SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

MORDECHAI TENDLER, Plaintiff, -against- BAIS KNESSES OF NEW HEMPSTEAD, INC., D/B/A/ THE RAV ARON JOFFEN COMMUNIITY SYNAGOGUE Defendant.	)	Index No. 2284/2006 **MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA TO GOOGLE TO IDENTIFY ANONYMOUS BLOGGERS**

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Five years ago, Mordechai Tendler initiated pre-litigation discovery proceedings in Ohio and California, seeking to compel Google to identify four users of Google's Blogspot who commented on Tendler's reported sexual abuse of women using his religious authority. Tendler asserted that the purpose of the discovery was to bring a defamation action against the operators of four web logs, or "blogs," devoted to issues of sexual and similar abuses by rabbis and other authority figures in the Orthodox Jewish community. The bloggers retained counsel who filed a special motion to strike Tendler's discovery proceeding, arguing that the subpoenas violated their First Amendment right of anonymous speech as well as California's anti-SLAPP statute, and seeking an award of attorney fees for the abusive discovery. When it became clear that Tendler's efforts to intimidate his critics into silence were doomed to failure, Tendler discharged his Ohio and California attorneys, dropped the discovery proceedings, and tried to avoid the consequence of having imposed on the bloggers the need to hire counsel.

Although the statute of limitations has long expired on any claims Tendler could bring against the four bloggers, Tendler has issued a new subpoena to Google seeking to identify the four bloggers. This time, however, he is using the attorneys who are pursuing this action over his dismissal from his congregation to obtain the discovery. Because the discovery still violates the bloggers' First Amendment right of anonymous speech, and because the subpoena is facially defective under CPLR 3101(a)(4), the Court should quash the subpoena.

STATEMENT OF THE CASE

The Internet is a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997),

> From a publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

In short, full First Amendment protection applies to speech on the Internet. *Id.*

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. Google's Blogspot gives individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, major companies, or other topics while allowing visitors to post their own comments.

Many people who post messages in such forums do so under pseudonyms — similar to the system of truck drivers using "handles" speaking on their CB's. Nothing prevents an individual from using a real name, but the blogs at issue here are typical in that most choose nicknames. These monikers protect the writer's identity and encourage the uninhibited exchange of ideas and opinions. Such exchanges can be very heated. The exchanges are sometimes filled with invective and insult, often directed at other posters.

One aspect of message boards and blogs makes them very different from almost any other form of published expression: Because any member of the public can express a point of view, a person who disagrees for any reason with something that is said — such as because she believes that a statement contains false or misleading information — can respond immediately and at no cost. Sometimes that is done on the very same blog, and sometimes on another blog. For example, the blog called jewishsurvivor.blogspot.com (almost identical to the name of the JewishSurvivors blog,

jewishsurvivors.blogspot.com but without the "s") is devoted solely to criticizing the "Awareness Center" blog, theawarenesscenter.blogspot.com, which has reported extensively on the Tendler controversy. Such responses will often have the same prominence as the offending message. A blog is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). The response can provide facts or opinions to controvert the criticism and persuade the audience that the critics are wrong. And because many people regularly revisit the same blogs, a response is likely to be seen by much the same audience as those who saw the original criticism. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, is the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

Four blogs are at issue on this motion: www.jewishsurvivors.blogspot.com, www.jewish whistleblower.blogspot.com, www.newhempsteadnews.blogspot.com, and www.rabbinicintegrity .blogspot.com. The plaintiff, Mordechai Tendler, is an Orthodox rabbi who served defendant, a congregation in New Hempstead, New York. Over a period of years, Tendler was accused by several women in his congregation of having sex with them through abuse of his position, such as by telling a woman who was having trouble finding a marriage partner that her problem was that she was too closed to men and that she needed to have sex with him to learn how to open herself up. After several such accusers came forward, Tendler was investigated by a special ethics committee of the Rabbinical Council of America ("RCA"), which in turn hired a private investigation firm to help find the facts. Based on their detailed report, Tendler was expelled from the RCA and fired by his congregation. Tendler was sued in 2005 by one of his congregants, but the action was dismissed because her efforts to plead around claims that would require undue entanglement with religious

issues left her without a viable cause of action. *Marmelstein v. Kehillat New Hempstead*, 11 N.Y.3d 15, 892 N.E.2d 375 (2008).

