CATHERINE R. GELLIS
(SBN 251927)
Email: cathy@cgcounsel.com
PO Box. 2477
Sausalito, CA 94966
Tel: (202) 642-2849

Attorney for St. Lucia Free Press

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

St. Lucia Free Press, Petitioner, v. Oliver Gobat, Respondent.	California Case No: 13-513220 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FIRST AMENDED PETITION TO QUASH INVALID SUBPOENA** (C.C.P. §§ 2029.100 et seq., 1987.1, 1987.2) Date: January 22, 2014 Time: 9:00 A.M. Dept: 302 - DISCOVERY Judge: Hon. Marla J. Miller

I. Introduction

In October this Court ruled that Respondent Oliver Gobat ("Respondent" or "Gobat") was not entitled to violate the rights of privacy and free speech of Petitioner St. Lucia Free Press ("Petitioner") when it quashed the August 22 subpoena ("August Subpoena") issued by Gobat on Automattic, Inc. ("Automattic"), the host of Petitioner's "St. Lucia Free Press" blog, demanding Petitioner's identifying information in connection with Petitioner's authorship of two blog posts that Mr. Gobat alleged were defamatory in nature. Despite this Court's unequivocal ruling denying this discovery, Gobat has nonetheless propounded yet another subpoena on Automattic

(the "Instant Subpoena" or "November Subpoena"), attached as Exhibit F,[1] seeking the exact same identifying information about the author of the exact same content that Gobat's preceding two[2] subpoenas had targeted over the exact same vaguely-defined claim of defamation.[3]

Petitioner is therefore compelled to amend the original Petition to Quash to include the quashing of this duplicative November Subpoena and to seek additional monetary and injunctive sanctions against Gobat and his California counsel sufficient to compensate Petitioner for the entire amount Gobat has required Petitioner expend to defend Petitioner's privacy and free speech rights, as well as to deter Gobat from continuing to abuse the discovery process to harass Petitioner for the exercise of these rights, which this Court has already vindicated.

II. Legal Argument

A. The Instant Subpoena must be quashed.

i. This Court has already ruled that Respondent is not entitled to the information he seeks to unmask Petitioner.

In California the doctrine of *res judicata* gives conclusive effect to a former judgment in subsequent litigation involving the same case or controversy. *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 797 (2010). *Res judicata* can apply either as a "bar to the maintenance of a second suit between the same parties on the same cause of action," *id.*, or to preclude the re-adjudication in a second action issues that "were actually litigated and determined in the first action." *Id.* "The prerequisite elements for applying the doctrine to either an entire cause of

[1] When Petitioner's counsel received the Instant Subpoena from Automattic it was attached to three exhibits, the latter two being 114 and 63 pages of semi-legible scans. Consequently only the California-issued subpoena itself is attached herein as Exhibit F. Additional relevant excerpts from the subpoena's other supporting documentation are instead attached as separate exhibits. See Appendix A for a Table of Exhibits, all of which are incorporated herein by reference.

[2] The subpoena this court quashed in October was actually Gobat's second subpoena seeking the same information about the authorship of the same content. The first ("July Subpoena"), attached as Exhibit A, was issued on July 18, 2013. After Automattic responded with its objections, attached as Exhibit B, complaining in particular that the subpoena was not connected with commenced litigation, on August 22, 2013, Gobat issued the second subpoena, including with it a naked claim form without any pleadings, ostensibly to indicate that litigation had commenced. Automattic also objected to this second subpoena, see Exhibit D, as well as to the Instant Subpoena. See Exhibit F.

