UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

MARIZA DIAZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. RWT 06-57
	)	
THE MARYLAND NATIONAL CAPITAL PARK POLICE, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

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MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

NOW COMES non-party Fraternal Order of Police, Montgomery County Lodge 35, Inc. ("Lodge 35"), by and through its attorneys, Law Offices of Charles Lee Mudd Jr. and Martha L. Handman, and respectfully submits this Memorandum in Opposition to Plaintiff's Motion to Compel, stating as follows:

INTRODUCTION AND PRELIMINARY STATEMENT

Lodge 35 opposes Plaintiff's Motion to Compel production of information tending to identify anonymous users of its services and seeks to quash the subpoena served upon it by Plaintiff in March 2006 (the "Subpoena"). The Subpoena seeks information irrelevant to this litigation for which Plaintiff has demonstrated no need. Moreover, by demanding information that would identify anonymous individuals who have posted anonymous communications to a private forum hosted by Lodge 35, compliance with the Subpoena will violate these individuals' rights to anonymous communications and associational anonymity protected by the First Amendment of the United States Constitution ("First Amendment") and the Maryland Declaration of Rights. Thus, the harm that would be imposed upon these individuals and Lodge 35 by compelling production far outweighs the Plaintiff's need, or absence thereof, for the information. Additionally, Lodge 35 contends compliance with the Subpoena is unduly burdensome. Consequently, Plaintiff's Motion to Compel should be denied and her Subpoena quashed.

FACTUAL BACKGROUND

This Litigation

As the Plaintiff makes clear in her motion, this litigation involves alleged wrongful arrest and civil rights claims against the Maryland National Capital Police, Montgomery County Division ("MNCPP"), one of MNCPP's former officers, and at least one of MNCPP's current officers. Pl.'s Mot.

Compel., p. 1. The Plaintiff alleges that certain officers of the MNCPP acted in a racially and ethnically derogatory manner toward the Plaintiff, a Latina-American. Plaintiff has not made any such allegations against the Montgomery County Police Department or its officers. Plaintiff also has not made any such allegations against Lodge 35, an entity wholly separate from non-party Montgomery County Police Department, or its members. In fact, neither Lodge 35 nor any of its members have been named as a defendant in the underlying suit.

The sole basis for Lodge 35's involvement arises from the Plaintiff's groundless guesswork and speculation. The Plaintiff seeks information relating to anonymous communications posted on a webboard hosted by Lodge 35 for its members ("Lodge 35 Webboard"). The Plaintiff's interest in the Lodge 35 Webboard arises from mere speculation based on three unrelated allegations. First, one of the defendants purportedly patrolled "public, Montgomery County, Maryland parking lots under a Memorandum of Understanding with the Montgomery County Police Department" on the date of the alleged conduct. Again, Plaintiff has not even named the Montgomery County Police Department as a defendant, and, in any case, Lodge 35 remains a separate entity from the non-party Montgomery County Police Department. Second, individuals who are not members of Lodge 35 ("Non-members") purportedly gained unauthorized access to the Lodge 35 Webboard. Finally, some "commentary posted by police officers" on the Lodge 35 Webboard has recently been characterized as racially and ethnically derogatory to Latino-Americans. Pl.'s Mot. Compel, p. 2. Based on these three allegations, the Plaintiff speculates that one of the defendants *may* have been one of the Non-members who *may* have gained access to the Lodge 35 Webboard without authorization and *may* have posted communications on the Lodge 35 Webboard that *may* have been among the comments recently characterized as "racial and

ethnic." Plaintiff's interest in Lodge 35 amounts to nothing more than an impermissible fishing expedition.

Message Boards and User Accounts

Lodge 35 provides a private message board for its members on the Internet. Apart from restricting access to Lodge 35 members, the Lodge 35 Webboard operates as any other public Internet message board (or "webboard"). A webboard has been characterized as the equivalent of a public kiosk in a town square where anyone can read and post messages. For, anyone on the Internet from any location can, theoretically, access and log onto a public webboard from which he or she can freely read and post messages. On many webboards, the messages posted by users may be categorized into certain topic areas. Within any particular topic area, a "string of messages" exists discussing particular issues related to that topic. Often, webboards may be restrictive in their content and membership. For example, a webboard may be restricted to topics related to dog breeding. The operators of such a webboard may further limit the webboard's membership to verified dog breeders rather than the open public. In any case, the heart of any webboard consists of the messages posted by its users.

A message posted to a webboard may publicly display certain identifying information about the posting that can be viewed by any other webboard user. This information may include the username of the individual posting the message, the date and time the user posted the message, and a subject line identifying the topic of the message. The username represents the pseudonym created by the user when he or she created an account for use with the webboard. The username may represent the individual's real name or be an alias often having no relation to the individual's real name. Also, an individual can often change his username at any time. By using a pseudonym, an individual can associate

anonymously with a webboard, communicate anonymously on the webboard, read material on the webboard anonymously, and maintain the privacy of his or her membership with a private webboard.

A message posted to the webboard also provides additional information that may or may not be publicly displayed. In particular, a message will most likely be associated with an Internet Protocol ("IP") address. An IP address represents a unique numerical address that identifies to some extent the source from which an individual obtains a connection to the Internet. At the individual consumer level, an Internet Service Provider ("ISP"), the entity providing an individual with access to the Internet, will assign IP addresses to its customers. An individual may be assigned either a dynamic or static IP address associated with his or her connection to the Internet. A dynamic IP address may change from time to time and is not associated with any particular individual. In such a case, an ISP's equipment automatically assigns a "dynamic" or temporary IP address when a customer connects to the Internet through a modem. The dynamic IP address remains associated with that customer so long as the connection to the Internet is maintained. When the connection is broken, the IP address may be returned to the pool of available IP addresses and re-assigned as necessary to another customer. In contrast, a static IP address is assigned to a particular individual and remains with that individual until an account is terminated. More than one computer may access the Internet through a single IP address.

If one knows a particular IP address, it is possible to identify the ISP used by the individual posting a message to a webboard. Because ISPs often retain records associating its IP addresses with its customers for a certain period of time, it becomes possible for an ISP to identify the customer's account that used a particular IP address on a particular date and time. However, the information is not always accurate. Moreover, that record *does not* indicate the location or telephone number from which the user account was accessed, what computer accessed it or who was using the computer at any time during the

session. More importantly, ISPs maintain those records in confidence and, as individual records, consider them to be private to their customers. Likewise, most customers also consider the records showing their Internet use to be private.

