

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

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THE PUBLIC RELATIONS SOCIETY OF  
AMERICA, INC.  
and CATHERINE A. BOLTON,

Index No. 116210/04

Petitioners,  
- against -

ROAD RUNNER HIGH SPEED ONLINE,

Respondent,  
- against -

JOHN DOE,

Intervenor.

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**MEMORANDUM OF LAW IN OPPOSITION TO  
JOHN DOE'S MOTION TO VACATE THE COURT'S ORDER  
AND HIS PROPOSED MOTION TO DISMISS THE PETITION**

This memorandum of law, the accompanying affirmation of Julie Stark, dated December 3, 2005 ("Stark Aff."), the exhibits attached thereto and all papers heretofore filed in this matter are submitted in support of the opposition by petitioners, The Public Relations Society of America, Inc. ("PRSA") and Catherine A. Bolton ("Bolton"), to the motion of proposed intervenor John Doe ("Doe"), to: (a) proceed anonymously and to intervene for the purpose of filing its Proposed Motion to Dismiss the Petition; and (b) vacate the Court's November 24, 2004, Order ("Order") directing Time Warner Cable's Road Runner High Speed On-Line Service ("Road Runner") to identify Doe's name, address and information regarding the email message that is the subject of this proceeding.

## PRELIMINARY STATEMENT

Doe sent an anonymous and defamatory email to the PRSA Board of Directors (the “Board”) and perhaps others (the “Email”). There is no question -- indeed Doe admits this in his motion papers -- that the First Amendment does not protect defamatory speech, anonymous or otherwise. Now, faced with the realization that his identity will be revealed and he will be subjected to a libel suit, Doe is trying to hide behind the First Amendment by arguing that his Email is non-actionable opinion. This is nonsense; Doe’s Email is textbook libel. Doe disparaged and impugned the Board and Bolton in their profession. In particular, Doe’s statements strongly suggest that neither the Board nor Bolton have properly performed their jobs or are capable of doing so in the future and that both have engaged in unprofessional conduct. Doe also alleges that Bolton is dishonest and unethical. Under New York law, all of these statements are libelous even without a specific allegation of harm.

There is no question that PRSA and Bolton are entitled to pre-action discovery of Doe’s name, address and information regarding the Email. CPLR 3102(c) provides that pre-action discovery is permitted when a party has a meritorious cause of action and the information sought is material and necessary for bringing that cause of action. PRSA and Bolton’s request easily meet this standard. Petitioners have set forth a prima facie case of libel against Doe, which they cannot pursue until his identity is known. Indeed, when petitioners attempted to file a Summons and Complaint against Doe, the Clerk of this Court rejected it and directed them to seek a court order for pre-action discovery for Doe’s identity.

PRSA and Bolton are also entitled to discovery of Doe's identity under the recent and more exacting Federal standard for identifying the user of an Internet Protocol ("IP") address. PRSA and Bolton have: (a) made a concrete showing of actionable harm, namely, made out a prima facie case of libel; (b) been specific in their discovery request, i.e., they have not engaged in a "fishing expedition;" (c) demonstrated an absence of alternative means to obtain that discovery; (d) demonstrated a central need for that discovery to advance their claim; and (e) demonstrated that their need overrides Doe's minimal expectation of privacy. As a Road Runner subscriber, Doe was specifically told that Road Runner will disclose his private user information to third parties if ordered to by a court of law or if he commits tortious or other wrongful acts, such as libel.

Under both New York and Federal law, the Court properly ordered Road Runner to provide petitioners with Doe's name, address, and information regarding the defamatory Email. Accordingly, the Court must dismiss Doe's motion in its entirety and dissolve the stay of execution of the Order.

The Court cannot permit Doe to proceed anonymously to dismiss the action PRSA and Bolton have yet to file against him. The law does not allow a potential tortfeasor such as Doe to disprove petitioners' prima facie case before they have the opportunity to learn his identity and gather basic discovery. The law also does not permit a defendant in a civil action to proceed anonymously when his only reason for doing so is to protect his professional or economic interests. Doe does not and cannot claim that he will be denied a fair trial or that he will be subjected to public embarrassment or ridicule if his identity is revealed. Accordingly, he cannot be permitted to proceed anonymously in the defamation action petitioners seek to bring against him.

## STATEMENT OF FACTS

PRSA is a not-for-profit professional organization for public relations practitioners, with its principal place of business at 33 Maiden Lane, New York, New York. Bolton is the Executive Director and Chief Operating Officer (“COO”) of PRSA. (Stark Aff. ¶¶ 3-4).