[3] Both the August and November subpoenas were issued in connection with Claim No. HQ13D04242, Queen's Bench Division, as filed on August 22, 2013. See Exhibits C and H. The Claim Form indicates this claim is for allegedly defamatory content in blog posts entitled "Pirates of the Landings St. Lucia: Pirate Oliver Gobat's Receivership Wreck," and "Pirates at the Landings St. Lucia: Conflicts of Sales, Marketing, and Management Interest."

action or [to] one or more issues are the same: (1) [a] claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or [was] in privity with a party to the prior proceeding." *Id.*

Here, all three elements are satisfied. Regarding the third element, the Respondent Mr. Gobat, the Petitioner, and even the targeted witness (Automattic) are all the same. As to the second element, the subpoenas are virtually identical as well. All three subpoenas issued by Gobat in connection with this matter seek the disclosure of Petitioner's personally identifiable information, as defined by Civ. Code § 1798.79.8(b), in connection with the same two blog posts, and ostensibly in support of the same vaguely-defined claim of defamation. See Exhibits C and G. Therefore the question that would be before the Court now is exactly the same question that was before it then: has Gobat shown that these blog posts could support a *prima facie* case for defamation, sufficient to trump the Petitioner's rights to privacy and to speak anonymously. *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1172 (2008). This Court has already answered Gobat's question on that point and, in a final, appealable judgment,[4] ruled he had not. See Exhibit E.

If Gobat was unsatisfied with this earlier result the correct course of action would have been to seek reconsideration or appeal. *See Sabek, Inc. v. Engelhard Corp.*, 65 Cal.App.4th 992, 997 (1998). Gobat, however, purposefully chose not to do either. Exhibit I ¶13. Instead Gobat, in propounding his third subpoena, demands the question be re-litigated all over again. However, "[i]t rests upon the sound public policy that there must be an end of litigation and accordingly, persons who have had one fair trial on an issue may not again have it adjudicated." *Preston v. Wyoming Pac. Oil Co.*, 197 Cal. App. 2d 517, 528 (1961) (citing *Dillard v. McKnight*, 34 Cal.2d 209, 213-214 (1949)). Gobat already had ample opportunity to litigate the question of whether the blog content he objects to could give rise to a *prima facie* case for defamation. After failing to make his case at that time, he should not be allowed to litigate the matter again because he disagrees with the result reached by this Court, even if it were a result born in part from

[4] See *Warford v. Medeiros*, 160 Cal App. 3d 1035, 1039-41 (1984), holding that a discovery order is a "final appealable judgment" when it is the sole matter before the trial court.

procedural missteps.[5] *See Helvey v. Castles*, 73 Cal. App. 2d 667, 671 (1946) (*citing Wheeler v. Eldred*, 137 Cal. 37, 39 (1902) ("[*Res judicata* means a party ought not be] allowed to maintain a second suit after judgment had been rendered against him in a former suit on the same cause of action, because on the trial of the first action he had not properly argued his case.")).

Such a bar to re-litigation is even more important in cases such as this one, which involves the exercise of free speech rights. For example, analogizing to the anti-SLAPP law, a law intended explicitly to protect such free speech rights, "the anti-SLAPP statute makes no provision for amending the complaint once the court finds the requisite connection to First Amendment speech… [If it did, i]nstead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading." *Simmons v. Allstate Ins. Co.* 92 Cal. App. 4th 1068, 1073 (2001); *see also City of Colton v. Singletary*, 206 Cal App. 4th 751, 775 (2012). This same rationale should apply in the context of this sort of subpoena seeking to unmask someone having exercised their free speech rights, and thus Gobat should not be permitted leave to re-plead his underlying *prima facie* case once this Court has already ruled it insufficient to trump those free speech rights. To find otherwise would leave anonymous speakers such as Petitioner subject to a potentially endless onslaught of subpoenas, as litigants such as Gobat try again and again to craft a pleading sufficient to survive First Amendment scrutiny. The parties here have already litigated whether Gobat was entitled, under the Krinsky standard, to unmask Petitioner. This Court ruled the *Krinsky* standard was unmet, and that should have ended the matter. Thus the Instant Subpoena should be quashed.

ii. Gobat has failed once again to plead a *prima facie* case for defamation that would justify intruding on the Constitutional right to speak anonymously.

