SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application Pursuant to
CPLR 3102 of

PAMELA GREENBAUM,

Petitioner, Index No: 102063/07

-against-

GOOGLE, INC. d/b/a/ BLOGGER
and BLOGSPOT.COM,

Respondent.

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REPLY MEMORANDUM OF PROPOSED INTERVENOR "ORTHOMOM" IN SUPPORT OF HER OPPOSITION TO REQUESTED DISCOVERY AND OF HER MOTION FOR LEAVE TO INTERVENE

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MISCELLANEOUS

A. Greenbaum Has Not Shown That She Has a Viable Claim for Defamation Against Orthomom.

In her petition for pre-litigation disclosure, Pamela Greenbaum asserted, under oath, that "Orthomom and her readers . . . posted . . . statements about me alleging among other things that I am a 'bigot' and an 'anti-Semite' for my positions," Petition ¶ 6 (capitalization corrected), pointing specifically to a posting by Orthomom on January 11, 2007. Greenbaum further swore that in the January 11 article, "Orthomom wrote that my concern revealed an anti-Semitic agenda." *Id.* ¶ 7 (capitalization corrected). *See also* Petition ¶ 1, describing the purpose of the petition as being to identify "the author of an anonymous weblog and anonymous commenters who have used this blog to defame me by calling me a 'bigot' [and] implying that I am an 'anti-Semite.'" (capitalization corrected). Although Greenbaum swore that these supposed statements by Orthomom were false, the petition did not cite any other alleged statements by Orthomom as a potential basis for litigation.

In response to Orthomom's opposition to discovery, which showed that both the First Amendment and CPLR 3016(a) require specificity concerning the allegedly defamatory words, Greenbaum has now attempted to be specific about which Orthomom statements are the putative basis for her desired libel suit. Feder Affirmation in Opposition ("Feder Aff.") ¶ 37. However, her submission fails to identify even a single Orthomom statement which, in the words of the Petition, "wrote" or "alleged" that Greenbaum was either a bigot or anti-Semitic, or "called" Greenbaum a bigot. Instead, the only Orthomom statement made before this case was filed that is **now** claimed to be libelous is that, after discussing Greenbaum's position on the use of school funds for after-school activities by private school children, Orthomom stated "Way to make it clear that you have no interest in helping the private school community in any fashion." Feder Aff. ¶ 37, first bullet

point.[1]

Read in context, this statement is a classic example of opinion based on disclosed and undisputed facts. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289, 501 N.E.2d 550, 552-553 (N.Y. 1986), reaffirmed as an independent state law standard for distinguishing constitutionally protected opinion in *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 252, 567 N.E.2d 1270, 1280 (N.Y. 1991). There is no dispute that Greenbaum has taken the position on funding that Orthomom attributes to her. Orthomom's post dissects that position, argues that Greenbaum's position is not required by law, and reasons, by process of elimination, that if Greenbaum is simply reflecting a personal preference, then "wow," her statement logically should be understood as showing that she has no interest in helping the private school community, which is a major voting and taxpaying constituency. Orthomom's opinions on these issues are simply not actionable as libel.

Feder argues in his affirmation that Orthomom's statement "implies" that Greenbaum is

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[1] The complete posting is attached to Orthomom's opposition as Exhibit F. The complete discussion of the funding issue reads as follows:

> Um . . . what? Unless I'm mistaken, there is no law against district private school students being taught on public school property by public school teachers. The reason such an arrangement generally does not occur is a matter of the choice private school parents make to send their children elsewhere to be educated. In this case, we are discussing the prospect of private school students receiving extracurricular education from public school teachers on public school property. There is no connection whatsoever to the religious education these students may receive in another venue during the school day. I just don't see how Greenbaum can object on principle to the concept of district children being taught by district teachers on district property. Anyone remember Super Sunday, the (now-defunct) program where district teachers were paid to provide extracurricular activities to private school students on public school property? That was legal. And if she's discussing her personal preference as opposed to some legal issue with Dr. Mansdorf's suggestion, then . . .wow. **Way to make it clear that you have no interest in helping the private school community in any fashion.** (emphasis on words quoted by Greenbaum).

