*To be Argued by:*
PETER SCHUYLER
*(Time Requested: 15 Minutes)*

# New York Supreme Court
## Appellate Division – Second Department

**Docket No.: 2012-06490**

In the Matter of Application Pursuant to CPLR §3102(c) of:

SUSAN KONIG, individually, and the CROTON REPUBLICAN COMMITTEE, by and through its Chairperson, Susan Konig,

*Petitioners-Respondents,*

– against –

CSC HOLDINGS, LLC,

*Respondent,*

– and –

WATCH CROTON,

*Respondent-Appellant.*

# BRIEF FOR PETITIONERS-RESPONDENTS

KITSON & SCHUYLER LLP
*Attorneys for Petitioners-Respondents*
321 South Riverside Avenue
Croton on Hudson, New York 10520
(914) 862-0999

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## QUESTIONS PRESENTED

**QUESTION:** Whether the trial court's May 24, 2012 Decision and Order correctly determined that the court had jurisdiction over the Respondent-Appellant Watch Croton for purposes of ordering discovery under CPLR § 3102(c).

**ANSWER:** Yes.

**QUESTION:** Whether the Respondent-Appellant Watch Croton has standing under CPLR § 5511 to act as a surrogate for third-party anonymous blogger Q-Tip for the purpose of making arguments on appeal regarding the First Amendment rights of Q-Tip, when Q-Tip was not a party to the case below, when Q-Tip has not moved to intervene in the instant appeal, and when Watch Croton never alleged it has any interest in, or would suffer any injury by, the disclosure of the identity of Q-Tip, who it asserts is unconnected to the administration of the blog.

**ANSWER:** No.

## PRELIMINARY STATEMENT

This brief is submitted by petitioners-respondents Susan Konig, individually and the Croton Republican Committee, by and through its Chairperson, Susan Konig ("Ms. Konig" and "the CRC", collectively "Petitioners") in opposition to respondent-appellant's appeal from the May 24, 2012 Decision and Order of the Supreme Court of New York, County of Westchester (Bellantoni, J.), which granted Petitioners' request for pre-action disclosure pursuant to CPLR § 3102(c) regarding the identities of the person(s) responsible for the operation and administration of an anonymous local blog, "Watch Croton" and the identity of an anonymous third-party blogger self-identified as "Q-Tip," who posted defamatory statements concerning the Petitioners on Watch Croton. In opposition to the Petition, Q-Tip provided an affidavit supporting Watch Croton, but she did not move to intervene in the Petition under either CPLR §§ 1012 or 1013 in order to oppose the petition personally, and thus, Q-Tip has never become a party to this proceeding.[1]

In the underlying CPLR § 3102(c) petition, petitioners defined

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[1] Appellant previously has previously indicated Q-Tip is a woman by using the pronoun she. (R. 287, fn 11)

respondent-appellant (hereafter, "Appellant") "Watch Croton" as the "operators/administrators of a blog watchcroton.com" that is "operated by various anonymous blogger(s), who are New York residents living in or around Croton on Hudson, New York." (R 21, 23) Given that Watch Croton provides no identifying information as to its organizational structure or owner/operators, petitioners subpoenaed[2] the California company, WordPress/Automattic that physically hosts the website watchcroton.com to obtain the identity of the administrator(s) of Watch Croton as well as the identity of the blogger Q-Tip. According to WordPress, their hosted blogs have one or more administrators who "have full and complete ownership of [the] blog, and can do absolutely everything. This person has complete power over the post/pages, comments, settings, theme choice, import, users – the whole shebang." (R. 286)

WordPress alerted the administrator of Watch Croton to allow them the opportunity to move to quash the subpoena. Thereafter, Watch Croton administrator's New York counsel contacted the

[2] The subpoena was issued as part of the underlying defamation action. (R. 275-276) WordPress states that it voluntarily accepts subpoenas electronically from any state. (R. 102-103)

Petitioners and agreed that he would accept service on his/her behalf and would oppose the CPLR § 3102(c) petition, which was filed after Watch Croton threatened to move for a TRO in Los Angeles, California. (R. 303)

Watch Croton asserts in its brief that the court lacks jurisdiction over it because, it alleges, it is a "non-existing entity."[3] (Appellant's Br. 15) However, the administrator of Watch Croton submitted no factual affidavit in opposition to the CPLR § 3102(c) petition and therefore the trial court described the administrator's argument that the blog Watch Croton had no "jural existence" as "without merit" because there was "no showing by one with personal knowledge as the organizational structure of Watch Croton and thus this Court is left to speculate as to its status, i.e. a corporation, a partnership, and unincorporated association etc." (R. 17) Watch Croton's argument that it is not subject to jurisdiction because it doesn't exist is absurd on its face in light of the fact that its voluntary appearance by counsel

[3] In contradiction to its non-jural entity argument, counsel for Watch Croton also argued in the underlying petition that Watch Croton was an "interactive computer service" created to allow individuals to publish written content. (R. 173-174) Again, no affidavit was submitted in support of this contradictory factual assertion.

in this suit by some person or persons who created and operated this website through the purchase of services from the web hosting company WordPress, and who has done so seemingly for the purpose of providing a forum to cyberbullies to attack and destroy the reputation of local citizens, does not indicate a "non-existent entity."

Watch Croton's remaining arguments against the disclosure of the identity of third-party Q-Tip on First Amendment grounds are equally frivolous for two reasons. First, given that Q-Tip was not a party to the underlying action and has failed to move to intervene in this appeal these arguments must be rejected on standing grounds.[4] Second, in the petition below Watch Croton stated that Q-Tip was not an administrator of Watch Croton and failed to identify any interest it had in protecting Q-Tip's alleged First Amendment rights. The record below demonstrates that Watch Croton has made no allegation whatsoever that it has any interest in, or would suffer any injury by, the disclosure of the identity of Q-Tip, who it asserts is unconnected

[4] Appellant states that third-party anonymous blogger Q-Tip "joins in this Brief, as his/her interests obviously are impacted by the Order." (Appellant's Br., fn 1) It is unclear from this statement whether Section II of the Appellant Brief (pages 16-38) was submitted on behalf of Q-Tip or Watch Croton.

to the administration of the blog. In the absence of any such showing, Watch Croton has no standing upon which it may assert any argument regarding the constitutional rights of an unrelated third party who is not a party to this proceeding.

