ALEXANDRA ZUBOWSKI (a minor) and BARBARA ZUBOWSKI (on behalf of Alexandra Zubowski as parent), Plaintiffs/Appellants, vs. **JOHN DOE and JANE DOE,** Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-5060-08T3 CIVIL ACTION On Appeal From: Superior Court of New Jersey Law Division: Bergen County Docket No.: BER-L-6469-08 Sat below: Menelaos W. Toskos, J.S.C.

PLAINTIFFS/APPELLANTS ALEXANDRA ZUBOWSKI AND BARBARA ZUBOWSKIS' REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

BRACH EICHLER L.L.C.
101 Eisenhower Parkway
Roseland, New Jersey 07068
(973) 228-5700
Attorneys for
Plaintiffs/Appellants

Of Counsel: Carl J. Soranno, Esq.

On The Brief: Carl J. Soranno, Esq.
Bobby Kasolas, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LEGAL ARGUMENTS

POINT I

DENDRITE IS LIMITED TO PUBLIC PUBLICATIONS BROADCASTING AN ANONYMOUS POSTER'S OPINION ON AN ON-LINE PUBLIC FORUM AHD SHOULD NOT BE APPLIED TO SPECIFICALLY TARGETED TELECOMMUNICATIONS DESIGNED TO HARM INDIVIDUALS MERELY BECAUSE THE COMMUNICATION IS ELECTRONIC.

The Dendrite case should be limited to those situations involving nothing more than public utterances made in online message boards and internet forums concerning important topics of public opinion. It should be limited to factual patterns involving the **public publication** of anonymous poster's opinions in online forums such as Yahoo Bullet, YouTube and Twitter and not **targeted telecommunications** that are nothing more than ordinary letters sent via electronic means through the internet. Dendrite should only apply in such limited instances since there is a decisive distinction between a anonymous targeted letter designed to cause harm and the making of a general public statement in an open forum designed to sway public opinion.

Certainly, Doe's specifically targeted electronic letter was not intended to change public opinion or to advocate on any public issue concerning underage drinking, but to simply harm those children whose pictures were attached to the accusatory email, including Ms. Zubowski. This is readily evident in the language regarding accusations Ms. Zubowski "broke the law" and

"broke their contracts" with the Heroes and Cool Kinds program, issues that are not a public issue for the general public but were rather specific attacks at the children Doe alleged to have committed these wrongs, whose photos were attached to the email.

Had Doe forwarded the defamatory email by paper letter with printed photographs through the regular mail, the Dendrite standard would have undoubtedly not been applied. In strong comparison, had Doe posted a statement on an online message board concerning the problems the subject school system has been having with alleged under-aged drinking, Doe could then hypothetically request application of Dendrite. However, no reference to the issue of underage drinking is mentioned anywhere in Doe's email to the school's guidance counselor.

To the contrary, the email in question only makes reference to the "Heroes & Cool Kids Program" and what Doe's perception of what the program should be and what Doe perceives it to actually be. Such tailored remarks on a non-public issue such as the "Heroes & Cool Kids Program" coupled with remarks about Appellant "breaking the law" and "breaking her contract" are not public issues that Doe was exercising a First Amendment right over, nor did the email implicate underage drinking or illegal narcotic use. Moreover, the email was not a public broadcast to a public forum designed to sway public opinion on an important

public topic, and certainly not even designed to sway opinion on the program itself.

It is important to note that the Dendrite online message board had been specifically designed as a forum site for interested person to discuss topics concerning opinions of the Dendrite company. In very stark comparison, this case only involves an anonymous letter forwarded to a single person with the intent to harm and defame those discussed in the photographs, through an email that says nothing concerning the issue of underage drinking or illegal narcotics use by young school children.

Accordingly, the trial court's application of Dendrite to Doe's specifically targeted letter through electronic means does not implicate the rationale behind Dendrite. Tellingly, other New Jersey courts have also applied Dendrite specifically to on-line bulletin board postings on public issues and not to specifically targeted emails. See e.g. Immunomedics, Inc. v. Doe, 342 N.J. Super. 160 (App. Div. 2001). It is also telling that defendants do not dispute that had they sent the defamatory email in question by regular mail, Dendrite would not apply. Doe also does not dispute that there is no difference between an electronic letter sent by email and an ordinary letter sent by regular mail. Therefore, Doe's and the trial court's positions that Dendrite should apply to quash the subject subpoena merely

because Doe's defamatory letter was sent by email rather than regular mail defies logic and reason. Accordingly, Dendrite should not have been applied by the trial court and does not apply in the current circumstances.

POINT II

THE TRIAL COURT ERRED IN DETERMINING ZUBOWSKI DID NOT PRODUCE SUFFICIENT EVIDENCE TO DEMONSTRATE THE STRENGTH OF HER PRIMA FACIE CASE SINCE DENDRITE ONLY REQUIRES ZUBOWSKI TO BE ABLE TO SURVIVE A MOTION TO DISMISS, AND SINCE SHE ESTABLISHED A PRIMA FACIE CASE STRONGER THAN DOE'S RIGHT TO ANONYMOUS FREE SPEECH BY PRODUCING STRONG EVIDENCE ESTABLISHING HER CLAIMS.