"anti-Semitic," ¶ 47, but no such meaning is either stated or implied. Orthomom does not suggest that disagreements within the Jewish community between Orthodox and non-Orthodox families reflect or imply anti-Semitism (although even if she did, it would not be libelous as discussed below in Section B). She simply states her opinion, and the language in which the expression is couched —"wow" and "way to show that"— make clear that it is opinion. In our democracy, citizens are entitled to express such opinions and evaluations of elected officials and candidates for public office. Even if Greenbaum thinks that any accusation of disinterest in helping the "private school community" necessarily implies anti-Semitism, the issue of whether a given statement has a defamatory meaning is a matter of law for the Court. *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 817, 623 N.E.2d 1163, 1167 (1993).

Instead of providing specific instances in which Orthomom has accused Greenbaum of anti-Semitism or bigotry, Greenbaum now invents a totally new basis for her libel litigation— Orthomom's criticism of Greenbaum's effort to identify her as being based on false assertions. Specifically, Greenbaum now charges that, in blog posts on February 16 and 18, 2007, Orthomom libeled her by complaining that Greenbaum had improperly attributed the accusations of anti-Semitism and bigotry to Orthomom personally. The allegedly defamatory words on February 16 are as follows: "She says that I 'slandered her by calling her a bigot and an anti-Semite.' Lie. She may be referring to something that a commenter on my site said. She should say so." (The passages containing the allegedly defamatory words on February 18 run several full pages in single spaced type and thus are too lengthy to be quoted in this brief, but they are attached to the Feder Affirmation as Exhibit G). In that post, Orthomom dissected Greenbaum's petition paragraph by paragraph, and again took Greenbaum to task for improperly attributing to Orthomom words of the anonymous

commenters who accused Greenbaum of being a "bigot."

Even assuming that Orthomom's characterization of Greenbaum's sworn petition as containing false statements could be actionable as tantamount to a charge of perjury, there is no evidence that Orthomom's statements are **false**. In fact, it is a documented fact that Orthomom's charge is true—Greenbaum is unable to point to **any** statement by Orthomom that accused Greenbaum of being a "bigot" or "anti-Semite," and Greenbaum had every reason to know that.

The First Amendment places the burden on a public official plaintiff in a libel action to prove falsity. Similarly, on a motion that depends on her ability to show that she has evidence of a viable claim, the First Amendment places on Greenbaum the burden to produce evidence that statements on which she seeks to sue for libel are false. Greenbaum's affirmation does not show this. Moreover, a plaintiff cannot meet the summary judgment standard in a libel case by averring generally that the defendant has made "false" statements. An affidavit must explain precisely what about an actionable statement is false, and must aver what the truth is. By the same token, a precise affidavit must be attached to meet the summary judgment standard on which the quest to identify an anonymous speaker rests. Having failed to make such a showing, Greenbaum has not provided sufficient evidence to overcome Orthomom's First Amendment right to speak anonymously.[2]

Evidently recognizing that she lacks evidence of falsity, Greenbaum makes several other arguments seeking to avoid the burden of showing prima facie evidence of a viable claim. None of

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[2]The affidavit that the court accepted in *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), attached to Orthomom's opening brief as Exhibit C, shows the proper level of detail. Given that the plaintiff here is a public official and the statements on which she sues are core political speech, the standard of proof should be even higher under the "balancing" part of the analysis, as discussed in Orthomom's opening brief at page 25-29. *See also* Siber & Marino, *Unmasking Online Defendants,* New York Law Journal April 9, 2007, at S4 (attached as Exhibit G), which argues for a balancing approach.

