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

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

**ANONYMOUS SPEAKERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR RENEWED MOTION TO QUASH WILSON YARD DEFENDANTS' SUBPOENAS OF JANUARY 12, 2009**

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## I. INTRODUCTION

While the Court in July took the preliminary step of temporarily blocking enforcement of Defendants' baseless subpoenas, this step has proven insufficient. Even though the Plaintiffs have filed an amended complaint, Defendants refuse to justify or withdraw their subpoenas and continue to chill debate about their development project. Because of this ongoing chilling effect, and because the subpoenas are demonstrably baseless, Anonymous Speakers ask the Court to remove the threat in its entirety.

This matter is ripe and should be decided now. The continued existence of these sweeping, invasive, and ultimately irrelevant subpoenas imposes a tremendous burden on not only the Anonymous Speakers themselves but also on the community as a whole that has effectively been told that critics will be targeted and exposed. Without an affirmative statement by this Court confirming that the subpoenas are unenforceable and that the Defendants cannot revisit such tactics in the future, Defendants will be able to lord such threats over their targets indefinitely. Speech commenting on government-sponsored activity enjoys the most robust protection under the First Amendment and must be defended with "exacting scrutiny." Any attempt to utilize the judicial system that unnecessarily chills that protected speech must fail. Anonymous Speakers respectfully ask this Court to quash Defendants' subpoenas and prevent them from issuing such discovery in the future.

## II. BACKGROUND

### A. Factual Background and Procedural History.

On December 3, 2008, Plaintiffs community organization Fix Wilson Yard, Inc., and several individual Chicago residents – Judith A. Pier, D. Richard Quigley, Judy Glazebrook, Katherine Boyda, Lukas Ceha, and Pat Reuter – filed a complaint against Defendants City of Chicago and six firms affiliated with Holsten Real Estate Development Corp. challenging Chicago ordinances that established the Wilson Yard development project in the Uptown neighborhood of Chicago. On January 12, 2009, Defendants issued sweeping subpoenas seeking the identities of Wilson Yard development critics to Internet corporation Google (operator of the

blogger.com service used by two of the targeted anonymous speakers), the Buena Park Neighbors ("BPN") neighborhood association (which links to a message board on which users can anonymously post messages on a variety of subjects), and to the Uptown Neighborhood Council, a "grassroots organization of Uptown residents" that operates a blog commenting on news regarding the Uptown area of Chicago.[1] The operators of the two blogs whose information is sought pursuant to the subpoena to Google ("What the Helen" and "Uptown Update") and the Buena Park Neighbors (collectively, the "Anonymous Speakers"[2]) bring this motion to quash and for a protective order.

The subpoena issued to Google requires it to produce "[a]ll documents . . . related to the identity of the person or persons who created and/or control 'What the Helen.com' and 'Uptown Update' blogs and websites." The "What the Helen" blog, now defunct, provided commentary on the 2007 election campaign of Alderman Helen Shiller who presided over the planning process for the Wilson Yard development. Subpoena of January 12, 2009, to Google, Inc., Exhibit A to the Declaration of Matthew J. Zimmerman ("Zimmerman Decl."). The "Uptown Update" blog, which was launched in May of 2007, presents discussion on a range of local political issues of particular interest to the Uptown neighborhood, including the Wilson Yard development.

The subpoena issued to Buena Park Neighbors requires that organization to produce:

1. All documents showing posts on [BPN's] web site [sic], whether in the form of a blog, chat room comment, website post or any other form that relates to the Wilson Yard development, Adlerman Shiller, or Uptown development;

[1] Defendants' have apparently failed to file their non-party discovery requests with the Court as required by Rule 201(o) ("Not withstanding the foregoing, a copy of any discovery request under these rules to any nonparty shall be filed with the clerk in accord with Rule 104(b)."

[2] Uptown Neighborhood Council is not represented by the undersigned council and is not participating in this motion to quash.

2. All documents identifying information [sic] on persons who have posted, in any form, on [BPN's] website involving the Wilson Yard development, Alderman Shiller, or Uptown development;
3. All documents pertaining to the following persons: Judith A. Pier, D. Richard Quigley, Judy Glazebrook, Katherine Boyda, Lukas Ceha or Pat Reuter;
4. All documents pertaining to the Wilson Yard development.

Subpoena of January 12, 2009, to Buena Park Neighbors, Exhibit B to Zimmerman Decl.

