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June 15, 2021

VIA ECF

The Honorable Vincent L. Briccetti
United States District Court for the Southern District of New York
300 Quarropas Street, Courtroom 620
White Plains, NY 10601

Re: *Kurin v. Balter*, No. 7:20-cv-4613 (VB) (SDNY) Letter Requesting Motions Conference

Dear Judge Briccetti:

We are counsel to Defendant Michael Balter in the above-captioned action. We write to request a motions conference to seek entry of a protective order to: 1) preclude from disclosure personal identifying information of readers of Mr. Balter's website who posted anonymous comments; and 2) to stop Plaintiff Danielle Kurin from publicly (or privately) attacking and intimidating her former students who have come forward as witnesses in the case, and to stop threatening Mr. Balter with bodily harm or otherwise.

The case is styled as a defamation action, but it is a classic "SLAPP" (Strategic Litigation Against Public Participation) suit—a lawsuit designed to silence a defendant's speech by saddling him with costly, burdensome, and distracting litigation even though the speech is protected by the First Amendment. Dr. Kurin challenges Mr. Balter's reporting about her misconduct at archeology field schools in Peru, but documents obtained in discovery thus far, including from the University of California, Santa Barbara ("UCSB") and the Institute for Field Research ("IFR"), the two institutions that sponsored the field schools where misconduct by Dr. Kurin and her ex-husband occurred, corroborate Mr. Balter's reporting in every respect.

Recognizing that her core claims against Mr. Balter lack merit—she cannot prove falsity in any of the publications—Dr. Kurin has refocused her litigation strategy to seek the identities of anonymous readers of Mr. Balter's weblog and to attack Mr. Balter and witnesses on social media, including a former student who had earlier filed a complaint against Dr. Kurin and has now bravely offered testimony in support of the defense.

Rule 26(c) of the Federal Rules of Civil Procedure expressly contemplates that a "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden and expense." New York courts also have long protected the

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identities of anonymous speakers where, like here, there is no viable cause of action against them. The Court should enter a protective order to prevent Dr. Kurin from continuing to engage in this improper conduct during the pendency of the case.

Background

The facts in this case are straightforward: In 2015, Dr. Kurin's (soon-to-be) husband Enmanuel Gomez engaged in sexual misconduct with students placed under Dr. Kurin's supervision at an archeology field school in Peru. A Title IX complaint was filed against Dr. Kurin and Gomez. According to the formal Title IX report issued in 2016, the university found that Dr. Kurin retaliated against students that spoke out about Gomez's abuse. (It also found that Gomez had engaged in sexual harassment). Due to this 2015 incident, Dr. Kurin was suspended from the UCSB campus for three years, a punishment to which Dr. Kurin agreed, and a Letter of Censure was placed in her personnel file for three years.¹ Notwithstanding the suspension, Dr. Kurin was permitted to run field schools in Peru in 2017 and 2018 operated by a different organization—IFR. Dr. Kurin again brought along Gomez (her husband by this time) and in 2018 he again was accused by students of sexual misconduct. Students also complained about Dr. Kurin's handling of the situation. IFR investigated the allegations, and terminated its relationship with Dr. Kurin.

Upon her return to campus in 2019, certain individuals contacted Mr. Balter in his role as a science writer and investigative journalist covering #MeToo matters in academia. They raised concerns about Dr. Kurin returning to teaching, especially after the 2018 incident. As Mr. Balter began to investigate and report about Dr. Kurin, more and more individuals came forward with harrowing stories about Dr. Kurin's abusive treatment, bullying, and retaliation. Dr. Kurin sued Mr. Balter for defamation on June 16, 2020 and filed an Amended Complaint on August 4.

The October 27, 2020 Blog Post

At the outset of this case, Mr. Balter, suspecting that Dr. Kurin's defamation suit against him was a pretext for obtaining his sources' identities so she could retaliate against them (as she did against students who reported her misconduct), publicly stated that he would never disclose his sources and he would fight to protect their rights. In response, Dr. Kurin's legal counsel, David Scher, took to social media and posted the following statement on Twitter on June 23, 2020:

My firm Hoyer Law Group, represents Ms. Kurin. ***Ms. Kurin does not seek, nor will she ever seek, any of Mr. Balter's sources' names.*** Mr. Balter's defamation of Ms. Kurin rests on objective evidence and therefore his sources are irrelevant.

(emphasis added). A few months later, on October 19, 2020, Dr. Kurin served a second set of document requests on Mr. Balter adding four more requests to the 74 she had already served and including a request for “[a]ll documents identifying your sources.”

