

1 ETHAN JACOBS (SBN 291838)
Ethan Jacobs Law Corporation
2 ethan@ejacobslaw.com
100 Pine Street, Suite 1250
3 San Francisco, CA 94111
4 Telephone: (415) 275-0845

5 JAMES SLATER (*pro hac vice* application forthcoming)
Slater Legal PLLC
6 james@slater.legal
333 S.E. 2nd Ave. #2000
7 Miami, FL 33131
8 Telephone: (305) 523-9023

9 Attorneys for Petitioner John Doe

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN FRANCISCO**

13 *In the Matter of the Subpoena Issued to Reddit,*
Inc. in:

14 JOHN DOE,

15 Petitioner,

16 vs.

17 MIKE BOUDET, an individual, and
18 INCONGRUITY, LLC, a Florida limited liability
company,

19 Respondents.

20
21 MIKE BOUDET, an individual, and
22 INCONGRUITY, LLC, a Florida limited liability
company,

23 Plaintiffs,

24 vs.

25 JOHN DOE a/k/a
U/IMNOTREALLYHEREKINDA,

26 Defendant.

Case No.:

DISCOVERY

**PETITIONER'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PETITION TO QUASH
SUBPOENA PURSUANT TO CAL. CIV.
PROC. 1987.1(A) AND 2029.600**

Date: May 24, 2022
Time: 9:00 a.m.
Department: 302

Case No.: 2021-CA-026668
IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI DADE COUNTY,
FLORIDA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTUAL BACKGROUND..... 1

III. ARGUMENT.....2

A. DOE HAS STANDING TO CHALLENGE THE SUBPOENA..... 2

B. THE SUBPOENA VIOLATES DOE’S FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT AND THE CALIFORNIA CONSTITUTION.....3

1. Legal Standard for Overcoming a Speaker’s First Amendment Right to Anonymous Speech.....3

2. Respondents Cannot Meet their Evidentiary Burden to Make Out a Prima Facie Claim of Defamation..... 3

a) Respondents cannot show actual malice.....4

b) Respondents fail to adequately plead publication.....7

c) The statements are protected opinion or rhetorical hyperbole.....7

d) The alleged statements are true or substantially true..... 12

C. RESPONDENTS FAIL TO PLEAD PERSONAL JURISDICTION OVER DOE IN FLORIDA.....12

D. DOE IS ENTITLED TO FEES AND COSTS..... 14

IV. CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

<i>Boehm v. American Bankers Ins. Group</i> , 557 So. 2d 91 (Fla. Dist. Ct. App. 1990).....	14
<i>Buckner v. Lower Fla. Keys Hosp. Dist.</i> , 403 So. 2d 1025 (Fla. Dist. Ct. App. 1981).....	8
<i>Catalyst Pharms., Inc. v. Fullerton</i> , No. 1:16-cv-25365 2017 WL 6558397, at *6 (S.D. Fla. Aug. 8, 2017), <i>aff'd</i> 748 F. App'x 944, 947 (11th Cir. 2018).....	15
<i>Demby v. English</i> , 667 So. 2d 350 (Fla. Dist. Ct. App. 1995).....	10
<i>DeMoya v. Walsh</i> , 441 So. 2d 1120 (Fla. Dist. Ct. App. 1983).....	11
<i>Digital Music News LLC v. Superior Court</i> (2014) 226 Cal.App.4th 216.....	3
<i>Edward L. Nezelek, Inc. v. Sunbeam Television Corp.</i> , 413 So. 2d 51 (Fla. 3d DCA 1982).....	12
<i>Frieder v. Prince</i> , 308 So. 2d 132 (Fla. Dist. Ct. App. 1975).....	6
<i>From v. Tallahassee Democrat, Inc.</i> , 400 So. 2d 52 (Fla. Dist. Ct. App. 1981).....	6
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	5, 7, 9
<i>Hay v. Independent Newspapers, Inc.</i> , 450 So. 2d 293 (Fla. Dist. Ct. App. 1984).....	10
<i>Haywood v. Superior Court of Los Angeles County</i> , 77 Cal.App.4th 949 (Cal. Ct. App. 2000).....	16
<i>Horsley v. Rivera</i> , 292 F.3d 695 (11th Cir. 2002).....	10
<i>Hudson v. Hudson</i> , 52 Cal.2d 735 (Cal. 1959).....	16
<i>In re DMCA Subpoena To Reddit, Inc.</i> , 383 F. Supp. 3d 900 (N.D. Cal. 2019).....	1, 17
<i>Internet Sols. Corp. v. Marshall</i> , 39 So. 3d 1201 (Fla. 2010).....	15
<i>Jews For Jesus, Inc. v. Rapp</i> , 997 So.2d 1098 (Fla. 2008).....	4
<i>Krinsky v. Doe 6</i> (2008) 159 Cal. App.4th 1154.....	3, 10
<i>Lerman v. Flynt Distributing Co., Inc.</i> , 745 F.2d 123 (2d Cir. 1984).....	6
<i>Levan v. Capital Cities/ABC, Inc.</i> , 190 F.3d 1230 (11th Cir. 1999).....	7
<i>Mar. Exec., LLC v. Larson Elecs., LLC</i> , No. 17-cv-60323, 2018 WL 2938376 (S.D. Fla June 11, 2018).....	15
<i>Mastandrea v. Snow</i> , No. 1D20-3713, Fla. Dist. Ct. App. Feb. 2, 2022).....	6
<i>McKee v. Cosby</i> , 874 F.3d 54 (1st Cir. 2017).....	5
<i>Michel v. NYP Holdings, Inc.</i> , 816 F.3d 686 (11th Cir 2016).....	7
<i>Mile Marker, Inc. v. Petersen Publ'g, L.L.C.</i> , 811 So. 2d 841 (Fla. Dist. Ct. App. 2002).....	5