Doe incorrectly contends that plaintiffs have not presented evidence supporting Alexandra Zubowski's prima facie elements for defamation and slander per se. While Ms. Zubowski is not required to submit a certification under Dendrite and the trial court erred in concluding so, the trial court's position is erroneous since plaintiffs submitted all the evidence required to establish a slander per se claim. The irrefutable and undisputed evidence Ms. Zubowski has submitted into the record is as follows: (i) the Doe email stating that Ms. Zubowski and other children at her school were "breaking the law" and thus committing a crime (Pa34); (ii) the email's attached photograph depicting Ms. Zubowski doing nothing more than merely holding a ping-pong ball - and not engaging in any unlawful or illegal conduct that would constitute "committing a

crime" (9a-14a); and (iii) evidence demonstrating that both the school and the two local police departments who were involved in investigating Doe's allegations of underage drinking did not charge Ms. Zubowski with the commission of a crime or felony, and that Doe's allegations of Zubowski "breaking the law" in Doe's email were therefore untrue. (Pa15-Pa16).

Consequently, these three facts are the only evidence Ms. Zubowski needs to unequivocally prove and firmly establish her slander per se action against Doe. The email itself accused Ms. Zubowski of committing a crime, attached a picture showing no evidence of her doing so, and she was never charge by the local police departments with a crime following the investigations triggered by Doe's email. These facts fit perfectly into the elements necessary to prove slander per se.

To state a claim for defamation, a plaintiff must prove (1) that the defendant made the defamatory statement; (2) concerning the plaintiff; (3) which was false; (4) which was communicated to persons other than the plaintiff; and (5) fault. See Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 189 (3rd Cir. 1998); Klagsburn v. Va'ad Harabonim of Great Monsey, 53 F. Supp. 732, 739 (D.N.J. 1999). A statement is defamatory when it is false and injures the reputation of another, exposes another person to hatred, contempt or ridicule, or subjects another person to loss of goodwill and confidence in which he or

she is held by others. See Feggans v. Billington, 291 N.J. Super. 382, 390-91 (App. Div. 1996); Romaine v. Kallinger, 109 N.J. 282, 289 (1988).

Statements are defamatory where a defendant communicates untrue statements to a third party tending to harm plaintiff's reputation in the eyes of the community. See McLaughlin v. Roasanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 312 (App. Div. 2000); Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 164-65 (1999); Feggans, 291 N.J. Super. at 390-91. No damage to a plaintiff's reputation need be proved if the defamatory statements constitute slander per se because damage to reputation is presumed to flow from such statements. See McLaughlin, 331 N.J. Super. at 308; Ward v. Zelikovsky, 136 N.J. 516, 540 (1994).

Four types of statements qualify as slander per se: accusing one of (1) **committing a criminal offense**; (2) of having a loathsome disease; (3) of engaging in conduct or having a condition or quality incompatible with one's business; and (4) engaging in serious sexual misconduct. See McLaughlin, 331 N.J. Super. at 313-14.; Biondi v. Nassimos, 300 N.J. Super. 148, 154-55 (App. Div. 1997) (emphasis added). This Court held in Biondi that slander per se plaintiffs can establish a cause of action "not only without proving special damages, [...]

but without proving any form of actual damage to reputation." Id.

The untrue nature of Doe's email concerning Alexandra Zubowski of "breaking the law" and thus committing a criminal offense, the refusal of the local police and school to take any punitive measure or file any charges against her and the false nature of the statement is all plaintiffs need to establish their case for slander per se. As a result of these three facts, Plaintiffs automatically established a prima facie case for slander per se than is stronger than Doe's First Amendment right, since a case for axiomatically proven slander under a slander per se standard defeats the protections afforded by the First Amendment

This conclusion regarding the superior strength of Appellants' slander per se claims over Doe's First Amendment rights is logically inescapable since the term "per se" means the slander is automatic and indefensible at law. Black's Law Dictionary defines slander per se as, "by itself; in itself; taken alone; by means of itself; through itself; inherently; in isolation; unconnected with other matters; simply as such; in its own nature without reference to its relation. See Black's Law Dictionary Deluxe, 6th Ed. (1990). More importantly, Black's Law Dictionary defines the term "per se" as follows:

> In the law of defamation, certain words and phrases that are actionable as slander or libel in and of themselves without proof of special damages **e.g. accusation of a crime**. (emphasis added). Black's Law Dictionary Deluxe, 6th Ed. (1990). (emphasis added)

Accordingly, it is impossible for the trial court to have reached the conclusion that Zubowski established a prima facie case for slander per se while contemporaneously concluding that such a case was not stronger than Doe's right to anonymous free speech to comment on public issues. It defies logic for a prima facie claim of slander per se already proven by the evidence in the record to not be a case stronger than Doe's First Amendment right to speak freely, since establishing and pleading a prima facie case for slander per se defeats any First Amendment protection the party committing such slanderous conduct may enjoy. See e.g. Immunomedics, Inc. v. Doe, 342 N.J. Super. 160, 165-167 (2001); Beauharnais v. Illinois, 343 U.S. 250, 266, 72 S.Ct. 725, 96 L.Ed. 919 (1952); Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). The U.S. Supreme Court made this perfectly clear y holding that there is no right to freely defame others. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) ("the legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.").

