SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

IN THE MATTER OF FOUR SUBPOENAS DATED OCTOBER 30, 2007, MAY 6, 2008, MAY 6, 2008 AND MAY 8, 2008	: : : : :	Index No. 08- **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH SUBPOENAS DUCES TECUM**

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MISCELLANEOUS

The question in this case is whether the First Amendment affords any protection against a subpoena directed to the operators of a political blog, seeking to identify more than two dozen citizens who have engaged in political speech – speech at the heart of the First Amendment – by anonymously criticizing Bronx public and political party officials. Many courts across the country have grappled in the civil context with the question of how to reconcile the well-established First Amendment right to engage in anonymous Internet speech critical of public figures and big companies with the right of a person who has been wronged to proceed against anonymous speakers who have abused their anonymity. These courts have consistently demanded that both procedural and substantive protections be observed to ensure that the mere possibility of identifying information being subpoenaed does not have an untoward chilling effect on the contributions to the marketplace of ideas that are provided by anonymous Internet messages. But no court in the nation, so far as we are aware, has addressed how to balance the right to speak anonymously against the power of a grand jury to demand evidence needed to investigate crimes.

Although the issue is one of first impression, long-established law in New York and elsewhere provides that even a grand jury is subject to constitutional limits under both the First Amendment and Article I, Section 8 of the New York Constitution. When a subpoena threatens to infringe free speech rights, the prosecutor must show that the subpoena is needed to serve a compelling government interest, that the subpoena is narrowly tailored to seek only the information that is truly needed to serve that interest, and that there are no alternative means to pursue the investigation. Moreover, the **procedural** protections afforded in civil cases — notice and an opportunity to defend anonymity — are equally important in the grand jury context. Yet the District Attorney has threatened the blog operators with criminal prosecution if they notify the anonymous posters that they are subject to this subpoena, and hence give them an opportunity to hire counsel to

defend their right to remain anonymous. Moreover, the District Attorney has refused to provide any explanation about what crimes may have been committed by the anonymous speakers, how identification of the anonymous speakers will show crimes by others, or how notification to the anonymous posters so that they can seek counsel to oppose the subpoenas will injure the People's legitimate interests. Accordingly, the subpoenas should be quashed at least until notice can be given, and until the District Attorney makes the constitutionally required showing on the merits.

STATEMENT

A. Facts

1. The Internet is a democratic institution in the fullest sense.

> The internet is a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate. Unlike thirty years ago, when many citizens were barred from meaningful participation in public discourse by financial or status inequalities and a relatively small number of powerful speakers [could] dominate the marketplace of ideas . . . [t]hrough the internet, speakers can bypass mainstream media to speak directly to an audience larger and more diverse than any of the Framers could have imagined.
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> *Doe v. Cahill*, 884 A.2d 451, 455-456 (Del. 2005).

The Internet is the modern equivalent of Speakers' Corner in London's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to read them. As the Supreme Court explained in *Reno v. ACLU,* 521 U.S. 844, 853, 870 (1997),

> From the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide 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.

The Court held, therefore, that full First Amendment protection applies to speech on the Internet.

Id. Or, as another court put it, "[defendant] is free to shout 'Taubman Sucks!' from the rooftops . . .. Essentially, this is what he has done in his domain name. The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and [defendant] has a First Amendment right to express his opinion about Taubman." *Taubman v. WebFeats*, 319 F.3d 770, 778 (6th Cir. 2003).

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many individuals and companies have organized outlets for the expression of opinions. For example, Yahoo! and Raging Bull each host a separate message board for every publicly traded company, at http://biz.yahoo.com/promo/mbbeta.html, and http://ragingbull.quote.com/cgi-bin/static.cgi/a=index.txt&d=mainpages. Google hosts both easy-to-use blog creation system called Blogger, https://www.blogger.com/start, and YouTube, an interactive community that allows members of the public to post videos and to rework or comment on each other's videos. *See* www.youtube.com. Most newspapers now host online discussion communities connected with their home web sites, allowing interactive discussion of their columnists, http://blog.washingtonpost.com/thefix/, or dividing blogs into particular communities so that neighbors can discuss local affairs. *See* http://www.nj.com/forums/index.ssf?local.ssf. Many political web sites host discussion boards that are oriented toward one political sentiment or another. *E.g.*, http://www.democraticunderground.com/about.html.

The individuals who post messages generally do so under pseudonyms – similar to the old system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the various message boards at issue in this

case will reveal, most people choose nicknames. These typically colorful monikers protect the writer's identity from those who disagree with him or her, and they encourage the uninhibited exchange of ideas and opinions. Indeed, every message board has regular posters who persistently complain about companies or individuals under discussion, others who persistently praise them, and others whose opinions vary between praise and criticism. Such exchanges are often very heated, and they are sometimes filled with invective and insult. Most, if not everything, that is said on message boards is taken with a grain of salt.