The record below demonstrates that the petitioners Susan Konig and the Croton Republican Committee have made the required *prima facie* showing that entitles them to disclosure of the identities of the administrator(s) of the blog Watch Croton and the blogger Q-Tip. Conversely, Watch Croton has made no showing regarding either its alleged lack of jural existence or its standing to set forth constitutional arguments on behalf of an unrelated non-party individual. As such, its appeal should be denied and the order below affirmed.

## STATEMENT OF FACTS

Petitioners commenced this action by filing a petition and Order to Show Cause to compel disclosure pursuant to CPLR § 3102(c) on April 6, 2012. (R. 32) The petition sought the disclosure of the identities of an unknown number of bloggers who posted false and defamatory comments about the petitioners on a local anonymous blog called Watch Croton, as well as disclosure of the identity of the person or persons who served as administrator(s) of the blog Watch Croton, a respondent to the petition, to determine whether the blog could claim immunity from tort liability under the Communications Decency Act. Thereafter, on April 16, 2012, a motion was interposed on behalf of one or more anonymous bloggers, self-identified as "Astonished", "Logical", "TeaLeaf" and "Sick of Konig" who sought to intervene in the petition and oppose the disclosure of their identity(ies).[5] (R. 112) Thereafter, on April 26, 2012, the administrator of the blog Watch Croton filed its opposition to the petition. (R. 150) Subsequent to the parties' full submissions

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[5] The court below determined that as to the bloggers self-identified as "Astonished", "Logical", "Tea Leaf" and "Sick of Konig", none of the identified statements were actionable, leading the court to deny the motion to intervene as moot. (R. 17)

on the petition, the court issued its Short Form Order, directing respondent Watch Croton to disclose information identifying the blogger self-identified as "Q-Tip," and the administrator(s) of the blog Watch Croton. On May 31, 2012, Watch Croton filed its Notice of Appeal. (R. 3)

Petitioner Susan Konig is a journalist and editor who lives in Croton on Hudson, New York, a community of approximately 8,000 residents. Ms. Konig has authored three books of family-oriented humor, and has hosted a radio show for the Catholic Archdiocese of New York. Ms. Konig is active in local political affairs and currently serves both as the Chairperson of the Croton Republican Committee and as Chair of the Westchester County Planning Board. (R. 104) Petitioner the Croton Republican Committee is an unincorporated organization situated in Croton on Hudson, New York. (R. 33)

Created in 2010, Watch Croton is an anonymous internet blog that publishes stories about local subjects and encourages its readers to post commentary in response. (R. 286) Watch Croton describes itself as posting "honest and respectful" commentary, yet Watch Croton's posts have variously falsely labeled Susan Konig as a liar, a

racist, and have accused and suggested that she was involved in various criminal activities, both as an individual and in connection with her association with the Croton Republican Committee. With regard to the Croton Republican Committee, Watch Croton's posts have accused them of participating in a criminal conspiracy, and of using a local citizen group called Citizens Against Bowhunting, accused by Watch Croton of being an illegal unregistered Political Action Committee, as a "front" for their activities.

Service of the petition below was not the first attempt by the petitioners to discover the identities of the anonymous bloggers who have defamed them. In May 2011 Ms. Konig emailed a complaint to WordPress, Watch Croton's hosting company, complaining about the content of two blog posts, one of which is the same as one of the blog posts at issue herein. (R. 105) Ms. Konig did so in accordance with the written complaint procedure publicized by WordPress on its website. On May 5, 2011, she received a response to her complaint which advised that WordPress would not take any action against Watch Croton or the bloggers she identified unless she brought a lawsuit. As the false and defamatory statements made on Watch

Croton did not stop, and with no other alternative, according to Watch Croton's hosting company, than to bring suit, Ms. Konig filed a summons with notice on March 9, 2012 on her own behalf and on behalf of the Croton Republican Committee. (R. 105)

Subsequently, Ms. Konig and the Croton Republican Committee issued *subpoenae duces tecum* to WordPress in accordance with WordPress' complaint policy. (R. 267-80) The blogging service WordPress offers software to allow users to create unique websites, such as watchcroton.com, and then hosts these websites for free or for a fee depending on the services ordered. Internet users or bloggers can access these websites and post comments to be shared with other bloggers. These posts can then be searched via internet search engines such as Google.[6] WordPress collects certain private data from its users, including email and IP addresses, according to its privacy policy. (R. 76) WordPress cautions its users that "if you are a blogger looking for a completely anonymous blogging service, or if the fact that the above data could be revealed in court proceedings, etc.

