

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT**

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GSB GOLD STANDARD CORPORATION AG,

Petitioner-Respondent,

Appellate Division
Docket No. 2023-05565

-against-

Sup. Ct. N.Y. County
Index No. 160880/2022

GOOGLE LLC and GODADDY,

Respondents Below,

BEHINDMLM, the Anonymous Internet Poster
Whose Identity is Sought by the Subpoenas

Movant/Appellant.

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**MOVANT/APPELLANT'S REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL**

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BehindMLM’s motion for a stay pending appeal explained that the decision below, which strips her of her First Amendment right to speak anonymously based solely on a decision by a German court in a proceeding against Google and GoDaddy, could not be sustained because BehindMLM was not a party to the German proceeding. Beckerman Affirmation ¶¶ 12-13.¹ She urged that the order be stayed because, if Google and GoDaddy are forced to obey it immediately, she would suffer irreparable prejudice—her identity would be revealed and she would forever lose her right to maintain her anonymity. *Id.* ¶ 14. Deprivation of First Amendment rights, even for a moment, constitutes irreparable injury that supports the issuance of equitable relief. *Elrod v. Burns*, 427 US 347, 373 [1976] (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”), *quoted with approval in Time Square Books v. City of Rochester*, 223 AD2d 270, 278 [4th Dept 1996]. Given that movant’s blog reports on fraudulent activity by criminal gangs, being outed as a result of the order below could subject BehindMLM to a risk of harm. For example, an international criminal who ran a different Ponzi scheme than GSB’s, whom movant had criticized in several blog posts, and whose scheme fell apart after that criticism, has threatened to shoot her.²

The affirmation supporting the stay also pointed out (¶ 14) that GSB Gold Standard

¹ This reply memorandum refers to BehindMLM using female gender pronouns generically, not to specify BehindMLM’s actual gender.

² See *Ruja Ignatova’s warning underscores OneCoin mafia ties* [Nov 18 2019] available at <https://behindmlm.com/companies/onecoin/ruja-ignatovas-warning-underscores-onecoin-mafia-ties/> (discussing subject’s ties to the Russian Mafia and her mysterious disappearance); *Jan Gregory issues death threat against BehindMLM’s Oz* [June 22 2023] available at <https://behindmlm.com/companies/jan-gregory-issues-death-threat-against-behindmlms-oz/> (online death threat).

Corporation would suffer no prejudice by being forced to wait to obtain BehindMLM’s identity while this Court considers the lawfulness of the decision below. Although GSB’s papers bandy about the phrase “defamatory per se,” it has not sued BehindMLM, and it has not even proffered a complaint for defamation for proposed future filing—thereby raising serious questions as to what, exactly, GSB wants to do with BehindMLM’s identifying information. BehindMLM is worried that GSB hopes to use her identifying information to pursue private, extra-judicial forms of retaliation. The threat of such extra-judicial self-help is precisely the danger that has animated many courts throughout the United States to adopt some variant of the *Dendrite* standard,³ requiring that a party seeking to identify a detractor make a legal and evidentiary showing of merit before it may use judicial process to compel that showing. *See* Kosseff, *United States of Anonymous* 93-101 [2022] (describing historic origins of the *Dendrite* standard).

If GSB prevails in this appeal, it will obtain BehindMLM’s identifying information and it can file suit seeking an award of damages against her at that time. The absence of any prejudice to GSB’s ability to file at a later time should alone be fatal to its opposition.

In addition to making no response to movant’s showing on prejudice, GSB offers no defense of the only ground on which the court below relied—the judgment of a German court in a proceeding that GSB brought against Google. And GSB has good reason not to defend the ruling, because the trial court’s reliance on the findings in that proceeding to adversely affect BehindMLM’s rights is legally indefensible. “It 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

³ *Dendrite International, Inc. v. Doe No. 3*, 342 NJ Super 134, 775 A2d 756 [NJ App 2001]. Cases from other states following *Dendrite* are cited below at 4.

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]. Because BehindMLM was not a party to the proceeding in Germany, denying BehindMLM’s First Amendment right to speak anonymously based solely on the German judgment finding that GSB had viable defamation claims violates Due Process.⁴

Instead of defending the ruling below, GSB opposes the stay by offering an alternative ground for affirmance. It argues that the claim in its petition that BehindMLM’s statements about GSB were defamatory per se negates BehindMLM’s contention that the petition threatens her First Amendment right to speak anonymously because the First Amendment does not protect defamation. Opposition at 7-8. The opposition consistently assumes that its mere **contention** that statements in BehindMLM’s blog are false and are defamatory per se is enough to strip BehindMLM of her First Amendment right to speak anonymously. New York’s appellate courts have not yet addressed this question—which may be addressed on the merits of this appeal, given that GSB has signaled that it will raise this argument—but many state and federal courts have recognized that mere allegations and conclusory assertions are inadequate to warrant relief depriving the accused speaker of the First Amendment right to speak anonymously:

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.

