SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CHRISTOPHER BRUMMER, Plaintiff, v. BENJAMIN WEY, FNL MEDIA LLC, AND NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP, Defendants.	Index No. 153583/2015 HON. MANUEL J. MENDEZ IAS Part 13

PLAINTIFF CHRISTOPHER BRUMMER'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST THREATENING USE OF LYNCHING PHOTOGRAPHS AND ASSOCIATED INCITEMENTS TO VIOLENCE

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MEMORANDUM IN SUPPORT

Plaintiff Christopher Brummer ("Professor Brummer") respectfully urges the Court to enter a TRO and preliminary injunction against defendants Benjamin Wey ("Wey"), FNL Media LLC ("FNL") and NYG Capital LLC d/b/a New York Global Group ("NYG") (collectively "Defendants"), ordering them to remove ***lynching photographs*** and associated ***incitements to such violence*** from their internet websites. For two years, Defendants have been publishing objectively false and reprehensible stories designed to stimulate outrage against Professor Brummer. Defendants recently added photographs of lynching victims beside pictures of Professor Brummer, his counsel and at least one regulator, along with a "comment" suggesting that Professor Brummer ***should be shot***.

The lynching and gunfire espoused by Defendants are the last pieces of the proverbial puzzle. Infused with these overtures to deadly violence, the entire content of the Defendants' websites relating to Professor Brummer constitutes a classic and serious threat of physical harm. The Court has full authority to enjoin these threats of physical harm and inducements to violence. Pending the entry of final judgment, the Court should exercise that authority to protect Professor Brummer and others from the menacing activity and personal risk to which Defendants are unlawfully subjecting them. Specifically, the Court should order immediate removal from the websites of Defendants of the lynching photographs and all "stories" about Professor Brummer, including, but not limited to, the materials appended to the Amended Complaint as Exhibits G and H and to this brief as Exhibits 14-24.

I. Defendants are seeking to incite violence against Professor Brummer and persons associated with him.

This case arises from the internet defamation and harassment campaign that Wey and his corporate entities have been waging against Professor Brummer. Their increasingly rabid

rhetoric has consisted thus far of an online flow of false, crude and despicable claims about Professor Brummer, his family and his counsel in this case, described below. The obvious objective has been to vilify Professor Brummer, target him for public contempt and provoke disdainful audiences into action. Having created a completely false image of Professor Brummer, calculated to arouse public indignation against him, the incitements by Defendants have now reached a violence-prone crescendo. This pattern of threats and incitement to violence has an unfortunate history in our nation, for which zero tolerance is the only answer.

A. Defendants have spread vicious lies about Professor Brummer.

Professor Brummer, who serves on the faculty at Georgetown University Law Center, was a member of the National Adjudicatory Council ("NAC") of the Financial Industry Regulatory Authority ("FINRA") for three years. In his FINRA capacity, he participated in a December 2014 ruling against two of Wey's business associates, which the United States Securities and Exchange Commission affirmed. (*See* Am. Compl. at ¶¶ 3, 12-13, 47.) (Earlier this year, in a separate proceeding, the United States District Court for the Northern District of Ohio sentenced the two business associates to imprisonment and restitution for conspiracy to commit securities fraud violations and for wire fraud. (*See* Morgenstern Aff. at ¶¶ 9-10, Ex. 8-9.)) In retaliation, Wey and his corporate entities in January 2015 launched an online torrent of objective falsehoods, racist invective and misogynist diatribes that continue to this day to smear Professor Brummer's professional integrity and character. (*See* Am. Compl. at ¶ 14.)

Defendants laid the initial groundwork on the website known as theblot.com ("TheBlot"), which Defendants have created and published. (Morgenstern Aff. at ¶¶ 2-5, 11-16, Ex. 1-4, 10-21.) From January 2015 to the present, Defendants have published many articles on TheBlot

containing defamatory statements about Professor Brummer (who is African-American), including, but not limited to false assertions that:

- Professor Brummer "fabricated evidence" in support of the FINRA panel decision because he is a "racist" and an "Uncle Tom";
- Professor Brummer was involved in bribery and other schemes with financier Michael Milken, and defrauded investors;
- Professor Brummer was "unable to get into a decent law school," "squeezed himself into a part-time program waiving [sic] the flag of 'affirmative action'," "struggled" in law school, was a failure in the private sector, had a "collapsed legal career," "inflate[s]" his professional biography and is unqualified to serve as a professor or as a member of the NAC;
- Professor Brummer was a suspect in a rape case at Georgetown University and "barely kept his tenure";
- Professor Brummer has engaged in a dalliance with his counsel in this case and an "alleged sexual affair with a FINRA witness";
- Professor Brummer spent his studies "dancing with naked European women";
- Professor Brummer "laid his eyes on a young female student's pair of naked legs -- a waitress working at Saxby's Coffee, a popular coffee joint near Georgetown University in D.C.";
- Professor Brummer "is just another Nigga trying to get in the pants of a white chick."