her arguments are sound. First, Greenbaum argues that the Court should simply disregard the many decisions of federal and state courts in other jurisdictions that have addressed the disclosure of anonymous speakers' identity, either because only state law is relevant here, Feder Aff. ¶¶ 35, 59, or because New York, unlike some other states, provides a specific mechanism for pre-litigation discovery. *Id.* ¶ 33. However, because the principal basis for Orthomom's objection is that discovery would violate her First Amendment right to speak anonymously, the decisions of courts in other jurisdictions are worthy of consideration, even if they are not binding. Nor should the formal name given to the discovery mechanism—"pre-litigation discovery to identify the person sought to be sued" or "discovery to obtain the name of the defendant so that service can be effected" —affect the substance of the way in which the First Amendment should be applied. Many states where judges have recognized First Amendment limits on such discovery to protect the right of anonymous speech allow pre-complaint discovery. *E.g.*, Tex. R. Civ. P. 202; Penn. R. Civ. P. 4001(c). Moreover, even in states where the discovery is sought post-complaint for the purpose of effecting service, such discovery is allowed so long as no privilege would be violated. *E.g.*, *Dry Branch Kaolin Co. v. Doe*, 263 N.J. Super. 325, 328-329, 622 A.2d 1320 (N.J. Super. 1993). However, the First Amendment right to anonymity creates such a privilege, and regardless of the label affixed to the discovery mechanism, First Amendment rights, including the right to anonymous speech, can be overcome only by a compelling government interest. Only if the plaintiff or putative plaintiff can show that she has a valid claim on which there is a reasonable likelihood of success does the interest in identifying the defendant or prospective defendant become compelling.

Although as noted above Orthomom's opposition is based principally on the First Amendment, Greenbaum has not met even the requirements of CPLR 3102(c). Her reliance on

Orthomom's criticism of Greenbaum's position on funding of after-school activities fails because the statement rests on true facts and is protected opinion. Moreover, her reliance on the supposed accusation of making false statements under oath fails because the particular Greenbaum statement that Orthomom criticized – that Orthomom herself had called Greenbaum a bigot or an anti-Semite – is false, as shown above. In that regard, the CPLR 3102(c) requirement that the petitioner show that she has "a meritorious cause of action" means that "the applicant must show the existence of a prima facie cause of action," *Ero v. Graystone Materials*, 252 A.D.2d 812, 814, 676 N.Y.S.2d 707, 708-709 (App. Div. 3d Dept. 1998), including the presentation of evidence that "must be based on first-hand knowledge." *Id.* *See also Toal v. Staten Island University Hosp.,* 300 A.D.2d 592, 593, 752 N.Y.S.2d 372, 374 (App. Div. 2d Dept. 2002) (must consider "the evidence presented"). To avoid the need to confront a constitutional question, this Court should construe the "meritorious cause of action" requirement in light of the First Amendment by holding that in this case, where the discovery seeks to strip a speaker of the right to remain anonymous, a factual showing is required.[3]

Next, Greenbaum apparently argues that even though the Communications Decency Act bars her from suing Orthomom over statements posted on her blog by others, she is entitled to identify Orthomom to ascertain whether Orthomom is in fact the person who posted certain anonymous comments. Feder Aff. ¶¶ 52-54. The logic does not follow. It is Greenbaum's obligation to present

[3]Greenbaum argues, based on unreported decisions that she cites without attaching them for the Court's examination, that New York judges "routinely" grant pre-litigation discovery to identify anonymous Internet speakers. Feder Aff. ¶ 4. Because Orthomom argues for a balancing test that allows identification when the plaintiff can show that it has a legally and factually supportable claim, the existence of such decisions does not show that disclosure would be proper here. However, counsel have obtained copies of most of these decisions, and have attached them to this brief as Exhibit H. It appears that the discovery in those cases was granted by default based on unopposed petitions.

evidence that Orthomom has made a particular statement before she may use it as a basis for identifying Orthomom. In this regard, Greenbaum's argument is at odds with the Order of February 22, 2007, which provides in ¶ 2 that Google need only provide identifying information about the posters of specific comments that Greenbaum identifies as allegedly defamatory. If Greenbaum can satisfy the standards of CPLR 3102(c) and the First Amendment with respect to any given "anonymous" comment, she will be entitled to discovery from Google providing IP information about the poster of that comment, and can use that information to bring suit against that person. Orthomom denies having posted any of the allegedly defamatory "comments," and Greenbaum has absolutely no evidence otherwise, not to speak of showing a prima facie case. Of course, if Greenbaum can meet the First Amendment and CPLR 3102(c) tests with respect to any particular statement, the IP information provided by Google with respect to that post will tell the tale.

