SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

In re Subpoena Issued to Reddit Inc. in: JOHN DOE, Petitioner, v. MIKE BOUDET, et al., Respondents.	Case No. CPF-22-517749 **ORDER GRANTING PETITION TO QUASH SUBPOENA** Motion filed: April 25, 2022 Hearing: May 24, 2022

I held a hearing on this motion on May 24, 2022. Ethan Jacobs, Esq., appeared for Petitioner. Ruben Peña, Esq. appeared for Respondents. During the hearing, I adopted the tentative ruling on the merits and GRANTED the motion to quash. I requested that the parties meet and confer about a schedule for briefing the request for attorney fees, which they did. Having considered that briefing, the request for reasonable expenses is GRANTED in the amount of $26,297.50.

1. Adopted Tentative Ruling

Motion to quash GRANTED. The controlling California decision, cited by both parties, is *Krinsky v Doe 6* (2008) 159 Cal.App.4th 1154. As that decision explained, a key part of the analysis in deciding whether a California court may order an internet platform to unmask an anonymous internet commenter is determining whether the commenter made statements of pure

opinion, which are protected by the First Amendment, or statements of fact or mixed opinion, which are potentially subject to defamation liability. *Id.* at 1174-76. Pure opinion is where the defendant "makes a comment or opinion based on facts" set forth in the publication or otherwise known or available to a reader as a member of the public. *Id.* Mixed opinion (and a statement of fact) is based on facts regarding a plaintiff that have not been stated or assumed to exist. Id.

There are two sets of statements by Petitioner at issue: (1) that Respondent Boudet "groomed minors" and (2) that he engaged in plagiarism (Respondent grouped these into 4 statements, 2 of which related to grooming and 2 of which related to plagiarism, but I treat them in groups for this tentative ruling). Reviewing the materials submitted by the parties, it is clear that both statements were made based on facts discussed in the subject subreddit. The "grooming" discussion occurred in the context of a post by "U/boudettaway" that Boudet groomed "her." Jacobs Ex. A. I previously heard a motion to enforce a subpoena seeking to unmask U/boudettaway and recommended the Court do so, and the Court adopted that recommendation. The key difference between that case and this one is that U/boudettaway asserted or implied objective facts, which made it mixed opinion under Krinsky. Here, there is no indication that Petitioner's comments were based on any alleged facts that were not publicly known or available to anyone who saw the post by U/boudettaway or other commenters in that thread. Even if U/boudettaway made false statements that are potentially subject to defamation liability, without asserting or implying independent facts, Petitioner does not somehow accede to that potential liability by repeating or discussing those statements. Holding otherwise would expand defamation liability to people who merely repeat what they have heard from others but for which they assert no independent knowledge. Krinsky held that this would be inappropriate. Likewise, the comment about plagiarism follows a post that linked to a Rolling Stone article and suggested that Respondent "mostly copied it word for word." Jacobs Ex. E. Members of the public can compare the linked article and Respondent's posts, so these are matters available to a reader or member of the public. While Petitioner and Respondent may disagree over whether there was sufficient overlap to qualify as "plagiarism," this is pure opinion of the sort discussed in *Krinsky*. Applying *Krinsky's* command to view the allegedly defamatory communications in context, they are

protected opinion. Accordingly, as happened in *Krinsky*, the motion to quash must be granted. Because *Krinsky* and its discussion of the First Amendment control the resolution of this motion, I do not address any of the other issues raised in the papers, including which state may have jurisdiction or which state's law may apply, whether there is adequate publication, or whether Respondent must show actual malice or some other showing.

2. Procedure for Addressing Fees

The tentative ruling would have denied the request for attorney fees under CCP 2023.040 because the initial moving papers requested fees but did not identify the amount requested or basis for the request. This information was instead included in the reply.

During the hearing, I took under submission the issue of expenses, and asked the parties to meet and confer about a briefing schedule. The parties agreed as follows:

The parties jointly propose the following supplemental briefing on Doe's fee request under CCP 1987.2(c):

- Respondent shall submit a brief of no more than ten pages on or before June 10, 2022;
- Petitioner shall submit a reply of no more than ten pages on or before June 24, 2022; and
- No hearing is required, and the fee application will be decided on the papers.

3. Fees Under 1987.2(c) Are Not "Sanctions"

CCP 1987.2(c) provides that if a party files a motion to quash a subpoena to a provider of an interactive computer service and prevails, "and if the underlying action arises from the moving party's exercise of free speech rights on the Internet and the respondent has failed to make a prima facie showing of a cause of action, the court shall award the amount of reasonable expenses incurred in making the motion, including reasonable attorney's fees." The parties dispute whether these permitted reasonable expenses and attorney's fees are a sanction or statutory fees. Petitioner argues that fees under CCP 1987.2(c) are mandatory expenses and not sanctions. Respondent argues that such fees are sanctions and so should be subject to the usual requirements for sanctions requests, including CCP 2023.040, which requires that a request for sanctions identify the type of sanctions sought, and that the motion requesting sanctions be accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.

