To be Argued by:
JASON L. BECKERMAN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

Docket No.: 2012-10814

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 –

WORDPRESS.COM,

Respondent,

– and –

Q-TIP,

Intervenor-Respondent-Appellant.

REPLY BRIEF FOR INTERVENOR-RESPONDENT-APPELLANT

AMANDA L. NELSON
EDWARD HAYUM
JASON L. BECKERMAN
Of Counsel

COZEN O'CONNOR
Attorneys for Intervenor-Respondent-Appellant
45 Broadway, 16th Floor
New York, New York 10006
(212) 509-9400

Westchester County Clerk's Index No. 61390/12

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Intervenor-Respondent-Appellant Q-Tip ("Q-Tip") respectfully submits this Reply Brief in further support of the appeal of the Order of the Supreme Court, Westchester County (Hon. Orazio R. Bellantoni) directing WordPress.com to provide pre-action disclosure of Q-Tip's identity.

INTRODUCTION

In the opening brief, Q-Tip showed that Petitioners Susan Konig ("Konig") and the Croton Republic Committee ("CRC") (collectively "Petitioners") failed to set forth a prima facie case for defamation sufficient to warrant the evisceration of Q-Tip's First Amendment right to anonymous free speech. Specifically, Q-Tip showed that the two statements deemed defamatory by the lower Court contained only non-actionable opinion and, at most, rhetorical hyperbole. Q-Tip further showed that one of the statements was, indeed, factually true, such showing based on Petitioners' own submissions to the Court below. Finally, Q-Tip showed that Petitioners failed to offer any basis for a finding of malice, which is necessary for a defamation claim against a public figure, which Petitioners acknowledge they are.

Q-Tip further showed that the lower Court's Order was a nullity, as the lower Court did not have jurisdiction over WordPress.com, a blog-hosting website, based out of California and solely owned by a Delaware corporation.

In response, Petitioners have not addressed any of the arguments raised as to the validity of their defamation claim, including, most notably, the argument that

Petitioner Konig did, in fact, violate the local codes regarding campaign sign placement, as asserted in one of the allegedly defamatory statements. Petitioners have also not offered any legal basis as to how a website is a jural entity capable of being sued, nor have they set forth any facts to justify the imposition of long-arm jurisdiction. Instead, Petitioners argue that Q-Tip is precluded from raising these arguments. However, the arguments raised by Q-Tip are both valid, and properly before this Court, and should be considered. Moreover, these arguments (and the supporting precedent) reveal that the lower Court erred in issuing the Order directing the disclosure of Q-Tip's identity. It is respectfully submitted that this Court should reverse the Order, and dismiss the petition for pre-action disclosure.

ARGUMENT

I.

THE LOWER COURT ORDER SHOULD BE REVERSED AS THE LOWER COURT DID NOT HAVE JURISDICTION OVER RESPONDENT WORDPRESS.COM

A. WordPress.com's Default In The Proceeding Does Not Require A Finding That The Lower Court Had The Requisite Jurisdiction To Direct WordPress.com To Disclose Q-Tip's Identity

In opposition to the instant Appeal, Petitioners do not offer any precedent upon which this Court may base a finding that a website is a jural entity capable of being sued. Likewise, Petitioners do not present any evidence or precedent to

withstand the argument that a California-based website, owned by a Delaware corporation, is subject to New York State Court jurisdiction.

Rather, Petitioners argue that the issue of jurisdiction is mooted by WordPress.com's failure to appear in the proceeding. Alternatively, Petitioners argue that, by submitting an affidavit setting forth facts which clearly reveal the lack of jurisdiction over WordPress.com and representing the dismissal of the proceeding, WordPress.com submitted itself to the lower Court's jurisdiction.

These arguments are without merit, and the lower Court erred in finding that it had jurisdiction over WordPress.com.

