IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Frank L. VanderSloot and Melaleuca, Inc. Plaintiffs, v. **The Foundation for National Progress, Monika Bauerlien, and Stephanie Mencimer** Defendants.	Case No. 14-0003684 Judge _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NON-PARTY GLENN SIMPSON'S MOTION TO QUASH THIRD PARTY SUBPOENA TO PRODUCE DOCUMENTS AND TESTIFY AT A DEPOSITION AND SPECIAL MOTION TO DISMISS UNDER D.C. ANTI-SLAPP STATUTE

INTRODUCTION

Glenn Simpson, a former investigative reporter for the *Wall Street Journal* and current independent research consultant for Fusion GPS, has been issued a subpoena by the plaintiffs in a defamation action pending in Idaho state court concerning an article published by *Mother Jones* magazine regarding plaintiffs. Mr. Simpson is not a party or affiliated with any of the parties. Mr. Simpson had no role in researching, writing, or publishing any of the allegedly defamatory statements. In fact, the *only connection* Plaintiffs have between Mr. Simpson and the underlying libel case is that he instructed an intern to make telephone calls to an Idaho state court to request copies of publicly available court files involving plaintiff Frank VanderSloot months *after* the allegedly defamatory statements had been published.

Plaintiffs admit that the request for court files – records that are available to any member of the public – is the only reason they subpoenaed Mr. Simpson. When challenged about the relevance of Mr. Simpson's testimony, plaintiffs' counsel responded that his testimony

supposedly was relevant to the Idaho action because the allegedly defamatory statements "resulted in ... ***firms like Fusion GPS sending interns to Idaho to dig up old court records.***"[1] (Although plaintiffs' counsel's letter suggests that the intern traveled to Idaho, he did not. He made the public records request over the phone.)

The public records request to the Idaho state court cannot be relevant to the publication of the *Mother Jones* article because it was made months after the article was published. The critical question in that case – whether Mother Jones acted with actual malice – goes to the defendants' subjective state of mind at the time of publication. Mr. Simpson had nothing to do with the allegedly defamatory article and plaintiffs do not argue that he did. Indeed, Mr. Simpson did not even know who plaintiffs were until after the article was published, and it was only then that he requested public court files related to Mr. VanderSloot. Plaintiffs' claim that Mr. Simpson would have information relating to their damages is also a pure fishing expedition. Mr. Simpson had no idea who plaintiffs were until he read the *Mother Jones* article and he has no information related to any alleged damage to their reputations.

Without any relevant information to provide, the subpoena serves only to harass Mr. Simpson by seeking irrelevant information about Mr. Simpson's clients, about Mr. Simpson's political discussions and activities, and about other subjects in retaliation for his public records request. The D.C. Council enacted legislation in 2011 to combat just the type of conduct at issue here through the District of Columbia Anti-SLAPP Act of 2010, D.C. Code Ann. § 16-5501 *et seq.* ("Anti-SLAPP Act"). The Anti-SLAPP Act was designed to protect against one party in a

[1] *See* Exhibit G, T. Clare Letter, dated July 9, 2014, to L. Babinski, at 2.

policy or political debate from punishing a person on the other side through litigation.[2] This civil action proceeding that plaintiffs filed to obtain the subpoena – Case No. 14-CA-3684 – is in violation of the Anti-SLAPP Act. Thus, Mr. Simpson requests that the Court quash the subpoena and grant this motion to dismiss under the Anti-SLAPP Act.

STATEMENT OF FACTS

The underlying dispute in this case is a defamation action filed in Idaho state court by Frank VanderSloot and his company, Melaleuca, Inc., against The Foundation for National Progress, which publishes *Mother Jones* magazine, Monika Bauerlein, who is one of two co-editors of *Mother Jones*, and Stephanie Mencimer, a reporter for *Mother Jones*. *Mother Jones* is a magazine focusing on politics, current events, and culture, and is generally acknowledged as politically liberal. Mr. VanderSloot, on the other hand, has actively promoted conservative policy issues and political candidates for many years, including serving as the National Finance Co-Chair for Mitt Romney's in the 2012 Presidential campaign.

