SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 18

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MIRIAM HERSH and MICHAEL HERSH,

Plaintiffs,

-against-

ELIZABETH REBECCA COHEN, RAPHAEL COHEN, ARYEH LARRY WOLBE, ELI WOLBE, ZVI GLUCK, JOSHUA AMBUSH, ARIEL FISHMAN, HINDA FISHMAN, EFFI GOLDSTEIN, ABE LIFSCHITZ, AYELET MEHLMAN, SARAH KREISLER, YOSEF SHIDLER, RACHEL ROSENGARTEN, DINA DEUTSCH, and JOHN DOES #1-18,

Defendants.

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Index No. 006170-2009

Justice Bernadette Bayne

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH

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I. INTRODUCTION

Pursuant to CPLR 2304 and 3103, Anonymous Forum Hosts[1] – who include the owners/operators of some of the targeted online forums (collectively, "Movants" or "Anonymous Forum Hosts") – submit this memorandum in support of their motion to quash Plaintiffs' subpoenas duces tecum of June 14, 2010, to non-parties Google, Inc. ("Google") and Yahoo!, Inc. ("Yahoo"). See Exhibits B and C to Ron Lazebnik Affirmation in Support of Motion to Quash, dated July 12, 2010 ("Lazebnik Aff.").

By means of two overbroad dragnet subpoenas issued to Internet service providers Google and Yahoo – and without any accompanying explanation, differentiation, or justification – Plaintiffs seek to unmask those whom they appear to believe constitute a wide range of anonymous online critics and the associates of their online critics en masse. Specifically targeted in the subpoenas are the identities of users of ten email accounts, operators of thirty blogs[2] and a website, and potentially hundreds of users who posted comments on those sites. In addition to identity-related information, Plaintiffs demand disclosure of the contents of communications

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[1] As identified in the Notice of Motion, the Anonymous Forum Hosts include anonymous Internet blog and forum operators whose forums and participants are targeted by Plaintiffs' subpoenas. They include the operators of the forums located at the following internet addresses (sought by Plaintiffs' June 14, 2010, subpoena to Google):

- unorthodoxjews.blogspot.com
- anunorthodoxjew.blogspot.com
- groupoj.blogspot.com
- unorthodoxjew.blogspot.com
- aunorthodoxjew.blogspot.com
- un-orthodoxjew.blogspot.com
- theunorthodoxjew.blogspot.com
- daattorah.blogspot.com/

They also include the user of the following e-mail address (sought by Plaintiffs' June 14, 2010, subpoena to Yahoo):

- a_unorthodoxjew@yahoo.com

[2] "A blog (a portmanteau of the term 'web log') is a type of website or part of a website. Blogs are usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video. Entries are commonly displayed in reverse-chronological order." Blog, Wikipedia, http://en.wikipedia.org/wiki/Blog (last visited July 6, 2010).

regarding or related to the targeted individuals. As the subpoenas violate the CPLR, the First Amendment to the United States Constitution, and the federal Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq., Movants respectfully request that the Court quash the subpoenas and enter a protective order to protect the forum operators and anonymous speakers[3] from future attempts to expose their identities and the content of their communications.

