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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 23-0587E

JAMES A. CINTOLO, R.N.,
Plaintiff,

v.

MASSACHUSETTS BOARD OF REGISTRATION IN NURSING, and MARGRET COOKE,
Defendants.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2023 MAR 10 A 10:08
JOHN E. POWERS III
ACTING CLERK MAGISTRATE

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S APPLICATION FOR ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The Plaintiff, James Cintolo, R.N., is a member of a large plurality of medical providers who have expressed skepticism in response to the mainstream narrative surrounding the public health response to the SARS-CoV-2 ("COVID-19") pandemic. In keeping with centuries of tradition which has fueled the advancement of medicine from the early days of germ theory through the present, Nurse Cintolo has expressed his views by publishing them for examination by the public and his peers. Since the pandemic began, he has used social media to offer criticism of the response to COVID-19 by both government and media, and he has contributed to the public discourse on a wide array of medical and medicine-adjacent subjects, including discussion of the long-term health effects of COVID-19, vaccine efficacy, vaccine side effects, public health policy, and politics.

Now, in response to an anonymous complaint tendered, not by a former patient, but by an online troll, the Massachusetts Board of Registration in Nursing ("BORN") has initiated an investigation into Nurse Cintolo's conduct, alleging, without any basis, that his speech has violated

the laws and regulations governing the practice of nursing in the Commonwealth. In response to the free exercise of Constitutionally protected speech, the chair of the BORN, Defendant Margaret Cooke, and its designated investigator, Katelyn Vaughn, have threatened to deprive Nurse Cintolo of his vested property interest in his nursing license, which has had the effect of silencing him and curtailing his free speech. The actions of Defendant Cooke through her agent, Katelyn Vaughn, has already interfered with Nurse Cintolo's rights to exercise free speech, and as such, her conduct is violative of the Massachusetts Civil Rights Act, M.G.L. c. 12, §§ 11H, 11I ("MCRA").

Accordingly, Plaintiff seeks issuance of a temporary restraining order and, after notice and a hearing, a preliminary injunction under the authority granted him by the MCRA to safeguard his property and protect himself and others similarly situated from Ms. Cooke's further interference with his secured rights and to protect and promote the public interest in unfettered discourse. *See T & D Video, Inc. v. Revere*, 66 Mass. App. Ct. 461, 473-74 (2006).

I. BACKGROUND

After the onset of the COVID-19 pandemic, Nurse Cintolo began to participate in the public discourse surrounding the response by government, media, and certain sectors of the medical profession via social media, including his account on Twitter,[1] where he is followed by approximately 93,100 accounts. His Twitter account specifically indicates his views are his own, and he does not purport to express opinions on behalf of any organization or employer. Nurse Cintolo has used his social media to express commentary, criticism, and skepticism over certain aspects of the public response to the crisis, including the politicization of medical discourse and the suppression of dissenting viewpoints.

[1] Available at <twitter.com/healthbyjames>.

On January 23, 2023, an anonymous individual purporting to operate "[o]n behalf of BORN" filed an unsigned complaint against Nurse Cintolo. Nursing Complaint Form ("Ex. C"). There are no contact details present on the complaint, no address is listed, nor is any first name, last name, or the requested "incident leading up to [the] complaint." *Id.* at 1. Under the signature—which would affirm the truth of the complaint under the pains and penalties of perjury—the complainant only wrote "On Behalf of BORN." *Id.* at 2. The complaint, in full, reads:

> I would like to report James Cintolo to your board, a registered nurse who is spreading massive medical misinformation on his Twitter account to a massive audience every single day.

Id. at 1.

As a result of this anonymous complaint, on February 6, 2023, Defendant Margret Cooke, through her agent, Katelyn Vaughn, purporting to act on behalf of the BORN, and at the request of a heretofore unidentified individual going by the pseudonym "Lina Artemis" initiated an investigation into Nurse Cintolo's license, maintaining that the single sentence of the anonymous complaint—which contained no specific factual foundation as to why his speech constituted "misinformation," *see ibid.*—contained a cognizable allegation that he "violated the laws and regulations governing nursing practice." BORN Notice of Complaint and Investigation ("Ex. D") at 1. No specific conduct is identified in the notice of complaint, nor is any basis identified for how Nurse Cintolo's exercise of protected speech could be considered a violation of the laws and regulations governing his profession. *See generally id.* The investigation demands cooperation in the form of the production of documents including "remedial action" that Nurse Cintolo has taken to address his supposed wrongdoing under the threat of deprivation of his license to practice. *Id.* at 3; *see* 244 CMR 7.03(o)-(p) (empowering the Board to take action against a licensee if they do not comply with an investigation). As a result of this threat of deprivation of his property and livelihood, Nurse Cintolo has ceased to publish on Twitter as of February 8, 2023. *See* n. 1. *supra.*