1	<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990).....	9
2	<i>Moore v. Cecil</i> , 488 F. Supp. 3d 1144 (N.D. Ala. 2020).....	7
3	<i>Morse v. Ripken</i> , 707 So.2d 921 (Fla. Dist. Ct. App. 1998).....	13
4	<i>Murray v. Pronto Installations, Inc.</i> , No. 8:20-cv-00824, 2020 WL 6728812 (M.D. Fla. Nov. 16, 2020).....	11, 13
5	<i>Nevada v. Hall</i> , 440 U.S. 410 (1979).....	16
6	<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	5, 6
7	<i>Pippen v. NBCUniversal Media, LLC</i> , 734 F.3d 610 (7th Cir. 2013).....	4
8	<i>Readon v. WPLG, LLC</i> , So.3d 1229 (Fla. Dist. Ct. App. 2021), review denied, 2021 WL 3523557 (Fla. Aug. 11, 2021).....	4, 6, 7
9	<i>Roe v. Halbig</i> (Cal. Ct. App. 2018) 29 Cal.App.5th 286.....	3
10	<i>Rosanova v. Playboy Enterprises, Inc.</i> , 580 F.2d 859 (5th Cir. 1978).....	7
11	<i>Ruiz v. Austin Ind. Sch. Dist.</i> , No. 03-02-00798-CV (Tex. App. May 27, 2004).....	4
12	<i>Santilli v. Van Erp</i> , No. 8:17-cv-1797-T-33MAP, 2018 WL 2172554 (M.D. Fla. Apr. 20, 2018)...	9
13	<i>Seropian v. Forman</i> , 652 So. 2d 490 (Fla. Dist. Ct. App. 1995).....	9
14	<i>Smith v. Cuban Am. Nat’l Found.</i> , 731 So. 2d 702 (Fla. Dist. Ct. App. 1999).....	14
15	<i>Smith v. Taylor County Pub. Co. Inc.</i> , 443 So.2d 1042 (Fla. Dist. Ct. App. 1983).....	13
16	<i>Smith-Johnson v. Thrivent Financial for Lutherans</i> , No. 8:03-cv-2551-T-30EAJ, 2005 WL 1705471 (M.D. Fla. July 20, 2005).....	14
17	<i>Sovereign Offshore Servs., LLC v. Shames</i> , No. 17-cv-80172, 2017 WL 7798664 (S.D. Fla. Aug. 3, 2017).....	15
18	<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968).....	6, 7
19	<i>Stembridge v. Mintz</i> , 652 So. 2d 444 (Fla. Dist. Ct. App. 1995).....	9
20	<i>Turner v. Wells</i> , 879 F.3d 1254 (11th Cir. 2018).....	9
21	<i>Underwriters Nat. Assur. Co. v. N.C. Life and Acc. and Health Ins. Guaranty Ass’n</i> , 455 U.S. 691 (1982).....	16
22	<i>ZL Techs., Inc. v. Doe</i> (Cal. Ct. App. 2017) 13 Cal.App.5th 603.....	3, 10, 14
23		
24	<u>Statutes</u>	
25		
26	47 U.S.C. § 230.....	17
27	Cal. Civ. P. Code § 1987.1.....	1
	Cal. Civ. P. Code § 1987.2.....	16

ii.

1	Fla. Stat. § 48.193.....	15
2	Tex. Civ. Prac. & Rem. Code § 16.002(a).....	4
3	Cal. Civ. Code § 1798.....	2, 16, 17

Constitutional Provisions

4	Cal. Const., art. I, § 1.....	3
---	-------------------------------	---

Treatises

5	ROBERT D. SACK, SACK ON DEFAMATION, § 2:4.1 (5th ed. 2018).....	9
---	---	---

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

I. INTRODUCTION

Respondents Mike Boudet and Incongruity, LLC's subpoena to Reddit, Inc. to unmask Doe (the "Reddit Subpoena") and their underlying defamation claim are a groundless attempt to silence an anonymous speaker in violation of their First Amendment rights. Boudet responds to critics of his true crime podcast, *Sword and Scale*, by disseminating their contact information and encouraging his subscribers to harass them. In this case, Respondents' Florida defamation claim against Doe and this subpoena to discover Doe's identity are nothing more than an attempt to censor Doe (who moderates the Reddit¹ forum dedicated to *Sword and Scale*) and stifle criticism.

Fortunately, California law and the First Amendment protect Doe and others like them. When a document subpoena seeks a person's personally identifying information in connection with an underlying action involving their exercise of free speech rights, they can move to quash under California Civil Procedure Code Section 1987.1(b)(5). And where the respondent fails to make a *prima facie* showing of a cause of action against the respondent, the petitioner is entitled to a mandatory award of reasonable attorneys' fees under California Civil Procedure Code Section 1987.2(c). For the reasons set forth below, the Court should grant Doe's petition to quash Respondents' subpoena to Reddit, Inc. and award Doe their reasonable attorneys' fees.