Many message boards have a significant feature that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use a message board to express his point of view; a person who disagrees with something that is said on a message board for any reason – including the belief that a statement contains false or misleading information – can respond to those statements immediately at no cost, and that response can have the same prominence as the offending message. A message board 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). By contrast, on most message boards companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. And because many people regularly revisit message boards about a particular topic, 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, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

2. This case concerns an interactive discussion site called Room Eight, which is hosted by movant Room Eight LLC. Room Eight LLC was founded by movants Ben Smith, a full-time reporter for the publication Politico (*see* www.politico.com), Smith Affidavit ¶ 1, and Gur Tsabar, a vice-president with the public relations company Ketchum. Tsabar Affidavit ¶ 1. Room Eight is the imaginary neighbor to New York City Hall's legendary press room, Room 9. Technically speaking, it is a group blog, or an online community. It is a place where both insiders and informed outsiders can have a running conversation about New York politics. All members of the political community, with varying perspectives, can contribute to the Room Eight blog, either by setting up their own blogs or by making comments on the blogs of others. Smith Affidavit ¶ 2.

When a member of the public establishes a blog of her own, she first registers with Room Eight by selecting a username that may or may not be her own name and providing an email address that is used to confirm registration. She can then post regularly to the blog that she created. Other members of the public may choose not to create their own blogs, but only comment on blogs created by others. Smith Affidavit ¶ 3. Such comments may be posted using a self-created pseudonym or by using the name "anonymous." Room Eight encourages both bloggers and commenters to adopt and use either their own names or pseudonyms, and to post continuously under those names so that the users of the blog can get to know the personas of individual speakers. Although some posters on Room Eight use their own names, as Smith and Tsabar do, the great majority use pseudonyms. Many Internet posters use pseudonyms because that gives them more freedom to comment on situations and to criticize powerful figures without having to worry that they, their families, their employers, or their political associates will be intimidated or face adverse consequences from having particular comments associated with them. *Id.* ¶ 4.

However, like any other Internet user who visits a web site, members of the public who visit a Room Eight blog and post comments there leave tracks of their visit that can be used to find out who they are. Web servers – the computers on which web sites are hosted – record the "Internet Protocol number" ("IP number") from which each Internet visitor gained access to the Internet at the precise moment when she posted a comment to a blog. *Id.* ¶ 3. Each Internet Service Provider ("ISP") that provides access to the Internet does so by means of a string of IP numbers under its control; public registries can be consulted to determine which ISP controls which range of IP numbers. Some IP numbers are, in turn, assigned "statically," on a permanent basis to particular individuals; thus, for example, if an IP number has been assigned permanently to a single small entity, learning the IP number is tantamount to identifying the individual poster. More often, an ISP assigns IP numbers "dynamically," providing a particular IP number to a particular user as the need arises to fill the demand for Internet access among all its users. ISP's keep track of which user has control of which IP number at which particular time. Tsabar Affidavit ¶ 3. Thus, by obtaining the particular IP number that was used at the particular time when a particular comment was posted to a blog, using that number to identify the ISP that provided access to the Internet through that IP number, and then using the records of the ISP to identify the particular Internet account holder who gained access to the Internet using that IP number, it is possible to track back from the comment to the user.

3. One of the bloggers on the Room Eight blog used the pseudonym Republican Dissident. Republican Dissident routinely criticized Democrats and Republicans alike.[1] One of her common

[1]Movants use female pronouns generically to refer to Republican Dissident and to all of the anonymous commenters in this case, without any intent to signal the actual gender of any poster.

themes was that Republicans in the Bronx were too deferential to the Democrats, going along with misconduct to get a piece of the patronage pie, instead of trying to compete actively and to run candidates against all Democratic office holders. Smith Affidavit ¶ 5. Republican Dissident specifically criticized the Republican leadership for the failure to field candidates against District Attorney Robert Johnson. For example, Republican Dissident stated,

> From a republican standpoint, the current Bronx GOP Leader Joseph J. Savino is not capable of mounting up a challenge to run a candidate against Robert Johnson. Mr. Savino is only concerned about his own political future to become the NYS senator for the 34th senate district, which he will never succeed at. He does not care about the Bronx County GOP at all. As a GOP leader he should be trying to run a republican candidate for the Bronx District Attorney's position. What does he do instead, he runs an incumbent democrat, who is already the Bronx County District Attorney - Robert Johnson.
>
> *Id.*

In complaining about Republican party corruption in the Bronx, and proclaiming the need to prosecute that corruption, she bemoaned the fact that Robert Johnson was the District Attorney because the Bronx Republican Party always endorses him for re-election. For example, Republican Dissident stated:

> Wait till Fred Brown starts to cooperate with the Bronx DA's office on Jay Savino, Dawn Sandow and others, it is the beginning of the end, and they all deserve whatever the judical system has intended for them. They all have no place in politics of city civil service jobs, thay all lie and falsify. And I would get another prosecutor than Bronx DA Robert Johnson, Bronx County GP always endorses him in every election he runs in.
>
> *Id.*

