UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIZABETH SINES, *ET AL.*, Movants, v. MICHAEL PEINOVICH, Respondent.	Misc. Case No. 7-20-mc-00243 Related to Civil Action No. 3:17-cv-00072-NKM, pending in the United States District Court for the Western District of Virginia, Charlottesville Division
MICHAEL PEINOVICH, Movant, v. ELIZABETH SINES, *ET AL.*, Respondents.	Misc. Case No. 7-20-mc-00245

RESPONDENTS' OPPOSITION TO MOVANTS' MOTION TO QUASH

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INTRODUCTION

Movant Michael Peinovich fails to justify his motion to quash subpoenas to produce documents and appear at a deposition properly served by Plaintiffs Elizabeth Sines, Seth Wispelwey, Marissa Blair, April Muñiz, Marcus Martin, Natalie Romero, Chelsea Alvarado, John Doe, and Thomas Baker ("Plaintiffs") as part of an ongoing suit pending in the Western District of Virginia (*Sines v. Kessler*, No. 3:17-CV-00072-NKM (the "Charlottesville Action")). Peinovich's objections are entirely without merit, and do not accurately characterize the applicable law. This Court should deny Peinovich's motion to quash in its entirety.

PROCEDURAL HISTORY[1]

Plaintiffs filed the Charlottesville Action on October 10, 2017, asserting federal and state civil rights violations against a group of defendants involved in planning the August 11-12, 2017 Unite the Right ("UTR") rally. Peinovich was originally named as a defendant, but was dismissed from the Charlottesville Action at the motion to dismiss stage. *See* ECF Nos. 1, ¶ 43; 335.[2] After Peinovich was dismissed, Plaintiffs focused on obtaining discovery from the remaining named defendants in the Charlottesville Action (collectively, "UTR Defendants"), consistent with Rule 45's policy goals of "avoid[ing] undue burden or expense" on a non-party.

Unfortunately, the UTR Defendants have largely been non-cooperative throughout the years-long discovery process. *See* Movants' Motion to Compel, *Sines et al. v. Peinovich*, No. 7:20-mc-00243, (S.D.N.Y), Dkt. 3 (hereinafter, "MTC") at 7 (detailing discovery disputes).

[1] This abbreviated procedural history provides only the context necessary for this Court to address the present subpoenas. For a full factual background and procedural history, please refer to Respondents' Motion to Compel. *Sines et al. v. Peinovich*, No. 7:20-mc-00243, Dkt. 3 at 2-9 (June 29, 2020 S.D.N.Y.).

[2] ECF numbers refer to the docket numbers in *Sines v. Kessler*, No. 3:17-cv-00072-NKM (W.D. Va.).

Through the limited documents Plaintiffs have received from UTR Defendants, Plaintiffs learned that Peinovich communicated with the leaders and organizers of UTR and helped Defendants plan and promote UTR. *E.g.*, Ex. B.[3] Plaintiffs also became aware that some of the UTR Defendants failed to preserve, and even intentionally destroyed, relevant documents. *See* MTC at 7 (listing filings). This means that any information in Peinovich's possession or control is of critical importance to Plaintiffs' claims in the Charlottesville Action.

On May 22, 2020, Plaintiffs issued a narrowly tailored non-party subpoena *duces tecum* on Peinovich pursuant to Fed. R. Civ. P. 45 containing 12 document requests. Dkt. 2-1[4] at 4–34 ("Document Subpoena"). Roughly a week later, the process server successfully served the Document Subpoena, as well as a subpoena to give deposition testimony remotely over videoconference on June 30, 2020 at 9:30 AM, despite Peinovich's best attempts to avoid service. Dkt. 2-1 at 1–3 ("Deposition Subpoena"); Ex. C (detailing attempts to serve and observations during those efforts).

On June 12, 2020, Peinovich objected to both subpoenas through counsel. Along with his objections to the Document Subpoena and Deposition Subpoena, Peinovich produced three documents: two text messages sent to his mother and a document Plaintiffs cited in the Charlottesville Action Complaint. Dkt. 2-6 ("Objections") at 3. Peinovich did not state these three documents constituted all of the documents in his possession, and claimed the Document Subpoena was invalid. *Id.* at 5–6. Counsel for Plaintiffs sent a letter to Peinovich on June 15, 2020 responding to his objections and confirming that Peinovich would comply with both subpoenas.