II. BACKGROUND

On March 19, 2010, Plaintiffs filed their First Amended Verified Complaint ("Complaint") alleging a sweeping conspiracy led by family members and their acquaintances to accuse the Plaintiffs of mistreating their children and to cause a public controversy to Plaintiffs' detriment. See Lazebnik Aff. Exh. A. In that Complaint – in which Plaintiffs bring causes of action for tortious interference with contract, tortious interference with prospective business relations, intentional infliction of emotional distress, aiding and abetting, and prima facie tort – Plaintiffs make a series of largely unspecified allegations alluding to generally unspecified materials posted on the Internet that Plaintiffs found objectionable (see, e.g., Complaint at ¶¶ 53-55, 59-61, 92-100, 102-103, 117, 124, 125, 126, 127). While Plaintiffs did identify with some specificity a fraction of the Internet material to which they objected in their Complaint (see, e.g., Complaint at ¶ 94 (discussing the alleged portrayal of Plaintiff Michael Hersh as a "Nazi" on the site www.thecooljew.com,[4] although even there the actual statement at issue is not quoted)), most allegations are vague, alluding generally to (for example) unspecified "websites" (Complaint at ¶ 53), unspecified "MySpace and Facebook groups and public pages on the Internet" (Complaint at ¶ 59), unspecified "posts" and "group sites" (Complaint at ¶ 60), the "Blogosphere" generally (Complaint at ¶ 92), an unspecified "different website" (Complaint at ¶ 92), and unspecified "blogs" (Complaint at ¶ 93).

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[3] The Anonymous Forum Hosts have standing to assert not only their own rights related to this dispute but also those of users of their services. See, e.g., McVicker v. King, 266 F.R.D. 92, 95 (W.D. Pa. 2010) ("[E]ntities such as newspapers, internet service providers, and website hosts may, under the principle of jus tertii standing, assert the rights of their readers and subscribers.").

[4] The operator of the web site located at www.thecooljew.com is not explicitly participating in this motion.

On June 14, 2010, Plaintiffs issued dragnet discovery subpoenas to Google and Yahoo, demanding the identities of dozens of website operators not cited in the Complaint and the identities of potentially hundreds of individuals who commented on those websites, regardless of when those comments were made or what those individuals may have said. Plaintiffs made no attempt to identify why these hundreds of individuals were targeted, citing no specific statements associated with the accounts or sites in question. Plaintiffs furthermore did not allege any wrongdoing by any specific forum host, any commenter on a targeted forum, or any user of a targeted e-mail account. Indeed, Plaintiffs did not indicate how these sites, operators, or speakers were connected to the underlying litigation at all.

On July 7, 2010, counsel for the Anonymous Forum Hosts contacted counsel for the Plaintiffs, explained the First Amendment deficiencies of Plaintiffs' subpoenas, and sought an extension to file a motion to quash and/or a narrowing of the scope of the subpoenas. Lazebnik Aff. ¶ 9. On July 8, 2010, counsel for the Anonymous Forum Hosts reiterated this request in a letter to Plaintiffs' counsel. Id. ¶ 10 & Exh. D. As of July 11, 2010, Plaintiffs have not agreed to either request. Id. ¶ 11.

III. LEGAL STANDARD

Pursuant to CPLR 3103, a court "may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." CPLR 3103(a). Moreover, pursuant to CPLR 2304, the court "may quash, fix conditions or modify a subpoena" and "[r]easonable conditions may be imposed upon the granting or denial of a motion to quash or modify." See, e.g, Carvel Corp. v. Lefkowitz, 431 N.Y.S.2d 609 (N.Y. Sup. Ct. 1979) (restricting sweeping subpoena).

IV. ARGUMENT

A. Plaintiffs' Subpoenas are Invalid Under New York Law as Facially Defective, Imprecise, and Irrelevant.

1. Plaintiffs' Non-Party Subpoenas Are Facially Defective Because They Fail to Indicate "The Circumstances or Reasons Such Disclosure Is Sought or Required" as Required by CPLR 3101(a)(4).

Plaintiffs' subpoenas must be quashed for a variety of reasons, both procedural and substantive. To begin with, Plaintiffs' non-party subpoenas fail for the elemental reason that, in violation of CPLR 3101(a)(4), Plaintiffs did not include a notice setting forth "the circumstances or reasons such disclosure is sought or required." CPLR 3101(a)(4). A subpoena lacking such notice is "facially defective" and must be quashed. See, e.g., Matter of Am. Express Prop. Cas. Co. v. Vinci, 63 A.D.3d 1055, 1056 (2d Dept. 2009) ("[T]he Supreme Court properly determined that the subpoena . . . was facially defective because it neither contained nor was accompanied by a notice stating the 'circumstances or reasons such disclosure is . . . required' . . . .") (citations omitted). The facial notice requirement is not merely procedural; it "afford[s] a nonparty who has no idea of the parties' dispute . . . an opportunity to decide how to respond" to the subpoena. Velez v. Hunts Point Multi-Servs. Ctr., Inc., 29 A.D.3d 104, 110 (1st Dept. 2006).

