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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF ALAMEDA**

11 ROBERT F. KENNEDY, JR., an individual
12 Petitioner,

13 v.

14 KOS MEDIA, LLC d/b/a DAILY KOS
Respondent.

15 *First Petition, Case No. RG21102647*
DOWNEASTDEM, an individual
16 Petitioner,

17 v.

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

20 *In the Matter of the Subpoena Issued to Kos*
21 *Media, LLC:*

22 ROBERT F. KENNEDY, JR.,
23 Petitioner,

24 v.

25 KOS MEDIA, LLC d/b/a DAILY KOS,
26 Respondent.

27 In the Supreme Court of the State of New
28 York, County of Westchester
Index No. 65319/2020
Order granting pre-action disclosure issued
on April 16, 2021
Appeal pending:
N.Y. App. Division, Dept. 2
Nos. 2021-03700 and 2021-04476

Case No. **HG 21107215**

**ROBERT F. KENNEDY, JR.'S
PETITION TO COMPEL KOS MEDIA,
LLC TO COMPLY WITH SUBPOENA
FOR BUSINESS RECORDS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Hearing Date: 9/7, 2021
Time: ~~9:00~~ a.m. 9:30 am
Department: 511

First Petition filed by DowneastDem on
June 23, 2021; instant Petition filed by
party in out-of-state action [C.C.P. §
2029.620]

BY FAX

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION5

STATEMENT OF FACTS5

 A. DowneastDem’s Defamatory Post5

 B. The New York Court’s Decision and Order Authorizing Pre-Action
 Disclosure.....6

 C. California Proceedings8

ARGUMENT9

 A. The Daily Kos Is Precluded from Re-Litigating the Subpoena in
 California.....9

 B. In Any Event, the Daily Kos’s Objections Are Meritless Under California
 Law.....10

 1. *The subpoena does not violate DowneastDem’s First Amendment
 rights.*.....10

 2. *The basic information sought by Mr. Kennedy is not protected.*.....14

 3. *The subpoena was validly authorized by the New York Supreme
 Court.*.....15

CONCLUSION.....15

TABLE OF AUTHORITIES

FEDERAL CASES

Buckley v. Littell,
(2d Cir. 1976) 539 F.2d 882 12

Christopher v. Am. News Co.,
(7th Cir. 1948) 171 F.2d 275 12

Cohen v. Google, Inc.,
(Sup. Ct. N.Y. Cty. 2009) 887 N.Y.S.2d 424 10, 11

Doe v. Cahill,
(Del. 2005) 884 A.2d 451 14

Gaccione v. Scarpinato,
(2d Dep’t 2016) 26 N.Y.S.3d 603 12

Herlihy v. Metro. Museum of Art,
(Sup. Ct. N.Y. Cty. 1994) 608 N.Y.S.2d 770,
aff’d as modified, 633 N.Y.S.2d 106 (1995)..... 13

