UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation, and Danny Lee Shelton, individually,

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

Case No.: 07-40098-FDS

PLAINTIFFS' RESPONSIVE MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PERMANENT IMPOUNDMENT

INTRODUCTION

Plaintiffs' initial memorandum in support of impoundment set forth Defendants' pattern and practice of using every possible medium, including court documents, to impugn, directly through defamatory statements and indirectly through innuendo and speculative commentary, Plaintiffs' reputations and conduct. Plaintiffs have thereby already provided this Court with ample justification to impound documents in this case. In response, Defendants have failed to raise any countervailing public interests that would significantly weigh against impoundment or cite to any meaningful authority to support their position. Instead, Defendants have attempted to mislead this Court by misciting case authority. Because impoundment is an appropriate mechanism by which this Court can prevent Defendants from utilizing the Court's files to further their campaign to defame Plaintiffs, but also recognizing that impoundment of the entirety of every submission in this case would be overbroad, Plaintiffs respectfully request that this Court

issue the attached Order Governing Impoundment of Pleadings, which contains a method for Plaintiffs to move for impoundment on a document-by-document basis as to only those documents or portions thereof that contain disparaging statements or highly sensitive information that could be used by the Defendants to disparage Plaintiffs. See Attachment 1, proposed Order Governing Impoundment of Pleadings.

ARGUMENT

I. This Court Should Exercise its Supervisory Power Over its Files and Records to Prevent Defendants from Using them as a Reservoir for Libelous Statements.

A. The common law right of access to court files is not absolute and requires a balancing of the right of the public to know with the private interests at stake.

"Although the Supreme Court has not established whether the constitutional right of access attaches to civil cases in general, the common law right of access extends to judicial records in civil proceedings." In re Providence Journal Company, 293 F.3d 1, 13 n. 5 (1st Cir. 2002). "Under the common law, there has been a long-standing presumption of public access to judicial records." In re Gitto Global Corp., 422 F.3d 1, 6 (1st Cir. 2005) (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978)). "This presumption of access 'helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies.'" Id. (quoting In re Orion Pictures Corp., 21 F.3d 24, 26 (2d Cir. 1994) (internal quotation marks and citation marks omitted)). "[R]elevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies." FTC v. Standard Financial Management, 830 F.2d 404, 410 (1st Cir. 1987).

This right of public access, however, is not absolute. See Gitto, 422 F.3d at 6. "Every court has supervisory power over its own records and files, and access has been denied where

court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal[,]'" Nixon, 435 U.S. at 598 (quoting In re Caswell, 18 R.I. 835, 836 (1893)), or to prevent their files from becoming "reservoirs of libelous statements for press consumption." Id. (citations omitted).

"When faced with a claim that cause sufficiently cogent to block access has arisen, it falls to the courts to weigh the presumptively paramount right of the public to know against the competing private interests at stake. This balance must be struck, of course, 'in light of the relevant facts and circumstances of the particular case.'" Id. (quoting Nixon, 435 U.S. at 599). See also In re Providence Journal Company, 293 F.3d at 10. The First Circuit has recognized that "privacy rights of participants and third parties' are among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records." Id. at 411 (citations omitted).

The majority of cases in the First Circuit that have applied this balancing test have involved petitions by the press to gain access in criminal, rather than civil cases. See, e.g., In re Boston Herald, Inc. v. Connolly, 321 F.3d 174 (1st Cir. 2003); In re Providence Journal Company, 293 F.3d 1, 5, and 13 n. 5 (1st Cir. 2002); United States v. Sampson, 297 F.Supp.2d 342 (D. Mass. 2003). Nevertheless, two First Circuit cases have addressed impoundment in the civil context, In re Gitto Global Corp., 422 F.3d 1 (1st Cir. 2002) and FTC v. Standard Financial Management, 830 F.2d 404 (1st Cir. 1987).

In re Gitto Global Corp., 422 F.3d 1 (1st Cir. 2002) involved interpretation of the definition of "scandalous or defamatory" within the meaning of the Bankruptcy Code. By statute, Bankruptcy filings are public records unless the filings constitute trade secrets or other

confidential material and scandalous or defamatory material. See 11 U.S.C. s. 107(b)(1)-(2). In reaching its decision, the First Circuit noted that 11 U.S.C. s. 107 displaces entirely the traditional common law analysis regarding public disclosure. See id. at 9. Therefore, the Gitto opinion is largely inapposite to this case. Nevertheless, at the very least, the statute itself which exempts from public disclosure material that is scandalous or defamatory reinforces the importance of court files not becoming reservoirs for defamatory material about the litigants in a case.

