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December 12, 2007

Honorable Terence P. Flynn
Monmouth County Superior Court
71 Monument Park
P.O. Box 1266
Freehold, NJ 07728

RE: Township of Manalapan v. Stuart Moskowitz, Esq.
Docket No. MON-L-2893-07
Our File No. 1158
Motion Returnable: December 21, 2007

Dear Judge Flynn:

This firm represents the plaintiff, Township of Manalapan, in the above referenced matter. Please accept this letter brief in lieu of a more formal brief in opposition to Movant DaTruthsquad.com's notice of motion to quash and for protective order. For our statement of material facts, please refer to our attached certification.

ARGUMENT

A. The Motion For Letter Rogatory And Attached Subpoena Seek Information Likely To Lead to Admissible Evidence

The Poster's Attorney argues in his brief that the September 26th Subpoena is unenforceable because it is both procedurally

invalid and because it seeks information unlikely to lead to admissible evidence. As Plaintiff counsel details below, our motion for issuance of letter rogatory, currently before this Court, remedies any procedural deficiencies regarding the September 26th Subpoena. Furthermore, the subpoena attached with the motion for letter rogatory, like the September 26th Subpoena, seeks information likely to lead to admissible evidence.

i. The Motion For Issuance of Letter Rogatory Resolves the Procedural Issues Regarding the Initially-Filed Subpoena

Plaintiff's counsel has filed a motion for issuance of letter rogatory that is currently before this Court. Pursuant to Rule 4:11-5, depositions taken outside the State of New Jersey may be applied for in accordance with a commission or letter rogatory issued by a New Jersey court. The Rule provides, in pertinent part:

A deposition for use in an action in this state, whether pending, not yet commenced, or pending appeal, may be taken outside this state... (b) in accordance with a commission or letter rogatory issued by a court of this state, which shall be applied for by motion on notice... Commissions and letters rogatory shall be issued in accordance with R. 4:12-3.

R. 4:11-5. Importantly, a Comment to the Rule "permits the issuance of a commission or letter rogatory **without a showing of necessity or convenience.**" Pressler, N.J. Court Rules, Comment 1.3 on R. 4:11-5 (2007) (emphasis added.)

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 23, 2007 Order and made knowing misrepresentations to the court. **The blogger identification information we request from Google via the subpoena attached with the motion for issuance of letter rogatory is essential and critical to this determination.**

Because Plaintiff's current motion for issuance of letter rogatory resolves any deficiencies the Court may find with the prior September 26th Subpoena, we respectfully request that this Court deny Poster Attorney's motion prohibiting the issuance of any future discovery subpoenas regarding the Poster's identity-related information.

ii. The Information and Materials Sought By Subpoena Are Likely to Lead to Admissible Evidence

As stated above and reiterated throughout this opposition letter, if the identification information sought verifies that the Poster is Mr. Moskovitz, then it will be confirmed that the defendant has made knowing misrepresentations to the Court regarding his involvement with daTruthSquad blog. These potential knowing misrepresentations bear directly on the underlying lawsuit because if it is confirmed that defendant has lied regarding this issue, then the veracity of any statements he makes in open court or in future certifications is in question and this will have continuing repercussions as discovery proceeds.

B. The First Amendment Does Not Bar Discovery of The Information Sought By The Township Counsel

The Poster cites the Dendrite Int'l v. Doe No. 3, 342 N.J. Super. 134, 142 (App. Div. 2001) in arguing that Plaintiff cannot show compelling need required to discover his identification information. The Poster recognizes, however, that anonymous speech is a **qualified privilege** under the first amendment and that such anonymity is unprotected if the party seeking to unmask the anonymous speaker shows the compelling need for discovery of the anonymous speaker's identity pursuant Dendrite. The Dendrite court recognized that the First Amendment does not provide absolute protection for anonymity when the anonymous speaker violates the law:

In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements **should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances**. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact pseudonymously and anonymously with each other **so long as those acts are not in violation of the law**.