[3] Citations to letter exhibits refer to the Declaration of Scott W. Stemetzki, Esq. in Support of Respondents' Opposition to the Motion to Quash, filed herewith.

[4] Citations to the docket, or abbreviated "Dkt.," refer to the documents filed in *Peinovich v. Sines et. al.*, No. 7:20-mc-00245 (S.D.N.Y.), which has been consolidated with *Sines et. al. v. Peinovich*, No. 7:20-mc-00243 (S.D.N.Y).

Dkt. 2-7 at 3–4. Peinovich's counsel responded on June 22, 2020, doubling down on Peinovich's objections and making it clear Peinovich would not comply. Dkt. 2-8. Counsel for Plaintiffs and Peinovich were unable to resolve their disagreements over the phone on June 26, 2020.

On June 29, 2020 Plaintiffs moved to compel Peinovich to comply with the requests in both Subpoenas before third party discovery closes in the Charlottesville Action on July 24, 2020. *See generally* MTC. In the MTC, Plaintiffs withdrew Document Subpoena Request No. 12. *Id.* at 10 n. 14. The very next day, counsel for Peinovich filed a motion to quash Plaintiffs' Subpoenas in a separate action. Dkt. 3 (hereinafter, "MTQ"). On July 14, 2020, the Court consolidated the MTC and MTQ into the same action. Order, *Sines et al. v. Peinovich*, No. 7:20-mc-00243, Dkt. 6 (S.D.N.Y. July 14, 2020).

Third-party discovery closes on July 24, 2020 in the Charlottesville Action. ECF No. 597. Parties may depose third parties after the discovery deadline if they made a good-faith effort to serve them during the discovery period. ECF No. 791. The case is set for trial on October 26, 2020. ECF No. 597.

LEGAL STANDARD

Under Federal Rules of Civil Procedure 45, a party may serve a subpoena commanding a nonparty to "attend and testify; [or] produce designated documents . . . in that person's possession, custody, or control . . . ." Fed. R. Civ. P. 45(a)(1)(A)(iii). Under Rule 26(b), documents which are relevant to the parties' claims and/or defense, and are proportional to the needs of the case are discoverable. Fed R. Civ. P. 26(b)(1); *Malibu Media, LLC v. Doe*, 2018 WL 6011615, at *2 (S.D.N.Y. 2018) (explaining Rule 45 subpoenas are governed by the relevance requirements of Rule 26).

Third parties seeking to challenge discovery requests bear the burden of persuasion that can do so through a motion to quash. *Dukes v. NYCERS*, 331 F.R.D. 464, 469 (S.D.N.Y. 2019)

(the "burden of persuasion in a motion to quash a subpoena . . . is borne by the movant" (citation omitted)). Movants seeking to quash a properly served subpoena must demonstrate compliance would subject the party to an "undue burden," requiring the movant to specifically identify "the manner and extent of the burden and the probable negative consequences of insisting on compliance." *Shaw v. Arena*, 2018 WL 324896, at *2 (S.D.N.Y. 2018) (citation omitted). Moreover, "it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition." *Am. High-Income Tr. v. AlliedSignal Inc*., 2006 WL 3545432, at *2 (S.D.N.Y. 2006) (citation omitted). District courts have the authority to modify subpoenas otherwise enforceable subpoenas, and "modification is generally preferred over quashing of a subpoena." *Chevron Corp. v. Donziger*, 2020 WL 635556, at *6 (S.D.N.Y. 2020). Peinovich has never argued the probable negative consequences of compliance with either properly served Subpoena in his MTQ, nor articulated an appropriate basis for an order barring his deposition.

ARGUMENT

I. PLAINTIFFS PROPERLY NOTICED PEINOVICH'S REMOTE DEPOSITION.

Peinovich objects to Plaintiffs' deposition subpoena because it "fails to specify an actual place for the deposition, whether remote or otherwise, and thus runs afoul of FRCP 45(a)(1)(3)." MTQ at 7. As explained in Plaintiffs' Motion to Compel, the deposition subpoena says that Peinovich's deposition will be remote, taken over video conferencing software, and before a duly sworn stenographer and videographer. *See* Deposition Subpoena. Thus, Peinovich may attend this deposition from any location with an adequate internet connection using either a computer and webcam or video camera.

