SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 27

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THE PEOPLE OF THE STATE OF NEW YORK	:	Kings County Indictment No. 6825/2005
- against -	:	
R. LINDLEY DEVECCHIO,	:	
Defendant.		

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MEMORANDUM OF LAW OF NON-PARTY PETER LANCE
<u>IN SUPPORT OF HIS MOTION TO QUASH SUBPOENAS</u>

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Non-party witness Peter Lance ("Lance"), by his undersigned attorneys, respectfully submits this memorandum of law in support of his motion to quash the subpoena *duces tecum* served by defendant R. Lindley DeVecchio ("Defendant's Subpoena") and the subpoena served by the Kings County District Attorney ("DA's Subpoena"), pursuant to Section 2304 of the New York Civil Practice Law and Rules ("CPLR"). The facts necessary for the determination of this motion are set forth in the accompanying affidavit of Peter Lance, sworn to the 18th day of July, 2007 (the "Lance Aff."), and the exhibits annexed thereto, the affidavit of Jason P. Conti, sworn to the 18th day of July, 2007 (the "Conti Aff."), and the affidavit of Rachel F. Strom, sworn to the 20th day of July, 2007, (the "Strom Aff.").

PRELIMINARY STATEMENT

In simple terms, the subpoenas here strike at the very heart of a journalist's ability to protect his or her newsgathering activities. In ignoring decades of New York jurisprudence and strict rules enacted by the New York Legislature that non-confidential newsgathering materials should be produced in judicial proceedings only as a last resort, Defendant and the District Attorney here have decided to issue open-ended subpoenas demanding undefined testimony and, in the case of the Defendant's Subpoena, numerous documents from a journalist regarding his newsgathering activities.

In order to combat intrusive subpoenas such as the ones in the instant action, the New York State Legislature adopted a broad and exacting privilege for journalists embodied in the New York State Shield Law, codified as § 79-h of the New York Civil Rights Law (the "Shield Law"). That protection is available to a journalist in both criminal and civil proceedings. In order to require Lance to testify at the *Kastigar* hearing in this case, Defendant and the District Attorney must prove that Lance's testimony and documentary evidence are (1) "highly material

and relevant"; (2) "critical or necessary" to the maintenance of his defense; and (3) unobtainable from any alternative source. The source(s) of Lance's information, and any documents related to that information, are not even remotely relevant to the issues in the *Kastigar* hearing scheduled in this matter, and therefore cannot possibly approach, much less meet, the strict three-part test enacted by the New York State Legislature to protect such information. Accordingly, this Court should grant Lance's motion to quash the subpoenas in their entirety.

FACTUAL BACKGROUND

A. Non-Party Peter Lance

Lance, a resident of the State of California, has worked as a professional journalist for many of the past 35 years, serving in various capacities in the print and television news business. Lance Aff. ¶ 1. Lance has both a masters degree in journalism and a law degree. *Id.* ¶ 2, 4. During Lance's tenure as a television journalist working on several television news shows including ABC's "20/20", "Nightline," and "World News Tonight," he won five Emmy Awards for his reports from across the globe on a wide array of newsworthy topics. *Id.* ¶ 4. After Lance spent ten years writing and producing dramatic television programs in California, he began his career as a book author. *Id.* ¶ 5. Lance's first book, a work of fiction, was published in 1997, and his first non-fiction book was published in 2000. *Id.* ¶ 6. Following the terrorist attacks on September 11, 2001, Lance began investigating the origins of the 9/11 plot and the al Qaeda cell responsible for the 1993 bombing of the World Trade Center. Lance Aff. ¶ 9. As a result of Lance's 9/11 research for over five years, Lance wrote three books that were published by HarperCollins Publishers LLC ("HarperCollins"). In addition, Lance is in the process of writing his fourth book for HarperCollins regarding the intelligence failures leading up to 9/11 and how this case is related. *Id.* ¶ 21.

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B. <u>Lance's Books Regarding 9/11 And The Connection To The Present Action</u>

The subpoenas to Lance stem from his investigative work in the years following the September 11, 2001 terrorist attacks. More than five years ago Lance began investigating the al Qaeda network and the first terrorist attack at the World Trade Center in 1993. Lance Aff. ¶ 9. Lance first researched Osama bin Laden's master bomb maker, Ramzi Yousef ("Yousef"), who was convicted and sentenced to a life sentence as the mastermind of the 1993 bombing plot. *Id*. He also investigated efforts by law enforcement agencies to track terrorist activities in the years leading up to 9/11. *Id.* Based on this research, Lance wrote *1000 Years for Revenge: International Terrorism and the FBI—the Untold Story* ("*1000 Years*"), his first book regarding 9/11. *Id.* The book, published by HarperCollins in September 2003, tells the story of Yousef and the 12-year search by the Federal Bureau of Investigation ("FBI") for Osama bin Laden's New York City terrorist cell amidst in-fighting and mismanagement in the FBI's New York Office ("NYO"). *Id.*

As a result of the acclaim for *1000 Years*, Lance testified in March 2004 in private before the National Commission on Terrorist Attacks Upon the United States (also known as the "9/11 Commission"). Lance Aff. ¶ 10. Following his testimony, in the late spring of 2004, he began following up on his research for *1000 Years* regarding a possible connection between Yousef, the al Qaeda terrorist network and the crash of TWA Flight # 800 off the coast of Long Island in July, 1996. *Id*. Lance then wrote his second book related to the events leading up to 9/11—a follow up to *1000 Years*—entitled, *Cover Up: What the Government Is Still Hiding About the War on Terror* ("*Cover Up*"). *Id.*

Cover Up, which was published by HarperCollins in September 2004, tells the story of a how senior FBI and Department of Justice ("DOJ") officials buried key al Qaeda related

evidence in 1996 and 1997 in order to suppress a scandal involving a series of organized crime cases being prosecuted by the U.S. Attorney for the Eastern District of New York. *Id.* ¶ 11. The book presents new revelations regarding Yousef, including an 11-month long intelligence gathering initiative by FBI and DOJ officials to extract information from Yousef and other terrorists by using an accused member of the Colombo Crime family named Gregory Scarpa, Jr. ("Scarpa Jr."), who was housed in a cell between Yousef and another accused terrorist at the Metropolitan Correctional Center ("MCC") in Lower Manhattan. *Id.* The book notes that in spring 1996, while Yousef awaited trial for the World Trade Center bombing, Scarpa Jr. learned from Yousef several details regarding al Qaeda activities, including Yousef's plan to blow up an airplane in order to secure a mistrial in his own case. *Id.* Although the FBI initially took this intelligence very seriously, it was ultimately labeled by FBI and DOJ officials as a "hoax" and a "scam." Lance Aff. ¶ 13. The book contends that the federal government ultimately discounted Scarpa Jr. as a source for the information, because if they were to validate him as a witness, it would have put in jeopardy numerous past Mafia-related cases then being prosecuted. *Id.* ¶ 14.

Those cases were based in part on testimony from defendant R. Lindley DeVecchio ("DeVecchio" or "Defendant"), a former senior FBI Supervisory Special Agent who served as the control agent for former FBI Top Ecehlon informant and Colombo crime family hitman Gregory Scarpa, Sr. ("Scarpa Sr."), Scarpa Jr.'s father. *Id.* ¶ 14. Scarpa Jr. later offered detailed testimony that DeVecchio was given thousands of dollars in the form of bribes from his father, Scarpa Sr., in return for DeVecchio providing Scarpa Sr. intelligence on the whereabouts of Scarpa Sr. rivals in the Colombo Family so that Scarpa Sr., or his agents, could murder those individuals. *Id.* ¶ 15-16. Lance notes in *Cover Up* that if this information were released, thus portraying DeVecchio as a crooked agent, numerous high-profile Mob cases, with DeVecchio as

the star witness, would have unraveled. Lance Aff. ¶ 17. Therefore, if the government validated Scarpa Jr.'s intelligence as to Yousef, it would enhance Scarpa Jr.'s credibility in his testimony as to DeVecchio, thereby jeopardizing numerous Mafia-related convictions. In short, *Cover Up* contends that the government made an "ends justify the means" decision and chose to discredit Scarpa Jr. a key witness with information about terrorism, in order to maintain DeVecchio's reputation so that he could testify as a key witness in the multiple Colombo prosecutions. *Id.* ¶.