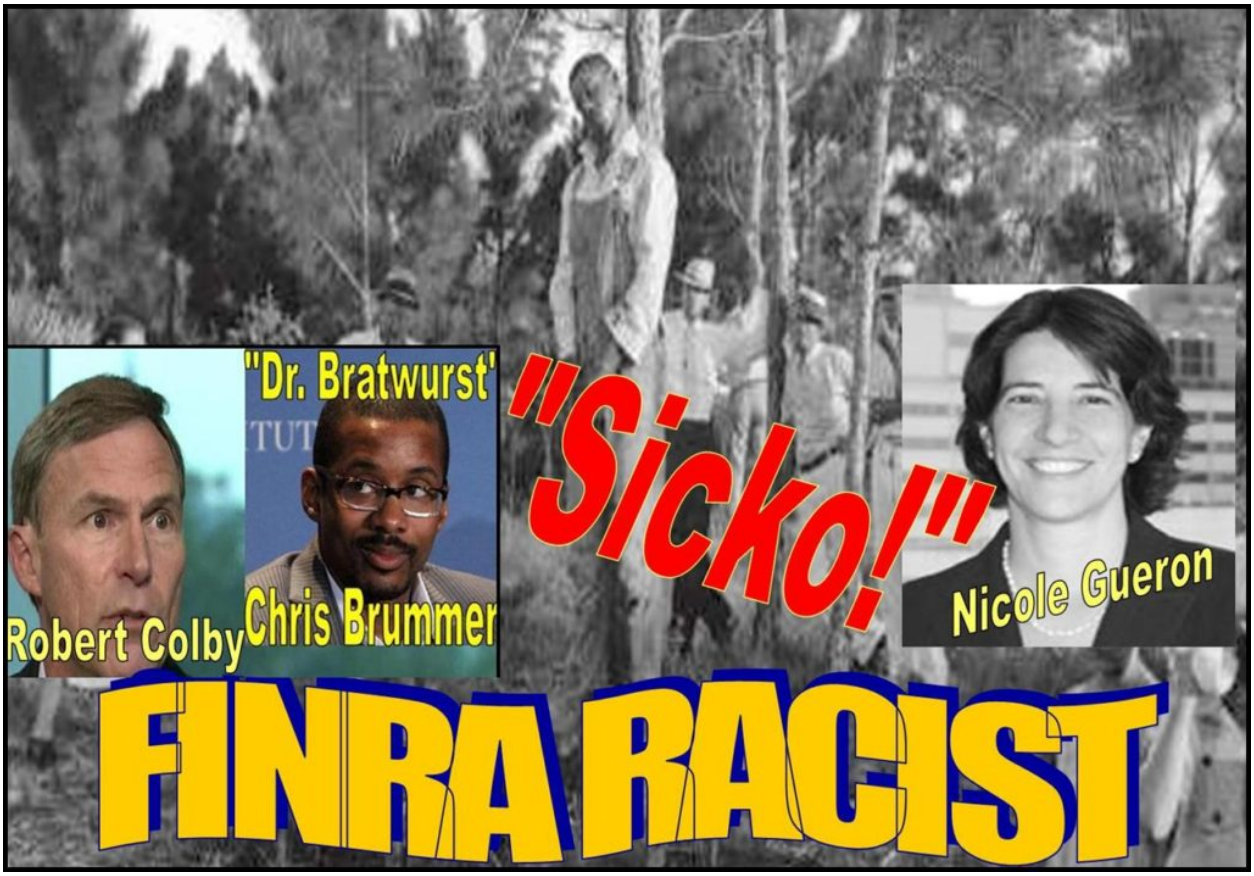
(*See* Morgenstern Aff. at ¶ 15, Ex. 14-16.) Defendants have literally flooded the internet with such articles, images and innuendos. (*Id*. at ¶¶ 15, 17-19, Ex. 22-25; Am. Compl. at Ex. G, H.) Wey admits that he authored each of the "articles" in which these statements were made. (*Id*. at ¶¶ 11, 16, Ex. 10.)

B. Defendants now have added lynching photographs to their websites.

Defendants now have given readers a "solution" to the "problem" of Professor Brummer. They recently have added several explicit lynching photographs to their digital diatribe. These

gruesome photographs do far more than ratchet up the intensity of their defamation campaign. They reveal its potentially lethal objective. Already malicious and fraudulent, the collective postings now emerge as the rationale for the fate that Defendants threaten to inflict upon Professor Brummer and others associated with him. For the ***first time*** in their online advocacy, Defendants have resorted to ***lynching photographs that embrace explicit violent imagery***.

