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.	)	No. 09 L 5636
PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD, INC.	)	
Respondent.	)	

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIVISION
DOROTHY BROWN CLERK

RESPONSE TO PETITIONER'S MOTION TO DISCLOSE COMCAST'S RESPONSE TO SUBPOENA

NOW COMES John Doe, user of I.P. address 24.1.3.203, and for his Response to Petitioner's Motion to Disclose Comcast's Response to Subpoena, states as follows:

I. Introduction

1. For his response, John Doe incorporates by this reference the arguments and authorities set forth in his Motion in Opposition to Turnover of Identity ("Motion in Opposition"), previously filed in this cause. This Court should dismiss Lisa Stone's ("Stone") Amended Supreme Court Rule 224 Petition ("Petition"), and decline to reveal the Comcast information, because Stone's Motion to Disclose Comcast's Response to Subpoena ("Motion") fails to establish by clear and convincing evidence that John Doe's speech is not immunized by the Illinois Citizen Participation Act ("CPA"). 735 ILCS 110/20. Even if the CPA does not apply here, John Doe's allegedly actionable speech is protected under the first amendment because the speech does not convey a fact. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill.2d 381, 397 (2008).

2. Alternatively, this Court should apply the standard applied in *Dendrite Int'l, Inc. v. Doe No.* , dismiss the Petition, and decline to turn over the Comcast information because Stone's Motion fails to establish a cause of action relative to the subject speech that could survive a motion for summary judgment. 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

2. On October 2, 2008, the Honorable Eugene P. Daugherty applied the *Dendrite* standard and dismissed a 224 Petition on very similar facts in *Maxon v. Ottawa Publishing Company*. Thirteenth Judicial Circuit Court case no. 2008-MR-125. A copy of the transcript of hearing on the *Maxon* dismissal motion is attached hereto as Exhibit "1". The dismissal of the *Maxon* 224 Petition has been appealed to the Third District as case no. 03-08-0805.

3. A cursory review of Stone's Motion reveals why the supposedly actionable speech had not been previously disclosed by Stone. The speech attributed to John Doe in the Motion is not actionable, even if constitutional considerations are disregarded. Stone's Petition, and the subpoenas issued pursuant to the Petition, are nothing more than an effort to intimidate Stone's critics into silence. Stone's Motion and the anonymous comments cited therein fail to support any viable cause of action.

II. Points and Authorities

A. <u>The First Amendment Bars Defamation Actions Not Based Upon the Assertion of Facts</u>

1. The Motion erroneously asserts that the following language, attributed to John Doe <u>and directed at the screen name "UncleW"</u>, is somehow objectionable and potentially actionable:

> 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 . . .

Stone's Motion argues that the above language portrays UncleW "as a child who solicits and engages in sex with male pederasts".

2. The Illinois Supreme Court, in *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, held that "the first amendment prohibits defamation actions based on loose, figurative language that no reasonable personal would believe presented facts." 227 Ill.2d 381, 397 (2008). If a statement does not state an actual fact, it is protected by the first amendment and is not actionable as defamation. *Id.* at 398. Determining whether a statement states an actual fact requires a court to apply the following criteria: "(1) whether the statement has a precise and readily understood meaning, (2) whether the statement is verifiable, and (3) whether the statement's literary or social context signals it has factual content." *Id.* The Illinois Supreme Court did not reverse the First District Appellate Court's application of the above test to private party publications relative to another private party. *Id.* at 400.

3. Applying the first criterion to the speech at issue here, a reader would have to strain considerably to construe the speech as having the meaning suggested by Stone's Motion. The speech at issue is not a statement of fact, but a question. The question does not mention UncleW's name, UncleW's age, or UncleW's sexual proclivities. Stone injects innuendo into the statement that a casual reader of the statement would have no reason to infer from the words themselves. Thus, the statement fails to meet the first criterion as it does not have a "precise or readily understood meaning." *Id.*

4. The second criterion also demonstrates that the statement is not one of fact, because it is not verifiable. *Id.* No statement of opinion or fact is made. The comment is merely a question to a person posting under the screen name "UncleW". Nowhere does Stone's Motion allege that John Doe ever provided an answer to the question that resulted in injury to UncleW or cast UncleW in a false light. Nor does Stone explain how one could verify purported facts uttered not about a person, but about a screen name in a web forum.

5. Finally, no reasonable person would believe that people posting anonymously on a newspaper web forum under the screen names "hipcheck16" and "UncleW" were actually conveying factual content. If speech of the kind challenged by Stone here were found to convey factual content, the courts would be flooded with defamation actions for perceived slights suffered by anonymous posters everywhere.

6. Ensuring that a statement conveys a factual assertion protects against a chilling effect on "imaginative expression" and "rhetorical hyperbole" which adds to public debate. *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1, 20 (1990). In deciding whether a statement is factual, the Court must consider the circumstances in which the statement was made, especially where the statement "was made in public debate . . . or other circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole." *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).

