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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10

11 St. Lucia Free Press,
12 Petitioner,
13 v.
14 Oliver Gobat,
15 Respondent.

California Case No:

**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

18 QUEEN'S BENCH DIVISION
19 LONDON, UK
20

21 Oliver Gobat,
22 Claimant,
23 v.
24 Persons Unknown,
25 Defendants.
26

(Claim No. HQ13D04242, Queen's Bench
Division, London, UK)

1 Petitioner DOE (hereinafter "Petitioner" or "Doe"), through Petitioner's counsel, petitions
2 to quash a foreign subpoena issued to Automattic, Inc. ("Automattic") on August 22, 2013 (the
3 "Instant Subpoena"). The Instant Subpoena, including its attached supporting documents, is
4 attached as Exhibit A to this Memorandum of Points and Authorities. This petition is brought
5 pursuant to Cal. Code of Civ. Proc. ("CCP") §§ 1987.1 and 2029.100 *et seq.* to prevent the
6 production of documents for the reasons discussed below.

7 **I. Introduction**

8 Respondent Oliver Gobat ("Respondent" or "Gobat"), a resident of the sovereign island
9 nation of St. Lucia, accuses Doe of having published defamatory statements online concerning
10 his business practices. On July 18, 2013, by and through his California-licensed counsel, Gobat
11 propounded a subpoena ("First Subpoena") upon Automattic demanding it produce:

12 "all registration data in its possession in relation to the blog at
13 <http://stluciafreepress.wordpress.com> (the "Blog") including (a) the full name registered
14 to the Blog; (b) all contact details registered to the account from which the Blog was
15 published (the "Account"), including all names, email addresses, physical addresses and
16 telephone numbers; [and] the IP login history relating to the account identifying (a) the IP
17 addresses of any computers that have access the Account; and the times and dates of all
18 such access."

19 A copy of this subpoena, including its attached supporting documents, is attached as
20 Exhibit B. On August 19, 2013, Automattic objected to this subpoena on several grounds,
21 including because it constituted pre-litigation discovery in violation of CCP § 2035.010(b). See
22 "Non-Party Automattic, Inc.'s Responses and Objections to Deposition Subpoena for Production
23 of Business Records in Action Pending Outside California" ("First Objections") attached as
24 Exhibit C.

25 Gobat then, by and through his California-licensed counsel, issued the Instant Subpoena
26 on August 22, 2013, which repeated the same production demands as in the First Subpoena.
27 Like the First Subpoena the Instant Subpoena included these discovery demands in an attached
28 document captioned "order" ("Draft Order") that bore a "Queen's Bench Listing" stamp from
June 12, 2013. See Exhibit A at pp. 5-7. The Instant Subpoena also included a document
captioned "Claim Form" ("Claim Form") that bore a "Queen's Bench Action Department" stamp
from August 22, 2013 as well as a claim number. See Exhibit A at pp. 8-9.

1 Petitioner Doe hereby petitions to quash the Instant Subpoena on the grounds that it is a
2 facially invalid attempt to violate Petitioner's constitutional right to privacy connected to the
3 exercise of Petitioner's free speech rights and consequentially also petitions for an award of
4 reasonable expenses incurred in making this petition.

5 **II. Legal Argument**

6 A. This court should quash the subpoena to Automattic because it intrudes on the
7 Constitutional right to speak anonymously.

8 a. The Instant Subpoena is not based on a valid foreign subpoena.

9 Under the Interstate and International Depositions and Discovery Act, CCP 2029.100 *et*
10 *seq.*, a party who wishes to issue a subpoena must submit a true and correct copy of a foreign
11 subpoena to the clerk of the superior court in the California county in which discovery is sought.
12 CCP § 2029.300(a). In the alternative, an active member of the California State Bar who is
13 retained by a party to an out-of-state court proceeding, and who "receives the original or a true
14 and correct copy of a foreign subpoena" may issue a subpoena. CCP § 2029.350(a). In either
15 case the subpoena must incorporate the terms of the foreign subpoena. CCP § 2029.350(b). A
16 foreign subpoena "means a subpoena issued under authority of a court of record of a foreign
17 jurisdiction." CCP § 2029.200(b). No such subpoena exists in this case.