On Monday, October 18, 2004, at 11:19 p.m. Doe sent the anonymous and defamatory Email to undisclosed recipients, including the Board. The Email used the pseudonym “Catherine Hater” and was addressed to the “2004 Board.” The Email’s subject line was “Staff Morale at an All-Time Low,” and was “signed” under the identity “Anonymous Staffer.” (Exh. A).<sup>1</sup>

The email address for “Catherine Hater” is listed as **prsa\_staff@hotmail.com**. PRSA was able to determine that **prsa\_staff@hotmail.com** was sent from the IP address **66.108.84.160**, and that this IP address belonged to Road Runner. PRSA is unable to obtain the name and address of the owner of this IP address. (Exh. B, ¶¶ 5-7).

In the Email, Doe defames both PRSA and Bolton. Doe makes numerous allegations that Bolton is grossly unfit for her job as the Executive Director and COO of PRSA, that she puts her personal interests above those of her employer PRSA, that she is unethical and dishonest and that she behaves unprofessionally towards the staff at PRSA. Doe also suggests that the Board is incompetent and unqualified to run PRSA and implies that it is willfully turning a blind eye to Bolton’s purported lack of ability and her alleged misdeeds. Doe also calls for the termination of Bolton. (Stark Aff. ¶ 7; Exh. A).

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<sup>1</sup> References to “Exh. \_\_\_” are to the exhibits attached to the Stark Aff. submitted concurrently with this memorandum of law.

Road Runner's user policies provide that Road Runner will not maintain the privacy of a subscriber if it is ordered to provide information pursuant to a court order or if the subscriber engages in, among other things, defamation. Road Runner's Subscriber Privacy Notice states that "federal law authorizes us to disclose personally identifiable information to a governmental entity or other third party when disclosure is required pursuant to a court order." Under Road Runner's Acceptable Use Policy subscribers agree "to use the system only for lawful purposes and not to use or allow others to use Road Runner . . . to engage in illegal, unlawful, or tortious conduct . . . including, but not limited to libel . . . ." Road Runner's Acceptable Use Policy also states that Road Runner "may turn over other information such as the content of e-mail" in response to a court order or other legal process. (Exh. C).

### **PROCEDURAL HISTORY**

PRSA and Bolton wish to file a defamation action against Doe. On November 15, 2004, they attempted to file a Summons and Complaint against Doe with the Clerk of the Court. The Clerk rejected petitioners' papers however, because Doe's identity is unknown. The Clerk instructed counsel for petitioners to seek an order for pre-action discovery pursuant to CPLR § 3102(c) for the information necessary to bring petitioners' action. (Stark Aff. ¶ 9).

Accordingly, on November 16, 2004, PRSA and Bolton commenced this proceeding by Order to Show Cause, pursuant to CPLR § 3102(c), seeking an order directing Road Runner to: (a) produce all documents in its possession concerning the identity of the person who used, owned or was otherwise in possession of control of the IP address **66.108.84.160** on Monday, October 18, 2004 at or about 11:19 p.m.; (b) to

produce all documents concerning the Email that was sent from **prsa\_staff@hotmail.com** from the IP address **66.108.84.160** to undisclosed recipients on October 18, 2004, at or about 11:19 p.m.; and (c) to temporarily restrain Road Runner from erasing, destroying or otherwise disposing of any documents concerning the individual who used, owned or was otherwise in possession of control of the IP address **66.108.84.160** on Monday, October 18, 2004, at or about 11:19 p.m. (Exh. D).

Immediately thereafter, the Court entered a Temporary Restraining Order prohibiting Road Runner from erasing, destroying or otherwise disposing of any documents concerning the individual who used, owned or was otherwise in possession of control of the IP address **66.108.84.160** on Monday, October 18, 2004, at or about 11:19 p.m. Road Runner did not oppose petitioners' motion. (Exh. E.). On November 24, 2004, the Court granted petitioners' motion in its entirety (the "Order"). The Order was entered on December 14, 2004. (Exh. F).

On December 10, 2004, Doe moved the Court, by Order to Show Cause, for leave to proceed anonymously in petitioner's yet-to-be filed action for the purpose of filing a proposed motion to dismiss that action; and (b) to vacate the Order. On December 14, 2004, the Court directed that Doe serve his papers by first-class mail no later than Thursday, December 16, 2004, and directed oral argument for Wednesday, December 22, 2004. (Stark Aff. ¶ 13).

Petitioners did not receive Doe's papers until Monday, December 20, 2004, at approximately 11:00 a.m. (Stark Aff. ¶ 14). On December 23, 2004, counsel for petitioners appeared before the Court prepared to argue against Doe's motion. Before argument, however, counsel for petitioners advised the Court that at the conclusion of the

hearing petitioners would be making an application for an opportunity to submit written opposition to Doe's motion. The Court adjourned argument on Doe's motion and ordered petitioners to file and serve opposition papers by Monday, January 3, 2004, and to appear for oral argument on Wednesday, January 5, 2004.

