SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

RICHARD OTTINGER and JUNE OTTINGER, Plaintiffs, - against - JOHN DOE 1-100 and JANE DOE 1-100, Defendants.	Index No. 08/3892

MEMORANDUM OF LAW OF NONPARTY WITNESS *THE JOURNAL NEWS* IN SUPPORT OF ITS MOTION TO QUASH

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

MISCELLANEOUS

Nonparty witness The Journal News respectfully submits this memorandum of law in support of its motion to quash a subpoena, dated February 28, 2008, issued by plaintiffs in this action (the "Subpoena").

PRELIMINARY STATEMENT

Anonymous speech has a long and valued history in this country. With the advent, even the explosion, of the internet, the opportunities for speakers to reach new audiences – and the potential value for the anonymity of those speakers – has increased exponentially. The chance for speakers to remain anonymous, or pseudonymous, has made the Internet a wide-open, robust forum for discussion and information exchange and for exercise of the freedom of speech guaranteed by the First Amendment.

The Subpoena of plaintiffs Richard and June Ottinger (the "Ottingers") in this case threatens to erode that freedom. The Ottingers have sought to unmask the identity of posters to the public forums of the website for The Journal News, claiming that comments by these posters criticizing the Ottingers' efforts at obtaining zoning changes for their new home have defamed them. The effect of this SLAPP (Strategic Lawsuit Against Public Participation) suit, if successful, is clear: these forums, which The Journal News instituted precisely to foster the free and public exchange of information and ideas, will become severely chilled if the public feels that they cannot participate in such forums without risk of being unmasked and, perhaps, haled into court should their speech offend the wrong person. Thus, in addition to the other significant procedural deficiencies in plaintiffs' Subpoena that require its quashing, the Court should likewise do so in order to vindicate the strong First Amendment rights at stake in this matter.

BACKGROUND

The Journal News is a daily newspaper that is widely distributed throughout Westchester, Bronx, New York, Putnam, and Rockland Counties and in surrounding areas of New York and

Southern Connecticut. The Journal News operates a website, www.lohud.com, which contains, among other things, on-line community forums on which readers may post comments regarding news, opinion, or anything of public or community interest. (Affidavit of Mark Fowler ("Fowler Aff.") ¶¶ 2-3.)

On February 25, 2008, plaintiffs filed the complaint and summons in this matter. (Fowler Aff. Ex. A ("Compl.").) The caption names only fictitious defendants, "John Doe 1-100 and Jane Doe 1-100." The complaint alleges a cause of action for defamation against the fictitious defendants based on four postings on The Journal News forums. (Compl. ¶ 6.) The comments apparently relate to the Ottingers' renovation of their home in Mamaroneck, in pursuit of which they "sought building approvals and permits from the Building Department, Zoning Board of Appeals, Coastal Zone Management Commission, Architectural Review Board, and other requisite boards in the Village of Mamaroneck" and "were also required to resolve outstanding issues at the Zoning Board of Appeals." (Id. ¶¶ 3-4.)

According to the complaint, "throughout the years the Ottingers were both very involved in serving their community on numerous boards and committees." (Id. ¶ 14.) In particular, plaintiff Richard Ottinger is Dean Emeritus of the Pace Law School and, among other things, a former United States Representative from New York for 16 years (1965-1971 and 1975-1985). (A copy of his Pace Law School website biography is included as Fowler Aff. Ex. B.)

On February 29, 2008, The Journal News was served with a subpoena in this case from plaintiffs (the "Subpoena") (Fowler Aff. Ex. C.) The Subpoena calls for attendance at a deposition (originally noticed for March 25, 2008), then recites several allegedly defamatory statements made "on the LoHud 'blog' hosted by the New York Journal News ('lohud.com')"

and makes the following demands (whether these are intended as deposition topics or document requests is unclear):

> Plaintiffs demand the senders' identity and demands [sic] that you identify the senders' identifying internet user information. In making this identification, plaintiffs demand that you identify the following for each person that posted:
>
> 1. name;
> 2. address;
> 3. the IP address from which the blogs were posted;
> 4. the corresponding internet service provider; and
> 5. other information which will allow plaintiffs to identify the person(s) posting the blog entries.
>
> All of this information is critical in plaintiffs identifying the proper defendants in this matter.
>
> Plaintiffs also demand all blog entries concerning the Ottingers and their home in the Village of Mamaroneck, New York.
>
> PLEASE TAKE FURTHER NOTICE that The Journal News is required to produce at this oral examination any and all books, records, agreements, correspondence, and other documents relevant to the posting of blogs on LoHud.

