Attorney No. 45901

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

LISA STONE, mother and next friend of Jed Stone, a minor,	)	
Petitioner,	)	No. 09 L 5636
v.	)	Calendar D
PADDOCK PUBLICATIONS, INC., d/b/a/ The DailyHerald, Inc.	)	Hon. Jeffrey Lawrence
Respondent.	)	

PETITIONER'S RESPONSE TO JOHN DOE'S MOTION IN OPPOSITION TO TURNOVER OF IDENTITY

Petitioner Lisa Stone, as mother and next friend of Jed Stone, a minor, through her attorneys, hereby responds in opposition to John Doe's Motion in Opposition to Turnover of his Identity ("Motion") and, in opposing the Motion, represents as follows:

1. The present proceeding was initiated under Ill. Sup. Ct. Rule 224. Rule 224 is to be used in situations where a person is injured and does not know the identity of one from whom recovery may be sought. *Gaynor v. Burlington Northern and Santa Fe Ry.* 322 Ill. App.3d 288, 294 (5th Dist., 2001). "In such cases, there is a genuine need and, if the expiration of the statute of limitations is near, an urgent need to identify potential defendants so that a plaintiff is not without redress for the injury suffered" *Id.* "The language of the rule clearly limits discovery under it to the *identity* of those who may be responsible in damages. Once the identity of such persons or entities has been ascertained, the purpose of the rule has been accomplished and the action should be dismissed." *Roth v. St. Elizabeth's Hosp.* 241 Ill. App.3d 407, 413 (5th Dist., 1993).

2. Doe's motion is made with respect to a subpoena duces tecum which Petitioner

served on Comcast Cable Communications, L.L.C. ("Comcast") and which the Court on October 9, 2009 ordered be made returnable to the Court. Doe asks the Court to deny Petitioner access to information about the identity of the person or persons using the designation "Hipcheck 16" who posted defamatory and injurious statements about Petitioner's minor son on a weblog or "blog" maintained by the Respondent from IP address 24.1.3.203.

3. In the first paragraph of his Motion, Doe maintains that Petitioner "has refused to reveal the allegedly defamatory comment despite requests from counsel for John Doe." Even if this were true, it does not provide a basis for contending that Doe does not know what statements could be the subject of Petitioner's Rule 224 request. The statements were posted using an IP address assigned to a modem, router, personal computer or computer network which Doe controls or has access to. Furthermore, Petitioner revealed an example of the injurious statements in ¶ 14 of her own Motion to Disclose Comcast's Response to Subpoena, where she demonstrated that the person using the name "Hipcheck16" on April 9, 2009 at 10:53 a.m. posted on Respondent's public forum the following as public comment:

> . . .
>
> Thanks for the invitation to visit you, but I'll have to decline. Seems like you're very willing to invite a man you only know from the internet over to your house – have you done it before, or do they usually invite you to their house?
>
> Plus now that you stupidly revealed yourself, you may want to watch what you say here . . .

Petitioner also attached to her Motion to Disclose a copy of the actual posting from Respondent's website. Petitioner has met what Doe claims is the "heightened" pleading standard required in defamation actions under *Green v. Rogers*, ____ Ill.2d ____, 2009 WL 3063399 (Sept. 24, 2009),

even though *Green* holds that the "heightened" standard is applicable only to claims for defamation *per se*:

> Although a complaint for defamation *per se* need not set forth the allegedly defamatory words *in haec verba*, the substance of the statement must be pled with sufficient precision and particularity so as to permit initial judicial review of its defamatory content. Precision and particularity are also necessary so that the defendant may properly formulate an answer and identify any potential affirmative defenses.

2009 WL 3063399, *7. On the page cited by Doe, Motion pp. 7-8, *Green* actually holds that this "heightened" level of particularity in pleading is not required for claims for defamation *per quod*. 2009 WL 3063399, *9. In her Motion to Disclose Doe's identity to her, Petitioner has set forth the defamation *in haec verba*, so she has met the *Green* standard for pleading defamation *per se*.

4. The disclosure to Petitioner of the identity of such person is required, as that individual is a potential defendant for remarks made publicly and directed to Petitioner's next friend. Those remarks are defamatory of Petitioner's next friend and maliciously cast him in a false light as a child who solicits and engages in sex with male pederasts.

