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

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In the matter of the Application of LISKULA COHEN,

Petitioner,

for an order pursuant to section 3102(c) of the Civil Practice Law and Rules to compel disclosure from

Index No.: 100012/09 (JAM)

GOOGLE, INC. and/or its subsidiary, BLOGGER.COM,

Respondent,

of the identity of the defendants JOHN DOE and/or JANE DOE being unknown to the petitioner, in an action about to be commenced.

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MEMORANDUM OF LAW IN OPPOSITION TO APPLICATION FOR PRE-ACTION DISCLOSURE

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PRELIMINARY STATEMENT

Anonymous blogger(s) John Doe and/or Jane Doe (hereinafter collectively referred to as "Blogger"), by and through its undersigned counsel, Guzov Ofsink, LLC, respectfully submits this memorandum of law in opposition to the application of petitioner Liskula Cohen ("Petitioner") for pre-action disclosure pursuant to Section 3102(c) of the New York Civil Practice Law and Rules ("CPLR"), brought by order to show cause dated January 5, 2009 (the "Application"). This Court should deny the Application in its entirety. Petitioner has not and cannot meet her burden for such extraordinary relief because she cannot plead a meritorious claim for defamation.

With the increasing prevalence of email, chat rooms, social networking websites and web logs ("blogs"), the Internet has become essential to the free exchange of ideas and opinions, however absurd, insulting, profane or rhetorical. Petitioner's Application threatens this free exchange. This is an exceptional case. A plaintiff with no cognizable cause of action seeks to discover the identity of an anonymous speaker in order to commence a meritless action, based upon loose, hyperbolic statements such as "ho" and "skank" posted on an amateur blog that no reasonable viewer could take seriously.

Despite its seemingly petty underpinnings, this action is important and involves fundamental First Amendment rights that Petitioner threatens to destroy. If granted, Petitioner's Application would have a dangerous chilling effect upon what has become the predominant forum for free speech in modern society. However, Petitioner fails to satisfy the most basic standard for such an application – let alone the more stringent standard set by recent case law – for the pre-action unmasking of anonymous online speakers such as Blogger.[1]

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[1] *See Ottinger v. Non-Party The Journal News*, No. 08-03892 (RJB), 2008 WL 4375330, at *2-3 (Westchester Sup. June 27, 2008) (applying a hybrid of the motion to dismiss standard with the summary judgment standard).

The gravamen of Petitioner's claim is that captions such as "ho" and "skank" posted by Blogger accompanying provocative pictures of Petitioner (posted on the Internet by Petitioner herself) on the website, entitled "SKANKS IN NYC," constitute actionable libel under New York law. A true and correct copy of the blog at issue is annexed to the accompanying Affirmation of Matthew A. Pek, Esq., dated February 18, 2009 (the "Pek Affirmation" or "Pek Aff.") as **Exhibit A**. Stated simply, these captions are opinion and hyperbole – neither of which constitutes an actionable statement of defamation.

Moreover, Petitioner has not – and cannot – carry her burden of demonstrating a meritorious claim for defamation, particularly in light of Petitioner's own self-authored captions in which Petitioner describes herself as "being a big ho." Even a cursory review of the numerous statements published on the Internet by Petitioner herself (true and correct copies of which are collectively annexed to the Pek Affirmation as **Exhibit B**), demonstrate that Petitioner's threatened defamation claim against Blogger is entirely without merit.

Accordingly, in light of the fundamental First Amendment free speech rights which the Application seeks to threaten, coupled with the lack of merit of Petitioner's threatened defamation claim, Blogger respectfully requests that this Court deny the Application in its entirety.

STATEMENT OF FACTS

The majority of material facts relevant to Petitioner's Application are not in dispute. In the interests of brevity, Blogger respectfully refers the Court to the Pek Affirmation, wherein a summary of the facts and procedural history relevant to this action are set forth in detail.