B. The Balance of Interests Strongly Supports Preservation of Orthomom's Anonymity.

Greenbaum also argues that the balance of interests – the final stage of the analysis demanded by cases such as *Dendrite v. Doe*—does not weigh in Orthomom's favor because New York does not recognize a common law right of privacy, Feder Aff. ¶ 76, because Orthomom's worry about embarrassment cannot overcome the strong presumption favoring open court proceedings, including the names of the parties, *id.* ¶¶ 76-77, and because Google's Terms of Service warned that her identity might be revealed if demanded by court order. *Id.* ¶ 73-74. These arguments fail because Orthomom's rights asserted here rest not on any generalized common law right of privacy, and not on the embarrassment that follows from being a defendant in a viable litigation, but rather on the First Amendment right of anonymity and the chilling effect that would follow if politicians like

Greenbaum could demand identification of their critics simply by virtue of filing a lawsuit regardless of how tenuous their claims are. The sorts of retaliation that threaten Orthomom if she is identified —loss of economic opportunities and social ostracism if she is identified as being the author of unpopular opinions—are exactly the sort of dangers that typically induce courts to adopt extra safeguards against needless disclosure of otherwise anonymous associations. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 100 (1982). Greenbaum must take her proposed defendant as it finds her, even if her vulnerability stems from her membership in a different community than Greenbaum's, because the different source of the threat does not alter the chilling effect of disclosure.

Moreover, although many of the threats to Orthomom's well-being may come from within the Orthodox community, Orthomom must also worry about retaliation from the anti-Orthodox in Lawrence. This danger was driven home by recent reports of phone calls threatening to kill the school board chairman, whose positions Orthomom supported in her January 11 blog post that is at issue in this case. Fertig, *Mandorf Gets Death Threats*, Jewish Star, Vol. 5, No. 45 (November 17, 2006), at 1 (copy attached as Exhibit I). Greenbaum herself has recognized the chilling effect that forced identification can have – when, after the death threats were reported, the school board instituted a requirement that identification be shown by all people attending school board meetings, Greenbaum objected to the requirement because "the new policy would intimidate people from attending the meetings" with the result of "free speech being chilled." Gordon, *In Defense of Orthomom*, 5 Towns Jewish Times, http://www.5tjt.com/news/read.asp?Id=781, copy attached as Exhibit J. Regrettably, tensions have increased within Lawrence, and the Court should protect the anonymity of Orthomom and her commenters lest they, too, start receiving such threats.

Greenbaum's reliance on the common-law presumption of court openness, and on the Google terms of service noting that identifying information may be provided if so required by court order, also smack of question-begging because whether Greenbaum has viable claims of defamation, and whether a court order **should** issue, are the very questions presented for decision on this motion. The fact that a court might order disclosure does not detract from the presumption of anonymity and the expectation of privacy on the part of those who have, in fact, not engaged in actionable speech. Indeed, the argument that anonymity expectations should be ignored or downplayed because an ISP's terms of service acknowledge the possibility of a court order for identifying information has often been presented as a reason to reject a *Dendrite* or *Cahill* style standard, and those arguments have consistently been rejected without courts even tarrying to discuss them.

Greenbaum invokes *Sony Music v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), to support her argument that Orthomom had no legitimate expectation of privacy, but a comparison of the facts here with *Sony* actually supports the opposite conclusion. The issue in *Sony* was whether a group of music companies should be allowed to identify forty Doe defendants whom it had caught making copyrighted recordings available for downloading, allegedly infringing the copyright owners' rights under 17 U.S.C. § 106. In that case, although it would have been embarrassing to have been "caught" in illegal file-sharing, and bothersome to have to defend the litigation, there was no realistic danger of a chilling effect on constitutionally protected speech. Here, the Blau Affidavit, paired with the sorts of criticisms of Orthodox community misdeeds that have been noted in the record, show a genuine danger to a person like Orthomom. But *Sony* also provides a useful counterpoint on the other side of the balancing scale— the nature of the protected speech. As Judge Chin noted in *Sony*, although the display of others' copyrighted expression has some First Amendment value, its value

is quite limited. This case, by contrast, involves core political speech about a public official on the eve of her next election campaign.[4] The speaker's interest is near the apogee of First Amendment protection, and although one may feel empathy for a private person who has faced harsh criticism, elected officials open themselves to criticism by virtue of having stood for and gained election to public office. On both sides of the scale, the balancing of interests thus favors Orthomom far more than it favored the downloaders in *Sony*.

