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

FIX WILSON YARD, INC., et al. Plaintiff, vs. CITY OF CHICAGO, et al. Defendants.	)	Docket No. 2008-CH-45023

ANONYMOUS SPEAKERS' REPLY IN SUPPORT OF THEIR RENEWED MOTION TO QUASH WILSON YARD DEFENDANTS' SUBPOENAS OF JANUARY 12, 2009

I. INTRODUCTION

In a nutshell, Defendants argue that their subpoenas are proper because – although backed by not a shred of evidence to support their theory – unnamed online critics might be the Plaintiffs and they hypothetically could have made statements inconsistent with the claims asserted by the Plaintiffs in their Amended Complaint. Moreover, Defendants argue, because they would prefer not to have to justify their subpoenas at this stage in the litigation, Anonymous Speakers have no recourse to challenge the legality of the subpoenas but instead must wait for a time and manner of Defendants' choosing to exercise their rights. Defendants are incorrect.

II. ARGUMENT

Defendants can provide neither factual nor legal justification for their subpoenas, required before any discovery request may issue. Furthermore, Defendants cannot contest, let alone excuse, the ongoing First Amendment impact of their subpoenas. Defendants' subpoenas must be quashed and a protective order entered. As Defendants in their Response largely ignore the substance of the Renewed Motion to Quash, Anonymous Speakers will not duplicate their own efforts here. However, some of the many irrelevant, incomplete, and flat-out false statements made by the Defendants in their Response warrant at least brief discussion.

A. Defendants Fail to Even Address the Clear Prohibition Against Discovery "Fishing Expeditions," a Primary Failing of Their Subpoenas.

Not once in their Response did Defendants address the clear prohibition against discovery "fishing expeditions" which their subpoenas plainly violate. See, e.g., People v. Rodriguez, 119 Ill. App. 3d 575, 578 (Ill. App. Ct. 1983) (quashing subpoena proper where defendant, ostensibly seeking impeachment material, "failed to make any [factual] showing whatsoever" to support an argument that a witness lied). See also, e.g., United States v. Nixon, 418 U.S. 683, 701 (1974) ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."). Defendants essentially argue that, given their enormous discovery dragnet, something might show up that is relevant to their defense. That, however, is the definition of a fishing expedition, one that necessarily sweeps in innocent third parties exercising their First

Amendment right to engage in political speech, speech that enjoys the highest protection under the First Amendment. See, e.g., People v. White, 116 Ill. 2d 171, 177 (Ill. 1987) (political speech is the "essence of self-government"); Nixon, 418 U.S. at 699-700 (discovery available only where it is "not intended as a general 'fishing expedition.'").

The question before the Court is not whether Defendants can identify a broad enough universe of potential targets the examination of which might lead to evidence relevant to their case but instead whether the "application is made in good faith" and whether there is a "preliminary showing of materiality" to indicate that the "requested discovery is relevant or will lead to such evidence." Nixon, 418 U.S. at 699-700; Leeson v. State Farm Mut. Auto. Ins. Co., 190 Ill. App. 3d 359, 368 (Ill. App. Ct. 1989); In re All Asbestos Litigation, 385 Ill. App. 3d 386, 389 (Ill. App. Ct. 2008). All Defendants can show is that some of the Anonymous Speakers (among others) vocally objected to their project, hardly meeting their burden. Defendants' fantasies regarding the identities of the Anonymous Speakers – whose First Amendment-protected speech about this clear matter of public concern Defendants derisively refer to as "internet chatter" (Response at p. 4)[1] – do not in any way provide a factual basis to support the issuance or further existence of their subpoenas.

B. Defendants Have Flatly Misrepresented the Facts of This Case In an Attempt to Conjure a Justification For Their Subpoenas.

Misrepresenting their suspicions to the Court as facts obviously does not help the Defendants meet their burden either. Defendants' Response rests almost entirely on the egregious misrepresentation,[2] made without a shred of evidentiary support, that the Anonymous Speakers are somehow, definitively, the Plaintiffs:

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[1] While Defendants' Response does not include page numbers, Anonymous Speakers include them for ease of reference.

