To be Argued by:
MICHAEL LINHORST
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

MARC ANTHONY,

Plaintiff-Respondent,

Case No.: CV-24-1707

– against –

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

Respondents.

JOSEPH ABRAHAM,

Non-Party Appellant.

REPLY BRIEF FOR NON-PARTY APPELLANT

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PRELIMINARY STATEMENT

In this appeal concerning the enforceability of a subpoena seeking information protected by the New York Shield Law, the opposition brief takes a surprising approach: It never quotes the language of the subpoena. Instead of grappling with the shockingly broad reach of his own subpoena, Plaintiff-Respondent Marc Anthony ("Plaintiff") instead asks the Court to just trust him that, notwithstanding what the subpoena actually says, he wants a narrow set of information. This Court should not take the bait.

The actual text of the subpoena demands that a journalist — the Third-Party Appellant, Joseph Abraham — turn over *all documents* that in any way "refer[]" to Plaintiff, or to the public office that Plaintiff previously held, the Town of Highland Constabulary, or to an article published by Mr. Abraham's former employer that reported on a Town investigation into Plaintiff. R. at 79 (subpoena). This wildly broad subpoena must be quashed in its entirety under the New York Shield Law, Civil Rights Law § 79-h.

Plaintiff claims that he is only interested in the name of the Town source who confirmed to Mr. Abraham's newspaper that the copy of the investigation it obtained was authentic. But the text of the subpoena would also require disclosure of information related to a confidential source who was involved in providing the report to the newspaper — confidential information for which the Shield Law provides

"[a]bsolute protection." Civil Rights Law § 79-h(b). And the text of the subpoena would require disclosure of a wide swath of other information that Plaintiff does not even attempt to justify.

Even with respect to the narrower information Plaintiff says he is seeking, he completely fails to meet the Shield Law's strict three-part test for non-confidential, unpublished information. *See* Civil Rights Law § 79-h(c). The test requires a party seeking protected information to make "a clear and specific showing" that the information is "highly material and relevant" to his claim, is "critical or necessary" to the claim, and "is not obtainable from any alternative source." *Id*. Plaintiff has utterly failed to meet any of the elements, let alone all three. The identity of the Town source who authenticated the report is irrelevant to his defamation claim against Kaitlin Haas, since the authenticity of the report is not at issue. And Plaintiff now reveals additional information that demonstrates the identity of the Town source is not critical to his claim. He says he can seek an "adverse inference" against Ms. Haas "in lieu of Mr. Abraham's" testimony. Brief of Respondent Marc Anthony, ECF No. 6 ("Resp. Br.") at 17 n.3. That should be the end of the matter, since he acknowledges he can go forward with his case without Mr. Abraham's testimony. Plaintiff's brief also highlights his deposition of Ms. Haas herself, underscoring that he can obtain the information he wants from her.

Additionally, Plaintiff does nothing to justify the lower court's failure to support its decision "with clear and specific findings made after a hearing." Civil Rights Law § 79-h(c). This failure is yet another reason, among many, why the lower court's denial of Mr. Abraham's motion to quash cannot stand. This Court should reverse that decision and quash Plaintiff's subpoena.

ARGUMENT

Plaintiff's brief does nothing to change the reality of his overbroad subpoena — it seeks information that could not possibly be relevant; it seeks information from a confidential source that is subject to an absolute privilege under the Shield Law; and Plaintiff does not come close to meeting the Shield Law's demanding test for obtaining non-confidential, unpublished information. That is little surprise, as Plaintiff's brief almost entirely fails to confront Mr. Abraham's case citations or arguments. The subpoena cannot be enforced, and the lower court's decision denying Mr. Abraham's motion to quash must be reversed.

I. IGNORING THE TEXT OF HIS OWN SUBPOENA, PLAINTIFF FALSELY CLAIMS TO BE SEEKING LIMITED INFORMATION.

Plaintiff makes no attempt to defend the scope of his subpoena. Plaintiff instead wants the Court to trust him that, despite what his subpoena in fact requests, he "seeks only to learn the name of the 'unnamed' Town source." Resp. Br. at 9. But Plaintiff provides no basis for his just-trust-me approach. He does not deny, nor could he, that the subpoena calls for testimony and "[a]ny documents" concerning

everything that so much as "refers" to the Plaintiff, the Town of Highland Constabulary, or the article that reported on the investigatory report, R. at 79 — far beyond anything even arguably relevant, let alone simply the "name of the 'unnamed' Town source" that Plaintiff claims to seek. The Court must rely on the text of the subpoena, not Plaintiff's mere say-so.[1] The subpoena is fatally overbroad and must be quashed.