## **ARGUMENT**

### **I. PRSA AND BOLTON ARE ENTITLED TO PRE-ACTION DISCOVERY PURSUANT TO CPLR § 3102(C)**

Pre-action discovery “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.” Matter of Bliss v. Jaffin, 176 A.D.2d 106, 108 (1st Dep’t 1991) (petitioner denied pre-action discovery; personal injury claim on behalf of child injured during birth was meritorious but medical records sought were not necessary to bring action because mother had sufficient information to make out a complaint). In other words, the party seeking pre-action discovery is not permitted to conduct a “fishing expedition” to ascertain whether a meritorious cause of action exists. See Liberty Imports v. Bourguet, 146 A.D.2d 535, 536 (1st Dep’t 1991) (petitioner denied pre-action discovery because it was seeking to determine whether or not it had a meritorious action for breach of contract).<sup>2</sup>

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<sup>2</sup> Doe's reliance on Holtzman v. Manhattan and Bronx Surface Transit Operating Authority, 271 A.D.2d 346 (1st Dep’t 2000), Bliss, 176 A.D.2d 106 and Liberty Imports, 146 A.D.2d 535, for the proposition that petitioners are not entitled to pre-action discovery is misplaced. These cases involve neither defamation claims nor anonymous internet speech. Holtzman was a slip and fall action in which the court held that petitioner was not entitled to pre-action discovery because he had not set forth a *prima facie* case of negligence (he failed to allege what caused him to fall), and because he already had sufficient information to frame a complaint. As noted above, Bliss was a personal injury action and Liberty Imports, related to a breach of contract.

As demonstrated below, PRSA and Bolton have a meritorious cause of action against Doe and the discovery they seek is material and necessary to bring that action against him.

**A. The First Amendment Does not Protect Anonymous Defamatory Speech And Courts Routinely Permit The Type of Discovery Sought by Petitioners**

It is black-letter law that the First Amendment only protects statements of opinion, not defamatory speech. Beuharnais v. Illinois, 343 U.S. 250, 266 (1992) (“[I]ibulous utterances are not constitutionally protected speech”). Whether a statement is made anonymously is irrelevant to the analysis of whether that speech is protected opinion or actionable defamation. In re Subpoena Duces Tecum to America Online, Inc. v. Anonymous Publicly Traded Corporation, 2000 WL 1210372, \*7 (Va. Cir. Ct. Jan. 31, 2000) (anonymous defamatory speech on the internet is not protected by the First Amendment) (rev’d on other grounds). Indeed, Doe concedes that anonymous defamatory speech is not protected by the First Amendment in his motion papers. (Memorandum of Law In Support of the Motion by John Doe to Dismiss the Petition, dated December 10, 2004 (“Doe Mem.”) at p. 4).

Despite this fundamental principle of Constitutional law, Doe suggests that defamation on the internet is afforded special protection and that Courts rarely grant such discovery. (Doe Mem. pp. 4-5; 6-7). This argument is not only wrong but is belied by the very cases upon which Doe relies.

For example, Doe relies upon Doe v. 2THE MART.com, Inc., 140 F. Supp. 2d 1088 (W.D. Wa 2001), in support of this argument. (Doe Mem. p. 5). But, the reason the court denied the discovery request in 2THE MART.com was because the defendant

sought the identities of non-party witnesses who had participated in a chatroom discussion. The court held that non-party disclosure is only appropriate “in the exceptional case where the compelling need for the discovery outweighs the First Amendment rights of the anonymous speaker.” Id., 140 F.Supp.2d at 1095. This case has no application here because petitioners seek Doe’s identity so they can sue him for libel. He will be a defendant in that action, not a third-party witness.

Doe similarly relies on Sony Music Ent. Inc. v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), Elektra Entertainment Group, Inc. v. Does 1-9, 2004 WL 2095581 (S.D.N.Y. 2004), Columbia Ins. Co. v. SeesCandy.Com, 185 F.R.D. 573 (N.D. Ca. 1999), Immunomedics, Inc. v. Jean Doe, 775 A.2d 773 (N.J. Super. 2001) and America Online, Inc., 2000 WL 1210372 to support his argument that the Court should vacate its Order. (Doe Mem. pp. 6-7). But in each of these cases the court ordered discovery of the anonymous internet users’ identity in facts strikingly similar to this case. As set forth in Section II, PRSA and Bolton easily pass the tests established by these courts and are, therefore, entitled to the discovery they seek.<sup>3</sup>

**B. PRSA and Bolton Have a Meritorious Action for Libel Against Doe**

As a preliminary matter, it must be noted that it is a question for the jury, not the Court on motion, to decide whether Doe’s writing is defamatory. Nichols v. Item Publishers, Inc., 309 N.Y. 596, 601 (1956). Moreover, the Court must construe the facts alleged in support of petitioners’ request for pre-action discovery in the light most

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<sup>3</sup> Doe also relies on cases that have nothing to do with First Amendment jurisprudence. United States v. Perez, 247 F. Supp. 2d 459 (S.D.N.Y. 2003) and Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) are Fourth Amendment cases.

favorable to PRSA and Bolton. Matter of Michael Ero v. Graystone Materials, Inc., 252 A.D.2d 812, 813 (3d Dep't 1998).

