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Attorneys for John Doe No. 1

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

John Doe No. 1 ("Zujua") submits this reply memorandum of points and authorities in further support of his motion to quash and for a protective order, and in response to plaintiff's opposing memorandum ("Pl's Memo").

Introduction

The provision governing the special motion to quash in the District of Columbia's anti-SLAPP statute is clear and unequivocal: a motion to quash a subpoena seeking personally identifying information in a case arising from an act in furtherance of the right of advocacy on issues of public interest will be granted, unless the plaintiff can show a likelihood of success on the merits. Under this standard, to prevent the threat of meritless lawsuits from chilling public discussion, only subpoenas issued in suits that are likely to be successful can be enforced.

Plaintiff's attempts to get around this clear statutory standard are uniformly unsuccessful.

I. The statute applies to Zujua's edit

First, plaintiff misconstrues the statutory language, claiming that that § 16-5501(1)(B) does not apply to "written statements" such as Zujua's edit. Pl's Memo, 5. But of course, the phrase "any other expression" clearly applies to written statements *other than* those defined in the immediately-preceding § 16-5502(1)(A)(i) and (ii) (for example, a letter or email to a group of selected recipients) - for the obvious reason that a written statement is a kind of expression. Plaintiff's strained contrary interpretation - that the catchall language of § 16-

5501(1)(B) applies only to "expressive conduct" and "expressions" that are *not* written or oral statements (whatever these might be) - is an unjustified departure from both common sense and the statute's plain meaning.

In any event, Wikipedia is certainly a public forum - plaintiff even refers to it as "an open forum," Pl's Memo, 7 - since, as plaintiff notes, anyone with internet access can post articles and make edits. *Id.* Thus, § 16-5501(1)(A)(ii) applies.

Plaintiff also claims, without argument, that Zujua must show that plaintiff is a public figure in order for the statute to apply. Pl's Memo, 5. Though plaintiff certainly is a public figure (see below) she need not be one for the statute to apply, because in § 16-5501(3), an issue of public interest is defined in part as one "related to.... safety," "community well-being," or a "service in the marketplace." See Pl's Memo, 8 ("Defendant was commenting on.... Ms. Burke's alleged professional misdeeds.") Since Zujua's edit, if it can be construed as having a defamatory meaning at all, concerns a lawsuit (plaintiff's lawsuit) that created a very public controversy about the role of private contractors in the war on terror, it clearly "relates" to both public safety and community well-being, as well as the services plaintiff provides in the marketplace.

Next, plaintiff argues, oddly, that Zujua's edit did not concern a public issue related to her, since the edit concerns only her "alleged professional misdeeds," which have "no nexus" with an "issue on which Ms. Burke may be a public figure." Pl's Memo, 8. But actually, the edit does not mention plaintiff, but merely relates what Judge Urbina wrote about the conduct of prosecutors in a criminal case with the same underlying facts as plaintiff's case. Only the edit's placement in a paragraph about plaintiff's suit against Blackwater over the same events - the Nisour Square shootings - could possibly lead a reader to believe that it was about plaintiff at all. Any nexus the edit has with plaintiff, then, it has through its nexus with her lawsuit against Blackwater, for purposes of which she is a public figure (see II below).

Here, and also when it comes to malice (see IV below), plaintiff cannot have it both ways. To show any likelihood of success, she must show defamatory meaning, and Zujua's edit can have such a meaning only if it is construed as being "about" plaintiff's civil suit against Blackwater, a highly public issue in which she was prominently involved.

II. Plaintiff is a public figure

For similar reasons, plaintiff's argument that she is not a public figure because she is not one for purposes of the