Konig v. WordPress.com,
(2013) 978 N.Y.S.2d 92 7, 10, 11

Krinsky v. Doe 6,
(2008) 159 Cal.App.4th 1154 10, 13, 14

Lemon Juice v. Twitter, Inc.,
(Sup. Ct. Kings Cty. 2014) 997 N.Y.S.2d 669 11

Levy v. Gelber,
(Sup. Ct. Bronx Cty. 1941) 25 N.Y.S.2d 148 13

Matrixx Initiatives, Inc. v. Doe,
(2006) 138 Cal.App.4th 872 15

Mencher v. Chesley,
(N.Y. 1947) 297 N.Y. 94 12

Mitchell v. Super. Ct.,
(1984) 37 Cal.3d 268 14, 15

Mycogen Corp. v. Monsanto Co.,
(2002) 28 Cal.4th 888 9

Proctor v. Vishay Intertechnology, Inc.,
(2013) 213 Cal.App.4th 1258 10

1	<i>Schermerhorn v. Rosenberg,</i> (2d Dep't 1980) 426 N.Y.S.2d 274.....	12
2	<i>St. Louis-San Francisco Ry. Co. v. Super. Ct.,</i> (1969) 276 Cal.App.2d 762	11
3		
4	<i>Sweeney v. Schenectady Union Publ'g Co.,</i> (2d Cir. 1941) 122 F.2d 288, 5 <i>aff'd by an equally divided court,</i> 316 U.S. 642 (1942)	12
6	<i>Tingley v. Times-Mirror Co.</i> (1904) 144 Cal. 205	11
7		
8	<i>Toal v. Staten Island Univ. Hosp.,</i> (2d Dep't 2002) 752 N.Y.S.2d 372.....	7, 11
9		
10	<i>V.L. v. E.L.,</i> (2016) 577 U.S. 404.....	10
11	<i>Vetere v. Associated Press, Inc.,</i> (S.D.N.Y. Apr. 17, 1989) No. 88-CV-4115 (MGC), 1989 WL 39664.....	12
12		
13	<i>Yelp Inc. v. Super. Ct.,</i> (2017) 17 Cal.App.5th 1	13
14	CODE	
15	Cal. Evid. Code, § 1070.....	14
16	RULES	
17	New York CPLR 3102(c)	11
18	CONSTITUTION	
19	Const. art. I, § 2.....	14
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 Robert F. Kennedy, Jr. respectfully petitions to compel Kos Media, LLC d/b/a Daily Kos
2 (herein "Daily Kos") to comply with a subpoena for business records and submits this
3 Memorandum of Points and Authorities in support thereof.

4 INTRODUCTION

5 Over the Daily Kos's opposition, Mr. Kennedy obtained judicial approval in New York for
6 a pre-suit subpoena to identify "DowneastDem," an anonymous author of a defamatory post on the
7 Daily Kos's website. Having lost in New York, the Daily Kos now seeks to relitigate its objections
8 in this Court.

9 DowneastDem defamed Mr. Kennedy by falsely stating on the Daily Kos website that Mr.
10 Kennedy "join[ed] neo-Nazis" at a protest in Berlin that "was organized by right-wing extremist
11 organizations- including the AfD party and various anti-Semitic conspiracy groups as well as the
12 neo-Nazi NPD party." Not knowing DowneastDem's identity, Mr. Kennedy filed a pre-suit petition
13 in New York state court for a subpoena to the Daily Kos. On April 16, 2021, the New York Supreme
14 Court, Westchester County, held that Mr. Kennedy had, for purposes of pre-action disclosure,
15 satisfied his initial burden to demonstrate a prima facie defamation claim against DowneastDem.

16 The New York court rejected all of the arguments that the Daily Kos raised in opposition to
17 Mr. Kennedy's petition for pre-action disclosure, including that the subpoena violates
18 DowneastDem's First Amendment rights; that Mr. Kennedy failed to establish a prima facie claim
19 for defamation; that the statements made by DowneastDem were factually true; that DowneastDem's
20 statements were protected opinion and based on disclosed facts; and that the subpoena was overbroad
21 and violated New York's disclosure rules. Now, after being served with the subpoena in California,
22 the Daily Kos objects again to the subpoena on many of the same grounds.

23 As the New York court already decided, however, the Daily Kos does not have a valid basis
24 on which to refuse to disclose the identity of DowneastDem to Mr. Kennedy. This Court likewise
25 should reject the Daily Kos's objections and order it to comply with the subpoena.

26 STATEMENT OF FACTS

27 A. DowneastDem's Defamatory Post

28 In August 2020, an anonymous blogger, using the pseudonym DowneastDem, falsely

1 accused Mr. Kennedy on the Daily Kos website of joining neo-Nazis at a protest in Berlin, writing
2 that “RFK JR. joins neo-Nazis” (“Defamatory Statement One”) and that Mr. Kennedy spoke at a
3 “protest [] organized by right-wing extremist organizations[,] including the AfD party and various
4 anti-Semitic conspiracy groups as well as the neo-Nazi NPD party” (“Defamatory Statement Two”) (collectively, the “Defamatory Statements”). (Declaration of Craig Wenner (“Wenner Decl.”), Ex.
5 1, at ¶ 5 (“N.Y. Pet.”).)¹

7 The Defamatory Statements are false. (*Id.* ¶ 6.) Mr. Kennedy did not “join[] neo-Nazis” at a
8 protest in Berlin, nor did he speak at a “protest [] organized by right-wing extremist organizations[,] including the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi NPD
9 party.” (*Id.*) To the contrary, Mr. Kennedy gave a speech decrying Nazism at the Protest for Peace
10 and Freedom in Berlin, which was initiated by the group Querdenken 711—a democratic movement
11 whose name means “lateral thinking” and that opposes all forms of fascism and extremism. (*Id.* ¶ 7.)