In the latter case, FTC v. Standard Financial Management, the court held that the press was entitled to access sworn personal financial statements of the two principals of a closely-held corporation, statements on which the Federal Trade Commission (FTC) relied in agreeing to a settlement that would fall far short of what would be needed to make the affected consumers whole. Id., 830 F.2d at 406. In finding that the public should have access to the personal financial statements, the court rejected the appellants' privacy argument, finding instead that the appellants waived privacy by choosing to submit the documents to the FTC as part of the settlement process and further, that releasing the documents had worked to their advantage in persuading the FTC to agree to a desirable settlement. The appellants were not then entitled to argue that "some general notion of fairness requires the settlement to be made public but the documents to be locked away." Id. at 412. In affirming the district court's decision to unseal the documents, the First Circuit noted that the record was void of any factual demonstration of a single particularized tangible harm that might befall the appellants from disclosure of the documents. See id. ("We continue to believe that '[a] finding of good cause [to impound documents] must be based on a particular factual demonstration of potential harm, not on conclusory statements.'")

B. The private interests at stake in this case establish good cause to tilt the balance overwhelmingly in favor of impoundment.

Unlike the appellants in Standard Financial Management, Plaintiffs 3ABN and Danny Shelton have never chosen to waive their privacy interests. This case centers on a malicious campaign of defamation orchestrated and perpetrated by Defendants Joy and Pickle. In order to obtain relief, Plaintiffs have been forced to repeat in their Complaint the offensive and scurrilous statements that Defendants Joy and Pickle have made about them, and those statements, as well as countless other misrepresentations of fact concerning Plaintiffs 3ABN and Danny Shelton which have been published on the internet will undoubtedly be contained in other pleadings in this matter, in witness affidavits, and perhaps even by necessity in the rulings of the Court. Without impounding these documents, this Court's judicial record will become an unwitting tool that Defendants will use to spread their lies.

Plaintiffs do not seek impoundment lightly or request it as a means of hiding this dispute, or the facts which underlie it, from the public. Plaintiffs only ask this Court to authorize impoundment as a means of preventing further irreparable injury to Plaintiffs through the publication of pleadings and court submissions containing further defamatory statements by Defendants. The Affidavits of Mollie Steenson and Larry Ewing demonstrate the tangible harm that has befallen and will continue to befall Plaintiffs should Defendants be empowered to utilize this litigation as a vehicle for continued defamation of Plaintiffs. See Attachment 2, Affidavit of Mollie Steenson ("Steenson Aff."), and Attachment 3, Affidavit of Larry Ewing ("Ewing Aff."). These Affidavits as well as the attachments to Plaintiffs initial memorandum in support of impoundment, which demonstrate Defendants' various methods of defamation, establish good cause weighing in favor of impoundment in this case.

According to Mollie Steenson, General Manager of 3ABN, donors to the ministry have stopped or withdrawn financial support of 3ABN specifically because of the defamatory comments posted by Defendants on their internet site, www.save3ABN.com, and other Adventist outlets. See Steenson Aff. at ¶¶ 5—8. In fact, donations to 3ABN decreased dramatically in direct correlation to the commencement and continuation of Defendants' defamatory conduct, dropping by almost 20% since July 2006. See Steenson Aff. at ¶ 4; Ewing Aff. at ¶¶ 5-9. But the financial losses suffered as a result of Defendants' activities pale in comparison to the immeasurable loss of reputation 3ABN has unjustifiably incurred at Defendants' hands.

As a direct result of Defendants' conduct, 3ABN has experienced a substantial loss of goodwill within the Adventist faith community. 3ABN has received numerous communications from previous viewers and supporters notifying the ministry that, based entirely on the defamatory rumors and innuendo being spread by Defendants on save3abn and other internet sites, those supporters have been led to believe that 3ABN is no longer a reputable institution and that Danny Shelton should be removed from his position at 3ABN. See Steenson Aff. at ¶ 5. Defendants have made sure that their defamatory statements were not only spread to the community of internet-savvy Adventists, but were publicized to all Adventists by mailing postcards to every Seventh-Day Adventist Church in the United States, encouraging church members to visit the save3ABN.com website. See Steenson Aff. at ¶¶ 10—11. It is simply not possible to quantify the damage to 3ABN's reputation within the Seventh-Day Adventist community that has been caused by the Defendants' campaign of willful disparagement.