Also to be weighed as part of the equitable balance is the fact that, once identified, Orthomom can never get her anonymity back. The consequences to Greenbaum of denying discovery here are not so permanent. Although Greenbaum repeatedly characterizes Orthomom's opposition papers as seeking dismissal of her petition, and objects that upon dismissal she will lose all ability to pursue her purported defamation claims, Feder Aff. ¶¶ 2, 5, 54, 57, 69, the denial of her request for discovery will be without prejudice because Orthomom seeks denial of discovery based only on the argument and evidence presented by Greenbaum to date. If Greenbaum loses this motion for lack of evidence sufficient to create a prima facie case, she can nevertheless move for discovery again after she obtains such evidence. Of course, she will not be able to proceed further if her motion is denied because the Court concludes that the statements on which she sues are not actionable, but in that case she will have no legitimate expectation of moving forward.

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[4] Although one newspaper reported that Greenbaum had decided not to run for re-election this summer, Fertig, *Mansdorf, Greenbaum Not Running in District* 15, Jewish Star, Vol. 6, No. 13 (March 30, 2007), a more recent report states that she has simply decided to run for a different seat on the School Board. Coen & Teigman, *3 declare for LPS board seats,* Herald Community Newspapers Online, at http://www.zwire.com/site/news.cfm?newsid=18173568&BRD=1601&PAG= 461&dept_id=479855&rfi=6. Copies of these articles are attached as Exhibit K.

C. Greenbaum Has Not Justified Identifying Any of the Anonymous Commenters.

In response to the Court's order that Google need only provide information about the posters of comments that Greenbaum has specifically identified as being defamatory, Greenbaum specifies three statements by anonymous commenters that she claims are actionable. Feder Aff. at ¶ 37. In addition, in a letter to Google's counsel Tonia Klausner (copy attached as Exhibit L), Greenbaum has identified six statements, two of which are included in her affirmation. None of these statements affords a proper basis for discovery.

To begin with, **none** of the seven statements call Greenbaum an anti-Semite. Three comments call her a bigot or refer to "her bigotry"; one comment says that she is "ugly"; one comment says that Greenbaum "is not to be believed"; one comment refers to the position that Greenbaum has taken on the board with respect to screening for child abuse and "refusing ever to agree with an Orthodox Jew"; and one accuses Greenbaum both of "refusing to agree with an Orthodox Jew" and of "safeguarding the interests of the teachers union." Thus, not only is Greenbaum's accusation that **Orthomom** called her an anti-Semite untrue; her statement that the anonymous commenters used that label is also not true.

In support of her contention that being called an anti-Semite is defamatory, Greenbaum cites *Herlihy v. Metropolitan Museum of Art*, 214 A.D.2d 250, 633 N.Y.S.2d 106 (App. Div. 1st Dept. 1995). That case illustrates the difference between mere name-calling, which courts consistently hold to be opinion, and statements of concrete fact, which may be actionable for defamation. In *Herlihy*, a museum staffer sued several volunteers who got her fired by complaining to museum management that she had made specific remarks to Jewish volunteers, including "you Jews are such liars"; "you Jews are all alike"; and that Jewish volunteers were "f--king whores," "liars" and

"undependable." The question of whether Herlihy made these specific statements was one of fact that could be proved or disproved, and the defendants did not argue that their statements should be excused on the ground that they were mere opinion. Thus, *Herlihy* affords no basis to distinguish or overcome the many cases holding that bare accusations of anti-Semitism or bigotry are mere opinion and not actionable. *See* Greenbaum's Opening Brief at 20-21 (citing cases).[5]

The other statements on which Greenbaum relies for her claims against the commenters are likewise nor actionable as libel. It may be hurtful to be called ugly, but just as beauty is in the eye of the beholder, so too is ugliness—the comment is surely pure opinion. And a statement that a candidate for public office "is not to be believed," or that she supports the interest of a particular union (or a particular company, or other specific interests in the community), are par for the course in political campaigns and simply do not provide the basis for a libel suit. If they did, candidates and their supporters or opponents would spend all their time in court, instead of campaigning and letting the marketplace of ideas determine the outcome of elections.