Republican Dissident also ran a series of blog postings that criticized two figures in Bronx politics, J.C. Polanco and Dawn Sandow. Sandow was formerly a chair of the Republican Party in the Bronx, and is currently the Deputy Chief Clerk at the Board of Elections. The New York Times

has reported that city investigators have sought information concerning the personal relationship between Sandow and Jay Savino, the head of the Bronx Republican Party. In a series of blog posts, supported by citations to newspaper articles, voter registration documents, and other public documents, Republican Dissident asserted that Sandow was breaking the law in several respects, including by registering to vote from the Bronx so that she could meet the residence requirement for city employment, even though, Republican Dissident claimed, Sandow was living in Rockland County. Republican Dissident repeatedly complained that Sandow was not being prosecuted for these crimes. Many anonymous posters chimed in with criticisms of Sandow, many of them caustic and many of them accompanied by harshly critical illustrations. For example, one poster used a graphic that showed Sandow as a witch on a broomstick; another made reference to Sandow changing Osama bin Laden's diapers, and showed him in diapers suspended from a pair of hands and arms. Other Republican Dissident posts criticized Jay Savino, associated him with a Mafia figure, and predicted that he would be indicted. Other posters chimed in with criticisms of Savino and further predictions that he would go to jail. *Id.* ¶ 6 and Exhibit A.

4. In September, 2007, Dawn Sandow contacted Room Eight to complain about the posts criticizing her, and left several voicemail messages threatening prosecution. When Gur Tsabar called her back, she said that she had already gone to the police and that they had told her she needed to get the IP numbers for the posts that disturbed her. Tsabar responded that, as a general matter, when Room Eight receives complaints about particular posts that are claimed to be abusive or defamatory, they review the posts to determine whether they violate the Room Eight Terms of Service. However, he explained that Room Eight does not give out the IP numbers through which its users access the Internet, because it values its users' privacy and believes that its users expect

Room Eight to defend their privacy. Tsabar Affidavit ¶¶ 2-5.

Indeed, both principals of Room Eight believe that Room Eight users feel free to write candidly about New York City politics, and to criticize powerful party leaders and public officials, in substantial part because they are able to do so anonymously. If users learned either that Room Eight gave up their identifying information with no resistance, and without giving them any opportunity to defend themselves, or that posting public criticisms could lead to their getting hauled before a grand jury on nothing more than a prosecutor's say-so, the result would be an enormous chilling effect that would discourage public criticism of the government or political leaders. *Id.* ¶¶ 6-7; Smith Affidavit ¶¶ 7-11.

5. On April 15, 2008, Republican Dissident deleted all of the posts on her blog. Room Eight had not archived the contents of the blog. Tsabar Affidavit ¶ 8. However, undersigned counsel, Mr. Levy, had downloaded the text of those posts that were subject to the subpoena (discussed below), and Assistant District Attorney James Goward furnished a set of the subpoenaed posts that were printed from the Internet before the date of the deletion. The posts are attached to the Affidavit of Ben Smith as Exhibit A.

B. Proceedings to Date

On October 30, 2007 — one month after Dawn Sandow complained to Room Eight about the criticisms that were being posted about her — Bronx District Attorney Robert Johnson issued a grand jury subpoena, returnable October 31, 2007, directing Room Eight to produce all identifying information in its possession, including email addresses and IP numbers, for two separate posts by the blogger Republican Dissident, for one comment posted on the Republican Dissident blog by a poster calling herself "Dissident Hunter," and for eleven more comments posted by users calling

themselves "Anonymous." Tsabar Affidavit ¶ 7; LevyAffidavit ¶ 2 and Exhibit A. The consistent theme of the posts whose authors were sought to be identified was criticism of Dawn Sandow as well as other Republican public figures. *Compare* Smith Affidavit Exhibit A *with* Levy Affidavit Exhibit A (attachment listing subpoenaed posts). However, the subpoena was not delivered to Room Eight until late January, 2008. Tsabar Affidavit ¶ 7.

A legend on the subpoena stated:

> "DO NOT DISCLOSE THE EXISTENCE OF THIS REQUEST BUT UPON THE LAWFUL ORDER OF A COURT OF COMPETENT JURISDICTION. ANY SUCH DISCLOSURE COULD IMPEDE THE INVESTIGATION BEING CONDUCTED AND THEREBY INTERFERE WITH LAW ENFORCEMENT."

The capitalization is in the original. A copy of this subpoena is attached to the Levy Affidavit as Exhibit A.

