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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

St. Lucia Free Press, Petitioner, v. Oliver Gobat, Respondent.	California Case No: **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION TO QUASH INVALID SUBPOENA** Date: October 16, 2013 Time: 9:00 A.M. Dept: 302 - DISCOVERY Judge: Hon. Marla J. Miller

I. Introduction

In his opposition ("Opposition") to the instant petition and its Memorandum of Points and Authorities ("Memorandum") respondent Oliver Gobat ("Respondent") argues primarily that, through content posted at http://stluciafreepress.wordpress.com, petitioner ("Petitioner") defamed him. As a matter of both procedural and substantive due process, this belatedly-made claim is insufficient to justify stripping Petitioner of his anonymity. On either ground this court should deny Respondent discovery into the identity of Petitioner and award Petitioner the costs incurred in bringing this Petition to protect his constitutional privacy and free speech rights.

II. Argument with respect to the subpoena

A. As a matter of procedural due process, the subpoena must be quashed.

a. Despite the claims of Respondent, Petitioner has standing to petition for the subpoena to be quashed on procedural grounds.

In his Opposition, Respondent argues that Petitioner lacks standing to address procedural defects manifest in the subpoena, just the subpoena's substantive impact on Petitioner's free speech rights. Opposition at FN 5. However, "[t]he line between procedural and substantive law is hazy." *Erie R. Co. v. Tompkins*, 304 US 64, 92 (1938) (Reed, J., concurring). When procedural law bears on substantive rights, the difference in terms become meaningless semantics. *Guaranty Trust Co. v. York*, 326 US 99, 108-110 (1945). This petition directly bears on Petitioner's substantive rights guaranteed under the California and United States Constitutions. In addition, "[b]ecause discovery orders involve state-compelled disclosure, such disclosure is treated as a product of state action." *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Court of Appeal, Second District, 2000). For that reason, Petitioner must be able to challenge that state action on any basis by which it threatens those substantive rights.[1]

b. Even if the subpoena had been appropriately authorized by a foreign court, it would constitute a disallowed pre-litigation discovery instrument.

One of two things is true about the subpoena: either it constitutes an invalid California subpoena issued against a draft discovery order unauthorized by any foreign court or it represents a pre-litigation discovery instrument disallowed in California. In his Opposition, Respondent asserts that the order, despite its blank signature and date fields, was nonetheless authorized by the foreign court on June 12, 2013.[2] Accepting *arguendo* this attestation as true, Respondent admits that June 12 was more than two months before any litigation was commenced. According to the transcript ("Transcript") attached as Exhibit A to the Declaration of Ashley Hurst, no

[1] Furthermore, the California Code of Civil Procedure ("CCP") § 1987.1(b) makes no distinction among the types of parties who may bring an action to quash a subpoena and on what grounds.

[2] Although the legislature specifically adapted the Uniform Interstate Depositions and Discovery Act to apply to subpoenas issued under the authority of courts of other nations, the statutory history suggests the it had the expectation that subpoenas from foreign jurisdictions would appear similar to local ones. Law Review Commission Comments to CCP §§ 2029.200 and 2029.300. Its contemplated example did not address the impact of California subpoenas predicated on foreign orders that did not bear the facial hallmarks of orders as they would be recognized in this jurisdiction, such as a dated judge's signature, particularly when diligent inquiry, as occurred here, could provide no such confirmation as to their validity.

litigation had yet been filed, and none was required by the English court before allowing discovery. Transcript at 5:41-5:43; 6:1-6:2. However, the same would not be possible in California, where discovery is not permitted for purpose of "identifying those who might be made parties to an action not yet filed." CCP § 2035.010.

The reasons for this rule are significant. "Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of ex parte procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that [a] plaintiff has standing to pursue an action against [a] defendant." *Columbia Insurance Co. v. Seescandy.com et al*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). Although the court in that case was considering pre-service discovery, the same concern arises when pre-litigation discovery is at issue. In California the rules of civil procedure forbid the filing of frivolous claims and impose sanctions for violations of this rule. See CCP § 128.7. California's "anti-SLAPP" law goes even further, making litigants who abuse the judicial process by bringing unmeritorious lawsuits designed to chill speech liable for the costs of defending against them. See CCP § 425.16. These rules, together with the requirement that actual litigation be filed before discovery is launched, serve to ensure that there will be no discovery available to a litigant unless and until that litigant has committed himself to the filing of a lawsuit for which he will be then held accountable.

