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YECHESKEL SCHWAB and DATAMAP INTELLIGENCE LLC, Plaintiffs, vs. JOYCE BLAY, HERSHEL HERSKOWITZ a/k/a HAROLD HERSKOWITZ, SHLOMIE KLEIN a/k/a SHLOMO KLEIN, ABRAHAM SHARABY, JOHN DOES 1-10, ABC CORPS A-J Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY Docket No.: OCN-L-2695-18 Civil Action

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM AND TO QUASH THE SUBPOENA SERVED ON ABRAHAM SCHUBERT

On the Brief:
Solomon Rubin (ID No.: 022162003)

Dated: December 21, 2018

PRELIMINARY STATEMENT

Defendants, Harold Herskowitz, Shlomie Klein, and Abraham Sharaby ("Defendants"), by their counsel, Solomon Rubin, move pursuant to R. 4:6-2(e) to dismiss the complaint of plaintiffs, Yecheskel Schwab and Datamap Intelligence LLC (hereinafter collectively "Plaintiff"), for failure to state a claim, and pursuant to R. 4:10-3, to quash the subpoena served on Abraham Schubert.

This lawsuit is a SLAPP suit - a "Strategic Lawsuit Against Public Participation." See, e.g., LoBiondo v. Schwartz, 199 N.J. 62, 72 (2009). SLAPP suits are part of "a nationwide trend in which large commercial interests utilize[] litigation to intimidate citizens who otherwise would exercise their constitutionally protected right to speak in protest against those interests." Id. at 85. "[T]he goal of such litigation [is] not to prevail, but to silence or intimidate the target, or to cause the target sufficient expense so that he or she would cease speaking out." Id. "SLAPP suits are an improper use of our courts." Id. at 86; see also, N.J.S.A. 2A:15-59.1 (awarding costs and attorney fees to victims of frivolous litigation); R. 1:4-8 (imposing sanctions for frivolous litigation).

As is apparent from the Complaint, Plaintiff is financially well off and does substantial business with municipalities. As such, he has a significant interest in preventing people from knowing about his business dealings with public entities. The purpose of this suit is not to address any particular allegedly false claims, but to send a message that criticizing Plaintiff's dealings with the Township of Lakewood will result in a hefty legal bill. As will be discussed below, Plaintiff's objective in this action is not only to shut down Defendants, but to use discovery to ascertain others who criticized Plaintiff, so that their speech can be suppressed through threat of litigation as well.

Certain parts of Plaintiff's complaint and his procedural moves would be inexplicable if Plaintiff really filed this action to seek redress for defamatory statements. But once one considers Plaintiff's true motives, everything becomes more understandable.

Plaintiff took the unusual step of serving a subpoena on a non-party, which set a deposition date of December 17, 2018, at the same time as Plaintiff served the Complaint. This is although this case is on discovery Track III, so it will have a discovery end date in April 2020. If Plaintiff's goal in taking this deposition were to obtain information to prosecute this case, there would be no rush to do so. But when one realizes that ferreting out critics is its own end, independently of whether it will lead to admissible evidence, Plaintiff's conduct becomes understandable.

Moreover, some of the allegedly false statements stated in the Complaint are not about or concerning Plaintiff. Rather, they relate to certain local elected officials with whom Plaintiff is friendly. Moreover, one of the Defendants is being sued simply for making OPRA requests to the Township of Lakewood. Plainly, the purpose of this litigation is to inhibit people's willingness to obtain information and speak about matters of public concern.

First Amendment values are compromised by long and costly litigation in defamation cases. Kotlikoff v. The Cmty. News, 89 N.J. 62, 67 (1982) (noting the "real potential for chilling journalistic criticism and comment"); Maressa v. New Jersey Monthly, 89 N.J. 176, 196 (1982) ("[T]he cost of defending a libel action can itself deter free press.") As such, for the reasons stated below, Plaintiff's complaint should be dismissed, and the subpoena served on non-party Abraham Schubert should be quashed.

LEGAL ARGUMENT

Point I
The Motion to Dismiss Standard

A motion to dismiss a complaint under R. 4:6-2(e) for failure to state a claim must be evaluated in light of the legal sufficiency of the facts alleged in the complaint. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). When reviewing a motion to dismiss for failure to state a claim, courts must accept the asserted facts as true and give the pleader the benefit of all reasonable inferences. New Jersey Sports Productions, Inc. v. Bobby Bostick Promotions, LLC, 405 N.J. Super. 173, 177 (Ch. Div. 2007).

