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

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

REPLY MEMORANDUM OF LAW OF NON-PARTY PETER LANCE IN FURTHER SUPPORT OF HIS MOTION TO QUASH SUBPOENAS

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Non-party witness Peter Lance ("Lance"), by his undersigned attorneys, respectfully submits this reply memorandum of law in further support of his motion to quash the subpoena served by defendant R. Lindley DeVecchio ("Defendant"), seeking documents and testimony ("Defendant's Subpoena"), and the subpoena served by the Kings County District Attorney ("District Attorney") seeking testimony (the "DA's Subpoena"), pursuant to Section 2304 of the New York Civil Practice Law and Rules ("CPLR").[1]

PRELIMINARY STATEMENT

In response to the instant motion to quash served by non-party Peter Lance, Defendant has withdrawn any request for documents, and the District Attorney has seemingly abandoned pursuing testimony from Lance by failing to oppose the motion. However, because Defendant continues to misinterpret the New York State Shield Law, codified as § 79-h of the New York Civil Rights Law (the "Shield Law"), by pursuing unpublished newsgathering materials without making any showing whatsoever that he can satisfy the rigorous three-part test necessary to overcome Lance's invocation of the Shield Law, it is still necessary for this Court to determine what testimony—if any—Lance must provide.

Information that Lance has already published is not at issue in the instant motion. Such published material, while of dubious relevance here, is not covered by the Shield Law. Rather, this motion relates to Lance's unpublished newsgathering activities. Such information is subject to the qualified privilege outlined in the Shield Law, and therefore requires Defendant to meet

[1] The facts necessary for the determination of this motion are set forth in the 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."), submitted with the Memorandum of Law of Non-Party Peter Lance in Support of His Motion to Quash Subpoenas (the "Opening Memorandum").

the applicable three-part test in order to require Lance to testify.[2] In his opposition, Defendant effectively concedes that he cannot meet this burden by completely failing to address the three-part test. Instead, Defendant relies on a misinformed interpretation of the Shield Law to claim Lance has "waived" the privilege. Defendant's overly broad interpretation of the waiver provision in the Shield Law is incorrect. Rather, it is clear that because Lance has not waived the Shield Law, and because Defendant cannot meet the three-part test necessary to overcome the Shield Law, Lance should not be required to testify as to his unpublished newsgathering activities.

ARGUMENT

OTHER THAN STRICTLY LIMITED TESTIMONY FROM LANCE AS TO *PUBLISHED* INFORMATION, THIS COURT SHOULD QUASH THE SUBPOENAS BECAUSE DEFENDANT AND THE DISTRICT ATTORNEY HAVE NOT MET THE RIGOROUS BURDEN NECESSARY TO OVERCOME LANCE'S RELIANCE UPON NEW YORK'S SHIELD LAW

In response to the motion to quash filed by Lance, Defendant improperly asserts that limited publication of certain information has in fact caused Lance to "waive" his reliance on the Shield Law, and the District Attorney has not served any opposition of any kind.[3] Because Defendant has misinterpreted the Shield Law, and the District Attorney has apparently decided not to pursue the D.A. Subpoena, Lance's motion to quash should be granted such that the only testimony—if any—that Lance is required to provide at the upcoming *Kastigar* hearing pertains

[2] The qualified privilege in the Shield Law as to unpublished newsgathering information requires a movant to make a "clear and specific showing" that the requested information: "(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." N.Y. Civ. Rights Law § 79-h(c).

[3] Pursuant to the Order to Show Cause in connection with the instant motion, this Court ordered that Defendant and the District Attorney serve opposition papers on counsel for Lance by 5 p.m. on Friday, August 3, 2007. Counsel for Lance did not receive any such opposition papers from the District Attorney.

strictly to published material.[4]

A. Any Testimony From Lance Should Be Strictly Limited To Published Information

Lance has filed the instant motion to quash to prevent him from having to testify as to unpublished newsgathering activities pursuant to the qualified privilege contained in the Shield Law. N.Y. Civ. Rights Law § 79-h(c). To the extent that Lance has published certain information, Lance does not object to testifying as to that specific, published information.[5] However, Defendant here seeks to go beyond having Lance testify in this limited fashion.

