SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

MARC ANTHONY,

Plaintiff,

- against -

KAITLIN HAAS and THE TOWN BOARD OF THE TOWN OF HIGHLAND,

Respondents.

INDEX NO. E2023-260

NOTICE OF CROSS-MOTION TO QUASH SUBPOENA

PLEASE TAKE NOTICE that upon the annexed Memorandum of Law, the Affirmation of Joseph Abraham, the Affirmation of Michael Linhorst, and the exhibits attached thereto, nonparty Joseph Abraham will move the Supreme Court of the State of New York, County of Sullivan, 414 Broadway, Monticello, New York, 12701, before the Hon. Stephen Schick, on the 13th day of June, 2024, at 11:30 a.m. or as soon thereafter as counsel may be heard for an Order to Quash Plaintiff's Subpoena, and for such other and further relief as this Court may deem just and proper.

Dated: June 6, 2024

Respectfully submitted,

By: /s/ *Michael Linhorst*

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Counsel for Nonparty Joseph Abraham

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

MARC ANTHONY,

Plaintiff,

- against - INDEX NO. E2023-260

KAITLIN HAAS and THE TOWN BOARD
OF THE TOWN OF HIGHLAND,

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL NONPARTY JOSEPH ABRAHAM TO TESTIFY AT DEPOSITION AND IN SUPPORT OF NONPARTY JOSEPH ABRAHAM'S CROSS-MOTION TO QUASH SUBPOENA

Respectfully submitted,

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Nonparty journalist Joseph Abraham appears for the limited purpose of opposing the motion filed by Plaintiff Marc Anthony that seeks to compel Mr. Abraham to testify at a deposition and to produce any documents referring to Marc Anthony, the Town of Highland Constabulary, or to an April 2022 *Sullivan County Democrat* article, and cross-moving to quash the subpoena. The subpoena was not properly served on Mr. Abraham, it is substantively defective, and it is barred by the New York Shield Law that protects journalists like Mr. Abraham from precisely this type of compulsory testimony. Mr. Abraham respectfully requests that the Court deny Plaintiff's Motion to Compel and grant Mr. Abraham's Cross-Motion to Quash.

PRELIMINARY STATEMENT

Plaintiff is attempting to subpoena a nonparty journalist to force disclosure of protected information that is not even relevant to this litigation. The subpoena, if valid, would infringe on Mr. Abraham's rights. But the subpoena is neither procedurally nor substantively valid. For three independent reasons, the Court should refuse to enforce it.

First, Plaintiff failed to meet the requirements for service of a subpoena because it was not served on Mr. Abraham's "actual . . . dwelling place or usual place of abode." CPLR 308(2). New York courts strictly enforce this requirement, and the fact that Mr. Abraham later learned about the subpoena through his parents has no bearing on Plaintiff's failure to properly serve it.

Second, the subpoena failed to provide "notice stating the circumstances or reasons such disclosure is sought or required," which is mandatory for subpoenas to nonparties. CPLR 3101(a)(4). The lack of this notice renders the subpoena "facially defective" and unenforceable. *De Stafano v. MT Health Clubs*, 220 A.D.2d 331, 331 (1st Dep't 1995).

Third, enforcement of the subpoena is barred by New York's Shield Law, Civil Rights Law § 79-h. The law provides "[a]bsolute protection" to journalists like Mr. Abraham against

compelled disclosure of information from confidential sources, and it sets a stringent test a party must meet before compelling disclosure of any other unpublished information. Plaintiff cannot overcome this qualified protection because he cannot show that the testimony he seeks could be "highly material and relevant," "critical or necessary" to his defamation claim, and "not obtainable from any alternative source." *See* Civil Rights Law § 79-h(c).

Any of these reasons individually would be sufficient to quash Plaintiff's subpoena. Mr. Abraham therefore respectfully requests that the Court deny Plaintiff's Motion to Compel and grant Mr. Abraham's Cross-Motion to Quash.

