MOTLEY RICE LLC
GREGG S. LEVIN (admitted *pro hac vice*)
LANCE V. OLIVER (admitted *pro hac vice*)
MEGHAN S.B. OLIVER (admitted *pro hac vice*)
MAX N. GRUETZMACHER (admitted *pro hac vice*)
CHRISTOPHER F. MORIARTY (admitted *pro hac vice*)
MEREDITH B. WEATHERBY (admitted *pro hac vice*)
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
Telephone: (843) 216-9000
Facsimile: (843) 216-9450

ROBBINS GELLER RUDMAN & DOWD LLP
DANIEL S. DROSMAN (200643)
TOR GRONBORG (179109)
LUCAS F. OLTS (234843)
J. MARCO JANOSKI GRAY (306547)
CHRISTOPHER R. KINNON (316850)
HEATHER G. SCHLESIER (322937)
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

Co-Class Counsel for the Class

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re TWITTER INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Case No. 4:16-cv-05314-JST (SK) CLASS ACTION **PLAINTIFFS' OPPOSITION TO MOTION TO QUASH SUBPOENA TO NON-PARTY JOURNALIST NICK BILTON** JUDGE: Jon S. Tigar DATE: September 17, 2021 TIME: 1:30 P.M. (via videoconference) TRIAL DATE: September 20, 2021

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Class Representatives and Plaintiffs KBC Asset Management NV and National Elevator Industry Pension Fund ("Plaintiffs") respectfully submit this Opposition to the Motion to Quash Subpoena to Non-Party Journalist Nick Bilton (the "Motion"). ECF No. 630. (This filing also addresses Defendants' "response" to the Motion dated September 1, 2021. *See* ECF 631.)

I. INTRODUCTION

Every trial is "a search for the truth." *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 543 (D. Nev. 2008). But neither this Court nor any jury empaneled in this case may discover that truth if critical evidence is withheld. That is exactly what Nick Bilton seeks to accomplish here: to hide important testimony behind the shield of the journalist's qualified privilege. Mr. Bilton's First Amendment arguments fail here for several reasons. Most critically, Mr. Bilton has ***waived*** his ability to assert the qualified journalist's privilege. In 2016, Mr. Bilton met with and discussed with counsel for Plaintiffs the very types of factual information he now seeks to shield. Mr. Bilton's Motion is tellingly silent on this fact. He cannot have it both ways. He may not speak when it suits his interests, but claim the qualified privilege when it does not. Having already spoken, this Court should deny Mr. Bilton's Motion to quash the trial subpoena. *See* Fed. R. Civ. P. 45(d)(3)(A)(iii) ("[T]he court . . . must quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, ***if no exception or waiver applies***." (emphasis added)).

In his June 2016 article regarding Twitter, entitled "Twitter is Betting Everything on Jack Dorsey: Will It Work?" (the "Article"), *see* ECF No. 630-2, Mr. Bilton wrote about the growth issues that Twitter faced – including facts that go directly to the core issues here. The Article recounts a meeting of Twitter's topmost executives at the end of the Class Period. During this meeting, Gabriel Stricker, Twitter's then-Chief Communications Officer, advised Defendant Anthony Noto and Jack Dorsey that the Company needed to "come clean" to the market about its stagnant growth numbers. (Quite obviously, one does not need to "come clean" unless one has first concealed something.) Mr. Stricker was abruptly fired within days of that meeting. These events go to the heart of Plaintiffs' case, and this statement, from a C-level Twitter officer, provides crucial evidence of scienter. Plaintiffs pursued this evidence repeatedly at depositions of Twitter

employees, but despite Mr. Bilton's contemporaneous account, none of the deposed Twitter officers (all of whom were represented and/or prepared by Defendants' counsel) could recall hearing or making these statements. Plaintiffs therefore had no choice but to subpoena Mr. Bilton.