A. Frank VanderSloot and Melaleuca Dispute the *Scouts' Honor* Series of Articles

The dispute between Mr. VanderSloot[3] and *Mother Jones* grew from a public debate that Mr. VanderSloot initiated back in 2005. In late February and early March of that year, a reporter for the Iowa Falls *Post Register* wrote a six part investigative series on a local man who for years had served as a counselor in a Boy Scout troop sponsored by the Church of Latter Day Saints despite having a history of molesting children. Peter Zuckerman, *Scouts' Honor*, Idaho Falls Register, Feb. 27, 2005, attached as Exhibit A. Over the course of nine years, the abuser admitted

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[2] *See generally*, Committee Report Council on the District of Columbia Committee on Public Safety and the Judiciary, Report on Bill 18–893, Anti–SLAPP Act of 2010 (Nov. 18, 2010).

[3] For ease of reference, when referring to the plaintiffs, Mr. Simpson may refer to them collectively as "Mr. VanderSloot."

to molesting 24 boys.

After Mr. VanderSloot, who lived in the Idaho Falls Community, read the *Scouts' Honor* series, he decided to conduct his own investigation. Mr. VanderSloot paid $15,000 to a local law firm to review the case records involving the abuser, and purchased a full page advertisement to publish a rebuttal to the *Scouts' Honor* story. Complaint, *VanderSloot v. The Foundation for National Progress, et al.*, attached as Exhibit B, at ¶ 33. Mr. VanderSloot's rebuttal acknowledged "being a great fan the scouting organization and ... be[ecoming] a member of the LDS Church when [he]was seventeen years old," but claimed that he merely wanted to find out the truth behind the *Scouts' Honor* series. The Community Page, *Responsible Journalism or Misleading Propaganda?*, attached as Exhibit C. The response questioned whether the *Scouts' Honor* series unfairly criticized the Boy Scout and LDS church officials involved in the case. *Id.*

It also characterized Peter Zuckerman as a "fairly new reporter for the *Post Register*" who previously "declared to the public that he is homosexual and admitted that it is very difficult for him to be objective on things he feels strongly about." *Id.* The article then noted that the Boy Scouts have excluded gay men from being scout leaders, and that the LDS church's position is that marriage is between a man and a woman, and stated that, "for whatever reason, Zuckerman chose to weave a story" that unfairly depicted Boy Scout and LDS church leaders. *Id.*

B. *Mother Jones* Publishes an Article That Criticizes VanderSloot, Melaleuca, and Revives the *Scouts' Honor* Dispute

During the 2012 Presidential campaign, Mr. VanderSloot served as the National Finance Co-Chair for Mitt Romney's Presidential campaign, and Mr. VanderSloot and Melaleuca donated one million dollars to a political action committee that supported Mitt Romney. Compl. ¶ 22. That donation, and Mr. VanderSloot's high-profile position within the Romney campaign, brought Mr. VanderSloot national attention, including from *Mother Jones*.

On February 6, 2012, *Mother Jones* published an article, entitled *Pyramid-Like Company Ponies Up $1 Million for Mitt Romney*, about Melaleuca, Mr. VanderSloot, and their role in the Romney campaign. Compl. ¶ 37. The article characterized Mr. VanderSloot as "a controversial figure, particularly when it comes to issues involving gays and lesbians." Compl. ¶ 40. As an example, the article cited Mr. VanderSloot's response to the *Scout's Honor* series, stating that the *Post Register* reporter "had rankled VanderSloot by breaking a major story revealing that the Mormon church, which sponsored local Boy Scout troops, had been aware that several pedophiles were serving as scout leaders or camp employees but did nothing about it." *Id.* The article also portrayed VanderSloot's response as "publicly outing a reporter at the paper as gay." *Id.*[4]

The *Mother Jones* article generated extensive coverage and commentary from other media outlets, including print, television, and internet news outlets. Compl. ¶ 72. Further, according to the complaint, that controversy and media coverage landed Mr. VanderSloot on a so-called "enemies' list" created by President Obama's campaign organization, Obama for America. Compl. ¶ 9. The list contained high level members of the Romney campaign characterized as "a group of wealthy individuals with less-than-reputable records," and cited the *Mother Jones* article as its source. *Id.*

