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The Hon. Brian Dennis
Ontario County Court
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March 2, 2020

Dear Judge Dennis:

We write on behalf of Mr. Jim Meaney in response to the February 26, 2020 request for a temporary restraining order and proposed order to show cause filed by Massa Construction, Inc. ("Massa") in Case No. 126837-2020. We respectfully urge the Court to reject Massa's disturbing request, which would have the Court take the extraordinary and virtually unprecedented step of ordering the removal of constitutionally protected speech that has not been deemed libelous. Massa is not entitled to such extreme relief—which constitutes a prior restraint in violation of the First Amendment—because equity will not lie to enjoin an alleged libel. And even should Massa ultimately prove that Mr. Meaney's articles are defamatory (which it cannot), injunctive relief would still not be appropriate because money damages are available to compensate Massa for any purported injury attributable to the articles at issue.

I. Background

Mr. Meaney is a citizen journalist who publishes *The Geneva Believer*, a shoestring watchdog publication that promotes accountability surrounding the Geneva city government. Massa is a construction company that has performed millions of dollars' worth of municipal projects in recent years. Mr. Meaney has covered many of these projects in *The Geneva Believer*. His articles consist primarily of publicly available information gleaned through public records requests and city council meetings, and of certain editorial commentary based on that information. Having taken offense at Mr. Meaney's articles, Massa filed suit on February 5, 2020, alleging defamation and libel *per se*. Following a letter from undersigned counsel to Massa's counsel noting that the complaint was procedurally defective and urging

Massa to withdraw it, Massa filed an amended complaint along with a temporary restraining order and accompanying order to show cause. Massa asks the Court to order Mr. Meaney to take down no less than ten articles (attached as exhibits to Massa's amended complaint) concerning Massa's business dealings with the city government, currently published and accessible on *The Geneva Believer* website. As set forth below, Massa's request cannot be reconciled with the First Amendment.

II. Massa's Request for a TRO Constitutes A Prior Restraint That Violates the First Amendment

First, relief requiring Mr. Meaney to remove his articles from *The Geneva Believer* website is prohibited as a prior restraint on Mr. Meaney's speech in violation of the First Amendment. The requested injunction would directly prohibit *The Geneva Believer* from publishing information on a matter of legitimate public interest concerning Massa's relationship with the City of Geneva and is therefore a classic example of a prior restraint presumptively violative of the First Amendment. *Alexander v. United States*, 509 U.S. 544, 550 (1993) (permanent injunction is a "true restraint on future speech"). There is a "deeply-seated American hostility to prior restraints." *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 589 (1976).

The seminal case concerning prior restraints is *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Near*, a newspaper appealed from a permanent injunction issued after a case came on for trial. *Id*. at 705-06. The injunction in that case "perpetually" prevented the defendant from publishing again because, in the preceding trial, the lower court determined that the defendant's newspaper was "chiefly devoted to malicious, scandalous and defamatory articles." *Id*. at 706. The *Near* court held that such an injunction on future speech, even if preceded by the publication of defamatory material, was unconstitutional. *Id.* at 721. This holding *a fortiori* requires denial of the injunction mandating the removal of the challenged articles from *The Geneva Believer's* website, as there has been no determination on the merits that they are defamatory. Indeed, the presumption of enjoining publication of news information is so strong that the U.S. Supreme Court has *never* affirmed the imposition of such a prior restraint.

New York courts, too, "strongly disfavor[]" prior restraints, holding that "[p]rior restraints are not permissible, as here, merely to enjoin the publication of

libel." *See Rosenberg Diamond Dev. Corp. v. Appel*, 735 N.Y.S.2d 528 (N.Y. App. Div. 2002). This outright bar on injunctive relief for libel demonstrates New York courts' severe skepticism of prior restraints, "the most serious and the least tolerable infringement on First Amendment rights." *Ash v. Bd. of Managers of 155 Condo.*, 843 N.Y.S.2d 218, 219 (N.Y. 2007) (quoting *Nebraska Press Assoc.*, *supra*). Any prior restraint carries a "'heavy presumption against its constitutional validity' and a party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition." *Id*. (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Specifically, this heavy burden is satisfied only if the challenged speech is "likely to produce a clear and present danger . . . that rises far above public inconvenience, annoyance or unrest." *Rosenberg*, 735 N.Y.S.2d at 528. Prior restraints thus "may be imposed only in the most 'exceptional cases,'" *Porco v. Lifetime Entm't Servs., LLC*, 984 N.Y.S.2d 457, 458 (N.Y. App. Div. 2014) (quoting *Near*, 283 U.S. at 716, such as cases involving "true threats" where the speech threatens violence against the plaintiff. *Brummer v. Wey*, 166 A.D.3d 475, 477–78 (N.Y. App. Div. 2018).