On January 16, 2009, Defendants filed a motion to dismiss the complaint, and the Circuit Court granted Defendants' motion on May 19, 2009. See Order of January 16, 2009, Granting Motion to Dismiss, Exhibit C to Zimmerman Decl. On June 22, 2009, Anonymous Speakers filed a motion to quash based solely on the grounds that Defendants' subpoenas were invalid in the absence of an operative complaint. On July 9, 2009, in part as a result of Defendants' argument that Plaintiffs might file an amended complaint in short order, the Court indefinitely stayed enforcement of the subpoenas and authorized the Anonymous Speakers to file a supplemental motion if appropriate. See Order of July 9, 2009, Exhibit D to Zimmerman Decl. Plaintiffs then filed an amended complaint on July 24, 2009, that provides no new basis for the continuation of Defendants' subpoenas. Defendants have indicated that they will not withdraw their subpoenas and, when pressed, have been unable to provide any new basis for them in light of Plaintiffs' new complaint.

**B. The Chilling Effect of Defendants' Subpoenas.**

The reaction to Defendants' tactics – issuing subpoenas aimed at outing grassroots critics of their project and the primary elected official promoting it – was predictable. In the week after news of the subpoenas broke, Uptown Update readers posted over 100 comments decrying the move, describing the blunt tactic as (among other things) a "witch hunt," "intimidation," "harassment," "creepy," "disheartening," "desperate," "politically motivated," "corrupt," and "bully[ing]." Uptown Update, News-Star: "Hosten's Attorney Subpoenas Google,"

UptownUpdate.com, January 28, 2009, located at http://www.uptownupdate.com/2009/01/news-star-holstens-attorney-subpoenas.html, Exhibit E to Zimmerman Decl. Posters repeatedly observed that if the Defendants successfully unmasked their anonymous critics, "that person or persons could face some sort of retribution." Id. Others noted the apparent connection between Alderman Shiller's son Brendan – along with his mother, a frequent target of criticism on the targeted websites – and Defendants' counsel Tom Johnson who share an office suite. Id. The Chicago Journal, and later the Chicago Tribune, wrote stories about the subpoenas, with the Tribune calling the subpoenas the "latest salvo in a decade-long fight over the development, one that plays off class warfare and dueling political agendas over a sprawling tract of land in Uptown." James Janega, Wilson Yard Developer Fights to Unmask Uptown Bloggers, Chicago Tribune, February 12, 2009, located at http://archives.chicagotribune.com/2009/feb/12/local/chi-uptown_update_city_zonefeb12, Exhibit F to Zimmerman Decl. Plaintiffs' counsel Thomas Ramsdell described the subpoenas as "politically motivated in a way to harass and intimidate the plaintiffs and anyone else who might support them," noting that if he had a legitimate need for the information, "[a]ll [Defendants' counsel] needed to do was serve us with a request . . . asking us if any of the plaintiffs were blogging at this time." Id. University of Tennessee law professor and political blogger Glenn Reynolds offered perhaps the more succinct observation: "Expose Chicago politicians and their cronies, and they'll try to expose you, I guess." Glenn Reynolds, Chicago Bloggers Threatened, Instapundit.com, February 7, 2009, located at http://pajamasmedia.com/instapundit/69015/.

Since the subpoenas were issued, What the Helen – which frequently criticized the actions of Alderman Shiller and her son and was first disabled in 2007 – has remained quiet. See, e.g., Lorraine Swanson, Quash 'Em, Lake Effect News, June 24, 2009, located at http://www.lakeeffectnews.com/2009/06/24/quash-em/, Exhibit G to Zimmerman Decl. The "Wilson Yard Discussion" area on the BPN message board, which garnered over 1,200 posts since its inception in 2005, has not seen a single post since the issuance of the subpoenas seeking the identities of their commentators, and the traffic on the site has largely dried up as well,

leading one poster to ask in May of this year: "What happened to BPN? This board is d-e-a-d." "What Happened to BPN?" discussion threat on Buena Park Neighbors message board, May 24, 2009, to June 18, 2009, located at http://buenaparkneighbors.yuku.com/topic/1634/t/what-happened-to-BPN.html, Exhibit H to Zimmerman Decl. While Uptown Update continues to publish regularly about the Wilson Yard development project and about the Uptown neighborhood generally, the subpoena threat clearly remains on the minds of local residents and other observers critical of the Defendants' development project. See, e.g., Comment to Lake Effect News Article, Exhibit G to Zimmerman Decl. ("Given Ald. Shiller's history of retaliation, there is every reason to be fearful.").

### C. Anonymous Speakers' Repeated Efforts to Resolve the Matter and Defendants' Refusal to Withdraw Their Subpoenas.

To date, Defendants have taken not a single affirmative step to protect the rights of the Anonymous Speakers. Counsel for Anonymous Speakers has repeatedly asked Defendants' counsel to withdraw or justify the subpoenas, requests that have been steadfastly refused. Instead of addressing the substance (or lack thereof) of his subpoenas, Defendants' counsel has repeatedly suggested delays while one after another illusory deadline has come and gone. And despite repeated attempts by counsel for the Anonymous Speakers to broker a meet-and-confer call between the parties to resolve any discovery differences, Defendants' counsel has apparently never contacted the Plaintiffs to discuss the issue. Zimmerman Decl. at ¶ 14. Only when it became clear that Defendants had no interest in addressing the abusive nature of their subpoenas, and that they were content with the status quo – legal threats hanging over the heads of their critics – did Anonymous Speakers seek the Court's assistance to stay the subpoenas (granted on July 9, 2009) and now to quash them for their substantive failings.