As to the claim that WordPress.com's default constitutes a waiver of any jurisdictional defenses, this is wholly unsupported by precedent, including *Gager v. White*, 53 N.Y.2d 475 (1981), relied upon by Petitioners, wherein the Court simply noted that jurisdictional arguments must be raised either in an answer or in an appropriate motion (such as that made in the Proceeding). Furthermore, as set forth below, it was Petitioners' burden to prove jurisdiction in the first place. WordPress.com's default does not relieve Petitioners of this burden, or obviate the need for proof that the Court has jurisdiction over WordPress.com.

Additionally, Sieminski's affidavit, which was offered for the clear and distinct purpose of contesting jurisdiction, and expressly requested the dismissal of the Proceeding, does not act as a predicate for jurisdiction. (R145-148) In support

of this argument, Petitioners again rely on *Gager v. White, supra*. However, *Gager* stands for no such thing. Indeed, in *Gager*, the Court expressly held that where, as here, the objection to jurisdiction is contained in an answer or appropriate motion, it will be considered. Thus, the Court of Appeals affirmed the dismissal of the action commenced in *Gager* on jurisdictional grounds. *Id.* at 488.

The only other case offered by Petitioners on this point is clearly distinguishable from the case at hand. *See, Hauger v. Hauger*, 275 A.D.2d 953 (4th Dept. 2000) (Finding jurisdiction where "respondent clearly indicated a desire to participate in the proceedings without jurisdictional objection."). Here, WordPress.com has indicated no desire to participate in the Proceeding, and Sieminski expressly noted the general policy of WordPress.com's parent corporation of leaving the anonymous bloggers to fend for themselves in cases such as the one at hand. (R145). Moreover, there was a clear jurisdiction objection, via both the Sieminski Affidavit and in Q-Tip's moving papers. Thus, *Hauger* bears no relation to the instant appeal.

Simply stated, WordPress.com's mere failure to appear in this matter does not, *ipso facto*, confer jurisdiction on New York courts, and the lower Court erred in finding otherwise.

B. Petitioners Failed To Meet Their Burden Of Proving That Jurisdiction Over WordPress.com Existed

The arguments raised by Petitioners in opposition completely disregard the fact that Petitioners bore the initial burden of proving that the lower Court had jurisdiction over WordPress.com, irrespective of any affirmative pleadings by either WordPress.com or Q-Tip. *See e.g. Unicon Management Corp. v. Koppers Co.*, 250 F. Supp. 850 (S.D.N.Y. 1966) ("The burden of pleading and proving jurisdiction is upon the party asserting its existence."); *Kim v. Dvorak*, 230 A.D.2d 286 (3d Dep't 1997) (Finding plaintiffs failed to meet the burden necessary for the imposition of long-arm jurisdiction in a defamation matter).

Thus, the default of WordPress.com in the Proceeding cannot "moot" the issue of jurisdiction, when it was Petitioners' burden to prove that such jurisdiction existed in the first place. As discussed below, Petitioners failed to clear this hurdle, and therefore failed to meet the requisite burden of proof that the lower Court had jurisdiction over WordPress.com. The lower Court erred in finding that it had such jurisdiction, and the Order should be reversed accordingly.

i. The Lower Court Lacked Jurisdiction Over WordPress.com, As WordPress.com Is Not A Jural Entity, and Has No Independent Existence

As set forth in Q-Tip's opening brief, WordPress.com is merely a website – a non-jural entity akin to a trade name which is incapable of being sued. *See e.g. Leser v. Penido,* 18 Misc.3d 1119(A) (Sup. Ct. N.Y. Co. 2008); *Provosty v. Lydia*

E. Hall Hospital, 91 A.D.2d 658 (2d Dep't 1982) *aff'd* 464 N.Y.S.2d 754 (1983) Petitioners failed to address this rule of law, or the many cases on which Q-Tip relied.

Accordingly, as Petitioners failed to show in either the Court below or in this Appeal, that WordPress.com is subject to the lower Court's jurisdiction, and can be forced to act, the lower Court lacked jurisdiction, and the Order must be reversed.

ii. The Lower Court Lacked Jurisdiction Over WordPress.com As WordPress.com Does Not Maintain Sufficient Contacts With New York For Long Arm Jurisdiction To Apply

Petitioners likewise failed to address the arguments in Q-Tip's opening brief (as based on the sworn affidavits of Paul Sieminski and Q-Tip), that the Court does not have long-arm jurisdiction over WordPress.com.