Plaintiff does not dispute that the subpoena covers such wholly irrelevant material as a draft article written about Plaintiff's first day as Constable, a text message with Ms. Haas regarding a Town Board vote on the Constabulary's budget, and an email between Mr. Abraham and another editor about a typo in a draft of the Town investigation article. *See* Brief of Appellant Joseph Abraham, ECF No. 5 ("App. Br.") at 21. While Mr. Abraham raised these points in his opening brief, Plaintiff did not even attempt to refute them.

Plaintiff further undercuts his claim about the narrowness of what he seeks by repeating the questions he wants to ask Mr. Abraham at his deposition, which go far beyond the single question of the Town source's identity. *See* Resp. Br. at 18-19. Plaintiff incorrectly claims that only one of his questions could be "subject to the qualified privilege." *Id*. at 19. In reality, most, if not all, of the questions are

[1] Plaintiff has never asked this Court or the lower court to modify his subpoena, and this Court should not do so *sua sponte*, as even a narrowed subpoena would still have to be quashed under the Shield Law.

protected by the privilege. The questions ask about Mr. Abraham's "practice" as an editor in deciding what information to publish, where the *Sullivan County Democrat* obtained *all* "the information published" in its article (not limited to the name of the Town source), and an email that the newspaper's publisher sent Plaintiff's counsel.[2] *Id*. at 18-19.

New York law is clear that these questions are covered by the Shield Law, which applies to "inquiries into the newsgathering process." *Baker v. Goldman Sachs & Co.*, 669 F.3d 105, 109 (2d Cir. 2012). The Shield Law's privilege against disclosure extends to information about a journalist's editorial practices, investigation, sources, and background. *Id*. at 109, 111. Guarding such information is key to the Shield Law, which protects against "incursions into the integrity" and "privacy of editorial processes." *Giuffre v. Maxwell*, 221 F. Supp. 3d 472, 477 (S.D.N.Y. 2016) (quoting *In re Grand Jury Subpoenas Served on Nat. Broad. Co., Inc.*, 178 Misc. 2d 1052, 1055 (Sup. Ct., N.Y. Cnty. 1998) and *Pugh v. Avis Rent A Car Sys., Inc.*, 1997 WL 669876, at *5-6 (S.D.N.Y. Oct. 28, 1997)). The First Amendment also protects against forced disclosure of editorial decisions, processes, and procedures. *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Allowing discovery into a news organization's "reportorial and editorial

[2] Even these impermissible questions, which extend far beyond the name of the Town source, pale in comparison to the breadth of the documents Plaintiff seeks in the subpoena.

processes . . . would represent a substantial intrusion on fact gathering and editorial privacy which are significant aspects of a free press." *Application of Consumers Union of U.S., Inc.*, 495 F. Supp. 582, 586 (S.D.N.Y. 1980); *see also People v. Iannaccone*, 112 Misc. 2d 1057, 1063 (Sup. Ct., N.Y. Cnty. 1982) (explaining that such disclosures would threaten journalists' "editorial processes"). Yet Plaintiff admits that editorial "procedure" is exactly what he aims to explore. Resp. Br. at 19. The Shield Law does not permit such "incursions into the integrity of the editorial process." *Giuffre*, 221 F. Supp. 3d at 477.