A year and a half after publication of *Cover Up*, the Kings County District Attorney's Office held a press conference (the "Press Conference") on March 30, 2006 to announce that DeVecchio had been indicted on four counts of second-degree intentional murder. *Id.* ¶ 20. Lance attended that press conference as a journalist investigating the DeVecchio case for his upcoming book, *Triple Cross: How bin Laden's Master Spy Penetrated the CIA, the Green Berets, and the FBI—and Why Patrick Fitzgerald Failed to Stop Him* ("*Triple Cross*"). *Id.* In addition, Lance attended the press conference as a journalist working on a television documentary based on *Triple Cross*. *Id.*

In *Triple Cross*, published by HarperCollins in November 2006, Lance presents evidence that senior FBI and Justice Department officials may have obstructed justice in their failure to monitor Ali Mohamed, a principal spy for Osama bin Laden inside the United States. Lance Aff. ¶ 20.

Lance is currently working on his fourth book to be published by HarperCollins that will further explore the DeVecchio case and the government's failures in the years before 9/11. *Id.* ¶ 21.

C. Lance's Research For *Cover Up* And His Other Books

During Lance's research for *Cover Up*, he reviewed thousands of pages of documents and

spoke to dozens of sources. Lance Aff. ¶ 18. Some sources spoke with Lance only after Lance gave them an express assurance of confidentiality. *Id.*

Lance discusses DeVecchio on several pages in *Cover Up*. (A true and correct copy of the "Index" from *Cover Up*, which includes the pages on which DeVecchio's name appears, is annexed to the Lance Aff. as Exhibit A; true and correct copies of the pages from *Cover Up* that reference DeVecchio's name are annexed to the Lance Aff. as Exhibit B.) As part of his extensive research for *Cover Up*, Lance also reviewed some compelled and immunized testimony given by DeVecchio. Lance Aff. ¶ 19.[1]

Lance's upcoming book, as well as his three 9/11-related books (collectively, the "Books"), are all part of an ongoing investigation that Lance began in the months following September 11, 2001. *Id.* ¶ 21. For over five years, Lance has worked as an investigative journalist, interviewing witnesses, seeking leads, and poring over documents in order to write the Books. *Id.*. During all of these years, Lance was researching either for one of the books that has already been published, or for his forthcoming book. *Id.* The activities of DeVecchio while he was with the FBI and the current case against him have been part of Lance's research since 2004. *Id.*

D. <u>The Subpoenas And The Instant Application</u>

On June 23, 2007, Lance agreed to accept service of a subpoena *duces tecum* (the "Defendant's Subpoena") issued by Defendant's counsel in this action after learning that a process server was trying to find him in California. Lance Aff. ¶ 22 (A true and correct copy of

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[1] The relevant testimony involves a statement DeVecchio was compelled to provide in an FBI Office of Professional Responsibility ("OPR") internal affairs investigation, and immunized testimony he provided in prior federal cases. Although the OPR statement was technically "compelled", while the other testimony was immunized, for convenience, all of this testimony is referred to as "immunized" for purposes of the instant motion.

the Defendant's Subpoena is annexed as Exhibit D to the Lance Aff.) DeVecchio has been indicted on four counts of second-degree murder for the deaths of Mary Bari, Joseph DeDomenico, Jr., Patrick Porco and Lorenzo Lampesi. *New York v. De Vecchio*, 468 F. Supp. 2d 448 (E.D.N.Y. 2007). The Defendant's Subpoena seeks three categories of documents: (1) any materials related to any correspondence with the Kings County District Attorney's Office from January 1, 2000 to the present; (2) any recordings and materials relating to the Press Conference of March 30, 2006; and (3) any recordings and materials relating to an appearance by Lance at Borders bookstore in Los Angeles broadcast on C-SPAN 2 (the "C-SPAN Appearance").[2] Lance Aff. ¶ 22, Ex. D. The Defendant's Subpoena also commands that Lance appear as a witness at an upcoming "*Kastigar*" hearing in this action on August 8, 2007 at 9:30 a.m. *Id.* The Defendant's Subpoena does not define the scope of the required testimony from Lance, but rather merely commands his appearance. *Id.*

After receipt of the Defendant's Subpoena, Counsel for Lance contacted counsel for DeVecchio on July 5, 2007 regarding the Subpoena. Conti Aff. ¶ 3. DeVecchio's counsel responded on July 9, 2007, at which time Lance's counsel stated that Lance would be invoking the Shield Law in response to the Defendant's Subpoena. Lance's counsel urged DeVecchio's counsel to review the requirements necessary to overcome the Shield Law, and then withdraw the Defendant's Subpoena as to all documents and testimony except for the C-SPAN Appearance.

[2] To the extent that this third category seeks <u>only</u> a copy of the C-SPAN Appearance, Lance does not object to Defendant obtaining that material. However, to the extent that Defendant seeks <u>anything</u> beyond the as-broadcast version of that appearance, including any notes, Lance specifically invokes the Shield Law. Further, it should be noted that while Lance has posted the C-SPAN Appearance on his Web site, he does not have any videotape of DVD version of his television appearance. Lance Aff. ¶24. As such, it is not at all clear why Defendant seeks this broadcast tape from Lance rather than obtaining it directly from C-SPAN.

Id. DeVecchio's counsel stated that, notwithstanding the Shield Law, they intended to pursue the Defendant's Subpoena. *Id.*

On July 18, 2007, counsel for Lance agreed to accept service of a subpoena (the "DA's Subpoena") issued by Kings County District Attorney. The DA's Subpoena does not request Lance to produce any documents, but it commands that Lance appear as a witness at an upcoming "*Kastigar*" hearing in this action on August 8, 2007 at 10:00 a.m. *Id.* Strom Aff. ¶ 2, Ex. A. Like the Defendant's Subpoena, the DA's Subpoena does not define the scope of the required testimony from Lance, but rather merely commands his appearance. *Id.* After receipt of the DA's Subpoena, counsel for Lance contacted Assistant District Attorney Kevin Richardson on July 20, 2007 regarding the DA's Subpoena. Strom Aff. ¶ 3. In that call, Lance's counsel stated that Lance would be invoking the Shield Law in response to the DA's Subpoena and urged the District Attorney's office to withdraw the DA's Subpoena. *Id.* Mr. Richardson stated that, notwithstanding the Shield Law, the District Attorney's Office intended to pursue the DA's Subpoena. *Id.* As such, in response to the DA's Subpoena and the Defendant's Subpoena (collectively "Subpoenas"), Lance has invoked the Shield Law to avoid testifying or divulging information related to his newsgathering activities. Lance Aff. ¶¶ 31.

ARGUMENT

THIS COURT SHOULD QUASH THE SUBPOENAS BECAUSE DEFENDANT AND THE DISTRICT ATTORNEY CANNOT SATISFY THE RIGOROUS BURDEN NECESSARY TO OVERCOME NEW YORK'S SHIELD LAW

The District Attorney and Defendant here are seeking non-confidential information obtained by a professional journalist during the newsgathering process. To obtain that information, they will need to overcome Lance's qualified reporter's privilege, embodied in § 79-h(c) of the New York Civil Rights Law, Article I, Section 8 of the New York State

Constitution, and the First and Fourteenth Amendments to the U.S. Constitution.[3] That strong protection for non-confidential information obtained through the newsgathering process yields only in the narrow instances in which the party seeking the information can satisfy, through a clear and specific showing, an exacting three-pronged test. The District Attorney and Defendant here cannot satisfy even one of the three prongs necessary to obtain Lance's testimony, much less meet the rigorous standard overall. Therefore, the Subpoenas must be quashed in their entirety.