BACKGROUND

Mr. Abraham was managing editor of the *Sullivan County Democrat* from April 2021 to April 2023. Abraham Aff. ¶ 3. During that time, the newspaper published an article titled *Highland Constabulary internal turmoil* on August 19, 2022. *See* Exhibit JA-7.[1] Mr. Abraham was not the reporter assigned to the article; he did not write it, and his name is not included on the byline. *See id*.; Abraham Aff. ¶ 4. The article reported on the contents of an unredacted copy of an investigative report written by the Town of Highland regarding the Town's Constabulary. The newspaper relied on two sources in the article. Abraham Aff. ¶ 5; *see* Exhibit JA-7. An anonymous source provided a copy of the unredacted report to the newspaper, and an unnamed Town source confirmed the authenticity of the report. Abraham Aff. ¶ 5; *see* Exhibit JA-7 (article stating "[t]he town has confirmed the contents of the unredacted report obtained by the Democrat").

Plaintiff Marc Anthony was Constable for the Town of Highland until he was suspended in April 2022. Compl. ¶ 1. He filed a lawsuit on Feb. 13, 2023, that contains one count relevant

[1] Unless otherwise noted, exhibits refer to the exhibits filed in support of Plaintiff's Motion to Compel and appended to the Affirmation of Stacey Van Malden.

here. He alleges that Kaitlin Haas, a Town board member who he claims was acting in her personal capacity, defamed him in "[a] defamatory statement [that] was published in the Sullivan County Democrat." Compl. ¶¶ 81-82. The Complaint does not specify what that "statement" was. *See id*. Plaintiff does not allege that he was defamed by Mr. Abraham or the *Sullivan County Democrat*. Neither Mr. Abraham nor the *Sullivan County Democrat* are parties to this suit.

On April 23, 2024, a process server delivered a subpoena bearing Mr. Abraham's name to Mr. Abraham's mother at 2203 Sinclair Avenue, Utica, New York. Exhibit JA-2. Mr. Abraham's parents live at that address. Abraham Aff. ¶ 7. Although Mr. Abraham owns the property, he did not live there at the time of delivery, nor does he now. Abraham Aff. ¶¶ 6, 8. Mr. Abraham's parents told him about the subpoena. Abraham Aff. ¶ 9. On April 26, 2024, Mr. Abraham emailed Plaintiff's counsel, Stacey Van Malden, to invoke the New York Shield Law and inform her that he would not comply with the subpoena because the law protected him from being compelled to testify on this matter. Exhibit JA-4.

The subpoena purported to set a deposition date of May 14, 2024. Exhibit JA-1. The subpoena limited its scope to "[a]ny documents in your possession which refer[] to Marc Anthony, the Town of Highland Constabulary, or to an article published in the Sullivan County Democrat on or about April 19 or 22, 2022 regarding the Town of Highland Constabulary." *Id*.

On Friday, May 10, 2024, undersigned counsel was retained by Mr. Abraham. Linhorst Aff. ¶ 4. Counsel contacted Ms. Van Malden by phone the morning of the next business day and followed up with an email. Linhorst Aff. ¶ 5 & Exhibit A. In a phone conversation with Ms. Van Malden, counsel stated that the subpoena was not properly served on Mr. Abraham and that the New York Shield Law barred her attempt to compel his testimony. Linhorst Aff. ¶ 6. Counsel asked Ms. Van Malden to either withdraw the subpoena or to postpone the deposition to allow

time to file a motion to quash. *Id*. Ms. Van Malden refused to do so. *Id*. However, in an email, she further limited the scope of the subpoena by stating that she was not seeking to question Mr. Abraham regarding the anonymous source of the report, but instead "[t]he sole purpose of the deposition is to identify who at 'The Town' confirmed the report." Linhorst Aff. ¶ 8 & Exhibit B.

In a follow-up letter to Ms. Van Malden later that day, Mr. Abraham's counsel reiterated that he had requested the deposition be postponed and explained in further detail the reasons why the deposition could not go forward, including that the subpoena was not properly served, it did not comport with New York's requirements regarding the contents of nonparty subpoenas, and Plaintiff could not overcome the broad protections of the Shield Law. Linhorst Aff. ¶ 7; Exhibit JA-3. Counsel for Mr. Abraham heard nothing further from Ms. Van Malden until receiving a copy of the instant Motion to Compel.