Plaintiff's brief goes on to emphasize just how deeply he wants to delve into this protected information about the newspaper's editorial processes. For example, Plaintiff makes a series of assumptions about the internal workings and editorial procedures of the newspaper, speculating that "but for the [Town source's] confirmation and authentication, this defamatory report does not get published," Resp. Br. at 13, and that the Town source "caused the publication," *id*. at 15. Such claims build assumption upon assumption — first about the newspaper's editorial processes, and second about what the newspaper knew from its confidential source. For all Plaintiff knows, the newspaper was fully confident in the authenticity of the report based on the information it learned from the confidential source, and the authentication by the Town source was wholly duplicative prior to publication. Yet Plaintiff claims, baselessly, that the Town source "allow[ed]" the newspaper to

publish the article. *Id*. at 14. And Plaintiff does not stop there. He goes on to speculate about the nature of news itself, asking, "[i]s it actually 'News' if the information published is unconfirmed speculation?" *Id*. at 20. But Plaintiff is not suing the newspaper, and he does not allege that the newspaper's article was defamatory. All of Plaintiff's speculation about the nature of news and the newspaper's editorial processes is irrelevant to his claim against Ms. Haas, and it highlights how deeply into the "privacy of editorial processes" he wants to delve, all in violation of the Shield Law. *Giuffre*, 221 F. Supp. 3d at 477; *Iannaccone*, 112 Misc. 2d at 1063.

Plaintiff's brief offers nothing to refute that his subpoena seeks an incredibly broad array of information, all of it protected by the Shield Law. The subpoena must be quashed.

II. PLAINTIFF DOES NOT CHALLENGE THE FACT THAT ANY INFORMATION FROM THE CONFIDENTIAL SOURCE IS ABSOLUTELY PROTECTED.

Plaintiff provides no argument for how the Shield Law's absolute privilege could be overcome here with respect to information from or about the confidential source who was involved in providing the investigative report to the newspaper. *See* R. at 77 ¶ 7 (Abraham affirmation describing confidential source). Indeed, the privilege cannot be overcome. App. Br. at 11-13. The statute provides "[a]bsolute protection" for any information "obtained or received in confidence" by a journalist.

Civil Rights Law § 79-h(b); *Flynn v. NYP Holdings Inc.*, 652 N.Y.S.2d 833, 835 (3d Dep't 1997) (describing the "unqualified protection" afforded to information provided by confidential sources).

Yet the subpoena clearly calls for information from the confidential source,[3] as it seeks *anything* that refers to the Plaintiff, his former office, or the newspaper article about the investigative report. R. at 79. Therefore, the subpoena necessarily includes information that came from the confidential source. The Shield Law requires that the subpoena be quashed with respect to all of that information, Civil Rights Law § 79-h(b), but the lower court failed to do so.

III. EVEN THE INFORMATION PLAINTIFF SAYS HE IS SEEKING CANNOT BE OBTAINED UNDER THE SHIELD LAW.

Even if the subpoena were restricted to the information that Plaintiff says he wants — the identity of the Town source — it still must be quashed under the Shield Law. Plaintiff offers nothing substantive to refute Mr. Abraham's opening brief showing that Plaintiff cannot meet the Shield Law's stringent three-part test for obtaining non-confidential but unpublished information. Indeed, Plaintiff does not even address any of the case law Mr. Abraham cited.

[3] Plaintiff tries to muddy the waters concerning this confidential source by claiming that Mr. Abraham somehow "contradicted" himself because he stated both that this source was anonymous and confidential. Resp. Br. at 8, 10. Each of Mr. Abraham's statements are true. This source was promised confidentiality. R. at 77 ¶ 7 (Abraham affirmation). The source is also anonymous, since the source's identity has not been publicly revealed. Any confidential source, including this one, can simultaneously be "confidential" and "anonymous."

Instead, the fact remains that the identity of the Town source who accurately and truthfully confirmed the authenticity of the report bears no relevance to Plaintiff's defamation claim at all, since the authenticity of the report is not at issue in the underlying lawsuit. The source's identity is far from meeting the Shield Law's test, which requires Plaintiff to show the information is "highly material and relevant," "critical or necessary" to the maintenance of his claim, and cannot be obtained from any other source. Civil Rights Law § 79-h(c). Plaintiff's brief not only fails to refute these points, but also offers yet more reasons why he fails all three elements.

A. The information is neither "highly material and relevant" nor "critical or necessary."

As set forth in Mr. Abraham's initial brief, the identity of the Town source cannot possibly be "highly material and relevant" nor "critical or necessary" to the underlying defamation suit against Ms. Haas because the underlying lawsuit relates to the *substance* of the investigative report, not its *authenticity*. Plaintiff does not, and cannot, dispute that the report is authentic; his claim is that statements contained in that report defame him. The identity of the Town source who authenticated the report for the newspaper is simply not relevant ─ much less "highly material" or "critical or necessary" ─ to Plaintiff's claim that he was defamed by statements made in the report itself. Plaintiff does not need to know the identity of the Town source to meet the elements of his libel suit.

