

Index No. 160880/2022

New York Supreme Court

Appellate Division – First Department

GSB GOLD STANDARD CORPORATION AG,

Petitioner-Respondent,

-against-

GOOGLE, LLC and GODADDY INC.,

Respondents.

<p>Appellate Case No. 2023-05565</p>

Behind MLM, The Anonymous Internet Poster Whose
Identity is Sought by The Subpoenas,

Non-Party Appellant,

**NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN
SUPPORT OF NON-PARTY APPELLANT**

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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Poster Whose Identity is Sought by The
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App. Div. 1st Dept.

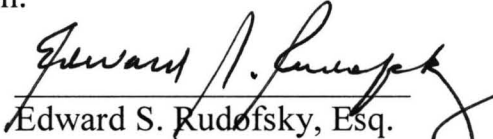
**NOTICE OF MOTION AND
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PARTY APPELLANT**

PLEASE TAKE NOTICE that upon the affirmation of BRENDAN GILLIGAN, an attorney duly admitted to practice law before the courts of the State of New York, dated March 8, 2024, and the accompanying proposed Amicus Brief of Electronic Frontier Foundation in Support of Non-Party Appellant, the undersigned will move this Court at the Appellate Division Courthouse, located at 27 Madison Avenue, New York, New York on March 25, 2024 at 10:00 a.m. or as soon as thereafter as counsel may be heard, for an order granting leave to the Electronic Frontier Foundation to file a brief as amicus curiae in support of Non-Party Appellant BehindMLM. A copy of the affirmation of Brendan Gilligan in support of this motion is annexed hereto as Exhibit A, and the proposed Amicus

Brief in Support of Non-Party Appellant is annexed hereto as Exhibit B. A copy of the Notice of Appeal in this matter is attached as Exhibit C.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), answering papers, if any, are to be served on the undersigned no later than seven (7) days prior to the return date of this Motion.

Dated: Melville, New York
March 8, 2024


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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
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**AFFIRMATION OF
BRENDAN GILLIGAN IN
SUPPORT OF MOTION
FOR LEAVE TO FILE
BRIEF OF AMICUS
CURIAE ELECTRONIC
FRONTIER FOUNDATION**

Brendan Gilligan, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following under penalties of perjury pursuant to CPLR § 2106:

1. I am a legal fellow with the Electronic Frontier Foundation (“EFF”) and counsel to proposed *amici* EFF. I am familiar with all the facts and circumstances addressed herein. I submit this affirmation in support of proposed *amici* EFF’s Motion for Leave to File Amicus Curiae Brief in Support of Non-Party Appellant Behind MLM.
2. Appellant BehindMLM seeks reversal of a trial court order that failed

to properly analyze and apply the First Amendment's protections for anonymous speakers to a pre-suit discovery demand by Petitioner GSB Gold Standard Corp. AG ("GSB") to identify BehindMLM. This Court granted BehindMLM's motion to stay the trial court's order allowing GSB to identify BehindMLM.

3. Proposed *amici* respectfully request this Court's permission to participate in this proceeding as *amici* for the following reasons.
4. This case raises an important and novel issue: the standards New York courts require litigants satisfy before compelling the disclosure of anonymous speakers' identities. Anonymous online expression is a historic and essential means of fostering robust public debate, and the First Amendment protects the right to speak anonymously. Thus, the standards plaintiffs must meet before unmasking anonymous speakers has the potential to significantly affect public discourse, both inside the State of New York and beyond it.
5. EFF is a non-profit civil liberties organization based in with more than 30,000 members that works to protect rights in the digital world. Based in San Francisco and founded in 1990, EFF regularly advocates in courts on behalf of users and creators of technology that supports free expression, privacy, and openness online.

6. EFF has an acute interest in the outcome of this case because it regularly represents and advocates on behalf of anonymous online speakers' First Amendment rights. *See e.g. In re Subpoena to Cloudflare, Inc.*, 2023 WL 3167424 [ND Cal, Apr. 27, 2023, No. 23-MC-80005-HSG] (serving as counsel to Doe); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 SE2d 440 [Va 2015] (serving as amicus curiae in support of anonymous speaker); *Signature Mgmt. Team, LLC v. Doe*, 876 F3d 831 [6th Cir 2017] (same).¹ The right to anonymity is thus central to EFF's mission.
7. EFF respectfully requests that this Court grant its motion because its amicus curiae brief is not duplicative of BehindMLM's brief. EFF's proposed brief explains why it is essential that litigants who seek to unmask these speakers satisfy the rigorous evidentiary and procedural standards that appellant BehindMLM urges this Court to adopt.
8. EFF's brief shows that anonymous speech is a time-honored and constitutionally protected tradition that advances robust debate. It also shows that litigants who dislike anonymous speakers' criticism often use litigation as a pretext to retaliate, punish, and harass speakers.

