, GSB is seeking to identify BehindMLM, a blogger who reports on multi-level marketing schemes and who was among the first to call public attention to the Ponzi-like character of GSB's operations. To secure that identifying information, GSB filed a legal proceeding in Germany against Google, alleging that BehindMLM's statements about it were false and defamatory,

and obtained ex parte relief directing Google to suppress in Germany access to three pages of BehindMLM's eponymous blog.

GSB then filed a petition for pre-litigation discovery in the court below, relying on the German orders, seeking a court order compelling Google, which hosted the blog, and GoDaddy, which has registered the domain name for the blog, to disclose BehindMLM's identity. BehindMLM appeared by counsel to oppose the petition for discovery, invoking her First Amendment right to speak anonymously and arguing, based on a line of cases holding that evidence to support the claim and a balancing of interest are required in such cases, that the petition for discovery should be denied for lack of evidence to support GSB's claims. Instead of supplying affidavits and other evidence to support its claims, GSB stood on the German court order as providing sufficient support for its claim of defamation. BehindMLM pointed out, in reply, that because she was not a party to that litigation, it would violate due process and public policy to compel her identification based solely on the German judgment. Nonetheless, the Supreme Court granted the petition for discovery based solely on the German orders. This Court granted a stay pending appeal, and should now reverse.[1]

[1] This brief refers to BehindMLM using generic female pronouns, not to specify her gender.

QUESTIONS PRESENTED

1. Did the Supreme Court err by ordering Google and GoDaddy to identify BehindMLM without following the proper standard for stripping an anonymous speaker of her First Amendment right to speak anonymously?

2. Did petitioner GSB make a sufficient showing that its purported libel claims have legal and evidentiary merit to warrant depriving BehindMLM of her First Amendment right to speak anonymously?

3. May a court give preclusive effect to a foreign court order against a person who was not a party to the foreign legal proceeding?

4. Does the balance of equities favor compelled identification of the anonymous blogger in this case?

BACKGROUND

As electronic communications have become essential tools for speech, the Internet has become 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:*

> From a publisher's standpoint, [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. . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

521 US 844, 853, 870 [1997].

Knowing that people love to share their views, many companies, such as Facebook and Twitter (now "X"), have created platforms where members of the public may create accounts, post information, and express opinions. Similarly, Blogger, WordPress and TypePad give individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, companies, or other topics while leaving it open for visitors to post their own comments. Yahoo! and Raging Bull host message boards for every publicly traded company where investors, and other members of the public, can post discussions about the company. Other web sites, such as Yelp and Angie's List, have organized forums for consumers to share their experiences with local merchants. And still other sites are organized by industry, such as Trip Advisor, which hosts reviews of hotels, restaurants and tourist venues; 800Notes, where recipients of telemarketing calls can describe their experiences with cold marketing calls; RateMD and Healthgrades, which provides forums for patients to review

medical professionals; Houzz, which provides a forum for discussion of building contractors; Glassdoor, a site for employees to review their employers; and Avvo, which enables clients and other lawyers to post reviews of lawyers.

The individuals who post messages on such web sites often do so under pseudonyms—much as truck drivers might use "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but many people choose nicknames that protect the writer's identity from those who disagree with him or her, and hence encourage the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature that makes them very different from almost any other form of published expression. Although members of the public can criticize as well as praise on these forums, people who disagree with published criticisms can typically respond immediately at no cost, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. Response to criticisms published in an Internet forum will often have the same prominence as the offending message. A blog is thus unlike a newspaper, which often does not print responses to its criticisms, and, indeed, cannot be required to do so. *See Miami Herald Pub. Co. v. Tornillo*, 418 US 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, provides the best forum for the resolution of disputes about facts and opinions.

A. Facts of This Case

Since 2010, appellant has operated the blog BehindMLM, which is devoted to coverage of multi-level marketing schemes. As explained on BehindMLM's "about" page, https://behindmlm.com/about/:

> There's a lot of rubbish MLM review and news sites on the internet that masquerade solely as lead generation tools for their owners. I believe there's a distinct lack of concise and clear information out there regarding companies within the MLM industry and MLM itself.
>
> The aim of Behind MLM is to fill that void and prove to be a useful resource to people curious about the MLM industry and the companies that exist within it.
>
> I created BehindMLM out of a genuine interest in the MLM industry and a desire to provide the public with relevant and accurate MLM information, news and company reviews.

The author of BehindMLM maintains the blog anonymously. Articles are posted without any byline, and the blogger participates in discussions in the comment section using the pseudonym "Oz." Early in the site's existence, a reader posted a comment to the "about" page, challenging BehindMLM's decision to blog

anonymously, saying that he had extensive experience with multilevel marketing, and demanding that BehindMLM identify herself and explain how she had enough knowledge and experience that readers should trust her reporting as authoritative. Oz replied that her own experience did not matter, and that readers should not accept her statements based on a claim of knowledge and expertise. Rather, she explained,

> the information I publish should be able to stand on its own, regardless of who I am. It's not about me, it's about reviewing and analysing MLM and the various opportunities available. . . . I'm not affiliated with any MLM company. Instead I try to provide information from the viewpoint of someone doing their own research and analysis into a company. . . ."

Id. The blog posts are generally supported by excerpts from documents and videos that BehindMLM has located through her own research. Members of the community of viewers discuss the blog posts in the comment section found on each page, BehndMLM participates in those discussions to elucidate her analysis and respond to criticism.

BehindMLM has an additional reason to maintain anonymity. Multi-level marketers have large sums of money at stake, giving them an incentive to try to suppress criticism. BehindMLM worries that they may use influence in government bodies, or indeed bring litigation in judicial systems that favor the powerful few over the many: as BehindMLM explains in comments on the "about"

page, “Easier to bog people down in the legal system and hope they fold than to engage people.” *Id.*

Even worse, some multi-level marketing schemes are operated by criminal gangs who might use less savory methods to stop their critics. For example, BehindMLM has reported extensively on a multi-level marketing scheme called One Coin. *See* https://behindmlm.com/companies/onecoin/. Its founder, Dr Ruja Ignatova, is a fugitive from justice on the FBI’s Ten Most Wanted List, which indicates that she travels with armed guards. https://www.fbi.gov/ wanted/topten/ruja -ignatova/@@ download.pdf. The BBC reports that the U.S. Department of Justice describes One Coin as having ties to organized crime, and that those who criticize the operation openly have had their lives threatened. *See* https://www.bbc.com/news/stories-50435014. *See also Ruja Ignatova’s warning underscores OneCoin mafia ties*, (Nov. 18, 2019), https://behindmlm.com/companies/onecoin/ruja-ignatovas - warning-underscores-onecoin-mafia-ties/ (discussing Ignatova’s ties to the Russian Mafia and her mysterious disappearance). An international criminal who ran a different Ponzi scheme, whom movant had criticized in several blog posts, and whose scheme fell apart after that criticism, has threatened to shoot her. *Jan Gregory issues death threat against BehindMLM’s Oz* (June 22, 2023), https://behindmlm.com/

companies/jan-gregory-issues-death-threat-against-behindmlms-oz/ (online death threat).

