Filed
D.C. Superior Court
10/27/2014 15:32PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

FRANK L. VANDERSLOOT and MELALEUCA, INC., **Plaintiffs,** **v.** **THE FOUNDATION FOR NATIONAL PROGRESS d/b/a MOTHER JONES; MONIKA BAUERLEIN; and STEPHANIE MENCIMER.** **Defendants.**	**2014 CA 003684 2** **Judge Robert Okun** **Calendar 10** **Case No. CV-2013-352** **(Pending in the District Court of the Seventh Judicial District for the State of Idaho, in and for the County of Bonneville)**

ORDER

The following motions are before this Court. First, on July 21, 2014, Non-Party Obama for America "(OFA") filed a Motion to Quash Subpoena, which Plaintiffs opposed. Second, on July 22, 2014, Non-Party Glenn Simpson ("Simpson") filed a Motion to Quash Subpoena and a Special Motion to Dismiss under DC Anti-SLAPP Statute, which Plaintiffs opposed. Third, on July 25, 2014, OFA filed a Special Motion to Dismiss under the District of Columbia's Anti-SLAPP Statute, which Plaintiffs opposed. Finally, on August 1, 2014, Plaintiffs filed a Cross-Motion to Compel Non-Party Glenn Simpson's Compliance with Subpoena Duces Tecum, which Simpson opposed. Upon consideration of the Motions, the Oppositions, the arguments of the parties, and the entire record, the Court will **deny** OFA's Motion to Quash Subpoena, **deny** OFA's Special Motion to Dismiss, **deny** Simpson's Motion to Quash Subpoena and Special Motion to Dismiss, and **grant** Plaintiffs' Cross-Motion to Compel.

PROCEDURAL HISTORY

A. The Complaint Filed in Idaho State Court

On January 29, 2013, Plaintiffs Frank VanderSloot ("VanderSloot") and Melaleuca, Inc. ("Melaleuca") filed a Complaint for defamation against Defendants Foundation for National Progress d/b/a Mother Jones ("Mother Jones"), Monika Bauerlein ("Bauerlein") and Stephanie Mencimer ("Mencimer") (collectively "Defendants") in Idaho state court. The Complaint arose out of an article that Mother Jones published on February 6, 2012, and revised and re-published on February 16, 2012, in which Defendants allegedly made false and defamatory statements about an advertisement that Plaintiffs posted in an Idaho newspaper in 2005. The Complaint also alleged that Defendants made false and defamatory statements about Plaintiffs in a February 6, 2012 "tweet" and a subsequent "re-tweet."

The Complaint further alleged that, on April 20, 2012, OFA published an Internet post entitled "Behind the curtain: A brief history of Romney's donors," which included a link to the February 16, 2012, Mother Jones article, listed Plaintiff as part of a "group of wealthy individuals with less-than-reputable records," and described Plaintiff as "litigious, combative, and a bitter foe of the gays right movement." (Compl. ¶9.) The Complaint does not allege that Simpson took any action based on the Mother Jones articles and "tweets," but in their Cross-Motion to Compel, Plaintiffs allege that, approximately one week after OFA published its list of "less-than-reputable" Romney donors, an intern named Michael Wolf, who was employed by Simpson's company, Fusion GPS, contacted the Bonneville County Courthouse in Idaho Falls, Idaho, and requested court records concerning VanderSloot's divorces and a case involving a former Melaleuca employee. (Mot. 4.)

B. The Subpoena *Duces Tecum* Issued to OFA

On April 2, 2014, Plaintiffs obtained a subpoena *duces tecum* from the Clerk of the Superior Court of the District of Columbia that required Organizing for Action[1] to produce the following documents to Plaintiffs' counsel by May 9, 2014:

> All documents relating to Frank VanderSloot or Melaleuca, Inc.
>
> All documents received from or sent to Stephanie Mencimer, Monika Bauerlein, or anyone employed by or acting on behalf of the Foundation for National Progress d/b/a Mother Jones.
>
> All documents received from or sent to Glenn Simpson, Michael Wolf, or anyone employed by or acting on behalf of Fusion GPS.