Although the return date for the subpoena had passed months before service, Room Eight retained undersigned counsel Mr. Levy to contact the District Attorney on its behalf to try to find out what the basis for the subpoena was, and to ask that Room Eight be permitted to notify the subpoenaed posters by sending an email to Republican Dissident (for whom Room Eight has an email address) and by posting the subpoena on its blog (to notify the other posters, for whom Room Eight has no email addresses). Levy Affidavit ¶ 2. Mr. Levy spoke to Assistant District Attorneys Rosemary Iaconis and James Goward to inform them of Room Eight's First Amendment concerns, to discuss the relevant authorities, and to inquire about the postings' relevance to a legitimate criminal investigation. Levy Affidavit ¶¶ 3-11. In addition to several telephone conversations, counsel exchanged correspondence discussing the dispute. (The exchange of correspondence is attached to the Levy Affidavit as Exhibit B.) Mr. Levy explained that, in a series of civil cases,

courts had developed a procedure for notifying anonymous posters that their identity was subject to subpoena, so that they could have a chance to defend their right to anonymous speech, and a substantive test to ensure that the right of anonymous speech was not infringed unless the court was satisfied that there was a sound basis for bringing a legal proceeding against them. He pointed out that the First Amendment also limits the subpoena power of a grand jury, and suggested that a rule comparable to the rule adopted in the civil cases would be judicially applied in the grand jury context. Moreover, he explained that the posts whose authors the District Attorney was trying to identify were all core political speech, directed at criticizing a public official. Levy Affidavit ¶ 3.

In their initial conversations, when Mr. Levy inquired about the crimes that were being investigated and how the posts were relevant to those crimes, the District Attorney's office asserted that the right of anonymous speech applied only to "core First Amendment expression," and that the posters were not being sought because of the content of their speech. Levy Affidavit ¶ 5 and Exhibit B (Goward Letter dated February 28). In later conversations, however, the District Attorney's office explained that the content of the posters' speech suggested a form of signaling, although they refused to say what crimes were being signaled by the speech. Levy Affidavit ¶ 6. Mr. Levy pointed out that, in cases determining whether there is a "compelling need" to overcome the First Amendment rights infringed by a subpoena, the courts discussed the prosecutor's showing in a way that suggested that the prosecutor had provided a specific description of the crimes at issue and how the subpoenaed information would further investigation of those crimes. *Id.* Although the District Attorney's office indicated that it would consider providing this information in advance of briefing, it has never done so. *Id.*

In addition, Mr. Levy pressed the District Attorney's office to release Room Eight from the

threat of criminal prosecution for disclosing the existence of the subpoena, even to the extent of notifying the posters that their identity had been subpoenaed. *Id.* ¶¶ 4, 7, 11. Initially, the District Attorney's office suggested that it might be open to allowing Room Eight to send email notification to each of the posters, but when Mr. Levy indicated that Room Eight had no email address for most of the posters, and that the only way to reach such posters would be to post a notice of the subpoena on Room Eight, the Assistant District Attorneys indicated that such a posting would interfere with law enforcement and hence risk criminal prosecution under the direction contained in the legend. *Id.* No explanation was ever given of how such a posting would "interfere with law enforcement."

As discussions between counsel continued, the District Attorney's office increased the list of posts whose authors were sought to be identified from fourteen to twenty-eight, *id.* ¶ 8, Exhibit C, and to make sure that Room Eight knew exactly which postings were at issue, it sent Mr. Levy a printout of the twenty-eight posts, as they had been printed from the Room Eight web site in the course of the investigation. A copy of this list is attached as Exhibit C. Some of the additional fourteen posts were not so directly critical of Dawn Sandow as the original fourteen. *Id.* ¶ 8 and Exhibit C; Smith Affidavit Exhibit A. The District Attorney's office later provided a 29th post that was deemed relevant to the investigation. *Id*. ¶¶ 10, 13.

Finally, the District Attorney's office agreed to serve new subpoenas, so that Room Eight would be the recipient of a set of subpoenas that compelled production of documents at a date **after** the subpoenas were served. *Id.* ¶¶ 10, 12. The new subpoenas are attached to the Levy Affidavit as Exhibit D. Counsel agreed that Mr. Levy would accept service of the subpoenas on behalf of Room Eight, and that the District Attorney would not seek contempt for failure to comply with the subpoenas so long as movants filed a motion to quash them no later than May 22, 2008. *Id.* ¶ 12.

The parties further agreed that the District Attorney would respond to the motion at some point after the Memorial Day weekend, and that the parties would try to schedule a mutually convenient date for oral argument thereafter. In addition, movants will seek to file a reply brief to address the District Attorney's response that explains, for the first time, why the authors of political criticisms of public officials are being deprived of their right to speak anonymously,.

ARGUMENT

THE FIRST AMENDMENT AND ARTICLE I, SECTION 8 OF THE NEW YORK CONSTITUTION BAR THE SUBPOENA TO ROOM EIGHT.

A. The First Amendment and Article I, Section 8 Protect Against the Compelled Identification of Anonymous Internet Speakers.

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). The New York courts have similarly upheld the right to speak anonymously under both the First Amendment and Article I, section 8 of the New York Constitution. *E.g.*, *Figari v. New York Tel. Co.*, 32 A.D.2d 434, 441, 447 (2d Dept. 1969). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers. The United States Supreme Court has stated:

> [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.
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> * * *
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> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 U.S. at 341-342, 356.

