Superior Court of New Jersey
Appellate Division
Docket No.

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| WORLD MISSION SOCIETY CHURCH OF GOD<br><br>Plaintiff-Respondent | |
| v. | Civil Action |
| MICHELE COLÓN<br><br>Defendant-Appellant | On request for leave to appeal the orders denying Defendant's motion to dismiss for failure to state a claim and motion for reconsideration entered in the Superior Court of New Jersey, Bergen County Docket No. BER-L-5274-12<br><br>Sat below: Honorable Rachelle L. Harz, J.S.C. |

# Brief of Defendant-Appellant
# Michele Colón

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## PRELIMINARY STATEMENT

Defendant Michele Colón seeks leave to appeal from the lower court's August 7, 2013 order denying her motion to dismiss pursuant to Rule 4:6-2(e) for failure to state a claim, and from the October 4, 2013 order denying her motion for reconsideration. Although this lawsuit is framed as a defamation suit, it is nothing more than a SLAPP suit - a "Strategic Lawsuit Against Public Participation." See LoBiondo v. Schwartz, 199 N.J. 62, 72 (2009). SLAPP suits are part of "a nationwide trend in which large commercial interests utilize[] litigation to intimidate citizens who otherwise would exercise their constitutionally protected right to speak in protest against those interests." Id. at 85. "[T]he goal of such litigation [is] not to prevail, but to silence or intimidate the target, or to cause the target sufficient expense so that he or she would cease speaking out." Id. "SLAPP suits are an improper use of our courts." Id. at 86.

Plaintiff is the New Jersey branch of the World Mission Society Church of God ("WMSCOG"), a wealthy Korean-based doomsday church. Ms. Colón is a former member of Plaintiff. Plaintiff is suing for the sole purpose of silencing Ms. Colón's legal and truthful criticisms of Plaintiff. The lower court erred by applying the incorrect law and ordering Ms. Colón to

answer for her constitutionally protected speech. In so doing, the lower court violated her due process and free speech rights. This Court should correct the error in the interest of justice.

## STATEMENT OF FACTS

After severing ties with Plaintiff, Ms. Colón wrote a Five-Part Story describing her experience, called "How the WMSCOG Turned My Life Upside Down" (the "Story"). (Da136.) The Story was published on a website devoted to criticism of WMSCOG, called examiningthewmscog.com ("Examining Website"), owned by Tyler Newton. (Id.; Da5.) In the Story, Ms. Colón described how Plaintiff systematically manipulated her and her husband until their relationship fell apart. (Da136-42.) For instance, Ms. Colón was subjected to intense pressure to spend increasing amounts of time with Plaintiff, where she was kept separated from her husband. (Da137.) When she protested, Plaintiff turned her husband against her, by claiming that Ms. Colón was being "used by Satan." (Da140.) Plaintiff also attempted to keep Ms. Colón and her husband sleep-deprived. (Da142.) Over time, Ms. Colón discovered "an obvious pattern" of families being torn apart by Plaintiff. (Da140; Da142.) She subsequently formed the opinion that Plaintiff is a "cult" that uses "mind control" and destroys families. (Da138; Da140; Da142.) She became an activist, attending public meetings of the Ridgewood, New Jersey

Planning Board where Plaintiff's variance application was being discussed. (Da40-41.) She also testified in a child-custody trial where Plaintiff's treatment of children was at issue. (Da41.)

In response, Plaintiff sent two cease and desist letters to the Examining Website's ISP in the fall of 2011. (Da110-13.) Both letters sought to remove the entirety of the Examining Website, rather than specific defamation. (Id.) The Examining Website stayed up, and on December 6, 2011, Plaintiff filed suit against Ms. Colón and Mr. Newton in Virginia, where Mr. Newton lives. (Da5-6.) During the Virginia litigation, Plaintiff made an oppressive settlement offer (Da118-19.) If they had accepted, Ms. Colón and Mr. Newton would have had to agree to refrain from any further criticism of all WMSCOG entities. (Id.)