¹ A complete list of anonymous speech cases EFF has participated in is available at <https://www.eff.org/issues/anonymity>.

9. EFF's brief also will explain why the requirements BehindMLM encourages the Court to adopt are crucial to prevent litigants from unjustifiably unmasking anonymous speakers.
10. Finally, EFF's brief will explain why—in the instant case—upholding the trial court's denial of BehindMLM's motion to quash would undermine online speakers' First Amendment right to anonymity.
11. EFF's brief will therefore assist this Court as it considers BehindMLM's challenge to GSB's pre-suit discovery by providing a broader perspective regarding the issues in the case and the potential consequences of failing to protect anonymous online speakers.
12. For these reasons, EFF respectfully seeks the Court's permission to file the attached *amicus curiae* brief.

WHEREFORE, Electronic Frontier Foundation respectfully requests an order granting it leave to file an Amicus Brief in Support of Non-Party Appellant BehindMLM.

Dated: San Francisco, California
March 8, 2024


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Electronic Frontier Foundation

EXHIBIT B

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March 8, 2024

Appellate Case No. 2023-05565

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INTEREST OF AMICUS¹

Amicus curiae Electronic Frontier Foundation, Inc. (“EFF”) is a member-supported, nonprofit organization that works to protect civil liberties and human rights in the digital world. Through impact litigation, direct advocacy, and technology development, EFF encourages and challenges industry, government, and courts to support free speech, privacy, and innovation in the information society. Founded in 1990, EFF has more than 30,000 active donors.

This appeal touches on an issue central to EFF’s work: protecting online expression, including the right to speak anonymously. As counsel and amicus, EFF has been involved in multiple cases concerning First Amendment protections for anonymous speech. *See e.g. In re Subpoena to Cloudflare, Inc.*, 2023 WL 3167424 [ND Cal, Apr. 27, 2023, No. 23-MC-80005-HSG] (counsel to Doe); *In re DMCA § 512(h) Subpoena to Twitter, Inc.*, 608 F Supp 3d 868 [ND Cal 2022] (amicus); *In re DMCA Subpoena to Reddit, Inc.*, 441 F Supp 3d 875 [ND Cal 2020] (counsel to Doe); *Payward, Inc. d/b/a Kraken v. Does 1-10* [Marin Cty Super Ct 2019, Case No. CIV 1902105] (counsel to Doe); *Glassdoor, Inc. v. Andra Grp., LP*, 575 SW3d 523 [Tex 2019] (amicus); *Signature Mgmt. Team, LLC v. Doe*, 876 F3d 831 [6th

¹ No party’s counsel authored this brief in whole or in part, and neither any party, nor any party’s counsel, contributed money towards the preparation of this brief. No person other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Cir 2017] (amicus); *USA Tech., Inc. v. Doe*, 713 F Supp 2d 901 [ND Cal 2010] (counsel to Doe); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 SE2d 440 [Va 2015] (amicus); *Doe v. 2TheMart.com Inc.*, 140 F Supp 2d 1088 [WD Wash 2001] (counsel to Doe).²

Based on this experience, EFF can offer a distinct perspective regarding the history and value of applying the balancing test the First Amendment requires whenever a litigant seeks to unmask an anonymous online speaker.

INTRODUCTION

This case presents an opportunity to ensure that New York courts follow the lead of federal and state courts around the nation that have adopted balancing tests to help protect online speakers from improper efforts to pierce their anonymity. This Court should take it. These tests vary somewhat by jurisdiction, but all to seek to accommodate a party's legitimate need to identify anonymous speakers while also ensuring that unmasking requests don't discourage speakers from challenging the powerful or expressing unpopular viewpoints due to the threat of retaliation, ostracism, or harassment.

Appellant BehindMLM's opening brief demonstrates why the First Amendment requires courts to balance litigants' competing interests where

² A complete list of anonymous speech cases EFF has participated in is available at <https://www.eff.org/issues/anonymity>.

anonymous speech is at issue. *Amicus* EFF writes separately to identify the core elements that animate the various tests and to share, based on its direct experience offering pro bono legal services, and how these balancing tests help prevent litigants from misusing the discovery process to intimidate, harass, or silence anonymous speakers.

ARGUMENT

I. THE FIRST AMENDMENT PROVIDES STRONG PROTECTIONS FOR ANONYMOUS SPEAKERS AGAINST ATTEMPTS BY OTHERS TO IDENTIFY, HARASS, OR INTIMIDATE THEM.

