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January 7, 2021

VIA ECF
The Honorable Vincent L. Briccetti
United States District Court for the Southern District of New York
300 Quarropas Street, Room 630, White Plains, NY 10601

RE: *Kurin v. Balter, 7:20-cv-4613 – Opposition to Pre-Motion Conference Request*

Dear Judge Briccetti:

I am counsel to plaintiff Danielle Kurin, PhD. ("Dr. Kurin" or "Plaintiff") an Assistant Professor of Anthropology and Director of the PL Waler Bioarchaeology and Biogeochemistry Laboratory at the University of California, Santa Barbara ("UCSB"). Dr. Kurin sued defendant Michael Balter ("Mr. Balter" or "Defendant") for defamation and other claims in response to extensive cyberstalking and cyber bullying. Mr. Balter, a former professional journalist turned infamous cyberbully blogger, has a long history of troubling behavior, which recently led *eleven members* of the National Association of Science Writers to submit a formal grievance against him seeking his censure and removal after a 35-year tenure.[1,2] This follows Mr. Balter's termination from Science Magazine following a 25-year career for what Mr. Balter admits was due to a "breakdown of trust."[3] Mr. Balter's harassment is so severe and pervasive that over two years ago, one of the individuals targeted by Mr. Balter committed suicide.[4]

I write to you now in opposition to Defendant's January 5, 2021 letter seeking a conference and leave to file for summary judgement well before the close of discovery. The letter materially misrepresents the nascent record and pleadings and is submitted to this court for what I believe is an improper purpose. More specifically, Defendant's letter is an attempt to stifle discovery and to prevent Plaintiff from moving to compel the production of documents and for sanctions in response

[1] The NASW is the premier professional association for "journalists, authors, editors, producers, public information officers, students and people who write and produce material intended to inform the public about science, health, engineering, and technology." About the NASW, https://www.nasw.org/about-national-association-science-writers-inc (last visited Jan. 5, 2021).
[2] Letter from Dr. [REDACTED] et al. to NASW, Sept. 30, 2020 (on file with Plaintiff) (Complaining that Mr. Balter has a pattern of accusing sources of lying to him, threatening to and actually exposing private correspondence from victims of sexual harassment and assault, retaliating against victims who refuse to cooperate with him and give him the story he wants, and deceptively editing quotes, among other ethical violations. The net effect of which is that information given to Mr. Balter is coerced and he should know it may be unreliable).
[3] *See Balter*, Why Did @sciencemagazine Terminate Me After 25 Years of Service? (Mar. 11, 2016, 2:31 AM), http://michael-balter.blogspot.com/2016/03/why-did-sciencemagazine-terminate-me.html (last visited Jan. 5, 2021); First Amended Complaint ("FAC") ¶ 39.
[4] *See Balter*, An Accused Sexual Harasser Has Committed Suicide. Who is to blame? (Dec. 29, 2018, 10:31 AM), https://michael-balter.blogspot.com/2018/12/an-accused-sexual-harasser-has.html (last visited Jan. 5, 2021).

to Defendant's ongoing intentional destruction of evidence and witness intimidation.[5,6] Moreover, Defendant's motion for summary judgment would be immature and contrary to judicial efficiency and would only result in delay under Fed. R. Civ. P 56(d), especially since Plaintiff also has a cause of action for tortious interference, which will proceed regardless and require the same discovery. Lastly, Defendant's reliance on the November 2020 amendments to the New York anti-SLAPP law is misplaced, because as observed by the United States Court of Appeals for the Second Circuit in *La Liberte v. Reid*, the procedural mechanisms of state anti-SLAPP statutes do not apply in federal diversity cases and thus provide no impetus for denying Plaintiff discovery and forcing her to a premature proof of evidence.[7,8]

Defendant Omits Key Facts in his Letter and Mischaracterizes the Nature of the Case

Defendant claims that the thrust of Plaintiff's case is that Defendant falsely proclaimed Plaintiff "guilty," despite her never being declared as such, and that Defendant used the word in colloquial sense that is not defamatory. Defendant's argument is illogical and will not prevail at summary judgment. Defendant holds himself out as professional journalist. All preeminent journalistic authorities hold that journalists must not claim a person is "guilty" unless there has been a legal finding (such as in a criminal or administrative tribunal) against that person because of the unfair, significant prejudice and collateral repercussions that person will be subjected to by being labeled guilty. That is a strict, unwavering rule, in part because when someone hears the word "guilty" he thinks there has been a legal condemnation of that person.

Plaintiff was never adjudged guilty, rather, in a non-adversarial proceeding, investigators found that there was reason to believe that allegations that Plaintiff retaliated against a complainant when she wrote in an email to the complainant "bioarchaeology and forensic archaeology are small fields and your achievements will certainly precede you," and when she contacted students to ask if they participated in an investigation, may be founded. *That's it.* Plaintiff was never accused of nor found guilty of any type of sexual abuse, sexual misconduct, or anything else. Defendant's actions and words are akin to declaring a criminal suspect guilty because he or she was arrested yet never tried nor convicted – of anything. Plaintiff later reached a settlement agreement with the university and was never adjudged "guilty" by any definition of the word. The fact that Plaintiff, who never claimed to be a journalist, uttered remorse feelings and used the same word in a years old social media post is irrelevant.

