

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

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In the matter of the Application of :

DONALD J. TOBIAS, :

Petitioner, :

For the entry of an order, pursuant to
CPLR 3102(c), to compel pre-action
disclosure from :

PETITION

GOOGLE INC., :

Index No.

Respondent, :

for the identity of defendant :

JOHN DOE or JANE DOE, who posted :

a defamatory "review," under name Mia :

Arce, being unknown to the Petitioner, :

in an action about to be commenced. :

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Petitioner Donald J. Tobias, as and for his Petition (the "Petition") in this proceeding,
seeking pre-action disclosure pursuant to CPLR 3102(c), hereby sets forth and alleges as follows:

THE PARTIES

1. At all time relevant hereto, Donald J. Tobias, the Petitioner herein (the "Petitioner"),
was and is domiciled in the City, County and State of New York.

2. At all time relevant hereto, Google Inc., the Respondent herein (the "Respondent"),
was and is a corporation, duly organized under the laws of the State of Delaware. The
Respondent is authorized to transact business in the State of New York and maintains an office
in the City, County and State of New York.

PRELIMINARY

3. The Petitioner herein, an attorney at law with an unblemished record before the bar of this Court, now seeks, as a result of a purported “Google Review” that was posted under the name “Mia Arce,” who is a complete and utter stranger to him, relief from the Court. Specifically, the Petitioner requests that this Court enter an order: (a) directing that Respondent Google disclose and furnish to the Petitioner all information in its possession that reflects the identity of the person that posted the purported “Review,” at URL <https://www.google.com/search?q=Tobias%20Donald%20J&ludocid=0x89c258e52f305a25:0x6d53492b1dd281aa#istate=kp:xpdd&lrd=0x89c258e52f305a25:0x6d53492b1dd281aa,1>, and/or at any other location known to the respondent, under the name “Mia Arce,” including without limitation the said persons’s name, address, telephone number, e-mail address, Google account number, date of opening and closing of any account, method of payment and billing logs, Internet Protocol (IP) address, Media Access Control (MAC) and any other information that pertains to the status of that person’s account and overall identity; (b) directing that the aforesaid Respondent preserve all such information; and (c) granting such other and related relief that the Court may deem to be just and proper.

THE BACKGROUND FACTS

4. In or about the late spring or early summer of 2016, the Petitioner learned that a person conducting a “Google” search for “attorney Donald J. Tobias” will see, upon being directed to his offices’s website and related “contact” information, that there has been posted, directly below the Petitioner’s name, “1 review” (i.e., one review), presumably of him as an attorney. When that “1 Review” link is activated, the viewing screen thereupon displays, under the heading

“Google Reviews,” a three word “review” posting by a person named “Mia Arce” that states, wholly without any elaboration or explanation, “**It** was horrible.” (See Exhibit A to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure, a copy of that “Google Reviews” posting).

5. This posting was and continues to be highly problematic and troubling for several reasons. First, the Petitioner does not know and has never known a person with the name “Mia,” or “Arce,” or “Mia Arce.” Nor is he aware of any reason why someone named Mia Arce, or anyone else for that matter, would post such a thing about him. The posting itself is, moreover, highly defamatory since the assertion that “**it** was horrible” (with absolutely no revelation of what the “it” was or might be) is not a mere statement of opinion but is instead one that on its face implies that it is based upon facts that justify the stated opinion, but which facts are left wholly unknown to those reading or hearing such an opinion. As such it is, under the axiomatic case law doctrine that is to be set forth in this Petition and in the accompanying papers, a plainly actionable “mixed opinion” that, additionally, serves to disparage a person in his profession, rendering it libelous per se.

6. Upon learning about the above referenced posting, the Petitioner took a series of steps to find out why someone named Mia Arce and/or someone using the name Mia Arce would make such a blatantly false and defamatory statement about and/or in connection with him. He also tried to ascertain what this person was and/or could have been referring to when asserting, upon undertaking a posting about Donald J. Tobias, that “**it**” “was horrible.”