5. In opposing the release of his identity, Doe asserts that the Court should deny Petitioner's request to turn over the identity on two grounds. First, Doe contends that Petitioner has not established, by clear and convincing evidence, that Doe's comments on the weblog were not immunized by the Illinois Citizen Participation Act, 735 ILCS 110/1 *et seq.* ("CPA"). Second, Doe argues that this Court must determine that all the elements of an action for defamation have been pleaded in this Rule 224 proceeding prior to the turning over of Doe's identity. As shown in paragraph 3 above, Petitioner has established all of the elements of her next friend's causes of action.

6. Doe's reliance on the CPA is inappropriate, as the statute is not concerned with

speech of the type which Doe posted on Respondent's blog on April 9, 2009. The CPA immunizes from liability "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government" except when such act is not *"genuinely aimed at securing favorable government action, result or outcome."* 735 ILCS 110/15 (emphasis supplied). The CPA stipulates as its goal the securing of "constitutional rights of citizens and organizations to be involved in and participate freely *in the process of government."* 735 ILCS 110/5 (emphasis supplied). The CPA attempts to "protect and encourage public participation in government to the maximum extent permitted by law." The CPA's Public Policy Statement shows that its framers designed it to address situations where claims had been filed "against citizens and organizations of this State as a result of their valid exercise of their constitutional right to petition, speak freely, associate freely and otherwise participate in and communicate *with government."* 735 ILCS 110/5 (emphasis supplied). The stated goal of the legislation is to address abuses of the judicial process where citizens and organizations involving themselves in public affairs had been intimidated, harassed and punished through what have come to be known as "Strategic Lawsuits against Public Participation" or "SLAPPs."

7. As there is no relationship between his defamation and an actual or attempted participation in government, Doe is not entitled to immunity under the CPA. Doe's language is "not generally aimed at procuring a favorable government action, result or outcome," his language is not protected by the CPA. Moreover, Doe has things completely backwards: the burden on him is an affirmative one to show that his speech is immunized by the CPA because it involves his communication with or participation in a unit of government. This he cannot do, as the speech in question was not directed to any government.

8. Doe has not shown how his malicious defamation is designed to obtain any "favorable government action, result or outcome." Rather, his statements were directed at the minor child of an individual who was then a successful candidate for public office. The Court can take judicial notice of the fact that the municipal elections for Buffalo Grove were held on April 7, 2009, that Petitioner was elected a trustee of Buffalo Grove in that election but did not take office until the following month, and that Doe's April 9, 2009 statement has nothing to do with the election in question. Consequently, the CPA affords Doe no immunity for his statements.

9. Moreover, the CPA's grant of conditional immunity for certain First Amendment activity relates only to substantive legal claims and does not relate to attempts to obtain information related to that claim, such as this Rule 224 Petition. CPA §15 limits the scope of the statute to any type of "claim" in any proceeding that is "based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association or to otherwise participate in government." The CPA defines the term "claim" to "include any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury." 735 ILCS 110/10. The instant petition seeks only information relating to the identity of "Hipcheck 16" and asserts no claim for damages. Consequently, no "claim" as that term is defined in the Act has been made.

10. Doe also asserts that Petitioner must demonstrate that Doe's comments are not protected speech prior to his identity being turned over. Citing *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (2001), Doe argues "this Court should require [Petitioner] to allege with specificity the allegedly actionable comment, along with the context in which the comment was made, before John Doe's identity is revealed." As noted in paragraph 3 and elsewhere above, Petitioner has set

forth actual language imputing promiscuous sexual conduct to her minor son. The location, date and time of publication of the language has been set forth. These are the standards which *Dendrite* held must be met in order to permit discovery of the identity of one making anonymous statements. *Id.* at 141.

11. While *Dendrite* concluded that the plaintiff there failed to prove the alleged defamatory statements caused any harm, here the Court can see that Petitioner's next friend has a cause of action for defamation.

12. Doe's reliance on *Dendrite* is misplaced. In *Dendrite*, a corporation filed suit against Doe defendants and alleged it had been harmed by comments made anonymously by these Doe defendants about administrative actions taken by its president and other officers. The *Dendrite* court acknowledged that anonymity is not a protection against claims based on statements anonymously made:

> With the rise of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely on-line. The tort feasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tort feasor from Internet Service Provider (ISP) to ISP, with little or no hope of actually discovering the identity of the tort feasor.
>
> In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. *People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law.*

Id. at 150-51, quoting *Columbia Ins. Co., v. Seescandy.Com,* 185 F.R.D. 573, 578 (N.D. Cal.1999) (emphasis supplied). Any other result would mean that statements which would otherwise be

actionable are rendered immune from action for having been made under the cloak of anonymity. *Dendrite* thus acknowledges that statements made anonymously are still actionable – it simply found that the statements made in that case would not survive a motion to dismiss.

