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No. 73391-5-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION I

THE REPUBLIC OF KAZAKHSTAN,

Respondent/Plaintiff

v.

DOES 1-100 inclusive,

Defendants

v.

LLC MEDIA-CONSULT,

Appellant/Third Party.

REPLY BRIEF OF APPELLANT LLC MEDIA-CONSULT

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I. REPLY

The Republic of Kazakhstan issued its subpoena duces tecum for the *purpose* of identifying the source of allegedly-stolen emails that Respublika published in a news article. The subpoena was issued to a Washington business working with Respublika for records about Respublika. Clerk's Papers ("CP") at 1-4. At oral argument to the trial court, Kazakhstan's counsel admitted that was the subpoena's purpose.[1] *See, e.g.*, Report of Proceedings ("RP") at 18:5-14.

In Kazakhstan's New York federal case, LLC Media-Consult ("LMC") has confirmed that the source of those emails was kazaword.wordpress.com—a third-party website that LMC does not control or operate. CP at 86 ¶ 36; Letter dated June 25, 2015 at 2, Ex. A to Kazakhstan's Motion to Supplement ("Motion"). Based on that confirmation, Kazakhstan argues that Respublika's source was not

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[1] Kazakhstan's counsel argued:

> **All we're asking is to identify an individual. If and when we were to take the next step and subpoena them** if we could, if they were even in the United States, which we don't know and it's probably likely that they're not -- but if they were and we were then to do some kind of compulsory process exercising the laws of the state of Washington, **saying we want to ask you questions, we want to know, "What did you publish, did it involve the stolen emails, where did you get it from," then those questions would implicate the Shield Law, but those questions aren't being asked right now.**

RP at 18:5-14 (emphasis added).

"confidential" and that the Shield Law therefore cannot apply.[2] Brief of Respondent ("Resp. Br.") at 3-4, 31-33.

Kazakhstan now knows the source. The proverbial cat is out of the bag. Kazakhstan also knows that it has hit a dead end in terms of discovering anything about the alleged hackers from Respublika or eNom, Inc., as Kazakhstan dubiously claims was the purpose of this subpoena. Resp. Br. at 9, 13, 29-30, 33-34. One would expect Kazakhstan to withdraw its subpoena and move on to other discovery targets.

And yet Kazakhstan has not done so. Instead, Kazakhstan filed a 45-page brief (and a 9-page motion to supplement the record) insisting that its subpoena must still be enforced, without explaining why.

Kazakhstan wants its subpoena to go forward for two apparent reasons, both of which are unlawful. First, Kazakhstan doubts that the "kazaword" website was really Respublika's source for the emails. If so,

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[2] Contrary to Kazakhstan's arguments, there is no requirement in the Shield Law that a source be "confidential." RCW 5.68.010(1)(a) & (3). This statute protects the identities of sources and confidential sources alike. *Id.* Based on its faulty premise, Kazakhstan accuses LMC of misleading this Court by "dancing around" this issue, "speaking out of both sides of its mouth," "playing fast and loose with the facts," and making "the exact opposite claim in a different court." Resp. Br. at 32; Respondent's Motion to Supplement at 6-7, 9. LMC strongly denies those accusations. LMC has indeed argued that its source is confidential. This is not because a "Deep Throat"-style informant would be revealed—LMC never argued that—but because the Shield Law explicitly precludes a party from issuing subpoenas like this for the *purpose* of discovering a source. RCW 5.68.010(1)(a) & (3). Based on that same faulty premise, Kazakhstan also suggests that LMC has somehow waived its ability to invoke this law. *See* Resp. Br. at 33 n.8. That is incorrect. By statute, these protections cannot be waived. RCW 5.68.010(4).

then Kazakhstan's *continued purpose* is to discover the identity of Respublika's source, which still violates RCW 5.68.010(3).