II. FACTUAL BACKGROUND

Almost ten years ago, Boudet created a true crime podcast called *Sword and Scale*, hosted by Incongruity LLC, which Boudet contends attracted a large following. (Compl. ¶¶ 10-12, attached as Exhibit B to the Declaration of Ethan Jacobs ("Jacobs Decl.")). That recognition didn't come without controversy. (See Distractify, *Why is 'Sword and Scale' Getting Canceled? The Podcast's Controversy* (Mar. 31, 2021), <https://www.distractify.com/p/why-is-sword-and-scale-getting-canceled>.) Among the many controversies surrounding *Sword and Scale*, in 2019 a Reddit user with the username u/boudettaway posted on the *Sword and Scale* Reddit forum accusing Boudet of pursuing an inappropriate relationship with her when she was fifteen years old. (Jacobs Decl. Ex. C.) To corroborate her story, u/boudettaway posted Boudet's personal cell phone

¹ Reddit is a social media platform where people can post to different forums using pseudonyms. (See In re DMCA Subpoena To Reddit, Inc., 383 F. Supp. 3d 900 (N.D. Cal. 2019).)

1 number in the Reddit comments to her post. (*Id.*) In response, in 2020, Boudet sued her in Florida
2 seeking discovery in anticipation of a defamation suit against her. (*Id.*) Since then, other users on
3 Reddit and other social media sites have discussed this controversy, including on the *Sword and*
4 *Scale* Reddit forum. (Jacobs Decl. Ex. D.)

5 Boudet also has attracted criticism on the Reddit forum for his alleged plagiarism. On
6 several occasions forum users noted that *Sword and Scale* appeared to copy long-form reporting
7 and other podcasts. (Jacobs Decl. Exs. E and F.) For example, users claimed that episode 81 of
8 *Sword and Scale* was copied from the *Rolling Stone* article *Tyler Hadley's Killer Party* by
9 Nathaniel Rich. (*Id.* at Ex. E.)

10 Boudet now has sued Doe, the moderator of the *Sword and Scale* Reddit forum (Compl. ¶
11 19) and seeks their identity through the Reddit Subpoena. Respondents claim that Doe has
12 defamed them by referencing the above controversies on Reddit. But as laid out below, those
13 claims cannot survive First Amendment scrutiny and the Subpoena therefore must be quashed.

14 **III. ARGUMENT**

15 **A. DOE HAS STANDING TO CHALLENGE THE SUBPOENA**

16 Doe has standing to bring this petition under CCP 1987.1(b)(5), because they are “[a]
17 person whose personally identifying information, as defined in subdivision (b) of Section
18 1798.79.8 of the Civil Code, is sought in connection with an underlying action involving that
19 person’s exercise of free speech rights.” California Civil Code Section 1798.79.8(b)(7)-(8)
20 provides that an “Internet protocol address or host name” and “[a]ny other information ... that, in
21 combination with any other nonpersonally identifying information, would serve to identify any
22 individual” constitute “personally identifying information.”

1 **B. THE SUBPOENA VIOLATES DOE’S FREE SPEECH RIGHTS UNDER**
2 **THE FIRST AMENDMENT AND THE CALIFORNIA CONSTITUTION**

3 **1. Legal Standard for Overcoming a Speaker’s First Amendment Right to**
4 **Anonymous Speech.**

5 The Reddit Subpoena, if enforced, would violate Doe’s First Amendment right to engage
6 in anonymous online speech. That is because Boudet cannot make out a *prima facie* defamation
7 claim to justify overcoming Doe’s right to anonymously criticize the *Sword and Scales* podcast.

8 The First Amendment of the U.S. and the California Constitutions protect a person’s
9 decision to speak anonymously. (See, e.g., Krinsky v. Doe 6 (2008) 159 Cal. App.4th 1154,
10 1163–64; ZL Techs., Inc. v. Doe (Cal. Ct. App. 2017) 13 Cal.App.5th 603, 632. See also Cal.
11 Const., art. I, § 1; Digital Music News LLC v. Superior Court (2014) 226 Cal.App.4th 216, 22–29
12 .) Thus, when a defamation plaintiff seeks disclosure of an online speaker’s identity, a court must
13 balance the speaker’s First Amendment rights against the plaintiff’s right to prosecute its case. (ZL
14 Techs., 13 Cal.App.5th at 611–12.) Neither the United States nor California Supreme Court,
15 however, has set out a standard for striking that balance.

16 In the First and Sixth Appellate Districts, however, a plaintiff must, at a minimum, “make
17 a *prima facie* showing of the elements of libel” to compel disclosure of a defendant’s identity. (
18 Krinsky, 159 Cal.App.4th at 1172; see also Roe v. Halbig (Cal. Ct. App. 2018) 29 Cal.App.5th 286
19 (movant “prevailed” under CCP 1987.2(c) because respondent failed to set forth *prima facie* claim
20 of defamation under *Krinsky*.) Under the *Krinsky* test, the *prima facie* showing requires evidence
21 that supports a legal and factual basis for a libel claim. (159 Cal.App.4th at 1172.)

22 As set forth below, Respondents cannot meet their burden.

23 **2. Respondents Cannot Meet their Evidentiary Burden to Make Out a**
24 **Prima Facie Claim of Defamation.**

25 The Reddit Subpoena should not be enforced because Respondents cannot meet their
26 evidentiary burden to make out a *prima facie* claim of defamation.
27

Under Florida law,² a defamation claim requires (1) publication; (2) falsity; (3) knowledge or reckless disregard as to falsity on a matter concerning a public official (“actual malice”), or negligence on a matter concerning a private person; (4) actual damages; and (5) a defamatory statement. (*Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008); *see also Readon v. WPLG, LLC*, So.3d 1229, 1235 (Fla. Dist. Ct. App. 2021), review denied, 2021 WL 3523557 (Fla. Aug. 11, 2021).) The Court should quash the Reddit Subpoena because Respondents cannot show Doe acted with actual malice; fail to plead publication; the statements are protected opinion or rhetorical hyperbole; and the statements are substantially true.

a) Respondents cannot show actual malice.