18 The terms that both the Instant Subpoena and First Subpoena incorporate are
19 encapsulated in the attached Draft Order. Notably, however, this Draft Order was not issued
20 under the authority of any court, and thus it cannot be construed as a valid foreign subpoena.¹
21 Had it been a valid order issued by the Queen's Bench court it would have borne the signature and
22 seal of a judge. See Ministry of Justice Civil Procedure Rules ("CPR") 40.2(2), attached as
23 Exhibit D. The Draft Order attached to the Instant Subpoena includes neither.² Instead it stands
24 as a naked document drafted by Gobat's local counsel in England but reflects no authority of any

25 ¹ In fact there appears to be no record of the Queen's Bench court having issued *any* order for
26 Gobat. See Declaration of Catherine Gellis ("Declaration") at ¶ 3.

27 ² The "Queen's Bench Listing" stamp suggests the order may have been applied for but does not
28 connote that the order was granted. Compare the "Queen's Bench Listing" stamp with the
29 "Queen's Bench Action Department" stamp on the Claim Form affixed over the space for "seal."
30 In any event the Draft Order does not include a judge's signature. The space provided for it is
31 blank.

1 court or any other force of law. Without that authority no foreign subpoena exists upon which a
2 California subpoena could be issued. Therefore the Instant Subpoena must be quashed.

3 b. Even if the foreign subpoena were validly issued by the foreign court, the
4 English courts are not an appropriate venue for this claim.

5 As noted on his Claim Form, Gobat is a resident of the sovereign island nation of St.
6 Lucia attempting to sue over speech made by a St. Lucia journalist concerning St. Lucian matters
7 intended for a St. Lucian audience. These facts make it clear that filing this claim in England
8 amounts to little more than forum shopping. Moreover, for Gobat to have been issued a valid
9 order upon which a California subpoena could be predicated, Gobat would have been required to
10 satisfy an English court that it had jurisdiction over the matter, which he likely could not given
11 that the operative facts of this case have no nexus whatsoever to England or Wales. See CPR
12 6.37(3), attached as Exhibit E ("The court will not give permission unless satisfied that England
13 and Wales is the proper place in which to bring the claim.").³ Because the UK court is clearly
14 without jurisdiction, the subpoena should be quashed.

15 c. Claimant fails to make a prima facie case for defamation.

16 Even assuming the Instant Subpoena were valid, and that either the Draft Order or Claim
17 Form had been eligible for service outside of England on Automattic (which they were not), in
18 none of these documents does Gobat include sufficient allegations to sustain a cause of action for
19 defamation. In California a plaintiff seeking the disclosure of personally identifiable information
20 as defined by Civ. Code § 1798.79.8(b), which Gobat does in the Instant Subpoena, must make a
21 prima facie showing that the content in question could support a claim of defamation before
22 trumping the defendant's right to speak anonymously. *Krinsky v. Doe*, 159 Cal. App. 4th 1154,
23 1163 (Cal. App. 6th Dist. 2008). "Requiring at least that much ensures that the plaintiff is not
24 merely seeking to harass or embarrass the speaker or stifle legitimate criticism." *Id.* at 1171.

25
26 ³ Pursuant to CPR 6.36 and CPR 6.38, attached as Exhibit E, Gobat was obligated to seek the
27 court's permission before serving any documents, including both the Claim Form and Draft
28 Order itself, outside of England. The lack of any signed order suggests that no permission to
serve any document, including a subpoena, on any foreign party, including Automattic, was ever
granted by the English court.