As noted, the Shield Law requires that the three-part test contained in the qualified privilege in the Shield Law be applied in an exacting fashion. The statute specifically states that, "A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described [three-part] showing has been made…." N.Y. Civ. Rights Law § 79-h(c).

[4] In response to the instant motion to quash, Defendant has withdrawn the portion of Defendant's Subpoena seeking documents from Lance. In light of that withdrawal, Defendant now claims that the motion to quash is premature, and that any Shield Law concerns can be addressed when Lance takes the stand. However, because of the complexity of applying the three-part Shield Law test during the course of a hearing, there is a clear benefit in determining what testimony—if any—Lance is required to provide in advance of any hearing. Further, one of the clear purposes of the Shield Law is to limit the burden on journalists when forced to testify. *See, e.g.*, *O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 526-27, 528 N.Y.S.2d 1, 3 (1988). ("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. 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.") (emphasis added). As such, this Court should make a determination as to what testimony—if any—Lance must provide prior to the *Kastigar* hearing.

[5] Defendant incorrectly states that Lance must testify as to such published information because he has "waived" the privilege. Memorandum of Law Opposing the Motion to Quash the Third Party Subpoena of Peter Lance ("Defendant's Opposition") at p. 4 ("Thus, Mr. Lance has waived any claim of privilege and is subject to a subpoena compelling his disclosure with respect to the information that he published or otherwise injected into the public realm..."). Defendant is clearly mistaken. The qualified privilege in the Shield Law only applies to unpublished materials; to the extent that Defendant only seeks testimony strictly regarding published statements, Lance has not waived the Shield Law, because it does not apply to that material. *See* N.Y. Civ. Rights Law § 79-h(c).

Furthermore, any such showing, must be supported by an "order with clear and specific findings made after a hearing." *Id.* As such, if Lance is forced to testify at all, this Court will be required to determine if the three-part test has been satisfied for each and every newsgathering question regarding unpublished information posed by Defendant's counsel or the District Attorney. *See* N.Y. Civ. Rights Law § 79-h(c); *Flynn v. NYP Holdings, Inc.*, 235 A.D.2d 907, 908, 652 N.Y.S.2d 833, 835 (3d Dept. 1997) (to satisfy second prong of test, party seeking disclosure must "convince the court that the claim 'virtually rises or falls with the admission or exclusion of the proffered evidence'") (emphasis added).

To avoid such a question by question analysis, if this Court requires Lance to testify at all, it should strictly limit that testimony to published statements only in accordance with past cases addressing this issue. For example, in *In Re Grand Jury Subpoena to Moore*, 269 A.D.2d 475, 476-77, 703 N.Y.S.2d 230, 231 (2d Dep't 2000), the court required reporters to testify only "'in response to questions aimed solely to authenticate for admission as evidence before the Grand Jury the videotape broadcast … and the newspaper article'" (emphasis added). The court required the District Attorney to "refrain from inquiring about any conversations that were not published or broadcast." *Id.* Similarly, in *People v. Nasser*, 15 Misc. 3d 499, 502, n.3, 830 N.Y.S.2d 892, 895, n.3 (Sup. Ct. Westchester Co. 2007), while the court required a reporter to testify in a criminal action, it was only regarding the "contents of [a witness's] statement as contained in the newspaper article". *Id.* The court specifically stated that the subpoenaing party had "no intention of seeking any testimony regarding the circumstances under which the statement was made," and also noted that "nothing in this Court's decision prohibits the witness from claiming the privilege with respect to any testimony sought to be elicited by defense counsel that arguably constitutes unpublished information which falls outside the parameters of

the testimony discussed during oral argument." *Id.* (emphasis added).