13. Petitioner appreciates the need for a balance between the rights of her minor son and the right of anonymous expression. The Supreme Court has recognized that the right to speak anonymously is protected under the First Amendment to the United States Constitution. *Buckley v. Am.Constitutional Law Found.*, 525 U.S. 182 (1999) (invalidating a Colorado statute that required initiative petition circulators to wear identification badges); *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995) (overturning an Ohio law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature); and *Talley v. California*, 362 U.S. 60 (1960) (invalidating a California statute prohibiting the distribution of any handbill that did not contain the name and address of the person issuing the literature). However, the Supreme Court has also held that the First Amendment does not protect false, defamatory speech. *Gertz v. Robert Welch. Inc.*, 418 U.S. 323, 340 (1974) ("[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake"); *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) ("[I]mportant social values which underlie the law of defamation" The Supreme Court has also recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation"). *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

14. Doe's reliance on *People v. White*, 116 Ill.2d 171 (1987) is misplaced. In *White,* the Illinois Supreme Court struck down as constitutionally infirm a provision in the Illinois Election Code which prohibited distribution of political literature which does not contain the names and addresses of persons publishing and distributing the literature. In so doing, *White* recognized the

right to be anonymous in political discourse, but it did not address the issue of whether that right extends to immunize statements which are defamatory or otherwise injurious. Doe seems to argue that the right to anonymity is not only absolute but immunizing as well, and his own authority shows the contrary.

15. "[W]here speakers remain anonymous there is also a great potential for irresponsible, malicious, and harmful communication, and the lack of accountability that anonymity affords is anything but an unqualified good. This is particularly true where the speed and power of internet technology makes it difficult for the truth to 'catch up' to the lie. ... Anonymity thus presents benefits, risks, and problems. To the extent that Courts take on the task of protecting it, balancing is inevitable" *Quixtar Inc. v. Signature Management Team, L.L.C.*, 566 F.Supp.2d 1205, 1214 (D. Nev. 2008). "[T]he right to speak anonymously, on the internet or otherwise, is not absolute and does not protect speech that otherwise would be unprotected". *Doe I v. Individuals*, 561 F.Supp.2d 249, 254 (D. Conn., 2008) (Motion to quash subpoena to internet service provider seeking identity of individual posting material on blog denied after party issuing subpoena made a *prima facie* showing that the posted material was actionable).

16. Doe's assertions to the contrary notwithstanding, the right of free speech provided for in Art. 1, §4 of the Illinois Constitution of 1970 is not a shield against liability for defamation. "The constitutional guarantees of freedom of speech do not include the right to slander and libel without incurring civil or criminal liability." *Welch v. Chicago Tribune*, 34 Ill. App.3d 1046, 1055 (1st Dist. 1975).

17. Hipcheck's, or Doe's, statements are libelous *per se*, as they claim that Petitioner's next friend regularly engaged in criminal sexual conduct.

18. Illinois law recognizes four invasion of privacy torts: (1) intrusion upon seclusion of another; (2) appropriation of a name or likeness of another; (3) publication given to private life; and (4) publicity placing another person in false light. *Lovgren v. Citizens First National Bank of Princeton,* 126 Ill.2d 411, 416 (1989), citing *Restatement (Second) of Torts* §§ 652B, 652C, 652D, 652E (1977). The third and fourth of these are applicable to acts of speech. Thus, even if the posting in question is not defamatory *per se*, if the statement is true, it still can be actionable as a publication of information which is inherently private, and if it is not true, it may be actionable for putting Petitioner's next friend in a false light.

19. The statements in question are not protected political speech. The statements were not uttered in a context which consisted otherwise of political discourse. The statements were made two days *after* an election had been concluded, they were made to and about a person who was not even eligible to vote, let alone act as a candidate, and they do not concern the election at all – they concern the supposed sexual tendencies exhibited by a minor.

For the foregoing reasons and for those described in Petitioner's Motion to Disclose Comcast's Response to Subpoena, Petitioner Lisa Stone respectfully requests that the Court deny John Doe's Motion in Opposition to Turnover of his Identity, that the Court release to Petitioner the information provided to the Court by Comcast in response to her subpoena, and that the Court grant Petitioner such other relief as it deems to be just and equitable under the circumstances.