Such is decidedly not the case here. The only exceptional thing about this case is Massa's request. Not only does Massa seek an impermissible prior restraint for libel, it does so *despite the fact that Mr. Meaney's articles have not been held libelous.* Mr. Meaney's speech is fully protected by the First Amendment and thus cannot be ordered removed from his website.[1] The above precedents make clear that injunctive relief ordering Mr. Meaney to remove his articles would be an assault on the First

[1] Two recent cases are directly on point. In both, courts rejected injunctive relief that would have required publishers to remove allegedly defamatory material from the internet. In *Brummer*, a tabloid style blog posted "highly offensive, repulsive and inflammatory" racist content in response to a ruling made by the plaintiff in his capacity as a regulatory appellate panel member. 89 N.Y.S.3d at 13. The plaintiff sued for libel, and the trial court entered a temporary restraining order requiring the blog to remove the content for the duration of the case. *Id*. The appellate court vacated the order. *Id*. at 14. It stated explicitly that the plaintiff could not meet the "exacting constitutional standard" required for forced removal even if the content was ultimately found libelous. *Id*. The prior restraint could only be justified if the speech constituted a true threat of violence, which the court held it did not. *Id*. Likewise, in *P.D. & Assocs. v. Richardson*, 104 N.Y.S.3d 876, 878 (N.Y. Sup. Ct. 2019), the court rejected the plaintiff lawyer's request that a former client be ordered to take down allegedly defamatory online reviews of the plaintiff's services. Relying on *Brummer*, the court reiterated that prior restraints cannot enjoin the publication of libel. *Id*. at 882. The court held that the plaintiff's unopposed contentions that the reviews were defamatory did not justify a takedown order. *Id*. at 883.

Amendment. When protected speech is restrained for even a very limited period of time—as little as 24 hours—a defendant suffers irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Time Square Books, Inc. v. City of Rochester*, 645 N.Y.S.2d 951, 958 (N.Y. App Div. 1996) (same); *see also New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) (the "*Pentagon Papers*" case) (Black, J., concurring) ("[E]very moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."); *Nebraska Press Assoc.*, 423 U.S. at 1329 ("any First Amendment infringement that occurs with each passing day is irreparable"). The irony of Massa's request is that it makes Mr. Meaney the only party at risk of immediate irreparable injury in this case.

III. The TRO Should Be Denied Because Monetary Relief Is An Available Remedy

Massa cannot show irreparable injury even if Mr. Meaney's articles are ultimately found to be defamatory because Massa can be made whole through an award of money damages.

This principle animates First Amendment jurisprudence. For example, in *CBS v. Davis*, 510 U.S. 1315 (1994), the Supreme Court stayed a trial court injunction against CBS that prohibited the network from publishing certain stories because money damages were an adequate remedy. The Court granted the network's emergency motion to stay a trial court order barring the news broadcaster from disseminating or broadcasting video made by an employee of a meatpacking plant about the company's business practices. The company contended that broadcast of the video would cause it irreparable harm. In language equally applicable here, the Court rejected the company's claim that such a prior restraint was permissible under the First Amendment: "Even if economic harm were sufficient in itself to justify a prior restraint, however, we previously have refused to rely on such speculative predictions as based on 'factors unknown and unknowable." *Id.* at 1318. (citing *Near v. Minnesota, supra*; *Pentagon Papers, supra*.). The Court concluded: "If CBS has breached its state law obligations, the First Amendment requires that [the company] remedy its harms through a damages proceeding rather than through suppression of protected speech."

Id. Throughout American history, courts have held that damages, not injunctions, are the appropriate remedy for libel plaintiffs. "If the publications in the newspapers are false and injurious, [plaintiff] can prosecute the publishers for libel. If a court of equity can interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation belonging to courts at law." *Francis v. Flinn*, 118 U.S. 385, 389 (1886). *See also Near*, 283 U.S. at 718–19; *Pennekamp v. Florida*, 328 U.S. 33, 346–71 (1946).

New York courts are in accord. "Where, as here, a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue." *Dana Distributors, Inc. v. Crown Imports, LLC*, 853 N.Y.S.2d 111, 112 (N.Y. App. Div. 2008); *see also Norton v. Dubrey*, 983 N.Y.S.2d 679, 681 (N.Y. App. Div. 2014) (affirming denial of preliminary injunction where monetary damages constituted an adequate remedy).

Massa's only alleged harm is the enormously speculative contention that it might lose business during its busy spring bidding season due to Mr. Meaney's articles. This is precisely the type of non-irreparable injury that is appropriately compensated with money damages. An injunction in this case would be a grave affront to the First Amendment and cannot be sustained under New York precedent. We respectfully request that Massa's request for temporary injunctive relief, which would require this Court to flout decades of free speech jurisprudence, be denied.

Very truly yours,

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