Ms. Colón was dismissed from the Virginia case for lack of personal jurisdiction on March 16, 2012, but the case against Mr. Newton continued. (Da177-78.) When Plaintiff defaulted on discovery, Mr. Newton filed a motion for sanctions. (Da7.) Plaintiff responded by voluntarily dismissing the case on September 7, 2012. (Id.) Meanwhile, Plaintiff filed suit against Ms. Colón in New Jersey, where she lives. (Da37.) On April 19, 2013, Ms. Colón filed a separate suit against Plaintiff and

related defendants, asserting claims arising out of her experience with Plaintiff. (Da179.)

## PROCEDURAL HISTORY

The instant case was filed on July 11, 2012. (Da37.) In the complaint, Plaintiff accused Ms. Colón of making a variety of defamatory statements. Representative examples of the challenged statements include statements accusing Plaintiff of being a "cult," using "mind control," "destroying families," "taking your money," "lying to the IRS," maintaining an improper relationship between Plaintiff and a for-profit corporation, and violating the rules of a volunteer award program. (Da37-61.)

Ms. Colón filed her first motion to dismiss on August 24, 2012. (Da1.) Plaintiff filed an opposition on November 20, 2012, along with a motion for leave to amend the complaint. (Da1). Ms. Colón filed a reply for the motion to dismiss on December 3, 2012, and an opposition to the motion to amend on December 5, 2012. Plaintiff filed a reply for the motion to amend on December 14, 2012. Oral argument was held on January 11, 2012, at which time the Court granted Plaintiff's motion to amend and denied Ms. Colón's motion to dismiss without prejudice. (Da1-2.) The First Amended Complaint ("FAC") was filed on January 30, 2013. (Da2.) The FAC contained six causes of action, adding Mr.

Newton as a Defendant and Mark Ortiz, Ms. Colón's husband, as a Plaintiff.

On February 6, 2013, Ms. Colón brought a discovery motion to force Plaintiff to produce copies of the challenged statements described in the FAC. On February 15, 2013, Judge Harz ordered "that Plaintiff provide by April 15, 2013, all documents referred to in the First Amended Complaint pertaining to the internet or text messages containing statements that are alleged to be defamatory." (Da34-36.) Plaintiff subsequently produced copies of some, but not all, of the challenged statements. (Da123-48; Da155-62.) The document production was accompanied by a Rule 4:18-1 Certification. (Da150-52.)

On April 24, 2013, Plaintiff attempted to file a Second Amended Complaint ("SAC"), which was identical to the FAC except that a seventh cause of action was added. (Da62.) Ms. Colón treated the SAC as if it were properly filed, and on April 30, 2013, filed her second motion to dismiss, joined by Mr. Newton. Arguments made on the first motion to dismiss that were still relevant to the SAC were incorporated by reference into the second motion to dismiss. Plaintiff filed its opposition to the motion on May 21, 2013, and the Defendants replied on May 31, 2013. Oral argument was held on June 7, 2013, at which time the court allowed the SAC to be properly filed. (Da2.)

On August 7, 2013, Judge Harz decided the motion. (Da1.) She dismissed all claims brought by Mr. Ortiz. (Da11-12.) She dismissed Mr. Newton from the case for lack of personal jurisdiction. (Da5-10.) She dismissed five of the seven causes of action in the SAC - leaving only the claims for defamation and false light invasion of privacy. (Da30-31.) Ms. Colón filed a motion for reconsideration on August 9, 2013. Plaintiff filed no opposition to the motion. Ms. Colón nevertheless filed an additional letter brief on September 23, 2013. On October 4, 2013, Judge Harz denied the motion for reconsideration, thus giving rise to the instant motion. (Da32-33.)

## STANDARD OF REVIEW

If leave to appeal is granted, the standard of review for the questions of law presented herein is de novo. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 358 (2007). On appeal, this Court will review a motion to dismiss for failure to state a claim under the same standard as that required of the trial court. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002). The trial court must decide a motion to dismiss based upon the contents of the pleading. Roa v. Roa, 200 N.J. 555, 562 (2010). As part of that pleading, documents referenced in the complaint may be considered. N.J.