3ABN has also suffered, as a direct result of Defendants' activities, an irreparable loss of confidence on the part of the official Adventist Conference, the South Pacific Division of which has gone so far as to pass a moratorium prohibiting interaction with 3ABN. See Steenson Aff. at

¶ 9. Without Conference interaction, 3ABN loses not only the financial support of its Adventist donors, but also the opportunity to spread its ministry by participating in important Conference-sponsored events. See Steenson Aff. at ¶ 9.

As a non-profit organization, damage to 3ABN's mission is inherently immeasurable in terms of pecuniary damages, since its primary goal is not to make money but to spread its ministry and message. The harm that 3ABN has already suffered in its ability to do so is irreparable, as will be the harm 3ABN will suffer if Defendants are permitted to publish further defamatory statements through pleadings and submissions in this case.

Nor can it be argued that Plaintiffs' concern over continued defamation is illusory. Since the advent of the PACER system, the notion that court records are public documents has gained new meaning. Any member of the public with access to a computer anywhere in the world can obtain a PACER account and view any and all pleadings and other submissions that are not sealed. Defendants have shown that they are willing to go to great lengths to direct people who might not otherwise use the internet or visit certain internet sites to do so in order to ensure that their libelous statements reach the widest possible audience. See Steenson Aff. ¶10 (detailing Defendants' mailing of postcards to Seventh-day Adventist Churches across the world urging readers to visit www.save3ABN.com). Thus, one can surmise without a great stretch of the imagination that, absent impoundment, Defendants will direct members of the public to PACER to view the pleadings and other submissions and thereby publish them to the widest possible audience in that way.

The United States Supreme Court has stated that it is particularly appropriate to impound court records in cases such as this one where harmful, scurrilous, and defamatory statements are at the heart of the cause of action. See Nixon, 435 U.S. at 598. The Affidavits of Mollie

Steenson and Larry Ewing, as well as the attachments to Plaintiffs' initial memorandum in support of impoundment, establish good cause for impoundment, amply demonstrating the harm Plaintiffs have suffered and will continue to suffer by repeated publication of Defendants' defamatory statements. This is exactly the type of case where impoundment is warranted and appropriate.

C. The fact that statements made during the course of a judicial proceeding are privileged will embolden Defendants and leave Plaintiffs without recourse.

Massachusetts recognizes an absolute privilege with respect to "statements made 'in the institution or conduct of litigation or in conferences and other communications preliminary to litigation.'" Taylor v. Swartout, 445 F.Supp.2d 98, 102 (D. Mass. 2006) (quoting Sriberg v. Raymond, 370 Mass. 105, 109 (1976)). "[T]he litigation privilege is absolute and 'provides a complete defense even if the offensive statements are uttered maliciously or in bad faith.'" See Taylor, 445 F.2d at 103 (quoting Doe v. Nutter, McClennan & Fish, 41 Mass. App. Ct. 137, 140 (1996)). Plaintiffs have no means of preventing Defendants or their witnesses from including, in the pleadings, affidavits, motion papers and other court submissions in this case, willful and malicious defamatory statements, and, under the above-referenced cases, have no cause of action available to them to redress the harm that would be caused by such statements.

In light of Defendants' admitted objective of "indicting" the Plaintiffs in the public eye, see Steenson Aff. ¶ 4, Plaintiffs have no doubt that Defendants intend to and will, in fact, include such defamatory statements in their court submissions. Moreover, because they will be made in the context of an official judicial record, Defendants' libelous statements may appear to certain members of the public, particularly web viewers unsophisticated about the law, as somehow having the imprimatur of the Court. This is particularly likely in light of the innuendo-laden commentary Joy and Pickle have routinely attached to other official court documents they have

published on the internet in the past. See Memorandum in Support of Plaintiffs' *Ex Parte* Motion for Preliminary Impoundment and Request for a Hearing on Permanent Impoundment, Attachments 2—3.

