Fox Rothschild LLP
ATTORNEYS AT LAW

Mail: P.O. Box 5231, Princeton, NJ 08543-5231

Princeton Pike Corporate Center
997 Lenox Drive, Building 3
Lawrenceville, NJ 08648-2311
Tel 609.896.3600 Fax 609.896.1469
www.foxrothschild.com

Jeffrey M Pollock
Direct Dial: (609) 896-7660
Email Address: jmpollock@foxrothschild.com

July 22, 2009

VIA HAND DELIVERY

Clerk - Superior Court of New Jersey
Monmouth County
Civil Division
71 Monument Park
Freehold, New Jersey 07728-1266

Re: Too Much Media, LLC, et al. v. Shellee Hale, et al.
Docket No.: MON-L-2736-08

Dear Sir or Madam:

This firm represents defendant, Shellee Hale, in the above-referenced action. Enclosed for filing is an original and two copies of the following:

(1) Shellee Hale's Notice of Motion for Reconsideration, returnable on August 14, 2009;

(2) Certification of Jeffrey M. Pollock, Esq., with Exhibits;

(3) Brief in Support of Motion;

(4) Proposed form of Order; and

(5) Certification of Filing and Service.

Please file the originals and return a file-stamped copy to my waiting messenger, and please charge any applicable filing fees to our Superior Court Account No. 31965.

Thank you and please do not hesitate to contact me should you have any questions.

Respectfully submitted,

JEFFREY M POLLOCK

Encl.

cc: Joel N. Kreizman, Esq. (w/encl.) (via Hand-Delivery)
John Prindiville, Esq. (w./encl.) (via Federal Express)
Hon. Daniel M. Waldman, J.S.C. (w/encl.) (via Federal Express) (COURTESY COPY)

FOX ROTHSCHILD LLP
Formed in the Commonwealth of Pennsylvania
Princeton Pike Corporate Center
997 Lenox Drive, Building 3
Lawrenceville, New Jersey 08648-2311
(609) 896-3600
Attorneys for Defendant,
Shellee Hale

TOO MUCH MEDIA, LLC, JOHN ALBRIGHT and CHARLES BERREBBI,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY
Plaintiffs,	DOCKET NO.: MON-L-2736-08
v.	Civil Action
SHELLEE HALE and JOHN DOES 1 Through 13,	**NOTICE OF MOTION FOR RECONSIDERATION**
Defendants.	

TO: CLERK, LAW DIVISION
Superior Court of New Jersey
Monmouth County Courthouse
71 Monument Park
Freehold, New Jersey 07728-1266

JOEL N. KREIZMAN, ESQ.
Evans, Osborne and Kreizman, LLC
802 W. Park Avenue
Oakhurst, New Jersey 07755
Attorneys for Plaintiffs

SIR/MADAM:

PLEASE TAKE NOTICE that on Friday, August 14, 2009, at 9:00 a.m. in the forenoon or as soon thereafter as counsel may be heard, defendant, Shellee Hale, shall apply to the Superior Court, Law Division, Monmouth County, at the Monmouth County Courthouse, Freehold, New Jersey, for reconsideration of the Court's June 30, 2009 Orders and Opinion.

PLEASE TAKE FURTHER NOTICE that defendant will rely upon the Brief and Certification submitted herewith in support of this Motion.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is submitted herewith pursuant to R. 1:6-2.

PLEASE TAKE FURTHER NOTICE that oral argument is requested on this Motion.

FOX ROTHSCHILD LLP
Attorneys for Defendant,
Shellee Hale

By: _____
JEFFREY M. POLLOCK

DATED: July 22, 2009

CERTIFICATION OF SERVICE

BARRY J. MULLER, of full age, by way of certification, states as follows:

1. On this date, the original and two (2) copies of the within Notice of Motion and supporting papers were filed via Hand Delivery with the Clerk, Law Division, Superior Court of New Jersey, Monmouth County Courthouse, 71 Monument Park, Freehold, New Jersey 07728.

2. On this date, a copy of the within Notice of Motion and supporting papers were served via Hand Delivery upon:

JOEL N. KREIZMAN, ESQ.
Evans, Osborne and Kreizman, LLC
802 W Park Avenue
Oakhurst, New Jersey 07755
Attorneys for Plaintiffs

3. I certify that the foregoing statements made by me are true and correct. I am aware that if any of the foregoing statements are willfully false, I may be subject to punishment.

BARRY J. MULLER

DATED: July 22, 2009

FOX ROTHSCHILD LLP
Formed in the Commonwealth of Pennsylvania
By: Jeffrey M. Pollock, Esq.
Barry J. Muller, Esq.
Joseph Schramm, III, Esq.
Princeton Pike Corporate Center
997 Lenox Drive, Building 3
Lawrenceville, NJ 08648-2311
(609) 895-3317
Attorneys for Defendant, Shellee Hale

TOO MUCH MEDIA, LLC, JOHN ALBRIGHT and CHARLES BERREBBI,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY
Plaintiffs,	DOCKET NO.: MON-L-2736-08
v.	Civil Action
SHELLEE HALE and JOHN DOES 1 Through 13,	**CERTIFICATION OF JEFFREY M. POLLOCK**
Defendants.	**VOLUME I**

JEFFREY M. POLLOCK, Esquire, of full age, hereby says:

1. I am an attorney-at-law of the State of New Jersey and I am a partner in the law firm Fox Rothschild LLP, counsel for defendant, Shellee Hale ("Ms. Hale" or "Defendant"). I make this Certification based upon personal knowledge and in support of Ms. Hale's motion for reconsideration of the Court's June 30, 2009 Opinion.

2. Plaintiffs Too Much Media, LLC, John Albright and Charles Berrebbi (collectively, "Plaintiffs") filed a Complaint against Ms. Hale on June 10, 2008. A true and correct copy of Plaintiffs' Complaint is attached hereto as Exhibit 1.

3. A true and correct copy of the Transcript of Motions dated January 9, 2009 is attached hereto as Exhibit 2.

4. A true and correct copy of the Transcript of Motions dated April 17, 2009 is attached hereto as Exhibit 3.

5. A true and correct copy of the Transcript of Hearing, Morning Session I, dated April 23, 2009 is attached hereto as Exhibit 4.

6. A true and correct copy of the Transcript of Hearing, Balance of A.M. Session and Afternoon Session, dated April 23, 2009 is attached hereto as Exhibit 5.

7. True and correct copies of the Court's June 30, 2009 Opinion and accompanying Orders are attached hereto as Exhibit 6.

8. A true and correct copy of portions of the legislative history of 1979 N.J. Laws c. 479 (codified at N.J.S.A. 2A:84A-21.1 et seq.) is attached hereto as Exhibit 7.

9. A true and correct copy of Defendant's Exhibit 1 from the April 23, 2009 Hearing is attached hereto as Exhibit 8.

10. A true and correct copy of Defendant's Exhibit 2 from the April 23, 2009 Hearing is attached hereto as Exhibit 9.

11. A true and correct copy of Defendant's Exhibit 3 from the April 23, 2009 Hearing is attached hereto as Exhibit 10.

12. A true and correct copy of Defendant's Exhibit 4 from the April 23, 2009 Hearing is attached hereto as Exhibit 11.

13. A true and correct copy of Defendant's Exhibit 5 from the April 23, 2009 Hearing is attached hereto as Exhibit 12.

14. A true and correct copy of Defendant's Exhibit 6 from the April 23, 2009 Hearing is attached hereto as Exhibit 13.

15. A true and correct copy of Defendant's Exhibit 7 from the April 23, 2009 Hearing is attached hereto as Exhibit 14.

16. A true and correct copy of Defendant's Exhibit 8 from the April 23, 2009 Hearing is attached hereto as Exhibit 15.

17. A true and correct copy of Defendant's Exhibit 9 from the April 23, 2009 Hearing is attached hereto as Exhibit 16.

18. A true and correct copy of Defendant's Exhibit 10 from the April 23, 2009 Hearing is attached hereto as Exhibit 17.

19. A true and correct copy of Defendant's Exhibit 11 from the April 23, 2009 Hearing is attached hereto as Exhibit 18.

20. A true and correct copy of Defendant's Exhibit 12 from the April 23, 2009 Hearing is attached hereto as Exhibit 19.

21. A true and correct copy of Defendant's Exhibit 13 from the April 23, 2009 Hearing is attached hereto as Exhibit 20.

22. A true and correct copy of Defendant's Exhibit 14 from the April 23, 2009 Hearing is attached hereto as Exhibit 21.

23. A true and correct copy of Defendant's Exhibit 15 from the April 23, 2009 Hearing is attached hereto as Exhibit 22.

24. A true and correct copy of Defendant's Exhibit 16 from the April 23, 2009 Hearing is attached hereto as Exhibit 23.

25. A true and correct copy of Defendant's Exhibit 17 from the April 23, 2009 Hearing is attached hereto as Exhibit 24.

26. A true and correct copy of Defendant's Exhibit 18 from the April 23, 2009 Hearing is attached hereto as Exhibit 25.

27. A true and correct copy of Defendant's Exhibit 19 from the April 23, 2009 Hearing is attached hereto as Exhibit 26.

28. A true and correct copy of Defendant's Exhibit 20 from the April 23, 2009 Hearing is attached hereto as Exhibit 27.

29. A true and correct copy of Defendant's Exhibit 21 from the April 23, 2009 Hearing is attached hereto as Exhibit 28.

30. A true and correct copy of Defendant's Exhibit 22 from the April 23, 2009 Hearing is attached hereto as Exhibit 29.

31. A true and correct copy of Defendant's Exhibit 23 from the April 23, 2009 Hearing is attached hereto as Exhibit 30.

32. A true and correct copy of Defendant's Exhibit 24 from the April 23, 2009 Hearing is attached hereto as Exhibit 31.

33. A true and correct copy of Defendant's Exhibit 25 from the April 23, 2009 Hearing is attached hereto as Exhibit 32.

34. A true and correct copy of Defendant's Exhibit 26 from the April 23, 2009 Hearing is attached hereto as Exhibit 33.

35. A true and correct copy of Defendant's Exhibit 27 from the April 23, 2009 Hearing is attached hereto as Exhibit 34.

36. A true and correct copy of Defendant's Exhibit 28 from the April 23, 2009 Hearing is attached hereto as Exhibit 35.

37. A true and correct copy of Defendant's Exhibit 29 from the April 23, 2009 Hearing is attached hereto as Exhibit 36.

38. A true and correct copy of Defendant's Exhibit 30 from the April 23, 2009 Hearing is attached hereto as Exhibit 37.

39. A true and correct copy of Defendant's Exhibit 31 from the April 23, 2009 Hearing is attached hereto as Exhibit 38.

40. A true and correct copy of Defendant's Exhibit 32 from the April 23, 2009 Hearing is attached hereto as Exhibit 39.

41. A true and correct copy of Defendant's Exhibit 33 from the April 23, 2009 Hearing is attached hereto as Exhibit 40.

42. A true and correct copy of Defendant's Exhibit 34 from the April 23, 2009 Hearing is attached hereto as Exhibit 41.

43. A true and correct copy of Defendant's Exhibit 35 from the April 23, 2009 Hearing is attached hereto as Exhibit 42.

44. A true and correct copy of Defendant's Exhibit 36 from the April 23, 2009 Hearing is attached hereto as Exhibit 43.

45. A true and correct copy of Defendant's Exhibit 37 from the April 23, 2009 Hearing is attached hereto as Exhibit 44.

46. A true and correct copy of Defendant's Exhibit 38 from the April 23, 2009 Hearing is attached hereto as Exhibit 45.

47. True and correct copies of Ms. Hale's Notice of Motion to Dismiss and Supporting Brief are attached hereto as Exhibit 46.

48. True and correct copies of Ms. Hale's Notice of Motion for Application of the Newsperson's Privilege and for a Protective Order and To Seal Court Records and Proceedings, Supporting Brief, and Supporting Certification of Shellee Hale are attached hereto as Exhibit 47.

49. True and correct copies of Plaintiff's Memorandum in Opposition to Defendant's Motion for a Protective Order, Supporting Certification of John Albright and Supporting Certification of Joel N. Kreizman, Esq., are attached hereto as Exhibit 48.

50. True and correct copies of Plaintiff's Memorandum in Opposition to Defendant's Second Motion to Dismiss are attached hereto as Exhibit 49.

51. A true and correct copy of Ms. Hale's Letter Reply Brief in Further Support of Motion to Dismiss and Motion for Application of Newsperson's Privilege and for a Protective Order, with exhibits, is attached hereto as Exhibit 50.

52. A true and correct copy of Ms. Hale's Memorandum in Support of Motion *In Limine*, with exhibit, is attached hereto as Exibit 51.

53. A true and correct copy of Ms. Hale's Proposed Findings of Fact and Conclusions of Law is attached hereto as Exhibit 52.

54. A true and correct copy of Plaintiffs' Post Hearing Submission is attached hereto as Exhibit 53.

55. A true and correct copy of the transcript of Doty v. Molnar, No. DV 07-022 (Mont. Dist. Yellowstone Cy., Sept. 3, 2008, is attached hereto as Exhibit 54.

56. A true and correct copy of the opinion from Doe v. TS, Case No. 08036093 (Ore. Cir. Clackamas Cy., Sept. 30, 2008) is attached hereto as Exhibit 55.

I certify that the foregoing statements are true and correct, and that if any of the foregoing statements are willfully false, I am subject to punishment.