In this proceeding, GSB seeks to identify BehindMLM. Although GSB itself is incorporated in Germany, the findings of the Texas Securities Commissioner show that it is part of a network of corporate entities known as GSB Group or GS Partners, headed by Josip Heit, and which has been found by numerous regulatory bodies to be based in Dubai. *In the Matter of GSB Gold Standard Bank et al.*, Order No. ENF-23-CDO-1879 [Tex St Sec Board Nov 16 2023] *available at* https://ssb.texas.gov/sites/default/files/2023-11/ENF_23_CDO_1879.pdf (cited here as "Texas Order"). GSB sells investments backed by cryptocurrency, *id*. ¶¶ 2-5, an arrangement which, the Securities and Exchange Commission has warned, is often used by perpetrators of Ponzi schemes; the SEC warns investors to be cautious about such investments. U.S. Securities and Exchange Commission, *Investor Alert: Ponzi Schemes Using Virtual Currencies*, https://www.sec. gov/files/ia_virtual currencies.pdf. Over the past few years, GSB and its various corporate affiliates (enumerated in the Texas Order) have held glitzy sales events promoting its investment vehicles online and in various countries as well as several places in the United States. Texas Order ¶¶ 3, 32-33. BehindMLM has been reporting on GSB since February 2021, *see*

GSPartners Review: Josip Heit's G999 Karatbars spinoff, Feb. 24, 2021, https://behindmlm.com/ mlm-reviews/gspartners-review-josep-heits-g999-karatbars-spinoff/, and has carried scores of blog posts about that company since then. *See* https://behindmlm.com/ companies/gspartners/.

During the pendency of this litigation, several state and Canadian securities commissions conducted a coordinated investigation of GSB, Texas Order ¶ 7, culminating in several regulatory rulings including the Texas Order. The Texas Order is a sixty-one page document that details GSB's "various fraudulent investment schemes," ¶ 1, and bans GSB from offering investments in Texas. Texas Order at 60. This order was followed by orders in several other states as well as other countries, cracking down on the entire GSB network of entities, including specifically GSB Gold Standard Corporation, finding that it had engaged in securities fraud and had failed to register for the sale of securities, and forbidding it from offering its investments in their respective jurisdictions.[2] As a

[2] *In the Matter of GSB Gold Standard Bank Ltd. d/b/a GSPartners, et al.*, WDFI Case No 246723 at ¶ 5 (EX) [Wis Dept Fin Inst Nov 16 2023] *available at* https://dfi.wi.gov/Documents/Securities/RegistrationOfProfessionals/EnforcementAdministrativeOrders/2023/20231116GSBGoldStandardBankLtd.pdf; *Kentucky Dep't of Financial Institutions v. GS Partners Global and Josip Heit*, No. 2023-AH-0027 [Ky Dept Fin Inst Nov 16 2023] *available at* https://kfi.ky.gov/Documents/GS%20Partners%2c%20Josip%20Heit%202023AH0027.pdf; *GS Partners et al.,* 2023 BCSECCOM 529 [BC Sec Comm'n Nov 16 2023] *available at* https://www.bcsc.bc.ca/-/media/PWS/New-Resources/Decision-and-

result, the website of GSPro, the latest manifestation of the GS Partners scheme, now carries the following warning:

> GSPartners, along with related entities and individuals (collectively, "The Companies"), have been served with cease-and-desist orders and other legal process by the U.S. states of Alabama, Arizona, Arkansas, California, Florida, Kentucky, New Hampshire, Texas, Washington, and Wisconsin. At this time, The Companies have ceased doing business in the United States and Canada. We are not offering any services to, engaging in any transactions with, or accepting any funds from U.S. or Canadian customers. No new U.S. or Canadian customers will be permitted to register. Nor will any new customer be permitted to register from any country without proper "Know Your

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Orders/Notices-of-Hearing-and-Temporary-Orders/2023/2023-BCSECCOM-529.pdf?dt=20231116173539; *GSB Gold Standard Bank Ltd. et al.*, Desist and Refrain Order, Department of Financial Protection and Innovation, California Business Consumer Services and Housing Agency [Nov 16, 2023] *available at* https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/11/Desist-and-Refrain-Order-GSB-Gold-Standard-Bank-Ltd-2023-11-16.pdf; *In the Matter of GS Partners Global Wealthbuilders Worldwide et al.*, No. CD-2023-0021 [Ala Sec Comm'n Nov 16 2023] *available at* https://asc.alabama.gov/Orders/2023/CD-2023-0021.pdf; *WA DFI Issues Action Against GSPartners, Citing Certificate Sales and Multi-Level Marketing Program Violate State Securities Law* [Nov 16 2023] *available at* https://dfi.wa.gov/news/press/wa-dfi-issues-action-against-gspartners-citing-certificate-sales- and-multi-level; Temporary Order to Cease and Desist, [Ariz Corp Comm'n Nov 16 2023] *available at*, https://docket.images.azcc.gov/E000032154.pdf?i=1708367798550; Notice of Order [NH Dept State Nov 25 2023) *available at* https://sos.nh.gov/media/xmfoiiwp/enforceord_i-2023-000033.pdf; *Emergency Order to Cease and Desist*, Order No. ENSC-241162 [GA Comm'r Secs Jan 22 2024] *available at* https://sos.ga.gov/sites/default/files/2024-01/GS%20PARTNERS%20GLOBAL%2C%20et%20al%20Emergecy%20Order%20%28ENCE-241162%29.pdf; *Mississippi Secretary of State Issues Cease and Desist Order Against GS Partners Global, Josip Heit, and Richard L. Shoto* [Dec 6 2023] *available at* https://www.sos.ms.gov/press/mississippi-secretary-state-issues-cease-and-desist-order-against-gs-partners-global-josip.

> Customer" documentation. Any existing U.S. or Canadian customer accounts are in the process of being closed, as are all existing accounts without proper "Know Your Customer" documentation on file.
>
> * * *

GSPro, *available at* https://gspro.network/us.

B. Proceedings To Date

Although this proceeding began as a petition for pre-litigation discovery in the Supreme Court for New York County on December 20, 2022, GSB's effort to suppress criticism on BehindMLM began in 2021, when one of GSB's affiliates filed a legal proceeding in Ukraine, securing an ex parte order forbidding BehindMLM from publishing its criticisms of GSB in Ukraine. *See GSPartners gets BehindMLM censored in… the Ukraine?* (July 5, 2021), *available at* https://behindmlm.com/companies/ gspartners-gets-behindmlm-censored-in-the-ukraine/. BehindMLM had no notice of that proceeding until it was over.

