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11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
14

15 IN RE:
16 RULE 45 SUBPOENA ISSUED TO
17 RICOCHET TELEVISION, INC.

Case No.: CV08-6731 SJO (MANx)

Hon. Margaret A. Nagle

18 JASON COLODNE,
19 Plaintiff,
20 v.
21 PATRIARCH PARTNERS, LLC,
22 Defendant.

**NON-PARTY RICOCHET
TELEVISION, INC.'S OPPOSITION
TO MOTION TO COMPEL**

Date: Nov. 17, 2008
Time: 10:00 a.m.
Place: Roybal, 580

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This subpoena seeks information that is protected by the media shield law
4 and is not relevant to any material issue in dispute in the underlying action. For
5 these reasons, the motion to compel production should be denied.

6 Jason Colodne (“Colodne” or “plaintiff”), former President of Patriarch
7 Partners, LLC (“Patriarch” or “defendant”), filed a wrongful termination action
8 against his former employer in federal court in New York. Patriarch contends that
9 it fired Mr. Colodne for cause because of poor performance managing the
10 company’s investment funds. On the very day that Patriarch fired Mr. Colodne,
11 Patriarch’s CEO also learned that Mr. Colodne would be appearing in the reality
12 television program “The Real Housewives of New York City.” Patriarch contends
13 that it was additionally justified in firing Mr. Colodne because he violated the
14 company’s media policy by appearing on this show without Patriarch’s consent.

15 Allegedly to defend its termination decision, Patriarch has issued a subpoena
16 on Ricochet Television, Inc. (“Ricochet”), the production company of “The Real
17 Housewives of New York City,” seeking all documents that concern Mr. Colodne
18 or his ex-wife, including documents concerning his appearance on the program,
19 which aired long after Patriarch fired Mr. Colodne. Ricochet has refused to
20 produce these documents because the subpoena impermissibly intrudes into
21 Ricochet’s information gathering and dissemination process in violation of
22 California (and New York) law. The information sought is also entirely irrelevant
23 to the legal question of whether Mr. Colodne’s undisputed appearance on the
24 program violated Patriarch’s media policy.

25 Patriarch is not entitled to these documents, and the motion to compel
26 should be denied because:

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- Ricochet — which produces a television program that chronicles real people in their everyday lives – disseminates to the public information and news commentary that address issues of public concern and is therefore covered by the media shield law; and
- None of the information sought by Patriarch relates to a material issue of disputed fact and therefore the documents sought are not relevant to the underlying action.

II. BACKGROUND

A. *The New York Litigation*

On or around February 22, 2008, Jason Colodne was terminated from Patriarch Partners, LLC, where he had been its President, Executive Managing Director and Head of Leveraged Loan and M&A Activity for one year. He subsequently commenced an action against Patriarch in the U.S. District Court for the Southern District of New York, alleging a single claim for breach of his employment agreement. Def. Ex. 1. The central question in the New York litigation is whether Mr. Colodne was wrongfully terminated, as he claims, or whether Patriarch fired him for cause.

At a court conference on June 19, 2008, the District Court Judge in New York asked Patriarch’s counsel what the company intended to argue were the grounds for its termination decision. Counsel was emphatic that Mr. Colodne “was fired because he was told that his performance failed and he was being terminated for that reason and, secondarily, he had failed to get permission to speak to the media.” Ricochet Ex. A (Tr. 9:11-14).¹ In response to the Court’s repeated questioning, Patriarch counsel made clear that it was simply the *fact* of Mr. Colodne’s participation and not the *nature* of that participation that formed the basis for the company’s determination that he violated its media policy. *See generally id.* at Tr. 12:4-7 (Counsel: “he was told that he was being fired for all of the performance-based reasons that he was aware of leading up to that and he was

¹ Ricochet’s Exhibits are attached to the Declaration of Sarah Netburn, dated November 3, 2008.

1 fired for not seeking permission to make a media appearance.”); *Id.* at Tr. 14:20-21
2 (Counsel: “I won't be arguing that the show was the basis for his termination. It
3 had not aired yet.”); *Id.* at Tr. 17:19-25 (Court: “You are not going to argue and
4 you are going to be precluded from arguing that this TV show and the nature of
5 this TV show has anything to do with being one of the legitimate reasons that he
6 was fired. The only reason that he was fired – it has nothing to with the content of
7 the show, am I correct?” Counsel: “Yes.”).

8 At her deposition, Patriarch’s CEO, Lynn Tilton, maintained this position.
9 She testified that she had determined to fire Mr. Colodne for poor performance
10 about one month before he was actually fired, Def. Ex. 1 (Tr. 136:19-21), and that
11 she learned of his involvement in “The Real Housewives of New York City” on
12 the same day that she terminated him, Def. Ex. 1 (Tr. 135:5-7). Ms. Tilton further
13 testified that “absolutely, yes” she would have fired Mr. Colodne even absent his
14 involvement on the program. Def. Ex. 1 (Tr. 137:5). Notwithstanding that, Ms.
15 Tilton also asserted that Mr. Colodne’s participation on the television program
16 violated Patriarch’s “media policy,” which bars employees from speaking to the
17 media without the company’s consent. Def. Ex. 1 (Tr. 137:13-16). Because the
18 show had not aired at the time of Mr. Colodne’s termination, Patriarch has never
19 argued, and could not argue, that what Mr. Colodne did or said on the program was
20 a basis for his termination.