The second reason is more perverse and, frankly, more likely. Kazakhstan wants the names and locations of Respublika's people, as well as the location of the newspaper's online "printing press," for reasons that are quite unrelated to the allegedly-stolen emails or the lawsuits about them. Kazakhstan will use any records obtained by this subpoena to further threaten and intimidate Respublika. Kazakhstan's agents will locate the newspaper's hosting server and shut it down again.[3] Kazakhstan will use these records as a stepping stone to discover more information about Respublika, and on and on until its journalists quit criticizing President Nazarbayev's autocratic regime and the newspaper stops publishing for good. This is not a "parade of horribles." These are a sober predictions based on actual events. *See, e.g.*, CP at 80-86, 88 (¶¶ 9-13, 18-19, 21-22, 25, 27-29, 32-33, 45); CP at 94-95, 97, 99, 102-03, 106-07, 113-14, 137. Kazakhstan has turned to our courts for help gathering "intel" on Respublika. This should not be tolerated. Our court system is not a tool for repressive governments to chill free press or stamp out political dissent.

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[3] In 2014, a server hosting one of Respublika's websites was seized in Russia, apparently at the behest of Kazakhstan's government. CP at 82, 84-85 (¶¶ 19, 29).

To avoid acknowledging the government's history of persecuting Respublika, Kazakhstan invites this Court not to try to settle disputes about Kazakh "internal politics." Resp. Br. at 4. This is not politics, at least not how they are conducted in America. Lives may be at stake.

Surprisingly, after asking the Court to ignore "politics," Kazakhstan goes on for nearly a dozen pages introducing a former Kazakh politician named Mukhtar Ablyazov (who co-founded a short-lived political party that opposed President Nazarbayev, CP at 80 ¶ 9; CP at 103) and alleging that Mr. Ablyazov and his political supporters are responsible for a host of misdeeds. *See* Resp. Br. 1-9, 13. Kazakhstan alleges that he might also be responsible for the alleged theft of the emails at issue in Kazakhstan's "John Doe" lawsuits pending in California and New York. *Id.* at 8-9.

This Court should not decide the appeal based on Kazakhstan's "suspicions" about Mr. Ablyazov or his political supporters. *Id.* at 1-2, 7-8. Instead, this Court should decide the appeal by applying the law to ascertainable facts about the parties before the Court. One party is a repressive, foreign nation that has been controlled by a single strongman since before the fall of the Soviet Union. The other party is an opposition newspaper that has long reported news that is critical of his interminable government. Kazakhstan's threats and violent intimidation campaign against Respublika and its journalists are well-documented in the appellate

record. CP at 80, 82-85 (¶¶ 9-13, 22, 25, 28-29); CP at 94-95, 97-99, 103, 113-14, 137. (The threats and violence began with Respublika's endorsement of Mr. Ablyazov's opposition political party. CP at 80 ¶ 9.)

In Washington, Kazakhstan is not entitled to issue a subpoena with the *purpose* of identifying a newspaper's source. Nor is Kazakhstan entitled to use Washington courts to intimidate and threaten the free press. Washington's Shield Law and case law about oppressive discovery make this clear. So does our Constitution, which cannot tolerate opening our courts to a repressive foreign country conducting discovery designed to quash political dissent and chill speech and free press. The trial court's order should be reversed, and this limited action should be dismissed.

A. Kazakhstan is engaged in improper claim-splitting.

As a threshold matter, Kazakhstan asserts that LMC did not raise its claim-splitting argument to the trial court. Resp. Br. at 18. Not so. In Kazakhstan's opposition brief below, Kazakhstan revealed that it had *also* filed a federal lawsuit alleging the same facts and federal cause of action against the same 100 "John Doe" defendants. CP at 174 n.1, 188-93, 362 n.1. In its reply brief, LMC argued to the trial court that Kazakhstan was therefore engaged in improper claim-splitting. CP at 386-87. This argument is preserved for appeal.