ARGUMENT

The Motion to Compel should be denied and Mr. Abraham's Cross-Motion to Quash should be granted. Plaintiff's subpoena is unenforceable for three independent reasons: it was not properly served, it does not comply with the requirements for nonparty subpoenas, and it is barred by the Shield Law.

I. The Subpoena Should Be Quashed Because It Was Not Properly Served.

The subpoena is not effective because it was not properly served. It was neither served on Mr. Abraham personally, nor served in a way that met New York State's requirements for substituted service. *See* CPLR 308.

Ms. Van Malden claims that the subpoena was served by "Substituted Service," Van Malden Aff. ¶ 7, apparently referring to the process delineated in CPLR 308(2). However, this provision requires service on "a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served," together with "mailing the

summons to the person to be served at his or her last known residence." CPLR 308(2). Plaintiff failed to meet these requirements.

The subpoena was delivered to Mr. Abraham's parents' house at 2203 Sinclair Avenue in Utica, New York, and handed to his mother. Exhibit JA-2. Mr. Abraham owns that building, and his parents live there, but Mr. Abraham does not. Abraham Aff. ¶¶ 6-8. It is not his "dwelling place or usual place of abode." CPLR 308(2). In such a circumstance, where the target of the subpoena "did not reside at the address where personal service was attempted and the address was not alleged to be the [person's] place of business, any purported service pursuant to CPLR 308 was ineffective." *Perdomo v. Chau Shing Wong*, 275 A.D.2d 357, 358 (2d Dep't 2000). That should be the end of the matter.

Ms. Van Malden attaches an online Whitepages entry for Mr. Abraham, apparently trying to suggest that 2203 Sinclair Avenue was his "last known residence." *See* Exhibit JA-9 (Whitepages entry stating that 2203 Sinclair Avenue was Mr. Abraham's "current" address but also that his "[r]esidence" there ended in "2023"). Regardless, the Court of Appeals has made clear that a person's "last known residence" is not the same as the person's "dwelling place or usual place of abode," and serving process only on a last known residence cannot meet the requirements of CPLR 308. *Feinstein v. Bergner*, 48 N.Y.2d 234, 239, 241 (1979) (holding that service was not effective where document was served on "defendant's last known residence rather than his actual abode"). Without service at the location where the person actually lives (or the person's place of business), service has not been accomplished. *Id*.

The circumstances here closely mirror the facts of *Jia Wang v. Dan Zhao*, 151 A.D.3d 538 (1st Dep't 2017). In that case, the plaintiff attempted to serve the defendant pursuant to CPLR 308(2) at an apartment that the defendant owned and used as a mailing address on certain

documents. *Id*. at 538. However, the defendant did not reside at the apartment. *Id*. at 538-39. The First Department concluded that the defendant was not properly served because the apartment was not his "dwelling place or usual place of abode." *Id*. Just like in *Jia Wang*, Mr. Abraham was not properly served because the subpoena was delivered to a property he merely owns and does not reside at. *See id*.; *see also N.Y. State Higher Educ. Servs. Corp. v. Perchik*, 207 A.D.2d 1040, 1040 (4th Dep't 1994) (holding that service was ineffective where defendant "did not reside at the address where the process server purported to have served defendant by serving defendant's father," even though the address was listed on defendant's driver's license).

Ms. Van Malden notes that Mr. Abraham "acknowledged" the subpoena, Van Malden Aff. ¶ 8, but his email to her invoking the Shield Law, *see* Exhibit JA-4, has no bearing on the validity of the service. The fact that Mr. Abraham "subsequently received actual notice" of this subpoena "does not cure this defect, since notice received by means other than those authorized by statute" cannot cure the legal insufficiency of the service. *Feinstein*, 48 N.Y.2d at 241. In other words, "[w]hen the requirements for service of process have not been met, it is irrelevant that [Mr. Abraham] may have actually received the documents." *Raschel v. Rish*, 69 N.Y.2d 694, 697 (1986); *see also U.S. Bank Nat. Ass'n v. Vanvliet*, 24 A.D.3d 906, 907 (3d Dep't 2005) ("CPLR 308(2) requires strict compliance and, thus, even a defendant's subsequent receipt of actual notice of a lawsuit will not cure a defect.").