While the Court may not be able to order Defendants to refrain from making defamatory statements in its proceedings, it can intervene to prevent the irreparable injury that will occur from a distorted dissemination of those allegations and statements by prohibiting publication of any such statements outside the context of the Court's proceedings. Impoundment is the means of effectuating that protection. The avoidance of the use of court files and proceedings for improper purposes has been recognized by the United States Supreme Court as a fundamental justification for impounding court records. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978) (citations omitted). It is precisely to avoid Defendants' misuse of the record in this case that Plaintiffs seek to have the attached proposed Order Governing Impoundment of Pleadings entered.

D. The public interest in this case does not tip the scales in favor of public access.

Although Defendants have failed to provide any evidence, by affidavit or otherwise, as to how or why the proceedings at issue are of particular interest to the public at large, they vaguely argue that freedom of the press to report items of community interest precludes impoundment of the court files in this case. Defendants' argument is both factually and legally inapplicable in the current circumstances.

First, although 3ABN is a registered Illinois corporation, it is nonetheless a private, non-profit enterprise and, absent criminal charges or an order of the court otherwise compelling disclosure, it is entitled to confidentiality concerning matters of corporate governance. This is,

after all, not a publicly traded, for-profit corporation where the public, as shareholders or as potential stock purchasers, have an interest in the litigation documents.

Second, Defendants are not media outlets, reporters or journalists intent on disseminating objective facts, but are private individuals who have admitted to a personal agenda of discrediting 3ABN and its President. As Defendant Joy stated in an internet post on November 20, 2006, "[i]f [the attempt to resolve the matter before ASI [a religious tribunal] does not work out, then in January, 2007 we will launch a full scale and public effort to exonerate Linda, to indict Danny in the public eye and to put pressure on 3ABN . . .." Steenson Aff. ¶ 4. Glaringly absent from Defendants' responsive submissions was any affidavit setting forth that either Pickle or Joy are employed by a news or news reporting agency, that either of them have any experience or credentials as a journalist, reporter, or free-lance newsman, or that either of them is currently on assignment by any legitimate news organization as a reporter, columnist, correspondent or newscaster. There is simply nothing unique about the nature of the parties or their relationship with one another that weighs against the impoundment of properly identified court documents.

Defendants cite Ottoway Newspapers, Cox Broadcasting and Oklahoma Publishing for the proposition that the impoundment Plaintiffs seek constitutes a prohibited "prior restraint" of publication. However, none of these cases involved the publication of impounded material, but rather the publication of proceedings in open court with unrestricted files, and are inapplicable to the instant case.

In Oklahoma Publishing Co. v. District Court In and For Oklahoma County, 430 U.S. 308 (1977), the United States Supreme Court undertook review of an Oklahoma Supreme Court ruling affirming an injunction that prohibited a newspaper from publishing the name or picture of

a minor child involved in a juvenile proceeding. In that case, an 11-year old boy was charged with second degree murder in the shooting of a railroad switchman. See id. at 309. A reporter attended a detention hearing in the matter, where he learned the boy's name, and took photographs of the boy immediately after the hearing, as the boy was being escorted from the courthouse to a waiting vehicle. The boy's name and picture were published in several newspapers and broadcast on local radio and television. Subsequently, at the boy's arraignment, the court entered an order enjoining future publication of the juvenile's name and picture, but the identifying information was published again despite the order. The Oklahoma Publishing Company petitioned to quash the order by writs of prohibition and mandamus, which petitions were denied. The Oklahoma Supreme Court, relying on statutes providing that "juvenile proceedings are to be held in private 'unless ordered by the judge to be held in public,' and that juvenile records are open to public inspection 'only by order of the court,'" upheld the district court's order and Oklahoma Publishing appealed to the United States Supreme Court. See id. at 309—310 (quoting the relevant Oklahoma statutes).

In reversing the Oklahoma Supreme Court, the U.S. Supreme Court acknowledged the Oklahoma statutes, but found that because the prohibitions of the statutes had not been enforced and the reporter was allowed to remain in the courtroom without objection by the attorneys or the judge, who all saw the reporter in the courtroom, during what otherwise should have been a closed hearing, the information he discovered during the hearing was legitimately obtained and publishable. See id. at 311. The case is therefore inapplicable to the instant facts, because the information at issue in Oklahoma Publishing should have been impounded, but was not. The case merely stands for the proposition that the press has a right to report unrestricted information; it does not stand for the proposition that impoundment constitutes prior restraint.