Plaintiffs conferred with Mr. Bilton and offered a compromise. Plaintiffs would not ask Mr. Bilton to identify his confidential sources if he would confirm for the jury critical aspects of the Article – information that Mr. Bilton had ***already provided to counsel for Plaintiffs***. Mr. Bilton declined this compromise, insisting that his First Amendment protection is absolute and broad. Mr. Bilton is incorrect. If it were otherwise, journalists would never testify in trials, but as discussed below, they do – and not infrequently, particularly when they have waived the privilege. Thus, this Court should deny Mr. Bilton's motion to quash the trial subpoena.

II. BACKGROUND

On June 1, 2016, *Vanity Fair* published the Article, which was based on, among other things, interviews with Twitter executives, including its CEO Jack Dorsey and individual defendant Anthony Noto. The Article chronicles Twitter's response to the Company's stagnating user growth during the Class Period, and contains at least two party-opponent admissions from Mr. Stricker, Twitter's Chief Communications Officer at the time.

In the runup to the final corrective disclosure on July 28, 2015, Mr. Stricker opined at a high-level corporate meeting that Twitter had "***zero credibility with Wall Street***" and needed "'***to come clean***' about the [C]ompany's stagnant growth numbers." *See* Article 6. Within days, Mr. Stricker was fired. *Id*. During his deposition, Mr. Stricker claimed ignorance of, and could not recall, making these statements, though he admitted that "[s]ome of that language [quoted in the Article] sounds like language that I could use."[1] He also offered no alternative rationale for his termination.

[1] Stricker Dep. Tr. 400:9-13. All of the deposition transcripts cited herein have been previously lodged with the Court. Therefore, Plaintiffs are not attaching any deposition excerpts to this opposition. If requested, however, Plaintiffs can produce the relevant pages.

Following the Article's publication, Mr. Bilton was contacted by representatives of Plaintiffs' counsel and, on November 29, 2016, met with them, in person, in Los Angeles for approximately two-and-a-half hours to discuss the Article – a fact Mr. Bilton does not (and cannot) contest. *See* Koelbl Decl. ¶ 2;[2] *see also* ECF No. 630-1 ¶ 5 (the "Bilton Decl."). During that meeting, Mr. Bilton elaborated on several excerpts from the Article. *See* Koelbl Decl. ¶ 3. In particular, Mr. Bilton discussed the quotes attributed to Stricker – that Twitter had "zero credibility with Wall Street" and needed "to come clean" about the Company's stagnant growth numbers. *Id.* Mr. Bilton explained that he had corroborated these events and statements with "several persons" who were in attendance. *Id.* at ¶ 4. He also verified that the events described in the excerpt took place at a "Staff" meeting that was attended by Jack Dorsey and his direct reports, all of whom were Twitter senior executives. *Id.* Mr. Bilton also confirmed that a draft of the Article was sent to Twitter's corporate communications/public relations department prior to its publication, and that no facts appearing in the final, as-published version of the article were contested by Twitter. *See id.* at ¶ 5.

Twitter, recognizing the impact this evidence will have at trial, moved *in limine* to exclude both the Article and any testimony from Mr. Bilton. *See generally* ECF No. 498 at 2-9. Plaintiffs opposed that motion, arguing that the Article is an adopted admission and the admission of a party-opponent. *See* ECF No. 523 at 2-8. Prior to publication, Mr. Bilton had provided Twitter with a draft of the Article so that the Company could make corrections or dispute inaccurate factual matters contained in it. *See* Koelbl Decl. ¶ 5; *see also* ECF No. 523 at 2-4 (adopted admission), 4-5 (admission of party opponent). Alexandra Valasek, Twitter's Global Consumer Communications Director, circulated the Article to Twitter's Operating Committee, stating it was "as expected" and that "***[w]e made the decision to participate in the piece to set the record straight***." ECF No. 523 at 3 (emphasis added). She then circulated the Article to all 3,000 Twitter

[2] The Declaration of Terry R. Koelbl in Support of Plaintiffs' Opposition to Motion to Quash Subpoena to Non-Party Journalist Nick Bilton was filed contemporaneously herewith.

employees, explaining that Twitter decided to "help shape the story . . . ***in our own words***." *Id.* (emphasis added).