As stated in Q-Tip's opening brief, WordPress.com is based in California and owned by a Delaware Corporation, and does not maintain sufficient contacts in New York to be subjected to jurisdiction. (R145-147) Where such contacts are lacking, no jurisdiction can be found. *See e.g. Best Van Lines, Inc. v. Walker,* 490 F.3d 239 (2d Cir. 2007); *Rakofsky v. Washington Post,* 39 Misc. 3d 1226(A) (Sup. Ct. N.Y. Co. 2013)("[T]here are insufficient contacts with this state to "hale" into court multiple defendants living thousands of miles away in other states which would 'chill' their right to free speech.").

Accordingly, as unaddressed by Petitioners in this appeal, the lower Court erred when it found it had jurisdiction over WordPress.com, and the Order should be reversed.

II.

THE LOWER COURT ERRED IN GRANTING THE RELIEF SOUGHT AS PETITIONERS FAILED TO SET FORTH A PRIMA FACIE CASE OF DEFAMATION SUFFICIENT TO WARRANT THE DISCLOSURE OF Q-TIP'S IDENTITY

A. Q-Tip Is Not Precluded From Raising Arguments Contesting Petitioners' Claims Of Defamation By Res Judicata or Collateral Estoppel

Petitioners argue that, because Q-Tip did not intervene in the Prior Disclosure Proceeding, Q-Tip is precluded from litigating the issues decided in the Prior Disclosure Proceeding – to wit, whether the statements attributed to Q-Tip were sufficiently defamatory to warrant the exposure of Q-Tip's identity – pursuant to the doctrines of res judicata and collateral estoppel.

Specifically, Petitioners argue that the Prior Disclosure Proceeding addressed issues "determinative" of the Proceeding, and issues relevant to the Proceeding were "necessarily decided" therein. (Brief for Petitioners-Respondents ["Opp."] at page 16)

In so arguing, Petitioners make much of the fact that Q-Tip recognizes that this Appeal is directly related to the Appeal presently before this Court of the Prior

Disclosure Proceeding Order, and that both appeals address identical issues of fact.[1]

Q-Tip does not deny that the same issues in the Prior Disclosure Proceeding pertaining to whether Q-Tip's statements were defamatory were at issue in the Proceeding. Likewise, Q-Tip does not contest the unity in interest with Watch Croton, the named respondent in the Prior Disclosure Proceeding. This does not mean, however, that Q-Tip is barred from addressing Petitioners' claims of defamation in this Appeal and, indeed, the lower Court did not find that Q-Tip was barred from addressing those claims in the Order. (R5-7)

Significantly, at the time that Petitioners commenced the Proceeding and Q-Tip moved to intervene, the lower Court's Order from the Prior Disclosure Proceeding was on appeal to this Court. Thus, any determination of *res judicata* or collateral estoppel based on the Prior Disclosure Proceeding Order would have been wholly premature and, in essence, the lower Court would have been supplanting its own judgment for that of this Court. *See e.g. Petrina Enterprises, Ltd. v. Republic Carting Co.*, 90 A.D.2d 539 (2d Dept. 1982) (Finding a determination based on res judicata would be premature inasmuch as an appeal of the prior decision was pending).

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[1] Petitioners' argument, if given credence, makes it clear that the Appeal of the Prior Disclosure Proceeding and the instant Appeal should be heard together. Oddly enough, when Q-Tip submitted a letter request to this Court, submitting that the instant appeal and the appeal of the Prior Disclosure Proceeding Order should be heard together, on the very basis that they both involve identical issues of fact, Petitioners opposed the request.