7. Here, because the statements were made on an Internet bulletin board, a strong presumption that the statements are not factual should apply. *Global Telemedia Int'l Inc. v. Doe*,

132 F.Supp.2d 1261, 1267 (C.D. Cal. 2001); *see also Rocker Mgmt. v. John Does*, 2003 WL 22149380, *2-*3 (N.D. Cal. 2003)(holding that "vague" and "hyperbolic" statements posted in an internet chat room are not defamatory); *see also SPX Corp. v. Doe*, 253 F.Supp.2d 974, 980-81 (N.D. Ohio 2003)(holding that "imprecise" or "figurative" statements weigh against a finding of defamation). Because the language objected to by Stone, and the context in which the language was used suggest mere rhetorical hyperbole, this Court should find that the speech is protected by the first amendment.

B. In Order to be Actionable, Speech Must be Directed at an Identifiable Person

1. Here, Stone fails to cite one instance in which "UncleW" is identified by John Doe in a way that would lead readers to conclude who UncleW is. Stone's Motion assumes that readers of the web forum in question knew how many children Stone has, what their names are, which of Stone's children posts under the pseudonym "UncleW", and that every anonymous poster who offers hints as to his identity in a web forum is who he purports to be.

2. In order to be actionable for defamation, there must be damage to the plaintiff in the "eyes of others." *Voris v. Street & Smith Publications*, 330 Ill.App.409, 412 (1st Dist. 1947). The *Voris* opinion held that an allegedly libelous article about an individual referred to only as "Snapper Charlie" was not actionable because nobody was alleged to have understood who the subject of the article was. *Id.* at 413. The *Voris* opinion explained why the failure to reference the plaintiff's name was fatal to the claim:

> It is not enough to constitute libel that plaintiff knew that he was the subject of the article, or that defendants knew of whom they were writing. It should appear upon the face of the complaint that persons other than these must have reasonably understood that the article was written of and concerning the plaintiff, and that the so-called libelous expression related to him. An averment of fact extrinsic to the article, and essential to an identification of the article with the person complaining, cannot be embodied in an

> innuendo. The office of an innuendo is to deduce inferences from premises already stated, not to state the premises themselves. *Id.*

Here, Stone's Motion relies entirely upon innuendo to state the premise of her prospective claim. Additionally, Stone's relies upon facts extrinsic to the posts attached to her Motion to establish the identity of the person purportedly injured. Thus, the posting relied upon Stone is not actionable.

C. The Speech is Not Actionable as Defamation Per Se

1. This Court should dismiss the Petition because the speech is not actionable as defamation *per se*. In Illinois, the five categories of statements that support a cause of action for defamation *per se*, and relieve the pleader of pleading proving special damages, are as follows: "(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." *Tuite v. Corbitt*, 224 Ill.2d 490, 501 (2007). Presumably, Stone believes John Doe's post falls into the fifth category of defamation *per se.*

2. The speech at issue here has nothing to do with the sexual proclivities of UncleW on its face, so it is not actionable as defamation *per se*. Nevertheless, under the innocent construction rule, a person cannot be liable for defamation *per se* if the allegedly actionable words are capable of an innocent construction. *Id.* at 502. A court is not required to strain to find an unnatural innocent meaning for a statement when a defamatory statement is much more reasonable. *Id.* at 504-505. Whether a statement is

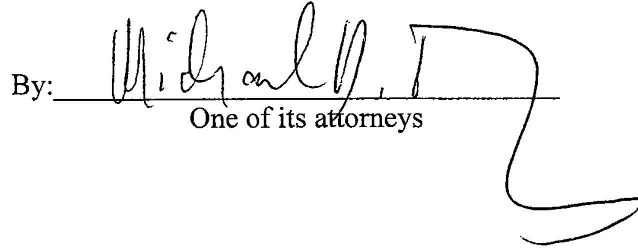
capable of innocent construction is a question of law for the court. *Id.* at 509. Here, it is Stone who strains to infuse the speech attributed to John Doe with the innuendo necessary to arrive at the conclusion that it implies her next friend is minor who engages in sex with male pederasts. Because the speech at issue here is clearly capable of innocent construction, and no straining is required to arrive at such a construction, the speech is not actionable as defamation *per se*.

D. The Speech is Not Actionable *Per Quod*

1. If it is Stone's position that the statements are not defamatory *per se* but defamatory *per quod*, such a position is also untenable. In order to establish defamation *per quod*, a Plaintiff must plead and prove special damages. *Moriarty v. Greene*, 325 Ill.App.3d 225, 236 (1st Dist. 2000). Here, Stone's Motion fails to mention the existence of special damages or evidence in support of same. Moreover, a defamatory statement is not actionable *per quod* unless extrinsic circumstances are plead that explain why a statement not defamatory *per se* demonstrates injurious meaning. *Thomas v. Fuerst*, 345 Ill.App.3d 929, 934 (1st Dist. 2004). Accordingly, the speech is not actionable as defamation *per quod*.

WHEREFORE, John Doe respectfully requests that this Court deny Petitioner's Motion to Disclose Comcast's Response to Subpoena, that the Petition be dismissed.

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



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