While the ability of parties to obtain information necessary to support the merits of their legal positions is unquestioned, so is the need to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Rule 201 (c)(1). Defendants have no legitimate need for the invasive material sought or for the continued threat posed by the subpoenas

themselves. As Defendants have conceded, they cannot justify the subpoenas on substantive grounds but instead believe that it is appropriate to leave their subpoena targets in legal limbo until they can come up with a justification. Defendants are incorrect. Accordingly, the subpoenas must be quashed to remove the unwarranted legal threat from the middle of a live discussion about a matter of tremendous local public concern.

## III. LEGAL STANDARD

Pursuant to Illinois Supreme Court Rule 201(b)(1), "a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party[.]" This authorization to pursue relevant discovery is limited by (among other things) Rule 201(c) which states that a court may "make a protective order as justice requires, denying . . . discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." To protect against such undue and unreasonable outcomes, litigants' "right to discovery is limited to disclosure of matters that will be relevant to the case at hand[.]" Leeson v. State Farm Mut. Auto. Ins. Co., 190 Ill. App. 3d 359, 366 (Ill. App. 1989). For discovery purposes, "[r]elevancy is determined by reference to the issues, for generally, something is relevant if it tends to prove or disprove something in issue." Bauter v. Reding, 68 Ill. App. 3d 171, 175 (Ill. App. 1979).

In addition to quashing a subpoena that exceeds the discovery limitations of Rule 201, courts may in their discretion enter a protective order barring litigants from seeking sensitive discovery materials in the future if "justice requires." See, e.g., Statland v. Freeman, 112 Ill.2d 494, 499 (Ill. 1986) (upholding protective order where litigant intended to use sensitive discovery material for purposes unrelated to the merits of the underlying case); May Centers, Inc. v. S.G. Adams Printing and Stationery Co., 153 Ill. App. 3d 1018 (Ill. App. 1987) ("There is ample precedent for the entry of a protective order preventing dissemination of sensitive discoverable materials to third parties or for purposes unrelated to the lawsuit."). "Rule 201(c) does not contain any language expressly requiring a showing of good cause before a protective

order may be entered." Willeford v. Toys R US-Delaware, Inc., 385 Ill. App. 3d 265 (Ill. App. 2008).

## IV. ARGUMENT

Two separate grounds exist to quash Defendants' subpoenas. First, the Defendants cannot meet the discovery requirements of the Illinois Supreme Court Rules. See Rules 201(b)(1), 201(c)(1). Second, even if the information they seek is somehow relevant, Defendants cannot meet the heightened First Amendment requirements demanded of litigants seeking the identities of anonymous speakers via the discovery process, requirements that litigants demonstrate that the information sought is necessary to their defense, that the information sought cannot be obtained through any alternative means, and that the discovery was not issued for an improper purpose.

### A. Both Oppressive and Irrelevant, the Information and Materials Sought Pursuant to the Subpoenas Do Not Satisfy the Requirements of Rule 201.

It is axiomatic that a litigant may not engage in discovery "fishing expeditions" in the hopes of stumbling across information relevant to his or her case. See, e.g., U.S. v. Nixon, 418 U.S. 683, 699 (1974) ("[I]n order to require production prior to trial, the moving party must show . . . that the application is made in good faith and is not intended as a general 'fishing expedition.'"); People v. Rodriguez, 119 Ill. App. 3d 575 (Ill. App. 1983) (quashing a subpoena proper in order to prevent the "use of the discovery process" as a "mere 'fishing expedition[.]'"). While the "relevancy" requirement set forth in the Rule 201 establishes an easily-cleared hurdle for litigants with legitimate discovery needs, subpoenas may only issue if that requirement is met, and met in advance. See, e.g., In re All Asbestos Litigation, 385 Ill. App. 3d 386, 389 (Ill. App. 2008) ("[A] court should deny discovery requests when there is insufficient evidence that the requested discovery is relevant or will lead to such evidence."); Leeson, 190 Ill. App. 3d at 368 (1989) (finding trial court abused its discretion in ordering compliance with dragnet discovery subpoena request "absent some preliminary showing of materiality and relevancy. . .").

As Defendants' subpoenas seek information irrelevant to the "actual issues in the case," the subpoenas must be quashed.