The right to speak anonymously is deeply embedded in the political and expressive history of this country. Allowing individuals to express their opinions, unmoored from their identity, encourages participation in the public sphere by those who might otherwise be discouraged from doing so.

Accordingly, while anonymous speakers do not enjoy an absolute right to anonymity, the First Amendment requires courts to ensure that litigants do not misuse the legal discovery process based on pretextual claims. It further requires courts balance the interests of the party seeking unmasking against the concrete harms—to the speaker and others—that can result.

A. The First Amendment right to anonymous speech is a historic and essential means of fostering robust debate.

The Supreme Court has recognized that anonymous speech is not a “pernicious, fraudulent practice, but an honorable tradition of advocacy and of

dissent.” *McIntyre v. Ohio Elections Comm’n*, 514 US 334, 357 [1995]. Our Founders relied on anonymity in both advocating for independence before the Revolutionary War and in publishing the Federalist Papers during their debates over our founding charter. *See Talley v. California*, 362 US 60, 64–65 [1960]. Today, the right to anonymity remains a crucial “shield from the tyranny of the majority.” *McIntyre*, 514 US at 357, which “may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” *McIntyre*, 514 US at 341–42.

Further, the First Amendment’s protections for anonymous speech extend fully to online communications. *See Reno v. ACLU*, 521 US 844, 870 [1997] (establishing that there is “no basis for qualifying the level of First Amendment scrutiny” that should be applied to digital communications). Indeed, anonymity has become an essential feature of online discourse that “facilitates the rich, diverse, and far ranging exchange of ideas” and “can foster open communication and robust debate.” *Doe v. 2TheMart.com Inc.*, 140 F Supp 2d 1088, 1092 [WD Wash 2001].

B. Piercing anonymity risks chilling online speech

Litigants may have legitimate reasons to seek to hold anonymous speakers accountable for their expression, and that process may require unmasking the speaker. But courts have recognized that they should not issue unmasking orders lightly. Unmasking anonymous speakers is harmful in at least three ways.

First, the disclosure of anonymous speakers’ identities can make the marketplace of ideas less robust. *Art of Living Found. v. Does 1-10*, 2011 WL 5444622, *9 [ND Cal Nov. 9, 2011, No. 10–CV–05022–LHK] (“*Art of Living I*”) (citing *McIntyre*, 514 US at 342). At minimum, unmasking can hinder speakers’ effectiveness because it directs attention to their identities rather than the content of their speech. *See e.g., Highfields Capital Management, L.P. v. Doe*, 385 F Supp 2d 969, 980 [ND Cal 2005] (“defendant has a real First Amendment interest in having his sardonic messages reach as many people as possible – and being free to use a screen name . . . carries the promise that more people will attend to the substance of his views.”)

The harm of unmasking can be acute for speakers whose true identities are shunned or disliked, as others may be more dismissive of their statements, and the speakers may be chilled from continuing to speak publicly on that same topic. Anonymity “provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.” *Doe v. Harris*, 772 F3d 563, 581 [9th Cir 2014] (internal quotations omitted). In these circumstances, unveiling speakers’ true identities thus “diminishes the free exchange of ideas guaranteed by the Constitution.” *Art of Living II*, 2011 WL 5444622 *9.

Second, unmasking can lead to serious personal consequences—for the

speaker or even the speaker’s family—including public shaming, retaliation, harassment, physical violence, and loss of a job. *See Dendrite Intern., Inc. v. Doe No. 3*, 775 A2d 756, 771 [NJ Super Ct App Div 2001] (recognizing that unmasking speakers can let other people “harass, intimidate or silence critics”). In the analogous context of identifying individuals’ anonymous political activities, the Supreme Court has recognized how unmasked individuals can be “vulnerable to threats, harassment, and reprisals.” *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 US 87, 97 [1982].

Third, unmasking one speaker may to chill others’ speech. As the *Highfields* court recognized in quashing a subpoena from a company seeking to identify one of their anonymous critics online, would-be speakers on an online message board are unlikely to be prepared to bear such high costs for their speech. 385 F Supp 2d at 981. Thus, “when word gets out that the price tag of effective . . . speech is this high, that speech will likely disappear.” *Id.*

C. Litigants regularly use pretextual claims to target online expression

As a nonprofit legal services organization, EFF has been involved, as counsel or *amicus*, in numerous cases where plaintiffs appeared to have manufactured legal claims as a pretext to unmask less powerful anonymous speakers. Examples include:

- A Russian financial firm sought to unmask anonymous security

researchers who had identified potential communications between the firm and the Trump Organization during the 2016 election. *AO Alfa-Bank v. Doe*, 171 NE3d 1018, 1020 [Ind Ct App 2021]. The firm's underlying lawsuit did not allege that the anonymous researchers violated the law. Instead, it sued other parties and then propounded discovery for the sole purpose of identifying the researchers, even though the company never explained how identifying the researchers would help advance the claims against the defendants.

