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TOWNSHIP OF MANALAPAN, Plaintiff, vs. STUART MOSKOVITZ, ESQ., JANE DOE and/or JOHN DOE, ESQ. I-V (these names being fictitious as their true identities are presently unknown) and XYZ Corporation, I-V (these names being fictitious as their true corporate identities are currently unknown) Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-L-2893-07 **CIVIL ACTION** (LEGAL MALPRACTICE) **BRIEF OF ANONYMOUS SPEAKER "DATRUTHSQUAD" IN OPPOSITION TO PLAINTIFF'S MOTION FOR ISSUANCE OF LETTER ROGATORY**

I. INTRODUCTION

On November 28, 2007, the third-party target of Manalapan's prior discovery attempt - the anonymous Blogspot blogger known

as "datruthsquad" ("the blogger," "Doe," or "datruthsquad") - filed a motion to quash a baseless September subpoena to Google seeking his[1] identity, e-mails, blog drafts, and "any and all information" related to his account. In that motion, the blogger also sought a protective order preventing the township from issuing future subpoenas seeking the same or similar information. The accompanying brief described the multitude of substantive reasons why the September subpoena - and any similar future subpoenas - was and would be unenforceable.[2]

The township has addressed none of those substantive failings in its letter brief in support of its motion of December 4, 2007, seeking issuance of a letter rogatory to allow it to subpoena Google, Inc., at its headquarters in California for the same information sought by the earlier subpoena. In fact, the township's new motion and supporting papers again demonstrate that not only is the subpoena request unwarranted, it is prohibited. Accordingly, the Court should deny this latest attempt by the township to identify and expose an anonymous critic.

II. ARGUMENT

As the substantive arguments against the issuance or enforcement of such subpoenas remain nearly identical to those

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[1] Once again, for simplicity's sake, Doe will be referred to for the remainder of the brief using the masculine pronoun "him." This should not be taken as an admission as to his gender.

[2] Doe also moved to intervene in this action pursuant to R. 4:33-1 and -2 for the sole purpose of opposing discovery attempts targeting him or his personal information.

made in prior briefing, Doe incorporates all such arguments from its Brief in Support of Motion to Quash and for a Protective Order, filed on November 28, 2007 ("Motion to Quash brief"). Doe briefly summarizes those arguments below and refutes the few new arguments offered by the township.

A. The Information and Materials Sought by the Subpoena Are Not Likely to Lead to Admissible Evidence About Any of Plaintiff's Causes of Action.

The township's sole argument in its December 4 motion as to why it should be permitted to unmask its anonymous critic is this:

> It is clear that ascertaining whether the Poster on daTruthSquad is, in fact, the defendant, Mr. Moskovitz, is essential to determining whether he violated the July 23rd Order and made misrepresentations to the court. The identification information we request from Google via the attached subpoena is essential and critical to this determination and the information cannot be obtained elsewhere.

Plaintiff's Letter Brief in Support of its Motion for Issuance of Letter Rogatory of December 4, 2007, ("Letter Rogatory brief") at p. 4. The township's argument is fatally flawed in several ways and demonstrates that the material sought is not reasonably calculated to lead to admissible evidence about any of the township's causes of action as required by New Jersey Rule of Court 4:10-2.

First, nowhere does the township even allege, let alone support with evidence, that anyone "communicat[ed] with the press [or] the public concerning the subject matter of this

litigation" during the time period in which the Court's Order to Show Cause of July 23, 2007, was in effect. While the township included multiple screenshots from datruthsquad's blog in support of a previous motion (subsequently attached as Exhibit D to the Certification of Matthew J. Zimmerman of November 28, 2007), none of the entries was posted after July 23, 2007.

The township's request, then, amounts to nothing more than a "fishing expedition" barred by New Jersey law. See, e.g., Axelrod v. CBS Pubs., 185 N.J. Super. 359, 372 (App. Div. 1982) (affirming Monmouth County Superior Court ruling) (identities of anonymous authors of self-help books not relevant to claims of fraud and breach of contract against publisher and discovery request amounted to "little more than a fishing expedition lacking a basis in fact.").

Similarly, the township has offered no evidence to support their naked allegation that "[i]t appears that the Poster [on datruthsquad.blogspot.com] may be the defendant in this litigation, Stuart Moskovitz." Letter Rogatory brief at p.2. Groundless speculation is not a sufficient basis to conduct invasive discovery, especially (as discussed below) when constitutional rights would be violated in the process. See R. 1:4-8, 4:10-2. Indeed, the Appellate Division has held that accusations of wrongdoing, absent some modicum of independent corroborating evidence, cannot justify invasive discovery. See, e.g., K.S. v. ABC Professional Corp., 330 N.J.Super. 288, 295-96 (App. Div. 2000) (denying discovery into the sexual histories of

employees, even if such discovery was nominally relevant to plaintiff's sexual harassment claim, after finding that "there is nothing in this record, including the depositions, to even remotely suggest that" the plaintiff's allegations were true.).