Citizen Action, Inc. v. Cnty. of Bergen, 391 N.J. Super. 596, 605 (App. Div.), cert. denied, 192 N.J. 597 (2007).

## ARGUMENT

### I. THIS COURT SHOULD GRANT MS. COLÓN LEAVE TO APPEAL IN THE INTEREST OF JUSTICE BECAUSE THE LOWER COURT'S DECISION VIOLATED MS. COLÓN'S DUE PROCESS AND FREE SPEECH RIGHTS.

"[T]he Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order of a court." R. 2:2-4. While leave is rarely granted, the "interest of justice" standard has been satisfied when the Appellate Division is asked to review issues of constitutional magnitude. Brundage v. Estate of Carambio, 195 N.J. 575, 600 (2008). The instant case raises such issues, because the lower court's rulings on the motion to dismiss violated Ms. Colón's Fourteenth Amendment due process rights and First Amendment free speech rights.

The law provides a number of legal mechanisms to protect the liberty of a speaker whose speech might otherwise be chilled by a bogus defamation claim. The lower court violated Ms. Colón's due process rights by failing to utilize those legal mechanisms to protect Ms. Colón's liberty to speak. As explained below, the lower court violated Ms. Colón's due process rights by converting the motion into one for summary judgment; by not enforcing the of and concerning rule; by applying a standard for analyzing the fact versus opinion issue that resolves close

questions in favor of Plaintiff instead of Ms. Colón; by failing to individually analyze each challenged statement to determine if they consisted of fact or opinion; by forcing Ms. Colón to answer an invasion of privacy claim brought by a corporation, which is incapable of feeling an invasion of privacy; and by failing to sanction Plaintiff or its attorneys for engaging in witness intimidation. Because each of those due process violations results in a chill on Ms. Colón's speech, her First Amendment rights have been violated as well.

In summary, the lower court erred by failing to subject Plaintiff's claims to "stringent scrutiny" as required by this Court in Karnell v. Campbell, 206 N.J. Super. 81, 94-95 (App. Div. 1985). In Karnell, this Court expressed concern about how this type of litigation would chill speech:

> No opinion of this sort would be complete without an expression of the deep concern with which we view plaintiffs' action here. The citizens of our state must be free, within reason, to speak out on matters of public concern. So long as they state the facts implicated fairly and express their opinions, even in the most colorful and hyperbolic terms, their speech should be protected by us.

As explained below, Ms. Colón did state the facts, and the facts are not challenged by Plaintiff. Only Ms. Colón's opinions are challenged. By ordering Ms. Colón to litigate these types of statements, the lower court has imposed a chill on speech:

> We nevertheless fear that no one will be left to carry the torch of criticism even when defendants like those in this case are vindicated, after they have withstood the financial and emotional rigors of litigation such as this. Indeed it may become too costly for ordinary citizens to exercise the right to free speech which undergirds a democratic society. We are profoundly concerned with the chilling effect that plaintiffs' lawsuit in these rather unremarkable circumstances may have on other citizens who would ordinarily speak out on behalf of what they perceive to be the public good.

Karnell, 206 N.J. Super. at 94-95.

The instant case presented the lower court with a multitude of reasons to be concerned that Plaintiff was engaged in litigation abuse. Plaintiff is suing over opinions, while not challenging the underlying facts. Plaintiff is suing over statements that make no reference to Plaintiff. Plaintiff sued Ms. Colón over her courtroom testimony, even though she is entitled to testimonial immunity. With its cease and desist letters and subsequent settlement offer, Plaintiff has sought to silence all of Ms. Colón's speech about all WMSCOG entities, rather than merely silencing specific defamation about Plaintiff. In other words, Plaintiff is attempting to intimidate Ms. Colón into silence, and is relying on its superior wealth to win a war of attrition against an adversary with much fewer

resources. These kind of intimidation suits, or SLAPP suits, "are an improper use of our courts." LoBiondo, 199 N.J. at 86.