The Defendants similarly skew the holding of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In that case, plaintiff Martin Cohn sued the Cox Broadcasting Company for invasion of privacy in connection with the company's publication of the name of his 17-year old daughter, the victim of a brutal rape and murder. Six youths were arrested for the incident and the victim's name remained unpublished for eight months, at which time a hearing was held where five of the defendants pled guilty to rape or attempted rape (in exchange for the prosecutor dropping the murder charge) and one defendant pled not guilty. See id. at 471—72. A Cox Broadcasting reporter attended the hearing and, while in the courtroom, was allowed by the clerk to review the various indictments in the case, all of which were public documents open for inspection and all of which identified the victim by name. See id. at 472—73.

Despite a Georgia statute that made it a misdemeanor to publish the "name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made," the reporter published the victim's name as part of a television news broadcast on Cox station WSB-TV. The victim's father brought suit for invasion of privacy, and Cox defended by claiming that its actions were privileged under the First and Fourteenth Amendments. The trial court rejected Cox's constitutional claims, held that the rape shield statute gave rise to a private cause of action for those injured by a violation thereof, granted summary judgment on liability, and set the damages determination for jury trial. See id. at 474.

The Georgia Supreme Court found that the trial court had erred in deciding that the rape shield law provided a civil remedy for its violation and therefore found it unnecessary to reach the constitutionality of the statute. It did, however, find that the father had an independent cause of action for common law invasion of privacy and that liability and damages would need to be tried, overturning the trial court's grant of summary judgment. See id. at 475. On motion for

rehearing, the Georgia Supreme Court found the rape shield statute "an authoritative declaration of state policy that the name of a rape victim was not a matter of public concern." Id. It addressed the constitutionality question and sustained the statute as a legitimate limitation on First Amendment rights. Id.

The United States Supreme Court took the case on the narrow issue of whether the State may impose sanctions for the accurate publication of the name of a rape victim obtained from public records—specifically, judicial records—open to inspection and maintained in connection with a public prosecution. See id. at 491. The Court held in the negative, based on its finding that "even the prevailing law of invasion of privacy generally recognizes that the interest in privacy fade when the information involved already appears on the public record." Cox, 420 U.S. at 494-95. It was specifically because the victim's name was already part of the prosecutorial process and had been disclosed by the State as part of the open, public record in the case, that the Supreme Court found it sufficiently in the public interest to warrant publication.

The Court held:

> By placing the information in the public domain on the official court records, the State must be presumed to have concluded that the public interest was thereby being served. ...[T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Id. at 495. Thus, contrary to the overreaching assertions of Defendants in this case, Cox merely stands for the proposition that once a court has included information in that portion of the public record open to inspection, the constitutional guarantees of free press render the information publishable. Cox does not stand for the proposition that the parties themselves, the press or any

third parties are entitled to publish information that is kept from public inspection or that the impoundment of court materials constitutes prior restraint.

Finally, in Ottoway Newspapers, Inc., the Massachusetts Commissioner of Banks, after determining that Bass River Savings Bank had engaged in unsound commercial loan practices, began statutorily-governed proceedings to remove the bank's officers. See Ottoway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 541 (1977). To stem those proceedings, the bank filed an action against the Commissioner, the crux of which was that the Commissioner had a bias against the bank and its officers that was motivating her conduct. Id. In support of its claims, the bank submitted papers evidencing dealings between the Bank and Commissioner over a period of time and copies of excerpts of bank examination reports prepared by the Commissioner's staff. Id. Included with these submissions was a motion to impound the Bank's papers, which motion was granted. See id. at 542.

A local newspaper learned that litigation was pending between the bank and the commissioner and sought access to the court record to learn more about the dispute, at which time it discovered that three impoundment orders were in place keeping various documents and materials from public inspection. The newspaper brought an action seeking to have the impoundment orders vacated. It first attacked the impoundment order on the grounds that it was entitled to inspect the documents under the Commonwealth's bank examination laws, which require the custodian of those records to release them for inspection upon request. The court held, however, that the custodian was not required to release the documents because once they were included in the lawsuit, and were impounded in connection therewith, they came under an exception to the disclosure statute. See id. at 545.