Evidently recognizing same, the lower Court did not find that Q-Tip's arguments were barred by collateral estoppel or *res judicata*. Indeed, the lower Court implicitly rejected these arguments (which were raised wholly in opposition to Q-Tip's assertions of a right to intervene in the Proceeding), granted Q-Tip intervention, and merely employed the same rationale for the finding of defamation as in the Prior Disclosure Proceeding Order.[2] (R5-7) At no point did the lower Court find that Q-Tip's arguments that the statements were not defamatory were barred by collateral estoppel or *res judicata*.

Finally, Petitioners argue "collateral estoppel bars [Q-Tip] from relitigating the same issues in this appeal." (Opp. at page 18) However, it is beyond cavil that the lower Court's determinations do not bind this Court. *See e.g. Clark v. Great Atl. & Pac. Tea Co., Inc.*, 23 A.D.3d 510 (2d Dept. 2005); *Tref Realty Corp. v. New York*, 135 A.D.2d 862 (2d Dept. 1987) (Holding that the lower court's decision had no binding effect on the appellate court). Therefore, the lower Court's decision in the Prior Disclosure Proceeding does not preclude this Court from considering the issues raised in the instant Appeal.

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[2] Petitioners have not appealed from the portion of the Order which granted Q-Tip leave to intervene.

B. Q-Tip's Arguments That The Statements At Issue Were Not Defamatory Are Properly Before This Court

Contrary to Petitioners' assertion that Q-Tip failed to argue that the statements at issue are not defamatory, Q-Tip specifically reserved and reiterated the arguments made in the Prior Disclosure Proceeding – and expressly those arguments that the statements at issue were not defamatory, and that Petitioners failed to meet the necessary requirements for pre-action disclosure – in moving to intervene, and annexed the supporting papers offered in the Prior Disclosure Proceeding. (R121-122; 201-240). Indeed, Petitioners' argument to this end is somewhat perplexing, as Petitioners utilized the same exact vehicle (to wit, incorporating and relying on documents in the Prior Disclosure Proceeding) to satisfy the requirement that Petitioners prove the merit of their proposed action before being granted pre-action disclosure. (R21, 27-54)

Thus, it is clear that Q-Tip's arguments that the statements at issue are not defamatory per se were raised below, and are now properly before this Court.

As to Petitioners' claim that Q-Tip failed to argue to the Court below that the statements at issue were not false, Petitioners wholly disregard their burden to, in the first instance, prove that the statements at issue are false. *See e.g. Immuno AG v. Moor-Jankowski,* 77 N.Y.2d 235 (1991) (Affirming the dismissal of a complaint for defamation, stating "a libel plaintiff has the burden of showing the falsity of factual assertions."). Here, Petitioners failed to make any such showing

and, with respect to the allegations regarding the impropriety of the placement of election signs on public property, Petitioners themselves submitted the Code provisions and Konig's sworn statements which reveal that Q-Tip's statements were, in fact, true. (R93-94, 102) Thus, there can be no prejudice or surprise in an argument based on the very local codes offered and relied on by Petitioners.

In any event, as the only plausibly "new" aspects to Q-Tip's brief are legal arguments as to whether the statements at issue are defamatory, and whether Petitioners have set forth their *prima facie* case for entitlement to pre-action discovery, Petitioners' position is without merit.

It is well-settled that where a party "raises a legal argument 'which appeared upon the face of the record and which could not have been avoided ... if brought to [the opposing party's] attention at the proper juncture,' the matter is reviewable." *Chateau D'If Corp. v. City of New York*, 219 A.D.2d 205 (1st Dept. 1996) *lv. den'd* 88 N.Y.2d 811 (1996). *See also Block v. Magee*, 146 A.D.2d 730 (2d Dept. 1989) ("[A]n issue which was not raised before the nisi prius court is reviewable by this court if the question presented is one of law 'which appeared upon the face of the record and which could not have been avoided by [the respondent] if brought to [his] attention at the proper juncture.' At bar, the plaintiff's brief alleges no new facts, but rather raises legal arguments which could not have been avoided by the defendants if they had been raised in the Supreme Court. Thus, the arguments

raised by the plaintiff may be considered."); *Kapilevich v City of New York*, 103 A.D.3d 548 (1st Dept. 2013) (Considering issue raised for the first time on appeal, noting "This Court will consider the argument because the issue is one of law which appears on the face of the record and could not have been avoided by plaintiff had it been raised by the City at the proper juncture.")