Tendler and his supporters fought back against the accusations, claiming that they were retaliation for his public advocacy on feminist issues and that he was denied due process; he also filed suit for libel in a rabbinical court in Israel. In this action, Tendler has sued his synagogue for reinstatement. The Appellate Division held that the discharge was procedurally improper because it was effected before, and not after, authorization was obtained from a rabbinical court. *Tendler v. Bais Knesses of New Hempstead*, 52 A.D.3d 500, 860 N.Y.S.2d 551 (2nd Dep't 2008). The debate between Tendler's supporters and detractors has raged for years. The controversy has been extensively reported both in the Jewish press and in mainstream media sources such as newspapers and television programs. *See* Affidavit of Rabbi Mark Dratch (identifying news articles showing public discussion of controversy), attached to the Levy Affidavit as Exhibit F. The controversy has also been extensively discussed on many blogs, including the blogs whose authors Tendler seeks to identify through this proceeding.

This case is not the first time Tendler has tried to use subpoenas to identify these bloggers. On February 15, 2006, Tendler filed a petition in an Ohio court, claiming that there were false and defamatory statements about Tendler on three blogs — www.jewishsurvivors.blogspot.com, www.rabbinic integrity.blogspot.com, and www.newhempsteadnews.blogspot.com — but did not identify any specific defamatory statements, or offer any evidence that any of the postings were, in fact, false. Levy Affidavit, Exhibit A. The petition also did not note that Tendler lived in New York, much less explain why a New Yorker was seeking redress in Ohio. *Id.* Even though Ohio Rule 34(D) requires a party seeking pre-litigation discovery to serve his request on the anticipated adverse

party, no effort was made to notify the bloggers in question that Tendler was seeking to identify them. It would have been simple for Tendler to have given notice to each blogger, even though he did not have their names, either by using the "comment" feature, or by looking at the "profiles" on two of the blogs that reveal the operators' email addresses. The Ohio court was not informed that means of notice existed. Levy Affidavit ¶ 4 and Exhibit A.

The Ohio court granted the petition authorizing discovery, and Tendler sent Ohio subpoenas to Google, Inc., a California company that owns and operates Blogspot. However, Google declined to respond to Ohio process Levy Affidavit, Exhibit B. Tendler then obtained a commission to the California state courts in support of his Ohio proceeding and retained a California lawyer to pursue his subpoenas through a California state court in San Jose. Levy Affidavit, Exhibits B, C. Google gave notice to the bloggers, who were able to obtain the pro bono services of undersigned counsel Mr. Levy. The bloggers then moved to quash the subpoena and filed a special motion to strike the subpoena proceeding under California's anti-SLAPP statute, Cal. Code of Civil Procedure § 425.16. Levy Affidavit ¶ 9. In support of those motions, the bloggers showed that enforcement of the subpoenas was barred by the First Amendment, which protects the right to speak anonymously and bars the use of state authority to take away anonymity absent compelling reasons to believe that anonymity has been abused, such as by the deliberate making of false statements. The bloggers showed that Tendler had never provided any evidence in support of his contention that anything the bloggers had said about him was a false statement of fact, as opposed to a true statement, or merely an opinion. In addition, the bloggers presented evidence that they had reason to worry about private retaliation if their identities as critics of Tendler were revealed. *Id.* ¶¶ 9-10 and Exhibits F, G.