The disclosure of an IP address associated with anonymous communications thus constitutes information that will tend to identify the individual making the anonymous communications. If one knows an individual's IP address beforehand, disclosure of a matching IP address can confirm the individual's identity. In other cases, disclosure of an IP address will lead an investigator to the individual's ISP and bring the investigator one step closer to identifying the individual. Consequently, an IP address, along with other related information, associated with anonymous communications must remain confidential and private to ensure the anonymity of the individual speaker.

The Subpoena

The Plaintiff misrepresents the actual facts involving service of the subpoena and the original and amended notices of deposition.[1] On March 31, 2006, the Plaintiff personally served a copy of the original subpoena and notice of deposition upon Lodge 35 ("Original Subpoena"). See March 29, 2006 Subpoena, p. 3 (attached as Exhibit 1). This Original Subpoena sought information from Lodge 35 regarding matters involving Fraternal Order of Police *Lodge 56*. Id., p. 2. Upon being served, Lodge 35 promptly responded to the Original Subpoena by letter on April 5, 2006. See Letter April 5, 2006 (attached as Exhibit 2). Indeed, Lodge Secretary Jane A. Milne indicated that it did not have "any documents that are responsive to your March 29, 2006 subpoena duces tecum." Id.

[1] In Exhibit 1 to her Motion to Compel, Plaintiff has mistakenly and misleadingly attached the original Subpoena issued on March 29, 2006 with the Amended Notice of Deposition dated April 12, 2006.

On April 12, 2006, the Plaintiff issued an Amended Notice of Deposition seeking documents related to Lodge 35. See Amended Notice of Deposition (attached as Exhibit 3). The Amended Notice of Deposition seeks:

> (1) Any and all Web Server, and/or Application Server and/or Data Base Server Log Files pertaining to any and all officer accessible bulletin board(s); and/or blog site(s); and/or online message board(s); and/or website(s) maintained and/or hosted and/or provided by F.o.P., Lodge 35 for the past five years. Said Log Files shall include any and all "aliases" "blog i.d.'s" and/or content.
>
> (2) Copies of any and all Reports from Web Traffic Application Tracking Software pertaining to any and all officer accessible bulletin board(s); and/or blog site(s); and/or online message board(s); and/or website(s) maintained and/or hosted and/or provided by F.o.P., Lodge 35 for the past five years.
>
> (3) Reports from any and all software, not otherwise previously requested, pertaining to any and all officer accessible bulletin board(s); and/or blog site(s); and/or online message board(s); and/or website(s) maintained and/or hosted and/or provided by F.o.P., Lodge 35 for the past five years recording who wrote what, when any such posting(s) was/were made, any and all alias(es), any and all IP address(es) and/or conten [sic] posted.

Id. Lodge 35 received this Amended Notice of Deposition on April 14, 2006. Less than a week later, Lodge 35, through its counsel, informed Plaintiff that Lodge 35 had not been served with a proper subpoena; that, in any case, it objected to the inspection and copying of the materials listed in the Amended Notice of Deposition; and, that the letter constituted written objection pursuant to Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure. See Letter dated April 20, 2006 (attached as Exhibit 4). Thus, Lodge 35 made timely written objection to the Amended Notice of Deposition. Id.

Procedural Posture

On May 1, 2006, the Plaintiff filed a Motion to Compel Compliance with Subpoena ("Plaintiff's Motion" or "Motion to Compel") seeking production of documents responsive to the Amended Notice of Deposition. Lodge 35 now files its opposition to Plaintiff's Motion.

ARGUMENT

Lodge 35 opposes Plaintiff's Motion and urges this Court to deny Plaintiff's Motion and quash her Subpoena.

I. STANDARD

Generally, the Federal Rules of Civil Procedure allow broad discovery. Micro Motion, Inc. v. Kane Steel Co., 894 F.2d 1318, 1322 (Fed. Cir. 1990). However, a right to discovery has limits. Id. Where a non-party objects to discovery requests served upon it, the Rules provide the non-party several methods to protect itself including moving to quash the subpoena, moving for a protective order, or merely objecting to the production of documents and things pursuant to Fed. R. Civ. P. 45. Id. at 1323. Indeed, objection may come in the form of an opposition to a motion to compel. United States v. Star Sci., 205 F. Supp. 2d 482, 484 (D. Md. 2002). Regardless of the method used, the substantive considerations invoked by such objection to deny "a party discovery are generally the same and may be gleaned from Rule 26(b), (c) and (g)." Micro Motion, Inc., 894 F.2d at 1323. As the Micro Motion Court stated:

> Discovery may not be had regarding a matter which is not "relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). *Even if relevant*, discovery is not permitted where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information. Fed. R. Civ. P. 26(b)(1); American Standard, Inc. v. Pfizer Inc., 828 F.2d 734, 739-42 (Fed. Cir. 1987). Rule 26(g) specifically requires that the party or his attorney seeking discovery must *certify* that he has made a "reasonable inquiry" that the request is warranted. This "reasonable inquiry" is also imposed by Rule 11. See Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules -- 1983 Amendment ("Discovery motions, however, fall within the ambit of Rule 11."); see also Apex Oil Co. v. Belcher Co., 855 F.2d 1009, 1015 (2d Cir. 1988) (noting that Rule 26(g) "imposes a more stringent certification requirement than Rule 11" because a discovery request usually pertains to more specific subject matter than that covered under Rule 11).

Id.; see also Insulate Am. v. Masco Corp., 227 F.R.D. 427, 432 (D. N.C. 2005).

II. SUBPOENA NOT CALCULATED TO OBTAIN RELEVANT EVIDENCE

Plaintiff's Motion to Compel must be denied because the scope of the information sought is overbroad and not calculated to obtain relevant evidence. Indeed, Plaintiff cannot demonstrate the relevance of the discovery she demands of Lodge 35.