Kazakhstan argues that this Court cannot consider whether Kazakhstan has filed the same lawsuit in California state court (from which this Washington action derives) and in New York federal court. Resp. Br. at 19-20. Kazakhstan cites no authority for this proposition. It is true that this Court lacks power to dismiss Kazakhstan's complaints filed in those other jurisdictions. But this Court obviously has power to dismiss the "subpoena" action that Kazakhstan filed here in Washington. *See, e.g.*, RAP 2.2(a)(3).

Though RCW 5.51.050 indeed sets forth how to seek a protective order regarding out-of-state subpoenas ("comply with the rules or statutes of Washington state"), the statute certainly does not "provide only" for that type of relief. Resp. Br. at 19. In fact, this statute underscores the importance of respecting the laws of the discovery state (here, Washington), which has a significant interest in stepping in when parties from foreign jurisdictions seek to conduct unreasonable or unfair in-state discovery. *See* RCW 5.51.050.

At the same time that Kazakhstan tells the Court to ignore the duplicative nature of these lawsuits, Kazakhstan also asks to supplement the appellate record so the Court can stay abreast of developments in the New York litigation, where Respublika has appeared to challenge Kazakhstan's misuse of the federal court's injunctive order. *See* Motion at 1; CP at 192-

201 (federal court order). Exhibit A to Kazakhstan's Motion is a letter dated June 25, 2015, containing legal argument by LMC and Respublika. Exhibit B to that Motion is a responsive letter dated June 30, 2015 containing Kazakhstan's legal argument. Kazakhstan finds one sentence in Exhibit A that is relevant to this appeal (that is, how Respublika found the allegedly stolen emails), but Kazakhstan asks this Court to review pages and pages of argument that both parties submitted to the federal court. *See* Motion at 9 & Exs. A-B. LMC does not oppose Kazakhstan's request to supplement the record (just as LMC presumes that Kazakhstan does not oppose the inclusion in the record of Kazakhstan's federal complaint, which is Appendix B to LMC's Opening Brief). However, Kazakhstan's request to supplement the record with information and arguments from the New York case further demonstrates the inherent problems with this duplicative litigation.

Kazakhstan makes no effort to explain *why* discovery should go forward under these circumstances. *See* Resp. Br. at 18-21. Instead, Kazakhstan argues that claim-splitting is the same as res judicata and that res judicata does not apply here (yet) because neither of the lawsuits have reached a final judgment. Resp. Br. at 20. That is inaccurate.

In Washington, the terms "claim-splitting" and "res judicata," perhaps inartfully, describe multiple preclusion rules, and the general

prohibition on claim-splitting involves more than just res judicata. *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 43-44, 321 P.3d 266 (2014); *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274 (1999) (calling res judicata a "second and related reason for prohibiting claim splitting" and stating that the claim-splitting doctrine is "in accord" with res judicata principles); *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328, 941 P.2d 1108 (1997) ("Claim-splitting ... is prohibited by both merger and bar.").

When a trial court finds itself adjudicating a matter over which another court already has jurisdiction, the rule against claim-splitting is sometimes called the "priority of action" rule.[4] *See Bunch*, 180 Wn. App. at 39, 43-33; *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990); *see also Gilman v. Gilman*, 41 Wn.2d 319, 322-23, 249 P.2d 361 (1952) (calling this rule a "plea of another action pending"); *Jones v. City of Centralia*, 157 Wash. 227, 228-29, 289 P. 14 (1930) (summarily affirming dismissal without naming the rule). In that situation, an order dismissing or staying the second action is necessary to prevent "'unseemly, expensive, and dangerous conflicts of jurisdiction and of process.'" *Bunch*, 180 Wn. App. at 44 (internal quotation marks omitted) (quoting *Am. Mobile Homes of Wash.*, 115 Wn.2d at 317).

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[4] Put another way, this rule applies when two actions share the same subject matter, parties, and requested relief. *Bunch*, 180 Wn. App. at 41.