Plaintiff attempts to obscure this reality through the use of adverbs, claiming that "the unnamed Town Source knowingly, intentionally and maliciously confirmed and authenticated the unredacted Constable Report to the Sullivan County Democrat." *Id*. at 15. But Plaintiff's charged language does not change the essential fact that he is not disputing the authenticity of the report. Plaintiff does not claim that the Town source "falsely" confirmed and authenticated anything. Falsity, of course, is required for any defamation claim, *Jule v. Kiamesha Shores Prop. Owners Ass'n Inc.*, 210 A.D.3d 1330, 1334 (3d Dep't 2022), underscoring why the identity of this Town source is not relevant to Plaintiff's defamation case.[4]

Instead, Plaintiff's defamation claim takes issue with the substance of the report. *See* Resp. Br. at 6, 14, 15 (criticizing statements from the report about Plaintiff's training and qualifications). But there is no suggestion here that the Town source told the newspaper that the statements in the report were accurate; the source only confirmed that the copy of the report that was obtained by the newspaper was an authentic copy. *See* Resp. Br. at 8 ("The other source was an unnamed Town Source who confirmed the authenticity of the report."). Even if Ms. Haas were the Town source, the fact that she truthfully confirmed the report's authenticity to the

[4] Plaintiff also claims, with no basis, that the person who confirmed the report's authenticity somehow violated laws in some sort of "severe and wide ranging" way. Resp. Br. at 22. Even if the Town source did break a law — and there is no indication that they did — Plaintiff has utterly failed to show how this is relevant to his defamation claim again Ms. Haas.

newspaper does not impact the determination of whether she said something false and defamatory about Plaintiff in the report.

For essentially the same reasons, Plaintiff also fails to show that the material is "critical or necessary" to his claim, as the Shield Law requires. Plaintiff can pursue his libel claim against Ms. Haas without knowing the identity of the Town source, as that information would have no bearing on whether Ms. Haas made a false statement, of and concerning Plaintiff, with the requisite degree of fault, that caused Plaintiff damage — the elements of a libel suit in New York. *Jule*, 210 A.D.3d at 1334.

Plaintiff's brief offers an additional reason why Mr. Abraham's testimony is not "necessary" to maintaining his claim. Plaintiff noted that "in lieu of Mr. Abraham's limited testimony," he might seek an "adverse inference" against Ms. Haas based on her discovery production. Resp. Br. at 17 n.3. Since Plaintiff admits having other options "in lieu of Mr. Abraham's limited testimony," Mr. Abraham's testimony is not "necessary." *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.").

Far from making a "clear and specific" showing why he meets the first two prongs of the Shield Law's test, Civil Rights Law § 79-h(c), Plaintiff's brief offers

even more reasons why he does not. Since a party must meet "all three prongs" in order to overcome the Shield Law's qualified privilege, *In re Grand Jury Subpoenas to Maguire*, 161 Misc. 2d 960, 966 (Sup. Ct., Westchester Cnty. 1994); *Flynn*, 652 N.Y.S.2d at 835, any one of these failures is fatal.

B. Any relevant information can be obtained from other sources.

Plaintiff's brief also highlights the other sources, including Ms. Haas, from whom he could obtain the identity of the Town source. *See* Resp. Br. at 17. As Mr. Abraham explained in his opening brief — and Plaintiff did not refute — the opportunity to obtain information from Ms. Haas about whether she was the source means that this information is, indeed, "obtainable" from a source other than Mr. Abraham. App. Br. at 22-25. Plaintiff thus fails the third prong of the Shield Law's test. Civil Rights Law § 79-h(c).