Similarly, in *People v. Duryea,* 76 Misc.2d 948, 966 (Sup. Ct. N.Y. Co. 1974), the court wrote:

> The identity of the source is helpful in evaluating ideas. But "the best test of truth is the power of the thought to get itself accepted in the competition of the market" (*Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J.)). Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public 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. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). "Courts . . . have repeatedly recognized that the First Amendment protects the right to participate in online forums anonymously or under a pseudonym, and that anonymous speech can foster the free and diverse exchange of ideas." *Greenbaum v. Google, Inc.*, 18 Misc.3d 185, 187, (Sup. Ct. N.Y. Co. 2007), citing *Sony Music Entertainment Inc. v. Does*, 326 F. Supp.2d 556 (S.D.N.Y. 2004) and *Best Western Intl., Inc. v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006).[2]

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[2] Federal courts recognizing the right to online anonymity include *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998); *ACLU v. Miller,* 977 F. Supp. 1228, 1230 (N.D. Ga. 1997); *ApolloMEDIA Corp. v. Reno*, 526 U.S. 1061 (1999)*, aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications); *Global Telemedia v. Does*, 132 F. Supp.2d 1261 (C.D. Cal. 2001) (striking complaint based on anonymous postings on Yahoo! message board

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, the impact of a rule that makes it too easy to remove the cloak of anonymity is to deprive the marketplace of ideas of valuable contributions, and potentially to bring unnecessary harm to the speakers themselves.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. The technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind an electronic footprint that, if saved by the recipient, provides the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). 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. The big-brother implications of a rule that allows identification of anonymous Internet speakers on demand has led many informed observers to argue that the law should provide special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences, and*

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based on California's anti-SLAPP statute); and *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1092-1093 (W.D.Wash. 2001) (denying subpoena to identify third parties).

Anonymous Speech, 82 Notre Dame L. Rev. 1537 (2007); Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139 (1996); Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

A court order constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten 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. First Amendment rights may also be curtailed by retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524. As the Supreme Court has held, 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 anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. at 347.

B. Many Courts Have Recognized the Need for Special Rules to Protect Against Subpoenas in Civil Litigation to Identify Anonymous Internet Speakers.

Because of such concerns, courts considering subpoenas to identify anonymous Internet

speakers in civil cases have evolved a specialized test that requires both procedural due process and a showing on the merits before subpoenas may be obtained or enforced to identify anonymous Internet speakers, either as prospective witnesses or as defendants subject to being sued for their anonymous speech. For example, one of the established purposes of discovery in a civil case is to identify individuals who may have knowledge of relevant facts, so that they can be deposed or asked to produce relevant documents. *See*, *e.g.*, Rules 26(a)(1)(A)(i) and 26(b)(1) of the Federal Rules of Civil Procedure; *see also* CPLR§ 3101(a) (broad scope for discovery). But when a civil litigant seeks to identify an anonymous Internet speaker as a potential witness in a case, the courts have adapted the familiar three-part test for the disclosure of reporters' sources,[3] by requiring the person seeking to identify the anonymous speaker to show that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of his case; (2) disclosure of the source to prove the issue is "necessary" 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 his case. *Doe v. 2theMart.com*, 140 F. Supp.2d at 1093.

Similarly, when a civil litigant seeks to bring a lawsuit against a person whose identity he does not know, such as when a worker is injured at work by a machine whose maker he does not know, or when a citizen has suffered an assault at the hands of unknown police officers, discovery is needed at the outset of the case simply to identify the defendants so that they can be served with summons and the case begun. But when the potential defendant is an anonymous Internet speaker whose "wrong" was committed by posting anonymous words, the courts do not routinely allow discovery because of the First Amendment implications. Instead, they recognize the possible chilling

[3] *O'Neill v. Oakgrove Construction*, 71 N.Y.2d 521, 527 (1988).

effect of such discovery, *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999):

> 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 . . . gain the power of the court's order to discover their identities.

Courts "recognize that anonymity is a particularly important component of Internet speech [in that] Internet anonymity facilitates the rich, diverse and far ranging exchange of ideas." *Best Western Int'l v. John Doe*, 2006 WL 2091695 , at *3 (D. Ariz. July 25, 2006). Consequently, courts across the country have adopted tests that require the party seeking discovery to provide the speaker with due process in the form of an opportunity to protect his anonymity, as well as a substantive showing that the plaintiff has a realistic chance of prevailing against the anonymous speaker on the merits.[4] As shown by the cases cited in footnote 4, the common elements of this test are:

(1) The court must ensure that notice has been given to the speaker, advising of the attempt to compel their identification, either by email or hard copy notice by the web site host to the speaker's last known address, or by posting a notice on the relevant message board. After such notice is given, the court must delay enforcement of the subpoena until

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[4] *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *Greenbaum v. Google, Inc.*, 18 Misc.3d 185 (Sup. Ct. N.Y. Co. 2007); *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 6th Dist. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006*)*; *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)*; Melvin v. Doe*, 49 Pa D&C 4th 449 (2000), *rev'd on other grounds*, 836 A.2d 42 (Pa. 2003).

the speaker has had a fair opportunity to receive the notice, retain counsel, and file a motion to quash the subpoena.