Because the subpoena was not served on Mr. Abraham personally or served at his "actual place of business, dwelling place or usual place of abode," the subpoena was not properly served. CPLR 308. Mr. Abraham is under no obligation pursuant to the subpoena, and it should be quashed.

II. The Subpoena Should Be Quashed Because Plaintiff Failed to Meet the Requirements of CPLR § 3101(a)(4).

Even if the subpoena had been served properly (and it was not), it would still be invalid because it fails to meet the requirements for nonparty subpoenas. CPLR 3101 requires a party seeking to subpoena a nonparty to provide "notice stating the circumstances or reasons such disclosure is sought or required." CPLR 3101(a)(4); *see also Kapon v. Koch*, 23 N.Y.3d 32, 34 (2014) ("[T]he subpoenaing party must first sufficiently state the 'circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it)."). A subpoena that fails to do so is "facially defective" and cannot be enforced. *De Stafano v. MT Health Clubs*, 220 A.D.2d 331, 331 (1st Dep't 1995) (affirming trial court's refusal to enforce subpoenas on third-party witnesses because they "were facially defective for failure to 'stat[e] the circumstances or reasons such disclosure is sought or required,' as required by CPLR 3101(a)(4)").

The subpoena to Mr. Abraham included no such notice. *See* Exhibit JA-1. Instead, it merely commanded him to bring documents on certain subjects with him to the deposition. *Id*. This renders the subpoena "facially invalid and unenforceable, because it neither contained nor was accompanied by a notice setting forth the reason why such disclosure was sought." *Wolf v. Wolf*, 300 A.D.2d 473, 473 (2d Dep't 2002).

While there are a number of ways a party can meet this requirement, Plaintiff made no attempt to do so. Counsel alerted Ms. Van Malden to this defect in his letter on May 13, 2024, *see* Exhibit JA-3 at 4, but her Motion to Compel and accompanying affidavit are notably silent on this point. Thus, because Plaintiff failed to meet the requirements of CPLR 3101(a)(4), the subpoena

is not enforceable. *Kapon*, 23 N.Y.3d at 39 ("The subpoenaing party must include that information in the notice in the first instance, lest it be subject to a challenge for facial insufficiency.").[2]

III. The Subpoena Should Be Quashed Because the New York Shield Law Protects Mr. Abraham From Compelled Testimony.

Even if Plaintiff could somehow overcome his subpoena's fatal service and notice defects, the subpoena still could not be enforced. New York's Shield Law prohibits compelling a journalist like Mr. Abraham from testifying about a confidential source, and it sets a high bar — which Plaintiff cannot overcome — before a journalist can be compelled to testify about a non-confidential source. *See* Civil Rights Law § 79-h.

The Shield Law provides journalists the "broadest possible protection" against forced disclosure of newsgathering information, "without any qualifying language," and it is "recognized as the strongest in the nation." *Holmes v. Winter*, 22 N.Y.3d 300, 308, 310 (2013).

By its express terms, the Shield Law provides "[a]bsolute protection" to journalists against the compulsory disclosure of information "obtained or received in confidence," or the "identity of the source" of any such information. Civil Rights Law § 79-h(b); *see, e.g.*, *Baker v. Goldman Sachs & Co.*, 669 F.3d 105, 107 (2d Cir. 2012) ("New York's Shield Law provides journalists an absolute privilege from testifying with regard to news obtained under a promise of confidentiality."). The law also provides a qualified privilege for unpublished information obtained through a non-confidential source, allowing the reporter to refuse to provide the

