UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN DOE Plaintiff, v. WESLEYAN UNIVERSITY Defendant.	CASE NO. 3:14-CV-01735 (SRU) SEPTEMBER 30, 2015

MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PLAINTIFF'S MOTION FOR RECONSIDERATION

Pursuant to Fed. R. Civ. P. 59(e) and Local Rule 7 (c) and (d) of the District of Connecticut Local Rules, Plaintiff John Doe ("Plaintiff") submits this memorandum of law in further support of his Motion for Reconsideration of this Court's August 20, 2015 order ("Order") insofar as it denied Plaintiff's Motion to Proceed in Fictitious Name and for Protective Order, November 20, 2014, which was amended on January 9, 2015 ("Motion").

A. Wesleyan Completely Misses The Point of Plaintiff's Action; Wesleyan's Efforts To Trivialize Plaintiff's Harm Should Be Disregarded

The underlying allegations of "inappropriate text messages and non-consensual kissing" are the beginning, *not the end*, of the analysis of how Plaintiff will be harmed by pursuing this action under his real name. (Wesleyan Opp., p. 2.) Wesleyan goes into great detail about the underlying allegations and Plaintiff's purported "admissions" of guilt during his student conduct hearings in an effort to claim that Plaintiff will not suffer harm now. (Wesleyan Opp., pp. 2-5.) The statements being attributed to Plaintiff, however, are wholly taken out of context as is evidenced by the repeated use of ellipses. (Wesleyan Opp., p. 4.) When reviewing the entire written statement (Herrington Aff., Exhibit F), Plaintiff clearly stated that his actions were

"neither hostile nor threatening, neither sexual misconduct nor sexual assault." Wesleyan's attempt to attribute to Plaintiff an admission of liability for sexual misconduct is absurd.

More importantly, Wesleyan confuses the focus of Plaintiff's lawsuit. (Wesleyan Opp., pp. 2-5.) Plaintiff brought this action to seek redress for Wesleyan's flawed and discriminatory response and adjudication of the underlying sexual assault allegations. In taking the complainants' allegations at face value, failing to provide Plaintiff with a material opportunity to defend himself, and failing to safeguard his confidentiality, Plaintiff was found responsible of "sexual misconduct," a label that carries a significantly negative stigma that will forever tarnish Plaintiff's record.

Representing further evidence of Wesleyan's misconception is its citation to Plaintiff's "brief eleven day period" of restrictions from graduation activities and commencement as if to suggest that he has not suffered any harm. (Wesleyan Opp., p. 5.) Glaringly omitted from Wesleyan's analysis is the importance of the mark on John Doe's disciplinary record, namely, guilty of "sexual misconduct," which brands him as a sexual predator. His future plans for graduate school and law school will most certainly be curtailed, and any argument to the contrary is ignorant of the realities of stigmas and public perception. *John Doe v. Middlebury College*, No. 1:15-cv-00192 (D. Vt. Sept. 16, 2015) (John Doe will experience irreparable harm from the gap in his education due to a charge of sexual assault, which will last for the remainder of his professional life, and any explanation is unlikely to fully erase the stigma); *King v. DePauw Univ.*, 2014 WL 4197507 at *13 (any explanation is unlikely to fully erase the stigma associated with a finding of sexual misconduct when plaintiff is asked to explain the situation to future employers or graduate school admissions committees); *Doe v. Salisbury Univ.*, No. CIV. JKB-

14-3853, 2015 WL 3478134, at *9 (D. Md. June 2, 2015) (the longstanding impact of being labeled responsible of "sexual assault" is so severe that monetary damages alone are insufficient).

One employer has already terminated Plaintiff's employment because of the stigma and public perception associated with the label, "sexual misconduct," which was disclosed to his employer due to Wesleyan's failure to safeguard Plaintiff's confidentiality. Plaintiff is now at risk of having his current employment terminated for the same reasons, and future employment opportunities curtailed on the same basis. The circumstances are so sensitive so as to justify Plaintiff proceeding with his case against Wesleyan under a pseudonym to prevent further retaliatory harm.