Far from setting forth "the circumstances or reasons such disclosure is sought or required," Plaintiffs' subpoenas to Google and Yahoo consist of naked demands for documents and records. Plaintiffs have provided no notice of any kind as to how the records are relevant to the underlying litigation. The subpoenas are, consequently, facially defective and should be quashed. See, e.g., Matter of Am. Express Prop. Cas. Co., 63 A.D.3d at 1056; Matter of Validation Review Assocs., Inc., 237 A.D.2d 614, 615 (2d Dept. 1997) .

2. The Subpoenas Are Both Fatally Imprecise and Overbroad in Violation of CPLR 3101.

In addition to Plaintiffs' failure to articulate the reasons for seeking the material in their subpoenas, the subpoenas must also be quashed because they fail to specify what information and materials the Plaintiffs actually believe is necessary to their case. While New York courts liberally construe the CPLR 3101(a) requirement that information sought in discovery be

"material and necessary," "this is not to say that carte blanche demands are to be honored." Cappoccia v. Spiro, 88 A.D.2d 1100, 1101 (3d Dept. 1982). Requests that are unduly burdensome or "lack specificity" must be quashed. Id. Moreover, to sustain subpoenas to non-parties, who "[a]s a matter of policy . . . ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest," New York courts impose an enhanced burden beyond "mere relevance and materiality." Kooper v. Kooper, 74 A.D.3d 6, 2010 N.Y. Slip Op. 04147 at *6 (2d Dept. 2010) (party seeking discovery from non-parties must show that such discovery is required). Plaintiffs have certainly not met this burden.

Plaintiffs' dragnet subpoenas demand the identification of potentially hundreds of anonymous speakers without any apparent tie to this case and further require "[a]ll documents relating or referring to" the sites on which those anonymous speakers participated. Lazebnik Aff. Exhs. B & C. These vague requests both underspecify which documents Google and Yahoo should produce and at the same time encompass a broad swath of records far beyond those conceivably related to the underlying litigation. Once again, Plaintiffs make no effort to differentiate between any targeted material for which they believe they can meet their heightened burden and material not relevant to the case. Especially where the First Amendment rights of anonymous speakers are implicated (see part IV.B below), Plaintiffs must ensure that they articulate what materials are relevant to their case so as to avoid harming the privacy interests of other speakers who are in no way implicated by the underlying litigation. Plaintiffs, however, have made no such effort. New York law does not grant license for this sort of "fishing expedition." See, e.g., Fallon v. CBS Inc., 124 A.D.2d 697, 698 (2d Dept. 1986) (discovery motion denied as "palpably improper and cannot be sustained" where "defendants' papers reveal that they lack knowledge of the existence of specific documents and are improperly utilizing CPLR 3120 to conduct a 'fishing expedition' and thereby to ascertain whether any such documents do exist.").

3. The Subpoenas Seek Material That Is Privileged and Therefore Barred from Disclosure Under CPLR 3101(b).

Beyond failing their specificity burden, Plaintiffs' subpoenas are barred by CPLR 3101(b) which renders privileged information immune from discovery. See, e.g., Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 376 (1991). As discussed in detail below, anonymous speakers enjoy a qualified privilege under the First Amendment. As Plaintiffs cannot meet their burden to overcome the Movants' qualified privilege, the material Plaintiffs seek is barred from disclosure, providing yet another reason that Plaintiffs' subpoenas must be quashed.