Remote depositions are contemplated both by the Federal Rules of Civil Procedure and by this District. *See* Fed. R. Civ. P. 30(b)(4) ("The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means."); *see also Angamarca v.*

Da Ciro, Inc., 303 F.R.D. 445, 447 (S.D.N.Y. 2012) (holding that a remote deposition of a party who could not travel to the United States was valid and necessary). Indeed, throughout the COVID-19 pandemic, this District has encouraged remote depositions to promote judicial efficiency, limit delays, and keep cases on track while mitigating health risks germane to in person depositions. *E.g.*, *City of Almaty, Kazakhstan v. Sater*, 2020 WL 2765084, at * 3 (S.D.N.Y. 2020) (holding the remote deposition of a non-party would not be unduly burdensome since the court "has encouraged the taking of depositions remotely by video" due to the COVID-19 pandemic); Standing Order of Judge Lewis J. Linman, S.D.N.Y., https://nysd.uscourts.gov/sites/default/files/practice_documents/LJL%20Liman%20COVID-19%20Emergency%20Individual%20Practices%20in%20Civil%20and%20Criminal%20Cases_FINAL_3.19.2020.pdf (ordering depositions to be taken via telephone, video conference, or other remote means in light of COVID-19). Peinovich has not articulated any legitimate reasons or any appropriate basis to quash Plaintiffs' Deposition Subpoena, and has not met his burden. *See Am. High-Income Tr.*, 2006 WL 3545432, at *2 (emphasizing the difficulty of demonstrating an appropriate basis to bar a deposition). Peinovich's MTQ should be denied.

II. THERE IS NO TIME REQUIREMENT FOR NON-PARTY SUBPOENAS ISSUED UNDER RULE 45.

Peinovich also moves to quash both Plaintiffs' Document Subpoena and Deposition Subpoena because Plaintiffs did not give Peinovich at least 30 days' notice to produce documents and appear for a deposition. *See* MTQ at 7. This is incorrect. There is no requirement to give 30 days' notice in Rule 45. Indeed, Rule 45 itself contemplates that the time specified for compliance could be less than 30 days. Fed R. Civ. P. 45(d)(2)(B) (requiring objections "before the ***earlier*** of the time specified for compliance or 14 days after the subpoena is served") (emphasis added).

The sole source Peinovich cites in support of this argument is an excerpt from a discovery handbook, which explains that party subpoenas require 30 days' notice, but as a non-party, this rule does not apply to him. *See* Grenig & Kinsler, *Handbook Fed. Civ. Disc. & Disclosure*, § 9:27 (4th ed.) (July 2019 update) ("A question that often arises is whether a ***party*** may use a subpoena duces tecum to compel documents from another party in fewer than 30 days. By implication, a subpoena duces tecum ***issued to a party*** must provide at least 30 days for a response unless the court shortens the time.") (emphasis added). Thus, even this authority is inapplicable.

III. THE DOCUMENT SUBPOENA SEEKS DOCUMENTS TAILORED TO THE NEEDS OF PLAINTIFFS' CLAIMS AND IS NOT OVERBROAD.

Peinovich objects that Plaintiffs' requests are overbroad because they seek "any and all" documents for some topics. MTQ at 4. This objection fails because he ignores that Plaintiffs' requests are limited only to topics relevant to the issues in the underlying case.

Citing *In re Asbestos Products Liability Litigation. (No. VI)*, 256 F.R.D. 151, 157 (E.D. Pa. 2009), Peinovich claims that document requests seeking "all documents" related to a relevant topic are categorically improper. But *In re Asbestos* provides no such rule, as the court there merely limited the scope of certain subpoenas to issues relevant to the case at hand. *Id.* Defendants in that case served third-party subpoenas to numerous doctors seeking, among other things, the doctors' tax returns, employment agreements, and certain advertising materials. The court held such documents were not relevant to the actual issue in the case: the medical diagnoses of certain patients filing claims in the associated multidistrict litigation proceeding. *Id.* Notably, the court narrowed the scope of certain requests rather than quashing the subpoena in whole. *Id.* Here, by contrast, Plaintiffs' Document Subpoena seeks information from Peinovich directly relevant to Plaintiffs' claims, including documents regarding the planning, advertising, and coordination of the UTR rally. *In re Asbestos Products* is not applicable.