The Complaint alleges that Respondents are public figures and that the actual malice standard applies, but Respondents cannot show actual malice. (*See, e.g., Compl. ¶¶ 11–17* (describing the large number of *Sword and Scale’s* listeners and people who discuss it online), *37–44, 49–50* (alleging that Doe acted with actual malice); *see also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).) Where, as here, the plaintiff is a public figure, he must show that the defendant published the allegedly defamatory statements with actual malice, *i.e.*, with knowledge of their falsity or with reckless disregard for their truth. (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974).)

There are two classes of “public figures:” “general public figures” and “limited public figures.” General public figures have enough “fame or notoriety in a community” so they “are always considered public figures,” while limited public figures “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues

² In fact, the law of Texas should apply to Respondents’ claims because Boudet, the subject of the allegedly defamatory statements, is a Texas resident. (*Compl. ¶ 3.*) And under Texas law, the statements identified in Complaint *Exhibits A, C, and D* are time-barred under the one-year statute of limitations for defamation. (*See Ruiz v. Austin Ind. Sch. Dist.*, No. 03-02-00798-CV, at *1 (Tex. App. May 27, 2004) (statute of limitations for defamation claims is one year from the day after the cause of action accrues); *Tex. Civ. Prac. & Rem. Code § 16.002(a)*; *see also Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 615–16 (7th Cir. 2013) (noting that every state court that has considered the single publication rule in the internet context has applied it).) It’s no coincidence that California’s key cases on First Amendment anonymous speech such as *Krinsky* are interpreting Florida law: Plaintiffs regularly try to take advantage of Florida’s longer statute of limitations even when the dispute does not concern conduct in Florida or Florida residents.

involved.” (*Mile Marker, Inc. v. Petersen Publ’g, L.L.C.*, 811 So. 2d 841, 845 (Fla. Dist. Ct. App. 2002) (citing *Gertz*, 418 U.S. at 323).)

Respondents are general public figures: as they plead, *Sword and Scale* enjoyed “skyrocket[ing]” popularity and has “a large social media presence.” (Compl. ¶¶ 11–12.) But if they are not, they are limited public figures because (1) the allegedly defamatory statements relate to a “public controversy” (2) in which they played a central role. (*Mile Marker*, 811 So.2d at 845–46.) A “public controversy” is one about which “a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.” (*Id.*) There is a public controversy here: the initial claims against Boudet were made on the *Sword and Scale* Reddit forum—where fans and critics of the show congregate—and Respondents allege that Doe’s Reddit posts on that forum could have been viewed by tens of thousands of fans and critics. (Compl. ¶¶ 39, 43, 45–46.) Boudet’s #metoo and plagiarism controversies are public controversies. (*McKee v. Cosby*, 874 F.3d 54, 62 (1st Cir. 2017) (finding sexual assault allegations against actor Bill Cosby were public controversy); *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 138 (2d Cir. 1984) (“public ‘controversy’ is any topic upon which sizeable segments of society have different, strongly held views”).)

And Respondents played “a sufficiently central role” in the controversy to be “public figure[s] for purposes of that controversy.” (*Mile Marker*, 811 So.2d at 846 (citation omitted).) One controversy here involves Respondents’ podcast and Boudet’s attempts to silence the anonymous Reddit user who accused him of “grooming” her when she was fifteen. (See *Mastandrea v. Snow*, No. 1D20-3713, Fla. Dist. Ct. App. Feb. 2, 2022) (defending oneself from a defamatory statement can render an individual a limited-purpose public figure).)

The Complaint acknowledges that the “actual malice” standard applies, but its conclusory allegations that Doe acted with actual malice are insufficient to set out a *prima facie* claim. (*From v. Tallahassee Democrat, Inc.*, 400 So. 2d, 52 55–58 (Fla. Dist. Ct. App. 1981).) Instead, a plaintiff must “set forth *facts* which are legally sufficient to establish actual malice.” (*Frieder v. Prince*, 308 So. 2d 132, 134 (Fla. Dist. Ct. App. 1975) (emphasis added).)

1 A defendant acts with “actual malice” when he makes a statement “with knowledge that it
2 was false or with reckless disregard of whether it was false or not.” (*Sullivan*, 376 U.S. at 280.)
3 Recklessness, in turn, “is not measured by whether a reasonably prudent man would have
4 published, or would have investigated before publishing,” and instead requires “sufficient
5 evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the
6 truth of his publication.” (*Readon*, 317 So.3d at 1235 (quoting *St. Amant v. Thompson*, 390 U.S.
7 727, 731 (1968)).) Moreover, actual malice requires more than a departure from reasonable
8 standards: it is not merely a defendant’s “failure to investigate,” but his “purposefully avoid[ing]
9 further investigation with the intent to avoid the truth.” (*Readon*, 317 So.3d at 1235 (quoting
10 *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 701–02 (11th Cir 2016).)