By: _____

DATED: July 22, 2009 JEFFREY M. POLLOCK

TOO MUCH MEDIA, LLC, JOHN ALBRIGHT and CHARLES BERREBBI,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY
Plaintiffs,	:	DOCKET NO.: MON-L-2736-08
v.	:	Civil Action
SHELLEE HALE and JOHN DOES 1 Through 13,	:	
Defendants.	:	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION

FOX ROTHSCHILD LLP
Formed in the Commonwealth of Pennsylvania
Princeton Pike Corporate Center
997 Lenox Drive, Building 3
Lawrenceville, New Jersey 08648-2311
(609) 896-3600
Attorneys for Defendant,
Shellee Hale

Jeffrey M. Pollock, Esq.
Of Counsel & On The Brief

Joseph Schramm III, Esq.
Barry J. Muller, Esq.
On The Brief

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PRELIMINARY STATEMENT

From late 2007 through 2008, Shellee Hale, a mother of five from Bellevue, Washington, was engaged in the investigation of corruption in the online porn industry. Shellee formed a website for purposes of writing about her findings (www.Pornafia.org), hired professional journalists to write for Pornafia, and, in the course of her investigation, interviewed witnesses on a confidential basis, researched what other reporters had found in the area of corruption in the online porn industry, and used her background as a computer programmer to gather and evaluate information. As her investigation progressed and after Shellee and some of her confidential sources received death threats, one of the adult entertainment industry companies that Shellee was investigating, Too Much Media, LLC, who suffered a security breach in its computer software that put the private information of thousands of consumers of online pornography at risk, filed this lawsuit sounding in defamation against her.

Offended by what Shellee had written and apparently hoping to uncover the sources upon which she relied, Too Much Media seeks to compel her deposition and identify her confidential sources and information. In response, Shellee filed a motion for application of the Newsperson's Privilege[1], for a Protective Order and to Seal Court Records and Proceedings. Shellee conducted her investigation with the purpose of disseminating news of significant importance to the general public and the Newsperson's Privilege protects from disclosure her sources, her investigative process and the information obtained in the course of her investigation. Moreover, Shellee's confidential sources have a right to maintain their confidentiality under New Jersey law. Further, due to the confidential and proprietary nature of the information and a prior threat, Shellee is entitled to a protective and sealing order limiting any disclosure to "attorneys' eyes only".

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[1] N.J.S.A. 2A:84A-21, et seq. (also referred to as the " Shield Law").

On January 9, 2009, the plaintiffs, through their counsel, Joel Kreizman, Esq., withdrew all claims for economic loss against Shellee and acknowledged that they are proceeding under the sole cause of action of slander per se. Plaintiffs agreed to limit their cause of action so as to avoid their discovery obligations in response to Shellee's motion to compel discovery of their financial information. Although plaintiffs concede that they sustained no quantifiable economic harm, they are prosecuting this lawsuit against Shellee in an effort to chill her free speech and prevent her from further investigating and reporting on matters of public concern. Shellee moved to dismiss the Complaint as the tort of slander per se is not actionable as there are no alleged oral publications. Further, in light of the near elimination of the slander per se doctrine and the admission of no quantifiable economic harm, the plaintiffs' claim must yield to the overriding Constitutional protection of a free press and informed citizenry.

Although this is a purely civil litigation and involves no criminal claims, and despite the fact that plaintiffs provided no sworn certifications or other evidence to refute Shellee's motives at the time she conducted her investigation, Judge Locascio erroneously conducted a hearing under N.J.S.A. 2A:84A-21.3, which pertains exclusively to criminal matters and the Confrontation Clause of the Sixth Amendment. Accordingly, Shellee argues, as she did previously, that there was no valid purpose to be served by any hearing or any findings therefrom, because the hearing was neither required by statute nor warranted by the motion record.

Rather, Judge Locascio should have decided the issues based on the motion record presented, and on the February 6, 2008 press release issued by Pornafia, which confirmed the purpose and intent of Shellee's investigation:

> *PRLog (Press Release) – Feb 06. 2008* – Recently launched http://pornafia.org is an information exchange in the fight against

> criminal activity within the global adult entertainment industry, which encompasses credit card fraud, ransomware, affiliate fraud, money laundering, and PPC fraud as well as other crimes.
> This effort came about in reaction to the unprecedented levels of criminal activity now rampant within the global adult entertainment industry, which have until now gone largely unchecked, with the aim of providing a cost free information resource for victims, potential victims, legitimate industry players, and pertinent government agencies worldwide.

Judge Locascio, although presented with evidence that Shellee acted as an investigatory journalist, spoke with sources and performed research and undercover work, held that the Newsperson's Privilege does not protect Shellee or her confidential sources and that the benefits afforded to the media regarding defamation law were not available to Shellee. Judge Locascio compounded this error by finding that Shellee's writings were slander and not libel even though the one decision that he found supporting this proposition was an unpublished Pennsylvania trial court decision that was subsequently reversed. The Judge also incorrectly held that, despite Mr. Kreizman's unequivocal statements to the contrary, the plaintiffs had not limited their cause of action to slander per se. Judge Locascio curiously reached this conclusion without conducting a hearing.

Judge Locascio completely failed to consider the rights of Shelee's confidential sources to maintain their confidentiality and Shellee's standing to assert these rights on their behalf, given the special relationship of "reporter and source". This issue was squarely raised by Shellee and is supported directly by the Dendrite[2] decision—but the Judge simply failed to even mention it. The Judge also failed to consider the confidential and proprietary nature of Shellee's information and sources and the prior threat, for which Shellee is entitled to a protective and sealing order. Finally, Judge Locascio's decision is effectively an unconstitutional content-based

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[2] Dendrite Int'l, Inc. v. John Doe, 342 N.J. Super. 134 (App. Div. 2001).

analysis of protected speech that purports to determine what is and is not "newsworthy", which can neither withstand strict scrutiny nor any Constitutional analysis.

For these reasons, and those set forth at length herein, Shellee respectfully requests that the Court grant reconsideration.

STATEMENT OF FACTS

To assist the Court, a complete factual background including substantially the same facts set forth in Shellee Hale's Proposed Findings of Fact and Conclusions of Law is included below. (Certification of Jeffrey M. Pollock, Ex. 52) (hereinafter, "Pollock Cert., __").

I. Shellee Hale's Family and Educational Background

Shellee Hale, a resident of Bellevue, Washington, was married in 1994 (Id., Ex. 4 (P. 20, Lns. 8-9)) and has five children, including one adopted child. (Id. (P. 20, Lns. 10-16; P. 23, Lns. 23-24)).

As a teenager, Shellee completed her high school classes at Mira Costa High School in Manhattan Beach, California as a junior in 1979 and spent her senior year of high school in a fast track program at El Camino College. (Id. (P. 21, Lns. 3-14)). Shellee graduated from high school in 1980, and then attended Mount St. Mary's College until 1984, where she majored in respiratory therapy. (Id. (P. 12-20)).

After her education at Mount St. Mary's, Shellee worked for Microsoft's corporate account division from 1986 to 1987. (Id. (P. 20, Lns. 21, P. 22, Lns. 7)). In 1987, Shellee left Microsoft to form Castle Consulting, a programming company in which she assisted clients in migrating their PC-based account system from ACCPAC BPI, a PC-based accounting system, to the As/400 Software 2000. While working for Castle Consulting, she was also involved in putting together policies and procedures for IT departments. (Pollock Cert., Ex. 4 (P. 22, Lns. 8-

25, P. 23, Lns. 12)). Shellee worked at Castle Consulting until 1994 when she took a break from the work force after having her first child. (Id. (P. 23, Lns. 20-25, P. 24, Lns. 2)).

II. Shellee Hale's Profession As A Life Coach

After 13 years at home with her family, in 2007, Shellee began working again in the field of life coaching. (Id. (P. 24, Lns. 3-6)). The life coaching process allows Shellee to help people to work with their agenda, improve their lives, and act as their "cheerleader." As a certified life coach, Shellee discusses family problems, education problems, business problems and a variety of other issues with her clients. (Id. (P.29, Lns. 17-22, P. 30, Lns. 3)). Today, Shellee runs two businesses, "Camandago" and "Coach Shellee," both of which have Internet websites, through which she provides life coaching and private investigation services. (See id. (P. 24, Lns. 7-17; P. 25, Lns. 7-10)).

Through her Coach Shellee business, Shellee offers Internet courses she has designed to "coach" families and individuals on a variety of issues. (Pollock Cert., Ex. 4 (P. 26, Lns. 12-18)). In order to facilitate her Internet courses, she uses a website that offers a two-way camera, with per-minute billing, to provide personal life coaching remotely to her customers. (Id. (P. 28, Lns. 21 P. 29, Lns. 8)).

III. Shellee Hale Is Victimized By Cyber Flashers During Her On-Line Life Coaching

During the course of her on-line life coaching, Shellee fell victim to "cyber-flashers" who used the two-way camera technology to sexually abuse women by entering the coaching room and turning on their camera while they were naked. (Id. (P. 28, Lns. 21, P. 29, Lns. 16)). When Shellee contacted the website company to complain and obtain the identities of the cyber-flashers, she was told to use the company's sister website to run her life coaching sessions. However, the cyber-flashing problem continued on that site as well. Shellee's complaints were

ridiculed because the company made most of its money in the adult entertainment section of its website, where naked women entertained men through a camera-to-camera basis. (Id. (P.30, Lns. 10-22)).

IV. Shellee Hale Forms Pornafia To Investigate And Report To The Public On Crime And Fraud In The Online Adult Entertainment Industry

In response to her "cyber-flashing" abuse, Shellee took action to protect and inform the public. She created an Internet website and online news magazine called "Pornafia"[3] so that she could report[4] to the public information she obtained regarding technical and criminal activity in the online adult entertainment industry as well as scams, fraud and technological issues in the porn business. (Pollock Cert., Ex. 4 (P. 27, Lns. 20, P. 28 Lns. 3); id., Ex. 5 (P. 88, Lns. 11-17)). On February 6, 2008, Shellee issued a press release about the creation and purpose of Pornafia, which was written by Rachel Shaw, Shellee's employee:

> **PORNAFIA: FIGHTING CRIMINAL ACTIVITY IN THE ADULT ENTERTAINMENT INDUSTRY**
>
> **Crime within the global adult entertainment industry is rampant and credit card fraud, identity theft, affiliate fraud and PPC fraud are some of the topics that pornafia.org serves as an information exchange for.**
>
> *FOR IMMEDIATE RELEASE*
> *PRLog (Press Release) – Feb 06. 2008* – Recently launched http://pornafia.org is an information exchange in the fight against criminal activity within the global adult entertainment industry, which encompasses credit card fraud, ransomware, affiliate fraud, money laundering, and PPC fraud as well as other crimes.
>
> This effort came about in reaction to the unprecedented levels of criminal activity now rampant within the global adult entertainment industry, which have until now gone largely unchecked, with the aim of providing a cost free information

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3 "Pornafia" is a combination of "porn" and "mafia." (Pollock Cert., Ex. 5 (P. 140, Lns. 18-19)).

4 The transcript incorrectly says "recording," instead of "reporting." (Id. (P.88, Ln. 14)).

> resource for victims, potential victims, legitimate industry players, and pertinent government agencies worldwide.
>
> [Id., Ex. 4 (P. 35, Lns. 5-20); id., Ex. 44.]

Pornafia's purpose remained unchanged from the period it was formed to the time the press release was issued. (Id., Ex. 4 (P. 36, Lns. 11-18)). Shellee designed Pornafia using a software product called "VBulletin," and hired journalists to write for the online news magazine portion of Pornafia. (Id., Ex. 5 (P. 143, Lns. 11-20)).

V. After Notifying The Authorities, Shellee Hale Creates Adult Entertainment Websites To Facilitate Her Investigation And Develop Credibility In The Industry

For purposes of her investigation and to develop her credibility in the adult entertainment industry, Shellee formed a limited liability company called "ES Enterprises" and created two camera sites for porn called "sexyteaser" and "sexyteaserguys." (Id. (P. 157, Lns. 8-11); id., Ex. 4 (P. 25, Lns. 15-25)). Prior to creating these websites, she discussed both sexyteaser and sexyteaserguys with both the Washington State Attorney General, Bob McKenna, and her Congressman's office (Id., Ex. 5 (P. 201, Lns. 13, P. 202, Lns. 5)), explaining to them that she was setting up porn sites under ES Enterprises to gain legitimacy in the adult industry in order to further her investigation, develop relationships, and introduce herself into the porn business under a pretext. (Pollock Cert., Ex. 5 (P. 158, Lns. 4-20; P. 201, Lns. 6-12; P. 196, Lns. 10-14; P. 197, Lns. 13)). Shellee generated no revenue from either sexyteaser or sexyteaserguys. (Id. (P. 158, Lns. 13-20)).

VI. Shellee Hale Investigates And Gathers Information On The Adult Online Entertainment Industry For The Purpose Of Informing The Public

In the course of her activities at Pornafia to investigate and inform the public of crime and fraud in the porn industry, Shellee engaged in an extensive investigation of the online adult entertainment industry (Id., Ex. 4 (P. 39, Lns. 11-13)), which included reviewing web pages of

porn-industry and mainstream media news sites; collecting information from and communicating with people in online forums such as gofuckyourself.com ("GFY.com"), weblogs ("blogs"); attending meetings and conventions; and interviewing people, sometimes on a confidential basis, involved in the porn industry. (Id. (P. 38, Lns. 21, P. 39, Lns. 19); id., Ex. 5 (P. 88, Lns. 20, P. 89, Lns. 4)).

As part of her investigation, Shellee reviewed messages and information which were exchanged and posted[5] on GFY.com, which is an Internet bulletin/message board where people exchange information regarding the online adult entertainment industry. (Id., Ex. 4 (P. 38, Lns. 5-20)). Justblowme.com is another Internet forum that Shellee visited on a regular basis for the purpose of collecting information for her investigation of issues of public importance, which she planned to report on. (Pollock Cert., Ex. 4(P. 49, Lns. 14, P. 50, Lns. 19)). On Facebook, for example, a user may permit only her friends to gain access to her site. In contrast, GFY.com is an open forum for the exchange of ideas that anyone can access; however, only registered users of GFY.com may post on the site. (Id. (P. 92, Lns. 14, P. 93, Lns. 4)).