Peinovich also cites a separate opinion connected to the underlying matter addressing the validity of another third-party document subpoena. *See Sines v. Kessler*, 325 F.R.D. 563, 569 (E.D. La. 2018). That action sought to enforce a document subpoena seeking different documents than those at issue here, and from a different third party to the Charlottesville Action. Rather than prove Peinovich's argument, the judge in that case *overruled* most of the objections to the document subpoena and ordered compliance from the third party. *Id.* Although the Eastern District of Louisiana did sustain a few objections, the order largely compelled production of the requested information, modified as needed by the court. *Id.* This ruling does not support Peinovich's attempt to quash the present subpoenas.

IV. PEINOVICH'S BOILERPLATE OBJECTIONS TO PLAINTIFFS' DOCUMENT REQUESTS ARE IMPROPER AND UNSUPPORTED.

Peinovich asserts generic objections lacking specificity or differentiation in response to Plaintiffs' document requests. As explained in the MTC, the following blanket objections are stated for *every request*: (1) an objection that the requests "do[] not describe the materials sought with any reasonable [*sic*] as mandated by FRCP 34(B)(1)(A)"; (2) an objection that the requests are "so incredibly broad that it could not but sweep materials not relevant to [Plaintiffs'] claims."; (3) an objection that the request "could seek materials covered by the attorney-client and work product privilege"; and objections to all requests, save for 1 and 3, because they are "palpably improper" and "harassing." *See* MTC at 11. Peinovich's motion to quash relies on similar refrains of "palpably improper," "broad" and "vague" in detailing his objections to Requests No. 2, 5, 6, 7, 8, 9, 10, 11, and 12. *See* MTQ at 5–7. Such boilerplate objections devoid of any specificity are improper and do not provide grounds to avoid Peinovich's discovery obligations. *E.g.*, *Taylor Precision Prods., Inc. v. Larimer Grp., Inc.*, 2017 WL 10221320, at *4-5 (S.D.N.Y. 2017) (rejecting objections because third party "failed to state, with any specificity, how or why any

given unidentified document request it wishes to challenge is irrelevant" and "failed to demonstrate with any specificity that the . . . subpoena is overly broad and unduly burdensome"); *Jacoby v. Hartford Life & Accident Ins. Co.*, 254 F.R.D. 477, 478 (S.D.N.Y 2009) ("[B]oilerplate objections that include unsubstantiated claims of undue burden, overbreadth and lack of relevancy . . . are a paradigm of discovery abuse."). In fact, courts deem reliance on generic objections as a waiver of any other objections a person may have. *See Fischer v. Forrest*, 2017 WL 773964, at *3 (S.D.N.Y. 2017) ("[A]ny discovery response that does not . . . state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections (except as to privilege)."). Accordingly, Peinovich's MTQ should not be granted as to any of Plaintiffs' requests due to his summary reliance on boilerplate objections, as this constitutes a waiver of any other objections.

Notwithstanding the fact that Peinovich has effectively waived his objections to Plaintiffs' Document Subpoena, Plaintiffs respond to the arguments advanced in Peinovich's MTQ for the following requests:

Request No. 2: Peinovich objects to this request as "palpably improper" and "almost unlimited in scope," calling it "manifest abuse" without explaining why it is improper, unlimited in scope, or is abusive; nor does he clarify what information he would need to respond to the request. *See* MTQ at 5. This request seeks documents and communications relating to events and rallies prior to UTR, as referenced in the Second Amended Complaint, ECF No. 557 ("SAC"), and are relevant to Plaintiffs' claims. *See* SAC ¶¶ 45-58.