Moreover, even if the identified statements were actionable, Greenbaum has not made a sufficient showing that any of them are **false**. Greenbaum's attestation of her petition claimed only that it was false to call her a "bigot"; she did not aver that any other statements were false.

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[5]Greenbaum also cites *Sharon v. Time*, 575 F. Supp. 1162 (S.D.N.Y. 1983), and *Stuart v. Anti-Defamation League*, 127 N.Y.S.2d 362 (N. Y. Sup. N.Y. Co. 1953), in support of her contention that an accusation of anti-Semitism is defamatory. The issue on *Sharon* was not anti-Semitism; *Time* reported that Sharon had deliberately turned a blind eye to the likelihood that Palestinians would be massacred when he ordered military action in refugee camps, and that he had discussed the need for revenge against camp inhabitants. 575 F. Supp. at 1165. The 1953 decision In *Stuart* held that the accusation that plaintiff was "'being subsidized' in the performance of his office as editor 'by a known anti-Semite'," was actionable, 127 N.Y.S.2d at 364; however, the decision is inconsistent with later New York rulings, including Appellate Division cases, cited in our opening brief, at 20-21. Moreover, the accusation of receiving a subsidy is, at least, a verifiable statement of fact.

Moreover, although Mr. Feder avers generally that Greenbaum is suing over false statements of fact, his affirmation is not made on personal knowledge and in any event does not explain **how** any of these other statements are false. Even with respect to the averment that the accusations of bigotry were false, Greenbaum has provided only a general denial, not a specific explanation of the way in which she is not a bigot. Accordingly, the Court should not order identification of the anonymous speakers who made any of these comments.

Greenbaum argues, however, that Orthomom lacks standing to defend the First Amendment rights of people who post comments on her blog. But just as the NAACP has standing to protect the anonymity of its members in *NAACP v. Alabama*, 357 U.S. 449, 459 (1958), and booksellers may defend the First Amendment rights of bookbuyers, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-393 (1988), or newspapers may protect the anonymity of their sources, *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972), Orthomom has standing to protect the anonymity of the people who have chosen to post on her blog. Indeed, Greenbaum's argument that Orthomom lacks standing is completely at odds with her contention that Orthomom should not be able to intervene because she can rely on Google to defend her First Amendment right to remain anonymous. That argument assumes that Google would have standing to raise that defense. Yet Orthomom stands in the same relation to commenters who put statements on her site as Google stands in relation to Orthomom.[6]

Greenbaum's attempt to capture identifying information about the anonymous commenters

[6] Greenbaum cites *Barkoo v. Melby* , 901 F.2d 613 (7th Cir. 1990), in support of her standing argument. Feder Aff. ¶ 58. The issue in *Barkoo* was whether employee speech was a matter of public concern, and the word standing appears nowhere in the decision. Greenbaum does not provide a jump citation that identifies the part of the ruling that supports her standing contention.

by denying Orthomom's standing to argue for them is particularly improper given that Greenbaum has taken no steps to give the commenters notice of the particular statements whose authors she seeks to identify. In an effort to comply with the spirit of the Court's order that Google notify **her** of the pendency of this action, Orthomom has posted on her blog the list of statements set forth in Mr. Feder's letter to Ms. Klausner. *See* post dated April 7, 2007, http://orthomom.blogspot.com/2007/04/school-district- 15-tidbits.html, attached as Exhibit M. She has also posted the additional anonymous comment identified in paragraph 37 of Mr. Feder's affirmation that was not mentioned in the letter to Google's counsel, in the hope of giving notice to the author of that additional comment. *See* post dated April 12, 2007, http://orthomom.blogspot.com/2007/04/psa-regarding-legal-action-against.html, attached as Exhibit N. However, there has not been nearly enough time between those posts and the April 19 hearing for the authors to see the notice and obtain counsel. Accordingly, if the Court does not recognize Orthomom's standing, and is unwilling to consider those posters' First Amendment rights sua sponte, it should allow more time for those posters to appear to oppose identification.

D. Orthomom Has Taken the Proper Procedural Steps to Preserve Her Anonymity.

Greenbaum also advances a litany of complaints about Orthomom's motion for leave to intervene and the manner in which her papers were prepared and served. Most of these claims elevate form over substance, and implicitly contend that this Court erred by accepting Orthomom's papers and by setting a briefing schedule and a hearing date. Greenbaum attempts to beg the central question on this motion – does the First Amendment allow Greenbaum to use the authority and power of the Court to strip Orthomom of her right to keep her criticisms anonymous. None of Greenbaum's procedural objections has merit.