A. The Shield Law Provides A Strong, Qualified Privilege Against Disclosure Of Non-Confidential Information, Which Only Yields Under Very Limited Circumstances

The freedom of the press in New York has always been afforded the utmost protection. Indeed, the framers of the New York State Constitution did not merely echo the precise scope of the protections embodied in the First Amendment, but rather far exceeded those protections.

[3] Because neither of the Subpoenas makes any attempt to define the scope of the desired testimony from Lance, it is impossible to determine whether they seek information as to Lance's confidential sources for *Cover Up* or any of his other books. As such, while Lance has invoked the qualified privilege as to the requested documents, and any testimony related to those documents, to the extent that the Subpoenas do seek testimony regarding Lance's confidential sources, Lance specifically invokes the absolute protection afforded by New York Civil Rights Law § 79-h(b). That provision provides an "[A]bsolute protection for confidential news." N.Y. Civ. Rights Law § 79-h(b) (emphasis added). Unlike the qualified protection afforded journalists for non-confidential information and sources, which can be overcome by a movant who satisfies a rigorous three-part test, the privilege that applies to confidential sources and information is absolute. *See id.* As such, the statute does not provide any mechanism whatsoever by which the privilege can be overcome. *See id.*; *see also Beach v. Shanley*, 62 N.Y.2d 241, 251, 476 N.Y.S.2d 765, 771 (1984) (noting that the statute provides a "broad protection to journalists without any qualifying language"). Indeed, in *Beach v. Shanley* the New York Court of Appeals held that the Shield Law provides an absolute privilege that cannot yield—even when confronted with a request from a grand jury where the testimony itself likely would reveal the commission of a crime. *Id. See, e.g.*, *In re Subpoena Duces Tecum to Am. Broad. Cos.*, 189 Misc. 2d 805, 807, 735 N.Y.S.2d 919, 921 (Sup. Ct. N.Y. Co. 2001) (noting that "[t]he Shield Law provides professional journalists with absolute protection from contempt citations for refusing to disclose the source of confidential news…"). As such, to the extent that Defendant or the District Attorney seeks confidential sources, there is no mechanism for compelling Lance to provide that information.

Instead of framing the freedom of the press only in the negative: "[C]ongress shall make no law … abridging the freedom of speech, or of the press…" (U.S. Const. Amend. I), the New York Constitution affirmatively declares: "Every citizen may freely speak, write and publish his or her sentiments on all subjects," while also ensuring that "no law shall be passed to restrain or abridge the liberty of speech or of the press.…" N.Y. Const., Art. I, § 8.

Courts in New York have long recognized this additional protection, often noting that the freedom guaranteed in the New York Constitution is broader than in the U.S. Constitution. *See, e.g., O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 527, 529 n.3, 528 N.Y.S.2d 1, 5 n.3 (1988) (the history of freedom of speech in New York "call[s] for particular vigilance by the courts of this State in safeguarding the free press against undue interference."). In 1991, the New York State Court of Appeals robustly reaffirmed these sentiments, noting that "[t]his State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas..." and concluding that "the 'protection afforded by the guarantees of free press and speech in the New York Constitution <u>is often broader than the minimum required</u> by' the Federal Constitution." *Immuno AG. v. Moor-Jankowski,* 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 913 (1991) (citations omitted) (emphasis added).

With this long-standing tradition as a backdrop, the New York State Legislature enacted the Shield Law in 1970 in order to protect journalists from being compelled, on pain of contempt of court, to divulge the identity of their confidential sources (or information provided by confidential sources) in judicial proceedings throughout the State, including criminal court. N.Y. Civ. Rights Law § 79-h. After years of the Shield Law applying only to confidential material obtained through newsgathering activities, the New York Court of Appeals, in *O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 528 N.Y.S.2d 1 (1988), expanded the scope of the

protection to non-confidential information as well, establishing a three-part test to determine if the privilege had to yield to a party's request. The Court of Appeals articulated a compelling rationale for the privilege:

> The ability of the press freely to collect and edit news, unhampered by repeated demands for its resource materials, requires more protection than that afforded by the disclosure statute (CPLR 3101). The autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted. <u>Moreover, because journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a nonparty would be widespread if not restricted</u>. The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press.

Id. at 526-27, 528 N.Y.S.2d at 3 (citations omitted) (emphasis added). In concluding that the New York State Constitution provides an independent mandate for a "qualified privilege to prevent undue diversion of journalistic effort and disruption of press functions," the Court noted that such a privilege was based in part on the "consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events,'" which therefore calls for "vigilance by the courts of this State in safeguarding the free press against undue influence." *Id.* 71 N.Y.2d at 528-29; 528 N.Y.S.2d at 4-5.

Based on the robust freedom of the press principles articulated in *O'Neill*, and the paramount public interest in the maintenance of a vigorous and aggressive press, the New York Legislature amended the Shield Law statute most recently in 1990 in order to adopt the qualified reporter's privilege outlined in *O'Neill*, protecting <u>non-confidential</u>, unpublished information from disclosure. N.Y. Civ. Rights Law §79-h(c); *People v. Lyons*, 151 Misc. 2d 718, 723, 574 N.Y.S.2d 126, 130 (City Ct. Buffalo 1991). The relevant section of the Shield Law pertaining to this qualified privilege reads:

> (c) Exemption of professional journalists and newscasters from contempt: Qualified protection for nonconfidential news.
> Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist … presently or having previously been employed or otherwise associated with any newspaper … shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist … held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any unpublished news obtained or prepared by a journalist … in the course of gathering or obtaining news as provided in subsection (b) of this section, or the source of any such news, where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing.…

N.Y. Civ. Rights Law § 79-h(c) (emphasis added).

Courts applying the Shield Law, as amended, have reaffirmed the broad principles articulated in *O'Neill* by upholding the protections from disclosure for non-confidential materials and information obtained by journalists in the course of the newsgathering process in civil and criminal matters. Indeed, it is clear that the Shield Law does not yield simply because information is being sought in a criminal matter: "'The interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial….'" *People v. Iannaccone*, 112 Misc. 2d 1057, 1059, 447 N.Y.S.2d 996, 997 (Sup. Ct. N.Y. Co. 1982) (quoting *U.S. v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980)). In fact, the Legislature strengthened the Shield Law in 1990 in order to "'advance First Amendment values by protecting journalists from improper requests for information or disclosure of sources. … In recent years, decisions of the Court of Appeals have raised questions about the scope of the Shield Law. This [amendment]

resolves those questions in favor of a free and unfettered press.'" *Lyons*, 151 Misc. 2d at 722, 574 N.Y.S.2d at 129 (quoting Governor Cuomo's Memorandum of Support Approving L.1990, ch. 33 [3/23/90], 1990 McKinney's Session Laws of N.Y., at 2693). In describing this intrusion, the Legislature was clear that criminal matters were particularly invasive to a free press: "'[J]ournalists, however, encounter the most problematic incursions into the integrity of the editorial process when they are drawn into the criminal justice system merely because they have reported on a crime. They run the risk of being used as investigative agents of the government or the defense. <u>The need for protection of non-confidential information and sources is thus greatest in criminal cases</u>....'" *Id.* 151 Misc. 2d at 723, 574 N.Y.S.2d at 129-30 (quoting State Executive Department Memorandum, 1990 McKinney's Session Laws of N.Y., at 2332) (emphasis added).

