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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

DOWNEASTDEM, an individual,
Petitioner,

vs.

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

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

ROBERT F. KENNEDY, JR.,
Petitioner,
v.
KOS MEDIA, LLC, d/b/a, DAILY KOS,
Respondent.

In the Supreme Court of the State of New York, County of Westchester Index No. 65319/2020. Hon. Mary H. Smith. Order granting pre-action disclosure, April 16, 2021. Appeal pending, Nos. 2021-03700 and 2021-04476 (N.Y. App. Div. Dept. 2)

CASE NO. RG21102647

DOWNEASTDEM'S REPLY MEMORANDUM IN SUPPORT OF HER MOTION TO QUASH SUBPOENA

ASSIGNED FOR ALL PURPOSES TO: JUDGE MICHAEL MARKMAN

Hearing Date: November 2, 2021
Hearing Time: 10 a.m.
Department: 16
Reservation No.: 227279

Related Petition to Compel:
` Case No. HG21107215
Motion to Compel Hearing Date:
November 2, 2021
Hearing Time: 10 a.m.
Department: 16
Reservation No.: None

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MISCELLANEOUS

In her opening memorandum in support of her motion to quash ("Mem."), DowneastDem showed that respondent Robert F. Kennedy Jr. ("Kennedy") had obtained an order from a New York state trial court authorizing the service of a subpoena to Kos Media ("Kos") seeking to identify DowneastDem for the purported purpose of pursuing a defamation claim based on publication of a blog post, even though the Court had no jurisdiction over Kos or DowneastDem. (Mem. 15-16.) DowneastDem then showed that the supposedly actionable sentences in her post are either nonactionable opinion or correct statements of fact: Statements of opinion cannot constitutionally form the basis of a defamation action (Mem. 16-20) and Kennedy has not produced any basis to believe that he can succeed in showing that any facts in DowneastDem's posts were either false or posted with actual malice. (Mem. 20-25.)

Much of Kennedy's memorandum in opposition ("Opp.") is devoted to futile efforts to show a basis for personal jurisdiction, and hence argue that this Court cannot assess for itself whether Kennedy has made an evidentiary showing sufficient to overcome DowneastDem's First Amendment right to speak anonymously (Opp. 14-19), even though that issue was never litigated before the New York court. (*Infra* 7-8.) Kennedy also devotes pages to an effort to relitigate his motion to strike DowneastDem's motion to quash, which Judge Kolakowski denied. (Opp. 29-32.) When he finally turns to the merits, Kennedy argues that DowneastDem's blog post about Kennedy joining neo-Nazis at the Berlin rally stated fact, not opinion (Opp. 19-22), and posits that his declaration, which tracks the allegations in his petition for discovery without showing any basis for personal knowledge of the facts asserted, shows a prima facie basis for overcoming DowneastDem's First Amendment right to speak anonymously. (Opp. 24-29.) As shown below, Kennedy's objections should be rejected, and the motion to quash should be granted.

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE THE NEW YORK COURT LACKED PERSONAL JURISDICTION.

In her opening memorandum (at 15-16), DowneastDem showed that Kennedy had procured an order authorizing issuance of a subpoena to Kos from a court that had neither subpoena jurisdiction over Kos nor personal jurisdiction over DowneastDem. Kennedy offers several responses to that argument, but none of his arguments has merit.

First, Kennedy contends that lack of personal jurisdiction by the New York court is irrelevant to enforcement of court process to strip DowneastDem of her First Amendment right to speak anonymously. (Opp. 13-14.) As a general rule, "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (*Taylor v. Sturgell* (2008) 553 U.S. 880, 892-893, 904.) Consequently, full faith and credit does not extend to judgments entered without personal jurisdiction, and when the judgment winner seeks to enforce it in California, any party who is adversely affected is entitled to appear in a California court to challenge the judgment on jurisdictional grounds. (*See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982) 456 U.S. 694, 706.) Moreover, California authority expressly rejects the contention that defendants lose their jurisdictional objections when they '"slept on their rights' and 'knowingly ignored every opportunity they had to make a timely objection to the pre-judgment proceedings.'" (*Yu v. Signet Bank/Virginia* (1999) 69 Cal. App.4th 1377, 1385-1386.) Thus, even if DowneastDem had deliberately waited to attack a requested subpoena in a different jurisdiction (as opposed to not having counsel to represent her in New York), DowneastDem is entitled to raise jurisdictional objections here, just as the *Yu* appellants did.