Contrary to Kazakhstan's contention, there is no need to waste time and resources waiting for a final judgment in either of those lawsuits. *See* Resp. Br. at 20. All that matters is that the similarity of the lawsuits is "'such that a final adjudication of the case by the court in which it first became pending would, as res judicata, be a bar to further proceedings in a court of concurrent jurisdiction.'" *Am. Mobile Homes of Wash.*, 115 Wn.2d at 320 (quoting *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981)); *see Bunch*, 180 Wn. App. at 41, 48.

In its opening brief, LMC cited to this Court's decision in *Bunch*, which applied this preclusion rule by reversing a trial court's refusal to stay a plaintiff's second lawsuit involving identical parties and an identical violation of the Consumer Protection Act. 180 Wn. App. at 41, 45; Brief of Appellant ("App. Br.") at 22-23. According to the *Bunch* court, "if two courts are simultaneously considering the same issue . . . there is a risk of the two courts arriving at inconsistent results. This would also be a waste of judicial resources." 180 Wn. App. at 50. Kazakhstan ignores *Bunch* entirely.

Kazakhstan filed neither of its complaints in Washington state court, so this Court cannot apply the claim-splitting (or "priority of action") rule directly to a complaint. But Washington policy is clear: Our courts do not tolerate litigants bringing concurrent or successive suits about the same

subject matter against the same defendants. This rule should entirely dispose of Kazakhstan's subpoena action in Washington.

Kazakhstan still has discovery tools available to it, especially in the Southern District of New York, which permits national and even international service of subpoenas. Fed. R. Civ. P. 45(b)(2); Fed. R. Civ. P. 45(b)(3); 28 U.S.C. § 1783. Besides, that federal district court has already issued multiple discovery orders, and these parties are actively litigating there. *See, e.g.*, CP at 192; Exs. A & B to Kazakhstan's Motion.

Kazakhstan's claim-splitting has improperly dragged Washington courts into already multi-jurisdictional litigation involving the same allegations and same parties. The trial court's order should be reversed for this reason alone.

B. Kazakhstan's subpoena duces tecum violates RCW 5.68.010(3).

Kazakhstan expresses confusion about which part of the Shield Law LMC is arguing applies to this case—subsections (1) or (3). Resp. Br. at 25 (citing App. Br. at 26-27). Subsection (3) applies here.

Ironically, Kazakhstan did not explain why it was confused with LMC's application of the Shield Law. It is possible that Kazakhstan's confusion lies in the fact that subsection (3) twice references subsection (1) in important ways—first to import the explicit prohibition on courts

compelling subpoenas falling within subsection (3), and second to describe the improper "purposes" for issuing a subpoena under the Shield Law. RCW 5.68.010(3).

It is also possible that Kazakhstan did not follow why LMC discussed its own status as a member of the "news media." App. Br. at 26-27. LMC simply pointed out that it constitutes "news media" under the definition of subsection (5) in order to meet the text of subsection (3), which bars a subpoena to non-news media when the subpoena "seeks records, information, or other communications relating to business transactions between such nonnews media party **and the news media**. . . ." RCW 5.68.010(3) (emphasis added); *see* App. Br. at 26-27.

In its interpretation of what should be subsection (3)'s prima facie burden, Kazakhstan's confusion is evident:

> Thus, to invoke the Shield Law's protections, LMC had to make the prima facie showing that current or past domain name registrant(s) provided those [allegedly] stolen materials to journalists in confidence—i.e., that the current or past domain registrants were the confidential "source." Alternatively, LMC had to make the prima facie showing that the subpoena would tend to identify their journalist' confidential "source"—that is, the person who provided the [allegedly] stolen materials to the journalist.

Resp. Br. at 30. Kazakhstan then argues that LMC did not meet that burden.