Later that year, GSB filed a second proceeding, this time in the Regional Court of Hamburg, Germany, Division 24 for Civil Matters. As reflected in the legal papers filed in the court below, Exhibit A to the petition (Appx. 15-26), that action was filed only against Google, the company on whose servers the blog was posted. So far as the record discloses, Google had no participation in the German proceeding, and the Court held no hearings in the matter. The court, assuming that

the factual allegations in the complaint were true because Google had not appeared to contest them, Appx. 17, 22-23, issued two preliminary injunctions against Google. Appx. 16, 21. The court assessed legal expenses against Google and forbade it from making three specific pages on the BehindMLM blog available to readers in Germany. *Id.*

Armed with these foreign-court rulings, GSB filed a petition for pre-litigation discovery from both Google, as the host of the blog, and GoDaddy, the registrar of the domain name behindmlm.com. Appx. 6-13. The only statements alleged to be defamatory were the specific sentences cited in the two German court orders. *Compare* Appx. 9-10 *with* Appx. 16-17, 21-22. Neither Google nor GoDaddy responded to GSB's petition for discovery, and the document was not served on BehindMLM. On February 24, 2024, the Supreme Court granted the petition by default. *GSB Gold Standard Corp. v. Google LLC*, Index No. 160880/2022, Doc No 18 [Sup Ct, NY County Feb 24 2023]. GSB issued a press release proclaiming this victory, *available at* https://www.einnews.com/pr_news/619316029/gsb-gold-standard-corporation-celebrates-court-victory-in-case-against-google-and-godaddy; the following day, a commenter mentioned this release on BehindMLM's blog. https://behindmlm.com/companies/gspartners/gspartners-covers-up-bdswiss-lies-

with-skyground-group/#comment-463495. Only at that point did BehindMLM learn of the proceeding. Eventually, after GSB served subpoenas on Google and GoDaddy, Google issued a notice to BehindMLM that her identity had been subpoenaed; BehindMLM retained counsel who filed a motion to quash subpoenas to both companies. Appx. 41-43.

BehindMLM argued that the court should follow the decision in *Dendrite Int'l v. Doe No. 3*, 342 NJ Super 134, 775 A2d 756 [NJ App 2001], and other state appellate and federal courts that have agreed with the *Dendrite* decision, by requiring a party seeking discovery to identify an anonymous critic to make a legal and evidentiary showing of merit. The petition should be denied, BehindMLM argued, because GSB has not made the needed showing in this case. She also argued that the petition had not explained in what respect each statement was false. Appx. 53-69.

In its opposition to the motions to quash, Appx. 73-88, GSB did not supply any affidavits. Instead, its opposition consisted solely of a memorandum of law arguing that the many decisions cited in the motions to quash should be rejected because they were from outside New York, and further contending that its success in the court proceeding in Hamburg against Google provided all needed support for the proposition that BehindMLM's statements at issue were defamatory per se and

hence outside the protection of the First Amendment because nobody "has a First Amendment right to defame GSB anonymously." Appx. 83. In reply, BehindMLM argued that it was not a party to the proceedings in Germany, and that due process forbids a party from being subjected to a judgment from a proceeding in which it did not appear and in which it was not represented. Appx. 87-88.

The lower court denied the motions to quash, based solely on the German rulings which, the court concluded, established "that the statements made are defamatory per se; thus they are not subject to protection and anonymity under the First Amendment." Appx. 5. The Supreme Court therefore ordered Google and GoDaddy to comply with GSB's subpoenas.

BehindMLM appealed, and sought a stay pending appeal. That stay was granted, and the Court set an expedited schedule for briefing and argument of the appeal.

SUMMARY OF ARGUMENT

The petition for discovery in this case is not the typical such proceeding, such as when a worker seeks to identify the maker of a machine that injured her at work so that she can bring a product liability action against the right manufacturer, or when a victim of police brutality seeks to identify which one of a crowd of law enforcement officers was responsible for her injuries. In such cases, identifying an

unknown defendant is just the first step toward establishing liability for damages, but identification does not inherently deprive the would-be defendant of any legal rights.

In cases like this one, however, merely compelling disclosure of the anonymous speaker's identity can violate her First Amendment rights, because 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 a complaint is brought against an anonymous speaker, courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right to anonymity of those who have done no wrong. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Identifying the speaker gives the plaintiff immediate relief as well as a powerful new weapon, because it enables him to employ extra-judicial self-help measures to counteract both the speech and the speaker. It also creates a substantial risk of harm to the speaker, who forever loses the right to remain anonymous, not only on the speech at issue, but with respect to all speech posted with the same pseudonym. Moreover, the unmasked speaker is exposed to efforts

to punish or deter his speech. For example, an employer might discharge a whistleblower, or a public official might use influence to retaliate against the speaker. Similar cases across the country, and advice openly given by lawyers to potential clients, demonstrate that access to identifying information to enable extra-judicial action may, in many cases, be the only reason plaintiffs bring many such lawsuits at all.

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief. The constitutional challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure to unmask critics—thus violating their First Amendment right to speak anonymously—simply by filing a complaint that is not inadequate on its face.

Among the state and federal courts that have considered these issues, there is a well-developed consensus that only a compelling interest is sufficient to outweigh the First Amendment right to anonymous free speech. Such courts

consistently hold that, when faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process, a court should: (1) require notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate his rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; and (4) require the plaintiff to produce evidence supporting each element of her claims. A majority of the courts reaching this issue also apply a fifth requirement—that the trial court balance the equities, weighing the potential harm to the plaintiff if the subpoena is not enforced against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. Employing this approach, a court can ensure that a plaintiff does not obtain important relief—identification of anonymous critics—and that the defendant is not denied important First Amendment rights, unless the plaintiff has a realistic chance of success on the merits.

Everything that a plaintiff must do to meet this test, she must also do to prevail on the merits of her case. So long as the test does not demand more information than a plaintiff would be reasonably able to provide shortly after filing a complaint, the standard does not unfairly prevent the plaintiff with a legitimate

grievance from achieving redress against an anonymous speaker. And cases from jurisdictions that apply this standard show that plaintiffs regularly succeed in meeting the test and enforcing such subpoenas.

Applying that standard here, the order compelling discovery should be reversed for several reasons. First, the petition for discovery does not allege a proper claim for defamation. The derogatory statements on the BehindMLM blog consist of an unflattering analysis of GSB's financial dealings based on publicly available information, a good example of the type of constitutionally protected opinion that courts have consistently rejected as supporting a libel case. Second, GSB has not introduced evidence of falsity of any factual assertions on the blog, and the German court orders finding the use of the word "Ponzi" to be false cannot constitutionally be enforced against BehindMLM because she was not a party to that proceeding. Third, the balance of the equities strongly favors allowing BehindMLM to maintain her anonymity.