Request Nos. 5, 6 and 7: Peinovich objects to these requests as "palpably improper" and overbroad, again without specifying what information he would need to respond to the requests. *See* MTQ at 5–6. These requests seek Peinovich's communications and documents pertaining to

UTR and its participants, which will show how the Charlottesville Action defendants coordinated and planned UTR. As an advertised speaker at UTR who actively promoted the event for weeks, it is likely that Peinovich possesses or controls such documents or communications. Peinovich further objects to request No. 6 as an unlimited fishing expedition, again without explanation. As explained in the SAC, UTR was almost exclusively planned through social media, so information relating to Peinovich's social media accounts would be relevant and likely to lead to admissible evidence for Plaintiffs' claims.

Request No. 8: Peinovich objects to this request as "palpably improper" without explaining why it is improper or clarifying what information he would need to respond to the request. *See* MTQ at 6. This request is narrowly tailored and directly relevant to Plaintiffs' claims, as it requests documents and communications pertaining to other white supremacist rallies in Charlottesville in the three months preceding UTR, which were referenced in the SAC.

Request No. 9: Peinovich objects to this request as "palpably improper" and criticizes the request for failing to relate to UTR. However, as explained in Plaintiffs' MTC, Plaintiffs seek to establish Peinovich's control of therightstuff.biz. That website hosts podcasts, some made by Peinovich, that promoted UTR, demonstrate connections between various UTR Defendants, offer first-hand accounts of UTR, and discuss the Charlottesville Action. *See* MTC at 10. This information will allow Plaintiffs to authenticate documents from therightstuff.biz, and demonstrate Peinovich's statements and first-hand knowledge about events recorded on the podcasts hosted on therightstuff.biz. It is thus relevant to Plaintiffs' claims.

Request No. 10: Peinovich objects to this request as being palpably improper and overly broad and vague, without any explanation as to why it is palpably improper, or what information he would need to respond to the request. First, Peinovich asserts this allegation is vague as to what

"members associated with 'the Daily Shoah' or 'The Right Stuff' means. MTQ at 6. Peinovich is confused, because the introductory language of Request No. 10 asks for documents, communications, and social media related to "The Daily Shoah" *or other podcasts* hosted by members or affiliates of "The Right Stuff" which concern subpoints i-iii. Put another way, this Request asks for documents, communications, or social media by therightstuff.biz's various hosts and content creators relating to: (i) Unite the Right, or (ii) those who planned, supported, or coordinated Unite the Right, or (iii) any defendant in the SAC. This request is not overbroad, even with regard to parts (ii) and (iii) because Plaintiffs anticipate that some of these communications, documents, and social media in Peinovich's possession will reveal that the Charlottesville Action defendants were motivated in part by racial animus, which is the basis of several of Plaintiffs' allegations. *E.g.*, SAC ¶¶ 89, 95, 98, 102, 120, 127, 149, 160-62, 175, 178, 186–89; 201, 202, 214, 235, 311, 353, 364-67.

Further, that the podcasts may take considerable time to review is of no consequence—Peinovich was well aware that he would be expected to comply with Plaintiffs' discovery requests even after being dismissed as a party to the Charlottesville Action. *See* ECF No. 287 at 2–3 noting that Peinovich's information was still discoverable as a third party when denying one of Peinovich's attempts to avoid party discovery); *see also* MTC at 12–13.

Finally, Peinovich moved to quash this request because some of the podcasts are publicly available. However, Plaintiffs have evidence that Peinovich removed some podcasts from the publicly available website to hide discussions of violence. Ex. A. Plaintiffs need any removed podcasts. This request also seeks documents, communications, and social media which may not be publicly available. Peinovich has no excuse to withhold those documents.

Request No. 11: Peinovich objects to this request as overly broad and vague, and as not

relating to the allegations in the SAC. To the contrary, this request is narrowly tailored and specifically seeks "documents and communications concerning any lawsuits, claims of violence, or arrests relating to racially, ethnically, or religiously motivated conduct by [Peinovich] or any defendant named in the [SAC]." Document Subpoena at 12. Again, Peinovich does not explain why this request is overly broad or vague. This request is relevant to Plaintiffs' claims because one of the elements Plaintiffs must prove is that the Charlottesville Action defendants were motivated in part by racial animus. *E.g.*, SAC ¶¶ 89, 95, 98, 102, 120, 127, 149, 160-62, 175, 178, 186-89; 201, 202, 214, 235, 311, 353, 364-67.