Here, Q-Tip has not offered any new facts in the instant Appeal. At most, Q-Tip is offering "new" legal arguments which are plain from the very face of the Record, and which Petitioners could not have avoided if raised earlier. Specifically, Q-Tip argues that the placement of campaign signs on public property is, in fact, violative of local Code provisions, in accord with the information on which Q-Tip relied when making the relevant statements in the blog post "It's Just Good Government?". (R60-61, 156-157)

This argument simply could not be more available, with the relevant provisions of the Code at issue contained within the Record itself due to Petitioners' own submission. (R93-94) Accordingly, even though not explicitly argued to the lower Court, the issue of the truthfulness of Q-Tip's statements (and the attendant failure or Petitioners to prove the falsity of such statements) is properly before this Court.

As such, the issues surrounding a determination as to the nature of the statements at issue, such being the entire basis for the Proceeding, are properly before this Court and should be considered.

C. Petitioners' Opposition Ignores the Fact That Petitioners Are Required To Set Forth A Prima Facie Case For Defamation

Moreover, in addition to having been raised by Q-Tip below, the issue of whether the statements at issue are defamatory must be addressed as Petitioners bore the initial burden of showing that the statements were defamatory before relief could be awarded.[3] Any failure on Petitioners' part to meet this burden (with or without the opposition of Q-Tip) warrants the denial of the relief sought, and the reversal of the Order. *See e.g. Stump v. 209 E. 56th St. Corp.*, 212 A.D.2d 410 (1st Dept. 1995). Tellingly, Petitioners do not address the merits of Q-Tip's argument that the statements at issue do not rise to the level of defamation.

i. Petitioners Failed To Show That The Statements Made By Q-Tip Were False

Petitioners fail to address the fact that, at least in part, Q-Tip's statement regarding Petitioners' sign-postings was factually true.

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[3] In addition to the statements at issue, Petitioners claim that the anonymous bloggers on Watch Croton have falsely labeled Petitioner Konig as a racist. (R6, 25) Nowhere in the Record or in Petitioners' opposition is there any support for this statement. And, in any event, calling someone a racist does not rise to the level necessary to set forth a *prima facie* case for defamation, and certainly not one sufficient to deprive Q-Tip of the First Amendment right to anonymous free speech. *See e.g. Parks v. Steinbrenner*, 131 A.D.2d 60 (1st Dep't 1987); *Covino v. Hagemann*, 165 Misc. 2d 465 (Sup. Ct. Richmond Co. 1995).

It is well settled that falsity is an element of defamation which must be proven. *See e.g. Goldberg v Levine*, 97 A.D.3d 725 (2d Dept. 2012) ("the documentary evidence submitted by the defendant demonstrated that the defendant's statements that hazardous or toxic substances were located on the plaintiff's property were substantially true. 'Truth is an absolute defense to an action based on defamation.' Thus, the documentary evidence submitted by the defendant conclusively establishes a defense to the claim as a matter of law."); *Salvatore v. Kumar*, 45 A.D.3d 560 (2d Dept. 2007). As it is evident from the Code and from Konig's own admission that she placed signs on public property, Petitioners have failed to set forth a valid claim for defamation on this statement. (R93-94)

In opposition, Petitioners offer only a footnote, contending that the statement is, in fact, false as "local law expressly exempts political signs from the regulation cited by Q-Tip." (Opp. at 21) This is patently incorrect – the local law exempts political signs from the time restraints set forth in the Code. It does not exempt political signs from the prohibition against posting on public property, which is the provision relied upon by Q-Tip. (R93-94)

Thus, as Petitioners have not shown that the statement at issue is false, it cannot be defamatory and, therefore, cannot give rise to an entitlement to pre-action disclosure. *See Goldberg v Levine, supra.*

ii. Petitioners Failed To Show That The Statements Rise To The Necessary Level Of Exposing Petitioners To Public Contempt