Shellee also routinely reviewed and gathered articles from news websites, including, among others, MSNBC, Fox News, CNN, CNBC, ChewOnTech, TechCrunch, Slashdot,[6] Business Week, L.A. Times, Wall Street Journal, and New York Times. (Id., Ex. 5 (P. 15, Lns. 14, P. 16, Lns. 2)).[7] Another part of Shellee's investigation involved her travel to six adult industry trade shows throughout the United States and Canada, and her hiring of people to sign up for affiliate programs in the adult industry. (Id. (P. 165, Lns. 2-4; P. 184, Lns. 9-22)) An

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[5] Posts on GFY.com are written statements and are reviewed by many people. (Id., Ex. 5 (P. 4, Lns. 13-25)).

[6] The transcript improperly refers to "TechCrunch/dot" but Shellee referred to two distinct websites: "TechCrunch" and "Slashdot."

[7] Almost every single news source is now available electronically online, including most of the major television networks. (Id., Ex. 5 (P. 14, Lns. 22-24; P. 16, Lns. 3-6)).

affiliate program is a program where a website pays affiliates a commission for sending customers, or "traffic," to that website. (Id. (P. 61, Lns. 5-22; P. 62, Lns. 12-17); see also id. (P. 62, Lns. 4-6)).

Throughout her investigation, Shellee took notes regarding the information she obtained from these various sources. (Pollock Cert., Ex. 5 (P. 89, Lns. 5-7)). She used the information she obtained in the course of her investigation to further the stated purposes of Pornafia – namely, to inform the public of illegal and unethical practices in the porn industry. (Id., Ex. 4 (P. 39, Lns. 20-24)).

VII. Shellee Hale Investigates The Too Much Media Security Breach For The Purpose Of Informing The Public

During the course of her investigation undertaken for Pornafia, Shellee became concerned that there had been a security breach at Too Much Media ("TMM") on the Next-Generation Administration and Tracking System ("NATS"), which is the affiliate software program owned by plaintiff TMM. (Id., Ex. 5 (P. 27, Lns. 22, P. 28, Lns. 1); id., Ex. 4 (P. 60, Lns. 17-23)). Shellee conducted a detailed probe of the security breach, which could have an industry-wide impact on the security and confidentiality of the porn community, including reviewing the pleadings from a federal litigation involving TMM's NATS software (Naked Rhino v. Too Much Media, No. 3:06-cv-03988, D.N.J) and interviewing individuals, sometimes on a confidential basis. Shellee also reviewed several posts and news articles relating to a security breach in the NATS program, including:

- An October 26, 2007 post[8] was made by Registered User[9] Ycaza on October 26, 2007 under the heading "OC3 networks customers urgent" that states:

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[8] A post is a statement that a person, whether identifiable or not, makes in writing. Posts are available to anyone who visits a website. (Id., Ex. 4 (P. 52, Lns. 4-12)).

> **Ycaza:** If you are running nats i need you to calll [sic] me asap
> 818 636 6710
> Caz
>
> [Id., Ex. 8 (Post #1).]

- An October 28, 2007 post on justblowme.com by plaintiff John Albright,[10] using the moniker PBucksJohn, which states, in part:

> **PBucksJohn:** There are no known exploits in NATS. There was no exploit found. A few people took it upon themselves to tell people there was an exploit and it has ballooned into a mess of misinformation. We are currently investigating exactly what was said and by who, it will be handled [sic] over to our attorneys to be dealt with as they see appropriate. . . .
>
> (Id., Ex. 4 (P. 50, Lns. 20, P. 51, Lns. 3); id., Ex. 9 (Post # 5)).

- Posts dated October 28, 2007 on askdamagex.com, another adult industry bulletin board, that state, in part:

> **JD**: Quote:
> Originally Posted by **Viper**
>
> *. . .Then there was a post about some NATs admin PW[11] info being posted in some other places... On another board, someone posted that they have been told (seemed to imply NATs told them this) to tell all their clients to change their NATs admin password(s).*
>
> *So seems to be more going on... Or it could all just be a coincidence and unrelated events... Didn't find anything about a "backdoor exploit[12]" though. . .*

---

9 A "registered user" is someone who registers to be a part of the community on GFY.com. (Id., Ex. 5 (P. 89, Lns. 24, P. 90, Lns. 1)). There is no monetary charge to become a registered user of GFY.com. To become a registered user, one must fill out their name, address, user name, and upload one's pictures and bio information. Then, GFY.com must approve you. (Id. (P. 90, Lns. 2-13)).

10 John Albright is one of the owners of TMM. (Pollock Cert., Ex. 4 (P. 65, Lns. 20-23)).

11 "NATS admin P.W." means NATS administrative password. (Id., Ex. 4 (P. 62, Lns. 22-24)).

12 A "backdoor exploit" is programming that would allow one to get into a system, other than through the regular admin panel, perhaps through an open port or some other hole in the system. (Id. (P. 63, Lns. 13-17)). A "backdoor" is an obscure entry point left in a piece of software by the writer to enable them to get into a system without the user knowing. (Id. (P. 72, Lns. 17-23)). An "exploit" is a security hole in a software program, which provides an outside hacker the ability to illegally get into a system and gain information. (Id. (P. 64, Lns. 7-18)).

Spudstr: Apparently the guys at TMM are going after the people causing all the drama/problems. They asked us who said what and where and links/logs. They will be sending out Subpoenas shortly it seems.

Quote:

"Hi, Can you please provide what you heard and who you heard it from for legal purposes?

There is currently no known exploit. We are recommending everyone change their NATS admin and SSH passwords for all accounts which is good practice anyway.

Please provide us what you heard and who you heard it from as we are going to be conducting an investigation into what was said for legal purposes. Subpoenas will be issued if needed as these actions have been very damaging and we are taking them very seriously.

Thank you, John Albright"

[Pollock Cert., Ex. 4 (P. 57, Lns. 21-22; P. 57, Lns. 23, P. 58, Lns. 2); id., Ex. 45 (Posts #7, 8).]

- A December 21, 20007 a post by TMM on GFY.com that states:

TMM_John: If you use NATS and your members are being spammed, it is most likely one of two possibilities. Your server has somehow been compromised and people are grabbing the info directly off your server, or someone has compromised an admin password to your system. There are, of course, other possibilities, but these are the most likely scenarios.

You are not required to maintain an admin password for TMM to use. You are more than welcome to change this password to whatever you wish and grant us access only when it is needed upon your approval. Changing of all admin passwords on a regular basis is a highly recommended security practice.

Also, we have recently implemented remote security logging for admin accesses. You can now have the ability to log all admin accesses, IP addresses, and actions to a local or remote server location. If you are interested in setting this up please submit a support ticket and we will be glad to assist you. This does not send any data to our servers, it can be setup to log directly to anywhere you like.

> Server and software security is an extremely important and complicated issue. We are always doing all we can to protect your data and ours.
>
> [Id., Ex. 4 (P. 69, Lns. 1-15); id., Ex. 10 (Post #21).]

- Another post, within the same thread, by Registered User "TheSenator", which states, in part:

> **TheSenator:** Exploit or inside job?
>
> Someone has to be familiar with the NATS system to exploit that way.
>
> [Id., Ex. 10 (Post #38).]

- A December 22, 2007 post on GFY.com in which Registered User "Milan" suggests that the NATS security breach was an inside job and recommends that everyone change their passwords:

> After many MANY emails and VM's I will post what OC3 Networks discovered back in October after routine audit of 2 of our clients security.
>
> We know this issue exist since mid Aug 2007, secured our customers and blocked the intruder IP's from any access to our network.
>
> We posted the threat {url]http://www.gfy.com/showthread.php?t=779742[/url] and got some lawsuit treat [sic] to sue us that we could have care less...
>
> BUT when our customers that we tracked the breach on their servers got treats [sic] as well and requested us to NOT come out public with it, we honored their request.
>
> . . . .
>
> The issue with this "intruder" does not seem to be an exploit of the nats software itself. *Someone has access to TMM's clients database with your admin logins and passwords. That's what the issue is. I'm not posting this to bash TMM. I'm posting this because they have had month to fix this issue and have apparently failed. They didn't even let (some of?) their customers know they implemented this "Admin activity log" and installed it behind their backs.

I've been involved with a high number of NATS clients and have found the following to be true:

*)Changing all admin level account passwords stops the intruder. He still attempts to login, but in vain.

*) As soon as TMM has admin access to NATS the intruder is back. Sometimes the same day.

*)Intruder is using an automation script that dumps the NATS members list. In some cases he is doing this every hour on the hour.

. . . .

I have some suggestions for people using NATS:

*) Change all your admin level passwords.

*) Do not give TMM an admin account they can use anytime they want. Change the pass when they are done.

. . . .

*) Be thankful of many things I'll not get into.

P.S. Im hearing that there is a backdoor that TMM can use to get into your NATS, but I haven't investigated so its speculation. Only reason I even mention this is because NATS is encrypted and you don't know. Im not interested in decrypting NATS just to find out. There are other ways. I hope this isn't true.

[Id., Ex. 4 (P. 70, Lns. 17, P. 71, Lns. 18); Id., Ex. 11 (Post #1).]

- A December 23, 2007 post written by Keith on the site In Corruption We Trust ("ICWT"), entitled "Tens of Thousands of Adult Website Records Compromised," that pulled together in one source the information that was in little pieces on several of the adult blogs:

Tens of Thousands of Adult Website Records Compromised
Posted on 12.23.07 by Keith @ 12:00 am

. . . .

Too Much Media did everything it could to keep news of its exploits out of the public limelight and not much to fix the security issue itself. It is rumored that Too Much Media had even threatened to sue several people who spoke of the exploit in public, a rumor that seems to be confirmed by ICWT's experiences with them (more on this below).

....

There is also speculation that this whole thing could have been an inside job. We do not have confirmation of this.

[Id., Ex. 4 (P. 76, Lns. 24, P. 77, Lns. 4; P. 79, Lns. 5-10; P. 79 Lns. 23, P. 80, Lns. 5); id., Ex. 13 (P. 1).]

- A December 21, 2007 post on GFY.com in which people complained about receiving an unprecedented amount of spam[13] after signing up as an affiliate on several different programs that use the NATS software. (Id., Ex. 4 (P. 66, Lns. 13-22; P. 67, Lns. 1-16)).

A. Too Much Media Admits The NATS Security Breach

In continuing her investigation of the TMM security breach, Shellee learned that John Albright was informing people to change their NATS administrative passwords because there was a security breach. (Id. (P. 62, Lns. 25, P. 63, Lns. 7)). On December 22, 2007, John Albright published a post on GFY.com under the heading "Statement regarding the NATS security issue" in which TMM used GFY.com to issue a statement regarding its NATS software:

TMM_John: This issue has been a real eye opener for me.

First, I would like to address the issue. It appears at this point that a number of the non-unique admin usernames & passwords we maintain for support were compromised. All passwords were had changed were charged to a random string and we have destroyed our list and our mechanism of keeping it which resided on a local server in the office. We are still investigating whether or not someone accessed them from there and if so, how someone may have accessed that server. We have implemented a policy change in that we will no longer maintain any NATS admin accounts. We had made this change a while ago regarding SSH information. We are now doing this with all passwords. You will need to grant us access for any level of support. We have also contacted all clients to inform them of the security features in NATS they can utilize to better prevent any security situation from arising in the future.

Whether you are a NATS client or not you are more than welcome to contact us with any questions about these issues.

---

[13] "Spamming" is sending an unsolicited e-mail, trying to sell something. (Id., Ex. 4 (P. 67, Lns. 21-23)).

> Second, I would like to talk about our previous handling of the issue. Our security and the security of our clients is of extreme importance to us. We had become aware over the past few months that a few clients were being accessed wrongly using the account we maintain. We believed we had a way of knowing which clients were affected and we contacted them immediately. Apparently we were wrong. I apologize for this. As perfect as I wish we can be we are going to make mistakes from time to time. If we had known that the issue was more widespread we would have without question contacted everyone. We did not believe at the time it was a widespread issue. Again, this was a mistake on our part and I apologize to everyone for it. I was not trying to put blame on our clients for this and I'm sorry if I was taken that way. I was simply trying to point out the various possibilities as to what may have been going on while we were investigating it. This is not our clients fault in any way.
>
> Many people here have brought forth a lot of information and helped greatly with this issue. I am very grateful for that. However, I am sad to see so many people enjoying the problems we and our clients are having because they have some personal agenda. We never have a problem with anyone any stating issues we may have. I appreciate those who brought the issue up and contributed to what we hope is the resolution of it. However, there have been numerous misstatements and false accusations flying around. I assure you there is no backdoor in NATS which we use to access your system and I assure you Fred is not stealing your emails and spamming your members. These are just two of the many untrue things that we have been accused of over the past 72 hours. Due to all of this I will not be continuing a discussion of the issue here. I feel I have addressed what the issue is and I apologize again for our being wrong about it originally. I wish we hadn't been both for our sake and yours.
>
> Again, anyone is free to contact me to discuss this directly.
>
> [Pollock Cert., Ex. 4 (P. 74, Lns. 6, P. 75, Lns. 15); id., Ex. 12 (Post #1).]

Of course, Shellee understood this statement to mean that TMM had a security breach in NATS, which allowed someone to access TMM's customers' administration panels, and that TMM was advising everyone to change their passwords. (Id., Ex. 4 (P. 74, Lns. 16, P. 75, Lns. 6)).

Two days later, an article by Q Boyer on xbiz.com reported:

> **Too Much Media Comments on NATS Security Breach**

Too Much Media's co-founder said that an investigation is underway to determine scope of breach and precisely how it occurred.

XBIZ NEWS REPORT
By Q Boyer
Monday, Dec 24, 2007

FREEHOLD, NJ — Too Much Media, creators of the NATS affiliate tracking software, confirmed that the company has been the victim of a security breach through which an unspecified number of NATS clients' data also has been compromised.

"We have been made aware that we may have been a victim of a security breach in which access was made to one of our servers," Too Much Media co-founder John Albright told XBIZ. "It appears that certain non-unique usernames and passwords we maintained for administrative support of our clients were compromised."