A. Relevance Standard

The standards imposed by Rule 26 of the Federal Rules of Civil Procedure govern discovery sought from a non-party pursuant to a subpoena. See Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed. Cir. 1993); Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw, 211 F.R.D. 658, 662 (D. Kan. 2003). Rule 26 of the Federal Rules of Civil Procedure provides that discovery may be obtained regarding "any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26. "Relevance" is further defined by the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In other words, "does the item of evidence tend to prove the matter sought to be proved?" Id. Comm. As this Court has elsewhere explained, "the commentary to the 2000 amendments to Fed. R. Civ. P. 26 admonishes courts to 'focus on the actual claims and defenses involved in the action in determining relevance.'" United Oil Co. v. Parts Assocs., 227 F.R.D. 404, 409 (D. Md. 2005). As for burdens, a party seeking discovery of information has the initial burden to demonstrate relevance. Id. Upon such an initial showing, the Party opposing discovery then has the burden to demonstrate irrelevance. Id.

B. First Numbered Demand Seeks Irrelevant Information

The first numbered demand of the Subpoena demands *any and all* log files pertaining to "any and all officer accessible bulletin board(s); and/or blog site(s); and/or online message board(s); and or website(s) maintained and/or hosted and/or provided by the F.o.P. Lodge 35 . . . ." Plaintiff does not specifically identify the bulletin board, blog site, or online message board she believes applicable to her suit against the MNCPP. Indeed, she does not identify in the Subpoena "the [Lodge 35] web site in question." Pl.'s Mot. Compel, p. 4. If Plaintiff has concerns with a particular site or board, she should so specify in her demand. To the extent she seeks information related to sites other than the "web site in question," the request seeks irrelevant information and is clearly overbroad. Further, Plaintiff seeks "log files" for the last five (5) years, despite the fact that the events giving rise to her claims occurred in 2005 – just one year ago. Plaintiff clearly exceeds any temporal relevance.

Additionally, Plaintiff does not identify what information she seeks from the "log files." In fact, Plaintiff fails to define the term "log files." As such, Lodge 35 cannot determine what "log files" Plaintiff seeks. Without this knowledge, Lodge 35 cannot assess what information could or would be contained in the "log files" sought by Plaintiff that may give rise to privileges. For example, the "log files" could contain proprietary and confidential information completely unrelated to messages or users of whatever site and board concerns Plaintiff Diaz. As such, the information would be both privileged and irrelevant. Also, the "log files" could include information relating to those individuals who merely accessed, read, or viewed a Lodge 35 forum. This information would also be privileged, protected by the First Amendment, and irrelevant. See Reno v. ACLU, 521 U.S. 844, 874 (1997) (invalidating provisions of law that "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another"); Board of Educ., Island Trees Union Free

Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866-67 (1982) ("[W]e have held that in a variety of contexts the Constitution protects the right to receive information and ideas . . . [which] follows ineluctably from the sender's First Amendment right to send them . . . More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom") (internal quotes and citation omitted); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well-established that the Constitution protects the right to receive information and ideas.") (quoting Martin v. City of Struthers, 319 U.S. 141, 143 (1943)); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("[T]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."); United States v. Rumley, 345 U.S. 41, 57 (1953) (Douglas, J., concurring) ("Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears . . . The purchase of a book or pamplet today may result in a subpoena tomorrow.").

Plaintiff Diaz also specifies that the log files "shall include any and all 'aliases' 'blog i.d.'s' and/or content." By such specification, Plaintiff seeks all aliases despite the fact that many, if not most all, aliases will be associated with content completely irrelevant to the "claims or defenses" of the underlying litigation. Similarly, Plaintiff does not limit her demand to *content* relevant to the "claims or defenses" of the underlying litigation. For these reasons, Plaintiff's first numbered demand seeks wholly irrelevant information.

C. Second Numbered Demand Seeks Irrelevant Information

The second numbered demand in the Subpoena fails for similar reasons. It seeks "any and all Reports from Web Traffic Application Tracking Software" pertaining to any and all Lodge 35 boards or

sites. Like the first demand, Plaintiff does not specify "the [Lodge 35] web site in question." Plaintiff does not specify what information she seeks in the reports. In fact, she does not specify any information whatsoever. And, like the first numbered demand, the second requires reports for the past five (5) years. For these reasons, Plaintiff's second numbered demand also seeks wholly irrelevant information.

D. Third Numbered Demand Seeks Irrelevant Information

The third numbered demand seeks reports from any and all software pertaining to any and all Lodge 35 boards or sites for the past five years that recorded (a) "who wrote what"; (b) when any such posting(s) was/were made; (c) "any and all alias(es)"; and "any and all IP address(es) and/or conten[t] posted." As such, it suffers the same fatal flaws as the first two demands. Additionally, by seeking all content for the last five (5) years, Plaintiff Diaz again seeks information for content that cannot be relevant to the claims and defenses in the underlying litigation. Indeed, the content will either have been published long before the incidents giving rise to Plaintiff Diaz' claims against the MNCPP or the content will have nothing to do with any of the claims or defenses in the underlying litigation. For these reasons, Plaintiff's third numbered demand also seeks wholly irrelevant information.

E. Plaintiff Fails to Articulate Relevancy in Her Motion to Compel

Just as Plaintiff's Subpoena fails to meet Rule 26 relevancy requirements, Plaintiff's Motion to Compel fails to articulate any relevancy of the information demanded of Lodge 35. See generally Pl.'s Mot. Compel. Although Plaintiff references an email from Lt. Brian Smith of the MNCPP which stated that Defendant DeBruhl's husband contacted "PGPD union shop stewards," this has nothing to do with Lodge 35 or its members. In fact, it has nothing to do with the Montgomery County Police Department at all. Pl.'s Mot. Compel, pp. 2, 4. "PGPD" represents an acronym for the *Prince George's Police Department – a completely unrelated entity*. Consequently, the email does not suggest the involvement

of Lodge 35, its members, or its shop stewards. Pl.'s Mot. Compel, Ex. 2. Indeed, it does not suggest or even hint that defendant officers accessed or utilized any Lodge 35 communications forum.