11 The Complaint fails to show that Doe acted with knowledge of falsity or with a reckless
12 disregard for the truth. (*Gertz*, 418 U.S. at 334; *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230,
13 1239 (11th Cir. 1999).) Respondents’ allegation that Doe failed to investigate the substance of
14 their statements (Compl. ¶ 38) is insufficient because mere failure to investigate is not actual
15 malice. Respondents would have to show that Doe “avoided further investigation with the intent to
16 avoid the truth.” (*Readon*, 317 So.3d at 1235.) And as the U.S. Supreme Court has explained,
17 “actual malice” is generally limited to circumstances where a “story is fabricated by the defendant,
18 is the product of his imagination, or is based wholly on an unverified anonymous telephone call.” (*St. Amant*, 390 U.S. at 732.) Nothing in the Complaint provides any indication of fabrication.

20 The statements attributed to Doe cannot support a finding of actual malice because they
21 rely on earlier reports about the same conduct by Boudet. A libel plaintiff cannot prove the
22 defendant’s subjective awareness of probable falsity where the defendant’s allegations “are
23 supported by a multitude of previous reports upon which [he] reasonably relied.” (*Rosanova v.*
24 *Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978); *Moore v. Cecil*, 488 F. Supp. 3d
25 1144 (N.D. Ala. 2020) (no subjective awareness of falsity by use of term “pedophile” or “child
26 molester” in reference to Roy Moore when use was supported by prior reports of misconduct).)
27 Dozens of comments on Reddit and elsewhere on the internet accuse Boudet of plagiarizing a

1 *Rolling Stone* article in one of his episodes. (Jacobs Decl. Ex. E.) And the accusations of improper
2 conduct with a minor stem from a tell-all post about Boudet engaging in an inappropriate
3 relationship with a fifteen-year-old girl. (Jacobs Decl. Ex. C ¶ 10.)

4 Because Respondents cannot show actual malice, the Reddit Subpoena must be quashed.

5 **b) Respondents fail to adequately plead publication.**

6 Respondents fail to plead publication by identifying any specific individual to whom the
7 alleged statements were made and when. Respondents claim only that their “advertisers and
8 business contacts are apprised of the posts on the [Reddit] page” (Compl. ¶ 40), and that Doe
9 should have anticipated that “tens of thousands of viewers would read the statements” (*Id.* at ¶ 39.)
10 They also claim that some of the alleged statements on Reddit were “upvoted” and “commented”
11 on. (*Id.* at ¶ 24.) Florida law requires more.

12 Respondents’ failure to identify with specificity any individual to whom the statements
13 were made dooms their defamation claim under Florida law. In *Buckner v. Lower Fla. Keys Hosp.*
14 *Dist.*, the court found that the plaintiff had not adequately pleaded the publication element of
15 defamation by alleging the defamatory remarks were made to “numerous third parties on
16 numerous occasions.” (403 So. 2d 1025, 1027–28 (Fla. Dist. Ct. App. 1981).) This was
17 insufficient because a complaint must identify the particular person to whom remarks are made
18 with a reasonable degree of certainty. (*Id.*) Respondents’ allegation that the posts were seen by
19 unnamed advertisers and were upvoted or commented on does not satisfy the requirements of
20 *Buckner*.

21 **c) The statements are protected opinion or rhetorical hyperbole.**

22 The Reddit Subpoena also should be quashed because the statements are protected opinion
23 and hyperbole. To constitute defamation, a statement must convey a defamatory meaning:
24 something factually false and damaging to plaintiff’s reputation, when given an ordinary and
25 natural reading in context based on its plain language. (*Seropian v. Forman*, 652 So. 2d 490, 495
26 (Fla. Dist. Ct. App. 1995).) Many kinds of unpleasant expressions fail this test.

1 First, not every insult is defamatory. (See ROBERT D. SACK, SACK ON
2 DEFAMATION, § 2:4.1 (5th ed. 2018) (“a communication that is merely unflattering, annoying,
3 irksome, or embarrassing, or that hurts only the plaintiff’s feelings, is not actionable”).)

4 Second, “opinions cannot be defamatory.” (*Hoon v. Pate Construction Co.*, 607 So. 2d
5 423, 429 (Fla. Dist. Ct. App. 1992).) Under the First Amendment, “there is no such thing as a false
6 idea.” (*Gertz*, 418 U.S. at 339.) The distinction between a protected opinion and an unprotected
7 statement of fact is whether it is objectively falsifiable. (See *Santilli v. Van Erp*, No. 8:17-cv-1797-
8 T-33MAP, 2018 WL 2172554, at *5–6 (M.D. Fla. Apr. 20, 2018).) Further, opinions that are
9 based on facts that are disclosed or otherwise known to the audience are not actionable. (See
10 *Turner v. Wells*, 879 F.3d 1254, 1265 (11th Cir. 2018) (“[I]t is well settled in Florida that
11 commentary or opinion based on accurate facts set forth in an article ‘are not the stuff of libel.’”);
12 *Stembridge v. Mintz*, 652 So. 2d 444, 446 (Fla. Dist. Ct. App. 1995) (protected opinions are based
13 on facts set forth in the article or otherwise known or available to the reader as a member of the
14 public).)

15 Third, rhetorical or hyperbolic statements are not defamatory where they cannot
16 “reasonably [be] interpreted as stating actual facts.” (*Milkovich v. Lorain Journal Co.*, 497 U.S. 1,
17 20 (1990).) Because exaggeration is an “integral part of social discourse,” even highly insulting
18 rhetorical statements are not actionable. (*Horsley v. Rivera*, 292 F.3d 695, 701–02 (11th Cir. 2002)
19 (finding statement on national television that plaintiff was “an accomplice to murder” was
20 rhetorical hyperbole); *Demby v. English*, 667 So. 2d 350, 354 (Fla. Dist. Ct. App. 1995) (letter
21 accusing animal control director of being “inhumane” and “unreasonable” is pure opinion); *Hav v.*
22 *Independent Newspapers, Inc.*, 450 So. 2d 293, 295–96 (Fla. Dist. Ct. App. 1984) (statements
23 referring to the plaintiff as a “crook” and a “criminal” are statements of opinion).)