21 ***B. The Ricochet Subpoena***

22 Patriarch served Ricochet Television, Inc., the production company of “The
23 Real Housewives of New York City,” with a subpoena for documents on
24 August 29, 2008 and again on September 9, 2008. Def. Ex. 5. The subpoena calls
25 for the production of all documents concerning Mr. Colodne and his participation
26 in any reality television program and in “The Real Housewives of New York
27 City,” including communications between Mr. Colodne and (i) any representative
28 of any reality television production company; (ii) any representative of Ricochet;

1 and (iii) the producer of “The Real Housewives of New York City” (Keira Briggs).
2 It also seeks all communications with “Housewife” Bethenny Frankel,
3 Mr. Colodne’s girlfriend, and all communications with Kim Spaerstein Colodne,
4 Mr. Colodne’s ex-wife.²

5 Ricochet responded to the subpoena on September 10, 2008, objecting on
6 the grounds that the subpoena sought documents and information that are protected
7 by the California and New York media shield laws. Def. Ex. 7. Ricochet
8 specifically noted that California law provides an absolute privilege against the
9 disclosure of “information obtained or prepared in gathering, receiving or
10 processing of information for communication to the public.” *Id.* The documents
11 sought were also protected under the qualified New York media shield law and
12 Patriarch could not demonstrate that the documents sought were (i) highly material
13 and relevant; (ii) critical or necessary to the maintenance of Patriarch’s defense
14 and (iii) not obtainable from any other source. *Id.*

15 Six days later, counsel for Ricochet and Patriarch discussed Ricochet’s
16 objections under the media shield laws and discussed the relevancy of the
17 documents sought to prove Patriarch’s defense. Counsel for Ricochet made the
18 point that there is no dispute that Mr. Colodne appeared on the program without
19 Patriarch’s consent and whether such unauthorized appearance breached
20 Patriarch’s media policy was a pure legal question that could not be resolved by
21 reviewing internal private communications of Ricochet employees. Patriarch
22 insisted it was entitled to this discovery and filed its motion to compel on
23 October 10, 2008.

24 _____
25 ² Mr. Colodne appeared on the show because he was the boyfriend of
26 “Housewife” Bethenny Frankel, a single “career woman” who is profiled in the
27 show. At one point there was a question of whether Mr. Colodne’s children would
28 be filmed and so Mr. Colodne’s ex-wife, the mother of his children, was contacted
by Ricochet.

1 On October 22, 2008, Ricochet obtained the June 19, 2008 court transcript
2 in which Patriarch's lawyer repeatedly represented to the Court that Patriarch's
3 for-cause grounds for terminating Mr. Colodne were limited to his poor
4 performance and his alleged violation of the company's media policy. That same
5 day, in light of these representations, Ricochet wrote to Patriarch to request that it
6 withdraw its motion because the information sought was not at all relevant to any
7 material disputed issue in the underlying litigation. Ricochet Ex. B. Ricochet
8 stated that if Patriarch failed to withdraw the motion, Ricochet would seek legal
9 fees and costs associated with responding to the motion and any other relief the
10 Court deems appropriate. Patriarch refused to withdraw its motion. Ricochet
11 Ex. C.

12 Around this time, Ricochet also learned that NBC Universal had agreed to
13 produce internal documents and communications concerning Mr. Colodne, blog
14 entries discussing his appearance in "The Real Housewives of New York City," a
15 video clip from the show, an advertisement and six photographs.

16 Thus, Ricochet now knows the following information that it did not know
17 when it was served with the subpoena and filed its objections: that (i) Patriarch's
18 CEO admitted at her deposition that she had already determined to terminate
19 Mr. Colodne before she knew about his participation in the show "The Real
20 Housewives of New York City"; (ii) that he was terminated before the program
21 aired; (iii) that notwithstanding all of this, Patriarch has obtained from NBC
22 numerous communications, blog entries, video and photographs related to
23 Mr. Colodne's participation on the show; (iv) Patriarch obtained from Mr. Colodne
24 his unsigned release in connection with the program and email communications
25 with Ricochet representatives and Bethenny Frankel; and lastly (v) that Patriarch's
26 own lawyer represented to the New York Court that the company was not claiming
27 that Mr. Colodne was fired because of the nature of his participation in the
28 program but only because he failed to seek permission to so participate.

1 In light of all this, there is no legitimate basis for this motion to compel the
2 production of Ricochet's documents. Patriarch has in its possession everything it
3 needs to defend this case. This subpoena is classic fishing.