(Id.) On March 19, 2008, The Journal News served objections to the subpoena pursuant to CPLR 3122. (Id. Ex. D.) Pursuant to a stipulation between The Journal News and plaintiffs, it was agreed that The Journal News would move to quash and/or modify the Subpoena on March 21, 2008. (Id. Ex. E.)

ARGUMENT

I. PLAINTIFFS EFFECTIVELY SEEK PRE-COMMENCEMENT DISCOVERY WHICH MUST PROCEED VIA SPECIAL PROCEEDING

As stated directly in the Subpoena, the purpose of the Ottingers' discovery is to "identify the proper defendants" in this action. Discovery for the purpose of obtaining the defendants' identity, however, is plainly in the nature of pre-commencement discovery which is properly sought under CPLR 3102(c). See, e.g., Greenbaum v. Google, Inc., 18 Misc. 3d 185, 845

N.Y.S.2d 695, 697-99 (Sup. Ct. N.Y. County 2007) (plaintiff sought pre-action discovery against internet service provider to determine names of anonymous internet posters who allegedly defamed her). The correct procedure for obtaining discovery under CPLR 3102(c) is via a special proceeding commenced against the witness from whom discovery is sought. See id.; Robinson v. Gov't of Malaysia, 174 Misc. 2d 560, 560-61, 664 N.Y.S.2d 907 (Sup. Ct. N.Y. County 1997). Moreover, as discussed in more detail infra at 6, such discovery is tightly circumscribed and requires a heightened showing, via affidavit, that the party seeking the discovery has a meritorious cause of action.

The fact that plaintiffs have purported to commence this action by filing a complaint naming solely fictitious defendants does not change the nature of the relief they seek. First, it should be evident that the heightened showing required of plaintiffs under CPLR 3102(c) would be rendered completely meaningless if all one had to do was file a Doe complaint/summons and then seek precisely the same discovery. Indeed, if such a procedure were proper, presumably no one would ever seek pre-commencement discovery because to do so requires the separate purchase of an index number – and, indeed, plaintiffs here have therefore effectively sought to pursue their action and their discovery proceeding under the same index number, a procedurally defective and improper course.[1] See CPLR 306-a(a); Harris v. Niagara Falls Board of Ed., 6 N.Y.3d 155, 159, 811 N.Y.S.2d 299 (2006).

Such procedural evasion is not available, moreover, because under CPLR 1024, "the naming of a fictitious party is allowed only when there is proof of timely efforts to identify the correct party." Fountain v. Ocean View II Assocs., 266 A.D.2d 339, 340, 701 N.Y.S.2d 68 (2d

[1] Proceeding via special proceeding would also, of course, require that The Journal News be served with a notice of petition, CPLR 403, which has not been done. In addition, proceeding via Subpoena is also improper because, quite apparently, notice has not been given to the other parties (i.e., the Doe defendants) as required by CPLR 3107 and 3120.

Dep't 1999); see Maurro v. Lederman, 7 Misc. 3d 863, 870, 795 N.Y.S.2d 867 (Sup. Ct. Richmond County 2005) ("An explicit prerequisite to the use of CPLR 1024 is plaintiff's ignorance of the defendant's name. Implicit in this requirement is the need for due diligence in seeking to ascertain the defendant's name prior to commencement of the action."). Failure to comply with the requirements of CPLR 1024 renders the purported "commencement" jurisdictionally defective. See Maurro, 7 Misc. 3d at 870; Opont v. DuClair Realty Corp., 190 A.D.2d 781, 782, 593 N.Y.S.2d 568 (2d Dep't 1993); see also David D. Siegel, Siegel's Practice Review 43:4 (April 1996) ("The filing of a "John Doe" summons without sufficient basis will prevent it from performing . . . the direct 'commencement' function that it would otherwise have in a 'filing' court."). It must therefore follow that plaintiffs who are unaware of the identity of the persons they wish to sue must first take advantage of available discovery avenues, including a pre-commencement discovery proceeding under CPLR 3102(c). Cf. Misa v. Hossain, 42 A.D.3d 484, 486, 840 N.Y.S.2d 614 (2d Dep't 2007) (plaintiff failed to show diligent efforts at identification required for CPLR 1024 where he "failed . . . to apply to the Supreme Court for assistance"). To file under CPLR 1024, and only then take steps to seek those identities, is pure bootstrapping.