7. In exploring the matter further, the Petitioner learned that there had been, in 2013, a tragically unfortunate incident, taking place in the New York City subway, involving a suicide by

a college professor that was, like the Petitioner, named “Donald J. Tobias.” According to the published reports of that incident, that Donald J. Tobias (who, despite having the exact same name, including the same middle initial, was not related to or known at all to the Petitioner) jumped in front of an oncoming subway train and was decapitated. (See Exhibit B to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure). The Petitioner could, therefore, only speculate that a person that witnessed the aforesaid decapitation incident was attempting to make an on-line comment about what had been observed (which might explain the notation “It was horrible”) and that this person’s observations somehow wound up, either through some technical glitch or some posting error, as a “review” of the Petitioner, attorney Donald J. Tobias.

**THE PETITIONER’S EFFORTS TO
RESOLVE THE MATTER**

8. Since the Petitioner believed that the subject posting, which somehow became a “review” of him as an attorney, was in all likelihood the result of some technical glitch or mistake, he sought to contact both Google, as the internet provider upon whose platform the offending material was exhibited, as well as, ultimately, any person named “Mia Arce” that he could, through publicly available resources, locate.

9. In this connection, on June 3, 2016, the Petitioner wrote a letter to Google’s legal department wherein he apprised it of the fact, *inter alia*, that: (a) there had been a plainly defamatory Google “review” of him posted under the name Mia Arce, who was and is a complete stranger; (b) that a person named Mia Arce has, according to the internet search that he had undertaken, posted numerous internet “You Tube” reviews about various subjects; and (c) that

the comment, purportedly by Mia Arce, that “**It** was horrible” very likely pertained to the referenced tragic incident, taking place in the New York City subway, but had absolutely nothing to do with the Petitioner. (See Exhibit C to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure, a copy of the Petitioner’s letter to Google’s legal department, dated June 3, 2016).

10.. The Petitioner had, of course, hoped that Google would take appropriate steps to investigate the matter and at the very least determine whether or not the Google account holder that had posted the above referenced comment (i.e., “**It** was horrible”) had actually meant to proffer a “review” of Donald J. Tobias, attorney. This expectation was, he believed, a reasonable one since Google was in the possession of the e-mail address and other identifying information supplied by the “Google” account holder that had made this posting and could have easily ascertained, from this person, whether or not that posting was made in error. The Petitioner had hoped that this would be done since he had, as noted, apprised Google both of the unique facts of this case, i.e., the possible confusion caused by the fact that he had the exact same name as a person that had been involved in publicly-witnessed, truly “horrible,” event, and that the person, named Mia Arce, that appeared to have made the posting was a complete and utter stranger to him..

11. This effort was, unfortunately, unavailing. On June 17, 2016, the Petitioner received a “form” e-mail, from the “Google Team,” wherein the said Respondent, apparently relying upon its purported right, assertedly by virtue of the provisions of the Communications Decency Act of 1996 (i.e., 47 U.S.C. 230[c]), to ignore the problem with which the Petitioner was now confronted, stated, among other things, that “Google has decided not to take action on your

request.” In doing so, the “Google Team” noted that while it had acted as the “host” for the placement of third party content, it was not “the creator or mediator of that content” and that it would therefore do nothing more than “encourag[e] [Petitioner] to resolve any disputes directly with the individual who posted the content“ (steps that would include, of course, if need be, commencing a lawsuit against the said individual and obtaining against the said individual appropriate injunctive and/or monetary relief). Google did nothing, however, to provide the Petitioner with any information, such as the address, telephone number or e-mail address of the person that made the subject posting, or even confirm that the person who did the posting was in fact an individual named Mia Arce. To the contrary, the Petitioner was told in this “form” reply that such information would be provided only in response to what it called “valid legal process.” (See Exhibit D to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure, a copy of the aforesaid response form the “Google Team,” dated June 17, 2016).

12. Upon receipt of this “form” communication, the Petitioner tried, once again, to get Google to review and address the egregious nature of the facts surrounding the subject posting, i.e., that this serious, highly damaging assertion from an utter stranger was very likely the product of some kind of mistake. Additionally, he apprised Google of the fact that the request that he was making (i.e., that it take into account the fact that he did not know and never knew a Mia Arce) would render the posting subject to removal, in any event, according to Google’s own announced policies, as a “fake” or “misrepresented” review. The Petitioner’s response in this regard, dated

June 21, 2016, and which is annexed as Exhibit E to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure June 21, was as follows:

Please be advised that I strongly disagree with your apparent decision, as reflected in the “form” response that you have now sent to me, not to take action,”at the present time,” to rectify the situation that was fully set forth in my letter to Google’s legal department, dated June 3, 2016. (Copy attached).