Dated: October 27, 2009

LISA STONE, as mother and next friend of Jed Stone, a minor

By: _____
One of her attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

LISA STONE, a mother and next Friend of Jed Stone, a minor, Petitioner, v. PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD, INC. Respondent.	)	No. 09 L 5636

REPLY IN SUPPORT OF MOTION IN OPPOSITION TO TURNOVER OF IDENTITY

NOW COMES John Doe, user of I.P. address 24.1.3.203, and for his Reply in Support of Motion in Opposition to Turnover of Identity ("Reply"), states as follows:

1. After John Doe filed his Motion in Opposition to Turnover of Identity, Petitioner filed her Motion to Disclose Comcast's Response to Subpoena, which identified the purportedly actionable speech attributed to John Doe in a Daily Herald web forum. Because the speech identified is clearly protected under the First Amendment and also not actionable, notwithstanding questions of constitutional privilege, this Court should grant John Doe's Motion in Opposition to Turnover of Identity. For his Reply, John Doe incorporates the authorities and arguments set forth in his Response to Stone's Motion to Disclose Comcast's Response to Subpoena.

2. Petitioner Lisa Stone's ("Stone's) Response to John Doe's Motion in Opposition to Turnover of Identity ("Response") argues that the speech at issue here is not entitled to protection under the United States and Illinois constitutions because it is not, in her estimation, political speech. However, Stone's narrow interpretation of the subject post demonstrates why

the Illinois Citizen Participation Act ("CPA") must be broadly construed to immunize "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government . . . regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result or outcome." 735 ILCS 110/15 (emphasis added); 735 ILCS 110/30 (stating that the CPA "shall be construed liberally to effectuate its purposes and intent fully.")

3. Here, in the same post that contains the language Stone objects to, John Doe questions the efficacy of Stone's campaign strategy and calls for Stone to apologize and learn "something about finance before she is sworn in." The Supreme Court in *Mills v. State of Alabama* explained the protection afforded to political speech under the First Amendment as follows:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect free discussion of governmental affairs. This of course includes discussions of candidates, structures, forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines but also humble leaflets and circulars to play an important role in the discussion of public affairs.

384 U.S. 214, 218-19 (1966). In this way, the First Amendment "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley v. Valeo*, 424, U.S. 1, 14 (1976) *citing New York Times V. Sullivan at* 376 U.S. 254, 270 (1964). There can be no more obvious example of participating in the public process than a citizen engaging in debate about the conduct of an elected official in a public forum.

4. The tone of John Doe's speech does not deprive it of constitutional protection and Stone's hypersensitive interpretation of that speech as a false statement of fact does not make it actionable. *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1, 20 (1990); *Lewis v. Time Inc.*, 710 F.2d 549, 553 (9th Cir. 1983); *see also Underwager v. Channel 9 Australia*, 69 F.3d 361, 366-367 (9th Cir. 1995)(comments made in the context of heated debate would be viewed as spirited critique and audience would expect emphatic language on both sides). Stone cannot establish by "clear and convincing evidence" that John Doe's posting was not immunized, or not in furtherance of acts immunized under the CPA, and her 224 Petition must be dismissed. 735 ILCS 110/20.

5. Even if the CPA does not apply, and it does, constitutional protections afforded to statements of opinion mandate dismissal of Stone's 224 Petition. Authorities in support of First Amendment protection for non-factual statements are set forth in John Doe's Response to Stone's Motion to Disclose. This Court should apply the standard applied by Court in *Dendrite Int'l, Inc. v. Doe No. 3,* 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) in concluding that John Doe's posting is constitutionally privileged and not actionable, or alternatively, that the posting is not actionable notwithstanding questions of constitutional privilege.

6. The *Dendrite* opinion states that a party seeking an order disclosing the identity of anonymous internet posters, "in addition to establishing [the] action can withstand a motion to dismiss, . . . must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant." *Id.* at 760. Here, Stone fails to present evidence of actionable speech and none of her briefing can be construed as having set forth allegations of actionable speech.

7. In addition to arguing in conclusory fashion that a question from "hipcheck16" to "UncleW" is an actionable statement of fact sufficient to support liability as defamation *per se*, Stone implies that the question is also actionable as defamation *per quod*. However, Stone fails to allege facts extrinsic to the posting which potentially provide a basis for defamation *per quod* liability. *Thomas v. Fuerst*, 345 Ill.App.3d 929, 934 (1st Dist. 2004)(defamatory statement is not actionable *per quod* unless extrinsic circumstances are plead that explain why a statement not defamatory *per se* demonstrates injurious meaning). Moreover, Stone does not allege that her son has suffered special damages, which is required before a statement is actionable as defamation *per quod*. *Moriarty v. Greene*, 325 Ill.App.3d 225, 236 (1st Dist. 2000); *see also Zucker v. The Chicago Tribune Company*, 2004 WL 3312757, *5 (Ill. App. 1st Dist 2004)(in a defamation *per quod* action, special damages must be plead with particularity and "general allegations of damage to health or reputation, economic loss, or emotional distress, are insufficient to plead special damages.")