1 Gobat has not set forth a prima facie case. To prevail on a libel claim Gobat must prove
2 that the Petitioner published a false statement about Gobat to a third party and that the false
3 statement caused injury to him. *See id.* at 1173. Additionally, in the case of a public figure,
4 which, as a businessman closely and publicly involved with highly-visible property development
5 projects on St. Lucia Gobat is, he must also prove actual malice. *See, e.g.,* *New York Times v.*
6 *Sullivan*, 376 U.S. 254, 280 (1964). These elements are his burdens to prove, *id.* at 279; *Paterno*
7 *v. Superior Court*, 163 Cal.App.4th 1342, 1349 (Cal. Ct. App. 4th Dist. 2008), but here they are
8 not even alleged. The Claim Form, the only evidence we have of any potentially pending
9 litigation over this claim, seeks to take action against whoever posted the articles "'Pirates of the
10 Landings St. Lucia: Pirate Oliver Gobat's Receivership Wreck' and 'Pirates at the Landings St.
11 Lucia: Conflicts of Sales, Marketing, and Management Interest' on the website
12 <http://stluciafreepress.wordpress.com/>" and, more vaguely, the person "sending anonymous
13 emails from the email address slufreepress@gmail.com." It includes no other allegation of what
14 specific content within these posts Gobat claims to be defamatory at all, and certainly not in any
15 way that would trump the author's right to speak anonymously or to comment on matters of
16 public concern.⁴ Gobat has also not alleged, nor is there any evidence supporting, that Petitioner
17 had reckless disregard for the truth or actual knowledge of falsity in any of Petitioner's speech.
18 On the contrary, even inferring generously from the paucity of information Gobat did provide,
19 the speech at issue – content on a blog entitled "St. Lucia Free Press" – is clearly journalistic
20 commentary about a public figure in the St. Lucia community on matters of public interest
21 involving the failure of a highly visible St. Lucian development project and its impact on the
22 public fisc. Thus the failure to make a prima facie case for defamation requires the subpoena to
23 be quashed.

24 d. Even if Gobat could make a claim for defamation under English law, such a
25 verdict would be unenforceable in California.

26 ⁴ The Claim Form also seeks "an injunction restraining the Defendant(s) whether by themselves,
27 their servants or agents or otherwise howsoever from further publishing or causing to be
28 published the same or similar allegations defamatory of the Claimant as those published," which,
if granted, would constitute impermissible prior restraint under U.S. law. *See Near v. Minnesota*,
283 U.S. 697, 733 (1931).

1 While the general rule is to evaluate the merits of a claim based on the local law of the
2 jurisdiction where the claim was brought, *Krinsky*, 159 Cal. App. 4th at 1172, it is the policy of
3 the United States not to enforce foreign orders based on law that does not recognize those free
4 speech values protected by the First Amendment. See Securing the Protection of our Enduring
5 and Established Constitutional Heritage Act (the “SPEECH Act”), codified at 28 U.S.C. § 4102
6 *et seq.* English law may offer some protections for speech as well, and by failing to seek court
7 permission before propounding discovery via the Draft Order the English court was denied an
8 opportunity to evaluate the likelihood of success of Gobat's claim in light of the free speech
9 values English law does actually recognize. However, even if Gobat had been able to obtain a
10 court-approved order, to the extent English law provides less protection for speech than U.S. law
11 does, both in terms of substance, 28 U.S.C. § 4102(a)(1), and procedure, 28 U.S.C. § 4102(b)(1),
12 the SPEECH Act and the public policy values it encompasses would prevent this court from
13 enforcing a foreign subpoena predicated on such an order. See *Trout Point Lodge, Ltd. v.*
14 *Handshoe*, 2013 WL 4766530, at *16-20 (5th Cir. Sept. 5, 2013) (interpreting the enforceability
15 of Canadian and English libel judgments under U.S. law and finding their protection for accused
16 speakers to be beneath the protections afforded by the First Amendment).