B. <u>The Buzzfeed Article Is Not Any More Public Than The Court Docket</u>

In an effort to discount Plaintiff's harm from being publicly named in this action, Wesleyan points to John Doe's decision to participate in a Buzzfeed Article on the climate of campus sexual assault. (Wesleyan Opp., p. 5.) However, Plaintiff's decision to participate (on advice of his last counsel) in a Buzzfeed Article under the pseudonym, "John Doe," is not any more public than his decision to proceed as "John Doe" in this public lawsuit. Plaintiff thoughtfully preserved his identity in both instances.

The fact that the Buzzfeed Article "contained enough detail about the underlying events to prompt one of Plaintiff's alleged victims to publish a response article" is of no moment. (Wesleyan Opp., p. 5.) The Article contained the same level of detail as the underlying Complaint in this action, and the same "alleged victim" would have been able to publish a response article to the Complaint. Irrespective of the Buzzfeed Article, the "alleged victim" was a "party" to the underlying student conduct proceeding and, as such, she possesses insider knowledge of the facts of Plaintiff's case.

C. John Doe Will Experience Retaliatory Harm if His Real Name Is Associated With the Stigma of Perpetrating Sexual Misconduct

Contrary to Wesleyan's supposition, there has been no misapprehension of the legal standards Plaintiff must satisfy in order to support his request for reconsideration. (Wesleyan Opp., p. 6.) Reconsideration will be granted where the movant can "point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Alston v. Sharpe*, No. 3:13-CV-0001 CSH, 2015 WL 4715340, at *6 (D. Conn. Aug. 7, 2015). The introduction of *relevant* case law is sufficient to support such a request and should not be overlooked. *Shrader*, 70 F.3d at 257 ("But in light of CSXT's introduction of additional relevant case law and substantial legislative history, we cannot say that the district court's decision to reconsider its earlier ruling was an abuse of discretion").

John Doe does not claim that he is a victim of sexual assault (Wesleyan Opp., p. 7.); his citation to the relevant authority on pages 4-5 of his Motion demonstrates the level of sensitivity and harm that stems from cases involving allegations of a sexual nature. Plaintiff is the victim of being wrongfully branded a sexual predator, which has caused (and will continue to cause) emotional and reputational damages. The risk of retaliatory harm to Plaintiff is real; being associated with the label, "sexual misconduct," has already led to Plaintiff's employment being terminated by the congress member, regardless of his steadfast denial of the charges. As one district court stated,

> The Court finds it inevitable that he would be asked to explain either situation by future employers or graduate school admissions committees, which would require him to reveal that he was found guilty of sexual misconduct by DePauw. Successfully seeing this lawsuit to its conclusion could not erase the gap or the transfer; the question will still be raised, and any explanation is unlikely to fully erase the stigma associated with such a finding. Money damages would not provide an adequate remedy at that point; DePauw's disciplinary finding—even if

> determined to have been arbitrary or made in bad faith—would continue to affect him in a very concrete way, likely for years to come.

King, 2014 WL 4197507 at *13.

Similarly, another district court indicated how the social stigma associated with sexual assault results in harm that cannot be addressed by monetary damages alone:

> Plaintiff has plausibly articulated the longstanding impact that such an investigation or disciplinary action could have on Plaintiff's life. Plaintiff could suffer "humiliation, disgrace, mental anguish, severe emotional distress, injury to reputation, past and future economic loss," etc. (*Id.* ¶ 35.) The social stigma associated with a sexual assault conviction is deservedly severe. But for that reason, if the Court finds that SU's investigation and possible disciplinary action would be somehow unlawful, money damages alone could not unring that bell.

Doe v. Salisbury Univ., 2015 WL 3478134 at *9.

The district court in *John Doe v. Middlebury College* echoed the same sentiment when expressing the life-long effects of having the label of sexual assault attributed to John Doe:

> John Doe will experience irreparable harm from the gap in his education due to a charge of sexual assault, which will last for the remainder of his professional life, and any explanation is unlikely to fully erase the stigma.