Even if he were allowed a second bite at the apple, Gobat has again failed to plead sufficiently to support a prima face case for defamation. To prevail on such a claim Gobat must

[5] Gobat puts great stock into this court's tentative ruling noting that he had not actually plead a claim for defamation and mistakenly deems the August Subpoena's quashing as a mere "technical matter" inviting him to finally do so with another subpoena. See Exhibit I, ¶10-¶16.

show that the Petitioner published a false statement about him to a third party, and that the false statement caused injury to him. *See Krinsky* at 1173. Additionally, in the case of a public figure – which, as a businessman closely and publicly involved with highly-visible property development projects on St. Lucia, Gobat undoubtedly is – a respondent must also plead actual malice. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). These elements are solely Gobat's burdens to prove, *id.* at 279; *Paterno v. Superior Court*, 163 Cal.App.4th 1342, 1349 (2008), but, as with the August Subpoena, they again have not been adequately pleaded. While unlike with that subpoena there has now been some attempt to articulate an actual pleading, this pleading still fails to articulate the requisite elements.

"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). While Gobat's "Particulars of Claim" does include the actual words contained in the blog posts at issue, it includes *every single one of them* instead of giving any indication of which specific ones are alleged to be defamatory and on what basis. Exhibit H ¶10 and ¶19. Instead the "Particulars of Claim" put forth many conclusory arguments asserting that "taken both separately and together as whole" all these words may have damaged Respondent's reputation. Id. ¶17. See also id. ¶23. This approach, however, is insufficient to plead a cause of action for defamation. First, it fails to give Petitioner adequate notice as to what wrongful statement(s) he is accused of making. In submitting entire articles he leaves Petitioner and this Court to guess what content Gobat believes to be defamatory and impermissibly shifts the pleading burden to Petitioner by forcing Petitioner to defend each and every sentence of the entire blog posts even when clearly non-actionable.[6] Furthermore, in considering the sufficiency of the pleading, 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

[6] Some included statements may, for instance, be "rhetorical hyperbole," "vigorous epithet[s]," or figurative language, which cannot be considered defamatory. *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401 (1999). Other statements may be protectable opinion. See *Krinsky* at 1175. And, many of the statements, as Gobat himself has admitted, are completely true and thus unable to support a claim for defamation. See Reply Memorandum, October 8, 2013, at FN 6.

50 (1st Cir. 2012). Yet once all of Respondent's pleas to that effect have been stripped away, there is nothing left in the pleading on which Gobat may base his *prima facie* case.

As for actual malice, Gobat offers no facts that could support this accusation. He argues that malice is shown because (i) the statements have been made anonymously, Exhibit H ¶26.1; (ii) the statements were republished by Petitioner after having been initially deleted by Automattic, id. ¶26.2; (iii) the Petitioner has made no attempt to contact Gobat, id. ¶26.3(a), or to "correct untrue facts having been informed of their inaccuracies," id. at 26.3(b); (iv) the Petitioner has not shown the truth of his statements, id. at ¶26.4; (v) the Petitioner has not reported any of the allegations to an appropriate authority, id. ¶26.5; and (vi) the Petitioner "knew or should have known" certain facts, whose relevance is unclear, id. ¶26.6. Of course, none of these assertions can properly support a claim of actual malice. First, they ascribe duties to the Petitioner that Petitioner simply does not have, such as a duty to contact Gobat, prove the truth of any of these statements, make corrections,[7] or contact authorities.[8] Petitioner also had no duty to suppress his own speech by electing not to re-publish the blog posts Gobat had censored. Moreover, were Petitioner's having made these statements anonymously considered sufficient to support a claim of actual malice, such a conclusion would effectively eviscerate the time-honored principle of protecting anonymous speech that has heretofore been enshrined in First Amendment jurisprudence. *See Krinsky* at 1163-1164.

For these reasons Respondent has again failed to plead a prima facie case for defamation and thus the Instant Subpoena must be quashed.

iii. <u>It would violate public policy to enforce the English discovery order.</u>

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 such deference would be inconsistent with the

[7] Gobat has yet to make clear exactly what is inaccurate about anything Petitioner has published.
[8] It is also not clear how Gobat would know if Petitioner had or had not contacted authorities given that Gobat's action here is predicated on him not knowing who the Petitioner is.

