

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division**

ELIZABETH SINES, SETH WISPELWEY,
MARISSA BLAIR, APRIL MUÑIZ,
MARCUS MARTIN, NATALIE ROMERO,
CHELSEA ALVARADO, JOHN DOE, and
THOMAS BAKER,

Plaintiffs,

v.

JASON KESSLER, et al.,

Defendants.

Civil Action No. 3:17-cv-00072-NKM

JURY TRIAL DEMANDED

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF
THEIR MOTIONS FOR EVIDENTIARY SANCTIONS AGAINST
DEFENDANT ELLIOTT KLINE A/K/A ELI MOSLEY**

Plaintiffs respectfully file this supplemental brief in further support of their April 3, 2019, Motion for Sanctions, ECF No. 457 (“First Sanctions Motion”), and December 6, 2019, Motion for Evidentiary Sanctions, ECF No. 601 (“Second Sanctions Motion”), to provide the Court with yet more new evidence that Defendant Elliott Kline lied under oath, likely intentionally spoliated evidence, and apparently withheld yet another phone number that he has never before provided to Plaintiffs or the Court.

As the Court knows, Plaintiffs recently learned through discovery that, in two versions of the “Operation Unite the Right Charlottesville 2.0” document that Kline conceded he drafted, Kline provided Unite the Right rally-goers with a (347) phone number that Kline had never before disclosed in discovery. *See* Second Sanctions Motion 4–5, Ex. E at 3, ECF No. 601-5 (listing a (347) area code number), Ex. F at 3, ECF No. 601-6 (same). On the document, Kline referred to

the (347) number as “my direct contact information” and told rally-goers to “[f]eel free to msg/call whenever.” Second Sanctions Motion, Ex. E at 3, ECF No. 601-5, Ex. F at 3, ECF No. 601-6.

When Plaintiffs brought the (347) number to the Court’s attention in December 2019, Kline repeatedly and vehemently denied under oath that he had ever owned or used this number. During the December 16, 2019, hearing Kline swore under oath that “I looked for that number in all of my – in everything I had, and I’ve never seen that number. I don’t know where it’s from. I don’t know if it’s somebody else’s number that was put next to mine for a contact. But I’ve never used a number like that or had a phone number like that. ***I never had a 347 number linked to me or anything like that.*** I looked to try to find where that number came from or who it was, and I wasn’t able to find it.” Hr’g Tr. at 23–24, Dec. 16, 2019, ECF No. 609 (emphasis added); *see also id.* at 25 (“I can only assume that this was somebody else’s number that I accidentally put here, something like that, because I never used any 347 number or any number during this, other than the [(610)] number.”).

Kline doubled-down on this position during the January 6, 2020, telephonic hearing with the Court. He again swore under oath that “[t]hat is not a phone number I’ve ever used. I don’t know why that phone number is next to my name on that sheet. I don’t know if it was somebody else’s number that I put there – that I put there by accident or was put there by somebody else before it was sent out, ***but that is not a number that I’ve ever used.***” (emphasis added)). Hr’g Tr. at 17, Jan. 6, 2020, ECF No. 632; *see also id.* at 24 (“Like I said, I truly do not have another phone number. I don’t know why that number was listed there next to my name. . . . The only number I

used was that 610 number during – during the – specifically, the Unite the Right was that 610 number. I used that the entire time, and that was the only number I used.”¹

In light of Kline’s previous misrepresentations to the Court and the documentary evidence connecting Kline with the (347) number, Plaintiffs served a subpoena pursuant to Fed. R. Civ. P. 45 on Google LLC, which was the provider for the (347) number through its Google Voice service.

On January 31, 2020, Plaintiffs received Google’s production. *See* Exhibit A. Google’s production unequivocally confirms that the (347) number was registered to “Eli Mosley,” the name that Kline has admitted was his alter ego during the relevant period. *Id.*; *see* Kline Dep. Tr. at 48, Aug. 7, 2019, ECF No. 601-1. Moreover, the (347) number was registered to the email address “DeplorableTruth@gmail.com,” which Kline uses to this day. Ex. A. There is no doubt that the (347) number was registered to Kline and that Kline lied to the Court repeatedly under oath about it.

Google’s production also confirms that Kline likely spoliated additional relevant evidence. The production contains a complete record of activity for the Google Voice account associated with the (347) number and shows that Kline used the (347) number for hundreds of communications, including numerous text messages, between May 2017 and December 2017. *Id.* Critically, the (347) number was used for multiple communications, including text messages, on August 11 and 12, 2017, the weekend of the torch rally and Unite the Right. *See id.* The Google production shows that on January 2, 2018, well after this litigation had commenced and while

¹ Kline also swore under oath during his August 2019 deposition that he did not have a phone during the relevant period other than the iPhone associated with the (610) number and the “Walmart phone.” *See* Kline Dep. Tr. at 389, Aug. 7, 2019, ECF No. 566-3 (“Q. . . . [Y]ou had one phone in 2017? A. Correct.”); *id.* at 393 (“The only two phones I have had has been the iPhone and the Walmart one.”); *id.* at 395 (“The only two phones I have ever had – I mean, the 610 number I have had since, like, seventh grade. And, like, it has only been on two different phones. The other phone I got is the, umm, the Walmart one.”).

Kline was under an obligation to preserve his data, Kline ended his Google Voice subscription, *see id.*, without producing to Plaintiffs any of the communications associated with the (347) number, including those he received on the day of Unite the Right. Assuming that those communications had not been deleted when Kline ended his subscription, which they may well have been, Plaintiffs have not received them. In short, Kline withheld relevant evidence, likely spoliated that evidence by deactivating his Google Voice account, then lied under oath about it.²

As if this were not enough, Google's production also connects Kline to yet another previously undisclosed phone number, beginning with the area code (484) (associated with southeastern Pennsylvania, where Kline resides), which Kline has *never* provided to Plaintiffs or the Court. Specifically, Google's production seems to indicate that Kline forwarded incoming text messages and phone calls from the (347) number to a (484) number during various periods from October to December 2017. *See id.* Yet Kline *never* disclosed any (484) phone number to Plaintiffs or the Court—withholding yet another trove of potentially responsive documents that Plaintiffs will never see.

Kline's misconduct—lying under oath, likely spoliation, and withholding evidence—deserves the sanctions Plaintiffs have previously requested. Plaintiffs respectfully reiterate their request that the Court grant the First and Second Sanctions Motions and that the Court (1) deem the facts listed in the Sanctions Motions established; (2) deem authentic for purposes of Fed. R. Evid. 901 any documents that Plaintiffs have a good-faith basis to believe that Kline created, including all documents from the social media accounts listed in the Sanctions Motions, as well as any photographs taken by or depicting Kline; and (3) instruct the jury that Kline chose to

² Kline has admitted that he was aware of his discovery and preservation obligations. *E.g.*, Hr'g Tr. at 36, Nov. 25, 2019, ECF No. 600 (“Q And Mr. Kolenich told you, while he still represented you, about your discovery obligations, correct? A Yes.”).

intentionally withhold his documents, and that the jury may draw adverse inferences from that fact, including that Kline chose to withhold such documents because he was aware that such documents contained evidence that Kline conspired to plan racially motivated violence at Unite the Right.

Dated: February 7, 2020

Respectfully submitted,

/s/ Robert T. Cahill

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CERTIFICATE OF SERVICE

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I further hereby certify that on February 7, 2020, I also served the following non-ECF participants, via electronic mail, as follows:

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EXHIBIT A

FILED UNDER SEAL