Frank L. Corrado, Esquire
BARRY, CORRADO, GRASSI & GIBSON, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609)729-1333 Fax:(609)522-4927

Matthew J. Zimmerman, Esquire (pro hac application pending)
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
415-436-9333 x127
415-436-9993 Fax

Attorneys for Movant Datruthsquad.com a/k/a John Doe

TOWNSHIP OF MANALAPAN, Plaintiff, vs. STUART MOSKOVITZ, ESQ., JANE DOE and/or JOHN DOE, ESQ. I-V (these names being fictitious as their true identities are presently unknown) and XYZ Corporation, I-V (these names being fictitious as their true corporate identities are currently unknown) Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-L-2893-07 **CIVIL ACTION** (LEGAL MALPRACTICE) **REPLY BRIEF OF ANONYMOUS SPEAKER "DATRUTHSQUAD" IN SUPPORT OF MOTION TO QUASH AND FOR A PROTECTIVE ORDER**

I. INTRODUCTION

If any doubt remained that Manalapan's efforts to expose the identity of an online critic are legally barred and based on improper motives, the township's own Opposition to Doe's Motion to Quash and for a Protective Order ("Opposition") has erased

that doubt. Not only does the township misapply the appropriate First Amendment standard, it fails even to address the overbreadth of its proposed subpoena and then offers - without a single reference to an authoritative source - the ludicrous argument that its attempts to issue a prohibited civil subpoena are actually part of a self-initiated criminal investigation and thus qualify for a law enforcement exception to the federal statute that bans such attempts. Its arguments are all without merit. While most of the township's arguments have been adequately addressed in his initial submission and need not be repeated here, Doe wishes to make three important points in reply.

II. ARGUMENT

A. The Subpoena of September 26, 2007, Must Be Quashed Because Its Procedural Failings Cannot Be Repaired.

First, the township's outstanding subpoena must be quashed because its procedural defects cannot be repaired. The subsequent filing of a motion for letter rogatory - that the township now concedes is a necessary predicate for such discovery to eventually issue - does not "remed[y] any procedural deficiencies regarding the September 26th subpoena" that was improperly issued from New Jersey and served directly on Google, Inc., in California. Opposition at 2. Filing such a motion, even if that motion were subsequently granted, does not authorize the issuance of a discovery subpoena, nor would

granting such a motion retroactively imbue the procedurally flawed subpoena with legal enforceability.

As discussed in the November 28 brief in support of the Motion to Quash (see pp. 3-4), even if the Court were to grant the letter rogatory motion, that would only permit the township to confront the next procedural hurdle it must clear before a subpoena could issue: obtaining approval of the appropriate California court for issuance of the subpoena. See, e.g., Balazinski v. Lebid, 65 N.J.Super. 483, 495-96 (App. Div. 1961) (enforcing use of letter rogatory for extra-territorial discovery when "properly addressed to the appropriate judicial authority."). See also, e.g., Fuller v. Doe, 151 Cal.App.4th 879, 884 (Cal. App. 2007) ("[P]laintiff commenced this proceeding under [California] Code of Civil Procedure section 2029.010 by filing a declaration of counsel placing the Minnesota commission before the superior court and stating an intention to issue a subpoena duces tecum directing Yahoo to produce … information identifying, or aiding in discovering the identity of" an anonymous Internet user.). Indeed, the township's counsel has already recognized that he must obtain such approval before a subpoena can issue. See Letter of November 8, 2007, from David Weeks to Matt Zimmerman, introduced as Exhibit K to the Certification of Matthew J. Zimmerman, filed November 28, 2007 ("In the event that it is necessary to comply with procedural technicalities, we will obtain a writ, commission, or letters rogatory directed to the California

Superior Court for the County of Santa Clara to issue a subpoena in accordance with California Civil Proc. Code § 2029.") (emphasis added).

Whatever the Court's ultimate ruling on the township's motion for issuance of letter rogatory, the subpoena of September 26, 2007 - the subject of the immediate motion - must be quashed.

B. In Its Opposition, The Township Has Fabricated the Factual Basis Underlying Its Need To Obtain The Subpoenaed Material, A "Basis" That Is Contradicted By All of the Evidence In The Record.

In its prior briefing, Doe has exhaustively explained why the township's subpoena fails on relevancy and First Amendment grounds and will not repeat those arguments here. However, the township's misrepresentation of the only evidence in the record bears critical attention. In its Opposition, the township makes the following remarkable assertion, which constitutes its only attempt to provide "factual" support for its belief that Mr. Moskovitz is "datruthsquad":

> [O]n daTruthSquad blog, the Poster refers to himself as "da Mosked Man" which obviously bears a striking similarity to the surname of the defendant in this litigation.

