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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

DOWNEASTDEM, an individual,
Petitioner,
v.

ROBERT F. KENNEDY, JR., an individual,
Respondent.

In the Matter of the Subpoena Issued to Kos Media, LLC:

ROBERT F. KENNEDY, JR.,
Petitioner,
v.

KOS MEDIA, LLC d/b/a DAILY KOS,
Respondents.

In the Supreme Court of the State of New York, County of Westchester
Index No. 65319/2020
Order granting pre-action disclosure issued on April 16, 2021
Appeal pending:
N.Y. App. Division, Dept. 2
Nos. 2021-03700 and 2021-04476

Case No. RG21102647

RESPONDENT ROBERT F. KENNEDY JR.'S OPPOSITION TO PETITIONER DOWNEASTDEM'S PETITION AND MOTION TO QUASH SUBPOENA FOR BUSINESS RECORDS

Hearing Date: November 1, 2021
Time: 9:30 a.m.
Department: 511

Petition filed by DowneastDem on June 23, 2021; Second Petition filed by DowneastDem: August 10, 2021

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INTRODUCTION

On April 16, 2021, the New York Supreme Court, Westchester County, authorized Robert F. Kennedy, Jr. to issue a subpoena compelling Kos Media to disclose documents identifying DowneastDem, an anonymous blogger who had defamed Mr. Kennedy by falsely stating that he had "joined" Nazis at a rally in Berlin. The issue of whether Mr. Kennedy had established a *prima facie* case for defamation, thereby justifying the subpoena to disclose DowneastDem's identity, was hotly contested before the New York court over roughly six months. After considering voluminous argument from both parties, the court concluded that Mr. Kennedy's "petition alleges sufficient facts, which fairly indicate that he has a claim for defamation and is thus entitled to pre-action discovery limited to obtaining the identity of prospective defendants." (Pet. Ex. B at 3.)

Following additional litigation between Mr. Kennedy and the Daily Kos concerning the scope of the subpoena, the New York court on June 7, 2021 authorized the issuance of a subpoena in the form proposed by Mr. Kennedy ("the New York subpoena"). Pursuant to California Civil Procedure Code § 2029.350, Mr. Kennedy then issued a reciprocal subpoena here in California ("the California subpoena") incorporating the language approved by the New York court. On June 10, 2021, Mr. Kennedy served the subpoena on the Daily Kos.

All the while, DowneastDem was lying in wait. While fully aware of the New York litigation, she did not seek to intervene in any way.[1] Instead, she remained in the background, waiting until the last possible moment to make her presence known in California.

Finally, on June 23, 2021, roughly one week before the Daily Kos's deadline to respond, DowneastDem entered the picture, seeking to quash the California subpoena on a variety of grounds. In essence, DowneastDem wants to re-litigate the entire case, asking this Court to address issues as far afield as whether the New York court had personal jurisdiction over an anonymous defendant.

But the only issues requiring this Court's consideration are whether the New York subpoena was valid under New York law, and whether the California subpoena is valid under California law. Both are. The court should deny DowneastDem's motion to quash.

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[1] We use the female gender to refer to DowneastDem, because that is the gender DowneastDem's attorneys have used when referring to DowneastDem.

FACTUAL BACKGROUND

On August 29, 2020, a blogger using the pseudonym "DowneastDem" posted statements about Robert F. Kennedy, Jr. on the Daily Kos website. DowneastDem stated that Mr. Kennedy had joined neo-Nazis and spoke at a right-wing protest in Berlin organized by German neo-Nazi political groups. These statements were false: at the time, Mr. Kennedy was giving a speech *decrying* neo-Nazism at a wholly different congregation, organized by a different group, known as Querdenken (whose name means "lateral thinking").

Mr. Kennedy asked the Daily Kos and DowneastDem to take down the defamatory post, but they refused. Left with few options, Mr. Kennedy filed a petition for pre-action disclosure from the Daily Kos to obtain DowneastDem's identity, in order to bring a lawsuit through which he could prove that the blogger's statements were false. (Pet. Ex. A, ¶ 1.) The Daily Kos opposed Mr. Kennedy's petition, asserting DowneastDem's First Amendment rights and raising other objections. (Wenner Decl. ¶ 6.) DowneastDem knew of the New York litigation and even coordinated with the Daily Kos concerning a proposed settlement that would have mooted the petition. (Wenner Decl. ¶¶ 7-8.)

On April 16, 2021, the New York Supreme Court, Westchester County, held that Mr. Kennedy succeeded in stating a *prima facie* case claim for defamation against DowneastDem, and approved the issuance of a subpoena to identify the blogger ("April 16 Order"). (Pet. Ex. B.) The New York Court reasoned that, under New York law, "'a petition for pre-action discovery limited to obtaining the identity of prospective defendants should be granted where the petitioner has alleged facts fairly indicating that he or she has some cause of action.'" (*Id*. at 3, quoting *Konig v. WordPress.com* (2013) 978 N.Y.S.2d 92, 93, and citing *Toal v. Staten Is. Univ. Hosp*., (2002) 752 N.Y.S.2d 372, 374).) After reviewing arguments put forward by both parties, the court stated that Mr. Kennedy's "petition alleges sufficient facts, which fairly indicate that he has a claim for defamation and is thus entitled to pre-action discovery limited to obtaining the identity of prospective defendants." (*Id.* at 3.) That decision is now on appeal in New York. (Wenner Decl. ¶¶ 10, 12.)

On June 10, 2021, after the New York court authorized the issuance of the initial subpoena, Mr. Kennedy personally served the Daily Kos with a subpoena for the production of business records. The California subpoena, which mirrored the New York subpoena, was served under California's interstate

reciprocal discovery rules and obligated the Daily Kos to respond by June 30, 2021. (Wenner Decl., Ex. 5 (complete subpoena).)

On Wednesday, June 23, 2021, after waiting approximately seven months to intervene in the litigation, DowneastDem filed a petition to quash the California subpoena. (Wenner Decl. ¶ 14.) On filing, the Deputy Clerk for the Alameda Superior Court set an August 16, 2021 hearing date for that petition. Counsel for Mr. Kennedy and DowneastDem then met and conferred concerning a proposed briefing schedule, but they were unable to reach agreement. DowneastDem's counsel then wrote to court staff *ex parte*, and the August 16 hearing was vacated and the petition was rescheduled to be heard months later on November 1. DowneastDem subsequently filed an *ex parte* application to set a briefing schedule, including a second motion to quash in addition to the earlier-filed petition, and to modify the page lengths and briefing schedule in light of the new hearing date. (Wenner Decl., Ex. 5.) That application was misleading in several key respects: it failed to inform the Court that Mr. Kennedy would be submitting an opposition to the application; it wrongly suggested Mr. Kennedy's counsel agreed with DowneastDem that a lengthy and protracted briefing schedule was warranted, when in fact his counsel had repeatedly stated that the hearing should be held on the originally scheduled August 16 date; and finally, it suggested that DowneastDem had not already filed a motion to quash the subpoena, and that her motion would be "forthcoming." (Wenner Decl. ¶ 14; Wenner Decl., Exs. 6 (Jul. 9, 2021 opposition to *ex parte* application) and 9 (Aug. 13, 2021 Respondent's motion to strike).) In so doing, DowneastDem's *ex parte* disguised a request for permission to file a late memorandum in support of the earlier-filed petition to quash as a modification of the briefing schedule on a second, future motion.