The subpoena also requested that a representative from Organizing for Action appear for a deposition at the offices of Plaintiffs' counsel on May 23, 2014. On April 22, 2014, OFA filed objections to Plaintiffs' subpoena claiming, among other things, that it was overbroad, and that it sought documents protected from disclosure by the First Amendment, the work product doctrine, the attorney-client privilege, and the D.C. Anti-SLAPP statute. In response to OFA's objections, Plaintiffs obtained a new subpoena on June 16, 2014, and served the subpoena on OFA, rather than Organizing for Action. In addition, Plaintiffs narrowed the time frame of the new subpoena, now requesting that OFA bring the following documents to a deposition scheduled for July 22, 2014:

> All documents relating to Frank VanderSloot or Melaleuca, Inc., received from sent to, or copying Stephanie Mencimer, Monika Bauerlein, or anyone employed by or acting on behalf of the Foundation for National Progress d/b/a Mother Jones, or Glenn Simpson, Michael Wolf, or anyone employed by or acting on behalf of Fusion GPS, from January 31, 2011 until November 6, 2012.

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[1] Plaintiffs subsequently were informed by OFA's counsel that OFA was the entity responsible for publishing the link to the Mother Jones article, rather than Organizing for Action, and Plaintiffs subsequently obtained a new subpoena and directed it to OFA. (*See* Pls.' Opp. to OFA's Mot. to Quash and Special Mot. to Dismiss at 2.)

In addition, Plaintiffs agreed to limit the deposition to questions about OFA's external communications with Mother Jones and Fusion GPS about Plaintiffs and the circumstances under which OFA came to post the link to the Mother Jones' article, and further agreed to limit the deposition to two hours. (*See* Pls.' Opp. to OFA's Mot. to Quash and Special Mot. to Dismiss, Ex. G.)

C. The Subpoena *Duces Tecum* Issued to Simpson

On June 16, 2014, Plaintiffs obtained a subpoena *duces tecum* from the Clerk of the Superior Court of the District of Columbia that required Simpson to appear at a deposition at the office of Plaintiffs' counsel on July 23, 2014, and to provide the following documents at the deposition:

> 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 anyone employed by or acting on behalf of Obama for America.

On July 7, 2014, Simpson filed objections to the subpoena, claiming that it was overbroad and unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and sought information protected by the attorney-client privilege and D.C. Code § 16-4701 (which limits the disclosure of information obtained by a person employed by the news media in a news gathering or news disseminating capacity).

D. The Motions to Quash and Dismiss and the Cross-Motion to Compel

On July 21, 2014, OFA filed a Motion to Quash Subpoena, arguing that Plaintiffs' subpoena sought information that was not relevant to Plaintiffs' claims and that enforcing the subpoena would infringe OFA's First Amendment rights. On July 22, 2014, Simpson filed a Motion to Quash Subpoena and a Special Motion to Dismiss under DC Anti-SLAPP Statute. In his Motion to Quash, Simpson argued that Plaintiffs' subpoena was overbroad, would impose an undue burden on Simpson, and would chill his First Amendment rights. In his Special Motion to Dismiss, Simpson argued that Plaintiffs' subpoena should be dismissed under the Anti-SLAPP Act because it was issued to punish Simpson's acts in furtherance of his right to advocacy on issues of public interest. On July 25, 2014, OFA filed a Special Motion to Dismiss under the District of Columbia's Anti-SLAPP Statute, arguing, like Simpson, that the subpoena violated the Anti-SLAPP Act because it was issued to punish OFA's acts in furtherance of their right to advocacy on issues of public interest.