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[6] Watch Croton allows users to sign up for email notification of new posts. It is unknown how many readers receive posts automatically from Watch Croton. (R. 35)

bothers you, please do NOT use Wordpress.com for your blogging." (R. 102)

On March 22, 2012, counsel for Petitioners was informed by WordPress that there were "multiple owners/administrators" of Watch Croton, and that they had received copies of "all subpoenas." WordPress also stated that it had notified the affected bloggers regarding the requested information, and that only Watch Croton and two bloggers, Q-Tip and Bugsy, had objected to the subpoenas directed at them. After speaking to an attorney for Watch Croton, Q-Tip, and Bugsy, Petitioners agreed to withdraw the subpoenas directed toward these three parties, after Watch Croton's attorney stated that his firm would move for a restraining order against the San Francisco owner of WordPress.com, Automattic, Inc., in Los Angeles, California, where his firm had a branch office, and threatened that his firm would be requesting sanctions and attorneys fees for bringing the motion. (R. 35)

Unlike the proposed intervenors self-identified as "Astonished", "Logical", "TeaLeaf" and "Sick of Konig", the blogger identified as Q-Tip failed to cross move to intervene under CPLR § 1013 in the

petition below. The Petitioners never stipulated to permit Q-Tip to appear, nor did their counsel even seek such agreement from Petitioners. While Q-Tip did not appear in the petition, either below or in this court, Watch Croton, on her behalf and apparently with her knowledge and consent, submitted an affidavit from her indicating she wished to remain anonymous on First Amendment grounds. (R. 192) As set forth by counsel, the blogger Q-Tip is not an owner/administrator of respondent Watch Croton, (R. 174) and thus, is not a party hereto.

## ARGUMENT

## POINT I

## WATCH CROTON'S CLAIM TO LACK JURAL EXISTENCE LACKS LEGAL MERIT

Watch Croton asserts herein that the court has no jurisdiction over it because it "is not a person or a partnership, nor is it incorporated or formed as any other kind of business or legal entity." (Appellant's Br. p. 11) It further asserts that "[a]t most, it can be considered to be a 'trade name,' but nothing more." *Id.* However, other than repeating these and other self-serving assertions to the same effect, Watch Croton sets forth no factual basis on which this

court, or the court below, can draw any conclusion concerning its structure – or lack thereof – as an organization. As the court noted in the decision at issue:

> The second point concerning Watch Croton's alleged lack of jural existence is without merit, as there has been no showing by one with personal knowledge as to its status, i.e. a corporation, a partnership, and [sic] unincorporated association, etc.

(R. 17) Because Watch Croton has offered nothing other than mere attorney argument to support its claim to lack jural existence, this court must reject its argument as wholly lacking in any factual foundation and thus, like the trial court, find such argument to be without merit.

Simply put, Watch Croton offers no evidence that its assertion that it is nothing more than a trade name has any validity whatsoever. Such failure requires denial of its appeal, particularly in light of the fact that petitioners have set forth "legally sufficient allegations of jurisdiction" in their submissions below. *See In re Magnetic Audiotape Antitrust Lit.*, 334 F.3d 204, 206 (2d Cir. 2003). Though obviously overlooked by Watch Croton, petitioners' Petition described Watch Croton as "a New York website, operated by various anonymous

blogger(s), who are New York residents living in or around Croton on Hudson, New York." (R. 23) Petitioners' description of Watch Croton as a website operated by various unknown individuals is a legally sufficient allegation of jurisdiction over the individuals involved in running the website, as the petition sought the disclosure of "the identification of the operators/administrators of Watch Croton," and did not, as in the cases cited by Watch Croton, attempt to bring suit against a non-jural entity or a business entity operating as a trade name. (R. 22) *See, e.g., Marder v. Betty's Beauty Shoppe*, 38 Misc. 2d 687, 239 N.Y.S.2d 923, 924 (2d Dep't 1962) (while no provision of law permits suit against a business operating under a trade name, the law does permit "the commencement of an action against an individual doing business under a trade name."); *Provosty v. Lydia E. Hall Hosp.*, 91 A.D.2d 658, 659, 457 N.Y.S.2d 106, 108 (2d Dep't 1982) (trade name cannot sue or be sued independently of its owner).[7]

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[7] The unreported case of *Leser v. Karenkooper.com*, 18 Misc. 3d 1119(A), 856 N.Y.S.2d 498 (Sup. Ct. 2008) does not support Watch Croton's "jural existence" argument because it does not describe why "karenkooper.com" was nothing more than a trade name. There is nothing in this decision to indicate this particular website hosted an interactive computer service like Watch Croton, or that it operated as a blog like Watch Croton. (See Appellant Brief, p. 12.)

Petitioners herein have not sought to bring suit against the alleged trade name "Watch Croton," but rather, have sought the identity of the individuals operating the website known as "watchcroton.com". Moreover, further allegations concerning the organizational structure of Watch Croton that give rise to the presumption that it is more than a mere trade name have been set forth by both parties to this petition. Petitioners have alleged that Watch Croton is a blog whose owners/administrators have purchased premium services from Wordpress.com, its internet hosting service. (R. 286) Petitioners have further set forth that Watch Croton's hosting service requires it to have one or more administrators who, according to Wordpress.com, "have full and complete ownership of the blog, and can do absolutely everything. This person has complete power over the post/pages, comments, settings, theme choice, import, users – the whole shebang." (R. 286, 307) Moreover, Watch Croton itself has averred that it is an "interactive computer service" for the purposes of claiming immunity from liability under the Communications Decency Act, 47 U.S.C. §230(c)(1). (R. 174-75) How Watch Croton can be an "interactive computer service" for the

purpose of claiming immunity from liability for its owner/operator under federal law, and yet nothing more than a mere "trade name" with no independent jural existence for the purpose of resisting jurisdiction, is unexplained by Watch Croton.

Finally, to the extent that Watch Croton's averment that it is an "interactive computer service" indicates that it is some form of organization, CPLR § 1025 permits service upon it in its business name. The fact that petitioners do not have an understanding of the organizational structure of Watch Croton is entirely a function of the fact that the owners/administrators of the blog run it anonymously and purposely hide any information about who they are or what the organization is from the public. In the face of petitioners' legally sufficient allegations of jurisdiction, as well as Watch Croton's own statements against interest, and in light of Watch Croton's utter failure to offer any factual allegations supporting its claim to lack jural existence, such claim must be dismissed as lacking legal merit, in accord with the court below. Watch Croton's appeal should be denied.