Over the past six months, Defendants have only offered two plainly insufficient grounds for the issuance of their subpoenas. Defendants first argue that the information sought is relevant to their laches defense; that is, that the Plaintiffs "knew of the TIF ordinances after they were adopted and at a time where they could have filed a timely challenge, i.e. before June of 2006." E-mail of February 11, 2009, from Tom Johnson to Matthew Zimmerman, Exhibit I to Zimmerman Decl. Defendants next argue that the information sought is relevant to their defense of "the constitutional claim brought" by the Plaintiffs: "I am also interested in the many statements that indicate the speaker is not opposed to the TIF ordinances or TIF subsidies, provided the money is not used for low-income housing. This bears directly on the constitutional claim that has been advanced." Id. Not only do neither basis satisfy Rule 201's relevancy requirement, they do not justify the remarkable overbreadth and patently offensive nature of the subpoenas.

**1. Defendants' Attempts to Identify Their Anonymous Critics Through the Discovery Process is Oppressive and Unduly Burdensome.**

Defendants' subpoenas should be quashed because they are improper threats to out anonymous critics of their development project. The common denominator among the Anonymous Speakers whose identities were subpoenaed is that they feature the writings of strong critics of the Defendants' project. Even when repeatedly given the opportunity to try to minimize the threatening scope of the subpoenas for the purpose of avoiding this obvious criticism, counsel for Defendants has steadfastly refused to budge. Defendants were surprisingly direct with their subpoena targets, making no attempt whatsoever to tailor the subpoenas to avoid the inherent First Amendment harm, instead targeting them solely on the basis of their political speech. See, e.g., People v. White, 116 Ill. 2d 171, 177 (Ill. 1987) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 422

(1992) ("Core political speech occupies the highest, most protected position."). Such a clumsy attempt, one that has conveyed a chilling message to the community, is inappropriate and cannot stand.

Moreover, many of documents sought from BPN constituting copies of web site postings – e.g., "All documents showing posts on your organization's web site" relating to various subjects – are readily available to Defendants themselves who are free to collect them. It is not the job of discovery targets to do Defendants' research for them. See, e.g., Leeson, 190 Ill. App. 3d at 368 (discovery quashed where relevancy was minimal and compliance would have required defendant to spend significant time and effort searching computer records); King v. Burlington Northern & Santa Fe Ry. Co., 538 F.3d 814, 819 (7th Cir. 2008) (denial of discovery deadline not an abuse of discretion where information was publicly available). Especially as this would impose a significant burden on a small neighborhood association and as Defendants obviously have the resources to search the publicly available materials themselves, Defendants' attempts to take a short-cut by subpoenaing third parties should be denied.[3]

**2. Defendants Have Explicitly Conceded That Much of the Information Sought Pursuant to Their Subpoenas Is Not Relevant.**

The subpoenas must also be quashed because they simply do not seek information relevant to the case. In early February of this year, when asked for the basis for the subpoenas, Defendants' counsel Tom Johnson stated that the identities of Defendants' online critics were somehow relevant to Defendants' intended laches and statute of limitations defenses because if it turned out that anonymous online criticism could be tied to the Plaintiffs, it would show "that they knew of the TIF ordinances after they were adopted and at a time where they could have filed a timely challenge, i.e. before June of 2006." Exhibit I to Zimmerman Decl. Statements

[3] To the extent that Defendants actually seek online communications not publicly available, the subpoenas must also be quashed as they are barred under the federal Stored Communications Act, 18 U.S.C. §§ 2701 et. seq.; In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008) ("Applying the clear and unambiguous language of § 2702 to this case, AOL . . . may not divulge the contents of . . . electronic communications . . . because the statutory language of the [Stored Communications Act] does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas.").

made after June of 2006, according to Johnson, did not implicate such defenses. Id. When shown that all of the statements of one of the Anonymous Speakers apparently took place after June of 2006, Johnson conceded that "the fact that Uptown Update may not have started until 2007 would seem to make it irrelevant on the limitations question . . ." Id.

Of the two subpoenas at issue in this motion, the subpoena to Google – seeking "the identity of the person or persons who created and/or control 'What the Helen.com' [sic] and 'Uptown Update' blogs and websites" – solely implicates online statements made during or after June of 2006. The "whatthehelen.com" domain name was first registered in June of 2006 (see Whois.com domain name registration record for whatthehelen.com, located at http://www.whois.net/whois/whatthehelen.com, Exhibit J to Zimmerman Decl.) and the Uptown Update blog began in May of 2007 (see Uptown Update, Welcome to the First Posting, UptownUpdate.com, May 15, 2007, located at http://www.uptownupdate.com/2007/05/welcome-to-first-posting.html, Exhibit K to Zimmerman Decl.). Moreover, many of the statements made on the BPN message board (sought pursuant to the second subpoena) were made solely by online speakers who did not post content prior to June of 2006. See generally Buena Park Neighbors Message Board, located at http://buenaparkneighbors.yuku.com. While the laches basis does not actually satisfy Rule 201's relevancy requirement (as discussed below), and must also fail because of those separate substantive failings, the subpoenas must be quashed and a protective order should be granted to the extent that Defendants seek the identities of these "post-June 2006" speakers based solely on their laches justification as none of the statements at issue took place during the period self-identified by Defendants as relevant.