Nevertheless, the lower court failed to recognize the need to protect Ms. Colón from such litigation abuse, and has instead sanctioned that abuse by ordering her to submit to discovery. As explained below, the challenged statements are not actionable, which means that Ms. Colón is destined to win on summary judgment. Yet, as a result of the lower court's decision, there is a real possibility that Ms. Colón will run out of money before this case reaches a summary judgment decision. The result will be that Ms. Colón will end up losing a case by default that she was otherwise entitled to win, simply because the lower court failed to effectively scrutinize the Plaintiff's claim at the motion to dismiss stage. Such a result would not only be unjust for Ms. Colón, but it would establish a very dangerous precedent that would chill the speech of all New Jersey citizens. Therefore, this Court should grant Ms. Colón leave to appeal in the interest of justice.

## II. THE LOWER COURT ERRED BY CONVERTING THE MOTION TO DISMISS INTO ONE FOR SUMMARY JUDGMENT, WHERE THE MATERIAL PRESENTED TO THE COURT OUTSIDE THE PLEADINGS CONSISTED OF PRINTOUTS PRODUCED BY PLAINTIFF CONTAINING THE CHALLENGED STATEMENTS DESCRIBED IN PLAINTIFF'S PLEADINGS.

Throughout the lower court's August 7, 2013 decision, the judge treated the motion as one for summary judgment rather than

as a motion to dismiss. That is because the court incorrectly assumed that the documents submitted with the motion containing the challenged statements were outside the pleadings. The court ignored the well-established rule that documents referenced in the complaint may be considered. N.J. Citizen Action, Inc., 391 N.J. Super. at 605. The challenged statements were produced by Plaintiff, (Da123-48; Da155-62), in response to Judge Harz' order to produce all of the allegedly defamatory online statements described in the pleadings, (Da34-36). Plaintiff certified that the documents produced were responsive, complete, and accurate. (Da150-52.) By doing so, Plaintiff eliminated any genuine issue of material fact as to what the statements looked like when they were published online. As explained below, the produced statements are non-actionable on their face. The lower court erred by ignoring those produced statements.

## III. THE LOWER COURT ERRED BY NOT DISMISSING CHALLENGED STATEMENTS FOR FAILURE TO SATISFY THE OF AND CONCERNING ELEMENT, WHERE PLAINTIFF IS A LOCAL BRANCH OF A GLOBAL ORGANIZATION AND THE CHALLENGED STATEMENTS, AS DESCRIBED IN THE PLEADINGS OR IN DOCUMENTS INCORPORATED BY REFERENCE INTO THE PLEADINGS, REFER ONLY TO THE GLOBAL ORGANIZATION, OR TO OTHER BRANCHES OF THE ORGANIZATION.

"An indispensable prerequisite to an action for defamation is that the defamatory statements must be of and concerning the complaining party." Durski v. Chaneles, 175 N.J. Super. 418, 420 (App. Div. 1980). The Plaintiff has a "significant burden" to

plead the "of and concerning" element of a defamation claim with specificity. Foxtons, Inc. v. Cirri Germain Realty, 2008 N.J. Super. Unpub. LEXIS 189, *13 (App. Div. Feb. 22, 2008) (Da86). Moreover, if the challenged statement fails to specifically mention Plaintiff, but instead identifies a group to which Plaintiff belongs, then Plaintiff can only satisfy the of and concerning test if it can show that there is "some reasonable application of the words to [its]self." Id. at *10 (internal citations omitted).

For purposes of the motion to dismiss, there was no dispute that Plaintiff consists only of the Ridgewood, New Jersey branch of the WMSCOG. (Da359-60.) Therefore, any statements that are alleged in the SAC to refer to the WMSCOG as a group, or to other branches of the WMSCOG, are not of and concerning Plaintiff. Such is the case for the challenged statements alleged in the following paragraphs of the SAC: ¶ 30(d); ¶ 33; ¶ 34; 54; 55; 56; 57; 62; and 66. (Da68-75.) Nevertheless, the lower court ordered that discovery be conducted on each of those statements.

Moreover, even where the SAC does allege that a statement is of and concerning Plaintiff, if the copy of that statement produced by Plaintiff reveals that the statement is not of and concerning Plaintiff, then the statement should be dismissed.

