

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

<p>DowneastDem Plaintiff/Petitioner(s) VS. Robert F. Kennedy, Jr. Defendant/Respondent(s)</p>	<p>No.           RG21102647</p> <p>Date:         11/08/2021</p> <p>Time:         8:14 AM</p> <p>Dept:         16</p> <p>Judge:        Michael Markman</p> <p>ORDER re: Ruling on Submitted Matter</p>
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The Court, having taken the matter under submission on 11/02/2021, now rules as follows:

Petitioner Robert F. Kennedy, Jr. seeks to reveal the true identity of an anonymous blogger using the handle “DowneastDem.” DowneastDem posted an entry on the “Daily Kos” site about Mr. Kennedy’s speech to an audience in Germany. Mr. Kennedy says DowneastDem’s post was defamatory. He persuaded a court in Westchester County, New York to issue a pre-suit subpoena to Kos Media, LLC d/b/a Daily Kos (“Daily Kos”) seeking to obtain information about DowneastDem’s identity. KK

The Westchester County decision is on appeal in New York. Nonetheless, on June 23, 2021, the DowneastDem blogger filed a Petition to Quash Subpoena pursuant to sections 1987.1, 1987.2, and 2029.600 of the California Code of Civil Procedure (RG21102647). And on July 30, 2021, Mr. Kennedy filed a Petition to Compel Kos Media, LLC to Comply with the Subpoena (Case No. HG21107215). Since the identity of DowneastDem is unknown, the Court will refer to the blogger with “they/them” pronouns.

A different bench officer previously denied an ex parte motion to consolidate the two cases without prejudice to a noticed motion. On its own motion, the Court now consolidates the two cases. The two cases concern the same subpoena, and the issues raised in the two cases are substantially similar. Consolidating the cases will benefit all concerned by coordinating hearings and by ensuring consistent adjudication of overlapping identical issues.

The Court will exercise its discretion to STAY both the Petition to Compel and the Petition to Quash pending the outcome of the appeal of the Decision and Order by the Supreme Court of the State of New York, Westchester County, in Kennedy, Jr. v. Kos Media, LLC (Index No.: 65319/2020), dated April 16, 2021 (the “New York Decision”).

Daily Kos and DowneastDem are collaterally attacking the New York Decision here. Many, though not all, of the arguments raised by Daily Kos in opposition to the Motion to Compel, and by DowneastDem on their Motion to Quash, were raised in the first instance in the New York action. There, the New York court determined that Mr. Kennedy “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.” (New York Decision at 3.)

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New York authorities are apparently split concerning the test for determining whether to issue a subpoena to reveal the identity of an anonymous speaker. One of New York's four appellate departments – the Second Department – has held that it is sufficient to simply allege facts that would support a claim for defamation. (See New York Decision at 3 [citing *Matter of Konig v. WordPress.com*, 112 AD3d 936, 936 [2d Dept. 2013]; *Matter of Toal v. Staten Island Univ. Hosp.*, 300 AD2d 592, 592 [2d Dept. 2002]].) Westchester County apparently looks to the law of the Second Department, and the New York Decision follows that approach.

California law, however, typically requires a prima facie showing with evidence to support a defamation claim before permitting the use of a subpoena to pierce a speaker's

anonymity (California thus appears to be in line with New York's other three appellate departments). In *Krinsky v. Doe 6* (2008) 159 Cal. App. 4th 1154, 1172, the Court of Appeal conducted a searching analysis of the law at the time concerning the use of subpoenas to reveal the identity of an anonymous speaker. The Krinsky court ultimately concluded:

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. Where it is clear to the court that discovery of the defendant's identity is necessary to pursue the plaintiff's 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. When there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment.

(Id.)

Daily Kos and DowneastDem argue at length that the New York Decision is wrong. They argue both that Mr. Kennedy both failed to allege facts sufficient to state a claim for defamation, which would not pass even the Second Department's test, and failed to present evidence to support a prima facie claim for defamation, in violation of the test set out in Krinsky (as well as the test used by New York's First, Third, and Fourth Departments, according to the parties' arguments at the hearing in this case).