**3. Discovery Regarding Defendants' Laches Defense is Irrelevant as Plaintiffs Have Already Conceded – and the Court Has Already Found – That the Plaintiffs Were Aware of Their Potential Cause of Action Prior to June of 2006.**

The identities of pre-June 2006 anonymous online critics are in fact irrelevant to any laches defense Defendants may choose to bring. Defendants apparently believe that evidence that the Plaintiffs "knew of the TIF ordinances after they were adopted and at a time where they

could have filed a timely challenge, i.e. before June of 2006" would help show that one of Plaintiffs' claims is time-barred. Exhibit I to Zimmerman Decl. This argument is fatally flawed, however, as Plaintiffs have already admitted that they were actually aware of the availability of their potential TIF Act claim at least as far back as 2004. See Exhibit C to Zimmerman Decl. at p. 5 (citing the Plaintiffs' Answers to the Defendants' First Set of Interrogatories "show that Plaintiffs began actively opposing the Redevelopment Plan in 2004."). Furthermore, the Court has found that knowledge of the potential claim is imputed to Plaintiffs all the way back to June of 2001. See id. at p. 5 (noting that the June 2001 adoption of the TIF ordinances was a matter of public record and that the "Complaint does not allege that Plaintiffs were prevented from learning of the passage of the Ordinances."). As there is no factual dispute regarding when the Plaintiffs were aware of any potential TIF Act claim, and no new contradictory factual allegations have been made in the Plaintiffs' amended complaint,[4] discovery aimed at establishing that fact is irrelevant.

**4. Defendants' Alternative Justification for Issuing the Subpoenas Is Incoherent and Has No Basis In Law.**

Defendants alternatively argue that their subpoenas seeking the identities of anonymous critics are justified because some online critics have criticized the Wilson Yard development project but concurrently do not appear to be "opposed to the TIF ordinances or TIF subsidies,

[4] While Plaintiffs have since amended their TIF Act claim since the Court granted Defendants' motion to dismiss, this amendment does not materially affect Defendants' laches argument. In Count I of their original verified complaint of December 2, 2008, Plaintiffs alleged that Defendants violated the TIF Act by (a) improperly declaring the Wilson Yard property a "conservation area" subject to redevelopment under the statute and (b) improperly finding that the property "would not reasonably be anticipated to be developed without the adoption of the redevelopment plan." 65 ILCS 5/11-74.4-2(b), 65 ILCS 5/11-74.4-3(m)(J). In their motion to dismiss filed January 16, 2009, Defendants argued that Count I was barred by the doctrine of laches, noting that Plaintiffs had waited over seven years after the passage of the ordinances which adopted the redevelopment plan and approved TIF financing to bring their claim. In their amended complaint, filed July 17, 2009, Plaintiffs again allege that the Defendants violated the TIF Act, this time arguing that the Defendants failed to "amend its Redevelopment Plan prior to incurring project redevelopment costs that are inconsistent with the program set forth in the plan." Amended Complaint ¶¶ 30-37; 65 ILCS 5/11-74.4(b). Any laches defense raised to the revised TIF Act claim would implicate the same factual issues implicated by the first TIF Act claim which the Court has already found was barred by laches.

provided the money is not used for low-income housing." Exhibit I to Zimmerman Decl. As Defendants' counsel explained the argument in a February 2009 e-mail, "This bears directly on the constitutional claim that has been advanced." Id.

Defendants' argument is incoherent and by no means meets the relevancy requirement set forth in Rule 201. Defendants appear to argue that Plaintiffs' TIF Act challenge may fail because some of the Plaintiffs might not be subjectively motivated by a desire to challenge the ordinances for dry legalistic reasons and may instead secretly (or not-so-secretly) harbor a desire to replace Defendants' proposed development plan with one which they favor; that is, the Plaintiffs might not raise such a fuss "provided the money is not used for low-income housing." Id. Such hypothetical motivations are of no moment to Plaintiffs due process challenge or Defendants' defense. Defendants' suggested "hypocrisy challenge" has no support in law and cannot justify the issuance or continuation of the challenged subpoenas.

**5. The Subpoenas are Overbroad, Identifying Targets Based On Criteria Irrelevant Even to Defendants' Stated Defense Theories.**

Even if Defendants' laches and "Plaintiff hypocrisy" theories were valid defenses, much of the information sought through the subpoenas is not even related to those theories. As litigants are not entitled to issue overbroad subpoenas – even to support valid theories – much of the information sought in the subpoenas can never be compelled for this reason alone. See, e.g., People ex rel. General Motors Corp. v. Bua, 37 Ill.2d 180, 193-94 (Ill. 1967) (discovery in automobile accident case seeking manufacturer records for subsequent year models – amounting to a "catch-all demand for production of documents without the slightest degree of specificity" – "ought not have been ordered without some preliminary showing of materiality and relevancy.").