- A plaintiff sought to unmask an anonymous website provider because it had once hosted a website for an antifascist group the plaintiff was suing. *In re Subpoena to Cloudflare, Inc.*, 2023 WL 3167424 [ND Cal, Apr. 27, 2023, No. 23-MC-80005-HSG]. The plaintiff alleged no claims against the provider or the website it once hosted. EFF moved to quash the subpoena on the provider's behalf, explaining in its motion that the provider feared identification would jeopardize their safety, given the underlying suit's racially charged nature. The plaintiff then abandoned the subpoena.³

³ See *Court Rejects Efforts to Identify Anonymous Webhost*, EFF (July 23, 2023), <https://www.eff.org/am/deeplinks/2023/07/first-amendment-win-webhost-anonymity-case>.

- A school district superintendent also sought to unmask a website provider—as well as all its registered users—after speakers on the site criticized him. *Amicus* intervened on behalf of the provider and a registered user. As with *Cloudflare*, the superintendent immediately dropped their subpoena.⁴
- A company sought to unmask an anonymous Yahoo! message board user who compared the company’s CEO to characters in Charles Dickens’ fiction and Shakespeare’s plays. *USA Tech., Inc. v. Doe*, 713 F Supp 2d 901, 905–06 [ND Cal 2010]. With EFF’s assistance, the user successfully moved to quash the subpoena, with the court holding that the perceived insult did not justify unmasking the user under the First Amendment. *USA Tech., Inc.*, 713 F Supp 2d at 909.

EFF was able to assist in these cases, but it does not have unlimited resources. Absent rigorous court review, anonymous speakers who are unable to obtain counsel may be less successful in defending their First Amendment rights.

More recently, EFF has been involved in cases where litigants sought to misuse the Digital Millennium Copyright Act’s (“DMCA”) hair-trigger subpoena provision to unmask critics. Under 17 USC § 512(h), a rightsholder can issue a

⁴ See *Anonymity Preserved for Critics of Oklahoma School Official*, EFF Press Release (July 18, 2006), <https://www.eff.org/press/archives/2006/07/18>.

subpoena to unmask an alleged infringer without any initial judicial supervision.

That streamlined process is convenient but also ripe for abuse. For example:

- The headquarters of the Jehovah’s Witnesses faith, Watch Tower, sought to identify an anonymous Reddit user who had questioned Watch Tower’s fundraising and privacy practices. *In re DMCA Subpoena to Reddit, Inc.*, 441 F Supp 3d 875, 887 [ND Cal 2020]. After EFF explained that the alleged infringement was a self-evidently lawful fair use, the court quashed the subpoena.
- A private equity billionaire formed a company for the sole purpose of issuing a DMCA subpoena to unmask an anonymous Twitter (now X) user who posted a few tweets satirizing the billionaire’s alleged lifestyle. *In re DMCA § 512(h) Subpoena to Twitter, Inc.*, 608 F Supp 3d 868, 874–75 [ND Cal 2022]. Even though Twitter took down the tweets allegedly containing the infringing works, and the tweets themselves were clear fair uses, the company still demanded that Twitter identify the user. Twitter moved to quash the subpoena, with *amicus*’s support. The court granted the motion, but many service providers would not have invested the legal resources to mount the challenge in the first place.

II. BEFORE COURTS UNMASK ANONYMOUS SPEAKERS, PLAINTIFFS MUST MEET A SUBSTANTIAL EVIDENTIARY AND PROCEDURAL BURDEN.

This above background demonstrates the importance of developing and applying robust procedural and substantive protections for individuals targeted by legal process seeking to unmask them.

BehindMLM's brief discusses these requirements in full. EFF endorses those arguments and urges the Court to adopt the test she articulates. EFF writes separately to explain why the two substantive steps of the anonymity test are essential.

First, the requirement that litigants seeking to unmask anonymous speakers meet a substantial evidentiary burden to demonstrate the legal sufficiency of their claims ensures that the litigation is not a pretext to retaliate against the speaker. *See e.g., Dendrite*, 775 A2d at 760; *Highfields*, 385 F Supp 2d at 975–76. While courts have employed a variety of evidentiary standards at this step, *amicus* believes the summary judgment standard provides the proper protection for anonymous speakers. *Highfields*, 385 F Supp 2d at 975. Some courts require plaintiffs to establish a *prima facie* case, supported by evidence, that the anonymous speaker's statements in fact rise to the level of civil or criminal liability. Resolving this appeal does not require this Court to decide which standard is appropriate for this step, however, as GSB Gold Standard, Inc. cannot meet either. If, as here, a party

cannot meet their evidentiary burden, the analysis should end, and the court should quash the subpoena.