Additionally, the Plaintiff contends she seeks information "that will trace racially/ethnically derogatory postings made by Montgomery County, and possibly other police officers . . . ." Pl.'s Mot. Compel., p. 4. Clearly, any statements made by Montgomery County police officers, derogatory or not, cannot assist the Plaintiff in her claims (Counts V and VIII) against the defendant MNCPP police officers or the MNCPP for "the existence of a pattern and practice of departmental wrongdoing in selecting, managing and maintaining, *inter alia*, racist/ethnically biased [*MNCPP*] police officers." Pl.'s Mot. Compel, p. 4. Consequently, her search for statements made by Montgomery County police officers or any officers other than MNCPP officers has no relevance to her claims.

At the same time, Plaintiff also refers to individuals who are not members of Lodge 35 having accessed the Lodge 35 "web site in question." Id. Plaintiff speculates, without any evidence whatsoever, that these individuals could have been MNCPP officers. Id. No one has ever suggested that the "Non-members" who may have accessed the Lodge 35 "web site in question" are police officers or, in particular, police officers from outside the Montgomery County Police Department. Consequently, the fact that some "Non-members" may have accessed the "web site in question" does not give rise to a reasonable conclusion that they were MNCPP officers, let alone the defendants. Plaintiff only reaches this conclusion through an inquiry based on guesswork and speculation. This does not suffice to create relevance or provide grounds for her Subpoena. See Micro Motion, Inc., 894 F.2d at 1326 ("requested information is not relevant to 'subject matter involved' in the pending action if the inquiry is based on the party's mere suspicion or speculation."). Rule 26(b)(1) has never been construed to justify "wholly speculative discovery." Id., n. 7. As this Circuit has made clear, the discovery process should not

become a "fishing expedition." Cohn v. Bond, 953 F.2d 154, 159 (4th Cir. 1991); see also Morrow v. Farrell, 187 F. Supp. 2d 548, 551 (D. Md. 2002) (holding that a request for discovery will not be granted if the party merely wishes to conduct a "fishing expedition" in search of evidence that may be helpful).

As the information sought by the Subpoena is irrelevant, overbroad, and based solely on the guesswork and speculation of Plaintiff (or her counsel), the Subpoena should not be enforced and, therefore, the Motion to Compel should be denied.[2] See Fed. R. Civ. P. 26. Therefore, this court must deny Plaintiff's Motion to Compel and quash the Plaintiff's Subpoena. See id.; Fed. R. Evid. 401; United Oil Co., 227 F.R.D. at 409; Micro Motion, Inc., 894 F.2d at 1323, 1326. Cohn, 953 F.2d at 159; see also Morrow, 187 F. Supp. 2d at 551.

III. PLAINTIFF HAS NO NEED FOR DOCUMENTS REQUESTED

Alternatively, Plaintiff's Motion to Compel must be denied because she has not demonstrated a need for the information requested in her Subpoena. Plaintiff does not explain how documents from Lodge 35, a union of some individual officers within the non-party Montgomery County Police Department, can lend any evidence to how the Defendant MNCPP selected, managed, and maintained MNCPP police officers or whether defendant MNCPP Officer DeBruhl assaulted and wrongly arrested Plaintiff. Pl.'s Mot. Compel, p. 4. As explained above, *supra* II, Plaintiff's demand amounts to nothing more than a "fishing expedition" based on guesswork and speculation that cannot support compelling Lodge 35 to produce the information requested. See Cohn, 953 F.2d at 159; Morrow, 187 F. Supp. 2d at 551; Micro Motion, Inc., 894 F.2d at 1323, 1326. As the Plaintiff has not demonstrated a need for the documents requested but for a "fishing expedition," the Plaintiff's Motion to Compel must be denied

[2] Even under the "good cause" standard, Plaintiff's Demands of Lodge 35 cannot be found relevant to the subject matter involved in the underlying litigation.

and the Plaintiff's Subpoena quashed. See Micro Motion, Inc., 894 F.2d at 1322 ("discovery is not permitted where no need is shown" and citing Fed. R. Civ. P. 26).

IV. THE HARM IN DISCLOSING INFORMATION PROTECTED BY FIRST AMENDMENT AND MARYLAND DECLARATION OF RIGHTS OUTWEIGHS PLAINTIFF'S NON-EXISTENT NEED FOR COMPLIANCE

Alternatively, Plaintiff's Motion to Compel must be denied because the harm in compelling disclosure of information protected by the First Amendment and the Maryland Declaration of Rights outweighs the Plaintiff's non-existent need for the information she seeks. Plaintiff seeks information that will identify persons who anonymously posted communications on the Lodge 35 Webboard; will associate these individuals with their specific anonymous communications; and, will disclose their anonymous association with Lodge 35. Consequently, compliance with the subpoena and production of the requested information would violate the individuals' constitutional rights to speak and associate anonymously guaranteed by the First Amendment and the Maryland Declaration of Rights.[3] Indeed, compliance and production would also chill further expressive activity, particulary participation in constitutionally protected speech and association.[4] As the Subpoena invokes state action and affects fundamental rights guaranteed under the First Amendment and the Maryland Declaration of Rights, limitations must be placed upon the exercise of the subpoena power sought by Plaintiff. Doe v. 2themart.com, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001). These fundamental rights include, at a

[3] As the Maryland Court of Appeals has addressed rights guaranteed by Article 40 of the Maryland Declaration of Rights and the First Amendment of the Constitution together as a single issue, Lubin v. Agora, Inc., 389 Md. 1, 17 n.8 (Md. 2005), Lodge 35's analysis under the First Amendment of the United States Constitution applies equally to the Maryland Declaration of Rights.

[4] Internet Service Providers have standing to assert and preserve the First Amendment rights and confidentiality of their anonymous users. See In re Subpoena Duces Tecum to America Online, Inc., 2000 Va. Cir. LEXIS 220, 52 Va. Cir. 26 (Va. Cir. Ct. Jan. 31, 2000).

minimum, the right to free speech, free association, and privacy. Despite Plaintiff's representation to the contrary, constitutional protections and privileges do exist that bar enforcement of Plaintiff's Subpoena.

A. The Law of Forcing the Disclosure of The Identity of Anonymous Speaker

The advent of electronic communications has required courts to apply long-standing constitutional principles to new technologies and communications media. In this case, courts have long recognized that the First Amendment protects anonymous speech and associational anonymity. Courts have applied these same principles to electronic communications. Particularly, Courts have been required to apply these principles to situations where a Plaintiff seeks to discover information that would identify an anonymous speaker. Recently, the Supreme Court of Delaware issued the sole opinion from a state supreme court to address this specific issue in Doe v. Cahill, 884 A.2d 451 (Del. 2005). Lodge 35 urges this Court to adopt the Cahill Standard in this case.

