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# New York Supreme Court

## Appellate Division—First Department

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GSB GOLD STANDARD CORPORATION AG,

*Petitioner-Respondent,*

– against –

GOOGLE LLC and GODADDY INC.,

*Respondents.*

**Appellate  
Case No.:  
2023-05565**

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Behind MLM, The Anonymous Internet Poster

Whose Identity is Sought by The Subpoenas,

*Non-Party Appellant.*

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### REPLY BRIEF FOR NON-PARTY APPELLANT

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New York County Clerk's Index No. 160880/22

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In her opening brief, appellant BehindMLM showed both that there is a proper standard for stripping an online speaker of her right to speak anonymously, and that the Supreme Court erred in not following that standard. As BehindMLM explained, state appellate and federal courts that have addressed the question of when a party may obtain pre-action disclosure of the identity of an anonymous online speaker for the purported purpose of bringing suit against that speaker have overwhelmingly held that the First Amendment requires the would-be plaintiff to provide notice to the speaker, identify clearly the legal basis for the claim that the speech was actionable, and show both a tenable legal claim and evidence in support of that claim. Many courts also require an explicit balancing of the speaker's First Amendment interest in protecting her right to speak anonymously against the would-be plaintiff's interest in obtaining judicial redress of its grievances against the speaker.

Applying that approach, BehindMLM showed that the Orders denying BehindMLM's motions to quash the subpoenas requiring Google and GoDaddy to disclose her identity (the "Orders") should be overturned for several reasons: (1) GSB Gold Standard Corporation has neither alleged a sufficiently specific claim for defamation nor alleged the constitutionally required elements of a defamation claim; (2) BehindMLM's statements express constitutionally protected statements of opinion based on disclosed fact; (3) GSB has presented no evidence of falsity; (4) the Supreme

Court's reliance, as its sole basis for ordering disclosure of BehindMLM's identity, on two German court orders from proceedings of which BehindMLM had no notice and in which she was not represented was itself unconstitutional; and (5) the balance of interests tips decidedly in BehindMLM's favor.

GSB's brief in support of the Orders below does not even address some of these arguments. GSB offers no defense of its failure to specify the allegedly false aspects of the statements over which it says it wants to sue or its failure to allege actual malice. It does not address BehindMLM's argument that hyperlinks in her blog post referring back to prior posts constitute disclosed facts, and therefore her statements about GSB are protected as opinion based on disclosed fact. GSB also makes no effort to argue that the balance of equities favors disclosure. Instead, GSB suggests that BehindMLM has appealed the wrong court orders, and that she has failed to show that the trial court abused its decision in enforcing the subpoenas. Then GSB mounts a generalized attack on the *Dendrite / Cahill* standard, trying to undercut BehindMLM's due process argument by relying on New York decisions holding that German court orders can be enforced in New York in appropriate circumstances.

None of these arguments provides a sound basis for upholding the ruling below. The Court should vacate the Orders below and remand the case for further proceedings.

**I. BEHINDMLM HAS PROPERLY SOUGHT REVIEW OF THE ORDERS DENYING THE MOTIONS TO QUASH AND HAS PRESERVED HER ARGUMENTS FOR APPEAL**

A. GSB first argues that, rather than appealing only the Orders upholding the subpoenas compelling Google and GoDaddy to turn over identifying information, BehindMLM should also have appealed from the Petition. According to GSB, because BehindMLM did not designate the Petition in her Notice of Appeal, defects in the Petition cannot support reversal. NY St Cts Elec Filing [NYSCEF] Doc No. 24 (GSB Brief) 16-19.

BehindMLM has not appealed from the Petition because the Petition did not adversely affect her rights. BehindMLM has appealed only from the rulings that did adversely affect her: namely, the Orders denying the motions to quash.

GSB's argument that BehindMLM cannot mention the Petition in her appellate briefs misapprehends the procedural posture of the case. Those Orders from which BehindMLM appeals were issued in response to the Petition. Indeed, the arguments advanced by GSB in the Supreme Court and the arguments in its appellate brief rely on the allegations in the Petition both as the basis for GSB's defamation claims and, because the Petition was verified, as providing proof in support of those claims. Those arguments (and the language of the Petition) were properly addressed in BehindMLM's opening brief and in this Reply Brief.

