UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HANNA BOUVENG,

Plaintiff,

v.

NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP, NYG CAPITAL LLC d/b/a FNAL MEDIA LLC, and BENJAMIN WEY,

Defendants.

Case No. 14-CV-5474 (PGG)

DEFENDANT BENJAMIN WEY'S MEMORANDUM OF LAW IN OPPOSITION TO PLANTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Justin Sher
Joanna Riesman
SHER TREMONTE LLP
80 Broad Street, Suite 1301
New York, New York 10004
Tel: 212.202.2600
jsher@shertremonte.com

Attorneys for Defendants
NYG Capital LLC and Benjamin Wey

Defendant Benjamin Wey ("Wey") by his attorneys, Sher Tremonte LLP, respectfully submits this memorandum of law in opposition to Plaintiff Hanna Bouveng's ("Plaintiff" or "Bouveng") motion, brought by order to show cause, for a temporary restraining order and/or preliminary injunction (the "Motion").

PRELIMINARY STATEMENT

In this action, Plaintiff seeks $850 million in damages for alleged sexual harassment and related claims arising from her six-month employment as a temporary intern at New York Global Group ("NYGG"). By this Motion, Plaintiff seeks an order curtailing Wey's right to speak and communicate freely. Under the First Amendment and the law governing preliminary injunctions, Plaintiff is not entitled to such extraordinary relief.

In support of her emergency application, Plaintiff points to two categories of communications. First, Plaintiff attaches a series of emails and text messages, which Wey sent in April and May 2014 – *three months ago* – in the wake of Plaintiff's termination from NYGG. The emails include expressions of concern about Plaintiff's erratic behavior and the persons with whom she was associating; a request that Plaintiff remove any references to NYGG from her online profiles; and explanations for her termination. Plaintiff does not contend that Wey has sent any such communications in *over 12 weeks*. Notwithstanding the fact that Plaintiff may not agree with these past communications, they do not give rise to damages, let alone demonstrate a risk of imminent and irreparable harm.

Second, Plaintiff points to Wey's own, private Facebook page, where Wey observes to his Facebook "friends" (all of whom can choose to subscribe or unsubscribe from Wey's page as they see fit) that Plaintiff is engaged in a campaign to extort him. Plaintiff points to no authority that would support the entry of an order precluding Wey from expressing himself in this manner

on his private social media page. To the contrary, there is no precedent for barring Wey from communicating with his friends and associates on a private website (or otherwise) as he sees fit in response to the media attention that Plaintiff's lawsuit has attracted (as Plaintiff surely knew it would). Wey is free to conclude, as he has, that his reputation would suffer if he failed to do so. Moreover, Plaintiff fails to explain how postings on Wey's own Facebook page could result in harassment and intimidation. She and others are free to "unfriend" Wey (i.e. to unsubscribe from his private social media webpage), ignore his postings and remove themselves from any other social media feeds they do not wish to receive.

In short, Plaintiff cannot meet the heavy burden necessary to restrain a party's speech and cannot demonstrate that she will suffer irreparable harm in the absence of such restraint. For these and the other reasons set forth below, the Court should deny Plaintiff's application.

FACTUAL BACKGROUND

According to Plaintiff's Complaint, Wey has been the CEO of NYGG since 2002. (Complaint, attached as Ex. A to the Affirmation of David S. Ratner, dated July 23, 2014 ("Ratner Aff.") ¶ 7.) Bouveng worked briefly for NYGG from October 2013 until April 2014. (*Id.* at ¶ 10.) Following the termination of her employment as an intern, Bouveng threatened to sue Wey and NYGG. (Ratner Aff., Ex. J.)

Immediately after filing the Complaint, but prior to serving it on Defendants,[1] Bouveng filed, by order to show cause, an *ex parte* motion for a temporary restraining order and/or preliminary injunction. Through the Motion, Plaintiff seeks to enjoin Wey from "intimidating and harassing" Bouveng and persons Bouveng describes as "potential witnesses," including Bouveng's father, her aunt, her brother, certain friends (Chemme Koluman, Nina Chelidze, and

[1] Defendants have not been served with the Summons and Complaint in the underlying action. By appearing in response to the Order to Show Cause, Defendants waive no objections they may have to jurisdiction.

