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June 30, 2021

## VIA ECF

The Honorable Judith C. McCarthy  
United States Magistrate Judge  
United States District Court for the Southern District of New York  
300 Quarropas Street, Courtroom 421  
White Plains, NY 10601

*Re: Kurin v. Balter, No. 7:20-cv-4613 (VB)(JCM) (SDNY) Motion's Conference to Address Case and Discovery Issues*

Dear Judge McCarthy:

We are counsel to Defendant Michael Balter in the above-captioned action. In connection with the "Discovery Dispute Conference" the Court has scheduled for July 16, 2021, we write to request that certain issues relating to Plaintiff's document production also be addressed at the conference, in addition to the issues raised in our two letter motions (ECF Nos. 44 & 46). For the sake of efficiency and clarity, we include the following brief discovery summary, followed by an itemization of the additional issues.

## SUMMARY OF DISCOVERY

The parties exchanged initial disclosures in September 2020, and served document requests in October 2020, and interrogatories in November 2020. Because Dr. Kurin has challenged Mr. Balter's reporting about the incidents that occurred at the field schools in 2015 (with the University of California Santa Barbara ("UCSB")) and 2018 (with the Institute for Field Research ("IFR")), Mr. Balter served subpoenas on UCSB and IFR in November 2020 for documents relating to Dr. Kurin and the incidents in question. In December 2020, Dr. Kurin served a subpoena on one of her former students at UCSB who was identified by Mr. Balter as a witness for the defense. This student incurred thousands of dollars in legal expenses and costs in responding to that subpoena. Dr. Kurin also served subpoenas on Akshay Sarathi, a professor at Indiana University, and the National Association of Science Writers—third parties with no involvement or knowledge of the facts or circumstances of Dr. Kurin's misconduct that was the subject of Mr. Balter's reporting challenged here.

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Mr. Balter subpoenaed one of Dr. Kurin's identified witnesses, Dr. Kathryn Clancy, a University of Illinois professor, but Dr. Clancy responded with a sworn declaration in which she stated that she had no knowledge or information concerning the incidents relating to Dr. Kurin's misconduct. He also subpoenaed Dr. Richard Kurin, Plaintiff's father with whom she engaged in substantial communications in the midst of her misconduct in Peru and a powerful figure in anthropology circles as a senior executive at the Smithsonian Institute.

Dr. Kurin claimed that she had completed her document production in response to Defendant's requests on March 10, 2021, and again on April 2, 2021. The majority of her production was non-responsive and included: (1) screen captures of Defendant's social media posts as well as his published blog posts; (2) articles, news clippings, and manuals irrelevant to the litigation (and not published by either party); and (3) legal filings in other proceedings both in the U.S. and abroad in English and Spanish with no application here. Dr. Kurin failed to produce any documents or communications concerning the issues of this litigation—i.e., the complaints made against her and her former husband Enmanuel Gomez for improper conduct, investigations into their misconduct, Title IX (and other) findings made by UCSB, and IFR's termination of its relationship with her.

In addition to producing his non-privileged documents and communications, Mr. Balter also produced sworn declarations from former students documenting Dr. Kurin's misconduct. Mr. Balter's document production is nearly complete.

In early March, the parties entered intensive mediation with court-appointed mediator John Harris. To facilitate mediation, the parties agreed to hold discovery in abeyance. Mr. Harris informed the Court in May that the parties were close but settlement ultimately was not reached.

As discovery resumed in late May, defense counsel followed up on Dr. Kurin's deficient document production and it became clear that Dr. Kurin had not even searched her electronic files for communications and documents responsive to Defendant's discovery requests—requests served more than eight months before. Due to the delayed productions by Plaintiff and her father and the onset of the discovery deadline (then set to expire on June 28), Mr. Balter earlier this month subpoenaed Plaintiff's wireless carrier and Dr. Richard Kurin's employer, although both subpoenas are being held in abeyance and/or delayed pending production by the Kurins.

No depositions have been taken yet in the case. Mr. Balter plans to notice depositions once he receives Dr. Kurin's documents that are relevant to this action.

The parties have exchanged correspondence and met and conferred regarding Dr. Kurin's failure to produce her responsive communications (among other discovery issues). While Dr. Kurin's counsel now says they will conduct a "full 100% forensics capture" of her phone and personal email, he warns this production will take "several months." This inordinate delay is consistent with Mr. Balter's long-held belief that this is a "SLAPP" (Strategic Litigation Against Public Participation) suit—a lawsuit designed to burden a defendant with costly, time-consuming, and distracting litigation to chill his First Amendment rights.

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We seek the Court's assistance in requiring Dr. Kurin to promptly comply with her discovery obligations, as detailed below, and to address the serious issues raised in the prior letters.