A motion to dismiss "is based upon the content of the pleading in and of itself." Id. at 178. However, an "exception to this general rule is that a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment." Contel Glob. Mktg., Inc. v. Dreifuss, A-3542-08T3, 2010 WL 374946, at *8 (App. Div. Feb. 4, 2010).[1] See also, Banco Popular N. Am. V. Gandi, 184 N.J. 161, 183 (2005) (noting that when "evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, **and documents that form the basis of the claim**" (emphasis added)); New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 605 (App. Div. 2007) (on a motion to dismiss, a court may properly rely on documents referred to in the complaint as part of the pleading even if those documents are not attached as exhibits to the complaint).

[1] Pursuant to R. 1:36-3, I attached this opinion and state I am unaware of any contrary unpublished opinions.

In determining whether pleadings state a cause of action, the Court should not just consider whether the pleadings allege the elements of the cause of action, but whether the pleadings allege **facts** in support of the elements. Edwards v. Prudential Prop. & Cas., 357 N.J. Super. 196 (App. Div. 2003). As such, conclusory pleadings should be dismissed. Id., at 202 (affirming dismissal of complaint because the "court found no facts in the pleadings supporting Plaintiff's claim"); Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987); Camden Cty. Energy Recovery Assocs., L.P. v. Dep't of Envtl. Prot., 320 NJ. Super. 59, 64-65 (App. Div. 1999), aff'd, 170 NJ, 246 (2001). As such, for the reasons stated below, the Complaint should be dismissed.

Point II
Plaintiff Fails to State a Claim for Defamation Against the Moving Defendants

Plaintiff's first cause of action is for defamation. Complaint, ¶¶ 19-53. "Defamation imposes liability for publication of false statements that injure the reputation of another." Printing Mart-Morristown, 116 N.J. at 765. To succeed on a defamation claim, Plaintiff must prove four elements: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; (3) fault amounting to at least negligence by the publisher; (4) the Plaintiff was damaged by the statement. DeAngelis v. Hill, 180 N.J. 1 (2004). Whether a "statement is susceptible of a defamatory meaning is a question of law for the court." Ward v. Zelikovsky, 136 N.J. 516, 529 (1994). As will be explained below, Plaintiff does not show these elements regarding the moving Defendants.

a. The Defamation Claim Against Sharaby Must Be Dismissed Because the Complaint Fails to Allege He Made Any Statements About Plaintiff

A substantial portion of the Complaint addresses allegedly defamatory statements, without claiming they were made by any of the defendants. Complaint, ¶¶ 24-31. As to

statements that the Complaint alleges were made by a defendant, Plaintiff's pleadings lump them all together in an inappropriate group pleading. Complaint, ¶¶ 46-53. As such, Plaintiff seeks to assert claims for defamation against Defendants for things said by others. This must explain how Plaintiff managed to assert a cause of action for defamation against Sharaby, although the Complaint never identifies a single statement that he made or published. Complaint, generally.

In a "complaint charging defamation, plaintiff must plead facts sufficient to identify the defamatory words, **their utterer** and the fact of their publication. A vague conclusory allegation is not enough." (Emphasis added). Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101 (App. Div. 1986). Because the Complaint never asserts Sharaby uttered anything, the claim for defamation against his must be dismissed.

b. The Defamation Claim Against Klein Must Be Dismissed Because the Complaint Fails to Allege He Made Any Statements About Plaintiff, and Even if He Controls Sites on Which Others Wrote Defamatory Content, He Would Be Immune From Liability Under 47 U.S.C. § 230

As is the case with Sharaby, the Complaint never identifies a single statement made by Klein. Complaint, generally. The Complaint alleges that Klein "is the driving force behind hefkervelt and jleaks." Complaint, ¶ 37. But that does not mean he made any of the statements stated on those sites.

Even if Klein created and/or managed these sites, which is not stated in the complaint, it would be irrelevant. This is because under the Communications Decency Act ("CDA"), 47 U.S.C. § 230, a party cannot be found liable for another's statements online. Specifically, the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1). As such, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section," id. at § 230(e)(3).

"Together, these sections provide immunity to an interactive computer service provider as a publisher or speaker of information originating from another information content provider." Obado v. Magedson, 612 F. App'x 90, 93 (3d Cir. 2015) (quotation and brackets omitted). As the Third Circuit has observed, "decisions relating to monitoring, screening, and deletion of content from [a] network" are "actions quintessentially related to a publisher's role." Green v. Am. Online (AOL), 318 F.3d 465, 471 (3d Cir. 2003). Therefore, Klein's being "driving force behind hefkervelt and jleaks," even if true, could not be the basis of liability against him for something that he did not publish. Therefore, the claim for defamation against Klein must be dismissed.

c. The Defamation Claim Against Herskowitz Must Be Dismissed Because the Allegedly Defamatory Statements Were Either Not About Plaintiff or Not Made with the Required Malice

The Plaintiff cites three statements made by Herskowitz as a basis for the defamation claim. Complaint, ¶ 32. However, as will be explained below, none of them could be the basis of a claim for defamation.