## POINT II

## WATCH CROTON LACKS STANDING TO MAKE ARGUMENTS ON BEHALF OF THIRD-PARTY BLOGGER Q-TIP

As an initial matter it should be undisputed that Q-Tip has no standing to join individually in Watch Croton's appeal as (1) she was not a party to the Petition below; (2) she did not move to intervene in the petition below under either CPLR § 1012 (intervention as of right) or § 1013 (intervention by permission); (3) she failed to move to intervene by Order to Show Cause in this appeal; and (4) she failed to move for permission to file a brief as an *amicus curiae* by Order to Show Cause. Contrary to Appellant's declaration, she simply has no standing to "join" Appellant's brief for any reason.

Watch Croton has no standing under CPLR § 5511 to act as a surrogate for third-party anonymous blogger Q-Tip for the purpose of making arguments on appeal regarding the First Amendment rights of Q-Tip. *See Castaldi v. 39 Winfield Assoc., LLC,* 22 A.D.3d 780, 781, 803 N.Y.S.2d 716 (2d Dep't 2005) ("only an aggrieved party has standing to appeal"). Generally, a party must assert his or her own legal rights and interests and cannot request relief based on the legal

rights and interests of third-parties. Only a litigant has standing to raise her or her own rights. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) ("To limit the issues which must be dealt with . . . this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves."). Appellants are not permitted to vicariously assert the constitutional rights of others because the injured party is the best advocate for his or her position and the appellant may be in a self-interested or even conflicting position to the third party whose rights the appellant purports to assert. *See Singleton v. Wulff*, 428 U.S. 106, 114 (1975). Simply put, Watch Croton is not an "aggrieved party" and thus, it has no standing to assert arguments on Q-Tip's behalf.

In the Petition no affidavit was submitted by Watch Croton to support the argument that it has any interest in protecting the identities of Q-Tip or that it would suffer any injury by the disclosure of her identity. Based on the failure to allege any injury to itself, Watch Croton is not "aggrieved" and has no standing to bring any First Amendment challenge on behalf of Q-Tip. *See Peterson v. Nat'l Telecommunications & Info. Admin.*, 478 F.3d 626, 634 (4th Cir.

2007) (rejecting First Amendment arguments concerning the disclosure of the identity of non-party anonymous bloggers because the plaintiff failed to demonstrate "a distinct and palpable injury"); *cf.* *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113 (1982) ("The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others . . ."); *DiMare v. O'Rourke*, 35 A.D.3d 346, 825 N.Y.S.2d 273, 274 (2d Dep't 2006) ("To be "aggrieved," the party must have a direct interest in the controversy which is affected by the result, and the adjudication must have a binding force against the rights, person or property of the party.") (internal quotations omitted).

Further, Watch Croton's fear that Q-Tip's alleged First Amendment "right" to blog anonymously will be affected is totally misplaced. Even if her actual identity is disclosed, she can continue to freely blog anonymously under other "handles." Q-Tip failed to explain in her affidavit that she would be prejudiced in any way by having to use a different nickname, or that she was not already doing so.

Q-Tip claimed in the proceedings below that she needs to blog anonymously in order "to feel comfortable engaging in this open dialog about important local issues." (R. 195) Instead of doing this she has taken the opportunity to anonymously blog in order to defame the petitioners. Cyberbullies, such as Q-Tip, use anonymous blogs as a pulpit to attack and destroy real people, with real names and reputations such as Susan Konig and the members of the Croton Republican Committee as well as the candidates that they supported in the 2011 elections, such as Keith Douglas, Pat Calcutti, and attorney Mark Aarons. The First Amendment does not protect the cyberbully's defamation. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46, 122 S. Ct. 1389, 1399, 152 L. Ed. 2d 403 (2002); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383, 112 S. Ct. 2538, 2543, 120 L. Ed. 2d 305 (1992).

The record below demonstrates that Q-Tip unquestionably had notice and the opportunity to join the proceedings – both herein and below – as a party for the purpose of asserting her own rights. She chose not to do so, although she voluntarily appeared as a non-party witness in support of Watch Croton, a blog with which she has no

organizational connection. A court cannot grant affirmative relief to a third party unless that party subjects themselves to the jurisdiction of the court, which Q-Tip has failed to do. *See NYCTL 1996-1 Trust v. King*, 304 A.D.2d 629, 631, 758 N.Y.S.2d 374, 375 (2d Dep't 2003) (holding that although defendant and interested third-party bank were represented by the same counsel, the bank was not entitled to relief because it had not moved to intervene); *Prince v. Prince*, 247 A.D.2d 457, 458, 668 N.Y.S.2d 670, 672 (2d Dep't 1998); *Reinisch v. Reinisch*, 226 A.D.2d 615, 616, 641 N.Y.S.2d 393, 394 (2d Dep't 1996); *Vacco v. Herrera*, 247 A.D.2d 608, 609, 669 N.Y.S.2d 228 (2d Dep't 1998) (holding a third party's failure to timely intervene waives any right to participate in the proceeding).

Any attempt by Watch Croton in this appeal to assert arguments on behalf of Q-Tip must be rejected, as Q-Tip has chosen not to become a party, either to these proceedings or the trial proceedings below, although procedural mechanisms for her to have done so, either upon the filing of the petition or this appeal, exist. Further, as Watch Croton has failed to set forth any allegation that it would sustain any injury resulting from an order disclosing Q-Tip's

identity, it cannot show that it is an "aggrieved party" under CPLR § 5511 for the purpose of prosecuting any appeal on behalf of Q-Tip. As such, that portion of Watch Croton's brief that sets forth argument on Q-Tip's behalf should be disregarded. The order below should be affirmed.