Amanda Bostrom), her colleagues at NYGG, and certain business contacts (Sherwin Zanjanian, Levi McCathern and Lars Forseth). Both Plaintiff's lawsuit and the Motion have been reported in the New York Post.[2]

In support of her contention that she and others are being harassed and intimidated, Plaintiff submits the following emails and text messages:

- Emails from Wey to Plaintiff's father, Nils Sundqvist, from April 28 and 29, 2014, in which Wey warns Sundqvist about Bouveng's "partying" and the company she is keeping, (Ratner Aff., Ex. B C, I);
- Emails from Wey to Bouveng dated April 28, 2014, asking her to remove any references to NYGG on Bouveng's LinkedIn page and elsewhere, (*id.,* Exs. D, F.);
- Emails from Wey to Bouveng dated April 26 and 29, 2014, urging Bouveng to give up her "partying," (*id*., Exs. E & K);
- An email purportedly from NYGG to a friend of Bouveng's, Chemme Koluman, dated April 28, 2014, indicating that Bouveng had been terminated for cause (*id*., Ex. G);
- Text messages purportedly sent to Bouveng's brother on April 28, 2014 in which Wey describes Plaintiff as a "talented person; smart and strong" but expresses concern about the risks she is taking by "partying" with the wrong people, (*id.,* Ex. H.);
- An email dated May 3, 3014 from Wey to Nina Chelidze and an individual with the email address, law.gwen@hotmail.com, in which Wey indicates that Bouveng had been terminated because of alcohol use and other irresponsible behavior (*id.*, Ex. L).

As indicated above, the most recent email submitted by Plaintiff was sent on May 3, 2014 – more than 11 weeks before Plaintiff filed her suit. (*See id.*, Ex. L.) Indeed, since Plaintiff's counsel sent an email to Wey asking him to stop communicating with Bouveng, her family and her friends (and threatening "expensive and embarrassing litigation" if he did not pay a

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[2] *See* http://nypost.com/2014/07/22/wall-street-financier-slapped-with-75m-sexual-harassment-suit/ and http://nypost.com/2014/07/29/swedish-beauty-claims-financier-is-ruining-her-reputation/.

substantial settlement), (*id.* Ex. M.), the evidence demonstrates that Wey ceased sending such emails and text messages.

In support of her Motion, Plaintiff also submits several print-outs of posts to Wey's personal Facebook page. (*Id.*, Exs. N-S). These postings include images of Bouveng, her alleged boyfriend, and images of people (not Bouveng) using cocaine and performing sex acts. The Facebook posts contain a variety of messages and images that have nothing to do with Bouveng, including travel pictures, announcements of upcoming events, and comments about frozen yogurt. The Facebook posts also state that Wey does "not accept extortion and blackmail from drug dealers or anyone else." (*Id.*, Ex. O, p. 3).

Plaintiff does not present any evidence that she, her family or her friends were compelled to visit Wey's personal Facebook page. Nor does Plaintiff present any evidence, other than her own conclusory assertions, that her friends and family have been harassed and intimidated by Wey's posts. Indeed, only Plaintiff and her counsel have submitted declarations in support of the Motion

ARGUMENT

I. INJUNCTIONS RESTRAINING SPEECH ARE PRESUMPTIVELY INVALID UNDER THE FIRST AMENDMENT

Because the preliminary injunction sought by Plaintiff would restrain Wey's speech, it is presumptively invalid under the First Amendment and should be rejected for this reason alone.

A preliminary injunction "is one of the most drastic tools in the arsenal of judicial remedies." *Iron Mountain Info. Mgmt. v. Taddeo*, 455 F.Supp.2d 124, 132 (E.D.N.Y. 2006) (quoting *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 60 (2d Cir. 1985)). Courts routinely acknowledge the "Second Circuit's continuing admonishments that interim injunctive relief is an

extraordinary and drastic remedy which should not be routinely granted." *Int'l Bus. Mach. Corp. v. Johnson*, 629 F. Supp. 2d 321, 329 (S.D.N.Y. 2009).

This general reluctance to grant injunctive relief is even greater when speech is at issue. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citing *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968) and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Indeed, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

In *Org. for a Better Austin v. Keefe*, the Supreme Court vacated an injunction against an organization issuing pamphlets critical of a real estate broker for "only sell[ing] to Negroes." 402 U.S. 415, 416-17 (1971). The Court ruled that courts cannot "concern themselves with the truth or validity of the publication" and, as long as the means are peaceful, a communication "need not meet standards of acceptability." *Id.* at 418-19. The fact that the expressions were intended to have a coercive effect on the broker also did not "remove them from the reach of the First Amendment." *Id.* at 419. The Court held that "the interest of an individual in being free from public criticism" did not warrant "an impermissible restraint on First Amendment rights." *Id.* at 418, 419.