‘s

First and foremost, it appears that you have not read, with any reasonable degree of care, my letter. Had you done so, you would have learned that I am not a vendor that is complaining about a negative review from a customer. To the contrary, a person named Mia Arce, who I have never met and do not know, let alone furnished professional services to, has mistakenly posted a highly disparaging comment (“It was horrible”) that somehow wound up as a purported “review” of me, a practicing attorney with an unblemished record stretching back more than forty (40) years. While I cannot say with any degree of certainty how this comment happened to have turned into a “review” of me, attorney Donald J Tobias, it was I strongly suspect her chronicled reaction, possibly as witness to, or as a person having some familiarity with, the unfortunate incident that was mentioned in my initial letter to you, involving the relatively recent and well-publicized suicide by decapitation, on the subway tracks, of a New York City based college professor also named “Donald J. Tobias.” Of course, the continued posting, however it happened to have occurred, of this highly damaging “review,” by a person that I can and will swear under oath that I have never met, spoken to or furnished legal services to, cannot be justified.

I must also take issue with the other "points" that you have raised in the "form" response that you sent to me. While you suggest that I counter this disparaging and defamatory comment with some gratuitous assertion about my "commitment to quality service," my doing this would serve only to dignify and validate this purported "review," which could not have been, as I keep telling you, directed at me. In any event, how could I undo the damage that is caused by this person’s comment, which suggests that I, a duly licensed practicing attorney, engaged in some wholly undisclosed, albeit “horrible,” act, which is never specified? Do you expect me to say that I am not so horrible or that I did nothing “horrible”?

I also must take issue with your request that I register these “concerns” by clicking the “Flag as Inappropriate” link through which you say you will pass on my removal demand to your reviews policy team. Please note that I have

already passed on, directly to Google's legal department, my "concerns" about this matter and do not understand why these "concerns" cannot now be directed, immediately, to the appropriate internal Google department. More significantly, however, I cannot and will not use the "Flag as Inappropriate" link not only because my doing so would serve to validate, as a purported but challenged professional services "review," what is plainly a posting mistake, but also because none of the four choices that are provided within that link speak to the situation that I am trying to rectify and address, i.e. a mistaken posting, from a complete stranger, that was not intended as a business or professional "review."

Finally, I must note that Google's present unwillingness to take action, even in the face of a mistaken yet highly disparaging posting, contradicts the company's publicly articulated policy as it pertains to reviews that are submitted by third parties. In this connection, Google has, as you are certainly aware, publicly reserved to itself the right to police and remove reviews in which a third-party has "impersonate[d]" someone, has "misrepresent[ed][his/her] affiliation with a person or entity" or has proffered what is a "fake" review. While I believe that Mia Arce's posting was the product of some kind technical glitch or mistake on the latter's and/or Google's part (in which case no responsible person or entity would or should sanction its continued display), the fact that I do not know and never knew a Mia Arce would render it subject to removal, in any event, according to Google's own announced policies, as a "fake" or "misrepresented" review. Either way, its posting must be deleted.

While I certainly appreciate the fact that Google is a large and powerful company that may not wish to take the time and trouble to address the concerns of "every day" citizens and business people, the facilities that it provides may in certain cases work to impose significant damage to and even destroy a reputation that took a lifetime to develop. I am an innocent victim of a purported but highly damaging "review" that was posted, in all probability by mistake, by someone that I do not know and with whom I have had no relationship of any kind. Google, which has the means and ability to contact the Mia Arce that posted the "review," is certainly free to check the accuracy or veracity of what I am saying. It cannot, however, simply "decid[e] not to take action," to my ultimate detriment and damage."

13. Google answered this e-mail by sending the Petitioner the very same "form" response that it had sent to him, on June 17, 2016, in response to his letter of June 3, 2016. Annexed as Exhibit F to the Affidavit of Donald J. Tobias in Support of Order to Show Cause Compelling Pre-Action Disclosure is a true copy of the e-mail response,

dated July 20, 2016, to Petitioner's e-mail dated June 21, 2016.