Albright said that in light of the breach, "all passwords have been changed and passwords will be no longer be maintained by TMM."

According to Albright, no credit card information was at risk due to the breach, and that "preliminary indications are that the hacker was after email lists."

Asked how long TMM had been aware of the breach, Albright said that there had been a "lot of misrepresentation [as] to this," but verified that the company did "become aware of an issue a few months ago."

"We had determined what we at the time thought to be the extent of it and notified those who were affected," Albright said. "Also, as a precaution, we changed all of the admin passwords we maintained regardless of whether we had an indication they had been compromised or not. As soon as we became aware of the issue being more widespread we immediately contacted all of our clients and took the actions mentioned previously."

Albright took exception to the notion that the company had not notified its clients in a timely fashion, and defended the company's actions as being appropriate given the perceived degree of the breach's severity at the time it was first discovered.

"This is something being misrepresented by people," Albright said. "We take our security and the security of our clients very seriously.

[W]e contacted everyone we thought had been affected when we first knew of the issue and we contacted all clients as soon as we learned the issue was more widespread."

Asked what NATS clients should do in the short term to improve security on their end, Albright said TMM is "recommending all clients utilize the admin IP restriction feature which has been available in NATS for some time."

"Many clients had already taken advantage of this and other security features in NATS and were not affected by this breach," Albright said, adding that TMM has been in touch with their clients in order to gather information and to advise their clients about what steps to take.

"We have asked via statements, emails to clients, and news items posted in the NATS admin news and on our website that people submit a support ticket so we may advise them of the best actions to take," Albright said. "We have also taken actions on our end to change all passwords to any installs which may have been compromised and we are no longer maintaining those passwords.

We have modified our policy to no longer keep any passwords of any sort. Clients will need to grant us access to their install when any work is to be performed."

Albright said that an investigation is now underway to determine "the exact cause and level of the security breach."

"TMM intends to prosecute to the fullest extent possible anyone responsible for any breach of its servers and programs," Albright said.

In a statement issued over the weekend, Albright said that his company's handling of the situation had not been ideal and apologized for not taking more extensive action sooner, but attributed its limited actions to the fact that TMM was not aware of the full scope of the problem.

"If we had known that the issue was more widespread we would have without question contacted everyone," Albright said in the statement. "We did not believe at the time it was a widespread issue. Again, this was a mistake on our part and I apologize to everyone for it. I was not trying to put blame on our clients for this and I'm sorry if I was taken that way. I was simply trying to point out the various possibilities as to what may have been going on

while we were investigating it. This is not our [clients'] fault in any way."

[Id., Ex. 4 (P. 85, Lns. 25, P. 86, Lns. 4); id., Ex. 14.]

B. Shellee Hale Continues To Investigate The NATS Security Breach After Too Much Media's Admission

After TMM's admission, Shellee continued her investigation. She obtained and reviewed a December 24, 2007 posting on GFY.com that reported a press release that TMM issued. (Id., Ex. 4 (P. 87, Lns. 22, P. 88, Lns. 4; P. 89, Lns. 9-12); id., Ex. 15). In response to this posting, Registered User "tical" wrote:

> **tical:** i'm willing to bet this 'breach' went on for a LOT longer after nats was installed for amateurwealth.com (LONG ago) before we even went live I was getting spammed to my test transaction email addresses[14] (catchall emails that were never used before) i doubt we were hacked, we hadn't even announced anything at that point wouldn't be surprised if it was the same issue
>
> [Id., Ex. 15 (Post #9).]

The next day, Shellee continued her research and obtained and reviewed an article dated December 25, 2007 by Sherri L. Shaulis on business.avn.com, entitled "NATS FACING SECURITY ISSUE." (Pollock Cert., Ex. 5 (P. 9, Lns. 18-23); id., Ex. 16.) Shellee also obtained and reviewed a copy of several articles dated December 27, 2007: one by Lisa Friedman of the Los Angeles Daily News that appeared in the Columbus Dispatch, entitled "Data may have been stolen from viewers of online porn." (Id., Ex. 5 (P. 12, Lns. 9-25)); another from chewontech.com, an online news source, entitled "Tens of Thousands of Adult Website Records Compromised." (Id. (P. 13, Lns. 16, P. 14, Lns. 9)); and a third article dated by Keith of ICWT entitled "Don't Worry, Be Happy, Says Adult Industry – We're On It" in the course of her work for Pornafia. (Id. (P. 16, Lns. 17, P. 17, Lns. 9); id., Ex. 19)). This article states, in part:

> A disturbing portion of the adult industry has taken the "its [sic] just an e-mail address" stance with regard to the massive data breach at TMM/NATS that ICWT made (very) public this last week. As we have reported, the only thing we can confirm with any certainty is that e-mail addresses of porn buyers and affiliates have actually be misused and buyers are getting spammed to death as a result thereof.
>
> [Pollock Cert., Ex. 19.]

Shellee also reviewed articles relevant to the NATS security breach on the blog "pogowasright.org." Pogowasright.org is a news source that reports on different technical issues. (Id., Ex. 5 (P. 20, Lns. 7, P. 21, Lns. 21)). Shellee visited pogowasright.org because she was interested in reading other newspersons' perspective on the security breach as it hit mainstream media. (Id. (P. 21, Lns. 1-5)). The person behind pogowasright.org compiles various news stories on the blog so that the public has one place to go where they can see all types of security breaches that were reported in the news over the past week. (Id. (P. 24, Lns. 3-9)). Pogowasright.org reported on the NATS security breach on December 31, 2007.

Shellee continued her investigation into 2008, obtaining and reviewing a January 2, 2008 post by Keith on ICWT entitled "Adult Industry May Have Ignored Hack for Over a Year." (Id. (P. 26, Lns. 17, P. 27, Lns. 8); id., Ex. 22)). This article states, in part, that:

> This is an update to our ongoing investigation into the security breach at Too Much Media, makers of the NATS software that powers the back end of about 35% to 40% of the porn sites online. Word has come now that the software could have been breached as far back as 18 months ago from an industry news source – AVN. Today, they released an article entitled "NATS Security Problem May Not Be New". . . .
>
> [Id., Ex. 22.]

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[4] If one were spammed through a test transaction e-mail, they received spam at a specific e-mail address setup and used for testing purposes. (Id., Ex. 5 (P. 5, Lns. 6, P. 6, Lns. 5)).

At one point, Shellee received an e-mail from John Albright, in which he spoke about his program, NATS, and sent her a press release responding to the litigation. (Pollock Cert., Ex. 5 (P. 113, Lns. 8-21)). Shellee also obtained and reviewed an article on business.avn.com by Kathee Brewer dated January 2, 2008, entitled "NATS Security Problem May Not Be New." (Id. (P. 36, Lns. 19, P. 37, Lns. 1); id., Ex. 23).

The next day, Shellee, still investigating, obtained and reviewed a January 3, 2008 post on GFY.com by Registered User will76 related to the NATS security breach. (Id., Ex. 24 (Post #18)). That same day, she also obtained and reviewed a January 3, 2008 article by Keith on ICWT, entitled "ICWT in The Washington Post: January 4, 2008 Edition." (Id., Ex. 27; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)). She also obtained and reviewed a January 4, 2008 article by Keith B. Richburg in The Washington Post, entitled "User Data Stolen From Pornographic Web Sites," (Id., Ex. 25; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)) and a January 4, 2008 article from StarTribune.com entitled "Watching porn on Internet? It might not be your secret." These articles all provide information on the NATS security breach. (Pollock Cert., Ex. 26; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)). The next day, Shellee obtained and reviewed a January 5, 2008 article by Keith B. Richburg in The Boston Globe, at boston.com/news, entitled "Security breach on Web porn sites: Consumer data theft could affect tens of thousands," which also reports on the NATS security breach. (Id., Ex. 28; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)).

The following week, Shellee continued investigating, reviewing three articles dated January 11, 2008: one by Geoff Mulvihill, an Associated Press writer, on sfgate.com, entitled "Breach Worries Online Porn Industry;" (Id., Ex. 29; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)); one by Geoff Mulvihill on msnbc.msn.com, entitled "Security breach worries online porn world: Hackers gain access to various adult Web sites' subscriber lists;" and one by Keith on ICWT,

entitled "Associated Press Picks Up ICWT Story on Too Much Media. (Id., Ex. 31; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)). These three articles provides information on the NATS security breach.

Shellee also obtained and reviewed articles dated January 14, 2008 -- one by Geoff Mulvihill on ioltechnology.co.za, entitled "Breach worries online porn industry," (Id. Ex. 32; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)) and another by the Associated Press on foxnews.com, entitled "Data Theft Has Web-Porn Sites, Customers Worried," both articles providing information on the NATS security breach. (Id., Ex. 33; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)).

Shellee's investigation continued for months, and she also obtained and reviewed a March 19, 2008 article by Q Boyer on xbiz.com, entitled "NR Media Moves to Amend Lawsuit Against Too Much Media." This article provides information on the NATS security breach and the litigation between NR Media Inc. and TMM, and provides a link to the proposed amended "hybrid class action" complaint. (Pollock Cert., Ex. 38; id., Ex. 5 (P. 84, Lns. 22, P. 85, Lns. 9)).

In the course of her investigation, Shellee reviewed many of the Oprano website pages and postings. (Id., Ex. 5 (P. 89, Lns. 23-25)). Oprano is an online community forum, self-described as the adult Wall Street Journal, where commentators can post information (Id. (P.89, Lns. 18, P. 90, Lns. 1-4); id., Ex. 35) Oprano provides moderators and administrators who oversee the forum and have the ability to edit, modify and delete posts, move threads and perform other actions. (Id., Ex. 36.)

Through her research on several blogs and forums, Shellee learned that people claimed John Albright had threatened them. (Id., Ex. 5 (P. 155, Lns. 10-15)). Shellee also reviewed discussions, posts, websites and statements about TMM threatening litigation against people who spoke about the security breach. (Pollock Cert., Ex. 4 (P.80, Lns. 18-23)).

In her investigation of the security breach in the NATS program, Shellee did not only look at internet sources, she also spoke with people. (Id., Ex. 5 (P. 28, Lns. 15-20)). Importantly, Shellee spoke with some of her sources on a confidential basis. (Id. (P. 28, Lns. 21-23)). Shellee compiled and maintained a record of the information obtained from her sources and investigation; however, she has not yet published her final report on her investigation of the NATS security breach based upon this information. (Id. (P. 31, Lns. 6, P. 32, Lns. 6)).

VIII. Shellee Hale Disseminates To The Public The Information Obtained From Her Investigation Through Posts On Pornafia And Oprano

During her investigation, Shellee wrote and published several articles consistent with the mission of Pornafia. (Id. (P. 121, Lns. 24, P. 122, Lns. 2, P. 134, Lns. 1-5)). In addition, Shellee posted on Oprano to inform the public regarding the misuse of technology, affiliate fraud in the porn industry, scams, and other issues, as well as to debate issues. (Id. (P. 90, Lns. 21, P. 91, Lns. 6-9)).

To inform the public and direct them to an article that she wrote on Pornafia, Shellee published a post on Oprano, on or about March 17, 2008, regarding two separate lawsuits arising from security issues with affiliate software programs, one lawsuit involving a company named Commission Junction and the other TMM. (Pollock Cert., Ex. 5 (P. 93, Lns. 16, P. 94, Lns. 1, 15-18); id., Ex. 37 (Post #2)). Both of these lawsuits involved litigation regarding affiliate software programs. (Id., Ex. 5 (P. 94, Lns. 2-6)). With the knowledge of her Pornafia investigation, Shellee published posts on Oprano to inform the public that an amended lawsuit was being filed against TMM (with regard to the security breach) and of the contents of that lawsuit. (Id. (P. 91, Lns. 23, P. 92, Lns. 2-10)). Shellee believed that the security threat and breached information was an issue of public interest because the public needed to know to

change their passwords, close accounts, and be aware that their credit or personal information could be compromised. (Id. (P. 92, Lns. 15, P. 93, Lns. 8)). Her post states, in part:

> **Shelleehale:**
>
> . . . .
>
> Consumer's personal information is fair game to every thief online Read the 2much media Nats depositions (not yet public but copies are out there – Charles and John may threaten your life if you report any of the specifics which makes me wonder) and the commission junction (class action by affiliates) law suit http://www.pornafia.org/showthread.php?t=24 and you would understand the depths of the schemes and fraud and how the unethical and illegal use of technology has become common practice. . .
>
> [Id., Ex. 37 (Post #2.]

Shellee had more than one source, including sources that she communicated with on a confidential basis, for the information stated in this post. (Id., Ex. 5 (P. 107, Lns. 9-17)).

This confidential source told Shellee that John Albright had "threatened their life." Shellee was originally told this information by a third party, but then called the recipient of the threat directly to confirm this information. (Id. (P. 110, Lns. 8-24)). Shellee again published on Oprano on or about March 19, 2008 (Id. (P. 95, Lns. 21, P. 96, Lns. 19); id., Ex. 39 (Post #1)), posting an article entitled "The Collapse of the Affiliate Marketing Model." (Id., Ex. 5 (P. 96, Lns 20, P. 97, Lns. 20)). After communicating with John Albright through the instant messaging[15] program ICQ, Shellee followed on this post by publishing the following post on Oprano:

> Let me just clarify that this is my personal opinion after reading and speaking with several people.

---

[15] Instant Messaging is computer-to-computer, generally one-to-one person, written interaction. These people are usually sitting at their computers at two different locations and are writing back and forth in real time. (Id. (P. 99, Lns. 15, P. 100, Lns. 18)). In contrast to an e-mail, which is permanent until it is deleted, an instant message is not normally maintained on the system. (Id. (P. 104, Lns. 17-24)).