Finally, there is another reason why plaintiffs should be required to proceed via a CPLR 3102(c) special proceeding. As discussed infra at 12-13, because of the serious First Amendment concerns raised by attempts to unmask an anonymous speaker, the posters whose identities are sought must first be given notice and an opportunity to intervene (anonymously) to oppose plaintiffs' request. See Greenbaum, 845 N.Y.S.2d at 698. While such intervention would be clearly permissible in a special proceeding against The Journal News, see id., it would be unavailable in this action because, of course, the "intervenor" is actually a defendant. See

CPLR 1012(a)(2) (intervention of right based on inadequate representation of person's interest "by the parties"). That is, for the defendant posters to challenge a subpoena issued in this action, they would need to actually appear, thereby possibly waiving their right to any jurisdictional challenges.

Accordingly, plaintiffs' subpoena in this matter is an improper attempt to obtain pre-commencement discovery. The subpoena should for that reason be quashed and plaintiffs required, if they continue to seek the posters' identities, to initiate a special proceeding under CPLR 3102(c) for that purpose.

II. THE STANDARDS OF CPLR 3102(C) FOR PRE-COMMENCEMENT DISCOVERY SHOULD APPLY IN ANY CASE

Even if the Court should choose to allow plaintiffs to proceed via subpoena in this matter, however, the standards applicable to pre-commencement discovery should still be applied. As stated in Greenbaum, "disclosure in advance of service of a summons and complaint is available only 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." Greenbaum, 845 N.Y.S.2d at 699. This demonstration of merit must be made by affidavit and/or other evidentiary submission. See In re Gleich, 111 A.D.2d 130, 131, 489 N.Y.S.2d 510 (1st Dep't 1985); Merck-Medco Managed Care L.L.C. v. Value Health Inc., 254 A.D.2d 519, 520, 678 N.Y.S.2d 681 (3d Dep't 1998). To obtain the information they seek about the posters' identities, therefore, the Ottingers must submit an affidavit or other evidentiary material demonstrating at least a prima facie case of defamation.[2] As discussed infra at 13-15, a similar requirement should likewise be imposed in order to protect the First Amendment rights of the posters.

[2] Plaintiffs' complaint is not verified and thus cannot serve as evidentiary support to meet this burden.

As for the information sought in the Subpoena beyond the identities of the posters – "all blog entries concerning the Ottingers" and a sweepingly overbroad request for all documents "relevant to the posting of blogs on LoHud" – it would appear that this information is sought for the purpose of discovering causes of action (e.g., whether anyone else has posted allegedly defamatory material about plaintiffs). Such discovery is beyond the scope of that allowed under CPLR 3102(c). See Rann v. Metropolitan Transit Auth., 22 A.D.3d 586, 586-87, 801 N.Y.S.2d 765 (2d Dep't 2005) (Supreme Court improvidently exercised discretion to allow pre-action discovery because "the discovery was not limited to obtaining the identities of prospective defendants"); Merck-Medco, 254 A.D.2d at 520 (pre-action discovery "not available for the purpose of determining whether a cause of action exists"); Uddin v. N.Y.C. Transit Auth., 27 A.D.3d 265, 266, 810 N.Y.S.2d 198 (1st Dep't 2006) (3102(c) not available "to explore alternative theories of liability").

