IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

FIX WILSON YARD, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 08 CH 45023**
	)	
CITY OF CHICAGO, WILSON YARD DEVELOPMENT I, LLC, et al.	)	**Judge Rochford**
	)	
Defendants.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on September 15, 2009, I filed with the Clerk of the Circuit Court of Cook County, Richard J. Daley Center, Chicago, IL 60602, the attached **THE WILSON YARD DEFENDANTS' BRIEF IN RESPONSE TO THE ANONYMOUS SPEAKERS' RENEWED MOTION TO QUASH WILSON YARD DEFENDANTS' SUBPOENA OF JANUARY 12, 2009**, a copy of which is herewith served upon you.

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THE WILSON YARD DEFENDANTS' BRIEF IN RESPONSE TO THE ANONYMOUS SPEAKERS' RENEWED MOTION TO QUASH WILSON YARD DEFENDANTS' SUBPOENA OF JANUARY 12, 2009

I. THIS CONTROVERSY HAS ALREADY BEEN RESOLVED BY THE COURT AND IT IS A WASTE OF THE PARTIES' AND THE COURT'S TIME TO RECONSIDER IT ON THIS RENEWED MOTION

A. This Matter Has Already Been Ruled Upon

Back on July 9, 2009, the "Anonymous Speakers" filed essentially the same motion to quash that they now renew. A copy of the prior motion is Exh. A hereto. At that time, the Wilson Yard defendants told the Court there was no need to litigate any issue related to the subpoenas, as on May 11, 2009, virtually the entire original complaint had been dismissed on legal grounds. Plaintiffs were then preparing an amended complaint and until we saw the new claims, it was unclear what, if any, discovery would be necessary. The Court then wisely suggested that the subpoenas should be stayed indefinitely and, if they were to be enforced, the Wilson Yard defendants should come back to court and raise the matter by motion. An agreed order to this effect was then entered. See, Order of July 9, 2009 attached hereto as Exh. B.

Thereafter, the plaintiffs filed their three-count Amended Complaint and all of the

defendants have moved to dismiss the Amended Complaint. The motion is now being briefed and the matter is set for a clerk's status on October 26, 2009. Counsel for the "Anonymous Speakers" were fully apprised of all of this and no effort has been made to enforce the subpoenas. Nonetheless, and to our surprise, a renewed motion seeking to quash the subpoenas that have already been stayed was noticed. There is no need to litigate this issue. The prior July 9, 2009 order more than adequately protects the "Anonymous Speakers" who are really not "anonymous" critics of government policy but rather the plaintiffs in this case trying to avoid the statements they have made under pseudonyms.

In order not to waste time on this issue at this juncture, counsel for the Wilson Yard defendants contacted counsel for the "Anonymous Speakers" regarding this renewed motion and offered to withdraw the subpoenas altogether without prejudice to re-issuing them and re-serving them later if the case advances beyond the pleading stage. While this entails some additional cost and time in having to later issue the subpoenas, it is far less than that required to resolve this discovery issue in court, and it leaves for another day the various constitutional and statutory questions the "Anonymous Speakers" raise, as did the Court's July 9, 2009 Order. Counsel for the "Anonymous Speakers", however, said that was unacceptable. He demanded that the Wilson Yard defendants withdraw the subpoenas with prejudice and pay his attorneys fees and costs. See, the email exchange that is Exh. B hereto. This effort to litigate, apparently for the sake of litigation, is misguided and the Court should deny the renewed motion and leave things where they were on July 9, 2009, when the Court previously considered this issue.

B. History of the Dispute

To understand this issue, the Court must know the following facts:

1. When the case was originally filed, plaintiffs urgently sought a preliminary injunction

and so the Court ordered all parties to issue their written discovery by January 9, 2009, see Order of December 18, 2009, attached as Exh. C.

2. In compliance with this order, the Wilson Yard defendants issued discovery in January, 2009 to the plaintiffs and the plaintiff organization, as well as the subpoena to Google that is the subject of this motion.

3. In response to the subpoena, Google advised that it had alerted the websites indicated in the subpoena (www.uptownupdate.com and www.whtthehelen.com) of the subpoena. Then attorney Matt Zimmerman of the Electronic Frontier Foundation in Chicago contacted counsel for the Wilson Yard defendants and indicated he was representing the websites. On February 11, 2009, counsel for the Wilson Yard defendants made it clear, in writing, what the subpoenas sought: statements by the plaintiffs or members of the plaintiff organization, made in the form of blogs or internet postings under pseudonyms, that show: 1) "they knew of the TIF ordinances after they were adopted and at a time when they could have filed a timely challenge" and 2) that they were "not opposed to the TIF ordinances or TIF subsidies, provided the money is not used for low-income housing". See, Email of 2/11/09, attached as Exh. D hereto. There was no effort to comb through all of the posts made on these websites nor to throttle expression on the websites. Our only concern was with statements made there by the very same persons who have filed the present lawsuit----statements that would impeach their claims here.