The first allegedly defamatory statement is "I am going to make this short and sweet. I can go on and list all of the corruption that Menashe and Meir have done together and separately, along with … builders and developers." Complaint, ¶ 32. This statement does not mention the Plaintiff at all. Id. This is also the case for the third allegedly defamatory statement, which asks, "how many lots and properties were sold, divided, switched and donated, all for personal gain since Menashe and Meir have been in charge?" Complaint, ¶ 32.

"An indispensable prerequisite to an action for defamation is that the defamatory statements must be of and concerning the complaining party." Durski v. Chaneles, 175 N.J. Super. 418, 420 (App. Div. 1980). These statements do not relate to Plaintiff at all. Complaint, ¶ 32. If Menashe Miller and Meir Lichtenstein feel these statements defame them, they may be

able to file suit. But Plaintiff has no standing to assert a claim on their behalf, given that cases are to be brought by the true party in interest. R. 4:26-1.[2]

Only the second allegedly defamatory statement actually mentions Plaintiff. Complaint, ¶ 32. ("This deal is nothing compared to the scam that Menasha perpetrated with Schwab by secretly bringing Mr. Garzo to claim hundreds of undersized lots and suing the township. In reality Mr. Garzo was suing the taxpayers. And the entire case was orchestrated by Menashe Miller and his friend.") However, as will be explained below, this statement cannot be a basis for a defamation claim, because it is a matter of public concern and Plaintiff does not plead factual claims of actual malice.

The fault requirement is raised to a standard of actual malice where the challenged statements are pertaining to an issue of public concern. Senna v. Florimont, 196 N.J. 469, 496 (2008). "Discourse on political subjects and critiques of the government will always fall within the category of protected speech that implicates the actual-malice standard." Id at 497. Even if Plaintiff's dealings were with private entities, his business dealings would be subject to the actual-malice standard. This is because any person or business which opens itself to the public becomes the subject of legitimate public interest, so the actual malice standard applies when a business owner seeks to vindicate his interests in a defamation action. Turf Lawnmower Repair,

[2] If this case were brought by Plaintiff to vindicate a legal right, it would be surprising that Plaintiff sought to sue over statements related to others. After all, his attorneys are surely aware that Plaintiff cannot recover for a statement that is allegedly defamatory as to someone else. But since the purpose of this suit is not to ultimately prevail on the merits, but to silence people through the threat of litigation, Plaintiff's motives make sense. By threatening legal fees for anyone who criticizes Menashe Miller and Meir Lichtenstein, who are members of the Lakewood Township Committee, Plaintiff provides them with a free service. One could imagine why Plaintiff, who does business with Lakewood, would want to curry favor with its township committee members.

Inc. v. Bergen Record Corp., 269 N.J. Super. 370 (App. Div. 1994), aff'd, 139 N.J. 392 (1995). Therefore, the actual malice standard applies to Plaintiff's defamation claim.

Under the actual malice standard, Herskowitz cannot be held liable unless he published the challenged statements about the Plaintiff with knowledge that such statements were false, or with reckless disregard of whether they were false. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). It is irrelevant whether Herskowitz is a professional journalist, as "the actual malice standard should apply to non-media as well as to media defendants." Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 153 (1986).

Plaintiff cannot survive a motion to dismiss based on actual malice, simply by asserting, "[t]he statements were published with actual malice, as Defendants either knew the statements were false, they acted in reckless disregard of the truth or falsity of the statements before communicating them." Complaint, ¶ 48. This is because "[t]he conclusory allegation that [the defendant] published the defamatory statements with actual malice is not sufficient to withstand a motion to dismiss on the pleadings." Donato v. Moldow, 374 N.J. Super. 475, 501 (App. Div. 2005). "It is not enough for Plaintiff to assert . . . that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can bolster a defamation cause of action through discovery, but not file a conclusory complaint to find out if one exists." Printing Mart-Morristown, 116 N.J. at 768 (internal quotation marks and brackets omitted). "[A] plaintiff must plead the facts and **give some detail** of the cause of action." (Emphasis added). Id.

There are no specific facts that are alleged to show that Herskowitz made this statement with actual malice. The test of whether a statement is made with actual malice "is subjective, not objective, and involves analyzing the thought processes of the particular defendant." Durando v. Nutley Sun, 209 N.J. 235, 251 (2012); Trump v. O'Brien, 422 N.J. Super. 540, 549 (App. Div.

2011). Because the Plaintiff did not assert a single fact to support the claim that Herskowitz knew that his claim as to the relationship between Plaintiff and Kenneth Garzo was false, or acted with reckless disregard for the truth, the Plaintiff's defamation claim must be dismissed.