Doe argues that the Court must decide whether his words are defamatory. This is incorrect and his reliance on Golub v. Enquirer/Star Group, Inc., 89 N.Y.2d 1074 (1997) is misleading. (Doe Mem. p. 8). In Golub, plaintiff's decedent sued defendant for libel when it published an article that said he had cancer. The court dismissed the case holding that this statement neither impugned plaintiff's ability to perform his job as a public relations consultant nor imputed a "loathsome disease" to plaintiff. Id. at 1076-77. In making this decision the court stated:

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction.

Id. (internal marks omitted).

Here, the Court need not strain itself to discern the defamatory meaning of Doe's Email. It plainly states, on its face, that petitioners are incompetent, dishonest, unethical and unprofessional. There is no question that when read in the light most favorable to petitioners, this Email sufficiently supports a prima facie case of libel against Doe.

The definition of libel is well-settled:

A writing is defamatory -- that is, actionable without allegation or proof of special damages -- if it tends to expose a person to hatred contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him. And, to that listing of the defamatory should be added a writing which tends to

disparage a person in the way of his office, profession or trade.

Nichols v. Item Publishers, Inc., 309 N.Y. 596, 600-01 (1956) (internal quotation marks and citations omitted). A statement is libel per se and requires no pleading or proof of damages if it suggests improper performance of a person's duties or unprofessional conduct. See Chiavarelli v. Williams, 256 A.D.2d 111, 113 (1st Dep't 1998) (letter about plaintiff distributed to plaintiff's supervisors sufficiently alleged as libelous because it claimed author of letter was given a poor performance review in retaliation for rejecting plaintiff's sexual advances).

Doe tries to mislead the Court by providing an incomplete definition of libel in its motion papers and by arguing that petitioners fail to meet their burden of pleading because they have not alleged special damages. (Affirmation of Carol A. Dunning, dated December 10, 2004 ("Dunning Aff.") ¶¶ 21-28; Doe Mem. pp. 7-8). This behavior should not be countenanced by the Court. It is also curious that Doe relies on Dillon v. City of New York, 261 A.D.2d 34 (1st Dep't 1999) and Matherson v. Marchello, 100 A.D.2d 233 (2d Dep't 1984) in support of this argument because both of these cases explicitly state that damages need not be pleaded in cases of libel per se. See Dillon, 261 A.D.2d at 38; Matherson, 100 A.D.2d at 236.

Doe's Email disparages Bolton professionally and suggests that she is unethical, dishonest and unprofessional. Consider the following examples:

- She cannot manage or lead an organization.
- Her quarterly reports to staff are garbage . . .
- Good writing skills are foreign to her.

- She can't write . . . .
- I hear her participation in Strategic Planning 2005-2007 was minimal, because she still hadn't signed her contract.
- She pow-wow-ed with lawyers and had her staff write ideas up and she submitted them.
- . . . she spent the first six months of 2004 negotiating her \$300,000 contract, ignoring the business . . . .
- Now, Bolton can sit back and take the credit and the bonus money.
- . . . membership broke 20,000, what did Catherine have to do with it???? Nothing.
- She ignores Jennifer and her team
- Bolton denegated (sic) [Rob Levy] in meetings and frequently yelled at him in plain view of his staff.

(Exh. A).

Doe's Email also disparages the Board's professional abilities and suggests that the Board is either ignorant or deliberately turning a blind eye to Bolton's purported wrongdoing:

- Nobody buys her fake sincerity, except the board.
- Executive Directors are supposed to write annual reports and quarterly reports. Not powerpoint presentations! Why doesn't the board see any of this?
- John Colletti runs the place . . .
- Why didn't [the Board] fight to keep Rob Levy? . . . Rob ran the only profitable enterprises . . . .

- . . . . pull out all of the PD dollars including the conference and you'll see the massive effect Rob had (has) on the 2004 business.
- You would have tanked without [Rob Levy].
- Do you realize that Executive directors that manage far more prestigious \$50,000,0000 organizations or universities make far less than \$300,000 a year?

(Exh. A). Clearly, Doe defames PRSA and Bolton in his Email and his intent was to disrupt the working relationship of Bolton and the Board:

- on January 1, they should boot Bolton and pay her severance.

(Exh. A).