Specifically, Defendants have created new posts with pictures that depict an African American hanging from a tree. In the foreground, facing the victim, are Professor Brummer (directly adjacent to the murdered victim), his counsel in this case (Nicole Gueron), as well as Robert L.D. Colby, the Chief Legal Officer of FINRA:



(*Id.* at ¶¶ 15(g), (i)-(j), Ex. 20, 22, 23.)

C. Defendants also suggest that Professor Brummer be shot.

In case anyone misses the point of the lynching photograph, Defendants have also spelled out exactly what end result they have in mind. They have included on their website an explicit comment about Professor Brummer dated February 3, 2017, and attributed to an otherwise anonymous "Bill," stating: "[t]hese FINRA motherfuckers ruin lives! ***Fuck them or shoot them? Both perhaps.***" (*See* Morgenstern Aff. at ¶ 15(g), Ex. 20 at 17-18 (emphasis added).) As with other "comments" that Defendants admit to have posted themselves, this verbal threat is at least as serious as the homicidal imagery. (*Id*. at ¶ 3, Ex. 2.)

Making matters worse, Defendants have accelerated their postings of similar content on other websites created and controlled by Wey. Domain registration records show that Wey created and has been the primary contact for the websites identified as unitedpressnews.com, investigativepress.com and professorchrisbrummer.com. (*Id*. at ¶¶ 12-14, Ex. 11-13.) Within the last year, posts of similar defamatory statements regarding Professor Brummer (now rising to the level of incitement to violence) have been published on these sites, including posts on unitedpressnews.com and investigativepress.com containing other lynching images. (*See id*. at ¶¶ 15(i)-(j), 17, Ex. 22-24.) Defendants' campaign has also included repeated posting of defamatory content about Professor Brummer on the Tumblr and Twitter accounts of Wey and TheBlot. (*Id*. at ¶ 18; Amended Comp. at Ex. G, H.) The lynching photographs now connect the dots.

D. Through "search engine optimization" technology, Defendants combine their threats with their incitements to violence and maximize their reach.

Defendants have used "search engine optimization" techniques as their vehicle to integrate these death threats with the incitements to such violence for which they carefully have laid the groundwork. Search engine optimization is a means of increasing the visibility of a

website in search engine results. "Going through the search engine optimization process typically leads to more traffic for the site," as has been noted, "because the site will appear higher in search results for information that pertains to the site's offerings." http://www.businessdictionary.com/definition/search-engine-optimization.html.

Wey and his co-defendants employ these techniques for TheBlot. (*See* Morgenstern Aff. at ¶ 3, Ex. 2.) The upshot is that TheBlot (and, as the evidence will show, their other websites) appears at or near the top of the results whenever anyone searches the name of Professor Brummer on the internet. The responsive websites appear in their entirety whenever a viewer clicks on the link. In that context, the death threats and defamatory inducements work digitally in tandem with each other.

E. There is a reason that courts take such death threats seriously.

Defendants' invitation to violence follows an infamous pattern in American history, which continues to repeat itself today across the nation. The lynching photographs are the culmination of the foul and flagrantly defamatory profile of Professor Brummer that Defendants have been methodically cultivating for over two years. As with other attempts to incite violence in the past, Wey and his business entities have infused false claims of criminal or immoral conduct and interracial sexual activity into their barrage of defamatory accusations. Their key (and objectively false) defamatory claims include the "reports" that:

- Professor Brummer has committed a series of criminal acts, ranging from theft, bribery and fraud to suspected rape;
- Professor Brummer has usurped opportunities that do not belong to him;
- Professor Brummer is infatuated with "European women," had an illicit relationship with a white FINRA witness, and is involved in an affair with his counsel (who is white).

Such claims have been grounds to support vigilante "justice" in the past. Although the first lynchings in the United States appear to have been tied to questions relating to the treatment of enemy Tories and the dispensing of justice on the American frontier, more modern lynchings have almost always been justified as vengeance for atrocious criminal action.[1] Often victims were accused of rape or theft -- exactly the false claims that Defendants have made about Professor Brummer -- or murder.[2] Where individuals had been accused of crimes, mobs have raided jailhouses to hang, torture and burn victims alive.[3]

Another common basis for lynching involved interracial relationships with white women. "From the 1880s to the 1960s, 4,000 to 5,000 blacks were lynched in the United States, many because of allegations of interracial sex."[4] "Black males who violated the taboo of interracial sexual relationships could find themselves the victims of lynching."[5] Such accusations have also been used to justify the lynching of white women as well.[6] False charges of rape were also