ARGUMENT

I. THE CONSTITUTION LIMITS COMPELLED IDENTIFICATION OF ANONYMOUS SPEAKERS

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 US 150, 166-167 [2002]; *McIntyre v. Ohio Elections Comm.*, 514 US 334 [1995]; *Talley v. California*, 362 US 60

[1960]. These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

> [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.

McIntyre, 514 US at 341-342, 356.

The right to speak anonymously is fully applicable online. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 US 844, 853, 870 [1997].

Internet speakers may choose to speak anonymously for a variety of reasons. *See generally* Kosseff, *United States of Anonymous* 201-213 [2022]. They may wish to avoid having their views stereotyped according to presumed racial, gender or other characteristics. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite attribution disclaimers, readers will assume that the group orchestrated the statement. Anonymity also provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. They 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.

An equally valid reason to remain anonymous is the torrent of online hatred that sometimes follows online denunciations. Wilson, *An Online Agitator, a Social Media Exposé and the Fallout in Brooklyn* [New York Times June 2 2018], *available at* https://www.nytimes.com/2018/06/06/nyregion/amymek-mekelburg-huffpost-doxxing.html. That hatred can lead to real-world consequences, as Internet users often "doxx" the targets of their ire and then communicate with employers or neighbors, Bowles, *How 'Doxxing' Became a Mainstream Tool in the Culture Wars* [New York Times Aug. 30, 2017], *available at*

https://www.nytimes.com/2017/08/30/technology/doxxing-protests.html, or even bring weaponry to "investigate" claims of wrongdoing. *E.g.*, *Pizzagate Conspiracy Theory*, Wikipedia, https://en.wikipedia.org/wiki/Pizzagate_conspiracy_theory.

Several pre-litigation discovery cases in New York have shown how the need for anonymity may properly be invoked to object to subpoenas to identify critics. For example, in *In re DMCA Sec. 512(h) Subp. to YouTube (Google, Inc.)*, 581 F Supp 3d 509 [SD NY 2022], the Jehovah's Witnesses sought to use a special federal statute that allows discovery to identify alleged copyright infringers to identify the owner of a video blog that made fun of the church by mocking some of the videos which it made available to its members. The blogger explained that the procedure was being abused to obtain his identity in an effort to "disfellowship him as an apostate" and that he needed "to appear anonymously in future proceedings for fear of being ostracized, shunned, or disfellowshipped by the denomination's community for voicing criticisms or doubts about the organization." *Id*. at 516. Indeed, there is evidence that the Jehovah's Witnesses organization had served many section 512(h) subpoenas claiming copyright infringement for the supposed purpose of suing for infringement, but had never actually filed such a suit—instead, it used the names to exact private retribution. Levy, *Watch Tower's*

misuse of copyright to suppress criticism, [Mar 22 2022], https://clpblog.citizen.org/watch-towers-misuse-of-copyright-to-suppress-criticism/. The court denied enforcement of the subpoena because it concluded that the vlog had made fair use of the videos and hence that there was no basis for enforcing the subpoena. 581 F Supp 3d at 509.

Similarly, in *Greenbaum v. Google, Inc.*, 845 NYS2d 695 [Sup Ct, NY County 2007], a member of a school board sought pre-litigation discovery from the Supreme Court for Nassau County to identify Orthomom, a blogger who regularly discussed issues facing the Orthodox community in the Five Towns area of Long Island, and who objected to the position that this official had taken on the issue of using public funds for Yeshiva students. The blogger showed that, if she were identified, her criticism of other members of the Orthodox community could lead to her being ostracized because of a community norm that forbids speaking ill of other Orthodox Jews, Affidavit of Yosef Blau, *Greenbaum v. Google*, Index No. 102063/2007 (March 2, 2007), and she invoked the *Dendrite* standard to avoid enforcement of the subpoena to Google. The court decided that Orthomom's criticisms of Greenbaum were all protected opinion, and hence did not reach the question whether the full *Dendrite* analysis should be followed. *Id.*, 845 NYS2d at 698-699.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to track down those who do. Anyone who sends an e-mail or visits a website leaves an electronic footprint that could start a path that can be traced back to the original sender. To avoid the Big Brother consequences of a rule that enables any company or political figure to identify critics, simply for the asking, courts have recognized that special protections are needed to ensure that subpoenas seeking disclosure of such identifying information are not abused. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L Rev 1537 [2007].

When courts do not create sufficient barriers to subpoenas to identify anonymous Internet speakers named as defendants, the subpoena can be the main point of the litigation, in that plaintiffs may identify their critics and then seek no further relief from the court. Kosseff, 101-102. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net:What to Do If a Message Board Messes with Your Message*, 10 Business Law Today No 1, at 40 [Sept.-Oct. 2000]. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the

defendant is. *Id.* As discussed in Kosseff, at 93-100, Raytheon filed suit in a Massachusetts state court to identify anonymous posters, learned that they were employees, and dropped its litigation but fired the critics. A similar course of events transpired in *Swiger v. Allegheny Energy*, 2006 WL 1409622 [ED Pa May 19 2006, No. 05-cv-5725].

Here, GSB invokes judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. Consequently, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny. *New York Times Co. v. Sullivan*, 376 US 254, 265 [1964]. Injunctive relief, even to aid a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 US 415 [1971].

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g., FEC v. Florida for Kennedy Committee*, 681 F2d 1281, 1284-1285 [11th Cir 1982]; *Ealy v. Littlejohn*, 560 F2d 219, 226-230 [5th Cir 1978]. In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources

of allegedly libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In those cases, courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of his case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of his case. *See Lee v. Department of Justice*, 413 F3d 53, 60 [DC Cir 2005]; *Ashcraft v. Conoco, Inc.*, 218 F3d 282, 288 [4th Cir 2000]; *Gonzales v. NBC.*, 194 F3d 29, 33 [2d Cir 1999]; *LaRouche v. NBC*, 780 F2d 1134, 1139 [4th Cir 1986]; *Baker v. F and F Inv.*, 470 F2d 778, 783 [2d Cir 1972]; *see also O'Neill v. Oakgrove Construction Co.*, 17 NY2d 521, 527 [1988].

Because the right of anonymous speakers to remain anonymous implicates the First Amendment, justification for infringing that right by ordering identification requires proof of a compelling interest, and beyond that, the disclosure order must be narrowly tailored to serve the interest. *McIntyre*, 514 US at 347.

> If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery [without a factual showing], 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 [WD Wash 2001].

II. THE COURT SHOULD REQUIRE A LEGAL AND EVIDENTIARY SHOWING FOR THE IDENTIFICATION OF JOHN DOE DEFENDANTS SUED FOR CRITICIZING A PLAINTIFF

The fact that a plaintiff has sued over certain speech, or announced its desire to file such litigation, does not create a compelling government interest in taking away a defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Doe v. Cahill*, 884 A2d 451, 457 [Del 2005].