> Mr. John Albright has personally contacted me to let me know he "has not threatened anyone." But I was told something different from someone who claims differently and a reliable source.
>
> I guess I have just pissed off a whole slew of people this week but when it all comes down to it they say the "truth" will set you free.
>
> Now only time will tell if these two legal battles will collapse and forever change the affiliate marketing model and just maybe I won't feel like using my voice to express my opinion was a death sentence. I would rather be tied to the solution than the problem. So, when you start seeing the replacement of Affiliate with Value Added Reseller or some other name to add distinction and distance from this we will know.
>
> [Pollock Cert., Ex. 5 (P. 98, Lns. 9-19); id., Ex. 39 (Post #3).]

Shellee published another post on Oprano, on or about March 19, 2008, informing the public of the litigation involving TMM, John Albright, and Naked Rhino/N.R. Media.[16] (Id., Ex. 5 (P. 115, Lns. 8-16); id., Ex. 39 (Posts #7, 8).) However, she does not recall whether she posted a copy of Keith from ICWT's article "Tens of Thousands of Adult Website Records Compromised" on Oprano, or whether someone else made this post after logging in with her user name and password. (Id., Ex. 5 (P. 116, Lns. 2, P. 117, Lns. 3)).

After reviewing all of the materials and information she had collected in her investigation, Shellee published a post on Oprano, on or about April 1, 2008, to inform the public that John Albright had publicly confirmed that e-mail addresses were stolen from the NATS security breach. (Id. (P. 117, Lns. 22, P. 118, Lns. 14)). She followed up on this information by posting a series of questions to raise the public's awareness of the security breach, its scope and the legal ramifications:

---

[16] The transcript improperly refers to this as "N.R. Media" as "Inarmedia."

> **Shelleehale:** Do you think there is traceable revenue[17] on the stolen email addresses from the security leak?
>
> Do you think that we will find that traffic, spam, re-directs are found on a adult site owned or operated by a TMM owner/employee?
>
> Is there a potential class action law suit by customers who's email addresses were compromised and were not informed of this theft as soon as TMM became aware of it?
>
> How many customers had a increase of spam or malware after signing up under a site managed by TMM and is there some relevancy connecting the two?
>
> There has been new legal complaints filed daily on spam and malware across the country; this case is in Federal Court I don't think the case will go under the radar and the exposure and answers to the above questions will get answered.
>
> Anyone know who the John/Jane Does are?
>
> [Id., Ex. 42.]

In addition to publishing her posts on Oprano, Shellee also published posts about the TMM security breach on Pornafia. (Pollock Cert., Ex. 5 (P. 140, Lns. 20, P. 141, Lns. 1)).

IX. As A Result Of A Death Threat And The Instant Lawsuit, Shellee Hale Was "Chilled" From Publishing Her Final Report And The Information Obtained Through Her Investigation

Although Shellee investigated and collected information on TMM and on their competitor for purposes of informing the public through Pornafia's news magazine, she has not yet presented the full results of her investigation. (Id. (P. 136, Lns. 13-17; P. 179, Lns. 1-11)). The posts that Shellee published on Oprano are only "small brief parts" of the more extensive statements that she intended to publish in Pornafia's online magazine. (Id. (P. 122, Lns. 3-16)).

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[17] In this post, "traceable revenue" means revenue from stolen e-mail addresses that could be traced to a security breach. (Id. (P. 119, Lns. 2-16)).

Shellee did not publish her complete findings for two reasons. First, "Ron at 12-clicks," a customer of TMM, called Shellee and gave her information related to TMM's NATS security breach, but threatened to kill Shellee if she ever repeated the information. (Id. (P. 123, Lns. 17-25; P. 131, Lns. 7-10)). Second, she was sued by Plaintiffs TMM, Charles Berrebbi and John Albright for defamation, false light and trade libel. (See id. (P. 122, Lns. 17-22; 134, Lns. 18-22)). As a result, she took Pornafia offline.

Had Shellee's life not been threatened and had she not been sued, she would have published her full investigatory report. (Pollock Cert., Ex. 5 (P. 134, Lns. 23-25)). However, because she deemed the death threat valid, Shellee determined that she could consolidate and use the information that she had collected in another way instead of publishing it on Pornafia. (Id. (P. 136, Lns. 4-9)). Shellee is working to publish a fictional book on organized crime and online porn. (Id. (P. 179, Lns. 12, P. 182, Lns. 180)).

X. Too Much Media Sues Shellee Hale

As mentioned above, in response to Shellee's posts on the Oprano message board related to her investigation for Pornafia, plaintiffs TMM, John Albright and Charles Berrebbi, filed a Complaint on June 10, 2008 alleging defamation, false light and trade libel. (See id., Ex. 1). However, on January 9, 2009, in order to avoid producing personal and financial information in response to Shellee's legitimate discovery requests, Plaintiffs voluntarily withdrew all claims other than slander per se. (See id., Ex. 2 (P. 8, Lns. 3-13; P. 17, Lns. 15, P. 18, Lns. 4)). Plaintiffs admit they cannot show any pecuniary harm and sought to proceed solely on the basis of "presumed damages." (Id. (P. 9, Lns. 23, P. 11, Lns. 3; P. 17, Lns. 18, P. 19, Lns. 20)).

That same day, the court ordered Shellee to attend a deposition via teleconference. It is undisputed that Plaintiffs intend to depose Shellee about her confidential sources and information

obtained in the course of her investigation for Pornafia and which she intended to report on the website. In response, Shellee filed a motion (1) for a protective order (pursuant to N.J.S.A. 2A:84A-21 and otherwise) and (2) to dismiss the complaint, pursuant to R. 4:6-2(e), on grounds that Plaintiffs are unable to sustain a claim for slander per se because (a) the communications in question are written (libel) and not oral (slander) and (b) because Plaintiffs admit they cannot prove pecuniary damages and must rely on presumed damages. On April 17, 2009, Judge Locascio determined that he was required to conduct a plenary hearing pursuant to N.J.S.A. 2A:84A-21.3(b) and (c) to adjudicate whether Shellee has made a prima facie showing that she is entitled to the protections of the Shield Law. (Pollock Cert., Ex. 3 (P. 58, Lns. 5-17)).

The plenary hearing was held six (6) days later on April 23, 2009. The Court heard a full day of testimony from Shellee and limited testimony from plaintiff John Albright. On June 30, 2009, the Judge issued an opinion and accompanying orders (the "Opinion") holding that (1) the protections of the Shield Law were not available to Shellee and she may not protect her confidential sources and information under the Shield Law, and (2) Plaintiffs can proceed on their claim. (See id., Ex. 6).

First, the trial court held that the Shield Law did not apply to Shellee because it was unconvinced that she "[i]s in any way involved with any 'news media for the purpose of gathering . . . or disseminating news for the general public.'" (Id., p. 8) Additionally, the court determined that Shellee's postings on Oprano, although certainly an "electronic means" of transmission, are not "similar" enough to any of the news sources recognized by N.J.S.A. 2A:84A-21(a) to warrant invoking the Shield Law to protect Shellee's confidential sources. (Pollock Cert., Ex. 6, at 9). The court based this determination on its conclusion that the Shield Law does not protect authors where there has been no required fact-checking, no editorial

review, and little accountability. (Id. at 9). After disregarding Shellee's certification, which detailed her investigation, as a "sham affidavit," the Opinion, states that because her final story was never published on Pornafia, scant evidence exists that she intended to "[d]isseminate anything newsworthy to the general public." (See id. at 9-10). The court acknowledged Shellee's testimony that she intended to publish her full investigation on Pornafia, but held that she does not possess the kind of "journalistic objectivity and creditability" necessary to invoke the Shield Law's protections. (Id. at 10).

As to Shellee's motion to dismiss, the court, first determined that Shellee is not entitled to the legal protection that in defamation cases journalists must have acted with actual malice because "[t]he issue, membership in adult websites" is not an issue of public concern. Next, the court held that Plaintiffs can maintain their cause of action without proof of special harm because the alleged statements constitute libel per se. (Id. at 16). Finally, the court rejected Shellee's arguments that (1) Plaintiffs limited their cause of action to slander per se, (2) Internet postings are more akin to libel than slander, and (3) Plaintiffs cannot recover for the "actual harm inflicted," including impairment to reputation and mental anguish, without evidence of an pecuniary damages, through witnesses offering "competent evidence concerning the injury." (Pollock Cert., Ex. 6, at 18).

The court's Opinion contains palpably incorrect and irrational conclusions of law, neglects to appreciate uncontested evidence before it, and fails to address a number of significant issues raised in the motion papers. As set forth herein, the Opinion warrants reconsideration.

ARGUMENT

I. The Court's June 30, 2009 Orders And Opinion Should Be Reconsidered

A. The Legal Standard

A motion to amend or reconsider a court's opinion may be made at any time until the entry of final judgment. See Pressler, Current N.J. Court Rules, comment 1 to R. 4:49-2; see also R. 4:42-2. Reconsideration is left to the sound discretion of the court, and is to be exercised in the interests of justice. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) (citing Johnson v. Cyclop Strapping Corp., 220 N.J. Super. 250, 257, 263 (App. Div. 1987), cert. denied, 110 N.J. 196 (1988)).

Reconsideration is warranted if a court's decision is based on plainly incorrect reasoning, if it has failed to consider evidence, or if there is good reason for it to consider new information. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). That is, a court should reconsider its decision in "those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria, supra, 242 N.J. Super. at 401; see also R. 4:49-2.

B. Reconsideration Of The Court's June 30, 2009 Orders And Opinion Is Warranted

Respectfully, each of these standards compel reconsideration in this case. Because of the Opinion's (1) palpably incorrect and irrational conclusions of law and (2) failure to address significant issues presented by the parties, reconsideration is warranted. As a preliminary matter, Judge Locascio came to his irrational conclusions of law and overlooked probative evidence after he incorrectly held that a hearing was required under the Shield Law, pursuant to N.J.S.A.

2A:84A-21.3, which applies only to criminal cases where the defendant's Sixth Amendment right to confront witnesses may overcome the Shield Law.[18]

After improperly holding a hearing purportedly to determine the applicability of the Shield Law, the Judge issued an Opinion and Orders that contain several errors of law based upon palpably incorrect and irrational basis. First, basic principles of tort law are at odds with the Opinion's finding that Shellee's alleged defamatory written publications constitute slander and not libel, and that the Plaintiffs may proceed with their cause of action without proof of monetary damages. Second, the Opinion failed to appreciate uncontroverted, competent evidence in finding that Shellee's investigation did not fall within the scope of the Shield Law. Third, the Judge crafted an unconstitutional content-based regulation of protected speech. Finally, the Judge made a palpably incorrect finding that Plaintiffs need not prove actual malice, which was not even addressed at oral argument.

In addition, the Opinion fails to address a number of issues presented in the motion papers, including whether good cause exists for the issuance of a protective order independent of the Newsperson's Privilege; whether discovery subject to the protective order should be sealed from public access; whether good cause exists to seal oral arguments, motions, and briefs designated by the parties to be filed under seal; and whether the privacy rights of Shellee's confidential sources outweigh the Plaintiffs' motives in this litigation. The Opinion's failure to so much as mention the above issues warrants reconsideration. For the reasons set forth herein, reconsideration of the court's June 30, 2009 Opinion is warranted.

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[18] See Resorts Int'l Inc. v. NJM Associates, 180 N.J. Super. 459 (Law Div. 1981), reversed by 89 N.J. 212 (1982).

II. Reconsideration Is Necessary Because The Court Made Palpably Incorrect And Irrational Errors Of Law

A. The Court Improperly Held A Hearing On The Applicability Of The Newsperson's Privilege Based Upon A Palpably Incorrect Reading Of The Shield Law

On April 17, 2009, Judge Locascio ordered a hearing to determine whether the Shellee can invoke the Shield Law after referring to N.J.S.A. 2A:84A-21.3 and determining that it must hold a plenary hearing. When Shellee's counsel advised the Judge that such a hearing was inappropriate, the Judge responded: "In fact, it's obvious that it doesn't apply [only in criminal cases] because two statutes before that, [N.J.S.A.] 2A:84A-21.1, specifically talks about a criminal situation, but [N.J.S.A.] 2A:84A-21.3 does not." (Pollock Cert., Ex. 3 (P. 55-58)).

The Judge failed to recognize that the Shield Law is absolute in civil cases and in this case, a hearing as to the applicability of the Newsperson's Privilege was not only unnecessary, but was an improper limitation of the Legislature's intent. N.J.S.A. 2A:84A-21.1 and -21.3 were both passed as part of one law, 1979 N.J. Laws c. 479 (codified at N.J.S.A. 2A;84A-21.1 et seq.), to govern the resolution of conflicts between a criminal defendant and a newsperson he wants to subpoena in his defense. See Biunno, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 508 (2009). Indeed, the voluminous legislative history of this bill leaves no doubt, "[t]he provisions of the bill [1979 P.L. 479, codified as N.J.S.A. 2A:84A-21.1 et seq.] are only applicable when a criminal defense is involved at the trial level." (See, e.g., Pollock Cert., Ex. 7). The language of N.J.S.A. 2A:84A-21.1, which applies the remaining sections of the Shield Law, reinforces the Legislature's intent to apply the procedures in N.J.S.A. 2A:84A-21.1 et seq. solely to criminal proceedings:

> [w]here a newsperson is required to disclose information pursuant to a subpoena issued by or on behalf of a defendant **in a criminal proceeding**, not including proceedings before administrative or

> investigative bodies, grand juries, or legislative committees or commissions, **the provisions and procedures in this act are applicable to the claim and exercise of the newsperson's privilege** under Rule 27 (C. 2A:84A-21).
>
> [N.J.S.A. 2A:84A-21.1 (emphasis added).]

The language of N.J.S.A. 2A:84A-21.3 further clarifies that this statute applies only to criminal matters, because subsection (b) of the statute permits the party seeking enforcement of a subpoena to overcome the Newsperson's Privilege by making a proper showing of need and inability to obtain the materials through an alternate source. In criminal cases, it is possible to overcome the privilege provided by the Shield Law because of the criminal defendant's Sixth Amendment right to confront and cross-examine witnesses.