13 DowneastDem did not claim to have personally attended the Berlin demonstrations. Rather,
14 DowneastDem’s defamatory post cited one article in one publication, the German daily newspaper
15 Der Tagesspiegel. But that article provides no support for the Defamatory Statements. (*Id.* ¶ 8.) Der
16 Tagesspiegel did not describe a rally attended by Mr. Kennedy and Nazis, but rather multiple
17 demonstrations at different locations in addition to the protest organized by Querdenken 711 that
18 Mr. Kennedy attended. It further made clear that right-wing extremists gathered at the Reichstag, on
19 one side of the Brandenburg Gate, while the Querdenken 711 rally occurred on the other side of the
20 Brandenburg Gate near the Victory Column. (*Id.*) A simple search of Google Maps reveals that the
21 Reichstag and the Victory Column are two kilometers from each other. Lastly, Der Tagesspiegel
22 never reported that Mr. Kennedy joined neo-Nazis or that the protest where Mr. Kennedy spoke had
23 been organized by the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi
24 NPD party.

25 **B. The New York Court’s Decision and Order Authorizing Pre-Action Disclosure**

26 On November 30, 2020, Mr. Kennedy filed a petition in New York state court seeking pre-

27 _____
28 ¹ A copy of the webpage including the blog post with the defamatory statements is attached as Wenner Decl. Ex. 4.

1 action disclosure of DowneastDem’s identity so that Mr. Kennedy could file a defamation lawsuit
2 against DowneastDem. Without that information, Mr. Kennedy will be unable to name a defendant.
3 Mr. Kennedy named the Daily Kos as the respondent because the Daily Kos maintains the website
4 where DowneastDem registered an account and posted the Defamatory Statements.

5 The Daily Kos opposed the petition, filing an opposition brief, a counterclaim, a motion for
6 sanctions, and a motion for a protective order. In those various filings, the Daily Kos argued that
7 DowneastDem’s statements were true or at least substantially true, *see* Wenner Decl. Ex. 7 at 2, 4,
8 7–11; that DowneastDem’s statements, when read in context, fairly reported the cited Der
9 Tagesspiegel article, *see id.* at 5–7, 12–13; that Mr. Kennedy’s allegation of actual malice was
10 frivolous and there is no evidence that DowneastDem was or should have been aware of the falsity
11 of the statements, *see id.* at 11–13; that the Daily Kos would be harmed and prejudiced from
12 disclosure, *see id.* at 14; that the petition was improper under New York’s Civil Rights Law’s anti-
13 SLAPP provision, *see* Wenner Decl. Ex. 6 at 5; that the petition failed to satisfy Mr. Kennedy’s
14 *prima facie* burden justifying pre-action disclosure of DowneastDem’s identity, *see* Wenner Decl.
15 Ex. 9 at 1–3; that the petition failed to satisfy additional defamation standards, the “grossly
16 irresponsible” and “substantial reasons” tests, *see id.* at 3–7; and that DowneastDem’s statements
17 were non-actionable opinion or opinion based on disclosed fact (the Der Tagesspiegel article), *see*
18 *id.* at 7–9.

19 The New York court rejected all of these arguments, issuing a Decision & Order finding that
20 “the petition alleges sufficient facts, which fairly indicate that [Mr. Kennedy] has a claim for
21 defamation and is thus entitled to pre-action discovery limited to obtaining the identity of prospective
22 defendants.” (Wenner Decl. Ex. 2 (Decision & Order dated April 16, 2021 (“April 16 Order”)) at 3.)
23 The court reasoned that, under New York law, “a petition for pre-action discovery limited to
24 obtaining the identity of prospective defendants should be granted where the petitioner has alleged
25 facts fairly indicating that he or she has some cause of action.” (*Id.*, quoting *Konig v.*
26 *WordPress.com* (2013) 978 N.Y.S.2d 92, 93, and citing *Toal v. Staten Is. Univ. Hosp.*, (2002) 752
27 N.Y.S.2d 372, 374.) After receiving additional briefing on the Daily Kos’s objections to the form
28 of the subpoena, the New York court ordered “that a subpoena duces tecum shall issue” in the form

1 proposed by Mr. Kennedy. (Wenner Decl. Ex. 3 (Order Granting Pre-Action Disclosure dated June
2 7, 2021 (“June 7 Order”)) at 2.)