III. THE SUBPOENA INFRINGES UPON THE POSTERS' FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY

Because of the procedural infirmities in plaintiffs' course of action, the Court need not reach the First Amendment issues implicated by the Subpoena. Should the Court determine otherwise, however, it is plain that any claim to enforcement of the subpoenas by plaintiff must be balanced against the serious First Amendment implications of infringing upon the posters' right to speak with anonymity. These First Amendment rights create a qualified privilege that require a heightened showing of need and materiality by plaintiff to be overcome. The Journal News submits that plaintiffs are unlikely to be able to make the necessary showing. Moreover, the importance of these rights requires that the anonymous posters whose identities plaintiff seeks be given the opportunity to challenge any showing made by plaintiffs.

A. Anonymous speech on the internet is protected by the First Amendment.

The Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that a speaker's "decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995); see also Watchtower Bible & Tract Soc. v. Village of Stratton, 536 U.S. 150, 166-67 (2002); Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 387 (2d Cir. 2000) ("anonymous communications . . . have played a central role in the development of free expression and democratic governance"). The First Amendment, including its concern for a speaker's choice to remain anonymous, is as fully applicable to speech on the Internet as it is to paper leaflets. See Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

Indeed, "[t]he Internet is a particularly effective forum for the dissemination of anonymous speech." Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004). As stated just last month by the California Court of Appeals,

> [O]rdinary people with access to the Internet can express their views to a wide audience through the forum of the online message board. The poster's message not only is transmitted instantly to other subscribers to the message board, but potentially is passed on to an expanding network of recipients, as readers may copy, forward, or print those messages to distribute to others. The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of any economic,

> political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field.

Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 237 (Cal. App. 2008); see also Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) ("Internet speech is often anonymous. . . . This unique feature of [the internet] promises to make public debate in cyberspace less hierarchical and discriminatory than in the real world because it disguises status indicators such as race, class and age.") (internal quotation omitted).

Because of these important values, efforts to use the power of the courts to pierce anonymity by subpoena implicate First Amendment concerns. Sony, 326 F. Supp. 2d at 563. Such efforts are therefore subject to a qualified privilege, which must be considered – and overcome – before permitting discovery of a defendant's identity. See McMann v. Doe, 460 F. Supp. 2d 259, 266 (D. Mass. 2006) ("Courts must adopt an appropriate standard such that aggrieved parties can obtain remedies, but cannot demand the court system unmask every insolent, disagreeable, or fiery anonymous online figure."). The right to anonymity is not absolute, however; it may be pierced where necessary for a plaintiff to receive redress for legitimate and cognizable grievances for, e.g., copyright infringement or defamation. See Sony, 326 F. Supp. 2d at 562-63; Cahill, 884 A.2d at 456.

Thus, courts faced with requests to require identification of anonymous potential defendants have attempted to strike a balance between the First Amendment rights of the speaker and the legitimate needs of a potential plaintiff. See Krinsky, 72 Cal. Rptr. 3d at 239. It is critical that the hurdle for such identification be set sufficiently high:

> We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very

> important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes.

Cahill, 884 A.2d at 457.

While, in the absence of Supreme Court (or, in this case, Court of Appeals) guidance, there is no controlling standard for this balance, most recent cases have adopted the test enunciated in the leading case of Dendrite Int'l v. Doe No. 3, 775 A.2d 756 (N.J. Super. App. Div. 2001), or some slight variant thereof. Dendrite announced a four-step test for a court faced with a request to enforce a subpoena requesting the identity of a potential defendant:

> 1) "[T]he trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board";
> 2) "The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster than plaintiff alleges constitutes actionable speech";
> 3) "The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named defendants. In addition to establishing that its action can withstand a motion to dismiss . . . the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis"; and
> 4) "The court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff properly to proceed."

Dendrite, 775 A.2d at 760. This test, with slight modifications, has been widely followed by subsequent courts. See Krinsky, 72 Cal. Rptr. 3d at 244-46; Mobilisa, Inc. v. Doe I, 170 P.3d 712, 719-21 (Ariz. App. 2007); Cahill, 884 A.2d at 459-60; Highfields Capital Mgmt. L.P., 385 F. Supp. 2d 969, 974-76 (N.D. Cal. 2005).[3]

Included in the list of courts following Dendrite, at least to the extent made necessary by the facts of the case, is Justice Friedman's decision denying a request to identify anonymous posters in Greenbaum v. Google, Inc., a case with many similarities to this one. In that case, plaintiff Greenbaum, an elected school board official on Long Island, brought a special proceeding under CPLR 3102(c) against Google to determine the identity of a blogger pseudonymously known as "Orthomom" and several of her (anonymous) commenters. 845 N.Y.S.2d at 697. Greenbaum alleged that Orthomom and her commenters had defamed her in discussions relating to certain positions taken by Greenbaum. Justice Friedman denied the petition, finding that the statements were not actionable as defamation. Id. at 699-701.