4 **III. THE DOCUMENTS SOUGHT ARE PROTECTED BY THE MEDIA**
5 **SHIELD LAWS OF CALIFORNIA AND NEW YORK**

6 **A. California Shield Law Applies**

7 Patriarch argues that, under California choice of law rules, the New York
8 media shield applies to a subpoena issued out of the District Court for the Central
9 District of California upon Ricochet, a California company. Def. Br. 3-4.
10 Patriarch does not cite a single case discussing which law applies when a subpoena
11 is issued from one court and the underlying litigation is pending in another court;
12 much less explain why a choice of law analysis is even appropriate here.³

13 Patriarch is simply wrong that the New York shield law applies to a
14 subpoena issued out of a California court. It is settled that the law of the circuit
15 from which the subpoena is issued applies, notwithstanding the fact that the
16 underlying action is pending in a different jurisdiction. *See In re Welding Rod*
17 *Prods. Liability Litig.*, 406 F. Supp. 2d 1064, 1065 (N.D. Cal. 2005) (“disputes
18 over discovery from a non-party are decided by the court which issued the
19 subpoena”); *Gonzales v. National Broadcasting Co., Inc.*, 155 F.3d 618 (2d Cir.
20 1998), *reversed on other grounds* (applying the law of the issuing court where the
21 subpoena was issued by the Southern District of New York but the underlying
22 action was litigated in the Western District of Louisiana); *In re Madden*, 151 F.3d
23 125 (3d Cir. 1998) (applying the law of the issuing court where the subpoenas

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25 ³ *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), merely stands for
26 the proposition that the conflicts law of the forum state, rather than federal
27 common law, will apply in diversity cases; it has nothing to do with which law
28 applies to a subpoena issued from one jurisdiction related to a case pending in
another.

1 were issued by the Western District of Pennsylvania but the underlying action was
2 litigated in the District of Connecticut); *In re Cusumano v. Microsoft Corp.*, 162
3 F.3d 708 (1st Cir. 1998) (applying the law of the issuing court where the subpoena
4 was issued by the District of Massachusetts but the underlying action was litigated
5 in the District of Columbia); *In re Ramaekers*, 33 F. Supp. 2d 312, 316 (S.D.N.Y.
6 1999) (“courts have uniformly applied the law of the circuit in which the subpoena
7 is issued”).

8 Choice of law analysis has no place here. The reason for this rule is plain.
9 District courts “have a paramount interest in enforcing subpoenas emanating from
10 their jurisdiction in a predictable and consistent manner.” *Ramaekers*, 33 F. Supp.
11 2d at 315. “That interest would be undermined if a district court were required to
12 apply choice of law principles whenever a discovery dispute involved litigation
13 pending in another district or circuit.” *Id.*

14 But even if the Court were to apply California’s governmental interests
15 analysis to determine which law should apply to the precise dispute before the
16 Court, it is plain that California holds the larger interest over New York.⁴ *See*
17 *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 918-19 (2001)
18 (discussing California’s choice of law rule). This subpoena seeks documents from
19 a company that is based in California. California – the media capital of the
20 country – plainly has an interest in enforcing its media shield law, especially as to
21 a media company located in California. It also has an interest in protecting against
22 intrusions into the dissemination of information to the public as guaranteed by the
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24 _____
25 ⁴ Patriarch frames the analysis as though the dispute was between Mr. Colodne
26 and Ricochet and concerned his appearance on the program. It does not. The
27 dispute is between Ricochet, a California company and a non-party to the New
28 York litigation, and Patriarch, and it concerns the limited issue of whether
Ricochet can be compelled to produce documents which are located in California.

1 State's Constitution. By contrast, New York has no interest in whether or not a
2 California-based company must produce documents that are located in California.

3 For all these reasons, this Court should apply the California media shield
4 law to bar disclosure of the documents sought by Patriarch's subpoena.

5 ***B. The Documents Sought Are Protected by the California Media***
6 ***Shield Law***

7 The California Constitution protects a television news reporter or "any other
8 person connected with or employed by a radio or television show" from contempt
9 for refusal to disclose an extremely broad range of information, including the
10 source of any information procured for "news commentary purposes on . . .
11 television" or "any unpublished *information* obtained or prepared in gathering,
12 receiving or processing of information for communication to the public." *See* Cal.
13 Const., art. I, § 2, subd. (b) (emphasis supplied).

14 The California Constitution provides "virtually absolute protection" for a
15 journalist's unpublished materials and their sources for information, whether
16 published or unpublished. *See Delaney v. Superior Court*, 50 Cal. 3d 785, 796-
17 805 (1990) (California law provides "the broadest protections" to journalists); *see*
18 *also New York Times Co. v. Superior Court*, 51 Cal. 3d 453 (1990) (California's
19 shield law confers an absolute immunity against compelled disclosure of the
20 protected information); 31A Cal. Jur. 3d *Evidence* § 564 (2008) (shield law
21 provides a nonparty witness with "virtually absolute protection against compelled
22 disclosure."); *People v. Vasco*, 131 Cal. App. 4th 137(2005) (refusing to compel
23 reporter's production of unpublished information); *Miller v. Superior Court*, 21
24 Cal. 4th 883 (1999) (following issuance of a subpoena duces tecum to a television
25 station, court held that California's shield law applied to unbroadcast portions of a
26 videotaped interview which a reporter for the station had conducted with the
27 criminal defendant in a murder case).