[2] Illinois Supreme Court Rules 201 and 219 prevent litigants from attempting to obtain through discovery information to which they are not entitled. Rule 137 states that an attorney who signs a pleading (such as Defendants' Response) certifies that he has made a "reasonable inquiry" into the assertions made in that pleading, that "it is well grounded in fact," and "that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." By first issuing and then refusing to withdraw subpoenas for which there was no factual basis (and, as discussed again below, no legal basis), Defendants

> "Anonymous Speakers" . . . 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.

Response at p. 2. Counsel for the Anonymous Speakers has asked Defendants' counsel six times since Defendants filed their Response to articulate some basis – any basis – for this remarkable assertion but he has refused to do so.[3] See Supplemental Zimmerman Declaration ("Suppl. Zimmerman Decl.") at ¶ 6.

Defendants' misrepresentation is nothing more than an attempt to divert attention from the real issue: whether Defendants had any basis whatsoever for issuing – or refusing to withdraw[4] – their broad subpoenas. They did not. Aside from Defendants' inability to point to

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violated Rules 201 and 219. By submitting a signed Response in which they present completely unsupported assertions as facts, Defendants and their attorney violated Rule 137.

[3] The day before this filing, after six requests to explain the factual basis for his assertions, Defendants' counsel forwarded what is purportedly a screenshot of a post made by a Buena Park Neighbors message board user in 2003, with counsel indicating "we believe (but do not know) that the author is plaintiff Katherine Boyda." See Exhibit C to Suppl. Zimmerman Decl. The supposed significance of this screenshot is not at all clear. To begin with, Defendants have not introduced it or anything similar into evidence. Moreover, such a screenshot does not purport to contain information about the identities of other speakers on the site, let alone about the identities of speakers on other targeted sites. Even if the statement was before the Court and is from Boyda – meaning that Defendants had identified Boyda's account name – then any information in the possession of the Buena Park Neighbors message board operator is redundant. See infra sec. IIC (discussing how neither of the web site operators at issue apparently collects the names of users). In any event, although the content of the post might indicate an awareness of a potential claim in 2003, the Court has already ruled (as Defendants have conceded) that Plaintiffs were aware of their potential cause of action as a matter of law in 2001, meaning that Defendants have no need for identity information from this online account or any other. See infra sec. IID.

[4] Defendants also blatantly misrepresent the exchange between counsel, falsely implying that Defendants' counsel offered to withdraw the subpoenas without condition when in fact he only did so on the condition that Anonymous Speakers waive all claims against him and his client. See Exh. B to Suppl. Zimmerman Decl. ("I am prepared to [withdraw the subpoenas without prejudice] if it moots your motion and all issues we have with your clients, for the time being.") (emphasis added). As briefly noted in footnote 2, Defendants have violated multiple Illinois Supreme Court Rules, potentially incurring liability that Anonymous Speakers may pursue in a future sanctions motion. Furthermore, as discussed in Anonymous Speakers' Opening Brief, Anonymous Speakers are entitled to a protective order even if Defendants withdraw their subpoenas without prejudice because Defendants have repeatedly expressed their intention to enforce these or similar subpoenas in the future. Nothing prevents Defendants from withdrawing their subpoenas unilaterally and then arguing (incorrectly), if they wish, that the motion for a protective order is moot.

any evidence that Anonymous Speakers "are" the Plaintiffs, Defendants similarly cannot even point to any evidence in the record that anyone made the types of statements that Defendants say necessitate the subpoenas. Defendants make the following baseless assertion regarding their "need" to subpoena the Anonymous Speakers:

> 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.

Response at p. 5. One would assume that, in order to back up legal arguments based on the purported existence of "internet posts" made "years ago" in which certain opinions were expressed, Defendants would actually identify such posts, when they were made, and how they might relate to the case. Defendants, however, do not appear to feel so constrained.[5] In effect, Defendants argue that someone, at some point, could have made some statement on the Internet that would support their positions. This by no stretch satisfies Defendants' obligations under the discovery rules.[6] As they amount to nothing more than Defendants' fanciful, baseless speculation, the subpoenas must be quashed.

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[5] Defendants apparently misunderstand Anonymous Speakers' separate point that Defendants can themselves obtain much of the information sought by the subpoenas themselves. See Opening Brief at pp. 19-20; compare Response at pp. 6-7. While Anonymous Speakers' identities may or may not be independently obtainable by Defendants, the statements that Defendants argue must have been made by the Plaintiffs are obviously publicly available. If there are statements on Anonymous Speakers' sites that Defendants believe implicate the Plaintiffs, as Defendants explicitly seek in their subpoenas, then it is up to Defendants to identify them.