**a. Identities of Individuals Who Posted About Alderman Shiller Are Irrelevant to Defendants' Stated Defense Theories.**

The BPN subpoena seeks, among other things, "All documents identifying information [sic] on persons who have posted, in any form, on [BPN's] website involving . . . Alderman Shiller." Discussions of elected officials, even one who champions the development project it

issue in this case, are irrelevant to any theory offered by the Defendants. Discovery regarding the identity of such speakers is unwarranted.

**b. Subpoena Seeking "All Documents Pertaining to" the Plaintiffs Generally is Overbroad.**

The BPN subpoena also broadly seeks "[a]ll documents pertaining to" the Plaintiffs. Even under the liberal rules of discovery, this request must be denied as they are "broad and not calculated to develop specific probative evidence" regarding outstanding issues in this case. Snoddy v. Teepak, Inc., 198 Ill. App. 3d 966, 969 (Ill. App. 1990). "All documents" in BPN's position could by definition be anything, including membership information and (as more fully discussed below) unpublished opinions by non-parties unrelated to anything posted on the web site.[5] Buena Park Neighbors cannot be compelled to disclose such information on a litigant's whim as Defendants seek to do here, engaging in baseless "fishing expeditions . . . conducted with the hope of finding something relevant." Id. See also, e.g., White, 116 Ill. 2d at 177 (quoting NAACP v. Alabama, 357 U.S. 449, 461 (1958)) ("The effect of broadly compelling disclosure of the identities of persons expressing political views is 'unconstitutional intimidation of the free exercise of the right to advocate.'"); NAACP, 357 U.S. at 460 ("Freedom to engage in association for the advancement of beliefs is an inseparable aspect of the liberty assured by the due process clause of the First Amendment.").

**B. Defendants Cannot Overcome the First Amendment Qualified Privilege Protecting Speakers' Right to Remain Anonymous.**

Defendants' subpoenas must also be quashed on the separate grounds that Defendants cannot overcome the First Amendment qualified privilege that protects anonymous speakers. Defendants' subpoenas, which aim to unmask anonymous speakers solely on the basis of their political speech, plainly do not qualify. Under the broad protections of the First Amendment and Article I, section 4, of the Illinois Constitution, speakers have not only a right to criticize public policies and governmental officials – speech that "may well include vehement, caustic, and

[5] Once again, the Stored Communications Act bars any attempt to compel disclosure of electronic communications through the use of civil discovery subpoenas. See, supra, footnote 3.

sometimes unpleasantly sharp attacks on government and public officials"[6] – but also the right to do so anonymously. This protection exists in addition to, and provides a much stronger level of protection than, that provided to discovery targets under Rule 201. Both the First Amendment and the Illinois Constitution require that those who seek to unmask vocal critics demonstrate a compelling need for such identity-related information before proceeding with discovery. No such need is implicated in this case.

**1. The Right to Speak Anonymously Is Constitutionally Guaranteed.**

The United States Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995). See also, e.g., id. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."); Talley v. California, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."). The Illinois Supreme Court has recognized identical rights emanating from Article I, section 4, of the Illinois Constitution. See, e.g., White, 116 Ill. 2d at 176 (citing Talley v. California, 362 U.S. at 64) (rejecting the argument that compelling identification without otherwise inhibiting the exercise of speech is permissible under the First Amendment or Article I, section 4).

These fundamental rights enjoy the same protections whether their context is an anonymous political leaflet or an Internet blog. See Reno v. ACLU, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet). See also, e.g., Doe v. 2theMart.com, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity

[6] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

facilitates the rich, diverse, and far ranging exchange of ideas."). And as discussed below, these fundamental rights protect anonymous speakers from forced identification, be they from overbroad statutes or unwarranted discovery requests.

**2. Anonymous Speakers Enjoy a Qualified Privilege Under the First Amendment.**

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts[7] to pierce anonymity are subject to a qualified privilege.[8] Courts must "be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas." Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999). This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." Dendrite Int'l v. Doe No. 3, 342 N.J. Super. 134, 142 (N.J. App. 2001). Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. See, e.g., Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns."); Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987) (citing Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977)) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure."). As one court described while drawing on principles relevant to the immediate case, "People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's

[7] A court order, even if granted to a private party, is state action and hence subject to constitutional limitations. See, e.g., Sullivan, 376 U.S. at 265 (1964); Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

[8] See also Rule 201(b)(2) ("All matters that are privileged against disclosure on the trial . . . are privileged against disclosure through any discovery procedure.").

order to discover their identity." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