Plaintiff's brief acknowledged that what he really wants from Mr. Abraham's testimony is impeachment material, since "Ms. Haas cannot be considered a reliable source." Resp. Br. at 17. But as Mr. Abraham demonstrated — and, again, Plaintiff did not refute — a party's attempt to obtain impeachment material cannot overcome the protections of the Shield Law. *See, e.g., In re Am. Broad. Companies, Inc.*, 189 Misc. 2d 805, 808 (Sup. Ct., N.Y. Cnty. 2001). Indeed, a New York court has encountered this precise situation before, and it held that the plaintiff did not meet the Shield Law's test. In *Brown & Williamson Tobacco Corp. v. Wigand*, the

plaintiff claimed that the defendant was "inherently dishonest," so even though it could depose him, it needed to obtain information about him from a third-party news organization. 1996 WL 350827, at *5 (Sup. Ct., N.Y. Cnty. Feb. 28, 1996). The court disagreed, holding that, because the information was "obtainable" from the defendant, the plaintiff failed the third prong of the Shield Law, despite its concerns about the defendant's honesty. *Id*. The same here. Plaintiff can find out whether Ms. Haas was the Town source by deposing Ms. Haas or obtaining relevant discovery from her.[5]

Additionally, Plaintiff admits that the investigative report was available to the Town attorney, the District Attorney, and all Town board members, Resp. Br. at 7, but he only deposed three of those people — Ms. Haas and two other board members, *id*. at 17. He does not explain why he has not tried to find out whether any of the other people were the Town source, except to say that he does not think it "seem[s] logical" for one of those people, the District Attorney, to be the source. *See id*. at 10 n.2.

[5] Plaintiff vaguely suggests that Mr. Abraham may have waived the protections of the Shield Law in a text message he allegedly sent to Ms. Haas. *See* Resp. Br. at 19-20. There is no evidence that he did, and Plaintiff offers nothing but pure speculation. The court below did not even consider waiver, and neither should this Court.

Because this information is "obtainable from an[] alternative source," the Shield Law prohibits subpoenaing Mr. Abraham to obtain it. Civil Rights Law § 79-h(c).

* * *

Thus, Plaintiff cannot meet the three requirements for overcoming the Shield Law's protections to force Mr. Abraham to disclose even the limited information that Plaintiff claims to be seeking, the identity of the Town source. If the subpoena were modified to cover only that information — and Plaintiff has not even requested, here or in the lower court, that the subpoena be so modified — the Shield Law would require that it be quashed. But it seeks much more information than that, and Plaintiff has made no attempt at all to explain how that information could overcome the Shield Law's protections. None of it can, and the subpoena must be quashed in its entirety.

IV. PLAINTIFF FAILS TO JUSTIFY THE LOWER COURT'S LACK OF 'CLEAR AND SPECIFIC FINDINGS.'

Plaintiff acknowledges that the Shield Law requires a court that orders disclosure of protected information to "support such order with clear and specific findings made after a hearing." Civil Rights Law § 79-h(c). But Plaintiff does not explain how the lower court's vague statement that it "agreed with Plaintiff's counsel, and disagreed with Appellant's counsel" could amount to the required "clear and specific findings." *See* Resp. Br. at 22; *see also* R. at 14:23-15:2

(transcript). Merely saying, as the court below did, that it "agreed" with arguments made by counsel does not constitute a "finding," and it does not satisfy the Shield Law's requirement. *See* Civil Rights Law § 79-h(c); *see also McCue v. McCue*, 225 A.D.2d 975, 979 (3d Dep't 1996) (reversing decision where lower court failed to follow analogous requirement that it specify its reasons for imposing costs on party).

The statute's demand that a judge make clear findings on the record after a hearing is another way for the law to protect journalists' rights, ensuring that judges do not merely say, "I agree with plaintiff's counsel," but instead engage more fully with the substance of the arguments and come to their own conclusions. A failure to enforce this requirement would weaken the law's "stringent" protections, *see Giuffre*, 221 F. Supp. 3d at 476, making it easier for lower courts to order disclosure with limited or no analysis. Therefore, for this additional, independent reason, the lower court's decision must be reversed.

CONCLUSION

Plaintiff's broad subpoena would require disclosure of confidential information that is covered by the Shield Law's "[a]bsolute protection," as well as other information that is subject to the law's qualified privilege. Plaintiff cannot establish that he overcomes that qualified privilege.

Mr. Abraham respectfully requests that this Court reverse the lower court and quash the subpoena, enforcing the Shield Law and protecting the rights of journalists in New York to report the news without harassment from third-party litigants.

Dated: May 19, 2025

Respectfully submitted,

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