Second, even if a litigant meets their evidentiary burden, they are not automatically entitled to unmask the speaker. As numerous courts recognize, litigants must also establish that the balance of competing interests weighs in favor of unmasking the anonymous speakers.⁵ When courts analyze these competing interests, they must carefully weigh the “magnitude of the harms that would be caused by competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant.” *Highfields*, 385 F Supp 2d at 976. Courts have identified four key interests: (1) the strength of the plaintiff’s case; (2) the plaintiff’s need to unmask the anonymous speaker, including whether there are less invasive discovery tools available that would satisfy plaintiffs’ needs; (3) the nature of the anonymous speech at issue in the case; and (4) the harm (or harms) that would result from the speaker’s loss of anonymity.

With respect to interests (1) and (2), courts have recognized that focusing their analysis on the strength of a plaintiff’s case and their necessity of unmasking

⁵ See e.g. *Dendrite*, 775 A2d at 760; *In re Indiana Newspapers*, 963 NE2d 534, 551 [Ind Ct App 2012]; *Pilchesky v. Gatelli*, 12 A3d 430 [Pa Super 2011]; *Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 999 A2d 184 [NH 2010]; *Indep. Newspapers, Inc. v. Brodie*, 966 A2d 432 [Md. 2009]; *Mobilisa, Inc. v. Doe*, 170 P3d 712, 720 [Ariz App Div 1 2007]; *Highfields*, 385 F Supp 2d at 976.

ensures that plaintiffs have some justifiable, legitimate litigation need for the information that outweighs the harm to an unmasked speaker. *See e.g. Art of Living II*, 2011 WL 5444622 *6, 10 (describing discovery alternatives short of an in-person deposition that would unmask Doe, such as depositions by telephone or via written questions). And just as a party seeking discovery must normally show their claims have merit, the party seeking unmasking must show the strength of their claim and unmasking's necessity. *See* Appellant's Br. at 44–46.

With respect to the interests (3) and (4), “the specific circumstances surrounding the speech serve to give context to the balancing exercise.” *In re Anonymous Speakers*, 661 F3d 1168, 1177 [9th Cir 2011]. Courts have found speakers have high First Amendment interests in anonymous political, religious, or literary speech. *See e.g. Art of Living II*, 2011 WL 5444622 *5–6 (finding critical commentary touched on matters of public concern). *Cf. Sony Music Entertainment, Inc. v. Does 1-40*, 326 F Supp 2d 556, 564 [SD NY 2004] (finding the speech interest in downloading music to be more limited). Courts must also consider whether disclosure will chill the speech of others. *See Art of Living II*, 2011 WL 5444622 *7 (“[W]here substantial First Amendment concerns are at stake, courts should determine whether a discovery request is likely to result in chilling protected activity”).

III. THE TRIAL COURT FAILED TO APPLY THE FIRST AMENDMENT'S ANONYMOUS SPEECH STANDARD IN DENYING BEHINDMLM'S MOTION TO QUASH.

A. GSB has failed to establish any grounds for liability against BehindMLM.

The trial court's order denying BehindMLM's motion to quash GSB's subpoena should be reversed because GSB has failed to establish that it has meritorious claims against BehindMLM. *See Indiana Newspapers*, 963 NE2d at 552.

First, GSB's petition fails to plead cognizable defamation claims against BehindMLM: the allegedly defamatory statements at issue here are opinion, and GSB has not alleged that BehindMLM made them with actual malice. *See Appellant's Br.* at 40–44. *Second*, GSB has offered no evidence to support these improper claims, relying solely on a nonbinding foreign judgment (discussed in more detail below). *See Appellant's Br.* at 47.

The First Amendment protects speakers' anonymity *regardless* of the content of their speech or a litigant's specific cause of action. Indeed, courts have developed the unmasking protections discussed in Section II precisely because First Amendment limits on the tort of defamation (and related claims) are distinct from the Constitution's protections for anonymous speech. These unmasking protections ensure that anonymous speakers are not unmasked without warrant. This is true even when anonymous speech is unprotected. *See Signature Mgmt.*

Team, LLC v. Doe, 876 F3d 831, 839 [6th Cir 2017] (holding that an anonymous speaker whose speech the court found to infringe plaintiff’s copyright retained their First Amendment right to anonymity).