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

Under the broad protections of the First Amendment, speakers have not only a right to publicly express criticism but also the right to do so anonymously. Accordingly, the First Amendment requires that those who seek to unmask online speakers (critics or otherwise) demonstrate a compelling need for such identity-related information before obtaining such 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 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."). Anonymity receives the same constitutional protection whether the means of communication is a political leaflet or an Internet message board. 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); 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 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 to pierce anonymity are subject to a qualified privilege. 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 (App. Div. 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 Entertainment Inc. v. Does 1-40, 326 F. Supp. 2d 556, 563 (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."). "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 order to discover their identity." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999); see also

2theMart.com, 140 F. Supp. 2d at 1093 ("[D]iscovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts.").

The constitutional privilege to remain anonymous is not absolute. Plaintiffs may properly seek information necessary to pursue reasonable and meritorious litigation. Seescandy.com, 185 F.R.D. 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."). Litigants may not, however, abuse the subpoena power to discover the identities of people who have simply made statements the litigants dislike. Accordingly, courts evaluating attempts to unmask anonymous speakers in cases similar to the one at hand have adopted standards that balance one person's right to speak anonymously with a litigant's legitimate need to pursue a claim. 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 their claims are valid and they have suffered a legally cognizable harm 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.

a. The Test to Unmask Anonymous Parties: Dendrite Int'l, Inc. v. Doe No. 3.

The seminal case setting forth First Amendment restrictions upon a litigant's ability to compel an online service provider to reveal an anonymous party's identity is Dendrite Int'l, Inc. v. Doe No. 3, in which the New Jersey Appellate Division adopted a test for protecting anonymous speakers. 342 N.J. Super. at 141-42. Namely, a plaintiff needs to:

- make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding;
- quote verbatim the allegedly actionable online speech;
- allege all elements of the cause of action;
- present evidence supporting the claim of violation; and,

- "[f]inally, assuming 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."

Id.

As this decision accurately and cogently outlines the important First Amendment interests raised by the Anonymous Forum Hosts, and trial courts in this Judicial Department[5] and other Judicial Departments[6] of New York State as well as myriad courts around the country[7] have endorsed this approach in the past, the holding and reasoning of Dendrite and its progeny should be applied here.

b. The Test to Unmask Anonymous Non-Parties: Doe v. 2themart.com.

The Dendrite test concerns party discovery and, as such, recognizes a minimum First Amendment standard. When non-parties are involved, First Amendment discovery protections must be even higher to ensure that non-litigants are not embroiled in costly litigation to which they may only be tangentially related or unrelated altogether. As the District Court for the Western District of Washington stated in Doe v. 2theMart.com:

> The standard for disclosing the identity of a non-party witness must be higher than that articulated in [party discovery cases]. When the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity. Therefore, non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.

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[5] See, e.g., Ottinger v. Non-Party The Journal News, 2008 N.Y. Misc. LEXIS 4579, *5-7; 36 Media L. Rep. 2018 (N.Y. Sup. Ct. June 7, 2008).

[6] See, e.g., Matter of Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698 (N.Y. Sup. Ct. 2007).

[7] See, e.g., Mobilisa, Inc. v. John Doe 1, 217 Ariz. 103, 170 P.3d 712 (Ariz. Ct. App. 2007); Doe v. Cahill, 884 A.2d at 459-60) (applying a modified Dendrite test); Highfields Capital Mgmt. L.P. v. Doe, 385 F. Supp. 2d 969, 974-76 (N.D. Cal., 2005); Indep. Newspapers, Inc. v. Brodie, 407 Md. 415, 446 (Md. 2009).

140 F. Supp. 2d at 1095. See also, e.g., Kooper v. Kooper, 74 A.D.3d 6, 2010 N.Y. Slip Op. 04147 at *6 ("nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement."); 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, especially if they are not represented by counsel or have no personal interest at stake.").