[6] As Anonymous Speakers pointed out in their Opening Brief, whatthehelen.com and uptownupdate.com – the identities of whose operators are sought in Defendants' subpoena to Google – began after the period self-identified by Defendants' counsel as relevant to a laches defense, so by definition no statement relevant to such a defense can exist on those sites. See Opening Brief at pp. 9-10. Similarly, no statement by anyone has been identified that allegedly shows contradictory opinions to those articulated by Plaintiffs in this case.

C. The Online Hosts of the Targeted Blogs and Message Boards Do Not Collect the Names of Users, Meaning That Any Information Obtained From Them Would Constitute Only the Beginning of Defendants' Fishing Expedition.

Defendants assert that "all they seek are the plaintiffs' statements" (Response at p. 5) yet fail to mention that the allegedly narrow discovery they seek likely cannot be obtained. Neither Google (which hosts uptownupdate.com and who hosted whatthehelen.com when it was active) nor Yuku.com (which hosts the Buena Park Neighbors message board) require that users identity themselves. See Exhibit A to Suppl. Zimmerman Decl. (registration pages for Blogger.com (owned by Google) accounts and Yuku.com accounts showing that names of account holders are not collected). This means that Google and Yuku.com might at best possess an e-mail address registered with an account. As a result, in order to confirm the identity of an alleged "Plaintiff," Defendants would have to initiate additional rounds of subpoenas to e-mail providers who may not even themselves know the real names of the account holders. More to the point, this ongoing dragnet subpoena process would be anything but focused, necessarily involving the disclosure of information about people who have nothing to do with this case. Defendants imply that they can simply ask these companies to "identify statements made by the plaintiffs" but that simply is not feasible (and in any case is not what they asked for in their subpoenas).

Even if, for example, they could provide a (relevant) list of e-mail addresses of accounts for which they would like to obtain a correlated list of online user names, and by extension the statements made under those accounts, Defendants have already indicated that limiting their discovery options in that way would be insufficient because Plaintiffs could hypothetically have made statements under other accounts as well. See, e.g., Response at p. 6 ("defendants have every right to test the truthfulness of plaintiffs' answers [regarding what online statements they might have made] by subpoening [sic] their posts from the blogs themselves."). Defendants effectively seek to launch and preserve a discovery plan with no limitations and no ending. Anonymous Speakers ask that the Court put a stop to this unjustified overreach here and now.

D. The Arguments Made By Defendants In Their Response Squarely Contradict the Arguments Made In Their Own Motion to Dismiss.

Defendants do not materially rebuke Anonymous Speakers' arguments that the legal defenses alluded to by the Defendants support neither the issuance nor continued existence of their subpoenas. It is worth pointing out, however, that Defendants in their Response take a position squarely at odds with the ones made in their own motion to dismiss that is currently before the Court. In their motion to dismiss briefing, instead of arguing that factual questions remain that warrant discovery (as they argue here) Defendants instead adopt Anonymous Speakers' position and argue that the laches question is settled:

> The Court has already ruled that challenges to the TIF Ordinances are barred by the doctrine of laches. . . . This Court found that the first element of laches – an unreasonable delay in bringing suit – was apparent from the face of the complaint because it showed that Plaintiffs waited 7 ½ years to challenge the TIF Ordinances, well past the five-year statute of limitations. . . . The Court's rationale for dismissing the previous challenge to the TIF Ordinances under section 2-619(a)(9) applies with equal – if not greater – force to Count III, which is also a challenge to the validity of the TIF Ordinances. . . . The TIF Ordinances were enacted on June 27, 2001 . . . and Plaintiffs' knowledge of their passage is presumed a matter of law. . . . Because this Court has already ruled in dismissing Plaintiffs' prior claim that 7 ½ years was an unreasonable delay in bringing suit, eight years is an even more unreasonable delay. Thus, the first element of laches – unreasonable delay – is easily satisfied.

Defendants' Memorandum in Support of their Motion to Dismiss, filed August 24, 2009, at pp. 13-14. Anonymous Speakers agree with Defendants that the Court has already ruled that "Plaintiffs' knowledge of the [TIF Ordinances' June 27, 2001] passage is presumed as a matter of law." Id. Why Defendants now argue that a factual issue remains is a mystery.