The constitutional privilege to remain anonymous is not absolute. Plaintiffs may properly seek information necessary to pursue reasonable and meritorious litigation. Id. at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection."). However, litigants may not abuse the subpoena power by targeting political opponents with frivolous – or even marginally relevant – discovery requests. Accordingly, courts evaluating attempts to unmask anonymous speakers in cases similar to the one at hand have adopted consistent standards that balance one person's right to speak anonymously with a litigant's legitimate need to pursue a defense. These courts have recognized that "setting the standard too low w[ould] chill potential posters from exercising their First Amendment right to speak anonymously," and have required Plaintiffs to demonstrate that their defenses are valid and that they have a need for the information before the Court will allow disclosure of the speaker's identity. Cahill, 884 A.2d at 457. See also Dendrite, 342 N.J. Super. at 141-42; Highfields Capital Mgmt. L.P. v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2004). Defendants cannot remotely hope to satisfy this burden.

### 3. The First Amendment Qualified Privilege Requires the Evaluation of Multiple Factors Prior to the Enforcement of Subpoenas Mandating the Disclosure of Identity Information, Factors That Weigh Strongly Against Defendants.

While Illinois courts have not yet directly addressed challenges to discovery requests seeking the identities of non-party Internet speakers, state and federal courts across the country have consistently applied a standard requiring litigants to demonstrate (among things) a compelling need for the information and an inability to obtain the information any other way, a standard consistent with the Illinois Supreme Court's holdings in White. Defendants can demonstrate neither.

The Western District of Washington's salient opinion in Doe v. 2theMart.com, supra, remains the clearest and most widely cited guide to ensuring that non-party anonymous online speakers receive the protection the First Amendment demands. In 2theMart.com, involving a derivative class action suit, the defendant corporation raised 27 affirmative defenses, including that the online postings of various anonymous third parties had caused the stock devaluation in question. The Defendant served subpoenas on the ISP seeking the identity of 23 anonymous speakers as well as all posted messages on the bulletin board. In quashing the subpoena, the district court underscored the importance of the First Amendment interests and the necessary judicial protections required to prevent litigants from abusing the discovery process:

> If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.

140 F. Supp. 2d at 1093.

In finding that the First Amendment required that the subpoena be quashed, the 2theMart.com court weighed four factors mandated by the First Amendment:

(1) whether the subpoena seeking the information was issued in good faith and not for any improper purpose,

(2) whether the information sought relates to a core claim or defense,

(3) whether the identifying information is directly and materially relevant to that claim or defense, and

(4) whether information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

140 F. Supp. 2d at 1095.

This First Amendment test articulated in 2theMart.com is appropriate here and has been approved by jurisdictions across the country.[9] As the 2theMart.com court noted, its test

[9] See, e.g., Independent Newspapers, Inc. v. Brodie, 966 A.2d 432, 448-49 (Md. 2009); Mobilisa, Inc. v. Doe, 217 Ariz. 103, 107, 111 (Ariz. App. 2007); Enterline v. Pocono Medical Center, No.

"provides a flexible framework for balancing the First Amendment rights of anonymous speakers with the right of civil litigants to protect their interests through the litigation discovery process." While the Court was mindful of the "high burden" it imposed on litigants, "[t]he First Amendment requires us to be vigilant in making [these] judgments, to guard against undue hindrances to political conversations and the exchange of ideas." Id. (citing Buckley, 525 U.S. at 192).[10] Especially as Defendants have no legitimate interest in the material they seek, the First Amendment factors weigh heavily in favor of Anonymous Speakers and of quashing the subpoenas.

**a. The Subpoenas Do Not Relate to a Core Claim or Defense.**

As discussed above, instead of making even the slightest effort to draft their subpoenas to obtain truly relevant information or, when repeatedly informed of their obvious constitutional infirmities, to make any attempt to narrow the subpoenas in order to avoid such harm, Defendants initiated a clumsy "fishing expedition." Neither excuse offered by Defendants' counsel – that some of the anonymous online critics of their government-funded development plan might turn out to be Plaintiffs and thus relevant to Defendants' laches defenses or relevant to show that the Plaintiffs might not have challenged the constitutionality of the TIF ordinances if the project at issue didn't involve low-income housing – is remotely defensible. Plaintiffs have already conceded, and the Court has already held, that Plaintiffs were aware of their potential constitutional claim "before June of 2006." Moreover, Defendants' alternative "Plaintiffs don't really mean it" defense is not legally cognizable. As neither excuse establishes

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3:08-cv-1934, 2008 WL 5192386, *4-*5 (M.D. Pa. Dec. 11, 2008); Polito v. AOL Time Warner, Inc., No. Civ. A. 03CV3218, 2004 WL 3768897, *5-7 (Pa. Com. Pl. Jan 28, 2004); La Societe Metro Cash & Carry France v. Time Warner Cable, No. CV030197400S, 2003 WL 22962857, *5-6 (Conn. Super. Dec. 02, 2003).