8. Nor does Stone set forth allegations sufficient to state a cause of action for false light invasion of privacy. In order to state a claim for false light invasion of privacy, a plaintiff must allege that the defendant (1) publicized a matter concerning plaintiff that places the plaintiff in a false light; (2) the false light "would be highly offensive to a reasonable person"; and (3) the defendant had knowledge of the falsity or acted in reckless disregard of the truth." *Zucker* at *5. First, Stone fails to establish that anything relative Jed Stone was publicized as she has not cited to a statement of fact or a reference to a real person. Instead, she alleges that the publication relates to a question posed by "hipcheck16" to "UncleW". Next, no reasonable person would interpret John Doe's question as a highly offensive statement. Finally, Stone makes no allegation about John Doe's knowledge or his reckless disregard of the truth. Moreover, false

light invasion of privacy requires a plaintiff to plead special damages with particularity. *Zucker* at *6. Here, again, Stone fails to allege special damages.

WHEREFORE, John Doe respectfully requests that this Court grant his Motion, that this Court decline to reveal his identity to Petitioner pursuant to his right to anonymous speech under the United States and Illinois Constitutions, and that the Petition be dismissed pursuant to 735 ILCS 110/1 *et seq.* Further, John Doe requests that he be awarded his attorneys fees incurred under 735 ILCS 110/25. Alternatively, John Doe requests that this Court dismiss the Petition with prejudice and without costs or fees to either party.

Respectfully submitted,
John Doe, by and through his attorneys,
TROBE, BABOWICE & ASSOCIATES, LLC

By: _____
One of its attorneys

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IN THE CIRCUIT COURT
COUNTY DEPARTMENT, LAW DIVISION
DOROTHY BROWN CLERK

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

LISA STONE, as mother and next friend of Jed Stone, a minor,	)	
Petitioner,	)	
v.	)	No. 09 L 5636
PADDOCK PUBLICATIONS, INC., d/b/a The Daily Herald,	)	
Respondent.	)	

PETITIONER'S REPLY IN SUPPORT OF MOTION TO DISCLOSE COMCAST'S RESPONSE TO SUBPOENA

Petitioner, Lisa Stone, mother and next friend of Jed Stone, a minor, by and through her attorneys, Tyma O'Connor, P.C., hereby replies in support of her request that this Court disclose to Petitioner the information provided to the Court *in camera* by Comcast pursuant to the Court's Order of September 25, 2009. In replying in support of her Motion, Petitioner represents as follows:

1. The essence of John Doe's Response to Petitioner's Motion to Disclose Comcast's Response to Subpoena is that he is protected by a veil of anonymity based in the First Amendment and that his veil can only be pierced if his anonymous comments are defamatory. He offers two reasons why his April 9, 2009 posting, as set out in Petitioner's Motion, is not defamatory. The first reason is that his comment is not a statement of fact. The second reason is that the posted comments were not made about an identifiable person. Neither of these reasons is correct, nor is the argument that defamation is the only reason why his identity can be revealed.

2. As Petitioner set out in her Response to John Doe's Motion in Opposition to Turnover of Identity, an act of otherwise protected speech can be injurious not only if it is defamatory – otherwise truthful statements are actionable if they are an invasion of privacy or if they

cast the subject of the speech in a false light. *See* Response to John Doe's Motion in Opposition to Turnover of Identity, ¶ 18, citing *Lovgren v. Citizens First National Bank of Princeton,* 126 Ill.2d 411, 416 (1989), and *Restatement (Second) of Torts* §§ 652B, 652C, 652D, 652E (1977). The "false light" here is Doe's statement to the effect that Petitioner's next friend, a juvenile, makes himself available for sexual liaisons with men whom he meets on the Internet. Thus, Hipcheck16 takes a statement innocently made and free from any sexual innuendo – that critics of Lisa Stone agree to meet with him to discuss her candidacy and qualifications for office – and twists it into an assertion that the minor child makes assignations with pederasts through the Internet.