3 On June 17, 2021, the Daily Kos filed a notice of appeal with the Supreme Court of the State
4 of New York, Appellate Division, and then moved the appellate court to stay the enforcement of the
5 subpoena pending appeal. The appellate court has not resolved the fully-briefed stay motion.

6 **C. California Proceedings**

7 Under California’s interstate discovery rules, on June 10, 2021, Mr. Kennedy personally
8 served the Daily Kos with a subpoena for the production of business records, which mirrored the
9 court-authorized New York subpoena. The subpoena obligated the Daily Kos to respond by June 30,
10 2021. (See Wenner Decl. Ex. 14 [Subpoena].)

11 On June 23, 2021, DowneastDem filed a petition to quash the subpoena in this Court. (See
12 Wenner Decl. Ex. 15 [Petition to Quash Subpoena, DowneastDem v. Robert F. Kennedy, Jr. (Super.
13 Ct. Alameda Cty., filed June 23, 2021, No. RG21102647) (“DowneastDem Pet.”)].) The Court
14 initially set an August 16, 2021 hearing date when DowneastDem filed the petition to quash. Counsel
15 for Mr. Kennedy and DowneastDem then met and conferred concerning a proposed briefing
16 schedule on the petition to quash, but the parties were unable to reach agreement. DowneastDem’s
17 counsel then apparently spoke to court staff *ex parte*, and the August 16 hearing was vacated and a
18 new hearing date was set for November 1, 2021. DowneastDem subsequently applied *ex parte* to
19 modify the page lengths and briefing schedule in light of the new hearing date, which Mr. Kennedy
20 opposed. No hearing was scheduled or order entered for DowneastDem’s *ex parte* application, but
21 according to the court docket, the Court granted the *ex parte* application on July 7, 2021, which
22 required DowneastDem to file the “memorandum and moving papers for motion to quash” on July
23 23, 2021. As of the date of this filing, DowneastDem has not filed those papers and has missed their
24 self-imposed deadline. (Wenner Decl. ¶ 12.)

25 On June 29, 2021, the Daily Kos served objections to the subpoena and refused to produce
26 documents. (Wenner Decl., Ex. 16 (“Objections”).) The Daily Kos objected because DowneastDem
27 has separately moved to quash the subpoena and because the subpoena allegedly: (1) violates
28 DowneastDem’s First Amendment rights; (2) seeks information protected under the California

1 Constitution and the Evidence Code; (3) seeks information or documents protected by the attorney-
2 client privilege or attorney work product doctrine; (4) seeks confidential or trade-secret business
3 information; (5) is overbroad and unduly burdensome; (6) seeks information protected by the
4 Electronic Communication Privacy Act; and (7) was not validly authorized by the New York court
5 and that court’s decision is on appeal. (*Id.* at 2–3.) On July 2 and July 26, 2021, the parties met and
6 conferred with respect to the Daily Kos’s objections and to identify any objections that the parties
7 did not need to raise with the Court at this time. The parties agree that the Daily Kos’s objections
8 based on attorney–client privilege, confidentiality or trade secrets, undue burden or overbreadth, the
9 Electronic Communications Privacy Act, and the Stored Communications Act may be the subject of
10 a future meet and confer, but the parties do not expect those objections to require a ruling from the
11 Court. (Wenner Decl. ¶ 11.)

12 ARGUMENT

13 A. The Daily Kos Is Precluded from Re-Litigating the Subpoena in California.

14 The Daily Kos already litigated Mr. Kennedy’s request for pre-action disclosure in
15 New York. It lost. This Court should overrule the Daily Kos’s objections to the California subpoena,
16 which are simply an attempt to obtain a different outcome before another forum. (*Mycogen Corp. v.*
17 *Monsanto Co.* (2002) 28 Cal.4th 888, 896 [“Res judicata, or claim preclusion, prevents relitigation
18 of the same cause of action in a second suit between the same parties or parties in privity with
19 them.”].)