Blackwater prosecution are unsuccessful. Pl's Memo 6-8. She certainly is a public figure for purposes of her series of high-profile lawsuits, spanning many years, against the U.S. military and its civilian contractor Blackwater; these suits, and her, have been the subject matter of countless reports in the media. One media company alone, Fox News, has published at least eighteen print articles about plaintiff, all concerning her lawsuits against the U.S. military and Blackwater. <http://www.foxnews.com/search-results/search?q=%22susan+burke%22> (listing eighteen articles). See also, e.g., <http://today.msnbc.msn.com/id/46637869#.T1e4rvHOXjs> (posting a story by Michael Isikoff on plaintiff's sexual assault suits, quoting plaintiff). She was a guest on the television program *Real Time with Bill Maher*, <http://vidgrids.com/susan-burke>, and according to her law firm's website, she and her work are the subject of *Invisible War*, a documentary about sexual assault in the military that has an Oscar-nominated director, won the "Audience Award" at the Sundance Film Festival, and was reviewed in many major news publications. <http://burkepllc.com/attorneys/susan-l-burke/> ("Ms. Burke is spearheading a nationwide series of lawsuits designed to reform the manner in which the military prosecutes rape and sexual assault. Her work on this project is the subject of a documentary premiering at Sundance called *The Invisible War*."); <http://invisiblewarmovie.com/index.cfm>;

<http://invisiblewar.movie.com/page.cfm?id=12>. If plaintiff is not a public figure with respect to her legal work against the U.S. military and its contractors, it is odd that at this moment she and her work in that field are prominently featured on movie screens across the country. <http://www.notinvisible.org/screenings>.

Plaintiff's fame in this area is recognized by press and public alike. On the website of the law practice of her husband, Jamison Koehler, a posting by Koehler dated May 24, 2010, reads:

I am proud to say that the Spring 2010 issue of Ms. Magazine features my wife, Susan Burke, and her class action suit against the military on behalf of rape victims. Entitled "Culture of Rape" and now available on newsstands (but not online), the article cites a 2003 study by the Veteran Affairs Medical Center which estimates that at least one-third of all female veterans experienced rape or sexual assault during their service. Of my wife, the article includes the following:

Susan Burke wants to dramatically change this brutal, unjust state of affairs.

The Washington, D.C. attorney, who heads the firm Burke PLLC, is preparing to file a class-action lawsuit this summer to revamp how the U.S. military deals with sexual violence and assault committed by its personnel. The suit.... will ask for damages as well as changes in the military's practices. As Burke puts it, "You shouldn't have to agree to be raped in order to sign up and serve your country."

Burke already has a well-deserved reputation as a crusader against violence by the military and its contractors. She spearheaded a series of lawsuits in 2004 against private security forces who allegedly committed torture and abuse on behalf of the U.S. military in Iraq's notorious Abu Ghraib prison. Later, she sued the infamous Blackwater firm on behalf

of Iraqis killed and wounded in two allegedly unprovoked 2007 attacks on civilians in Baghdad. (The Blackwater suits were settled for a confidential amount; the Abu Ghraib ones are pending.)

<http://koehlerlaw.net/2010/05/ms-magazine-article-on-rape-in-the-military/>. In the "comments" section of this post, a reader wrote:

Who knew that you are married to the famous Susan Burke? I studied her Abu Ghraib case when I was in law school. I also went to see her speak one time at some function in New York. She is a great public speaker and a brilliant and committed lawyer. She is also very courageous to take on big interests, such as Blackwater and the U.S. military.

Id.

Plaintiff's fame is no recent development. At the launch of her suit against Blackwater in 2007, National Public Radio reported as follows:

Details of the Blackwater shooting in September are achingly familiar by now. A convoy of Blackwater vehicles entered a Baghdad traffic circle on Sept. 16 and, a short time later, shots rang out.

Blackwater has said its guards began firing into oncoming cars in self-defense. A subsequent FBI inquiry reportedly determined that the shootout was unprovoked. What everyone agrees on is that 17 Iraqis died in the incident.

Philadelphia attorney Susan Burke filed a civil suit this week against Blackwater on behalf of five families who lost relatives in the incident and two people who actually survived the shooting.

"We have not found anyone, anyone at all, who has come forward to say there were any shots fired or any kind of threat made upon these Blackwater shooters," she said.

Determining Accountability

Burke's name may seem familiar. She was the lead attorney in another notable case. She has brought a civil suit against civilian contractors who took part in the prisoner abuse at Abu Ghraib. She says the cases strike many of the same chords.

"These cases pose a very important issue for us as Americans," she said. "When a company makes millions of dollars in providing services to the American government, is the company nonetheless still responsible for ensuring its workers do what they are supposed to do?"