A. Every Appellate Court to Address the Issue Has Required a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff

Courts have drawn on the media's privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, 775 A2d 756 [NJ App 2001], established a five-part standard that became a model followed or adapted throughout the country. The five parts may be summarized thusly:

> **1. Give Notice:** Require the plaintiff (and sometimes the Internet Service Provider) to provide 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.
>
> **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.

See id. at 760-61 (listing five factors). Courts in several other states have followed New Jersey's lead by adopting the *Dendrite* approach, including the balancing prong. *See In re Indiana Newspapers*, 963 NE2d 534 [Ind App 2012]; *Pilchesky v. Gatelli*, 12 A3d 430 [Pa Super 2011]; *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A2d 184 [NH 2010]; *Independent Newspapers v. Brodie*, 966 A2d 432 [Md 2009]; 170 P3d 712 [Ariz App 2007].

The fifth step has not been adopted in every state. In *Doe v. Cahill*, 884 A2d 451 [Del. 2005], for example, the trial 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 evidence that the statements are false. But it declined to use the balancing step. Four states have followed the *Cahill* approach by using *Dendrite*'s first four steps, but not the fifth. *Doe v. Coleman*, 436 SW3d 207, 211 [Ky App 2014]; *Solers v. Doe*, 977 A2d 941 [DC 2009]; *Krinsky v. Doe 6*, 72 Cal Rptr 3d 231 [Cal App 2008]; *In re Does 1-10*, 242 SW3d 805 [Tex App 2007]. Most recently, the Washington Court of Appeals endorsed the evidence requirement, while putting off for another day the question whether to have a balancing stage, noting that the record before the court contained no information to which the balancing stage could be applied. *Thomson v. Doe*, 356 P3d 727 [Wash App 2015].

Several federal courts of appeals have also addressed the standards for evaluating objections to discovery based on anonymity. The Court of Appeals for the Ninth Circuit, in the course of denying petitions for mandamus relief, *In re Anonymous Online Speakers*, 611 F3d 653, 661 [9th Cir 2010], *revised opinion adopted on rehearing*, 661 F3d 1168 [9th Cir 2011], said that "imposition of a

heightened standard is understandable" in a case involving political speech, but that when the Doe defendants are commercial actors tearing down a competitor, less protection for anonymity is appropriate. Similarly, in a case involving the infringement of large numbers of copyrighted sound recordings, the Court of Appeals for the Second Circuit upheld an order that an Internet Service Provider identify the anonymous defendant because the plaintiff had made a concrete prima facie showing of infringement, including the submission of an affidavit, sworn on personal knowledge, that identified specific copyrighted sound recordings and specified the means by which the affiant had identified Doe's Internet Protocol address with the copying of those recordings. *Arista Records v. Doe 3*, 604 F3d 110 [2d Cir 2010]. And in *Signature Management Team v. Doe*, 876 F3d 831, 837-838 [6th Cir 2017], the Sixth Circuit held that, even in a case where it had concluded that anonymous speakers could be held liable for copyright infringement, the First Amendment required a district court to weigh the potential chilling effect that would be caused by a judicial order compelling the unmasking of anonymous internet speakers against the strong presumption that parties subjected to a court judgment should be identified on the public record.

Federal district courts have repeatedly followed *Cahill* or *Dendrite*. *E.g.*, *In re DMCA § 512(h) Subp. to Twitter*, 608 F Supp 3d 868, 876 [ND Cal 2022]; *East*

Coast Test Prep v. Allnurses.com, 309 F Supp 3d 644, 676 [D Minn 2018] (a plaintiff "must produce prima facie support for all of the elements of his or her case that are within his or her control" before identifying Doe defendants); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 at *4-5 [ND Cal Nov 9 2011, No. 10-cv-05022-LHK]; *Highfields Capital Mgmt. v Doe*, 385 F Supp 2d 969, 976 [ND Cal 2005] (required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *Fodor v. Doe*, 2011 WL 1629572 [D Nev Apr 27 2011, No. 3:10-cv-0798-RCJ (VPC)] (followed *Highfields Capital)*; *Koch Industries v. Doe*, 2011 WL 1775765 at *10 (D Utah May 9 2011, No. 2:10-cv-1275-DAK) ("'The case law ... has begun to coalesce around the basic framework of the test articulated in *Dendrite*'") (quoting *SaleHoo Group v. Doe*, 722 F Supp 2d 1210, 1214 [WD Wash 2010]); *Best Western Int'l v. Doe*, 2006 WL 2091695 (D Ariz July 25 2006, No. CV-06-1737-PHX-DBC] (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 2001 WL 34806203 at *5 [WD La Dec 20 2001, No. 01-00026-M] (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F Supp 2d 128, 132 [D DC 2009] (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v. Does*, 2004 WL

2904405 [WD NC Dec 2 2004, No. 3L94 CV 374-H] (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v. Individuals whose true names are unknown*, 561 F Supp 2d 249 [D Conn 2008] (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress).

The approach in other states, requiring presentation of evidence in support of the elements of a defamation plaintiff's prima facie case, is also consistent with the longstanding view of New York courts that summary disposition is needed to ensure that the burdens of defamation litigation do not themselves create a chilling effect on protected expression. *See Balderman v. Am. Broad. Companies*, 738 NYS2d 462, 466 [4th Dept 2002] (citing *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 256 [1991]). The destruction of a defendant's First Amendment right of anonymous speech is yet another way that libel litigation can chill speech, and *Dendrite*'s solution of an early look at the merits of the claim, to decide whether there is a good reason to take away anonymity, is a sound approach to balancing the parties' respective interests.

The propriety of requiring evidence, not just allegations, to support impinging on the right to speak anonymously is especially appropriate in a case

where the plaintiff purportedly seeks to identify the prospective defendant in a lawsuit over speech on a matter of public interest. Since November 2020, such a suit in a New York state court would be subject to an anti-SLAPP motion to dismiss, and the Supreme Court would be required to consider affidavits, and not the bare allegations of a complaint, in deciding whether to dismiss. *E.g.*, *Gillespie v. Kling*, 192 NYS3d 78, 80 [1st Dept 2023]. Given that GSB would have to furnish evidence that the speech was wrongful without having had the opportunity to take discovery to avoid a motion to dismiss, it similarly should have to produce such evidence in this procedural posture, when it seeks the relief of identifying its critic.

There is also a practical reason for this Court to join the national consensus approach requiring an evidentiary showing before a New York court can authorize discovery to identify anonymous Internet speakers. New York courts lack subpoena jurisdiction to compel out-of-state companies to provide discovery, *Wiseman v. American Motors Sales Corp.*, 479 NYS2d 528, 532 [2d Dept 1984]; rather, pre-litigation subpoenas to such companies must be domesticated and enforced under the Uniform Interstate Deposition and Discovery Act. But most of the technology companies that host online content are located in California or Washington, each of which recognize some version of the *Dendrite* standard. So,

too, does Arizona, where GoDaddy is located. For a New York court to authorize discovery on terms that will not be sufficient to support discovery in the states where the subpoenas will have to be enforced would be a poor use of judicial resources and unhelpful to the litigants.