20 The Daily Kos asks this Court to revisit the precise question that the New York court already
21 resolved: Is Mr. Kennedy entitled to pre-action disclosure of the identity of DowneastDem? (*See,*
22 *e.g.,* Objections at 2 [invoking the First Amendment and the prima facie burden for pre-action
23 disclosure].) Indeed, the Daily Kos objected to Mr. Kennedy’s petition in New York on the basis of
24 federal constitutional law, New York’s anti-SLAPP legislation, the wording of the subpoena, and
25 the adequacy of Mr. Kennedy’s prima facie showing. (Wenner Decl. Exs. 4–6.) The *only* difference
26 between this proceeding and the one in New York is that the Daily Kos has replaced certain New
27 York standards and statutes with California standards and statutes. But this Court must give full faith
28 and credit to the New York court’s judgment, regardless of whether the Daily Kos believes it might

1 obtain a different result under California law. (*See, e.g., Proctor v. Vishay Intertechnology, Inc.*
2 (2013) 213 Cal.App.4th 1258, 1271 [“[C]ourts often speak of applying full faith and credit to a sister
3 state’s judgment in order to implement res judicata principles.”]; *see also V.L. v. E.L.* (2016) 577
4 U.S. 404, 407 [“A State may not disregard the judgment of a sister State because it disagrees with
5 the reasoning underlying the judgment or deems it to be wrong on the merits.”].) Accordingly, the
6 Court should overrule the Daily’s Kos objections and compel the Daily Kos to respond to the
7 subpoena.

8 **B. In Any Event, the Daily Kos’s Objections Are Meritless Under California Law.**

9 Mr. Kennedy’s subpoena, which merely seeks the identity of DowneastDem, is enforceable
10 under California law.

11 1. *The subpoena does not violate DowneastDem’s First Amendment rights.*

12 The Daily Kos objects to the subpoena on the grounds that it “violates DowneastDem’s First
13 Amendment right to speak anonymously,” and that Mr. Kennedy has “failed to establish a prima
14 facie showing of its underlying cause of action.” But as the Daily Kos admitted before the New York
15 appellate court, the New York trial court already rejected the Daily Kos’s arguments that Mr.
16 Kennedy failed to establish the prima facie showing required by the First Amendment “to sustain
17 disclosure of an anonymous internet speaker.” (Wenner Decl. Ex. 12 at 7; *see also id.* at 11 [“It is
18 well settled that the First Amendment protects anonymous speech.”].)² The New York Supreme
19 Court was correct to do so.

20 Applying New York law, this Court should reach the same result. “[I]n examining the law
21 of defamation . . . plaintiff’s prima facie burden must be defined and satisfied” according to the law
22 of the state where the cause of action arose. (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1173
23 [holding that the statements were non-actionable opinion under Florida law]; *see also St. Louis-San*

24 _____
25 ² While the New York court did not explicitly discuss the First Amendment right to anonymity,
26 the standards the court cited and applied to determine whether pre-action disclosure was justified
27 protect that right by requiring a prima facie showing of a defamation claim. (*See* Wenner Decl. Ex.
28 2 (April 16 Order at 3, citing *Konig v WordPress.com* (2d Dep’t 2013) 978 N.Y.S.2d 92); *see also*
Cohen v. Google, Inc. (Sup. Ct. N.Y. Cty. 2009) 887 N.Y.S.2d 424, 427 fn. 5 [noting that the
standards applied on a petition for pre-action disclosure “address the constitutional concerns raised
in this context”]; *Lemon Juice v. Twitter, Inc.* (Sup. Ct. Kings Cty. 2014) 997 N.Y.S.2d 669 [granting
pre-action disclosure of an anonymous Twitter user].)

1 *Francisco Ry. Co. v. Super. Ct.* (1969) 276 Cal.App.2d 762, 766 [in defamation case, holding the
2 law of the place “where the cause of action arose must be applied”].) In this case, a lawsuit has not
3 yet been filed. Mr. Kennedy established, however, that venue and jurisdiction for his pre-litigation
4 petition under New York CPLR 3102(c) were proper in New York because Mr. Kennedy is a resident
5 of Westchester County, New York, and because the Defamatory Statements were published
6 throughout the United States and internationally, including in Westchester County. (N.Y. Pet. ¶ 4.)
7 New York law therefore controls Mr. Kennedy’s claims arising from DowneastDem’s defamatory
8 statements. (*Tingley v. Times-Mirror Co.* (1904) 144 Cal. 205, 206 [“The liability arises where the
9 injury occurs, and the injury in the case of libel is peculiarly at the county in which the plaintiff
10 resides[.]”].)