II. ARGUMENT

The MCRA empowers individuals "whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with" to prosecute claims "in his own name and on his own behalf" for injunctive relief to enjoin unlawful interference with the enjoyment of those rights. M.G.L. c. 12, § 11I. Unlike in other civil litigation, which requires a showing of irreparable harm, injunctive relief under the MCRA is appropriate where the movant can show, by a preponderance of the evidence, that interference has occurred and that the requested relief "promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984).

As discussed below, injunctive relief is appropriate here where the Defendant Cooke, without legal or regulatory basis but purporting to act under the color of law, has interfered and continues to interfere with Mr. Cintolo's enjoyment of his right—secured by the Constitutions and laws of both the Commonwealth of Massachusetts and the United States—to exercise free speech by threatening his vested property right in his nursing license. A restraining order and subsequent preliminary injunction is especially warranted here, where the Defendant's conduct is ongoing and plainly motivated by politically motivated viewpoint discrimination.

A. The Defendants Have Violated the MCRA

To establish a violation of the MCRA under c. 12, § 11I, a plaintiff must show that

> (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.'

Bally v. Northeastern University, 403 Mass. 713, 717-18 (1989) (citing c. 12, §§ 11H-11I). Here, these elements are satisfied by on the actions of Defendant Cooke and their effect on Mr. Cintolo.

1. The Plaintiff's Speech is Secured by the Constitution and Laws of both the United States and the Commonwealth of Massachusetts.

The freedom of speech is protected by both the First Amendment to the United States Constitution and Article XVI of the Massachusetts Declaration of Rights, as amended, which provides "[t]he right of free speech shall not be abridged." The Massachusetts Supreme Judicial Court has previously "interpreted the protections of free speech and association under our Declaration of Rights to be 'comparable to those guaranteed by the First Amendment.'" *IA Auto, Inc. v. Director of the Office of Campaign and Political Finance*, 480 Mass. 423 (2018) (quoting *Opinion of the Justices*, 418 Mass. 1201, 1212 (1994)).

Where an alleged violation of the MCRA concerns interference with the exercise of free speech by those purporting to act under the color of law, the interference is assessed under "either strict or intermediate scrutiny." *T &D Video*, 66 Mass. App. Ct. at 467. Where speech would be generally restricted based on a content-neutral time place and manner restriction, it is subject to intermediate scrutiny, but when speech is restricted based on content, it is subject to the much higher standard of strict scrutiny. *Opinion of the Justices*, 436 Mass. 1201, 1206-07 (2002).

Worse still is when interference with speech is predicated not on content or subject matter, but rather based on a particular point of view. As the Supreme Court has previously stated, where infringement of the right to free speech

> targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rectors and Visitors of the Univ. of Virginia, 515 U.S. 819, 829 (1995).

Some restrictions on speech are permissible under both the Constitution and Declaration of rights, such as "regulate in a reasonable way the time, place, or manner of speech, provided that the regulation is applicable to all speech, regardless of its content." *Opinion of the Justices*, 396 Mass. at 1214 (citing *Planned Parenthood League of Mass., Inc. v. Attorney Gen.*, 391 Mass. 709, 714, cert. denied, 105 S. Ct. 189 (1984) (brackets omitted)). Such restriction can only be justified, however, where the limitation "is no greater than is necessary to protect that compelling interest." *Commonwealth v. Dennis*, 368 Mass. 92, 99 (1975). Where a speech would be restricted "because of its message, its ideas, its subject matter, or its content [the restriction] is presumptively invalid." *Commonwealth v. Lucas*, 472 Mass. 387, 392 (2015) (quotation marks and citations omitted).