[1] http://www.english.illinois.edu/maps/poets/g_l/Lynching/lynching.htm.
[2] *See* "*History of Lynchings in the South Documents Nearly 4,000 Names*," N.Y. Times (Feb. 10, 2015) ("these brutal deaths were not about administering justice, but terrorizing a community. . . . [T]he public extravagance of a lynching [was] clearly intended as a message to other African-Americans."); *see also* James Elbert Cutler, LYNCH-LAW: AN INVESTIGATION OF THE HISTORY OF LYNCHING IN THE UNITED STATES 112, 124 (1969). *See generally* James Harmon Chadbourne, LYNCHING AND THE LAW 10 (1933) ("most victims of lynching are Negroes").
[3] Cutler, LYNCH-LAW, *supra*, at 109, 112, 122; Nat'l Ass'n for the Advancement of Colored People, THIRTY YEARS OF LYNCHING IN THE UNITED STATES 1889-1918, 5 (1919)..
[4] http://content.law.virginia.edu/news/2004_fall/forde.htm. On lynching and interracial sex, *see* W. Fitzhugh Brundage, Lynching in the New South: Georgia and Virginia, 1880-1930 (Chicago: University of Illinois Press, 1993), 69 fig. 4.
[5] Brennan T. Hughes, STRICTLY TABOO: CULTURAL ANTHROPOLOGY'S INSIGHTS INTO MASS INCARCERATION AND VICTIMLESS CRIME, pg. 65, 41 New Eng. J. on Crim. & Civ. Confinement 49
[6] http://womhist.alexanderstreet.com/lynch/doc7.htm.

significant threats to African Americans, and could result in a range of vigilante acts depriving victims of their lives and livelihoods.[7]

The graphic image posted by Wey is not merely a relic of American history. It is also, unfortunately, characteristic of the recent resurgence of lynching threats. In September 2016, a black high school student in western Massachusetts "was told that he would be 'lynched in the woods.'"[8] The same month last year, in northeastern Ohio, a "Snapchat post surfaced with a photo of a hand-written piece of paper with four 'N-Words' . . . followed by 'Lets Lynch Ni--ers'" after a black high school football player responded to locker room use of the racial epithet.[9]

Years ago, one scholar recounted that "it is becoming common for cries of 'Lynch him,' 'Hang him,' "Get a rope and string him up,' &c., to be heard, even on the streets of New York City, whenever a crowd gathers in response to a feeling of popular excitement and indignation over the perpetration of some atrocious crime."[10] Wey and his co-defendants seek to perpetuate that legacy in the twenty-first century.

F. Professor Brummer depends upon judicial recourse to stop the threats and inducements to such violence.

Professor Brummer filed suit on April 22, 2015. (NYSCEF Doc. No. 1.) He seeks damages and injunctive relief. He moved to amend his complaint in 2016, to include examples of Defendants' new and increasingly vicious defamation and harassment. (*Id.* at Doc. Nos. 170, 181.) In the seven months since he moved to amend, Defendants have stepped up their attacks on Professor Brummer still further. In addition to their posting of lynching photographs, they

[7] Phyllis L. Crocker, IS THE DEATH PENALTY GOOD FOR WOMEN?, 4 Buff. Crim. L. Rev. 917 n.133.
[8] Morgenstern Aff. at ¶ 20 and Ex. 26 (http://theberkshireedge.com/african-american-student-at-monument-high-school-reportedly-threatened-with-lynching).
[9] Morgenstern Aff. at ¶ 21 and Ex. 27 (http://www.nydailynews.com/sports/football/hs-player-protest-anthem-receiving-vile-racist-threats-article-1.2787325).
[10] Cutler, LYNCH-LAW, *supra*, at 276.

added posts on TheBlot containing new scandalous and lurid allegations, including the false claims that Professor Brummer and one of his counsel are engaged in an extramarital affair and that Professor Brummer was a suspect in a rape case at Georgetown (Morgenstern Aff. at ¶ 15(d)-(h), Ex. 17-21) -- again, the exact sort of spurious yet incendiary allegations that often served as a predicate for lynchings.[11] Defendants have subjected Professor Brummer's wife to the same sort of harassment, by adding her name and scurrilous claims about her to recent postings about Professor Brummer. (*Id*. at ¶ 15(h), Ex. 21.)

The Court granted Professor Brummer leave to amend on January 12, 2017, to allow him to seek to hold Defendants accountable for the additional defamatory postings that they have continued to make even after the filing of this suit. (NYSCEF Doc. Nos. 262, 263.) The Amended Complaint has been served on all Defendants as of January 24, 2017. (NYSCEF Doc. Nos. 265, 270, 271.)