[2] This is not the only infirmity with the substance of the subpoena. The subpoena on its face is limited to any documents that "refer[] to Marc Anthony, the Town of Highland Constabulary, or to an article published in the Sullivan County Democrat on or about April 19 or 22, 2022 regarding the Town of Highland Constabulary." Exhibit JA-1. But the article that reported on the unredacted investigative report was published on August 19, 2022. Exhibit JA-7. Thus, even if the subpoena were enforceable and Mr. Abraham were forced to sit for a deposition, any questions related to the August 19 article would be outside the scope of the subpoena.

information unless the party seeking disclosure can meet a difficult, three-part test. N.Y. Civil Rights Law § 79-h(c).[3]

The protections afforded by the Shield Law serve several critical purposes. First, since newspapers regularly report on matters of public interest that generate lawsuits, and litigants regularly attempt to rely on newsgathering material rather than obtaining evidence independently, the Shield Law prevents journalists from becoming investigators or participants in litigation. *See, e.g.*, *In re CBS Inc.*, 232 A.D.2d 291, 292 (1st Dep't 1996). Additionally, the Shield Law recognizes "the unique role of reporters as purveyors of information to the public and of newspapers as forums for criticism, discussion and debate." *O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 532 (1988) (Bellacosa, J., concurring). Thus, to ensure the press remains fully vital and unfettered, as the Constitution demands, the law imposes important restrictions on compelling information from journalists.

The Shield Law bars the purported subpoena of Mr. Abraham in its entirety. To the extent the subpoena seeks any information concerning the anonymous source who was involved in providing the unredacted investigative report to the *Sullivan County Democrat*, this information is protected by the Shield Law's "[a]bsolute" privilege for confidential material. Civil Rights Law

[3] In addition to the Shield Law, the First Amendment protects against disclosure of confidential or unpublished information. Forced disclosure of unpublished information impinges on the press's constitutionally protected right of autonomy in editorial judgment. *See Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974). Compelled disclosure opens to public scrutiny information and materials that reporters and editors, in their editorial judgment, have chosen not to publish — and in doing so, it subjects those editorial decisions to external pressures that may "seriously hamper [the press'] ability to function in its editorial role." *Application of Consumers Union of U.S., Inc.*, 495 F.Supp. 582, 586 (S.D.N.Y. 1980). Especially when (as here) the press is not even a party to the proceeding, respect for a free press requires that journalists' "editorial privacy" be protected from incursion. *See People v. Iannaccone*, 112 Misc.2d 1057, 1063 (Sup. Ct., N.Y. Cnty. 1982) ("Compelling this reporter to produce her resource materials significantly intrudes into the news gathering and editorial processes.").

§ 79-h(b). As a result, Mr. Abraham cannot be compelled to testify about the identity of the source, the report itself, or any related information. *Id*. Plaintiff's counsel appears to have recognized as much in narrowing via e-mail the scope of the testimony sought. Linhorst Aff. ¶ 8 & Exhibit B.

To the extent Plaintiff seeks information about the unnamed source from the Town who verified the report's authenticity, information about this source — and any remaining, unpublished reporting the *Sullivan County Democrat* may have done in connection with the article — is protected by the Shield Law's qualified privilege. *See* Civil Rights Law § 79-h(c).

To overcome the qualified privilege, Plaintiff would have to make a "clear and specific" showing that the non-confidential, unpublished information "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." *Id*. "All three prongs" of the test "must be satisfied before disclosure can be ordered." *In re Grand Jury Subpoenas to Maguire*, 161 Misc. 2d 960, 966 (Sup. Ct., Westchester Cnty. 1994). This three-part test establishes a "stringent" standard "that imposes a 'very heavy burden' on any party seeking to overcome it." *Giuffre v. Maxwell*, 221 F. Supp. 3d 472, 476 (S.D.N.Y. 2016) (quashing subpoena of nonparty journalist in defamation case) (quoting *In re Am. Broad. Companies, Inc.*, 189 Misc.2d 805, 808 (Sup. Ct., N.Y. Cnty. 2001)). Plaintiff cannot overcome the privilege here.