But Kazakhstan's interpretation bears little resemblance to the text of subsection (3). Subsection (3) requires only that the subpoena-issuing

party's ***purpose*** be to identify a source (or to obtain information described in subsection (1)):

> (3) The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a nonnews media party where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media **for the purpose of discovering the identity of a source or obtaining news or information described in subsection (1) of this section.**

RCW 5.68.010(3) (emphasis added).

In essence, subsection (3) has a "content" element and a "purpose" element, both of which are met here. *See* Resp. Br. at 30-33, 36. First, the "content" element is that the subpoena "seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media[.]" RCW 5.68.010(3). Contrary to Kazakhstan's arguments, a subpoena does not violate this statute only when the subpoena specifically requests records about a source. *Id.*

Second, the "purpose" element is that the party's purpose in issuing the subpoena be for "discovering the identity of a source or obtaining news or information described in subsection (1) of this section." *Id.* Regardless of which records about news media a party requests from the news media's non-news partner, the Shield Law bars enforcement of that subpoena when the party's apparent *purpose* is to identify a source. *Id.* It would be absurd

to require news media invoking this Shield Law to point to a documented admission by the subpoena-issuing party that its purpose violates this statute. This Court cannot interpret the Shield Law in such a way that permits a subpoena-issuing party simply to mouth a different purpose, even when the circumstances of the case make it apparent that the purpose is to identify a news source. Pretext is too easy to come by, and that is certainly true with this subpoena.

Kazakhstan does not really dispute that its subpoena "seek records, information, or other communications relating to business transaction between such nonnews media party and the news media"—the "content" element of subsection (3). *See* Resp. Br. at 30-36. Nor could it.[5] CP at 3-4.

Rather, Kazakhstan argues that its subpoena does not run afoul of the statutory "purpose," claiming that its purpose for issuing this subpoena

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[5] Instead of disputing that the subpoena seeks eNom, Inc.'s records about Respublika, Kazakhstan argues that the Shield Law "has to be interpreted to require some meaningful connection between the third party's business records and the confidential source's identity." Resp. Br. at 36. But that "meaningful connection" already exists. The Shield Law only bars subpoenas to non-media businesses when they seek records about the news media *and* the subpoena's apparent purpose is to identify a source or discover information tending to identify a source. RCW 5.68.010(3). In other cases that have nothing to do with a newspaper's dissemination (that is, publication) of documents, there is little chance a trial court would question whether the Shield Law is implicated just because a subpoena is issued to a business that happens to work with news media. Besides, this Shield Law has been on the books since 2007, and it appears this is the first time a Washington appellate court has been called upon to address the statute's proper scope and application.

was to find the alleged *hackers*, not *Respublika's source* for those emails. Resp. Br. at 9, 14, 29-30, 33-34. That distinction simply does not hold water. The subpoena was issued to Respublika's domain name registrar for records about Respublika. CP at 1-4. The subpoena does not ask for records about the alleged hackers. *Id.* (Nor is there any indication that eNom, Inc. would have such information.) Unless Kazakhstan actually pleads that LMC, Respublika, or one or more their people are indeed defendants (and can support such allegations),[6] then the only relevance that the newspaper's information would have to Kazakhstan's lawsuits is that Respublika, like other newspapers around the world, published the emails. RP at 29:15-23.

Based on the circumstances here, Kazakhstan clearly sought to discover how the Respublika newspaper obtained those emails. That purpose easily meets the definition of a "source" under all[7] of Kazakhstan's

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[6] Kazakhstan continues to imply, but not outright allege, that Ms. Petrushova could be a "Jane Doe" defendant in either or both of the California or New York lawsuits. Resp. Br. at 2, 14. If so, then Kazakhstan's objection that she and LMC are somehow interfering in Kazakhstan's efforts to conduct discovery in the defendant-less lawsuits is particularly unavailing. *Id.* at 34. Chances are, neither she nor anyone else will be named as a defendant. According to Kazakhstan, it "turned to the United States courts to help identify the hackers." *Id.* at 9. Kazakhstan does not seek justice in American courts—only information. And defendants just impede the discovery process.