Second, Kennedy asserts that there is no evidence that DowneastDem lives anywhere besides New York (Opp. 15), but when personal jurisdiction is under attack, the party asserting the existence of personal jurisdiction has the burden of establishing facts to support it. (*Pavlovich v. Super. Ct.* (2002) 29 Cal.4th 262, 273; *Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1246.) In the New York court, Kennedy's only jurisdictional allegation was that DowneastDem had made defamatory statements that were published in New York, where Kennedy lived. (Mem. 11:15-17, 15:18-22.)[1] But that allegation did not support personal

[1] Kennedy argues that it does not matter that the New York court did not have subpoena jurisdiction over Kos because he was only proceeding in that court to obtain letters rogatory to be asserted in California. (Opp. 13:1-7.) However, Kennedy never told the New York Supreme Court that he was seeking only to be able to pursue a subpoena proceeding outside New York. (*See* the New York complaint and Levy Decl. Exh. 1, Kennedy's briefs in support of discovery.) On Kennedy's theory that neither subpoena jurisdiction nor

jurisdiction because Kennedy has not alleged that DowneastDem is a New York resident and, as shown in DowneastDem's opening memorandum (at 15, citing N.Y. CPLR §§ 302(a)(2) & (3)), New York has deliberately not extended its long-arm jurisdiction to allow proceedings against alleged defamers who do not live in New York. The opening memorandum showed the good reasons to believe that DowneastDem lives in Maine, including statements on her blog and admissions in the blog of Kennedy's NGO. (Mem. 15:28-16:4 &n.4.)[2] And, although Kennedy faults DowneastDem for not introducing evidence of her Maine residence, not only does that argument improperly rely on the assumption that DowneastDem has the burden on this issue, but the record now indicates that DowneastDem lives in Maine. (Levy Decl. ¶ 5.)

Third, Kennedy's contention that DowneastDem lost her ability to challenge the New York court's jurisdiction to issue a judgment affecting her rights because Kos represented her in that court (Opp. 17-18) is based on a series of factual misrepresentations. To begin with, the Opposition falsely asserts (at 18:24-25), relying on Mr. Wenner's Declaration (¶ 8), that Kos was litigating on DowneastDem's behalf. However, as DowneastDem has previously explained, the actions of Kos's counsel were not taken on her behalf. (Opposition to Motion to Strike, at 5:14-19; Charny Decl. ¶¶ 3-5.) Indeed, after DowneastDem responded to the same incorrect statement made in Kennedy's motion to strike, Kennedy promptly retracted Mr. Wenner's identical averment made in support of that motion, conceding that Mr. Wenner "never claimed that Daily Kos' counsel was acting as DowneastDem's attorney," but was only noting that a proposed settlement would have benefited DowneastDem. (Motion to Strike Reply 9:18-19.)

Similarly, Kennedy argues that in the New York proceeding, Kos asserted "third-party standing on behalf of DowneastDem to litigate her First Amendment right to anonymity." (Opp.

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jurisdiction over the alleged defamer was needed, Kennedy could have sought authority to issue a subpoena in any state where a court was amenable, despite the absence of any relation to the controversy, and this Court would be obligated to honor such an order.

[2] Kennedy points to a statement on DowneastDem's blog saying that she once had a job in New York (Opp. 15:20, citing Exh. W), but the exhibit shows only that DowneastDem worked at Deutsche Bank's New York office "in the 1980s."

18:3-5.). However, Kennedy offers no record citation for that contention, and his statement is false. Kos did not mention the First Amendment right to speak anonymously in its New York papers (Levy Decl. Exh. 1); Kos asserted only its own institutional interest in being able to host a platform that allows third parties to participate without identifying themselves. (Levy Decl. Exh. 1, Memorandum Supporting Respondents' Answer to the Petition at 14, citing Zuniga Affidavit.)

Consequently, Kennedy lacks any sound basis for attributing to DowneastDem any litigation conduct by Kos in the New York proceeding (including not objecting to personal jurisdiction), or for imposing on DowneastDem the collateral estoppel consequences of the New York order.

Several consequences follow from Kennedy's failure to carry his burden of showing that the New York court had personal jurisdiction over DowneastDem. First, because the New York court lacked subpoena jurisdiction over Kos (Mem. 15), a problem that Kennedy evades but does not deny (Opp. 13:3-7), it means that the New York order was lacking in any jurisdictional basis and could not supply a proper basis for the issuance of the California subpoena. Second, lack of personal jurisdiction over DowneastDem provides an independent basis for quashing the subpoena to identify her, because a party seeking to identify an anonymous speaker for the purported purpose of suing that person for wrongful speech must show that such a claim would be procedurally as well as substantively tenable. Thus, many courts have held that personal jurisdiction is a necessary predicate for a subpoena seeking to identify anonymous speakers. (*AF Holdings v. Does 1-1058* (D.C. Cir. 2014) 752 F.3d 990, 996; *In re Doe* (Tex. 2014) 444 S.W.3d 603, 608–09; *Deluxe Mktg. v. deluxemarketingincscam.wordpress.com* (D. Ariz. Aug. 20, 2014) 2014 WL 4162270, at *3; *Baker v. John Does 1-10* (D. Mass. Dec. 27, 2012) 2012 WL 6738253, at *1; *Sinclair v. TubeSockTedD* (D.D.C. 2009) 596 F. Supp. 2d 128, 133.)

Moreover, because New York lacks personal jurisdiction over DowneastDem, the Court should disregard Kennedy's pervasive assertions that New York law controls the assessment of the validity of Kennedy's purported defamation claim (Opp. 24, 25, 26, 27, 32) and that DowneastDem is improperly trying to "relitigate" rulings already made by the New York court in addressing Kos's objections to its pre-litigation petition. (Opp. 16, 17, 18. 21, 22 and 29.)

Unless Kennedy can show that New York would have personal jurisdiction of the defamation claim that he says he plans to bring, New York lacks the power to regulate DowneastDem's speech through application of its defamation law. Finally, because Kennedy has not carried his burden of showing that the New York court had personal jurisdiction of DowneastDem, she is not bound by the decision there, and she is entitled to have her **first** day in court, defending in this proceeding her First Amendment right to speak anonymously.

II. THE SUBPOENA SHOULD BE QUASHED BECAUSE KENNEDY HAS NOT SHOWN A PRIMA FACIE BASIS FOR HIS DEFAMATION CLAIM.

Because Kennedy is a public figure suing for alleged defamation on an issue of public concern, the First Amendment requires him to prove that allegedly defamatory statements of fact about him were false, and to show by clear and convincing evidence that the false statements of fact were made with "actual malice." (Mem. 20:23-21:1.) His opposition to the motion to quash gives the Court no basis for holding that he made even a prima facie showing on either count.

A. Kennedy Did Not Make a Prima Facie Showing of Falsity.

On the issue of falsity, the motion to quash presented a wealth of public reporting by responsible media entities to show what happened on August 29, 2020, who was there, and how the event was organized (Mem. 21-23), as well as the declaration of an expert witness who explained that Querdenken, which Kennedy has identified as the organization that invited him to speak, is itself an umbrella for a variety of right-wing extremist and neo-Nazi groups. (Mem. 23:13-23; Schalit Decl. ¶ 6.) Kennedy ignores the expert declaration and argues that the newspaper reports are mere hearsay that cannot prove the truth of what happened. (Opp. 27:10, 29:2-3.) However, Kennedy also relies largely on snippets from published reports, taken out of context, to show **his** version of what occurred on August 29, and he has not met the burden of proof on the issues of either falsity or actual malice. Although the Opposition makes a variety of assertions about Kennedy's version of the truth, those assertions are not backed up by the only **evidence** that Kennedy proffers—an inadmissible English translation of a page from the Querdenken website—as well as Kennedy's own declaration which, as now explained, does not meet the standards required for California declarations.

Under California law, a declaration must affirmatively show the declarant's competence to testify to the facts set forth in it; a mere sworn recitation that the declaration is made on personal knowledge and that the witness is competent to testify is not sufficient in that regard. (*Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.* (2019) 6 Cal.5th 931, 945.) The Supreme Court held in *Sweetwater* (*id.* at p. 945) that the same rule applies to declarations used to oppose anti-SLAPP motions. Because under *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1171-1172, adjudicating anonymous speech subpoenas also demands evidence sufficient to make out a prima facie case, a similar showing of competence to testify should be required here.

Paragraph 3 of Kennedy's declaration (which is attached as Exh. 12 to the Wenner Declaration) quotes sentences from the blog post and says that they are false, but that is a negative pregnant that does not carry his burden of making a prima facie showing on falsity. (*Indus. Waste & Debris Box Serv. v. Murphy* (2016) 4 Cal.App.5th 1135, 1159.) Moreover, the Kennedy declaration does not show that he is competent to testify on personal knowledge about who was and was not at the rally. Videos of his speech at the rally are widely available on the Internet (including on his own Children's Health Defense website, at https://childrenshealthdefense.org/news/robert-f-kennedy-jr-speaks-at-berlin-rally-for-freedom-and-peace/), and a copy of the video has been filed with the Court. (Levy Decl. Exh. 3.) One fact about the speech is striking—at an event where every other speaker spoke in German, Kennedy himself spoke in English, with simultaneous translation into German. The clear implication is that Kennedy himself is not sufficiently fluent in German to have addressed the crowd in that language. But if Kennedy is not fluent in German, how does he know what any of the speakers said, and what their affiliations were? In fact, did Kennedy remain for the rest of the rally? The video on his NGO's website, linked here (time stamp 12:50) shows him leaving the stage immediately after his speech and heading for a bus while speaking, again in English, with people gathered there.

Moreover, the Kennedy declaration provides no basis for the Court to conclude that he has personal knowledge about German politics, or about what adherents of particular neo-Nazi and anti-Semitic parties and organizations look like, how they dress, and what their signs say.

What's more, Kennedy's declaration does not say that neo-Nazis were not present at the

rally. It says only that he personally, standing on a stage in front of a crowd of thousands (his CHD website, linked above, claims "hundreds of thousands") "did not observe any neo-Nazi or anti-Semitic imagery or symbols." (Kennedy Decl. ¶ 6.) Even assuming that he knows what those symbols are—for example, what the Reichsflagge flag looks like and its currency among neo-Nazis seeking to evade the ban on displaying swastikas (*see* Schalit Decl. ¶ 8)—this declaration does not show that what DowneastDem said about the presence of large numbers of Nazis at his speech is false. That Kennedy "did not observe" anyone who he could tell was a neo-Nazi does not establish that neo-Nazis were not there, as many news outlets reported them to be. (*See* Mem. 21-23, quoting attached Exhibits L, M, N, O, Q and X.)

In addition, inasmuch as Kennedy was apparently invited to speak at the very last minute (Levy Decl. Exh. R, Ross, *Inside the Weird Pro-QAnon German Group Behind RFK Jr.'s Latest Anti-Vaxx Stunt*), he was presumably not involved in organizing the protest. He offers no basis to establish that he is competent to testify on personal knowledge about who was and was not involved in that organizing, whether that be "right-wing extremist organizations, the AfD party, any anti-Semitic conspiracy group, or the neo-Nazi NPD party" (Kennedy Decl. ¶ 4), or anyone else. Moreover, his declaration about the organizing of the rally does not say that the AfD and other identified groups were not involved in organizing it. It says only that Kennedy does not know that they were, and that he himself—apparently someone who is not fluent in German and not familiar with German politics— did not observe anything showing that they were so involved. (*Id.* ¶ 6.) This carefully worded statement does not show that anything DowneastDem said in her blog post is false.

Indeed, Kennedy's declaration contains no assertions about what Querdenken is, other than that Querdenken is the group that organized the rally he attended. Therefore, nothing in his declaration contradicts the testimony of DowneastDem's expert witness showing that Querdenken itself is an umbrella group for Germany's congerie of radical right groups. (Schalit Decl. ¶ 6.) The only evidence that Kennedy has offered to support his assertions about Querdenken is an online disclaimer of affiliation with right-wing extremists found on Querdenken's website, authenticated by Mr. Wenner. (Wenner Decl. ¶ 24.) Apart from the fact

that the English translation is not certified under oath by a qualified interpreter as required by CRC 3.1110(g), this statement was added to the Querdenken website in April, 2021, and only for the purpose of rebutting the widespread reports that Querdenken is a haven for German neo-Nazis and anti-Semites. (See Levy Decl. ¶ 8 and Exh. 5.) Thus, Kennedy's effort to negate DowneastDem's statements by identifying Querdenken as an organization that organized the rally at which he spoke does not support, by admissible evidence, but rather contradicts, the factual proposition that the rally was not organized by the extreme right-wing groups, and hence does not show that DowneastDem's blog post is false.[3]

B. Kennedy Did Not Make a Prima Facie Showing of Actual Malice.

The motion to quash should be granted for the independent reason that Kennedy has offered no evidence showing actual malice, an element of his defamation claim that he will ultimately have to prove by clear and convincing evidence. (*See* Mem. 20:26-28.) Citing a footnote in *Krinsky* (159 Cal.App.4th at p. 1171 n.12), Kennedy argues that he need not produce any evidence of actual malice before he can breach DowneastDem's First Amendment right to speak anonymously. (Opp. 28:14-16.) But in the footnote that Kennedy cites, *Krinsky* was discussing how courts in other states, as well as a law review author who was hostile to the then-nascent line of cases recognizing the need to limit subpoenas to identify anonymous online speakers, had addressed the issue of actual malice. And in two **other** footnotes, *Krinsky* expressly reserved the question of whether a plaintiff seeking to identify an online speaker whom the plaintiff was suing for defamation would be required to present at least some evidence of actual malice. (*Krinsky, supra,* at pp. 1169 n.9 and 1179 n. 21.)

Although in some cases it might be unfair to require a plaintiff to come forward with evidence supporting actual malice to secure identification of an alleged defamer, in the circumstances here, for several reasons, the Court should demand such evidence, or at least demand that actual malice be pleaded with particularity. (*See Resolute Forest Products v.*

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[3] Kennedy points to California cases that, like *Krinsky,* declined to add a "balancing" stage to the anonymity analysis. (Opp. 27:18-28:8, 29:17-24.) These cases are inapposite because Kennedy has presented **no** admissible evidence supporting a prima facie case.

Greenpeace (N.D.Cal. 2017) 302 F.Supp.3d 1005, 1018, *citing Biro v. Conde Nast* (2d Cir. 2015) 807 F.3d 541, 546; *see also Mitchell v. Twin Galaxies, LLC* (Oct. 12, 2021, No. B308889) __ Cal.App.5th ___, ___ (prima facie showing of actual malice must meet clear and convincing evidentiary standard).)

First, Kennedy has not even filed a lawsuit against DowneastDem claiming defamation. Had he sued DowneastDem in New York or Maine, he would have had to respond to an anti-SLAPP motion under those states' strong anti-SLAPP laws. (14 M.R.S. § 556; New York Civil Rights Law§ 76-a(1)(a)(1).) To survive a special motion to dismiss, he would have had to present evidence showing each element of his defamation claim, including actual malice. (*Coleman v. Grand* (E.D.N.Y. Feb. 26, 2021) 2021 WL 768167, at *8; *Gaudette v. Davis* (Me. 2017) 160 A.3d 1190, 1196.) Kennedy should meet the same burden before he obtains the relief of stripping away DowneastDem's First Amendment right to anonymity.

Second, this proceeding is not a defamation case involving a speaker who published criticisms based on private communications or on facts known only to the speaker but not previously publicly disclosed. Kennedy spoke to a huge crowd, at an event heavily covered by the mainstream media, and DowneastDem's blog post was no more than short summary of what was publicly reported. And, indeed, Kennedy himself has admitted that much of what DowneastDem said in her blog post was also reported in the mass media. During his Berlin speech, Kennedy began by saying:

> Back at home in the United States, the newspapers are saying that I came here today to speak to about 5,000 Nazis. And tomorrow, they're going to report that, yes, I was here, and I spoke to three to 5,000 Nazis.

(Levy Decl. Exh. 3. (time stamp 30 seconds).) As the reports attached to the motion to quash showed, that is indeed how the media described his audience. (Mem. 21-23, citing Exhs. L-O.) Kennedy may believe that the media reports are inaccurate, and he may be unhappy that a blogger took the word of the mainstream media over his denials. However, DowneastDem was entitled to take the media's word over Kennedy's about whether there were thousands of neo-Nazis at the rally. In deciding whom to credit on this issue, a blogger could consider reports that Kennedy published false information and made wild conspiracy claims, a reputation that has

since earned Kennedy a ban from several online platforms. (Levy Decl. ¶ 9 and Exh. 6; Levy Motion to Quash Decl. ¶ 19, Exh. T.)

In short, DowneastDem should be able to disbelieve Kennedy without being sued for libel. The fact that DowneastDem's blog post contradicts Kennedy's position on this issue is no indication of actual malice. In these circumstances, the Court should require Kennedy to produce a prima facie case under the clear and convincing evidence standard that DowneastDem wrote with actual malice before stripping her of her First Amendment right to speak anonymously.

Kennedy contends that the fact that DowneastDem's blog post allegedly contradicted a passage in the Tagesspiegel article that was linked from her blog post, to the effect that there were separate rallies on August 29, is evidence of actual malice that warrants denial of her motion to quash. (Opp. 28:16-22.) But there is no admissible evidence either that there were separate rallies, or that neo-Nazis only attended other rallies. Kennedy's New York complaint alleged the existence of "multiple spontaneous demonstrations at different locations" (¶ 21), but Kennedy's declaration makes no such assertion on purported personal knowledge. Instead, it states only that he is aware of published reports that neo-Nazis were at a separate rally, but that he had not attended that rally. (Kennedy Decl. ¶ 6.) Given that he was not at such other rallies, he could not have personal knowledge that other rallies existed, or who was there. Moreover, the blog post did not state that there were **not** separate rallies. Like several of the media stories, DowneastDem referred to "[t]he protest" and identified Kennedy as having spoken, but the word "protest" in the singular does not contradict the account in Kennedy's briefs. And although Der Tagesspiegel mentioned separate rallies, not only did it not say that the neo-Nazis were **only** at the separate rally, but as the opening memorandum noted (Mem. 23:26-24-9), right under the photograph showing Kennedy speaking, Der Tagesspiegel described a man peddling NPD propaganda, and placed that man at the Tiergarten, where Kennedy was speaking. DowneastDem could fairly read the article as placing the neo-Nazi at Kennedy's speech, and her reading is not evidence of actual malice. Because Kennedy has not produced any evidence of actual malice, let alone a prima facie case under the clear and convincing evidence standard, the

motion to quash should be granted.

III. THE ALLEGEDLY DEFAMATORY SENTENCES WERE CONSTITUTIONALLY PROTECTED OPINION.

Kennedy argues that the First Amendment rule that opinion cannot properly be the basis for a defamation action, and that the use of the term "neo-Nazi" is hyperbole and name-calling, and too vague to be provably true or false (Mem. 16:13-19:17), does not apply because DowneastDem was not calling Kennedy a neo-Nazi but rather said that Kennedy was at the rally with neo-Nazis, and whether he was there with such people is a fact, not an opinion. (Opp. 19-20, 21-22.) That argument is faulty. Whether Kennedy was at the rally is a fact. Whether there were other people at the rally is a fact. But as explained in DowneastDem's opening memorandum (at 16-19), under several different lines of authority, the characterization of those other people as neo-Nazis is protected opinion. The people to whom DowneastDem referred as neo- Nazis could not sue DowneastDem for using that label because it is political name-calling, not provably true or false, and the fact that the name-calling relates to people with whom Kennedy associated by speaking at the rally does not entitle Kennedy to bring a defamation suit that is forbidden to the targets of the name-calling.

Kennedy also argues that the doctrine of opinion based on disclosed fact does not apply here, because it only protects statements "that do not imply facts capable of being proved true or false" and that "assertions of fact and statements that may imply a false assertion of fact are not protected" by the doctrine of opinion based on disclosed fact. (Opp. 23:6-8, quoting *Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1101 (N.D.Cal. 1999).) But Kennedy's argument is belied by the very case he cites. If "opinion based on disclosed fact" provided protection only for statements that are otherwise protectable as opinion, then the First Amendment defense based on "disclosed fact" would add nothing to the analysis. Moreover, *Nicosia* does not treat that First Amendment defense in the way Kennedy does. The language that Kennedy quotes appears at page 1101 of the decision, but disclosure of facts via hyperlinks appears only in connection with one of the statements at issue in that case, discussed two pages later in a separate part of the decision, addressing the question whether DeRooy defamed Nicosia by accusing him of an "effort to keep

the public from noticing his embezzlement of at least $33,000 from Jan Kerouac's heirs." (*Id.* at p. 1102.) That statement, standing alone, sounds like a statement of fact, but the court held that it was protected opinion because DeRooy provided a hyperlink to underlying articles that elaborated the facts on which DeRooy based her judgment that Nicosia had embezzled from the heirs. (*Id.* at p. 1103.) Similarly, in *Ayyadurai v. Floor64, Inc.* (D. Mass. 2017) 270 F.Supp.3d 343, 360, the author's statement was that Ayyadurai had lied about his major purported accomplishment (which sounds factual); the court found opinion based on disclosed fact because the allegedly defamatory statement was backed up by hyperlinks that "'outline[] the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions.'" (*Ibid.* quoting *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1156–57.)

Here, too, DowneastDem expressed her opinion of the widespread media coverage of Kennedy's speech and of who organized and attended that rally, and she provided a hyperlink to an underlying media report that provided factual detail that Kennedy does not claim was false. Although the Tagesspiegel article—the disclosed fact—mentions separate rallies, the article does **not** say that neo-Nazis could be found only at locations other than one where Kennedy spoke.

Finally, Kennedy contends that DowneastDem's arguments about protected opinion should be disregarded because she cited California precedents even though, under *Krinsky,* it is the forum state whose law controls. But in *Krinsky*, there was no reason to doubt the forum state's jurisdiction over the Doe defendants (Florida has not deliberately limited its long-arm jurisdiction over libel claims, *see* Fla. Stat. § 48.193). Because New York lacks jurisdiction of DowneastDem (supra at 5-8), its defamation law cannot bind her. Moreover, the protection for opinion is rooted in the First Amendment, and California courts are not bound by interpretations of the First Amendment adopted by courts in other states. Thus, *Krinsky* cited several California cases in coming to the conclusion that the allegedly defamatory statements in that case were constitutionally protected opinion (159 Cal.App.4th at pp. 1177, 1178) and this Court should consider California precedent construing the First Amendment as well.

IV. DOWNEASTDEM'S MOTION PAPERS WERE TIMELY FILED AND SHOULD NOT BE STRICKEN.

Before responding to DowneastDem's motion to quash, Kennedy moved to strike it as untimely. Even after Judge Kolakowski disclosed that she reads the Daily Kos and sometimes comments there, Kennedy waited to see whether she would grant his motion to strike DowneastDem's motion to quash; only after she denied his motion did he file a peremptory challenge. Now he again asks the Court to strike the motion to quash. As Judge Kolakowski held, however, the request to strike should be denied.

When DowneastDem's counsel began to prepare her petition to quash, and the ensuing motion to quash, it was apparent to them, in light of experience litigating other similar cases, both that the memorandum in support of the motion might well exceed the standard 15-page limit, and that the standard four days to prepare a reply memorandum would likely be insufficient. (Levy Decl. Opposing Motion to Strike ¶ 4.) Hence, DowneastDem filed a petition to quash, thus starting a proceeding in which she could file an application to change the briefing length and timing. (*Id.* ¶ 6.) Then, as permitted by the Code and the rules, DowneastDem applied ex parte to modify the briefing schedule and the permissible memoranda lengths; those changes were granted (*Ibid.)* Thus, DowneastDem **did** seek the Court's permission to file a motion to quash and supporting papers after the filing of the petition, and the Court decided that DowneastDem **had** shown good cause for that.

Indeed, the rules allow applications to change the briefing schedule and to change the page limits; they do not say such applications cannot be filed on petitions to quash. (Code Civ.Proc., § 1005(b), and CRC 3.1113(e).) Kennedy's argument would effectively prohibit such changes: he asserts that the memorandum in support **must** be filed simultaneously with the petition. If that is so, a court could never be asked to change the briefing schedule and page limits on a motion to quash. No authority says that.

DowneastDem did not file her motion on July 23, the date sought in her ex parte application, at which time the court order on the application had not yet been issued. Although, at the end of July, counsel learned that a docket entry indicated that there was a ruling on the

application, the docket entry neither linked to the order nor stated the terms of the resulting court order. (Levy Decl. Opposing Motion to Strike ¶ 11.)[4] Thus, DowneastDem did not know its contents, and could not be sure that the dates DowneastDem had proposed had been approved, or whether a memorandum in excess of 15 pages would be allowed. (*Ibid.)* Accordingly, after counsel for Kennedy called attention to the docket entry, rather than file a memorandum that might be too long, DowneastDem's counsel asked the Court whether her proposed order had been accepted unchanged. (*Id.* ¶ 12.)

Apparently in response to this inquiry, Judge Kolakowski signed the proposed order on August 4. Until then, there was no binding order setting July 23 as the filing deadline. On Thursday, August 5, the Court notified the parties that DowneastDem's proposed order had been signed unchanged. By then, the July 23 deadline had passed, and it was no longer possible to meet the deadline set by the August 4 order. DowneastDem moved promptly, filing early the next week. (Levy Declaration Opposing Motion to Strike ¶ 13.) These circumstances show good cause for the time of filing and hence that the motion to quash was filed timely.