[http://www.npr.org/templates/story/story.php?storyId=16717292;](http://www.npr.org/templates/story/story.php?storyId=16717292)

see also, e.g., <http://www.huffingtonpost.com/2012/10/06/>

[military-sexual-assault-defense-department_n_1834196.html](http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html)

(posting a long article, quoting plaintiff, about sexual assault in the military, with a photo of plaintiff speaking to reporters in Abu Dhabi in 2010 about one of her Blackwater cases).

As the above reports indicate, plaintiff is a public figure with respect to her suits against Blackwater over the Nisour Square shootings as well as more generally. There have been countless articles and media reports about these consolidated cases and related matters, and plaintiff, as lead attorney for the Iraqi plaintiffs, is featured prominently in them. *See, e.g.,* <http://www.workers.org/2007/world/blackwater-1025/> (reporting on a press conference plaintiff held to announce the suit); http://www.msnbc.msn.com/id/34752336/ns/world_news-mideastn_africa/ (mentioning plaintiff in an article about the settlement of these cases); <http://abcnews.go.com/Blotter/505->

games-blackwater-videogame-courts-controversy-critic-calls/
story?id=13812778 (quoting plaintiff decrying a Blackwater video
game); http://ccrjustice.org/files/Blackwater_07.10.11_NYT.pdf
(posting a *New York Times* article about the Blackwater suit that
mentions plaintiff); <http://breakthru-radio.wordpress.com/2009/12/09/citizen-radio-with-attorney-susan-burke/> (featuring
plaintiff as a special guest on radio show); <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/28/AR2009082803782.html> (posting a *Washington Post* article, quoting
plaintiff, about the Blackwater case); http://www.cbsnews.com/2100-215_162-5257759.html (mentioning plaintiff in a major
article about the Blackwater case); <http://www.prnewswire.com/news-releases/xe-blackwater-personnel-shot-iraqi-children-others-in-multiple-incidents-according-to-burke-oneil-llc-62094127.html> (quoting plaintiff in a major article on the
Blackwater case and stating media inquiries are to go to
plaintiff's public relations firm).

The allegations against Blackwater in plaintiff's case were nothing if not attention-getting. See *Estate of Abtan v. Blackwater Lodge and Training Center*, 611 F. Supp. 2d 1, 4-5, 10 (D.D.C. 2009) (recounting allegations that, *inter alia*, Blackwater condoned drug use by its personnel, hired known human rights abusers, and lied to the State Department to obtain contracts to protect State Department officials). Not only are

these allegations of significant public interest, but plaintiff conducted the Blackwater case in such a way as to invite comment and controversy, issuing many press releases. <http://burkepllc.com/category/press-releases/> (containing numerous press releases about these cases). As widely reported in the press, she introduced evidence, in the form of affidavits by anonymous Blackwater employees, that Erik Prince, the founder of Blackwater, was personally involved in murder, weapons smuggling, and other crimes. <http://www.thenation.com/article/blackwater-founder-implicated-murder#>; <http://my.firedoglake.com/libbyliberal/2009/08/08/stunning-charges-against-blackwaterxe-erik-prince-aka-the-ugly-satanic-american-and-his-hired-war-criminals/>; <http://www.dailykos.com/story/2009/08/04/761882/-Erik-Prince-of-Xe-Blackwater-Implicated-in-Killing-of-Cooperative-Govt-Witnesses#>; <http://www.motherjones.com/mojo/2009/08/blackwater-erik-prince-assassinations-weapons-smuggling-wife-swapping#>; <http://boards.straightdope.com/sdmb/showthread.php?t=526983>. The negative publicity about Blackwater was such that Blackwater sought a gag order - a motion plaintiff's legal team contested. As *The Nation* reported:

Blackwater's gag-order motion focuses at length on Burke. It cites her labeling of Erik Prince as "a modern-day merchant of death" whose "repeated illegal conduct.... must be stopped" and then lists statements by Burke and other lawyers that Blackwater says "are merely the latest in a long line of inflammatory public utterances":

- The death of plaintiff Sa'adoon was "part of a pattern of illegal Xe-Blackwater shootings around the globe known to company management," and part of a "culture of lawlessness and unaccountability" fostered by the company.
- The deaths of plaintiffs in the Hassoon case "reflect the pattern and practice of recklessness in the use of deadly force" by Blackwater "mercenaries" who have "flouted the laws of the United States and their host nation Iraq."
- "Xe-Blackwater's repeated illegal conduct has caused hundreds of unnecessary deaths and thousands of unnecessary injuries. This shooting of [plaintiff] Rabea was not an isolated event. Xe-Blackwater personnel repeatedly and routinely shot for no reason as they prowled the streets of Iraq."