Thus, GSB’s argument that this Court should permit it to unmask BehindMLM based upon GSB’s defamation allegations, Respondent’s Mem. of Law in Opp. to Appellant’s Motion for a Stay Pending Appeal (“Respondent’s Opp.”) at 9, mistakenly conflates First Amendment protections for anonymous *speech* with those for anonymous *speakers*. Thus, even if GSB had established that BehindMLM defamed it (which it has not), GSB would need to show that unmasking BehindMLM is warranted (which it cannot).

GSB’s reliance on a default order obtained in a foreign jurisdiction is unavailing for all the reasons BehindMLM describes. See Appellant’s Br. at 47. That order is far from sufficient evidence to demonstrate its defamation claims have merit, particularly in light of the First Amendment’s limits on that tort in this country.

For these reasons alone, the trial court should have quashed the subpoena seeking BehindMLM’s identity.

B. BehindMLM’s First Amendment right to anonymous speech outweighs GSB’s interest in unmasking its identity.

Even if this Court were to find GSB had demonstrated its defamation claims have legal merit—and they do not—this Court should still require GSB to show the

equities weigh in favor of unmasking BehindMLM. *Signature Mgmt. Team*, 876 F3d at 839.

As BehindMLM's briefing explains, BehindMLM faces serious threats of extralegal retaliation if their identity is revealed, and unmasking BehindMLM could chill others from commenting on cryptocurrency, an issue of significant public concern. See Appellant's Br. at 51.

Conversely, GSB has not established that it must unmask BehindMLM to obtain meaningful relief. See Appellant's Br. at 51–53. The sole relief GSB seeks is BehindMLM's identity, which it claims it “relevant to GSB's *potential* claims for defamation and defamation *per se*.” Respondent's Opp. at 7 (emphasis added). Given BehindMLM's countervailing concerns, GSB's *potential* need falls far short of the justifiable, legitimate litigation need that courts require. For example, in *Signature Management Team v. Doe*, 323 F Supp 3d 954, 959 [ED Mich 2018], the district court, on remand from the Sixth Circuit Court of Appeals, found that unmasking a speaker was not necessary, even after a court adjudicated that the speaker had infringed the plaintiff's copyright and the plaintiff claimed that it needed Doe's identity to monitor compliance with the court's judgment. *See also Art of Living II*, 2011 WL 5444622 *6.

When litigants attempt to unmask anonymous speakers, balancing the speaker and litigants' interests is crucial to effectuating the First Amendment right

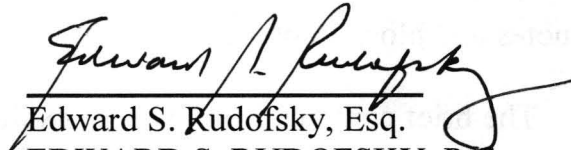
to anonymity. Where, as here, that balance so clearly weighs in favor of the anonymous speaker, the unmasking attempt cannot be allowed to proceed.

CONCLUSION

WHEREFORE, *amicus* respectfully urges the Court to reverse the trial court's order and grant BehindMLM's Motion to Quash.

Dated: March 8, 2024

Respectfully submitted,


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*Counsel for Amicus Curiae
Electronic Frontier Foundation*

PRINTING SPECIFICATIONS STATEMENT

I certify the following in compliance with the Rules of this Court:

The foregoing brief was prepared on a computer.

The typeface used is Times New Roman.

The point size of the text is 14 point.

The brief is double spaced, except for the Table of Contents, point headings, footnotes and block quotes.

The brief contains 3,361 words, exclusive of the Table of Contents, Affidavit of Service, and Certificate of Compliance, based on the word count of the word-processing system used to prepare this brief.

Dated: Melville, New York
March 8, 2024

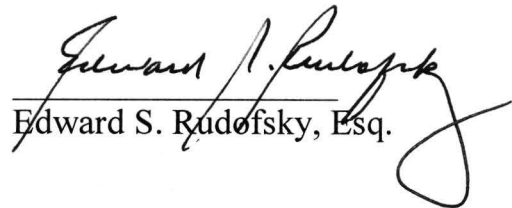

Edward S. Rudofsky, Esq.

EXHIBIT C

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

-----X

GSB GOLD STANDARD CORPORATION AG,

Index no. 160880/22

IAS Part 62

Plaintiff,

Justice Sweeting

-against-

NOTICE OF APPEAL

GOOGLE LLC, GODADDY INC.,

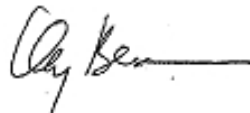
Defendants.