14. The Petitioner's efforts to rectify this unacceptable situation was not limited to the communications, as aforesaid, that he had with Google. For he also sought during this time frame, and as previously noted, to make contact with any person named Mia Arce whose address he could, with the use of publicly available resources, locate. In this connection, after undertaking various internet searches, the Petitioner did locate a person named Mia Arce that, it appeared, resided at 144 East 24th Street, New York, New York. He also learned, as a result of these efforts, of the existence of an e-mail address that was attributable to a Mia Arce at that location..

15. Accordingly, on June 3, 2016, the Petitioner sent an e-mail, a true copy of which is annexed as Exhibit G to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure, that stated as follows:

"To: Mia Arce

From: Donald J. Tobias

Subject: I need your assistance.

Dear Ms. Arce:

I am a New York based attorney. You and I have never met and do not know each other but I find that I need your help with an admittedly rather odd matter.

Several days ago, it came to my attention that a person who "Googles" my name will see a single "review," posted by someone named Mia Arce. The "review" consists of three words—"It was horrible."

Needless to say, I was very upset to see this, particularly since I have never known or represented anyone named Mia Arce and believe that this is a mistake or mix up of some kind. It was also upsetting since I take great pride in

the excellent reputation that I have built in the legal community over many years of practicing law.

I am aware that a man named Donald J. Tobias (no relation to me—I never met him) was involved, in 2013, in a tragic incident on the New York City subway (he killed himself, unfortunately). Perhaps this is what you or, if it was not you, some other person named Mia Arce that posted the “review,” was commenting on when leaving the notation “**It** was horrible.”

In any event, if you know anything about the posting, made about a Donald J. Tobias (which somehow, but certainly mistakenly, became a “review” of me as an attorney), please be kind enough to call me at my office at 212-759-4200. If you are not the person that did that posting, please let me know that as well. (You can also respond via e-mail at dtobias@tobiaslegal.com).

I am sorry to have to take your time with this but it is, as I am sure you understand, of great importance to me that this mistaken “review” be removed. I am and will be most grateful for your cooperation and assistance.

Thanks again.

Donald J. Tobias”

16. The Petitioner did not receive any response to that e-mail and had of course absolutely no way of knowing whether or not the aforesaid e-mail was ever received or whether or not the “Mia Arce” to whom he tried to send the e-mail was in fact the person that made the above referenced Google “review” posting.

17. On August 2, 2016, the Petitioner nonetheless sent a follow-up letter, a copy of which is annexed as Exhibit H to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure, to Mia Arce at 144 East 24th Street, New York, New York, wherein he stated as follows:

Dear Ms. Arce:

I am a New York based attorney. You and I have never met and do not know each other but I find that I need your help with an admittedly rather odd

matter.

Several weeks ago, it came to my attention that a person who “Googles” my name will see a single “review,” posted by someone named Mia Arce. The “review” consists of three words—“It was horrible.” (See enclosed).

Needless to say, I was very upset to see this, particularly since I have never known or represented anyone named Mia Arce and believe that this is a mistake or mix up of some kind. It was also upsetting since I take great pride in the excellent reputation that I have built in the legal community over many years of practicing law.

I am aware that a man named Donald J. Tobias (no relation to me—I never met him) was involved, in 2013, in a tragic incident on the New York City subway (he killed himself and was, according to the published news accounts, decapitated). Perhaps this is what you or, if it was not you, some other person named Mia Arce that posted the “review,” was commenting on when leaving the notation “**I**t was horrible.” (Google link references to that news story are enclosed).

In any event, if you know anything about the posting, made about a “Donald J. Tobias” (which somehow, but certainly mistakenly, became a “review” of me as an attorney), please be kind enough to call me at my office at 212-759-4200. If you are not the person that did that posting, please let me know that as well. (You can also respond via e-mail at dtobias@tobiaslegal.com).

Please note that I have attempted to contact you by sending the enclosed e-mail to rose_arce@yahoo.com, but that may have been an incorrect e-mail address and/or may not, for some other reason, have reached you.

I am sorry to have to take your time with this but it is, as I am sure you understand, of great importance to me that this mistaken “review” be removed. I would like to see this accomplished amicably and without delay.