However, the law is clear that in civil cases the Shield Law establishes an **absolute** privilege not to disclose sources, editorial processes and other confidential information involved in publication of an alleged libel. See Maressa v. New Jersey Monthly, 89 N.J. 176 (1982), cert. denied, 459 U.S. 908 (1982); see also Resorts Int'l Inc. v. NJM Associates, 89 N.J. 212, 215 (1982). As stated by our Supreme Court in Resorts:

> As we acknowledged in Maressa, the Shield Law makes it more difficult for libel plaintiffs to prove their case. However, the Legislature has decided to provide increased protection for news media at the expense of potential libel plaintiffs. This is a legislative choice that the United States and New Jersey Constitutions permit.
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> [89 N.J. at 216].

Even the trial court in Resorts acknowledged that the statutory piercing provision of N.J.S.A. 2A:84A-21.3 applied only to criminal matters:

> The significance of the legislation at this point, however, is that it appears to relate exclusively to cases involving defendants in a criminal proceeding. Indeed, defendants do not suggest otherwise. **The fact that the Legislature has recently reexamined this area**

> **and has chosen not to change the procedures applicable in civil settings is significant.** Under normal statutory construction the Legislature is presumed to know of the outstanding case law interpreting a particular statute. Having taken no steps to change the legislation in a way which would reject the readings given to it by Brogan and Beecroft, this court must assume that the Legislature intended to keep them intact. **Nor does a broad reading of the amendments which would apply the new procedures to a civil setting seem to be a fair interpretation.** This is particularly true in view of the "universal recognition" that statutory privileges, being in derogation of the common-law right to obtain information on matters directly in issue, should be strictly construed.
>
> [Resorts, 180 N.J. Super. at 468-69 (Law Div. 1981), reversed by 89 N.J. 212 (1982) (internal citations omitted) (emphasis added).]

Thus, there is no room for the trial court to hold a plenary hearing on the applicability of the Newsperson's Privilege in any civil case, especially where plaintiffs provided no sworn certifications or other evidence to refute Shellee's motives at the time she conducted her investigation. It was error for the trial court to hold this plenary hearing in the first place, which only set the stage for the court's improper and erroneous conclusions that, in the absence of any evidence to contradict Shellee's testimony, it knew better than Shellee what she did or did not intend to do with the results of her investigation for Pornafia and that the court could determine as a matter of law what constitutes news.

B. The Opinion Incorrectly Determined That The Newsperson's Privilege Did Not Apply To Shellee Hale In Connection With Her Investigation Of Information She Intended To Disseminate To The Public On Pornafia

The trial court's decision that Shellee and her confidential sources are not protected by the Newsperson's Privilege is palpably incorrect, irrational and irreconcilable with the evidence presented. See D'Atria, supra, 242 N.J. Super. at 401. First, the protections of the Shield Law are triggered in this case by Shellee's investigation for Pornafia. In civil actions, the Shield Law grants newspersons an absolute privilege to not disclose sources, editorial process and other

confidential information involved in publication of an alleged defamatory statement. Maressa, supra, 89 N.J. at 185. The Shield Law provides in pertinent part:

> Subject to [N.J.R.E. 530], a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal . . . proceeding . . . .
>
> (a) The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
>
> (b) Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.
>
> [N.J.S.A. 2A:84A-21.]

The Shield Law defines "news" as meaning

> any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.
>
> [N.J.S.A. 2A:84A-21a(b).]

The term "news media" includes "printed, photographic, mechanical or electronic means of disseminating news to the general public." N.J.S.A. 2A:84A-21a(a) (emphasis added). Notably, the availability of the privilege does not turn on whether the information was "derived from a confidential source." Kinsella v. Welch, 362 N.J. Super. 143, 152 (App. Div. 2003); see also In re Woodhaven Lumber & Mill Work, 123 N.J. 481, 490 (1991). The privilege is absolute, even in defamation actions, and affords complete protection against the disclosure of confidential sources and the editorial processes leading to the publication of an alleged libel.

Maressa, supra, 89 N.J. at 185. The New Jersey Supreme Court has repeatedly observed that the privilege created by N.J.S.A. 2A:84A-21 "was intended by the legislature to be as broad as possible." Maressa, supra, 89 N.J. at 187 (citing State v. Boiardo, 82 N.J. 446, 457 (1980)); see also In re Farber, 78 N.J. 259, 271 (1978).

In fact, New Jersey courts have applied the privilege so broadly that the individual claiming the privilege need not be actively involved in gathering and disseminating the news. See Gatsman v. North Jersey Newspapers, 254 N.J. Super. 140, 144-45 (App. Div. 1992). For example, an editor engaged in transmitting or compiling information such as unsolicited letters may claim the Newsperson's Privilege, which protects the confidentiality of the authors of such published letters. Id. at 145. In the same vein of maintaining a broad privilege, New Jersey courts have broadly construed the terms "news media" and "news." Kinsella, supra, 362 N.J. Super. at 153-54; see, e.g., Woodhaven, supra, 123 N.J. at 497-98 (privilege applies to unpublished photographs taken by news photographer at fire); In re Avila, 206 N.J. Super. 61, 66, (App. Div. 1985) (privilege applies to free twenty-page Spanish-language tabloid); In re Burnett, 269 N.J. Super. 493, 500-02 (Law Div. 1993) (privilege applies to information used in preparation of annual insurance rating report issued by industry trade publication). In Kinsella, the court construed the phrase "news media" to encompass the filming of video footage, which was never aired or published, for a reality television show:

> We recognize that the mere fact a videotape is taken for use in a television show does not automatically mean that the videotape producer is part of the "news media." We also recognize that most television shows do not consist of "news." It is clear, however, that "news" is not limited to reports of significant public events. Local television news programs are sometimes dominated by pictures of fires, accident scenes and interviews of crime victims or their families. Even network national news programs frequently broadcast "human interest" stories that may be considered more entertaining than informative. News magazine programs such as

> "60 Minutes" and "20/20," which present feature stories on topics that range from in-depth examinations of important public issues to interviews of entertainment celebrities, have become a common form of television show. In view of the variety of topics covered by news shows and the shadowy boundary between "news" and "entertainment," the Supreme Court has observed that "courts should be chary of deciding what is and what is not news."
>
> Under the broad definition of "news media" and "news" contained in N.J.S.A. 2A:84A-21a(a) and (b), we are satisfied that NYT is part of the news media and that the videotaping of "Trauma: Life in the E.R." constitutes "newsgathering" that is entitled to protection under the Shield Law.
>
> [Kinsella, supra, 362 N.J. Super. at 154-55 (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985)).]

Consistent with the Legislature's intent to broadly apply the Newsperson's Privilege, New Jersey courts have held that freelance reporters, though not directly employed by the news media, are clearly "connected with" them and entitled to claim the privilege. In re Napp Technologies, Inc., 338 N.J. Super. 176, 186-87 (Law Div. 2000). The privilege belongs to the newsperson and not the source, and may be asserted irrespective of whether the source expects, requests or is promised anonymity. State v. Boiardo, 83 N.J. 350 (1980); Gatsman, supra, 254 N.J. Super. at 146. In addition, under New Jersey law, an anonymous source has his or her own right to remain anonymous. See, e.g., Dendrite Int'l, Inc. v. John Doe, 342 N.J. Super. 134 (App. Div. 2001). Partial disclosures or the assertion of affirmative defenses do not constitute a general waiver of the privilege. Maressa, supra, 89 N.J. at 194.

i. The Court Failed To Appreciate The Significance Of Probative Evidence That Shellee Was A Person Connected With News Media Entitled To The Protection Of The Shield Law

As a matter of law, Pornafia is "news media" because it is an electronic means of disseminating news to the general public. See N.J.S.A. 2A:84A-21a(a). Shellee created Pornafia as an information exchange in the fight against criminal activity within the global adult

entertainment industry. Her goal was to provide a cost-free information resource for victims, potential victims, legitimate industry players, and pertinent government agencies worldwide. (Pollock Cert., Ex. 44). No evidence was presented to rebut the stated purpose of Pornafia as presented in the press release issued by Pornafia under Shellee's direction.

Despite the fact that the Shield Law does not impose education requirements to trigger the Newsperson's Privilege, the Judge denied Shellee and her confidential sources the protection afforded by the Legislature because he was unconvinced that Shellee, a private investigator with a degree in respiratory therapy, but no journalism degree, is in any way involved with the news media for the purpose of gathering or disseminating news for the general public. (See id., Ex. 6, at 3, 8). The Opinion then seemingly conflates Pornafia and Oprano, which are two separate websites, and launches into a discussion of Oprano, holding that "defendant's message board postings, although certainly an 'electronic means' of transmission" are not similar to any of the news sources mentioned in N.J.S.A. 2A:84A-21a(a). (See Pollock Cert., Ex. 6, at 9). The Judge court failed to recognize that Oprano is merely a message board where Shellee published posts that sparked this lawsuit; Pornafia was an online news media that Shellee created and for which she conducted an investigation that led her to confidential sources that the Plaintiffs now seek to discover. (Pollock Cert., Ex. 5 (P. 122, Lns. 3-16)). Notably, the Opinion is devoid of any discussion as to whether Pornafia is "news media" within the meaning of the Shield Law.

While Pornafia and Oprano may have similar audiences, Shellee researched for and intended to post her report on Pornafia, not Oprano. (Id., Ex. 4 (P. 27, Lns. 20, P. 28 Lns. 3; P. 39, Lns. 11-13); id., Ex. 5 (P. 88, Lns. 11-17)). Shellee hired journalists to write for the front-end of Pornafia, which was a news magazine similar to an online newspaper. (Id., Ex. 5 (P. 143, Lns. 11-20)). The stated purpose of Pornafia, to inform and educate the public on fraud and

corruption in the online adult entertainment industry, is unrebutted and supported by Shellee's testimony as well as independent evidence including the Pornafia press release, issued in February of 2007, more than a month before Shellee published any of the allegedly defamatory material. (Id., Ex. 44). However, despite the uncontroverted evidence before it and without any evidence whatsoever to support its findings, the Judge concluded that Shellee did not intend publish on Pornafia.

Thus, the Opinion's finding that Shellee was not a person connected with news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public warrants reconsideration because the Judge failed to appreciate the significance of probative, competent evidence that Shellee conducted a detailed investigation for months for information intended to be published on Pornafia. Reconsideration of the court's Opinion is further warranted because the Judge failed to properly respect the Legislature's intent to broadly construe the Shield Law. See D'Atria, supra 242 N.J. Super. at 401.

ii. The Court Made Palpably Incorrect Findings That The Shield Law Does Not Protect Shellee Hale

The Opinion also relies upon a palpably incorrect basis for its finding that the Shield Law does not protect Shellee, particularly where the trial court delves into her credentials. (See Pollock Cert., Ex. 6, at 8 ("Defendant has presented no credible evidence to this court that she ever worked for any 'newspapers, magazines . . . .'")). Under New Jersey law, even freelance reporters, though not employed by the news media, are clearly "connected with" them. In re Napp Technologies, supra, 338 N.J. Super. at 186-87. Shellee, as owner and creator of Pornafia and employer of journalists, was clearly connected with the news media. As a result, whether Shellee, the founder of an online news magazine, was ever actually employed by any newspapers

is irrelevant and the Opinion's reliance upon this fictitious standard under the law warrants reconsideration.

New Jersey's Constitutional right to free speech and its Shield Law are among the broadest in the nation, and our courts have consistently, applied the Shield Law broadly to effectuate the Legislature's intent to protect the integrity of the news reporting process. It therefore follows that New Jersey, like other jurisdictions, would apply its Shield Law to the dissemination of news over the Internet. Unlike most other privileges, the New Jersey Supreme Court recognized that "a newsperson's privilege has a constitutional foundation. . . . the United States Supreme Court has unanimously recognized that a reporter's gathering of information receives some First Amendment protection." Maressa, supra, 89 N.J. at 184 (citing Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (opinion of White, J., joined by Burger, C.J., and Blackmun, Rehnquist, JJ.); id. at 709 (Powell, J. concurring); id. at 712 (Douglas, J., dissenting); id. at 725 (Stewart, J. dissenting, joined by Brennan and Marshall, JJ.)). In contrast to the United States Constitution, the New Jersey Constitution's free speech provision is "an affirmative right[19], broader than practically all others in the nation." See Green Party v. Hartz Mountain Indus., 164 N.J. 127, 145 (2000). In this vein, the New Jersey Supreme Court has repeatedly observed that the privilege created by the Shield Law, N.J.S.A. 2A:84A-21, "was intended by the legislature to be as broad as possible." See Maressa, supra, 89 N.J. at 187 citing State v. Boiardo, 82 N.J. 446, 457 (1980); see also In re Farber, supra, 78 N.J. at 271. Thus, the Legislative intent and

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[19] "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." [N.J. Const. art. I, § 6.]

constitutional underpinnings of the Shield Law are furthered by New Jersey courts following those jurisdictions applying their shield laws to the dissemination of news over the Internet.

Other jurisdictions, with even more narrow statutes, have applied their Shield Laws to Internet communications. For example, California's Shield Law protects bloggers' confidential sources. In O'Grady v. Superior Court, Jason O'Grady, a blogger who owns and operates "O'Grady's PowerPage," an online news magazine devoted to news and information about Apple Macintosh computers, sought to protect his confidential sources of information. 139 Cal. App. 4th 1423, 1431-32 (Cal. Ct. App. 2006). The Court of Appeals of California, Sixth Appellate District, rejected the reasoning of the trial court, who had ruled that Mr. O'Grady was not entitled to the protection of the shield law because he "took the information and turned around and put it on the PowerPage site with essentially no added value." Id. at 1456. Rather, the California Court of Appeals reversed, and, mindful of the free speech rights of its citizens, declined to decide what constitutes "legitimate" journalism or news, declaring that:

> [a]ny attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.
>
> [Ibid.]