The Western District of Washington's opinion in Doe v. 2theMart.com remains the clearest guide to ensuring that non-party anonymous online speakers receive the protection the First Amendment demands. The 2theMart.com court's non-party test consisted of four additional First Amendment factors:

- whether the subpoena seeking the information was issued in good faith and not for any improper purpose;
- whether the information sought relates to a core claim or defense;
- whether the identifying information is directly and materially relevant to that claim or defense; and
- whether information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

As the 2theMart.com court noted, its test "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." 140 F. Supp. 2d at 1095. 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).

The 2theMart.com holding is consistent with and complimentary to the Dendrite test for unmasking anonymous online speakers. The Dendrite court, for example, explicitly approved of the approaches of other courts in similar circumstances that required litigants to demonstrate that

the subpoena was issued in good faith and that the subpoenaed identity information is "centrally needed to advance" the claim. 342 N.J. Super. at 157-58. Applying both the Dendrite and 2TheMart tests to dragnet discovery subpoenas that request the identities of a wide range of speakers would protect the First Amendment interests of non-parties yet still permit legitimate requests to be fulfilled. As such, the Court should apply both tests here.

3. Plaintiffs Cannot Meet Their Heightened Discovery Burden to Overcome the First Amendment Qualified Privilege Enjoyed by the Potentially Hundreds of Anonymous Forum Hosts Targeted in This Case.

Plaintiffs' subpoenas plainly fail both the Dendrite and 2TheMart tests; consequently, they must be quashed. To begin with, Plaintiffs cannot meet any of the elements of the Dendrite test. First, Plaintiffs apparently made no attempt in connection with the issuance of their subpoenas to provide adequate notice to the users whose identities they sought. Dendrite, 342 N.J. Super. at 141. While the subpoenaed non-parties Google and Yahoo apparently sent e-mail notices to their affected users, Plaintiffs appear not to have made any effort to notify the anonymous participants on the forums before seeking to unmask them through subpoenas. This requirement is not an academic one: absent adequate notice, speakers who may otherwise be able to raise successful challenges to Plaintiffs' invasive subpoenas may be unable to do so. Second, Plaintiffs have not indicated any specific emails, postings, or comments, let alone "set forth the exact statements," that purportedly give rise to their subpoenas. Id. Third, Plaintiffs have not identified any causes of action (if any) against the potentially hundreds of anonymous speakers who participated on the targeted forums, nor alleged all the elements of such cause of actions. Fourth, Plaintiffs have presented no evidence in support of any element of any such hypothetical cause of action. Given their failure to satisfy any of these four factors, it is hardly surprising that Plaintiffs have no basis to argue the final factor of the Dendrite test: that their "need" for the information "substantially outweighs" the First Amendment interests of the anonymous speakers. In fact, they have no such need. Under the Dendrite test, assuming (based on sheer speculation as they have given no other indication) that the Plaintiffs believe some unarticulated subset of the

users they have targeted are defendants in the above captioned matter, Plaintiffs have failed to meet their burden.

For similar reasons, Plaintiffs also fail to meet their burden under the First Amendment test recognized in 2theMart.com, designed to protect non-party anonymous speakers. Plaintiffs can hardly argue, for example, that their discovery efforts were made in good faith as they made not the slightest effort to explain how any of the material they are seeking is relevant to their case, neither identifying which claims the disclosure would help illuminate nor whom those claims might be against, and furthermore not taking any steps to avoid collateral First Amendment harm and harm to the privacy interests of individuals who have nothing to do with the case. See 2theMart.com, 140 F. Supp. 2d at 1096 (a plaintiff's "apparent disregard for the privacy and the First Amendment rights of the online users, while not demonstrating bad faith per se, weighs against" that plaintiff). Because Plaintiffs have not identified why they issued the subpoenas, it is impossible to determine whether the claims they seek to support are "core" claims or whether the information they seek is "directly and materially relevant" to such claims. Id. Moreover, Plaintiffs' already have a ready avenue to obtain the discovery they wish: if Plaintiffs believe that some of the Defendants in this case have made actionable comments anonymously somewhere on the Internet, then they can and should seek discovery from those defendants themselves instead of burdening entire populations of speakers en masse. Id.

