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December 11, 2007

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

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

Dear Judge Flynn:

This firm represents the plaintiff, Township of Manalapan, in the above referenced matter. Please accept this letter brief in lieu of a more formal brief in opposition to defendant's notice of motion for sanctions. The motion is returnable December 21, 2007.

I. Defendant Makes Numerous False Statements and Other Misrepresentations to the Court Regarding Statements Made By Plaintiff's Counsel and Special Counsel

The defendant's bizarre and meritless motion seeking sanctions is itself frivolous. To support his non-existent claim that plaintiff's counsel and special counsel (collectively "Township Counsel") warrant sanctions, defendant desperately attempts to twist Township Counsel's standard pre-trial discovery efforts into

violations of the New Jersey Court Rules and Rules of Professional Conduct. His hasty impetuous motion now before this Court is rife with gross exaggerations of the facts and misinterpretations of the law.

For example, Mr. Moskovitz argues that Township Counsel has violated RPC 3.4(d)(providing that a lawyer shall not make frivolous discovery attempts in pretrial procedure) in our attempts to determine whether he has lied to this court concerning his denials that he is the blogger on the blog website, "daTruthSquad". Additionally, Mr. Moskovitz argues that Township Counsel, in serving the subpoena, violated RPC 4.4(a) which states that, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Defendant conveniently ignores that our aim in serving the subpoena is for the "**substantial purpose**" of determining whether he made knowing misrepresentations to this Court regarding his denials that he is the blogger publishing on daTruthSquad. As we have stated in other motion papers, the answer to this determination is crucial to ascertaining whether Mr. Moskovitz has lied in open court regarding to what extent and capacity, if any, he is involved with daTruthSquad. In light of the importance of this determination, Mr. Moskovitz's argument that our subpoena was served in bad faith and in an

attempt to violate "a private citizen's constitutional rights" is an egregious mischaracterization of a standard discovery vehicle.

Further examples of Defendant's audaciously irrational positions abound in his certification (which we have summarized below and out of consideration of the Court's time and resources will not be addressed in further detail):

- In another attempt to confuse the issues in this litigation and direct the Court's attention away from pertinent legal argument, the defendant makes numerous outlandish and inaccurate emotional appeals completely irrelevant to this action. (e.g. "While our soldiers are dying overseas in the name of freedom, we have a local government spending hundreds of thousands of dollars of taxpayers' money in a frivolous litigation so that they can uncover a government critic." (See para. 19, p. 6.)
- Defendant claims that "the only reasonable sanction" is that Plaintiff be **prohibited in this matter from "serving <u>any</u> discovery prior to an Order from this Court approving such service**, upon a showing by Plaintiff that the discovery is appropriate for this matter". (See para. 37, p. 10.) (emphasis added.) Apparently, Defendant would prefer to have this Court and all parties perpetually mired in more unnecessary motion practice.
- And finally, Mr. Moskovitz demands **a total of $7,000[1] in attorneys fees** from this Court without substantiation. (See para. 69, p. 17.) The defendant expects a windfall of attorneys fees in return for defending standard discovery motions.

Defendant's reckless assertions and mischaracterizations of the law should not be countenanced and his motion for sanctions must be denied.

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[1]Defendant requests attorneys fees of $2,000.00 awarded against David Weeks and Ruprecht Hart & Weeks and attorneys fees of $5,000.00 awarded against Daniel McCarthy and Rogut McCarthy & Troy.

II. Defendant Has Failed to Comply with R. 1:4-8(b) Requirements and His Motion Must Be Denied

Not only does defendant's motion fail on substantive grounds, it fails on procedural grounds as well. As defendant admits in his own certification, he has failed to comply with the notice requirements for sanctions. Rule 1:4-8(b) states in pertinent part:

> . . . An application for sanctions under this rule shall be by motion made separately from other applications and shall describe the specific conduct alleged to have violated this rule. **No such motion shall be filed unless it includes a certification that the applicant served written notice and demand pursuant to R. 1:5-2 to the attorney or pro se party who signed or filed the paper objected to. The certification shall have annexed a copy of that notice and demand, which shall** (i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) **give notice**, except as otherwise provided herein, **that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand.** If, however, the subject of the application for sanctions is a motion whose return date precedes the expiration of the 28-day period, the demand shall give the movant the option of either consenting to an adjournment of the return date or waiving the balance of the 28-day period then remaining. A movant who does not request an adjournment of the return date as provided herein shall be deemed to have elected the waiver. The certification shall also certify that the paper objected to has not been withdrawn or corrected within the appropriate time period provided herein following service of the written notice and demand. . . . No motion shall be filed if the paper objected to has been withdrawn or corrected within 28 days of service of the notice

and demand or within such other time period as provided herein.