B. Arguments Against Requiring Civil Plaintiffs to Make an Evidentiary and Legal Showing Before Imposing on the First Amendment Right to Speak Anonymously Are Unpersuasive

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to get enforcement of a subpoena to identify Doe defendants is too onerous a burden, because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*, as occurred, for example, in *Fodor v. Doe, Does v. Individuals whose true names are unknown*, and *Alvis Coatings v. Does, supra*. Indeed, in *Immunomedics v Doe*, 775 A2d 773 [NJ App 2001], a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery. Moreover, an order identifying the anonymous defendant is a form of relief, relief that can injure the defendant (by exposing the defendant to retaliation at the hands of the plaintiff and/or his supporters), and

relief that can benefit the plaintiff by chilling future criticism as well as by identifying critics so that their dissent can be more easily addressed. Courts should not give relief without proof.

Similarly wanting is one of the arguments advanced by GSB below, Appx. 77, 83, and perhaps embraced by the Supreme Court when it concluded that because the statements at issue "are defamatory per se[,] they are not subject to protection and anonymity under the First Amendment." Appx. 5. But at this stage of the proceeding, GSB has only alleged that the statements are defamatory per se—it has not proved a case for defamation. And mere allegations of defamation do not take critical speech out of the protection of the First Amendment. Rather, once defamation is alleged, the plaintiff must prove falsity and, indeed, must prove actual malice by clear and convincing evidence in the case of a public figure. Only once those elements are established can speech said to be outside the protection of the First Amendment. *United States v. Alvarez*, 567 US 709, 719 [2012].

III. GSB HAS NOT MADE THE SHOWING REQUIRED BEFORE IDENTIFICATION OF ANY ANONYMOUS SPEAKER MAY BE ORDERED

This section of the brief explains in greater detail the five prongs of the *Dendrite* standard, which BehindMLM urges the Court to adopt, and shows that GSB has failed to meet the standard in several important respects.

A. Courts Should First Endeavor to Ensure Doe Defendants Get the Best Possible Notice of the Attempt to Subpoena Their Identities and a Fair Opportunity to Oppose the Subpoena

The first requirement in the *Dendrite / Cahill* consensus approach is for the plaintiff to notify the Doe of its efforts to take away his anonymity. Although BehindMLM knows about this proceeding (no thanks to GSB), the Court should adopt a notice requirement to guide the lower courts in future cases.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Columbia Insurance Co. v. Seescandy.com*, 185 FRD. 573, 579 [ND Cal 1999]. Thus, in *Dendrite*, before deciding whether to grant a motion for pre-litigation discovery, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved this requirement. 775 A2d at 760.

Indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 US 220 [2006]. Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property. *Id.* at 235. In the Internet context, posting on the Internet forum where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, at least if there is a continuing dialogue among participants. The Court is urged to follow the *Dendrite* example by requiring posting in addition to other means that are likely to be effective.

In the case of the BehindMLM blog, GSB could have posted a comment on the blog posts alleged to be defamatory. Doing so would have been effective because a review of the blog reveals that BehindMLM engages with her readers. Moreover, GSB could have used the contact page on the BehindMLM blog to advise BehindMLM of the threat to her anonymity. *See* https://behindmlm.com/contact-oz/. Indeed, GSB contacted BehindMLM directly to provide it with notice of the ruling against it in Ukraine. *GSPartners gets BehindMLM censored in… the Ukraine?* [July 5 2021],

https://behindmlm.com/companies/gspartners-gets-behindmlm-censored- in-the-ukraine/. GSB's failure to notify BehindMLM of its effort to take away her anonymity smacks of bad faith, and should be weighed in the final balancing stage of the *Dendrite* analysis.

Fortunately, both GoDaddy and Google generally provide notice to their users, and withhold disclosure for a reasonable period of time following that notice, so that users can retain counsel to protect their First Amendment rights—they follow the Cyberslapp Coalition's model notice standard for Internet Service Providers. https://web.archive.org/web/20160322010811/http://cyberslapp.org/about/page.cfm ?pageid=6. *See* Levy, *Developments in Dendrite*, 14 Fla Coastal L Rev 1, 48 [2012]; *see also How Google handles government requests for user information*, https://policies.google.com/terms/information-requests (Google's policy is to give notice to users unless prohibited); *May I obtain any account information or account contents using a subpoena?*, https://www.facebook.com/help/133221086752707 (similar policy from Meta). However, because not all Internet platforms reliably give notice, *id.*, courts should place the burden of ensuring that notice is given on the party seeking discovery.

B. GSB Pleaded Verbatim the Allegedly Defamatory Words

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated his rights.

New York is but one of many states, and many federal courts, that require that the defamatory words be set forth verbatim in a complaint for defamation. "CPLR 3016(a) requires that the particular words complained of be set forth in the complaint, but their application to the plaintiff may be stated generally. The requirement that the defamatory words must be quoted verbatim is strictly enforced." *Varela v. Inv'rs Ins. Holding Corp.*, 586 NYS2d 272, 273 [2d Dept 1992], *aff'd on other grounds*, 81 NY2d 958 [1993].

Imposing this requirement on petitions for pre-action discovery could enable New York courts to narrow the issuance of subpoenas that seek to identify anonymous speakers to cases that are more likely to be successful on the merits. For example, the court can assess whether the language charged as defamatory is an assertion of fact, which can be true or false and hence subject to a defamation action, or only a rhetorical statement of opinion, which is immune from litigation because, in our system of free speech, "there is no such thing as a false idea."

Gertz v Welch, 418 US 323, 339 [1974]. The court can also ascertain whether the statement was "of and concerning" the plaintiff, as both libel law and the First Amendment require, *Rosenblatt v Baer*, 383 US 75, 83 [1966], whether a defamation action had been filed within the statute of limitations, and other matters that might bar the claim on the face of the complaint.[3]

In this case, the complaint recited verbatim the language of the comments on the BehindMLM on which GSB claims it wants to sue for defamation, and provided a link to the web pages where the specific sentences appeared, so that the Court can evaluate the specific statements in context. Appx. 9-10. The petition is sufficient to bring GSB into compliance with the First Amendment's requirements on this prong of the test.