1. Protection of Anonymous Speech

The First Amendment protects the right to speak anonymously. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 200 (1999); Talley v. California, 362 U.S. 60, 65 (1960). This principle stems from our country's long-standing ideal that freedom of speech is a fundamental right. Whether to encourage and preserve the free exchange of thought in Justice Holmes' "marketplace of ideas," Abrams v. United States, 250 U.S. 616, 630 (1919), or our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), the right to freedom of speech remains one of our most highly respected and protected rights guaranteed by the United States Constitution. This includes the right to speak anonymously. Indeed, the Supreme Court has stated that "[a]nonymity is a shield from the tyranny of the majority," that "exemplifies the purpose" of the First Amendment: "to protect unpopular individuals

from retaliation . . . at the hand of an intolerant society." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (holding that 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"). Consequently, courts must "be vigilant . . . [and] guard against undue hindrances to political conversations and the exchange of ideas." Buckley, 525 U.S. at 192. This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760-61 (N.J. Super. A.D. 2001).

2. Protection of Associational Anonymity

The First Amendment also protects individuals' freedom of association. An essential "component of this freedom is a right of associational anonymity." Lubin v. Agora, Inc., 389 Md. 1, 19 (Md. 2005) (citing NAACP v. Alabama, 357 U.S. 449 (1958)). This right may be asserted by an organization on behalf of its members because "requiring the members to be parties to the litigation would nullify that right." Id. (citing NAACP, 357 U.S. at 459). An essential principle of this right provides that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." NAACP, 357 U.S. at 462. This right extends beyond mere inquiry into "one's membership in organizations and the names of one's co-members." Lubin, 389 Md. at 21. Indeed, "[c]ompelled disclosure of an individual's decision to read, purchase, or subscribe to certain publications may invade that individual's privacy of belief and association to just as great an extent." Id. at 21-22. For these reasons, Courts must protect these rights as they do other First Amendment rights by employing a review that will ensure "a meaningful analysis and a proper balancing of the equities and rights at issue."

Dendrite Int'l, Inc., 775 A.2d at 760-61.

3. Privileged Speech Applied to Anonymous Electronic Communications

The principles protecting anonymous speech have been extended to the Internet and electronic communications. Reno, 521 U.S.at 870 (there is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet); ACLU v. Johnson, 4 F. Supp. 2d 1029 (D.N.M. 1998), aff'd, 194 F.3d 1149 (10th Cir. 1999) (First Amendment right to anonymous speech applicable to "communicating and accessing information anonymously" over the Internet). Indeed, courts have treated the Internet as a public forum in which speech is deserving of the most protection. Dendrite Int'l, Inc., 775 A.2d at 771; 2theMart.com Inc., 140 F. Supp. 2d at 1097 ("[T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded."). Similarly, an individual's right to associational anonymity should extend to the Internet and electronic communications. See Reno, 521 U.S. at 870.

As the First Amendment protects the rights to speak and associate anonymously and these rights extend to electronic communications, a subpoena seeking identifying information about individuals who communicate anonymously on the Internet must overcome a qualified privilege. Consequently, courts must consider this qualified privilege before authorizing discovery in such cases. See Sony Music Entertainment Inc. v. Does, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns."). Courts must be vigilant in doing so because plaintiffs typically rely upon mere allegations of wrongdoing at the outset of litigation that would not generally be sufficient to overcome a privilege. Indeed, a serious chilling effect on anonymous speech and association would result if Internet speakers knew they could be identified by

persons who merely allege wrongdoing, without necessarily having any intention of carrying through with actual litigation. See e.g. Seescandy.com, 185 F.R.D. at 578 ("People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."); see also 2theMart.com, 140 F. Supp. 2d at 1093 ("If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts."). For these reasons, courts have employed a variety of standards to adequately balance the interests of the anonymous speakers against the plaintiff's need for the subpoenaed information. See e.g. Cahill, 884 A.2d at 451, 460-461; 2theMart.com, 140 F. Supp. 2d 1088; Dendrite, 775 A.2d at 771; Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal.1999). These standards impose strict requirements upon plaintiffs that must be met prior to authorizing the discovery of information identifying anonymous speakers. Id.

4. Development of Standards for Disclosure of Anonymous Identities

Courts have developed these standards and strict requirements over the last several years. The standards fall across a spectrum of burdens imposed upon the plaintiff. At one end, some courts have employed merely a "good faith" standard. See In re Subpoena Duces Tecum to America Online, Inc. ("In re Subpoena AOL") 2000 Va. Cir. LEXIS 220, 52 Va. Cir. 26 (Va. Cir. Ct. Jan. 31, 2000), rev'd on other grounds, 542 S.E.2d 377 (Va. 2001). This standard provides that a court should compel disclosure of an anonymous speaker's identifying information *only*:

> (1) when the court is satisfied by the pleadings or the evidence supplied to the court (2) that the party requesting the subpoena had a legitimate, good faith basis to contend that it

> may be the victim of actionable conduct and (3) the subpoenaed identity information is centrally needed to advance the claim.

Cahill, 884 A.2d at 458 (summarizing the standard developed in In re Subpoena AOL, 2000 Va. Cir. LEXIS 220, * 8). This standard provides only minimal protection of the anonymous speaker. Id. In a slightly more stringent standard, a plaintiff must (a) "identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court"; (b) "identify all previous steps taken to locate the elusive defendant"; and (c) "establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss." Seescandy.com, 185 F.R.D. at 578-579. As to the third requirement, the Court held that "a conclusory pleading will never be sufficient to satisfy this element . . . plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act." Id. at 579. This standard has come to be referred to as the Seescandy or "motion to dismiss" standard.[5]

Because "substantial harm may come from allowing a plaintiff to compel the disclosure of an anonymous defendant's identity by simply showing that his complaint can survive a motion to dismiss or that it was filed in good faith," Cahill, 884 A.2d at 459, dissatisfaction with the these standards led to a yet more stringent "summary judgment" standard articulated in Dendrite Intl., Inc. v. Doe, 775 A.2d 756 (N.J. Super Ct. App. Div. 2001). Under this standard, a plaintiff must:

> (1) undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application. In the internet context, the plaintiff's efforts should include posting a message of notification of the discovery request to the

[5] Although not discussed at length here, additional courts that have addressed these issues include: Melvin v. Doe, 49 Pa. D&C 4th 449, 477 (Pa. 2000); La Societe Metro Cash & Carry France v. Time Warner Cable, 2003 LEXIS 3302, 36 Conn. L. Rptr. 170 (Conn. Super. Dec. 2, 2003).