On August 1, 2014, Plaintiffs filed their Opposition to Simpson's Motion to Quash and Special Motion to Dismiss, and their Cross-Motion to Enforce Compliance with Subpoena *Duces Tecum*. In this Opposition, Plaintiffs argued that the evidence they sought was relevant to the issue of actual malice in the defamation action and to their claim for damages and that enforcement of the subpoena would not chill Simpson's First Amendment rights. Plaintiffs also argued that the Anti-SLAPP statute was not applicable because it did not cover subpoenas issued to named entities, such as the one issued to Simpson.[2] On August 8, 2014, Plaintiffs filed their Omnibus Opposition to OFA's Motion to Quash and Special Motion to Dismiss, raising the same arguments they raised in their Opposition to Simpson's Motion. Plaintiffs also asserted that even if the subpoena implicated OFA's First Amendment rights, it nonetheless should be enforced because it sought information that was highly relevant to Plaintiffs' defamation action, was narrowly tailored, and sought information that otherwise was unavailable.

[2] Although Plaintiffs opposed Simpson's motion to quash the deposition subpoena, they moved to compel compliance with the subpoena *duces tecum*, asserting that enforcement of a subpoena *duces tecum* must be obtained through a motion to compel pursuant to Superior Court Rule of Civil Procedure 45(c), rather than by merely opposing a motion to quash. (*See* Pls.' Opp. and Cross-Mot. 2, n.1.)

On August 15, 2014, Simpson filed his Reply to Plaintiffs' Opposition to his Motion to Quash, and his Opposition to Plaintiffs' Cross-Motion to Compel, arguing that the subpoena was improper under Superior Court Rules of Civil Procedure 26 and 45 because it imposed an undue burden on Simpson, and that the First Amendment's associational privilege applied to communications with Fusion GPS's clients. Simpson also asserted that the Anti-SLAPP statute applied because Plaintiffs' request for a subpoena constituted a "civil judicial pleading or filing requesting relief" under the statute. On that same day, OFA filed its Reply, asserting that the subpoena was overbroad and violative of the First Amendment because it sought any and all communications that OFA may have had with Mother Jones or Fusion GPS about Plaintiffs on any issue, over the course of a period of almost two years. OFA argued, therefore, that the subpoena was not narrowly tailored to obtain information that could not be obtained from any other source. Finally, on August 22, 2014, Plaintiffs filed a Reply in Support of their Cross-Motion to Compel, reiterating many of the arguments they previously made in support of their Cross-Motion to Compel.

E. The Motions Hearing

On September 11, 2014, this Court conducted a hearing on the pending motions before the Court.[3] At this hearing, the parties reiterated many of the arguments they made in their filings. In addition, OFA noted that it would not have objected to the subpoena if it were limited

[3] During this hearing, OFA and Simpson provided a declaration from Monika Bauerlein, co-editor of Mother Jones magazine, in support of their motions to quash and special motions to dismiss. The declaration stated that: 1) there were no communications between Mother Jones and OFA or Simpson concerning Plaintiffs prior to the publication of the article at issue in the defamation action; 2) there were no communications between Mother Jones and OFA regarding Plaintiffs after the publication of the article; and 3) that there were no communications between Mother Jones and Simpson regarding Plaintiffs after the publication of the article, "except that . . . there were a few brief, passing communications between Mother Jones and Simpson regarding the receipt by Simpson of an indication that Plaintiffs might be coming after him in some way . . ." (Bauerlein Decl. ¶4.) Bauerlein also stated that there were no communications at any time with OFA or Simpson regarding the basis for the allegedly defamatory statements in the Idaho lawsuit, or the truth or falsity of any of those statements. Although Plaintiffs initially moved to strike the declaration, they later withdrew that request.

to OFA's communications with Mother Jones concerning Defendants' knowledge of the falsity of the information contained in the articles at issue. OFA also pointed out that Plaintiffs' Report of Receipts and Disbursements to the Federal Election Commission was filed on January 31, 2012, not January 31, 2011, as Plaintiffs had suggested in choosing that date as the start date for their subpoena. In addition, Simpson argued that Plaintiffs' Cross-Motion to Compel constituted a civil judicial pleading or filing requesting relief (in addition to arguing that the subpoena constituted such a pleading or filing).