In any case, the Court granted DowneastDem's *ex parte* application on July 7, 2021, and thus DowneastDem was required to file the "memorandum and moving papers for motion to quash" on July 23. (Wenner Decl., Exs. 5 and 7.) That day came and went, with no filing by DowneastDem. Then, on August 3—nearly a month after the Court granted her *ex parte* application—DowneastDem's counsel emailed Department 511 to request a copy of the Order adopting DowneastDem's proposed order. (Wenner Decl., Ex. 8.) DowneastDem's counsel acknowledged that the order, "according to the Court's website, was signed on July 9 [*sic*], 2021 (the July 9 order), granting Petitioner DowneastDem's ex parte application, which was filed on July 2." (*Ibid.*) Despite the clarity of the July 7 minute entry granting her

ex parte, DowneastDem's counsel claimed that the Order could "impact decisions with respect to finalizing those papers." (*Ibid*.) Setting aside that the July 7 minute entry stated the *ex parte* was granted and not that it was granted in part or with any modification, DowneastDem's counsel did not explain why they did not request a copy of it before August 3.

On August 10, 2021, DowneastDem filed a second motion to quash, this time with a supporting memorandum and declarations. On August 13, 2021, Mr. Kennedy filed a motion to strike DowneastDem's August 10 filings—the second motion to quash—as untimely under the July 7 minute order, which had granted DowneastDem's *ex parte* application seeking a July 23 deadline. The Honorable Victoria Kolakowski denied Mr. Kennedy's motion to strike without prejudice to Mr. Kennedy raising the argument in his opposition to DowneastDem's petition and motion to quash.

On July 30, 2021, Mr. Kennedy filed a petition to compel the Daily Kos to respond to the subpoena. That motion is fully-briefed, and a hearing was held on September 7 before Judge Kolakowski. Judge Kolakowski upheld her tentative ruling adjourning the hearing from September 7 to November 1, over Mr. Kennedy's objection, to coincide with the hearing on DowneastDem's petition and motion to quash.[2]

ARGUMENT

A. The Subpoena Was Properly Issued Under the Authority of a New York Court that Had Personal Jurisdiction Over the Daily Kos.

Under the California Interstate and International Depositions and Discovery Act, a California subpoena may be based on a foreign subpoena "issued under authority of a court of record of a foreign jurisdiction." (Code Civ. P. §§ 2029.200(b), 2029.350(a).) The California subpoena here was based on a New York subpoena specifically issued under the authority of a New York court. Indeed, the New York subpoena was signed by a New York judge. (Wenner Decl., Exs. 3 and 4.) DowneastDem cites section 2029.350 of the Code of Civil Procedure and contends that this Court may ignore the existence of that subpoena because the New York court "did not have personal jurisdiction of Kos Media or

[2] On September 13, 2021, Mr. Kennedy filed a peremptory challenge to Judge Kolakowski on the basis of her disclosure the September 7 hearing that she has a user name on the Daily Kos and has posted comments there since 2006, including many in direct response to posts by the owner of the Daily Kos, who submitted multiple declarations in support of the Daily Kos's opposition to Mr. Kennedy's request for pre-action disclosure.

DowneastDem." (Pet.'s Aug. 10 Mem. at 15.) DowneastDem is wrong under both California and New York law.

DowneastDem cites no California cases or any provision of the Act that provides this Court with the authority to refuse to enforce a California subpoena on the basis that the underlying subpoena—specifically authorized by and issued under the authority of a foreign court—is invalid.[3] Section 2029.350, the only California law DowneastDem cites, provides that a California attorney who "receives the original or a true and correct copy of a foreign subpoena" may issue a subpoena under California law that "incorporate[s] the terms used in the foreign subpoena." (Code Civ. P. 2029.350(a), (b).) DowneastDem does not contend that the California subpoena failed to incorporate the terms of the original New York subpoena or that the New York subpoena is not authentic.

Even if this Court were to second-guess the New York court's authority under New York law to issue the subpoena, New York law clearly permitted the issuance of the subpoena. DowneastDem first points to the Daily Kos's location in California to argue that the New York court did not have personal jurisdiction over the Daily Kos "to command it to produce documents." (Pet.'s Aug. 10 Mem. at 15.) DowneastDem is wrong and misguided.

First, the Daily Kos voluntarily appeared before the New York court to contest the subpoena and never asserted a lack of jurisdiction, thereby submitting to the court's jurisdiction, separate and apart from its contacts with New York. Not only did the Daily Kos answer and oppose the petition, the Daily Kos also filed a counterclaim and issued its own merits discovery requests of Mr. Kennedy. (Wenner Decl. ¶ 6; *Cadlerock Joint Venture, L.P. v. Kierstedt* (N.Y.App.Div. 2014) 990 N.Y.S.2d 522, 524 ["A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss."]; *Taveras v. City of New York* (N.Y.App.Div. 2013) 969 N.Y.S.2d 481, 485 ["When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court."].)

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[3] Whether there are other reasons to quash the subpoena, such as DowneastDem's First Amendment rights, discussed below, is a separate question.

Second, a petition for pre-action disclosure in New York is a discovery mechanism, and the Daily Kos, though a respondent to the discovery motion, is a third-party witness to an underlying cause of action that has not yet been filed. The case cited by DowneastDem, (*Wiseman v. American Motors Sales Corp*. (N.Y. App. Div. 1984) 103 A.D.2d 230, 235,) simply acknowledged that an out-of-state witness may be compelled to provide evidence pursuant to letters rogatory and the cooperation of the foreign court, which is precisely what happened here when Mr. Kennedy utilized the interstate discovery act to domesticate the subpoena in California. In other words, this Court is the enforcing court, and it is not necessary under *Wiseman* for the issuing court to have personal jurisdiction over a third-party witness. Mr. Kennedy is not seeking enforcement in New York.

DowneastDem next claims, inaccurately, that Mr. Kennedy's New York petition "was predicated on the theory that the Westchester County Supreme Court had personal jurisdiction over the alleged defamer," that is, DowneastDem. DowneastDem then argues that DowneastDem is not subject to personal jurisdiction in New York. (Pet.'s Aug. 10 Mem. at 15–16.) This argument is wrong because the New York petition is not predicated—and need not be predicated—on the location of an anonymous internet defendant, whose location may be anywhere in the world. The paragraph of the New York petition cited by DowneastDem concerned the basis for *subject-matter jurisdiction and venue* in New York, not the basis for personal jurisdiction over a non-party who is contemplated to be the subject of the future proceeding. (Pet.'s Jul. 23 Pet. ¶ 4.) If DowneastDem's reading of the law were correct, the only way in which a petitioner could move for pre-action disclosure of identifying information of an anonymous internet defendant whose location was unknown would be to move in every court in every jurisdiction all over the world. New York law does not contemplate such an absurd result.

As numerous courts have made clear, "the law in New York governing pre-action discovery is well settled." (*Cohen v. Google, Inc*. (N.Y.Sup.Ct. 2009) 887 N.Y.S.2d 424, 426.) A petition for pre-action discovery under New York Civil Practice Law and Rules ("CPLR") § 3102(c), limited to obtaining the identity of prospective defendants, "should be granted where the petitioner has alleged facts fairly indicating that he or she has some cause of action." (*Konig v. CSC Holdings, LLC* (N.Y.App.Div. 2013) 977 N.Y.S.2d 756, 758.) The purpose behind this statutory device is to allow petitioners to "frame a complaint and to obtain the identity of the prospective defendants." (*Stewart v. New York City Transit*

Auth. (N.Y.App.Div.1985) 492 N.Y.S.2d 459, 460.) Courts evaluate whether the petitioner can show that a cause of action exists, and that "the information sought is material and necessary to the actionable wrong." (*Cohen*, 887 N.Y.S.2d at 426.) Courts grant "requests for disclosure of the identities of anonymous internet speakers where plaintiffs [have] made a *prima facie* showing of the proposed defamation claim," (*Deer Consumer Prod., Inc. v. Little* (N.Y.Sup.Ct. 2012) 938 N.Y.S.2d 767, 782,) as that is the requirement for the use of § 3102(c). (*See Greenbaum v. Google, Inc.* (N.Y.Sup.Ct. 2007) 845 N.Y.S.2d 695, 699 [holding that § 3102(c) "may be appropriate to identify potential defendants" when the petitioner can "demonstrate that it has a meritorious cause of action"].)