> anonymous defendant on the same message board as the original allegedly defamatory posting;
>
> (2) set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech; and
>
> (3) satisfy the *prima facie* or "summary judgment standard."

Cahill, 884 A.2d at 460 (summarizing the standard developed in Dendrite, 775 A.2d at 760). Additionally, if a plaintiff succeeds in the foregoing, the trial 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 in determining whether to allow the plaintiff to properly proceed." Id. (citing Dendrite, 775 A.2d at 760-761).

5. Emergence of the Cahill Standard

In October 2005, the Delaware Supreme Court analyzed and compared the foregoing standards. The Cahill court concluded that the most effective standard would be a synthesized version of the Dendrite "summary judgment" standard. It adopted the Dendrite court's notification requirement and the *prima facie* requirement, which it concluded subsumed the remaining Dendrite requirements. Cahill, 884 A.2d at 460-461. Essentially, the Cahill Standard requires the *Plaintiff* seeking discovery of an anonymous speaker's identity to (a) "undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application" and (b) demonstrate that it would survive a summary judgment motion. Id. With respect to the notification requirement, the Court held that:

> The notification provision imposes very little burden on a . . . plaintiff while at the same time giving an anonymous defendant the opportunity to respond. When *First Amendment* interests are at stake we disfavor *ex parte* discovery requests that afford the plaintiff the important form of relief that comes from unmasking an anonymous defendant.

Id. As to the summary judgment requirement, the Court concluded that requiring a plaintiff to demonstrate it would survive a summary judgment provides the most effective balance between a plaintiff's rights and those of the anonymous speaker. Id. The Cahill opinion is the only state supreme court opinion to address these issues.

B. The Court Should Adopt the Cahill Standard

Like the foregoing courts, the issues before this Court invoke principles of free speech and association protected by the First Amendment and the Maryland Declaration of Rights. Because Plaintiff Diaz seeks identities of anonymous speakers and anonymous members of a union organization, the Subpoena it employs to obtain such information is subject to a qualified privilege. Consequently, the Court must ensure that Plaintiff Diaz can meet certain requirements before permitting the discovery sought. See Sony Music Entertainment, 326 F. Supp. 2d at 565. Indeed, this Court should follow the practice of other state and federal courts and adopt a multi-factor balancing test which imposes a demonstrative burden upon Plaintiff prior to permitting her to pursue discovery of information tending to identify anonymous individuals who have done nothing more than communicate and associate anonymously online. See e.g., Cahill, 884 A.2d 451; 2theMart.com, 140 F. Supp. 2d 1088; Dendrite, 775 A.2d at 771; Seescandy.com, 185 F.R.D. at 578.

1. Defendants versus Non-Parties

In Cahill and most cases involving these issues, the discovery at issue sought information about *defendants* or *potential defendants* who had allegedly committed an actionable act. See Cahill, 884 A.2d at 460; Dendrite, 775 A.2d at 760-761; Seescandy, 185 F.R.D. at 580. Here, in contrast, the Plaintiff seeks identifying information about a large class of *non-party individuals* who have not engaged in any

alleged actionable act.[6] Consequently, the standard to be applied to discovery targeting information about anonymous, non-party individuals must be *at least as stringent* as the standard applicable to discovery targeting information about anonymous defendants. See 2themart.com, 140 F. Supp. 2d at 1095 (holding that "[t]he standard for disclosing the identity of a non-party *witness* must be higher than that articulated" in cases involving discovery seeking to disclose the identity of defendants or potential defendants). Otherwise, a plaintiff would have less of a burden in obtaining information about individuals completely unrelated to her litigation than in obtaining information about the actual defendants. Such a result would be illogical and permit an individual to obtain an anonymous speaker's identity merely because he associated with an organization or may have communicated in the same forum as that of the real defendant. Such a result cannot be. Id.

Because Cahill is the only state supreme court decision to address these issues; provides synthesized, straightforward requirements; and best balances the rights of a plaintiff against the rights of anonymous defendants, this Court should adopt the Cahill Standard. This Court should first adopt the Cahill Standard for determining when a trial court should compel the disclosure of information tending to identify anonymous speakers and anonymous members of organizations who also happen to be defendants in the underlying litigation.

2. Application of Cahill to Non-Parties

After adopting the Cahill Standard for discovery of identifying information about *defendants*, the Court should then adopt a standard no less stringent than Cahill for situations involving discovery of identifying information about anonymous individuals who *are not* parties to the underlying litigation.

[6] Although the Plaintiff will likely argue that she seeks to "fish" for information that *might* relate to the defendants, she has not identified any communications that could possibly be associated with the defendants. Indeed, she has not produced any evidence linking the "Beaner Go Home Comment" to any defendant. Moreover, the scope of her subpoena implicates the rights of individuals who will not be defendants or witnesses in the underlying litigation.

See 2themart.com, 140 F. Supp. 2d at 1095. One obvious approach to this situation, which Lodge 35 recommends, would be the adoption of the Cahill Standard. As to the first Cahill requirement, this Court should require the Plaintiff to demonstrate that she has made efforts to notify the anonymous posters that they are the subject of a subpoena; that she afforded the anonymous posters "a reasonable opportunity to file and serve opposition to the discovery request" before proceeding further; and, that she posted a message notifying the anonymous posters of the litigation and subpoena on the same message board at issue. See Cahill, 884 A.2d at 460-461.