In the course of denying petitioner's request, the court recognized that "the First Amendment protects the right to participate in online forums anonymously or under a pseudonym, and that anonymous speech can foster the free and diverse exchange of ideas." Id. at 698. After noting the need to balance the First Amendment values against a plaintiff's legitimate need for redress against defamation, Justice Friedman specifically adopted the first

[3] In Sony, Judge Chin of the Southern District of New York considered the following factors: (1) "a concrete showing of a prima facie claim of actionable harm," (2) "specificity of the discovery request," (3) "the absence of alternative means to obtain the subpoenaed information"; (4) "a central need for the subpoenaed information to advance the claim," and (5) "the party's expectation of privacy." 326 F. Supp. 2d at 556. Some courts have apparently understood Judge Chin, by "prima facie claim," to be referring to effectively a motion to dismiss standard, see Mobilisa, 170 P.3d at 720, but Judge Chin actually reviewed evidence beyond the pleading in making his determination, see 326 F. Supp. 2d at 565-66. To the extent that the Sony standard's "concrete showing" means the submission of actual evidence to support the claim, then at least as to claim viability it is quite similar to the Dendrite test. It should also be noted that the "speech" at issue in Sony was internet file sharing, an activity that, while Judge Chin held it to be entitled to some First Amendment protection, is "not engaging in true expression" and not "entitled to the broadest protection of the First Amendment." Id. at 564.

two elements of the Dendrite test – requiring notice to the anonymous poster and that the plaintiff set forth the particular statements deemed to be defamatory. Id. at 698. With respect to the third element the court noted that Dendrite was "persuasive authority" (and noted the disagreement among other courts) but found it unnecessary to determine the quantum of proof required by the First Amendment because, pursuant to CPLR 3102(c), the petitioner was required to demonstrate that she had a meritorious cause of action in order to obtain the discovery sought. Id. at 698-99. Finding no actionable defamation, the court apparently saw no need to discuss the fourth Dendrite prong.

Movant submits that this Court should follow Justice Friedman's lead and adopt the Dendrite test as the proper test to apply in determining whether plaintiffs are entitled to information regarding the identity of the anonymous posters. Application of that test would require, first, that there be a direction to plaintiffs to attempt to notify the posters of their request and a stay of proceedings for some time adequate to allow the posters to intervene should the posters choose to do so. Moreover, plaintiffs should be required to demonstrate, by affidavit or other evidentiary support, that they have a legitimate cause of action against the posters and that the suit is not merely an attempt to harass or retaliate against the posters because the Ottingers do not like what the posters had to say. Finally, should plaintiffs make that showing, the court should still balance the First Amendment values implicated against the rights of the plaintiffs and determine that the latter weigh more strongly before directing enforcement of the Subpoena.

B. The posters should be given notice and opportunity to intervene.

Under the first Dendrite prong, attempts should be made to notify the posters that plaintiffs are attempting to uncover their identities. Plainly, the posters are in the best position to defend their First Amendment rights, should they choose to do so. The Dendrite court stated that this notification should be done by requiring posting to the same forum as the original

comments; The Journal News agrees that the Ottingers should be ordered to post appropriate notices on the lohud.com forums, announcing to the specific posters that plaintiffs are seeking court intervention to determine their identities and providing information as to how they may intervene.[4] See Greenbaum, 845 N.Y.S.2d at 698 & n.1

The Court should also order that further action to enforce the Subpoena be stayed an appropriate length of time in order to allow intervention. Finally, as in Greenbaum, any posters who wish to intervene should be allowed to do so anonymously (assuming they are represented by counsel). See 845 N.Y.S.2d at 698.