11 New York courts regularly resolve petitions for pre-action disclosure of anonymous
12 defendants for anticipated defamation lawsuits. These pre-action petitions often involve third-party
13 custodians, such as the Daily Kos, that are located in other jurisdictions. (*See, e.g., Cohen v. Google,*
14 *Inc.* (Sup. Ct. N.Y. Cty. 2009) 887 N.Y.S.2d 424; *Lemon Juice v. Twitter, Inc.* (Sup. Ct. Kings Cty.
15 2014) 997 N.Y.S.2d 669.) Even though these petitions involve cross-border discovery, New York
16 courts apply New York law to the prima facie analysis. And the New York courts that have
17 considered whether to import prima facie standards from other states have recognized that the “law
18 in New York generally applicable to a CPLR 3102(c) application for pre-action disclosure which
19 requires a *prima facie* showing of a meritorious cause of action, and the legal requirements for
20 establishing a meritorious cause of action for defamation, appear to address the constitutional
21 concerns raised in this context.” (*Cohen*, 887 N.Y.S.2d at 427 n.5, citing defamation cases.)

22 In New York, “to obtain disclosure prior to commencing an action,” “the applicant must
23 show the existence of a prima facie cause of action.” (*Toal v. Staten Island Univ. Hosp.* (2d Dep’t
24 2002) 752 N.Y.S.2d 372, 374.) A request “limited to obtaining the identity of prospective defendants
25 should be granted where the petitioner has alleged facts fairly indicating that he or she has some
26 cause of action.” (*Konig v. WordPress.com* (2d Dep’t 2013) 978 N.Y.S.2d 92, 93; *see also* April 16
27 Order at 3 [“Thus, a petitioner is entitled to obtain the identity of prospective defendants where a
28 petitioner has alleged facts, which state a cause of action.”].) The elements of a cause of action for

1 defamation are “a false statement, published without privilege or authorization to a third party,
2 constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special
3 harm or constitute defamation per se.” (*Gaccione v. Scarpinato* (2d Dep’t 2016) 26 N.Y.S.3d 603,
4 605, internal quotation marks omitted.) In examining a prima facie case for defamation, “courts will
5 not strain to interpret [the words used] in their mildest and most inoffensive sense to hold them
6 nonlibelous.” (*Mencher v. Chesley* (N.Y. 1947) 297 N.Y. 94, 99.)

7 As the New York Supreme Court already ruled, “the petition alleges sufficient facts, which
8 fairly indicate that [Mr. Kennedy] has a claim for defamation and is thus entitled to pre-action
9 discovery limited to obtaining the identity of prospective defendants.” (Wenner Decl. Ex. 2 (April
10 16 Order at 3).) The statements are false because Mr. Kennedy did not “join[] neo-Nazis” at a protest
11 in Berlin, nor did he speak at a “protest [] organized by right-wing extremist organizations, including
12 the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi NPD party.” Mr.
13 Kennedy gave a speech specifically decrying Nazism at the Protest for Peace and Freedom in Berlin.
14 (See N.Y. Pet. ¶ 7.) Querdenken 711—the organizer of the protest where Mr. Kennedy spoke—is
15 not “the AfD party,” an “anti-Semitic conspiracy group,” or “the neo-Nazi NPD party.” Rather, it is
16 a democratic movement whose name means “lateral thinking” and that opposes all forms of fascism
17 and extremism. (*Id.* ¶ 7.)