For instance, the challenged statements described in the following paragraphs of the SAC were produced by Plaintiff but are not of and concerning Plaintiff: ¶ 30(h) (refers to WMSCOG of Santee, California)(Da129-31); ¶ 33 (refers to WMSCOG of California, or WMSCOG as a group)(Da156); ¶ 34 (refers to WMSCOG of Illinois, or WMSCOG as a group)(Da160); ¶ 36 (refers to WMSCOG of Illinois, or WMSCOG as a group)(Da162); ¶¶ 54-57 (refers to WMSCOG as a group)(Da149; Da163-66); ¶ 62 (refers to WMSCOG of Illinois)(Da149; Da169; Da171-74); and ¶ 64 (refers to WMSCOG of Illinois)(Da149; Da169; Da171-74).

As explained above, the lower court refused to consider the statements produced by Plaintiff. As a result, the parties are now required to undertake discovery on the issue of whether the statements refer to Plaintiff or not. This is absurd. There is no fact that could be obtained in discovery that would cause a statement that makes no reference to Plaintiff to satisfy the of and concerning element on summary judgment.

## IV. THE LOWER COURT ERRED WHEN ANALYZING THE FACT VERSUS OPINION ISSUE BY APPLYING A STANDARD THAT RESOLVES CLOSE QUESTIONS IN FAVOR OF PLAINTIFF, INSTEAD OF DEFERRING TO DEFENDANT'S CONSTITUTIONAL RIGHT TO SPEECH.

The elements of a defamation claim are: "(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher."

DeAngelis v. Hill, 180 N.J. 1, 12-13 (2004). "Under the First Amendment there is no such thing as a false idea. Gertz v. Robert Welch, 418 U.S. 323, 339 (1974). "Statements of opinion, as a matter of constitutional law, enjoy absolute immunity." Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 147 (1986). Whether a particular statement is a statement of fact or an expression of opinion is a question of law for the court. Kotlikoff v. Comty. News, 89 N.J. 62, 67 (1982).

When addressing the fact versus opinion issue, the lower court applied the incorrect legal standard, saying:

> In this case, this Court must decide whether the opinions contained in these forums are non-actionable opinions, actionable opinions mixed with fact or actionable opinions that are impliedly based upon unknown facts. Generally the question of whether a communication is defamatory is a question of law. See Farber v. City of Paterson, 440 F. 3d 131 (3d Cir. 2006). However, if the words are susceptible of either a defamatory or non-defamatory meaning resolution must be left to the trier of fact.

(Da25.) That is not the standard to be applied when addressing the fact versus opinion issue. That last line - saying that the issue must be given to the trier of fact if the words are susceptible of either a defamatory or non-defamatory meaning - is not applicable to the fact versus opinion determination. The lower court was confused by the following language from Karnell:

> Whether language is defamatory on its face is a question of law for a court to resolve. In so doing the judge must evaluate the statement in context, construing it according to the meaning that a reasonable recipient would give it. When the language at issue is capable of both a defamatory and a nondefamatory meaning, there exists a question of fact for a jury to decide.

Karnell v. Campbell, 206 N.J. Super. 81, 88 (App. Div. 1985) (internal citations omitted). The lower court failed to take heed of what Karnell said two paragraphs later:

> The question of whether the statement has a defamatory meaning does not even arise, however, unless the statement is an assertion or implication of "fact."

Id. at 89. In other words, the opinion versus fact issue is a threshold question that must be decided first. Only if the lower court determines that the challenged statement is a statement of fact may it then move on to the second question - which is whether or not the factual statement has a defamatory or nondefamatory meaning. It is at that point, and only at that point, that a statement that is capable of both a defamatory and nondefamatory meaning presents a factual dispute for a jury to decide. However, when deciding the earlier question (fact versus opinion), the standard is as follows:

> If a statement could be construed as either fact or opinion, a defendant should not be held liable. An interpretation favoring a

> finding of "fact" would tend to impose a chilling effect on speech.

Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 168 (1999). The lower court erred by jumping to the second question and skipping the first question, thereby applying the wrong standard.