Plaintiff separately alleges that some of Herskowitz's tweets were defamatory. Complaint, ¶¶ 34,35. However, these tweets cannot be a basis for a defamation claim for multiple reasons.

Firstly, as with the other claims, Plaintiff never alleges facts that would support the assertion of malice. Moreover, tweeting a link to an article does not make one liable for the contents of said article, even if the article were defamatory. Mirage Entm't, Inc. v. FEG Entretenimientos S.A., 326 F. Supp. 3d 26, 39 (S.D.N.Y. 2018); In re Philadelphia Newspapers, LLC, 690 F.3d 161, 175 (3d Cir. 2012), as corrected (Oct. 25, 2012). As such, the Court could only consider that which was written by Herskowitz.

Point III
Plaintiff Fails to State a Claim for False Light, Because He Does Not Plead Malice and the Statements Are Not Private, But are of Public Concern

Plaintiff's second cause of action is for false light. Complaint, ¶ 54, *et. seq.* To prove a claim for false light, a plaintiff must show that "the false light in which [he] was placed would be highly offensive to a reasonable person" and that the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed." Romaine v. Kallinger, 109 N.J. 282, 294 (1988). As such, malice is required even for matters of private concern. Id. For the reasons previously stated, since Plaintiff does not plead facts supporting the claim of malice, this Complaint must be dismissed.

Separately, false light is a privacy tort, and as such, a plaintiff must show that "the matters revealed were actually private." Romaine, 109 N.J. 282, 297 (1988). "The thrust of this

aspect of the tort is … that a person's private, personal affairs should not be pried into." Bisbee v. John C. Conover Agency, Inc., 186 N.J. Super. 335, 340 (App. Div. 1982). For this reason, matters that are of legitimate concern to the public cannot be the basis for an action for false light. Romaine, 109 N.J. at 297; Bisbee, 186 N.J. Super. at 340. See, also, Restatement (Second) of Torts § 652D cmt. d (1977) ("When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.")

In the case *sub judice*, all of the statements that are the basis of Plaintiff's Complaint are related to Plaintiff's dealing with a municipal government. Complaint, generally. Matters dealing with government are inherently public. Senna, 196 N.J. at 496. As such, it cannot be a basis for a claim for false light.

Finally, Plaintiff Datamap Intelligence LLC, cannot assert a claim for false light, because it is a cause of action only available to natural persons. N.O.C., Inc. v. Schaefer, 197 N.J. Super. 249, 253 (Law. Div. 1984). As such, this cause of action should be dismissed as to it.

Point IV
Plaintiff Fails to State a Claim for Conspiracy Against the Moving Defendants

Plaintiff's third cause of action is for conspiracy. Complaint, ¶ 60, *et. seq.* A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage. Banco Popular N. Am. v. Gandi, 184 N.J. 161 (2005). As will be explained below, Plaintiff's claim fails both for the lack of an unlawful act and for the lack of an agreement.

Firstly, because the defamation and false light claims fail, for the reasons previously stated, there is no "unlawful act." As such, the conspiracy claim must fail as well. Portes v. Tan, A-3940-11T3, 2014 WL 463140, at *10 (App. Div. Feb. 6, 2014)[3] ("Civil conspiracy is not a cause of action by itself, but rather an additional claim that requires an underlying 'overt act' that caused the harm in question.")

Separately, the Complaint never alleges any facts that would support the claim that the Defendants had an agreement to act in concert with each other. Plaintiff make the vague assertion that "Defendants malevolently conspired with each other to defame Schwab and DMI." Complaint, ¶ 62. This is merely conclusory, and contains no factual assertions, so it warrants dismissal. See, Grippi v. Spalliero, A-2842-07T3, 2008 WL 4963978,[4] at *8 (App. Div. Nov. 24, 2008) (dismissing conspiracy claim because Plaintiff "failed to allege sufficient **facts** to show that there was an agreement by defendants to commit the alleged wrongs" (Emphasis added)).

The only facts that Plaintiff alleges to show there was an agreement is that "on August 14 and 15, 2018, Defendants posted precisely the same defamatory, malicious, baseless, and unsubstantiated allegations on jleaks, hefkervelt, the Herskowitz Blog,[5] and NJ News and Views." Complaint, ¶ 62. The fact that the same claim is made by multiple Defendants would not indicate that there was an agreement between them. Rather, it would simply mean that multiple people believe the same thing.

[3] Pursuant to R. 1:36-3, I attached this opinion and state I am unaware of any contrary unpublished opinions.

[4] Pursuant to R. 1:36-3, I attached this opinion and state I am unaware of any contrary unpublished opinions.

[5] Herskowitz has not posted on his blog since October 1, 2014, so this claim as to him is plainly false. http://www.thelakewoodtimes.com/.