In brief, on or about August 21, 2008, Blogger posted five (5) sequential messages using an anonymous handle on respondent Blogger.com's website entitled "SKANKS IN NYC" located at uniform resource locator ("URL") http://www.skanksnyc.blogspot.com/ (hereinafter referred to as the "Blog"). *See* Pek Aff., ¶ 5, **Exhibit A**.

Aside from various comments posted by other bloggers in response to the Blog, the Blog has remained unaltered since its creation on or about August 21, 2008. *See id.*, ¶ 7, **Exhibit A**.

Importantly, the Blog at issue here contains no commercial advertisements whatsoever. *See id.*, ¶ 6, **Exhibit A**.

Notwithstanding Petitioner's failure to assert that any of the statements at issue on the Blog are, in fact, statements of fact that are verifiably false, Petitioner summarily and illogically concludes that, as a result of Petitioner's modeling career, the statements on the Blog are nevertheless defamatory. *See* Affidavit of Liskula Cohen in Support of Order to Show Cause Compelling Disclosure of Identity, sworn to on December 19, 2008 (the "Cohen Aff."), ¶ 3 ("defamatory statements describing me as a "skank" and a "ho" affect my reputation and desirability for endorsing products").

THE STANDARD UNDER CPLR § 3102(c)

Pursuant to CPLR § 3102(c), the court has discretion to grant pre-action disclosure only where there is a demonstration that the party bringing such a petition has a meritorious cause of action and the information being sought is material and necessary to an actionable wrong. *See American Media, Inc. v. Green*, 8 Misc.3d 1002(A), 2005 WL 1389361, at *2 (N.Y. Sup. April 8, 2005) (citations and quotation marks omitted) (JAM). When confronted with a pre-action petition to unmask an anonymous blogger, a 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." *Greenbaum v. Google, Inc.*, 18 Misc.3d 185, 845 N.Y.S.2d 695 (N.Y. Sup. 2007) (citations omitted). In the recent case of *Ottinger v. Non-Party The Journal News*, No. 08-03892 (RJB), 2008 WL 4375330, at *2-3 (Westchester Sup. June 27, 2008), the court adopted the heightened standard set by the New Jersey Superior Court in *Dendrite Int'l v. Doe*, 342 N.J. Super. 134 (2001), which requires a plaintiff to make an additional evidentiary showing in support of each element of a particular claim. *See also Doe v. Cahill*, 884 A.2d 451 (Del. Sup. 2005) ("a plaintiff must produce evidence on all elements of a defamation claim within the plaintiff's control").

Here, the Court need not address the heightened standard applied in *Ottinger*, as Petitioner has not even met the basic standard of demonstrating that she could plead a cause of action for defamation, let alone propound evidence to support each and every element of her threatened libel claim.

ARGUMENT

I. This Court Should Deny the Application in its Entirety Because Petitioner Is Unable to Plead a Meritorious Claim of Defamation Based Upon the Challenged Statements of Non-Actionable Opinion and/or Hyperbole

Petitioner does not allege any actionable defamatory statements made by Blogger. Blogger's statements undoubtedly constitute no more than "rhetorical hyperbole" and "vigorous epithets" and are therefore non-actionable opinions entitled to absolute protection under the First Amendment to the U.S. Constitution and Article 1, Section 8 of the New York Constitution.[2] To be sure, no reasonable viewer of the Blog would or could conclude that the statements referring to Petitioner as a "skank", or "skanky", or "acting like a ho" actually purport to convey verifiable statements of fact. Even a cursory review of the Blog compels the conclusion that these loose statements carry an unmistakable comic tone and constitute mere rhetoric, which, in a forum notorious for the unbridled exchange of caustic comments, invective and insult, would never be construed by a reasonable viewer as conveying actual facts about Petitioner. Accordingly, Petitioner's Application should be denied as it is evident that Petitioner's threatened defamation claim would fail as a matter of law.