In this Court's March 31, 2021 Order on the party's Motions in Limine, the Court excluded the Article, but denied the request to exclude Mr. Bilton's testimony. ECF No. 581 at 16. On July 29, 2021, Plaintiffs served a subpoena on Mr. Bilton seeking to compel his testimony at trial. Counsel for Plaintiffs and Mr. Bilton subsequently conferred on the scope of his testimony, but were unable to reach an agreement.

III. ARGUMENT

A. Mr. Bilton Has Waived His Journalist's Privilege

Mr. Bilton frames this as a cut-and-dry First Amendment issue, claiming that if he is required to testify in any capacity it will encroach on his constitutional rights. Critically, however, Mr. Bilton's Motion ***makes no mention*** of his meeting with counsel for Plaintiffs in November 2016, and notes that fact only in passing in his Declaration. "[L]ike other privileges, . . . the journalist's privilege may be waived." *Ayala v. Ayers*, 668 F. Supp. 2d 1248, 1250 (S.D. Cal. 2009). A journalist cannot provide information to a litigant "and later invoke the qualified reporter privilege to keep this information from the Court." *Id.* But that is exactly what Mr. Bilton seeks to do.

Under these circumstances, "courts may find a journalist has impliedly waived the privilege when ***fairness requires such a finding***." *Michael v. Est. of Kovarbasich*, 2015 WL 8750643, at *4 (C.D. Cal. Dec. 11, 2015) (emphasis added). Fairness "prevent[s] prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information." *Schiller v. City of New York*, 245 F.R.D. 112, 120 (S.D.N.Y. 2007) (alteration in original). "[A] party that discloses some privileged information cannot thereafter rely on the privilege to withhold related information necessary to gain a complete picture of the facts. . . . [T]hat doctrine necessarily applies to the qualified journalist's privilege as well." *Id.* (citations omitted); *see also Sims v. Blot*, 534 F.3d 117, 132-33 (2d Cir. 2008) (noting "waiver may be implied in circumstances where it is called for in the

interests of fairness," including when party makes selective disclosures) (cited with approval in *Ayala*, 668 F. Supp. 2d at 1250).

In his Motion, Mr. Bilton contends that "[h]e has never told anyone, other than those involved in his research and writing, the identity of his confidential sources, or disclosed the sources of specific statements in his Article, nor has he shared any unpublished information outside of his newsgathering and reporting process." Mot. 10. But Mr. Bilton's own Declaration tells a different story: he did, in fact, talk to someone outside of his employment – a representative of a party in this matter – about the Article. *See* Bilton Decl. ¶ 5; Koelbl Decl. ¶¶ 2-5. During his meeting with Plaintiffs' counsel, Mr. Bilton discussed the fact that he had corroborated what transpired at the "come clean" meeting with several Company executives who were in attendance. *Id.* at ¶¶ 3-4. Although Mr. Bilton did not reveal his sources, he confirmed the accuracy of those statements and discussed his reporting process – the exact same testimony Plaintiffs seek from him now. Fairness dictates that, once Mr. Bilton has voluntarily disclosed the very type of information he now seeks to "shield" via the journalist's qualified privilege, he may not simultaneously use the privilege as a "sword" to quash his trial subpoena. *Sims*, 534 F.3d at 132.

To be entirely clear: Plaintiffs do not intend to elicit testimony that would reveal Mr. Bilton's confidential sources and have assured Mr. Bilton that they will not do so. Rather, Plaintiffs seek the same type of factual information he already disclosed to their attorneys in November 2016: that his Article was corroborated by several Twitter executives who were in attendance at Mr. Dorsey's "Staff" meeting near the end of the Class Period. Having already spoken, fairness requires this Court to therefore deny Mr. Bilton's motion to quash the trial subpoena to the extent Mr. Bilton has waived any entitlement to invoke the journalists qualified privilege.