Notably, California's Shield Law is less protective than New Jersey's Shield Law, for it applies only to the source of any information procured for publication in a "newspaper, magazine, or other periodical publication[]." Compare Cal. Const., Art. I, § 2, subd. (b), with N.J.S.A. 2A:84A-21a(a) ("news media" means newspapers, magazines, press associations, news agencies, wire services, radio, television **or other similar. . . electronic means** of disseminating news to the general public." (emphasis added)). Nonetheless, even though California's statute

did not specify electronic publications like New Jersey's Shield Law, the O'Grady Court found that California's Shield Law protected Mr. O'Grady's website because the purpose of the statute was to protect "[a]ll ongoing, recurring news publications while excluding nonrecurring publications such as books, pamphlets, flyers and monographs." O'Grady, supra, 139 Cal. App. 4th at 1466. As New Jersey's Shield Law is broader and provides a more expansive definition of "news media," its protection undoubtedly applies to Shellee's newsgathering activities.

Other states, including Montana and Oregon, have also applied their shield laws to protect the identity of anonymous commenters on message boards attached to reporters' articles, a holding expressly rejected by the trial court in this case. See Doty v. Molnar, No. DV 07-022 (Mont. Dist. Yellowstone Cy., Sept. 3, 2008);[20] see also Doe v. TS, Case No. 08036093 (Ore. Cir. Clackamas Cy., Sept. 30, 2008);[21] see also Pollock Cert., Ex. 6, at 9 ("[t]he written public comments below the articles are made by people who need only provide a username, similar to posting on any message board, and thus should not qualify for the same protections as the author of the article in response to which the comments are made.").

Montana has recognized that comments posted to a newspaper's website are part of the newsgathering process. In Doty v. Molnar, the plaintiff in a defamation action subpoenaed *The Billings Gazette*, seeking the identity of three anonymous individuals who posted comments on the newspaper's website. The court granted *The Billings Gazette's* motion to quash, ruling that Montana's shield law protected the commenters' identifying information. Doty, supra, at 29-30. Montana's shield law provides that a news organization or any person "connected with or employed by [a news organization] for the purpose of gathering, writing, editing, or

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[20] A true and correct copy of the transcript of Doty v. Molnar, No. DV 07-002 (Mont. Dist. Yellowstone Cy., Sept. 3, 2008) is attached to the Pollock Cert. as Exhibit 54.

disseminating news" may not be required to "disclose any information obtained or prepared or the source of that information . . . if the information was gathered, received, or processed in the course of [a reporter's] employment or [a news organization's] business." Mont. Code Ann. § 26-1-902(1) (2007). The Doty court held that this language was broad enough to encompass data gathered in connection with the posting of comments on a newspaper's website.

Similarly, Oregon has applied its shield law to protect the identity of the author of anonymous blog comments as unpublished information obtained in the newsgathering process. Doe v. TS, Case No. 08036093 (Ore. Cir. Clackamas Cy., Sept. 30, 2008). The TS Court relied upon Or. Rev. Stat. § 44.520(b), which protects "[a]ny unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public." Or. Rev. Stat. § 44.510(1) defines "information" as including "any written, oral, pictorial or electronically recorded news or other data." Ibid. (emphasis added). The court characterized the anonymous commenter's IP address as data. Because the comment was related to the blog post, the court held that the newspaper obtained this data in the course of newsgathering and, therefore, it was protected from disclosure.

The federal bench has held that the First Amendment reporter's privilege extends to bloggers. Blumenthal v. Drudge, 186 F.R.D. 236, 244 (D.D.C. 1999) ("Drudge II"). In Blumenthal, a former White House Assistant sued Mr. Drudge for defamation in response to published comments accusing the plaintiff of spousal abuse. 992 F.Supp. 44, 46 (D.D.C. 1998) ("Drudge I"). Mr. Drudge operates a blog known as "The Drudge Report," which the court characterized as "a gossip column focusing on gossip from Hollywood and Washington, D.C." Id. at 47. During a discovery dispute in the ensuing litigation, the court applied the First

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[21] A true and correct copy of the opinion from Doe v. TS, Case No. 08036093 (Ore. Cir. Clackamas Cy., Sept. 30, 2008) is attached to the Pollock Cert. as Exhibit 55.

Amendment reporter's privilege to Mr. Drudge and denied the plaintiff access to information about Mr. Drudge's sources. Drudge II, supra, 186 F.R.D. at 244.

The trial court, in rejecting the case law of other jurisdictions that have applied their Shield Laws (which are more narrow than that of New Jersey), in situations similar to Shellee's, disregarded the clear mandate of New Jersey's Supreme Court and irrationally limited New Jersey's Shield Law. Thus, reconsideration is appropriate.

iii. The Court Made An Impermissible Content-Based Regulation Of Constitutionally Protected Speech

Courts in other jurisdictions have expressly declined to determine what is and what is not news for fear of trampling on the First Amendment. See, e.g., O'Grady, supra, 139 Cal. App. 4th 1456. Instead of heeding that wisdom, the Judge instead essentially rendered a content-based restriction on protected speech, and determined that Shellee never intended to disseminate anything newsworthy to the general public. (See, e.g., Pollock Cert., Ex. 6, at 10). On the way, the Opinion pays lip service to the jurisprudence of the United States Supreme Court, which mandates that "[C]ourts should be chary of deciding what is and what is not news" and instead did just that. Kinsella, supra, 362 N.J. Super. at 154 (quoting Harper & Row Publishers, Inc. v. Nation Enters, 471 U.S. 539, 561 (1985)).

Here, the Judge took action that infringed on Shellee's constitutionally-protected right to free speech based solely on the Judge's opinion as to what constitutes "news." Restrictions on speech based on its content are "presumptively invalid" and subject to strict scrutiny. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007); see also State v. DeAngelo, 197 N.J. 478, 486 (2009) (content-based restrictions on speech are subject to "the most exacting scrutiny."). Here, the court's determination that Shellee was not reporting

"anything newsworthy" is an impermissible content-based restriction on free speech, warranting reconsideration.

C. The Court Irrationally And Improperly Failed To Enforce Plaintiffs' Dismissal Of Their Claims Other Than Slander Per Se

Plaintiffs are judicially estopped from pursuing any claims other than slander per se. In order to avoid compliance with their discovery obligations, plaintiffs dismissed all of their claims except slander per se and limited their recovery to seeking only presumed damages. Plaintiffs conceded that the only damages they seek are presumptive damages (whatever those may be):

> THE COURT: What are you seeking by way of damages here?
>
> MR. KREIZMAN: We're seeking presumed damages.
>
> THE COURT: What does that mean in English?
>
> MR. KREIZMAN: Basically, it's up to the jury. It's like a punitive damage thing. It's up to the jury –
>
> [Pollock Cert., Ex. 2 (P. 10, Lns. 25, P. 11, Lns. 7).]

Under New Jersey law, slander per se is the only cause of action in defamation which damages are "presumed." The doctrine of slander per se (or presumed damages) "has been all but abandoned" and "is on its last legs in New Jersey, and may no longer be a viable jurisprudential basis for awarding damages where there is no demonstrable harm" as is the case here. McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 317, 320 (App. Div.), certif. denied, 166 N.J. 606 (2000). In fact, the Appellate Division in Biondi v. Nassimos, 300 N.J. Super. 148, 155-56 (App. Div. 1997), noting that the "presumed damages" doctrine had been "severely criticized" as allowing compensation when there is no harm, instructed the lower courts to invoke the doctrine of slander per se "only in cases where it clearly applies." The doctrine is clearly inapplicable here because slander per se requires an oral statement. See

McLaughlin, supra, 331 N.J. Super. at 312, 321 (refusing to apply slander per se doctrine to radio commercial, which "was more akin to libel than to slander.").

Indeed, Plaintiffs' counsel acknowledged this when he withdrew all claims except the disfavored tort of slander per se:

> MR. PRINDIVILLE: Well, if his -- if his claim is going to be I'm limiting my recovery, my potential recovery against this defendant to the singular issue of whether or not we've been slandered per se; and, therefore, there's presumed damages, then he may have something to talk about, but we don't know that.
>
> THE COURT: Are you limiting it to that?
>
> MR. KREIZMAN: Yes. I've said that.
>
> [Id. (P.17, Lns. 18, P. 18, Lns. 1).]

In fact, the Judge commented that if the Plaintiffs could not prove their slander per se claim, then they lose their case:

> THE COURT: Well, how does it have any bearing, Mr. Prindiville, in view of his two concessions today? He's not seeking actual damages. He's only seeking damages to reputation, which are presumptive, if he gets it to be a per se case. If it's not per se, then I guess he's going to lose. Right?
>
> [Id. (P. 21, Lns. 9-15).]

Despite this unambiguous understanding of the court and the parties, the Judge surprisingly found (without any testimony) that plaintiffs did not limit their claims and may now proceed under the theory of defamation per se, which is a distinct concept from slander per se. (Pollock Cert., Ex. 6, at 16). In order to support his efforts to keep plaintiffs' sinking complaint afloat, the Judge claimed to have adopted the reasoning of an unpublished[22] Pennsylvania trial court decision, which was subsequently reversed.

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[22] R. 1:36-3 states in pertinent part that "[n]o unpublished opinion shall constitute precedent or be binding upon any court . . ."

The Opinion claims that the court in Klehr v. JPA Development, No. 0425, 2006 Phila. Ct. Com. Pl. LEXIS 1 (Pa. C.P. Jan 4, 2006), rev'd without opinion, 898 A.2d 1141 (Pa. Super. Ct. 2006), (Pollock Cert., Ex. 49) "felt the more appropriate label for defamatory material on the internet is not slander per se, but rather "defamatory per se." (See Pollock Cert., Ex. 6, at 17). However, under New Jersey law:

> the term **"per se" is used in connection with two quite distinct concepts in the law of defamation**. The term "defamation per se" refers to a statement whose defamatory meaning is so clear on its face that the court is not required to submit the issue to the jury. On the other hand, 'slander per se,' . . . refers to four categories of slander which are considered so clearly damaging to reputation that a plaintiff may establish a cause of action without presenting any evidence of actual damage to reputation.
>
> [Biondi, supra, 300 N.J. Super. at 153, n. 2 (internal citations omitted) (emphasis added).]

The Klehr opinion contains no indication as to which of these two quite distinct concepts it refers to, and makes no mention of either damages or slander per se. Instead, the Klehr opinion makes the conclusory statement that "[t]he lawsuit involves two websites which this court has found, and the Superior Court agrees, contain material that is defamatory *per se.*" Klehr, supra, 2006 Phila. Ct. Com. Pl. LEXIS at 2; Pollock Cert., Ex. 49. The trial court unreasonably seized upon this language to equate Internet postings with slander rather than libel. Rejecting Shellee's contention that her alleged postings, which are written, can only be considered libel, the Opinion states that "[a]lthough internet postings are indeed written, because of their instantaneity, they are also somewhat comparable to spontaneous oral statements" and points to the Klehr Court's label for defamatory material on the Internet as "defamatory per se." (See Pollock Cert., Ex. 6, at 16-17).

The trial court's reliance on an overruled, unpublished Pennsylvania opinion, which would turn New Jersey slander and libel law on its head, cannot stand. Under New Jersey law, rather than Pennsylvania law, slander is oral defamation and libel is written defamation. See Riccardi v. Weber, 350 N.J. Super. 452, 475 (App. Div. 2002) (distinguishing oral and written defamation). This longstanding distinction is clearly set forth in a dedicated section of the *Restatement (Second) of Torts*:

> **§ 568. Libel and Slander Distinguished**
>
> (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
>
> (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those states in Subsection (1).
>
> (3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

Here, Plaintiffs allege that Shellee published defamatory statements on the Oprano message board, and the Opinion acknowledges that all of the alleged defamatory statements appear in writing. (See Pollock Cert., Ex. 6, at 16). Oprano users have the ability to view messages and posts over an extended period of time and to publish reply posts and messages. Oprano provides moderators and administrators who oversee the forum and have the ability to edit, modify and delete posts, move threads and perform other actions. (Id., Ex. 36). Unlike an Internet chat room, which involves "real time communication" and immediate, fleeting dialog, Oprano users post messages which may be read, reviewed and responded to by others at any point in time. Shellee's postings on Oprano are all written. (Id., Ex. 37, 39, 40, and 42). Unlike dialogue in an Internet chat room and oral statements, Shellee's posts are subject to being edited,

modified and even deleted at the discretion of the site's moderator or administrator. Thus, Shellee's postings on Oprano, if defamatory, are libel, not slander.

Further, even if Shellee's postings constitute slander, they do not rise to the level sufficient to sustain plaintiffs' one remaining claim of slander per se. First, slander per se requires an oral statement. As fully set forth above, the alleged defamatory posts by Shellee are in printed word and therefore would be considered libel. Thus, as a matter or law, the plaintiffs cannot establish a claim for slander per se. Even if, however, Shellee's statements were spoken, they do not fall into the four (4) narrow categories of slander per se.

The slander per se doctrine is limited to false statements of fact which "impute (1) commission of a crime, (2) contraction of a loathsome disease; (3) occupational incompetence or misconduct, and (4) unchastity of a woman." See Ward, 136 N.J. at 526, citing Gnapinsky v. Goldyn, 23 N.J. 243, 250-51 (1957).[23] The plaintiff bears the burden to prove each element by clear and convincing evidence. Russo v. Nagel, 358 N.J. Super. 254, 263 (App. Div. 2003) citing Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149 (2000); Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 165 (1999).

As detailed in Shellee's Memorandum in Support of Motion *In Limine* (Pollock Cert., Ex. 51 (P. 11-14)), the alleged defamatory posts contained within the Complaint, as a matter of law, either: (1) do not fall within the four recognized categories of slander *per se*; or (2) are not actionable statements of fact. Therefore despite the Judge's attempts to distort established New Jersey law to accommodate plaintiffs and their counsel, the jurisprudence of this state prohibits them from proceeding on their one remaining claim of slander per se. The court's decision to the

[23] Not to be confused with "defamation *per se*" which is merely a statement, if found to be untrue, is defamatory as a matter of law. Biondo, supra, 300 N.J. Super. At 153, fn. 2.

contrary, ignorance of New Jersey defamation law and reliance upon Klehr were palpably incorrect and warrant reconsideration.