[7] Among other authorities, Kazakhstan cites the definition of "source" in Delaware's Reporters' Privilege Act as "'*a person* from whom a reporter obtained information by means of written or spoken communication or the transfer of physical objects. . . .'" Resp. Br. at 29 (emphasis changed) (quoting 10 Del. Code Ann. Tit. 10, § 4320(5)). Of course, that statute also broadly defines the word "person" to mean any "individual, corporation, statutory trust, business trust, estate, trust, partnership or association, governmental body, or any other legal entity." 10 Del. Code Ann. Tit. 10, § 4320(3). Even using the Delaware

proposed definitions of that word, regardless of whether it might also lead to information about the alleged hackers. Resp. Br. at 27-28.

By arguing at length that a "source" must be the entity that *directly* gives information to news media, Kazakhstan belabors an insignificant point. Resp. Br. at 9, 29-30, 33-35. Kazakhstan's purpose here *was* to identify Respublika's *direct* source, which violates subsection (3).[8] That is true here, but this Court need not interpret the Shield Law so narrowly. Although Kazakhstan went so far as to cite Illinois and Delaware law, Kazakhstan overlooked Black's Law Dictionary, which defines "source" as "[t]he **originator** or primary agent of an act, circumstance, or result <she was the source of the information>." Black's Law Dictionary 1610 (10th ed. 2014) (emphasis added); Resp. Br. at 29. This definition of "source" better comports with the plain language definition that LMC cited from Webster's Third International Dictionary. App. Br. at 34 (quoting Webster's Third International Dictionary 2177) ("a point of origin").

Of course, Kazakhstan already knows Respublika's source was the "kazaword" website. Resp. Br. at 32. Kazakhstan knows that it has hit a

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Act's definition of "source," Washington's Shield Law would preclude the trial court from enforcing Kazakhstan's subpoena.

[8] Subsection (3) does not use the terms "human source," "confidential source," or "informant," so Kazakhstan's efforts to define those words add little to the analysis. Resp. Br. at 27-29; RCW 5.68.010(3).

dead end in terms of discovering anything about the alleged hackers with this subpoena. One would expect Kazakhstan to withdraw its subpoena and move on to other discovery targets.

But that has not happened, and it is telling. First, Kazakhstan may doubt that the "kazaword" website was really Respublika's source. If so, then Kazakhstan's *continued purpose* for the subpoena is to discover the identity of Respublika's source, which still violates subsection (3) of the Shield Law.

Second, and more likely, Kazakhstan still wants the names and locations of Respublika's people, as well as the location of the online "printing press," for reasons that have nothing to do with allegedly-stolen emails or lawsuits about them. As explained in the opening of this reply brief, LMC has well-founded reasons to believe that Kazakhstan will use this new information to further threaten and intimidate Respublika, and the Court cannot allow this.

Finally, suggesting LMC has waived the Shield Law's protections, Kazakhstan cites New Jersey case law for the proposition that, in that state, the newsperson's statutory privilege may be waived. Resp. Br. at 33 n.8. That has no bearing on this case. Unlike Washington's statute, New Jersey's statute permits waiver. N.J. Stat. Ann. §§ 2A:84A-21, 2A:84A-21.3; RCW 5.68.010(4). In Washington, dissemination by a newspaper of

some or all a source's identity (or any other information that would tend to identify the source) "**shall not constitute a waiver**" of the Shield Law's protections. RCW 5.68.010(4) (emphasis added). Kazakhstan ignores subsection (4) of the Shield Law.

C. The trial court did not, and could not, impose adequate protections on its order compelling disclosure of records pursuant to Kazakhstan's subpoena duces tecum.