Expressions of opinion (as opposed to fact) are non-actionable and receive "full constitutional protection" under New York and federal law. *Torain v. Liu*, No. 07-3672-cv, 2008 WL 2164659, at *1 (2d Cir. May 22, 2008). In determining whether a particular statement constitutes actionable defamation so as to survive a motion to dismiss, New York courts have

[2] The First Amendment provides, in pertinent part: "Congress shall make no law... abridging the freedom of speech, or of the press." Article 1, Section 8 of the New York Constitution states: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be ac-quitted; and the jury shall have the right to determine the law and the fact."

consistently followed the standard set by the Court of Appeals in the seminal case of *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993), involving a three (3) part analysis:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact.

82 N.Y.2d at 153 (emphasis added) (citations and quotation marks omitted).

The First Amendment provides broad protection for such statements of rhetorical hyperbole and opinion, but the New York Constitution affords absolute protection from defamation suits for statements of rhetorical hyperbole. *See, e.g., Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by" the Federal Constitution); *Mann v. Abel*, 10 N.Y.3d 271, 279 (2008) ("[e]xpressions of opinion are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation") (emphasis added); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974) (protecting "rhetorical hyperbole, a lusty and imaginative expression of contempt" such as defendant's characterization of plaintiff as a "scab" and a "traitor" with "rotten principles"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (First Amendment defeated claims for, *inter alia*, libel based upon a parody that "could not reasonably have been interpreted as stating actual facts"); *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 139 (1992) ("loose, figurative or hyperbolic" speech negates "the impression that an apparently verifiable assertion was in-tended" and is not actionable); *Roth v. United Federation of Teachers,* 787 N.Y.S.2d 603 (Kings Sup. 2004) ("statements of opinion are

absolutely privileged and shielded from claims of defamation under article I, § 8 of the New York State Constitution, no matter how vituperative or unreasonable the opinions may be") (emphasis added) (citations omitted).

This dispositive inquiry must be made from the perspective of an "ordinary, reasonable" viewer of the website at issue. *See Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 227 (2d Cir. 1985); *Home v. Matthews*, No. 97Civ.3605 (JSM), 1997 WL 598452, at *2 (S.D.N.Y. Sept. 25, 1997) ("[i]n determining whether the plaintiff has been defamed, the court must test the statement by its effect upon the average and ordinary reader to whom the publication is addressed"). In this inquiry, courts look "at the content of the whole communication, its tone and apparent purpose ... to determine whether a reasonable person would view [it] as expressing or implying any facts." *Immuno,* 77 N.Y.2d at 249, 254.

Petitioner conveniently ignores these firmly rooted principles, attempting instead to tease out a defamatory meaning from the Blog by extracting select snippets to be scrutinized out of context in an isolated vacuum in hope that the Court will disregard the lightheartedness that has become a defining characteristic of blogs devoted primarily to banter, rhetoric and oftentimes incomprehensible rants that no reasonable visitor would take seriously, much less regard as credible statements of verifiable fact. The Court should reject this misguided attempt to deny Blogger the absolute protection afforded to statements of opinion such as those challenged here.

A. Blogger's Statements Are Not Statements of Objective Fact

In determining whether the challenged statements are protected opinion, the Court must also look at the language itself to determine whether it has "a precise meaning which is readily understood" and whether it is "capable of being proven true or false." *Mann*, 10 N.Y.3d at 271, 279. It is beyond dispute that words such as "skank" and "ho" are not statements of objective

fact, nor are they capable of being true or false. *See, e.g., Seelig v. Infinity Broadcasting Corp.*, 119 Cal.Rptr.2d 108, 118 (1st Dist. App. Ct. 2002) ("[t]he phrase 'big skank' is not actionable because it is too vague to be capable of being proven true or false"); *Nunez v. A-T Financial Information, Inc.*, 957 F.Supp. 438, 442 (S.D.N.Y. 1997) (rejecting slander *per se* based on statement that "you, you need to suck more. You need to get out your knee pads and start sucking", finding that such statements were mere innuendo); *Bolton v. Strawbridge*, 156 N.Y.S.2d 722, 724 (Westchester Sup. 1956) (statement that "you'd do anything for five dollars, so I am told in the village" did not impute unchastity); *Pearlstein v. Draizin*, 73 N.Y.S.2d 594 (N.Y. Sup. 1947) (statement "charging the plaintiff with being a 'tramp' is not actionable per se"); *Ward v. Zelikovsky*, 136 N.J. 516, 537 (1994) ("'Bitch' in its common everyday use is vulgar but non-actionable name-calling that is incapable of objective truth or falsity").