## V. THE LOWER COURT ERRED BY FAILING TO ANALYZE EACH CHALLENGED STATEMENT INDIVIDUALLY TO DETERMINE WHETHER THEY CONTAIN SUFFICIENT FACTUAL CONTENT TO BE SUSCEPTIBLE TO BEING PROVEN TRUE OR FALSE.

The lower court erred by failing to analyze each of the challenged statements individually. The rule set forth by this Court in Karnell, 206 N.J. Super. at 88 - requiring the judge to "evaluate the statement in context, construing it according to the meaning that a reasonable recipient would give it" - cannot be satisfied unless the judge conducts a statement-by-statement analysis, taking into account the nuance of each individual statement. Yet, Judge Harz treated the challenged statements collectively, making a sweeping generalization that "Issues of material fact that preclude summary judgment are apparent." (Da26.) In addition to improperly converting the motion to one for summary judgment, as explained above, the judge failed to take into consideration the fact that the challenged statements alleged in the SAC are varied and numerous, and are not necessarily all susceptible to the same cookie-cutter analysis. By failing to conduct a fact versus opinion analysis for each

challenged statement, the lower court failed to give sufficient deference to Ms. Colón's constitutional right to express opinions. Had Judge Harz conducted such an analysis for each statement, all of the statements would have had to have been dismissed from the case - or at least most of them.

The lower court's analysis should have involved a review of the content, verifiability, and context of each of the challenged statements. Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 167 (1999). The lower court should have found that many of the statements contain mixtures of fact and opinion. "Where an opinion is accompanied by its underlying nondefamatory factual basis, a defamation action premised upon that opinion will fail, no matter how unjustified, unreasonable or derogatory the opinion might be." Kotlikoff, 89 N.J. at 72-73. "This is so because readers can interpret the factual statements and decide for themselves whether the writer's opinion was justified." Id.

In the instant case, all of the challenged statements are accompanied by an "underlying nondefamatory factual basis," and are therefore protected opinions. A representative example can be found in ¶ 56 of the SAC, which alleges that Ms. Colón stated in a YouTube Video that "The World Mission Society Church of God uses sleep deprivation as a means to make their members more vulnerable to the indoctrination process." (Da74.) The complete

video from which that statement was taken was produced by Plaintiff, and submitted by Ms. Colón on the motion.[1] The video reveals that the complete statement is as follows:

> World Mission Society Church of God also uses sleep deprivation as a means to make their members more vulnerable to the indoctrination process. Members often do not leave the organization until 12:00 am and are encouraged to wake up at 5:00 am every morning to pray.

(Da149; Da165-66). When viewed in context, it is clear that the second sentence is a factual assertion. The first sentence is a characterization - an opinion - based on the disclosed factual assertion contained in the second sentence. Nevertheless, Plaintiff is not claiming that the second sentence - the factual sentence - is defamatory. (See SAC ¶ 56, Da74.) Therefore, the characterization must necessarily be treated as an opinion. The only way the characterization in the first sentence could be defamatory is if Plaintiff alleged the facts in the second sentence are false, which it did not do (and presumably cannot do without being sanctioned for false pleading).

Likewise, all of the challenged statements produced by Plaintiff contain disclosed underlying facts, or links to

[1]For the lower court's convenience, Ms. Colón created transcripts of the videos in question, one of which is annotated with paragraph numbers from the SAC. Those transcripts were submitted on the motion. (Da165-66; Da171-74.) Plaintiff has not disputed the accuracy of Ms. Colón's transcripts.

disclosed underlying facts, which are not alleged by Plaintiff to be false. Ms. Colón's Story, which is the source of many of the challenged statements, is entirely filled with underlying facts that Plaintiff does not allege are false.