28

1 Patriarch argues that Ricochet is not entitled to the protection of any shield
2 law because, it contends, “The Real Housewives of New York City” is
3 entertainment and not professional journalism. In making this argument, Patriarch
4 asks this Court to do two things: (i) to narrowly interpret California’s shield law to
5 include only traditional news reports, and (ii) to make a subjective judgment that
6 “The Real Housewives of New York City” – a reality television program which
7 chronicles the lives of real women as they juggle the demands of their career,
8 family and community – portrays only fiction and does not disseminate “news
9 commentary” or “information” to the public. Patriarch’s position is unsupportable.

10 By its terms, the California media law squarely protects against compelled
11 disclosure of the documents and information sought by the subpoena. In *Rancho*
12 *Publications v. Superior Court*, the appellate court emphasized that where an
13 entity disseminated “information for communication to the public” the media
14 shield law applied. 68 Cal. App. 4th 1538, 1544-45 (1999) (citing Cal. Const., art.
15 I, § 2, subd. (b)). Here, there is no dispute that Ricochet gathered and
16 disseminated “information for communication to the public” about the lives and
17 struggles of five women in New York City. The program is unscripted, its stars
18 are ordinary people not actors, and the information they convey is real. The fact
19 that the program may be entertaining does mean that it cannot also “disseminate
20 information” as defined by the California Constitution. *See also Rancho*
21 *Publications*, 68 Cal. App. 4th at 1545 (declining invitation to hold that the media
22 shield law is limited to traditional “news” or “newsgathering”).

23 Indeed, the Supreme Court has observed that “courts should not be chary of
24 deciding what is and what is not news.” *Harper & Row, Publishers, Inc. v. Nation*
25 *Enters.*, 471 U.S. 539, 561 (1985) (quoting dissent below by Meskill, J., 723 F.2d
26 195, 215 (2d Cir. 1983)). With this as guidance, a New Jersey appellate court has
27 held that the videotaping of the reality-based television program “Trauma: Life in
28 the E.R.” constituted newsgathering that was entitled to protection under New

1 Jersey's shield law. *Kinsella v. Welch*, 827 A.2d 325, 331 (N.J. Super. Ct. App.
2 Div. 2003).⁵ The *Kinsella* court noted that while "Trauma: Life in the E.R."
3 included "primarily human interest stories," the court recognized that it "also has
4 educational and public policy aspects," such as how real people react to trauma,
5 real-life interactions with medical staff, and a patient's return to normal life
6 outside the hospital. 827 A.2d at 332. The court held that the sensationalized
7 depiction of patients' injuries and surgical procedures did not undermine its
8 conclusion that the show presented "news" and was therefore covered by the
9 state's shield law. *Id.*

10 Although Ricochet is not aware of any California case that addresses
11 whether the state's media shield law applies to reality television programming, its
12 courts have recognized that unscripted television programs address matters of
13 public concern and public interest. Such programming is not, as Patriarch
14 suggests, without "legitimate journalistic" value. In *Seelig v. Infinity Broadcasting*
15 *Corp.*, 97 Cal. App. 4th 798, 807 (2002), the court found that the reality television
16 program "Who Wants to Marry A Millionaire" was of significant interest to the
17 public and the media, and that it had generated considerable debate concerning the
18 condition of American society, including the willingness of a person to marry a
19 complete stranger on national television for financial rewards and notoriety. In
20 *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 754 (N.D. Cal. 1993), the court concluded
21 that the reality television program "Street Stories," which broadcast actual events
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24 ⁵ Notably, New Jersey's shield law is more restrictive than California's, covering a
25 person who works in television for the purpose of "gathering, procuring,
26 N.J.S.A. 2A:84A-21 (emphasis supplied). Compare Cal. Const., art. I, § 2, subd.
27 (b) (covering "any unpublished *information* obtained or prepared in gathering,
28 receiving or processing of information for communication to the public")
(emphasis supplied).

1 in a woman's home after she called police to report domestic violence but
2 portrayed those events in a misleading and sensationalized manner, was either a
3 "news or public affairs broadcast." The *Baugh* court specifically recognized that
4 television programs are "hard pressed to disseminate information in a manner that
5 will capture the viewers' attention," and that consideration of the format and style
6 of the program should not undermine the "newsworthiness" of the information that
7 is disseminated to the public. *Id.* at 754. Although these cases concern legal
8 questions related to claims for defamation or appropriation of likeness, they
9 highlight the fact that reality television conveys information of interest and
10 concern to the public and therefore has legitimate journalistic value.

11 The real-life depictions in "The Real Housewives of New York City" are
12 certainly akin to traditional news programming in that the show videotapes and
13 broadcasts actual events which transpire during an average day of five New York
14 City women. Even if "The Real Housewives of New York City" is not the nightly
15 news, it plainly disseminates information of public interest and concern about such
16 important issues as balancing work and family, financial stress and involvement in
17 one's community. Patriarch asks the Court to judge this program and determine
18 that the issues it addresses, the information it conveys, and the real-life portrayal of
19 people struggling with everyday concerns are not newsworthy and therefore not
20 protected by the media shield law. Patriarch offers no guidance as to how such a
21 value judgment could be judicially administered.