The New York court's power to issue a subpoena to the Daily Kos to identify an anonymous defendant did not depend on establishing personal jurisdiction over DowneastDem. Of course, Mr. Kennedy was required to provide notice and serve the petition on the *respondent*, the Daily Kos. (*See* N.Y. C.P.L.R. § 403(a).) This is precisely what the New York court's order to show cause required. (Wenner Decl., Ex. 2 ["it is ORDERED that service of a copy of this Order to show cause . . . be made . . . on Kos Media, LLC by personal service, and shall be deemed good and sufficient service[.]"]; *see also* Connors, McKinney Practice Commentary, (2018) N.Y. C.P.L.R. § 3102 ["[The service and notice requirements under Article 4 of the CPLR are] necessary to ensure that jurisdiction is obtained over the *respondent* from whom pre-action disclosure is sought." (emphasis added)].) As mentioned above, the Daily Kos—the respondent in the special proceeding—appeared and waived any personal jurisdiction defense. DowneastDem meanwhile knew of the proceeding as early as February 2021 (*see* Wenner Decl. ¶ 8,), and could have attempted to intervene to contest the petition as an interested party but chose to wait and see what happened instead. (*Cf. Greenbaum*, 845 N.Y.S.2d at 698 [permitting anonymous internet blogger to intervene in pre-action petition against Google].)

DowneastDem cites no cases that hold that the New York court was required to establish personal jurisdiction over the anonymous defendant before it could authorize a subpoena to the Daily Kos. (Pet.'s Aug. 10 Mem. at 15–16.) DowneastDem cites cases that explicitly concern subject matter jurisdiction. (Pet.'s Aug. 10 Mem. at 15.) Both courts in *Matter of Wallace* (N.Y.App.Div. 1998) 667 N.Y.S.2d 768 and *Perez v. New York Presbyterian* (N.Y.City Civ.Ct. 2006) 811 N.Y.S.2d 914 stated that the disputes at issue there concerned whether the Surrogate Court, which is "of limited subject matter jurisdiction and

may only entertain those proceedings and exercise those powers conferred upon it by statute," (*Wallace*, 667 N.Y.S.2d at 769,) has the power to grant a specific form of relief. (*See Perez*, 811 N.Y.S.2d at 916.) But the New York Supreme Court—the court of general jurisdiction—may properly hear a defamation action and pre-action petitions for disclosures relating to the same without first establishing personal jurisdiction over the unknown defendant. (*Cf. Lemon Juice v. Twitter, Inc*. (N.Y.Sup.Ct. 2014) 997 N.Y.S.2d 669 [ordering disclosure where "the anonymous Twitter account creator's behavior constitutes an actionable tort and is not speech covered by First Amendment protection"].)[4]

Lastly, DowneastDem suggests that Mr. Kennedy's pre-action petition in New York should have disclosed that DowneastDem "is a Maine resident." (Pet.'s Aug. 10 Mem. at 15–16.) But Mr. Kennedy has no idea whether this true. And in any event, DowneastDem's residence does not deprive the New York court of subject matter jurisdiction nor determine the extent of DowneastDem's contacts with New York, which may be sufficient to subject DowneastDem to personal jurisdiction in New York. Regardless, DowneastDem's purported residence is based on the argument of her attorney, not a declaration by DowneastDem herself or even a sworn statement by her attorney. DowneastDem's counsel argues that DowneastDem's Maine residence can be inferred from hearsay evidence because her moniker purportedly "refers to coastal regions of Maine and Canada's Atlantic Provinces." (*Ibid.*) But even if DowneastDem has some connection in her life to this admittedly large, international region, that does not establish where she is subject to suit presently. DowneastDem's counsel then points to three blog posts by DowneastDem that reference Maine. (Pet.'s Aug. 10 Mem. at 16 n.2.) But DowneastDem's blog posts also reveal that she spent part of her career "at the US office of Deutsche Bank in New York City." (Wenner Decl., Ex. 10.)[5] DowneastDem very well may have been in Maine (or not) in 2019—the date of the last post DowneastDem's counsel cites—but that does not mean DowneastDem remained there through the

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[4] For the same reason, DowneastDem's references to the defamation carve-out of New York's long-arm statute permitting suits against non-domiciliaries is inapt: the purpose behind § 3102(c) is to *identify* a would-be defendant whose domiciliary of course cannot be ascertained beforehand, whether under a long-arm statute or otherwise, regardless of the extent of that defendant's contacts with New York.

[5] DowneastDem also suggests that a non-party NGO that Mr. Kennedy is affiliated with "admitted that DowneastDem is in Maine." (Pet.'s Aug. 10 Mem. at 16.) But the blog post, which was from after the petition was filed, was simply parroting the assertions made by DowneastDem's attorney. (*See* Pet. Ex. W [noting that Paul Levy contacted Mr. Kennedy's counsel to explain that he was "representing Downeast Dem, pro bono, in a bid to save Downeast Dem, presumably a Maine Democrat, from having to reveal his identity."].)

pandemic or even resided there to begin with.

The New York court determined that Mr. Kennedy met his *prima facie* burden to establish a cause of action for defamation against DowneastDem. The New York court properly authorized a subpoena to the Daily Kos, which had consented to appear before it. Nothing more was required under New York law.

B. DowneastDem Cannot Relitigate Issues Resolved in New York.

DowneastDem should be collaterally estopped from relitigating issues the Daily Kos already raised on her behalf. From the beginning, DowneastDem and the Daily Kos have coordinated to ensure the Daily Kos litigated DowneastDem's rights while DowneastDem waited on the sidelines until she could take a second shot in a different court. Even now, the Daily Kos and DowneastDem both claim to be asserting DowneastDem's rights. In New York, through the Daily Kos, with whom she is in privity, DowneastDem already made the very arguments she makes here. The New York court heard and adjudicated the issues DowneastDem is now trying to relitigate, and its decision is binding.

California courts give full faith and credit to sister-state court judgments. (*See, e.g.*, *Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1271; *see also V.L. v. E.L.* (2016) 577 U.S. 404, 407 ["A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits."].) In addition, "issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. Issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Meridian Fin. Servs., Inc. v. Phan* (2021) 67 Cal.App.5th 657, quotation marks omitted.) All of these elements are satisfied here.

First, the New York court's decision is final. Under New York law, even if a "judgment is pending on appeal, this does not deprive it of preclusive effect under New York law." (*Depasquale v. Allstate Ins. Co.* (2d Cir. 2002) 50 Fed.Appx. 475, 475–76.) And while an adjudication is not deemed final if subject to appeal under California law, California courts recognize that "the validity and effect of a foreign judgment are governed by the laws of the state in which it is rendered." (*Brinker v. Superior Court* (1991) 235 Cal.App.3d 1296, 1300 [holding that because a judgment in a New Jersey action was considered final

under New Jersey law for res judicata purposes despite pending appeal, it would be recognized as such in California]; *see also R.S. v. PacifiCare Life & Health Ins. Co.* (2011) 194 Cal.App4th 192, 197 ["when determining the preclusive effect of a sister-state judgment, California courts measure that effect under the law of the state whose court rendered the judgment"].) DowneastDem therefore cannot try to use California law to argue that the New York decision is not final, as California's own choice-of-law provisions afford New York's law concerning finality operative here, just as it does in the context of the *prima facie* showing itself.