¹ Dr. Kurin withheld the Letter of Censure from production in response to Mr. Balter's discovery requests without justification. UCSB finally produced a copy of the Letter of Censure on June 4, 2021. We will address Dr. Kurin's malfeasance in failing to produce this key piece of evidence separately.

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His initial suspicions regarding Dr. Kurin's motives for this lawsuit confirmed, Mr. Balter published a short blog post entitled "Archaeologist accused of misconduct seeks to force reporter to name victims and witnesses." He included a screen shot of the Twitter message from Mr. Scher, where Mr. Scher stated that "*Ms. Kurin does not seek, nor will she ever seek, any of Mr. Balter's sources' names.*" He also wrote:

Apparently realizing the sensitivity of demanding the identities of vulnerable students and members of her own archaeological community, Kurin and her attorney made the promise you see in the screenshot above of a now deleted Tweet: That they would never seek the names of my sources. That was early in the lawsuit, perhaps when Kurin--who is currently up for tenure at UCSB--and her attorney realized that a hostile act against the colleagues she is counting on to give her a permanent position was not a good idea. Since then, however, the weakness of Kurin's case against me has become increasingly clear to observers, especially as I have continued to publish the results of my reporting--exactly what the lawsuit was designed to prevent.

Approximately ten comments were posted anonymously to this blog post. The commenters offered their opinions about Dr. Kurin, such as she is "a piece of work and . . . an effing big baby and a narcissist" and "her behavior is all so unbelievable and makes me want to puke." Three anonymous comments criticized Dr. Kurin's legal counsel for renegeing on his promise not to seek confidential sources. No comments defame Dr. Kurin.

Two days after the blog post, on October 29, Dr. Kurin served a third set of document requests for eight more categories of documents, including drafts of the blog post, IP addresses of anonymous individuals who posted comments, and data captured on website trackers from October 26-30, 2020. In particular, she sought:

Document Request No. 85: "The IP addresses and any other identifying or tracking information regarding all comments submitted to Defendant's Blog relating to Defendant's October 27, 2020 blog post..."

Document Request No. 86: "The logs from your StatsCounter and any other web tracker or analytics plugin or application used on your Blog, including Google Analytics, for the period October 26, 2020 to October 31, 2020."

Mr. Balter objected to both but agreed to produce Google Analytics data containing statistics about page views. Dr. Kurin has continued to seek the IP addresses of the commenters.

Dr. Kurin's Twitter Account

Separate and apart from Dr. Kurin's efforts to unmask anonymous posters, but consistent with her efforts to attack those who have criticized her, Dr. Kurin launched a social media account on Twitter primarily designed to denigrate, attack, and threaten Mr. Balter and one of his witnesses, a former student who suffered Dr. Kurin's demeaning, hostile, and bullying behavior. Although the student filed a Title IX complaint against Dr. Kurin with UCSB, she subsequently withdrew

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it after learning that Dr. Kurin was already put on leave in 2016 (i.e. the consequences of the Title IX investigation of the 2015 incident), because she was “so fearful of [Kurin’s] retaliation.”

Using an account name “@Camilleoncroton,” a reference to Mr. Balter’s cat named Camille, Dr. Kurin posted nearly 150 messages that contained vulgar, rude, threatening, and entirely false statements about Mr. Balter. For example, she captioned a screenshot of one of Mr. Balter’s Tweets, “**you will soon die and I will feast on your face.**” She also posted a picture of a urinal with the caption, “[**Michael Balter’s**] **Tombstone itself is coming along nicely as u can see. It serves a dual purpose as a urinal**” and the comment, “**Makes it more convenient to piss on his grave!**” She photoshopped a picture of Mr. Balter’s face onto the body of a Nazi soldier standing next to Adolf Hitler and captioned it: “**Balter and his buddy Adolph (sic) at thier (sic) scout meeting**” and wrote over the picture “**friends 4eva.**” She also photoshopped Mr. Balter’s head into a picture of concentration camp victims, and plastered a Jewish star on Mr. Balter’s forehead.

In addition to the *ad hominem* attacks, threats, and insults against Mr. Balter, Dr. Kurin also attempts to convey her low regard for an archeology book that Mr. Balter published in 2004. Dr. Kurin placed the book in numerous trash receptacles and dumpsters, took a photo of the book immersed in trash, and publicly posted the photos on her Twitter account. She also photographed the book in a portable toilet (filled with excrement) and photoshopped it into a litterbox, commenting that the book is “***great* for soaking up cat diarrhea.**” We recognize that Dr. Kurin is entitled to her opinion about another writer’s scholarship, especially on archeology, but her method of conveying her views coupled with the threats lodged in her other Twitter messages, raise serious questions about her mental fitness and presents legitimate concerns about what other actions she may take, not only against Mr. Balter, but also against the witnesses who have bravely come forward notwithstanding their reservations (now confirmed) about retaliation by Dr. Kurin.