## POINT III

## THE PETITIONERS STATED A *PRIMA FACIE* CASE OF DEFAMATION IN SUPPORT OF THE CPLR § 3102(c) PETITION

Petitioners respond herein to Watch Croton's arguments concerning whether a *prima facie* case of defamation has been set forth, even though they believe that Watch Croton lacks standing to make such arguments on Q-Tip's behalf.

The Blogger Q-Tip created the following defamatory blog post on September 18, 2011 entitled, "It's Just Good Government?"

> Republican candidate for District 9 County Legislator Sue Konig has made a point of getting her name out there. Her strategies include appearing with every Republican elected official available and plastering the landscape of the village she lives in with signs announcing her candidacy. Not only are her signs on public property, violating local codes, but candidate Konig has chosen to ignore regulations stating that signs in the Town of Cortlandt (incl. Croton) cannot be put up before 30 days prior to an election. Perhaps not only is it within your

right to remove any Konig sign you see on public spaces for the next few weeks, but your civic duty!

(R. 65)

In response to the Petition, Watch Croton submitted the redacted affidavit of Q-Tip, which, while not disputing that the information in the post was completely false and that her statements constitute *per se* defamation, argued that she did not act with malice because the false information she published was provided to her by Sue Konig's political adversaries. (R. 192)

Q-Tip's statement that she did not believe the information to be false does not defeat petitioners' statement of a *prima facie* case. Without knowing Q-Tip's identity, Petitioners cannot speculate as to what motivation Q-Tip could have had to recklessly (or knowingly) post the above false and per se defamatory comment about Sue Konig. Q-Tip could have verified the truth of her statements by a quick trip to the village's website, which provides a searchable link to village code. (R. 88) Malice may be shown by demonstrating that someone intentionally avoided the truth. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 693, 109 S. Ct. 2678, 2698, 105 L. Ed. 2d 562 (1989). Regardless of Q-Tip's

professed intent, petitioners have stated a *prima facie* case by alleging that the statement was made with malice. *See Silsdorf v. Levine*, 59 N.Y.2d 8, 17, 449 N.E.2d 716 (N.Y. 1983) (proof of malice not required to state prima facie case).

In falsely stating that Susan Konig broke the law and in holding her out to "public contempt, ridicule, aversion or disgrace," Q-Tip's statements were per se defamation, and thus the law presumes that Susan Konig was damaged. *See Silsdorf v. Levine*, 59 N.Y.2d 8, 16, 449 N.E.2d 716, 720 (N.Y. 1983). Although not necessary to state a cause of action, Susan Konig also suffered actual damages because, as a result of this post, many of her signs were vandalized and destroyed, negatively affecting her campaign and causing her to incur the cost of replacing the signs.

The court agreed, holding:

> The [post] made by blogger Q-Tip alleges that petitioner Konig violated the law and encourages the public to remove [her] campaign signs. Although expressions of opinion are constitutionally protected, accusations of criminal or illegal activity, even in the form of opinion, are not (*see Silsdorf v. Levine*, 59 NY2d 8 [1983]). Blogger Q-Tip's accusations that petitioner Konig violated the law, coupled with Konig's affidavit establishing this statement is false is sufficient to establish petitioners prima facie entitlement to disclosure concerning blogger Q-Tip.

(R. 15)

The Blogger Q-Tip, also created an additional defamatory blog post on March 11, 2011 entitled, "Would You Buy A Used Car From These Men?"

> They're trying to sell you a bill of goods. Pat Calcutti, Mark Aarons, and Keith Douglas think you aren't smart enough to see past the lies and downright criminal actions taken by their backers, the Croton Republican Committee. Lies about the "raided" fund balance. Using the PAC Citizens Against Bowhunting as a front. And the last minute desperate act, involving the County Executive's Office, of publishing fabrications about bringing waste back into Croton. They think they can scare you into not voting on March 15th. These candidates have been aware of and approved every action taken by the Republican Committee. Their complicity in the lying, the secrecy and the covering up is an embarrassment to Croton. Do you really want people like this running our Village?
>
> Look for this in your mailboxes soon–it's GOP trash talk, loud, clear and completely untrue. The only person interested in talking trash with the county is Croton Republican Chairwoman Sue Konig, George Oros protege and newly appointed County Planning Board member. She's also a "humorist". Here's a sample of her recent work.
>
> > *The Wiegman Administration had an undisclosed conversation with the owners of the Metro Enviro site to bring ash to Croton . . .*
> >
> > *That a conversation even took place about bringing back a waste facility to your backyard is unacceptable.*

"The meeting took place in late December 2010. There was nothing "secret" about it. We told the County that central question [sic] for Croton is how we maintain control over the site's uses..."
Mayor Leo Wiegman March 7

"There was a meeting on Dec. 22 which I attended. It was in the Manager's office in the village and had been arranged by the owners of the property – Greentree – in an effort to get the county interested in buying the property for use in removing their ash."
Trustee Ann Gallelli March 7

"I knew nothing of the meeting before or afterward. I was never informed. I just heard about it yesterday. Had I been told, I would have immediately informed the public."
Trustee Greg Schmidt March 9

"The County Commissioner of Environmental Facilities will confirm that a call did come from the Village asking if the County would be interested in storing the ash for the Charles Point facility at the site. The County quickly determined it had no interest in doing so."
County Executive Chief of Staff George Oros March 8

**AARONS CALCUTTI DOUGLAS**
**THE TEAM THAT WON'T TALK TRASH**

You can respond to the lies by getting out and casting your vote on March 15th. Vote for Leo Wiegman, Ian Murtaugh and Casey Raskob on Tuesday.

No trash talk, just honest fact-based leadership.