Accordingly, if you are the person that posted this mistaken “review,” all you have to do is contact me as soon as possible and help me have it removed. If this is done quickly, I would be extremely grateful for your help and that will end the matter. If you are not the person that posted the “review,” I would be similarly grateful if you would call and tell me that as well. If that is the case, I will apologize for bothering you with this and will then proceed to seek a court order compelling Google to disclose the identity of and other pertinent information about the person that actually did the posting.

I am and will be most grateful for your cooperation and assistance. Thus, whether or not you are the “Mia Arce” that posted the aforesaid “review,” I ask that you contact me at your earliest convenience.

Thanks again.

Very truly yours,

DONALD J. TOBIAS”

18. The Petitioner’s letter of August 2, 2016 was ultimately returned to him by the United States Postal Service with the notation that the addressee had moved to 155 East 37th Street, New York, New York 10016, Apartment 1B, but that the one year period during which mail would be forwarded to that address had expired. Accordingly, on September 20, 2016, the Petitioner re-sent that letter to Mia Arce, via regular and certified mail, using the aforesaid 155 East 37th Street address. (See letter of September 20, 2016, annexed as Exhibit I to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure).

19. On November 7, 2016, the certified mailing that had been sent to Mia Arce, addressed to her at 155 East 37th Street, New York, New York, was returned by the United States Postal Service as “unclaimed.” (See Exhibit J to the Affidavit of Donald J. Tobias in Support of Order to Show Cause and Petition Compelling Pre-Action Disclosure). However, on November 16, 2016, at approximately 2:41 p.m., the Petitioner received a telephone call from the Mia Arce that resides at 155 East 37th Street, New York, New York, who claimed that she had only recently read the Petitioner’s letter (which had also been sent, as noted above, by ordinary mail) and unequivocally denied

having been the Mia Arce that made the subject libelous posting.

20. Accordingly, despite all of the foregoing efforts, undertaken by the Petitioner, to, inter alia, learn the identity of the person that posted the facially defamatory Google “review,” the Petitioner does not know, and has no way of knowing: (a) whether or not the subject posting was made by someone that actually is named Mia Arce; or (b) where, if the posting was in fact made by someone named Mia Arce, that person can be served; or (c) who, if the posting was made by a person not named Mia Arce, is responsible for doing this and the place at which he or she may be served.

RELIEF UNDER CPLR 3102(c)

21. Under Rule 3102(c) of the Civil Practice Law and Rules, a party may by court order obtain “disclosure to aid in bringing an action.” Such relief is particularly appropriate where, as here, a party seeks to obtain information regarding the identity of prospective defendants and has alleged facts that, when viewed in the light most favorable to the Petitioner, indicate that he or she has a viable cause of action.

22. Such standards have been easily met in the instant proceeding. There can be little question but that the three word posting, set forth in the context of a purported professional “review” from a person that is wholly unknown to the Petitioner, and stating “It was horrible,” was and is facially defamatory. The elements of defamation in this state are a false statement, published without privilege or authorization to a third party constituting fault as judged by, at a minimum, a negligence standard, which causes special harm or constitutes defamation per se. Epifani v. Johnson, 65 A.D.3d 224, 882 N.Y.S.2d 234 ((2d Dept. 2009). See also Stepanov v. Dow Jones & Company, Inc., 120

A.D.3d. 28, 987 N.Y.S.2d 37 (1st Dept. 2014). A false, i.e., defamatory, statement is libelous per se if it charges another with a serious crime or tends to injure another in his or her trade, business or profession. Gionlekaj v. Sot, 308 A.D.2d 471, 764 N.Y.S.2d (2d Dept. 2003). This is the case since the law “presumes that damage results when a person’s business reputation is impugned.” Chiavarelli v. Williams, 256 A.D.111, 681 N.Y.S. 276 (1st Dept. 1998).