Third, even assuming that the township's theory is correct and it was demonstrated that Mr. Moskovitz was the author of posts on the datruthsquad blog, that fact would be irrelevant to the success or failure of the township's case. The township's assertion that "datruthsquad's" identity is "vital to this litigation" is nonsense. Certification of Counsel, Len. M. Garza, Esquire, In Support of Motion for Issuance of Letter Rogatory ("Garza Certification") at p.3. The identity of datruthsquad is not relevant to any element of the township's causes of action and thus cannot be the basis for any discovery request. See Motion to Quash brief at pp. 5-7. While the township might like to disparage the Defendant, allegations of misconduct invented out of whole cloth - unrelated to the underlying merits of the litigation - cannot authorize litigants to conduct groundless discovery-based investigations of their ostensible opponents. It is the province of the Court, not of a tangentially-affected litigant, to monitor compliance with its own orders.

Fourth, even assuming that the identity of datruthsquad were relevant to the township's causes of action, the scope of the subpoena is absurdly broad and exceeds the information even the township admits that it needs. Doe explained in detail in

its Motion to Quash brief how the township's subpoena might reach not only identity-related information but also private content such as e-mails and unpublished drafts, as well as a wide-range of other invasive materials such as search engine history, financial data, and associational information. See Motion to Quash brief at pp. 9-10. Inexplicably, however, even though it argues that it only seeks "identification information" (Letter Rogatory brief at p.4), the township proposes the same overbroad subpoena it issued in September.

Finally, again without any evidentiary support, the township makes the ludicrous assertion that evidence to determine whether defendant Moskovitz is the anonymous blogger "cannot be obtained elsewhere." Id. This too is nonsense: the township may issue discovery directly to Mr. Moskovitz seeking testimony or materials that would support or disprove its allegations. Indeed, Moskovitz has saved the township the trouble and voluntarily introduced the only evidence before the Court on this matter, swearing under penalty of perjury that he is not in fact the author of the posts obliquely referenced by the township. See Affidavit of Stuart J. Moskovitz of November 20, 2007, ("I do not now, nor have I ever, published information on the Internet or elsewhere under the pseudonym "datruthsquad," nor am I the author and/or operator of the blog located at http://datruthsquad.blogspot.com."). If it prefers, the township may further depose Mr. Moskovitz, propound interrogatories, or seek documents in his possession if it can

demonstrate a reasonable basis for believing such attempts would lead to admissible evidence. The township may not, however, pry into the private lives of non-parties to indulge unsupported fishing expeditions that are contradicted by all the evidence in the record.

B. Plaintiff Cannot Meet the First Amendment Requirements Regarding Attempts to Unveil Anonymous Online Speakers.

As more fully discussed in Doe's Motion to Quash brief, litigants attempting to unmask anonymous online speakers must meet a higher standard than those seeking discovery that does not implicate constitutional rights. Anonymous speech has long been recognized by the Supreme Court as "not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995). Indeed, the Court found that anonymous speech "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation - and their ideas from suppression - at the hand of an intolerant society." Id.

Attempts to pierce that anonymity are subject to a qualified privilege, requiring a court to (among other things) weigh the necessity for the discovery sought against the speaker's interest in anonymity; and to consider whether the subpoena was issued in good faith and not for any improper purpose, whether the information sought relates to a core claim or defense, whether the identifying information is directly and

materially relevant to that claim or defense, and whether information sufficient to establish or to disprove that claim or defense is unavailable from any other source. See, e.g., Dendrite Int'l v. Doe No. 3, 342 N.J.Super. 134, 141-42 (App. Div. 2001); Doe v. 2theMart.com, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001).

The township fails every aspect of this analysis. The discovery it seeks is not relevant to any claim or defense, discovery on this point is available from (and has already been provided by) other sources, and the township is apparently motivated by an attempt to silence or intimidate critical speakers. In short, the requested letter rogatory is unwarranted and must be denied.

C. Plaintiff Is Barred By the Stored Communications Act From Obtaining the Information It Seeks Through the Use of a Discovery Subpoena.