Opposition at pp. 5-6 (emphasis added).

This assertion is absolutely false. The township does not point to any statement on any of the voluminous screenshots of the datruthsquad blog before the Court - screenshots that the township itself introduced into evidence - to back up this

spurious claim. See, e.g., Screenshots from the "datruthsquad" blog, Exhibit D to the Certification of Matthew J. Zimmerman, filed November 28, 2007. The reason is simple: no such statement exists. Doe regularly discusses Mr. Moskovitz ("da Mosked Man") and other notable figures in Manalapan politics on his blog, but nowhere does he refer to himself by anything other than his pseudonym: datruthsquad.

As Doe has reiterated from the beginning of his involvement in this case - the filing of his Motion to Quash on November 28, 2007 - the township has not pointed, and cannot point, to any evidence that would support its preposterous claim that he is Mr. Moskovitz. Rather, the more likely motivation behind the township's insistence at exposing the identity of "datruthsquad" remains Doe's repeated criticism of the Manalapan government. Doe demands that the township immediately withdraw its baseless accusation.

With no evidence to support its allegations, the township is left with the following "rationale" for attempting to pry into the identity and private life of the anonymous Internet critic:

> We argue … that any reasonable observer could look at the daTruthSquad blog and draw the plausible conclusion that Mr. Moskovitz could indeed be the Poster.

Opposition at p. 5 (emphasis added). This is not a rationale; it is naked speculation. Both the First Amendment and the New

Jersey discovery rules demand more than this transparent attempt to conduct a "fishing expedition."

C. Plaintiff - Seeking A Motion For The Issuance Of A Civil Subpoena - Is Obviously Not Engaged In A "Criminal Investigation."

Finally, the township raises a single argument as to why any discovery subpoena seeking the requested information from Google is not barred by the Stored Communication Act: that the township is actually independently conducting a criminal investigation in the guise of its civil discovery request. See Opposition at 6-7. Specifically, the township asserts that its discovery request falls under the 18 U.S.C. § 2703(d) exception to the general prohibition on the disclosure of the content of communications and customer records:

> A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.

This argument is nonsensical and fails on even a cursory examination. And to underscore the importance of this discussion: if it does not in fact qualify for this lone cited exception, the township is absolutely barred from using civil subpoenas to obtain the information that it seeks. See 18 U.S.C. §§ 2701-2703; Motion to Quash brief at pp. 17-24.

Not a single case exists in which a party took such an absurd and disingenuous position that was so clearly barred by the plain language of the Stored Communications Act.[1] To begin with, this Court simply does not have the jurisdiction to issue rulings on any criminal matter, and under the plain language of the SCA, a civil court is explicitly barred from issuing a 2703(d) order. See 18 U.S.C. § 2703(d) (requiring that a court issuing such a criminal investigation order must be of "competent jurisdiction"); 18 U.S.C. § 3127(2)(B) (incorporated into the SCA at 18 U.S.C. § 2711(3)) (defining a "court of competent jurisdiction" as "a court of general criminal jurisdiction of a State authorized by the law of that State to enter orders authorizing the use of a pen register or a trap and trace device.").

Second, and to further highlight the obvious, there is no "ongoing criminal investigation" into any matters related to the underlying lawsuit which is required if the 2703(d) exception is to apply. No grand jury has been empanelled, no criminal complaint has been filed, and law enforcement is not pursuing the matter. See, e.g., In re The Grand Jury Appearance Request by Loigman, 183 N.J. 133, 141 (2005) ("The grand jury is a

[1] For examples of proper applications for 18 U.S.C. § 2703(d) orders - all of them brought by law enforcement in the context of ongoing criminal investigations - see, e.g., U.S. v. Jackson, 2007 WL 3230140 (D.D.C. October 30, 2007); U.S. v. Arthur, 2007 WL 2002500 (E.D.Mo. July 5, 2007); In re Application of U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d), 157 F.Supp.2d 286 (S.D.N.Y. 2001).

judicial, investigative body" with "broad investigative authority ... to determine … whether criminal investigations should be instituted against any person."); United States Attorney Manual § 9-11.151 (identifying "targets" and "subjects" of criminal investigations as those, respectively "to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant" and "a person whose conduct is within the scope of the grand jury's investigation."). If the township wishes, it can refer this or any matter to the county prosecutor who can then independently determine whether anything related to this case is worthy of referring to the grand jury for an official criminal investigation. Any idle speculation by the township in its role as a civil litigant in the underlying case, however, remains just that and does not transmute the township into a limited-purpose criminal investigator.[2]