The actions taken against Nurse Cintolo do not stem from any general attempt to restrict nurses from offering opinions on COVID-19 generally, but rather a complaint that Nurse Cintolo's viewpoint constitutes "misinformation," Ex. C at 1, and a correspondingly vague assertion from Defendant Cooke, through her agent Ms. Vaughn, that the complaint rises to the level of an allegation "that [he] ha[s] violated the laws and regulations governing nursing practice." Ex. D at 1. However much the public would like to believe that medicine is an exact science, the history of medicine reflects a long progression of hypothesis and rebuttal, typically in the form of publication and debate in the public arena.[2] The necessity of medical professionals to express unpopular opinions is not only essential to the scientific method, but also the very type of discourse that First Amendment exists to protect. *See Texas v. Johnson*, 491 U. S. 397, 414 (1989) ("[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[2] *See, e.g.*, Mervyn Susser *et al.*, Eras in Epidemiology: The Evolution of Ideas (2009) at 107-22 (discussing the history of the public debate between germ theory and miasma theory).

2. The Defendants Have Interfered or Attempted to Interfere with the Plaintiff's Secured Rights.

The MCRA extends the same protection afforded by 42 U.S.C. § 1983 against interference with constitutional rights by state actors in order to protect against interference and attempted interference by any person, including private persons, with any rights secured by the state or federal constitutions or state or federal law. *Bell v. Mazza*, 394 Mass. 176, 181-82 (1985) A right is "secured" by the constitution or by federal or state law if it "emanates from," or "finds its source" in, the constitution or federal or state law. *O'Cormell v. Chasdi*, 400 Mass. 686, 692 (1987) (quoting *Bell*, 394 Mass. at 182).

Here, Defendant Cooke's actions have interfered with Nurse Cintolo's right to freedom of speech secured by both the First Amendment to the United States Constitution and Article XVI of the Massachusetts Declaration of rights and also constitutes an attempt to interfere with Nurse Cintolo's right to engage in his lawful occupation in violation of the Fourteenth Amendment to the United States Constitution. *See Leigh v. Bd. of Registration in Nursing*, 395 Mass. 670, 682-83 (1985) ("the right to engage in any lawful occupation is an aspect of the liberty and property interests protected by the substantive reach of the due process clause of the Fourteenth Amendment to the United States Constitution and analogous provisions of our State Constitution") (quoting *Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming & Funeral Directing*, 379 Mass. 368, 372 (1979)). While the caselaw of the Commonwealth does permit the Boards of Registration to place restrictions on the practice of lawful occupations, the federal due process clause and "the State Constitution require[s any restrictions] bear 'a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare'" in order to be permissible. *Leigh*, 395 Mass. at 682 (quoting *Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 418 (1940)).

As Defendant Cooke is subjecting Nurse Cintolo to investigation and threat of deprivation of property based on his viewpoint on the response to the COVID-19 pandemic, rather than the subject matter of his speech, this interference is presumptively violative of the First Amendment and any action taken by the Board itself would be subject to strict scrutiny. *See T & D Video v. Revere*, 423 Mass. 577, 580-81 (1996). Additionally, the complaint at issue in this case does not provide a single specific citation to speech which reflects "misinformation." *See generally* Ex. C. Nevertheless, simply by raising the specter of deprivation of his right to practice his chosen lawful occupation, Defendant Cooke has silenced Nurse Cintolo in flagrant violation of his right to free speech. Due to the utter absence of any legal basis that his speech constitutes a "violat[ion of] the laws and regulations governing nursing practice" it is clear that rather than a *bona fide* action by the BORN to safeguard the health, safety, and general welfare of the public, this investigation reflects an attempt by Defendant Cooke, purporting to act under the color of her office as the chair of the BORN, to individually silence Nurse Cintolo from expressing his opinions on matters of public concern. *See* Ex. D at 1-2.

As there is no basis to find that the BORN has any power to regulate or restrict the speech of the Nurses of the Commonwealth as part of their police power over the occupation of nursing, *see generally* 244 CMR 9.00 *et seq.* (Standards of Conduct), then any attempt by Defendant Cooke to use her office to deprive a nurse of the right to freely express his individual viewpoint plainly reflects interference by her as an individual acting in their own capacity to deprive an individual nurse of his clearly established constitutional rights of which any reasonable person would be aware, thus also depriving her of any protection of qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985); *Breault v. Chairman of the Bd. of Fire Commrs. of Springfield*, 401 Mass. 26, 31 (1987), *cert. denied sub nom. Forastiere v. Breault*, 485 U.S. 906 (1988).