Plaintiffs noted that discovery in the Idaho litigation is set to end early in 2015, that numerous non-party depositions have been taken without objection, that the parties have not limited discovery to pre-publication communications, and that the case is set for trial in May 2015. Plaintiffs also noted that the depositions were needed as possible evidence in the Idaho litigation, that this information was not available from other sources, and that they were willing to limit the depositions of both OFA and Simpson to two hours. In addition, Plaintiffs noted that the Idaho court had issued a stipulated protective order under which parties and non-parties could designate information as confidential, and argued that both OFA and Simpson could avail themselves of this order if they believed any of the information disclosed was confidential.[4]

With respect to the deposition of an OFA representative, Plaintiffs stated that they were willing to limit the deposition of OFA's representative to questions about OFA's external communications with Defendants and Fusion GPS about Plaintiffs. Plaintiffs further asserted that, if there were no such communications with Defendants or Fusion GPS, they would be willing to limit the remainder of the deposition to questions about why OFA read Defendants'

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[4] Subsequent to the hearing, Plaintiffs provided a copy of this Order to the Court, with copies to OFA and Simpson. OFA and Simpson subsequently filed responses to this Order, in which they argued that the Order did not alleviate their First Amendment concerns with regard to the subpoenas. Plaintiffs then filed a response, arguing that the Order provided sufficient safeguards to parties and non-parties alike, but that they were willing to enter into separate protective orders with OFA and Simpson "upon reasonable terms." (Pls' Resp. 2.)

article and reached the conclusions it reached, who decided to use the article in OFA's Internet post and how it was selected. Plaintiffs also agreed to narrow the time frame for the OFA subpoena to begin on January 31, 2012, not January 31, 2011, in light of the fact that Plaintiffs had filed the FEC report on January 31, 2012. However, Plaintiffs asserted that they still would want to ask questions at the deposition about any pre-publication conversations OFA had with Defendants and Fusion GPS about Plaintiffs, regardless of the exact date these conversations occurred.

With respect to the deposition of Simpson, Plaintiffs agreed to limit his deposition to two hours, and asserted that they only would ask questions concerning: 1) external communications with Mother Jones and OFA concerning Plaintiffs; 2) the impressions Simpson formed when he read the Mother Jones article; and 3) the steps he took after reading the article, including whether Fusion GPS intern Michael Wolf was asked to contact the Idaho state court and, if so, who asked him to do this.

ANALYSIS

A. OFA's and Simpson's Motions to Dismiss are Denied

1. The District of Columbia Anti-SLAPP Statute

"A 'strategic lawsuit against public participation' or 'SLAPP' is a lawsuit 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Doe v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014) (quoting D.C. Council, Comm. on Pub. Safety and the Judiciary, Report ("Comm. Report") on Bill 18-893 at 1). In 2010, the Council of the District of Columbia enacted the D.C. Anti-SLAPP Act to "protect the targets of SLAPPs and encourage 'engag[ement] in political or policy debates.'" *Id.* at 1036 (quoting Comm. Report at 4).

Following the lead of a number of other jurisdictions, the statute creates a "special motion to dismiss" SLAPPs. *Id.* More specifically, D.C. Code § 16-5502(a) authorizes a party to file a special motion to dismiss a claim "arising from an act in furtherance of the right of advocacy on issues of public interest." The statute defines "claim" to include "any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief." D.C. Code § 16-5501(2). If the party filing the special motion to dismiss makes 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, the motion must be granted unless the responding party demonstrates that the claim is likely to succeed on the merits. D.C. Code § 16-5502(b).