Second, the New York court resolved the same issues that DowneastDem is now trying to litigate in California—namely, whether Mr. Kennedy satisfied his *prima facie* burden to demonstrate a defamation claim against her. She argues that her statements are not actionable, that they are opinion, that they are based on disclosed facts, and ultimately, that they are protected under the First Amendment—the very same arguments the Daily Kos raised on her behalf in the New York court earlier this year. (*Compare* Pet.'s Aug. 10. Mem. at 16–25 *with* Wenner Decl. ¶ 6.) Likewise, DowneastDem claims that Mr. Kennedy will be unable to show that her statements "were published with actual malice," Pet.'s Aug. 10 Mem. at p. 20—again, the exact issue the Daily Kos argued on her behalf and lost in New York. *See* Wenner Decl. ¶ 6; *see also* Pet. Ex. B (April 16 Order) at p. 3 ["Respondent has raised a number of factual issues and legal arguments, which may provide a defense, in whole or in part, in any future litigation. These factual issues and legal arguments, however, do not provide a basis to deny the relief sought in the petition."].) DowneastDem is now raising these same issues to have another bite at the proverbial apple in a different jurisdiction. That is precisely what the doctrine of collateral estoppel is meant to prevent. (*See Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941 ["Collateral estoppel is an equitable concept based on fundamental principles of fairness . . . [which] means that a party ordinarily may not relitigate an issue that was fully and fairly litigated on a previous occasion."].)

Third, DowneastDem is in privity with the Daily Kos. Under New York law, privity exists "when the connection between the parties [is] such that the interests of the nonparty can be said to have been represented in the prior proceeding" (*Anonymous v. New York State Just. Ctr. for the Prot. of People With Special Needs* (N.Y. App. Div. 2018) 89 N.Y.S.3d 346, 351) or when a non-party's "interests are represented by a party to the action." (*Buechel v. Bain* (2001) 766 N.E.2d 914, 920; *see also In re*

Stephiana UU. (N.Y. App. Div. 2009) 887 N.Y.S.2d 699, 703 ["Generally, to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding."]). In the New York action, the Daily Kos sought to thwart efforts to disclose DowneastDem's identity, asserting third-party standing on behalf of DowneastDem to litigate her First Amendment right to anonymity. That is the same goal DowneastDem has here, and it is hard to imagine a greater nexus of interests between two parties. The Daily Kos's interests in the New York action overlap almost entirely with DowneastDem's interests in remaining anonymous, and indeed, it is no coincidence that the two raise *identical* arguments in an effort to achieve *identical* goals in the two actions. DowneastDem even coordinated with the Daily Kos to attempt to settle the action in February 2021. (Wenner Decl. ¶¶ 7-8.) There can be no doubt that DowneastDem's interests in the New York litigation are inextricably interwoven with—because they are identical to—the positions the Daily Kos took and the arguments it made in that proceeding.

Even if any of these elements is disputed, considerations of equity militate in favor of preclusion. Collateral estoppel is an "equitable doctrine," one that is "grounded in the facts and realities of a particular litigation rather than rigid rules." (*Buechel*, *supra*, 766 N.E.2d at p. 919.) As New York courts have explained, the enumeration of [the] elements [of collateral estoppel] is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities. In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. " (*Ibid*., quotation marks omitted.) DowneastDem was on notice from the start that litigation was imminent when attorneys for Mr. Kennedy posted a demand letter on her defamatory blog post. (Wenner Decl., Ex. 1.) DowneastDem then communicated with the Daily Kos concerning the litigation and joined in the settlement proposal that the Daily Kos presented to Mr. Kennedy in February 2021. (Wenner Decl. ¶¶ 7-8.) Rather than formally intervene in the New York litigation, however, DowneastDem was content to let the Daily Kos litigate on her behalf, and then, when the Daily Kos lost, emerge in California to try to re-litigate those issues by objecting to the subpoena authorized by the New York court. Allowing her to shadow the Daily Kos in this manner would undermine the very purpose behind the doctrine of collateral estoppel. (*See California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 249 [the

doctrine "promotes judicial economy by minimizing repetitive litigation, prevents inconsistent judgments, which may undermine the integrity of the judicial system, and protects against vexatious litigation"].)

C. False Statements that Mr. Kennedy "joined neo-Nazis" at a Protest in Berlin Organized by the German "AfD party" and "neo-Nazi NPD party" Are Defamatory Statements of Fact.

DowneastDem did not simply call Mr. Kennedy names using vague, inflammatory language. DowneastDem accused Mr. Kennedy of taking a precise action that is provably false. DowneastDem stated that "Anti-Vaxxer RFK JR. joins neo-Nazis in massive Berlin 'Anti-Corona' Protest" and that the "protest was organized by right-wing extremist organizations- including the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi NPD party." (Wenner Decl., Ex. 1.) Either Mr. Kennedy joined neo-Nazis at a protest in Berlin organized by the specific groups DowneastDem identified, or he did not. Mr. Kennedy will prove at trial that he did not.

To get around these obviously factual statements, DowneastDem rewrites them to better fit her argument that the statements constitute protected opinion under the First Amendment, and so are not even *prima facie* actionable. DowneastDem claims that the statements are "opinionated writing" that merely contain "References to 'neo-Nazis' and the 'Extreme Right[.]'" (Pet.'s Aug. 10 Mem. at 16–17.) DowneastDem claims that by stating Mr. Kennedy "joined neo-Nazis" at a protest organized by German neo-Nazi political parties that she specifically identified was simply "name-calling." (*Id.* at 17 [citing *Seelig v. Infinity Broadcast. Corp.* (2002) 97 Cal.App.4th 798, 810 (*Seelig*)].) But DowneastDem's statements are not "too vague to be capable of being proven true or false," as they were in *Seelig*, cited by DowneastDem, where the defendant was accused of being a "local loser and chicken butt." (*Seelig,* 97 Cal.App.4th at 810.) DowneastDem did not call Mr. Kennedy "extremist," "racist," "anti-Semitic," or even a "neo-Nazi" in the vague way these terms were used in the cases DowneastDem cites. (*See, e.g.*, Pet.'s Aug. 10 Mem. at 17 [citing *Overhill Farms v. Lopez* (2010) 190 Cal.App.4th 1248, 1261–62 (noting that "racist" standing along is a "a word that lacks precise meaning")].) Like in *Overhill Farms*, DowneastDem "did not merely accuse [Mr. Kennedy] of being 'racist' in some abstract sense." (*Overhill Farms* 190 Cal.App.4th at 1262.) Rather, DowneastDem used "language which expressly accuses [Mr. Kennedy] of engaging in" a specific action, which in *Overhill Farms* was "racist firings." (*Ibid.* ["The assertion of racism, when viewed in that specific factual context, is not merely a hyperbolic

characterization of Overhill's black corporate heart—it represents an accusation of concrete, wrongful conduct."].)[6]

Not only does DowneastDem mischaracterize the defamatory statements themselves, DowneastDem applies the wrong law. DowneastDem incorrectly cites California law in her attempts to show that her statements are opinion. As the court held in the controlling case DowneastDem acknowledges applies here, in the context of a reciprocal subpoena brought under Cal. Civ. Proc. Code § 2029.350 and challenged in California on First Amendment grounds, a "plaintiff's *prima facie* burden must be defined and satisfied according to [the law of the issuing state]." (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1173 (hereafter *Krinksy*) [holding that Florida's law applied in California court's determination whether *prima facie* showing of defamation was met because that was where plaintiff's complaint was originally filed]). Here, the issuing state is New York, and so DowneastDem's citations to California caselaw (*see* Pet.'s Aug. 10 Mem. at 16-17) are inappropriate (though ultimately unhelpful to DowneastDem insofar as they warrant the same conclusions concerning the validity of the California subpoena that New York law does).