The strength of the Shield Law even for non-confidential material is evident in the number of criminal matters in which a subpoena for newsgathering materials has been quashed for failure to satisfy the exacting three-part test. *See, e.g.*, *People v. Roth*, 157 A.D.2d 494, 549 N.Y.S.2d 682, 683 (1st Dept.), *appeal denied*, 75 N.Y.2d 924, 555 N.Y.S.2d 42 (1990) (upholding the trial court's quashing of subpoena served on several media organizations that sought unpublished or unbroadcast statements made by slashing victim); *People v. Griffin*, No. 1438/92, 1992 WL 474518, at *1-*2 (Sup. Ct. N.Y. Co. Nov. 12, 1992) (quashing subpoena for non-confidential information related to robbery charge); *People v. Caputo*, 161 Misc. 2d 960, 966, 615 N.Y.S.2d 848, 852 (Co. Ct. Westchester Co. 1994) (quashing subpoena for appearance at grand jury investigating murder charge for failure to overcome three-prong test); *Lyons*, 151 Misc. 2d at 723-24, 574 N.Y.S.2d at 130 (quashing subpoena by District Attorney in criminal case for failure to overcome qualified privilege).

B. The Shield Law Applies Here Because Lance Is A Professional Journalist Who Writes About News That Is Of Public Concern And Interest

Because Lance has authored three books in the last four years regarding the intelligence failures leading up to the devastating attacks on September 11, 2001, and in fact is currently writing a fourth book, Lance is a professional journalist covering news of public interest and concern and therefore covered by the Shield Law.

The Shield Law protects any "Professional journalist" that gathers "news." N.Y. Civ. Rights Law § 79-h. In 1981, the Shield Law was amended such that a "Professional journalist" is now broadly defined as:

> [O]ne who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

N.Y. Civ. Rights Law § 79-h(a)(6).

While the statute does not explicitly include book authors in the definition, it is clear that such authors are covered by the Shield Law. The 1981 amendment was partly in response to cases finding that the Shield Law did not apply to book authors. The amendment broadened the definition of "Professional Journalist" such that "[a]ll those persons, whatever their job titles, performing a legitimate journalistic function will be protected." Memorandum of Assemblyman Steven Sanders, ch. 468, N.Y. Laws, reprinted in 1981 N.Y. St. Legis. Ann. At 257. In fact, the memorandum of the legislative sponsor of the amendment explicitly states that book authors are covered by the revised statute:

> [T]he highly absurd present situation of a Mr. Smith who writes news stories for a New York Times being covered while that same Mr. Smith six months later

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> leaving the Times and beginning work on an investigative book of non-fiction intended for sale to a Harper & Row is not covered, is corrected in this bill. Thus the new bill will protect the journalistic process wherever that process is being professionally undertaken.

Id. (emphasis in original).

The expansive definition following the 1981 amendment has been found by courts to include book authors. For example, in *People v. Chambers*, 15 Med. L. Rptr. 1151 (Sup. Ct. N.Y. Co. Mar. 1, 1988), the defendant served subpoenas *duces tecum* on two journalists who had written magazine articles about that criminal case. (A true and correct copy of this decision is annexed hereto as Exhibit A.) One of the journalists had also collected information in preparation for writing a book on the case. *Id.* at 1152. In determining that the subpoenas in that case should be quashed, the court found that the journalist investigating a book was covered by the Shield Law: "[N]otwithstanding defendant's assertion, the court finds that Wolfe, an experienced investigative reporter, has been performing as a professional journalist and that even in her role as a book author, she is protected by the Shield Law." *Id.* at 1154, n.5. *See also*, *Stewart v. National Enquirer*, 28 Med. L. Rptr. 1596, 1598 (S.D.N.Y. Oct. 7, 1999) (finding that book author and non-party publisher both protected under Shield Law) (A true and correct copy of this decision is annexed hereto as Exhibit B.) *See also*, *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144-45 (2d Cir. 1987) (noting that reporter's privilege under federal common law applies to individuals with "intent to use material-sought, gathered or received-to disseminate information to the public," and that the intended "manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like…") (emphasis added).

As a result, there is little doubt here that Lance is a professional journalist and covered by the Shield Law. Lance has worked as a journalist in numerous capacities for many of the past 35

years, serving in various roles as a print and television reporter, and most recently as an investigative journalist who has authored three books regarding 9/11, and is at work on his fourth. Lance Aff. ¶ 3-7. All of the information sought by the Subpoenas was gathered while Lance was following up his investigation published in his second book, *Cover Up*, and investigating and researching his other books. *See id.* ¶ 26. In addition, during the Press Conference announcing the DeVecchio indictment, Lance was also serving as a journalist reporting for a planned television documentary. *Id.* ¶ 20. Therefore, like the journalist in *People v. Chambers*, Lance is clearly a "Professional Journalist" under the Shield Law.

Further, Lance's Books clearly contain "news" because they are "written…recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." *See* N.Y. Civ. Rights Law § 79-h(a)(8). There is no question that reports regarding individuals accused of committing crimes—like DeVecchio in this case—address matters of public interest and concern. *See, e.g.*, *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 200, 379 N.Y.S.2d 61, 64 (1975) (noting that arrest of public school teacher is of legitimate public concern); *Mitchell v. Herald Co.*, 137 A.D.2d 213, 214-15, 216, 529 N.Y.S.2d 602, 604, 605 (4th Dep't 1988) (finding that article about altercation between an individual and police and the individual's subsequent arrest is matter of legitimate public concern). Further, reports of public corruption—like DeVecchio's alleged abuse of his position in the FBI in this case—is of the utmost public interest and concern, especially within the context of the worst terrorist attack in United States history. *See, e.g.*, *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 606 (1976) (Brennan, J., concurring) ("[C]ommentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern…"); *Johnson v. Ganim*, 342

F.3d 105, 112-13(2d Cir. 2003) ("[D]iscussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern.") (citation omitted).

As such, because Lance is a "Professional journalist" under the Shield Law who writes about "news" of public interest and concern, the broad protection of § 79-h(c) precludes requiring Lance to testify here relating to his newsgathering activities unless Defendant or the District Attorney can satisfy the rigorous three-pronged test set forth in the Shield Law. Here, they cannot even come close to satisfying that test.

C. Defendant And The District Attorney Are Unable To Satisfy The Demanding Three-Part Test Necessary To Overcome The Shield Law

As discussed, the qualified privilege for nonconfidential newsgathering materials provides protection to a journalist unless the party seeking the information can satisfy a rigorous three-part test. It is clear that Defendant and the District Attorney cannot meet this very high burden.

Here, Defendant and the District Attorney must demonstrate that the information sought from Lance: "(i) is highly material and relevant [to the action]; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." N.Y. Civ. Rights Law § 79-h(c). A party seeking disclosure of otherwise protected information or material has the burden of making a clear and specific showing that each of the three parts of this test is satisfied; failure to meet even one part of this test will defeat the party's application for disclosure. *See* N.Y. Civ. Rights Law § 79-h; *In re Subpoena Duces Tecum to Ayala*, 162 Misc. 2d 108, 616 N.Y.S.2d 575, 578-579 (Sup. Ct. Queens Co. 1994). Here, because Defendant and the District Attorney cannot meet this demanding standard, the Subpoenas must be quashed.

1. A *Kastigar* Hearing Requires The Prosecution To Prove It Did Not Rely On Immunized Testimony

Before examining each prong of the Shield Law in detail, it is first necessary to set forth the legal context in which the Subpoenas have been issued. The Subpoenas do not require testimony at the actual trial of Defendant, but rather demands testimony, and in the case of the DA's Subpoena, documents in conjunction with a "*Kastigar*" hearing. The parameters of such a hearing necessarily inform the reasons as to why Defendant and the District Attorney cannot overcome the Shield Law in this case.

The concept of a "*Kastigar*" hearing was borne from *Kastigar v. United States*, 406 U.S. 441 (1972). That case described the parameters of immunity, including transactional immunity—full immunity from prosecution for the offense to which the compelled testimony relates (which is not at issue here)—and use immunity, which is "[I]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom…." *Id.* at 453. In *Kastigar*, the Supreme Court upheld the constitutionality of use immunity. In addition, the Court noted that once a person demonstrates he has provided testimony under a grant of use immunity, and is being charged with a related crime, the prosecution then has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460.

