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

In the matter of the Application of HEIDI'S INC., Petitioner, For an Order pursuant to Section 3102(c) of the Civil Practice Law and Rules to compel disclosure pre-action from, -against- GOOGLE, INC. and/or its subsidiary, PLUS.GOOGLE.COM Respondents, of the identity the defendants JOHN DOE and/or JANE DOE, using the screen name "ARNOLD ZIFFLEL," being unknown to the petitioner, in an action about to be commenced.	AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE COMPELLING DISCLOSURE OF IDENTITY OF ANONYMOUS COMMENTER Index No.

DANIEL S. SZALKIEWICZ, ESQ., an attorney duly admitted to practice in the Courts of the State of New York, affirms the following statements to be true under the penalties of perjury, pursuant to Rule 2160 of the CPLR:

1. I am a member of the DANIEL SZALKIEWICZ & ASSOCIATES, P.C., the attorneys of record for the Petitioner, HEIDI'S INC., (hereinafter "Heidi's Inn"), in this matter.

2. I am fully familiar with the facts and circumstances of this matter from my firm's file on this matter kept in the ordinary course of business and from information provided by our client, Heidi's Inn.

3. I submit this affirmation in support of Petitioners application for an order, pursuant to CPLR 3102(c), for pre-action disclosure, compelling Google, Inc. and/or its subsidiary Plus.Google.Com (hereinafter collectively referred to as "Google") to disclosure the identity of the person or persons (hereinafter the "Reviewer") who posted a defamatory statement about Heidi's Inn on a website under the operation and control of Google.

4. Briefly, the application should be granted because the unknown defendants created a defamatory review entitled "Heidi's Inn" at the uniform resource locator ("URL") https://plus.google.com/u/0/104703725442367129039/reviews?hl=en&gl=us, containing commentary solely about Heidi's Inn and included defamatory statements concerning criminal activity, drug usage, police incidents, health violations, and other dishonest conduct. The review constitutes defamation *per se* in that it obviously done to damage the corporation's professional reputation. When the review was posted, of the **11** reviews on line, it appeared first. Additionally, when you searched "Heidi's Inn" on Google, of the **341,000** search results, the review appears on the first result. A copy of the review is annexed hereto as Exhibit "A".

5. Google will not disclosure the identifying information of the user as it would violate its privacy policy. However, Google has indicated that it would comply with an order directing it to furnish identifying information about the person or persons who posted the remarks that defamed Heidi's Inn.

6. In this affirmation and the annexed affidavit of Sean Diggin, a representative of Heidi's Inn, we have set forth facts sufficient for this Court to compel Google to disclose the identity of the anonymous reviewer who posted defamatory statements and other commentary on Google's website. It is respectfully submitted and will be demonstrated below that this application should be granted in all respects and result in an order requiring Google to disclose

the reviewer's name(s), address(es), email address(es), phone number(s), IP Address(es) and any other information that it may possess that would assist in ascertaining the reviewer's identity.

STANDARD OF REVIEW

7. New York's CPLR 3201(c) allows a potential plaintiff to seek discovery before the commencement of an action:

> Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration may be obtained but only by court order.

(CPLR 3102 [c] [McKinney 2007]; *see also Admission Consultants, Inc. v. Google. Inc.*, [N.Y. Cty. Index No. 115190/07, Cahn, J.])

8. A request for pre-action disclosure is best sought by the commencement of a special proceeding (*See* CPLR 3102[c], Commentary C3102:6 [2007]; *see also Daly v. 26-28 Market St., Inc.*, 21 A.D.3d 853, 801 N.Y.S.2d 596 [1st Dept 2005]). New York Courts routinely grant pre-action disclosure under CPLR 3102(c) to ascertain the identity of a defendant to aid in bringing an action (*See, e.g., Alexander v. Spanierman Gallery, LLC*, 33 A.D.3d 411, 822 N.Y.S.2d 506 [1st Dept 2006]; *Toal v. Staten Island University Hospital*, 300 A.D.2d 592, 752 N.Y.S.2d 372 [2d Dept 2002]; *Perez v. New York City Health and Hasp. Corp.*, 84 A.D.2d 789, 44 N.Y.S.2d 23 [2d Dept 1981]).