G. Defendants have shown that they have no remorse and will follow through on threats.

The death threats can hardly be dismissed as idle. While wreaking havoc with the same *modus operandi* in the lives of others, Defendants appear to have concluded that they can proceed with impunity because things cannot get much worse for themselves.

1. Wey is awaiting trial on federal criminal charges.

On September 10, 2015, a federal indictment of Wey was unsealed, charging that Wey had an undisclosed interest in the securities that his two associates were peddling, and that he had engaged in money laundering, wire fraud and conspiracy. *See United States v. Benjamin Wey*, No. 1:15-cr-00611-AJN (S.D.N.Y.). Wey was arrested the same day. A week later, the federal court froze Wey's assets. *See id*., Post-Indictment Restraining Order (Sept. 17, 2015)

[11] Nat'l Ass'n for the Advancement of Colored People, THIRTY YEARS OF LYNCHING, *supra*, 10, 12-28.

(Doc. No. 11). The court has set the case for trial on October 2, 2017. The penalties include imprisonment for up to twenty-five years and fines up to twice the value of the laundered funds or $500,000.

2. Wey has been held liable for defamation and sexual harassment of another victim in a separate federal case.

Meanwhile, the federal court in a separate civil case has entered final judgment against Wey, FNL and NYG in the total amount of $6 million in compensatory and punitive damages upon a jury verdict for another individual who they have defamed and harassed through similar tactics. *See Hanna Bouveng v. NYG Capital LLC, et al.*, No. 1:14-cv-05474-PGG (S.D.N.Y.) (Doc. No. 312). The court in that case, which was filed on July 21, 2014, provided for an accelerated discovery and trial calendar. The jury returned its verdict on June 29, 2015.

Ominously for Professor Brummer and those associated with him, the record of the *Bouveng* case is replete with evidence of aggressive and menacing threats and overt actions by Wey against other individuals who have become his targets. During the trial, former employees of TheBlot testified that Wey, the admitted publisher of TheBlot and the sole owner of TheBlot's parent company, used the site to attack those who he perceived as his enemies, often using a pseudonym. (Morgenstern Aff. at ¶¶ 4-6, Ex. 3-5.) One of his commonly-used pseudonyms was Thomas Greenfield, the same name given as author of one of the posts about Professor Brummer. (*Id*. at ¶ 4, Ex. 3; *id*. at ¶ 15(a), Ex. 14) Defendants also stipulated that they "caused comments to be added" to articles on TheBlot that were not actually authored by the individuals to whom they were attributed, and that the alleged authors whose names they used were "people associated with" the target of the comment or were "well-known people." (*Id*. at ¶ 3, Ex. 2 .)

Former employees of TheBlot also explained that these fake comments, as well as posts with similar content on other websites created by Defendants, were "search engine optimization"

tactics designed to boost the defamatory content in Google's search algorithm. (*Id*. at ¶ 4, Ex. 3.) Indeed, the former employees testified that Defendants employed a "search engine optimization" expert to maximize the visibility of their attacks. (*Id*..)

After his sexual advances and demands were rebuffed by the plaintiff (an employee named Hanna Bouveng, who is a Swedish national), Wey made serial threats in regard to her work visa, several photographs that he characterized as "bad for your future employment with any employer," and "fake stories" that he intended to publish. (*Id*. at ¶¶ 7-8, Ex. 6-7.) Wey communicated with Ms. Bouveng's former employer, left an audio recording about hiring detectives, sent "scary" communications to her father, and threatened the political career of her aunt in Sweden. (*Id*. at ¶¶ 7-8, Ex. 6-7.)

His actions left Ms. Bouveng "scared that he was going to send people after me, you know, that violence would get involved." (*Id*. at ¶¶ 7-8, Ex. 6-7.) Ms. Bouveng testified that she "knew from before that he had hired detectives that followed other women. It creeped me out and it was scary." (*Id*. at ¶¶ 7-8, Ex. 6-7.) After Ms. Bouveng fled back to Sweden in the summer of 2014, Wey stalked her to Scandinavia and found her in a café. A former editor-in-chief of TheBlot testified that she was "scared to testify. I was scared of Mr. Wey. I have seen what he does to people that he considers his enemies." (*Id*. at ¶¶ 7-8, Ex. 6-7.)

The court condemned the actions of Wey and his business entities in no uncertain terms: "In the internet age in which we live," said the court, "an individual's online presence is as important — perhaps more important early on — than her physical presence. Acting out of pure malice and spite, Defendants used the internet to ensure that no prospective employer would interview Bouveng, much less hire her, by intentionally disseminating scores of the most professionally damaging lies and falsehoods about her that they could conceive of." 175 F.