23. Here, a person claiming to be someone named Mia Arce has posted a public statement that is, purportedly, a professional “review” of the Petitioner herein. The statement is patently false in that, inter alia, this person is completely unknown to the Petitioner and could not have been in a position to proffer an actual and truthful professional “review” of him. The posting of this alleged, albeit false and highly derogatory, professional “review,” on a Google platform, constitutes, moreover, a lawfully cognizable publication, see Leser v. Penido, 62 A.D.3d 510, 879 N.Y.S.2d 107 (1st Dept. 2009), that is made without permission or authorization. It is libelous per se in that the assertion or implication, in the form of a professional “review,” that a duly licensed attorney has engaged in some wholly unspecified “horrible” act, is a statement that to say the very least “tend[s] to injure a party in his business or profession.” Chiavarelli v. Williams, Supra. See also, John Langenbacher Co., Inc.v. Tolksdorf, 197 A.D.2d 64, 605 N.Y.S.2d 34 (1st Dept. 1993).

24. The three word posting that is the subject of this action, i.e. “**It** was horrible,” is not and cannot moreover, under very emphatic and clearly enunciated prevailing case law doctrine, be deemed to be a legally protected statement of opinion. In the landmark case of

Steinhilber v. Alphonse, 68 NY 2d 283, 508 N.Y.S.2d 901 (1986), the New York Court of Appeals outlined the very clear distinction between a statement of “pure opinion,” which is entitled to First Amendment protection, and “mixed opinions” which are actionable under state defamation laws. As the Court of Appeals succinctly explained, at 68 N.Y.2d 289-290:

“A ‘pure opinion’ is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be ‘pure opinion’ if it does not imply that it is based upon undisclosed facts [citations omitted].....When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, is a ‘mixed opinion’ and is actionable [citations omitted]. The actionable element of a ‘mixed opinion’ is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.”

See also Davis v. Boenheim, 24 N.Y.3d 262, 998 N.Y.S.2d 131 (2014).

25. The applicability of the rule that was set forth in Steinhilber and its progeny is very well illustrated in the numerous cases in which statements of “mixed opinions” have been held to give rise to cognizable claims for defamation. For example, in Whitney Information Network, Inc. v. Weiss, 2008 WL 731024 (E.D.N.Y. 2008), certain shareholders of Whitney Information Network, Inc. (“WIN”), the corporate owner of a hotel and resort located in Costa Rica, sent an e-mail memorandum to other stockholders of the entity that stated, among several other things, that WIN has been “caught in the midst of a scheme,” was “trying to sweep their dirty work under the rug,” had been “caught with their hands in the proverbial cookie jar” and had engaged in “sleazy shananigans.” When the issuers of the e-mail moved to dismiss WIN’s defamation action on the ground that the above referenced statements constituted pure opinion, assertedly

protected by law, the Court disagreed, noting as follows:

“Viewed in toto, the Court finds that although some statements appear to be pure opinion, others cannot be so categorized as a matter of law. For example, Weiss’s statements that ‘they have been caught with their hands in the proverbial cookie jar’ and ‘[w]ithout strong representation we would have woken up to find the cookie jar empty’ reasonably suggests that WIN has engaged in inappropriate or legal conduct, an accusation that can be proven false. *Compare* Flamm, 201 F.3d at 154-155 (finding that description of attorney as an ‘ambulance chaser’ with an interest only in ‘slam dunk cases’ reasonably implied that attorney engaged in unethical solicitation of clients and was actionable). Moreover, Weiss’s e-mail does not merely imply, but rather expressly states, that she has factual information, which has not yet been disclosed, to support her assertions....(i.e., ‘Today we have received information from both our Costa Rican and United States attorney [involving WIN] and ‘[w]e will be in a position to tell [the shareholders] more details shortly, but right now it is better not to get into specifics.’) Thus, because Weiss’s statements convey that they are based upon facts which justify her opinion, but are unknown to those reading them, they are ‘mixed opinions’ and actionable. See *Steinhilber*, 68 N.Y.2d at 289.”

26. Similarly, in *Technovate LLC v. Fanelli*, 49 Misc 3d 1201(A), 20 N.Y.S.3d 295, (Civ. Ct. Richmond Co. 2015), the internet review, posted by an apparently dissatisfied customer of a floor contractor, that stated “do not use mr sand less of staten island matt is his name he will destroy your [sic] floor he is liar and con artist beware” was held to be an actionable mixed opinion since, as the court noted:

“There are no specifics to support the allegations and from which a reader could determine whether there is a basis in fact for the statements as “destroy you [sic] floor” is too general to be considered the statement of a fact and indicates that the defendant has other information not being put forth in the posting. This qualifies as a ‘mixed opinion.’”