As to the second Cahill requirement, that the Plaintiff demonstrate she would survive summary judgment, it remains applicable albeit in a slightly elaborated form. The second Cahill requirement arose from the Dendrite requirement that a "plaintiff must produce sufficient evidence supporting each element of its cause of action, on a *prima facie* basis, prior to a court ordering the disclosure of" identifying information. Dendrite, 775 A.2d at 760. It also incorporated the trial court's need to balance the "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 [poster's] identity to allow the plaintiff to properly proceed." Id. at 761. If a particular defendant happened to also be a Lodge 35 member, the Plaintiff would need to produce sufficient evidence to associate the objectionable communications *specifically* with the defendant-member before being able to obtain disclosure of identifying information. Applied to the instant case, this Court should require the Plaintiff to demonstrate sufficient evidence to *specifically* associate the non-party anonymous posters and their communications with the applicable claims of the underlying litigation and demonstrate the necessity for the disclosure to allow her claims to properly proceed. In essence, the Plaintiff must demonstrate the presence of sufficient evidence to convince the Court that she would survive summary judgment on the applicability of the

anonymous posters to the applicable claims.

3. *Alternative Standards – 2themart.com and Cahill-2themart.com*

Alternatively, if the Court is disinclined to adopt the Cahill Standard, this Court could adopt the standard articulated in 2themart.com. In addressing when to compel disclosure of information related to *non-party witnesses*, the 2themart.com Court held that a trial court must first determine that:

> (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

2themart.com, 140 F. Supp. 2d 1088. Although somewhat less stringent than the Cahill standard, it surpasses the weak "good faith" and "motion to dismiss" standards.

Alternatively, the Court could supplement the 2themart.com Standard with an additional element emanating from the Cahill Standard. Specifically, this Court could require the Plaintiff to demonstrate the presence of sufficient evidence to convince the Court that a question of fact exists on the applicability of the anonymous posters and their communications to the applicable claims or defenses in the underlying litigation. This would be in addition to the existing 2themart.com requirements. In doing so, the Court can impose a standard that employs the applicability of 2themart.com to non-parties and the evidentiary burden of Cahill to ensure protection of the anonymous individuals' privileges and rights.

C. Plaintiff Cannot Meet the Cahill, 2themart.com, or Cahill-2themart.com Standards

Whether under the Cahill, the 2themart.com, or the Cahill-2themart.com standards, the Plaintiff cannot meet her burden and, consequently, her Motion to Compel must be denied and her Subpoena quashed.

1. Plaintiff Cannot Meet the Burden of the Cahill Standard

First, Plaintiff Diaz has made no demonstration that she has made reasonable efforts to inform the individuals whose identities she seeks about the litigation and her discovery efforts. See generally Pl.'s Mot. Compel. As such, Plaintiff Diaz has failed to meet the first requirement under Cahill. See Cahill, 884 A.2d at 460-461. As for the second Cahill requirement, Plaintiff has not demonstrated *any* evidence to associate the non-party anonymous individuals and their communications with the applicable claims (Counts V and VIII) of the underlying litigation.[7] She has brought no claims against any of the anonymous posters at issue. Moreover, the Plaintiff has *no evidence* linking *any* communications on the Lodge 35 Webboard with any of the Defendants. In essence, she has not submitted any, much less sufficient, evidence to demonstrate that a question of fact exists on the applicability of the anonymous posters to the applicable claims. This simply cannot suffice. See In re Petroleum Prod. Antitrust Litig., 680 F.2d 5, 8 (2d Cir. 1982) (improper to compel disclosure of the names of sources that bear "at most a tenuous and speculative relationship" to plaintiff's claims); Richards of Rockford v. Pacific Gas & Electric Co., 71 F.R.D. 388, 390-391 (N.D. Cal. 1976) (barring disclosure of identities of individuals whom a professor interviewed where there was "absolutely no evidence" that the individuals had defamed plaintiff). Additionally, the Plaintiff has not demonstrated that disclosure is necessary to allow her claims to properly proceed. See *supra* Section III. Compared with the definite privileges and rights emanating from the First Amendment and Maryland Declaration of Rights, the balance clearly weighs against compelling disclosure. As such, Plaintiff Diaz cannot meet the Cahill Standard. Thus, the Motion to Compel must be denied and the Plaintiff's Subpoena quashed.

[7] Although Plaintiff refers only to Counts V and VIII in her Motion to Compel, the absence of evidence applies to all of her Counts.

See Cahill, 884 A.2d at 460-461.

2. Plaintiff Cannot Meet the Burden of the 2themart.com Standard

Similarly, Plaintiff cannot meet the 2themart.com Standard. The subpoena was not issued in good faith and is being used for the improper purpose of a "fishing expedition." As discussed throughout, the Plaintiff seeks the information from Lodge 35 based upon mere guesswork and speculation. This does not justify violating First Amendment rights. Cervantes v. Time, 464 F.2d 986, 993-94 (8th Cir. 1972) ("Mere speculation and conjecture about the fruits of such examination will not suffice"); Branzburg v. Hayes, 408 U.S. 665, 680-681 (1972) (grand jury subpoena that causes "unnecessary" impact on First Amendment rights should not be enforced). Further, the information sought is not relevant or related to a core claim or defense. See *supra* Section II. Moreover, the identifying information is not directly and materially relevant to *any* claim or defense.[8] Id. Again, violation of First Amendment rights is not justified in such circumstances. Id.; In re Petroleum Prod. Antitrust Litig., 680 F.2d at 8; Richards of Rockford, 71 F.R.D. at 390-391. And, information sufficient to establish or to disprove the applicable claims or defenses is available from other sources – particularly, the Defendants themselves. Indeed, the Plaintiff could submit discovery requests to the individual defendants seeking production of any and all electronic postings published anonymously or not. She could subpoena the Montgomery County Police Department to produce any Lodge 35 web site records it has. And yet, Plaintiff does not seek the foregoing information from the Defendants or the Montgomery County Police Department. Rather, Plaintiff seeks the foregoing information from a non-party corporation distinctly separate from the Montgomery County Police Department and MNCPP. Thus, the Plaintiff cannot meet the 2themart.com Standard. See 2themart.com, 140 F. Supp. 2d at 1088.

[8] For these reasons, Lodge 35 notes that Plaintiff would not be able to meet the less stringent standards articulated in AOL and Seescandy. See In re Subpoena AOL, 2000 Va. Cir. LEXIS 220, * 8; Seescandy.com, 185 F.R.D. at 578-579.

