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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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SUSAN L. BURKE,	:	
	:	
Plaintiff,	:	Civil Action No.
	:	2012 CA 007525 B
v.	:	
	:	
JOHN DOE No. 1 (using the name	:	The Hon. Gregory Jackson
"Zujua"), et al.,	:	
	:	
Defendants.	:	
	:	

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**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DOE No. 1'S MOTION FOR A
PROTECTIVE ORDER AND SPECIAL MOTION
TO QUASH PLAINTIFF'S SUBPOENAS**

Zujua's important First Amendment right to anonymous speech would be violated if his identity were revealed by court process. Accordingly, under the standards set forth in the

District of Columbia's anti-SLAPP statute, his anonymity should be protected and the instant motion granted.

FACTS

Zujua is an anonymous Wikipedia editor who plaintiff claims edited her Wikipedia page in a defamatory manner. Plaintiff intends the Subpoenas to aid in unmasking Zujua's identity so that she may serve him with the complaint in this action and conduct further discovery into his personal computer records, contacts, and other personal matters.

Plaintiff is a prominent attorney who specializes in suing the federal government and federal contractors on behalf of alleged victims of torture and other alleged victims of America's war on terror. In an edit Zujua made on plaintiff's Wikipedia page on January 9, 2012, he added the bolded text to the section entitled "Abtan v. Blackwater":

Burke represented plaintiffs Talib Mutlaq Deewan and the estates of Himoud Saed Abtan, Usama Fadil Abbass and Oday Ismail Ibraheem in a lawsuit against Blackwater. The lawsuit stemmed from the firefight in Nisoor Square in Baghdad. The lawsuit alleged Blackwater violated the federal Alien Tort Statute in committing extrajudicial killing and war crimes, and that the company was liable for assault and battery, wrongful death, intentional and negligent infliction of emotional distress, and negligent hiring, training and supervision. **Judge Urbina threw out the suit in December 2009, saying that "the court declines to excuse the government's reckless violation of the defendants' constitutional rights as harmless error," after they attempted to use as evidence the**

defendants' compelled statements taken under threat of the loss of their jobs. Judge Urbina went on to criticize prosecutors for withholding "substantial exculpatory evidence" from the grand jury, and presenting "distorted versions" of witness' testimony.
The lawsuit was dismissed in 2010.

http://en.wikipedia.org/w/index.php?title=Susan_L._Burke&oldid=470414413; Complaint ¶ 6. A citation after the bolded text is to a news article about the dismissal by federal district judge Ricardo M. Urbina, of the U.S. District Court for the District of the District of Columbia, of a criminal prosecution of Blackwater-affiliated security guards for the Nisour Square shootings in 2007. Charlie Savage, *Judge Drops Charges From Blackwater Deaths in Iraq*, N.Y. Times, December 31, 2009, at <http://www.nytimes.com/2010/01/01/us/01blackwater.html>. Zujua made just one subsequent edit to plaintiff's page, in which he altered the bolded text by deleting the first Judge Urbina quote. http://en.wikipedia.org/w/index.php?title=Susan_L._Burke&oldid=473119382.

According to plaintiff, she removed the bolded language in February 2012. Complaint ¶ 8. The Complaint goes on to allege that in April 2012, a different editor and defendant, CapBasic359, republished the statements that plaintiff had removed and added a new false statement; that plaintiff specifically apprised CapBasic359 of the falsity of the statements; that CapBasic359 republished the statements again

after this notification; and that a lawyer working with plaintiff repeatedly tried to remove the statements at issue only to have CapBasic359 restore them on each occasion. Complaint ¶¶ 9-14.

There are no allegations that plaintiff specifically apprised Zujua of the error in the statements (as she did with CapBasic359), that Zujua had any role in perpetuating or restoring his edits after plaintiff removed them in February 2012, or that Zujua has any connection at all with CapBasic359.

DISCUSSION

To protect Zujua's important First Amendment rights, both the protective order and the special motion to quash should be granted under the standard provided for a special motion to quash in the District of Columbia's anti-SLAPP statute.

I. MOTION FOR A PROTECTIVE ORDER

Rule 26(c) provides this Court with the power to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Here, Zujua will suffer annoyance, oppression, and undue burden and expense if he is deprived of his important First Amendment right to anonymous speech by the disclosure of his identity and other personal information to plaintiff and

served by her in this lawsuit. See, e.g., *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). The special motion to quash provided for in the District of Columbia's anti-SLAPP statute, which allows for the quashing of a subpoena seeking personally identifying information in a claim arising from an act in furtherance of the right of advocacy on issues of public interest (see below), plainly was designed to protect this very interest and to prevent the very sort of harm Zujua faces. Accordingly, this Court should determine whether to issue the instant protective order under the standard set forth for a special motion to quash, in order to effectuate the objectives served by both rules. Under that standard, as shown below, the protective order should be granted. See *Avocent Redmond Corp. v. Raritan Americas, Inc.* 2011 WL 4790545, *2 (S.D.N.Y. 2011) (ordering defendant not to enforce a subpoena against a non-party).