The text of the statute supports multiple readings. Subsection (a) provides that the court "in its discretion" may award "the amount of reasonable expenses incurred in making or opposing" a motion to quash a subpoena. Subsection (b)(1) provides that "notwithstanding subdivision (a), absent exceptional circumstances, the court shall not impose sanctions" for failure to provide electronically stored information that has been lost or become unavailable through the "routine, good faith operation of an electronic information system." As indicated above, subsection (c), which applies here, provides that the court "shall award" reasonable expenses including reasonable attorney's fees. The references to "reasonable expenses" in subsections (a) and (c) differs from the language employed in other discovery sanction contexts, which specifically refer to "sanctions." *See* CCP 2017.020, 2023.010, 2023.020, 2023.030. However, the use of "sanction" in subsection (b), obviously, refers to sanctions. Thus, the statute includes language suggesting that expenses are a sanction and language suggesting otherwise. Accordingly, I find that the statute is ambiguous about whether expenses under CCP 1987.2(c) are sanctions for purposes the procedure for requesting sanctions in other discovery contexts.

To resolve this ambiguity, I turn to the case law cited by the parties. Respondents cite authority that construed CCP 1987.2(c) as a "statute relating to discovery," and thus argue that the regular rules for attorney fees as discovery sanctions should apply. *Roe v. Halbig* (2018) 29 Cal.App.5th 286, 301 (discussing legislative history of interaction between CCP 1987.2(c) and the anti-SLAPP statute). As I read the legislative history discussed in *Halbig*, I conclude that it supports finding the award of fees to be something other than sanctions. That legislative history provides: "if the moving party prevails and if the underlying action arises from the moving party's exercise of free speech rights on the Internet and the respondent has failed to make a prima facie showing of a cause of action, the court shall award the amount of the reasonable attorney's fees." (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 2433 (2007-2008 Reg. Sess.), p. 17.)[1] Considering the mandatory nature of the legislative interest in awarding attorney's fees, I conclude that Petitioner has the better of the argument on the characterization of fees under

[1] Available at https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/publications/2007%2008%20bill%20sum.pdf

CCP 1987.2(c) as a statutory award of expenses instead of a sanction. Specifically, if the Legislature had intended the award of sanctions to proceed under the usual discovery sanctions procedures, I anticipate that it would have used language relevant to a sanctions analysis, as for example, the reference to "bad faith" and "substantial justification" in CCP 1987.2(a). Because expenses under CCP 1987.2(c) are a separate mandatory type of fee shifting, I conclude that CCP 2023.040 does not apply.

This petition involved a petition to quash a subpoena to Reddit, an interactive computer service, was based on the moving party's exercise of free speech rights, and I found that Respondents did not make the required showing. Accordingly, Petitioner is entitled to reasonable expenses, including fees, incurred in bringing the motion. CCP 1987.2(c).

4. Respondents Received Due Process and Responded

This does not end the analysis though. As Respondents also argued, "[d]ue process requires adequate notice be provided prior to the imposition of sanctions. *J.W. v. Watchtower Bible and Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142, 1167 (citing *Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 976). Even though I find that reasonable expenses under CCP 1987.2(c) are not "sanctions," the basic idea that due process requires adequate notice before the court may order payment of money however characterized is well established.

Here, Petitioner's notice of motion requested an award of attorney's fees and reasonable costs. The declaration in support of the initial motion said that Doe would seek attorneys' fees and costs and "will provide a calculation of these expenses incurred through the reply brief."

Halbig held that a trial court has discretion to consider evidence submitted for the first time on reply as long as the other party has opportunity to respond. 29 Cal.App.5th at 310 (citing *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308).

While the initial briefing process did not provide the required due process opportunity to respond, the subsequent agreed briefing process provided that opportunity. Accordingly, I turn to the requested fees.

5. Analysis of Fee Request

Halbig confirmed that the traditional lodestar approach applies to evaluating fees awarded

under CCP 1987.2(c). 29 Cal.App.5th at 310-12.

Petitioner requested fees of $26,297.50. This is based on work by two attorneys: Mr. Jacobs and James Slater. Mr. Jacobs has practiced law since 2004. Mr. Jacobs averred that his hourly billing rate is $450 and that he spent 29.7 hours preparing the petition and reply. Mr. Slater has practiced law since 2014. Mr. Slater averred that his hourly billing rate is $350 and that he spent 35.5 hours preparing the petition and reply.

While Respondents challenge the number of hours claimed, they do not challenge the requested hourly rates. I accept the requested hourly rates both as unchallenged and as consistent with other fee requests in discovery matters in this Court for similarly qualified counsel.

With respect to the number of hours, Petitioner's billing records are sufficiently detailed and none of the items appears objectively unreasonable, especially considering that the petition required briefing on the laws of different States and was done by attorneys admitted in those States. The requested fees are consistent with those awarded to counsel for Respondents in other matters as summarized in the request for judicial notice. Respondents objected that some of the fees appeared duplicative, because one attorney billed for communicating with the other, but the other did not bill for that time. Rather than seeing that as a problem, I accept that this represents a reasonable effort to avoid double billing. Accordingly, I approve all the requested hours. This leads to an award of fees of $25,790 ($13,365 for Mr. Jacobs and $12,425 for Mr. Slater).

Petitioner requested $507.50 in expenses related to filing fees and service, and Respondents did not challenge that amount.

Based on the foregoing, Petitioner is entitled to $507.50 for reasonable expenses and $25,790 for attorney's fees, for a total award of $26,297.50.

SO ORDERED.

Dated: June 21, 2022

Scott J. Borrowman, 241021
Judge Pro Tem