Because Doe made an untrue and defamatory statement alleging Zubowski committed a criminal offense by "breaking the law," and because that statement was undeniably false and unsupported by the photograph of Ms. Zubowski holding a ping-pong ball, she has establish slander per se and therefore automatic damages according to her Complaint. Therefore, the trial court should be overturned if this Court determines that Dendrite applies to this matter and in the event the Court concludes that Zubowski was required to submit evidence to demonstrate her case is stronger than Doe's First Amendment speech rights.

POINT III

DOE CANNOT DENY THAT ACCEPTANCE OF THE TRIAL COURT'S RULING WOULD MAKE DENDRITE APPLICABLE ANY TIME A SUBPOENA WAS SERVED UPON AN ISP OR ANY TIME A FIRST AMENDMENT ISSUE WAS RAISED, REGARDLESS OF THE COURT RULES GOVERNING THE QUASHING OF SUBPOENAS AND REGARDLESS OF WHETHER OR NOT THE CASE INVOLVED A DEFAMATION ACTION VERSUS ANY OTHER TYPE OF ACTION.

Doe's opposition is tantamount to nothing more than a request to hide behind the internet and the Dendrite case in forwarding a specifically targeted email designed for nothing more than to defame and harm Alexandra Zubowski. Doe does not address that portion of Appellants' brief concerning the trial court's reasoning and axiomatic application of Dendrite that would result if it were automatically applied simply because an

ISP were served with an subpoena. Doe is identically silent on the issue of automatically applying Dendrite anytime a First Amendment defense is raised by a defendant.

An ISP does not have to only be subpoenaed in instances where a defamatory email or posting is made over the internet, but could also be subpoenaed in instances involving commercial disputes and negligent acts. A First Amendment defense to a standard letter would also implicate Dendrite under the trial court's erroneous reasoning simply because the send made a First Amendment defense. Consequently, the trial court's ruling that Dendrite should apply to quash subpoenas governable under the Court Rules, simply because the issue of whether or not an ISP must disclose the sender's identity is involved, is severely flawed and must be overturned.

POINT IV

DOE CONCEDES APPELLANTS' ARGUMENTS ON THE NON-DISTINCTION BETWEEN TRACING AN EMAIL AND TRACING AN ORDINARY LETTER BY NOT ADDRESSING THIS ISSUE IN DOE'S BRIEF.

Doe did not and cannot address the arguments in Appellants' brief that standard ordinary letters are just as traceable as email letters via fingerprints, post office stamping and dating, handwriting, forensics, etc. Based upon this irrefutable fact and argument, there was no reason for the trial court to apply Dendrite simply because the email was traceable through the IP

address, since by that reasoning Dendrite would then also have to apply to ordinary standard letters sent by regular mail which are also traceable. The flawed reasoning of the trial court and Doe on this topic is even more apparent when reviewing the Supreme Court's statements in State v. Reid, 194 N.J. 386, 399 (2008), where the Supreme Court applied the Court Rules to deny a motion to quash a subpoena upon an ISP while holding that "[o]nly an internet service provider can translate an IP address into a user's name." Id. at 398-99.

Given that increased difficulty level and the severely limited option in tracing an email, Dendrite should not apply to ordinary letters simply because they are electronically sent. The trial court's argument for applying Dendrite based upon the fact emails can be traced back to their originator are flawed, and the trial court's ruling on this issue must respectfully be overturned.

POINT V

DOE'S SILENCE ON THE ISSUE OF THE CONTINUED VIABILITY OF SLANDER PER SE ARGUMENTS IS A CONCESSION ON THIS POINT.

Doe does not address the arguments Appellants make concerning the continued viability of a slander per se action under New Jersey law. Doe's silence on this point is a concession on this issue, and the trial court's rulings on the issue of the viability and/or strength of slander per se claims

must respectfully be overturned, particularly the trial court's conclusion that the strength of Ms. Zubowski's claims is weakened by the fact her claims are slander per se claims rather than other types of claims.

POINT VI

THE FOREIGN CASES CITED BY DOE OUTSIDE OF NEW JERSEY STATE AND FEDERAL LAW SHOULD NOT BE CONSIDERED BY THIS COURT.

Doe cites case law from other states and jurisdictions in support of Doe's opposition. These cases have no legal, binding or persuasive authority over this Court, particularly since there is adequate New Jersey state and federal case law on the relevant issues before the Court. Plaintiffs thus ask that those foreign cases not be considered or applied by this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Plaintiff/Appellants' appeal be granted in its entirety, and that the trial court's quashing of Appellants' subpoena upon Cablevision through application of Dendrite be reversed to allow Plaintiff/Appellants to ascertain the identity of Doe.

Respectfully submitted,

BRACH EICHLER L.L.C.
Attorneys for
Plaintiffs/Appellants

By: _____
Bobby Kasolas, Esq.

Dated:

ROS:1076060.1/ZUB003-237100