When asked about these specific statements, Burke quickly shot back: "It's all accurate. Those are all completely accurate statements. I stand by what I said."

The Blackwater legal team argues "there is no constitutional right to sway potential jurors through press releases, media interviews, and other extrajudicial statements. 'Legal trials,' the Supreme Court has observed, 'are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper.'"

Burke's partner in the lawsuit, the Center for Constitutional Rights, says it will fight vigorously against Blackwater's attempt to silence their Iraqi clients and attorneys. "Blackwater has consistently spent millions of dollars on PR and public advocacy to try to promote their position and this is something that they have done before," says Bill Quigley, CCR's Legal Director. "This is a blatant attempt to gag the First Amendment rights of the individual Iraqis, their families, their lawyers and the public at large and to bury these factual allegations under a cone of silence."

<http://www.thenation.com/article/blackwater-seeks-gag-order>.

Whatever the merits of plaintiff's lawsuit against Blackwater, the way she conducted it was calculated to receive wide

attention in the media, attention that plaintiff repeatedly encouraged and cooperated with.

Necessarily, the above represents merely a sampling of the media coverage of plaintiff and her lawsuits. Suffice it to say, if any lawyer in any case is a public figure for purposes of that case, plaintiff is for purposes of her suit against Blackwater. See, e.g., *Partington v. Bugliosi*, 825 F. Supp. 906, 917-918 (D. Hawaii 1993) (holding an attorney appointed by a court to represent a murder suspect was a public figure for purposes of the suspect's trial; "Partington's involvement in the case went far beyond the low-key participation one might expect of someone attempting to avoid the public eye. He actively sought exposure to the media and voluntarily maintained a high profile throughout the trial.... Partington voluntarily engaged in a course of action with respect to the trial that was bound to invite attention and comment. Accordingly, he was a public figure for the purpose of the Walker trial.").

III. Zujua's edit was not "directed toward" protecting commercial interests

Plaintiff argues, creatively, that Zujua must make a prima facie showing that his edit was not commercially motivated. Pl's Memo, 8-9. She does not explain what such a "prima facie" showing would entail above and beyond the showing, already

accomplished, that no commercial motive is discernible on the face of his edit or any surrounding circumstances. That, indeed, is all the showing that is required by the provision plaintiff relies on, § 16-5501(3), which exempts "statements directed primarily toward protecting the speaker's commercial interests." Statements cannot be "directed" at an interest if on their face they have nothing to do with that interest. For the Court to hold otherwise would be to require every person making a motion under this provision to provide special proof that the statement alleged to be defamatory was not made for any kind of monetary or other personal gain - a requirement irrelevant to the First Amendment, and one that would exclude all professional journalists and ghost writers (and would-be professional journalists and ghost writers) from the protection of the statute. See, e.g., *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."). Cf. Pl's Memo, 8 ("Many Wikipedia commentators are paid for their services").

IV. Plaintiff fails to show actual malice

Plaintiff claims that since the *New York Times* story Zujua referenced in his edit does not mention plaintiff and refers

briefly to a civil suit with the same subject matter, she has some evidence of actual malice. Pl's Memo, 9-10. But the brief mention of a civil case in the article, which does not include any mention of plaintiff, is easily missed, especially by someone who does not understand the distinction between a civil and a criminal case. Indeed, crucially, plaintiff does nothing to show that Zujua had legal training or was otherwise aware of this distinction, and accordingly did not simply assume that the *New York Times* article was about plaintiff's case, on the commonsense (if not legally sophisticated) ground that it concerned the same high-profile events, the Nisour Square shootings. Plaintiff cannot very well claim that such lack of sophistication on Zujua's part is at all unlikely; after all, the edit can only carry a defamatory meaning if *readers* of the edit had the same lack of sophistication. If they did not, they could hardly have believed that a judge's comments about "prosecutors" were even a reference to plaintiff's case. The evidence plaintiff proffers thus falls far short of the required showing that she is likely to persuade a fact-finder, with clear and convincing evidence, that all of the elements of defamation have been met.