B. The Type of Testimony Plaintiffs Seek From Mr. Bilton Does Not Implicate the Journalist's Qualified Privilege

Even if Mr. Bilton had not waived the journalist's privilege as he did, case law from across the country confirms that the privilege is not as broad as Mr. Bilton claims. Courts routinely permit reporters to confirm and verify the accuracy of limited facts without implicating the First

Amendment. *See, e.g., United States v. Treacy*, 603 F. Supp. 2d 670, 672 (S.D.N.Y. 2009); *N.L.R.B. v. Mortensen*, 701 F. Supp. 244, 246 (D.D.C. 1998); *see also United States v. Markiewicz*, 732 F. Supp. 316, 317 (N.D.N.Y. 1990) (declining to quash subpoenas that ''merely seek[] to have the reporters testify that the defendants made the statements reported in the newspapers''); *Sec. & Exch. Comm'n v. Seahawk Deep Ocean Tech., Inc.*, 166 F.R.D. 268, 269 (D. Conn. 1996) (refusing to quash subpoena issued "for only one purpose: to ask [the reporter] to verify that one of the defendants in this case in fact made the statements [the reporter] attributed to him in a published newspaper article [the reporter] wrote"); *Brinston v. Dunn*, 919 F. Supp. 240, 244 (S.D. Miss. 1996) ("It was . . . proper to require petitioner ***to answer questions regarding the truthfulness and accuracy of the contents of the article he authored***, including whether statements attributed to plaintiff in the article were in fact made by the plaintiff since this does not impermissibly infringe on the First Amendment right to freedom of the press." (emphasis added)).

Simply stated, a party may seek to confirm the accuracy of an article. Such verification is ***outside the scope of the journalist's privilege***. *See Mortensen*, 701 F. Supp. at 250 ("The reporters' interests in refusing to testify for the sole purpose of verifying the statements, not disclosing sources, is rather attenuated and must yield to the need for confirmation as presented here."). As such, a party properly may ask "simple questions as to matters evident on the face of the article." *Maughan v. NL Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981); *see also Seahawk Deep Ocean Tech.*, 166 F.R.D. at 271 (requiring journalist to testify when SEC was "simply seek[ing] the movant's testimony to confirm the accuracy of his story"); *id.* at 272 ("The subpoena does not seek information regarding a confidential source, nor does it seek any unpublished information or documents prepared in connection with the article at issue. On the other hand, the testimony is highly relevant to the underlying case and there is a strong public interest in favor of the litigation of such claims."). Given the limited nature of the testimony Plaintiffs seek to elicit from Mr. Bilton, denial of his Motion will not disturb his First Amendment rights.

C. Plaintiffs Have a Compelling Need for Mr. Bilton's Testimony

Even if the journalist's privilege reaches some aspect of Mr. Bilton's testimony, it is a ***qualified*** privilege, which must yield in this case. *See Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th

Cir. 1993) ("[T]he privilege is qualified, not absolute, and . . . the opposing need for disclosure [must] be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest."); *see also Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975) (noting federal privilege is "limited or conditional"). The party claiming the privilege has the burden of establishing his right to the privilege's protection. *Shoen*, 5 F.3d at 1293 (discussing *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987)). Because the privilege is qualified, it "may be overcome if the requesting party can demonstrate a 'sufficiently compelling need for the journalist's materials.'" *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 2018 WL 2441518, at *13 (N.D. Cal. May 31, 2018) (quoting *Shoen*, 5 F.3d at 1296). The Ninth Circuit has held that when "information sought is not confidential, a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege by a nonparty . . . upon a showing that the requested material [or information] is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen v. Shoen* (*Shoen II*), 48 F.3d 412, 416 (9th Cir. 1995). Here, the information sought is not confidential and Plaintiffs' request satisfies each of the foregoing elements. As such, Mr. Bilton's Motion should be denied and Plaintiffs should be permitted to call him as a witness at this significant trial.