D. The Court Made The Palpably Incorrect Finding that Plaintiffs Need Not Prove Actual Malice Because Plaintiffs' Security Breach, Which Placed At Risk The Private Information Of Countless Individuals, Was Not A Matter Of Public Concern

The Judge incorrectly determined that an Internet security breach placing at risk the private information of countless individuals was not a matter of public concern. Indeed, the Opinion's framing of this very issue is telling of its failure to recognize the public importance of a NATS security breach:

> Hale is neither a journalist nor a member of the media; she is a private person with unexplained motives for her postings. She is not commercially competitive with plaintiffs, who are not public officials, **nor is the issue, memberships in adult websites, an issue of public concern** in the same way that a teacher's conduct around children, or contaminated water are matters of public concern. Thus, in order to prove its [their] case, plaintiff[s] need not prove actual-malice.
>
> [Pollock Cert., Ex. 6, at 13 (citations omitted) (emphasis added).]

The issue that Shellee was investigating, as extensively explained in the motion record and developed at the plenary hearing, was a security breach in TMM's NATS software that put the private information of countless individuals at risk and the possibility that TMM had been dilatory in notifying customers whose personal information may have been compromised in violation of the Identify Theft Prevention Act, N.J.S.A. 56:8-161, et seq. The issue is not merely "membership in adult websites," as noted by the Judge.

Under New Jersey law, willful or reckless violations of the Identity Theft Protection Act are violations of the New Jersey Consumer Fraud Act. See N.J.S.A. 56:8-161. In a defamation case brought by a business against a member of the press, if substantially all the allegations set

forth in the article, if true, would support a consumer fraud complaint, then the actual-malice standard will apply. See Tuft Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 427 (1995). Here, as set forth above, Shellee was involved in reporting and investigating a security breach and possible violation of the New Jersey Consumer Fraud Act related to TMM and its NATS software. Indeed, the court's own finding that Shellee "is not commercially competitive with plaintiffs" supports the application of actual malice protection to Shellee. (See Pollock Cert., Ex. 6, at 13). As New Jersey's Supreme Court proclaimed:

> [a] media defendant is unlikely, for the most part, to derive a direct economic benefit from harming the reputation of a person who is the subject of a story. That is a critical reason why, under our common law, it is sensible to give the media enhanced protections when it publishes information on subjects related to health and safety, highly regulated industries, and consumer fraud . . . . Conversely, when a business owner maligns his competitor in the marketplace for apparent economic gain, it is difficult to reach the conclusion that such commercially disparaging expressions are at the heart of free speech values or implicate any of the concerns that animated the New York Times decision.
>
> [Senna v. Florimont, 196 N.J. 469, 495-96 (2008).]

Shellee, by the court's own admission, is not commercially competitive with Plaintiffs, and it is difficult to see how she could derive a direct economic benefit from harming the reputation of a person who is the subject of her story. Thus, the rationale behind providing the press with the protection of the actual malice standard is equally applicable to Shellee. Had the trial court conducted the proper analysis under Senna's "content, form, and context" formula, Plaintiffs would be required to show actual malice on Shellee's part to proceed with their claim.

Finally, the trial court ignored the fact that numerous mainstream news outlets reported on the security breach of TMM's NATS software.[24] (See e.g., Pollock Cert., Ex.s 25, 26, 28-30,

[24] Including, among others, MSNBC, Fox News, The Washington Post, Los Angeles Daily News, and Associated Press.

33). These reports, which are in the record, were plainly disregarded by the Court and demonstrate that the security breach in TMM's NATS software is an issue of public concern. Because Shellee, who was associated with Pornafia (a news media) intended to report on a matter of public concern, and because the rationale for applying the actual-malice standard to the press equally applies to Shellee even if she is not a member of the press, Plaintiffs must show that Shellee acted with actual malice. For these reasons, reconsideration of the court's contrary finding is warranted.

III. Reconsideration Is Necessary Because The Court Failed To Address A Number Of Issues Presented In The Motion Papers

A motion for reconsideration is properly based on "matters . . . which counsel believes the court has overlooked." R. 4:49-2. Reconsideration is warranted in this case because the Opinion fails to even mention, let alone decide, whether good cause exists for a protective order independent of the Newsperson's Privilege, whether good cause exists to seal discovery, oral argument pleadings, motions and briefs from public access, or whether the privacy rights of Shellee's confidential sources trump the Plaintiff's motives in this litigation. Because these issues were presented to the court and fully briefed, counsel respectfully believes the court has overlooked these matters and, thus, that reconsideration is warranted.

A. The Court Failed To Determine Whether Good Cause Exists For The Issuance Of A Protective Order Independent Of The Newsperson's Privilege

While Shellee reported the results of her investigation of the security breaches in the Plaintiffs' software system in her individual capacity, she currently uses the same confidential sources, investigative process and information in her business as a consultant and private investigator to investigate corrupt and illegal online business practices, including computer hacking and theft of private information. Shellee's ability to perform services as a private

investigator is dependent upon her confidential investigative process and business relationships with clients and sources. Requiring her to disclose this information in public will destroy her career and ability to help and inform the public, as well as expose third-parties to the potential threat of litigation, emotional distress and/or physical harm.

This issue was fully briefed in Ms. Hale's Brief in Support of Defendant's Motion for Application of the Newsperson's Privilege and for a Protective Order and to Seal Court Records and Proceedings. (See Pollock Cert., Ex. 47 (P. 13-17)). Reconsideration on this point is warranted because, although being fully briefed and before the court, the Opinion does not mention, let alone discuss, whether good cause exists for the issuance of a protective order independent of the Newsperson's Privilege.

B. The Court Failed To Determine Whether Discovery Subject To The Protective Order Should Be Sealed From Public Access

Shellee acknowledges that the sealing of public records and proceedings is an extraordinary measure; however, it is one that is warranted by both the particular facts of this case and the protections afforded by the Constitution. This issue was fully briefed in Ms. Hale's Brief in Support of Defendant's Motion for Application of the Newsperson's Privilege and for a Protective Order and to Seal Court Records and Proceedings. (See id. (P. 17-18)). Again, because the court's Opinion fails to discuss this issue, it warrants reconsideration.

C. The Court Failed To Determine Whether Good Cause Exists To Seal Oral Arguments, Pleadings, Motions And Briefs Designated By The Parties To Be Filed Under Seal

During the course of this action, discovery subject to the protective order – Shellee's clients, sources and her investigative process – as well as related materials and deposition testimony, may be placed into the record in briefs in support of motions, in letters concerning discovery, as exhibits to briefs, and during oral argument. As fully briefed in Ms. Hale's Brief in

Support of Defendant's Motion for Application of the Newsperson's Privilege and for a Protective Order and to Seal Court Records and Proceedings, good cause exists to seal oral arguments, pleadings, motions and briefs designated by the parties to be filed under seal. (See id. (P. 18-21)). The Opinion failed to discuss this point; thus reconsideration is appropriate.

D. The Court Failed To Determine Whether The Privacy Rights Of Shellee's Confidential Sources Trump The Plaintiffs' Motives In This Litigation

Even if Shellee cannot make a *prima facie* showing under N.J.S.A. 2A:84A-21, the Plaintiffs are still not entitled to the identity of her anonymous, confidential sources. That is because an individual's right to pursue an allegedly defamatory statement must yield to the First Amendment protection of anonymous free speech and the privacy rights of the individual. This issue was before the court and fully briefed in Defendant's Memorandum in Support of Motion *In Limine*, yet not discussed in the Opinion. (See Pollock Cert., Ex. 51 (P. 5-9)). As a result, reconsideration on this point is appropriate to determine whether the privacy rights of Shellee's confidential sources trump the Plaintiffs' motives in this litigation.

CONCLUSION

For the foregoing reasons, Shellee's motion for reconsideration should be granted, and the Court's Opinion should be modified as set forth above.

FOX ROTHSCHILD LLP
Attorneys for Defendant,
Shellee Hale

By: _____
JEFFREY M. POLLOCK

DATED: July 22, 2009

FOX ROTHSCHILD LLP
Formed in the Commonwealth of Pennsylvania
Princeton Pike Corporate Center
997 Lenox Drive, Building 3
Lawrenceville, New Jersey 08648-2311
(609) 896-3600
Attorneys for Defendant,
Shellee Hale

TOO MUCH MEDIA, LLC, JOHN ALBRIGHT and CHARLES BERREBBI,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY
Plaintiffs,	DOCKET NO.: MON-L-2736-08
v.	Civil Action
SHELLEE HALE and JOHN DOES 1 Through 13,	**ORDER GRANTING RECONSIDERATION**
Defendants.	

THIS MATTER having been opened to the Court upon the Motion of defendant, Shellee Hale ("Hale"), through her counsel, Fox Rothschild LLP, for reconsideration of the Court's June 30, 2009 Orders and Opinion; the Court having considered the papers submitted in support hereof and any opposition thereto; and for the reasons set forth on the record; and for other good cause being shown;

IT IS on this _____ day of _____, 2009, **HEREBY ORDERED** that:

1. Hale's motion for reconsideration is hereby granted;

2. The Complaint is hereby dismissed with prejudice;

IN THE ALTERNATIVE:

3. The identities of Hale's sources and clients and her investigative process and the information obtained in the course of her investigation are privileged and protected from disclosure by the Newsperson's Privilege;

4. Hale's application for the issuance of a Protective Order and an Order Sealing Court Records and Proceedings is hereby granted;

5. This Protective Order governs the handling of all Hale's documents, e-discovery, materials, testimony, and any other information and discovery regarding or relating to Hale's voluntary disclosure of the identities of her sources and clients and her investigative process and the information obtained in the course of her investigation (collectively, "Material"), which may be produced, obtained, or filed during the course of discovery in this action.

6. Hale shall have the right to designate any Material as "confidential" to the extent that she believes in good faith that such Material constitutes, contains, or would disclose confidential or proprietary information, or other private customer information, regarding or relating to Hale's clients, investigative process and sources.

7. Counsel for the Plaintiffs may view Hale's Confidential Material, however, no other person or entity may view the Confidential Materials. Plaintiffs' counsel is prohibited from revealing the contents of any Confidential Material to anyone, including clients.

8. Hale may designate documents or information as confidential information by placing the notation "confidential" on every page of each document so designated, by designating the material as "confidential" in a cover letter transmitted with the enclosed documents, or by placing the notation "confidential" on the outside of the medium or its container for a document in a non-paper medium. If part of a document contains confidential information, the entire document may be so designated.

9. A party may designate a deposition or any portion thereof as "confidential" information pursuant to this Order when the deposition relates to or would disclose Hale's Confidential Material.

10. All pleadings, motions, or other papers filed with the Court that contain or refer to Confidential Material shall be filed and kept under seal until further order of the Court. At the time of filing, such material shall be placed in a sealed envelope, which shall be marked with the title of the action and a description of the contents (*e.g.*, Deposition of John Doe). The envelope shall also bear the following legend:

> CONFIDENTIAL
>
> This envelope contains documents that are subject to an order governing discovery and the use of confidential discovery material entered by the Court in this action. The envelope shall not be opened nor the contents thereof displayed or revealed except by order of the Court.

11. All court proceedings that specifically pertain or refer to the contents of Confidential Material shall be sealed from public access.

12. If any party objects to the designation of any Material as Confidential Material, such party shall state all objections in a letter to Hale's counsel. The parties shall attempt in good faith to resolve all objections by agreement. If any objections cannot be resolved by agreement, the parties shall cooperate in jointly submitting the dispute to the Court. Until an objection has been resolved by agreement of counsel or by Order of the Court, the Material shall be treated as Confidential Material and subject to this Protective Order.

13. Confidential Material shall be used only in this action (including any appeals), and not for any other purpose whatsoever, and shall not be given, shown, made available, or communicated in any way to anyone except:

a. counsel of record in this action, and attorneys, paralegals, and other support staff employed by such counsel;

b. the Court, court personnel and the jury in this action; and

c. court reporters employed in connection with this action;

14. Each person, excluding counsel of record, the Court, court personnel, and the jury, who is given access to Confidential Material pursuant to Paragraph 9, shall be advised that (i) the Confidential Material is being disclosed pursuant to and subject to the terms of this Protective Order and may not be disclosed other than pursuant to the terms hereof, and (ii) the violation of the terms of the Protective Order may constitute contempt of a court Order.

15. In the event that any person not named in Paragraph 10 requests the disclosure of Confidential Material, the person receiving such request (the "Receiving Party") shall give notice in writing to Hale's counsel immediately. The Receiving Party shall not produce or divulge the contents of any Confidential Material until otherwise directed to do so by the Court.

16. This Protective Order, insofar as it restricts the communication and use of Confidential Material, shall continue to be binding throughout and after the conclusion of this action, including any appeals. The Court retains jurisdiction to enforce or modify this Protective Order. At the conclusion of this action, the parties shall promptly destroy all Confidential Material, copies thereof, and documents reflecting same, though each party may retain, subject to the terms and conditions of this Protective Order, full copies of all papers filed or submitted to the Court.

17. If, at any time after producing a document or information, Hale determines that certain Material should have been designated as "confidential," Hale shall promptly notify each party in possession of the Material to designate the Material as "confidential". The Material will thereafter be deemed "confidential" from the time the Receiving Party first received the Material.

18. Nothing in this Protective Order shall operate to require the production of information or documents that are privileged or otherwise protected from discovery. If after producing a document or information, Hale discovers that certain Material was properly subject

to protection under the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege, Hale shall provide written notice to the Receiving Party and may seek the return of the Material in accordance with applicable law.

IT IS FURTHER ORDERED that Hale's counsel shall serve a copy of this Order within ____ days after receipt hereof.

_____

, J.S.C.

Opposed ( )

Unopposed ( )