In this case Respondent obtained the authorization to conduct discovery before committing himself to any litigation at all. It was only when third-party witness Automattic, Inc. ("Automattic"), from whom discovery was sought, objected[3] to responding to an earlier subpoena that any sort of lawsuit was finally in any way commenced. Yet no new order was then subsequently sought; the subpoena merely reused the original June 12 pre-litigation discovery

[3] In his declaration Mr. Hurst attests that "[a] copy of [the order] was attached to the subpoena to Automattic, Inc., and no objection was raised by Automattic, Inc." Decl. of Ashley Hurst at ¶4. In fact, Automattic formally objected to the order in response to the instant subpoena, attached here as Exhibit A, and to the earlier one propounded on it in June. See Memorandum, Exhibit C.

order, thus making the California subpoena it was predicated on itself a pre-litigation discovery instrument, which is disallowed. For this reason the subpoena should be quashed.

c. Even if the subpoena were regarded as a valid discovery instrument in support of a valid pending lawsuit, the bare claim form cannot be regarded as a sufficient filing to overcome the bar on pre-litigation discovery.

In response to Automattic's objection to the first subpoena Respondent propounded upon it in June, Respondent attached a claim form to the instant subpoena, ostensibly indicating that litigation against Petitioner had begun. This claim form, however, gives no notice as to what the defamatory content at issue in the lawsuit would be and why such content might be defamatory. "The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." *Kahn v. Bower*, 232 Cal.App.3d 1599, 1612, FN. 5 (1991). All the claim form indicated was that defamatory content apparently had appeared in two articles published to the St. Lucia Free Press website. An equivalently vague document used to initiate a lawsuit in California would have been vulnerable to dismissal and to a motion to strike.

That England may have no similar pleading standard as California does not remediate the fact that all the problems incumbent with pre-litigation discovery are still manifest here: this court has no basis to evaluate whether "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." *Seescandy.com* at 581. "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." *Id.* at 578. Without any indication as to what statements Respondent claims to be potentially defamatory, this court is unable to determine whether the underlying lawsuit is frivolous and discovery therefore unwarranted. As such this court must quash the subpoena.

d. Due process prevents Respondent from belatedly trying to establish in his Opposition what his claim form did not already sufficiently allege.

The purpose of pleading standards is to put a defendant on notice as to what he is charged with so he may defend himself. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).[4] Respondent argues that the ruling in *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (2008), only requires Respondent to finally make out his prima facie case in response to a petition to quash. Opposition at FN 9. "We therefore agree with those courts that have compelled the plaintiff to make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity." *Krinsky* at 1172. But there the court was referring to the submission of *evidence* supporting the prima facie case for defamation in response to a motion to quash, not the submission of prima facie allegations that should have already been plead. In *Krinsky*, a complaint has already been filed, *id.* at 1159, as had been filed in the other cases it internally referenced. The next sentence in the *Krinsky* decision tellingly continues, "Where it is clear to the court that discovery of the defendant's identity is necessary to pursue the plaintiffs claim, the court may refuse to quash a third-party subpoena if the plaintiff succeeds in setting forth *evidence* that a libelous statement has been made." *Id.* at 1172 (emphasis added). Respondent may be correct that the instant petition gave him the opportunity to *further* support his prima facie case with actual evidence, but *Krinsky* does not give permission for him to only now first allege the elements of it, leaving Petitioner with only a handful of days and finite page count to rebut claims which should have been made long ago. Because at no point prior to filing his Opposition did Respondent even allege his prima facie case, he cannot satisfy the *Krinsky* test and for this reason the subpoena should be quashed.

e. <u>Even if Respondent would be permitted, at this late date, to make his prima facie case, he still has not.</u>

Even if this court were to allow Respondent's Opposition to now stand in as a substitute for a well-pleaded complaint, it still fails to make his prima facie case. The Opposition and supporting declaration from Mr. Gobat put forth many conclusory arguments asserting that

[4] While *Conley* and its progeny interpret federal pleading rules, their lessons are applicable here. Using federal law to determine whether a state court filing is proper "will encourage 'desirable uniformity in adjudication of federally created rights.'" *Bach v. County of Butte*, 147 Cal. App. 3d 554, 563 (1983) (citing *Brown v. Western R. Co. of Ala.*, 338 U.S. 294, 299 (1941)).

content on the St. Lucia Free Press website may have damaged Respondent's reputation, but in considering the sufficiency of the complaint this court must first "isolate and ignore statements in the complaint that simply offer legal labels and conclusions." *Schatz v. Republican State Leadership Committee*, 669 F. 3d 50 (1st Cir. 2012). With all that stripped away, with the exception of the word "pirate,"[5] Respondent provides no explanation or guidance to either the Petitioner or this court as to what statements were defamatory and how so.[6] He simply submits an entire article and leaves Petitioner (and this court) to guess.[7] Despite Respondent's assertion, Opposition at 14, it is not for Petitioner (or this court) to make Respondent's case for him. Therefore, because even at this late juncture Respondent has still failed to make out his prima facie case, the subpoena must be quashed.