E. Defendants' Argument That Justifying Their Subpoenas Would Be Too Burdensome Is Without Merit.

In a rather remarkable display of chutzpah, Defendants further argue that being forced to justify their subpoenas would be too burdensome for them. See, e.g., Response at p. 2 ("While [withdrawing their subpoenas without prejudice] . . . 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 . . ."). Indeed, in his last e-mail communication, Defendants counsel again refused to

provide any factual justification for targeting uptownupdate.com and whaththehelen.com, stating "I really don't want to go through all the statements on all the sites." Exh. D to Suppl. Zimmerman Decl. These arguments are more than a little obtuse. First, with the filing of this Reply, briefing is now complete; Defendants need not incur any "additional cost and time" for further briefing.[7] Second, this argument completely ignores the ongoing burden on the Anonymous Speakers and Defendants' demonstrated indifference to that fact over the past seven months. Because of Defendants' subpoenas, Anonymous Speakers have been forced to (a) find and hire counsel, (b) obtain subpoena deadline extensions from Google five separate times because Defendants repeatedly refused to do so themselves and refused to stay the subpoenas; (c) repeatedly contact counsel for both the Plaintiffs and Defendants in an effort to expedite a resolution to this dispute, even though Defendants' counsel never contacted Plaintiffs' counsel to follow up; (d) file two separate motions to quash when it became clear that Defendants were not interested in resolving the dispute; (e) inform Google of the Court's temporary stay order; and (f) contact Defendants' counsel six times and counting in a thus far futile effort to discern the factual basis for the arguments made in Defendants' Response. See Suppl. Zimmerman Decl. at ¶ 6. With all due respect to Defendants, having to appear at oral argument to justify the issuance of the subpoenas, especially now that the briefing is complete, is hardly an unreasonable burden.

The true ongoing burden here remains on Anonymous Speakers and others who may wish to engage in the public debate about Defendants' project. While Defendants assert without support (and contrary to the language of the subpoenas themselves) that it is not so,[8] subpoenas targeting speakers solely on behalf of their vocal criticism of the Defendants, their development project, and Alderman Shiller – even if temporarily stayed – obviously imposes a chilling effect

[7] Purportedly in the name of saving themselves and the Court unnecessary work, however, Defendants filed an extra unnecessary and baseless motion – their motion to stay Anonymous Speakers' motion to quash, filed September 16, 2009 – by which Defendants hope to obtain an additional opportunity to make the same arguments as the ones they made in opposition here.

[8] See, e.g., Response at p. 4 ("This subpoena has nothing to do with individuals who wish to host websites or who post comments on websites------[sic] other than the plaintiffs. So, there is no generalized chill on internet chatter.").

on public discourse. See, e.g., NAACP v. Alabama, 357 U.S. 449, 461 (1958) (underlying inquiry must always be whether a compelling governmental interest justifies any governmental action that has "the practical effect 'of discouraging' the exercise of constitutionally protected political rights"). If Defendants wish to invoke the power of the Court via the subpoena process in furtherance of their case, they must be ready to justify that exercise of power when challenged.

III. CONCLUSION

As the Illinois Supreme Court has noted, "[d]iscovery is not a tactical game." Williams v. A. E. Staley Manufacturing Co., 83 Ill. 2d 559, 566 (Ill. 1981). Neither is it something that can be invoked without a reasonable basis or a care for the impact on their targets, especially non-parties. Rather, "[t]he subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused." Theofel v. Farey-Jones, 359 F.3d 1066, 1074 (9th Cir. 2004). Defendants have not heeded these admonitions. Instead of minimizing the burden on third parties, Defendants have instead targeted them without justification. Instead of working to resolve their discovery dispute and minimize the collateral damage caused by their subpoenas, Defendants have refused to even discuss the matter with the Plaintiffs. And most egregiously, instead of certifying that relevant factual grounds existed to support the issuance of their subpoenas, Defendants simply made up their justification and presented it to the Court as fact. After seven months of trying to resolve this matter with the Defendants, and with no end in sight, enough is enough. Anonymous Speakers respectfully request that the Court put an end to this offensive fishing expedition and confirm that they can engage in a public dialogue about this matter of public concern without fear of future harassment.

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Respectfully submitted,

By _____

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