A stay of this case may permit the New York appellate process to address whether the New York Decision made an error in holding that Mr. Kennedy set out allegations sufficient to state a claim under New York's defamation laws. As the Krinsky decision illustrates, this Court must look to New York's defamation laws to determine whether Mr. Kennedy adequately alleged facts sufficient to state a claim for defamation. Further, this Court's interpretation of New York law will determine whether, under Krinsky, Mr. Kennedy has made a prima facie case (with admissible evidence) to support his defamation claim such that this Court may enforce the subpoena issued in New York. That question may be determined with finality in connection with the appeal – particularly if the New York Second Department comes in line with the First, Third, and Fourth Departments (and Krinsky).

Stated another way, if the New York appeal applies Krinsky and finds that Mr. Kennedy satisfied

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that test, then full faith and credit would seem to dictate that this Court should enforce the subpoena. If the New York appeal declines to apply Krinsky but finds that Mr. Kennedy failed to adequately allege a defamation claim, then again full faith and credit would seem to dictate that this Court should not enforce the subpoena. If the New York appeal declines to apply Krinsky, and finds that Mr. Kennedy adequately alleged a defamation claim, then this Court will seek further briefing on (a) the full faith and credit question, and (b) the distinction between issuance and enforcement of the subpoena, so that the Court can determine what test to apply to the enforcement of the subpoena.

In summary, the New York court must determine whether the subpoena was properly issued in the first instance. If it turns out that the subpoena was not properly issued, then the question of enforcement of the subpoena will become moot. If Mr. Kennedy prevails, the appellate decision could well be relevant to findings that this Court would need to make concerning enforcement of the subpoena. The parties would also be in a better position to more accurately brief the issue of full faith and credit along with the issues of claim and issue preclusion that typically would bar a collateral attack on the New York Decision.

Daily Kos and DowneastDem raise a number of arguments that are not discussed in the New York Decision. Those arguments do not impact this Court's decision to await the outcome of the New York appeal before rendering a decision on enforcement of the subpoena. Daily Kos and DowneastDem further argue that California's shield law for news reporters should apply to DowneastDem. And they argue that California law protecting disclosure of a confidential source might apply to Daily Kos.

DowneastDem further contends the New York courts lack personal jurisdiction over them. The personal jurisdiction issue seems to be a red herring, however, because the New York action concerns a subpoena directed to Daily Kos concerning DowneastDem's identity (and not a subpoena to DowneastDem). There appears to be no question concerning whether the New York court had jurisdiction to hear a case about a subpoena to Daily Kos. And the parties do not point to law that a pre-suit subpoena in New York to identify potential defendants must be for purposes of filing the lawsuit in New York rather than in some other jurisdiction.

As interesting as it could be to decide all of these issues right now, discretion is frequently the better part of valor. The Court finds that a stay "will promote the ends of justice" by allowing the New York appellate system to adjudicate the attack on its trial court's subpoena. (See Cal. R. Ct. 3.515(f).) During the oral argument on the motion, Daily Kos confirmed that it agreed with the Court's tentative ruling to await the outcome of the New York appeal.

The Court sets a case management conference for 1/25/21 at 10am in Dept. 16 to monitor the status of the New York appeal. If the appeal is decided prior to that date, this Court would plan to then reset the case management conference for a date approximately three weeks after receiving the appellate decision. Mr. Kennedy is directed to file a copy of the New York appellate decision with this Court within ten days of that decision and send notice to counsel for Daily Kos and DowneastDem.

On the Court's own motion, the Hearing on Motion to Quash Motion to Quash scheduled for

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11/02/2021 is continued to 01/25/2022 at 10:00 AM in Department 16 at Rene C. Davidson Courthouse.

Dated: 11/08/2021

A handwritten signature in black ink, appearing to read "Michael Markman".

**Michael Markman / Judge**