As mentioned above, the New York court already rejected the argument that the defamatory

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[6] A careful reading of the other cases DowneastDem cites demonstrates why DowneastDem's statements are actionable. (*See* Pet. Aug. 10 Mem. at 17 n.3.) In *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 725, which did not concern a statement about being a "fascist," as DowneastDem suggested, the word "babbler" was not used literally but as an "exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style." In *Washburn v. Wright* (1968) 261 Cal.App.2d 789, 796, "extremist organization" *could* be actionable if it "meant and were understood to mean an organization advocating obnoxious ends or the use of illegal violence and all other possible means to attain its ends," but it was not actionable in that case because the term referred to "an organization poles apart from the defendants in some undefined field of opinion, or, from the context of the whole advertisement, in the field of educational theory." In *Grutzmacher v. Chicago Sun-Times* (Ill. Cir. Sept. 28, 1994) 1994 WL 742257 at *4, the term "neo-Nazi" referred to "a wide group of people based upon those persons' views, and is not tantamount to an allegation of sympathy with Nazi Germany," as was literally the case with DowneastDem's references to German neo-Nazi political parties. In *Nelsen v. Southern Poverty Law Center*, whether the statements were actionable depended on whether they implied a course of action by the plaintiff. ((W.D. Mo., July 31, 2019, No. 4:18-00895-CV-RK) 2019 WL 12288374 at *5–6 [holding that "statements implying that Nelsen is a neo-Nazi, anti-immigrant, and a racist" "are not objectively verifiable," but holding that statements implying that Nelsen is opening a 'whites-only' or 'whites-favored' Club" were defamatory]; *see also Nat'l Rifle Assoc. of Am. v. Cuomo* (N.D.N.Y. 2018) 350 F.Supp.3d 94, 133 ["statement that the '[t]he NRA is an extremist organization' is clearly an expression of [] opinion"]; *Brimelow v. N.Y. Times Co.* (S.D.N.Y., Dec. 16, 2020) 2020 WL 7405261 at *6 [whether plaintiff was an "*open* white nationalist" was actionable, but "white nationalist" on its own "has a debatable, loose and varying meaning," quotation marks omitted].)

statements were protected opinion and held that, as a matter of New York law, the statements were actionable statements of fact. (Pet. Ex. B (April Order) at 3 ["the petition alleges sufficient facts, which fairly indicate that he has a claim for defamation and is thus entitled to pre-action discovery limited to obtaining the identity of prospective defendants."]). The New York court recognized that DowneastDem might raise factual issues at trial that provide a defense against the defamation claim, but that simply underscores why the statements present a triable question of fact. Even if this Court does not preclude DowneastDem from raising the same argument here, the New York decision is persuasive authority concerning the application of a foreign state's law on the precise question at issue here.

After mischaracterizing the defamatory statements as "name-calling" and ignoring that New York law applies, DowneastDem next likens her statements to "political opinion" that actually "did not call Kennedy anything." (Pet.'s Aug. 10 Mem. at 17–18.) But DowneastDem's tour through First Amendment jurisprudence, including caselaw establishing that derogatory terms such as "fascist" and "racist" standing alone are non-actionable, fails to engage with the context of her own statements.[7] Through them, she asserted that Mr. Kennedy *joined* a particular group and *spoke* at a particular time and place. DowneastDem claimed that Mr. Kennedy, while he was in Berlin, joined with people who openly identify as neo-Nazis at a protest that was organized by not just "extremist" groups, but by specific groups that promote anti-Semitic and Nazi ideals. These were not neo-Nazis in a vague, derogatory sense; these were literally the very groups that took up the mantle of post-World War II National Socialism in Germany[8]

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[7] DowneastDem complains that many of the cases Mr. Kennedy cited in his briefing in the New York proceeding to show that the statements were damaging are "from another era," (Pet.'s Aug. 10 Mem. at 18) presumably implying that in today's climate, alleging association with neo-Nazis would not have the same objectionable character. This argument is unpersuasive. First, the New York court deemed Mr. Kennedy's argument compelling in context, and attempting to relitigate it here is inappropriate. Second, many of the relevant cases are *not* "from another era," postdating the seminal First Amendment law DowneastDem cites. Third, it is more than reasonable to observe that "the mental climate of the times" is such that statements about cavorting with neo-Nazis is as damaging and reprehensible today as it was a few decades ago. Finally, and perhaps most importantly, DowneastDem misunderstands the significance of her defamatory statements when she writes that name-calling is protected opinion: the actionable statements are her false accusations of actions Mr. Kennedy allegedly performed, such as joining a particular group at a particular time, or giving a speech in a particular place.

[8] For example, the German Federal Constitutional Court found that the principles and behavior of the National Democratic Party of Germany (the "neo-Nazi NPD party" identified by DowneastDem) "violate human dignity (1.) and the core of the principle of democracy (2.) and show elements of a kinship with historical National Socialism (3.)." (https://www.bverfg.de/e/bs20170117_2bvb000113.html (google translate))

and stormed the Reichstag during a different protest from the one Mr. Kennedy attended.

The claim that Mr. Kennedy joined these admitted neo-Nazis at a particular location at a particular time is provably false. (*See Moyer v. Amador Valley J. Union High Sch. Dist*. (1990) 225 Cal.App.3d 720, 724 ["The dispositive question for the court is whether a reasonable factfinder could conclude that the published statements imply a provably false factual assertion."].) DowneastDem even admits the statements are provably false by arguing that the statements were in fact true. (*See* Pet.'s Aug. 10 Mem. at 19 ["The context here was supplied by the article itself, which said, truthfully, that the protest had been organized by various right-wing extremist organizations including a neo-Nazi party, known as the AfD"].) Either Mr. Kennedy joined neo-Nazis at their protest or he did not.

DowneastDem tries to downplay this plain and commonsense conclusion by observing that some dictionary definitions of the word "join" can sometimes have different meanings, some of which "simply refer to being at the same place as the same time," without connoting intentional association. (Pet.'s Aug. 10 Mem. at 19.) Here, too, she fails to apply bedrock principles of the First Amendment jurisprudence she extols. In evaluating claims concerning libel, courts examine whether the target language has "a precise meaning which is readily understood," whether it is capable of being proven true or false," and whether "considering the context in which the statements were made, readers are likely to understand the statements to be opinion rather than fact." (*Loder v. Nied*, (N.Y. App. Div. 2011) 932 N.Y.S.2d 546, 549.) DowneastDem's publication on the Kos website was not in a context in which a reasonable person would understand it to mean that Mr. Kennedy just happened to unknowingly or unintentionally be amongst neo-Nazis, or that DowneastDem was stating her opinion. Rather, the word "join," in context, indicates deliberate association to the relevant audience. (After all, what made the claims noteworthy in the first place, to DowneastDem and fellow bloggers, was the alleged choice of association, not the happenstance coincidence of certain groups of people.) To claim that saying Mr. Kennedy "joins neo-Nazis in massive protest" is somehow a statement "about other participants in the protest," (Pet.'s Aug. 10 Mem. at 19) rather than Mr. Kennedy's own conduct is not a credible construal of either the statement or its context.

D. The Doctrine of Opinion Based on Disclosed Fact Is Inapplicable Here.

DowneastDem's third argument attempting to relitigate the issue already decided in New York, that her statements are protected under the doctrine of opinion based on disclosed fact, is inapplicable here

because they are not *opinion* at all. As discussed above, DowneastDem stated that Mr. Kennedy "joined" a group of neo-Nazis at a large protest in Berlin and spoke at their rally. Mr. Kennedy either did or did not undertake these actions, and so DowneastDem's statements are factual; the doctrine of opinion based on disclosed fact simply does not come into play.