Supp. 3d 280, 343 (S.D.N.Y. 2016). The court ruled that Ms. Bouveng "is entitled to compensation for the damage Defendants have caused to her professional reputation . . . . Having caused the harm, Defendants cannot escape the liability." 175 F. Supp. 3d at 343. Further identifying the harm, the court recounted "the emotional distress and reputational harm she suffered, and was reasonably likely to suffer in the future, as a result of Defendants' outrageously defamatory statements, which were deliberately disseminated in a fashion to cause maximum damage to Plaintiff's reputation." *Id.* at 344.

II. The Court should protect against the threats by issuing a TRO and preliminary injunction.

The Court should promptly exercise its authority to order Defendants to take down not only the lynching photographs, which have become the centerpiece of their effort to defame and harass Professor Brummer, but also the balance of their website postings about him, which collectively constitute a clear incitement to inflict such harm upon him. Professor Brummer will seek by a separate motion to accelerate the discovery schedule in order to bring this case promptly to final judgment before the start of Wey's federal criminal trial on October 2, 2017. The Court will then be in a position to permanently enjoin Defendants' defamatory conduct altogether and award compensatory and punitive damages. In the meantime, the Court should put an immediate halt to the gruesome threats that Defendants have now brandished.

A. The lynching photographs and their defamatory context fall well within the standards for interlocutory injunctive relief.

The grounds for preliminary injunctions and temporary restraining orders are described in CPLR § 6301, which permits a preliminary injunction in, among other scenarios, "any action where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." Regarding TROs, § 6301 provides that a

TRO may be granted "where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before [a preliminary injunction] hearing can be had."

B. Professor Brummer is likely to succeed on the merits.

Professor Brummer is likely to succeed on the merits of his causes of action for defamation, defamation *per se* and intentional infliction of emotional distress.

1. Defamation and defamation *per se*

As this Court has explained in its Decision and Order denying Defendants' motion to dismiss, defamation "involves a false statement that tends to expose the subject of the communication to, 'public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons and to deprive [her] of their friendly intercourse in society.'" Decision and Order (Mar. 1, 2016) at 3 (NYSCEF Doc. Nos. 148, 149). "A claim of defamation requires, '(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm.'" *Id.* (citations omitted). The Court has ruled that "[r]acist terms referring to plaintiff, as stated *TheBlot*, together with other statements describing the plaintiff as available for hire, involved in fraud, and affiliated with felons, could reasonably be susceptible to a defamatory connotation." *Id.*

The Court further has noted that defamation *per se* "involves a statement that, charges the plaintiff with a serious crime of 'tends to injure another in his or her trade, business or profession.'" *Id.* (citation omitted). The Court has ruled that Professor Brummer "has stated a potential claim of defamation per se by the allegations in the Complaint that defendants referred to criminal affiliation and fraud." *Id.*

As set forth in the attached Affirmation, statements authored by Wey and published on websites created and controlled by Defendants' claim that Professor Brummer (1) engaged in multiple extramarital affairs, (2) committed several serious crimes, (3) is racist, and (4) lied about his background and is not qualified for his position as a law professor. (Morgenstern Aff. at ¶¶ 15, 17, Ex. 14-24,.) The proof at trial will show that all of these claims are false and have harmed Professor Brummer. Accordingly, Professor Brummer is likely to succeed on the defamation and defamation *per se* claims.

2. Intentional infliction of emotional distress

Intentional infliction of emotional distress, as the Court has observed, "requires, '(1) extreme and outrageous conduct, (2) with intent to cause, or in disregard of a substantial probability of causing severe emotional distress, (3) a causal connection between the conduct and the injury and (4) severe emotional distress.'" *Id.* (citation omitted). "The conduct alleged must be outrageous, extreme and beyond the bounds of decency, such that it would be regarded as, 'atrocious and utterly intolerable in a civilized community.'" *Id.* Moreover, a "claim that establishes a 'deliberate and malicious campaign of harassment or intimidation' or malevolent purpose is sufficient for intentional infliction of emotional distress." *Id.*

The Court has ruled that Professor Brummer "has sufficiently stated a potential claim of intentional infliction of emotional distress resulting from the defendants alleged actions as part of an internet-based campaign of harassment and intimidation." *Id.* at 4.