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[2] Even if the township could unilaterally remake its civil discovery request into a component of a criminal investigation, the township-qua-prosecutor would be ethically barred from leading the criminal investigation into a civil matter in which it is already intimately involved. "To permit a prosecuting attorney to have an interest of any nature whatsoever in any civil proceedings, directly or indirectly, and which proceeding involve similar facts or the same subject matter as a criminal prosecution then pending or thereafter initiated, can only give rise to suspicion concerning and relating to the motives of the prosecuting attorney involved, and bring such office into disrepute with the public." State v. Detroit Motors, 62 NJ Super 386, 393 (N.J. Super. 1960). See also Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984) (noting that a prosecutor "is not disinterested if he has, or is under the

Third, the township has not offered any "specific and articulable facts" showing that there are "reasonable grounds" to believe the requested material is relevant to an ongoing criminal investigation, also a requirement of 18 U.S.C. 2703(d). As previously discussed in detail, the requested material is not relevant to the township's case, let alone an ongoing criminal investigation. But moreover, the township's vague allusion to unspecified blog posts by datruthsquad, and its conclusory speculation about what "reasonable people" might conclude, are not "specific and articulable facts."[3] See, e.g., U.S. v. Kennedy, 81 F.Supp.2d 1103, 1109-10 (D.Kan. 2000) (denying a 2703(d) order application, holding that "the government should have articulated more specific facts such as how the government obtained the information it did have at the time and how this information lead the agents to believe that the attainment of the subscriber information of this particular IP address would assist in the investigation.").

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influence of others who have, an axe to grind against the defendant.").

[3] The SCA originally permitted access on a bare showing that there was "reason to believe . . . the records or other information sought, are relevant to a legitimate law enforcement inquiry." Pub. L. No. 99-508, Title II, § 201, 100 Stat. 1861 (Oct. 21, 1986). Congress tightened the standard by enacting the Communications Assistance for Law Enforcement Act of 1994 ("CALEA"), Pub. L. No. 103-414, Title II, § 207(a), 108 Stat. 4292 (Oct. 25, 1994), citing privacy concerns about the increasing amount of online transactional data compiled by service providers. H.R. Rep. No. 103-827(I), at 17, reprinted at 1994 U.S.C.C.A.N. 3489, 3497. The heightened standard was specifically designed "to guard against 'fishing expeditions' by law enforcement." Id. at 31.

Fourth, attempts to depose witnesses or otherwise obtain materials from out of state as part of a criminal investigation must, by definition, satisfy the state's criminal procedure rules and cannot be made as part of civil request. See New Jersey Rule of Court 3:13; N.J.S.A 2A:81-18 through 2A:81-23 (the New Jersey "Uniform Act to Secure the Attendance of Witnesses From Within or Without a State in Criminal Proceedings"). The township's civil discovery request obviously does not qualify.

The township's argument that it somehow qualifies for an 18 U.S.C. § 2703(d) exception is nothing short of sanctionable, and Doe demands that the township withdraw it immediately. Having raised no other arguments as to why the SCA's ban does not apply, the township's subpoena must be quashed and a protective order should be granted on the SCA ground alone.

III. CONCLUSION

The township has failed to rebut any of the procedural or substantive arguments put forth by anonymous speaker "datruthsquad" to quash the September subpoena seeking his identity and for the granting of a protective order. It has raised only a clearly frivolous argument in a half-baked attempt to explain why the federal Stored Communications Act does not bar its discovery attempt. The township also failed to introduce any evidence to support its groundless assertion that a "reasonable observer could look at the daTruthSquad blog and draw the plausible conclusion that Mr. Moskovitz could indeed

be" the blogger datruthsquad (emphasis added), let alone demonstrate the relevancy of that information or how even any nominal relevancy could possibly outweigh the First Amendment interests of an anonymous critic of governmental policies and elected officials. Most damningly, the township has also misrepresented the only evidence it has introduced in the case in a misguided effort to establish the relevance of its overbroad attempts. Doe respectfully asks the Court to put an end to these unwarranted and offensive efforts.

12/17/07

Respectfully submitted,

BARRY, CORRADO, GRASSI & GIBSON, PC

By: _____
FRANK L. CORRADO, ESQUIRE

ELECTRONIC FRONTIER FOUNDATION
MATTHEW J. ZIMMERMAN, ESQUIRE
(pro hac application pending)

Attorneys for Movant Datruthsquad.com
a/k/a John Doe