24 In determining whether the statement is one of fact or mixed opinion (which can be
25 defamatory) or pure opinion (which cannot), a court must examine the statement in its totality and
26 the context in which it was uttered or published. (*Krinsky v. Doe 6* (Cal. Ct. App. 2008) 159
27 Cal.App.4th 1154, 1175 (applying Florida libel law).) This is a key issue “[w]hen a defamation

1 action arises from debate or criticism that has become heated and caustic, as often occurs when
2 speakers use Internet chat rooms or message boards." (*Id.* at 1174.) Courts consider "the nature
3 and full content of the particular communication, as well as the knowledge and understanding of
4 the audience targeted by the publication," including "whether the statements were posted
5 anonymously on an Internet website, as the culture of most electronic bulletin boards encourages
6 discussion participants to play fast and loose with facts, and the use of anonymity or pseudonyms,
7 is a cue to discount the authors' statements accordingly." (*ZL Techs., Inc.*, 13 Cal.App.5th at 625
8 (cleaned up).) The court must "consider all of the words used, not merely a particular phrase or
9 sentence," and "give weight to cautionary terms used by the person publishing the statement and
10 consider all of the circumstances surrounding the statement, including the medium by which the
11 statement is disseminated and the audience to which it is published." (*Id.*)

12 Here, Respondents' Complaint identifies only non-actionable statements: those about
13 Boudet's alleged sexual misconduct and those about alleged plagiarism. Doe addresses each topic
14 in turn.

15 **Sexual Misconduct**

16 The Complaint identifies in Exhibits A and B statements in which Doe purportedly accuses
17 Boudet of sexual misconduct. Each exhibit is addressed below.

18 **Exhibit A.** Exhibit A is an example of a "meme" based on the adult cartoon *Rick and*
19 *Morty*. In the original cartoon, Rick, the paranoid, time-travelling mad scientist, tears down
20 wallpaper to reveal the Pringles logo. Users on Reddit and other social media sites began using the
21 image to show Rick tearing off the wallpaper to reveal various other messages. (See
22 <https://knowyourmeme.com/memes/rick-rips-the-wallpaper>.) Here, the Reddit user who created
23 the image—not Doe—depicted Rick tearing down a poster for the *Sword and Scale* podcast to
24 reveal opinions and impressions of Boudet (that he is a racist, that jokes about rape, etc.). Here,
25 Respondents' claim is that the reference in Exhibit A to "grooming minors" implies "that Boudet
26 is engaged in [p]edophilia." (Compl. ¶¶ 23, 25.) That statement is an opinion based on disclosed
27 facts—specifically, the Reddit post accusing Boudet of inappropriate sexual conduct with a minor.

1 (*DeMoya v. Walsh*, 441 So. 2d 1120 (Fla. Dist. Ct. App. 1983) (comparing actionable opinion
2 implying undisclosed facts with protected opinion based on disclosed facts).) The statement is
3 incapable of defamatory fault against public figures like Respondents: they cannot prove Doe’s
4 subjective awareness of its falsity. A fifteen-year-old credibly accused Boudet of inappropriate
5 sexual misconduct (by posting her story and Boudet’s personal cell phone number) in the same
6 Reddit forum where Respondents claim Doe made the allegedly false statement that Boudet
7 “groom[s] minors.” And finally, the meme is not capable of defamatory meaning because the
8 culture of internet communications and meme-sharing encourages a lack of credence—
9 “reasonable readers of most Facebook pages do not understand posts to be conveying factual
10 information.” (*Murray v. Pronto Installations, Inc.*, No. 8:20-cv-00824, 2020 WL 6728812, at *9-
11 10 (M.D. Fla. Nov. 16, 2020) (citation omitted).)

12 **Exhibit B.** Exhibit B is a Twitter post from an unidentified user whose truncated username
13 begins with “@swordand:”

14 **imnotreallyherekinda @swordand...**

15 The Complaint does not allege why Respondents believe the user is Doe. Exhibit B therefore
16 should not be evaluated as one of their claimed defamatory statements. But even if Doe had made
17 the statement, the complained-of text is the “hashtag” #MikeBoudetgroomedmewhenIwas15. The
18 user’s next tweet adds “Allegedly.” The Complaint provides no further context. Regardless of the
19 identity of the speaker, this statement is also an opinion based on disclosed facts. (Jacobs Decl. Ex.
20 C.)

21 **Plagiarism**

22 Next, Respondents identify statements in Exhibits A, C, and D that purportedly
23 demonstrate that Doe accused Respondents of plagiarism.

24 **Exhibit A.** Respondents again identify the *Rick and Morty* meme, which lists complaints
25 about Boudet. Besides “grooming minors,” which is addressed above, Respondents only
26 specifically set forth the following statements as defamatory: “plagiarism, domestic assault
27 praising, mental health blaming.” (Compl. ¶ 31.) Again, the meme lists a series of general

1 criticisms without any context or background sufficient to show the intended effect. (See Edward
2 L. Nezelek, Inc. v. Sunbeam Television Corp., 413 So. 2d 51, 55 (Fla. 3d DCA 1982) (requiring
3 “sufficient particularity to enable the court to determine whether the publication was
4 defamatory”).) These are generalities or subjective statements. Also, a subjective view about
5 whether Boudet’s conduct amounted to praise or blame is protected opinion.