C. GSB Has Not Alleged a Facially Valid Claim for Defamation

There are two respects in which the petition fails to allege a proper claim for defamation. First, the petition identifies several discrete sentences in three separate blog posts as being false statements, Appx. 9-10, ¶¶ 8, 9 and 10; the footnotes in

[3] Because GSB has not indicated where it intends to sue for defamation, the Court cannot be certain whether that jurisdiction allows the pursuit of a petition for discovery to toll the statute of limitations. *See Glassdoor, Inc. v. Andra Group*, 575 SW3d 523, 530 [Tex 2019] (because statute expired while petition for discovery was pending, the petition became moot).

the petition identify the blog pages at which each sentence appears. But the petition also acknowledges that the allegedly defamatory gist of BehindMLM's blog post is that GSB's overall operation constitutes a Ponzi scheme, in that GSB is operating on an unregistered basis in several different jurisdiction and offering investment interests backed only by cryptocurrency. Appx. 9, ¶ 7. Characterization of GSB as a Ponzi scheme is BehindMLM's opinion, and the opinion is based on the many facts, including copies of documents, and hyperlinks referring back to previous blog posts further explaining the basis for BehindMLM's opinion. Opinions based on disclosed fact are not actionable. *Zion v. NYP Inc.*, 795 NYS2d 238, 238 [1st Dept 2005].

Rather than focusing solely on the statements cited in the petition, "courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts, to determine whether the reasonable listener or reader is likely to understand the remark as an assertion of provable fact." *Gross v. New York Times Co.*, 82 NY2d 146, 155 [1993]. And in context, it would be apparent to the reader that Behind MLM's blog posts express her opinion that GSB is running a Ponzi scheme.

Moreover, it is not only the many documents reproduced in the blog, but also the hyperlinks to prior posts that are scattered throughout the blog posts, that

constitute "disclosed facts" for the purpose of considering whether allegedly defamatory statements constitute nonactionable opinion based on disclosed fact. *Biro v. Conde Nast*, 2014 WL 4851901, at *4 [SD NY Sept 30 2014, No. 11–CV–4442 (JPO)]; *Nicosia v. De Rooy*, 72 F Supp 2d 1093, 1103 [ND Cal 1999]; *see also Adelson v. Harris*, 973 F Supp 2d 467, 484 [SD NY 2013] ("The hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law."). When an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment. In other words, "[a] simple expression of opinion based on disclosed . . .nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Id.* at 490.

Courts often treat Internet reviews in particular, even when they contain both facts and opinions, as "suggest[ing] to a reasonable reader that the author was merely expressing his opinion based on a negative business interaction with plaintiffs." *Torati v. Hodak*, 47 NYS3d 288, 290 [1st Dept 2017].

The petition alleges that some statements are false, but does not say in what respect they are false. Are they false because they use the term "Ponzi" to refer to

GSB, or is some other aspect of each statement false? It appears that petition rests solely on the allegation that the use of the term "Ponzi" is false. For example, paragraph 10(a) of the Petition, Appx. 10, alleges that the following statement is false: "GSPartners and Driven Properties have gotten Google to hide their Ponzi partnership in Germany." It is undeniable that GSB obtained an injunction against Google's allowing the blog to be viewable in Germany. The only aspect of the statement that could possibly be claimed to be false is the phrase "their Ponzi partnership." But the Ponzi reference is opinion based on disclosed fact. Because the petition does not specify the falsity with respect to any of the challenged statements, it does not adequately allege a claim for defamation.

Second, the petition does not contain any allegation that BehindMLM made the allegedly false statements with knowledge that they were false or with reckless disregard of their probable falsity—that is, it does not allege actual malice. Actual malice would be required in this case both as a matter of First Amendment law and as a matter of state law. The First Amendment requires allegations of actual malice in light of both GSB's self-characterizations in the petition and the findings of the Securities Commissioner. The petition says that GSB is a "leading software manufacturer," Appx. 9, ¶ 4 and that it has "a global reputation for integrity and transparency." *Id.* ¶ 6. The Texas Order (at ¶¶ 29-33) says that GSB and its

cluster of co-conspirators have been hosting events featuring sports celebrities in arenas seating thousands, as well as posting online videos promoted to investors throughout the world, to seek investors. By these activities GSB has "thrust [it]self into the public spotlight and sought a continuing public interest in [its] activities," making itself a limited purpose public figure. *Gottwald v. Sebert*, 40 NY3d 240, 251 [2023]. *See also Celle v. Filipino Rptr. Enterprises*, 209 F3d 163, 177 [2d Cir 2000] (plaintiff's self-characterization "as a 'well known radio commentator' within the Metropolitan Filipino–American community" was enough to make him a public figure). Moreover, to the extent that GSB seeks to identify BehindMLM so that it can sue her for damages, it is required by the section 76-a(2) of the Civil Rights Law to show actual malice. GSB's failure to include any allegation of actual malice in its petition alone should impel the Court to conclude that GSB's petition did not allege a valid claim for defamation.

D. GSB Presented No Evidence That BehindMLM Made Any False Statements About It

Even if the petition had alleged the falsity of any statement that was objectively verifiable and hence actionable, and had alleged actual malice, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a

lawsuit against that defendant. This requirement, which has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, prevents a plaintiff from being able to identify his critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward with evidence in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of relief in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F2d 5, 6-9 [2d Cir 1982]. *Richards of Rockford v. PGE*, 71 FRD 388, 390-391 [ND Cal 1976]. In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case (at least those on which it

can fairly be expected to make a showing without discovery) before it is allowed to obtain the identities of anonymous speakers. *Cervantes v. Time*, 464 F2d 986, 993-994 [8th Cir 1972]. "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false (in a defamation action) or rests on confidential information (in a suit for disclosure of inside information). Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant. By contrast, courts considering subpoena controversies about anonymous speakers generally hold that a plaintiff cannot be expected to make a showing on the issue of actual malice sufficient to survive summary judgment.

Here, even if the complaint were facially adequate, GSB's subpoenas fail because it has adduced no evidence in support of its complaint. Instead of introducing affidavits to show the basis for its claim of falsity, GSB argued that the rulings of the Hamburg courts were sufficient to establish its claims. But BehindMLM was not a party to the proceedings in Germany, and "[i]t is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v. Sturgell*, 553 US 880, 884 [2008]. And "judicial action enforcing [such a judgment] against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires." *Hansberry v. Lee*, 311 US 32, 41 [1940]. Hence, the German orders do not cure the GSB's failure to support its claim of falsity by filing affidavits.

E. The Balance of GSB's Interest in Avoiding Criticism and BehindMLM's First Amendment Right to Remain Anonymous Tips in BehindMLM's Favor

Even if GSB had pleaded a valid claim for defamation and submitted evidence sufficient to establish a prima facie case of falsity,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In

> fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

Missouri ex rel. Classic III v Ely, 954 SW2d 650, 659 [Mo App 1997].

As the Court explained in *Dendrite*, individualized balancing is needed when the plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite, 775 A2d at 760-761; *see In re DMCA § 512(h) Subp. to Twitter*, 608 F Supp 3d at 881-883 (extended discussion of considerations to weigh in the balance); *Signature Management Team*, 876 F3d at 837-839 (same); *Mobilisa v. Doe*, 170 P3d at 720; *Highfields Capital Mgmt. v. Doe*, 385 F Supp 2d at 976.