Perhaps because the anti-SLAPP statute requires an award of attorney fees when a plaintiff

is unable to show that his proceeding has a reasonable probability of success, Tendler promptly withdrew his California subpoena to Google and dismissed the Ohio proceeding. Levy Affidavit ¶ 11. The bloggers persisted in their anti-SLAPP motion, because the anti-SLAPP statute provides that dismissal of a proceeding after an anti-SLAPP motion is filed does not render moot the claim for attorney fees. Tendler then discharged his California counsel and argued that the California courts did not have jurisdiction to award attorney fees against him; in fact, he claimed that the lawyer who was pursuing the California subpoena was never his lawyer. Levy Affidavit Exhibit I. The California court was not fooled by these maneuvers, found that the anti-SLAPP statute had been violated, and awarded fees against Tendler. At this point, Tendler proceeded pro se and had personal knowledge of the fact that Mr. Levy represented the bloggers. Levy Affidavit ¶ 14 and Exhibit O.[1]

Nothing has been posted about Tendler on the blogs in question for several years. In fact, some of the blogs have been inactive since 2006, and the last posting on any of the blogs was in early 2009. Levy Affidavit ¶ 27. In June, 2008, flush with his appellate victories, Tendler issued a press release asserting that he was again in a position to issue subpoenas to identify the anonymous bloggers. Levy Affidavit, Exhibit O.

Nevertheless, he took no such action until February 15, 2011, when counsel for Tendler issued a subpoena to identify five bloggers — www.jewishsurvivors.blogspot.com, www.jewish whistleblower.blogspot.com, www.newhempsteadnews.blogspot.com, www.rabbinicintegrity

[1] Tendler appealed the fee award, and in a published opinion, the California Court of Appeal ruled that a subpoena proceeding under a commission from a court in another state is not a "civil proceeding" subject to California's anti-SLAPP statute. *Tendler v. www.jewishsurvivors.blogspot .com*, 164 Cal.App.4th 802, 79 Cal.Rptr.3d 407 (6 Dist. 2008). The California legislature responded to this ruling by adopting a new statute providing for awards of attorney fees when subpoenas are sought to identify anonymous Internet speakers and the subpoenaing party fails to make a prima facie case supporting the subpoena. California Code of Civil Procedure section 1987.2.

.blogspot.com and knhmember.blogspot.com. Levy Affidavit, Exhibit J. Even though Tendler himself was personally aware that undersigned counsel Mr. Levy had previously defended the anonymity rights of four of these five bloggers, he made no effort to contact Mr. Levy to let him know that he was, once again, trying to take away Mr. Levy's clients' First Amendment right to speak anonymously. Levy Affidavit ¶ 16. Mr. Levy understands that Google attempted to contact the bloggers, using the email addresses that they gave when establishing the blogs, but that the blogs are so old that the email notice was ineffective. However, defendants' counsel, knowing of Mr. Levy's previous representation of some of the bloggers, told him about the subpoena. *Id.* ¶ 18.

Tendler's counsel Marvin Neiman did not include any explanation of the need for discovery in the subpoena itself, and he expressly refused to withdraw the subpoena for that reason when defendant's counsel Stephen Weg asked him to do so. Levy Affidavit Exhibits L and M. And when Mr. Levy contacted Mr. Neiman to ask why the discovery was needed, Mr. Neiman declined to offer any explanation. Levy Affidavit, Exhibit K. Nor was Mr. Neiman willing to agree to any extension of time for Google to comply with the subpoena, even though it was Tendler's own refusal to provide notice to the bloggers that was responsible for the delay in filing a motion to quash. *Id.* After Google unilaterally agreed to extend the time for the bloggers to move to quash the subpoena, Mr. Levy sent Mr. Neiman a written assertion of the First Amemdment privilege against disclosure, coupled with a request that the subpoena be withdrawn. Levy Affidavit, Exhibit N. Because Mr. Neiman has not withdrawn it, the bloggers now ask the Court to quash the subpoena.

ARGUMENT

The subpoena should be quashed for two separate but related reasons. First, it was served in violation of the longstanding requirement in CPLR 3101(a)(4) that, "where disclosure is sought

from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required." Second, the subpoena infringes the bloggers' First Amendment right to speak anonymously, and because there is no compelling justification for the discovery, the First Amendment rights of the bloggers must prevail.

A. The Subpoena Should Be Quashed Because Tendler Did Not Include "Notice Stating the Circumstances or Reasons Such Disclosure Is Sought or Required" as Required by CPLR 3101(a)(4).