Because these requests each fall within the scope of acceptable discovery under Rule 26, and because Peinovich has failed to either demonstrate that compliance with the requests would subject him to an undue burden or to specify the "manner and extent of the burden and probable negative consequences" of complying with Plaintiffs' Document Subpoena, his motion to quash should be denied. *See Shaw*, 2018 WL 324896, at *2 (citation omitted).

V. PLAINTIFFS' DOCUMENT REQUESTS ARE NOT DUPLICATIVE OF PEINOVICH'S 2018 INTERROGATORY RESPONSES.

Peinovich also states that he already provided relevant information in his possession to Plaintiffs via interrogatory responses dated June 11, 2018. *See* MTQ at 5; *see also* Objections at 2–4 (objecting that Request Nos. 2 and 4-9 request duplicative information).

This argument defies logic and common sense—interrogatory responses do not negate the requirement to produce documents. If that were the case, no party or third party would ever produce documents, and would merely rely upon written discovery responses. Notably, Peinovich did not, and has not meaningfully responded to any of Plaintiffs' document requests: Peinovich vigorously fought Plaintiffs' discovery requests while he was a party to the Charlottesville Action, filing multiple discovery requests, yet never actually producing any documents. *See* MTC at 6

(citing Charlottesville Action, ECF Nos. 224, 226, 258, 309, and 331). In response to Plaintiffs' Document Subpoena, Peinovich only produced three documents, including one which was referenced in the Charlottesville Action Complaint. Further, that Peinovich is receiving discovery requests as a third party in addition to those received when he was a party, is not grounds for quashing the subpoena. Peinovich knew he would be expected to comply with third party discovery requests in the Charlottesville Action. ECF No. 287 at 2–3; *see also* MTC at 12–13.

VI. PEINOVICH POSSESSES INFORMATION WHICH PLAINTIFFS CANNOT GET FROM PARTIES TO THE CHARLOTTESVILLE ACTION.

Another ground for Peinovich's motion to quash is that Plaintiffs have not shown that they cannot obtain the requested discovery from other parties. This is untrue. Again, Peinovich was fully aware that relevant information in his possession is still discoverable, even as a nonparty. *See* ECF No. 287 at 2–3; MTC at 12–13. As detailed in the MTC, Plaintiffs only sought discovery from Peinovich after making significant efforts to receive documents from defendants in the Charlottesville Action. *See* MTC at 6–7 (summarizing discovery efforts and sanctions issued).

When Peinovich was a named defendant in the Charlottesville Action, he similarly attempted to eschew his responsibility to comply with discovery requests. *See id.* at 6. Based on the discovery received from the UTR Defendants to date, Plaintiffs have learned that Peinovich actively communicated with the leaders of the UTR events and helped them plan and promote the rally in Charlottesville. *E.g.*, Ex. B. Moreover, Plaintiffs discovered that the UTR organizers failed to preserve—and in some instances, intentionally destroyed—documents relevant to the Charlottesville Action. *See* ECF No. 539 at 14–15; ECF No. 671 at 8–9. As a result, Peinovich likely has relevant materials which have not been produced by other parties to the suit.

Notably, the two documents produced by Peinovich in response to the Document Subpoena were documents that Plaintiffs had not received from any Charlottesville Action party previously,

making it clear that Peinovich does possess unique and potentially relevant information that is subject to disclosure. *See* Objections at 3.

The case law cited by Peinovich in support of this argument is inapposite. First, the third-party document requests at issue in *Vamplew v. Wayne State University Board of Governors* differ from those in this action. In *Vamplew*, all of the requested documents had been transmitted to the party medical center. *See* 2013 WL 3188879, at *2–3 (E.D. Mich. 2013). As a result, the party medical center possessed all relevant documents that the third-party medical center would have had. *Id.* Peinovich has not, and cannot allege any similar facts in this case: Peinovich has not transferred relevant records to any party in the Charlottesville Action.

