UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, an Illinois non-profit corporation, and Danny Lee Shelton, individually, Plaintiffs vs. Gailon Arthur Joy and Robert Pickle Defendants	C.A. No. 07-40098-RCL

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PERMANENT IMPOUNDMENT

Pursuant to Local Rule 7.1 (b)(2) the defendants Gailon Arthur Joy and Robert Pickle submit this Opposition to the Plaintiffs' Motion for Permanent Impoundment, giving as their reasons therefor:

1. The Local Rules do not permit the Court to issue prospective orders for impoundment, and Local Rule 7.2 (3) indicates that a separate "motion for impoundment must be presented each time a document or group of documents is to be filed."

2. Prior Restraint on the public's right to inspect the contents of a court docket has been ruled on by the United States Supreme Court, not to mention the courts of the Commonwealth and the State of Illinois, and under each analysis of the facts presented is either not indicated or, by precedent, not allowed.

3. The defendant G. Arthur Joy is engaged in print and online news reporting and to

impound these materials is to curtail his own personal right to report the news to his community and readership, which is a constitutionally protected right.

I. Local Practice.

The local practice, as exemplified in the Local Rules, does not contemplate a blanket order impounding an entire case docket. Instead, the Counsel are asked to submit a motion to impound specific material as indicated.

It should be noted that the Defendant, Mr. Gailon Arthur Joy, asked to view the case file and was not allowed to on the basis that it was impounded. This was not made clear to his counsel, who had not yet entered his appearance, until the very eve of the hearing on the Motion for Permanent Impoundment. Mr. Joy was seeking to see if any materials had been submitted by the Plaintiffs which had not been served on him. In particular, he asked if a Motion to Appear Pro Haec Vice had been filed and it had. He had not yet received the same.

The Plaintiffs are asking this Court to craft its own rule varying from the Federal Rules of Civil Procedure and the Local Rules.

II. Discussion Relative to Case Law

In Ottaway Newspapers Inc. v. Appeals Court, 372 Mass. 539, the Court held

> only 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. Such censorship is certainly in the category of prior restraint. See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), it was noted that Time. Inc. v.

Hill, 385 U.S. 374 (1967) "expressly saved the question whether truthful publication of very private matters unrelated to public affairs could be consititutionally proscribed" (Douglas, J, concurring). The court in this case would prohibit the publication or indeed the public's right to be informed of the details here, which are very much related to public affairs, and, indeed, of very public figures.

Similarly, Oklahoma Publishing Co. v. District Court in and for Oklahoma County, Oklahoma, 430 U.S. 308 (1977) held very decisively that it was improper to restrain news media from publishing information obtained in court proceedings.

In the more recent case of Tory v. Cochran, 544 U.S. 734, 125 S.Ct. 2108 (2005), an injunction against the petitioner Tory from defaming the plaintiff Johnnie L. Cochran, Jr. in certain specific manners was vacated as an unconsititutional prior restraint on the free speech guarantees of the First Amendment.

We have, then, the Supreme Court indicating 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, and that the information in court files, which are public records as a rule, should similarly not be subject to prior restraint from publication. Exceptions to the latter rule are narrowly carved when there is another constitutionally protected right in conflict; for instance, in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the restraint of publication, prior to the impanelment of the jury, of information which might prejudice a criminal defendant was deemed proper.

There is no such right here on the part of the plaintiffs. It is not defamation to repeat, in court documents, what is allegedly or actually defamatory and has been published. Also see,

e.g., Pope vs. The Chronicle Publishing Company, 891 F. Supp 491 (C. D. Ill. 1995) where it was held "The article is capable of an innocent construction. The article merely recounts the concerns raised [...] in telexes to Pope. [...] Such a statement is not defamation per se, and accurately summarizes events occurring prior to the project's completion." Id. At 476.

Finally, the Supreme Court in Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 , 105 S.Ct. 2939 (1985) clarified the decision of Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974), relating to alleged defamation of public figures or private individuals. A media figure, such as is Plaintiff Danny Shelton, is deemed a public figure. See, e.g. Lee v. Dong-a Ilbo, 849 F.2d 876 (4th Cir. 1988). There has been some indication that a prior restraint of defamation might apply to a private individual, which is to say the issue is by no means closed, but the public has an inherent right to know and interest in a public figure which weighs most heavily against imposing any limits on the speech concerning that public figure.

III. Discussion of Applicable Illinois Law

Should the court choose to apply Illinois law, the Court's attention is drawn to the prolix opinion of Cummings v. Beaton & Associates, Inc., 249 Ill. App.3d 287, 324, 618 N.E.2d 292 (1992) and to the case cited there which held the impounding of the court submissions unconstitutional, namely Cummings v. Beaton & Associates, Inc. , 192 Ill. App.3d 792, 549 N.E.2d 634 (1989).

IV. Conclusion

In Conclusion, the case file should be unsealed and any impoundment of materials handled on a submission-by-submission basis, as indicated by the Local Rules. Doing otherwise amounts to an unconstitutional prior restraint on free speech whether or not the defendants are

deemed news reporters or publishers.

V. Exhibits

The Defendants are also enclosing complete copies of the exhibits which the Plaintiffs submitted only parts of. The Defendants contend that this self-censorship was for no more reason than to seek to sway the Court by only presenting part of the record, while the best evidence for what a document stands for is the document itself. This principle is codified in Illinois practice, incidentally, and where a pleading refers to a document the document must be attached or its contents recited, unless it already has been placed into the record.

RESPECTFULLY SUBMITTED this 10th Day of May, 2007,
for the defendants, Gailon Arthur Joy and Bob Pickle.

/s/ Laird J. Heal

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