Point V
Plaintiff Fails to State a Claim for Aiding and Abetting Against the Moving Defendants

Plaintiff's fourth cause of action is for aiding and abetting. Complaint, ¶¶ 67-73. To assert a claim for aiding and abetting, a plaintiff must show that "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." State, Dep't of Treasury ex rel. McCormac v. Qwest Commc'ns Int'l, Inc., 387 N.J. Super. 469, 484–85 (App. Div. 2006). Based on this definition, the Complaint is woefully deficient to assert such a cause of action.

Because, as previously noted, Plaintiff fails to assert a claim for defamation or false light, Plaintiff cannot meet the first element, which is that "the party whom the defendant aids must perform a wrongful act that causes an injury." McCormac, 387 N.J. Super. at 484. Because there is no wrongful act, there can be no claim for aiding and abetting.

Even if there were a wrongful act, Plaintiff would have to prove that each Defendant was "generally aware of his role as part of an overall illegal or tortious activity" and "knowingly and substantially assist[ed] the principal violation." McCormac, 387 N.J. Super. at 484. Plaintiff fails to plead any facts supporting this claim.

The Complaint makes the vague general claims that "Defendants knew that the defamatory statements would be used to try and prevent Lakewood Township from doing business with DMI" and "Defendants knowingly and substantially participated in the wrongdoing and/or directed it." Complaint, ¶¶ 69,70. As previously noted, in looking to whether pleadings state a cause of action, the Court should not just consider whether the pleadings allege

the elements of the cause of action, but whether the pleadings allege **specific facts** in support of the elements. Edwards, 357 N.J. Super. at 202. As such, the Court should disregard these vague statements. When one looks for actual pleaded facts alleging that Defendants were aware of the allegedly wrongful activity and participation in same, one cannot find any.

There is not a single specifically alleged fact as to how Herskowitz aided any other Defendant in making a claim. Complaint, generally. As such, this cause of action must be dismissed.

Regarding Klein, the Complaint says he "is the driving force behind hefkervelt and jleaks." Complaint, ¶ 37. It is unclear what it means to be the "driving force," but having a website does not prove that he is aware of anyone else's wrongful acts or participated in same. Moreover, under 47 U.S.C. § 230(e)(3), he would be immune from liability for other people's comments on the site.

The only allegation in the Complaint as to what Sharaby did to aid the other Defendants is the assertion that he "files frequent OPRA requests to gather documents relating to Schwab and his business interests. The purpose of these requests is not to review public information. Instead, Sharaby supplies these documents for Defendants to use to misrepresent, distort and promulgate false allegations about the personal and business activities of Schwab." Complaint, ¶ 45. This reveals Plaintiff's true motive in suing Sharaby. Plaintiff seeks to prevent the disclosure of public information about his dealings with Lakewood Township, by threatening litigation against those who might inquire. But regardless, this is not a basis for a cause of action for aiding and abetting against Sharaby for two separate reasons.

Firstly, to have a cause of action for aiding and abetting, not only would a defendant have to be aware of the tortious activity, but the defendant must "knowingly and **substantially assist**

the principal violation." (Emphasis added). McCormac, 387 N.J. Super. at 484. Plaintiff does not specifically identify a single allegedly defamatory statement for which Sharaby supplied someone with documents that assisted the speaker in making those statements. None of the allegedly defamatory statements referenced a document that a defendant claimed proved its claim.

Moreover, making an OPRA should not be a basis to find someone legally liable for a conspiracy as it implicates a defendant's constitutional rights. N.J.S.A. Const. Art. 1, par. 6. The free speech guarantee in New Jersey's state constitution "protects not only the free discussion of governmental affairs, but also the corresponding **right to receive information and ideas** so that the discussion be informed." (Emphasis added). Tarus v. Borough of Pine Hill, 381 N.J. Super. 412, 422 (App. Div. 2005), aff'd in part, rev'd in part on other grounds, 189 N.J. 497 (2007), citing to, Globe Newspaper Co. v. Superior Court for Norfolk, 457 U.S. 596, 604–05 (1982); Stanley v. Georgia, 394 U.S. 557, 564 (1969). For this reason, OPRA's broad public policy favors public access to government records and serves to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Wronko v. New Jersey Soc'y for Prevention of Cruelty to Animals, 453 N.J. Super. 73, 80 (App. Div. 2018), citing, Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 293 (2017).

In light of this policy, OPRA provides for ready access to government records by the citizens of this State. Mason v. City of Hoboken, 196 N.J. 51, 64–65 (2008). The statute directs that "all government records shall be subject to public access unless exempt," and that "any limitations on the right of access ... shall be construed in favor of the public's right of access." N.J.S.A. 47:1A–1. "The right to inspect and copy governmental records under OPRA is without

limitation as to the reasons for which the access is undertaken." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 545 (App. Div. 2005).