1. The Information Is Unavailable Despite Exhaustion of All Reasonable Alternative Sources

First, Plaintiffs' discovery efforts have been more than diligent, yet no Twitter witness has admitted hearing or making the relevant statements. Plaintiffs deposed numerous Twitter executives present at the meeting, but they all claimed they could not recall the statements described in the Article. *See, e.g.*, Messinger Dep. Tr. 252:16-253:11 (testifying he was "not sure" whether he was present at the meeting and he "do[esn't] recall [Stricker] saying [the Company has to "come clean"]); Dorsey Dep. Tr. 236:8-237:12 (testifying he did not "recall ever having that conversation" with Mr. Stricker that the Company needed to "come clean"). Likewise, while Twitter's 30(b)(6) corporate designee testified that there were "factual inaccuracies" in the Article, she also testified that "to [her] knowledge," Twitter did not ask Mr. Bilton to correct them. *See*

30(b)(6) Designee Bessinger Dep. Tr. 289:24-290:15. Plaintiffs also deposed Mr. Stricker, to whom Mr. Bilton attributed the quotes at issue, and he, like his colleagues, feigned ignorance. Mr. Stricker did, however, admit that "[s]ome of that language [quoted in the Article] sounds like language that I could use." Stricker Dep. Tr. 400:9-13.

The statement by a Twitter executive, during a meeting preparing for Twitter's Q2 2015 earnings call, that the Company needed to "come clean," is a critical piece of state of mind evidence. It is an admission that the Company was not being honest with its investors and shareholders during the Class Period. Without verification from Mr. Bilton that the statements in his Article are accurate, Plaintiffs' access to this piece of critical evidence, which was "corroborated" by Mr. Bilton, an objective third party, "with ***several persons who were present at the meeting***," Koelbl Decl. ¶ 4 (emphasis added), could be kept from the jury. As one court noted in a similar situation, "[j]ournalists are often the only ones able to testify that certain statements were ever made, and the speaker's motivation in disclosing certain information to a reporter may be very important to a case." *Mortensen*, 701 F. Supp. at 248. In situations like here, "[w]hen movants clearly have no other source from which they can gain this insight, the journalist may be compelled to testify." *Id.*

Here, Plaintiffs have exhausted all reasonable alternative sources to determine the accuracy of the statements made in the Article. *See Beaver Cnty. Emp'rs Ret. Fund v. Tile Shop Holdings, Inc.*, 2016 WL 3162218, at *5 (N.D. Cal. June 7, 2016) (rejecting notion party must depose entire universe of former or current employees who could potentially have knowledge as "this is plainly not required by *Shoen*"). Plaintiffs have deposed Mr. Dorsey, Mr. Stricker, Mr. Messinger, and even Twitter itself (through its 30(b)(6) designee) on this topic. None of them, including Mr. Stricker (who allegedly said that the Company needed to "come clean") could recall the statements being made. Moreover, Mr. Bilton sent a draft of the Article "to Twitter's corporate communications/public relations department prior to its publication," and thus "provided [it] with an opportunity to correct or deny any information that it did not agree with." Koelbl Decl. ¶ 5. The published Article therefore contains no such information; indeed, Twitter's own Global Consumer Communications Director Alexandra Valasek circulated the Article to Twitter's

Operating Committee, stating it was "as expected" and "***[w]e made the decision to participate in the piece to set the record straight***," then later circulated the Article to all 3,000 Twitter employees, explaining that Twitter decided to "help shape the story . . . ***in our own words***." ECF No. 523 at 3 (emphases added). Because Twitter did ***not*** dispute the veracity of Mr. Bilton's account, and numerous witnesses present at the meeting have conveniently lost any recollection of what occurred, Plaintiffs "must turn to the keeper[] of the information . . . , the reporter[, Mr. Bilton,] who actually wrote the statements and conducted the interviews." *Mortensen*, 701 F. Supp. at 249.