Doe's argument that the Email simply expresses his angry opinion is ludicrous. (Doe Mem. p. 8). Doe makes numerous false statements about Bolton and PRSA. For example, Doe says that Bolton put her own interests above PRSA's by not working until she had successfully negotiated her employment contract, that she passes her work on to others and then takes the credit for it and that she routinely ignores and yells at the PRSA staff. These are not statements of opinion because they can be proven true or false. See Parks v. Steinbrenner, 131 A.D.2d 60, 63 (1st Dep't 1987). However, even if the Court were to consider these statements to be opinion, they are actionable "mixed opinion" not protected "pure opinion" as defined below:

Nonactionable "pure opinion" is defined as a statement of opinion which either is accompanied by a recitation of the facts upon which it is based, or, if not so accompanied, does not imply that is based upon undisclosed facts. Alternatively, when a defamatory statement of opinion implies that it is based upon undisclosed detrimental facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and actionable. Similarly actionable as a "mixed opinion" is a defamatory

opinion which is ostensibly accompanied by a recitation of the underlying facts upon which the opinion is based, but those underlying facts are either falsely misrepresented or grossly distorted.

Parks, 131 A.D.2d at 62 (internal marks and citations omitted).

Many of Doe's other statements are actionable "mixed opinion." For example, he repeatedly claims that neither Bolton nor the Board possess the skills necessary to perform their jobs. He also suggests that the Board is ignorant and implies that it may be deliberately turning a blind eye to Bolton's alleged misdeeds. Doe does not provide any facts to support these statements. Or, at best, he bases these claims on facts that are "falsely misrepresented" or "grossly distorted." Either way, these statements are actionable.

Petitioners' discovery request is nearly identical to the request that was made and granted in La Societe Metro Cash & Carry France v. Time Warner Cable, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Sup Ct. 2003). In La Societe, several of plaintiff's regional directors received an email accusing plaintiff of underhanded and deceptive business practices. The author of the email was traced to the internet account of a Time Warner Cable customer. The Court granted plaintiff's motion for discovery because plaintiff established that it had a cause of action against the subscriber. Id. at \*2. In making this determination, the Court stated:

There is no question but that the document is intended to portray the plaintiff and its senior managers in an unsavory light. They are accused of "milking operating accounts using methods that approach intellectual dishonesty," of disregarding the financial interests and welfare of "Directors" (key managers in subordinate positions), and of dealing with their employees in bad faith. These accusations were emailed to a number of Directors and,

without doubt, were intended to disrupt the plaintiff's relationships with these employees.

Id. Indeed, such is the case herein. Doe makes numerous disparaging remarks about Bolton and the Board and then calls for Bolton's termination. (Exh. A). Doe intended his Email to disrupt Bolton's relationship with her employers by stating that both Bolton and the Board are unfit for their positions.

As demonstrated above, petitioners have a prima facie case of libel against Doe. Doe's feeble argument that petitioners have set forth colorable claims of libel cannot stand up to scrutiny. Indeed, Doe's own motion papers belie his untenable argument. Doe either misstates the holdings of the cases upon which he bases his argument, or the cases are so factually inapposite as to be irrelevant.

Rinaldi v. Holt, Rinehart & Winston, 42 N.Y. 2d 369, 381 (1977) has no application to this case. (Dunning Aff. ¶ 26; Doe Mem. pp. 7-8). In Rinaldi, the court dismissed the case on a motion for summary judgment, not a motion for pre-action discovery or even a motion to dismiss the complaint. Accordingly, the court does not address the requisite elements of a prima facie case of libel. Moreover, the facts of Rinaldi are wholly inapposite to the facts herein. Plaintiff Rinaldi was a Judge who sued the author of a book that criticized his fitness for office and suggested that he had engaged in illegal behavior while on the bench. Regarding the fitness for office cause of action, the court held that this was an opinion supported by detailed statements of fact published in the book. No such factual support exists in the case herein.

With respect to the illegal behavior cause of action, the Rinaldi court held that these statements were clearly defamatory, but dismissed that cause of action because

plaintiff, a public official, had failed to prove actual malice on the part of the authors by clear and convincing evidence. Id. at 382. Petitioners herein are at the pleading stage and have no burden of proof as yet. Moreover, they are not public officials and, accordingly, they are not required to plead or prove malice.

Parks, 131 A.D.2d 60 is also inapposite. (Doe Mem. p. 9). Parks concerned George Steinbrenner's critical comments about an umpire. The court considered the "customs and conventions regarding the status of an umpire in the great American pastime" and concluded that Steinbrenner's remarks were non-actionable opinion in the context of "the owner of an embattled baseball team who is chafing at the team's poor play" and "in light of the generally critical attitudes which baseball umpires . . . ordinarily appear to inspire in both the game's fans and participants." Id. at 65-66. Doe's statements, when taken as a whole, are nothing like "the kind of rhetorical hyperbole that communicates displeasure with an umpire's calls." Id. at 65. Rather, these statements plainly disparage the Board and Bolton in their professions and were meant to disrupt Bolton's relations with PRSA.

