At an IAS Part ____, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York on the _____ day of January, 2009.

P R E S E N T

Hon. _____
J.S.C.

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

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In the matter of the Application of LISKULA COHEN,

Petitioner,

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

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

Respondent,

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

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Unsigned Order to Show Cause

09100012

Index #:

ORDER TO SHOW CAUSE
IN LIEU OF PETITION

In lieu of petition pursuant to Civil Practice Laws and Rules (CPLR) § 403(d), **UPON** the reading and filing of the Affirmation of Daniel J. Schneider, Esq. with memorandum of law, affirmed December 19, 2008, the Affidavit of Liskula Cohen, and the exhibits annexed thereto, and all other papers and proceedings heretofore had herein, it is

ORDERED that Defendants show cause at the Supreme Court of the State of New York, in Room ___ at the Courthouse located at 60 Centre Street, New York, New York, on the ___ day of January, 2009, at 9:30 a.m., or as soon thereafter as counsel can be heard why an Order should not be made, pursuant to CPLR § 3102(c), compelling pre-action disclosure by Google, Inc. and/or its subsidiary Blogger.com of the identity or identities, including, but not limited to the name, address, telephone number and email of the person or persons who posted the weblog located at the URL http://skanksnyc.blogspot.com (hereinafter the "Bloggers"), which was posted under the umbrella of http://blogger.com and the dates and times at which these weblogs were posted on the ground that without said disclosure, a summons and complaint cannot be served upon the Bloggers and such other and further relief as the Court deems just and proper (including motion costs);

SUFFICIENT CAUSE BEING ALLEGED THEREFORE, it is further **ORDERED** that service of a copy of this Order to Show Cause, and all supporting papers upon which same is based, be made upon Liskula Cohen locate at care of Wagner Davis P.C., 99 Madison Avenue, Eleventh Floor, New York, New York, 10016 and pursuant to CPLR § 311, be made upon an officer of Google New York or other person authorized to accept service at 76 Ninth Avenue, Fourth Floor, New York, New York 10011 and mail a copy of the same upon Google, Inc. 1600 Amphitheatre Parkway, Mountain View, CA 94043 on or before _____ shall be deemed good and sufficient service.

ENTER:

_____

J.S.C.

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

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AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE COMPELLING DISCLOSURE OF IDENTITY WITH MEMORANDUM OF LAW

Index #: 100012/08

DANIEL J. SCHNEIDER, an attorney duly admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, pursuant to Civil Practice Laws and Rules (CPLR) § 2106, as follows:

1. I am associated with Wagner Davis P.C. ("WD"), attorney for Liskula Cohen ("Cohen") in the above captioned petition and I am familiar with all the facts and circumstances set forth in this affirmation. I make this affirmation in support of Cohen's application for an order, pursuant to CPLR § 3102(c), for pre-action disclosure, and compelling Google, Inc. and/or its subsidiary Blogger.com (hereinafter collectively referred to as "Google") to disclose the identity of the person or persons (hereinafter the "Bloggers") who posted five (5) weblogs, which contain defamatory statements about Cohen on websites under the operation and control of Google.

2. Briefly, the application should be granted because the unknown defendants created a defamatory blog entitled "Skanks in NYC" located at the uniform resource locator ("URL") http://skanksnyc.blogspot.com and posted entries, including photographs, captions to the photographs and commentary solely about Liskula Cohen that describe her as a "Skank"[1] and a "Ho"[2] and include other defamatory statements concerning her appearance, hygiene and sexual conduct that are malicious and untrue. Upon information and belief, some of the pictures posted on the blog appearing with her name do not even depict Cohen. The blog constitutes defamation *per se* in that it obviously impugns the chastity of Cohen and further, it negatively reflects on her business. Cohen is a professional full-time model. I am advised that this blog has been mentioned to Cohen during by two people who work with one of her modeling clients, who mentioned the blog because they were concerned about Cohen's image and its relationship to the client's products.

3. In connection with this application, my office has made attempts to ascertain the identity of these Bloggers directly from Google, however has failed and refused to provide the names and other identifying information because it claims to do so would violate its privacy policy. Google has indicated, however, that it would comply with an order directing it to furnish identifying information about the person or persons who posted the remarks that defamed Cohen.