4. In accordance with the Court's order, the parties answered the written discovery on February 17, 2009. The Wilson Yard defendants asked each of the plaintiffs for the names they used on websites when blogging or posting comments and for the comments they made. The plaintiffs objected to answering. A copy of Judy Glazebrook's answers to interrogatories 2 and 5 are attached as Exh. E, as an example.

5. While the plaintiffs and defendants answered the written discovery, there were many objections. The parties agreed to defer resolving all the discovery disputes until the Court ruled on the motion to dismiss. When the Court ruled on May 11, 2009 in defendants' favor, the parties continued this approach while the plaintiffs prepared and filed an Amended Complaint and the current motion to dismiss was briefed.

6. From February, 2009 to July, 2009, counsel for the Wilson Yard defendants and counsel for the "Anonymous Speakers" agreed to hold the issue of the present subpoenas in abeyance. They apprised Google of this and the subpoenas were put on hold. Copies of the agreements are attached as Exh. F hereto.

7. On July 9, 2009, the "Anonymous Speakers" filed a motion to quash the subpoenas, even though no one was seeking to enforce them. On July 9, 2009, the Court, with the Wilson Yard defendants' concurrence, entered and continued the motion, stayed the enforcement of the subpoenas indefinitely and indicated that when defendants wanted to enforce them, they should come to court and raise the matter as an issue. See, Exh. B hereto.

8. The Court's July 9, 2009 Order staying enforcement of the subpoenas was sent to Google. See, Exh. G hereto.

9. On September 2, 2009, the "Anonymous Speakers" renewed their motion to quash. (The motion was heard not when noticed but during a status call in the case.) Thereafter, in order to save time and money, counsel for the Wilson Yard defendants offered to withdraw the subpoenas without prejudice to re-issuing them, if the Amended Complaint survived the present motion to dismiss. The "Anonymous Speakers" counsel refused to permit this, indicating that the Wilson Yard defendants would have to withdraw the subpoenas with prejudice and pay the "Anonymous Speakers" fees and costs. See, the email exchange on September 11, 2009, which is Exh. H hereto.

C. Nothing Has Changed Since The Court's July 9, 2009 Ruling and It Should Stand

When the Court entered its July 9, 2009 Order, the parties were seeking to determine if any part of plaintiffs' claims were sufficient legally to survive a motion to dismiss. All discovery disputes were postponed until the section 2-615 and 2-619 motions were resolved. The situation remains the same today and will remain the same until the Court rules later this fall on the sufficiency of the Amended Complaint. The Court's July 9, 2009 order staying enforcement of the subpoenas is sufficient to protect the interests of the websites in question, while also preserving the defendants' right to take discovery and defend themselves against the plaintiffs' allegations, if the case moves beyond the pleading stage. This subpoena has nothing to do with individuals who wish to host websites or post comments on websites-------other than the plaintiffs. So, there is no generalized chill on internet chatter. The plaintiffs, however, cannot escape responsibility for their statements just because they make them on the internet under names that conceal their identity. Therefore, the July 9, 2009 Order, entered with the consent of the defendants, should stand.

II. THE SUBPOENA AT ISSUE IS PROPER UNDER THE DISCOVERY RULE AND THE CONSTITUTION

A party cannot file suit and claim the TIF Ordinance is vague (as plaintiffs now due in

Count III) when that party has made statements over the years on the internet indicating he or she knew exactly what the TIF Ordinance involved. That party cannot say that he or she only recently understood what the TIF Ordinances meant and therefore is bringing this case eight years after the Ordinances' adoption, when the party has said, in internet posts, years ago that he or she knew exactly how the TIF Ordinances would work, but were only objecting because the money would be used, in part, for low-income housing or other purposes that the party did not prefer. Such statements are directly material to the defense of laches. A party may not claim that the Wilson Yard Redevelopment Agreement does not address the alleviation of the conservation factors in the neighborhood or provide sufficient new residential units (as plaintiffs allege in their new Count I) when that party has posted statements on the internet conceding that the project does address the conservation factors, but just not in the way he or she wants the City to do so. Once you have launched litigation, what you have said, on an internet blog site, or elsewhere, can be used against you at a preliminary injunction hearing, in a deposition or at trial.