Courts that have engaged in "*Kastigar*" inquiries in New York describe the procedure as follows:

> Once a defendant presents evidence that he or she has been immunized, the prosecution must shoulder 'the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.' Such a showing is required with respect to 'any use, direct or indirect, of the compelled testimony and any information derived therefrom.' This burden 'is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a

> legitimate source wholly independent of the compelled testimony.' 'Neither [the] mere "assertion that the immunized testimony was not used" nor even proof that the prosecutor "had no direct or indirect access to the grand jury minutes" is sufficient.' The burden, however, is not insurmountable.

People v. Kronberg, 243 A.D.2d 132, 135-36, 672 N.Y.S.2d 63, 66 (1st Dep't), *appeal denied*, 92 N.Y.2d 880, 678 N.Y.S.2d 27 (1998) (citations omitted). To show that the prosecution has an independent source for their evidence, "the People need only show that, more likely than not, the evidence had a source independent of the immunized testimony." *Id.* 243 A.D.2d at 148; 672 N.Y.S.2d at 74 (finding that the prosecution used independent sources because their witnesses were not named in immunized testimony) (citation omitted).

Additionally, if it is "established . . . that [the immunized] testimony added nothing to the People's knowledge of the case, the inquiry should [end]." *Id.* 243 A.D.2d at 151; 672 N.Y.S.2d at 75. Further, "[i]n determining whether evidence discovered after the giving of use-immunized testimony is derived from that testimony, the critical question is whether, after the immunized testimony is given, 'the witness and the prosecutorial authorities [are] in substantially the same position as if the witness had claimed the Fifth Amendment privilege.'" *Id.* (quoting *Kastigar*, 406 U.S. at 462). While it is the government's burden to prove a lack of taint, there are proven methods by which it can meet that burden. An "insubstantial and speculative possibility of taint [is insufficient to find that an indictment was tainted]. While it is true that the burden shifts to the government ... to prove independent source, the government may meet its burden with affidavits that are non-conclusory in form and do not simply ask the court to rely on the government's good faith." *U.S. v. Harloff,* 807 F. Supp. 270, 282, 283 (W.D.N.Y. 1992) (also noting that although officer had previously been exposed to immunized testimony, "since [the officer] claims 'no recollection of the contents of defendant's immunized testimony,' he 'could [not] possibly make any use of it.'") (citations omitted).

Significantly, a showing that the "immunized testimony may have 'tangentially influenced'...prosecutors and investigators' thought processes..." is not sufficient to taint an indictment. *Kronberg*, 243 A.D.2d at 149; 672 N.Y.S.2d at 74 (emphasis added) (citation omitted). To find otherwise would "cast an almost impossible burden on the People, i.e., to prove a negative. In the absence of a showing that the People made any use of [the] immunized testimony as an informational source leading to the discovery of other investigatory material, [a defendant's] use immunity has not been violated." *Id.*

As such it is clear that the tangential use of immunized testimony is insufficient to dismiss an indictment. *See U.S. v. Mariani,* 851 F.2d 595, 600-01 (2d. Cir. 1988) (government's knowledge of defendant's immunized testimony did not taint conviction because the court declined to follow the reasoning that "the prosecution of an immunized witness [must be foreclosed] where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial," and that the "'uses' at issue were wholly conjectural and insubstantial") (emphasis added); *U.S. v. Rivieccio,* 919 F.2d 812, 815 (2d Cir. 1990) (holding that "To the extent the Government's thought process or questioning of witnesses [at trial] may have been influenced by Appellant's immunized testimony, we hold that any such use was merely tangential and was therefore not a prohibited use," and noting that even if government misused immunized testimony, defendant would still not be entitled to dismissal of indictment).

One case is particularly instructive regarding the inability for a tangential connection between immunized testimony and an indictment to implicate Fifth Amendment concerns. In *U.S. v. Helmsley,* the Second Circuit rejected Leona Helmsley's argument that her conviction was tainted from a chain of events leading to her prior-immunized testimony. 941 F.2d 71, 81

(2d Cir. 1991). In that case, Helmsley's argument was as follows: Helmsley provided immunized state court testimony regarding her alleged participation in a scheme to avoid state sales taxes; news stories contained information regarding her immunized testimony; those news stories caused another reporter to reinstitute his investigation regarding Helmsley's misuse of corporate funds, which produced previously unknown sources; finally, this second reporter's investigation served as the "catalyst" for a joint federal-state investigation, and the "factual information derived from [the reporter] and his sources provided the basis of the subsequent prosecution and convictions." *See id.* at 79-81. Helmsley argued that her prior immunized testimony was therefore clearly the "'but for' cause of her instant convictions and hence that her right against self-incrimination" was violated. *Id.* at 80-81. The *Helmsley* court determined that there was no possibility that the "content of the testimony of the prosecution's witnesses [were] affected by the defendant's immunized testimony," and that the chain of events, "though unlucky," did not infringe Helmsley's Fifth Amendment rights. *Id.* at 82, 83. *See also*, *U.S. v. Blau,* 159 F.3d 68, 73 (2d Cir. 1998) (rejecting defendant's "chain of taint" argument that his prior immunized testimony helped convict individuals who later came forward as witnesses in trial that found defendant guilty).

Finally, even when a court determines that the government did use immunized testimony, the remedy, except in two very limited circumstances, "is the suppression of the tainted evidence at trial, not a dismissal of the indictment." *Rivieccio,* 919 F.2d at 816, n.4 (noting only two exceptions: when "the defendant testifies under immunity before the <u>same grand jury</u> returning the indictment or when the immunized testimony is placed before the indicting grand jury," and "when the government concedes that the indictment <u>rests almost exclusively on tainted evidence</u>.") (emphasis added).

2. Defendant And The District Attorney Cannot Prove Testimony Or Documents From Lance Are Highly Material And Relevant To Their Defense Or Prosecution In This Action

The first prong of the three-part test requires that the party seeking to compel disclosure show, clearly and specifically, that the information sought is "highly material and relevant." N.Y. Civ. Rights Law § 79-h(c); *O'Neill*, 71 N.Y.2d at 527, 528 N.Y.S.2d at 3; *Lyons*, 151 Misc. 2d at 722, 574 N.Y.S.2d at 129.

Courts have routinely quashed subpoenas to journalists because the parties seeking the information could not demonstrate that the information was highly material and relevant. *See, e.g.*, *Roth*, 157 A.D.2d at 494, 549 N.Y.S.2d at 683 (upholding quashing of subpoena served on media organizations seeking unpublished or unbroadcast statements made by the victim, for failure to establish relevance); *Lyons*, 151 Misc. 2d at 722, 574 N.Y.S.2d at 130 (quashing subpoena issued to television news station because police detective could not testify that videotape of outtakes was "highly material and relevant" to case). In attempting to satisfy this burden, Defendant and the District Attorney cannot merely express a hope that Lance's testimony could reveal information that may prove helpful; fishing expeditions are not nearly sufficient to overcome the Shield Law. *See Iannaccone*, 112 Misc. 2d at 1060, 447 N.Y.S.2d at 998 ("[t]he clear language of the New York Shield Law indicates that the legislature intended to prevent a defendant from conducting a 'fishing expedition' into the work product of a reporter..."); *Hawkes v. Mount Sinai Hosp.*, 75 A.D.2d 509, 510, 426 N.Y.S.2d 745, 746 (1st Dept. 1980) (frowning upon "fishing expeditions" where the purpose of the demand is simply "the hope that something may be discovered which will be helpful" and further stating that "[s]o amorphous a predicate furnishes no basis for discovery"); *see also*, *Chambers*, 15 Med. L. Rptr. at 1154, n.7 (noting in case involving journalists subpoenaed in a criminal trial by the defendant

that "[A] subpoena *duces tecum* may not be used to 'fish for impeaching material.'") (citations omitted).