3. Doe's assertion that his statements cannot be defamatory because they are not directed to an identifiable individual is not correct. If the matter were in the posture of full-blown litigation against Hipcheck16 or Doe, Petitioner would be able to show that someone using the "Hipcheck16" identity made no fewer than fifteen postings on Respondent's public forum between 11:28 p.m. on March 31, 2009 and April 13, 2009 at 9:03 p.m. and that all of those postings related in some way to Petitioner and the Buffalo Grove municipal election on April 7, 2009. In some of those postings, Hipcheck16 identifies Petitioner's son (who used the identity "UncleW") as Petitioner's son. For example, in responding to a posting by "UncleW," Hipcheck16 mistakenly attributes that posting to a person who used the name "Lou Skolnick:"

> **posted by Hipcheck16 on Sat Apr 04, 2009 10:49 AM**
>
> Here we go again - another brainwashed adolescent who can't form an opinion on their [*sic*] own. Lou - *you're probably not old enough to vote, and I'm certain all you know about this election is what your mommy told you.* I'll bet you've never been to a Village board meeting and couldn't find village hall even if they were giving away free iPods there. Do some of your own research on your wonderful candidate and you'll quickly discover that she is NOT QUALIFIED to be a trustee. She knows little about finance, NOTHING about business or village operations and can't seem to form a coherent thought - at least not ones that find their way out of her mouth. Your parents should teach you the importance of having good

community leaders, and a lesson on independent thinking would probably be beneficial too. While you're at it, perhaps you should work on that spelling and grammar stuff, as it seems to be an ongoing challenge for you, as well as other Stone supporters.

Now go watch MTV and quit inserting yourself into conversations for which you're not prepared. *If you're 16, go take your Rottweiler for a nice long walk.* And don't do heroin - it's bad for you.

(Emphasis supplied). The caution not to "do heroin" relates to a campaign which Petitioner participated in in the past about what she perceived to be a marked frequency of heroin use in Buffalo Grove about which something should be done. The suggestion that, if he is sixteen, "UncleW" should take his Rottweiler for a nice long walk refers to a campaign in which Petitioner was active in advocating restrictions on Rottweilers, pit bulls, and similar dogs in Buffalo Grove. Hipcheck16 then caught his mistake in addressing "UncleW" as "Lou:"

posted by Hipcheck16 on Sat Apr 04, 2009 11:44 AM

Ooops - my previous post was directed at our little pal UncleW, not Lou. My apologies Lou!

I'm not perfect. But at least I know what a Home Rule Tax is. :)

In no fewer than two other postings, Hipcheck16 himself identified "UncleW" as Petitioner's son:

posted by Hipcheck16 on Wed Apr 08, 2009 4:33PM

Thanks UncleW, ya little nebbish. You have a nice little Pesach yourself. I may stop by tonight - have room for me at the Seder?

Some days I'm really ashamed of my fellow tribesmen, and today is one of them. You'll do anything to justify your actions, and your sense of entitlement sickens me. *Your holier than thou attitude and arrogance is disgusting, but what's even worse is that just like your mommy and all her buddies, you think you're smarter than you really are.* And there is nothing more dangerous than someone who is not nearly as smart as they think they are.

Hope you and daddy are in the front row at the board meetings so you can mouth answers to her, just like you did at the forum. Otherwise she'll be completely lost, and I don't think she should count on the other trustees for help, since she's already

alienated herself from most of them. She's not qualified to carry the other trustees' briefcases - they know it and she knows it. Can't wait to watch her ummm and uhhh her way through the meetings - I'm in need of a good laugh.

Now go help mommy prepare her Seder so she doesn't break one of her acrylic nail extensions or accidentally wash off her fake tan.

(Emphasis supplied). Copies of the foregoing posting to Respondent's public forum and of the others of Hipcheck16's postings which are cited herein are appended as an exhibit.

posted by Hipcheck16 on Mon Apr 13, 2009 9:03 PM

The lies continue. *In a blog under a previous article related to the election, Stone's son, writing under them [sic] name UncleW* claims that his family received one of the robo calls. Now Stone claims they never got one. The least they could do is get their lies straight.

. . . .

(Emphasis supplied). The reference in the April 8, 2009 posting to "UncleW" and "[his] daddy [being] in the front row at the board meetings so [they] can mouth answers to [Petitioner], just like [they] did at the forum" is a reference to another of Hipcheck16's earlier postings:

posted by Hipcheck16 on Sat Apr 04, 2009 10:25AM

People should just watch the video of the recent B.G. candidate forum to see Stone self-destruct. Her bumbling, incoherent answer to the question about potential budget cuts, including her COMPLETELY INCORRECT assertion that the Home Rule Tax COSTS the village money should be enough to scare the daylight out of B.G. voters. Face it - she didn't know what she was talking about, and her performance at the forum only confirms what I've been saying about her all along ... Stone is NOT QUALIFIED TO BE A TRUSTEE

If you're an undecided voter, the forum will be broadcast on Comcast channel 19 at 7:00 PM on April 6th. You'll see for yourself just how unprepared Stone is, and you'll be treated to several of her vague, poorly informed, over-simplified [*sic*] and off the mark points of view - most of which begin "Ummmm, Uhhhhh" and go downhill from there.