Pursuant to this First Amendment jurisprudence, courts within the Second Circuit have consistently vacated or declined to impose injunctions restraining speech, including speech alleged to be defamatory. *See, e.g., Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 239 F.3d 172, 176 (2d Cir. 2001) (vacating injunction that prohibited labor union from making "fraudulent or defamatory" statements regarding the MET);

Kessler v. Gen. Servs. Admin., 341 F.2d 275 (2d Cir. 1964) (holding that former government employee was not entitled to injunctive relief against alleged libelous statements or interference with the performance of her work); *Stop the Olympic Prison v. United States Olympic Comm.,* 489 F. Supp. 1112, 1124–25 (S.D.N.Y. 1980) (declining to issue injunction against distribution of allegedly defamatory poster); *Konigsberg v. Time, Inc.*, 288 F. Supp. 989 (S.D.N.Y. 1968) (declining to enjoin the publication of a potentially libelous article and ruling, "To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution."); *see also Bihari v. Gross,* 119 F. Supp. 2d 309, 325 (S.D.N.Y. 2000) (refusing to enjoin allegedly defamatory statements posted online by disgruntled customer).

The two cases cited by Plaintiff in support of an injunction do not hold otherwise. In *Mullins v. City of New York*, the court enjoined the police department from conducting formal investigations of police officers who were plaintiffs in an on-going wage-related lawsuit. 634 F. Supp. 2d 373 (S.D.N.Y. 2009). The court did not restrain the defendant's speech. In *Trojan Elec. & Mach. Co. v. Heusinger,* 557 N.Y.S.2d 756, 757 (3d Dep't 1990), the other case cited by Plaintiff, the New York State Appellate Division enjoined a would-be condominium-purchaser whose deposit had not been refunded from disruptive and aggressive picketing outside the condominium and outside of the developer's home. In support of the injunction, the developer submitted ten affidavits from residents of the condominium stating that the picketing was invading their privacy and interfering with the quiet enjoyment of their homes. In light of its effect on third parties and because the picketing was "calculated to injure plaintiff's business" rather than to resolve their dispute, the court granted the injunction. *Id.* at 758-59.

II. PLAINTIFF CANNOT DEMONSTRATE IRREPARABLE HARM

Even in the absence of the presumption and heavy burden that apply in the context of a restraint on speech, Plaintiff cannot make the basic showing necessary for a preliminary injunction. A party seeking preliminary injunctive relief must demonstrate (1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction. *Red Earth LLC v. United States,* 657 F.3d 138, 143 (2d Cir. 2011). Plaintiff cannot show irreparable harm, has not demonstrated a likelihood of success on the merits, and both the balance of the equities and public policy weigh against injunction. Accordingly, Bouveng's motion should be denied in its entirety.

Irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Reuters Ltd. v. United Press, Intern., Inc.,* 903 F.2d 904, 907 (2d Cir. 1990) (quotation omitted). Irreparable harm is an "injury for which a monetary award cannot be adequate compensation." *Jayaraj v. Scappini,* 66 F.3d 36, 39 (2d Cir.1995). Further, "[i]rreparable harm must be shown by the moving party to be imminent, not remote or speculative." *Reuters,* 903 F.2d at 907 (citing *Tucker Anthony Realty Corp. v. Schlesinger,* 888 F.2d 969, 972 (2d Cir.1989)). The movant is required to establish not a mere *possibility* of irreparable harm, but that it is *"likely* to suffer irreparable harm if equitable relief is denied." *JSG Trading Corp. v. Tray–Wrap, Inc.,* 917 F.2d 75, 79 (2d Cir. 1990) (emphasis in original). "Likelihood sets, of course, a higher standard than 'possibility.'" *Id.*

Plaintiff is unable to show a likely and imminent threat of harm. Plaintiff contends that Wey's emails and various Internet postings were aimed at intimidating her and at dissuading her

from pursuing a lawsuit against him. (*See* Ratner Aff. at ¶¶ 8, 16, 27, & 33.) Now that she has filed a lawsuit, indicating that she was not in fact dissuaded from doing so, she cannot claim that she we will be irreparably harmed because of any communications by Wey. Moreover, Bouveng has not provided any evidence that any potential witnesses to the incidents alleged in her Complaint have been intimidated or dissuaded from testifying or participating in her lawsuit. In fact, Plaintiff does not present any evidence that they even directed Wey to stop his communications. Finally, in the absence of evidence that Wey continues to send emails or text messages to potential witnesses (or any at all since May 3, 2014), Plaintiff cannot credibly claim that Wey's speech will imminently and irreparably interfere with this litigation.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Motion be denied in its entirety so that Wey can continue to defend his reputation and otherwise communicate freely.

Dated: New York, New York
July 30, 2014

SHER TREMONTE LLP

By: /s/ Justin M. Sher
Justin M. Sher
Joanna Riesman
80 Broad Street, Suite 1301
New York, New York 10004
Tel: 212.202.2600
Email: jsher@shertremonte.com

Attorneys for Defendants
NYG Capital LLC and Benjamin Wey