Once the Orders under appeal are reversed, the Petition will remain on file and, as BehindMLM pointed out in her opening brief, NY St Cts Elec Filing [NYSCEF] Doc No. 15 (BehindMLM Brief) 53, GSB will have the opportunity to present additional argument and evidence in support of its effort to obtain BehindMLM's identifying information, should it desire to do so. At the same time, BehindMLM will have the opportunity to move to dismiss the Petition pursuant to the 2020 Amendments to New York's antiSLAPP law, and to seek an award of attorney fees pursuant to that law.

**B.** GSB also argues that BehindMLM did not preserve the arguments presented on this appeal. GSB Brief 3, 42-43. GSB is wrong. BehindMLM argued below that her statements about GSB were constitutionally protected opinion. *See* Appx. 42 (¶ E), 57 (¶ E), 67, 67-68 n.2, 90-91, 95 (¶ E), 104 (¶ E), 113-114 n.2, 133-134. She also argued that reliance on the German Orders would violate due process. Appx. 87-88.

## **II. BEHINDMLM'S FIRST AMENDMENT RIGHT TO INDEPENDENT APPELLATE REVIEW SUPERSEDES THE ABUSE OF DISCRETION STANDARD**

GSB faults BehindMLM for not arguing that the Orders represented a "clear abuse of discretion" by the Supreme Court. GSB Brief 19-21. In that regard, GSB confuses the standard of review that applies in a run of the mill discovery dispute

with the standard that applies when First Amendment protections are at issue.

The Supreme Court first held in *New York Times v. Sullivan*, 376 US 254, 284-286 [1964], that when a line must be drawn between speech that is protected by the First Amendment and speech that is not so protected, a state appellate court must conduct an independent review on the record as a whole rather than deferring to the findings below. The Court of Appeals has embraced this rule, *Shulman v. Hunderfund*, 905 NE2d 1159, 1161 [NY 2009]; *Prozeralik v. Capital Cities Communications, Inc.*, 626 NE2d 34, 39 [NY 1993], and the Supreme Court has repeatedly reaffirmed this responsibility both in the libel context, *Greenbelt Cooperative Publ. Assoc. v. Bresler*, 398 US 6, 11 [1970]; *St. Amant v. Thompson*, 390 US 727, 732–733 [1968], and elsewhere, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557, 567 [1995] (independent review to decide whether participation in parade was non-expressive conduct); *Rankin v. McPherson*, 483 US 378, 385–386 [1987] (whether speech threatening the president was on a matter of public concern). See also *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 US 485, 499 [1984] (extending constitutional requirement of independent appellate review to federal courts of appeal); *A.H. by and through Hester v. French*, 985 F3d 165, 175-176 [2d Cir 2021] (applying standard to protect freedom of religion as well as freedom of speech).

Courts also hold that when First Amendment rights are at stake, determinations ordinarily reviewed for abuse of discretion are subject to independent appellate review. *See United States v. Thomas*, 905 F3d 276, 281 [3d Cir 2018]; *United States v. Antar*, 38 F3d 1348, 1357 [3d Cir 1994]. Accordingly, BehindMLM properly argued based on independent review, not abuse of discretion.

In any event, even were an abuse of discretion standard applied, it would require reversal, since it was a clear abuse of discretion to uphold the subpoenas and grant discovery that would irrevocably destroy BehindMLM's First Amendment right to remain anonymous with no evidence at all to support GSB's claims, and to rely on judgments in a German proceeding of which BehindMLM had no notice and in which she did not participate.

### **III. GSB'S UNPROVEN CONTENTION THAT BEHINDMLM'S BLOG POSTS WERE DEFAMATORY DOES NOT PROVIDE A BASIS FOR REFUSING TO APPLY THE FIRST AMENDMENT**

GSB argues that BehindMLM cannot invoke her First Amendment right to speak anonymously because its petition for discovery alleges that her speech was defamatory, and the First Amendment does not protect defamatory speech. As explained in BehindMLM's opening brief, that argument is just wrong and without any authority. *See* BehindMLM Brief 35. A mere contention that speech is defamatory does not deprive it of First Amendment protection. At this stage of the

proceeding, there has been no determination that any of BehindMLM's speech was actually wrongful. Rather its defamatory character has only been alleged.