In addition to creating the remedy of a special motion to dismiss, the D.C. Anti-SLAPP Act "goes further than . . . other jurisdictions . . . in its additional protection for anonymous speech." *Doe*, 91 A.3d at 1036. More specifically, D.C. Code § 16-5503(a) authorizes a person whose "personal identifying information is sought, pursuant to a discovery order, request, or **subpoena**, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest, [to] make a special motion to quash the discovery order, request, or **subpoena**." *Id.* (emphases added). Section 5503(b) also states that the special motion to quash must be granted if the person filing the special motion makes a *prima facie* showing that the underlying claim concerns the type of speech that the statute is designed to protect, unless the party seeking the personal identifying information demonstrates that the underlying claim is likely to succeed on the merits. *Id.* As the Court of Appeals has noted, this provision allows an "anonymous would-be defendant" to protect his or her identity and "thus avoid being named in a suit and served with a complaint." *Doe*, 91 A.3d at 1036.

2. The Anti-SLAPP Statute Does Not Apply to Plaintiffs' Subpoenas

OFA and Simpson argue that the Anti-SLAPP Act applies to Plaintiffs' subpoenas because a subpoena is a "claim" under Section 5501(2) since it constitutes a "civil judicial pleading or filing requesting relief." More specifically, OFA and Simpson argue that Plaintiffs' subpoenas are civil filings, filed with the Clerk's Office, that request relief in the form of production of documents and attendance at depositions. The Court disagrees.

Although neither the statute nor the legislative history directly addresses the issue of whether a subpoena constitutes a "civil judicial pleading or filing requesting relief," it is clear from an examination of the statute as a whole that subpoenas are not "claims" under Section 5502. Indeed, it is apparent that the Council knew how to specify whether the Act applies to subpoenas, because it explicitly authorized special motions to quash subpoenas for personal identifying information in Section 5503. The fact that the Council specifically delineated that Section 5503 applies to subpoenas, and did not do so in Section 5502, directly undercuts the argument that Section 5502 applies to subpoenas as well.

Moreover, the Court of Appeals has distinguished between the remedies created in Sections 5502 and 5503, noting that Section 5502 applies to motions to dismiss lawsuits and that Section 5503 applies to motions to quash subpoenas. More specifically, the Court has stated that Section 5502 created the remedy of special motions to dismiss to allow a named defendant to "quickly and equitably end a meritless **suit**," while Section 5503 created a remedy for an anonymous would-be defendant to "quash a **subpoena**." *Doe*, 91 A.3d at 1036 (emphases added). Thus, the structure of the Act as a whole, and the Court of Appeals' interpretation of that structure, demonstrates that Section 5502 does not apply to subpoenas.

Furthermore, the definition of "claim" in Section 5501 demonstrates that a "claim" does not include a subpoena. Indeed, the first five examples of a "claim" in Section 5501 involve requests for relief that are quite different from a subpoena. In fact, each of the examples -- "any civil lawsuit, complaint, cause of action, cross-claim, [or] counterclaim" -- involves a request for relief from the Court, not a request for information from a party or other person. Likewise, the term "claim" is commonly defined in the context of judicial proceedings as being a request for relief from the Court, not information from a party or other person. *See, e.g., Black's Law Dictionary* (9th ed. 2009) (defining "claim" as the assertion of a "right to payment or to an equitable remedy" or as a "demand for money, property, or a legal remedy to which one asserts a right").

In addition, the term "other judicial pleading" does not refer to a subpoena, because the term "pleading" is defined in the Rules of Civil Procedure as being limited to complaints and answers, replies to counterclaims, answers to cross-claims, and third-party complaints and answers. *See* Super. Ct. R. Civ. P. 7(a). Finally, the term "other judicial . . . filing requesting relief" also does not apply to subpoenas. Indeed, subpoenas are not a "judicial" filing, but merely a request to the Clerk's Office, which "shall issue a subpoena, signed but otherwise in blank, to a party requesting it," Super. Ct. R. Civ. P. 45(a)(3), without any involvement from a judicial officer. Likewise, a subpoena is not a "filing requesting relief" because it is simply a document that a party sends to another party or non-party requesting information, and does not seek "relief" as that term is commonly used in the context of judicial proceedings. *See, e.g., Black's Law Dictionary* (9th ed. 2009) (defining "relief" as the "redress or benefit . . . that a party asks of a court"). Accordingly, this Court finds that Plaintiffs' subpoenas are not "claims" under the Anti-SLAPP Act, and denies OFA's and Simpson's motions to dismiss on that basis.