22 Patriarch contends that simply because the producers have the right by
23 contract to "edit, delete, dub and/or fictionalize" the real-life footage of the
24 characters, the program does not disseminate "information for communication to
25 the public" in a manner that qualifies Ricochet for the shield law. As a preliminary
26 matter, the California media shield law expressly contemplates that information
27 conveyed to the public may be "processed" before it is published. Cal. Const., art.
28 I, § 2, subd. (b). Thus, the privilege is plainly not limited to the publication of

1 “raw” news. To be sure, traditional news programming is often edited in a manner
2 which may portray a particular point of view.⁶

3 Patriarch, however, offers no manageable standard for the application of the
4 shield law it proposes. Would programs such as “Entertainment Tonight” or
5 “Access Hollywood” – entertainment news programs which report on celebrity
6 lives in an entertaining, sensationalized and often misleading manner – be
7 covered? What about news segments that offer a particular point of view on a
8 matter of public concern? Will courts be required to evaluate the editorial process
9 before determining whether video footage of real-life events qualifies for
10 protection? The standard proposed by Patriarch is unmanageable and would open
11 the flood gates to endless litigation over the merits and values of reality television
12 and other television programs that “gather[], receiv[e] or process[] . . . information
13 for communication to the public.” *See* Cal. Const., art. I, § 2, subd. (b).

14 Patriarch claims that *In re Madden*, 151 F.3d 125 (3d Cir. 1998), is “highly
15 instructive” to the Court’s analysis. Def. Br. at 7. *In re Madden* is not this case.
16 There, Mr. Madden had produced tape-recorded commentaries to promote
17 upcoming World Champion Wrestling (“WCW”) events. *Id.* at 126. He obtained
18 his information from WCW employees and the information was available only to
19 people who called a 1-900 hotline. *Id.* When asked at his deposition for the names
20 of the individuals who provided him his information, he sought the protection of
21 the federal reporter’s privilege. *Id.* The Third Circuit Court of Appeals held that
22 the privilege did not apply because “[b]y his own admission, he is an entertainer,
23 not a reporter, disseminating hype, not news.” *Id.* at 130. He did not gather or

24
25 ⁶ For example, the news coverage of political candidates’ speeches or interviews
26 is often incomplete and arguably misleading as a result. MSNBC and Fox News
27 may report on the same event in an editorialized manner that conveys two different
28 messages. Plainly, Patriarch would not argue that these classic news agencies
would not be covered by the shield law.

1 investigate any of the stories he recorded and, of “critical” importance, he had no
2 intention of disseminating the information he obtained to the public. *Id.* His
3 primary goal was “to provide advertisement and entertainment – not to gather
4 news or disseminate information.” *Id.*

5 By contrast, Ricochet actually “gathers news and information” by following
6 five New York City women and recording their real-life experiences. This
7 information is recorded with the sole purpose of disseminating it to the public.
8 “The Real Housewives of New York” is not an advertisement. And, although the
9 program may be entertaining to some, it unquestionably conveys information
10 concerning matters of public concern and interest that are newsworthy.

11 California’s media shield law is broad by its terms – covering any entity that
12 communicates “information” to “the public” – and courts have declined to
13 narrowly interpret its scope. Ricochet – which communicates “information” to
14 “the public” by chronicling the real lives of five women in New York City – is
15 entitled to the protections afforded under the State’s Constitution.

16 ***C. The Documents Sought Are Protected by the New York Media***
17 ***Shield Law***

18 New York law, were it to be determined to apply, provides equally vigorous
19 protection to information gathered by journalists. *See* N.Y. Civil Rights Law § 79-
20 h(c) (journalist’s qualified privilege for non-confidential information); *see also*
21 *Gonzales v. Nat’l Broad. Co., Inc.*, 194 F.3d 29, 32 (2d Cir. 1999) (endorsing
22 journalistic privilege for non-confidential information).

23 The New York media shield applies to any professional journalist employed
24 or associated with a “professional medium of communicating news to the public.”
25 N.Y. Civil Rights Law § 79-h(c). “Professional journalists” are, in turn, defined as
26 “one who, for gain or livelihood, is engaged in the gathering, preparing, collecting,
27 writing, editing, filming, taping or photographing of news intended for a . . .
28 professional medium or agency which has as one of its regular functions the

1 processing and researching of news intended for dissemination to the public.”
2 N.Y. Civil Rights Law § 79-h(a)(6). Finally, “news” is broadly defined to include
3 “information or communication concerning . . . matters of public concern or public
4 interest or affecting the public welfare.” N.Y. Civil Rights Law § 79-h(a)(8).