Petitioners also do not address the argument that the statements were not of the nature to arouse in right-thinking people the requisite ridicule, aversion and disgrace required for a finding of defamation. In particular, Petitioners fail to consider that the statements at issue must be considered in the context in which they were offered, on a community blog in the middle of a heated local election. *See e.g. Alf v Buffalo News, Inc.*, 2013 NY Slip Op 04843 (2013); *Mann v. Abel*, 10 N.Y.3d 271 (2008), *cert. denied*, 555 U.S. 1170 (2009). *See also Parks v. Steinbrenner*, 131 A.D.2d 60 (1st Dep't 1987) ("Indeed, even if the assertions in the statement implying that plaintiff was incompetent and biased in performing his duties were to be viewed as statements of fact, it is questionable whether they could be construed as defamatory -- i.e., exposing the plaintiff to public contempt, ridicule, aversion and disgrace and inducing an evil opinion of him in the minds of right thinking persons -- in light of the generally 'critical' attitudes which baseball umpires, in any event, ordinarily appear to inspire in both the game's fans and its participants.").

This Court's recent decision in *Melius v Glacken*, 94 A.D.3d 959 (2d Dept. 2012) is particularly relevant to this matter, where the allegedly defamatory statements were made solely in the context of a heated political election. Specifically, in dismissing a complaint for defamation, this Court stated:

> Looking at the broader social context, the statement was made in the midst of a heated political debate, a forum where the audience would 'anticipate the use of epithets, fiery rhetoric or hyperbole' and would 'arrive with an appropriate amount of skepticism,' 'with the expectation that they are, in all probability, going to hear opinion,' and with a reluctance 'to conclude—absent clear clues to the contrary from the words or context—that the statements made are to be heard as objective fact.' (citations omitted)

Nonetheless, the lower Court viewed Q-Tip's statements in isolation, without taking into account the tenor of the posts, the circumstances surrounding the statements or the broader social context in which they were made. This was patently in error, and the Order should be reversed. *See Alf v Buffalo News, Inc., supra* ("When examining a claim of libel, we do not view statements in isolation. Instead, '[t]he publication must be considered in its entirety when evaluating the defamatory effect of the words.'")

iii. Petitioners Failed to Show That Q-Tip's Statements Were More Than Non-Actionable Opinion

Petitioners also fail to address the argument, raised here and below, that the statements alleged to be defamatory (and, in particular, the statements that Petitioners' actions were "downright criminal" in the post captioned "Would You Buy a Used Car From These Men?") were non-actionable opinion, and contained mere rhetorical hyperbole. *See e.g. Rinaldi v. Holt, Rinehart & Wilson,* 42 N.Y.2d 369, *cert. denied,* 434 U.S. 969 (1977); *LeBlanc v. Skinner*, 955 N.Y.S.2d 391 (2d

Dept. 2012) (Finding calling the plaintiff a "terrorist" "was likely to be perceived as 'rhetorical hyperbole, a vigorous epithet.'"); *Russell v Davies*, 97 A.D.3d 649 (2d Dept. 2012) ("In this case, the context of the complained-of statements was such that a reasonable reader would have concluded that he or she was reading and/or listening to opinions, and not facts, about the plaintiff."); *Galasso v. Saltzman*, 42 A.D.3d 310 (1st Dept. 2007) (Dismissing defamation complaint where defendant called plaintiff "a criminal" and said he "engaged in criminal conduct," finding these statements to be nonactionable opinion).

Again, it was Petitioners' burden to prove the statements at issue were defamatory, and, again, Petitioners failed to do so. The lower Court erred in finding these statements to be sufficiently defamatory to warrant the disclosure of Q-Tip's identity, and the Order should be reversed.

iv. Petitioners Failed To Show The Requisite Malice By Q-Tip

Finally, Petitioners do not address their failure to plead and show malice on Q-Tip's part, despite Petitioners' admitted status as public figures. As argued in Q-Tip's opening brief, such failure precludes a finding of defamation and, consequently, a direction that Q-Tip's identity must be revealed. *See Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970); *Gleich v. Kissinger,* 111 A.D.2d 130 (1st Dept. 1985) (pre-action disclosure denied to petitioner in prospective defamation claim, noting, inter alia, that the public figure petitioner

failed to allege actual malice by the alleged defamer); *Finkel v. Dauber*, 29 Misc. 3d 325 (Sup. Ct. Nassau Co. 2010).