The newspaper then challenged the impoundment on grounds that it violated the rule of open conduct of judicial proceedings. In fact, the very issue for which the instant Defendants claim the Ottoway case stands (that impoundment of court documents constitutes prior restraint of the free press), was specifically argued and soundly rejected by the Ottoway court. Acknowledging the "general principle of publicity," the court nonetheless found that:

> At the same time there are statutes which, for a variety of reasons that can be surmised, limit, or authorize limitation of access to court proceedings and official records. These statutes do not preclude the exercise by judges of a sound discretion to impose reasonable cloture, including impoundment, in other cases when found necessary.

Ottoway, 372 Mass. at 546. Determining that all three judges who had reviewed and sustained impoundment in the underlying action had acted properly in accordance with their discretion, the court held that a judge may, without offense to the Constitution, withhold case documents by impoundment. See id. at 549. Specifically discussing the Cox Broadcasting and Oklahoma Publishing cases, the court found:

> [O]nly in the most extreme situations, if at all, may a State court constitutionally forbid a newspaper (or anyone else) to report or comment on happenings in and about proceedings which have been held in open court; and a similar rule would apply to court files otherwise unrestricted. . . . Different issues, however, are raised by the question how far a State is required to go in assisting the press (or others) to gather information, or, in the context of the present case, how far the State is constitutionally required to keep court proceedings public, or court files open, in order to lend such support to intending publishers.

Id. at 548.

Ottoway Newspapers stands for the proposition that after documents and materials and other information are published in open court and are made a part of the unrestricted record that is open to public inspection, it may be an unconstitutional prior restraint to prohibit their further

publication, but that a decision by the court to impound materials, seal a record, or otherwise preclude the publication of the information in open court or the unrestricted record does not constitute prior restraint. Thus, contrary to Defendants' arguments, Oklahoma Publishing, Cox and Ottoway Newspapers, Inc. do not support their "prior restraint" claims.

E. There is no "right to defame" that weighs against impoundment.

Defendants also cite to Tory v. Cochran, 544 U.S. 734 (2005), which they describe as a case where "an injunction against the petitioner Tory from defaming the plaintiff Johnnie L. Cochran, Jr. in certain specific manners was vacated as unconstitutional prior restraint on the free speech guarantees of the First Amendment," and claim it stands for the proposition that "the free speech guarantees extend to the out-of-court statements made even when they are defamatory, where the recourse is to obtain judgment for defamation… ." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Permanent Impoundment at p. 3. Though Defendants' argument on this point is not entirely clear, to the extent they are claiming that the Court cannot issue an injunction prohibiting future defamatory speech or that such an injunction constitutes prior restraint, they are wrong. If anything, Cochran supports Plaintiffs' Motion for impoundment, with underlying facts that mirror the concerted defamatory activities of Defendants in the instant case.

Attorney Johnnie Cochran brought an action for defamation against Ulysses Tory, who, with a cadre of other actors, had engaged in a willful campaign of slander and libel by, *inter alia*, falsely claiming Cochran owed him money, filing complaints against Cochran with the bar association, writing threatening letters to Cochran, and picketing Cochran's office holding up signs containing insults and obscenities. See id. at 735—36. The trial court determined Tory had committed a willful campaign of slander and libel in an effort to coerce Cochran into paying

him money to which he was not entitled as a "tribute" for desisting from the defamatory conduct, and, noting Tory had indicated an intention to continue his efforts absent a court order, enjoined Tory from future defamatory conduct. See id. at 736—37. The decision was affirmed by the California Court of Appeals and Tory petitioned for a writ of certiorari to the U.S. Supreme Court on the issue of "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment." Id. at 736. Certiorari was granted but before the Court issued its decision, Cochran died and the parties agreed to substitute Sylvia Dale Cochran, Johnnie Cochran's widow, as respondent, with Tory claiming the case was now moot. See id.