2. The Information is Noncumulative

Under *Shoen II*, the "demonstrably cumulative" factor weighs whether the information sought is duplicative of other information that is already available to the parties. *See* 48 F.3d at 417 (finding information sought as to "ill will" was cumulative with prior deposition testimony from which "ill will" could easily be inferred). The information sought is not cumulative with any other information already discovered by the Plaintiffs. As discussed above, Plaintiffs have deposed numerous Twitter senior executives – and none of them have confirmed, let alone are willing to recall, the statements at issue and the Article itself has been excluded.[3]

3. The Information Is Clearly Relevant to An Important Issue

The information Plaintiffs seek is central to an element of Plaintiffs' case. Many securities fraud cases turn on the scienter element, which is often established with circumstantial evidence. *See, e.g.*, *In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *3 (C.D. Cal. Oct. 25, 2016) (noting scienter "is the most difficult element of proof and one that is rarely supported by direct evidence"). Perhaps the best evidence of Defendants' scienter is in the hands of Mr. Bilton. The statements that he reported show that Defendants knew or were on notice of the need to "come clean" with Wall Street. This strongly supports Plaintiffs' account of the events at Twitter during the Class

[3] Mr. Bilton's contention that any testimony he would provide would be cumulative because the Article "merely 'corroborate[s] the accounts of the [11 confidential witnesses],' cited in the Amended Complaint," Mot. 13, is misguided. None of the confidential witnesses was alleged to have been at the executive meeting discussed in the Article and none of those witnesses testified about the meeting.

Period. There is no need to "come clean" without having first concealed something. Mr. Bilton's own discussions with Plaintiffs' counsel revealed (without naming his sources) that "he had corroborated the events described in" the Article "with several persons who were present at the meeting," which was "a 'Staff' meeting" consisting of "Jack Dorsey and his direct reports, all of whom were Twitter senior executives." Koelbl Decl. ¶ 4. There is no doubt that this evidence is relevant. Indeed, courts have recognized the importance of – and ordered – journalist testimony when an article forms part of a plaintiff's claim. *See, e.g.*, *In re Waldholz*, 1996 WL 389261, at *2-4 (S.D.N.Y. July 11, 1996) (denying motion to quash in Rule 10b-5 action when "the Class predicates defendants' liability in part directly on the statement by [the defendant] reported in [the journalist]'s article"); *see also Mulligan v. Nichols*, 2013 WL 12218751, at *3 (C.D. Cal. Oct. 4, 2013) (finding information to be "clearly relevant to the claims and defenses, and the subject matter, of this case" and ultimately holding reporter's privilege was overcome under *Shoen*); *Crowe v. Cnty. of San Diego*, 242 F. Supp. 2d 740, 751 (S.D. Cal. 2003) ("[T]he relevance of this material is, *inter alia*, that it puts defendant Stephan's statements in context, which context is necessary to determine whether her statements are actionable."); *Planned Parenthood*, 2018 WL 2441518, at *15 ("The communications at issue bear on the precise conduct that Plaintiffs challenge in this litigation."). As such, Mr. Bilton's reliance on "[t]he reporters' interests in refusing to testify for the sole purpose of verifying the statements, not disclosing sources, is rather attenuated and must yield to the need for confirmation as presented here." *Mortensen*, 701 F. Supp. at 249.

D. The Court Has Discretion to Limit Questioning

Mr. Bilton also argues that "even if Plaintiffs did not ask about the identities of sources, that would not restrict defense counsel from doing so." Mot. 10. This argument is a nonstarter. Evidence "101" vests this Court with the inherent and clear authority to limit questioning that may stray beyond what is permissible. *See* Fed. R. Evid. 611(a). "The proper extent of cross-examination lies within the sound discretion of the trial court." *United States v. Kizer*, 569 F.2d 504, 505 (9th Cir. 1978); *accord Thompson v. Afamasaga*, 2019 WL 1290856, at *3 (D. Haw. Mar. 20, 2019) ("Embedded in Rule 611(a) is authorization for a trial court to exercise broad

discretion over trial-management decisions."). There is little question that this Court has discretion over what each party may ask Mr. Bilton. *See Lipinski v. Skinner*, 781 F. Supp. 131, 136 (N.D.N.Y. 1991) ("[I]f the questions put to a reporter are narrowly limited, then subpoenaing a reporter is more acceptable.").

