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THE DISTRICT OF COLUMBIA COURT OF APPEALS

SUSAN L. BURKE, Plaintiff,	:	
v.	:	Appeal No. 13-CV-83
JOHN DOE No. 1 (using the name "Zujua"), et al., Defendants.	:	

DOE No. 1'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant John Doe No. 1 ("Zujua") submits this memorandum in opposition to plaintiff's motion to dismiss. Zujua's important First Amendment right to anonymous speech about issues of public interest is a right protected from the burdens of unmeritorious litigation under the District of Columbia's new anti-SLAPP statute. That right will be irreparably infringed if

the denial of his motion stands and his identity is disclosed; accordingly, this Court has jurisdiction to hear his appeal. *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 178 (5th Cir. 2009) (holding that appellate court had jurisdiction over an appeal from a denial of a motion to dismiss based on Louisiana's anti-SLAPP statute; "The purpose of [the Louisiana statute] is to free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights. [Statute] thus provides a right not to stand trial, as avoiding the costs of trial is the very purpose of the statute."); *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1139-40 (D.C. 2010) (recognizing that "the public's interest in the full exercise of First Amendment rights to free speech and to petition for redress of grievances concerning 'matters of public significance'" supported appellate jurisdiction in *Henry*) (quoting *Henry*, 566 F.3d at 180).

FACTS

Zujua (an online pseudonym) is an anonymous Wikipedia editor who plaintiff claims edited her Wikipedia page in a defamatory manner. A copy of plaintiff's complaint (the "Complaint") accompanies this response as Exhibit 1. Plaintiff intends the Subpoenas, attached to this response as Exhibit 2, to aid in identifying Zujua so that she may serve him with the

Complaint 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. Of consequence to this matter, she represented individuals who were victims of the Al Watahba and Nisour Square shootings in September 2007 in Iraq. *Abtan v. Blackwater Lodge and Training Center*, 611 F. Supp. 2d 1, 3 (D.D.C. 2009).

In the complaints in those consolidated cases, plaintiff (on behalf of her Iraqi clients) alleged that Blackwater is a company that obtained a contract to provide security services to State Department officials in Iraq during the hostilities there. *Id.* at 4. Plaintiff further alleged that Blackwater employees habitually shot innocent bystanders without justification, a practice not discouraged at all by Blackwater because it benefitted financially from such killings (*id.* at 5); that Blackwater shot the plaintiffs and/or their decedents without provocation along with other innocent civilians (*id.* at 5-6); and that Blackwater's conduct constituted war crimes (*id.* at 6). She alleged that Blackwater had procured the contract to provide security services in Iraq through

misrepresentations to the State Department (*id.* at 8), and that, in fact, the contract to procure such services was invalid because Blackwater was a mercenary or quasi-mercenary organization (*e.g.*, Amended Complaint in *Estate of Albazzaz v. Blackwater Lodge and Training Center*, D.D.C. Civ. No. 07-cv-02273-RBW, D.E. 16-1, ¶¶ 54-55).

Plaintiff also alleged at length (and wholly unnecessarily with respect to defendants' liability) that Blackwater's actions harm the United States (*id.* ¶¶ 43-53). She pointed out that Blackwater was being investigated by a Congressional committee, and that the shooting incidents were being investigated by the Department of Justice, the FBI, and the Iraqi government. *See also Abtan*, 611 F. Supp. 2d at 8. The shootings in Nisour Square had resulted in criminal charges being brought against Blackwater employees. *Id.* at 9 n.6.