Here, there has been no factual basis for any claim of actual malice by Q-Tip and, indeed, Q-Tip expressly stated that the statements at issue were believed to be true when posted. (R156-157) As there is no indication that Q-Tip's statements were made with knowledge of the falsity thereof or, at a minimum, with reckless disregard for the truth, there is nothing to show that Q-Tip acted with actual malice. *See Shulman v. Hunderfund*, 12 N.Y.3d 143 (2009) (Dismissing complaint for libel based on a campaign flyer alleging that plaintiff, who was running for office, broke the law, stating "Because the record does not clearly and convincingly show that [defendant] knew [plaintiff] to be innocent, or that he had no basis for thinking him guilty, of any legal transgression, [plaintiff's] case must fail."). Petitioners therefore failed to set forth a prima facie case for defamation, and are not entitled to the disclosure of Q-Tip's identity.

III.

THE LOWER COURT ERRED IN FAILING TO EFFECTUATE A BALANCING TEST BETWEEN PETITIONERS' REQUEST FOR THE INFORMATION SOUGHT AND Q-TIP'S FIRST AMENDMENT RIGHT TO ANONYMOUS FREE SPEECH AND THE PUBLIC INTEREST IN PROTECTING OPEN, FREE DEBATE

As set forth in Q-Tip's opening brief, the lower Court erred in failing to utilize a balancing test to weigh Petitioners' need for divulging Q-Tip's identity

against Q-Tip's interest in maintaining his/her First Amendment right to anonymous free speech, and the general public interest in the free exchange of ideas, particularly in matters of public concern, such as political elections.

In opposition, Petitioners argue that New York Courts have "consistently rejected the argument" that a balancing test must be employed in considering pre-action disclosure requests in defamation matters. (Opp. at 21).

This is patently incorrect. Indeed, in a situation directly on point with the matter before this Court, the Appellate Division, First Department expressly recognized the need for such a balancing test, when First Amendment freedoms are at stake, employing judicial discretion to deny the relief sought. *See Gleich v. Kissinger*, *supra* (Dismissing proceeding for pre-action disclosure relating to defamation claim, concluding with "We now exercise that discretion to deny [petitioner's] application upon the legal principles and our societal interest in freedom of speech discussed above.").

Indeed, Justice Rory J. Bellantoni, the son of the Justice who decided the Order and the Prior Disclosure Proceeding Order, employed a balancing test in a previous pre-action disclosure proceeding, such as that required by *Dendrite International v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. 2001). *See Ottinger v. Non-Party The Journal News*, 36 Media L. Rep. 2018, 2008 N.Y. Misc. LEXIS 4579 (Sup. Ct. Westchester Co. 2008). Petitioners cite this opinion, but

misrepresent the Court's opinion as merely referring to *Dendrite* as helpful, and stopping short of employing the fourth prong of *Dendrite* – to wit, the balancing test. (Opp. at. 27) However, the Court clearly employed the *Dendrite* balancing test, stating "Applying the fourth prong of *Dendrite*, the court finds that the balance in this case weighs in favor of the petitioners." *Id.* at 7.

Petitioners additionally err in asserting that the Court in *Greenbaum v. Google, Inc.*, 18 Misc. 3d 185 (Sup. Ct. N.Y. Co. 2007) did not employ a balancing test and "declined the invitation to follow *Dendrite*." (Opp. at 29) In *Greenbaum*, the Court found that the statements at issue were not defamatory, and therefore did not need to embark on a balancing test. However, even without this necessity, the Court clearly weighed the plaintiff's request for disclosure of the anonymous bloggers' identities against the larger societal impact which would arise from the infringement of the right to free, anonymous speech, stating "The relief sought by Greenbaum, on the eve of a school board election, would have a chilling effect on protected political speech. Greenbaum's request for disclosure of the identities of the anonymous Internet speakers must therefore be denied." *Id.* at 191.