-----X

PLEASE TAKE NOTICE that the undersigned hereby appeals to the Supreme Court, Appellate Division, First Department, from the Order of the Court entered by the Clerk of the Court on November 3, 2023, ECF Document No. 41, Motion Sequence No. 002, and from the Order of the Court entered by the Clerk of the Court on November 3, 2023, ECF Document No. 42, Motion Sequence No. 003, and from each and every part of each of said Orders.

Dated: Forest Hills, New York
November 3, 2023

LAW OFFICE OF RAY BECKERMAN, P.C.



By: _____

Ray Beckerman

Attorneys for Movant

Anonymous Internet Poster "BehindMLM"

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Forest Hills NY 11375

(718) 544-3434

ray@beckermanlegal.com

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

GSB GOLD STANDARD CORPORATION AG

- against -

GOOGLE LLC, GODADDY INC.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

- Case Type**
- Civil Action
 - CPLR article 75 Arbitration
 - Action Commenced under CPLR 214-g
 - CPLR article 78 Proceeding
 - Special Proceeding Other
 - Habeas Corpus Proceeding

- Filing Type**
- Appeal
 - Original Proceedings
 - CPLR Article 78
 - Eminent Domain
 - Labor Law 220 or 220-b
 - Public Officers Law § 36
 - Real Property Tax Law § 1278
 - Transferred Proceeding
 - CPLR Article 78
 - Executive Law § 298
 - CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input checked="" type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	
<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):	
Court: Supreme Court	County: New York
Dated: 11/01/2023	Entered: 11/03/2023
Judge (name in full): J. Mabelle Sweeting	Index No.: 160880/2022
Stage: <input type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input checked="" type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case: No	
Original Proceeding	
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus Date Filed:	
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: Choose Court	County: Choose County
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.	
2 identical orders denying motions to quash made by anonymous internet poster on First Amendment grounds, subpoenas directed to Google LLC and Godaddy Inc	

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

1. Whether the identity of an anonymous internet poster ("BehindMLM", the movant/appellant) is protected on First Amendment grounds, and disclosure can only be compelled upon evidentiary proof by the petitioner of a prima facie cause of action against the anonymous individual, including the procedural basis for jurisdiction in the New York courts, and by a balancing of the plaintiff's interest against the potential harm to the speaker from losing their First Amendment right to speak anonymously?

2. Whether the determination of a Regional Court in Hamburg, Germany, in a proceeding between petitioner and Google LLC, to which the movant/appellant was not a party or other participant, has res judicata and/or collateral effect against the movant/appellant.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	BehindMLM (Fictitious name of anonymous internet poster)	Objectant	Appellant
2	Google LLC	Respondent	None
3	Godaddy Inc	Respondent	None
4	GSB Gold Standard Corporation AG	Petitioner	Respondent
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Ray Beckerman, Law Office of Ray Beckerman PC

Address: 10818 Queens Blvd 4 Fl

City: Forest Hills	State: NY	Zip: 11375	Telephone No: 7185443434
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E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):1

Attorney/Firm Name: Daniel T. Podhaskie, Warren Law Group

Address: 519 8th Ave 25 Fl

City: New York	State: NY	Zip: 10018	Telephone No: 2123908215
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E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):4

Attorney/Firm Name:

Address:

City:	State:	Zip:	Telephone No:
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E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:	State:	Zip:	Telephone No:
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E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:	State:	Zip:	Telephone No:
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E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:	State:	Zip:	Telephone No:
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E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Supplement to “Paper Appealed From” Section of Informational Statement

The appeal is taken from two (2) identical orders, both dated November 1, 2023, and entered November 3, 2023, one denying the motion to quash the subpoena directed to Godaddy Inc., the other denying the motion to quash the subpoena directed to Google LLC.

Copies of both orders are annexed hereto.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X INDEX NO. 160880/2022

GSB GOLD STANDARD CORPORATION AG, 06/26/2023,

Petitioner, MOTION DATE 08/25/2023

- v -

MOTION SEQ. NO. 002 003

GOOGLE LLC, GODADDY INC., DECISION + ORDER ON MOTION Respondents.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 25, 26, 28, 30, 32, 33

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

In Motion Sequence #001, petitioner GSB Gold Standard Corporation AG sought orders for pre-action disclosure to compel respondents Google LLC ("Google") and GoDaddy Inc. ("GoDaddy") to produce complete and accurate copies of all documents containing information as to the identity of the unknown individual or individual(s) that have registered the website www.behindmlm.com (the "Website").

On February 24, 2023, Motion Sequence #001 was granted as unopposed (NYSCEF Doc. No. 18). Subsequently, petitioner served a subpoena duces tecum on respondents.