As a result, if required to testify, Lance should only testify to the following: (1) whether he wrote certain books and statements that have been published regarding this case; (2) the identity of any sources that have already been publicly disclosed; and (3) whether the published statements were accurate to the best of Lance's knowledge at the time they were published. In addition, this Court should specifically determine that Lance will not be required to testify as to any other topics related to unpublished newsgathering information, including the identity of sources not previously disclosed, the details of any discussions with the District Attorney's office not already publicly disseminated, or any other unpublished materials or newsgathering activities. In short, should this Court require any testimony from Lance, it should be strictly limited to questions regarding published information.

B. Defendant Has Completely Failed To Satisfy The Demanding Three-Part Test Necessary To Require Lance To Testify As To Any Unpublished Newsgathering Materials, And Has Misinterpreted The Waiver Provision Of The Shield Law

Rather than seek testimony only as to information Lance published, Defendant instead seeks to go further by requiring Lance to testify as to unpublished newsgathering information as well. In pursuit of this testimony, Defendant incorrectly interprets the Shield Law to assert that because Lance has published certain details regarding this case, he has in fact "waived" his right to invoke the Shield Law entirely. Defendant's assertion is a clear misinterpretation of the Shield Law. In order to obtain such unpublished information, Defendant would need to satisfy the demanding three-part test set forth in the Shield Law. Here, Defendant has not only failed to meet that burden, he has not even attempted to do so.[6]

[6] Defendant has conceded that Lance is a "professional journalist", and does not contest the fact that information related to this case is of public interest and therefore qualifies as news under the Shield Law. *See* Defendant's Opposition at p. 3.

The Shield Law is very clear regarding the circumstances under which a journalist waives the protection afforded in the statute:

> Notwithstanding the provisions of this section, a person entitled to claim the exemption provided under subdivision (b) or (c) of this section waives such exemption if such person voluntarily discloses or consents to disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section.

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

Therefore, the plain language of the statute states that any voluntary disclosure of information waives the privilege only as to that limited, specific information. Rather than heed this limiting language, Defendant instead seeks to broaden the waiver provision by making all of the details surrounding anything Lance has ever published subject to disclosure. However, while it is clear Lance has written about this case, and that the statements he has published are not subject to the Shield Law, all of the circumstances surrounding those statements—the sources, the newsgathering materials Lance relied upon, etc.—are all still protected by the Shield Law. As discussed, if Defendant seeks merely to put Lance on the stand, recite certain public statements he has made, and then ask if he believed them to be accurate at the time of publication, then the Shield Law would not apply. However, Defendant's Opposition indicates that Defendant clearly seeks to go further by delving into any and all details regarding Lance's published statements about this case, including who provided the information, when it was provided and what other documents he reviewed. Defendant has presented no evidence to demonstrate that Lance has waived the privilege regarding this unpublished material.

Courts have been careful to narrowly interpret any waiver of the Shield Law. For example, in *Brown & Williamson Tobacco Corp. v. Wigand*, No. 101678/96, 1996 WL 350827 (Sup. Ct. N.Y. Co. Feb. 28, 1996), the plaintiff sought numerous discovery materials from CBS

in connection with an investigation and news story regarding the tobacco industry aired on that network's television show "60 Minutes". As part of the plaintiff's opposition to the motion to quash, plaintiff argued that the privilege had been waived because a transcript of one of the interviews with a key whistleblower had been leaked by the network to the *New York Daily News*. *Id.* at *5. The court noted that pursuant to N.Y. Civ. Rights Law § 79-h(g), waiver only applies to certain "specific information" that has been waived. *Id.* at *5-6. The court cautioned against broadening this provision:

> Under this section, the specific information sought is reachable in discovery if it has been disclosed and the disclosure is consented to. [Defendant] seeks to go beyond this limitation. It impliedly attempts to analogize to courtroom evidentiary rules based on the fairness doctrine that permit expanded testimony regarding a privileged matter upon which the door has been opened. Extrajudicial disclosures, however, do not present the same concerns for fairness that govern trial procedures ...