The subpoena should be quashed because it is facially defective under CPLR 3101(a)(4) and longstanding precedent in the Second Department. CPLR 3101(a)(4) allows a plaintiff to seek discovery from a third party like Google, but only "upon notice stating the circumstances or reasons such disclosure is sought or required." Longstanding precedent in the Second Department provides that the failure to include this notice in the subpoena, or at least in a document served with the subpoena, makes the subpoena facially defective and hence unenforceable. *E.g., Matter of American Express Prop. Cas. Co. v. Vinci*, 63 A.D.3d 1055, 1056, 881 N.Y.S.2d 484 (2d Dep't 2009); *Wolf v. Wolf*, 300 A.D.2d 473, 751 N.Y.S.2d 425 (2d Dep't 2002); *In re Ehmer*, 272 A.D.2d 540, 541, 708 N.Y.S.2d 903 (2d Dep't 2000); *Knitwork Prods. Corp. v. Helfat*, 234 A.D.2d 345, 346, 651 N.Y.S.2d 99 (2 Dep't 1996).

Not only was no such notice included in or with the subpoena in this case, but plaintiff's counsel has defiantly refused to provide such a notice. Defendant's counsel Mr. Weg warned plaintiff's counsel Mr. Neiman that his subpoena to Google is facially defective. Levy Affidavit Exhhibit L. Mr. Neiman responded that he did not need to provide such a notice because, he claimed, the Second Department cases requiring the notice had been overruled in *Kooper v. Kooper*, 74 A.D.3d 6, 901 N.Y.S.2d 312 (2d Dep't 2010). Levy Affidavit Exhibit M. But *Kooper* did not

overrule these cases, nor could it have, because the requirement of notice of the reasons for the subpoena is not a judicial gloss — it appears in the text of the rule itself. *Kooper* overruled a different set of Second Department precedents that, **in addition to** the notice of reasons, required that the proponent of non-party discovery justify the discovery by reference to "special circumstances," a term that formerly appeared in CPLR 3101(a)(4). As *Kooper* notes, that language was removed by the 1984 and 2002 amendments to the CPLR, which also eliminated the former requirement of a motion before discovery could be served on non-parties.

However, far from eliminating the requirement of notice, the amendments **added** that requirement as a replacement for the requirement of a motion based on a showing of "special circumstances." *Kooper*, 74 A.D.2d at 11-12. After discussing this legislative history, *Kooper* recognized that, since the amendments, the Second Department "has adhered to the view that a subpoena duces tecum served on a nonparty is 'facially defective' and unenforceable if it neither contains, nor is accompanied by, a notice stating the circumstances or reasons such disclosure is sought or required." *Id.* at 13. The Court expressly declined to reopen that question. *Id.* at 14. Consequently, Tendler's defense of his refusal to explain the need for discovery is without merit.

Not only did Mr. Neiman refuse to correct the facial deficiency of his subpoena upon demand by defendant's counsel, he also declined to give Mr. Levy any explanation of why the subpoena sought information that is relevant to the remaining issues in the litigation. Levy Affidavit ¶ 19 and Exhibit K. At the same time, Mr. Neiman declined to agree to any extension of Google's obligation to comply with the defective subpoena, and he refused a written demand to withdraw the subpoena. *Id.* This obstinate behavior forced the bloggers to file this motion to quash; the Court is requested to award the bloggers their attorneys' fees for having had to file this motion.

B. The Subpoena Should Be Quashed Because Its Enforcement Would Violate the Bloggers' First Amendment Rights.

In addition to violating the CPLR, the subpoena violates the First Amendment's protections for the right of anonymous speech. The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an 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.
> * * *
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.
>
> 514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. Accordingly, First Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521

U.S. 844 (1997).

Internet speakers speak anonymously for various reasons. They might wish to avoid having their views stereotyped according to their race, ethnicity, gender, or class characteristics. They might be associated with a group but want to express opinions of their own, without running the risk that, however much they disclaim attribution of opinions to the group, readers will assume that the individual speaks for the group. They might discuss embarrassing subjects and might want to say or imply things about themselves that they are unwilling to disclose otherwise. And they might wish to say things that might make other people angry and stir a desire for retaliation. Levy Affidavit ¶ 23. Whatever the reason for wanting to speak anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor speakers and discover their identities. Speakers who send e-mail or visit a website leave behind electronic footprints that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original senders. *Id.* ¶ 25. Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom.