B. <u>As a matter of substantive due process the subpoena must be quashed.</u>

a. <u>In failing to properly plead at any point, Respondent has omitted alleging critical elements necessary to sustaining his libel claim.</u>

Despite his arguments to the contrary,[8] Respondent is clearly at least a limited public figure for purposes of the content in question by virtue of him having "voluntarily inject[ed] himself" into the particular public controversy – the state of St. Lucia tourism development projects – addressed by the content in question. *See Gertz v. Robert Welch, Inc.*, 418 US 323, 351 (1974). Respondent's own declaration and supporting exhibits highlight just how visible he

[5] "[R]hetorical hyperbole," "vigorous epithet[s]," and figurative language are not considered defamatory. *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401 (1999).

[6] On page 12 of the Opposition, Respondent does take issue with the specific terms "financial[ly] defunct" and "almost bankrupt" apparently in reference to the resort. However in Paragraph 5 of Mr. Gobat's declaration he says the resort was developed by "TLL," and in Paragraph 9 that TLL entered into receivership. At least some of the resort was then controlled by the bank. Decl. of Oliver Gobat at ¶ 10. In sum, not only does Respondent fail to plead how these terms were false, by his own admission he shows how they were (at least arguably) true.

[7] In fact, not only is it unclear which sentences Respondent objects to, it remains unclear from any of Respondent's filings before any court even which *article* (or articles) Respondent objects to. For example, in the Opposition Respondent asserts, "Finally, Petitioner wrongly suggests that Respondent has a conflict of interest by acting as both a sales agent and a manager of the resort," and it cites to Paragraph 20 of Mr. Gobat's declaration. Paragraph 20(c) includes Mr. Gobat's denial as to such a suggestion, but at no point does Respondent provide any text of what Petitioner is alleged to have published making this suggestion.

[8] Respondent argues one of the "public figure" tests is whether he has achieved "pervasive fame or notoriety" *in the U.S.* Opposition at FN 11. His cited case does not support this proposition.

was in those dealings.[9] Ironically, the more he claims his reputation in the real estate development business could possibly have been harmed, the more he demonstrates the extent to which he is a public figure within that business, and the more he justifies the heightened standard he must meet to make out a defamation claim based on commentary about that business. Thus, because Respondent is a public figure, to make his prima facie case for libel he must establish that Petitioner published statements with "actual malice." *Gertz* at 335-36. Such a burden is Respondent's to prove, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 US 657, 667 (1989), but here it is hardly even suggested. Because actual malice cannot be presumed, *N.Y. Times v. Sullivan*, 376 US 254, 283-84 (1964), this court should find that Respondent failed to make his prima facie case.

Yet even if he were considered a private individual for purposes of defamation analysis, Respondent still failed to show how any statements would be actionable. In matters of public interest even private-figure plaintiffs must plead falsity to make out a claim for defamation. *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 373 (1996); *Philadelphia Newspapers, Inc. v. Hepps*, 475 US 767, 769 (1986). There is no question that the article Respondent submits, an article about The Landings real estate development, covered a matter of public concern: even the Prime Minister of the country of St. Lucia commented on the matter. See Exhibit B ("Two properties, the Landings and Smugglers, are in the hands of receivers. One can only hope that they emerge out of receivership with new owners and management as quickly as possible."). Although Respondent repeatedly insists that Petitioner published statements creating a false impression, he refuses to allege which statements might have done so. Respondent instead alleges that all the statements "taken together and read as a whole" created a false impression. Decl. of Oliver Gobat at ¶20. For reasons discussed above, however, such conclusory claims do not supplant the need to actually plead each element of the defamation claim, including that there was a statement published that was false. *See Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th

[9] Exhibit F to Mr. Gobat's declaration lists various search results for his name, including references to articles such as the one appearing in the Telegraph newspaper where he was quoted in the lede about St. Lucia real estate investment opportunities. See Exhibit C attached here.

1027, 1047 (2008). By not identifying what statement may have been false, he cannot prove its falsity and thus fails to make his prima facie case.

b. It would violate public policy to enforce the English discovery order.

Although California courts are generally inclined to allow liberal discovery, such permission is not required when justice and public policy preclude it. See *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 383 (1961). The "SPEECH Act" sets forth two grounds for refusing deference to the English court: because it is inconsistent with the First Amendment, 28 U.S.C. § 4102(a), and because "the exercise of personal jurisdiction by the foreign court [does not comport] with the due process requirements that are imposed on domestic courts by the Constitution of the United States." 28 U.S.C. § 4102(b).[10]

With regard to the latter criteria, the Transcript reveals many of the ways English courts inadequately protect those interests. There the court determined it was the proper forum to hear Respondent's claim during an *ex parte* hearing, addressing an area of law the judge himself conceded no expertise in, see Transcript at 3:32, and by deferring to Respondent's counsel's own presumptive expertise. *Id.* at 3:41; see also *id.* at 4:1-2. If the English court were correct that it had jurisdiction it would mean that anyone who spent less than 10 percent of a year in England, was a citizen of England, or who had family or business contacts in England, could bring any claim in England for any content published anywhere in the world about any topic so wholly unconnected with England simply because someone in England may have read it.[11] This court need not give credence to the English court's grant of jurisdiction and, based on the evidence, it should not. The instant subpoena should be quashed because it was issued upon the authority of a court with no jurisdiction as to this matter.