## **SUMMARY OF DISCOVERY & CASE ISSUES**

### **1. Protection of Anonymous Speech (Letter filed at ECF No. 44)**

The anonymous speech and protection of non-parties who submitted comments to Mr. Balter's weblog has been addressed in our June 15, 2021 letter to Judge Briccetti (ECF No. 44).<sup>1</sup> Because of the First Amendment rights of unrepresented non-parties at stake, we request the opportunity to file a motion for a protective order precluding Dr. Kurin from obtaining identifying information of the anonymous posters.

### **2. Sanctions for Withholding Key Evidence (Letter filed at ECF No. 46)**

As noted in our letter of June 21, 2021 (ECF No. 46), we recently learned that Dr. Kurin and her counsel took affirmative steps seeking to conceal from the defense the Letter of Censure that was issued against Dr. Kurin by UCSB in February 2018, a document squarely responsive to a lawfully issued subpoena to UCSB. This is not a mere "discovery dispute" but a direct affirmative act by a party to conceal the truth—conduct that Defendant believes warrants the ultimate sanction of dismissal of this lawsuit. While the supporting documentation for this request can be filed under seal or provided *in camera* to the Court due to confidentiality designations on the documents made by UCSB, we also ask the Court to remove the confidentiality designation for this and all UCSB documents. By filing this lawsuit challenging Mr. Balter's reporting of her misconduct, Dr. Kurin opened the door to scrutiny of that misconduct, including evidence showing the disciplinary actions taken by her own university. We seek to file motions requesting the relief set forth in our June 21 Letter.

### **3. Plaintiff's Continued Delay and Failure to Produce Responsive Documents and Communications in her Possession, Custody or Control**

#### **A. Failure to Produce Any Communications**

As noted above, none of Dr. Kurin's communications have been produced to date. Although Defendant's discovery requests were served in October 2020, Dr. Kurin never undertook any efforts to search and collect for production her communications (including emails, texts, etc.) until this month. Significantly, Dr. Kurin has also made no effort to collect her emails from her UCSB email account, falsely claiming that she is not permitted to do so by UCSB. We have confirmed with the legal counsel's office at UCSB that she is and has been permitted to access her UCSB email account at all times. There is no excuse for Plaintiff's failure to produce *any communications with anyone at all—including her communications with Gomez regarding their misconduct—while repeatedly asserting that her production was complete.* We request that the Court order Plaintiff

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<sup>1</sup> We incorporate by reference here our June 15, 2021 (ECF No. 44) and June 21, 2021 (ECF No. 46) letter motions.

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to expeditiously collect her documents, including her UCSB emails, and produce them as soon as possible but no later than July 21, 2021.

**B. Failure to Produce Social Media Documents and Communications**

Dr. Kurin has also refused to produce her social media posts and messages responsive to Mr. Balter's discovery requests by claiming that her Facebook account was "closed" in 2016 and that she did not retain any copies of her posts. Dr. Kurin has taken no steps to assess the actual status of her Facebook account (including as to whether it was formally deactivated, or merely disabled, and/or whether any information posted has been deleted, and if so, when). Dr. Kurin has also failed to produce any information relating to her social media platforms (i.e., email addresses, usernames, and/or handles). This is important evidence because Dr. Kurin has made material admissions on social media. (In a Facebook post captured by one of her Facebook "friends," Dr. Kurin admitted she was "found guilty" by UCSB, despite her claim in this lawsuit that Mr. Balter's use of the term "guilty" is false and defamatory.) We seek an order requiring Dr. Kurin to collect and produce her social media posts that are now not publicly accessible.

**C. Improper Assertions of Attorney-Client Privilege**

We also recently received a privilege log from one of Dr. Kurin's witnesses—Dr. Clancy—that claimed attorney-client privilege or work product protection over her communications with Dr. Kurin's counsel. Dr. Clancy's counsel explained that she was instructed by Dr. Kurin's attorney to make the privilege assertions. To be clear, there is no attorney-client relationship between Dr. Clancy and Dr. Kurin's counsel, and given the documented attempts by Dr. Kurin to conceal damaging evidence against her, we request an order requiring Dr. Clancy to produce all relevant communications, including her communications with Dr. Kurin's counsel.

\* \* \*

We respectfully request that these additional issues be addressed at the July 16, 2021 conference. Thank you for your attention to these matters.

Sincerely,

/s/ Mark I. Bailen

Mark I. Bailen

cc: David Scher, Esq. and David Fullerborn, Esq. (via ECF)  
Michael Goldstein Esq., Senior Counsel, University of California Office of the General Counsel, Counsel for UCSB (via email)  
Kristina Larsen, Esq., Counsel to Professor Kathryn Clancy (via email)