Mr. Abraham's testimony would not even be relevant, let alone highly material, critical or necessary, to Plaintiff's claims. The Complaint alleges that Ms. Haas defamed him by making a statement that "was published in the Sullivan County Democrat on August 19, 2022." Compl. ¶¶ 81-82. The Complaint never identifies the particular statement it claims to be defamatory, nor does it explain how a statement published in August 2022 harmed Plaintiff, who was already suspended in April 2022. *See id*. ¶ 1. And Ms. Van Malden has stated that she seeks Mr.

Abraham's deposition only "to identify who at 'The Town' confirmed the report," Linhorst Ex. B — not even to identify who made whatever statements in the report Plaintiff claims were defamatory. There is no indication here how Mr. Abraham's testimony could be "relevant," let alone "critical or necessary," to establishing Plaintiff's claim.[4] *See Perito v. Finklestein*, 51 A.D.3d 674, 675 (2d Dep't 2008) ("In order to show that information sought is 'critical or necessary,' a petitioner cannot merely show that it would be useful, but rather that the defense could not be presented without it."). For example, Ms. Van Malden states that "[n]o witness has been able to identify the member of the Town Board that confirmed the information in the unredacted Constable Report," and "[w]ithout the disclosure of identity of the person who confirmed the information, quite simply, plaintiff's defamation claim fails." Van Malden Aff. ¶¶ 14, 31. But the source's identity is irrelevant if it is not Ms. Haas, since Plaintiff only alleges defamation against her, and Ms. Van Malden acknowledges that she already deposed Ms. Haas. Van Malden Aff. ¶ 12.

Even if Plaintiff were able to establish through Mr. Abraham that a certain defendant was the Town official who confirmed the authenticity of the report to the newspaper, it remains a mystery how that fact would be "critical or necessary" to Plaintiff's claim. Ms. Van Malden's affidavit offers nothing to establish these elements. Instead, she merely repeats in a conclusory fashion the elements of the Shield Law. *See* Van Malden Aff. ¶¶ 28, 32.

[4] To establish his defamation claim, Plaintiff will have to prove that Ms. Haas (1) made a false statement of fact, (2) to a third party, (3) without privilege or authorization, (4) "constituting fault as judged by, at a minimum, a negligence standard," (5) "and it must either cause special harm or constitute defamation per se." *Jule v. Kiamesha Shores Prop. Owners Ass'n Inc.*, 210 A.D.3d 1330, 1334 (3d Dep't 2023) (affirming Schick, J.'s dismissal of defamation claim because, among other reasons, "[n]othing in the pleadings provides any actual words attributed to [defendant]" that could amount to defamation).

Further, if Plaintiff were correct that Ms. Haas was the newspaper's source, he could have confirmed that in deposing Ms. Haas or in seeking relevant discovery from her. Plaintiff could therefore establish whether she was the source through a witness other than Mr. Abraham. Plaintiff thus fails to meet any of the three required elements; he is unable to make a "clear and specific" showing that Mr. Abraham's testimony would be "relevant," "critical or necessary," or "not obtainable from any alternative source."

These failings require Plaintiff's subpoena to be quashed. As the Court of Appeals has explained, the Shield Law reflects the Legislature's decision to give "reporters strong protection against compulsory disclosure of their sources or information obtained in the news-gathering process." *Beach v. Shanley*, 62 N.Y.2d 241, 245 (1984). The law furthers New York's "consistent tradition" of providing journalists "the broadest possible protection." *Holmes*, 22 N.Y.3d at 308. Courts therefore apply the law "stringent[ly]," *Giuffre*, 221 F. Supp. 3d at 476, and Plaintiff does not come close to meeting this high bar.