Here, it is far from clear why documents or testimony from Lance would be highly material and relevant to the District Attorney's prosecution or to the Defendant's defense in this action and the *Kastigar* hearing. As a preliminary matter, it is unclear whether reliance on DeVecchio's immunized testimony would even be problematic, as one court has already raised the possibility that DeVeccio's past testimony was not even related to the murders contained in DeVecchio's indictment. In a decision remanding this case to this Court, United States District Court Judge Frederic Block noted that, "[E]ven though <u>neither the compelled FBI statement nor the compelled trial testimony addresses any of the four murders</u>, DeVecchio nonetheless claims that both 'have been improperly used, either directly or indirectly, to procure the present prosecution[.]'" *New York v. De Vecchio*, 468 F. Supp. 2d 448, 453 (E.D.N.Y. 2007) (citation omitted) (emphasis added). While not specifically addressing the merits of any Fifth Amendment concerns, Judge Block nonetheless clearly doubts Defendant's argument, noting, "DeVecchio's claim is based on the fact that, in exchange for immunity, he was compelled to give testimony in the course of an FBI internal investigation, and again during the trials of [Victor A.] Orena and [Gregory] Scarpa, Jr., centering on his knowledge, or lack thereof, of Scarpa's involvement in various crimes of violence. Be that as it may, this would not equate to a federal defense against the murder charges. In the first place, <u>neither DeVecchio's immunized statement nor his trial testimony addresses, or even mentions, any of the four murders</u>." *Id.* at 463 (emphasis added).[4]

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[4] It should be noted that Lance does not take any position with respect to the merits of the *Kastigar* hearing itself, other than to note that his testimony is clearly not highly material and

Even if the immunized testimony does address the four murders in the indictment, it is still unclear as to why Lance's testimony is highly material and relevant as to the key issue in the *Kastigar* hearing: whether the District Attorney relied on DeVecchio's immunized testimony in bringing the indictment. It seems that Defendant's convoluted theory is thus: Lance reviewed immunized testimony from DeVecchio as part of his research for *Cover Up*. Lance then wrote the book having relied in some way on that testimony. Someone in the District Attorney's Office then read Lance's book, which includes information based in some way on immunized testimony from DeVecchio, thereby tainting the investigation.

However, a careful review of the sections of *Cover Up* that pertain to DeVecchio debunk Defendant's wild theory. Although DeVecchio is mentioned on several pages in *Cover Up*, because the book is extensively sourced with hundreds of notes listed in the back of the book, it is possible to determine from that "Notes" section which passages in the book rely on immunized testimony. Lance Aff. Exs. B, C. Indeed, the "Notes" section of *Cover Up* makes reference to Lance's reliance on immunized testimony from DeVecchio in only five notes related to three passages. *Id.* Ex. C. The first two references in the notes section relate to a passage on page 20 of the book that reads:

> DeVecchio himself had escaped trial on gun-running charges in 1997 when a federal judge decided not to prosecute him for illegally selling $60,000 worth of weapons in Maryland, and lying to agents of the Bureau of Alcohol, Tobacco and Firearms.[27]
>
> Even worse, DeVecchio had intervened at least twice after Scarpa was arrested for a massive bogus credit-card scam and later for gun possession, making sure that his prized informant got probation and stayed on the street. All of this, again, was in defiance of FBI informant rules. But DeVecchio later testified that Scarpa's violent murder spree was known to the New York Special Agent in Charge, as well as top FBI officials in Washington.[28]

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relevant, critical or necessary to the District Attorney's prosecution or the Defendant's defense or unobtainable from any other source.

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Lance Aff. Ex. B. The notes upon which this passage are based state: "27 Affirmation of Flora Edwards; Exhibit M. *Victor J. Orena and Pasquale Amato v. U.S.*, Testimony of R. Lindley DeVecchio; Cross Examination by Gerald Shargel, Ibid., transcript pp. 158-166. 28 Pasquale Amato, *Victory Orena v. CV-96-1461;* CV-96-1474, Affirmation of Flora Edwards, Exhibit M., p. 9 January 7, 2004." *Id.* Ex. C.

The next reference relates to information contained on page 84 of the book, which states, "When Cabbage Patch Kids dolls were scarcer than bags of heroin, Scarpa reportedly furnished one to DeVecchio for his daughter." *Id.* Ex. B. The corresponding note on page 326 states: "6 In a written statement pursuant to the FBI OPR investigation of his relationship with Scarpa Sr., DeVecchio admitted accepting the doll from the hitman but alleged that it was for 'the niece' of a friend. He claimed that he offered to pay for it and that 'it would have been an insult' to Scarpa Sr. if he had tried to return it, May 5, 1995." *Id.* Ex. C.

The remaining two references are both from DeVecchio's testimony in a federal case, and relate to the following passage on page 87 of *Cover Up*:

> By March 2, 1992, the Bureau ordered DeVecchio to close Scarpa and terminate contact with him. Special Agent Favo later alleged that DeVecchio lied to FBI brass about his knowledge of the elder Scarpa's involvement in three separate homicides.[22] But DeVecchio wrote to FBI Headquarters asking for permission to reopen Scarpa Sr.
>
> Incredibly, despite Scarpa's homicidal reputation, DeVecchio was given the okay. He would testify later that FBI supervisors 'right up to the top' were aware of his relationship with the hit man, and that the SAC in charge of the New York Office knew that Scarpa Sr. had committed 'multiple murders,' but permitted him to stay 'open.'[23]

Id. Ex. B. Notes 22 and 23, upon which this passage is based, state: "22. Testimony of R. Lindley DeVecchio, Orena-Amato 2255 hearing, February 27, 1997. 23. Ibid., pp. 137-138." Lance Aff. Ex. C.

As such, there isn't even any evidence in *Cover Up* that Lance relied on any sections of

the immunized testimony that could in any way be relevant to the four murders in the DeVecchio indictment at issue in this action, let alone highly material and necessary. Surely Defendant cannot be suggesting that a vignette from DeVecchio's compelled testimony regarding Cabbage Patch dolls could somehow result in a Fifth Amendment violation.

Further, as noted, immunized testimony that tangentially influences a prosecution is insufficient to disturb an indictment. *See Mariani,* 851 F.2d at 600-01. As such, even if the District Attorney did rely on *Cover Up* and read these passages, surely nothing more than a tangential taint could be present, given that the innocuous passages have no real bearing on the current prosecution. In fact, *Cover Up* only mentions one of the murder victims contained in the DeVecchio indictment, Larry Lampesi, on one page. *See* Lance Aff. Ex. B, p. 87. That one reference states, "On May 22, 1992, Scarpa Sr. killed rival soldier Larry Lampesi with a shotgun; another Orena loyalist was wounded in the attack. When Special Agent Chris Favo reported both attacks to DeVecchio, he laughed, slapped his desk with his open hand, and exclaimed 'We're going to *win* this thing.'" *Id.* That one reference was not even based on immunized testimony, but instead was based on an article that appeared in the *New Yorker*. *See id.* Ex. C, p. 327, n. 24. As such, the only information in *Cover Up* that even mentions one of the murders at issue in the current case wasn't even based on immunized testimony. Therefore, it is difficult even to make out a tangential connection here between the immunized testimony and the indictment.

Finally, because the Subpoenas do not even bother to define the scope of Lance's testimony at the *Kastigar* hearing, it is clear that testimony is not highly material and relevant. Such open-ended subpoenas leaves open the possibility that Defendant or the District Attorney seeks to elicit testimony from Lance on numerous topics regarding his research and journalistic

processes that have nothing to do with this prosecution. The District Attorney and Defendant cannot merely theorize that information obtained by Lance is somehow relevant to this action. There has to more than mere hope, conjecture and creative prognosticating in order to obtain newsgathering materials. In short, it is a challenge even to theorize how Lance's testimony could even be tangentially relevant, never mind highly material and relevant.