The holding of Dendrite Int'l v. John Doe No. 3, 775 A.2d 756 (N.J. App. Div. 2001) is questionable and the facts of that case are inapposite to this case. (Doe Mem. pp. 6-7). Although the Dendrite court does not clearly set out the New Jersey law standard for pre-action discovery, it is clear from the opinion that the standard is different from New York law. The Dendrite court held that plaintiff did not demonstrate that any harm resulted from defendant's defamatory statement that plaintiff used questionable accounting practices. Id. at 154-55. But, as demonstrated above, damages need not be alleged in cases of libel, certainly not in New York. In addition, the court wrote that

although plaintiff's allegations would survive a motion to dismiss, they were insufficient to make out a claim for pre-action discovery. Id. at 157. New York law does not prescribe a different prima facie standard for pre-action discovery as opposed to surviving a motion to dismiss. In fact, New York law specifically provides that the standard is the same. See Matter of Michael Ero, 252 A.D.2d at 813-14; In the Matter of Wien & Malkin LLP v. Wichman, 255 A.D.2d 244 (1st Dep't 1998) (preaction disclosure properly granted because petitioner established that it has likely causes of action against respondent); In the Matter of Kevin Toal v. Staten Island University Hospital, 300 A.D.2d 592 (2nd Dep't 2002) (preaction discovery granted because petitioners state a cause of action and the discovery which they seek is limited to obtaining the identity of the defendants). The facts of Dendrite are also inapposite to the case herein. In Dendrite, the author of the statements had some expectation of privacy, unlike here where Road Runner's User Agreement clearly states that Doe cannot expect Road Runner to protect his private user information. (Stark Aff. ¶ 8; Exh. C).

Matter of Gleich v. Kissinger, 111 A.D.2d 130, 132 (1st Dep't 1985) is also inapposite to this case. (Doe Mem. p. 5). The pre-action discovery sought in Gleich was a deposition of a potential defendant in a slander action. In this case only two statements were alleged to be actionable: that Kissinger said Gleich "lacked candor" and that he "may have lied" to Kissinger. The court held that these two statements were insufficient to state a meritorious case, and, moreover, they would be protected by an absolute privilege if made in the course of Kissinger's duties as City Manager. Id. In the case herein, Doe makes two type-written pages worth of defamatory statements about PRSA

and Bolton, not two isolated comments. Moreover, petitioners seek discovery far less onerous than the deposition sought in Gleich, and Doe makes no claim of privilege.

Steinhilber v. Alphonse, 68 N.Y.2d 283 (1986) is also inapposite to this case. (Doe Mem. pp. 9-10). The Court in Steinhilber held that defendant's statements about plaintiff, when taken as a whole, were not defamatory but, rather, were meant to be taken figuratively, as "a tasteless effort to lampoon plaintiff" for crossing a picket line during a strike. Id. at 294-95. But, the court was also careful to point out that:

To be sure, in another context, a flat statement that a person lacks talent or ambition or initiative might be viewed as a factual assertion.

Id. at 294. Here, Doe unquestionably intended his Email to be taken literally, not figuratively. This is demonstrated by his suggestion that the Board fire Bolton for her alleged wrongful conduct.

Lasky v. Kempton, 285 A.D. 1121 (1st Dep't 1955) has no application to this case. (Doe Mem. p. 8). The complaint in Lasky was dismissed with leave to replead the specific libelous statements with particularity. No standards regarding a prima facie case of libel appear anywhere in the court's opinion.

In sum, there can be no doubt that both petitioners have a meritorious cause of action for libel against Doe. And, as further demonstrated below, petitioners are entitled to discovery of Doe's name, address and information about the Email in order to pursue their claims against him.

**C. Doe's Name, Address and Information Regarding the Email Are Material and Necessary to Petitioner's Claims and Doe Cannot Proceed Anonymously to Dismiss Those Claims**

Doe's identity is material and necessary to the action petitioners seek to file against him. Petitioners' Summons and Complaint were rejected by the Clerk of the Court because they did not have information sufficient for service of process or jurisdiction. See CPLR § 1024, Practice Commentary (2004) (“[T]he defendant whose name is unknown must be described in such a way as to fairly apprise the party that he or she is an intended defendant. An inadequate description renders the action jurisdictionally defective.”) Accordingly, the Clerk of the Court instructed petitioners to seek an order pursuant to CPLR § 3102(c) to determine Doe's identity. (Stark Aff. ¶ 9). The information petitioners seek regarding the Email is also material and necessary for petitioners to ascertain the extent of Doe's wrongdoing. Although Doe admits that he sent the Email to Board, (Dunning Aff. ¶ 7, Doe Mem. p. 4) there is some evidence that he may have sent it to others as well.

Obviously petitioners do not object to Doe proceeding anonymously insofar as he seeks to vacate the Order. However, even if Doe consents to jurisdiction and his counsel accepts service on his behalf, he cannot be permitted to proceed anonymously in petitioners' yet-to-be-filed action because it would unfairly prejudice petitioners. Petitioners would be forced to defend Doe's motion to dismiss without a shred of discovery, even within its own organization. This does not comport with New York law and would be manifestly unjust.