II. MOTION TO QUASH

The District of Columbia anti-SLAPP statute provides for a special motion to quash a subpoena seeking personally identifying information. If a person whose personally

identifying information is sought moves to quash and makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, the motion will be granted, unless the party seeking the information demonstrates that the underlying claim is likely to succeed on the merits. DC Code § 16-5503.

The existence of a Wikipedia page on plaintiff, numerous articles in the media about her,¹ and her having thrust herself into prominence in connection with the public issue of America's conduct of the war on terror by bringing high-profile lawsuits against the United States and its contractors show that plaintiff is a public figure, at least for the limited purpose relevant here. See *Clampitt v. American University*, 957 A.2d 23, 43 n.25 (D.C. 2008) ("Limited-purpose public figures are individuals who are not deemed public figures for all purposes, but who assume roles in the forefront of particular public controversies in order to influence the resolution of the issues

¹ See, e.g., Jennifer Lind-Westbrook, *Power and Violence in the Safe Zones: "The Invisible War,"* PopMatters, November 2012, at <http://www.popmatters.com/pm/review/164953-the-invisible-war-look-at-one-of-the-u.s.-militarys-dirtiest-secre/>; Shannon McDonald, *Attorney, Yoga Instructor Shed Light on Torture of Iraqi Prisoners*, Newsworks, February 3, 2011, at <http://www.newsworks.org/index.php/the-feed/item/12379-attorney-yoga-instructor-shed-light-on-torture-of-iraqi-prisoners>; *EXCLUSIVE - Family Members of Slain Iraqis Sue Blackwater USA for Deadly Baghdad Shooting*, Democracy Now!, Oct. 11, 2011, at http://www.democracynow.org/2007/10/11/exclusive_family_members_of_slain_iraqis.

involved, and who are deemed public figures only for purposes of the controversy in which they are influential.") (internal citations and quotation marks omitted).

Zujua's required prima facie showing under § 16-5503 is easily made. Since plaintiff is a public figure, Zujua's statements about her were in connection with a public issue under § 16-5501(3), and since they were such and communicated to members of the public, under § 16-5501(1)(B) they were an act in furtherance of the right of advocacy on issues of public interest. In any event, the statements in Zujua's edit that plaintiff claims are defamatory concerned a public issue whether plaintiff is a public figure or not, since their subject matter related to the conduct of the war in Iraq and whether those prosecuting that war engaged in misconduct for which they should be held responsible. It was the same as the subject matter of an article in the *New York Times*. DC Code § 16-5501(1)(B) ("'[a]ct in furtherance of the right of advocacy on issues of public interest' means.... any.... expression.... that involves.... communicating views to members of the public in connection with an issue of public interest").

Plaintiff will be unable to meet her burden of showing that she is likely to succeed on her claim against Zujua. To prevail, plaintiff would have to provide evidence that Zujua made his edit with actual malice, that is, with "knowledge that

it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Clampitt, supra*, at 42. The standard for actual malice is subjective. The plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," or acted with a "high degree of awareness of... probable falsity." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-511 (1991) (internal citations and quotation marks omitted). These subjective states of mind must be proven by clear and convincing evidence, which may be circumstantial. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659, 668 (1989).

There is no evidence, let alone clear and convincing evidence, that Zujua entertained serious doubts about the truth of his edit when he posted it, or had any awareness, let alone a high degree of awareness, that it was probably false. The edit itself falls far short of clear and convincing evidence that Zujua did not simply fail to appreciate the difference between a criminal and a civil case, and assume that the case the *New York Times* article was about, which had the same underlying subject matter as a prominent case brought by plaintiff, was that same case. Significantly, the Complaint does not allege that plaintiff provided Zujua with any notice that the statements he posted were false, as she did with CapBasic359, much less that

Zujua repeated the statements after such a warning (as is alleged of CapBasic359). To the contrary. The Complaint alleges that plaintiff removed the statements Zujua posted the following month, and says nothing about any action by Zujua after she removed them.

III. ATTORNEYS' FEES

Under the standard of DC Code § 16-5503, this is a clear-cut case in which the motion should be granted. By the same token, it is clear that plaintiff was not substantially justified in issuing her subpoenas seeking Zujua's personally identifying information. Accordingly, pursuant to DC Code § 16-5504, as well as Civil Rules 26(c) and 37(a)(4), Zujua should receive reasonable attorneys' fees and costs, to effectuate the protection of important First Amendment rights that is the purpose of the anti-SLAPP statute.

CONCLUSION

For the foregoing reason, the instant motion for a protective order and special motion to quash should be granted.

Dated: December 10, 2012

Respectfully submitted,

/s/ Michael E. Rosman

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