Plaintiff did more than just file legal papers. She held press conferences to publicize the lawsuit and spoke out broadly against Blackwater's role (as well as the use of private contractors for security services generally) in Iraq. *See, e.g.*, http://www.workers.org/2007/world/blackwater-1025/ (reporting on a press conference plaintiff held to announce the suit); http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101101030.html

(quoting plaintiff as decrying the "cowboy culture" that contractors have fostered in Iraq); http://burkepllc.com/category/press-releases (containing six press releases issued by plaintiff about the lawsuit, and stating, *e.g.*, "Susan L. Burke, of Burke O'Neil LLC, stated, 'The culture of lawlessness created and fostered by Blackwater has exacted a terrible toll on innocent people in Iraq. Once again, Blackwater "shooters" senselessly ended the innocent life of Mr. Albazzaz. We continue to believe that the ongoing government investigations and this litigation will prove that Blackwater's interests are contrary to the interests of the U.S. military, the State Department, and the nation of Iraq.").

Not only did plaintiff seek widespread press attention to her crusading, public policy-oriented lawsuit; she received it. Doe No. 1's Emergency Motion for a Protective Order Enjoining Enforcement of Subpoenas, filed March 11, 2013, Exhibit 5 thereto (Zujua's reply papers in the court below) ("Reply Papers") at 4-12 (detailing some of the extensive media coverage plaintiff and her lawsuit against Blackwater have received).

In her Complaint in this action, plaintiff alleges that Zujua made an edit on plaintiff's Wikipedia page on

January 9, 2012, adding 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.

Complaint ¶ 6; http://en.wikipedia.org/w/index.php?title=Susan_L._Burke&oldid=470414413. 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.

Plaintiff alleges that she removed the erroneous bolded language in February 2012 (one month after the edit complained of). Complaint ¶ 8. The Complaint contains no further allegations against Zujua regarding any edits he made to plaintiff's Wikipedia article.

In the remainder of the Complaint, plaintiff goes on to allege that in April 2012, a different editor and defendant, CapBasics359, republished the statements that plaintiff had removed and added a new false statement; that plaintiff specifically apprised CapBasics359 of the falsity of the statements; that CapBasics359 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 CapBasics359 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 CapBasics359), 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 CapBasics359.

Plaintiff issued subpoenas to Wikimedia shortly after filing the Complaint. Zujua moved in the Superior Court to quash the subpoenas pursuant to D.C.'s anti-SLAPP statute and for a protective order "enjoining" plaintiff from enforcing those subpoenas pursuant to Superior Court Rule 26(c). Plaintiff's Motion to Dismiss ("Pl's Motion"), Exhibit 1 thereto ("Pl's Exhibit 1"). On January 30, 2013, after the hearing on Zujua's motion, Judge Maurice A. Ross of the District of Columbia Superior Court issued a very brief order denying the motion (the "Order"), in which he merely repeated plaintiff's arguments in her opposition brief without addressing any of Zujua's replies to them. A copy of the Order accompanies these papers as Exhibit 3. Zujua filed a notice of appeal of Judge Ross's order on January 31, 2013. On February 25, this Court issued an order to show cause why it had appellate jurisdiction. On February 28, plaintiff filed a motion to dismiss in this Court, claiming the Court lacks jurisdiction over this appeal.

DISCUSSION

This Court has appellate jurisdiction over the Order for two separate and distinct reasons: first, it is a denial of an

injunction; second, it is appealable under the collateral order doctrine.

1. Denial of Injunction

DC Code § 11-721(a)(2)(A) provides this Court with jurisdiction to hear denials of injunctions. In his motion below, Zujua sought an order "permanently enjoining" plaintiff from enforcing the Subpoenas, one of which was issued in California (Pl's Exhibit 1 at 2); that motion was denied. *See, e.g., McQueen v. Lustine Realty Co., Inc.*, 547 A.2d 172, 176-77 (D.C. 1988) ("[A]n injunction may be defined as an equitable remedy, consisting of a command by the court, through an order or writ, that the party to whom it is directed do, or refrain from doing, some specified act.") (citations omitted).[1]