A court order, even if granted for a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel production of individuals' identities in a situation that threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably

follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524.

Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of speakers to remain anonymous, justification for incursions on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347.

In a closely analogous area of law, courts have developed a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In such cases, many courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of the plaintiff's case; (2) disclosure of the source is "necessary" to prove the issue because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of its case. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identities were allegedly relevant to defend against a shareholder derivative action, "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." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). Similarly, in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), the court expressed concern about the possible chilling effect of such discovery:

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . 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 identities.

Several courts have enunciated standards to govern identification of anonymous Internet speakers. The first appellate decision in the country remains the leading case. In *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), a company sued four individuals who had criticized it on a Yahoo! bulletin board. The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers for the purpose of suing them as defendants:

> 1. **Give Notice:** Require reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena;
>
> 2. **Require Specificity:** Require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights;
>
> 3. **Ensure Facial Validity:** Review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant;
>
> 4. **Require An Evidentiary Showing:** Require the plaintiff to produce evidence supporting each element of its claims; and
>
> 5. **Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

Since *Dendrite* was decided, many other state appellate courts have imposed similar requirements.[2] There are no appellate decisions yet in New York addressing the question, but several Supreme Court justices have required a substantial showing of merit.[3]

If Tendler's reason for seeking to identify the bloggers is to enable him to sue them — and his June 2008 press release (Levy Affidavit, Exhibit O) strongly implies that this is his real motivation, then he has failed to meet the *Dendrite* test. First, he deliberately failed to give any notice of the subpoena. Second, he has not identified any defamatory or otherwise actionable words that the bloggers uttered. Third, he has not and could not state a viable claim for defamation against any of the bloggers, because much of what the bloggers posted was just non-actionable opinion about the various public allegations about Tendler. Moreover, nothing has been posted on any of the blogs since at least 2009, and nothing has been posted about Tendler on any of the blogs since even earlier. Levy Affidavit ¶ 27. Because the statute of limitations for defamation actions is one year, CPLR 215(3), and because the single publication rule applies to Internet publications, *Firth v. State of New York,* 4 N.Y.3d 709, 830 N.E.2d 1145, 797 N.Y.S.2d 81 (2005), any suit by Tendler for defamation

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[2]*Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Pilchesky v. Gatelli*, 2011 PA Super 3, 12 A.3d 430 (2011); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 160 N.H. 227, 999 A.2d 184, 192 (2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432, 456-457 (2009); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007);*Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal.App. 6 Dist. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App. - Texarkana 2007).

[3]*Cohen v. Google, Inc.*, 25 Misc.3d 945, 887 N.Y.S.2d 424 (Sup Ct., N.Y. Co. 2009); *In Matter of Ottinger v. Non-Party The Journal News,* 2008 N.Y. Misc. Lexis 4579 (Sup. Ct., Westch. Co. June 27, 2008); *Greenbaum v. Google, Inc.*, 18 Misc.3d 185, 845 N.Y.S.2d 695 (Sup. Ct., N.Y. Co. 2007); *Public Relations Society of America v. Road Runner High Speed Online*, 8 Misc.3d 820, 799 N.Y.S.2d 847 (Sup. Ct., N.Y. Co. 2005).

would be time-barred. And, in any event, Tendler has presented no evidence that anything any of the bloggers said about him is false.

If, however, Tendler seeks to identify the bloggers to obtain evidence for use in the current action, the leading case of *Doe v. 2TheMart.Com*, *supra*, established the relevant test to be applied, which is akin to the First Amendment test for a subpoena for a reporter's sources. Under that test, once notice has been given to the bloggers,

1. The subpoena must have been issued in **good faith**.

2. The information sought must **relate to a core claim or defense**.

3. The identifying information must be **directly and materially relevant to that claim or defense**.

4. Information sufficient to establish or to disprove that claim or defense must be **unavailable from any other source**.