27. In the instant case, the three word assertion, i.e. “**It** was horrible,” proffered as a purported professional “review” of an attorney at law, even more readily qualifies, when compared to the above referenced examples, as an actionable mixed opinion. For the person that

posted the Google “review” in this case is not simply expressing an “opinion” of the Petitioner or even saying that the Petitioner is “horrible.” To the contrary, an individual, purportedly named Mia Arce and presumably a client of the Petitioner (but who is in truth and in fact a complete stranger) is in sum and substance stating, entirely without qualification, and without supplying even a semblance of factual detail, that the Petitioner **did** something “horrible” (i.e.—that “**it**” was “horrible” as opposed to “he” was horrible) and has, with these three explosively damaging and defamatory words, imputed some unspecified act of professional unfitness, misbehavior or worse to the Petitioner. This blanket assertion falls squarely within the doctrine enunciated in Steinhilber since it creates the impression that this “Mia Arce” knows some undisclosed facts that indicate that the Petitioner, while serving as an attorney, engaged in some wholly unidentified “horrible” behavior and/or performed some wholly unspecified “horrible” act. As such, it gives rise to an action for defamation against an as yet unknown person whose identity must, if any relief is to be obtained by the Petitioner, be disclosed.

THE CONTINUING IRREPARABLE INJURY

28. The continuation of the subject defamatory posting (consisting of a professional “review” that was proffered by a person named Mia Arce), which Google will not, in the absence of litigation commenced against the person that caused it to be published, remove, has caused, and continues to cause, irreparable injury and damage to the Petitioner. Any new client or business that is referred to the Petitioner’s office or web site and/or who wants to check the Petitioner’s bona fides by running a “Google” search of him, will be directed to the subject, singular Google “review” and will be told that, according to this “Mia Arce,” the Petitioner committed some form of “horrible” act (i.e., “**It** was horrible”), which this “reviewer” does not specify or particularize.

That highly negative impression, based upon facts that are not disclosed, has damaged and will continue to damage the Petitioner's professional reputation and business opportunities.

CONCLUSION

29. The motion should be granted in all respects and this Court should enter an order:

(a) directing that Respondent Google disclose and furnish to the Petitioner all information in its possession that reflects the identity of the person that posted the purported "Review," at URL

<https://www.google.com/search?q=Tobias%20Donald%20J&ludocid=0x89c258e52f305a25:0x6d53492b1dd281aa#istate=kp:xpdd&lrd=0x89c258e52f305a25:0x6d53492b1dd281aa,1>, and/or at any other location known to the respondent, under the name "Mia Arce," including without limitation the said persons's name, address, telephone number, e-mail address, Google account number, date of opening and closing of any account, method of payment and billing logs, Internet Protocol (IP) address, Media Access Control (MAC) and any other information that pertains to the status of that person's account and overall identity;

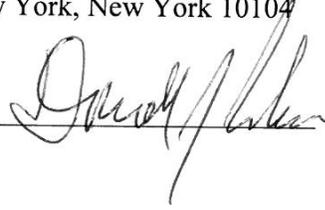
(b) directing that the aforesaid Respondent preserve all such information; and

(c) granting such other and related relief that the Court may deem to be just and proper.

Dated: New York, New York
December 6, 2016

Yours, etc.

DONALD J. TOBIAS
Attorney for the Petitioner
And Petitioner Pro Se
1290 Avenue of the Americas
30th Floor
New York, New York 10104

By: 

VERIFICATION

STATE OF NEW YORK)
 ss.:
COUNTY OF NEW YORK)

DONALD J. TOBIAS, being duly sworn, deposes and says that:

I am the Petitioner in the within proceeding. I have read the foregoing Verified
Petition and know its contents.

The matters stated in the Verified Petition are true except as to those matters which
are stated on information and belief, and as to those matters I believe them to be true.



DONALD J. TOBIAS

Sworn to before me this
6th day of December , 2016



NOTARY PUBLIC

JOHN BURLEIGH
NOTARY PUBLIC, State of New York
No. 314916545
Qualifies New York County
Commission Expires December 7, 2018