King v. DePauw Univ., *Doe v. Salisbury Univ.*, and *John Doe v. Middlebury College* constitute *relevant* case law authority in support of Plaintiff's argument that he will experience retaliatory harm if he is not granted the protection of proceeding under a pseudonym. *Shrader*, 70 F.3d at 257.

D. Current and Future Employers Will Care if Plaintiff's Real Name Is Publicized, Which Will Cause Irrevocable Damages to John Doe's Future

Plaintiff's sworn declaration attesting to his current and future risk of termination is not a "recently concocted proffer" or "inadmissible hearsay" for the purposes of his Motion for Reconsideration (Wesleyan Opp., pp. 9-12.)

For example, in support of a motion for summary judgment, a declaration that complies with 28 U.S.C. § 1746 may be used, so long as it is sworn to under penalty of perjury, based on personal knowledge, presents facts that are admissible in evidence, and demonstrates that the declarant is competent to testify about the matters stated. Fed. R. Civ. P. 56(c)(4).

Plaintiff has presented evidence that during a meeting on July 14, 2015, in which he was a participant, his current employer advised him of its interest in maintaining Plaintiff's anonymity in his lawsuit due to the public-facing nature of his position. (John Doe Decl. ¶¶ 8-14). Publicly naming Plaintiff in his lawsuit will potentially adversely impact the perception of Plaintiff or his employer by its members and stakeholders. (Kimbis Decl. ¶ 8.) The headline perception of an employee associated with allegations of sexual assault may cause significant harm to the organization. (*Id.*); *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000).

Wesleyan cites to *Prasad vs. Cornell* University, No. 15-cv-00322 (N.D.N.Y. Mar. 25, 2015) for the proposition that a plaintiff's fear of embarrassment and economic harm is insufficient to justify the need to proceed anonymously. (Wesleyan Opp., p. 9.) Wesleyan misstates the holding in *Prasad*. It wasn't plaintiff's economic harm that was deemed insufficient; the *Prasad* court specifically held that plaintiff failed to explain how the disclosure of his identity in the action would perpetuate any **further harm** to his "career prospects and economic future."

Unlike the plaintiff in *Prasad vs. Cornell*, Plaintiff has demonstrated how disclosure of his identity would perpetuate further harm to his career prospects and economic future. This risk of retaliatory harm is not singularly contained to his current employer. Plaintiff's future career goals include public-service oriented politics. (John Doe Decl. ¶¶ 4, 7.) Undoubtedly, Plaintiff's

reputation is of the utmost importance to attaining a successful public sector career. (Kimbis Decl. ¶ 7.) However, public perception on the issue of sexual assault is a significant issue, especially given the current climate today where campus sexual assault is particularly reviled by the White House, the Department of Education, victim advocacy groups, colleges and universities, and the public at large. Disallowing Plaintiff the protection of pursuing this action under a fictitious name will guaranty that Internet search results will infinitely reveal Plaintiff's name associated with being accused of and found responsible for sexual misconduct. Plaintiff's ability to serve in an elected capacity at the local, state, or federal level will be irrevocably undermined without the protection of a pseudonym.

E. Wesleyan Will Not Suffer Any Prejudice

Wesleyan will not suffer any prejudice from Plaintiff proceeding with his claims anonymously, nor will Wesleyan experience any impediment to defending itself or impeach Plaintiff's credibility. (Wesleyan Opp., p. 14.) Plaintiff's identity is already known to Wesleyan, and the identity of all student witnesses involved in the underlying allegations is also known to Wesleyan, which is evidenced by its request to protect the identity of all current and prior students when it filed the Proposed Stipulation and Order Regarding Confidentiality of Student Records ("Confidentiality Order") on August 25, 2015 (Docket No. 31). On balance, Plaintiff has outlined the great harm he will suffer if he is foreclosed from proceeding under a pseudonym.

F. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Motion for Reconsideration of the Order in light of the legal and factual issues raised herein, and, ultimately, grant his Motion to Proceed in Fictitious Name and for Protective Order so as to prevent further damage to his reputation, avoid further loss of economic opportunities, and avoid

the risk of retaliation that he will suffer as a result of being required to pursue this action under his real name.