C. Mr. VanderSloot and Melaleuca File a Defamation Lawsuit

Mr. VanderSloot and Melaleuca filed a three-count defamation suit against The National Foundation for Progress (doing business as *Mother Jones*) in Idaho state court. Compl. at 1. In

[4] In addition to the article, Ms. Bauerlien tweeted – posted a statement on the website Twitter.com – that "Romney gay-bashing buddy runs a company that targets stay-at-home moms for misleading marketing scheme. Charming!," and included a link to the article. Ms. Mencimer later re-tweeted – resent Ms. Bauerlien's tweet from her own account – Ms. Bauerlien's tweet.

his defamation suit, Mr. VanderSloot claims that the he and his business were defamed by the *Mother Jones* article which falsely claimed that Mr. VanderSloot "outed" Mr. Zuckerman as gay and "bashed" him. Compl. at ¶¶ 79-94. VanderSloot also alleged that the individual defendants, Ms. Bauerlein and Ms. Mencimer, defamed him and his business when they published a post on the website Twitter that "Romney's gay-bashing buddy runs a company that targets stay-at-home moms for misleading marketing scheme. Charming!" Compl. at ¶¶ 110-23.

D. Mr. Simpson's Firm Makes a Public Records Request

Neither Mr. Simpson nor his company, Fusion GPS, had any role in the dispute between Mr. VanderSloot and Mr. Zuckerman and the *Falls Register*. Nor did Mr. Simpson or his company have any role in the dispute between Mr. VanderSloot and *Mother Jones*. Mr. Simpson did not provide research for, write, or publish the *Mother Jones* article about Mr. VanderSloot and Melaleuca. Declaration of Glenn Simpson, dated July 21, 2014, attached as Exhibit D, at ¶ 6. Nor did Mr. Simpson provide research for, write, or publish, Twitter posts by Ms. Bauerlien or Ms. Mencimer. Simpson Decl. at ¶ 6. In fact, Mr. Simpson had never heard of Mr. VanderSloot or his company before reading the *Mother Jones* article. Simpson Decl. at ¶ 6.

It was only after Mr. VanderSloot's role as National Co-Finance Chair of Mr. Romney's campaign became public that Fusion GPS conducted some research about Mr. VanderSloot. Simpson Decl. at ¶ 7. As part of that research, Mr. Simpson instructed an intern for Fusion GPS to request any publicly available Idaho state court documents involving Mr. VanderSloot. Simpson Decl. at ¶ 7. The intern made two phone calls to the court in Idaho and Fusion GPS received public court files on four court proceedings, none of which related in any way to the *Mother Jones* article, or to any other allegedly defamatory statement in the underlying case.

Mr. VanderSloot somehow found out about Mr. Simpson's public records request and

issued a subpoena to Mr. Simpson demanding testimony as well as the following documents:

> All documents dated from January 31, 2012 until November 6, 2012 relating to Frank VanderSloot or Melaleuca, Inc. received from, sent to, or copying Stephanie Mencimer, Monika Bauerlein, anyone employed by or acting on behalf of the Foundation for National Progress d/b/a Mother Jones, or acting on behalf of Obama for America.

Subpoena, dated June 16, 2014, to Glenn R. Simpson, attached as Exhibit E. Mr. VanderSloot and Melaleuca have also issued a subpoena to Michael Wolf, the Fusion GPS intern, demanding the same information. Subpoena, dated June 13, 2014, to Michael Wolf, attached as Exhibit F.

When negotiating the scope of the subpoena, Mr. VanderSloot's counsel wrote that the material sought was relevant because the "media firestorm" created by the *Mother Jones* article "resulted in ... ***firms like Fusion GPS sending interns to Idaho to dig up old court records***." *See* T. Clare Letter, dated July 9, 2014, to L. Babinski, attached as Exhibit G, at 2.

ARGUMENT

I. The Court Should Quash the Subpoena Under Rules 26 and 45

A. Legal Standard

A third party subpoena is subject to this Court's general discovery provisions under Rule 26, as well as its provisions governing subpoenas under Rule 45. *See In re Herndon*, 596 A.2d 592, 595-96 (D.C. 1991). Thus, the Court may quash any subpoena, *inter alia*, that imposes an undue burden, or requires disclosure of privileged or confidential information. D.C. Super. Ct. R. Civ P. 45. Further, the Court may issue any order to protect a party or third party from "annoyance, embarrassment, oppression, or undue burden ... including ... that the discovery not be had." D.C. Super. Ct. R. Civ. P. 26(c).