(2) The party seeking discovery must specify the statements that form the basis for the claim against the speaker, so that the purported bases for filing suit over those words can be assessed in light to the words themselves.

(3) The discovering party must articulate the legal basis for the claim based on those words, and the court must be persuaded that the claim is legally viable.

(4) The discovering party must present a factual showing that is at least sufficient to create a prima facie case, or to withstand a motion for summary judgment.

(5) In some states, including New Jersey and Arizona, as well as some federal courts, the court then applies a balancing test, akin to the standard for obtaining a preliminary injunction, under which the interests favoring disclosure of the defendant's identity must outweigh the defendant's interest in maintaining his First Amendment right to speak anonymously.

C. The First Amendment and Article I, Section 8 Similarly Require Special Protections for Anonymous Internet Speakers Whose Identity Is Sought by a Grand Jury Subpoena.

Just as the courts have evolved a special test for protecting anonymous Internet speakers against civil subpoenas, the impact on the constitutional right to speak anonymously requires the creation of a special test to protect anonymous speakers against grand jury subpoenas. As the Delaware Supreme Court said in *Doe v. Cahill,* courts should be

> concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity . . . could intimidate anonymous posters into self-censoring their

> comments or simply not commenting at all. . . . The revelation of identity of an anonymous speaker may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes.

On the other hand, the standard established in the civil context that requires the plaintiff to survive a summary judgment standard, regardless of the nature of the speech at issue and the seriousness of the claim of wrongdoing, is insufficiently deferential to the important role played by the grand jury in our system of criminal justice, and to the "presumptive validity" of a grand jury subpoena. *In re Bergamo Medical,* 17 Misc.3d 182, 189 (Sup. Ct. Kings Co. 2007), citing *Matter of Comprehensive Habilitation Service v. Attorney General*, 278 A.D.2d 557, 558 (3d Dept. 2000).

However, grand juries, like other arms of the state, operate subject to First Amendment limits. *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972). When a First Amendment challenge is presented to a grand jury subpoena, courts should proceed on a case-by-case basis, balancing the possible constitutional infringement and the government's need for the documents, with due regard to the sort of speech at issue, so that, for example, greater protection is provided when it is core political speech that is at issue, and the subpoena is directed toward political dissidents. *See In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 232, 234 (4th Cir. 1992).

Guidance in developing the test for grand jury subpoenas to identify anonymous Internet speakers is available from the decisions, in New York and elsewhere, holding that when a grand jury subpoena trenches on well-established First Amendment rights, "the prosecution has the burden of establishing that the infringement is outweighed by a compelling State interest, to which the information sought is substantially related, and that the State's ends may not be achieved by less

restrictive means." *Full Gospel Tabernacle v. Attorney General*, 142 A.D.2d 489, 493 (3d Dept. 1988), citing *Matter of Grand Jury Subpoenas for Carpenters Locals 17, 135, 257 and 608*, 72 N.Y.2d 307, 312-313 (N.Y. 1988). *See also Congregation B'Nai Jonah v. Kuriansky*, 172 A.D.2d 35, 38-39 (3d Dept. 1991); *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1312-1313 (8th Cir 1996); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236-1237 (11th Cir. 1988).

Moreover, the courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). For example, knowledge that a prosecutor was permitted to subpoena a large number of otherwise anonymous online book purchasers could easily deter the public from buying books online in the future. *See In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D. Wis. 2007). Similarly, the protection against discovery of journalists' sources, codified in the New York Shield Law, Civil Rights Law Section 79-h, is based on a recognition of the chilling effect that discovery of journalists' sources would have on the future willingness of sources to cooperate with journalists. *People v. Korkala,* 99 A.D.2d 161, 167 (1st Dept. 1984). A similar impact would follow if this Court were to allow anonymous political critics of Bronx public officials to be subpoenaed by the Bronx District Attorney without a forceful showing of need. The prospect of being haled before a grand jury for voicing criticisms of government officials may be especially chilling. "Political dissidents who criticize the Government may well have more fear about disclosure to the Government than to anyone else . . .." *Bursey v. United States*, 466 F.2d 1059, 1086 (9th Cir. 1972).

Given the well-established First Amendment right to speak anonymously, and the chilling

effect of being summoned before a grand jury to answer for anonymous criticisms of government or party officials, the grand jury subpoenas at issue here threaten important First Amendment freedoms, and hence implicate the *Full Gospel Tabernacle* test. When a grand jury seeks to subpoena political dissidents whose speech is directed to the political leadership of the very government of which the prosecutors are a part,

> the Government's burden is not met unless it establishes that the Government's interest in the subject matter of the investigation is "immediate, substantial, and subordinating," that there is a "substantial connection" between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interest. The investigation must proceed "step by step . . . [and] an adequate foundation for inquiry must be laid before proceeding in such manner as" may inhibit First Amendment freedoms.
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> *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972).