Respectfully submitted,
Plaintiff John Doe

By: s/ *Jeffrey Hellman*
Jeffrey Hellman, Esq. (CT04102)
Law Offices of Jeffrey Hellman, LLC
195 Church Street, 10th Floor
New Haven, Connecticut 06510
Tel: (203) 691-8762
jeff@jeffhellmanlaw.com

-and-

By: /s/ *Kimberly C. Lau*
Kimberly C. Lau (*pro hac vice*)
Warshaw Burstein, LLP
555 Fifth Avenue
New York, NY 10017
Tel.: (212) 984-7709
klau@wbcsk,com

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of September, 2015, a copy of the foregoing Memorandum of Law in Further Support of Plaintiff's Motion for Reconsideration, and Declaration of Thomas P. Kimbis in Further Support of Motion For Reconsideration was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's CM/ECF electronic filing system.

/s/ *Kimberly C. Lau*
Kimberly C. Lau

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN DOE	)	
	)	CASE NO.
Plaintiff,	)	3:14-CV-01735 (SRU)
v.	)	
WESLEYAN UNIVERSITY	)	
Defendant.	)	SEPTEMBER 28, 2015

DECLARATION OF THOMAS P. KIMBIS IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION

I, Thomas P. Kimbis, declare pursuant to 28 U.S.C. 1746:

1. I am the Vice-President of Executive Affairs and General Counsel at the Solar Energy Industries Association (SEIA). SEIA is Plaintiff John Doe's current employer.

2. I have been advised that Plaintiff initially filed a Motion to Proceed in Fictitious Name and for Protective Order on November 20, 2014, which was denied on August 20, 2015 ("Order"). I have further been advised that Plaintiff filed a Motion for Reconsideration of the Order on the grounds that he will suffer significant retaliatory harm and manifest injustice if he is required to proceed with his action under his real name.

3. Plaintiff John Doe initially began with SEIA as a fall intern in the fall of 2014.

4. As an intern, Plaintiff disclosed to me that he is pursuing a lawsuit against Wesleyan University for "Title IX violations," and that he is proceeding as a "John Doe."

5. Due to Plaintiff's exemplary performance, commitment to public service, and passion for renewable energy, SEIA decided to extend a permanent salaried position as Business Development Associate to Plaintiff on March 16, 2015.

6. Plaintiff has kept me abreast of the status of his case. I appreciated that Plaintiff continued to make these disclosures to me and remain satisfied that he was proceeding anonymously for two reasons.

7. First, Plaintiff has made clear from the time of his internship that he has aspirations for public service. Having served as a public servant for the U.S. Department of Energy, and in my current role as liaison between the solar industry and the executive branch of the federal government, I state with confidence that one's reputation is of immense importance to a successful public sector career. It would be unfortunate to see the current matter before the Court cause reputational damage to Plaintiff simply due to proceeding without the protection of a fictitious name.

8. Second, while I am primarily interested in seeing Plaintiff proceed anonymously for Plaintiff's own sake, as the General Counsel of SEIA I would not want the existence or details of Plaintiff's case to adversely impact the perception of Plaintiff or of SEIA by the members and stakeholders of SEIA. Plaintiff has a public-facing role at SEIA. I am concerned about the impact of the alleged sexual assault by Plaintiff should our member companies become aware of the allegations. As a non-profit entity, we are only able to operate due to the support of our members. While I would hope that individuals finding out about the allegations against Plaintiff would recognize them for what they are – allegations – in reality I fear member companies would be significantly concerned about the headline perception and optics of a SEIA employee associated with allegations of sexual assault and misconduct that they may discontinue their membership in SEIA, causing significant harm to the organization. This potential harm to a non-profit entity alone seems worthy of providing Plaintiff with the protection he seeks.

9. Based on the foregoing, I submit this declaration in support of Plaintiff's Motion for Reconsideration and, respectfully request that the Court grant Plaintiff's Motion to Proceed in Fictitious Name and for Protective Order.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: Washington, D.C.
September 28, 2015

Thomas P. Kimbis, Esq.