This claim is similarly poised for success. In addition to the defamatory material described above—which, on its own, is sufficient to demonstrate intent to cause severe emotional distress—Defendants' recent expansion of their campaign to include attacks on Professor Brummer's wife and lynching imagery removes any doubt as to their intent. (*See*

Morgenstern Aff. at ¶¶ 15(g)-(j), Ex. 20-23.) The proof at trial will show that the defamatory statements and lynching images have caused Professor Brummer to suffer severe emotional distress.

C. Professor Brummer will suffer irreparable harm in the absence of interim injunctive relief.

Courts have recognized the gruesome and threatening connotations of lynching symbols. "A noose is a historical symbol of racial hatred for African Americans and can represent a severe physical threat," as the court observed in *McKenzie v. Citation Corp., LLC,* No. 05-0138-CG-C, 2007 U.S. Dist. LEXIS 34890, at *41-42 (S.D. Ala. May 11, 2007). Likewise in *Smith v. Town of Hempstead Dep't of Sanitation Sanitary Dist. No. 2,* 798 F. Supp. 2d 443, 452-53 (E.D.N.Y. 2011), in analyzing a hostile work environment claim, the court noted that "there is little doubt that 'the noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence.'" (quoting *Williams v. New York City Hous. Auth*., 154 F. Supp. 2d 820, 824 (S.D.N.Y. 2001)). In *Jones v. Kent Sales & Serv. Corp.*, No. 2:12-cv-00251-SLB, 2012 U.S. Dist. LEXIS 132108, at *11-15 (N.D. Ala. Sep. 17, 2012), the court acknowledged that a "noose is a symbol of intense racial hatred and well-recognized as such, especially in the south."

Judicial condemnation of the murderous imagery of lynching is widespread. *See Turley v. ISG Lackawanna, Inc.,* 774 F.3d 140, 146 (2d Cir. 2014) (in the context of an intentional infliction of emotional distress claim, noting "the steadily intensifying drumbeat of racial insults, intimidation, and degradation," that included "insults, slurs, evocations of the Ku Klux Klan, statements comparing black men to apes, death threats, and the placement of a noose dangling from the plaintiff's automobile"); *Wilson v. Fayette Sand & Gravel, Inc. (In re Armentrout),* Nos. BK 06-71069-CMS-7, AP 06-70042-CMS, 2010 Bankr. LEXIS 58, at *24-25 (U.S. Bankr. N.D. Ala. Jan. 5, 2010) (finding that "[i]n addition to the persistent use of the racial epithet 'n****r,'

the Plaintiff was also taunted with the presence of a noose, a symbol of lynching, in the workplace").

Indeed, as a matter of law, the harassing use of lynching imagery is a crime under New York state law, which defines "Aggravated harassment in the second degree" as: "With intent to harass another person, the actor either: (a) communicates, anonymously or otherwise, by telephone, by computer or any other electronic means…a threat to cause physical harm to, or unlawful harm to the property of, such person…and the actor knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person's physical safety or property…." New York Penal Code § 240.30. The New York Penal Code recognizes that images of nooses and lynching are a particularly terrorizing form of harassment, and defines displays of those images on buildings or real estate as aggravated harassment in the first degree (a class E felony). *See* Penal Code § 240.31(5).

There can be no doubt that the sole purpose of the lynching photographs is to inspire fear and invite mayhem -- in other words, they pose a quintessential threat. "The idea expressed by hanging the body is that all Black people belong in a subordinate position and should stay there or they will be horribly brutalized, maimed, and murdered." *See* Catherine A. MacKinnon, WOMEN'S LIVES, MEN'S LAWS 324 (Harvard Univ. 2007). *See generally* Ashraf H. A. Rushdy, THE END OF AMERICAN LYNCHING 62-70 (2012); *Brennan v. Metro. Opera Ass'n, Inc.*, 192 F.3d 310, 320 (1999) (Newman, J., concurring in part and dissenting in part) ("Displays of photos of Blacks being lynched . . . would not be insulated from Title VII claims simply because the photos were observable by all office employees, White and Black[.]").

D. Interim injunctive relief will cause no harm to others.

Courts have made clear that expression that constitutes a "true threat," such as the lynching photographs, shooting recommendation and incitements to such violence, is not protected speech. As the Supreme Court explained in *Virginia v. Black*, 538 U.S. 343, 358 (2003), "[t]he protections afforded by the First Amendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. . . . The First Amendment," said the Court, "permits 'restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"

1. The First Amendment does not protect threats.

Pointedly for purposes of the present case, the Court noted that the First Amendment "permits a State to ban a 'true threat.'" *Id.* at 359. "True threats," said the Court, "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* "The speaker need not actually intend to carry out the threat," the Court noted. "Rather, a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

Thus, in *Turner v. Commonwealth*, the Virginia Court of Appeals held that a prosecution for displaying an all-black, life-sized dummy hanging from the neck by a noose did not violate

the First Amendment, because 'true threats' are "undeserving of First Amendment protection." 67 Va. App. 46, 60–61, 792 S.E.2d 299, 306 (2016), The court recognized lynching's "powerful terroristic effect on the target population" and ruled that "while the First Amendment protects [an individual's] right to be a racist and even to convey his racist beliefs to others, the protections of our Constitution do not permit him to threaten or intimidate others." 67 Va. App. at 60-61.