Second, the underlying facts in *Acuity v. Kerstiens Home & Designs, Inc.* differ from the instant case. *See* 2018 WL 3375015 (S.D. Ind. 2018). The *Acuity* court found that the requests in *Acuity* were not relevant to the declaratory judgment at issue. *Id.* at *2. Here, the requests made by Plaintiffs are clearly relevant to the underlying Charlottesville Action. *See* MTC at 10–11 (detailing the relevance of Plaintiffs' requests). Additionally, the plaintiff in *Acuity* did not make a showing or argument that the requested information cannot be obtained from a party, unlike the argument just set forth by Plaintiffs in the paragraphs above. *See* 2018 WL 3375015, at *2. Because Plaintiffs have demonstrated that Peinovich possesses information that is likely unobtainable from other parties, his motion to quash on this ground should be denied.

VII. PLAINTIFFS ARE NOT JUDICIALLY ESTOPPED FROM SEEKING RELEVANT EVIDENCE AND TESTIMONY FROM PEINOVICH.

Peinovich asserts that Plaintiff Seth Wispelwey "took the position that the knowledge of who perpetrated violence at the Unite the Right Rally … was simply not relevant to any parties' claims or defenses." MTQ at 2. Based on Wispelwey's objection to an interrogatory, Peinovich

contends that Plaintiffs should be judicially estopped from seeking critical evidence through the relevant subpoenas. *Id*. This argument fails.

To begin, Peinovich ignores that Wispelwey is only one of nine plaintiffs in the Charlottesville Action, all of whom issued the Document Subpoena. Even assuming that Wispelwey is somehow judicially estopped from seeking certain information (which he is not), all of the remaining plaintiffs are still entitled to review the relevant discovery. This, by itself, is dispositive.

Additionally, Peinovich's argument is meritless because objections or responses to interrogatories in an underlying matter do not render a non-party subpoena unenforceable. The scope of discovery permits discovery of information "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); *Malibu Media*, 2018 WL 6011615, at *2 (explaining Rule 45 subpoenas are governed by the relevance requirements of Rule 26, which allows "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense"). Any objections made, or discovery sought, in the underlying matter does not affect the propriety of the document requests served on Peinovich, who possesses information directly relevant to the Plaintiffs' claims in this action. Peinovich cannot fashion a shield from a single objection to prevent compliance with the Document Subpoena.

Peinovich also fails to establish judicial estoppel. For a court to apply judicial estoppel, "the inconsistent position must have been adopted by the court in some manner." *Peralta v. Vasquez*, 467 F.3d 98, 105 (2d Cir. 2006).[5] The W.D. Va. court presiding over the Charlottesville

[5] The case law relied upon in Peinovich's motion to quash similarly explains that a court must have previously adopted the contested position to apply judicial estoppel. *See* MTQ at 2 (citing *Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 619 (2d Cir. 2012) (explaining judicial estoppel applies only when "the party seeking to assert this new position previously persuaded a court to accept its earlier position")).

Action has never ruled on the validity of Wispelwey's objections. Therefore, there is no conceivable theory under which the court could have "adopted" Wispelwey's position. Accordingly, arguments premised on principles of judicial estoppel are not relevant here.

Further, Peinovich mischaracterizes the scope of Wispelwey's interrogatory objection. Peinovich's interrogatories asked Wispelwey about the identity of the author of an online post that described Antifa's purported goals during the UTR rally. Wispelwey properly objected to this interrogatory on relevance grounds, as the identity of the author and related information requested did not bear on any party's claims or defenses. A valid objection to providing the identity of the author of an unvetted online post is a monumental leap from the position that "the knowledge of who perpetrated violence at the Unite the Right Rally" is irrelevant to any claims or defenses in the Charlottesville Action.

VIII. PEINOVICH'S ARGUMENTS OF BAD FAITH AND REQUEST FOR SANCTIONS ARE FRIVOLOUS.

Peinovich contends that Wispelwey has proceeded in bad faith, and that this conduct warrants sanctions, because (a) a report prepared by the law firm Hunton & Williams analyzing the events before and during the Rally (the "Heaphy Report") observed that progressive groups participated in violence, and (b) an unnamed person wrote a blog post that "celebrated the violence of antifa." MTQ at 2-3. These arguments are irrelevant and illogical, and they must fail.