As the very caselaw DowneastDem cites expressly states, the First Amendment protects expressions that "do not imply facts capable of being proved true or false." (*Nicosia v. De Rooy* (N.D. Cal. 1999) 72 F. Supp. 2d 1093, 1101.) At the same time, "assertions of fact and statements that may imply a false assertion of fact are not protected." (*Ibid.*) The doctrine of opinion based on disclosed fact does not undercut, undermine, or in any way modify this tenet—the rule only applies when the statement at issue does *not* imply "facts capable of being proved true or false." (*Ibid*.) To cite, again, a case DowneastDem misleadingly attempts to leverage, "[t]he rationale behind [the doctrine] is straightforward: When the facts underlying *a statement of opinion* are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts." (*Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1439 [emphasis added].) As evident in this articulation of the rule, it only bears on statements of opinion, not assertions of fact. DowneastDem did not overlay her own subjective interpretation on top of some underlying facts when she reported that Mr. Kennedy had joined neo-Nazis at a protest: that is *itself* a provably false statement of fact.

DowneastDem recites a litany of other points that similarly have no bearing here. Whether the blog post in which her statements were made also suggested that she herself was in Berlin; whether her audience understood that she often comments on German politics; and whether the blog post links to other articles that readers could use to "form their own conclusions" about whether she had "drawn fair conclusions," (Pet.'s Aug. 10 Mem. at 20) are all irrelevant. DowneastDem did not make a "broad characterization," (*id.* at 19) based on sourced material; she expressed specific, factual propositions that ascribed Mr. Kennedy as having performed specific actions in a specific time and place. The doctrine of opinion based on disclosed facts is only operative when the statements at issue "proffer a hypothesis" that is "readily understood by the audience as conjecture." (*Gross v. New York Times Co.* (1993) 82 N.Y.2d

146, 154.) DowneastDem's assertions of disprovable fact do not fall under this category. (*See ibid.* [holding that statements "would be understood by the reasonable reader as assertions of fact."].) Once again, California courts hold the same. (*See, e.g.*, *Bently Rsrv. LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 428, 431, 433 [holding that statements asserting that individual undertook specific actions are "actionable assertions of fact" and that while generalized comments on the Internet that lack any specificity as to the time or place of alleged conduct may be a further signal to the reader there is no factual basis for the accusations, specifics, if given, may signal the opposite and render an Internet posting actionable"] [internal quotation marks omitted].)

DowneastDem's descriptions of Mr. Kennedy's actions are in no way opinion, and, thus, whether based on hyperlinked articles, news stories, or other purported factual sources, they are unprotected by the doctrine of opinion based on disclosed fact.[9]

E. Mr. Kennedy Met the *Prima Facie* Burden Required for the California Subpoena under Both New York and California Law.

DowneastDem's petition to quash effectively asks the Court to hold a trial now on the truth of DowneastDem's defamatory statements. (Pet.'s Aug. 10 Mem. at 20–25.) This was the same approach—rejected by the New York court—taken by the Daily Kos in opposition to Mr. Kennedy's New York petition. Indeed, the Daily Kos and DowneastDem both rely on much of the same hearsay evidence from newspapers. Like the Daily Kos, DowneastDem misapplies both New York and California law and would have the Court weigh the evidence, thereby imposing a heightened burden on Mr. Kennedy that has been explicitly rejected by California courts. Moreover, Mr. Kennedy's *prima facie* burden is defined by New York law, which he has already satisfied. But even under California law, Mr. Kennedy easily meets his burden to justify pre-action disclosure.

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[9] Even if DowneastDem's statements could in some way be interpreted as opinion, or a close call—which they cannot—that would still not be enough to protect it. New York courts have long held that merely adding a prefatory phrase such as "I believe that" to a factual statement does not make it non-actionable, protected opinion. (*See, e.g.*, *Suarez v. Angelet* (N.Y. App. Div. 2011) 935 N.Y.S.2d 599, 601.) California courts concur. (*See Issa v. Applegate* (2019) 31 Cal.App.5th 689, 702 ["a statement of opinion that implies a false assertion of fact is actionable" [quoting *McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 97, 112 ["simply couching such statements in terms of opinion does not dispel these [false, defamatory] implications because a speaker may still imply a knowledge of facts which lead to the [defamatory] conclusion"] [internal citations and quotation marks omitted].)

1. Mr. Kennedy Established that DowneastDem's Statements are Defamatory.

Applying New York law, this Court should reach the same result as the New York court. "[I]n examining the law of defamation . . . plaintiff's *prima facie* burden must be defined and satisfied" according to the law of the state where the cause of action arose. (*Krinsky,* 159 Cal.App.4th at 1173 [holding that the statements were non-actionable opinion under Florida law]; *see also St. Louis-San Francisco Ry. Co. v. Super. Ct.* (1969) 276 Cal.App.2d 762, 766 [in defamation case, holding the law of the place "where the cause of action arose must be applied"].) In this case, a lawsuit has not yet been filed. Mr. Kennedy established, however, that venue and jurisdiction for his pre-litigation petition under New York CPLR 3102(c) were proper in New York because he is a resident of Westchester County, New York, and because DowneastDem's statements were published throughout the United States and internationally, including in Westchester County. (Pet. Ex. A (N.Y. Pet.) at ¶ 4.) New York law therefore controls Mr. Kennedy's claims arising from DowneastDem's defamatory statements. (*See Tingley v. Times-Mirror Co.* (1904) 144 Cal. 205, 206 ["The liability arises where the injury occurs, and the injury in the case of libel is peculiarly at the county in which the plaintiff resides[.]"].)

New York courts regularly resolve petitions for pre-action disclosure of anonymous defendants for anticipated defamation lawsuits. Pre-action petitions often involve third-party custodians, such as the Daily Kos, that provide the internet service over which the statements were made. (*See, e.g.*, *Cohen v. Google, Inc.* (Sup. Ct. N.Y. Cty. 2009) 887 N.Y.S.2d 424; *Lemon Juice v. Twitter, Inc.* (Sup. Ct. Kings Cty. 2014) 997 N.Y.S.2d 669.) New York courts apply New York law to the *prima facie* analysis. There, "to obtain disclosure prior to commencing an action," "the applicant must show the existence of a *prima facie* cause of action." (*Toal v. Staten Island Univ. Hosp.* (2d Dep't 2002) 752 N.Y.S.2d 372, 374.) A request "limited to obtaining the identity of prospective defendants should be granted where the petitioner has alleged facts fairly indicating that he or she has some cause of action." (*Konig v. WordPress.com* (2d Dep't 2013) 978 N.Y.S.2d 92, 93; *see also* Pet. Ex. B (April 16 Order) at 3 ["Thus, a petitioner is entitled to obtain the identity of prospective defendants where a petitioner has alleged facts, which state a cause of action."].) In examining a *prima facie* case for defamation, "courts will not strain to interpret [the words used] in their mildest and most inoffensive sense to hold them nonlibelous." (*Mencher v. Chesley* (1947) 297 N.Y. 94, 99.)

As the New York court already ruled, "[Mr. Kennedy's] petition alleges sufficient facts, which fairly indicate that [he] has a claim for defamation and is thus entitled to pre-action discovery limited to obtaining the identity of prospective defendants." (Pet. Ex. B (April 16 Order) at 3.) As Mr. Kennedy established before the New York court on the pre-action petition, the statements are false because Mr. Kennedy did not "join[] neo-Nazis" at a protest in Berlin, nor did he speak at a "protest [] organized by right-wing extremist organizations, including the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi NPD party." (Pet. Ex. A.) Mr. Kennedy gave a speech specifically decrying Nazism at the Protest for Peace and Freedom in Berlin. Querdenken 711—the organizer of the protest where Mr. Kennedy spoke—is not "the AfD party," an "anti-Semitic conspiracy group," or "the neo-Nazi NPD party." Rather, it is a democratic movement that opposes all forms of fascism and extremism. (*Id*.)

