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

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Anonymous, an Infant above the age of fourteen, by her father and natural guardian, Anonymous, for an Order pursuant to Section 3102 (c) of the Civil Practice Laws and Rules to Compel Disclosure from, Petitioner,

-against-

Google, Inc.,

Defendants.

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Index No.:

AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE COMPELLING PRE-ACTION DISCLOSURE

Russell Bogart, an attorney duly admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, pursuant to Civil Practice Laws and Rules ("CPLR") § 2106, as follows:

1. I am a partner in the law firm of Hoffman Polland & Furman, PLLC and represent Petitioner Anonymous ("Petitioner") in the above-captioned petition. I am familiar with the facts and circumstances set forth in this affirmation. I make this affirmation in support of Petitioner's application for an Order, pursuant to CPLR §3102(c), for pre-action disclosure against the Respondent Google, Inc. ("Google"), directing Google to preserve and disclose the Registrant Information and IP Address Information pertaining to the email address mgulelo@gmail.com ("GMAIL account").

2. The Petitioner is a sixteen-year old minor. Petitioner is also an A student and ranked by the United States Tennis Association as one of the top forty female tennis players in her age group in New York state. As a high school junior, Petitioner also has contacted a number of prestigious colleges and universities about possible athletic and/or academic scholarships. Petitioner had posted on a website devoted to the recruiting of tennis players the colleges that she is interested in attending.

3. To the Petitioner's horror and humiliation, she has discovered that an individual pseudonymously using the GMAIL Account (hereinafter the "Defendant") has transmitted defamatory emails to a number of the tennis coaches at the universities that she had listed on the tennis recruiting website as schools she was interested in attending. In December 2013, a tennis coach from an academically prestigious university forwarded to the Petitioner's high school coach an email sent by the Defendant about her. A second university tennis coach also has informed the Petitioner's parents, through an intermediary, of the receipt of a similar email. Based on the facts discussed below, Petitioner fears that she has only uncovered the tip of the iceberg in terms of the harm that the Defendant has attempted to inflict, or is inflicting, upon her.

4. To say the least, the email communications impugn the integrity, character and fitness of the Petitioner. In a December 16, 2013 email transmitted to one university tennis coach, the Defendant wrote "I want to inform you of a current high school junior that has your school on the list of schools she wants to apply to next year." The Defendant further explained that the Petitioner "has your school as 'High Interest' on the Tennis Recruiting website." [1]

5. The Defendant then stated that to protect the "school's best interests," the Defendant was warning the school that the Petitioner is "Someone you most certainly do not want to be a team member on your school's women's tennis." The Defendant further indicated that the Petitioner "cheats any chance she gets (not only in tennis)." The Defendant further accused the Petitioner, *inter alia*, of "having a very disrespectful attitude towards both" her teammates and coaches, exhibiting extremely poor sportsmanship, of accusing the coaches of being "corrupt and unfair" and that "Badmouthing others is most definitely her very strong asset." The email further charges that the Petitioner is only a mediocre student and tennis player.

[1] Petitioner's counsel will bring the actual emails to oral argument if the Court wishes to inspect them.

6. Tellingly, as the university coach told the Petitioner's high school coach in a December 17, 2013 email:

> "I personally think it may be important for [Jane Doe] to know that someone is sending these emails out about her and I think it is *troubling that someone would go to these lengths"* (emphasis added).

7. The circumstances strongly indicate that the Defendant sent similar defamatory communications to other tennis programs that the Petitioner had expressed interest in on the Tennis Recruiting website, along with other third parties. Thus, absent obtaining pre-action discovery tailored toward identifying the Defendant, the Petitioner will be unable to bring a legal action against the Defendant for damages and/or to curtail the malicious conduct. Understandably, upon learning of the conduct perpetrated against her, Petitioner has suffered significant emotional harm in addition to the obvious harm to her reputation.

8. The publication of Petitioner's true name in the public record inevitably would subject this teenager to further unwanted publicity and further exacerbate the harm caused to her emotionally, along with to her reputation. Accordingly, to minimize such harm, Petitioner has filed this Petition utilizing the pseudonym "Jane Doe." *See, e.g., Doe v. N.Y.U.*, 6 Misc.3d 866 (Sup.Ct. N.Y. Co. 2004) (anonymous filings permitted in "compelling situations" involving "highly sensitive matters" including "social stigmatization," or "where the injury litigated against would occur as a result of the disclosure of the plaintiff's identity"). The infant Petitioner is aware of the filing of this Petition and has requested that her parents assist her in pursuing this pre-action discovery because of the fear of harm that the Defendant has placed her in.

THE STANDARD FOR OBTAINING PRE-ACTION DISCLOSURE

9. Pursuant to CPLR §3102(c), a court is permitted to issue an order allowing a party to obtain discovery, pre-action, to aid in bringing an action or to preserve information. *See Matter of Uddin v. New York City Transit Authority*, 27 A.D.3d 265, 266 (1st Dep't 2006). "A petition for pre-action discovery should only be granted when the petitioner demonstrates that he

or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." *Id*. New York Courts have awarded pre-action discovery where necessary to determine the identity of bloggers who have posted defamatory material. *See, e.g.*, *Cohen v. Google, Inc.*, 25 Misc. 3d 945, 948, 887 N.Y.S.2d 424, 426 (N.Y. Sup. Ct. 2009).

10. As one court aptly observed when deciding whether discovery was warranted of the identity of an anonymous blogger:

> In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.