C. Plaintiffs should be required to demonstrate evidentiary support for their defamation action.

Whether the posters choose to intervene or not, plaintiffs should nonetheless be required, as per the second and third prongs of Dendrite, to first specify the statements made that are claimed to be defamatory, and then to produce evidentiary support as necessary to demonstrate that they have a prima facie case of defamation. The specification of the actual statements is, of course, required in any case pursuant to CPLR 3016(a). See, e.g., Pipia v. Nassau County, 34 A.D.3d 664, 667, 826 N.Y.S.2d 318 (2d Dep't 2006). Although plaintiffs' complaint does set out four specific comments complained of, movant notes that the complaint also states that the defamatory statements allegedly made are "not limited" to those statements. (Compl. ¶ 6.) Recovery for any other statements would seem to be barred by CPLR 3016, but to the extent the plaintiffs wish to rely on any other alleged statements, they should at least be required, per Dendrite, to specify them in haec verba in order for the court to assess whether they can form the basis for a valid defamation action.

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[4] The specifics of any such notice should be determined by the Court. It may be appropriate to notify the posters of the possible availability of pro bono counsel (as in Greenbaum) or to direct the posters to public interest groups, such as the Electronic Frontier Foundation or Public Citizen, who litigate in this area.

1. Plaintiffs' suit is subject to the heightened standards for a SLAPP suit.

As for the third Dendrite prong, its requirement that the plaintiffs not only survive a motion to dismiss standard but actually support their claim with some evidence is particularly appropriate in this case, because the suit brought by the Ottingers falls within the definition of an "action involving public petition and participation" under the New York Civil Rights law.[5] New York defines such an action as:

> an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

N.Y. Civ. Rts. L. § 76-a(1)(a). By plaintiffs' own complaint, they are "public applicants or permittees," namely, they sought approval from various boards for the renovations made to their house in Mamaroneck.[6] (Compl. ¶ 4) It is further apparent from reading the comments made by the posters (the full context of which is available in Exhibit A to the Complaint) that the remarks of which the Ottingers complain were efforts of the posters to "comment on" the applications and/or permissions received by plaintiffs regarding their home.

For purposes of the plaintiffs' request, the effect of this law is twofold. First, it requires the plaintiffs, in order to succeed in their defamation suit, to "establish[] by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false." N.Y. Civ. Rts. L. § 76-a(2) (emphasis added). This is, of course, the New York Times v. Sullivan standard that applies to defamation

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[5] Such suits are often referred to as "SLAPP" suits, or strategic lawsuits against public participation. See T.S. Haulers, Inc. v. Kaplan, 295 A.D.2d 595, 596, 744 N.Y.S.2d 193 (2d Dep't 2002).

[6] A "'public applicant or permittee' shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." N.Y. Civ. Rts. L. § 76-a(1)(b).

claims by public figures. See Huggins v. Moore, 94 N.Y.2d 296, 301-02, 704 N.Y.S.2d 904 (1999). (Given Richard Ottinger's career as congressman and Pace Law School dean, and both Ottingers' prominence in the Mamaroneck community, the public-figure standard is most likely applicable in any case.)

More important for purposes of this motion, however, is the fact that SLAPP suits are subject to a special standard for dismissal or summary judgment, in that once a defendant shows that the suit falls within the parameters of Civ. Rts. L. § 76-a, a plaintiff must make a heightened showing of merit – i.e., that the cause of action has a "substantial basis in [fact and] law." CPLR 3211(g); CPLR 3212(h); see T.S. Haulers, 295 A.D.2d at 596; Duane Reade, Inc. v. Clark, 2 Misc. 3d 1007(A), 2004 WL 690191, at *4 (Sup. Ct. N.Y. County 2004) ("In order to avoid dismissal of its SLAPP suit complaint, plaintiff must establish by clear and convincing evidence a 'substantial basis' in fact and law for its claim. The Legislature viewed 'substantial' as a more stringent standard than the 'reasonable' standard that would otherwise apply.").

Given that the plaintiffs' defamation action could be dismissed if they cannot make a showing of substantial basis, it would make no sense to demand a lesser standard of merit for unmasking the identity of their critics. The goals of the SLAPP statute and those of the First Amendment – which overlap and reinforce each other[7] – are both served by requiring, per the third Dendrite prong, that plaintiffs demonstrate that their complaint states a valid cause of action and that they have some evidentiary support for that action.