[10] See also, e.g., Reda v. Advocate Health Care, 199 Ill. 2d 47, 59 (Ill. 2002) ("Although defendants might be denied access to information that could benefit their case, any 'unfairness' is the same that is present any time a privilege against disclosure is exercised. Evidentiary privileges, generally, are not designed to promote the truth-seeking process, but rather to protect some outside interest other than the ascertainment of truth at trial.") (quoting Norskog v. Pfiel, 197 Ill. 2d 60, 83 (Ill. 2001) (internal citations omitted).

relevancy, Defendants' subpoenas must be quashed because Defendants cannot satisfy the obligations of the First Amendment.

**b. The Information Sought In Defendants' Subpoena is Either Publicly Available or Available From the Plaintiffs.**

Even assuming that any of the identity information sought in the subpoenas is relevant, Defendants have a more obvious and more appropriate source: the Plaintiffs themselves. Indeed, Defendants' first excuse for not withdrawing the subpoenas was that the Anonymous Speakers should wait for the Plaintiffs to respond to discovery requests asking them to identify all of their online personas. See Exhibit I to Zimmerman Decl. Leaving aside the lack of relevancy of such requests, if Defendants wish to obtain such information, they must do so from the Plaintiffs and not from non-parties.[11] See, e.g., White, 116 Ill. 2d at 181 (statute prohibiting the publication of political literature which does not show name and address of authors, passed in part to further a state goal of preventing defamatory speech, "unnecessarily restricts protected expression and thus cannot be considered the least drastic alternative"). Indeed, such a course would guarantee that Defendants obtain only relevant information about the Plaintiffs and not do collateral damage to others engaged in protected speech.

Any failure on behalf of the Plaintiffs so far to provide discovery responses on these subjects to the satisfaction of the Defendants is irrelevant because Defendants have failed to pursue the matter directly with the Plaintiffs. When Defendants' counsel announced that Plaintiffs' discovery responses were insufficient, counsel for the Anonymous Speakers made repeated "shuttle diplomacy" attempts between the parties to help satisfy any alleged shortcomings. See Zimmerman Decl. at ¶ 14. Despite this, by all accounts, counsel for Defendants has made no attempt (other than issuing the discovery requests) to obtain the information at issue in this motion from the Plaintiffs. Id.

Given the obligation to apply the protections of the First Amendment with "exacting scrutiny," Defendants' attempt to seek a shortcut through the rights of anonymous non-parties

[11] Similarly (see supra at p. 9), Defendants are not prevented from gathering for themselves the public "documents showing posts on your organization's web site" concerning various subjects.

must fail. White, 116 Ill. 2d at 175. See also, e.g., id. at 183 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973)) ("It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.").

**c. Defendants' Subpoenas are Oppressive and Target Political Opponents and Others Exercising Opinions About Matters of Public Concern.**

At best, Defendants have proven indifferent to the inappropriateness of their subpoenas. At worst, the ongoing harm caused by their actions is intentional. In either case, the subpoenas are unsupportable under the First Amendment and must be quashed. Attempts to out anonymous critics solely based on the content of their political speech is anathema to the rights enshrined in the First Amendment. Defendants have had ample opportunity to demonstrate both that their motivation is proper and that they take the First Amendment rights of their critics seriously. They have done neither. In the meantime, while Defendants are content to put their opponents' rights on hold, critics must daily decide whether they want to take on litigants of virtually unlimited means who have demonstrated that they can and will use the judicial system against them. E-mail of February 11, 2009, from Tom Johnson to Matthew Zimmerman, Exhibit L to Zimmerman Decl. ("I have not focused in on your subpoenas, but if I want to enforce them, the judge said I have to file a motion in court. I will do so if I need to enforce them."). Not surprisingly, many have fallen silent. Anonymous Speakers ask this Court to quash the subpoenas and remove the cloud of fear that has chilled speech and advocacy in the community.

## V. CONCLUSION

Defendants' refusal to withdraw the subpoenas puts the Anonymous Speakers in the untenable position of passively waiting for the parties to work out their differences before moving to quash the illegal subpoena. As Defendants are no doubt aware, however, responding to subpoenas – even if in the short term "only" to repeatedly negotiate extensions – is not cost-free. See, e.g., Theofel v. Farey-Jones, 359 F.3d 1066, 1074-75 (9th Cir. 2004) ("Fighting a

subpoena in court is not cheap, and many may be cowed into compliance with even overbroad subpoenas[.]"). It is up to the parties, not innocent bystanders, to bear the burden of their current fight. Especially as the ongoing delay perpetuates the speech-chilling harm that Anonymous Speakers challenge, the status quo cannot remain. As the First Amendment and Rule 201 bar Defendants' discovery efforts, the Anonymous Speakers respectfully as this Court to quash Defendants' subpoenas of January 12, 2009.

Respectfully submitted,

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