18 Additionally, DowneastDem’s statement is defamatory *per se* because it associates Mr.
19 Kennedy with Nazism or anti-Semitism. (See, e.g., *Schermerhorn v. Rosenberg* (2d Dep’t 1980) 426
20 N.Y.S.2d 274, 284–85 [anti-Semitism]; *Sweeney v. Schenectady Union Publ’g Co.* (2d Cir. 1941)
21 122 F.2d 288, 289–91 [same], *aff’d by an equally divided court*, 316 U.S. 642 (1942); *Christopher*
22 *v. Am. News Co.* (7th Cir. 1948) 171 F.2d 275, 278 [“A charge that one is a Nazi or a pro-Nazi is
23 actionable.”]; *Buckley v. Littell* (2d Cir. 1976) 539 F.2d 882, 893 fn. 11 [accusation that one is a
24 “fellow traveler” of the Nazis would be libelous]; *Vetere v. Associated Press, Inc.* (S.D.N.Y. Apr.
25 17, 1989) No. 88-CV-4115 (MGC), 1989 WL 39664, at *1 [holding on summary judgment in libel
26 action that plaintiff was in fact “a former member of the American Nazi Party”]; see also *Herlihy v.*
27 *Metro. Museum of Art* (Sup. Ct. N.Y. Cty. 1994) 608 N.Y.S.2d 770, 774 [“There is no doubt that in
28 these days of heightened sensitivity, being unjustly labeled as a blatant anti-Semite is just as

1 repulsive as calling someone ‘a dirty Jew.’”], *aff’d as modified*, 633 N.Y.S.2d 106 (1995); *Levy v.*
2 *Gelber* (Sup. Ct. Bronx Cty. 1941) 25 N.Y.S.2d 148, 149 [“[T]o label an attorney a Communist or
3 a Nazi is to taint him with disrepute.”].)

4 Finally, while New York law plainly applies, Mr. Kennedy also meets his burden to establish
5 a prima facie case under California law. A prima facie case under California law requires “evidence
6 that a libelous statement has been made.” (*Krinsky*, 159 Cal.App.4th at 1172.) “Prima facie evidence
7 is that which will support a ruling in favor of its proponent if no controverting evidence is presented.
8 It may be slight evidence which creates a reasonable inference of fact sought to be established but
9 need not eliminate all contrary inferences.” (*Id.* at 1172, fn. 14, internal citations omitted.)

10 The assertions in the Petition that DowneastDem’s statements are false and defamatory are
11 easily substantiated. Mr. Kennedy did not join neo-Nazis at a protest in Berlin. (Decl. of Robert F.
12 Kennedy, Jr., ¶ 3.) Rather, he gave a speech at the Protest for Peace and Freedom in Berlin. (*Id.* ¶
13 2.) And far from joining neo-Nazis, Mr. Kennedy specifically decried Nazism and totalitarianism,
14 stating:

15 I look at this crowd, and I see the opposite of Nazism. I see people who love
16 democracy; people who want open government; people who want leaders that are
17 not going to lie to them; people who [want] leaders who will not make up arbitrary
18 rules and regulations to orchestrate obedience of the population.

18 (*Id.* ¶ 5.) Furthermore, the Protest for Peace and Freedom that Mr. Kennedy attended was not
19 organized by the AfD party, an anti-Semitic conspiracy group, or the neo-Nazi NPD party; it was
20 organized by a group called Querdenken 711. (*Id.* ¶ 2.) Querdenken 711 is a democratic movement
21 whose name means “lateral thinking” and that opposes all forms of fascism and extremism.³ These
22 simple facts provide all that is needed for a reasonable inference that DowneastDem’s statements
23 are false. (*Yelp Inc. v. Super. Ct.* (2017) 17 Cal.App.5th 1, 19–20 [plaintiff “demonstrated a sufficient
24 prima facie case of defamation” where it alleged facts demonstrating the defamatory statement was
25

26 ³ See Wenner Decl. Ex. 5 (Unser Manifest, QUERDENKEN 711, <https://querdenken-711.de/manifest/> (last accessed July 29, 2021) (“Wir sind Demokraten. Wir sind eine friedliche
27 Bewegung, in der Extremismus, Gewalt, Antisemitismus und menschenverachtendes Gedankengut
28 keinen Platz hat.” (unofficially translated as, “We are democrats. We are a peaceful movement in
which extremism, violence, anti-Semitism and inhuman ideas have no place.”))).

1 false and “supported those allegations in the declaration he submitted in support of his motion to
2 compel”].)