Dr. Kurin’s attacks against the former student (whose sworn declaration has been produced to Dr. Kurin and is labeled by Dr. Kurin as “Karen BPD” (bi-polar disorder) and “Avenging Angel”) include the following:

- “**46 yo failure Avenging Angel has borderline personality disorder – a perfect codependent match for Baby Balter and his untreated Narcissistic Personality Disorder. Like racist moths to the flame of stupidity**”
- “**Earth to BPD Karen: Get a job. Get a life. Ur parents want u the fuck out of their house—and told me as much. U r an elderly woman for Christ sake. Ever thought of acting like an adult? (Her answer: of course not)**”
- “**Avnging Angel is a 46 yr old woman who lives at home with mom & dad & can’t hold down a job. She rages over imagined slights and invented trauma [...] Bitch please. BPD Karen is a pathological liar who blames others for her shitty life**” (sic).

Dr. Kurin’s Twitter account was publicly available beginning in May and remained open and

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freely available until late in the day on June 7, 2021. It appears Dr. Kurin made it private only after we contacted her attorneys earlier in the day to follow-up on her missing discovery of her social media activity and we served notice of a subpoena to her cell phone provider.²

Good Cause Exists for a Protective Order

Good cause exists for the Court to protect the anonymous commenters. Anonymous speech has long been protected under the First Amendment. *See McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 357 (1995) (anonymous speech is an “honorable tradition of advocacy and dissent”); *see also Sony Music Ent. Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004) (citing *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999)). The First Amendment’s protection extends to anonymous speech on the internet because it is “a valuable forum for robust exchange and debate.” *Id.* at 562 (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). New York courts have generally followed two tests.³ Dr. Kurin cannot meet either test because there is no *prima facie* cause of action for defamation against the anonymous commenters. *See Varrenti v. Gannett Co., Inc.*, 929 N.Y.S.2d 671, 676 (N.Y. Sup. Ct. 2011). First, because the comments were not posted until October 2020, none is referenced in the Amended Complaint filed on August 4, 2020 and thus Dr. Kurin has not alleged any claims based on these comments. Second, she has not pointed to anything false and defamatory in the comments. She may disagree that she is a “piece of work,” a “big baby” or a “narcissist,” but those are protected opinions and not actionable. For this reason, her wild speculation that the anonymous comments may have been made by Mr. Balter himself (which makes no sense because he has openly published extensively about her) does not advance her position because she has no viable claim regardless of who made the comments.

Because constitutional rights of unrepresented third parties are at stake, the Court should enter a protective order precluding Dr. Kurin from obtaining the identifying information of the anonymous posters.

There is also good cause for an order requiring Dr. Kurin to refrain from intimidating, insulting, and otherwise harassing witnesses, and from threatening Mr. Balter. As noted above, Dr. Kurin’s goal in this SLAPP suit is not to win the lawsuit but to punish Mr. Balter and intimidate him into silence. That is precisely what Dr. Kurin is attempting to do here. Discovery from UCSB and IFR confirms she has no case. The only purpose to this lawsuit is to intimidate, harass, and retaliate. We request a protective order to end her improper conduct.

² Counsel for Dr. Kurin falsely informed UCSB that the Twitter account was private and only publicly available for “two brief moments.” This is categorically false and further evidences Dr. Kurin’s refusal to accept responsibility for any of her actions. We (along with an independent IT firm) accessed Dr. Kurin’s Twitter for several days before she disabled public access. Screenshots of the Twitter messages can be provided to the Court upon request.

³ New York courts have followed the four-part test from *Dendrite Internat’l, Inc. v. Doe No. 3*, 775 A.2d 756, 771 (N.J. Super. Ct. App. Div. 2001) or the five-part test in *Sony Music Ent. Inc. v. Does 1-40*, 326 F.Supp.2d 556, 565-66 (S.D.N.Y. 2004) to determine when to disclose an anonymous internet party’s identity. Both require the party seeking disclosure to make a *prima facie* showing of a viable claim for defamation.

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Sincerely,

/s/ Mark I. Bailen

Mark I. Bailen

cc: David Scher, Esq and David Fulleborn, Esq. (via ECF)