Moreover, if the lower court had conducted an analysis of each statement, it would have found that most of the statements consist of "loose, figurative or hyperbolic language." See Ward v. Zelikovsky, 136 N.J. 516, 531-32 (1994). Such statements are non-actionable because they cannot be proven true or false. Id. By not dismissing the hyperbole, the lower court has forced the parties to try to prove whether it is true or false that Plaintiff is a "cult" that uses "mind control." Neither the parties nor the court will ever be able to agree on a definition for such terms, much less on the type or scope of evidence necessary to prove them true or false. Statements alleging the Plaintiff "destroys families" are equally non-actionable because there is no way to know how many families have to be proven destroyed in order to make them true, or how much destruction has to occur to a particular family in order for that family to be considered "destroyed." Such is the problem when a plaintiff sues over characterizations rather than underlying facts.

Furthermore, if the lower court had conducted an analysis of each statement produced by Plaintiff, it would have noticed

that the statements are filled with indicia of opinion. The challenged statements all appeared "on obviously critical blogs with heated discussion and criticism." See Art of Living Found. v. Does, 2011 U.S. Dist. LEXIS 63507, *19 (N.D. Cal. June 15, 2011) (Da92). Statements in such forums have generally been treated as opinions. Id., see also Nicosia v. De Rooy, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999) (statements made on personal website, through Internet discussion groups, and as part of heated debate are less likely viewed as statements of fact). This is especially true where the blogs link to the plaintiff's website, or to other favorable information about the plaintiff, "evincing a forum for debate and discussion." Art of Living Found., 2011 U.S. Dist. LEXIS 63507, at *21. In the instant case, most of the statements at issue were made on "obviously critical blogs," such as the Examining Website, or the Ross Institute website. (Da123-47.) Statements that were not posted directly to those blogs contained links to those blogs, and were themselves posted in forums that were designed to promote "heated discussion and criticism." (See id.)

For instance, ¶ 30(e) of the SAC describes a statement allegedly published on aidpage.com that claims that Plaintiff "destroys families." (Da68.) The webpage begins with the words "Talking about" appearing before Plaintiff's name. (Da124-28.)

After a brief section summarizing some information about Plaintiff, there is a heading that states "Click here to add your comment . . ." Below that are a series of short comments posted to the site by a variety of different people. If an Internet reader were to scroll down through the comments, they would find the "destroys families" language complained of in the SAC in the very last entry at the bottom of the scroll. Along the way, the reader would see that some of the comments are favorable towards Plaintiff, while others are negative. After each comment, there is a link which enables the readers to post a reply to what they are reading. These facts are clearly "evincing a forum for debate and discussion." See Art of Living Found., 2011 U.S. Dist. LEXIS 63507, at *21.

Likewise, the statement alleged in ¶ 30(h) of the SAC (that Plaintiff is a "religious cult" that "wil [sic] destroy your family and take all of your money") (Da68) appears in the last of a series of comments contained in a section that is clearly labeled "USER REVIEWS" in capital letters. (Da129-31.) Each entry contains a five-star rating system, allowing each commenter to rate Plaintiff on a scale of one to five. Again, these facts evince a forum for debate and discussion.

Yet, Judge Harz never considered any of that indicia of opinion, even though those facts appeared on the face of the

challenged statements, as produced by Plaintiff, and should have been incorporated by reference into the pleadings.

Finally, the lower court erred by allowing itself to be distracted by a red herring - the tort suit filed by Ms. Colón. Judge Harz seemed to think that if a factual allegation is made in Ms. Colón's tort suit, then it precludes a similar allegation posted online from being treated as opinion for defamation purposes. (Da26.) Yet, Ms. Colón's tort suit is irrelevant to the instant case because the people reading the challenged statements online would not have known about Ms. Colón's tort suit. According to Karnell, "the judge must evaluate the statement in context, construing it according to the meaning that a reasonable recipient would give it." Karnell, 206 N.J. Super. at 88 (emphasis added). The challenged statements have to be read with an eye towards the factual content that is self-contained within the statements themselves, not with an eye to the factual content that was presented in the author's tort suit two years after the challenged statements were published online. After all, a statement can be treated as opinion for purposes of defamation law, and yet the factual basis for that opinion may still form a cause of action in a tort case. Therefore, the lower court erred by relying on the existence of Ms. Colón's

tort suit, rather than by conducting a proper fact versus opinion analysis for each challenged statement.