According to Kazakhstan, LMC has failed to cite any authority that "so much as suggests" that "the trial court loses its discretion to balance discovery needs against the claimed side effects of disclosure." Resp. Br. at 37. Not so. This Court need look no further than the Shield Law itself. If a subpoena falls within the statute, then "**no judicial**, legislative, administrative, or other **body** with the power to issue a subpoena or compulsory process **may compel** the news media to testify, produce, or disclose" the prohibited information.[9] RCW 5.68.010(1) (emphasis added). Subsection (3), governing subpoenas to non-news media, explicitly imports this same limitation on court power. RCW 5.68.010(3) ("The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a

[9] The Shield Law has an exception to this complete bar on court power. Under subsection (2), a court may compel the disclosure of information described in subsection (1)(b) if the subpoena-issuing party meets a statutory test. Kazakhstan has never argued that it meets that test.

nonnews media party. . . ."). Contrary to Kazakhstan's argument, if a court is powerless to enforce a subpoena, then the court is also powerless to enforce a subpoena with limitations, even after "balanc[ing] discovery needs against claimed side effects of disclosure." Resp. Br. at 37.

Kazakhstan maintains that the trial court was "sensitive to LMC's concerns" in placing limits on the order directing eNom, Inc. to comply with the subpoena. Resp. Br. at 41. But under the Shield Law the trial court was powerless to compel enforcement of that subpoena, regardless of any limits Kazakhstan proposed would be "fair." *See* RCW 5.68.010(3).

Even if this Court finds that the Shield Law does not apply, the trial court's modest efforts to limit Kazakhstan's subpoena are totally inadequate under the circumstances. To be clear, the "limits" imposed by the trial court were **all volunteered by Kazakhstan**. CP at 412; RP at 18:17-25, 20:19 – 21:7; Resp. Br. at 41. Aside from having records be produced for Kazakhstan's "attorney's eyes only," the "limits" were just deleting certain topics of records from Kazakhstan's subpoena:

> 1. Documents sufficient to show all details of all current and former registrants, including any underlying registrants using a privacy or proxy service, of the Domain Name including, but not limited to, his or her email address, physical address, phone number, ~~and billing information,~~ including any updated or revised details since registration.
>
> 2. Documents sufficient to show the dates, times and corresponding IP Addresses and/or Mac [*sic*]

Addresses from which the Domain Name was registered, created or modified.

~~3. All personally identifying information Related to any Person who purchased, used, or implemented Your "ID Protect" program in connection with the registration, purchase, or use of the Domain Name.~~

~~4. All personally identifying information Related to any Person who purchased, used or implemented the Whois Privacy Protection Service in connection with the registration, purchase, or use of the Domain Name.~~

~~5. Documents sufficient to show all contact information for Whois Privacy Protection Service and all employees of Whois Privacy Protection Service including, but not limited to, Your contact person at Whois Privacy Protection Service.~~

Compare CP at 3-4, 10, 16 (Subpoena Text), *with* CP at 411-12 (Trial Court Order).

Now, the subpoena will "only" uncover all details known to eNom, Inc. regarding individuals connected to Respublika's main website, including, but not limited to, their names, addresses, telephone numbers, email addresses, Internet Protocol (IP) addresses, and Media Access Control (MAC) addresses. CP at 3-4, 10, 16, 411-12. Once an IP address is determined, it can be used to discover either a server's specific geographical location or its hosting provider, which also has a specific geographical location. CP at 34 ¶ 5.