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[1] Of course, the particular arguments that Zujua made to support the relief requested are irrelevant to the nature of the relief. In any event, contrary to plaintiff's claim, Pl's Motion at 3, Zujua established each part of the three-part test for permanent injunctive relief in his motion papers. *Ifill v. District of Columbia,* 665 A.2d 185, 188 (D.C. 1995) ("A permanent injunction ... requires the trial court to find that there is no adequate remedy at law, ... the balance of equities favors the moving party, and ... success on the merits has been demonstrated.") (internal citations and quotation marks omitted), *cert. denied,* 517 U.S. 1169 (1996); Pl's Exhibit 1 (demonstrating success on the merits of the motion under the standard of § 16-5503); *id* at 4, 7-8 (demonstrating irreparable deprivation of Zujua's First Amendment-protected right to anonymous speech, regardless of the legal outcome of any trial); *id.* at 6-8 (presenting facts - *viz.,* that Zujua's edit was only up for one month, and he made no effort to perpetuate it - showing that the harm to plaintiff would be slight, and showing that the relief sought would uphold First Amendment rights and thus be in the public interest); Zujua's Reply Papers (expanding on these showings).

In any event, regardless of whether the Order is denominated a denial of an "injunction" or of a "protective order," it is appealable under DC Code § 11-721(a)(2)(A) because it both has the *practical effect* of the denial of an injunction and will have a serious and irreparable consequence.

This Court has adopted the construction the U.S. Supreme Court has given the similar federal statute (28 U.S.C. § 1292(a)(1)). Under this test, an interlocutory order is immediately appealable as an injunction if the litigant requesting appeal shows 1) that the order has the practical effect of an injunction or the denial of an injunction and 2) "that the order might have 'serious, perhaps irreparable consequences.'" *Landise v. Mauro,* 927 A.2d 1026, 1032 (D.C. 2007) (quoting *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 85 (1981)); *Brandon v. Hines,* 439 A.2d 496, 506-507 (D.C. 1981) *(en banc)* ("In addition to considering whether the order has the 'practical effect' of granting or refusing an injunction, the court must evaluate whether the order inflicts a sufficiently serious injury to justify immediate appeal.") (quoting *Carson,* 450 U.S. at 83).

What Zujua sought, under any name, certainly had the practical effect of an injunction: a command by the court that plaintiff refrain permanently from seeking the enforcement of the Subpoenas. *See, e.g., McQueen,* 547 A.2d at 176-77 (holding

a protective order appealable under DC Code § 11-721(a)(2)(A) in part because it had the practical effect of an injunction). Furthermore, as Zujua argued in the court below, Pl's Exhibit 1 at 4, 7-8, he sought the relief he asked for to prevent imminent irreparable injury to himself, *viz.*, the abridgment of his important First Amendment right to anonymous speech. The relief Zujua sought would have protected his right, and its denial imperiled it, just as much as any formal injunctive relief could have done. For these reasons, the Order below has the practical effect of the denial of an injunction, and the first prong of the *Carson* test clearly is met.

As for the second prong (that the Order *might* have serious *or* irreparable consequences), the very purpose of the D.C. anti-SLAPP statute is to protect individuals such as Zujua - that is, persons who speak anonymously on matters of public interest - from having their First Amendment right to anonymous speech infringed both by the disclosure of their identity by means of the court process of a subpoena and by being forced to undergo the burdens of litigation, including discovery. Thus, the denial of Zujua's motion does far more than raise the clear possibility of irreparable harm to him; the disclosure of his identity pursuant to it would constitute an infringement of his constitutionally and statutorily protected right to free speech in a way that could not be undone, regardless of whether he

prevailed at trial. *See, e.g., Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *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."); *Solers, Inc. v. Doe,* 977 A. 2d 941 (explaining the importance of the right to anonymous speech and setting forth a strong subpoena quashal standard to protect the right to speak anonymously, even on issues not of public importance, from litigants seeking the disclosure of a speaker's identity). As this Court explained when it incorporated the rule of *Carson* and held that denials of stays of litigation for purposes of litigation were appealable orders:

> In addition to considering whether the order has the "practical effect" of granting or refusing an injunction, the court must evaluate whether the order inflicts a sufficiently serious injury to justify immediate appeal. *See [Carson]* at 83, 101 S.Ct. at 996. The court may do so with reference to the legislative policy expressed in other statutes. *See id.* at 88 n.14, 101 S.Ct. at 998 n.14. In *Carson,* for example, the order rejecting the consent decree undermined Congress' "expressed ... preference for encouraging voluntary settlement of employment discrimination claims." *Id.*
>
> When we apply this second *Carson* criterion in the context of arbitration, we conclude that denials - but not grants - of stays of litigation pending arbitration are appealable interlocutory orders, since only orders that frustrate (in contrast with

> facilitate) arbitration impose a sufficiently serious injury to justify an immediate appeal.
>
> More specifically, if a trial court refuses to stay litigation pending arbitration, the party seeking arbitration cannot "'effectually challenge ( )'" the order without an immediate appeal. *Id.* at 83, 101 S.Ct. at 996.... Otherwise, the party will suffer "'the serious, perhaps irreparable, consequence'" of being forced to resolve the dispute by trial rather than by arbitration.

Brandon, 439 A.2d at 506-507 (citations and footnotes omitted). Likewise, here, the denial of Zujua's motion in the court below and the disclosure of his identity would have the serious and irreparable consequences of his losing his First Amendment-protected anonymity and being forced to undergo a trial for defamation, contrary to the policy of D.C.'s anti-SLAPP statute.

Plaintiff argues that the Order is not appealable as an injunction because it is a discovery order, and discovery orders are not injunctions. Pl's Motion at 3-4. But that is not the standard. An order denying a stay of litigation is not technically an injunction, but it has the practical effect of an order *denying* an injunction. So, too, here. Indeed, the Order here is very similar to the denial of a stay of litigation in *Brandon,* because the protective order would have made it quite difficult for plaintiff to pursue (and, thus, for practical purposes, would have "stayed") her litigation against Zujua. (If she could have served Zujua with process without the

information sought in the Subpoenas, she presumably would have done so already.)

2. The Collateral Order Doctrine

Plaintiff claims that the collateral order doctrine is simply inapplicable to discovery orders, Pl's Motion at 2-3, but the cases she cites for that proposition actually establish the contrary. *See, e.g., Scott v. Jackson,* 596 A.2d 523, 527 *et seq.* (D.C. 1991) (observing that "[d]iscovery orders *generally* do not qualify as final orders" for purposes of the collateral order doctrine and going on to apply that doctrine to the discovery order at issue, finding its requirements not met in that case) (emphasis added); *Crane v. Crane,* 657 A.2d 312, 315 n.3 (declining to decide whether the conditions of the collateral order doctrine were satisfied and finding jurisdiction on another basis). In fact, as demonstrated in cases in which other motions under similar anti-SLAPP statutes were considered, the Order is appealable under the collateral order doctrine because it has a final and irreparable effect on Zujua's statutorily and constitutionally protected right to speak anonymously on public issues.

This Court has stated the standard under this doctrine as follows:

> Under the collateral order doctrine, interlocutory orders are appealable if they (1) conclusively determine a disputed question of law; (2) resolve an

> important issue separate from the merits of the case; and (3) are effectively unreviewable on appeal from a final judgment. *See In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C.1993) (en banc). To put it succinctly, *"interlocutory orders are appealable if they have a final and irreparable effect on important rights of the parties."*

Meyers v. United States, 730 A.2d 155, 157 (D.C. 1999) (emphasis added). All three of these conditions - conclusiveness, separability and importance, and unreviewability - are met here.

A. Conclusiveness

The Order of the court below conclusively determined a disputed issue of law - whether the Subpoenas should be quashed and the order Zujua sought granted under the standard of the anti-SLAPP statute. In deciding this issue the court also conclusively determined another disputed legal issue: whether the statute applied to Zujua. *See, e.g., DC Comics v. Pacific Pictures Corp.*, __ F.3d __, 2013 WL 119716 *2 (9th Cir. Jan. 10, 2013) ("A decision on an anti-SLAPP motion is conclusive as to whether the anti-SLAPP statute requires dismissal of the suit."); *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d at 174 ("There is [] no indication that a trial court would revisit an earlier decision on an [anti-SLAPP] motion.").