⁴ Enforcement of the German judgment against BehindMLM would also be contrary to federal and state statutes barring libel tourism. 28 USC §§ 4101 *et seq.*; CPLR 5304 [b] [9].

Doe v. 2theMart.com, 140 F Supp 2d 1088, 1093 [W.D. Wash. 2001].

That concern led New Jersey's Appellate Division in *Dendrite* to formulate a test for a showing that must be made at the outset of litigation to justify equitable relief that overcomes the First Amendment right to speak anonymously. Appellate courts in Arizona, California, Delaware, the District of Columbia, Indiana, Kentucky, Maryland, New Hampshire, Pennsylvania, Texas, and Washington have joined New Jersey in holding that a plaintiff cannot obtain the identity of a defendant who is alleged to have engaged in wrongful speech unless the plaintiff both alleges a legally sufficient cause of action and presents admissible evidence of the elements of the cause of action that the plaintiff alleges.⁵ Although this is an issue of first impression in this Court, the United States District Court for the Southern District of New York held in a recent case that the Jehovah's Witnesses could not use a subpoena to identify one of their longstanding critics because they failed to present a legally tenable prima facie case of alleged copyright infringement. *In re DMCA Sec. 512(h) Subp. to YouTube (Google, Inc.)*, 581 F Supp 3d 509, 515 [SD NY 2022], citing *Arista Records v. Doe 3*, 604 F3d 110, 118 [2d Cir 2010].

GSB did not come close to meeting the *Dendrite* standard here. It presented a petition that identifies several statements excerpted from BehindMLM's blog about which it complains,

⁵ *Doe v. Coleman*, 497 SW3d 740, 747 [Ky. 2016]; *Thomson v. Doe*, 356 P3d 727 [Wash App 2015]; *Ghanam v. Does*, 303 Mich App 522, 541-42 [2014]; *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 Indus.*, 999 A2d 184 [NH 2010]; *Solers, Inc. v. Doe*, 977 A2d 941 [DC 2009]; *Independent Newspapers v. Brodie*, 966 A2d 432 [Md 2009]; *Krinsky v. Doe 6*, 72 Cal Rptr 3d 231 [Cal App 2008]; *In re Does 1-10*, 242 SW3d 805 [Tex App 2007]; *Mobilisa v. Doe*, 170 P3d 712 [Ariz App 2007]; *Doe v. Cahill*, 884 A2d 451 [Del 2005].

and contended in highly conclusory terms that the statements are false. GSB did not specify anything in those statements that it claimed to be false. Moreover, even if there were evidence of falsity, mere falsity is not enough to strip statements of First Amendment protection. *See United States v. Alvarez*, 567 US 709, 718-719 [2012]. On the contrary, when the basis for contending that false speech is constitutionally unprotected is its supposedly defamatory character, *Alvarez* indicates that the plaintiff must be able to meet the standards of *New York Times Co. v. Sullivan*, 376 US 254 [1964] (for public figures) and *Gertz v. Robert Welch, Inc.*, 418 US 323 [1974] (for private figures). *Alvarez*, 567 US at 717. The contentions of the petition—that GSB “is a leading software manufacturer” that has a “global reputation for integrity and transparency,” ¶¶ 4, 6—make it a public figure for defamation law purposes. *See 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). Yet GSB does not allege that BehindMLM published her statements with actual malice, and therefore cannot meet the *Sullivan* standard.

Instead of showing admissible evidence of falsity and pointing to a complaint alleging a legally viable claim for defamation, GSB repeatedly cites the fact that German courts have ruled on a defamation claim that GSB litigated against Google based on German law. Opposition at 1, 2, 4, and 8. But having failed to articulate a legally permissible basis, consistent with Due Process, for the district court’s application of the German court orders to bind BehindMLM and compromise her First Amendment right to speak anonymously, GSB cannot blithely cite those orders as the basis for affirming on appeal on the alternate ground that it has valid defamation claims. GSB also contends that it is “admitted” that BehindMLM has engaged in defamatory

conduct, *id.* at 7, and repeatedly asserts that it has shown that it has valid defamation claims, *id.* at 1, 7, 9. But nothing of the sort has been admitted or shown. Although BehindMLM made the statements quoted in the Opposition, BehindMLM hotly disputed below both that these were defamatory statements **of fact**, and that GSB had presented admissible evidence of falsity. *See* Memorandum Supporting Motion to Quash at 8-12. BehindMLM will also be arguing on appeal that the record below does not establish that GSB has tenable defamation claims that warrant stripping her of her First Amendment right to speak anonymously.