(R. 60)

In her affidavit, Q-Tip offers yet another excuse why she referred to the Croton Republican Committee and Sue Konig's "trash

talk" as "lies." (R. 194) In this instance, it was Mayor Leo Wiegman, who was running for re-election against GOP candidate and attorney Mark Aarons, who allegedly provided cover by disputing the allegations that his administration was secretly working with Westchester County to bring some type of waste treatment or handling facility to Croton. Mayor Wiegman has provided no supporting affidavit. Q-Tip does not allege any basis or excuse for her false statement that the Croton Republican Committee and its candidates were involved in a criminal conspiracy with the Citizens Against Bowhunting. Q-Tip's bare denials do not defeat the petitioners' *prima facie* case.

Viewing this blog post, a reasonable reader would conclude that it was conveying facts about the plaintiff Susan Konig and the Croton Republican Committee. Namely, that the Croton Republican Committee is (1) involved in "lies and downright criminal behavior; (2) that it is "Using the PAC Citizens Against Bowhunting as a front"; and (3) that it is "publishing fabrications about bringing waste back into Croton." These statements constitute actionable defamation because they convey as fact that the Croton Republican Committee is

involved in a criminal conspiracy and that it was lying with regard to the Wiegman administration's intentions regarding "bringing back a waste facility" to Croton. *See Silsdorf v. Levine*, 59 N.Y.2d 8, 16, 449 N.E.2d 716, 720 (N.Y. 1983); *Brach v. Congregation Yetev Lev D'Satmar, Inc.*, 265 A.D.2d 360, 361, 696 N.Y.S.2d 496 (2d Dep't 1999). These statements also constitute actionable defamation with respect to Susan Konig because they allege she authored the "lies" about the mayor and other members of his administration. *See Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 625 N.Y.S.2d 477, 649 N.E.2d 825 (N.Y. 1995); *Kaminester v. Weintraub*, 131 A.D.2d 440, 516 N.Y.S.2d 234 (2d Dep't 1987); *Curry v. Roman*, 217 A.D.2d 314, 635 N.Y.S.2d 391 (4th Dep't 1995); *Mase v. Reilly*, 206 A.D. 434, 436 201 N.Y.S. 470, 472 (1st Dep't 1923).[8]

The court below agreed that this statement was actionable defamation, holding that:

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[8] Petitioners also identified a third defamatory statement dated November 7, 2011 entitled, "Desperate Times Call For Desperate Measures," however, this statement was not considered by the court based on its holding that the first two statements established a *prima facie* case on behalf of the Petitioners. (R. 16.) Similarly, the court provided no analysis with respect to whether Q-Tip's accusations that Sue Konig was the author of the "lies" concerning Mayor Wiegman's plans to bring ash to Croton constituted actionable defamation.

> The [post] made by Q-Tip states "you aren't smart enough to see past the lies and downright criminal action taken by their backers, the Croton Republican Committee." As aforesaid, although expressions of opinion are constitutionally protected, accusations of criminal or illegal activity, even in the form of opinion are not (*see Silsdorf v. Levine*, 59 NY2d 8 [1983]). Blogger Q-Tip's accusations that the petitioner, Croton Republican Committee, violated the law is sufficient to establish petitioners prima facie entitlement to disclosure concerning the blogger Q-Tip.

(R. 16) To the extent that Watch Croton has standing to assert any argument regarding the defamatory nature of Q-Tip's blog posts, a proposition which respondents strenuously reject, Watch Croton's arguments should be rejected and the court's order below affirmed.

## POINT IV

## THE APPELLANT'S SUGGESTED STANDARD FOR DISCLOSURE UNDER CPLR § 3102(c) IS CONTRARY TO CONTROLLING AND WELL-ESTABLISHED LAW

A request for pre-action disclosure is brought by a special proceeding. *See Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d 535, 536, 536 N.Y.S.2d 784, 786 (1st Dep't 1989). Pursuant to § 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 Stewart v. New York City Transit Auth.*, 112 A.D.2d

939, 940, 492 N.Y.S.2d 459, 460 (2d Dep't 1985) ("It is well established that disclosure 'to aid in bringing an action' (CPLR 3102(c)) authorizes discovery to allow a plaintiff to frame a complaint and to obtain the identity of the prospective defendants.").

Under the well settled law of New York, an order granting disclosure under § 3102(c) is warranted "where there is a demonstration that the party bringing such a petition 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*, 146 A.D.2d 535, 536, 536 N.Y.S.2d 784, 786 (1st Dep't 1989). "To obtain such an order, the applicant must show the existence of a prima facie cause of action. . . . In determining whether the petitioner has demonstrated a prima facie case, the evidence presented must be considered in a light most favorable to the petitioner." *Toal v. Staten Island Univ. Hosp.*, 300 A.D.2d 592, 593, 752 N.Y.S.2d 372, 374 (2d Dep't 2002) (citations omitted); *see also Cohen v. Google, Inc.*, 25 Misc. 3d 945, 948, n. 5, 887 N.Y.S.2d 424 (NY Co. Sup. Ct. 2009) (rejecting higher evidentiary standard for discovery of an anonymous blogger involved in online defamation).

The Court of Appeals has described the standard for stating a *prima facie* case of defamation as follows: "If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action." *Silsdorf v. Levine*, 59 N.Y.2d 8, 12, 449 N.E.2d 716 (N.Y. 1983); *cf. DiGiovanni v. Rausch*, 226 A.D.2d 420, 640 N.Y.S.2d 793 (2d Dep't 1996) ("It is well-settled that a motion to dismiss a complaint for failure to establish a prima facie case should only be granted if, upon viewing the evidence in a light most favorable to the plaintiff, there is no rational process by which a jury could find for the plaintiff and against the moving defendant."); *Gallagher v. Kucker & Bruh, LLP*, 34 A.D.3d 419, 420, 824 N.Y.S.2d 145, 146 (2d Dep't 2006) ("On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action [for defamation], the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true, and according the plaintiff the benefit of every possible inference.").