In light of the nature and tone of the specific language at issue here and the way in which all members of society, but young adults in particular, attribute different meanings to particular words and phrases over time, such that the usage and meaning of any particular term may well change over time, it is important that the Court remain mindful of the axiomatic principle that:

> Whether language has that tendency depends, among other factors, upon the temper of the time, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place.

Mencher v. Chesley, 297 N.Y. 94, 100 (1947) (*citing Sweeney v. Schenectady Union Pub. Co.*, 122 F.2d 288, 290, *aff'd* 316 U.S. 652 (emphasis added) (citations omitted).

Here, Blogger's loose, hyperbolic use of the words "ho" and "skank" exemplify precisely the type of rhetorical hyperbole and vigorous epithets that both the Supreme Court and New York courts alike have vigorously protected. These words have become a popular form of "trash

talk" ubiquitous across the Internet as well as network television and should be treated no differently than "jerk" or any other form of loose and vague insults that the Constitution protects.

Likewise, contrary to Petitioner's assertion, Blogger's reference to Petitioner as "lying" does not constitute an actionable defamatory statement. *See, e.g., Bruno v. Schukart*, 177 N.Y.S.2d 51 (Monroe Sup. 1958) ("[y]ou're a liar and a crook" and "[y]ou're a no-good crook" held to be non-actionable, and holding that the term "crook" in particular is not slander *per se*).

Concerning the loose, non-clinical use of the term "psychotic," Courts have repeatedly dismissed defamation claims based on statements nearly identical. *Torain*, 2007 WL 2331073, at *2-3 (statements made by city council member at a press conference that plaintiff was a "lunatic" and a "sick pedophile loser" were not defamatory); *Polish Am. Immigration Relief Comm., Inc.*, 189 A.D.2d at 374, 596 N.Y.S.2d 756 (1st Dep't 1993) (description of organization as "madhouse" and its members as "thieves" and "false do-gooders" constituted "non[-]actionable expressions of opinion under Federal or State constitutional standards"); *Lloyd v. Cardiology & Internal Medicine of Long Island, PLLC*, No. 006924/07 (DRP), 2007 WL 2410853, at *6 (Nassau Sup. Aug. 23, 2007) (statement that physician's assistant had a "mental breakdown" qualified as personal opinion and hyperbole, and thus not actionable);*Brill v. Brenner,* 308 N.Y.S.2d 218, 222 (N.Y. Civ. 1970) (statement that claimant "went berserk," even when viewed out of context, was not defamatory); *Leidholdt v. L.F.P. Inc.,* 860 F.2d 890, 894 (9th Cir. 1988) (description of plaintiff as "wacko" and "twisted" and suffering from "bizarre paranoia" held not actionable); *Fleming v. Ben-zaquin*, 390 Mass. 175, 181 (1983) (statements describing state trooper as a "nut," "absolute barbarian" and "merciless" held non-actionable); *Loughman v. Mahoney,* No. 20044207 (JTH), 2005 WL 3489894, at *2 (Mass. Super. Nov. 3, 2005) (in context, statement that plaintiff was a "lunatic" held to be non-actionable opinion).

B. The Context of the Blog Belies Any Defamatory Meaning

Even if this Court were to find the "skank" and "ho" comments at issue here to be capable of a defamatory meaning, the context here negates any impression that a verifiable factual assertion was intended. Context is critical, if not dispositive, to the determination of whether a statement is protected opinion. *See Immuno,* 77 N.Y.2d at 254 ("statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying any facts"); *Knievel v. ESPN*, 393 F.3d 1068, 1075 (9th Cir. 2005) ("[t]he context in which the statement appears is paramount in our analysis, and in some cases it can be dispositive"); *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) ("[c]ontext does resolve the matter").