Therefore, the Motion to Compel must be denied and the Plaintiff's Subpoena quashed. See id.

3. Plaintiff Cannot Meet the 2themart.com-Cahill Standard

For the same reasons above, the Plaintiff cannot meet the requirements of the alternative 2themart.com-Cahill Standard. Thus, the Motion to Compel must be denied and the Plaintiff's Subpoena quashed. See id.; Cahill, 884 A.2d at 460-461.

V. COMPLIANCE WITH SUBPOENA WILL IMPOSE UNDUE BURDEN ON NON-PARTY FRATERNAL ORDER OF POLICE

Finally, Plaintiff's Motion must be denied because compliance with the Plaintiff's Subpoena will impose an undue burden and hardship on non-party Lodge 35. In particular, the Plaintiff's Subpoena seeks information from non-party Lodge 35 that is not calculated to lead to admissible or relevant evidence. Also, Plaintiff has failed to demonstrate a need for the information sought. For these and additional reasons, the Plaintiff's Motion must be denied and the Subpoena quashed.

A. Lodge 35 Is A Non-Party

Lodge 35's non-party status weighs in favor of denying Plaintiff's Motion to Compel and quashing Plaintiff's Subpoena. Lodge 35 is not a defendant. In fact, Lodge 35 is not, and has never been, a party to this litigation and does not possess or have access to any information or evidence whatsoever that is material to any of the claims or defenses set forth in the pleadings. See generally Compl. and Answer. While the Federal Rules of Civil Procedure anticipate discovery of non-parties, a court may consider "non-party status" in weighing the relative burdens imposed by discovery requests. Katz, 984 F.2d at 424 (Fed. Cir. 1993) (citing American Standard Inc., 828 F.2d at 738 (affirming district court's restriction of discovery where nonparty status "weigh[ed] against disclosure"); Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163, 179 (E.D.N.Y. 1988) (nonparty status significant factor in determining whether discovery is unduly burdensome), aff'd, 870 F.2d 642 (Fed. Cir. 1989); Richards of

Rockford, 71 F.R.D. at 390 (nonparty status considered in deciding motion to compel testimony and production of documents)). Considering the circumstances of this case and the irrelevance of the discovery sought by the Plaintiff, this factor weighs in favor denying Plaintiff's Motion to Compel and quashing the Plaintiff's Subpoena. See id,

B. Subpoena Seeks Irrelevant Evidence

The irrelevance of the evidence sought by Plaintiff's Subpoena weighs in favor of denying Plaintiff's Motion to Compel and quashing Plaintiff's Subpoena. In determining whether a subpoena imposes an undue burden, a court may consider the relevance, or lack thereof, of the information sought. Goodyear Tire & Rubber Co., 211 F.R.D. at 662 (citing Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 53 (S.D.N.Y. 1996)). As discussed above, the information sought by the Plaintiff's Subpoena is wholly irrelevant to the claims and defenses of the underlying litigation. See *supra* II. Consequently, this factor weighs in favor of denying Plaintiff's Motion to Compel and quashing Plaintiff's Subpoena. Id.

C. Plaintiff Has No Need for Documents Requested

Plaintiff has not demonstrated a need for the documents requested in Plaintiff's Subpoena. As demonstrated above, the Plaintiff seeks to conduct an impermissible "fishing expedition." See *supra* III; see also Cohn, 953 F.2d at159; Morrow, 187 F. Supp. 2d at 551. Consequently, the Plaintiff's Motion to Compel must be denied and the Plaintiff's Subpoena quashed. See Micro Motion, Inc., 894 F.2d at 1322 ("discovery is not permitted where no need is shown" and citing Fed. R. Civ. P. 26).

D. Additional Factors Weigh Against Subpoena

The Plaintiff's Subpoena suffers additional defects weighing against compelling disclosure. The breadth of discovery sought by Plaintiff's Subpoena is excessive. See *supra* Sections II, III. Also, it

lacks particularity. Id. For example, it does not limit the requests to the "web site in question"; does not specify a particular IP address about which it seeks information; does not specify certain search terms; does not specify the type of content; and, does not adequately define the terms it uses. Finally, the Plaintiff's Subpoena seeks information for an excessive time period in requesting documents for the past five (5) years. All of these factors weigh against compelling disclosure.

E. Subpoena Would Impose Hardship Upon Lodge 35

Compliance with the subpoena would impose undue burden, hardship, and inconvenience upon Lodge 35. Rule 45(c)(1) of the Federal Rules of Civil Procedure "requires that the attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(c)(1). This standard has been applied to discovery sought pursuant to subpoena. See Katz, 984 F.2d at 424 (Fed. Cir. 1993); Goodyear Tire, 211 F.R.D. at 662. Production of all documents related to all websites, webboards, and blog sites for the last five (5) years would be impose a significant hardship on Lodge 35. Lodge 35 employs only one full-time administrative employee who would handle such a monumental task of complying with the production request.[9] Compliance would necessarily involve the review of thousands of files which would require hundreds of hours. In effect, compliance with the Subpoena would effectively shut down operations of Lodge 35 for a substantial period of time. This would represent a substantial hardship on Lodge 35. Consequently, this factor weighs against compelling disclosure.

F. Subpoena Would Impose Undue Burden

For the foregoing reasons, the Subpoena would impose an undue burden on Lodge 35. Therefore, the Plaintiff's Motion to Compel must be denied, and the Plaintiff's Motion to Quash must be

[9] Lodge 35 could not outsource the work because of the confidential and/or privileged nature of many of its files and documents.

quashed. See Micro Motion, Inc., 894 F.2d at 1322 ("discovery is not permitted where . . . compliance would be unduly burdensome" and citing Fed. R. Civ. P. 26).

CONCLUSION

For the foregoing reasons, Lodge 35 respectfully prays for entry of an Order denying Plaintiff's Motion to Compel and quashing the subpoena served upon Lodge 35.

Dated: Chicago, Illinois
May 17, 2006

Respectfully submitted,

FRATERNAL ORDER OF POLICE
MONTGOMERY COUNTY LODGE 35, INC.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served via postage pre-paid U.S. Mail to all attorneys of record on this the ____ day of May 2006, addressed as follows:

For Plaintiff:

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