[10] Respondent argues that this statute should be discounted because it purportedly only applies to a foreign judgment. Opposition at FN10. However the June 12 order is itself a judgment, final as to its assessment of the prima facie case for defamation. See Transcript at 2:13-14. Additionally, the SPEECH Act stands as a statutory distillation of the discretion courts have long exercised in refusing to enforce actions of foreign courts inconsistent with American constitutional principles. *Trout Point Lodge* at *FN7. This court is not precluded from exercising such discretion here.

[11] The English court found there was "little doubt" "on the face of it" that jurisdiction in English courts was proper. This court, however, can see "on the face of" the single article Respondent submitted as evidence multiple bold and prominent references to St. Lucia, references to St. Lucia as "our country" (making it clear that the content was intended for a local St. Lucia audience), and no references to England whatsoever.

With respect to the second provision of the SPEECH Act, while ordinarily the rule requires the local court considering a foreign subpoena to use the law of the foreign jurisdiction, that rule applies to fellow American states who, subject to constitutional limitations, may define for themselves the law of liability for defamation. *Krinsky* at 1173. English courts, of course, are subject to no such constitutional limitations, and granting such deference to them here would green light even more forum shopping and "libel tourism" than already exists. *Trout Point Lodge, Ltd. v. Handshoe, 2013 U.S. App. LEXIS 18516* at *12-13. Respondent argues in his Opposition that he has made his prima facie case under English law. Even assuming he has, for this court to consider it a sufficient basis to grant him discovery would mean that anyone with even the most tenuous connection to England could go to England, get a pre-litigation *ex parte* discovery order, and attempt to unmask an anonymous speaker anywhere in the world, who will then be judged against a standard that gives short shrift[12] to the free speech protections enshrined for over two centuries in American jurisprudence, and be entitled to leverage CCP § 2029.300 or § 2029.350 to co-opt the California courts into giving weight to unsigned, unverifiable foreign orders ostensibly allowing him to do this. The ease by which litigants could make such an end run around the privacy and speech protections California has developed compels this court to exercise its discretion and resist such an attempt. To do otherwise would make anonymous speakers more vulnerable to internationally-foreign litigants than they are to domestically-foreign ones, where the First Amendment and other federal constitutional precepts surrounding due process already exist in these other states to temper similar attempts to chill such speech.

III. Argument with respect to the fees

A. If the subpoena is quashed, an award of fees to Petitioner is mandatory.

The instant subpoena requests personally identifying information from Automattic, a provider of an interactive computer service as defined by 47 U.S.C. § 230(f)(2), for use in an action pending in another state arising from Petitioner's exercise of free speech rights on the Internet. Respondent, as described above, has not made his prima facie showing regarding a

[12] See, e.g., *Trout Point Lodge* at *17-18.

cause of action sounding in libel. Therefore, the instant petition should be granted and – regardless of whether it is granted on procedural or substantive grounds – Petitioner should be awarded his fees pursuant to CCP § 1987.2. See Second Decl. of Catherine Gellis.

B. Even if the subpoena is not quashed, Respondent is not entitled to recover fees.

Petitioning the courts is an act explicitly protected by the First Amendment. *California Motor Transport Co. v. Trucking Unlimited*, 404 US 508, 510 (1972). It is also a necessary act one must take to preserve one's constitutional free speech and privacy rights when they are being attacked via the same courts. Such petitions are not, as Respondent would have it, a "misuse" of the courts. Opposition at 2. On the contrary, they are exactly what the courts are for: to step in and make sure these rights are protected against parties who would wish to trample them.

Respondent would only be able to recover fees if this court were to find that "the motion was made or opposed in bad faith or without substantial justification," and even then, the fee award would be discretionary. CCP § 1987.2(a). This Petition was a non-frivolous reaction to Respondent's attempts to use this court to compromise Petitioner's constitutional right to privacy and free speech. It was exactly the sort of reaction the California legislature envisioned in crafting the remedies of CCP §§ 1987.1 and 1987.2(c) and as such, even if this court were not to grant Petitioner his fees, it should not reward Respondent with his.

IV. Conclusion

For all of the aforementioned reasons, the Instant Subpoena should be quashed and costs, including attorney fees, awarded to Petitioner.

Dated: October 8, 2013

By:_____

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