140 F. Supp.2d at 1095.

In addition, "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." *Id.* Several subsequent courts have followed this test, including the United States District Court for the Eastern District of New York. *In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, 2010 WL 2219343, at *8-11 (E.D.N.Y. Feb 5, 2010), *adopted in relevant part*, 2010 WL 1686811, at *2-3 (Apr. 26, 2010); *McVicker v. King*, 266 F.R.D. 92, 94-97 (W.D. Pa. 2010); *Sedersten v. Taylor*, 2009 WL 4802567, at *2 (W.D. Mo. Dec. 9, 2009); *Enterline v. Pocono Medical Center*, 2008 WL 5192386, at *5-6 (M.D. Pa. Dec. 11, 2008). *See also Anderson v. Hale*, 2001 WL 503045, at *7-9 (N.D. Ill. May 10, 2001).

Tendler cannot satisfy any part of this test. First, the record presents serious questions about

whether he is proceeding in good faith. This is the second time Tendler has tried to subpoena the identity of the four bloggers who are filing this motion. The first time, he claimed that the reason was that he wanted to sue them for defamation, but he issued the subpoena out of an Ohio court without revealing that he lived in New York, then withdrew the subpoena after the bloggers moved to quash and sought attorney fees. Tendler was never able to articulate a viable claim for defamation and never presented evidence showing that anything the bloggers has said about him was false. Then, in issuing the current subpoena, Tendler deliberately did not give any notice to the bloggers' lawyer, even though Tendler was perfectly aware that the bloggers would object to being identified; and then Tendler refused to agree to any extension of the time for compliance. Such maneuvering to avoid giving the speakers a fair chance to oppose discovery was weighed against the plaintiff in *Cablevision Systems* and indeed was a reason why the Court awarded sanctions in that case. 2010 WL 2219343, at *11-12. And Tendler failed to include any notice of the reasons why discovery was needed, and refused to provide any reasons when Mr. Levy asked for them. Tendler's bad faith is itself sufficient reason to quash his subpoena.[4]

Second, the liability phase of this litigation is over; all that remains to be decided is the amount of damages. That is neither a core claim nor core defense. The right to speak anonymously should not be denied the bloggers just so that Tendler can get more money from the defendant. Third, even if the amount of damages is a sufficiently important issue to warrant denial of the right to speak anonymously, Tendler has not articulated any reason why identification of the bloggers is directly and materially relevant to the amount of damages. And fourth, Tendler has not shown that

[4]As the history of Tendler's Ohio and California litigation reflects, proceeding without notice to his opponents is Tendler's modus operandi. Levy Affidavit ¶¶ 4-8 and Exhibits A, C, E, H.

he has exhausted other sources of information for pursuing his damages claim. Indeed, Tendler claimed during the California appeal that he knew the identity of one of the bloggers. Levy Affidavit, Exhibit O. If he knows the identity, he does not need this subpoena to Google, but can simply take that individual's deposition by sending her a subpoena.

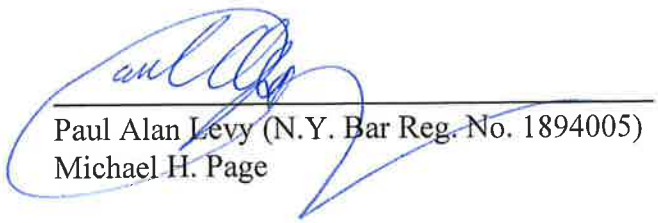
Finally, the affidavits of Mark Dratch and Yosef Blau provide an additional reason why the bloggers' privacy should be weighed especially heavily in the balance. Given the close-knit nature of the Orthodox community and the norms against open criticism of community leaders in forums visible outside the community, and especially criticisms of religious leaders, the bloggers are subject to serious private consequences if publicly identified as critics of Mordechai Tendler. In all the circumstances, it would be inequitable to enforce Tendler's subpoena, and the Court is requested to quash it.

In sum, Tendler's desire to identify four bloggers who criticized him several years ago simply does not create a compelling government purpose that is sufficient to overcome the bloggers' right to speak anonymously. The Court should also impose sanctions on Tendler for having refused to withdraw his subpoena and forcing the bloggers to file their motion to quash.

CONCLUSION

The Court should quash the subpoena to Google, and should order Tendler to pay the bloggers' attorney fees as a sanction for their having to file this motion.

Respectfully submitted,



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