In determining whether to quash or modify a subpoena in a civil proceeding, the Court should consider "the relevance of the discovery sought, the requesting party's need, and the

potential hardship to the party subject to the subpoena." *In re Herndon*, 596 A.2d at 596. In assessing the burden of complying with a subpoena, the Court should also consider whether the deponent is a party to the action. *Id.* (citing *Truswal Sys. Corp v. Hydro-Air Engineering, Inc.*, 813 F.2d 1207, 1210 (Fed. Cir. 1987)).

B. The Subpoena Is Overbroad and Would Not Produce Relevant Information

As noted above, neither Mr. Simpson, nor anyone at Fusion GPS, had any role in any of the allegedly defamatory statements about Mr. VanderSloot or Melaleuca. Mr. Simpson did not provide research for, write, or publish the *Mother Jones* article. Simpson Decl. at ¶ 6. Nor did Mr. Simpson provide research for, write, or publish, any Twitter posts by Ms. Bauerlien or Ms. Mencimer. Simpson Decl. at ¶ 6. In fact, Mr. Simpson had never even heard of Mr. VanderSloot or his company before reading the *Mother Jones* article. Simpson Decl. at ¶ 6.

Enforcing the subpoena would produce no material relevant to the underlying defamation case. The subpoena demands that Mr. Simpson produce any communications to or from any of the defendants, or to or from President Obama's reelection campaign organization, Obama for America, that occurred at any time from January 31, 2012, through November 6, 2012, eight months after *Mother Jones* published article. Simpson Subpoena at 7.[5]

As an initial matter, the subpoena is overbroad because it requests documents from February 6, 2012 all the way through November 6, 2012. Under defamation law in Idaho and elsewhere, when plaintiffs are public figures like Mr. VanderSloot and Melaleuca, they must show that the defendants published the offending statements with knowledge of the statement's falsity or with reckless disregard for the truth or falsity of the statement *at the time the statement was published. See Steele v. Spokesman-Review*, 61 P.3d 606, 609 (Idaho 2002) (noting that

[5] Not coincidentally, November 6, 2012 was also Election Day 2012.

statement must be made with knowledge that it was false); *Bandelin v. Pietsch*, 563 P.2d 395, 398 (Idaho 1977) (same); *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1508 (D.C. Cir. 1996) (actual malice must "necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication"); *Secord v. Cockburn*, 747 F. Supp. 779, 792 (D.D.C. 1990) ("[I]t is hornbook libel law that post-publication events have no impact whatever on actual malice as it bears on this lawsuit since the existence or non-existence of such malice must be determine as of the date of publication"). Thus, communications after February 6, 2012 cannot be relevant, as counsel for Mr. VanderSloot has argued, to any actual malice inquiry. Clare Letter at 2.

To the extent that communications before February 6, 2012 between Mr. Simpson and any defendant could be relevant to Mr. VanderSloot's claim, Mr. Simpson has already told counsel for Mr. VanderSloot that he has no such communications – and in fact, never even heard of Mr. VanderSloot prior to the Mother Jones article. Objections to Subpoena, dated July 7, 2014, attached as Exhibit H, at 3; Simpson Decl. at ¶ 6.

The subpoena is also overbroad to the extent that it requests any communications with President Obama's reelection organization, Obama for America. Obama for America is not defendant in this lawsuit, nor is it alleged to have made any defamatory statement. Instead, Mr. VanderSloot alleges only that Obama for American included him on a purported "enemies list." Compl. ¶ 9. Further, Mr. VanderSloot alleges that Obama for America cited the *Mother Jones* article as its sole source for including Mr. VanderSloot on that list. Mr. Simpson had no discussions with Obama for America about publishing a link to the *Mother Jones* article. Simpson Decl. at ¶ 6. Thus, no communication between Mr. Simpson and Obama for America would be relevant to Mr. VanderSloot's claims against *Mother Jones* and its staff, much less any

actual malice inquiry.