Id. at *6. The court then stated that if the court accepted the plaintiff's expansive view of the waiver provision in the Shield Law, it would essentially eviscerate the privilege altogether:

> Under [defendant's] interpretation of 79-h(g), a specific but limited disclosure would become a launching pad for a massive, unlimited and unspecified foray into matters undisclosed but related to the disclosed information. The court cannot support a reading of 79-h(g) that would fly in the face of the purpose of the Shield Law. Even if, arguendo, CBS did authorize the leak to the Daily News, CBS waived its protection only to what was published by that newspaper, and the limited disclosure in the Daily News cannot serve as a basis to gain unfettered access to CBS news files or to depose reporters, as called for in [defendant's] subpoenas.

Id. at *6 (emphasis added) (emphasis added). *See also Pugh v. Avis Rent a Car System, Inc.*, No. M8-85, 1997 WL 669876, at *5 (S.D.N.Y. Oct. 28, 1997) (assessing reporters privilege under federal common law and noting "The mere presence of third parties during an interview does not undermine [or waive] the interests served by the qualified privilege", and noting "This goes to the privacy of editorial processes, the independence of the press and the need to allow the press

to publish freely on topics of public interest without harassment and scrutiny by litigants seeking to conduct 'fishing expeditions' into nonbroadcast materials in the hope that some relevant information may turn up."); *In re Codey*, 183 A.D.2d 126, 134, 589 N.Y.S.2d 400, 405 (1st Dep't 1992) (noting that because waiver under the Shield Law only applied to "the specific information sought to be disclosed," that "It is clear … that the broadcast of part of the interview would not be a disclosure of the 'specific information' contained in the remainder of the interview"), *reversed on other grounds*, 82 N.Y.2d 521, 605 N.Y.S.2d 661 (1993).

Therefore, it is clear that Defendant's attempt here to use certain statements Lance has published about this case as a springboard to obtain his unpublished sources, newsgathering activities and other journalistic pursuits is wholly inappropriate. In order to obtain any unpublished materials, Defendant must satisfy the three-part test in the Shield Law. Instead, Defendant has completely ignored this test and disregarded the analysis in the Opening Memorandum.[7] As a result, Defendant has conceded—indeed waived—any attempt to claim that they can overcome the qualified privilege of the Shield Law as they have made absolutely no attempt to do so in their opposition.[8]

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[7] Rather than restating the argument, the Court is referred to the detailed analysis of the application of the Shield Law contained in the Opening Memorandum. However, it should be noted that Defendant has completely failed to demonstrate why testimony from Lance is even relevant to the upcoming *Kastigar* hearing. Defendant has not even attempted to explain why testimony from Lance will have any bearing whatsoever on the main objective of such a hearing—determining if the District Attorney improperly relied upon Defendant's prior immunized testimony in bringing the indictment.

[8] In a desperate and baseless attempt to claim that Lance cannot invoke the Shield Law, Defendant also resorts to ad hominem attacks on Lance's style, his objectivity and his private conversations with potential sources. Defendant's Opposition, at p. 7. Such statements have no place in this analysis as they are entirely irrelevant and indeed indicate that Defendant's Subpoena is motivated more by ill-will rather than a legitimate need to obtain relevant evidence. Moreover, since journalism entered its modern age, journalists have acted as advocates to uncover injustice, expose criminal activity and encourage government officials to take action in order to better society. From Lincoln Steffans investigating corruption in local government, to

