

Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., Friedman, Kapnick, Gesmer, Rosado, JJ.

2396 In the Matter of GSB GOLD STANDARD Index No. 160880/22  
CORPORATION AG, Case No. 2023-05565  
Petitioner-Respondent,

-against-

GOOGLE LLC, et al.,  
Respondents.

BEHIND MLM, etc.,  
Nonparty Appellant.

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Public Citizen Litigation Group, New York (Paul Alan Levy of counsel), and Dechert LLP, New York (Jennifer Insley-Pruitt of counsel), for appellant.

Sante Law Group PLLC, New York (Daniel T. Podhaskie of counsel), for GBS Gold Standard Corporation AG, respondent.

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Order, Supreme Court, New York County (J. Mabelle Sweeting, J.), entered November 3, 2023, which denied the motion of nonparty BehindMLM to quash subpoenas served upon respondents Google LLC (Google) and GoDaddy Inc. (GoDaddy), unanimously reversed, on the law, without costs, and the subpoenas quashed.

BehindMLM anonymously operates the website Behind MLM (the Website). Google hosts the Website, and the Website's domain name is registered with GoDaddy. BehindMLM posted four articles stating that various corporate entities were engaged in a "Ponzi scheme," frauds, and scams. In 2022, one of the companies mentioned in one of those articles, petitioner GSB Gold Standard (GSB), brought two separate actions

against Google in a German court, seeking preliminary injunctions preventing Google from disseminating these allegedly defamatory statements on the Website. Google failed to respond or appear in those cases, and the German court granted a default judgment in favor of GSB and enjoined Google from disseminating the statements in Germany. BehindMLM was not notified of those proceedings.

GSB then brought the instant proceeding, seeking, pursuant to CPLR 3102(c), a pre-action order compelling Google and GoDaddy to identify BehindMLM. In support of the petition, GSB attached copies of the German court orders, with certified translations. GSB set forth the allegedly defamatory statements and provided links to the Website's articles. The record does not show that GSB made any attempt to notify BehindMLM of this proceeding. Google and GoDaddy did not appear or file any opposition, and Supreme Court granted GSB's unopposed motion.

GSB subsequently served subpoenas on GoDaddy and Google, seeking all documents and information relating to the identity of BehindMLM. Once BehindMLM learned of the subpoenas, she moved to quash them, asserting her First Amendment right to anonymous expression and alleging that revealing her identity will chill her speech and expose her to intimidation and potentially even personal harm.

The court denied BehindMLM's motions to quash the subpoenas, finding that the German court orders had "already determined that the [challenged] statements are defamatory per se; [and] thus they are not subject to protection and anonymity under the First Amendment." The court's decision to give preclusive effect to the German orders was not supported by the record. The issue of whether BehindMLM's statements were defamatory was not actually litigated and determined in that action, since the German orders were issued on default (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449,

456-457 [1985]). BehindMLM was not a party to the German proceedings, was not notified of the proceedings and was not given an opportunity to litigate the matter (*see Matter of Abady*, 22 AD3d 71, 83-84 [1st Dept 2005] [collateral estoppel may only be properly applied to default judgments where the party against whom preclusion is sought appears in the prior action, yet willfully and deliberately refuses to participate in those litigation proceedings]).

We hold that when a party seeks an anonymous online speaker's identifying information, courts must first require the party to take reasonable efforts to provide the speaker with notice and an opportunity to appear in the action or proceeding (*see Sony Music Entertainment Inc. v Does 1-40*, 326 F Supp 2d 556, 564-565 [SD NY 2004]; *Doe v Cahill*, 884 A2d 451, 460-461 [Del 2005]; *Dendrite Intl., Inc. v Doe No. 3*, 775 A2d 756, 763-764 [NJ Super Ct App Div 2001]). Even though the Website contains an online contact form, GSB has not alleged that it took any steps to notify BehindMLM before filing the petition. As a result, BehindMLM did not learn that her identity was being sought until after the court issued the order on default.

Moreover, when a speaker asserts a First Amendment right to anonymous online speech (*see generally McIntyre v Ohio Elections Commn.*, 514 US 334, 341-342 [1995]; *Cornelio v Connecticut*, 32 F4th 160, 170 [2d Cir 2022]), a court should consider the First Amendment rights at stake, whether the party seeking disclosure has stated a showing of a prima facie defamation claim, and the balance of the equities (*see Sony Music* at 564; *Dendrite* at 767-768). This Court has stated that "we should protect against the use of subpoenas by corporations and plaintiffs with business interests to enlist the help of ISPs via court orders to silence their online critics, which threatens to

stifle the free exchange of ideas” (*Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 45 [1st Dept 2011] [internal quotation marks and citation omitted]).

In this case, GSB undisputedly set forth the precise statements alleged to be defamatory (*see* CPLR 3016[a]). However, even if GSB had stated a valid claim of defamation per se by alleging that the statements were false and harmed its business (*see Geraci v Probst*, 15 NY3d 336, 344 [2010]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]), the broad and conclusory allegations in the verified petition did not sufficiently establish the falsity of BehindMLM’s statements (*see Matter of Jaime v City of New York*, \_\_\_ NY3d \_\_\_, 2024 NY Slip Op 01581, \*3 [2024]; *Matter of New York City Asbestos Litig. [DiSalvo]*, 123 AD3d 498, 499 [1st Dept 2014]). Upon our consideration of all relevant factors, including the weak evidentiary showing and BehindMLM’s asserted First Amendment right to speak anonymously on matters of public concern, we conclude that, on the record as now presented, BehindMLM is constitutionally entitled to maintain her anonymity.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 30, 2024



Susanna Molina Rojas  
Clerk of the Court