Indeed, there is substantial reason to question the accuracy of GSB's conclusory assertions that BehindMLM's statements are false. Last week, the Securities Commissioner of the State of Texas issued an emergency cease and desist order against GSB barring GSB from offering its investments in Texas, based on evidence of a long pattern of securities fraud, involving the sale of cryptocurrency and investments backed by cryptocurrency. *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.⁶ The order finds that GSB is engaged in illegal multilevel marketing, *id.* at 2, 12, 13, 14, 19, 57, 58—the scam popularly known as a Ponzi scheme—and describes efforts that GSB has made to deploy litigation and illegal contract clauses as a means of suppressing public disclosure of its pattern of fraud, specifically identifying **this very lawsuit** as part of GSB's pattern of fraud

⁶ The Court can take judicial notice of information contained in rulings published on an official government website. *Maisto v. State* 154 AD3d 1248, 1251 [3d Dept 2017]; *People v. Woods*, 30 AD3d 983, 984 [4th Dept 2006]. This Court has taken judicial notice of facts found on the internet even though not official government information. *Amazon.com, LLC v. New York State Dept. of Taxn. and Fin.*, 81 AD3d 183, 204 [1st Dept 2010], *aff'd sub nom. Overstock.com, Inc. v. New York State Dept. of Taxn. and Fin.*, 20 NY3d 586 [2013].

against the public. *Id.* at 47-48. The securities enforcement authorities of Alabama, British Columbia, California, Kentucky, Washington, and Wisconsin, have followed suit, taking action against GSB for “engaging in an international scheme to illegally sell fraudulent investments.”⁷ The findings of these securities regulators contradict the vague claims in the petition for discovery that BehindMLM’s repeated expression of her opinions about GSB—that GSB’s sales of investment instruments backed by cryptocurrency certificates amount to a Ponzi scheme—are false statements of fact that constitute defamation per se. *See generally* U.S. Securities and Exchange Commission, *Investor Alert: Ponzi Schemes Using Virtual Currencies*, SEC Pub No 153 [July 1 2013] available at https://www.sec.gov/files/ia_virtual_currencies.pdf. GSB deliberately ignored these findings in its Opposition.

Finally, citing *Warren Hospital v. Does 1-10*, 63 A3d 246, 248 [NJ Super 2013], GSB argues that even if the Court agrees that the *Dendrite* line of cases should be applied in New

⁷ *In the Matter of GSB Gold Standard Bank Ltd. d/b/a GSPartners, et al.*, WDFI Case No 246723 (EX), ¶ 5 [Wis Dept Fin Inst Nov 16 2023] available at <https://dfi.wi.gov/Documents/Securities/RegistrationOfProfessionals/EnforcementAdministrativeOrders/2023/20231116GSBGGoldStandardBankLtd.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] <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.bpsc.bc.ca/-/media/PWS/New-Resources/Decision-and-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), <https://dfi.wa.gov/news/press/wa-dfi-issues-action-against-gspartners-citing-certificate-sales- and-multi-level>.

York, New Jersey would not extend its own *Dendrite* decision to the facts of this case.

Opposition at 10-11. In *Warren Hospital*, the court declined to apply a *Dendrite* analysis to a motion to quash filed by anonymous Internet users because they had illegally hacked into a hospital's computer system to send emails to the staff comparing one of the plaintiffs to Hitler and accusing others of sexual misconduct.

Hoping to take advantage of this precedent, GSB accuses BehindMLM of being “essentially, an extortionate network, which for years has been attempting to blackmail Heit and GSB by demanding exorbitant payments in exchange for removing the very defamatory articles here.” Opposition at 1, and claims that Heit “would receive, simultaneously with the publishing of many of the defamatory postings on BehindMLM’s Website, emails that threatened to publish more false stories about Heit and GSB.” *Id.* at 13. However, no evidence is cited in support of this outrageous claim which, contrary to the contention at page 13 of the Opposition, was **never** “explained to the court below.” There was no reference to the alleged extortion in the petition for discovery, and no mention of these allegations in the memoranda filed below, as the Court can see by reviewing Exhibit A to the Opposition (that memorandum made passing references to extortion, but offered no specifics and no evidence). The accusations in the Opposition, which have no support in the record, should be disregarded entirely.⁸

CONCLUSION

The motion for a stay pending appeal should be granted.

⁸ If the Court remands for application of the *Dendrite* standard in the first instance, GSB should be given the opportunity to bring Mr. Heit to New York to offer evidence of his alleged receipt of extortionate emails from BehindMLM.

November 22, 2023

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