In re Subpoena Duces Tecum to America Online, Inc., 2000 WL 1210372 (Va.Cir.Ct.), revd. on other gds, 261 Va. 350, 542 S.E.2d 377 (Va.Sup.Ct.2001)

PETITIONER POSSESSES MERITORIOUS CAUSES OF ACTION

11. Petitioner possesses a meritorious cause of action for defamation against the Defendant. To assert a cause of action for defamation, a plaintiff needs to allege the issuing of "a false statement, published without privilege or authorization to a third-party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't. 1999). Statements can be defamatory if they "tend[ ] to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of [her] in the minds of a substantial number of the community." *Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 1076 (1997).

12. Here, the email communications, by accusing the Petitioner of cheating "any chance she gets (not only in tennis)," are libelous *per se* as they charge the Petitioner, a minor, in

writing of being a liar and are thus actionable on their face. *Divet v Reinisch*, 169 A.D.2d 416, 417 (1st Dept 1991). As the Restatement (Second) of Torts § 569 (1977), comment g explains:

> It is actionable per se to impute to another in libelous form conduct that tends to lower the other's reputation for veracity or honesty, irrespective of whether the conduct constitutes a criminal offense and irrespective of whether it tends to affect the trade, business or profession of the other. Thus it is actionable so to accuse another of the crime of perjury, larceny or embezzlement, or to make any derogatory imputation of fact concerning another's veracity or integrity. Statements that another has cheated or taken unfair advantage in a business transaction or that he has in any way defrauded others, as by refusing to pay his debts, are within the rule stated in this Section.

13. The emails further suggest that the Defendant is aware of undisclosed facts – such that the Petitioner has cheated academically or is sexually promiscuous – which purportedly support the claim that the Petitioner "cheats any chance she gets." See e.g., *Qureshi v St. Barnabas Hosp. Ctr.*, 430 F.Supp 2d 279, 288 (S.D.N.Y. 2006) ("The actionable element of a "mixed opinion" is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to [her] audience, which support [her] opinion and are detrimental to the person about whom [s]he is speaking"); *Arias-Zeballos v Tan*, 2008 WL 833225 (S.D.N.Y. Mar. 28, 2008) ("Tan's statements to Fasano-that Zeballos "cheated" Tan and is "dangerous"-are capable of being characterized as true or false. To the extent it could be argued that calling someone "dangerous" expresses an opinion, the statement is still actionable stated alone and without any justification, it implies the existence of undisclosed facts warranting the conclusion that Zeballos is a dangerous person"). Significantly, these false statements were not issued in the context of a public debate, but rather were sent to targeted individuals in a manner designed to interfere with the Petitioner's professional aspirations.

14. The statements also were maliciously transmitted to each college tennis program that the Petitioner had expressed a desire to attend thereby satisfying the "fault" requirement to support a defamation claim. The defamatory statements were designed to inflict pecuniary harm

upon the Petitioner by interfering with the Petitioner's opportunity to procure university scholarships (i.e., prospective economic advantage) and ultimately to interfere with her educational and professional aspirations.

15. "The elements of a claim for intentional infliction of emotional distress are (i) extreme and outrageous conduct, (ii) an intent to cause—or disregard of a substantial probability of causing—severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv) the resultant severe emotional distress." *Lau v. S & M Enterprises*, 72 A.D.3d 497, 498, 898 N.Y.S.2d 42, 43 (N.Y. App. Div. 2010), *leave to appeal dismissed in part, denied in part*, 16 N.Y.3d 767, 944 N.E.2d 654 (2011).

16. Here, the Defendant has engaged in the outrageous conduct of attempting to blacklist the Petitioner from obtaining a college athletic scholarship through the secret dissemination of defamatory emails accusing her of deceit and unfitness. The extreme nature of the Defendant's conduct is confirmed by one tennis coach's comment about the disturbing lengths to which the Defendant had resorted to harm the Petitioner. The extreme and outrageous nature of the harm is further shown by the Petitioner's status as a minor and the apparent pattern of behavior at issue. Indeed, upon learning about these events, the Petitioner has expressed to her parents that she is now *"fearful"* of attending school.

17. An Order from this Court directing Google to disclose the Registrant and IP Address information pertaining to the GMAIL account is necessary to identify this individual.

18. On January 15, 2014, the Petitioner's mother sent an email addressed to the GMAIL Account requesting that the Defendant contact her to discuss the Defendant's communications about the Petitioner. No response was received.

19. On March 3, 2014, Petitioner's counsel sent an email to the GMAIL Account warning of the Petitioner's intent to file this motion for pre-action discovery. In response, Google sent a notification that the GMAIL account has been shut down.

20. Specifically, Petitioner requests that Google be required to disclose:

> All subscriber and/or account registration information for the user of the GMAIL Account from July 1, 2013 to the present, including but not limited to, name, address, phone number, additional verification email addresses, access logs, any sign-in IP address information, including the IP address utilized at the time of account creation.

21. Absent an award of the aforementioned pre-action discovery, the Petitioner will not be able to pursue any legal action against the Defendant.

22. The Petitioner has not made any prior request for relief from this Court.

WHEREFORE, for the above stated reasons, it is respectfully requested that the relief requested by Petitioner be granted in all respects, with all additional relief that is fair and just.

Dated: New York, New York
March 17, 2014

HOFFMAN POLLAND & FURMAN PLLC

By: */s/ Russell Bogart*
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General Information

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