3 As for the actual malice standard, California courts recognize that a public figure plaintiff in
4 a defamation claim is not required to produce evidence on the prospective defendant’s subjective
5 state of mind. (*See Krinsky*, 159 Cal.App.4th at pp. 1169–73 [adopting the standard set forth in *Doe*
6 *v. Cahill*]; *Doe v. Cahill* (Del. 2005) 884 A.2d 451, 464 [“Without discovery of the defendant’s
7 identity, satisfying this element may be difficult, if not impossible. Consequently, we do NOT hold
8 that the public figure defamation plaintiff is required to produce evidence on this element of the
9 claim.”].)

10 2. *The basic information sought by Mr. Kennedy is not protected.*

11 The Daily Kos also argues that the subpoena seeks information protected from disclosure by
12 the California Constitution and the California Shield Law (Evidence Code section 1070). Section
13 1070 states:

14 A publisher, editor, reporter, or other person connected with or employed upon a
15 newspaper, magazine, or other periodical publication, or by a press association or
16 wire service, or any person who has been so connected or employed, cannot be
17 adjudged in contempt by a judicial, legislative, administrative body, or any other
18 body having the power to issue subpoenas, for refusing to disclose, in any
19 proceeding as defined in Section 901, the source of any information procured while
20 so connected or employed for publication in a newspaper, magazine or other
21 periodical publication, or for refusing to disclose any unpublished information
22 obtained or prepared in gathering, receiving or processing of information for
23 communication to the public.

24 (Evid. Code, § 1070 [titled “Refusal to disclose news source”]; *see also* Const. art. I, § 2 [stating
25 substantially the same].) These provisions are wholly inapplicable to Mr. Kennedy’s subpoena.

26 Evidence Code section 1070 protects publishers, editors, reporters, and others from
27 disclosing the “source of any information.” But DowneastDem is not a “news source” for a story,
28 she is the author of a defamatory statements in a blog post on the internet. The Daily Kos fails to
provide any evidence, nor is there any, that DowneastDem was a fact witness to any of the relevant
events in Germany. DowneastDem’s identity simply is not covered under provisions of California
law that protect anonymous “news source[s].” (*See Mitchell v. Super. Ct.* (1984) 37 Cal.3d 268, 279

1 ["In general, disclosure is appropriate in civil cases, especially when the reporter is a party to the
2 litigation."].⁴

3 3. *The subpoena was validly authorized by the New York Supreme Court.*

4 Lastly, the Daily Kos objects on the grounds that the "subpoena was not validly authorized,"
5 and that the New York order authorizing the subpoena is on appeal. The Court should overrule this
6 objection for several reasons. First, while the Daily Kos may disagree with the New York court's
7 rejection of its arguments, that does not mean the subpoena was not "validly authorized." Second,
8 the Daily Kos's motion to stay pending appeal is currently before the New York appellate court,
9 which has not stayed enforcement of the subpoena. Finally, any delay in authorizing the subpoena
10 harms Mr. Kennedy. The Defamatory Statements are still posted on the Daily Kos's website, and
11 Mr. Kennedy is damaged each day it remains there. Mr. Kennedy also faces a serious risk of
12 irreparable harm from a stay if he is not able to bring his defamation lawsuit within the applicable
13 statute of limitations period, which in New York is one year.⁵ Accordingly, this objection should
14 be overruled.

15 **CONCLUSION**

16 For the reasons set forth above, Mr. Kennedy respectfully requests that the Court issue an
17 order overruling the Daily Kos's objections and compelling the Daily Kos to comply with the
18 subpoena.

19
20
21
22
23 ⁴ The Daily Kos's argument that Mr. Kennedy failed to exhaust other alternative sources,
24 relying on *Mitchell*, is misplaced. Objections at 2. First, DowneastDem is not a "news source," so
the argument is inapplicable. In any event, there are no alternative sources; only the Daily Kos knows
DowneastDem's identity.

25 ⁵ The Daily Kos also objected to the subpoena on the grounds that it is the "subject of the
26 Petition to Quash Subpoena" filed by DowneastDem. (*See* Objections at 2.) But that is beside the
27 point, because the Daily Kos "must assert [its] own legal rights [in refusing to comply with the
28 subpoena] rather than rely on the rights or interests of third parties." (*Matrixx Initiatives, Inc. v. Doe*
(2006) 138 Cal.App.4th 872, 877.) In any event, in the interests of judicial efficiency and to avoid
the risk of inconsistent rulings, Mr. Kennedy intends to move to consolidate this proceeding with
DowneastDem's.

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Respectfully submitted,

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