5 As discussed above, Ricochet is unquestionably “engaged in the gathering,
6 preparing, collecting, writing, editing, filming, taping or photographing” of
7 “information or communication concerning . . . matters of public concern or public
8 interest or affecting the public welfare,” which is “intended for dissemination to
9 the public.” New York’s media shield law protects Ricochet.

10 In *von Bulow v. von Bulow*, the Court of Appeals for the Second Circuit held
11 that the “essential characteristic of one entitled to invoke [New York’s] journalist’s
12 privilege” is that the individual claiming the privilege can demonstrate “the intent
13 to use material – sought, gathered or received – to disseminate information to the
14 public and that such intent existed at the inception of the newsgathering process.”
15 811 F.2d 136, 144 (2d Cir. 1987). In that case, because the book author could not
16 demonstrate that she intended to disseminate to the public the information she
17 collected at the time she collected it, the privilege did not apply. The *von Bulow*
18 Court also noted that an individual may successfully claim the journalist’s
19 privilege if she is involved in activities traditionally associated with the gathering
20 and dissemination of news, even though she may not ordinarily be a member of the
21 “institutionalized press.” *Id.* at 144. In other words, *von Bulow* holds that the
22 purpose of the media shield law was not solely to protect newspaper or television
23 reporters, but to protect the activity of “investigative reporting.” *Id.* at 142-43.

24 These principles demonstrate that Ricochet is covered by New York’s shield
25 law. From the beginning of its production, Ricochet had the intention of
26 disseminating to the public the information it had gathered. Unlike the authors in
27 *von Bulow* or *People v. LeGrand*, 415 N.Y.S.2d 252, 254-56 (N.Y. App. Div.
28 1979), Ricochet’s intent at the inception of “The Real Housewives of New York

1 City” was always to disseminate the information it collected to the public.
2 Additionally, Ricochet engages in traditional news gathering activities – including
3 filming ordinary individuals, interviewing them on camera and attempting to
4 convey a message about matters of public concern – even though it is not the
5 “institutionalized press.” Patriarch does not challenge these essential facts.

6 New York’s shield law, however, is qualified (unlike California’s) and may
7 be overcome by a “clear and specific showing” that the information sought “(i) is
8 highly material and relevant; (ii) is critical or necessary to the maintenance of a
9 party’s claim, defense or proof of an issue material thereto; and (iii) is not
10 obtainable from any alternative source.” N.Y. Civil Rights Law § 79-h(c). Thus,
11 once the Court determines that Ricochet is protected, Patriarch can overcome the
12 privilege, though its burden is substantial.

13 **1. The Information Sought Is Not “Highly Material and**
14 **Relevant”**

15 Patriarch – through sworn testimony of its CEO and by the repeated
16 representations of its Counsel to the New York Court – is claiming only two
17 grounds for its termination decision. First, that Mr. Colodne did not perform his
18 duties adequately, a decision made long before Patriarch knew about
19 Mr. Colodne’s appearance in “The Real Housewives of New York City.” Second,
20 that Mr. Colodne’s unauthorized appearance on “The Real Housewives of New
21 York City” violated Patriarch’s media policy. Patriarch is not alleging that what
22 Mr. Colodne did or said or how he appeared on the program had anything to do
23 with its decision to fire him. Thus, the only disputed question is whether his
24 appearance on the program – a fact that is uncontested – violated Patriarch’s media
25 policy. That is a purely legal question to be resolved by the New York Court.
26 Nothing in the private communications between Ricochet employees will shed any
27 light on this dispute.
28

1 Patriarch has offered four explanations for why the information sought is, in
2 fact, relevant: (1) that Mr. Colodne's poor work performance may be attributed to
3 his unavailability "at inopportune times," potentially due to taping of the program;
4 (2) that Patriarch is entitled to know "exactly what rights Mr. Colodne gave to
5 [Ricochet]" that might adversely affect Patriarch; (3) that "Housewife" Bethenny
6 Frankel, Mr. Colodne's girlfriend, sent to Bravo, "apparently on Mr. Colodne's
7 behalf," a "partially filled out survey" which indicated that his appearance may be
8 bad for his career; and (4) that communications between Mr. Colodne and
9 representatives of Ricochet may reveal whether Mr. Colodne believed his
10 appearance on the program violated Patriarch's media policy. Ricochet Ex. C.
11 Given the disputed legal issues in the underlying litigation, these contentions do
12 not come close to the standard under New York law that the information sought be
13 "highly" material or relevant.

14 Patriarch had apparently determined to fire Mr. Colodne for poor work
15 performance long before the company learned that he would appear on "The Real
16 Housewives of New York City." Whether that poor performance was caused by
17 incompetence, malfeasance or neglect matters not at all if Patriarch can prove that
18 his work was not satisfactory. Indeed, Patriarch's CEO testified that she had "no
19 way of knowing" what the reasons were for his poor performance. Def. Ex. 2 (Tr.
20 134:21). Moreover, vague contentions that Mr. Colodne was absent "at
21 inopportune times," does not justify disclosure of private internal communications
22 by Ricochet employees, especially since such communications will not likely
23 reveal when Mr. Colodne was absent from work due to his involvement with the
24 program. In short, Patriarch has failed to demonstrate a "clear and specific
25 showing" that the documents and information it seeks to attempt to prove Mr.
26 Colodne's whereabouts are "highly material and relevant."