4. In this affirmation and the annexed affidavit of Cohen, we have set forth facts sufficient for this Court to compel Google to disclose the identity of the anonymous Bloggers who posted defamatory photographs, captions to the photographs and other commentary on Google's website. It is respectfully submitted and will be demonstrated below that this

[1] "Skank" is defined as "One who is disgustingly foul or filthy and often considered sexually promiscuous. Used especially of a woman or girl." *The American Heritage® Dictionary of the English Language, Fourth Edition.* Retrieved November 07, 2008. from Dictionary.com website: http://dictionary.reference.com/browse/skanky.

[2] "Ho" is defined as a slang word for a prostitute and a slang alteration of the word "whore." *The American Heritage® Dictionary of the English Language, Fourth Edition.* Retrieved November 07, 2008, from Dictionary.com website: http://dictionary.reference.com/browse/ho.

application should be granted in all respects and result in an order requiring google to disclose the Bloggers' name(s), address(es), email address(es), phone number(s), IP Address(es) and any other information that it may possess that would assist in ascertaining the Bloggers' identity.

5. On August 21, 2008, five (5) different weblogs (hereinafter "Blogs") were posted on Blogger.com together under the URL, http://skanksnyc.blogspot.com. Copies of the Blogs are annexed hereto as Exhibits A-F. These Blogs are unmistakably about Cohen, the movant in this application, and the would be plaintiff in a defamation action if only she could ascertain the identity of the person or persons who posted the Blogs (hereinafter the "Bloggers"). Under available case law and the facts and circumstances here, Cohen must be entitled to "unmask" the Bloggers and obtain their identities and the time and date that they posted the Blog.

6. In New York, "[a] court may allow pre-action discovery if it is needed to aid a party in bringing an action against a potential defendant, but it may do so only by court order." Admission Consultants, Inc. v. Google, Inc., N.Y.L.J, 12/8/08, p. 18, col. 2 (N.Y. Cty. Index No. 115190/07, Cahn, J.). In order to be to be entitled to this relief, however, "the moving party must first show that it 'has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong.'" Id. citing Liberty Imports, Inc. v. Bourguet, et al., 146 A.D.2d 535, 536 (1st Dept. 1989); see also In the Matter of Greenbaum v. Google, Inc, 18 Misc. 3d 185, 188 (Sup. Ct. N.Y.C. 2007).

7. That we are aware, only three (3) Courts in New York have been confronted with unmasking people who post anonymously on the internet for alleged defamatory statements. See Admission Consultants, *supra*; Greenbaum, *supra*; and Admission Consultants v. McGraw Hill Publishing Co. (N.Y. Cty. Index No. 111503/2007, Feinman, J.). In the first two cases, the petition was denied, though in latter, the petition was granted (the granted petition offered no analysis to its reasoning, but the Justice Cahn Admission Consultants case does state the

statements dealt with there were discriminatory). The two petitions which were denied were because the petitioners could not even state a cause of action of defamation. As the Court in Greenbuam stated "the statements on which the petitioner seeks to base her defamation claim are plainly inactionable as a matter of law." 18 Misc. 3d at 188. Thus these Courts declined to "unmask" the blogger.

8. Cohen can put forth a meritorious cause of action of defamation and more specifically, libel. According to Admission Consultants, Inc. v. Google, *supra*, plaintiff must prove four (4) elements to be successful on a libel claim: "'(1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to plaintiff.'" Id., citing Penn Warranty Corp. v. DiGiovanni, 10 Misc. 3d 998, 1002 (Sup. Ct. N.Y.C. 2005).

9. In this case, the Court need only to examine the Blog to confirm that the postings are defamatory. Cohen will proceed under a theory that the Blog postings are libelous *per se* because they called into question her chastity and as a professional model, they relate to her reputation and her business. The explicit definition of libel *per se* is "any written or printed article...[which] tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 379 (1977). The statements posted in this case fall into this definition since the Court of Appeals holds that "written charges imputing unchaste conduct to a woman are libelous per se." James v. Gannett Co., Inc., 40 N.Y.2d 415, 419 (1976).