To prevent a governmental entity from wrongfully denying individuals documents that must be produced, those who are wrongfully deprived of information are entitled to legal fees. N.J.S.A. 47:1A-6. Were a private citizen to be liable for making OPRA requests, it would allow plaintiffs to prevent others from requesting relevant information by the threat of litigation. They would then not have the remedy of legal fees under N.J.S.A. 47:1A-6. This is an outcome that the statute is meant to avoid. As such, plaintiffs cannot sue a defendant for making an OPRA request.

Point VI
The Court Should Quash the Subpoena Served on Abraham Schubert

A subpoena was served on Abraham Schubert, setting a deposition for December 17, 2018. Schubert Cert., Exhibit A. Under R. 4:14-7(a), a witness may be compelled to appear for a subpoena "subject to the protective provisions of R. 1:9-2 and R. 4:10-3." However, under R. 1:9-2, the court "may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive."

As will be explained below, Plaintiff's outrageously broad subpoena seeks information, not to prosecute his claims, but to learn who opposes his dealings with Lakewood Township. Plaintiff desires this information so that he can suppress truthful information about matters of public concern. The concern about the right to speak anonymously is particularly relevant in the Lakewood Orthodox Jewish community, where there are attempts to quash dissenting voices. Herskowitz Cert., ¶¶ 10-18; Sharaby Cert., ¶¶ 6-32. As such, pursuant to R. 1:9-2 and R. 4:10-3 the subpoena should be quashed.

a. The Subpoena Seeks the Identity of Anonymous Internet Posters, Without Making a Prima Facie Case as Required by Dendrite v. Doe No. 3

Plaintiff is suing unknown "John Doe" defendants for defamation. Complaint, ¶¶ 10, 11. The subpoena seeks information that is intended to ascertain the identity of these defendants, so claims can be asserted against them. Thus, the subpoena *inter alia* requires Schubert to produce "[a]ll documents that refer or relate to the ownership or operation of any of the Websites." Schubert Cert., Exhibit A, Page 5, ¶ 5. The subpoena defines websites to be "jleaks.com, hefkervelt.blogspot.com, www.takebacklakewood.com, firstamendmentactivist.blogspot.com or www.joyceblaynewsandviews.com." Schubert Cert., Exhibit A, Page 4, ¶ 2. The Complaint never alleges any defamatory statements were made on the websites www.takebacklakewood.com or firstamendmentactivist.blogspot.com.[6] Complaint, generally.

The subpoena further requires that Schubert produce "[a]ll documents that refer or relate to articles or posts published on any of the Websites that refers or relates to Schwab or any Schwab Entity." Schubert Cert., Exhibit A, Page 5, ¶ 6. The subpoena does not limit the demand to statements that are related to allegedly defamatory statements.

The "right to speak anonymously is protected by the First Amendment and 'derives from the principle that to ensure a vibrant marketplace of ideas, some speakers must be allowed to withhold their identities to protect themselves from harassment and persecution.'" Juzwiak v. Doe, 415 N.J. Super. 442, 447 (App. Div. 2010); Talley v. California, 362 U.S. 60, 64 (1960). As such, even were Plaintiff exclusively seeking the identity of those who made allegedly defamatory statements, the subpoena still should be quashed. This is because, under Dendrite v. Doe No. 3, to obtain the identity of anonymous internet users, a plaintiff must (a) "make efforts

[6] Even if it did, as was previously explained, ownership of these sites is not a basis for liability in light of 47 U.S.C. § 230.

to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application," (b) "the Plaintiff must make a prima facie showing of a cause of action," and (c) "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity." Dendrite Int'l, Inc. v. Doe No. 3, 342 N.J. Super. 134, 140 (App. Div. 2001).

Plaintiff does not meet any of these criteria. The anonymous individuals do not have notice. Separately, Plaintiff did not make any sort of showing that it has a cause of action. As was explained in Dendrite, 342 N.J. Super. at 141, even in a case where plaintiff's pleadings can survive a motion to dismiss under R. 4:6-2(e), which is not the case *sub judice*, that would not be a basis to find the subpoena valid. Rather, a "plaintiff must produce sufficient evidence supporting each element of its cause of action." Id. In the case *sub judice*, Plaintiff does not provide any evidence. Not only does Plaintiff not make a *prima facie* case for defamation, Plaintiff seeks the identity of those for whom there is not even an allegation of defamation. Plaintiff demands to know what anyone ever said about him.