Threats made in internet articles or blog postings are equally outside First Amendment protection. The Second Circuit upheld a conviction based on threats made in a blog post, explaining that "[p]rohibitions on true threats—even where the speaker has no intention of carrying them out—'protect [ ] individuals from the fear of violence' and 'from the disruption that fear engenders[ ]'.... and are fully consistent with the First Amendment." *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) (citations omitted) (rejecting argument that statements were not threats but simply "political hyperbole" and the "kind of talk [that] permeates the public discourse").

2. New York state courts grant injunctive relief in similar circumstances.

New York courts have granted preliminary injunctive relief in the face of First Amendment arguments espoused by the party that would be subject to the injunction. For example, in *Dennis v. Napoli*, 2015 N.Y. Misc. LEXIS 3020, at *32-40 (N.Y. Sup. Ct. Aug. 12, 2015), the court granted a preliminary injunction barring a defendant from sending harassing communications to the plaintiff's employer and posting derogatory messages (accusing the plaintiff of being a "slut" and a "sexual predator") regarding the plaintiff on Facebook or other social media sites. The court noted the distinction "between constitutionally protected speech and speech which is merely an instrument of and incidental to wrongful conduct," and observed

that "an injunction will lie to restrain libel when the publication is part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose." *Id.* at *33.

After addressing the plaintiff's likelihood of success on the merits, the court discussed the irreparable harm to the plaintiff, stating that the "offensive communication" is "capable of injuring [plaintiff's] standing and reputation in all aspects of [her] personal and professional life, and of inflicting serious psychological and emotional damage to [plaintiff]." *Id*. at *36 (quoting *Bingham v. Struve*, 184 A.D.2d 85, 89-90 (1st Dep't 1992)). Next, the court examined the balance of equities and found it to weigh in the plaintiff's favor based on the conclusion that "defendants cannot identify one harm that [the defendant posting the derogatory messages] would face in being enjoined from such conduct," while the plaintiff faced "extreme harm." *Id.* at *37. Finally, the court cited the defendant's refusal to cease her defamatory campaign despite the filing of the lawsuit as further support for a preliminary injunction. *Id*. at *37-38.

Similarly, in *Bingham*, the First Department upheld the entry of a preliminary injunction against a defendant who repeatedly wrote and called family members, business associates and neighbors of the plaintiff, a former lover, and picketed outside the plaintiff's residence, claiming that the plaintiff had raped her thirty years ago. 184 A.D.2d at 87. As in *Dennis*, the court in *Bingham* noted the distinction between protected speech "intended to encourage debate on public issues," and "defamatory speech [that] does not advance such societal interests and, indeed, concerns a private individual." *Id*. at 89.

Likewise in *Trojan Elec. & Mach. Co. v. Heusinger*, 162 A.D.2d 859, 860 (3d Dep't 1990), the Third Department upheld the entry of a preliminary injunction against a defendant that picketed outside the business premises of the plaintiff, in part because "the words and conduct of the defendant were obviously designed and put into effect for the purpose of intimidating the

plaintiff and coercing settlement of a claim by adversely affecting [the plaintiff's] business venture."

Here, as in these cases, the lynching photographs are not protected speech, but direct threats to Professor Brummer, his family and his counsel that this Court can and should enjoin.

E. A TRO and preliminary injunction would serve the public interest.

Interim injunctive relief plainly would serve the public interest. There is no place in American life or public discourse for intentional use of lynching imagery in order to intimidate or harass. "Lynch-law will not cease to exist in this country until there is a strong and uncompromising public sentiment against it in every community, a public sentiment which . . . will invariably condemn lynchings because they are a crime against society." J. Cutler, LYNCH-LAW, *supra*, at 279. The public has an interest in the safety of all citizens, especially in the face of unmistakable threats that have led ineluctably to thousands of brutal and gruesome deaths.

III. Conclusion

For these reasons, Professor Brummer respectfully urges the Court to order immediate removal from the websites of Defendants of the lynching photographs and all "stories" about Professor Brummer, including, but not limited to, the materials appended to the Amended Complaint as Exhibits G and H and to this brief as Exhibits 14-24.

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Respectfully submitted,

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