Here, any ordinary visitor to a website entitled "SKANKS IN NYC" would undoubtedly expect this very sort of loose hyperbole and would have understood the challenged statements to be statements of opinion, not objective fact, especially in light of their immediate context – a garbled mishmash of unintelligible captions based on Petitioner's own public photos containing their own vague yet familiar epithets. *See Gorzelany v. Simon & Schuster, Inc.* No. BER-L-7775-08 at *4-5 (N.J. Super. Feb. 6, 2009) (unpublished opinion) (no reasonable person would conclude a book named "Hot Chicks With Douchebags," although "in some eyes vulgar and tasteless" was meant to contain assertions of fact that "anyone would take seriously").

In this case, the critical issue of context cannot be overstated. In recent years blogs have become a phenomenon, providing an excessively popular medium not only for conveying ideas, but also for mere venting purposes, affording the less outspoken a protected forum for voicing gripes, leveling invectives, and ranting about anything at all. In this way, the blogs have evolved as the modern day soapbox for one's personal opinions. Contemporary definitions of the term

"blog" hinge on the personal – rather than factual – outlet provided by Internet blogs today. For instance, the Merriam Webster Online Dictionary defines a "blog" as "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer."[3] Even the online resource upon which Petitioner relies likewise confirms the personalized, rhetorical and opinion-based nature of blogs, defining them as "an online diary; a personal chronological log of thoughts published on a Web page" and confirms "[t]ypically updated daily, blogs often reflect the personality of the author."[4]

The Ninth Circuit recognized as much in *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005). In *Knievel*, a photograph of Evel Knievel was posted on www.expn.com, a website that covers "extreme" sports such as skateboarding and motorcycle racing. The photograph contained a caption saying "Evel Knievel proves that you're never too old to be a pimp." The Ninth Circuit affirmed the district court's dismissal of Knievel's defamation lawsuit reasoning that "although the word 'pimp' may be reasonably capable of a defamatory meaning when read in isolation, we agree with the District Court's assessment that 'the term loses its meaning when considered in the context presented here.'" *Id.* at 1074. The court cited the youthful, loose nature of the website and reiterated the importance of the context in which the photo appeared in holding that a reasonable person would interpret the caption as hyperbole rather than as a factual allegation. *Id.*

Indispensable to an evaluation of the merits of Petitioner's threatened defamation claim the specific context at issue here, namely, "banter blogs" such as the Blog at issue here, which is obviously an amateur work of authorship in every sense. Any reasonable viewer would instantly understand the Blog to be nothing more than a personal opinion page with otherwise irrelevant

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[3] *Merriam Webster's Collegiate® Dictionary, Eleventh Edition*, retrievable from http://www.merriam-webster.com/dictionary/blog.

[4] *The American Heritage® Dictionary of the English Language, Fourth Edition*, retrievable from http://dictionary.reference.com/browse/blog.

rhetoric. No reasonable viewer would construe the Blog – predominated as it is by a host of grammatical and typographical errors and employment of slang terms such as "ho" and "skank" – and conclude that the Blog conveys or even purports to convey a single statement of fact about Petitioner. Accordingly, where, as here, the statements challenged by a plaintiff petitioning for pre-action disclosure are made in a banter-blog containing no advertisements, there is no question that "the full context of the communication in which the statement appears [and] the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact." *Gross*, 82 N.Y.2d at 153.

In sum, any ordinary viewer of the blog at issue would conclude that the Blogger's statements - made in a comic tone with hyperbolic language and in contexts known for expressions of caustic comments – were not conveying actual facts about Petitioner, but rather were nothing more than "rhetorical hyperbole," "vigorous epithets" and statements of opinion.

CONCLUSION

For the foregoing reasons, Blogger respectfully requests that the Court enter an order denying Petitioner's Application in its entirety and granting such other and further relief as the Court deems just and appropriate under the circumstances.

Dated: New York, New York
February 18, 2009

Respectfully submitted,

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