Also as discussed in Doe's Motion to Quash brief, the federal Stored Communications Act ("SCA")[3] absolutely bars litigants from using civil subpoenas to obtain the content of communications (such as e-mails and word processing documents) stored by electronic communication services and remote computing services. See 18 U.S.C. §2702(a). See also O'Grady v. Superior Court, 139 Cal.App.4th 1423, 1447 (Cal. App. 2006) ("Since the Act makes no exception for civil discovery and no repugnancy has been shown between a denial of such discovery and congressional

[3] 18 USC §§2701-11.

intent or purpose, the Act must be applied, in accordance with its plain terms, to render unenforceable the [discovery] subpoenas seeking to compel [providers] to disclose the contents of emails stored on their facilities."). Additionally, it prohibits governmental entities from obtaining non-content related information - including identity-related information - from such services through the use of civil subpoenas. See 18 U.S.C. §§2702(b), (c); 2703. See also FTC v. Netscape Communications Corp., 196 F.R.D. 559, 561 (N.D. Cal. 2000) (finding "no reason ... to believe that Congress could not have specifically included discovery subpoenas in the statute had it meant to."). As Google qualifies as an electronic communication service and/or a remote computing service for all of the materials sought by the township, access to those materials and information through the civil subpoena process is barred.

The township may use other procedural mechanisms such as a trial subpoena (see, e.g, 18 U.S.C. § 2703(c)) to pursue legitimate discovery if it can meet the previously discussed relevancy and First Amendment hurdles. In addition, nothing categorically prohibits the township from seeking relevant discovery directly from the Defendant. As a governmental entity, however, it is barred from using civil discovery subpoenas as it is attempting to do here.

III. CONCLUSION

Manalapan Township, beset by criticism of its decision to bring this underlying lawsuit, has repeatedly reinvented its

rationale for attempting to unmask the blogger "datruthsquad," perhaps its most vocal critic. In support of the immediate motion, the township states that the identity of the blogger is "critical" to its case because, if Mr. Moskovitz is proven to be "datruthsquad," that may demonstrate that Moskovitz violated the Court's gag order, even though the information would in no way impact its malpractice claims brought under N.J.S.A. 2A:13-4. This is the only rationale presented by the township in support of the immediate motion.

Yet less than a week before the township filed its motion, Township Attorney Caroline Casagrande indicated in the township committee meeting of November 28, 2007, that the content and manner of datruthsquad's criticism was at issue. Asked what the township had to gain by unmasking the anonymous blogger, Casagrande stated that "the First Amendment didn't mean to provide for anonymous bomb throwing." See Kathy Baratta, "Attorney Clarifies Who is Working on Civil Action," News Transcript, Dec. 5, 2007, at <http://newstranscript.gmnews.com/news/2007/1205/Front_page/014.html> (visited on December 10, 2007).

Before that, litigation counsel David Weeks indicated that Moskovitz's credibility was really what was at stake as the township wanted to discover whether or not Moskovitz lied when he denied being datruthsquad: "'I don't know one way or the other if it's him,' Weeks said. 'It could be him.'" See Kelly Heyboer, "Shielding Face of N.J. Blogger," New Jersey Star-

Ledger, November 28, 2007, at <http://www.nj.com/news/ledger/index.ssf?/base/news-12/119622917254690.xml&coll=1&thispage=1> (visited on December 10, 2007).

And before that, litigation counsel Daniel McCarthy asserted – in stark contrast to Mr. Weeks' later admission that he did not know "one way or the other" who datruthsquad was – that Mr. Moskovitz was definitely datruthsquad, that "the Defendant's … attacks on Township officials posted on his blog, 'daTruthSquad,' betray a mental instability and dangerous fixation on elected and appointed Township officials," and that therefore the Court should "require Defendant to adhere to the Rules of Professional Responsibility." Brief in Support of Plaintiff's Application to Vacate the Order to Show Cause (August 3, 2007) at p. 41. See also "Chart of Plaintiff's Written Court Statements Alleging that Defendant Moskovitz is Blogger 'Datruthsquad,'" attached as Exhibit L to the Certification of Matthew J. Zimmerman (November 28, 2007).

The township has no basis to violate Doe's right to anonymous speech. Instead, its repeated attempts amount to transparent efforts to chill the speech of critics, and the township is now seeking the Court's imprimatur on this unlawful campaign. Doe respectfully suggests that this Court should not permit the township to continue to indulge its fantasies about his identity.

Accordingly, for these reasons, and for the reasons set

forth in support of its Motion to Quash, Doe asks the Court to deny the township's motion for a letter rogatory.

12/12/07

Respectfully submitted,

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