Furthermore, even assuming *arguendo* that Plaintiffs' subpoenas did constitute "claims" under the Anti-SLAPP Act, OFA and Simpson still would not be entitled to dismissal of the subpoenas because Plaintiffs have demonstrated that they are likely to succeed on the merits of their "claim."[5] More specifically, Plaintiffs have demonstrated that they are entitled to enforcement of their subpoenas, with the minor modifications set forth below. Thus, because Plaintiffs have demonstrated that they are likely to succeed on the merits of their "claim," this Court must deny OFA's and Simpson's motions to dismiss on that basis as well. *See Doe*, 91 A.3d at 1044 (special motion to quash must be denied if plaintiff is likely to succeed on the merits of the claim); *see also Mann v. Nat'l Review, Inc.*, 2013 D.C. Super. Ct. LEXIS 7 at ** 13-16 (same).

3. Even if the Anti-SLAPP Statute Applies to Plaintiffs' Cross-Motion to Compel Compliance with Subpoena, Plaintiffs Have Established Likelihood of Success on the Merits of Their Motion to Compel

At the hearing in this case, Simpson argued, for the first time, that Plaintiffs' Cross-Motion to Compel constituted a "claim" under the Anti-SLAPP Act. The Court agrees that a motion to compel appears to constitute a judicial filing seeking relief and therefore constitutes a "claim" under the Act. Nonetheless, this Court will deny Simpson's Motion to Dismiss Plaintiffs' Cross-Motion to Compel because, for the reasons set forth below, Plaintiffs have demonstrated that they are likely to succeed on the merits of that claim.

B. OFA's and Simpson's Motions to Quash are Denied

OFA and Simpson argue that Plaintiffs' subpoenas should be quashed because they infringe upon their First Amendment associational privileges, and also because they are overly broad and unduly burdensome.

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[5] At the hearing in this case, OFA, Simpson and Plaintiffs all agreed that the enforcement of the subpoena, and not the underlying Idaho litigation, was the "claim" for which Plaintiffs must demonstrate a likelihood of success on the merits.

In support of its Motion to Quash, OFA submitted a declaration from Elizabeth Jarvis-Sheen, who was the Director of Research for OFA during the 2012 election campaign, in which Ms. Jarvis-Sheen stated that disclosure of communications with the press or others with whom OFA communicated confidentially would greatly hinder campaign communications. (*See* OFA Mot. to Quash, Ex. M.) Ms. Jarvis-Sheen also averred that disclosure of these communications would have a "particularly devastating effect" on the public debate about the influence of large-contribution donors to political campaigns, and would undermine the effectiveness of campaign finance laws. (*Id.*)

Similarly, Glenn Simpson submitted a declaration in support of his Motion to Quash, in which he stated that he formed Fusion GPS in 2010, after serving as an investigative reporter for the Wall Street Journal for 20 years. (Simpson Mot. to Quash, Ex. D.) According to Simpson, Fusion GPS is a research consulting firm that provides services for corporations, law firms, investors and other clients. (*Id.*) Simpson further asserted that Fusion GPS's clients request that their identity and the nature of their requests be maintained as confidential, and that "many, if not most, of Fusion GPS's clients would not engage our services if they believed we would disclose their identity, or the nature of the research that we provided to them." (*Id.*) Simpson acknowledged that he did perform some background research concerning VanderSloot after the Mother Jones article was published, and that he asked an intern to request public records from an Idaho state court concerning VanderSloot. (*Id.*) Finally, Simpson stated that he searched his files and found no documents concerning communications with Defendants or OFA concerning Plaintiffs prior to February 6, 2012, the date the Mother Jones article was first published. (*Id.*)

By contrast, Plaintiffs assert that the First Amendment's associational privilege does not apply to either OFA or Simpson because neither non-party is a membership organization that engages in expressive association. Plaintiffs further argue that, even if the First Amendment does apply to their subpoenas, that they have satisfied the First Amendment standards because their subpoenas seek information that is highly relevant to their claims, are narrowly tailored, and seek to obtain information that cannot be obtained from another source.