Finally, Ms. Van Malden's affidavit speculates that Mr. Abraham could have "waived" the Shield Law's privilege, citing a purported text message in which Ms. Haas asks, "Can I give our/my attorney your cell number for the defamation case," and Mr. Abraham replies, "Yeah that should be fine." Van Malden Aff. ¶¶ 33-38. But Ms. Van Malden offers nothing beyond rank speculation that any conversation took place at all, never mind a conversation that could have waived the privilege. *See id*. ¶ 36 ("It is unknown if that conversation took place."). She apparently obtained no evidence from Ms. Haas or from the attorney. Such pure speculation cannot overcome the "strong protection" of the Shield Law.[5]

[5] Even if some sort of waiver had occurred, it would be limited to only the specific information that was disclosed; it would not act as a waiver of the privilege more broadly. *Brown & Williamson*

The Shield Law provides "[a]bsolute protection" against compelling Mr. Abraham from testifying about the anonymous source who was involved in providing the investigative report. The law provides a strong, qualified privilege against compelling testimony about the unnamed source who confirmed the report's authenticity. Plaintiff does not come close to meeting even one, let alone all three, of the elements required for overcoming this privilege.

CONCLUSION

Plaintiff's subpoena was not properly served, and it fails to meet the requirements for a nonparty subpoena. And even if it were otherwise valid, it cannot be enforced under the New York Shield Law. Mr. Abraham respectfully requests that the Court deny Plaintiff's Motion to Compel and grant Mr. Abraham's Motion to Quash Plaintiff's subpoena.

Dated: June 6, 2024

Respectfully submitted,

By: /s/ *Michael Linhorst*

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Counsel for Nonparty Joseph Abraham

Tobacco Corp. v. Wigand, No. 101678/96, 1996 WL 350827, at *6 (Sup. Ct., N.Y. Co. Feb. 28, 1996).

SECTION 202.8-b CERTIFICATION

I, Michael Linhorst, do hereby certify that this document complies with the word count limit set forth in Section 202.8-b of the Uniform Civil Rules. The word count of this Memorandum of Law is 4,586 words. The word count excludes any caption, table of contents, table of authorities, and signature block, and it is compliant with the word count limit. This document was prepared using Microsoft Word. The font of this document is Times New Roman, size 12.

/s/ *Michael Linhorst*
Michael Linhorst

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

MARC ANTHONY,

Plaintiff,

- against -

KAITLIN HAAS and THE TOWN BOARD OF THE TOWN OF HIGHLAND,

Respondents.

INDEX NO. E2023-260

AFFIRMATION OF MICHAEL LINHORST IN SUPPORT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Michael Linhorst, an attorney duly admitted to the practice of law in the courts of the State of New York, hereby affirms under the penalty of perjury that the following is true and correct:

1. I am an attorney with the Cornell Law School First Amendment Clinic, and I represent nonparty Joseph Abraham.

2. I am fully familiar with the facts and circumstances discussed herein.

3. I make this affirmation in support of Mr. Abraham's Opposition to Plaintiff's Motion to Compel and Cross-Motion to Quash the subpoena Plaintiff attempted to issue to Mr. Abraham.

4. The Cornell First Amendment Clinic was retained by Mr. Abraham on Friday, May 10, 2024.

5. On the morning of Monday, May 13, 2024, I called Plaintiff's counsel, Stacey Van Malden, regarding the subpoena she attempted to serve on Mr. Abraham. I left a

voicemail requesting to speak with her, and I followed up with an email regarding the same. A true and correct copy of that email is attached as **Exhibit A.**

6. Ms. Van Malden returned my call, and I informed her the subpoena had not been properly served and was barred by the New York Shield Law. I asked that she either withdraw the subpoena or postpone the deposition date to allow for time to file a motion to quash. She declined to do so.

7. Later on May 13, 2024, I sent Ms. Van Malden a follow-up letter in which I reiterated that I had requested the deposition be postponed and explained in further detail the reasons why the deposition could not go forward. A true and correct copy of that letter is attached to Ms. Van Malden's affirmation as Exhibit JA-3.

8. Also on May 13, 2024, Ms. Van Malden sent me an email in which she stated "[t]he sole purpose of the deposition is to identify who at 'The Town' confirmed the report." A true and correct copy of that email is attached as **Exhibit B.**

I affirm on this 6th day of June, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

/s/ *Michael Linhorst*

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