Pending now before the court are two motions: In Motion Sequence #002, the Website seeks an order, pursuant to Civil Practice Law and Rules 2304, and the United States Constitution, Amendment I, quashing the subpoena duces tecum dated May 22, 2023, directed to respondent

GoDaddy.com, LLC. In Motion Sequence #003, the Website seeks the same order with respect to a subpoena *duces tecum* dated March 23, 2022, directed to defendant Google LLC.

In both motions, the Website contends, *inter alia*, that discovery that seeks to deprive an anonymous internet poster of their anonymity implicates the First Amendment of the United States Constitution, and for that reason must be supported by a strong evidentiary showing which was not satisfied here.

In opposition, petitioner argues that the subpoenas seek disclosure that would identify the individuals responsible for engaging in admitted defamatory conduct; that the subpoenas are not a mere “fishing expedition,” as the Website’s very appearance in this proceeding proves that Google and/or GoDaddy have information that is relevant to petitioner’s defamation claims; and that there is no privilege to defame others anonymously to aid efforts in extortion. Petitioner also argues that:

[...] multiple German Courts have found these very statements to be defamatory and have permanently enjoined Google from disseminating these very statements in Germany. The German Courts not only went out of their way to direct Google to pay the majority of GSB’s costs in obtaining the injunction, but specifically held that “*the statements that [GSB] operate a ‘Ponzi scheme’ are false*” (See NYSCEF Doc. No. 2) (emphasis added).

This court has reviewed the record, including the preliminary injunctions against respondent Google dated March 22, 2022, and August 17, 2022 issued by the Regional Court of Hamburg, Division 24 for Civil Matters (the “German court”). The record shows that a court has already determined that the statements made are defamatory *per se*; thus they are not subject to protection and anonymity under the First Amendment.

See also Cohen v Google, Inc., 25 Misc 3d 945 (Sup Ct 2009):

In this special proceeding, petitioner seeks an order pursuant to CPLR 3102(c) to compel pre-action disclosure directing respondents Google, Inc. and/or its subsidiary Blogger.Com (hereinafter “Google”) to identify the person or persons (hereinafter the “Blogger” or the “Anonymous Blogger”) who posted weblogs on websites under Google’s operation and control, which contained allegedly defamatory statements about petitioner (hereinafter the “Blog”) [...].

[...]

The law in New York governing pre-action discovery is well settled. CPLR 3102(c) requires a court order for pre-action disclosure to aid in bringing an action or to preserve information. A petition for pre-action discovery should only be granted when the petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong. As a general rule, the adequacy of merit rests within the sound discretion of the court [...].

Here, petitioner is entitled to pre-action disclosure of information as to the identity of the Anonymous Blogger, as she has sufficiently established the merits of her proposed cause of action for defamation against that person or persons, and that the information sought is material and necessary to identify the potential defendant or defendants [...]


[...]

Thus, in light of the merits of petitioner’s proposed cause of action for defamation, and the materiality and necessity of the requested information, petitioner is entitled to an order pursuant to CPLR 3102(c) directing respondent Google to disclose the information as to the identity of the Anonymous Blogger [...].

[internal citations omitted]

For the reasons cited herein, it is:

ORDERED that both Motion Sequence #002 and Motion Sequence #003 filed by the Website, to quash the subpoenas are **DENIED**.

<u>11/1/2023</u> DATE		 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X INDEX NO. 160880/2022

GSB GOLD STANDARD CORPORATION AG,
Petitioner, MOTION DATE 06/26/2023, 08/25/2023

- v -

GOOGLE LLC, GODADDY INC., Respondents. MOTION SEQ. NO. 002 003
DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 25, 26, 28, 30, 32, 33

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

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On February 24, 2023, Motion Sequence #001 was granted as unopposed (NYSCEF Doc. No. 18). Subsequently, petitioner served a subpoena duces tecum on respondents.

Pending now before the court are two motions: In Motion Sequence #002, the Website seeks an order, pursuant to Civil Practice Law and Rules 2304, and the United States Constitution, Amendment I, quashing the subpoena duces tecum dated May 22, 2023, directed to respondent

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[...] multiple German Courts have found these very statements to be defamatory and have permanently enjoined Google from disseminating these very statements in Germany. The German Courts not only went out of their way to direct Google to pay the majority of GSB’s costs in obtaining the injunction, but specifically held that “*the statements that [GSB] operate a ‘Ponzi scheme’ are false*” (See NYSCEF Doc. No. 2) (emphasis added).

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[internal citations omitted]

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<u>11/1/2023</u> DATE		 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
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CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
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		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE