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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 FOR THE COUNTY OF ALAMEDA

16 DOWNEASTDEM, an individual,

17 Petitioner,

18 vs.

19 ROBERT F. KENNEDY, JR.,

20 an individual,

21 Respondent.

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

24 ROBERT F. KENNEDY, JR.,  
25 Petitioner,

26 v.  
27 KOS MEDIA, LLC, d/b/a, DAILY KOS,  
28 Respondent.

29 In the Supreme Court of the State of  
30 New York, County of Westchester  
31 Lower Court Index No. 65319/2020  
32 Hon. Mary H. Smith  
33 Order granting pre-action disclosure,  
34 April 16, 2021

35 Appeal pending  
36 Nos. 2021-03700 and 2021-04476  
37 (N.Y. App. Div. Dept. 2)

38 ENDORSED  
39 FILED  
40 ALAMEDA COUNTY

41 JUN 23 2021

42 CLERK OF THE SUPERIOR COURT

43 By Jessica Flores Deputy

44 CASE NO. **RG21102647**

45 PETITION TO QUASH SUBPOENA  
46 SEEKING TO IDENTIFY ANONYMOUS  
47 INTERNET SPEAKER, PURSUANT TO  
48 CODE OF CIVIL PROCEDURE §§ 1987.1,  
49 1987.2, AND 2029.600

50 **Filed By Fax**

1 Petitioner DOWNEASTDEM, alleges as follows:

2 1. Kos Media LLC provides media and publishing services, doing business as  
3 the Daily Kos (Daily Kos). Daily Kos describes itself as a political news website, community site,  
4 and activist hub which provides a platform for discussion and debate about the full range of issues  
5 facing the American community, including and especially about politics and the politics of  
6 progressive social change within the Democratic Party.

7 2. Petitioner DowneastDem (Petitioner) is an individual who has posted content on the  
8 Daily Kos website, including an article published on August 29, 2020, under the pseudonym  
9 DowneastDem, titled “Anti-Vaxer RFK JR. joins neo-Nazis in massive Berlin ‘Anti-Corona  
10 Protest’” (the Article).

11 3. Respondent Robert F. Kennedy, Jr. (Respondent) is an individual and a  
12 resident of Westchester, New York.

13 4. On November 30, 2020, Respondent commenced a proceeding in the  
14 Supreme Court of the State of New York, County of Westchester seeking pre-action discovery,  
15 captioned *Robert F. Kennedy, Jr., Petitioner v. Kos Media, LLC, d/b/a/ Daily Kos, Respondent*,  
16 Index No. 65319/2020 (the Petition for Pre-action Discovery). Daily Kos filed opposition to the  
17 Petition.

18 5. On April 16, 2021, Hon. Mary H. Smith, Justice of the Supreme Court, granted  
19 Respondent’s Petition for Pre-action Discovery, and on June 7, 2021, the court entered an order  
20 granting pre-action disclosure. Kos Media appealed from that order on or about June 17, 2021;  
21 the appeal is pending. (Nos. 2021-03700 and 2021-04476 (N.Y. App. Div. Dept. 2).) Kos  
22 Media’s application for a temporary restraining order pending its motion to stay pending appeal  
23 was denied on June 22, 2021.

24 6. On or about June 7, 2021, Respondent’s counsel issued a subpoena on  
25 behalf of Respondent for production of business records in an action pending outside of  
26 California to Kos Media, LLC c/o Markos Moulitsas (Subpoena). The Subpoena, which is based  
27 upon the New York court order granting pre-action discovery, commands Daily Kos to  
28 produce by June 30, 2021: “All documents in your possession, custody or control evidencing the

1 identity of the person(s) who use or have created, posted, or authored content under the pseudonym  
2 DowneastDem on the website Daily Kos.” The Subpoena specifically references the Article.

3 7. For the following reasons, which will be more thoroughly set forth in Petitioner’s  
4 forthcoming motion to quash, the Subpoena to Kos Media should be quashed:

5 (a) The New York trial court that authorized issuance of the subpoenas lacked  
6 jurisdiction to do so.

7 (b) The allegedly false statements in the Article were rhetorical hyperbole,  
8 essentially political name-calling, which constitutes nonactionable opinion  
9 protected by the First Amendment.

10 (c) The allegedly false statements in the Article were based on press reports,  
11 some of which were hyperlinked from the Article, and hence constitute  
12 opinion based on disclosed fact which is protected by the First Amendment.

13 (d) The Subpoena violates Petitioner’s First Amendment right to speak  
14 anonymously. The New York court did not address the question whether  
15 Respondent’s showing was sufficient to overcome this right. Unlike  
16 California, no appellate court in New York has yet addressed the procedure  
17 and the showing needed to overcome the right to speak anonymously, and the  
18 New York court did not require Respondent to provide evidence supporting  
19 a prima facie case of defamation.

20 (e) To the extent that the allegedly defamatory statements were not protected  
21 opinion, they were true or substantially true and there was no evidence of  
22 falsity or actual malice.

23 8. Petitioner’s counsel Paul Alan Levy spoke by telephone on Wednesday, June 16,  
24 2021, with Craig Wenner, lead counsel for Respondent, to meet and confer about Petitioner’s  
25 proposed petition/motion to quash the Subpoena. Counsel had a detailed discussion both about  
26 the  
27 law and about whether it might be in Respondent’s interest to withdraw the Subpoena. Mr. Levy  
28 gave Mr. Wenner’s client until Friday, June 18, 2021, to decide whether to withdraw his Subpoena.

1 Because the Subpoena has not been withdrawn, this Petition is now being filed. A motion to quash  
2 will be noticed shortly.

3 9. Petitioner files this Petition to Quash Subpoena Seeking to Identify Anonymous  
4 Internet Speaker pursuant to Code of Civil Procedure sections 1987.1, 1987.2, and 2029.600.

5 Petitioner DOWNEASTDEM prays as follows:

6 1. That the Court quash the Subpoena.

7 2. That the Court award to Petitioner the attorneys' fees and expenses incurred in  
8 connection with this Petition.

9 3. For such other relief as the Court deems just and proper.

10  
11 DATED: June 22, 2021

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