Finally, "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented." Dendrite, 342 N.J. Super. at 140. When balancing the First Amendment rights of those whose identity will be disclosed, the Court should consider that, as was previously noted, there are particular concerns in the Orthodox Jewish Community in Lakewood about the consequences of public political dissent. Herskowitz Cert., ¶¶ 10-18; Sharaby Cert., ¶¶ 6-32. As such, Plaintiff plainly does not meet the disclosure standard stated in Dendrite.

b. The Subpoena Seeks Information Unrelated to the Allegedly Defamatory Statements, Simply So that Plaintiff Can Learn Who is Making Truthful Claims About Him, Although Anonymous Speech is Protected by the First Amendment

While Dendrite deals with anonymous statements on the internet, the Court should protect communications made off line as well. Under R. 4:14-7(a), a "subpoena may command the person to whom it is directed to produce designated books, papers, documents or other objects which constitute or contain evidence relating to all matters **within the scope of examination permitted by R. 4:10-2**." (Emphasis added.) Under R. 4:10-2(a), discovery is allowed about information "which is relevant to the subject matter involved in the pending action." As will be explained below, Plaintiff seeks substantial amounts of information unrelated to the allegations in his Complaint.

The documents demanded by Plaintiff in the subpoena demonstrate that he is not just seeking information related to the defamation claims. Rather, Plaintiff is seeking all information related to him, so he can suppress even truthful information about him. Thus, Plaintiff demands,

> All documents that refer or relate to communications, **including but not limited to** those with Joyce Blay, Hershel Herskowitz a/k/a Harold Herskowitz, Shlomie Klein a/k/a Shlomo Klein, Abraham Sharaby and/or Yitzchok Uri Szmidt, that refers or relates to Yecheskel "Charlie" Schwab ("Schwab") and any entity he owns or operates, including but not limited to DataMap Intelligence, LLC or Diamond Triumph Properties, LLC (individually, a "Schwab Entity" or collectively, the "Schwab Entities"). (Emphasis added.)
>
> Schubert Cert., Exhibit A, Page 4, ¶ 1.

The subpoena further seeks "[a]ll documents that refer or relate to Schwab or any Schwab Entity." Schubert Cert., Exhibit A, Page 4, ¶ 3. The subpoena further seeks "[a]ll documents that refer or relate to articles or posts published on any of the Websites that refers or relates to Schwab or any Schwab Entity." Schubert Cert., Exhibit A, Page 5, ¶ 6. Plaintiff essentially seeks anything that anyone ever said about him.

The subpoena further seeks "[a]ll documents sent or received by you relating to Schwab or any Schwab Entity." Schubert Cert., Exhibit A, Page 5, ¶ 9. Plaintiff seeks to know who is speaking about him, regardless of whether the statements are truthful or not. The threat of litigation will thus chill people's willingness to discuss Plaintiff's dealings with Lakewood Township, which is plainly a matter of public concern.

c. The Subpoena's Purpose is Partly to Suppress the Right to Obtain Public Information, which exists Under Both Common Law and OPRA

The subpoena further "[a]ll documents relating to Schwab or any Schwab Entity obtained, directly or indirectly, pursuant to OPRA requests." Schubert Cert., Exhibit A, Page 5, ¶ 8. Hereto, Plaintiff seeks to know what public information there is about him, and who is seeking said information. As was previously noted, this would inhibit the public's ability to seek public information, for fear of litigation. Supra, Page 13, *et. seq.* The free speech guarantee in New Jersey's state constitution, N.J.S.A. Const. Art. 1, par. 6, "protects … the … right to receive information and ideas." Tarus, 381 N.J. Super. at 422. Moreover, OPRA's broad public policy favors public access to government records, to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Wronko, 453 N.J. Super. at 80. As such, the subpoena is for an improper purpose.

d. The Subpoena Seeks to Inhibit Public Participation in Matters of Government

The subpoena further seeks "[a]ll documents (including any and all specific evidence, information, or supporting research), upon which written or spoken claims were made at any Township of Lakewood public meeting." Schubert Cert., Exhibit A, Page 5, ¶ 10. The purpose is to impact people's ability to participate in public meetings.

There is a "strong tradition both in this State and in the nation favoring public involvement in almost every aspect of government." Polillo v. Deane, 74 N.J. 562, 569 (1977).