3. Testimony From Lance Is Not Critical Or Necessary To Defendant's Ability To Defend Himself Or To The District Attorney's Ability To Proceed With The Indictment

To satisfy the second element of the three-part test, the District Attorney and Defendant must demonstrate, clearly and specifically, that the information is "critical or necessary" to a claim or defense in the action. N.Y. Civ. Rights Law § 79-h(c); *O'Neill*, 71 N.Y.2d at 527, 528 N.Y.S.2d at 3; *Lyons*, 151 Misc. 2d at 722, 574 N.Y.S.2d at 129.

Applying New York Law, the United States Court of Appeals for the Second Circuit has emphasized the strict application of the "critical and necessary" part of the test. The court noted:

> Several courts have held that in order to find unpublished news to be critical or necessary within the meaning of § 79-h, there must be a finding that the claim for which the information is to be used "virtually rises or falls with the admission or exclusion of the proffered evidence." It seems to us that the "virtually rises or falls" formulation should be applied to determine whether the critical or necessary test has been met.

Krase v. Graco Children Prods. (In re Nat'l Broad. Co.), 79 F.3d 346, 351 (2d Cir. 1996) (emphasis added) (citations omitted). Indeed, in order to satisfy the second prong of the test, a party cannot "merely show that the materials were useful." *Flynn v. NYP Holdings, Inc.*, 235 A.D.2d 907, 908, 652 N.Y.S.2d 833, 835 (3d Dept. 1997) (to satisfy the second prong, the party seeking disclosure must "convince the court that the claim 'virtually rises or falls with the admission or exclusion of the proffered evidence'") (citations omitted). Rather, a much more exacting standard must be met: "[T]he test is not merely that the material be helpful or probative,

but <u>whether or not the defense of the action may be presented without it</u>." *In re Subpoena Duces Tecum to Am. Broad. Cos.*, 189 Misc. 2d 805, 808, 735 N.Y.S.2d 919, 922 (Sup. Ct. N.Y. Co. 2001) (citations omitted) (emphasis added). *See also*, *Doe v. Cummings*, No. 91-346, 1994 WL 315640, at *1, 22 Med. L. Rptr. 1510, 1511 (Sup. Ct. St. Lawrence Co. Jan. 18, 1994) (finding movants had failed to meet burden and overcome New York Shield Law and noting "[I]t is not enough to show that the requested information is useful, such as for the purposes of cross-examination. Rather, movants must show that the requested information is <u>key to their proof at trial</u>.").

The strict application of this factor often results in quashing subpoenas to journalists. For example, in *In Re Subpoena Duces Tecum to Ayala*, 162 Misc. 2d 108, 114, 616 N.Y.S.2d 575, 579 (Sup. Ct. Queens Co. 1994), the court determined that the information the defendant sought from a television reporter regarding an interview with the police officer who had arrested defendant was not critical and necessary to his defense, and quashed the subpoena. The court concluded that "[M]ere speculation without demonstrative factual corroboration is legally insufficient to impinge upon the First Amendment safeguards embodied within Civil Rights Law § 79-h." *Id.* The court also noted that "[W]ere this Court to countenance vague and non-specific claims of criticality and necessity, it would thereby provide the impetus for all defense attorneys to demand disclosure on every criminal case in which there has been an interview of a police officer by a reporter." *Id.* *See also*, *In re Am. Broad. Cos.*, 189 Misc. 2d 805, 735 N.Y.S.2d 919 (quashing subpoena issued to ABC News by defendant in corruption trial seeking documents and materials related to interview with key witness, and determining that defendant could proceed to trial without requested materials and therefore they were not critical or necessary to defendant's case).

Here, Defendant and the District Attorney certainly cannot demonstrate that their defense or prosecution "virtually rises or falls" based on testimony from Lance such that Defendant will be unable to present a defense or the District Attorney will be unable to go forward with the indictment without that testimony. Indeed, it would be preposterous for Defendant or the District Attorney to claim that Lance's testimony or documents from Lance are the "key to [their] proof at trial," as is required, given that Lance's testimony does not even appear relevant. Here, Lance is a journalist who wrote a book that discusses DeVecchio on certain pages. In the process of writing the book, which is based on numerous documents and scores of witness, he happened to review some immunized testimony from Defendant that had little to nothing to do with any of the four murders in DeVecchio's indictment. *See* Lance Aff. ¶ 19. For the sake of argument, one can assume the best possible circumstance for Defendant—that Lance could testify to these facts regarding his research, and to the fact that he knows the District Attorney reviewed *Cover Up* prior to indicting Defendant. Even with this "best case scenario," DeVecchio's defense and the District Attorney's prosecution in this case could not possibly virtually rise or fall based on this testimony.

Indeed, even if the District Attorney did read *Cover Up*, which in turn was based in small part on immunized testimony, that still will not even come close to causing the indictment against DeVecchio to be dismissed here. Instead, the very best Defendant could hope for is that any information gleaned from *Cover Up* that was itself taken from immunized testimony (which, as noted, is negligible), would be suppressed at trial. *See Rivieccio,* 919 F.2d at 816, n.4. As such, it is unclear how Lance's testimony is critical and necessary to Defendant's defense or the District Attorney's prosecution, given that even if Lance provided exactly the best Defendant could hope for, the indictment will still be intact and the prosecution will still proceed virtually

unharmed. In order for Defendant to demonstrate that the indictment should be dismissed, it will take much more than the tangential evidence Lance could theoretically provide. Indeed, even the most imaginative conjecture and speculation from Defendant—which is of course insufficient to satisfy this prong of the Shield Law—still cannot result in Defendant's defense or the District Attorney's prosecution virtually rising or falling based on evidence or testimony from Lance.

If Defendant's convoluted theory here—that testimony regarding a prosecutor's review of a book that was written by a person with access to immunized testimony—were sufficient to dismiss an indictment, then it would be impossible to indict any individual who has ever provided use immunized testimony. *See, e.g.*, *Mariani*, 851 F.2d at 601. In fact, Defendant's chain of causation theory here is as attenuated as in *Helmsley*, where the court determined that an indictment based in part on articles that relied on immunized testimony was insufficient to cause a Fifth Amendment concern. *See Helmsley*, 941 F.2d at 79-81. As such, the requested testimony and documents from Lance are clearly not critical and necessary to Defendant's defense nor to the District Attorney's prosecution in this action.

4. Defendant And The District Attorney Cannot Possibly Demonstrate That The Information Sought Is Unavailable From Any Alternative Source

Even if this Court determines that testimony and documents from Lance are highly material and relevant, and even if this Court finds that Lance's evidence is "critical and necessary" to Defendant's ability to defend himself in this case or the District Attorney's ability to proceed with the indictment, they still could not overcome the Shield Law here because they failed to seek out the requested information from any other sources, and therefore have not satisfied the third prong of the Shield Law.

The third prong of the Shield Law requires that the party seeking to compel disclosure show, clearly and specifically, that the information is "not obtainable from any alternative

source." N.Y. Civ. Rights Law § 79-h(c) (emphasis added); *O'Neill*, 71 N.Y.2d at 527, 528 N.Y.S.2d at 3. The party seeking the information must detail "any efforts made to obtain the requested documents" or information in order to satisfy this prong. *Flynn*, 235 A.D.2d at 909, 652 N.Y.S.2d at 835 (denying discovery into journalist's notes and materials when plaintiff did not detail efforts he made to obtain requested information from alternative sources).