## VI. THE LOWER COURT ERRED BY FAILING TO DISMISS A FALSE LIGHT INVASION OF PRIVACY CLAIM BROUGHT BY A CORPORATION, EVEN THOUGH A CORPORATION HAS NO PRIVACY.

The lower court erred by failing to dismiss Plaintiff's claim for false light invasion of privacy. As a matter of law, a corporation has no standing to sue for invasion of privacy. N.O.C., Inc. v. Schaefer, 197 N.J. Super. 249, 253 (Law Div. 1984). As explained in N.O.C.:

> The tort of invasion of privacy focuses on the humiliation and intimate personal distress suffered by an individual as a result of intrusive behavior. While a corporation may have its reputation or business damaged as a result of intrusive activity, it is not capable of emotional suffering.

N.O.C., Inc. v. Schaefer, 197 N.J. Super. 249, 253 (Law Div. 1984); see also Oberweis Dairy, Inc. v. Democratic Cong. Campaign Comm., Inc., 2009 U.S. Dist. LEXIS 18514, *3-5 (N.D. Ill. Mar. 11, 2009) (collecting cases from around the country holding that corporations have no standing to sue for privacy torts, including false light) (Da102__.) Therefore, there is no legal basis for allowing the false light claim to go forward. Nevertheless, the lower court refused to dismiss the false light claim, and failed to state its reasons in writing in both the motion to dismiss and motion for reconsideration decisions.

## VII. THE LOWER COURT ERRED BY FAILING TO SANCTION PLAINTIFF AND ITS ATTORNEYS FOR WITNESS INTIMIDATION, WHERE PLAINTIFF SUED MS. COLÓN FOR TESTIFYING IN A CHILD CUSTODY CASE.

In Plaintiff's original complaint, Plaintiff sued Ms. Colón for statements she made while testifying in a child custody case in New York about Plaintiff's treatment of children. (Da41.) In New York, as in New Jersey, a witness testifying in a judicial proceeding is covered by an absolute privilege "to ensure that their own personal interests - especially fear of a civil action, whether successful or otherwise - do not have an adverse impact upon the discharge of their public function." Toker v. Pollak, 44 N.Y.2d 211, 219 (1978). Lawyers have been sanctioned for suing witnesses over their testimony. See, e.g., Gooch v. Choice Entertaining Corp., 355 N.J. Super. 14, 20 (App. Div. 2002) ("His pursuit of the defamation claim in the face of the absolute immunity warrants . . . the imposition of sanctions under the frivolous litigation statute.") Moreover, retaliation against a witness is a crime. N.J.S.A. 2C:28-5.

Plaintiff obviously included the testimonial claim to send a message to Ms. Colón and every other potential witness who might testify against Plaintiff in this or other litigation. Now that the word is out that Plaintiff sues witnesses, Ms. Colón is in the unenviable position of trying to recruit witnesses to help support her case - from a pool of witnesses who have been

implicitly threatened by Plaintiff. Ms. Colón may never even be aware of the extent that Plaintiff's intimidation is undermining her case. She can no longer be assured of getting a fair trial.

Ms. Colón argued for dismissal of the testimonial claim on the first motion to dismiss (Da362-63) and Plaintiff responded by withdrawing the claim when it amended the complaint. Ms. Colón argued on the second motion to dismiss that the witness pool had already been intimidated, and therefore Plaintiff's case should be dismissed as a sanction. (Da365-74.) The lower court failed to address the issue. That means that the testimonial claim has not been dismissed with prejudice, and could still be re-filed in New York. It further means that Plaintiff and its attorneys have successfully engaged in witness intimidation without consequences - a very dangerous precedent indeed. This Court should take a firm stand against witness intimidation and frivolous litigation by ordering Plaintiff's claims be dismissed as a sanction, and by referring the offending attorneys to the New Jersey Office of Attorney Ethics.

## CONCLUSION

Ms. Colón therefore requests this Court grant her leave to appeal. Ms. Colón further requests this Court grant the appeal and reverse the lower court's denial of her motion to dismiss.

Paul Grosswald

*Paul Grosswald, Esq.(for Defendant Michele Colón)  Oct. 18, 2013*