10. In this case, the statements which were made on the Blog unmistakably imputed Cohen's chastity and therefore are libelous *per se*. The Blog calls Cohen a "skank" or "skanky"

several times. As noted above, "skank" is "One who is disgustingly foul or filthy and often considered sexually promiscuous. Used especially of a woman or girl."

11. The Blog further states that Cohen is of the opinion that there is "nothing like opening wide to take that 'thing' into my mouth AGAIN." This caption implies that Cohen is a promiscuous person with a propensity for performing oral sex. Further, the Blog describes Cohen's actions as "acting like [a] ho." Also note above, the word "ho" is defined as a short form of the word "whore." Also it describes Cohen as being a "psychotic, lying, whoring...skank." These statements are certainly intended to "expose [Cohen] to public contempt, ridicule, aversion, disgrace and to induce an evil opinion of [her] in the minds of right-thinking persons, and to deprive [her] of [her] friendly intercourse in society." Rinaldi, *supra*. Based on the fact that the Blogger's statements made about Cohen impute her chastity and are so severe, they constitute libel *per se* and thus are defamatory. See Gannett Co., *supra*.

12. Cohen has sworn to the fact that the allegations in the statements imputing her chastity, describing her as a whore and being disgustingly foul or filthy and being sexually promiscuous are completely untrue. See Cohen's Affidavit attached hereto.

13. As to whether the statements posted on the Blog are factual is a question of law. See Rinaldi, *supra* at 381. The Blogger(s) statements and specifically their use of the words "ho" and "skank" clearly go far beyond asserting opinions. They are used to factually define Cohen.

14. Moreover, the statements clearly refer to Cohen. In the earliest post on the Blog, the Bloggers state, "I would have to say that the first place award for 'Skankiest in NYC" would have to go to Liskula Gentile Cohen." It explicitly states Cohen's name as well as a picture of her. Cohen's full name, first name and picture are used throughout the postings. There can be no doubt that the defamatory statements were made about Cohen.

15. Further, by posting the writings and pictures on the Blog, the Bloggers broadcast the defamatory statements on the internet and clearly published and broadcast the statements to many more people than just Cohen. They were broadcast to anyone who could find the page. Indeed, as noted above, at least two people who work with one of Ms. Cohen's clients have mentioned the Blog's existence to her and expressed concern about her suitability to serve as a spokesperson and representative for the client's products.

16. Finally, with respect to injury to Cohen, she does not have to prove damages. As noted above, the postings on the Blog constitute libel *per se*. See Gannett Co., Inc., 40 N.Y.2d at 419. That being the case, "the law presumes damage to the slandered individual's reputation so that the cause is actionable without proof of special damages." 60 Minute Man v. Kossman, 161 A.D.2d 574, 575 (2d Dept. 1990). Therefore Cohen "need not establish damages as an element of [her] defamation cause of action, and...failure to do so [would] not require [dismissal]." Id. at 576. Despite the fact that proving damages is not necessary in this case, Cohen still demonstrated them in her affidavit. As she stated, she has suffered damages including personal humiliation, mental anguish and damage to her reputation and standing in the community and in her industry.

17. As to whether the information is material and necessary, if Cohen is unable to ascertain the identities of the Bloggers, she will be unable to bring a defamation suit at all since she will not know who the defendants are who she needs to sue. Thus, the information sought, the identity of the Bloggers is not only material and necessary to the actionable wrong, if she is denied the relief sought herein, it will foreclose on her ability to even bring this cause of action.

18. Since Cohen is able to state a cause of action of defamation against these anonymous defendants, the Court must order, pursuant to CPLR § 3102(c), pre-action disclosure by Google, Inc. and/or Blogger.com and order them to identify the Bloggers who posted the defamatory Blog about Cohen.

WHEREFORE, it is respectfully requested that an order be issued, pursuant to CPLR § 3102(c), for pre-action disclosure, and compelling Google, Inc. and/or Blogger.com to identify the Bloggers who posted the defamatory Blog about Cohen, together with such other and further relief as the court deems proper.

Dated: New York, New York
December 19, 2008

DANIEL J. SCHNEIDER, ESQ.