B. Separability and Importance

One issue raised in motions of this type is completely separate from the merits - whether a given movant has made a prima facie case that D.C.'s anti-SLAPP statute applies to him.

Here, for example, the court below erroneously held that Zujua had failed to make a showing that his edit was not "commercially motivated" (Exhibit 4) even though no such motivation appeared on the face of Zujua's edits. Indeed, in the holding of the court below, the court appeared to adopt plaintiff's argument that reporters, ghost writers, and other media professionals - indeed, anyone who gets paid or hopes to get paid for communicating on issues of public importance - would be beyond the reach of this statute meant to protect First Amendment freedoms.

The second issue the Court would be called upon to decide in appeals of this type is whether the party seeking to defeat the motion had shown a likelihood of success on the merits. This issue, too, is distinct from the merits themselves. As the Ninth Circuit explained in *DC Comics,* 2013 WL 119716 at *2, "[T]he denial of [an anti-SLAPP] motion resolves a question separate from the merits, as it 'merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed'" (quoting *Batzel v. Smith,* 333 F.3d 1018, 1025 (9th Cir. 2003). *See also Henry,* 566 F.3d at 176 ("[A]lthough an [anti-SLAPP] motion looks to the plaintiff's probability of success, the court decides it before proceeding to trial and then moves on. Immediate appellate review would thus determine an issue separate from any issues that remain before the district

court."). Indeed, appellate courts assess likelihood of success on the merits routinely on interlocutory appeal, for example on interlocutory appeal of injunctions and their denials, without undue disruption to the administration of justice. And here, whether this Court affirms or reverses the decision of the court below, it will not have determined any issue that remains before that court.

The importance of the issues decided by the court below cannot be gainsaid. Indeed, the underlying purpose of the special motion to quash in Section 16-5503 is to protect speakers' First Amendment right to speak anonymously on issues of public importance. The importance of this right has been recognized repeatedly by the U.S. Supreme Court and this Court (see above), as well as being specifically protected in D.C.'s anti-SLAPP statute.

C. Unreviewability

A denial of Zujua's important right to anonymous speech by the disclosure of his identity and his being forced to undergo the burdens of litigation, like the denial of qualified immunity in constitutional litigation, is necessarily unreviewable after trial, indeed, unreviewable as soon as his identity is discovered. *See, e.g., District of Columbia v. Pizzulli,* 917 A.2d 620, 624 (D.C. 2007) (holding the denial of a claim of judicial immunity immediately appealable under the collateral

order doctrine); *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 178 (5th Cir. 2009) (holding that court had jurisdiction over an appeal from denial of motion to strike under Louisiana's anti-SLAPP statute; "The purpose of [the Louisiana statute] is to free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights. [Statute] thus provides a right not to stand trial, as avoiding the costs of trial is the very purpose of the statute."); *McNair Builders, Inc.*, 3 A.3d at 1139-40 (declining to apply the collateral order doctrine to an order implicating the judicial proceedings privilege because the public interest underlying that privilege did not "approximate the public's interest in the full exercise of First Amendment rights to free speech and to petition for redress of grievances concerning 'matters of public significance'" that supported appellate jurisdiction in *Henry)* (quoting *Henry*, 566 F.3d at 180).

In short, because of the Order of the court below, Zujua faces the irreparable infringement of his important right, strongly protected both in the First Amendment and in D.C.'s anti-SLAPP statute, to speak anonymously on issues of public importance. He therefore is entitled to appeal the Order before being forced to undergo the burdens of being a defendant in an unmeritorious defamation lawsuit - the very kind of harm to

First Amendment freedoms the D.C. anti-SLAPP statute was designed to prevent.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction to hear the instant appeal, and plaintiff's motion to dismiss should be denied.

Dated: March 12, 2013

Respectfully submitted,

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