"The broad reach of the common-law cause of action for defamation is indicated in the Restatement of Torts. "A

communication is defamatory...if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Morrison v. Nat'l Broad. Co.*, 19 N.Y.2d 453, 458, 227 N.E.2d 572 (N.Y. 1967). Petitioners possess a meritorious cause of action for defamation. The elements of a cause of action for defamation are 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." *Epifani v. Johnson*, 65 A.D.3d 224, 233, 882 N.Y.S.2d 234, 242 (2d Dep't 2009).

A written statement shall be considered *per se* defamation "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." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379, 366 N.E.2d 1299 (N.Y. 1977), *cert. denied* 434 U.S. 969, 98 S.Ct. 5514 (1977). "In addition, a defamatory statement is libelous per se if it imputes fraud, dishonesty, misconduct, or unfitness in conducting

one's profession." *Gjonlekaj v. Sot*, 308 A.D.2d 471, 473-74, 764 N.Y.S.2d 278, 281 (2d Dep't 2003); *see also Silsdorf v. Levine*, 59 N.Y.2d 8, 16, 449 N.E.2d 716, 720 (N.Y. 1983) ("accusations of criminal or illegal activity, even in the form of opinion, are not [protected]"); *Curry v. Roman*, 217 A.D.2d 314, 635 N.Y.S.2d 391 (4th Dep't 1995) (statements that parties were "crooks", "liars", "thieves", and "swindlers" were actionable). It is well-established that a "charge that a man is lying, at least, in a matter of public interest, is such a charge as tends to hold him up to scorn, as a matter of law." *Mase v. Reilly*, 206 A.D. 434, 436 201 N.Y.S. 470, 472 (1st Dep't 1923); *see also, Kaminester v. Weintraub*, 131 A.D.2d 440, 516 N.Y.S.2d 234 (2d Dep't 1987) (finding allegedly libelous statements accusing plaintiff of personal dishonesty were not constitutionally protected expressions of opinion). In addition to statements that falsely claim another is liar, publications that falsely depict someone as a racist are defamatory *per se*. *See Sheridan v. Carter*, 48 A.D.3d 444, 446-47, 851 N.Y.S.2d 248, 252 (2d Dep't 2008); *cf. Oluwo v. Hallum*, 16 Misc. 3d 1139(A), 851 N.Y.S.2d 59 (NY Co. Sup. Ct. 2007) (claim that plaintiff made anti-Semitic comments were actionable as

*per se* defamation).

In this case, the statements at issue are undoubtedly *per se* defamation, as they do not merely impute dishonesty and misconduct in the conduct of petitioners' affairs, but rather, affirmatively charge that Petitioners have lied publicly, have participated in criminal activity and have engaged in racist, discriminatory conduct.[9] Petitioners have the right to confront in court those who have defamed them. As Justice Fortas aptly noted in *St. Amant v. Thompson*,

> The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season.

*St. Amant v. Thompson*, 390 U.S. 727, 734, 88 S. Ct. 1323, 1327, 20 L. Ed. 2d 262 (1968) (dissenting op.).

Instead of acknowledging that the above standard for discovery under CPLR § 3102(c) is well settled, Watch Croton argues that this

[9] Contrary to Appellant's arguments, Petitioners stated that both statements were false. (R. 106, 109)

Court should adopt a new test, unsupported by any New York authority, based on the alleged violation of the bloggers' "First Amendment Privacy Rights." (R. 157) Watch Croton argues that instead of examining whether the Petitioners have alleged a meritorious cause of action, "the Court must balance compromising the bloggers' First Amendment rights against the merits of plaintiff's underlying lawsuit, the nature of the comments, the potential damage caused, if any, and whether the plaintiff can ultimately prevail on her claims." (Appellant's Br. p. 33) Watch Croton cites various "authority" for this standard, all of which contravenes New York's well settled law.

To support its argument that this court must employ a novel "balancing test", Watch Croton also relies on the New Jersey case *Dendrite Int'l., Inc. v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), which considered a discovery request under New Jersey procedural, common, and constitutional law and employed a four-prong test for disclosure, replacing the previous motion to dismiss standard. (Appellant's Br. p. 32) Not one of the New York State courts which have cited *Dendrite* has actually followed it. *See*

*Cohen v. Google, Inc.*, 25 Misc. 3d 945, 948, Fn. 2, 887 N.Y.S.2d 424, 426 (Sup. Ct. 2009) (noting that New York law regarding CPLR § 3102 adequately addresses the constitutional concerns raised in *Dendrite*); *Greenbaum v. Google, Inc.*, 18 Misc. 3d 185, 187-88, 845 N.Y.S.2d 695, 699 (NY Co. Sup. Ct. 2007); *Varrenti v. Gannett Co., Inc.*, 33 Misc. 3d 405, 411, 929 N.Y.S.2d 671, 676 (NY Co. Sup. Ct. 2011); *Deer Consumer Products, Inc. v. Little*, 938 N.Y.S.2d 767, 782 (NY Co. Sup. Ct. 2012). *Dendrite* is not binding on this court; New York's well settled law is. The order appealed from does not even address respondent's argument in this regard, a testament to the court's utter and complete rejection of respondent's suggestion that the court below employ such a novel and unnecessary new standard.

Contrary to Watch Croton's assertions , the New York cases of *Cohen v. Google, Inc.*, 25 Misc. 3d 945, 887 N.Y.S.2d 424 (Sup. Ct. N.Y. Co. 2009) and *Greenbaum v. Google*, 18 Misc. 3d 185, 845 N.Y.S.2d 695 (Sup. Ct. N.Y. Co. 2007) do not employ a "balancing test." (Appellant's Br. p. 22) In *Cohen*, the court held that "in the context of the blog at issue, the words "skank," "skanky" and "ho" carry a negative implication of sexual promiscuity, and as such are

reasonably susceptible of a defamatory connotation and are actionable." *Cohen v. Google, Inc.*, 25 Misc. 3d 945, 951, 887 N.Y.S.2d 424 (Sup. Ct. 2009). In the proceedings below, Watch Croton mischaracterizes this decision by claiming that the *Cohen* court made the statement quoted by respondents (R. 159, ¶ 31). It did not, but instead was citing to a Virginia Circuit Court decision, which the court used to support the following holding:

> The court also <u>rejects</u> the Anonymous Blogger's argument that this court should find as a matter of law that Internet Blogs serve as a modern day forum for conveying personal opinions, including invective and ranting, and that the statements in this action when considered in that context, cannot be reasonably understood as factual assertions.