Relevancy in discovery is determined by reference to the issues. Bauter v Redding, 68 Ill.App.3d 171, 175 (Ill.App. 1979). Statements by these plaintiffs related to the issues raised in Counts I and III, or related to the laches defense are obviously relevant. Since February, the Wilson Yard defendants have been 100% clear that all they seek are the plaintiffs' statements, not those of others opposing the Wilson Yard development. There is no effort to chill discussion about the project, only to get at impeaching admissions and other inconsistent statements the plaintiffs have made.

The "Anonymous Speakers" say defendants can get this information from the plaintiffs themselves. The simple answer is that defendants have tried that and, as can be seen from the Glazebrook interrogatory answers, the plaintiffs objected and refused to disclose their blog

names or posts. Even if those objections are overruled, defendants have every right to test the truthfulness of plaintiffs' answers by subpoening their posts from the blogs themselves.

The "Anonymous Speakers" claim that the defendants can simply read the websites and identify the statements that way. The problem is that posts are not made using the poster's actual name but rather a blog name. While we strongly think certain posts are by particular plaintiffs, we cannot know for sure without the disclosure of the identity of the poster. All we seek is all blog names or posting names of those people who are plaintiffs here or members of the plaintiff organization.

The "Anonymous Speakers" then say the Court has already found the plaintiffs are guilty of laches in dismissing parts of their original complaint. So, they reason, no discovery can ever take place on laches. First, this discovery goes beyond laches, but even if it did not, plaintiffs' Amended Complaint raises untimely claims all over again. Until the Court rules again, all facts related to a laches defense are material. The "Anonymous Speakers" cannot control the discovery defendants undertake in their own defense.

The "Anonymous Speakers" finally insist that the subpoena is barred by the First Amendment as it targets political opponents of the Alderman and others seeking to present their views and debate a matter of public interest. Nonsense. The subpoena seeks only the statements of the plaintiffs themselves. Indeed, we are not seeking the identity of anonymous speakers, we are seeking the statements of the specific people who have sued, who are trying apparently to hid behind the internet. While the subpoena itself may have been worded in a broader fashion, Rule 201(k) discussions between counsel have made it clear since February that this is the only material sought. None of the cases the "Anonymous Speakers" cite precluded discovery in a situation, like this, where the internet statements of plaintiffs were sought, those statements bear

upon the issues those plaintiffs raise or defenses to their claims, there is no alternative way to secure the statements and the party has significantly undermined their expectation of any privacy by filing suit. Indeed, the cases support the Wilson Yard defendants.

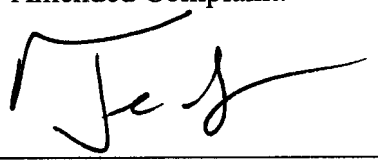
So, for example, in Sony Music Entertainment, Inc. v Does, 326 F.Supp.2d 556 (S.D.N.Y., 2004), the Court refused to quash a subpoena seeking the identity of defendants who were illegally downloading music, where they were sought from an internet provider. Accord: In Re Verizon Internet Sevices, Inc., 257 F.Supp.2d 244 (D.D.C. 2003), revd on other grounds Recording Industry Assn of America, Inc. v Verizon Internet Services, 351 F3d 1229 (D.C.Cir. 2003) (same). Or, in Online, Inc. v Anonymous Publicly Traded Co. 261 Va. 350, 542 SE2d 377 (2001), the court denied a motion to quash seeking to protect the identity of a defendant who had allegedly made false and defamatory statements on the internet and disclosed confidential insider information online.

The cases the "Anonymous Speakers" cite involved a non-party news reporter, Silkwood v Kerr-McGee Corp. 563 F2d 433 (10th Cir. 1977) or a person who was neither a plaintiff nor had done anything wrong, Highfields Capital Management, LP v Doe, 385 F.Supp.2d 969 (N.D. Calif., 2005). Leaving aside a case from the New Jersey trial court which we could not locate, the one case they have that involved a plaintiff, Grandbouche v Clancy, 825 F2d 1463 (10th Cir. 1987) merely remanded for the court to take a new look at whether the motion to quash was properly denied in the first place.

III. CONCLUSION

For the reasons set forth above, the Wilson Yard defendants respectfully request that the Court strike the "Anonymous Speakers" renewed motion and leave in place the existing July 9, 2009 Order or defer consideration of the renewed motion until after the Court's ruling on the

pending Motion to Dismiss the plaintiffs' Amended Complaint.



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