There is one clear example in which Defendant improperly attempts to exploit the waiver provision in the Shield Law. Defendant notes that in one of Lance's books, *Cover Up*, he states, "'The most important single source for the book was Angela Clemente.'" Defendant's Opposition, p. 5. Then, Defendant uses this innocuous statement as a basis to obtain whatever information desired, stating "To the extent that Clemente provided Mr. Lance with information, and Mr. Lance published or voluntarily disclosed that information to the public, Lance should be required to testify regarding the published information he obtained from Clemente." *Id.* This interpretation is patently incorrect. While Lance might need to confirm his statement in his book that Angela Clemente was an important source, there is no indication whatsoever that Lance waived the privilege as to the ways in which Clemente was an important source or what information she provided. Unless Lance identified the information Clemente provided—which Defendant has not asserted—the Shield Law still applies, and Lance is not required to testify unless Defendant satisfies the three-part test (which would be nearly impossible, given that this information appears in no way relevant to the *Kastigar* hearing, and indeed could be provided by Clemente herself). As noted in *Brown & Williamson*, the mere mention that Clemente was a source cannot be used as "a launching pad for a massive, unlimited and unspecified foray into matters undisclosed but related to the disclosed information". 1996 WL 350827, at *6.

Inexplicably, Defendant also tries to claim that any discussions Lance has had with any individuals in the District Attorney's office are not protected by the Shield Law because the District Attorney is "a person not otherwise entitled to claim the exemption provided" by the Shield Law. N.Y. Civ. Rights Law § 79-h(g). However, this provision of the Shield Law clearly

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Edwin Markham and others exposing the ills of child labor in the early twentieth century, to more modern examples like Bob Woodruff's personal campaign for Iraq War veterans to receive better medical care, journalists have served as vigorous advocates. Here, Lance has done nothing more than further enhance this long and noble tradition.

applies only when a journalist obtains information from a source, and then shares that information with someone other than his or her editor, attorney or employer. In the case relied upon by Defendant, *Guice- Mills v. Forbes*, 12 Misc. 3d 852, 819 N.Y.S.2d 432 (Sup. Ct. N.Y. Co. 2006), the reporter voluntarily disclosed to one source what another source had told him. However, the court "strictly limited" the reporter's testimony as to the specific information shared—indeed, the court noted that if the plaintiff "wants additional information with respect to the remainder of [the reporter's] article research, plaintiff must meet the tripartite test requirements." Id. 12 Misc. 3d at 857-58, 819 N.Y.S.2d at 436.

Here, Lance claims that certain individuals in the District Attorney's office have themselves been sources of information. Defendant has not even claimed, nor in any way proven, that Lance shared his interviews with other sources or that he shared his alleged discussions with the District Attorney's office with any other individuals. While Defendant claims Lance encouraged a *New York Times* reporter to learn from the District Attorney's office what Lance discussed with them, Lance himself did not disclose that information to the reporter. As such, aside from the limited publication in his books of certain details regarding Lance's meeting with the District Attorney's office, the Shield Law is clearly still firmly applicable.[9] In short, Defendant has failed to demonstrate any waiver whatsoever, and has failed to satisfy the rigorous

[9] It should also be noted that Defendant is imprecise and misleading in Defendant's Opposition with certain references to Lance's books. For example, Defendant cites the following passage in Lance's book, *Triple Cross*: "…in September 2005, a year after I laid out the case for the FBI/SDNY ends/means decision in *Cover Up*, investigators from the Rackets Bureau of the Brooklyn D.A.'s office, called me in for a meeting. The investigators asked me if I had uncovered any new evidence in the year since the book was published that would alter my analysis of the alleged Scarpa Jr./DeVecchio cover up. I told them that I stood by my findings." Defendant's Opposition at p. 4. Defendant claims that the source for this statement is contained in footnote 34, which is an interview with Noel Downey from March 30, 2006. *Id.*; Affirmation of Mark Bederow, Ex. F. However, that footnote has nothing to do with the cited paragraph; that footnote refers to the source for the information contained in the following paragraph. *See id.*

three-part test necessary to overcome the Shield Law. As such, the motion to quash should be granted to prevent Lance from testifying as to any unpublished newsgathering material.

CONCLUSION

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

Dated: August ____, 2007

Respectfully submitted,

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