Notably, while New York law plainly applies, Mr. Kennedy also meets the burden to establish a *prima facie* case under California law, which requires "evidence that a libelous statement has been made." (*Krinsky*, 159 Cal.App.4th at 1172.) *Prima facie* evidence, in turn, is "that which will support a ruling in favor of its proponent if no controverting evidence is presented. It may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences." (*Id.* at 1172, fn. 14 [internal citations omitted].)

Mr. Kennedy's assertions that DowneastDem's statements are false and defamatory are easily substantiated. He did not join neo-Nazis at a protest in Berlin. (Wenner Decl., Ex. 12.) Rather, he gave a speech at the Protest for Peace and Freedom in Berlin. And far from joining neo-Nazis, Mr. Kennedy specifically decried Nazism and totalitarianism, stating:

> I look at this crowd, and I see the opposite of Nazism. I see people who love democracy; people who want open government; people who want leaders that are not going to lie to them; people who [want] leaders who will not make up arbitrary rules and regulations to orchestrate obedience of the population.

(*Id. at* ¶ 5.) Furthermore, the Protest for Peace and Freedom that Mr. Kennedy attended was not organized by the AfD party, an anti-Semitic conspiracy group, or the neo-Nazi NPD party; it was organized by a group called Querdenken 711. (*Id. at* ¶ 6.) Querdenken 711 is a democratic movement whose name means "lateral thinking" and that opposes all forms of fascism and extremism. (Wenner Decl., Ex. 11.) These facts provide all that is needed for a reasonable inference that DowneastDem's statements are false. (*See*

Yelp Inc. v. Super. Ct. (2017) 17 Cal.App.5th 1, 19–20 [plaintiff "demonstrated a sufficient prima facie case of defamation" where it alleged facts demonstrating the defamatory statement was false and "supported those allegations in the declaration he submitted in support of his motion to compel"].)

2. The Court Should Not Weigh the Evidence on a Pre-action Petition.

In a pre-action petition for disclosure, the only question courts consider is whether the plaintiff has proffered sufficient evidence to show that a libelous statement has been made—it does *not* weigh that evidence against controverting proffers from an opposing party. Balancing of that kind—of the kind DowneastDem asks this Court to do by considering DowneastDem's evidentiary showing and determining whether DowneastDem's statements are factually true as a matter of law—is not appropriate here. Accordingly, DowneastDem's citations to hearsay in newspaper articles (or the purported "expert" opinion of a journalist that itself rests on hearsay) and claims about the ultimate truth of her statements are yet another attempt to distract this court from the only issue that is now relevant: whether Mr. Kennedy has presented *prima facie* evidence of a libelous statement.

Courts throughout the United States, including in New York, have recognized the potential tension between a plaintiff's right to employ judicial process to discover the identity of an allegedly libelous speaker, on the one hand, and a speaker's First Amendment right to remain anonymous, on the other. While, again, New York law applies, California courts have adopted the standard set out in *Krinsky*, 159 Cal.App.4th 1154, and further elaborated in *ZL Techs., Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603. In *Krinsky*, though the court resolved the petition on the basis of Florida law, the court articulated a standard under California law whereby a plaintiff must make a *prima facie* showing of the elements of libel to obtain disclosure of a defendant's identity; in *ZL Techs*, rejecting the very position argued for by DowneastDem, the court reiterated that "a further balancing should not be required where it is clear to the court that discovery of the defendant's identity is necessary to pursue the plaintiff's claim, and the plaintiff makes *a prima facie* showing that a libelous statement has been made." (*ZL Techs.*, 13 Cal.App.5th 603 at 617 [internal quotation marks omitted].)

DowneastDem, while citing *Krinsky*, fails to acknowledge that it does not require a balancing. Nor could it, as California precedent is clear that, in the context of a pre-action petition for disclosure, "the court *does not weigh evidence or resolve conflicting factual claims*." (*Briganti v. Chow* (2019) 42

Cal.App.5th 504, 509 [emphasis added] [internal quotation marks omitted] [rejecting anti-SLAPP motion and holding *prima facie* burden satisfied the basis of plaintiff's "own declaration and the declaration of her business partner" asserting the falsity of the defamatory statements].) It evaluates only whether the plaintiff has established that his claim has "minimal merit," which does not involve determining whether he has "prove[d] the specified claim to the trial court" but rather whether he has "stated and substantiated a legally sufficient claim." (*Id*. at 510) [holding that plaintiff "need only establish her claim has at least minimal merit"].) In other words, even if DowneastDem had any admissible evidence, it would be irrelevant at this stage.

In his sworn declaration, Mr. Kennedy has stated that he did not join neo-Nazis at a Berlin rally on August 29, 2021, that he that he did not speak at a right-wing protest there, and that he did not observe any neo-Nazi groups, symbols, or imagery at the place at which he was present on that day and at that time. (Wenner Decl., Ex. 12.) These facts establish that DowneastDem's statements are false. (*See Yelp* 17 Cal.App.5th 1 at 19–20 ([accepting a plaintiff's declaration that the statements were false as *prima facie* evidence of a defamation claim]].) While Mr. Kennedy does not yet have direct evidence of DowneastDem's state of mind—and therefore is not required to satisfy the actual malice standard now (*see Krinsky*, 159 Cal.App. 4th at 1171 fn.12 [*citing Doe v. Cahill*, (Del. 2005) 884 A.2d 451, 464])—he did point to DowneastDem's mischaracterization of the only news article she cited as evidence that she knowingly disregarded contrary facts. (Pet. Ex. A ¶ 8.)[10] For example, the *Der Tagesspiegel* article linked to by DowneastDem acknowledged that there were "several corona-related gatherings on this day" taking place at different times and in different places throughout Berlin, contrary to DowenastDem's assertion that there was a single protest. Mr. Kennedy thus satisfied the "minimal" burden required of him under California law (which he had already done to the court's satisfaction in New York), and he used the appropriate procedure to obtain a reciprocal subpoena in California.

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[10] Further demonstrating why DowneastDem's subjective state of mind cannot be determined until discovery, DowneastDem argues that *other* news reporting not cited in her post supports the truth of her statements. (Pet.'s Aug. 10 Mem. at 25 ["a showing of actual malice would have to be predicated on proving that the blog post was so far different from what various sources in the mainstream media were saying about the protest that DowneastDem must have known that the blog post was wrong."].) But there is no evidence in the record to suggest that DowneastDem saw any of the media sources cited in her brief other than the one article linked in the blog post, which did not state that Mr. Kennedy joined neo-Nazis as a protest organized by neo-Nazi groups.

Dissatisfied with these results, DowneastDem now seeks to relitigate the underlying issues and reframe the relevant questions for this Court by offering newspaper articles and press reports about the nature of the events in Berlin for their truth. Her very citation to these records shows that she has misunderstood the relevant law and shows that these factual disputes will need to be resolved at trial. As the court held in *Yelp*, 17 Cal.App.5th at 15, a "balancing test need not be applied in a case where the plaintiff has already demonstrated a prima facie case of defamation." Thus, whether one or more media sources stated that "there was a substantial neo-Nazi presence" in Berlin when Mr. Kenney spoke on August 29, (Pet.'s Aug. 10 Mem. at 21,) or whether Querdenken leaders allegedly issue "dog-whistle to neo-Nazis," (*id*. at 23,) do not bear on the question whether the California subpoena is valid.