Plaintiffs have neither explained nor justified the massive scope of their dragnet subpoenas. Because Plaintiffs cannot meet their discovery burden demanded by the First Amendment, the subpoenas must be quashed.

C. The Stored Communications Act Prohibits Use of Civil Discovery to Obtain the Subpoenaed Contents of Communications.

Apart from identity-related information, Plaintiffs' subpoenas appear to seek the content of communications. See Lazebnik Aff. Exhs. B & C. To the extent that they do,[8] the subpoenas

[8] Plaintiffs' subpoena to Google seeks (among other things) the following:

- "All documents relating or referring to the below list of sites, blogs, pages and/or groups."
- "All posts to any of the below list of sites, blogs, pages and/or groups."

are prohibited by the federal Stored Communication Act, which bars such discovery attempts and methods.

The Stored Communications Act, 18 U.S.C. § 2701 et seq., passed as part of the Electronic Communications Privacy Act of 1986 ("ECPA"), prohibits unauthorized access of electronic communications stored with online services. "The Act reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility. Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents . . . the Act protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility." Theofel, 341 F.3d at 982. While the Plaintiffs may be able to use other procedural devices to obtain access to information relevant to its case – such as obtaining copies of the communications directly from other litigants – the SCA flatly prohibits them from using civil discovery subpoenas to gain access to the contents of communications they seek from Google and Yahoo.

The SCA prohibits, subject to specific statutory exceptions that are inapplicable here, the disclosure of contents of electronic communications by two categories of service providers, providers of "electronic communication services"[9] ("ECS") and providers of "remote computing services"[10] ("RCS"). See 18 U.S.C. §§ 2702(a)(1) and 2702(a)(2), respectively. While

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Similarly, Plaintiffs' subpoena to Yahoo seeks (among other things) the following:

- "All documents relating or referring to http://geocities.com/saveisaac ("Save Isaac Page")."
- "All posts to the Save Isaac Page since its creation."

[9] "'[E]lectronic communication service' means any service which provides to users thereof the ability to send or receive wire or electronic communications . . . ." 18 U.S.C. § 2510 (15).

[10] "[T]he term 'remote computing service' means the provision to the public of computer storage or processing services by means of an electronic communications system . . . ." 18 U.S.C. § 2711 (2). Roughly speaking, a remote computing service is provided by an off-site computer that stores or processes data for a customer. See S. Rep. No. 99-541, at 10-11 (1986), reprinted in 1986 U.S.C.C.A.N 3555, 3568. For example, a service provider that processes data in a time-sharing arrangement provides an RCS. See H.R. Rep. No. 99-647, at 23 (1986). So do operators of electronic bulletin board systems. See Steve Jackson Games, Inc. v. U.S. Secret Service, 816 F. Supp. 432, 443 (W.D. Tex. 1993).

prohibitions and exceptions vary somewhat depending on ECS or RCS provider characterization, the protections applied to each type of provider are indistinguishable for purposes of this discussion. Both Google and Yahoo qualify as an ECS[11] and/or an RCS[12] provider respectively for each category of information sought by Plaintiffs' subpoena.

Subsection 2702(a)(1) of the SCA expressly prohibits the disclosure of the "contents" of communications by ECS providers:

> [A] person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service . . . .

18 U.S.C. § 2702(a)(1). Similarly, subsection 2702(a)(2) prohibits the disclosure of the "contents" of customers' electronics communications by RCS providers:

> [A] person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service . . .

18 U.S.C. § 2702(a)(2).

Plaintiffs' request for "[a]ll documents relating to and referring to" – e.g., e-mail communications and blog posts referring to specific topics – seeks precisely this kind of information and is therefore not permitted under section 2702.