E. The California State Constitutional Shield Law Is Inapplicable to the Present Case and Is Preempted by Federal Law

Finally, Mr. Bilton contends that the State of California's constitutional shield law is a special factor that weighs heavily in favor of quashing the subpoena. Mot. 3, 16-18. This contention should be summarily rejected.[4] In determining the law of privilege to be followed in a federal question case, like here, "the rule ultimately adopted, whatever its substance, is not state law but federal common law." *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975). Under Rule 501 of the Federal Rules of Evidence, the federal law of privilege applies in all cases except those in which state law supplies the rule of the decision. "Thus, the federal courts do not recognize, in non-diversity cases, state-created privileges." *United Liquor Co. v. Gard*, 88 F.R.D. 123, 125 (D. Ariz. 1980); *see also Crowe*, 242 F. Supp. 2d at 750 ("[W]here state law provides the rule of decision with respect to a state law claim but federal law provides the rule of decision with respect to a claim over which the court has federal subject matter jurisdiction, federal privilege law is to be applied with respect to both claims.").

Mr. Bilton argues that the State's constitutional shield law provides protection for a reporter "for refusing to disclose the source of any information." Mot. 16; *see also id.* at 17 (asserting shield law "would provide absolute protection against compelling Bilton to testify about

[4] California's shield law is not a "privilege," and it applies only in contempt proceedings, not motions to quash a subpoena. The plain language of both the California Constitution and Evidence Code make this clear. *See* Cal. Const. Art. 1, § 2(b) ("A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication . . . ***shall not be adjudged in contempt*** by a judicial . . . body . . . for refusing to disclose the source of any information. . . .") (emphasis added); Cal. Evid. Code § 1170 (same). As the California Supreme Court has explained, the shield law "does not create a privilege for newspeople, rather it provides an immunity from being adjudged in contempt." *N.Y. Times Co. v. Super. Ct.*, 51 Cal. 3d 453, 459 (1990); *see also KSDO v. Super. Ct.*, 136 Cal. App. 3d 375, 384 (1982) ("[T]he California shield law does not apply since petitioner has not been threatened with or cited for contempt.").

his sources or unpublished information"). However, the policy considerations that Mr. Bilton identifies, including that future sources may be deterred from coming forward, *see* Mot. 18, are not implicated because Plaintiffs are not seeking testimony about those sources, as Mr. Bilton acknowledges, *see, e.g.*, *id.* at 6, 7, 10. Plaintiffs ask only for Mr. Bilton to confirm what he already published in writing years ago.

IV. DEFENDANTS' SUBMISSION IS IMPROPER AND SHOULD BE DISREGARDED

A. Defendants Lack Standing

On September 1, 2021, Defendants filed a response in support of Mr. Bilton's motion to quash, *see* ECF No. 631, even though they lack standing to object to the subpoena. (Plaintiffs had alerted Defendants' counsel about their lack of standing to opine on Mr. Bilton's trial subpoena ***prior*** to the filing of the motion to quash.) "The party to whom the subpoena is directed" – in this case Mr. Bilton – "is the ***only*** party with standing to oppose it." *Donahoo v. Ohio Dep't of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002) (emphasis added). "The general rule is that a party to a lawsuit has no standing to object to a subpoena served on a non-party absent a privilege or privacy interest" regarding the subject matter of the subpoena. *Entrepreneur Media, Inc. v. Smith*, 2017 WL 2911644, at *5 (E.D. Cal. July 7, 2017); *see also United States v. Idema*, 118 F. App'x 740, 744 (4th Cir. 2005) ("[A] party does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena."). Because Defendants have made no showing (they cannot) that the subpoena implicated "some personal right or privilege in the information [being] sought," the inquiry ends there.