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, namely, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is

itself an injunction—and not even a preliminary one at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker's name is published to the world, she loses her anonymity and can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 US 347, 373-374 [1976]. In some cases, identification of the Does may expose them to significant danger of extra-judicial retaliation. Given the nature of the criminal enterprises at whom BehindMLM's criticism has been directed, BehindMLM is not wrong to worry that being identified could threaten her physical well-being.

Moreover, the adoption of a balancing approach can favor plaintiffs as well as anonymous defendants. For example, several courts have held that, although anonymous defendants accused of copyright infringement could be engaged in speech of a sort, the First Amendment value of offering copyrighted recordings for download is low, and the likely impact of being identified as one of several hundred alleged infringers is also likely low. *Call of the Wild Movie v. Does 1-1,062*, 770 F Supp 2d 332 [D DC 2011]; *Sony Music Entertainment v. Does 1-40*, 326 F Supp 2d 556 [SD NY 2004]; *London-Sire Records v. Doe 1*, 542 F Supp 2d 153, 164 [D Mass 2008]. Hence, such courts accept a lower level of evidence to support the prima facie case of infringement. *Call of the Wild*, 770 F Supp 2d at

351 nn.7, 8. It has been argued that these cases represent a copyright exception to the *Dendrite* rule, but other courts have, more properly, held that the cases turn on the nature of the speech at issue. *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 at *4-5 [ND Cal Nov 9 2011, No. 10-cv-05022-LHK]. Similarly, in *In Re Anonymous Online Speakers*, 661 F3d 1168, 1177 [9th Cir 2011], the court of appeals said that when a Doe lawsuit is filed over commercial speech, the lesser protection that the First Amendment affords for commercial speech should be reflected in a more permissive approach to identifying the defendant. Although these courts do not explicitly invoke the balancing stage of *Dendrite*, they implicitly do so.

Applying the balancing stage here, there is a very real danger of extra-judicial retaliation against BehindMLM that merits consideration in striking the proper balance. BehindMLM has reported on several criminal enterprises, and her blog has claimed credit for the destruction of several fraudulent schemes and the imprisonment of the fraudsters. *E.g.*, *BehindMLM is under threat*, https://behindmlm.com/ companies/gspartners/behindmlm-is-under-threat-gspartners-the-nysc/ ("Directly or indirectly, BehindMLM has fingerprints on pretty much every major MLM securities, commodities and/or wire fraud bust over the past decade. I keep a list of names we've helped send to prison."). Some of

the targets of her reporting are said to be affiliated with organized crime figures in various parts of the world, including the Russian mafia. *Supra* at 8. The Russian mafia, for example, has a broad international reach, giving BehindMLM every reason to be afraid. And as noted, at least one of those criminals has posted a video that fantasizes about killing BehindMLM. *Id.* For appellant, the danger of extra-judicial self help is very real, and hence the potential chilling effect on others who might consider reporting on cryptocurrency Ponzi schemes is substantial.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and its interest in redressing the alleged violations, the strength of the plaintiff's evidence, the nature of the allegations, and the likelihood of significant damage to the plaintiff.

GSB's defamation claims are at best weak. Its allegations of falsity are vague, and those allegations stand contradicted by the many findings by securities enforcement agencies in many states and countries that GSB's scheme is, indeed, fraudulent. Moreover, GSB is a public figure; there is intense public interest in crypto investments; and the Securities and Exchange Commission has warned investors to be cautious about investments backed by cryptocurrency. U.S. Securities and Exchange Commission, *Investor Alert: Ponzi Schemes Using Virtual Currencies*, *available at* https://www.sec. gov/files/ia_virtual

currencies.pdf. Potential investors have a significant interest in obtaining as much information as they can about possible dangers as well as potential benefits of investing in GSB's financial instruments.

Also weakening the interest in compelling the identification of BehindMLM is the account of the Texas Securities Commissioner of the improper ways in which GSB has tried to suppress criticism of its investments. *Texas Order* ¶¶ 130-143. The Commissioner's decision faulted GSB for requiring its investors to agree to a "Code of Ethics" that includes a prohibition on making "discouraging or disparaging claims," from using "negative language," and to not "disparage, demean or make negative remarks about or towards GSP . . . " *Id.* ¶ 130. The order also cited GSB for filing lawsuits against critics, *id.* ¶¶ 131-143, specifically including this legal proceeding. *Id.* ¶¶ 136-143. One of the GSB entities, Swiss Valorem, then issued a warning against any other person repeating BehindMLM's criticism, saying that the accounts of some such critics had already been suspended and that critical speakers would be treated as "accessories" and would not be tolerated. *Id.* ¶ 143.

In effect, the Texas Securities Commissioner has found that this very lawsuit is part of GSB's scheme to defraud investors. GSB has not appealed that finding, but rather has decided to comply with the order not to offer its securities in Texas. This finding, now res judicata against GSB, *see Scipio v. Wal-Mart Stores E.*, 953

NYS2d 776, 777 [4th Dept 2012] (res judicata applies to findings of agency proceedings), is a further reason why the Court should discount GSB's interest in disclosure, in weighing the equities as the balancing test requires.

Finally, reversal of the order allowing Doe to be identified, based on either lack of sufficient evidence or balancing the equities, would not compel dismissal of the complaint. On remand, GSB would retain the opportunity to renew its quest for prelitigation discovery by amending its petition to plead a proper claim for defamation, and then submitting probative evidence to support its assertions of falsity. But on the current record, the balance of the equities tilts strongly in favor of BehindMLM, and hence warrants reversal of the orders below.

CONCLUSION

The Court should vacate the orders below and remand the case for further proceedings.

Respectfully submitted,

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February 20, 2024

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Dated: February 20, 2024

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

GSB GOLD STANDARD CORPORATION AG,

Petitioner-Respondent,

– against –

GOOGLE LLC and GODADDY INC.,

Respondents.

Behind MLM, The Anonymous Internet Poster Whose Identity is Sought by The Subpoenas,

Non-Party Appellant.

1. The index number of the proceeding in the court below is 160880/22.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The proceeding was commenced in Supreme Court, New York County.

4. The proceeding was commenced on or about December 20, 2022, by filing of a Verified *Ex Parte* Petition. Issue was joined shortly thereafter.

5. The nature and object of the proceeding is for pre-action disclosure, and compelling Respondents Google LLC and GoDaddy Inc. to identify the individual and/or individuals operating the BehindMLM website, pursuant to CPLR §3102(c).

6. This appeal is from the Decision and Order of the Honorable J. Machelle Sweeting, dated November 1, 2023, and entered on November 3, 2023, which denied Motions to Quash Subpoena *Duces Tecum* (Motion Seq. Nos. 002 and 003).

7. This appeal is on the full reproduced record.