That burden has not been met here. First, the District Attorney has deliberately interfered with movants' efforts to give notice to the anonymous speakers whose right to anonymity the District Attorney seeks to deny. For several months, the District Attorney threatened prosecution if Room Eight told anybody about the subpoena, and made clear in conversations with undersigned counsel that even communications calculated to give notice to the anonymous speakers would make Room Eight and its principals subject to prosecution. At the last minute, the District Attorney relented and allowed email notification to the address given by one of the two dozen anonymous speakers whose information has been subpoenaed – Republican Dissident – but even then one of the emails bounced back, and there is no assurance that a second email was received at all, much less received in time for that speaker to obtain counsel and move to quash by the filing deadline. Even more important, the great bulk of the anonymous speakers have never been notified, and thus may have their right

to anonymity taken away without ever having had the opportunity to persuade this Court that their rights should be protected in the particular facts of this case.

"A court should not consider impacting a speaker's First Amendment rights without affording the speaker an opportunity to respond to the discovery request." *Mobilisa v. Doe,* 170 P.3d 712, 719 (Ariz. App. Div. 1 2007). Indeed, although courts have adopted different standards for adjudicating subpoenas to identify anonymous speakers in the civil context, **every** court that has considered the question has insisted that notice and sufficient time to move to quash be provided. *E.g., Greenbaum v. Google, Inc.*, 18 Misc.3d 185, 187 & n.1 (Sup. Ct. N.Y. Co. 2007); *Doe v. Cahill,* 884 A.2d 451, 460-461 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756, 760 (N.J. App. 2001). Notice and an opportunity to respond are, after all, the first requirement under the Due Process Clause before important rights are taken away. *Jones v. Flowers*, 547 U.S. 220 (2006).

To be sure, in this case, Room Eight has stepped forward to defend its users' right to remain anonymous, but arguments from a web site host or Internet Service Provider are a poor substitute for enabling the speaker to defend his or her own right to remain anonymous. In particular, after the District Attorney makes a showing about the crimes he is investigating, and how the identities of each of the citizens who are anonymously criticizing Dawn Sandow are needed to pursue that investigation, only the speakers themselves will be well-situated to respond to the specifics of that showing based on their knowledge of the circumstances.

Moreover, more generally, courts cannot count on web site hosts and Internet Service Providers to litigate the First Amendment anonymity rights of their users. Although ISP's have

sought to protect their users' privacy in some cases,[5] those cases are very much the exception and not the rule. In the experience of undersigned counsel, who has been involved in many of the major Internet anonymity subpoena cases over the past decade, most ISP's and web site hosts simply give notice to their users, tell them that the subpoenaed data will be supplied unless the user files a motion to quash within fifteen or twenty days of the notice, and then maintain a neutral stance in the ensuing litigation if a motion to quash is filed. Levy Affidavit ¶ 14. Indeed, given the number of subpoenas issued to identify anonymous users every year, no ISP or web site host can afford to investigate each claimed abuse by an anonymous speaker to decide whether a tenable objection to discovery can be put forward, not to speak of paying an attorney to litigate the matter. In this case, Room Eight has the benefit of pro bono representation and hence can afford to defend its users' rights. In the private market for legal services, the cost of this motion to quash would far outstrip the small pittance earned by Room Eight from advertising on its web site. Tsabar Affidavit ¶ 14. In constructing an appropriate rule for handling grand jury subpoena cases such as this, reliance on the self-interest of anonymous speakers in defending their own anonymity by hiring their own lawyers, once they have received notice, is the only way to ensure that First Amendment rights are duly protected.

The District Attorney may object that giving notice of the subpoena runs the risk that the recipients of the notice may take action to cover up evidence of their wrongdoing. Yet that risk, equally present in the civil context, has not deterred courts across the country from insisting that notice be given so that the anonymous speakers have an opportunity to defend their rights.

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[5] *E.g., In re Subpoena Duces Tecum to AOL*, 52 Va. Cir. 26, 2000 WL 1210372 (Va. Cir. Fairfax Co. 2000), *rev'd on other grounds, AOL v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001); *In re Verizon Internet Services*, 257 F. Supp.2d 244 (D.D.C.2003), *rev'd on another ground, RIAA v. Verizon Internet Services*, 351 F.3d 1229, 1239 (D.C. Cir.2003).