In order to satisfy this element, a party must "demonstrate that other available sources of the information have been exhausted." *Church of Scientology Celebrity Ctr. Int'l v. Internal Revenue Serv.*, 779 F. Supp. 273, 276 (S.D.N.Y. 1991) (emphasis added) (granting motion to quash subpoena to *Time* magazine). For example, in *In re Application of CBS, Inc.*, 232 A.D.2d 291, 648 N.Y.S.2d 443 (1st Dep't 1996) the court affirmed the lower court's decision to quash a subpoena from the Office of Professional Discipline ("OPD") to CBS regarding an investigation of a pharmacist who was allegedly dispensing drugs without proper prescriptions. The court noted that OPD "made no efforts to identify the potential witnesses who were in the pharmacy on the date in question, nor made any other investigative efforts to obtain evidence to substantiate the anticipated professional misconduct charges against the pharmacist." *Id.* 232 A.D.2d at 292, 648 N.Y.S.2d at 444.

Further, it has been held that in cases involving books, the requesting party must first exhaust leads provided by the book itself before forcing an author to testify. For example, in *Stewart v. National Enquirer*, 28 Med. L. Rptr. 1596 (S.D.N.Y. Oct. 7. 1999), in quashing the subpoena to a book author, the court detailed all of the leads the requesting party must follow before turning to the author: "[I]t has been noted that [the book author's] research assistant has not been deposed and it has been noted that the 400-page book, which in fact reports the

behaviors relied on by the experts, has numerous sources listed and there has been no showing that they have been exhausted." *Id.* at 1599 (emphasis added).

As such, in order to obtain any of the requested documents in the Defendant's Subpoena, or any of the testimony requested in the Subpoenas, Defendant and the District Attorney must first demonstrate that they exhausted all other potential sources for the information. As to the documents Defendant has requested, a quick review of the requested materials proves Defendant has not satisfied this prong as Lance is not necessary to obtain the information Defendant seeks. For example, the Defendant's Subpoena requests correspondence with the District Attorney's Office. Lance Aff. Ex. D. However, before requesting this information from Lance, Defendant must demonstrate that he has requested any such documents from every member of the District Attorney's Office. Indeed, it is common sense that when requesting correspondence between a journalist and another known party, it is clearly not "unobtainable from any other source". If Defendant wants this information, he clearly can receive the information from the other party to that correspondence—the District Attorney's Office. Further, with respect to recordings from the Press Conference, Defendant must demonstrate that he exhausted all other methods to obtain that information. The Shield Law therefore demands that Defendant determine all the individuals present at the Press Conference, and then exhaust each of those potential sources of information. Certainly Defendant cannot be suggesting that the announcement of an indictment in as high a profile case as this was witnessed only by Lance.[5]

As to the requested testimony, while it is difficult to determine exactly what Defendant or the District Attorney seeks from Lance because the Subpoenas fail to set forth any requested

[5] In addition, as noted, with respect to the final category of requested documents, while Lance does not object to Defendant obtaining the C-SPAN Appearance, Defendant should seek that broadcast directly from the original source, C-SPAN.

testimony, it seems likely from the document requests that Defendant wants Lance to testify regarding his contact with the District Attorney's Office. And because the District Attorney's Subpoena was served subsequently to the Defendant's Subpoena, it seems likely the District Attorney simply wants Lance to testify that he did not have any relevant contact with the District Attorney's Office. However, as with obtaining correspondence between Lance and the District Attorney's Office, it is equally clear that such testimony is not "unobtainable from any other source", as Defendant or the District Attorney could put every member of that office on the stand to testify regarding their contact with Lance. Indeed, because it is the District Attorney's burden in the *Kastigar* hearing to prove that they did not rely on immunized testimony to bring the indictment, members of that office will have to testify as to their knowledge of DeVecchio's immunized testimony and any potential discussions they had with Lance or anyone else regarding that testimony. Further, to the extent that Defendant or the District Attorney, seeks to learn all of the sources Lance relied on in researching *Cover Up* in order to determine whether they discussed DeVecchio's immunized testimony, as noted in *Stewart*, they have a perfect guide for obtaining this information. Rather than going to Lance, they first must exhaust all of the potential sources of information contained in the Notes in *Cover Up* itself. Lance Aff. Ex. C. They might argue that it is difficult for them to call every source listed in *Cover Up*, and that it would be more convenient to rely on Lance as one-stop-shopping. However, the Shield Law was enacted to avoid such blatant exploitation of journalists.

Consequently, in order to defeat the present motion, Defendant and the District Attorney must specifically detail the efforts they have made to obtain the information from every other potential source, and must specifically show that the requested information is <u>unavailable</u> from

any other source. It is clear from this analysis that they have not, and indeed can not, make such a showing. Therefore the Subpoenas must be quashed.

5. Enforcing The Subpoenas Here Would Eviscerate The Meaning Of The Shield Law And Would Greatly Disrupt Lance's Newsgathering Activities

The enforcement of the Subpoenas here would contradict the very purpose behind the Shield Law and would greatly disrupt Lance's ability to continue functioning as a journalist.

The requested information here is clearly ancillary to the main issues in the case against DeVecchio. Despite the tangential and marginal relevance at best of the information and testimony being sought, Defendant and the District Attorney have blindly proceeded in the face of the Shield Law. Rather than taking the time and effort to obtain the information from other sources—which is clearly an option in this case—they have instead chosen to take the easy route by seeking testimony and documents from Lance. If this Court were to enforce the Subpoenas, it would completely eviscerate the purpose of the qualified privilege embodied in the Shield Law, which is to protect journalists from just such an unwarranted abuse of subpoena power.

Further, Defendant's and the District Attorney's failure to meet the three-prong test is further evidenced by the fact that the Subpoenas make absolutely no attempt to narrowly tailor the testimony they seek from Lance. Rather, the Subpoenas are an open-ended mandate that requires Lance to take the stand to give testimony on any topic that they deem necessary. This unwillingness to limit the testimonial scope of the Subpoenas is itself a reason to quash the Subpoena. *See Iannaccone*, 112 Misc. 2d at 1063, 447 N.Y.S.2d at 999-1000 (citing the fact that "the defense *subpoena duces tecum* is a broad and general request…" as one reason to mandate that subpoena be quashed). If the Shield Law is to have any meaning whatsoever, certainly open-ended subpoenas such as the ones issued here, which involve information that is of questionable relevance, should be quashed for their complete failure to adhere to the strict

requirements in the statute.

In short, it is clear that the vigorous qualified reporter's privilege in New York is intended to protect journalists from being drawn unnecessarily into legal matters except in the most compelling of cases so that they may remain free and unimpaired in their newsgathering and reporting pursuits. *See O'Neill*, 71 N.Y.2d 521, 528 N.Y.S.2d 1; *Beach v. Shanley*, 62 N.Y.2d 241, 476 N.Y.S.2d 765 (1984). If journalists could easily be ordered to testify or produce their work product in proceedings to which they are not even a party, subpoenas would become a routine element of both criminal and civil litigation. For over five years, Lance has investigated and reported on the facts and circumstances leading up to the biggest intelligence failure and terrorist attack in United States history. Lance's ability to act as an effective journalist in reporting on this highly important matter hinges on his freedom to assemble newsgathering materials without fear of being haled into court by any criminal defendant, government prosecutor, or civil litigant. Routinely having to provide such testimony would no doubt cause sources to dry up, leads to evaporate and would greatly inhibit Lance's ability to continue to enlighten the public. *See* Lance Aff. ¶ 26.

Indeed, the routine use of journalists as witnesses and providers of documents—as Defendant and the District Attorney attempt to do here—would convert journalists into investigative arms of litigants, the government, and the courts, thereby compromising their credibility and objectivity in the eyes of their readers. Because of the dangers of such burdens on the press, courts have required disclosure of non-confidential materials "only as a last resort…." *In re Am. Broad. Cos.*, 189 Misc. 2d at 808, 735 N.Y.S.2d at 921-22 (emphasis in original). Lance's testimony is clearly not the last resort here, but rather is nothing more than a brazen attempt to circumvent the strict requirements of the Shield Law. As such, the Subpoenas should

be quashed in their entirety.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court quash the Subpoenas in their entirety pursuant to CPLR § 2304, award movant his costs, and grant such further relief as this Court deems appropriate.

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Respectfully submitted,

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