While 18 U.S.C. §§ 2702 and 2703 offer several explicit exceptions to the blanket prohibition on the disclosure of communications content under subsection 2702(a), none apply here. Multiple courts that have addressed this question of whether civil litigants can obtain the contents of communications from online providers by means of discovery subpoenas have come to this same conclusion: the SCA bars such attempts. In O'Grady v. Super. Ct., 44 Cal. Rptr. 3d 72 (Ct. App. 2006), for example, a case in which a non-government litigant (Apple Computer)

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[11] Both Google and Yahoo, to the extent that they "provide[] to users thereof the ability to send or receive . . . electronic communications" (through their respective Gmail and Yahoo! Mail e-mail services and otherwise) that are responsive to Plaintiffs' open-ended subpoena, also then qualify as ECS providers.

[12] Google also qualifies as an RCS provider for much of the information sought by Plaintiffs as the subpoena seeks information and materials in connection to the use by the respective forum hosts (as well as online commenters) of Blogspot, a service with which users can create blogs and allow comments by third parties. See Steve Jackson Games, 816 F. Supp. at 443.

issued civil subpoenas to an ECS operator seeking the e-mail communications of an online journalist who allegedly was in communication with a Doe defendant, the California Court of Appeals found that discovery subpoenas could not be used to obtain the material sought since discovery subpoenas were not included as a method by which disclosure could be compelled: "Since the Act makes no exception for civil discovery and no repugnancy has been shown between a denial of such discovery and congressional intent or purpose, the Act must be applied, in accordance with its plain terms, to render unenforceable the [discovery] subpoenas . . . ." Id. at 89 (holding that a protective order must issue to protect against such subpoenas).

Similarly, the District Court for the Eastern District of Virginia, expressly adopted the holding of the O'Grady court. In In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606 (E.D. Va. 2008), the court affirmed a lower court ruling quashing a civil discovery subpoena issued by State Farm Fire and Casualty Company to America Online seeking the e-mails and other information relating to the accounts of non-party witnesses:

> Applying the clear and unambiguous language of § 2702 to this case, AOL, a corporation that provides electronic communication services to the public, may not divulge the contents of the [witness's] electronic communications to State Farm 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.

Id. at 611. See also Viacom Int'l Inc. v. YouTube Inc., 253 F.R.D. 256, 264 (S.D.N.Y. 2008) ("§ 2702 contains no exception for disclosure of such communications pursuant to civil discovery requests."); Flagg v. City of Detroit, 252 F.R.D. 346, 350 (E.D. Mich. 2008) (same).

Even if the Plaintiffs' discovery request had merit, the SCA renders it – and any future discovery requests similarly seeking the contents of communications from Internet providers such as Google and Yahoo – unenforceable.

V. CONCLUSION

By targeting entire forums in which a wide range of topics are discussed, Plaintiffs attempt to take a shortcut through the legal rights of the forum hosts and their participants. Fortunately, state and federal law bars such attempts. Accordingly, for the many reasons discussed above, the Anonymous Forum Hosts respectfully request that this Court quash Plaintiffs' subpoenas duces tecum of June 14, 2010 to Google and Yahoo.

Respectfully submitted,

Date 7/12/10

By Ron Lazebnik

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 18

MIRIAM HERSH and MICHAEL HERSH,

Plaintiffs,

- against -

Index No. 006170-2009

Justice Bernadette Bayne

ELIZABETH REBECCA COHEN, RAPHAEL COHEN, ARYEH LARRY WOLBE, ELI WOLBE, ZVI GLUCK, JOSHUA AMBUSH, ARIEL FISHMAN, HINDA FISHMAN, EFFI GOLDSTEIN, ABE LIFSCHITZ, AYELET MEHLMAN, SARAH KREISLER, YOSEF SHIDLER, RACHEL ROSENGARTEN, DINA DEUTSCH, and JOHN DOES #1-18,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH

Signature (22 NYCRR §130-1.1-a)

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July 12, 2010