Moreover, on the facts of this case, the District Attorney's willingness to have email notice of the subpoena given to the one anonymous speaker for whom Room Eight has an address would undercut any claim that notice must be forbidden to protect the prosecution, as opposed to protecting the District Attorney's office against potential embarrassment once the public learns that it is seeking to compel the identification of anonymous political critics. In that regard, the fact that this case involves core political speech, which is at the heart of the First Amendment's protections, and that the speech is critical of public and party officials in the very jurisdiction that the District Attorney serves, increases the importance of notice as a protection against improper use of prosecutorial authority. Moreover, unlike some other jurisdictions, New York law expressly protects the right of grand jury **witnesses** to disclose their own grand jury testimony. Penal Law § 215.70. Perhaps, in a specific case, a prosecutor may be able to prove that public notice would create a sufficient danger to a particular investigation or prosecution to outweigh the Due Process and First Amendment rights of a speaker to receive notice that his anonymity is threatened, but the District Attorney should not be permitted to rely on generalized dangers of disclosure. Here, the District Attorney has yet to provide any such particularized showing.

Moreover, the District Attorney's adamant refusal to provide any detailed information about the crimes being investigated, and how the particular messages at issue relate to those crimes, precludes the Court from finding that his subpoenas for the identity of each of the anonymous posters are supported by a "compelling need, to which the information sought is substantially related, and that the State's ends may not be achieved by less restrictive means." *Full Gospel Tabernacle v. Attorney General*, 142 A.D.2d 489, 493 (3d Dept. 1988). As in *Full Tabernacle*, the District Attorney must show, by an affidavit filed in open court so that movants have an opportunity for

rebuttal, what acts he is investigating, including a factual showing of the reasons to believe that a crime has been committed, how each of the particular documents that he is trying to obtain bears a substantial relationship to that investigation, and that there are no means less invasive of free speech rights to obtain relevant evidence of the violations of law under investigation. 142 A.D.2d at 495-496. That showing must be made separately with respect to **each** of the speakers that the subpoena seeks to identify. *See Bursey v. United States*, 466 F.2d at 1086-1088 (considering whether to compel answers to grand jury on question-by-question basis).

Moreover, in considering the adequacy of the District Attorney's showing, the court should adopt the balancing approach adopted in such cases as *Dendrite v. Doe*, 775 A.2d 756, 760-761 (N.J. App. 2001), *Mobilisa v. Doe,*170 P.3d 712, 720 (Ariz. App. Div. 1 2007), and *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005), taking into account the nature of the speech at issue and the danger that forced identification posed to cherished rights of free speech under the First Amendment and Article I, Section 8 of the New York Constitution. Just as in the civil context, where the relatively insubstantial First Amendment protection for some kinds of speech encourages courts to accept a modest showing in support of discovery of anonymous Internet users, *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556, 564 (S.D.N.Y. 2004) (First Amendment provides some protection for performance of musical recordings held under copyright by others, but not much protection), courts considering challenges to grand jury subpoenas require a lesser showing of compelling interest when only commercial speech is at issue. *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 232 (4th Cir. 1992) (distinguishing political speech at issue in *Bursey* from corporate records about the shipment of obscene materials). Here, the speech at issue is core political speech, and the prosecuting authority that is investigating the speech for

possible violations of the law is the prosecutor for the same level of government as the officials who have been criticized, and as the Smith affidavit shows, the level of cooperation between the political parties in the Bronx is sufficient that citizens might well be suspicious that a District Attorney who receives routine endorsements from Bronx Republican leaders could be only too willing to aid an investigation into Republican dissidents who object to that cozy relationship.

Of all the cases discussing First Amendment challenges to grand jury subpoenas, the one that seems most similar to this case is *Bursey v. United States.* That case involved an investigation spurred by publication in *The Black Panther* newspaper of a speech by David Hilliard, Chief of Staff of the Black Panther Party, that included the words "We will kill Richard Nixon." 466 F.2d at 1065. Of course, an actual conspiracy or attempt to assassinate the President of the United States would be a serious crime, warranting full investigation and prosecution, although a purely rhetorical call for such an act, as a way of expressing disapproval of the President's policies, would be wholly protected speech. *Rankin v. McPherson*, 483 U.S. 378, 386-387 (1987). The Ninth Circuit held that, despite the seriousness of Hilliard's words, they did not justify a wide-ranging investigation of the membership of the Black Panther Party and of the operation of its newspaper. The Government's effort to compel two newspaper staff members to answer such questions was rejected. 466 F.2d at 1087-1088.

In this case, the adamant refusal of the District Attorney's staff to provide any cogent or specific information about the crimes being investigated and how they relate to the specific anonymous Internet speakers at issue in this case, given the superficial impression created by the posts, which represent nothing other than criticism of public officials, only reinforces the need to demand a compelling justification for the subpoena. Some of the criticisms, including the original

blog posts by Republican Dissident, are extremely detailed, based on an analysis of the public record, while others are simply mean and tasteless, such as the text calling Dawn Sandow a "bitch" and graphics portraying Dawn Sandow as a witch on a broomstick. These posts are plainly political speech, and they do not violate the criminal law. Absent a detailed justification for the District Attorney's subpoenas, the motion to quash should be granted.

CONCLUSION

The motion to quash should be granted.

Respectfully submitted,

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