Similarly, communications between Mr. Simpson and defendants or Obama for America are not relevant to Mr. VanderSloot's damages as his counsel has also alleged. Clare Letter at 2. Mr. VanderSloot seeks damages to recover for two categories of injuries. First, VanderSloot seeks recovery for "injuries presumed by law." Compl. ¶¶ 93, 108, 122. For those injuries presumed by law, Mr. VanderSloot needs no evidence from anyone, including Mr. Simpson. Second, Mr. VanderSloot alleges that the publication (which Mr. Simpson had nothing to do with) caused him injury:

a) By impugning Mr. VanderSloot's professional and personal reputations;

b) By impugning Melaleuca's professional reputation;

c) By ascribing to Mr. VanderSloot conduct that would adversely affect his fitness for proper conduct as CEO of Melaleuca;

d) By causing Melaleuca to lose Marketing Executives, customers, and employees;

e) By subjecting Mr. VanderSloot and Melaleuca to unwanted attention, harassment and persecution; and

f) By causing Mr. VanderSloot and Melaleuca damages in other way yet to be determined.

Compl. ¶¶ 93, 108, 122. Mr. Simpson had never even heard of Mr. VanderSloot or Melaleuca until *Mother Jones* published the allegedly defamatory article. All Mr. Simpson did was request state court records available to any member of the public. Accordingly, he cannot provide information on the reputational damages suffered by Mr. VanderSloot or Melaleuca.

C. The Subpoena Will Tend to Annoy, Embarrass, or Otherwise Impose an Undue Burden on Mr. Simpson

1. Mr. VanderSloot Issued the Subpoena for an Improper Purpose

The Court should quash the subpoena because it was issued for an improper purpose. Specifically, it appears that Mr. VanderSloot issued the subpoena to retaliate against Mr.

Simpson and Fusion GPS for requesting public Idaho state court records about him. Mr. VanderSloot's counsel admitted as much when he responded to Mr. Simpson's objections to the subpoena, stating that the defamatory statements "resulted in Mr. VanderSloot being placed on an Obama campaign "Enemies' List," ***and in firms like Fusion GPS sending interns to Idaho to dig up old court records***." Clare Letter at 2.

As Mr. VanderSloot knows, Fusion GPS obtained the court records only *after* publication of the *Mother Jones* article, and those records did not relate to any issue covered in the article. Simpson Decl. at ¶¶ 7-8. Further, neither Mr. Simpson nor Fusion GPS acted improperly by obtaining those records; Idaho law specifically authorized Mr. Simpson to request public records relating to Mr. VanderSloot. *See* Idaho Code Ann. § 9-338 ("Every person has a right to examine and take a copy of any public record of this state."). Thus, it appears that Mr. VanderSloot did not seek issuance of the subpoena to obtain evidence showing that *Mother Jones* defamed him, but instead to harass Mr. Simpson – as well as the intern, Mr. Wolf, to whom he also issued a subpoena in another jurisdiction – for requesting public court files about him.

Indeed, Mr. VanderSloot has displayed a penchant for using litigation to pursue people with whom he disagrees. As his own complaint demonstrates, in 2005, Mr. VanderSloot spent $15,000 on a law firm to conduct an investigation into the *Scouts' Honor* series that negatively portrayed officials from the Boy Scouts and the LDS church. Compl. ¶ 33. He then purchased a full page advertisement to publish his own article that questioned whether the reporter, Mr. Zuckerman, had been biased because the reporter was gay. Community Place Ad at 1. What's more, shortly after the *Mother Jones* published its article, Mr. Zuckerman appeared on national media to discuss the controversy. When Mr. Zuckerman repeated *Mother Jones*'s claim that VanderSloot "outed" him, Mr. VanderSloot filed a defamation action against Mr. Zuckerman.

See Complaint, *VanderSloot v. Zuckerman*, No. CV-2-14-2510 (Dist. Idaho, filed May 1, 2014), attached as Exhibit I.