Thus, it is clear that New York Courts have employed a balancing test, such as that offered in *Dendrite*, when considering whether pre-action disclosure as to an anonymous speaker's identity should be awarded.

In any event, Petitioners' statement is a misrepresentation of Q-Tip's argument for the need to employ a balancing test where free speech is at issue. Indeed, it has long been held that, when considering the rights of an individual versus the import of First Amendment rights, a balance must be cast, particularly in the context of political discourse, such as here. *See e.g. Rinaldi v. Holt, Rinehart & Winston, Inc., supra* (Gabrielli, J., dissenting in part) ("Indeed, our society is probably unique in its tolerance of sharp and robust criticism of public officials and government. On the other hand, however, we are equally committed to individual rights and in particular to the guarantee that one is presumed innocent until proven guilty in accord with the mandates of due process of law. Situations arise when these rights come into conflict. The task of balancing the competing interests may not be shirked by the ritualistic incantation of the rule of *New York Times Co. v. Sullivan,* as the majority concedes. Rather, the balancing must be achieved by a painstaking examination of the particular facts of each individual case in which the rights of the press and the rights of the individual are counterposed."); *Immuno AG v. Moor-Jankowski, supra* ("...striking an appropriate balance 'between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech' is consistent with the traditional role of State courts in applying privileges. . ."); *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226 (2d Dep't 1981) (Discussing the common-law rule against group libel actions,

stating "The rule was designed to encourage frank discussions of matters of public concern under the First Amendment guarantees. Thus the incidental and occasional injury to the individual resulting from the defamation of large groups is balanced against the public's right to know.")

The necessity for such a balancing test is evident from the import to be placed on First Amendment rights in the political context, as stated by the Supreme Court in *Mills v. Alabama*, 384 U.S. 214 (1966), wherein the court acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."

The lower Court, however, did not employ any balancing test, and evidently gave little to no weight to the fact that the statements concerned a matter of public concern, and were posted on a site where anyone could address or refute same.

Had the lower Court properly employed a balancing test, weighing Petitioners' desire for redress for statements concerning campaign sign postings and Political Action Committees, against Q-Tip's right to anonymous free speech and the need to avoid any chilling effect for such free, political speech, it is

submitted that the only rational outcome would be the dismissal of the Proceeding. *See e.g. Greenbaum v. Google, Inc., supra.*

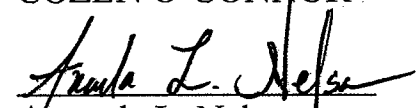
Thus, it is clear that New York Courts have not "consistently rejected" the employment of a balancing test in determining matters involving the right to free speech. It is equally clear that the lower Court did not effectuate such a balancing test in this matter, and erred in awarding Petitioners pre-action disclosure of Q-Tip's identity, in a clear infringement of Q-Tip's right to free speech, and the public need for free and open public discourse. The Order should be reversed.

CONCLUSION

For all of the above reasons, the Short Form Order of the Supreme Court entered on October 12, 2012, which ordered the disclosure of certain identifying information concerning Q-Tip, should be reversed and the Petition dismissed.

Dated: New York, New York
July 1, 2013

COZEN O'CONNOR



Amanda L. Nelson
Edward Hayum
Jason L. Beckerman
45 Broadway, 16th Floor
New York, New York 10006
(212) 509-9400
Attorneys for Appellant-Intervenor-Respondent Q-Tip

APPELLATE DIVISION – SECOND DEPARTMENT
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July 1, 2013

Amanda L. Nelson
COZEN O'CONNOR
45 Broadway Atrium,
Suite 1600
New York, NY 10006
212-509-9400
Attorneys for Appellant-Intervenor-Respondent Q-Tip