Similarly, DowneastDem writes that "to win a libel suit, Kennedy must show that DowneastDem's blog post was not even 'substantially true,'" (*id.* at 24) but the question before this Court is not whether Mr. Kennedy should win his libel suit, or whether the blog post was made with actual malice. It is whether he has offered sufficient evidence for a *prima facie* showing that a libelous statement was made, such that a pre-action subpoena is valid. As multiple California courts have held, in the context of a pre-action evidentiary showing of defamation, the burden on a plaintiff seeking the identity of pseudonymous speakers in circumstances similar to these is "neither heavy nor unfamiliar," (*ZL Technologies*, 13 Cal.App5th at 634,) because it is similar to the burden under California's anti-SLAPP statute, (Code of Civil Procedure, section 425.16): the plaintiff must "make a *prima facie* showing of facts which would, if proved at trial, support a judgment in plaintiff's favor," but the court evaluates this evidence *on its own terms*, rather than weighing it against purportedly countervailing evidence. (*See ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010 [internal quotation marks omitted] ["the court cannot weigh the evidence."]; *see also Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907; *ZL Technologies*, 13 Cal.App5th at 633-34.) Accordingly, DowneastDem's fourth argument fails to provide any grounds upon which the California subpoena may be deemed invalid.

F. The Court Should Strike DowneastDem's Improper and Untimely August 10 Filings.

DowneastDem twice failed to file papers in support of her petition to quash in violation of the Rules of Court and this Court's order. *First*, DowneastDem failed to file supporting papers with her

petition as required under the Code of Civil Procedure and Rules of Court. *Second*, DowneastDem then failed to file supporting papers by the July 23 deadline that set in her subsequent *ex parte* application,[11] which the Court granted in a July 7 minute order. Instead, DowneastDem filed supporting papers on August 10, nearly seven weeks after she filed her petition on June 23, and nearly three weeks after the July 23 deadline. DowneastDem never invoked any of the available procedures to obtain a court order finding good cause for the late submission and permitting her late filings.

As Mr. Kennedy explained in his opening brief, the Act provides that a request to quash a subpoena "shall be referred to as a petition" despite other statutes that may refer to a request for the same relief as a "motion." (Civ. Proc. Code, § 2029.600(a).) The Act also required a "*petition* under Section 2029.600" to satisfy "the requirements of Section 1005 relating to notice and to filing and service of papers." (*Ibid.*, emphasis added.) Section 1005, in turn, requires "written notice" of a "motion" or "[a]ny other proceeding under this code in which notice is required," and requires that "all moving and supporting papers shall be served and filed at least 16 court days before the hearing." (Civ. Proc. Code, § 1005(a)(1), (13) and (b).) Consistent with the Code of Civil Procedure, Rule of Court 3.1112 require that "the papers filed in support of a motion" must include a "notice of hearing on the motion," the "motion itself," and a "memorandum in support of the motion." (Cal. R. Court, rule 3.1112(a).) Similarly, rule 3.1113(a) requires that a "party filing a motion," like a petition to quash or compel compliance with a subpoena under the Act, "must serve and file a supporting memorandum." Further, rule 3.1114 lists the specific types of civil motions and petitions that do *not* require contemporaneous moving papers, and a petition or a motion to quash is not one of them. (*See* Cal. R. Court, rule 3.1114(a).)

After failing to file moving papers with her petition to quash on June 23, DowneastDem obtained a second opportunity to file a motion to quash by July 23. Then, without seeking leave to file late, DowneastDem filed her moving papers on August 10. California law clearly permits this Court to strike the late papers, both for violating the Court's July 7 order and because DowneastDem failed to obtain a prior court order finding good cause and permitting the late papers. "A trial court has broad discretion

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11 DowneastDem's *ex parte* application violated Rule of Court 3.1204 by failing to state that Mr. Kennedy would appear to oppose the application (Cal. Rules of Court, rule 3.1204(a)(2)), and instead falsely implying that Mr. Kennedy's counsel agreed with a November hearing on the petition and an extended briefing schedule (*compare* Wenner Decl., Ex. _, ¶¶ 13, 16-17 *with* Wenner Decl., ¶ _.). As a result, the Court granted the application before Mr. Kennedy filed his opposition.

under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765; *see, e.g.*, *Mackey v. Bd. of Trustees of Cal. State U.* (2019) 31 Cal.App.5th 640, 657 [affirming exclusion of supporting papers inadvertently filed four days late]; *Rancho Mirage Country Club Homeowners Assn. v Hazelbaker* (2016) 2 Cal.App.5th 252, 262–263 [affirming exclusion of late-filed opposition papers where party did not seek leave for late filing]; *see also* Code Civ. Proc., § 128(a)(4) ["Every court shall have the power to . . . compel obedience to its judgments, order, and process . . . in an action or proceeding therein."]; Code Civ. Proc., § 177(2) ["Every judicial officer shall have power . . . [t]o compel obedience to his lawful orders."].)

Even if DowneastDem had sought a prior court order excusing her non-compliance with the governing law and this Court's order, and attempted to demonstrate good cause (again, she has not), when the fault for missed deadlines lies entirely within an attorney's control, California courts do not find that such mistakes are excused. (*See, e.g.*, *Henderson v. Pac. Gas & Elec. Co*. (2010) 187 Cal.App.4th 215, 232-33 [attorney negligence resulting in late-filed brief was inexcusable, and failure to timely file motion papers based on claims of internal law office mistakes did not constitute excusable inadvertence, surprise, or neglect.]; *Ambrose v. Michelin N. Am., Inc*. (2005) 134 Cal.App.4th 1350, 1354 [attorney mistake is typically "not excusable neglect" under California statute providing for relief from adverse decision]; *Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, 1036 ["alleged lack of prejudice from [attorney's] failure to publish the proper summons and his opinion that it was published correctly. . . . is not good cause. . . . A mistake of law is not sufficient in itself to support a good-cause finding" in reverse validation action]; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682 ["Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable"].)

DowneastDem failed to seek a court order permitting her late filing on August 10, and she has not shown good cause for ignoring the Court's filing deadline—nor can she, given the clarity of that deadline on both the docket and the Court website. The fault for missing it lies squarely with her, and so too should the consequences. (*See, e.g.*, *Morgan v. So. Cal. Rapid Transit Dist.* (1987) 192 Cal.App.3d 976, 983 ["A party may disagree with a court order. He may believe it wrong-headed or a waste of time or picayunish—

but he disregards it at his peril."]; *see also* Code Civ. Proc. § 128.5 [authority to impose a variety of sanctions "as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay"]; Code of Civ. Proc. § 128.7 [authority to sanction for filings that "cause unnecessary delay or needless increase in the cost of litigation"].) Mr. Kennedy is "entitled to expert the trial court to enforce [the rules]." (*Bozzi*, *supra*, 186 Cal.App.4th at p. 765.) Accordingly, the Court should refuse to consider DowneastDem's untimely August 10 filings.

G. DowneastDem is Not Entitled to Attorney's Fees

DowneastDem is not entitled to attorney's fees under California Code of Civil Procedure section 1987.2(c). That statute permits reasonable attorney's fees only if the respondent "has failed to make a *prima facie* showing of a cause of action." (*Ibid.*, emphasis added.) Mr. Kennedy's "*prima facie* burden must be defined and satisfied according to" New York law (*Krinsky*, *supra*, 159 Cal.App.4th at p. 1173), and a New York court has already determined that he made that showing.

CONCLUSION

For all the foregoing reasons, Mr. Kennedy respectfully requests that the Court deny DowneastDem's petitions to quash the California subpoena to the Daily Kos authorized by the New York court.

Dated: September 14, 2021

Respectfully submitted,

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