The trial court agreed with Kazakhstan and ordered that eNom, Inc.'s records be produced "for attorneys' eyes only." RP at 20:19-23; CP

at 411-12. Kazakhstan argues that this resolves all of LMC's concerns. Resp. Br. at 42. It does not. To be clear, LMC is not suggesting the Kazakhstan's attorneys would violate any of their ethical or legal duties to the trial court. LMC is simply pointing out that Kazakhstan is a sovereign nation on the other side of the planet. Therefore, if Kazakhstan were to dismiss all of its pending lawsuits in America at once, in practical terms there is not a thing that the trial court in King County Superior Court could do to "retain jurisdiction" over the matter. Kazakhstan's lead counsel, Reed Smith LLP, does not even maintain an office in Washington state (though it has one in Kazakhstan). Moreover, Kazakhstan's counsel is entitled to use the information gathered from eNom, Inc. to suggest conducting further discovery—discovery which Kazakhstan is fully entitled to approve.

All of this, however, loses sight of the main problem with allowing *Kazakhstan* to gather information about *Respublika*: Kazakhstan has a long history of violence and oppression against this newspaper and its journalists. Among other things, there have been death threats, firebombs, dead animals, and even police raids in another country, all designed to silence the newspaper and its people. Over the years, Respublika has paid a terrible price for publishing news that is critical of, or embarrassing to,

President Nazarbayev and his autocratic regime.[10] No matter how trustworthy plaintiff's counsel may be, there is simply too much at stake to let this discovery go forward.

Kazakhstan brags that, through other subpoenas, it "already knows the primary contacts for the [newspaper's] website." Resp. Br. at 40. Kazakhstan then argues that this subpoena will likely only reveal information that Kazakhstan already knows. *Id.* That is striking. At the same time that Kazakhstan suggests *it does not even need* the subpoenaed records, Kazakhstan also urges this Court to gamble on the off-chance that no new information about Respublika's people would be revealed. *See id.* Washington courts cannot gamble on such possibilities, especially not when so much is at stake. Protection from oppression can include denying discovery into a person's identity. *See Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 628-30, 818 P.2d 1056 (1991); *State v. Rinaldo*, 36 Wn. App. 86, 87-88, 673 P.2d 614 (1983), *aff'd*, 102 Wn.2d 749, 689 P.2d 392 (1984). Such protection is warranted under these facts. In any event, Kazakhstan does not assert that it already knows the location

[10] Kazakhstan misstates LMC's constitutional argument as one that Washington's Constitution "has historically extended greater protection to the press than the federal Constitution. Resp. Br. at 36. Instead, LMC argued that "Washington's Constitution does not tolerate opening our courts to a repressive foreign country conducting discovery to quash political dissent and to chill speech and the press either here or abroad." App. Br. at 44. Because Kazakhstan does not address the constitutional argument further, LMC will simply rest on the arguments set forth in Part V.D of its opening brief. *Id.* at 44-50.

of Respublika's hosting server—the online "printing press." That much even Kazakhstan tacitly admits would be revealed under this subpoena.

Under these circumstances, the trial court erred in compelling disclosures pursuant to this subpoena.

II. CONCLUSION

Washington courts should not serve as a vehicle for abusive discovery. Kazakhstan's subpoena is a product of improper claim-splitting. The purpose of that subpoena to identify the source of Respublika's news article. Kazakhstan is also gathering information that jeopardizes the safety of Respublika's people. Article I, sections 1 and 5 prohibit the courts from helping Kazakhstan conduct abusive discovery targeting the press. The trial court's order should be reversed, and this action should be dismissed.

Respectfully submitted this 24th day of August, 2015.

HELSELL FETTERMAN LLP

By _____
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Attorneys for Appellant LLC Media-Consult

CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Kazakhstan v. Does, et al., I did on the date listed below (1) cause to be filed with this Court LLC Media-Consult's Brief of Appellant; (2) cause it to be delivered via messenger to Abraham Lorber of Lane Powell, 1420 Fifth Avenue, Suite 4200, Seattle, WA 98111 and (3) cause it to be delivered via electronic mail to Robert Phillips of Reed Smith, 101 Second Street 1800, San Francisco, CA 94105 who are counsel of record of Respondent The Republic of Kazakhstan.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: August 25, 2015.

Kyna Gonzalez

KYNA GONZALEZ