3. Defendant Cooke Has Used Threats, Intimidation, and Coercion to Interfere or Attempt to Interfere with the Plaintiff's Secured Rights.

Defendant Cooke's actions interfering with Nurse Cintolo's secured rights plainly constitute threats, intimidation, and coercion as those terms are used in the MCRA. Though the MCRA does not define the terms "threats, intimidation, or coercion," as a remedial statute, it is "entitled to a liberal construction of its terms," *see Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 822 (1985), and there is no requirement that the interference come by way of threat of physical force. *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 646-48 (2003) ("in certain circumstances, economic coercion, standing alone, may be actionable under the act").

The Supreme Judicial Court has defined "threat" as "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm." *Planned Parenthood League of Mass., Inc. v. Blake* ("*Blake*"), 417 Mass. 467, 474, *cert. denied*, 515 U.S. 868 (1994) (citing *Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 104 (1987) (O'Connor, J., dissenting)); *but see Delaney v. Chief of Police of Wareham*, 27 Mass. App. Ct. 398, 406-07, 409 (1989) (threat need not be of physical force, but can be proved by threat of economic harm). "'Intimidation' involves putting in fear for the purpose of compelling or deterring conduct." *Blake*, 417 Mass. at 474; *Redgrave*, 399 Mass. at 103-04; *Delaney*, 27 Mass. App. Ct. at 409. Coercion is the application of physical, moral, or economic force to compel an individual to take some action or forbear from some action. *Buster*, 438 Mass. at 646-48; *Blake*, 417 Mass. at 474; *Delaney*, 27 Mass. App. Ct. at 409. As the statutory requirement of "threats, intimidation, or coercion" is disjunctive, any one of these three precedents constitutes an independent and adequate basis for the issuance of injunctive relief under c, 12, §§ 11H-11I. *Sarvis v. Boston Safe Deposit & Trust Co.*, 47 Mass. App. Ct. 86, 91 (1999). As the Defendant Cooke's actions qualify under all three of these definitions, injunction relief is warranted.

Through her agent Ms. Vaughn, Defendant Cooke has raised the menace of unlawful deprivation of a vested property right, to wit, his right to practice nursing, to put Nurse Cintolo in fear that if he does not forbear from expressing his opinions in the public sphere, he will suffer the economic harm of unemployment and deprivation of his chosen profession. *See generally* Ex. D; *see also* 244 CMR 7.03(o)-(p). By misusing the powers of her office to effectuate an investigation not permitted by the regulations of the Commonwealth in order to pressure Nurse Cintolo into silence in violation of his secured right to free speech, the Defendant Cooke has committed a threat as that term is used in c. 12, § 11H. *See Blake*, 417 Mass. at 474; *Redgrave*, 399 Mass. at 103-04; *Delaney*, 27 Mass. App. Ct. at 409.

This same attempt to cause fear also constitutes intimidation, as the notice of complaint plainly reflects it was done in an attempt to deter Nurse Cintolo from engaging in a specific pattern of conduct, to wit, the expression of his opinions on Twitter. *See* Ex. D at 1-2, 5. Were Defendant Cooke's actions based on a *bona fide* exercise of the BORN's power to regulate the nursing profession, surely there would be some specific section of the standards of nursing conduct identified in the notice of complaint. *See generally* 244 CMR 9.00 *et seq.* Given that the complaint lacks any specific factual basis which could be construed to support Ms. Vaughn's statement that the complaint articulates a violation of "the laws and regulations governing nursing practice," the anonymous complaint offered "On Behalf of BORN" is plainly nothing more than a pretext for Defendant Cooke to deter Nurse Cintolo from exercising his rights. *See* Ex. C at 1; *contra* Ex. D at 1. Accordingly, she has engaged in intimidation as that term is used in c. 12, § 11H. *See Blake*, 417 Mass. at 474; *Redgrave*, 399 Mass. at 103-04; *Delaney*, 27 Mass. App. Ct. at 409.