Additionally, Defendants ***already*** independently moved to preclude Mr. Bilton's trial testimony – an argument that this Court has considered and rejected. *See* ECF 581 at 16. Given their lack of standing, Defendants' latest submission is nothing more than an inappropriate second bite at the apple. Not only should the Court disregard their brief, it should preclude Defendants from filing any further "reply" absent express permission from the Court.

B. Defendants' Submission Does Not Alter the Conclusion that the Motion to Quash Should Be Denied

Even if this Court were to consider Defendants' filing, none of their contentions alter the conclusion that Mr. Bilton should testify. First, not unlike Mr. Bilton's counsel, Defendants fail to consider the effect of Mr. Bilton's waiver. Second, while Defendants assert that they would be "substantially prejudiced" if Plaintiffs call Mr. Bilton at trial, ECF No. 631 at 3, that argument rings hollow. Other than Mr. Stricker, himself, Defendants have (or had) unfettered access to each of the senior Twitter executives who, by Mr. Bilton's own admission, corroborated the Article.

This current attempt to exclude his proposed testimony also is premature, at best. The admissibility of such evidence should be determined when the evidence is offered at trial so that the Court has the context of the evidentiary record available when ruling on admissibility. "[M]any courts have found that it is the ***better practice to deal with questions of admissibility as they arise***." *Williams v. Muhammad's Holy Temple of Islam, Inc.*, 2006 WL 297448, at *1 (E.D.N.Y. Feb. 8, 2006) (emphasis added). Here, any weighing of probative value and prejudice may change depending on the specific testimony that is actually elicited from Mr. Bilton.

Moreover, while Defendants purport to analyze the *Shoen II* factors, *see* ECF No. 631 at 1-3, their analysis falls far short for the reasons addressed in detail in Part III.C above.

Finally, Defendants' speculations as to issues that they might encounter upon the cross-examination of Mr. Bilton, *see* ECF No. 631 at 4-7, are of no consequence. The guaranteed "*opportunity* for effective cross-examination" does not mean that counsel is entitled to conduct "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987). Stated otherwise, effective cross-examination does not mean unlimited cross-examination.

V. CONCLUSION

For the foregoing reasons, Mr. Bilton's Motion to Quash should be denied. In the alternative, should the Court grant the Motion, Plaintiffs respectfully request that the Court reconsider its previous ruling on the admissibility of the Article.

DATED: September 3, 2021

MOTLEY RICE LLC

s/ Gregg S. Levin

GREGG S. LEVIN
LANCE V. OLIVER
MEGHAN S.B. OLIVER
MAX N. GRUETZMACHER
CHRISTOPHER F. MORIARTY
MEREDITH B. WEATHERBY
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
Telephone: (843) 216-9000
Facsimile: (843) 216-9450
glevin@motleyrice.com
moliver@motleyrice.com
mgruetzmacher@motleyrice.com
cmoriarty@motleyrice.com
mweatherby@motleyrice.com

ROBBINS GELLER RUDMAN & DOWD LLP
DANIEL S. DROSMAN
TOR GRONBORG
LUCAS F. OLTS
J. MARCO JANOSKI GRAY
CHRISTOPHER R. KINNON
HEATHER G. SCHLESIER 655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: (619) 231-1058
Facimile: (619) 231-7423
ddrosman@rgrdlaw.com
torg@rgrdlaw.com
lolts@rgrdlaw.com
mjanoski@rgrdlaw.com
ckinnon@rgrdlaw.com
hschlesier@rgrdlaw.com

ROBBINS GELLER RUDMAN & DOWD LLP
MAUREEN E. MUELLER
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364
mmueller@rgrdlaw.com

Co-Class Counsel for the Class

BLEICHMAR FONTI & AULD LLP
LESLEY E. WEAVER
555 12th Street, Suite 1600
Oakland, CA 94607
Telephone: (415) 445-4003
Facsimile: (415) 445-4020
lweaver@bfalaw.com

Liaison Counsel