Oh, and while you're watching, also look for Stone's ongoing "mouthed" conversation with her supporters in the audience while other candidates were speaking. Not too disrepectful [*sic*] is it?

> But what else would you expect from a candidate who showed up to the forum late, disrepecting [*sic*] the sponsors and the other candidates?

(Emphasis supplied). Doe's argument that his April 9, 2009 posting is not directed at an identifiable individual misleads because it disregards the context in which those comments occur. Doe himself identified "UncleW" as Petitioner's son before, in and after his April 9, 2009 posting. His reliance on *Voris v. Street & Smith Publications,* 330 Ill. App. 409, 412 (1st Dist. 1947) as support for his contention that his April 9, 2009 posting does not indicate that it was directed at an identifiable individual or at an individual the identity of which Hipcheck16 did not know is not correct. Hipcheck16's postings show both that he knew that "UncleW" was Petitioner's son and that he himself published information about "UncleW"'s identity in the very medium in which he made his April 9, 2009 posting. The entire corpus of postings made by others after Hipcheck16 made his comments about the identity of "UncleW" reveals that virtually all of the persons posting comments to Respondent's public forum after Hipcheck16 understood who "UncleW" was.

4. Doe attempts to excuse his April 9, 2009 posting as "fiery rhetoric" and "hyperbole" used in "heated debate" where the audience would expect "emphatic language." The posting was made two days after the election in question was over, and it reflects *ad hominem* comments made not about a candidate but about her son, who could have no influence in the election at all. The best that can be said about these comments is that they are sour grapes, but that is much less than what the posting is intended to say. There was nothing to debate when Hipcheck16 made his April 9, 2009 posting – the election was over, and he knew he was not making a comment about a candidate, or about an issue which arose, in the election. April 9, 2009 was after any expectations about "emphatic language" would have disappeared – the time for "fiery rhetoric" had passed.

5. To determine whether a statement reasonably presents or implies the existence of

facts about the Petitioner's next friend in a defamation action, the Court would submit the statement to three separate tests, all of which were used by courts prior to *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1 (1990), a case cited by Doe.

a. First, the Court would assess whether the language of the statement has a precise and readily understood meaning, bearing in mind that the First Amendment protects overly loose, figurative, rhetorical, or hyperbolic language, which negates the impression that the statement actually presents facts. *See Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 99-100 (1996) and *Milkovich*, 497 U.S. at 21.

There is a precise and readily understood meaning for the language of Hipcheck16's April 9, 2009 posting, which is that Petitioner's son regularly makes assignations for sexual encounters with adult males.

b. In the second test, the Court assesses whether the general tenor of the context in which the statement appears negates the impression that the statement has factual content. *Bryson*, 174 Ill.2d at 101; *Milkovich*, 497 U.S. at 21.

That "general tenor" of the context of Hipcheck16's postings leaves no other conclusion but that Hipcheck16 meant to make an assertion of fact about "UncleW." The posting asserts that "UncleW" habitually makes arrangements for sexual encounters with adult males on the Internet and inquires as to the location of those encounters. There is no hyperbole involved, as hyperbole would amount to exaggeration of the dimensions of an established fact.

c. Lastly, the Court determines whether the statement is susceptible of being objectively verified as true or false. *Bryson*, 174 Ill.2d at 100-01; *Milkovich*, 497 U.S. at 21. While this assessment considers the context within which the alleged defamatory statement

appears, its emphasis is on whether the statement contains an objectively verifiable assertion. *See Milkovich*, 497 U.S. at 19-21.

When put under this scrutiny, Hipcheck16's April 9, 2009 loses whatever First Amendment protection it might have had. The statement is susceptible of objective verification – evidence will show that no such acts occurred.