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).[9]

With regard to the latter criteria, the transcript of the June hearing granting Gobat his original foreign discovery order reveals many of the ways in which English courts inadequately protect those interests. There, for example, the court determined it was the proper forum to hear Gobat's claim during an *ex parte* hearing, addressing an area of law the judge himself conceded no expertise in, see Exhibit J at 3:32, and by deferring to Gobat's counsel's own presumptive expertise. *Id.* at 3:41; *id.* at 4:1-2. If the English court were correct that it had jurisdiction over this matter, 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, even those (as here) so wholly unconnected with England, simply because someone in England may have read it.[10] This Court need not give credence to the English court's broad 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.

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 that, subject to federal constitutional limitations, may define for themselves the law of liability for defamation. *Krinsky* at 1173. English courts, of

[9] Gobat has previously argued that this statute should be discounted because it purportedly only applies to a foreign judgment. Opposition, October 2, 2013 at FN10. However both the June 12 and November 8 discovery orders are themselves judgments, final as to their assessment of the *prima facie* case for defamation. See, e.g., Exhibit G. The November 8 order also includes a monetary judgment against defendant for £3025. Id. ¶4. In addition, the SPEECH Act stands as a statutory distillation of the discretion courts have long exercised in refusing to enforce actions of foreign courts that are inconsistent with American constitutional principles. *Trout Point Lodge, Ltd. v. Handshoe, 2013 U.S. App. LEXIS 18516* at *FN7. This court is not precluded from exercising such traditional discretion here.

[10] The English court found there could not be "any doubt" "on the face of it" that jurisdiction in English courts was proper. Exhibit J at 4:2-7. This Court, however, can see "on the face of" the articles Gobat submitted in his claim 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. See, e.g., Exhibit H ¶10 and ¶19.

course, are subject to no such constitutional limitations, and granting such deference to them here would embolden more of the forum shopping and "libel tourism" that Gobat's action exemplifies. *Trout Point Lodge* at *12-13. Gobat argues that he has made his *prima facie* case under English law. Even assuming he has, for this court to consider such a *prima facie* case a sufficient basis to grant him discovery in California would mean that anyone with even the most tenuous connection to England could go to England, get a pre-litigation *ex parte* discovery order to unmask an anonymous speaker anywhere in the world, and be entitled to leverage CCP § 2029.300 or § 2029.350 to co-opt the California courts into giving weight to foreign orders exposing speakers to a judicial standard that gives short shrift to the free speech protections enshrined in over two centuries in American jurisprudence. [11] The ease by which litigants could make an end run around the privacy and speech protections California has developed compels this court to exercise its discretion and resist such legal maneuvering.

B. Sanctions must once again be awarded.

i. If the subpoena is quashed, an award of fees and costs 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. As such, if this subpoena is quashed, an award of reasonable expenses, including attorney's fees and costs, is mandatory. CCP § 1987.2. The amount of these reasonable costs should include all costs expended to date to defend Petitioner's speech with regard to the content at issue, less what has already been awarded. See Fourth Decl. of Catherine Gellis.

ii. Awarded fees should be jointly and severally payable by Gobat and his California counsel.

Discovery sanctions may be awarded against a party's counsel when the party's discovery misuse reflects the advice of counsel. CCP § 2023.030(a). Here it is clear on the face of each and

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

every one of Gobat's subpoenas that his California counsel, David Owens, has been complicit in this campaign of harassment against Petitioner for Petitioner's exercise of his protected free speech rights.[12] Gobat did not seek to domesticate his foreign subpoenas with a California court; instead he called upon his California counsel to use his privilege as a member of the California bar to personally issue each and every one of these subpoenas at issue under CCP § 2029.350(a). Mr. Owens's signature on these subpoenas reflects his own volitional participation in Gobat's endeavor and, as such, sanctions against him are appropriate.