Even the underlying lawsuit appears calculated to exact revenge on *Mother Jones* rather than to recover any losses suffered. Although he claims that the article "did extensive and irreparable harm to Mr. VanderSloot [and] Melaleuca," Compl. ¶ 8, and that they have "suffered damage to their reputations and financial diminution due to a diversion of resources as they respond to these defamatory publications," Compl. ¶ 11, Mr. VanderSloot and Melaleuca seek only $74,999 in damages, and have expressly disclaimed any higher amount. Compl. ¶ 125(d); *see also* Compl., Ex. A (Affidavit of Frank VanderSloot), at 2-3. This amount is clearly insignificant to Melaleuca, a company with over $1 billion in annual revenues, and Mr. VanderSloot, who is reported to be a billionaire. Thus, Mr. VanderSloot appears to be pursuing his lawsuit against Mother Jones, and this discovery of Mr. Simpson and others, for reasons separate and apart from compensating him for any damage to his reputation or business.

Enforcing the subpoena against Mr. Simpson would mean that almost any person who requests public records about an individual could be subjected to discovery about that request, even if only to harass, annoy, or otherwise retaliate against the requestor.

2. The Subpoena Would Impose a Significant Hardship on Mr. Simpson Because It Could Force Him to Disclose the Identities of Fusion GPS's Clients

Regardless of Mr. VanderSloot's subjective motive, the subpoena will annoy, embarrass, or impose an undue burden because it may force Mr. Simpson to reveal the identity of Fusion GPS's clients, and should therefore be quashed. D.C. Super. Ct. R. Civ. P. 26.

Mr. VanderSloot seeks to depose Mr. Simpson, *inter alia*, in order to discover the identity of any person with whom he discussed Mr. VanderSloot or Melaleuca. Mr. VanderSloot's counsel indicated that the plaintiffs would inquire about whether there was a "coordinated

targeting of Melaleuca and/or Mr.VanderSloot" Clare Letter at 2. Under that theory, Mr. VanderSloot could ask Mr. Simpson to disclose every person or entity with whom he may have discussed Mr. VanderSloot or Melaleuca, including his clients.

Fusion GPS provides research services for a wide variety of clients seeking investigative resources for many different reasons. Simpson Decl. at ¶¶ 10-11. For example, some clients ask Fusion GPS to perform due diligence on businesses in which they are considering investing. Simpson Decl. at ¶ 10. Other clients ask Fusion GPS to investigate whether a business is engaged in corruption or fraud. Clients also retain Fusion GPS to perform research and gather background information on issues of public policy. Simpson Decl. at ¶ 11. This may include background information on political candidates or other public figures, but it also includes overarching policy issues.

Regardless of the project, the clients of Fusion GPS depend on Fusion GPS not to disclose their identities or the nature of their requests for information. Simpson Decl. at ¶ 12. Thus, requiring Mr. Simpson to disclose those clients' identities will impose significant hardship on Fusion GPS because it will likely lose clients whose identities are disclosed and potential future clients who learn of any such disclosures. *Id.* Moreover, enforcing the subpoena will impose a significant hardship on Fusion GPS's clients whose identity, and potentially confidential business information, will be revealed without their consent.

D. The Subpoena Would Chill the Right to Political Association of Mr. Simpson and His Clients Under the First Amendment

The Court should also quash the subpoena because it seeks information that is privileged under the First Amendment. The Supreme Court has recognized a qualified privilege that protects a party from being forced to disclose the identity of others with whom the party has engaged in protected First Amendment activity. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958);

International Action Center v. United States, 207 F.R.D. 1, 3-4 (D.D.C. 2002). The First Amendment privilege is not limited to disclosure requests by the government, but extends to requests for associational activity from private parties in civil suits. *See, e.g., City of Greenville v. Syngenta Crop Protection*, Nos. 11-mc-10, 11-mc-1031, 11-mc-1032, 2011 WL 5118601 (C.D. Ill. 2011) (finding communications among trade association members to be protected by the First Amendment in private tort claim).

As explained above, Mr. VanderSloot contends that he is entitled to inquire into any potential "coordinated targeting" of Mr. VanderSloot or Melaleuca, meaning he can request the identity of any person or entity with which Mr. Simpson may have discussed Mr. VanderSloot or Melaleuca. Clare Letter at 2. That would include any client that retained Fusion GPS to research or investigate matters of public policy.