Indeed, Doe has already submitted papers in support of his proposed motion to dismiss the yet-to-be-filed Summons and Complaint against him. As Immunomedics, a case relied upon by Doe, makes plain:

[T]o allow a potential tortfeasor to disprove a plaintiff's case before the plaintiff is even provided the opportunity to learn the defendant's identity, let alone gather any discovery, has no foundation in [the law].

Immunomedics, 342 N.J. Super at 167; see also Doe v. Shakur, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (in a civil action to recover damages for sexual assault plaintiff cannot proceed anonymously; defendant “would be at a serious disadvantage, for he would be required to defend himself publicly while plaintiff could make her accusations from behind a cloak of anonymity.”)

Moreover, the Court cannot permit Doe to proceed anonymously simply to “protect [his] professional or economic life.” See Guerrilla Girls, Inc. v. Kaz, 224 F.R.D. 571, 573 (S.D.N.Y. 2004) (defendants not permitted to proceed anonymously in trademark and copyright infringement case because the only harm defendants would suffer was economic, and because the identities of the parties had a substantial bearing on the issues of the case); Bittner v. Cummings, 188 A.D.2d 504, 506 (2d Dep’t 1992) (in an action for abuse of process and fraud, lower court properly refused to allow plaintiff to use a fictitious name); see also Anonymous v. Anonymous, 191 Misc. 2d 707, 709 (N.Y. Sup. Ct. 2002) (in a case which could garner much publicity, the court held that defendant should be permitted to proceed anonymously in order to avoid a “trial by newspaper” and to ensure defendant received a fair trial); Doe v. United Servs. Life Insurance Co., 123 F.R.D. 437, 439 (S.D.N.Y. 1998) (permitting homosexual to sue his

life insurance company anonymously because of the embarrassment publicly outing himself could cause).

In Guerrilla Girls, defendants, members of plaintiff's artistic organization, moved to keep their identities anonymous, arguing that if their identities were disclosed, their careers as artists would be jeopardized because of the political nature of the organization. Id., 224 F.R.D. at 573. The court held that economic injury alone was an insufficient basis for proceeding anonymously. Id. at 575-76. Such is the case herein. At best, Doe is claiming that he will suffer economic harm by being forced to defend himself in a libel suit. See Dunning Aff. ¶ 14 ("If Doe's identity is released . . . , it is clear from Petitioners' moving papers that Doe will be forced to defend a defamation suit . . . ."). This is an insufficient reason to permit him to proceed anonymously in the yet-to-be-filed action. He makes no claim that revealing his identity will deny him a fair trial, Anonymous, 191 Misc.2d at 709, or will subject him to public embarrassment. United Servs. Life Insurance Co., 123 F.R.D. at 439.

The Guerrilla Girls court also held that the identities of the parties had a substantial bearing on the issues of the case and was necessary to determine the copyright and trademark rights asserted by each side. Id. 224 F.R.D at 573. Such is the case herein. As already discussed above, Doe's name, address and information regarding the Email is necessary for petitioners to assert their claims and oppose Doe's defenses thereto.

For all the foregoing reasons, Doe's name, address and information regarding his defamatory Email must be disclosed to petitioners, and Doe's motion to vacate the Order and for leave to proceed anonymously in petitioners' yet-to-be-filed action against him must be denied in its entirety.

**II.**  
**PRSA AND BOLTON ARE ENTITLED TO**  
**PRE-ACTION DISCOVERY UNDER RECENT FEDERAL**  
**LAW GOVERNING THE DISCLOSURE OF IP ADDRESSES**

As noted earlier, courts routinely permit discovery of internet user information when the party seeking that information demonstrates that it has a meritorious cause of action and the information sought is material and necessary. Although there are no cases discussing pre-action discovery of internet user information pursuant to CPLR § 3102(c), there are several cases which set forth a useful analytical framework for petitioners' request. Although the details of the courts' analytical framework vary slightly from case to case, petitioners and Doe agree that the five-part test recently enunciated by Judge Denny Chin in Sony, 326 F. Supp. 2d at 565-67, is of paramount importance. (See Doe Mem. pp. 6-7).

The record company plaintiffs in Sony brought infringement actions against forty unidentified defendants who had allegedly downloaded and distributed copyrighted songs from the Internet. Although the underlying cause of action in Sony is copyright infringement rather than defamation, the facts of Sony are strikingly similar to the case herein.

The Sony plaintiffs served a subpoena on the non-party Internet Service Provider ("ISP") seeking to obtain defendants' identities. The court ordered the ISP to retain the information and issued the subpoena. Upon receipt of the subpoena, the ISP notified the individual subscribers that it would disclose their identities to plaintiffs unless they moved the quash. Some of the subscribers retained counsel but because no formal motion to quash was filed, their names were disclosed. Judge Chin ruled that subscribers

had timely moved to quash by letter and then went on to consider the merits of the parties' respective positions.