17 In the instant situation this court is being called upon to enforce a subpoena, not a final
18 order. However the distinction is without a difference: the harm to Petitioner's constitutional
19 right to privacy and to his right to speak anonymously is not contingent on Gobat prevailing in
20 Claim No. HQ HQ13D04242 in the Queen's Bench court, a claim he might well drop as quickly
21 as he has filed it. The harm to Petitioner occurs at the moment Automattic is compelled to
22 divulge Petitioner's identity. This court should not permit such a harm to Petitioner's right to
23 speak anonymously in an action so clearly misplaced, so unspecific in its allegations, so
24 calculated to harass, and so contrary to the rights of privacy and free speech enshrined in both the
25 United States and California constitutions.

26 e. The Instant Subpoena has been issued for the purpose of harassment and
27 stifling legitimate criticism.
28

1 Although Gobat eventually filed a claim form, his initial response to the news articles at
2 issue here was to pressure Petitioner's blog host into censoring Petitioner's speech and revealing
3 Petitioner's identity. His efforts to censor Petitioner immediately succeeded: Automattic first
4 disabled the articles Gobat complained about and then the entire St. Lucia Free Press website.
5 Despite having now silenced his critic he nonetheless commenced litigation, but only when it
6 became necessary in order to acquire Petitioner's identifying information. See First Objections.
7 Furthermore this second attempt to secure Petitioner's information has been rife with procedural
8 infirmities prejudicial to Petitioner's ability to defend his rights. In addition to pursuing a
9 California subpoena without the requisite foreign subpoena underpinning it, the California
10 subpoena also bore an incorrect return date, which inhibited Petitioner from finding counsel who
11 could step in on the short notice the subpoena incorrectly demanded. Once counsel was finally
12 obtained by Petitioner, Gobat denied any extensions for counsel to properly respond. See
13 Declaration at ¶ 2. While the error in date is not alone dispositive, nor was Gobat obligated to
14 give any extension, Gobat's rush to ensure he could obtain Petitioner's identity would, left,
15 unchecked, allow him to use the mere weight and threat of a California subpoena against
16 Petitioner's Internet service provider to undermine Petitioner's free speech rights, even when
17 invalid both procedurally and substantively. In light of the fact that any potentially offending
18 articles were available only for a short period of time before being taken down, and that the
19 entire blog itself remains deleted by Automattic, any potential harm that might have existed in
20 Petitioner's speech has been limited and mitigated. Gobat's tactics are designed to intimidate his
21 critics, not to get redress for any actual harm, and thus this court should quash the subpoena.

22 B. Respondent should be ordered to pay Petitioner's fees and expenses in making this
23 petition.

24 a. Recovery of fees and expenses is mandatory under California law.

25 The Instant Subpoena requests personally identifying information from Automattic, a
26 provider of an interactive computer service as defined by 47 U.S.C. § 230(f)(2), for use in an
27 action pending in another state arising from Petitioner's exercise of free speech rights on the
28 Internet. Additionally, Respondent has not and will not be able to make a prima facie showing

1 regarding a cause of action sounding in defamation, the nominal underpinning of his suit.
2 Therefore, should this petition be granted, CCP § 1987.2 provides that an award of attorneys'
3 fees and costs to Petitioner is mandatory.

4 b. Awarding fees against Respondent's counsel is appropriate because he
5 personally issued the Instant Subpoena without an appropriate foreign
6 subpoena underpinning it.

7 Because Respondent's California-licensed counsel personally issued the Instant Subpoena
8 without ensuring that it was predicated on a valid foreign subpoena, compounded with him also
9 issuing it to demand Automattic produce on a date sooner than statutorily entitled by CCP §
10 2020.410(c), it is appropriate to hold Respondent's counsel jointly and severally liable with the
11 Respondent for the costs incurred by Petitioner to make this petition.

12 **III. Conclusion**

13 For all of the aforementioned reasons, the Instant Subpoena should be quashed and costs,
14 including attorney fees, awarded according to proof as required by 1987.2(c).

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18 Dated: September 18, 2013

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21 By: _____

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