27 With respect to the other grounds to justify Patriarch's intrusion into
28 Ricochet's news and information gathering, Patriarch has repeatedly denied that

1 what happened on the show had anything to do with its decision to fire
2 Mr. Colodne. Thus, evidence concerning whether Mr. Colodne authorized
3 Ricochet to use Patriarch's name on the show (and there is no evidence that he did
4 or that the company was ever mentioned on the program), whether Mr. Colodne
5 thought his appearance on the show would be good or bad for his career, and
6 whether Mr. Colodne subjectively believed that he was violating Patriarch's media
7 policy is not at all "highly material or relevant" to any disputed issue in the New
8 York litigation.

9 Patriarch seeks these documents with the hope that they will uncover
10 something embarrassing to impeach Mr. Colodne. Patriarch has no good faith
11 basis to seek the documents it does. The Court should not condone this sort of
12 snooping in the guise of discovery, especially where important privileges are at
13 stake.

14 **2. The Information Sought Is Not "Critical or Necessary" to** 15 **Patriarch's Defense**

16 As set forth above, the documents and information Patriarch seeks are not
17 "highly relevant or material," much less "critical or necessary" to Patriarch's
18 defense. Patriarch has claimed that it will prove two points to defend against
19 Mr. Colodne's claim: (1) that Mr. Colodne did not adequately perform his job
20 duties and (2) that Mr. Colodne violated Patriarch's media policy when he
21 appeared on "The Real Housewives of New York City." Nobody disputes that
22 Mr. Colodne was on the program or that he failed to seek Patriarch's consent
23 before appearing on it. There is literally nothing in the documents that Patriarch
24 seeks that will support or refute its position that Mr. Colodne violated the
25 company's media policy. Patriarch cannot demonstrate a "clear and specific
26 showing" that the documents and information it seeks are "critical or necessary" to
27 its defense in the New York litigation.
28

1 **3. The Information Sought Has Been Obtained from Other**
2 **Sources**

3 Finally, Patriarch has already obtained from Mr. Colodne email
4 communications to or from representatives of Ricochet and Bethenny Frankel, a
5 copy of Mr. Colodne's unsigned release to Ricochet, over 100 pages of documents
6 and communications concerning Mr. Colodne from NBC, copies of excerpts of the
7 program and photographs of Mr. Colodne from the program. All of this evidence
8 demonstrates what is undisputed and what would only be confirmed if Ricochet
9 were compelled to produce documents: that Mr. Colodne appeared on the show
10 with some regularity as the boyfriend of "Housewife" Bethenny Frankel.
11 Ricochet's production would be redundant at best.

12 For all these reasons, should the Court apply the New York shield law, and
13 conclude that Ricochet qualifies as a professional journalistic agency and Patriarch
14 has failed to meet its burden to prove, by a clear and specific showing, that the
15 documents and information sought are highly relevant and material, critical and
16 necessary, or unavailable.

17 **IV. THE SUBPOENA IMPOSES AN UNDUE BURDEN ON RICOCHET**

18 There is an alternative basis for denying Patriarch's motion to compel. The
19 Court may conclude that the documents and information sought impose an "undue
20 burden" on Ricochet because they are not relevant to the underlying litigation.
21 Under Federal Rule of Civil Procedure 45(c)(3), the Court "must" quash a
22 subpoena that imposes such an undue burden on a non-party. Fed. R. Civ. P.
23 45(c)(3)(A)(iv). *See Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal.
24 2005) (noting that "courts have interpreted relevance as a factor when determining
25 motions to quash a subpoena"). "Specifically, under Rule 45(c)(3)(A), an
26 evaluation of undue burden requires the court to weigh the burden to the
27 subpoenaed party against the value of the information to the serving party, and in
28 particular, requires the court to consider such factors as relevance." *Id.* (internal

1 citations and quotations omitted). “[I]f the sought-after documents are not relevant
2 nor calculated to lead to the discovery of admissible evidence, then *any burden*
3 *whatsoever* imposed upon [the non-party] would be by definition ‘undue.’”
4 *Compaq Computer Corp. v. Packard Bell Elecs.*, 163 F.R.D. 329, 335-36 (N.D.
5 Cal. 1995) (emphasis in original). *See also* 9A Wright & Miller, *Federal Practice*
6 *& Procedure*, § 2463.1 (2008) (the determination of whether a subpoena is an
7 undue burden is based on its reasonableness).

8 The subpoena imposes an undue burden on Ricochet and should be quashed.
9 The only disputed issue that is related to Ricochet is whether Mr. Colodne’s
10 admitted participation on “The Real Housewives of New York City” constitutes a
11 breach of his media policy with Patriarch. Ricochet, a non-party in the underlying
12 litigation with no interest in its outcome, does not have a single document which
13 answers this purely legal question. *See also Dart Indus. Co. v. Westwood Chem.*
14 *Co.*, 649 F.2d 646, 649 (9th Cir. 1980) (discovery against a non-party is more
15 limited than the liberal discovery against parties).