GSB mischaracterizes BehindMLM's contention that the Court should join the overwhelming consensus of state appellate courts and federal courts alike and adopt the *Dendrite / Cahill* standard as asking the Court to adopt a "blanket or generalized 'right' to speak anonymously." GSB Brief 30-32. What the *Dendrite / Cahill* standard does, in actuality, is provide an analytic framework that allows courts to determine whether there is a sufficient basis at the pre-litigation stage to strip the accused speaker of her right to the anonymity that the First Amendment would otherwise protect. *See Doe v. Cahill*, 884 A2d 451, 457 [Del 2005]; *Dendrite Int'l, Inc. v. Doe*, 775 A2d 756, 760-761 [NJ App 2001]. Thus, the court looks to see whether the falsity has been adequately alleged, whether the elements of a defamation claim have been pleaded, whether the speech claimed to be defamatory is opinion or fact, and whether there is sufficient prima facie evidence of the falsity that has been alleged. If the court answers any of these questions in the negative, then the speech under challenge is entitled to First Amendment protection, at least at that preliminary stage. And, if the question remains close after the first four prongs of the *Dendrite* standard have been explored, the final inquiry calls for the Court to balance the equities to decide whether equitable relief depriving the speaker

of her First Amendment right of anonymity is justified.

GSB does not grapple with these questions, but rather assumes them away in asking this Court to simply accept its contention that the speech is defamatory and hence affirm the decision below taking away the right to speak anonymously. No other state or federal appellate court has declined to protect anonymity on that ground, and this Court should not be the first to do so.

GSB is wrong that *Warren Hospital v. Doe*, 63 A3d 246 [NJ App 2013], suggests that the New Jersey courts would enforce a subpoena to identify BehindMLM on the facts of this case. In *Warren Hospital*, the Doe defendants had hacked into the plaintiff's computer system to enable them to impersonate current employees for the purpose of delivering offensive and allegedly defamatory messages. *Id.* at 248. The New Jersey Appellate Division declined to apply *Dendrite* because regardless of whether the content of the speech was protected, the conduct—hacking into the computer system—was unprotected by the First Amendment. *Id.* at 250. And in cases subsequent to *Warren Hospital*, New Jersey has continued to apply the *Dendrite* standard to adjudicate discovery sought to identify Doe defendants whose speech about the plaintiffs is allegedly actionable. *Mauro v. Intellectual Freedom Found.*, 2015 WL 10372230, at \*4 [NJ Super App Feb. 26, 2016, No. A-0004-15T2]; *Trawinski v. Doe*, 2014 WL 1096308, at \*2 [NJ. Super

App Mar. 21, 2014, No. A-3348-12T3].

In an apparent attempt to bring this case within *Warren Hospital*, GSB begins its brief with a recitation of anonymous complaints about the BehindMLM blog that GSB has found (or perhaps placed) on some review sites. GSB Brief 7-9. Wholly apart from the fact that the anonymous accusations have no evidentiary value, it is curious that all of the criticisms have been posted in the two years since GSB began its legal proceedings against BehindMLM. Moreover, the anonymous criticisms are wrong. For example, the contention that BehindMLM does not allow critical comments or responses to her reporting to be posted on her site, *id.* at 8, is belied by such comments as:

- [behindmlm.com/companies/orkan-arats-involvement-in-nelo-life-is-messy/#comment-479885](http://behindmlm.com/companies/orkan-arats-involvement-in-nelo-life-is-messy/#comment-479885);
- [behindmlm.com/mlm-reviews/manifest-fx-review-unregistered-forex-trading-bot-scheme/#comment-450664](http://behindmlm.com/mlm-reviews/manifest-fx-review-unregistered-forex-trading-bot-scheme/#comment-450664);
- [behindmlm.com/mlm-reviews/mtc-education-review-200-a-month-crypto-education/#comment-453969](http://behindmlm.com/mlm-reviews/mtc-education-review-200-a-month-crypto-education/#comment-453969);
- [behindmlm.com/companies/lyoness-us-review-cashback-and-investment-returns/#comment-84893](http://behindmlm.com/companies/lyoness-us-review-cashback-and-investment-returns/#comment-84893).