Finding that the existence of a valid and enforceable injunction meant the case was not moot, the Supreme Court nonetheless determined that Cochran's death made it unnecessary to address whether the First Amendment prohibits issuance of a permanent injunction in a defamation case where the plaintiff is a public figure or whether the injunction was unconstitutionally broad. See id. at 738. The Court merely pointed out that, because Cochran could no longer be coerced to pay the "tribute," the underlying rationale for the injunction was diminished, if not gone, and held that the injunction, as it was written, had become overly broad and was a prior restraint upon speech lacking plausible justification. See id.

The Cochran case merely upholds the long-standing constitutional principle that legislative and judicial proclamations must be narrowly tailored to achieve the goals where there is arguably an intrusion upon constitutional rights. Cochran does not stand for the proposition that all injunctions against future defamatory conduct are prohibited or for the proposition that free speech rights protect the publication of defamatory out-of-court statements, or for the

proposition that a court engages in unconstitutional prior restraint when it prevents, through injunction, impoundment or otherwise, future defamatory conduct.

II. The Impoundment Requested is Procedurally Authorized and Narrowly Tailored.

The Federal Rules of Civil Procedure do not directly address impoundment. Local Rule 7.2 provides three general directives relating to impoundment governing (1) the required contents of a motion for impoundment, (2) the clerk of court's responsibilities as to the segregation and custody of impounded materials, and (3) the timing of impoundment motions. See D. Mass. R. 7.2. With regard to the timing of such motions, Local Rule 7.2(e) provides:

> The court will not enter blanket orders that counsel for a party may at any time file material with the clerk, marked confidential, with instructions that the clerk withhold the material from public inspection. A motion for impoundment must be presented each time a document or group of documents is to be filed.

Contrary to Defendants' characterization, Plaintiffs have not requested any relief prohibited under Local Rule 7.2. In their original Motion, Plaintiffs limited their request to impoundment of the Complaint and Defendants' Answers or other responsive pleadings. Plaintiffs' counsel is well aware of the Local Rule requiring that a motion for impoundment be presented each time a document or group of documents is to be filed and have tailored the requested relief accordingly. However, in light of the unique facts and circumstances of this case and Defendants' declared intent to "indict" Plaintiffs in the public eye, Plaintiffs request that this Court exercise its discretion to control its own files and enter the attached Proposed Order for Impoundment. The Proposed Order is narrowly tailored to provide for the impoundment of only those materials that contain disparaging statements or highly sensitive information that could be used by Defendants to disparage Plaintiffs, either directly or through innuendo and speculative commentary.

Plaintiffs' attached proposed Order Governing Impoundment of Pleadings calls for a segregation period of 10 business days for all documents filed with the Court, after which time, if no objection or motion to impound is made, the subject documents will be filed by the Clerk in the public file and made available for inspection. Thus, the presumption is that submitted materials will not be impounded. If a motion to impound is made, however, the documents will remain sealed until resolution of the motion.

As to its own submissions, Plaintiffs intend to submit, simultaneous with the filing, a motion to impound any documents it believes should not be published. It is the filing of Defendants' submissions that are of most concern to Plaintiffs, since Defendants will likely not seek impoundment of their own materials and, barring the segregation period, those materials would be publicly filed (and available for inspection and publication via the PACER system and otherwise) before Plaintiffs would have an opportunity to seek impoundment. Thus, the impoundment order proposed by Plaintiffs is not a blanket order impounding every document, sight unseen. It merely provides a brief segregation period, before automatic public filing, that gives Plaintiffs a short window of time in which to seek impoundment of Defendants' submissions.

CONCLUSION

In weighing the right of the public to know against the competing private interests at stake in this case, the Court must strike a balance in light of all the relevant facts and circumstances. The nature of the parties, the nature of the controversy, the type of information, the extent of community interest and the reasons for Plaintiffs' request all weigh decidedly in favor of impoundment, particularly given the narrow scope and procedural parameters of Plaintiffs' proposed Order Governing Impoundment of Pleadings.

Respectfully Submitted:

Dated: May 24, 2007

On behalf of Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Shelton,
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CERTIFICATE OF SERVICE

I, J. Lizette Richards, do certify that I have this day served a copy of the foregoing document, along with any attachments, on Defendants Gailon Joy and Robert Pickle by mailing same, first class postage prepaid to their attorney of record, Laird Heal, at 3 Clinton Road, P.O. Box 1425, Sterling, MA 01564.

Dated: May 24, 2007

J. Lizette Richards