First, Greenbaum complains that Orthomom filed her motion to intervene without a verified answer. Feder Aff. ¶¶ 8-9. There are several responses to this point. First, under CPLR 402, the adverse party to a petition must file either an answer **or** a motion to dismiss, and the Feder Affirmation repeatedly recognizes that Orthomom's papers are tantamount to a motion to dismiss. Orthomom submitted an answer to satisfy a request from a clerk in the ex parte office. However, because an answer is not in fact required, the form that the answer takes is irrelevant. Indeed, Google has not filed an answer to the petition, but Greenbaum has not argued that Google is in default. Second, there is no general requirement that responses to a petition for pre-litigation disclosure be verified, and Greenbaum does not cite any. Third, although the proposed answer was filed without verification in the belief that no verification was needed, counsel are certainly prepared to verify it pursuant to CPLR 3020(d)(3) if the court rules that an answer is needed and must be verified.

Given the difficulties that would be implicated by an effort to file an anonymous affirmation, it would appear that Greenbaum's attempt to require an anonymous respondent to verify an "answer" to a request for that respondent's identity is just another way of creating procedural obstacles to the protection of the First Amendment right to remain anonymous. In its February 22 order, this Court determined that Orthomom is entitled to appear to argue against Greenbaum's attempt to compel her identification, and intervention is the sensible means to effectuate that appearance. The law's procedural mechanisms should not be applied in a way that frustrates the law's purpose or, indeed, the requirements of the Constitution.[7]

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[7]Greenbaum is wrong to argue, Feder Aff. ¶ 14, that *Public Relations Society of America v. Road Runner*, 8 Misc.3d 820, 799 N.Y.S.2d 847 (N.Y. Sup. N.Y.Co. 2005) ("*PRSA*"), denied an anonymous intervention to oppose discovery to identify the anonymous email sender in that case.

Second, Greenbaum argues that intervention should be denied because Orthomom did not obtain permission to proceed anonymously before filing her motion for leave to intervene. This argument elevates form over substance. The central issue on the motion pending before the Court is whether Orthomom (and her commenters) are entitled to avoid identification. The gist of Orthomom's papers is to protect her right to remain anonymous. Greenbaum contends that before filing this these papers, Orthomom first had to get the Court to rule on whether she should be identified. The Court's ruling on the present motion will resolve that issue; there is no need for the two-step process that Greenbaum proposes.

Third, Greenbaum argues that intervention should be denied because there has been no "showing" that Google is unable or unwilling to protect Orthomom's right to remain anonymous. In fact, undersigned counsel Mr. Levy has been advised by Google's counsel Ms. Klausner that she expressly told the Court that Google wanted to be sure Orthomom had a chance to intervene and otherwise would follow the court's order. Moreover, the course of these proceedings show that Google is not going to make any arguments about whether the right to anonymity should be accepted or overridden on the particular facts of this case. It is unreasonable to expect an ISP with millions of customers for free services such as Gmail and Blogspot to make fine judgments in each case in which it receives a subpoena to identify customers about whether a given customer has made an actionable comment. Instead, the system that has evolved over time is for ISP's to give notice to the person or persons whose identifying information has been subpoenaed and to give that person enough time to get into court to oppose discovery. Levy Affirmation (attached to previous

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The court simply denied a motion to vacate a previous disclosure order without ever deciding whether intervention should be allowed.

memorandum), ¶ 15. That is what happened here, and Greenbaum's attempt to erect a procedural maze to avoid confronting the constitutional and other substantive legal flaws in her attempt to identify her critics should be rejected.

CONCLUSION

The motion for leave to intervene should be granted, and the request that Google be ordered to provide information identifying Orthomom and the anonymous commenters on her blog should be denied.

Dated: April 17, 2007

Paul Alan Levy
Allison M. Zieve

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

SCAROLA ELLIS LLP
888 Seventh Avenue, 45th Floor
New York, New York 10106
(212) 757-0007

Attorneys for Proposed Intervenor "Orthomom"