Most important, Kennedy suffered no prejudice from the filing of the motion papers on August 10. At that point, Kennedy had still had four weeks to prepare an opposition. Moreover, when Kennedy later sought a one-week extension to file his opposition, DowneastDem promptly consented. (Levy Declaration Opposing Motion to Strike ¶ 15.) Kennedy thus had a total of five weeks to respond to the motion to quash. (*Cf.* CCP § 1005(b), setting seven court days as the presumptive time for filing opposition memoranda.) It is not clear what good purpose would be served by granting the extraordinary relief of striking DowneastDem's opening memorandum and supporting papers, to which Kennedy has already responded, leaving only this reply memorandum to be considered.[5]

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[4] The Opposition (at 31:25-56), refers to "the clarity of that deadline on both the docket and the Court website," but provides no citation to the record. Neither deadline nor page length appears in Exhibit 7 to Mr. Wenner's declaration.

[5] Kennedy portrayed his motion to strike as justified by DowneastDem's refusal to agree to toll the statute of limitations on Kennedy's purported defamation claim, given New

By contrast, striking the motion to quash and supporting papers would be extremely prejudicial to DowneastDem. As Kennedy admits, a trial court has "broad discretion" whether or not to accept late-filed papers. (Opp. 30:25-31:7, citing *Bozzi v. Nordstrom* (2010) 186 Cal.App.4th 755, 765.) In *Bozzi* and most of the other cases that Kennedy cited to Judge Kolakowski and now cites to this Court, the rejected papers were "supplemental" materials filed on the eve of a summary judgment hearing, well after the summary judgment movant had already filed its reply brief. Indeed, in *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, which Kennedy cited in contesting the tentative on the motion to strike, the court of appeal approved the refusal to consider papers filed the day before the hearing, but approved the trial judge's consideration of other papers that were slightly less late, as a proper exercise of discretion. (*Id.* at pp. 624-625.) Judge Kolakowski approved DowneastDem's August 10 filing so that the full arguments of both sides could be heard. Having now responded in full to the motion to quash, Kennedy offers no good reason for revisiting her judgment in that regard.

CONCLUSION

The motion to quash the subpoena should be granted.

DATED: October 15, 2021

/s/ Mark Goldowitz
Paul Alan Levy, Public Citizen Litigation Group
Mark Goldowitz, California Anti-SLAPP Project

Attorneys for Petitioner DOWNEASTDEM

York's one-year limitations period. (Wenner Strike Decl.¶ 18, Strike Reply Mem. 8.) Naming DowneastDem as a defendant could have preserved Kennedy's defamation claim as timely under New York law, meeting that state's stringent due diligence requirement for equitable tolling. (*Simcuski v. Saeli* (N.Y. 1978) 377 N.E.2d 713, 717.) Because Kennedy has deliberately **not** sued DowneastDem as a pseudonymous defendant, **if** New York law is the governing authority, the statute of limitations has expired—yet another reason why Kennedy's subpoena should be quashed.

PROOF OF SERVICE

On this date, I am causing copies of this reply memorandum in support of the motion to quash and supporting papers (including the declaration of Paul Alan Levy and all accompanying exhibits except Exhibit 3, which will be served separatelyi) to be served on counsel for all parties by instructing my e-Filing service provider, OneLegal, to cause said documents to be e-served on counsel at the following email addresses:

Craig Wenner	cwenner@bsfllp.com
Maxwell Pritt	mpritt@bsfllp.com
Peter Skinner	pskinner@bsfllp.com
Garner Weng	gweng@hansonbridgett.com
Adam Hoffman	ahoffman@hansonbridgett.com
Nathaniel Charny	ncharny@charnywheeler.com
Paul Alan Levy	plevy@citizen.org
Mark Goldowitz	mg@casp.net

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 15, 2021 /s/ Mark Goldowitz

PROOF OF SERVICE

On October 14, I caused copies of Exhibit 3 to my declaration, a CD containing a video of Kennedy's Berlin speech, to be mailed by first-class mail, postage prepaid, to Craig Wenner, counsel for Kennedy, and Adam Hoffman, counsel for Kos Media, at the following addresses:

Craig Wenner
Boies Schiller Flexner LLP
55 Hudson Yards
New York, New York 10001

Adam Hofmann
Hanson Bridgett
15th Floor
500 Capitol Mall
Sacramento, California 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 14, 2021 /s/ Paul Alan Levy