If the Court enforces the subpoena, and Mr. Simpson is forced to reveal the identity of Fusion GPS's clients, or any other person with whom he discussed important matters of public policy, it will discourage future participation the public arena. *See* Simpson Decl. at ¶ 12. (explaining that clients will be less likely to retain Fusion GPS or other investigative firms if their identities will be disclosed). As the Supreme Court has recognized, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). But "identification of individuals who never intended their participation in First Amendment activity to thrust them into the harsh glare of the limelight is calculated to chill future political dissent." *International Action Center v. United States*, 207 F.R.D. 1, 3-4 (D.D.C. 2002).

In *Black Panther Party v. Smith*, the D.C. Circuit Court of Appeals held that, in deciding whether the First Amendment privilege applies, a trial court should balance the party's First

Amendment interest against the requesting party's need for the information sought. 661 F.2d 1243, 1266 (D.C. Cir. 1981). In balancing those factors, the Court should "consider the relevance of the information sought," but the requesting party's interest in disclosure must be deemed "relatively weak unless the information goes to the heart of the matter." *Id.* Further, "[m]ere speculation that information might be useful will not suffice." *Id.* Finally, to overcome the privilege, the party seeking disclosure must show that it has exhausted every other reasonable source for the information. *Id.*

Under that standard, the Court should quash the subpoena. The underlying dispute involves activity at the core of the First Amendment protections. Any potentially relevant discussions between Mr. Simpson and any client about Mr. VanderSloot or Melaleuca would necessarily involve the client's political leanings. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (noting that "[t]he First Amendment protects political association as well as political expression"). Further, the controversy involves one of today's foremost issues of public debate, gay rights. *See Perry*, 591 F.3d 1147, 1152 (9th Cir. 2009) (finding political activity on gay marriage and gay rights issues constitutes activity protected by the First Amendment).

By contrast, as explained above, the subpoena will provide Mr. VanderSloot with little, if any, information relevant to his defamation case. Thus, the Court should quash the subpoena to protect the First Amendment associational rights of Mr. Simpson and Fusion GPS's clients.

II. This Action to Issue the Subpoena Should Be Dismissed Under the D.C. Anti-SLAPP Statute and the Subpoena Should Be Withdrawn

As discussed above, plaintiffs initiated this proceeding to chill Mr. Simpson's First Amendment rights. As such, this action is a classic "SLAPP" that the D.C. Council sought to prevent through the enactment of the Anti-SLAPP Act. As courts in the District of Columbia have found, the Anti-SLAPP Act reflects a legislative judgment that:

> SLAPPs ... have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantial amount of money, time, and legal resources. The impact is not limited to named defendants' willingness to speak out, but prevents others from voicing concerns as well.

Boley v. Atl. Monthly Group, 950 F. Supp. 2d 249, 254 (D.D.C. 2013) (quoting Comm. Report at1.); *see also Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (2014).

Under the Anti SLAPP Act, a party may "file a special motion to dismiss any *claim* arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim."[6] D.C. Code Ann. § 16-5502 (emphasis added). The Act provides an extremely broad definition of the term claim.[7] It "includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other *civil judicial pleading or filing requesting relief*." D.C. Code Ann § 16-5501(C) (emphasis added). The petition that plaintiffs filed with this court on June 16, 2014 seeking issuance of the subpoena is a "filing requesting relief" that squarely falls within the definition of "claim" in the Anti-SLAPP Act. It has been assigned its own civil action number (14-CA-3684) and the clerk signed the subpoena, issuing the relief that was requested.[8] Other Judges in the District of Columbia have found that the Act provides broad protections to citizens, such as Mr. Simpson, who are faced with litigation expenses due to their protected activity. *See Forras v. Rauf*, 2014 WL 1512814, at *4 (D.D.C.

[6] The D.C. Anti-SLAPP Act also provides for a motion to quash a subpoena when an anonymous person's identifying information is being sought. D.C. Code § 16-5503.

[7] The D.C. Anti-SLAPP Act's definition of "claim" is significantly broader than statutes in other states, such as California, which limits Anti-SLAPP motions to dismissal of a "cause of action." Cal. Code Civ. Proc. § 425.16(b)(1).

[8] Because this motion to dismiss is directed to the action that plaintiffs filed in this Court for issuance of the subpoena under D.C. Code § 13-441, this motion does not address whether a subpoena issued under D.C. Superior Court Rule 45 is subject to the Anti-SLAPP Act.