For the reasons set forth below, this Court largely agrees with Plaintiffs' arguments but will modify Plaintiffs' subpoenas, to a minor degree, in order to minimize OFA's and Simpson's concerns about the breadth of the subpoenas.

1. Relevant Legal Framework

Rule 45(d) of the Superior Court Rules of Civil Procedure authorizes the trial court to quash a subpoena if it is "unreasonable and oppressive." *Id.*; *see also In re Herndon*, 596 A.2d 592, 596 (D.C. 1991). In determining whether to quash a subpoena in a civil proceeding, the trial 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." *Id.* The party seeking to quash the subpoena bears the burden of showing that the subpoena is unreasonable and oppressive. *See, e.g., Flanagan v. Wyndham International, Inc.*, 231 F.R.D. 98, 102 (D.D.C. 2005).

However, although the Court of Appeals has not addressed the issue in this jurisdiction, courts elsewhere routinely require parties issuing subpoenas to meet a higher standard of relevance and need when the subpoena implicates First Amendment rights. More specifically, courts have held that when the recipient of a subpoena makes a *prima facie* showing that compliance with the subpoena would infringe the recipient's First Amendment rights, the party issuing the subpoena must show that the information sought is "highly relevant" to the claims, that the request is "carefully tailored to avoid unnecessary interference with protected activities," and that the information must be "otherwise unavailable." *See. e.g., Perry v. Schwarzenegger*, 591 F.3d 1126, 1141 (9th Cir. 2010). In order to make a *prima facie* showing that compliance with the subpoena will infringe First Amendment associational rights, the recipient of the subpoena must demonstrate that enforcement of the subpoena will result in "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* at 1140; *see also In re: Motor Fuel Temperature Sales Practices Litigation*, 641 F.3d 470, 491 (10th Cir. 2011) (party claiming infringement of First Amendment associational privilege can meet its burden by submitting affidavits describing "harassment and intimidation of [a group's] known members, and the resulting reluctance of people sympathetic to the goals of [the group] to associate with [it] for fear of reprisals").

2. Application of Legal Framework to this Case

In this case, it is far from clear that OFA and Simpson have established that compliance with Plaintiffs' subpoenas would infringe their First Amendment associational rights. To the contrary, neither OFA nor Simpson is an association with members whose associational rights might be chilled by enforcement of the subpoenas. This is particularly true of Simpson, who runs a consulting business that provides research services to corporations, law firms, investors and other clients, and that could hardly be considered an association or advocacy organization with members who engage in associational activities. Furthermore, Plaintiffs are not seeking the type of information, such as membership lists, donor lists, or internal communications relating to campaign strategies, that courts have found to implicate the First Amendment's associational privilege. *See, e.g., Perry*, 591 F.3d at 1131 (internal campaign communications concerning state-wide referendum); *NAACP v. Alabama*, 357 U.S. 449, 453-54 (1958) (membership lists); *International Action Center v. United States*, 207 F.R.D. 1, 5 (D.D.C. 2002) (membership and donor lists). Rather, Plaintiffs have limited their subpoenas so as to seek information about external communications concerning Plaintiffs that occurred either between the non-party and Defendants or between the non-parties. Thus, it is far from clear that OFA or Simpson have made a *prima facie* showing that compliance with Plaintiffs' subpoenas would implicate their First Amendment associational privileges.