GSB also complains, GSB Brief 44, that appellant's opening brief mentions the rulings of securities commissioners across the United States and around the world that have found GSB's activities to be fraudulent and have prohibited GSB

from offering investments in their jurisdictions. BehindMLM Brief 9-11, 52-53. Unlike the anonymous criticisms cited in GSB's brief, the rulings of securities commissions are administrative rulings of which the Court can properly take judicial notice. *See Severson Envtl. Servs., Inc. v. Manhattan Telecom. Corp.*, 98 NYS3d 564, 565 [App Div 1st Dept 2019]; *Hoya Saxa, Inc. v. Gowan*, 571 NYS2d 179, 180 [App Term 1st Dept 1991]; *see also Siwek v. Mahoney*, 347 NE2d 599, 601 n 2 [NY 1976] ("Data culled from public records is, of course, a proper subject of judicial notice."). Since BehindMLM filed her opening brief, the United Kingdom's Financial Conduct Authority has issued fraud warnings about GSB. [fca.org.uk/news/warnings/gold-standard-trade-gstrade-https-gstradeexchange](https://www.fca.org.uk/news/warnings/gold-standard-trade-gstrade-https-gstradeexchange). As noted in BehindMLM's opening brief, BehindMLM Brief 11-12, rather than contesting these injunctions issued by securities regulators, GSB has apparently acceded to them, shutting down its operations in the jurisdictions where it has been banned, *id.*, and the rulings may, indeed, have collateral estoppel effect on GSB. BehindMLM Brief 52-53.

GSB also cites *Matter of Delgrange v. RealReal, Inc.*, 182 AD3d 421 [1st Dept. 2020] to support discovery here, but that case did not, contrary to GSB's claim, "address[] a very similar issue." GSB Brief 40. Petitioner there sought pre-action discovery to identify anonymous individuals who tried to use respondent's

consignment website to sell items of clothing that petitioner claimed had been stolen from her. *Delgrange*, 182 AD3d at 421. There is no indication that the First Amendment was invoked as a basis for blocking the discovery; the would-be plaintiff was trying to sue for conversion, nor for defamation or some other actionable speech. *Id.* at 422. Moreover, the First Amendment does not protect commercial speech through which a thief or a fence attempts to sell possibly stolen goods.

#### **IV. GSB DID NOT MAKE THE SHOWING REQUIRED BY THE FIRST AMENDMENT**

In finding that GSB has a valid defamation claim against BehindMLM, the Supreme Court relied wholly on the two German orders. In her opening brief, BehindMLM showed that, because she was not notified of the German proceedings until after the orders were issued, and because she did not participate in those proceedings, the Supreme Court violated due process by giving the German orders binding effect against BehindMLM.

Instead of responding to that argument, GSB argues that New York courts have found that German court proceedings generally meet due process standards. GSB Brief 37. But BehindMLM's appeal does not rest on any inherent due process defect in the German proceedings, but rather on the fact that due process forbids extending those judgments to a nonparticipant. *Cf. Carroll v. President and*

*Commissioners of Princess Anne*, 393 US 175, 180 [1968] (grant of ex parte injunction against speech violates First Amendment unless plaintiff shows why circumstances did not permit notice to the speaker before the hearing).

GSB also cites Rachel's Law, CPLR 5304 [b] [9], which provides that foreign judgments for defamation should not be recognized unless the court enforcing that judgment "first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions." GSB Brief 37. Because the burden rests on the proponent of the judgment to show the sufficiency of the foreign law to meet First Amendment standards, CPLR 5304 [c], GSB then goes on to argue that German libel law protects free speech. GSB Brief 41-42. However, GSB's argument that German law meets First Amendment standards is plainly wrong. *See* Joshua Crawford, *Importing German Defamation Principles: A Constitutional Right of Reply*, 41 Fla St L Rev 767, 768-776 [2014] (describing several ways German law falls short of First Amendment protections).<sup>1</sup>

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1. The federal SPEECH Act, 28 USC § 4101 *et seq.* similarly limits the enforcement of foreign defamation judgments in either state or federal court. GSB was able to obtain orders against Google based on its contention that a Google user was defaming GSB on web servers hosted by Google because Germany does not recognize any immunity for interactive service providers comparable to 47 USC

Finally, GSB argues that, in addition to presenting the German orders as evidence of falsity, its petition itself is evidence of falsity because the petition was verified. GSB Brief 35. But the Supreme Court did not rely on the petition as evidence. This is because the petition was not evidence: It consisted merely of conclusory allegations of falsity with no factual support. And even considered as an affidavit, the allegations in the petition are too vague to be admissible evidence on the issue of falsity.

### CONCLUSION

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

Respectfully submitted,



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§ 230. However, the SPEECH Act expressly forbids the enforcement of judgments that would violate section 230. 42 USC § 4102 [c].

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Name of typeface:	Times New Roman
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*Word Count.* The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is: 2,746.

Dated: April 5, 2024