Although the defendant would have the Court believe that "there is no such need" for him to provide this notice for his sanctions motion (See Defendant's Certification, para. 52, p. 13), New Jersey courts have soundly disagreed with his position. In Trocki Plastic Surg. v. Bartkowski, 344 N.J. Super. 399, 406-07 (App. Div. 2001), certif. den. 171 N.J. 338 (2002), the court held that the plaintiff's failure to provide notice required under R. 1:4-8(b)(1) was fatal to his claim for attorneys fees. In Trocki, Plaintiff hospital sought judgment against the defendants for payment of medical bills incurred in treating the minor patient, defendants' child. The trial court entered judgment against the defendant parents and granted the hospital's post-judgment motion for counsel fees under the frivolous litigation statute. The parents appealed. The appellate court, affirmed on the underlying action but reversed and vacated as to the trial court's award of attorneys fees. In reversing the trial court, the Appellate Division held that plaintiff's application for attorneys fees "should also have been denied because plaintiff failed to afford defendants the 'window of opportunity' to withdraw the 'frivolous action' provided for in R. 1:4-8(b)(1)." Id. at 406-07. Similarly, in State v. Franklin Sav. Account, 389 N.J. Super. 272, 281 (App. Div. 2006), the court denied the defendant bank's motion for

sanctions, holding that "**strict compliance**" with the rule's notice requirement is a "prerequisite to recovery."

Accordingly, due to defendant Moskovitz's failure to strictly comply with R. 1:4-8(b)(1)'s notice requirements, his motion for sanctions must be denied.

III. Court-Initiated Sanctions Against Defendant Are Proper Regarding this Patently Frivolous Motion

This motion is yet another effort by the defendant in a long pattern of abusing procedural vehicles and it flies in the face of prior orders. Since the initial filing of the Complaint in June 2007, the defendant has persisted in subverting the judicial process by filing patently unnecessary motions. It is clear that the defendant's aim in persisting with these dilatory tactics is to further obfuscate the substantive issues in this matter, specifically those surrounding his legal malpractice regarding his former representation of the Township. As one of the most glaring examples of defendant's dilatory tactics, almost a full **six (6) months** had passed since we filed the Complaint before we received the defendant's Answer.

Among other requirements of R. 1:4-8, subsection (a)(1) states that, "[b]y signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . .

the paper is not presented for any **improper purpose**, such as to harass or to cause **unnecessary delay** or **needless increase in the cost of litigation**". (Emphasis added.)

Ironically, although the defendant has continually asserted that Township Counsel's action has needlessly cost taxpayers' money, it is the baseless frivolous motions like the one that the defendant now makes before this Court that truly cost the Township's taxpayers. As we must continually oppose these meritless filings, Defendant's unnecessary motions only serve to increase the cost of litigation, as contemplated by R. 1:4-8.

In this instance, Court-initiated sanctions are entirely appropriate, and we argue, necessary, in order to ensure this litigation does not careen off-course from focusing on the real substantive issues in the case.

Accordingly, we seek the following sanctions against the defendant, Stuart Moskovitz, awarding attorneys fees as follows:

- $200 per hour of preparation of opposition to the defendant's motion; plus
- $1000 for cost of David Weeks' appearance at oral argument.

In the event, this Court does not assess costs, Township Counsel moves for attorneys fees and costs. Although defendant may argue we have not complied with the R. 1:4-8(b) notice requirements we cited above, **our compliance should be excused in this case under R. 1:4-8(f) due to impracticality**. In Toll Bros., Inc. V. Tp. Of

West Windsor, 190 NJ. 61, 69 (2007), the Court held, in accordance with R. 1:4-8(f), that "a litigant moving for counsel fees and costs pursuant to N.J.S.A. 2A:15-59.1 ["the Frivolous Lawsuit Statute"] is required to comply with Rule 1:4-8(b)(1)'s safe harbor provision, but **only "[t]o the extent practicable."** Here, it would be impractical for us to comply with the R. 1:4-8(b) notice requirements in light of the fast approaching return date of December 21, 2007.

Conclusion

We respectfully request that the Court grant reasonable attorneys fees, in accordance with our attached Order, against defendant for filing this frivolous motion and wasting the court's time and resources.

Respectfully submitted,

RUPRECHT, HART & WEEKS, LLP

LEN M. GARZA

LMG:lb
Enclosure
cc: Stuart J. Moskovitz, Esq.
Daniel J. McCarthy, Esq.
Frank L. Corrado, Esq.
Matt Zimmerman, Esq.