In considering whether the defendants' identities were protected by the First Amendment, Judge Chin fashioned a five-part test relying, in part, on the opinions of SeesCandy.Com and America Online, Inc.: (1) the movant must state a prima facie claim; (2) the discovery request must be specific; (3) there must be an absence of alternative means to obtain the information sought; (4) there must be a central need for the information; and (5) the need for the information must outweigh the defendant's expectation of privacy. Sony, 326 F. Supp.2d at 565-67. In Sony, Judge Chin held that each of the factors supported a disclosure of defendants' identities. As further set forth below, each of the Sony factors also supports disclosure of Doe's name, address and information regarding the Email.

**A. PRSA and Bolton Have Made a Prima Facie Claim of Libel**

As thoroughly set forth above, petitioners have made a concrete showing of actionable harm. See America Online, 2000 WL 1210372, \*8 (pleadings stated prima facie case of defamation, breach of contract and breach of fiduciary duty); Seescandy.Com, 185 F.R.D. at 577 (plaintiff demonstrated that trademark infringement claim could survive a motion to dismiss); see also Sony, 326 F.Supp.2d at 565 (plaintiffs made a prima facie showing of copyright infringement); Electra, 2004 WL 2095581, \* 4 (same).

**B. The Discovery Request Is Sufficiently Specific**

Petitioners' request for pre-action discovery could not be more specific. As discussed above, petitioners seeks Doe's name and address because it is necessary for

service of process and jurisdiction, and because his identity is critical to defending against the proposed motion to dismiss the yet-to-be-filed defamation action. Petitioners seek information regarding the Email in order to ascertain the extent of Doe's tortious acts. This discovery request is not a fishing expedition. See Sony, 326 F. Supp. 2d at 566 (request for information of subscribers based on times and dates they downloaded songs sufficiently specific); Elektra, 2004 WL 2095581, \* 4 (request sufficiently specific where it seeks only to identify defendants in order to serve process based on dates and times of downloads).

**C. There Are No Alternative Means to Obtain this Discovery**

Petitioners traced Doe's IP address as far they could. Only Road Runner and Doe have the information they seek. (Exh. B, ¶¶ 6-7). See Sony, 326 F. Supp. 2d at 566 (plaintiff established lack of other means by documenting the steps they took to locate the Doe defendants, including using a publicly available database to track their IP addresses); Electra, 2004 WL 2095581, \* 4 (using publicly available information plaintiffs were only able to ascertain the ISP for the Doe defendant, not his identity).

**D. This Discovery Is Necessary to Advance PRSA's and Bolton's Claim**

As already discussed above in Section I(C), the information petitioners seek is material and necessary to advance petitioners' claim against Doe. See Sony, 326 F. Supp. 2d at 566 (ascertaining the identities and residences of the Doe defendants is critical to plaintiffs' ability to pursue litigation, for without this information, plaintiffs will be unable to serve process); Electra, 2004 WL 2095581, \* 5 (same); see also Immunomedics, 342 N.J. Super at 167 ("to allow a potential tortfeasor to disprove a plaintiff's case before the plaintiff is even provided the opportunity to learn the

defendant's identity, let alone gather any discovery, has no foundation in [the law]"); Guerrilla Girls, 224 F.R.D. at 573 (parties not permitted to proceed pseudonymously because their identities had a substantial bearing on the issues of the case).

**E. Doe Has No Expectation of Privacy Under These Circumstances**

Petitioners are also entitled to discovery in light of Doe's minimal expectation of privacy. As stated previously, Road Runner's user policies clearly state that Road Runner will disclose subscriber and email information if the subscriber uses the Road Runner system to commit libel. (Exh. C).

Road Runner's terms of service are substantially similar to the terms of service in Sony: "Cablevision has the right . . . to disclose any information as necessary to satisfy any law, regulation, or other governmental request." 326 F.Supp.2d at 559. In Sony, Judge Chin held that in light of these terms of service, "defendants have little expectation of privacy in downloading and distributing copyrighted songs without permission." Id. at 566; see also Electra, 2004 WL 2095581, \* 5 (students using university's ISP had no expectation of privacy when guidelines stated that ISP will comply with a civil subpoena seeking identifying information of a student and that users must obtain permission of copyright owners before copying protected material). Clearly, Doe has only a minimal expectation of privacy with respect to his Road Runner account.

**CONCLUSION**

Under both New York and Federal law, the Court correctly ordered Road Runner to disclose Doe's name, address and information regarding the Email to petitioners. For

the forgoing reasons, the Court should deny Doe's motion in its entirety and should dissolve the temporary stay of execution of the Order.

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