First, all the alleged bad faith actions are irrelevant because they do not relate to the validity of the subpoenas. The merits of the Charlottesville Action are not before this court; that is for the Western District of Virginia to decide. Rather, this court has been asked only to address the validity of the Document and Deposition Subpoenas served on Peinovich. Courts consistently recognize that arguments about the merits of the underlying action have no relevance in deciding the enforceability of a Rule 45 subpoena. *See, e.g.*, *Malibu Media, LLC v. Doe*, 2016 WL 4574677

at *6 (E.D.N.Y. 2016) ("[W]hether Defendant ultimately has meritorious defenses to Plaintiff's claims is not relevant for purposes of the instant motion to quash or Plaintiff's ability to obtain the discovery sough in the [third-party] Subpoena."); *Strike 3 Holdings, LLC v. Doe*, 337 F. Supp. 3d 246, 255 (W.D.N.Y. 2018) (citation omitted) (explaining defendant's assertions regarding the underlying merits were not relevant to issuance of Rule 45 subpoena, because "general denial of liability is not a basis for quashing a subpoena"); *West Bay One, Inc. v. Does 1-1,653*, 270 F.R.D. 13, 15 (D.D.C. 2010) ("[T]he merits of this case are not relevant to the issue of whether the subpoena is valid and enforceable."). Wispelwey's claims survived several motions to dismiss by various UTR defendants, and are scheduled to go to trial in about three months. ECF Nos. 335, 597. Peinovich's personal theories about the causes of violence at UTR do not alter the validity of the relevant subpoenas.

Additionally, Peinovich offers no support for his allegations that Wispelwey acted in bad faith. He rants that "progressive forces" were the cause of the violence and speculates that Wispelwey might, or might not, have written a blog post celebrating that the white supremacists and neo-Nazis could not spread their hateful message in a city that did not welcome them. MTQ at 2–3. But none of these alleged bad acts involve any Plaintiff, and none of them negate Plaintiffs' right to issue a non-party subpoena. Issuing valid subpoenas is not "harassing" and does not "reek[] of bad faith" just because Peinovich disagrees with Wispelwey's claims in the Charlottesville Action. *Id*. Because Peinovich fails to support his claim that the subpoenas were issued in bad faith, these arguments are frivolous.

Moreover, even if Peinovich's allegations that Wispelwey acted in bad faith were correct (they are not), Peinovich again forgets that Wispelwey is only one of several Plaintiffs who issued the subpoenas. Each of these additional Plaintiffs are individually entitled to the information that

will be uncovered by enforcement of both subpoenas. Peinovich's conjecture about a single Plaintiff does not negate the subpoenas' validity as to the remaining Plaintiffs.

Because he fails to establish any harassment or bad faith, Peinovich's claim for sanctions should be denied. As detailed *supra*, neither the Document nor Deposition Subpoenas impose an undue burden on Peinovich. The Document Subpoena is tailored to gather information related to the Plaintiffs' claims. *See In re Rezulin Prods. Liab. Litig*., 2003 WL 21285537, at *2 (S.D.N.Y. 2003) (explaining that "undeniably … broad" Rule 45 subpoena "did not constitute a breach of counsel's duty to avoid imposing undue burden or expense" where "the scope of the material sought was entirely appropriate in view of the matters at issue in [the] action"). Because Plaintiffs have not imposed an undue burden on Peinovich, and have not harassed him or acted in bad faith, his request for sanctions should be denied. *See Molefi v. Oppenheimer Tr*., 2007 WL 538547, at *2 (E.D.N.Y. 2007) (requiring showing of undue burden before issuing sanctions). And, the statute cited by Peinovich, 28 U.S.C. § 1927, is not applicable here because nothing Peinovich describes constitutes multiplying proceedings "unreasonably and vexatiously."

In short, the bare allegation of bad faith cannot bar enforcement of the subpoenas or support sanctions here. Peinovich's dismissal from the underlying case cannot change the fact that he attended UTR and witnessed critical events that Plaintiffs must understand to fully present their claims. Peinovich's involvement in these events is indisputable: he attended the Rally as an advertised speaker, actively promoted the Rally on his podcast network, and coordinated with UTR Defendants to plan the rally. Seeking Peinovich's documents and testimony on these highly relevant topics cannot constitute bad faith harassment.

CONCLUSION

For the foregoing reasons, Peinovich's motion to quash the subpoenas served by Plaintiffs should be denied.

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Respectfully submitted,

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