*Cohen v. Google, Inc.*, 25 Misc. 3d 945, 951, 887 N.Y.S.2d 424 (Sup. Ct. 2009) (emphasis added).

In addition to arguing for a novel balancing test, Watch Croton argues that this Court "must require an evidentiary basis for the claims." (Appellant's Br. p. 29) The single New York case cited in support is *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982). This authority is inapposite because it concerns the protection of the confidentiality of journalists' sources in an antitrust case, which, again, is not at all relevant to this case. There is no

summary judgment standard for disclosure under CPLR § 3102(c). The Court of Appeals has described the standard for stating a prima facie case of defamation as follows: "If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action." *Silsdorf v. Levine*, 59 N.Y.2d 8, 12, 449 N.E.2d 716 (N.Y. 1983). This is the standard for demonstrating a meritorious cause of action in order to compel disclosure under the CPLR.[10]

To the extent that Watch Croton argues that the context in which the statements at issue were offered – which it variously defines as either "online forums" or "American politics" – creates some kind of "grain of salt" exception to liability, such argument must be rejected. (Appellant's Br. p. 17, 26) While Watch Croton asserts that "most, if not everything, said in such forums is taken with a grain of salt," it should be noted that Watch Croton itself attempted to bolster its argument in the proceedings below by citation to various

[10] Without citation, Watch Croton argues that there is authority "that Petitioners must also prove actual malice" in order to state a prima facie case of defamation in a CPLR § 3102(c) petition. (Appellant's Br. p. 34) (emphasis added). There is no such requirement under New York law. *See Silsdorf v. Levine*, 59 N.Y.2d 8, 17, 449 N.E.2d 716 (N.Y. 1983)(proof of malice not required to state prima facie case).

online blogs for the purpose of proving the truth of the statements at issue in this proceeding. (R. 186, 200-266) Further, such position is not supported by the applicable case law. For example, the case of *Silsdorf v. Levine*, 59 N.Y.2d 8, 449 N.E.2d 716 (N.Y. 1983), demonstrates that there is no "political comment exception" in New York. In this Court of Appeals case, the Mayor of Ocean Beach sued a group of political opponents who, during an election campaign, circulated "an open letter" (this was 1978, years before the Internet) that labeled the Mayor "corrupt" and alleged that the Mayor engaged in "illegal conduct while in office." The Court of Appeals reversed a decision of the Appellate Division which had dismissed the complaint, and held instead that the statements at issue, which constituted accusations of criminal or illegal activity (even if purportedly in the form of opinion), were actionable defamation. *Id.* at 16. The decision in *Silsdorf* indicates that the Court of Appeals rejected the very premise set forth by Watch Croton – that the public takes such accusations made during an election campaign with "a grain of salt" – and instead puts speakers on notice that such accusations can indeed form the basis of a defamation claim, regardless of their political

character. It should also be noted that although the old expression, "don't believe everything you read in the papers" exists, such sentiment has not formed the basis for any exception to tort liability for printed newspapers. Despite Watch Croton's exhortations to the contrary, no such "grain of salt" exception should exist for online blogs either. The court below rejected such claims as meritless, and such order should be affirmed by this court.

Watch Croton has set forth no reason why this court should depart from the well-settled law of New York concerning determining whether disclosure under CPLR § 3102(c) is appropriate, other than that its suggested standard would permit anonymous blogs like Watch Croton and anonymous bloggers like Q-Tip to continue to engage in cavalier defamation of members of the community without consequence. The change in legal standard suggested by Watch Croton is unnecessary to protect the First Amendment interests of parties accused of defamation and, in requiring victims of defamation to come forward with competent proof of every element of the claim even before obtaining the identity of the individual who defamed them, would undoubtedly yield absurd results if applied. Again, the

fact that the order appealed does not even address any such exhortations by Watch Croton is a testament to the court's complete rejection of any such suggestion from Watch Croton. The order at issue should be affirmed and Watch Croton's appeal denied.

## CONCLUSION

Based upon the foregoing, it is respectfully requested that respondent-appellant's appeal be denied in its entirety, that the Short Form Order dated May 24, 2012 be affirmed, that the costs and disbursements of this action be awarded to the petitioners-respondents, and that the court grant such other and further relief as it deems just and proper.

Dated: Croton-on-Hudson, New York
January 28, 2013

KITSON & SCHUYLER LLP

By: Peter J. Schuyler

Peter J. Schuyler, Esq.
Roseann K. Schuyler, Esq.
*Attorneys for Petitioners-Respondents*
321 South Riverside Avenue
Croton on Hudson, New York 10520
(914) 862-0999

**APPELLATE DIVISION – SECOND DEPARTMENT**

**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word 2007.

*Type:* A proportionally spaced typeface was used, as follows:

Name of typeface: Georgia
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Line Spacing: Double

*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, certificate of compliance, or any addendum containing statutes, rules, regulations, etc. is 8,269 words.

Dated: Croton on Hudson, New York
January 28, 2013

Peter Schuyler

Peter Schuyler, Esq.
KITSON & SCHUYLER LLP
321 South Riverside Avenue
Croton on Hudson, NY 10520
(914) 862-0999
*Attorneys for Petitioners-Respondents*