2. Plaintiffs have a high hurdle to demonstrate the merits of their claim.

With respect to whether the Ottingers can possibly make the required demonstration of the merits, The Journal News at this stage does not intend to wade deeply into the merits of the

[7] See 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 137 & n.1, 589 N.Y.S.2d 825 (1992) (noting the First Amendment concern for the "chilling effect" of defamation actions on public debate, and the response of New York (and other states) in enacting SLAPP suit legislation.

underlying action. Any such analysis, if required, is properly deferred until the posters themselves have been given opportunity to intervene, and moreover it is the Ottingers' burden in the first instance to demonstrate the validity of their claim. Nevertheless, it is immediately apparent from reviewing the complaint that plaintiffs have a significant hurdle, one that it seems unlikely they can overcome.

It is well-settled that the defamatory nature of a statement must be assessed in full context and as a reasonable reader would understand it. See Gross v. N.Y. Times, 82 N.Y.2d 146, 152-53, 603 N.Y.S.2d 813 (1993); Miness v. Alter, 262 A.D.2d 374, 375, 691 N.Y.S.2d 171 (2d Dep't 1999); Bernard v. Grenci, __ A.D.3d __, 2008 WL 526251, at *2 (2d Dep't Feb. 26, 2008). Upon reading the comments in their full context (as included in Appendix A to the complaint), rather than merely the excerpts cited by plaintiffs in the complaint itself, it becomes far less apparent that any actionable defamation is present in those comments. For example, while the Ottingers complain about a statement by poster "SAVE10543" that "[i]t now appears that it has been proven, that the Ottinger's . . . have presented a FRAUDULENT deed" (Compl. ¶ 6.a), the full comment shows that this statement was based on a fact allegedly revealed at a "BOT" (presumably, Mamaroneck Board of Trustees) meeting, i.e., that "the Ottinger's property was 20% smaller than the Ottingers had been claiming." (Compl. Appendix A, p.1.) Taken in this light, such the "fraudulent" comment may qualify as opinion or surmise based upon a disclosed fact, which is not actionable. See Miness, 262 A.D.2d at 375.

The general tenor of the comments and the comment thread must also be taken into account. Internet forums, in particular, tend to be wide-open and lend themselves to the sort of "loose, figurative, or hyperbolic" speech that may negate any inference on the observer's part that actual facts are being conveyed. See 600 W. 115th St., 80 N.Y.2d at 139-40. Given the

plainly heated nature of the comment threads, it is at least a serious question as to whether plaintiffs could ever demonstrate that even comments such as "THEY PAID THE RIGHT PEOPLE OFF!" would be understood by the reader as actually intending to convey an accusation of bribery rather than conjecture that the Ottingers had used their political influence, which is not actionable. See id. at 143-44 (statement that plaintiff's application was "as fraudulent as you can get and it smells of bribery and corruption" was not actionable; given circumstances and tenor of remarks, no reasonable listener would have understood factual assertions to be conveyed); Bernard, 2008 WL 526251, at *2 ("Accusations of the use of political influence to gain some benefit from the government are not defamatory and do not constitute libel per se.").

D. Even if plaintiffs can make the required showing, the Court should still consider the First Amendment values and balance them against the plaintiffs' need for redress.

Finally, the fourth Dendrite prong asks the Court to "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity." Dendrite, 775 A.2d at 760-61. The Dendrite court itself said little about this prong, other than that application of its four-part test was a "case-by-case" proposition requiring "a proper balancing of the equities and rights at issue." Id. at 761. A number of factors could conceivably be relevant to this balancing of equities.

For example, even if plaintiffs here were able to demonstrate that some of the comments were actionable, the Court could still reasonably consider the fact that, given the high "actual malice" standard that plaintiffs would ultimately have to meet, the chance of recovery for the Ottingers could realistically be quite remote. Similarly, the Court may reasonably consider whether the Ottingers have suffered any real harm from these forum postings. The Court as well could consider whether there are alternative means for plaintiffs to redress any harm that they