Finally, Defendant Cooke has abused and continues to abuse the powers of her office to effectuate coercion of Nurse Cintolo by forcing him to incur the expense of legal defense of his

nursing license in order to silence him on the basis that his viewpoint. Where an individual's "actions were specifically designed to dissuade" another from taking action "to which they were constitutionally entitled," an MCRA violation has occurred. *See Blake*, 417 Mass. at 475. In this case, the Defendant Cooke has used both moral force (the use of her office and that of her agent, Ms. Vaughn, to condemn Nurse Cintolo's exercise of his rights as "violat[ive of] the laws and regulations governing nursing practice") and economic force (legally compelling him to defend against a frivolous complaint or else lose his livelihood) to compel him from forbearing from the exercise of his free speech. *See* Ex. D at 1-4; 244 CMR 7.03(o)-(p). While not physical violence, these actions are textbook coercion, and thus warrant injunctive relief under c. 12, §§ 11H and 11I. *Buster*, 438 Mass. at 646-48; *Blake*, 417 Mass. at 474.

B. A Temporary Restraining Order and Subsequent Preliminary Injunction Halting Defendants' Ongoing Conduct and Restraining Them from Any Future Threats, Intimidation, and Coercion Will Serve the Public Interest.

The evidence shows that Defendant Cooke holds a particular animus against Nurse Cintolo and an aversion to his medical and political viewpoints. The power that this Defendant wields by virtue of her office makes her conduct particularly alarming and should rightfully cause the nurses of the Commonwealth to fear arbitrary sanction if they do not restrain the public expression of their opinions to those views which could be considered safe or mainstream. Permitting individuals holding offices responsible for oversight and employment of a profession to interfere with the exercise of constitutional rights of members of that profession would obliterate any free discourse by dissenting or minority viewpoints and should therefore spur immediate, unequivocal condemnation and injunction by this Court, lest professionals next be cast out because of closely held beliefs on divisive issues such as abortion, religion, or political affiliation. The MCRA exists as a safeguard to prevent individuals from doing exactly what Defendant Cooke has done here, using their individual power to run roughshod over the established rights of individuals.

Given Defendant Cooke's arbitrary and capricious use of their offices to curtail the speech of an individual and the ongoing nature of the harm, a preliminary injunction is necessary to restrain them from further threats, intimidation, and coercion of Nurse Cintolo and any other nurses who would exercise their right to free speech by expressing unpopular or divisive opinions, thus serving the public interest by "protect[ing] against future unlawful conduct that would be harmful to persons not currently identifiable." *See Blake*, 417 Mass. at 479. The proposed injunctive relief is well-tailored and narrowly defined to prevent the active, ongoing, irreparable harm at issue, as it prevents the Defendants from further misuse of their offices without restricting them in any way from continuing the appropriate exercise of their legal duties. *See Commonwealth v. Adams*, 416 Mass. 558, 566-67 (1993). It would require only that Defendant Cooke and her agent Ms. Vaughn immediately cease using their offices to effectuate an investigation of Nurse Cintolo predicated on his exercise of free speech and prohibit Defendant Cooke from using the powers of her office to prevent or attempt to prevent any nurses in the Commonwealth from exercising their freedom of speech to publicly express opinions on politics, government, and medicine. The proposed temporary restraining order is narrowly-tailored to the facts of this case and would restrict the Defendants only from actions which they have no reasonable need or legal authority to undertake.

III. CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that this Court grant the instant Application, affording all relief sought, entering injunctive relief in a form substantially similar to the attached Proposed Temporary Restraining Order, and set down a hearing date for the earliest possible time, no later than ten days, for consideration of the Proposed Preliminary Injunction attached hereto, to be considered upon notice to the Defendants to prevent them from further violating the secured rights of Plaintiff and other nurses practicing in the Commonwealth.

Respectfully submitted by the Plaintiff,

James Cintolo, R.N.,
By His Attorneys,

/s/Timothy Vaughan Malley
Sean E. Capplis, BBO #634740
Timothy Vaughan Malley, BBO #705603
CAPPLIS, CONNORS & CARROLL, PC
18 Tremont Street, Suite 330
Boston, MA 02108
T: 617-227-0722
F: 617-227-0772
scapplis@ccclaw.org
tmalley@ccclaw.org

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