6 Exhibits C and D. Exhibits C and D are Reddit threads that reference Boudet’s alleged use
7 of materials without attribution. Those statements, however, are buried in the comments without
8 identifying the original post or any other posts in the thread.³ Without the full posts, there is
9 insufficient context to substantiate that Respondents have a viable claim for defamation. (Smith v.
10 Taylor County Pub. Co. Inc., 443 So.2d 1042, 1047 (Fla. Dist. Ct. App. 1983); Morse v. Ripken,
11 707 So.2d 921, 922 (Fla. Dist. Ct. App. 1998).) Specifically, Respondents fail to include the
12 original post in these threads and other comments that precede the posts identified in Exhibits C
13 and D. In Exhibit C, for example, Doe is identified with the blue text “OP” next to their name,
14 indicating that Doe wrote the original post, which is not shown in the exhibit. Without knowing
15 the full context of the original post and the comments that preceded these statements, it is
16 impossible to determine the full context for purposes of evaluating Respondents’ claim. (Smith,
17 443 So.2d at 1047 (requiring the court to examine a statement “in its totality in the context in
18 which it was uttered or published).)

19 Further, like the statement that Boudet “groom[ed] minors,” reports of Boudet’s plagiarism
20 were pervasive before Doe’s allegedly defamatory statements, both on the Internet in general and
21 in the *Sword and Scale* Reddit community. (See Jacobs Decl. Exs. E and F.) Doe’s statements
22 concerning plagiarism therefore are opinions based on disclosed facts and their pervasiveness on
23 Reddit and elsewhere forecloses any finding of subjective awareness of falsity. And like the meme
24

25 ³ Reddit posts can be images, videos, or content, and the person who creates the post is called the
26 “original poster” or “OP,” and those letters appear in blue font next to their pseudonym within the
27 post. In response to the post, other users can leave comments, which can then become threads, or
essentially separate conversations within the original post. Because of the nature of a thread, one
of Respondents’ cherry-picked comments can be responsive to anything—the original post, a
comment to the post, or a preceding comment in a thread. (See, e.g. Jacobs Decl. Ex. F.)

1 in Exhibit A, comments buried in a Reddit thread are not meant to be taken seriously. (*See Murray*
2 , 2020 WL 6728812, at *9-10.) Thus, none of the statements alleged in the Complaint can support
3 a defamation claim under the *Krinsky* and *ZL Technologies* tests applying Florida law because
4 they are protected opinion or hyperbole.⁴

5 **d) The alleged statements are true or substantially true.**

6 Where a plaintiff seeks to unmask an anonymous speaker on a matter of public concern, it
7 must make a *prima facie* showing that their statements were false. (*ZL Techs., Inc.*, 13 Cal.App.5th
8 603, 633 (“the constitutional protections weigh in favor of requiring the plaintiff to make a *prima*
9 *facie* evidentiary showing of the elements of defamation, including falsity, before disclosure of a
10 defendant’s identity can be compelled”).) A statement need not be “perfectly accurate if the ‘gist’
11 or the ‘sting’ of the statement is true,” and it “is not considered false unless it would have a
12 different effect on the mind of the reader from that which the pleaded truth would have produced.”
13 (*Smith v. Cuban Am. Nat’l Found.*, 731 So. 2d 702, 706 (Fla. Dist. Ct. App. 1999)).)

14 Respondents’ mere allegations that the statements are false are insufficient to meet their
15 burden to show falsity. For this reason, and each of the reasons above, the Court should not permit
16 the Reddit Subpoena to be enforced.

17 **C. RESPONDENTS FAIL TO PLEAD PERSONAL JURISDICTION OVER**
18 **DOE IN FLORIDA**

19 Another reason to quash the Reddit Subpoena is that the Complaint is not viable because
20 Respondents fail to properly plead personal jurisdiction over Doe. Under Florida’s long-arm
21 statute, a court may exercise specific personal jurisdiction over a non-resident defendant “for ...
22 [c]omitting a tortious act within this state.” (Fla. Stat. § 48.193(1)(a)(2) (alterations added).) A
23 nonresident defendant “commits the tortious act of defamation in Florida” when he “makes

24 ⁴ The statements are also privileged. (*Boehm v. American Bankers Ins. Group*, 557 So. 2d 91, 96
25 (Fla. Dist. Ct. App. 1990).) Doe had a moral and social obligation as the administrator of the
26 *Sword and Scale* Reddit forum to communicate in good faith to other users on the site about the
27 public allegations surrounding Boudet and his show. (*Smith-Johnson v. Thrivent Financial for*
Lutherans, No. 8:03-cv-2551-T-30EAJ, 2005 WL 1705471, at *15 (M.D. Fla. July 20, 2005)
(burden on libel plaintiff to prove that a statement made in accordance with a qualified privilege
was made with “express malice”).)

1 allegedly defamatory statements about a Florida resident by posting those statements on a website,
2 provided that the website posts containing the statements are accessible in Florida and accessed in
3 Florida." (*Internet Sols. Corp. v. Marshall*, 39 So. 3d 1201, 1216 (Fla. 2010).) Where the alleged
4 defamatory statement is published on a website to readers worldwide, the pivotal issue is whether
5 the information was "accessed, and thereby published, in Florida." (*Catalyst Pharms., Inc. v.*
6 *Fullerton*, No. 1:16-cv-25365, 2017 WL 6558397, at *6 (S.D. Fla. Aug. 8, 2017), *aff'd* 748 F.
7 App'x 944, 947 (11th Cir. 2018) (dismissing complaint for lack of personal jurisdiction because
8 no facts showing statements were accessed in Florida).)