In fact, the very existence of this three-subpoena, six-plus month campaign to leverage the California courts against Petitioner also demonstrates why it is so important to hold California counsel jointly and severally liable for the fee award. An apparently well-resourced foreign litigant, as Gobat appears to be, could otherwise simply avail himself of the Interstate and International Depositions and Discovery Act and, keeping himself and his assets beyond the reach of American courts, continue to lob subpoena after subpoena into this jurisdiction with impunity. No fee award will remunerate a wronged defendant, such as Petitioner, if it is uncollectable. To force a vindicated defendant, such as Petitioner, to chase down an abusive litigant all over the world to recover fees and costs risks disclosing Petitioner's identity and, as a policy matter, would either discourage future *pro bono* counsel in such cases, for whom the prospect of fee recovery makes their service defending free speech feasible, or make defendants' defense of their free speech rights prohibitively expensive. In crafting the fee recovery provision of CCP § 1987.2 the legislature clearly intended to relieve defendants of the costs associates with the successful defense of their free speech rights. Yet it is only by holding California counsel jointly and severally accountable for the discovery abuse of their internationally-foreign clients that this provision can have any meaning in cases such as this one.

iii. Gobat should be enjoined from propounding further subpoenas seeking Petitioner's identification for the content at issue.

[12] Per CCP § 2023.010(a) the non-exhaustive list of misuses of the discovery process include "[p]ersisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery."

If Gobat had attempted to sue Petitioner for defamation in California with such a poorly pleaded complaint as was attached to the August Subpoena, it would have been vulnerable to an anti-SLAPP motion and he would not have been able to re-plead the matter. *Simmons* at 1073. Additionally, if, connected to any litigation instituted in California, Gobat had engaged in the discovery abuse that he has here, that local litigation would have been vulnerable to terminating sanctions. CCP § 2023.030(d). Gobat has shown himself to be willing to try, again and again, to abuse the discovery process to obtain Petitioner's identity. That these attempts are connected to a subpoena in a foreign action should not mean that Petitioner must be any more vulnerable to this sort of continued harassment than Petitioner would have been had the underlying action been brought in California. In fact, the inability of California courts to provide any other judicial oversight in this action makes it incumbent upon this Court to craft a remedy now that provides Petitioner equivalent protection against further abuse. Thus this court should enjoin Gobat from propounding any further subpoenas connected with any of these blog posts on any third party.[13]

III. Conclusion

For all of the aforementioned reasons, the duplicative Instant Subpoena should be quashed, Gobat should be enjoined from propounding any additional subpoenas, and Petitioner should be awarded all reasonable expenses, including attorney fees and costs, expended to date in preserving Petitioner's privacy and free speech rights against all these subpoenas.

Dated: December 12, 2013

By:_____

CATHERINE R. GELLIS
(CA State Bar No. 251927)
P.O. Box 2477
Sausalito, CA 94966
Tel: (202) 642-2849
cathy@cgcounsel.com

Counsel for St. Lucia Free Press

[13] Respondent has also sought to subpoena Google for identifying information associated with Petitioner's Gmail address in connection with this same defamation claim. See Exhibit J at 1:16. To prevent this pattern of abuse, the injunction should extend to any intermediary connected with the blog posts here at issue, not just to Automattic.

APPENDIX A – Table of Exhibits

Exhibit A – July Subpoena (California judicial form dated July 18, 2013 with June 12, 2013 foreign discovery order attached).

Exhibit B – Automattic's August 19, 2013 Objections to July Subpoena.

Exhibit C – August Subpoena (California judicial form dated August 22, 2013 with June 12, 2013 foreign discovery order and August 22, 2013 Claim Form for Claim No: HQ13DO4242, Queen's Bench Division, Royal Courts of Justice).

Exhibit D – Automattic's September 9, 2013 Objections to August Subpoena.

Exhibit E – October 16, 2013 Order Granting Petition to Quash Invalid Foreign Subpoena and Award Reasonable Expenses.

Exhibit F – November Subpoena (California judicial form dated November 18).

Exhibit G – November 8 foreign discovery order, which was attached as "Exhibit A" to the November Subpoena.

Exhibit H – "Particulars of Claim" for Claim No: HQ13DO4242, which was attached as pp. 2-15 of "Exhibit B" of the November Subpoena.

Exhibit I – Second Witness Statement of Ashley Hurst, which was attached as pp. 16-20 of "Exhibit B" of the November Subpoena.

Exhibit J – Transcript of June 12 hearing awarding Respondent's June 12 discovery orders against Automattic and Google, Inc, which was attached as pp. 103-112 of "Exhibit B" of the November Subpoena.

Exhibit K – Automattic's December 6, 2013 Objections to November Subpoena.