6. Doe's assertion that the April 9, 2009 posting does not amount to defamation *per se* notwithstanding, his own authority shows otherwise. Citing *Tuite v. Corbitt,* 224 Ill.2d 490, 501 (2007) for the proposition that defamation *per se* consists in

> (1) statements imputing the commission of a crime; (2) statements imputing infection with a loathsome communicable disease; (3) statements imputing an inability to perform or want of integrity in performing employment duties; (4) statements imputing a lack of ability or that otherwise prejudice a person in his business or profession; and (5) statements imputing adultery or fornication,

Doe minimizes the full effect of his April 9, 2009 charge by "presuming" that only the fifth of these categories is applicable. Doe's presumption is not correct. The applicable categories are the first and the fifth: Hipcheck16 himself explicitly described "UncleW" as and acknowledged him to be a boy who was no older than sixteen, so any person who had sexual encounters with "UncleW" would be committing a crime. *See, e.g.*, 720 ILCS 5/12-16(d) (Making it a felony if "[t]he accused commits aggravated criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim"), a crime which "UncleW" would be aiding and abetting. "UncleW's" solicitation of sexual contact with an adult is also criminal. *See, e.g.*, 720 ILCS 5/11-6.5(a)(1)(ii) ("A person commits indecent solicitation of an adult if the person . . . [a]rranges for a person 17 years of age or over to commit an act of sexual [conduct] . . . with a person . . . [t]hirteen years of age or over but under the age of 17 years"). Doe blithely disregards

the fact that Petitioner's son would be both defendant and victim in the criminal conduct and takes for granted that Petitioner's son's sexual behavior would be legal, which is not the case. Doe assumes that there are circumstances under which "UncleW" could legally have sexual relations if he is under the age of 17, which is not correct.

7. Even if the April 9, 2009 posting is not defamatory *per se*, it is otherwise actionable if it is defamatory *per quod*. "Statements are defamatory *per quod* under two circumstances: (1) where the defamatory character of the statement is not apparent on its face and resort to extrinsic circumstances is necessary to demonstrate its injurious meaning; and (2) where the statement is defamatory on its face, but does not fall within one of the limited categories of statements that are actionable *per se*." *Bryson*, 174 Ill.2d at 103. Doe contends that Petitioner has not demonstrated that the April 9, 2009 posting is defamatory *per quod* because she has made no allegation of "special damages." That concern, however, goes to whether Petitioner's son has been injured, and not to whether the statements are defamatory. Furthermore, Doe does not explain how Petitioner would have to resort to other facts extraneous to the April 9, 2009 posting itself to show how the statement is defamatory. It strains credulity to argue that a claim that a male minor regularly engages in sex with older men whom he meets through the Internet requires reference to extraneous facts to amount to defamation. Petitioner is not required to prove her son's damages at this phase – the question at this stage is whether Petitioner could make out a *prima facie* case so that she could proceed to prove those damages. Doe thus has put the proverbial cart before the horse.

8. Doe's resort to the innocent construction rule is inappropriate. His own authority holds that the innocent construction rule is applicable only in instances of defamation *per se*. *See, e.g., Tuite v. Corbitt*, 224 Ill.2d 490, 510-11 (2006) ("the innocent construction rule applies only to *per se* actions" . . . "The rule applies only to claims of defamation per se, and it is justified due to

the presumption of damages. A plaintiff can always avoid application of the innocent construction rule by seeking to establish a per quod action."). Thus, if the April 9, 2009 statement is not defamatory *per se* but is otherwise defamatory, Doe cannot rely on the innocent construction rule. The context of Hipcheck16's comments, starting from March 31, 2009 and continuing through April 13, 2009, shows that Hipcheck16 sought to injure Petitioner by injuring her son – his comments to "UncleW" are vituperation and not merely "emphatic language."

9. Hipcheck16's April 9, 2009 statement is not protected free speech. It was not made to or about a public official and is not in any way political speech. This public comment was made to a child on a public forum. The statement was made not to advance the political standing or platform of any candidate and was instead on its face a statement made with intent to injure Petitioner's next friend, to defame him, and to cast him in a false light.

10. Nothing in Doe's response to the Motion to Release shows just cause or reason to protect or withhold the identity of the subscriber. That person either posted the injurious statements himself, assisted the person who used the "Hipcheck16" name in posting those statements, or gave that person license to publish statements through his internet connection and through the internet service provided by Comcast. Discovery of information about the identity of the subscriber who either is Hipcheck16 is precisely what Ill. Sup. Ct. Rule 224 is designed to permit.

For the foregoing reasons, Petitioner, Lisa Stone, mother and next friend of Jed Stone, a minor, prays that this Court disclose the information provided to the Court *in camera* by Comcast in response to the subpoena issued seeking the identity of the subscriber of the IP address provided by the Respondent herein.

Dated: November 3, 2009

LISA STONE, mother and next friend of Jed Stone, a minor,

By: _____
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