16 Moreover, Patriarch, through its counsel and its CEO, has abandoned any
17 claim that the nature or extent of Mr. Colodne’s participation in the program is
18 relevant to its defense of a for-cause termination. Patriarch’s CEO testified that
19 she had decided to fire Mr. Colodne for alleged poor performance one month
20 before she learned about his involvement in the program. Def. Ex. 1 (Tr. 136:19-
21 21). She testified that she believed his participation on the program breached the
22 media policy but stated that she would have fired him regardless of this fact. Def.
23 Ex. 1 (Tr. 137:5). Counsel to Patriarch told the New York court that “I won’t be
24 arguing that the show was the basis for his termination. It had not aired yet.”
25 Ricochet Ex. A (Tr. 14:20-21). In light of this representation, the Court told
26 Patriarch’s counsel that “you are going to be precluded from arguing that this TV
27 show and the nature of this TV show has anything to do with being one of the
28

1 legitimate reasons that he was fired.” Ricochet Ex. A (Tr. 17:19-25). Given this
2 history, Patriarch cannot assert a good faith basis for seeking these documents.

3 Even Patriarch’s claim that Mr. Colodne’s work performance suffered
4 because he was absent during business hours does not justify the subpoena. First,
5 if Patriarch can demonstrate that Mr. Colodne did not perform his duties
6 adequately, it matters not at all if the reason for that failure was his absence, his
7 incompetence or his malfeasance. Second, private communications between
8 Ricochet, its employees and staff, and Mr. Colodne will not illuminate whether
9 Mr. Colodne was not at work when he apparently should have been. There is
10 simply no legitimate basis for seeking the documents and information addressed in
11 the subpoena.

12 Ricochet expects that Patriarch will argue that Ricochet has waived its
13 relevancy objection because it was not specifically set forth in its September 10,
14 2008 letter. *See* Def. Ex. 7. Patriarch is wrong. Ricochet is entitled to assert this
15 objection because (1) Ricochet’s September 10 objection asserting the New York
16 shield law expressly stated that the documents sought were not “highly material
17 and relevant,” *see* Def. Ex. 7, citing N.Y. Civil Rights Law § 79-h(c); (2) on
18 September 16, 2008, counsel for Patriarch and Ricochet discussed the reason
19 Patriarch was seeking these documents and Ricochet objected on relevancy
20 grounds; (3) on October 22, 2008, Ricochet received the July 19, 2008 court
21 conference transcript (Ricochet Ex. A), in which Patriarch’s counsel severely
22 undermined any relevancy claim to the Ricochet documents, and that same day
23 Ricochet sent a second letter setting forth its relevancy objections, *see* Ricochet
24 Ex. B; *see also McCoy v. Southwest Airlines Co., Inc.*, 211 F.R.D. 381, 385 (C.D.
25 Cal. 2002) (finding that subpoenaed non-party did not waive objection when it
26 acted in good faith and when counsel for the non-party and the subpoenaing party
27 were in contact concerning the non-party’s compliance prior to the time for the
28 non-party to challenge the legal basis for the subpoena); and (4) Rule 45 obligates

1 the Court to quash any subpoena that imposes an undue burden on the receiving
2 party, *see* Fed. R. Civ. P. 45(c)(3)(A)(iv) (“the issuing court *must* quash or modify
3 a subpoena that . . . subjects a person to undue burden”).

4 For all these reasons, the Court may quash the subpoena because it imposes
5 an undue burden on Ricochet by seeking documents that have no relevancy to any
6 disputed issue in the underlying litigation.

7 **V. RICOCHET IS ENTITLED TO FEES AND COSTS ASSOCIATED**
8 **WITH THE FILING OF THIS MOTION**

9 To protect against abuses of the subpoena power, the Federal Rules provide
10 that a party or attorney who issues a subpoena that imposes an undue burden or
11 expense on a non-party may be ordered to pay reasonable attorneys’ fees. Fed. R.
12 Civ. P. 45(c)(1). Ricochet not only objected to the subpoena under the media
13 shield law, but when it acquired evidence that undisputedly demonstrated that the
14 documents and information sought were not relevant to any disputed issue,
15 Ricochet again wrote to Patriarch and requested that it withdraw this motion.
16 Ricochet Ex. B. Patriarch was too stubborn to recognize that its subpoena and its
17 motion lacked merit. Ricochet should not be obligated to bear the expense of
18 responding to this Motion. The Court should order that all fees and costs accrued
19 as a result of this subpoena be paid by Patriarch. *See United States v. Columbia*
20 *Broadcasting System, Inc.*, 666 F.2d 364 (9th Cir. 1982) (court may award costs of
21 compliance with subpoena to non-party).

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VI. CONCLUSION

For all these reasons, the Court should deny Patriarch’s motion to compel production, quash the subpoena and award Ricochet attorneys’ fees and costs.

DATED: November 3, 2008

Respectfully submitted,

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