Moreover, even assuming *arguendo* that OFA and Simpson made a *prima facie* showing that compliance would implicate their First Amendment privileges, Plaintiffs have shown that the information they seek is highly relevant to their claims, that their requests are carefully tailored to avoid interference with protected activities, and that the information they seek is not otherwise available. First, the information Plaintiffs seek is highly relevant to their defamation claims in Idaho state court. Indeed, communications between Defendants and OFA or Simpson, and the actions OFA and Simpson took pursuant to those communications, are relevant both to the issue of damages and Defendants' state of mind, as are the actions that OFA and Simpson took after reading the Mother Jones article. This is true even if these communications occurred after the publication of the Mother Jones article. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979) ("[t]he existence of actual malice may be shown in many ways . . . including . . . subsequent statements of the defendant").

Second, for the most part, Plaintiffs' requests have been carefully tailored to avoid interference with protected activities. As noted above, Plaintiffs have limited their subpoena *duces tecum* to external communications concerning Plaintiffs for a relatively limited time period, and have agreed to limit their depositions to two hours and to primarily address these communications during the depositions. In addition, Plaintiffs have noted that OFA and Simpson can avail themselves of the protective order in the Idaho litigation if they believe that any of the information being disclosed is confidential, and Plaintiffs have further expressed a willingness to enter into separate protective orders with OFA and Simpson if they believe the existing protective order provides insufficient protection for confidential information. The existence of a protective order is a factor that mitigates the chilling effect that could otherwise result from compliance with the subpoena. *See, e.g., Perry*, 591 F.3d at 1140 n.6 (although not dispositive, a protective order may "mitigate the chilling effect and could weigh against the showing of infringement" of a First Amendment right).

Third, the information that Plaintiffs seek is not obtainable from other sources. To the contrary, Plaintiffs may only obtain information concerning Defendants' communications with OFA and Simpson regarding Plaintiffs from OFA and Simpson directly. Indeed, neither OFA nor Simpson has persuasively argued that this information can be obtained from other sources.

Nonetheless, the Court will modify the subpoenas, to a minor degree, to ensure that they are not overbroad and do not infringe upon OFA's and Simpson's possible First Amendment privileges. More specifically, the Court will modify the subpoena *duces tecum* to OFA so that the time period begins on January 31, 2012 (when Plaintiffs filed their FEC disclosure statement), rather than January 31, 2011; will limit the questioning at the depositions to questions concerning external communications about Plaintiffs between Defendants and OFA and Simpson, or between OFA and Simpson, and to any actions OFA or Simpson took pursuant to those communications or after reading the Mother Jones article; and will explicitly limit the time frame for each deposition to two hours. With these slight modifications, the Court believes Plaintiffs' subpoenas are not overbroad or unduly burdensome and do not infringe OFA's or Simpson's First Amendment rights, assuming *arguendo* that these rights are implicated by Plaintiffs' subpoenas.

Accordingly, this Court will deny OFA's and Simpson's Motions to Quash, except to the limited degree that the Court has modified the subpoenas as set forth above.

3. Plaintiffs' Cross-Motion to Compel is Granted

For the reasons that the Court has set forth above, the Court will grant Plaintiffs' Cross-Motion to Compel Simpson to comply with the subpoena *duces tecum* they issued to Simpson, and will require Simpson to provide the information requested in the subpoena within 30 days of the date of this Order.

Accordingly, it is this 27th day of October 2014, hereby

ORDERED that Obama for America's Special Motion to Dismiss is **DENIED**; it is further

ORDERED that Glenn Simpson's Special Motion to Dismiss is **DENIED**; it is further

ORDERED that Obama for America's Motion to Quash is **DENIED,** except as set forth above; it is further

ORDERED that Glenn Simpson's Motion to Quash is **DENIED,** except as set forth above; it is further

ORDERED that Plaintiffs' Cross-Motion to Compel is **GRANTED** as set forth above.

Judge Robert Okun
(Signed in Chambers)

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