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[5] Prior to, and through the first several months of litigation, Defendant operated software on his website which tracked all visitors. After Defendant was accused of making anonymous comments on his own blog, many of which defame plaintiff (*see e.g.*, FAC. ¶ 103), Defendant removed the software and in response to discovery requests, now claims that the data generated by the tracker does not exist. The evidence is material in that it should show whether certain defamatory statements on Defendant's website were made by Defendant or others as he alleges. Plaintiff intends to move to compel and/or for sanctions and will produce supporting documentation at conference if so requested.

[6] Defendant and several collaborators have repeatedly threatened to destroy the reputation of anyone who testifies against Defendant. They have made threats against at least two of Plaintiff's potential witnesses. Plaintiff has substantial evidence of Defendant's improper conduct and will produce supporting documentation at conference if so requested.

[7] *La Liberte*, 966 F.3d 79, 87-89 (2d. Cir. 2020) (finding that the early special motion to strike found in California's Anti-SLAPP statute conflicts with Federal Rules 12 and 56, and observing that procedural aspects of state anti-SLAPP laws impermissibly conflict with the Federal Rules); *accord Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019) (Texas law)*; Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018) (Georgia law)*; Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1335, 414 U.S. App. D.C. 465 (D.C. Cir. 2015) (D.C. law).

[8] Defendant cites *Palin v. N.Y. Times Co.*, No. 17-CV-4853 (JSR), 2020 WL 7711593 (S.D.N.Y. Dec. 29, 2020) for the proposition that the NY Anti-SLAPP law enacted on Nov. 10, 2020 applies to this matter, but *Palin* is irrelevant here, as it stands only for the proposition that the NY Anti-SLAPP law's malice standard may apply retroactively. The standard has no significant difference from federal defamation law.

Contrary to Defendant's assertion, this case is about much more than Defendant's apparent lack of understanding of the procedures under Title IX and his inability to use precise written language despite being a journalist for over four decades. Rather, as described in great detail in the FAC, this case is about Defendant's now hundreds of repeated and baseless attacks on Plaintiff, falsely calling her among other things a "sexual abuser," a "sexual predator's enabler," and "an enabler of sexual misconduct."[9] As well as Defendant's false accusations that Plaintiff has a "history of enabling sexual misconduct," that she enabled and covered up sexual harassment, that she has a history of "association with a sexual predator," and that Plaintiff was married to a convicted rapist to whom she supplied college coeds.[10] The Title IX Report that Defendant says exonerates him neither accuses nor finds Plaintiff "guilty". Defendant's allegations are demonstrably false and malicious by both legal and colloquial definitions of the word. Defendant's assertion that Plaintiff has not alleged by clear and convincing evidence that Defendant acted with malice flatly disregards not only the FAC[11], but also Defendant's own pleadings. For example, in both his Answer and Amended Answer Defendant repeatedly admits that he had no evidence that Plaintiff's former husband Gomez was ever convicted of rape.[12] Since this case has been filed Defendant has ongoingly defamed Plaintiff, her lawyers, and her witnesses in tirades of vicious cyberbullying and witness intimidation, as will be laid out in a further amended complaint that will be forthcoming.

This Case Is Not Ripe for Summary Judgment

At this date, the only discovery that has taken place is a rolling document production from both parties. Plaintiff has requested from Defendant copies of all information that Defendant relied upon in his reporting. Plaintiff anticipates that Defendant's production will demonstrate that he was without any reasonable basis to reach the conclusions that he did, and that he knowingly published exaggerated and outright false statements about Plaintiff, and that he substantially deviated from any accepted information gathering and dissemination practices. Defendant has objected to many discovery requests, asserting various reporter/journalist privileges, and thus far has not produced adequate discovery to permit a fair evaluation of the record. Plaintiff also has a cause of action for tortious interference, which will proceed regardless and require the same discovery. Accordingly, permitting summary judgment at this early stage of discovery, prior even to the return of interrogatory responses, will only lead to substantial delays to the inevitable proceedings as noted in Fed. R. Civ. P. 56(d). Accordingly, Defendant's request should be denied.

Sincerely,
/s/ David Scher
David L. Scher

cc: Mark I. Bailen, Esq.. Melissa M. Carvalho, Esq., Anat Maytal, Esq.
Counsel for Defendant

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[9] *See* FAC ¶¶ 83, 74(d), 99.
[10] *See* FAC ¶ 70(g); FAC Ex. 27 at 1-2; FAC Ex. 27 at 17; FAC ¶ 103.
[11] For example, in FAC ¶ 105, Plaintiff describes how Balter had and disregarded evidence that Gomez was never convicted of any crime of moral turpitude. Plaintiff also has current records from the Peruvian government proving that Plaintiff's ex-husband has never been convicted of a crime, let alone drugging and raping American college students.
[12] *See* Ans. ¶ 11, 102, 115; Amended Ans, ¶ 11, 103, 116. While Defendant has filed a second amended answer, on Dec. 27, 2020, he readopted his amended answer as "a point by point refutation" of Plaintiff's claims. *See* Balter (@mbalter), Twitter Dec. 27, 2020, 6:42 AM), https://twitter.com/mbalter/status/1343175503960825856.