April 18, 2014) ("the 'broad' protections afforded by the Act 'follow[ ] 'the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaged in protected actions'' by enacting anti-SLAPP laws" (citing and quoting *Farah v. Esquire Magazine,* 863 F.Supp.2d 29, 36 (D.D.C. 2012)).

To prevail on a motion to dismiss under the Anti-SLAPP Act, the moving party must make a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). If that showing is made, "the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits." *Id.* Mr. Simpson's request for public records was an act in furtherance of the right of advocacy and plaintiffs cannot show that they will succeed on the merits of the legitimacy of this subpoena.

A. The Filing Requesting the Subpoena Seeks to Punish a Protected Act

Plaintiffs issued this subpoena to Mr. Simpson as a result of Mr. Simpson's acts "in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502. An "issue of public interest" is one "related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." *Id.* § 16-5501(3).

Here, the subpoena arose from one act – a request for public judicial records about a public figure who served as a high ranking member of a presidential campaign. Public access to judicial and other public records certainly furthers the right of advocacy on issues of public interest. Indeed, courts have long recognized that ensuring that the public has access to our court's judicial records is "fundamental to a democratic state." *Zapp v. Zhenli Ye Gon*, 746 F. Supp. 2d 145, 148 (D.D.C. 2010). As the Supreme Court has explained, such access is

"necessary to support ... the citizen's desire to keep a watchful eye on the workings of public agencies" and other authorities. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978). *Id.* Thus, a public records request falls within the activity protected the anti-SLAPP statute.

Moreover, gathering information on close advisers of political leaders, such as Mr. VanderSloot, constitutes "an act in furtherance of the right of advocacy on issues of public interest." In *Abbas v. Foreign Policy Group*, 975 F. Supp. 2d 1, 11-13 (D.D.C. 2013), the son of, and an adviser to, Palestinian President Mahmoud Abbas brought a defamation action against a magazine that criticized him for improperly profiting from his father's position. *Id.* at 7. When the magazine's publishers moved to dismiss under the Anti-SLAPP Act, the court found the commentary to be "an act in furtherance of the right of advocacy on issues of public interest" because it was reporting on the adviser to a high-ranking political leader. *Id.* Similarly, any research about Mr. VanderSloot, who held a high-level position with the Romney campaign, is an act in furtherance of the right of advocacy.

B. Mr. VanderSloot and Melaleuca Cannot Demonstrate that they Will Prevail on the Merits

Mr. VanderSloot cannot show that he is likely to prevail on enforcement of the subpoena in this action. As explained above, the subpoena should be quashed because it seeks irrelevant information, was issued for an improper purpose, would cause undue hardship by seeking disclosure of Fusion GPS's confidential business information, and would infringe on the First Amendment rights of Mr. Simpson, Fusion GPS, and their clients.

For these reasons, the motion to dismiss this action – Case No. 14-CA-3684 – under the Anti-SLAPP Act should be granted and the Court should order that the subpoena issued by the Clerk on June 16, 2014 to Mr. Simpson be withdrawn. Further, pursuant to D.C. Code § 16-

5504, the Court should award Mr. Simpson his "costs of the litigation, including reasonable attorneys' fees."

CONCLUSION

Mr. VanderSloot is free to support whomever he wants for President. Mr. VanderSloot is free to donate his money to whichever political action committee he chooses. Mr. VanderSloot is free to advocate for whatever public policy issues he chooses. Mr. VanderSloot is also free to bring a defamation action against *Mother Jones*, its editors, and its reporters if he believes that they defamed him. But Mr. VanderSloot is not free to use this Court's authority to drag Mr. Simpson, his firm, or his clients into his political fights simply because they made one request for public court records.

Mr. Simpson has no information relevant to Mr. VanderSloot's defamation action against the defendants. Accordingly, the Court should quash the subpoena seeking documents and testimony from Mr. Simpson, grant the motion to dismiss this proceeding under the Anti-SLAPP Act and award Mr. Simpson his fees and costs pursuant to D.C. Code § 16-5504.

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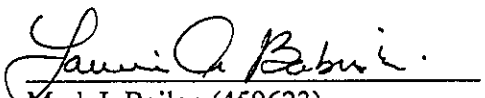
By: 

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