9. In order to be entitled to this relief, however, "the moving party must first show that it has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong." (*Liberty Imports. Inc. v. Bourguet. et al.*, 146 A.D.2d 535,

536 [1st Dept. 1989]; *see also In the Matter of Greenbaum v. Google. Inc.*, 18 Misc. 3d 185,188 [Sup. Ct. N.Y.C. 2007]).

PETITIONER HAS ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS BASED ON DEFENDANTS' DEFAMATORY STATEMENTS THAT CONSTITUTE LIBEL PER SE

10. In order to establish a claim for libel, a Plaintiff must demonstrate "(1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to plaintiff" (*Cheek v. DeGuzman*, 2011 WL 5295026 [N.Y. Sup. Ct., N.Y. Co., October 18, 2011].

A. False and Defamatory Statement of Facts

11. A statement is defamatory if it "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" *Mohen v. Stepanov*, 59 A.D.3d 502 [2d Dept. 2009], *citing Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369 [1977]). When determining whether a statement an expression of opinion or an assertion of fact, the "factors to be considered are: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact" (*Melius v. Glacken*, 2012 WL 1320224 [2d Dept. 2012]).

12. A Court must determine in the first instance whether the particular publication, considered as a whole, is susceptible of a defamatory meaning and whether the publication

concerns the plaintiff. “If the contested statements are reasonably susceptible of a defamatory connotation, then it becomes the jury's function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader” (*Knutt v. Metro Intern., S.A.*, 91 A.D.3d 915 [2d Dept. 2012]). The Court need only examine the contents of the statements to confirm that the postings are libelous statements of fact concerning Plaintiff.

13. The statements which were made in the review unmistakably refer to Petitioner as having committed multiple crimes and violations. The Defendants wrote that at Heidi’s Inn there have been “many, many instances of prostitution, drug activity, police involved incidents, health department violations, assaults, [and] vandalism.” See Plaintiff’s Exhibits “A”. Looking at the comments as a whole, the postings undeniably are asserted as fact. These statements are unambiguous factual assertions of criminal conduct and injury Petitioner’s business reputation. Defendant also asserted as a matter of fact that the owners of the Inn are “dishonest.” The “tone” of these defamatory statements are “straightforward and declaratory, and does not appear to be intended as a juvenile attempt to achieve humor” (*Suarez v. Angelet*, 90 A.D.3d 906, 935 [2d Dept. 2011]).

14. Petitioner’s representative has sworn to the fact that the allegations in the statements are completely untrue. See Diggin’s Affidavit annexed hereto.

15. The libelous statements clearly tend “to expose the Plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society” (*Mohen*, *supra*).

B. Publication of the Statements

16. The libelous statements are published on the review page for Heidi’s Inn.

17. By posting the writings on the google website, the reviewer broadcasted the defamatory statements on the internet and clearly published and broadcasted the statements to many more people than just Petitioner. They were broadcast to anyone who could find the page or searched for the phrase "Heidi's Inn."

C. Injury to the Plaintiff

18. Certain statements are considered so egregious by the Courts that they are libelous *per se*. Two categories of libelous *per se* statements are those that "charg[e]" plaintiff with a serious crime" and those that "that tend to injure another in his or her trade, business or profession" (*Liberman v. Gelstein*, 80 N.Y.2d 429 [1992]). When statements are libelous *per se*, the law presumes that damages will result and they need not be separately proved (*See DiMilia v. Ullman*, 2011 WL 1935958 (N.Y. Sup. Ct., Putnam Co. 2011).