Id. at 151. (emphasis added.)

The Dendrite court then detailed the necessary procedures for a court to follow in evaluating whether an anonymous speaker warrants protection by the First Amendment. The Dendrite court listed the initial four factors and a subsequent balancing-the-interests analysis regarding discovery of an anonymous speaker in the context

of defamation allegations. In consideration of the Court's time, we will not recount the initial four Dendrite factors here as the Poster's Attorney does not move to quash the subpoena based on any of those factors. Poster's Attorney only contends that Plaintiff cannot satisfy the balancing-the-interests test. Regarding the applicable balancing-the-interests analysis, the Dendrite court provided:

[A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must **balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.**

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Id. at 142. (emphasis added.)

Here, our need is more compelling than the Poster's qualified privilege of remaining anonymous because the disclosure of the anonymous speaker's identity is necessary to determine whether the defendant in this action has made knowing misrepresentations to this Court through his certifications and in court hearings. The Poster's Attorney would have us accept at face value Mr. Moskovitz's vehement denials that he is the Poster. We argue, however, that any reasonable observer could look at the daTruthSquad blog and draw the plausible conclusion that Mr. Moskovitz could indeed be the Poster. For example, on daTruthSquad

blog, the Poster refers to himself as "da Mosked Man" which obviously bears a striking similarity to the surname of the defendant in this litigation.

Because of the severity of the possible offense committed, a commission of perjury before this Court, Plaintiff's compelling need for discovery of the information sought by the subpoena satisfies Dendrite's scrutiny and the Poster's identity does not warrant First Amendment protection.

C. The Stored Communications Act Does Not Bar Plaintiff From Obtaining the Information It Seeks

In his papers, Doe's Attorney argues that the Stored Communications Act ("SCA") bars the discovery Plaintiff seeks. Doe's Attorney is incorrect, however, in stating that none of the SCA's numerous exceptions apply to this case. Specifically, §2703 provides means by which the information Plaintiff seeks is discoverable.

Section 2703 details circumstances that require disclosure of customer communications and records. Sections 2703(b)(B)(ii) and 2703(c)(B) provide that a governmental entity may require a provider of electronic communication service or remote computing service to disclose customer communications or records via a court order in accordance with the requirements in §2703(d). Section 2703 provides, in pertinent part:

. . . A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue

only if the governmental entity offers specific and articulable facts showing that there are **reasonable grounds** to believe that the contents of a wire or electronic communication, or the records or other information sought, are **relevant and material** to an ongoing **criminal** investigation. . .

18 U.S.C. 2703(d) (emphasis added.).

To once again reiterate from above, if the information sought in the subpoena confirms that Mr. Moskovitz is the Poster, then it will be confirmed that he has made knowing misrepresentations to this Court. Because of the seriousness and potential for the possible commission of a criminal offense, discovery of the information is crucial to confirming the veracity of defendant's denial that he is the Poster.

Poster's Attorney may argue that §2703(d) only provides for discovery of the information we seek via a court order, not a discovery subpoena. However, we contend that, **by this Court's signing our order granting issuance of letter rogatory, this would be, in effect, a court order within the meaning of §2703.** The fact that the court order is for issuance of a discovery subpoena does not invalidate our motion under the SCA.

Conclusion

In summary, by filing a motion for the issuance of letter rogatory, the plaintiff has corrected any procedural deficiencies of the initially-filed subpoena. Furthermore, Plaintiff has demonstrated its more compelling need to uncover the Poster's identity, thereby satisfying the Dendrite balancing analysis. Additionally, the SCA does not bar the plaintiff's subpoena because a court order granting our motion for issuance of letter rogatory would satisfy one of the SCA's many exceptions. Therefore, we respectfully request that this Court deny Poster Attorney's motion to quash and also deny granting him a protective order on the information sought via our subpoena.

Respectfully submitted,
RUPRECHT, HART & WEEKS, LLP


LEN M. GARZA

LMG:lb

cc: Stuart J. Moskowitz, Esq.
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