The First Amendment protects an individual's activity in speaking in public forums. Lawrence v. Bauer Pub. & Printing Ltd., 89 N.J. 451, 476 (1982), citing, Hague v. CIO, 307 U.S. 496, 515-16 (1939). Plaintiff seeks to undermine that right by preventing people from participating in public matters under the threat of litigation. However, under the Noerr-Pennington doctrine, those who petition the government for redress are afforded immunity for their action. Structure Bldg. Corp. v. Abella, 377 N.J. Super. 467, 471 (App. Div. 2005). The Doctrine was adopted in the State of New Jersey. LoBiondo v. Schwartz, 323 N.J. Super. 391, 414 (App. Div. 1999). As such, the subpoena is clearly for an improper purpose.

e. The Subpoena is Partly to Retaliate against Schubert For His Involvement in Preventing Plaintiff from Misappropriating Public Land, the Details of Which Are Outlined in the Case Flowing White Milk LLC v. Lakewood, OCN-1040-17

The subpoena seeks "[a]ll documents that refer or relate to any relationship that you, Joyce Blay, Hershel Herskowitz a/k/a Harold Herskowitz, Shlomie Klein a/k/a Shlomo Klein, Abraham Sharaby and/or Yitzchok Uri Szmidt have with Red Oaks Development." Schubert Cert., Exhibit A, Page 6, ¶ 14. The Complaint never alleges that a single defamatory statement was made, specifically regarding Red Oaks Development. Complaint, generally. However, as will be explained below, Plaintiff sought, with the acquiescence of Menashe Miller, to misappropriate land in the Red Oaks Development that belonged to Lakewood. It was only through the political involvement of concerned citizens such as Abraham Schubert, that this did not occur. Plaintiff seeks to retaliate against those who thwarted his plans, by involving them in litigation, to prevent this from occurring again.

Schubert resides in White Oaks Development, which is adjacent to Red Oaks Development. Schubert Cert., ¶ 5. In 2002, the developer of Red Oaks Development applied for a major subdivision before the Lakewood Township Zoning Board of Adjustment. Rubin Cert.,

Exhibit A, Page 5. The application was approved, with a subdivision map that specifically noted that Block 190. Lot 58.13 was being dedicated to the Township of Lakewood. Id. This lot is vacant land comprised of approximately 6.75 acres. Id.

No deed of dedication was prepared or delivered to Lakewood Township, which assessed taxes on the property. Rubin Cert., Exhibit A, Page 5. As such, the property was foreclosed on by Crusader Servicing Corporation, who transferred the Property to an entity Flowing White Milk, LLC ("FWM"). Id. FWM's manager is Rachel A. Bauman, the wife of Plaintiff. Id., Exhibit B.[7]

FWM applied for a subdivision of the property. Rubin Cert., Exhibit A, Page 5. Neighbors objected to this, as FWM should not have been developing a property that was required to be transferred to Lakewood Township. Id., Page 6. However, Menashe Miller seemed remarkably interested in ensuring that ownership of the property remain with FWM, notwithstanding Miller's fiduciary duty to the Township. Thus, on June 29, 2015, Miller met with a representative of FWM at the office of the Township's counsel. Id., Page 8. Miller then indicated that the Township would allow FWM to keep the property, notwithstanding that it should have been deeded over to the Township. Id.

On the same day, the Township Tax Assessor, Edward Seeger, correctly objected, noting "the town is basically giving away a lot worth anywhere from $300,000 to $400,000." Rubin Cert., Exhibit E, Page 8. However, the Township Committee refused to assert a claim for its interest in the property. Instead, the Township Committee accepted FWM's position, that the Township lost its claim to the property, as a result of the tax lien foreclosure. Id., Page 11.

[7] Although Plaintiff controls FWM, a look at its corporate status report shows how it seeks to conceal who owns it. Rubin Cert., Exhibit D. The corporate status report indicates that the principal of the entity is "Flowing White Milk LLC." Id. An entity cannot own itself. It further indicates that the registered agent for the entity is also Flowing White Milk LLC. Id. Clearly this is an entity that is trying to hide who owns it.

The claim that the Township lost its right to the property was devoid of merit. Twp. of Middletown v. Simon, 193 N.J. 228 (2008). The Township Committee accepted FWM's meritless position because it sought to advance the interests of FWM, against the interests of the Township. As such, neighbors were forced to retain counsel to deal with the matter. Schubert Cert., ¶ 12. The Township reversed course, only because neighbors were about to commence litigation. Schubert Cert., ¶ 13. As such, FWM filed the action Flowing White Milk LLC v. Lakewood, OCN-1040-17. Rubin Cert., Exhibit A. In that action, on January 24, 2018, the Hon. James Den Uyl, J.S.C. granted summary judgment to the Township. Id., Exhibit B.

Plaintiff's motive for this litigation generally, and the subpoena specifically, is to prevent people from inquiring into his dealings with the Township. Schubert Cert., ¶ 2. Since that is not a proper purpose of discovery, pursuant to R. 4:10-3, the subpoena should be quashed.

Conclusion

For the reasons stated above, the Court should dismiss the Complaint and quash the subpoena served on Abraham Schubert.

Respectfully submitted,

Solomon Rubin
Attorney for Defendants,
Harold Herskowitz, Shlomie Klein, and
Abraham Sharaby and non-party Abraham
Schubert

Date: December 21, 2018