19. First, an allegedly defamatory statement may constitute libel per se if it charged the defamed person with an indictable crime (*Klein v. McGauley*, 29 A.D.2d 418, 421 [2d Dept. 1968]). "While slanderous language need not consist of the technical words of a criminal indictment it is necessary that the language be reasonably susceptible to a connotation of criminality" (*Caffee v. Arnold*, 104 A.D.2d 352, 353 [2d Dept. 1984]). Statements regarding serious, as opposed to minor offenses, are actionable as libel *per se*. Serious crimes such as murder, burglary, larceny, fraud, arson, rape, and kidnapping fall within the list of crimes that are actionable as libel per se (*Liberman*, 80 N.Y.2d at 435). Further, courts have held that serious misdemeanors may form the basis for a claim of libel *per se* (*See, e.g., DeFilippo v. Xerox Corp.*, 223 A.D.2d 846, (3rd Dept. 1996).

20. Even in its simplest form, allowing prostitution and drug activity in a premises is a violation of the New York Penal Law. In fact, in New York City, such allegations are sufficient to have a location declared a "public nuisance" under the law and shut down permanently. Additionally, violations by the health department are both misdemeanors and penal law violations. Thus, there is no doubt that the review can be read as imputing crimes on Petitioner, and that this crime is sufficiently serious to be actionable as libel per se.

21. Even more glaring is the fact all the statements by Defendants are intended to, and do, defame Petitioner in its trade and are injurious to its profession. "Words which affect a person in his or her profession by imputing to him or her any kind of fraud, dishonesty, misconduct, or unfitness in conducting one's profession may be actionable" (*Wasserman v. Haller*, 216 A.D.2d 289 [2d Dept. 1995]; *See also Four Star Stage Lighting, Inc. v. Merrick*, 56 A.D.2d 767 [1st Dept. 1977]). More specifically, statements which adversely reflect on the integrity and management of a hospitality institution are actionable as libel *per se* (*see* 43 N.Y. Jur. 2d Defamation and Privacy § 60).

22. On not less than five occasions the Defendants attack Petitioner's professional character by asserting, as a matter of fact, that Petitioner's location allows criminal activity, and the Petitioner committed acts of fraud, misconduct and dishonesty. As detailed more thoroughly in the annexed Affidavit, Petitioner runs a respected institution and is well known in the local community. Therefore, the statements constitute libel *per se* as they go to the heart of Petitioner's livelihood.

CONCLUSION

23. For the foregoing reasons, Petitioner respectfully requests that the Court: (i) determine that Petitioner has made the requisite showing pursuant to CPLR §32102(c) concerning the existence of a meritorious cause of action; (ii) order Google to seek to attempt to notify the user of these proceedings in the event he or she wants to file an objection; (iii) order Google to provide pre-action disclosure to Petitioner respecting the identity of the person(s) responsible for the creation of the review, in the event the user does not file and objection; and (iv) grant such other and further relief as the Court deems just and proper under the circumstances.

DATED: November 25, 2013
New York, New York

DANIEL SZALKIEWICZ & ASSOCIATES, P.C.

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ATTORNEY'S VERIFICATION

STATE OF NEW YORK }
} ss.:
COUNTY OF NEW YORK }

DANIEL S. SZALKIEWICZ, ESQ., being duly sworn, deposes and says:

That I am an attorney duly admitted to practice in the courts of New York State, and that I am the attorney of records, or of counsel with the attorney(s) of record for the plaintiff(s), I have read and know the contents of the annexed ORDER TO SHOW CAUSE, know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe then to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following: facts, investigation and pertinent information contained in deponent's file.

The reason I make this affirmation instead of petitioner is because petitioner(s) reside in a County other than where the deponent maintains his office.

Dated: New York, New York
November 25, 2013

Daniel S. Szalkiewicz, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 301406/2010

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Petitioner,

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-against-

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Respondents,

of the identity the defendants JOHN DOE and/or JANE DOE, using the screen name "ARNOLD ZIFFLEL," being unknown to the petitioner, in an action about to be commenced.

ORDER TO SHOW CAUSE

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General Information

Court	New York Supreme Court, New York County
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Status	Open

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