Almost conceding as much, plaintiff proceeds to attempt to revise the statutory standard, and ask for discovery on malice. Pl's Memo, 10. But no discovery on the merits of a case is

provided for in a special motion to quash. And under the canon of *expressio unius*, that lack is dispositive of whether any should be granted, since "targeted discovery" is provided for in a special motion to dismiss under § 16-5502(c)(2), and could easily have been provided for here, if it was intended to be made available. (Strictly speaking, the D.C. Council's purpose in permitting "targeted discovery" under the special motion to dismiss is irrelevant here, but it seems likely to have revolved around the *res judicata* consequences of a dismissal, which are more serious than those of quashing a subpoena. Granting the instant motion will not preclude plaintiff from seeking to identify movant through other means and pursuing her lawsuit later.)

V. The issuance of a protective order is appropriate

Plaintiff's last argument, and her sole argument against the protective order, is that it would *not* burden Zujua to have Wikimedia comply with her subpoenas. Pl's Memo, 11. But clearly Zujua would be greatly burdened if his First Amendment rights were infringed, and also by the expense and inconvenience of defending even a meritless lawsuit. Plaintiff's claim that these things do not constitute a "burden," because only the Wikimedia Foundation must act to comply with the subpoenas, *id.*, transparently misses the point and ignores the broad language of

Rule 26(c). As the U.S. Court of Appeals for the District of Columbia Circuit has explained concerning Federal Rule of Civil Procedure 26(c), on which District of Columbia Superior Court Civil Rule 26(c) is modeled:

As a whole, "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly." *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 1597, 140 L.Ed.2d 759 (1998). And "[i]t is appropriate for the court, in exercising its discretion..., to undertake some substantive balancing of interests...." *Laxalt v. McClatchy*, 809 F.2d 885, 890 (D.C.Cir.1987); see *United States v. Microsoft Corp.*, 165 F.3d 952, 960 (D.C.Cir.1999) (holding that Rule 26(c)'s "'good cause' standard ... is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case"). In particular, "[a]lthough [Rule 26(c)] contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n. 21, 104 S.Ct. 2199, 2208 n. 21, 81 L.Ed.2d 17 (1984). Hence, in exercising their discretion under the rule, courts have long "recognized that interests in privacy may call for a measure of extra protection," even where the information sought is not privileged. FED. R. CIV. P. 26(b) advisory committee's note (1970) (referring to income tax returns, which are "generally held not privileged"); see *Pearson*, 211 F.3d at 72 (holding that "[l]egitimate interests in privacy are among the proper subjects of" Rule 26(c)'s protection).

Moreover, in determining which interests to weigh in the Rule 26 balance, courts look to statutory confidentiality provisions, even if they do not create enforceable privileges. In *Laxalt v. McClatchy*, for example, we noted that, although the Privacy Act, 5 U.S.C. § 552a, did not create a qualified discovery privilege, the fact that a document was subject to the Act was not "irrelevant to the manner in which discovery should proceed." 809 F.2d at 889. To the contrary, we held that "[w]here the actual content of the record has the potential to cause harm to the

affected party, a court supervising discovery should consider this factor in determining how to exercise its traditional authority to limit disclosure." *Id.* at 890; see also *Microsoft*, 165 F.3d at 959-60.

In re Sealed Case (Medical Records), 381 F.3d 1205, 1215-1216 (D.C. Cir. 2004). Here, movant asks only that the specific standard that the D.C. Council has adopted for this situation, reflected in Chapter 55 of Title 16 of the DC Code, be applied as well under Rule 26(c).

Conclusion

For the all of these reasons, and those set forth in the moving papers, the instant motion for a protective order and special motion to quash should be granted.

Dated: January 4, 2013

Respectfully submitted,

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Certificate of Service

I hereby certify that on January 4, 2012, I electronically filed the foregoing Reply on Doe No. 1's Motion for a Protective Order and to Quash with the Clerk of the Court using the Court's electronic filing system, which sent a notice of electronic filing to the following:

William T. O'Neil (attorney for plaintiff)

/s/ Michael E. Rosman
Michael E. Rosman