9 Here, Respondents fail to allege personal jurisdiction over Doe because they merely state
10 that the purported defamatory statements are *accessible* in Florida, and *can be* viewed in Florida,
11 not that they were accessed or viewed. (See *Compl.* ¶ 7;⁵ see also *Mar. Exec., LLC v. Larson*
12 *Elecs., LLC*, No. 17-cv-60323, 2018 WL 2938376, at *4 (S.D. Fla. June 11, 2018) (plaintiff failed
13 to satisfy Florida long-arm statute because it did not "identify a single third-party who it contends
14 accessed the alleged defamatory material within Florida"); *Sovereign Offshore Servs., LLC v.*
15 *Shames*, No. 17-cv-80172, 2017 WL 7798664, at *4 (S.D. Fla. Aug. 3, 2017) (even a
16 "[d]efendant's awareness that [its publication] would be accessible in Florida, by virtue of the
17 nature of the world-wide web, . . . [is] insufficient to establish that [d]efendant has minimum
18 contacts with Florida").) Thus, the Complaint is subject to dismissal for lack of personal
19 jurisdiction and a subpoena issued in that action should not be enforced. (*Hudson v. Hudson*, 52
20 Cal.2d 735 (Cal. 1959) (no full faith and credit where the issuing court lacked jurisdiction);
21 *Haywood v. Superior Court of Los Angeles County*, 77 Cal.App.4th 949, 957 (Cal. Ct. App. 2000)
22 (California not required to grant full faith and credit to an order where the issuing court lacked
23 jurisdiction over the matter); *Underwriters Nat. Assur. Co. v. N.C. Life and Acc. and Health Ins.*
24 *Guaranty Ass'n*, 455 U.S. 691, 704 (1982) ("[I]f [the issuing court] did not have jurisdiction over
25 the subject matter or the relevant parties, full faith and credit need not be given.") (citing *Nevada*

26
27 ⁵ Boudet's failure here is telling, as he properly alleged both accessibility and actual access in his
earlier Florida defamation lawsuit against the fifteen-year-old girl who claimed he "groomed" her.
(See Jacobs Decl. *Ex. C* ¶ 5.)

1 v. Hall, 440 U.S. 410, 421 (1979)).)

2 **D. DOE IS ENTITLED TO FEES AND COSTS**

3 Cal. Civ. Proc. 1987.2(c) provides that attorneys' fees and reasonable costs *shall* be
4 awarded to a moving party that files a successful petition to quash or modify a subpoena under
5 Cal. Civ. Proc. 1987.1 if: (1) the subpoena requests personally identifying information as defined
6 by section 1798.79.8 of the Cal. Civ. Code; (2) for use in an action pending in another state; (3)
7 the subpoena has been served on any Internet service provider or provider of any other interactive
8 computer service as defined in Section 230(t)(2) of Title 47 of the United States Code; (4) the
9 underlying action arises from the moving party's exercise of free speech rights; and (5) the
10 respondent has failed to make a *prima facie* showing of a cause of action.

11 These requirements are met here and Doe's request for relief is timely. (*See Jacobs Decl.*
12 *Ex. H*) (stipulating to extend the subpoena return date to April 25th).) The Reddit Subpoena seeks
13 the name, physical address, IP address, email address, and mobile phone number of Doe in
14 connection with a lawsuit in Florida. (*Jacobs Decl. Ex. A* at Att. 3; *Ex. B*.) As noted above in
15 Section III(A), California Civil Code § 1798.79.8(b)(7)-(8) provide that IP addresses and "[a]ny []
16 information ... that ... would serve to identify any individual" constitute "personally identifying
17 information." Further, the Reddit Subpoena has been served upon Reddit, Inc., on whose website
18 users can interface with one another by posting content and commenting on the same. (*Jacobs*
19 *Decl. Ex. A*; *see also In re DMCA Subpoena To Reddit, Inc.*, 383 F. Supp. 3d 900 (N.D. Cal.
20 2019).) As an information content provider, Reddit falls within the expansive definition of an
21 "Interactive Computer Service" set forth in 47 U.S.C. § 230(t)(2). ("The term 'interactive
22 computer service' means any information service ... that provides or enables computer access by
23 multiple users to a computer server").

24 Finally, Doe should also be awarded attorneys' fees under CCP 1987.2(a) because the
25 motion is facially invalid and "without substantial justification." Before filing this petition, Doe's
26 counsel told Respondents' counsel that it was contemplating a motion to quash and explained that
27 the allegedly defamatory statements were not sufficient to justify its complaint and subpoena.

1 Respondents refused to withdraw their subpoena, forcing Doe to bring this motion. (Jacobs Decl.
2 Exs. G & I.)

3 For all these reasons, Doe is entitled to reasonable attorneys' fees and costs incurred in
4 preparing this motion. Doe will include their calculation of fees and costs with their reply brief.

5 **IV. CONCLUSION**

6 For the reasons set forth above, Doe petitions that the Court quash the Subpoena and grant
7 them their reasonable fees and costs incurred in preparing of this motion.

8
9 Dated: September 13, 2022

Respectfully submitted,

10 ETHAN JACOBS LAW CORPORATION

11
12 By: /s/ Ethan Jacobs
13 Ethan Jacobs
14 Attorneys for Petitioner John Doe
15
16
17
18
19
20
21
22
23
24
25
26
27