SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

ALLAN A. ASH and JOEL S. ASH, AS CO-EXECUTORS FOR THE ESTATE OF RUTH MISHKIN, INDIVIDUALLY, and ON BEHALF OF THE 155 CONDOMINIUM,	New York County Index No. 106769/03
Plaintiffs-Appellants,	
- against -	
THE BOARD OF MANAGERS OF THE 155 CONDOMINIUM, GARY DONG, ARNOLD GITOMER, NEW BEDFORD MANAGEMENT CORP., MICHAEL WECHSLER and THE 155 CONDOMINIUM,	
Defendants-Respondents.	

MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR STAY
OF GAG ORDER PENDING APPEAL

QUESTIONS PRESENTED

1. Is the Order appealed from an unconstitutional "prior restraint" on Appellant's extrajudicial communications, in violation of his rights under the First Amendment and Article I, § 8 of the New York State Constitution?

The Court below, in entering and reaffirming the gag order, answered this question in the negative.

2. Can a prior restraint be justified in this case based on the "inherent power" of the Court to control its calendar, promote "order" and "decorum," or avoid delay in the discovery process, and did the Court make findings sufficient to support a conclusion that Appellant's expression was a substantial threat to Respondents' rights to a fair trial, that there were no less restrictive alternatives to the prior restraint and that its Order would be effective in preventing the harm alleged?

The Court below, in denying Appellant's motion to vacate the gag Order in its entirety, purported to answer these questions in the affirmative.

3. Alternatively, did the Court have the power to issue the prior restraint on the ground that Appellant's extrajudicial expression was defamatory, harassing, emotionally distressing or otherwise allegedly actionable, although no action had been brought against Appellant and no finding of the prima facie merit of such claims was ever made, on a theory

that Appellant's communications might be actionable or that such potentially actionable expression might interfere with the litigation?

The Court below, in entering and reaffirming the gag Order appealed from, also appeared to answer this question in the affirmative.

Nature of the Case and this Appeal

A. Preliminary Statement

On this appeal Plaintiff-Appellant Allan A. Ash (hereafter "Appellant") seeks to overturn an unconstitutional prior restraint on his freedom of expression. The Order appealed from was the third in a series of restraints entered at the behest of Respondents in the Court below.

The admitted purpose of the Orders was to restrain Appellant from continuing his uncensored extrajudicial communications, in the form of letters, newsletters, and other publications Appellant has circulated to willing owners[1] in the Condominium where he resides, and to others, that have been sharply critical of the actions of Respondents and their counsel in the governance of the Condominium and in this litigation. (R. 66-67)

[1] With respect to Appellant's care in avoiding circulation of his communications to unwilling Condominium owners, see Affidavit of Robert Dickson, Exhibit B to Reply Affidavit in Support of Appellant's Motion for a Stay; see also various notices and other indications of Appellant's care in this regard. (R. 161, 192, 220, 222, 245, 279, 295 ["P.S."], 313)

The prior restraint at issue currently takes the form of a restraining Order – essentially a gag order – prohibiting, limiting and/or conditioning Appellant's right to communicate with other parties to the litigation, potentially including other owners and Condominium Board members, while also imposing an unprecedented form of prior censorship requiring Appellant to submit his gagged communications for pre-screening by counsel for both sides.

Although the Order appealed from purports to narrow the previous gag orders, because of its vagueness it is not possible for Appellant to discern the precise scope of the limitations it places on him, thus exacerbating the Order's "chilling effect" by requiring him to "steer far wider of the unlawful zone."

Appellant has previously moved in this Court for a stay of the gag order pending appeal, for a preference in light of his advanced age (currently 90 years old) and poor health and, if his motion for a stay is not granted, for the expedited briefing and hearing of this appeal. Pending a determination of his stay motion, Appellant has sought to do what he can to expedite these proceedings by perfecting his appeal for the earliest Term of this Court that would normally be available.

B. The Underlying Action

The underlying action asserts a derivative claim for breach of fiduciary duty, on behalf of the owners of a Condominium, against the Condominium's Board, its (former) managing agent and certain of their key officers. (R. 26-43) Before instituting suit, Appellant, himself a Certified Public Accountant, had identified and complained about problems in the building's financial statements but was refused access to the relevant records by the Board. (Id.) The action was commenced in April 2003, and in June 2004 the Court below permitted amendment of the complaint to allege a second cause of action for an accounting and a third for improper use of condominium funds against all defendants. (R. 10)

The facial merits of Appellant's claims have been tested in a series of pretrial motions. Although certain subsidiary claims have been dismissed, and Appellant's status as a proper representative plaintiff on behalf of the Estate of Ruth Mishkin has been clarified, the sufficiency of Appellant's pleading of his core claims of misappropriation and financial mismanagement has been upheld and discovery on the merits of these claims is currently proceeding.

In fact, during the pendency of this litigation it has already been acknowledged and is now largely undisputed that:

(i) the Condominium's prior managing agent (defendant New Bedford Management Corp.) improperly diverted $150,000 from the Condominium to its own account, for its own purposes, without authority, and was ultimately fired by Respondents, but only after an extended delay and only after Appellant brought this action on behalf of the Condominium to remove New Bedford; and the Board never required timely or adequate disclosure of the defalcation or full repayment from the managing agent. (R. 102, 296);

(ii) the Condominium's accountants became aware of the diversion and Respondents also either knew, or should have known, of the diversion well before it was belatedly reported (Id.);

(iii) the Board fired the Condominium's accounting firm after it first delayed, but then insisted on disclosing, the defalcation (R. 32-36); and

(iv) it has now also become evident that – despite Appellant's numerous demands for meaningful access to the Condominium's books and records, both as a matter of statutory right and in discovery proceedings in this litigation – some of the most critical financial records Appellant has long been seeking to review have been lost, hidden or destroyed. (R. 282)[2]

[2] Notwithstanding his minimal access to the Condominium's books and records, Appellant has been able to establish that – even after the $150,000 diversion – at least one other unauthorized payment (to Antler Electric for $3,951) was made with the Condominium's funds for another building with which defendant Michael Wechsler was involved, thus suggesting a possible additional pattern of improper payments and false record-keeping that cannot be fully documented without the missing records. (R. 217)

In short, the Record fairly supports the implication that it is negative revelations of this kind – and not simply Appellant's acerbic commentary on them – that are a key reason why Respondents wish to limit and censor Appellant's further circulation within the Condominium of adverse news and information, including Appellant's pointed complaints and opinionated criticisms, regarding this litigation and other building-related matters.

C. The Three Gag Orders

The Order appealed from can only be understood in the context, and as a part of the progression, of the two prior gag orders the Court below entered at Respondents' behest. Commenting on the first two gag orders, Justice Tolub himself ultimately acknowledged that he "may have erred in barring Mr. Ash from voicing his opinions," (R. 17) and that the prior gag orders were overbroad under the cases that impose constitutional limitations on "[o]rders restraining extrajudicial comments by the parties or their attorneys ..." (R. 14)

As the Court below observed, "Plaintiff's counsel asserts that neither of this court's orders restricting Mr. Ash from communicating directly with members of the condominium about this litigation is permissible because it violates State and Federal law. To a certain extent, plaintiff's counsel is correct.") (Id.; emphasis added)

Despite this recognition, the Court entered a third gag order. While purporting to narrow the previous gags, the Order appealed from nonetheless reaffirmed and continued key aspects of the prior unconstitutional orders.

1. The February 3, 2006 Gag Order

The first gag was entered as part of a "Compliance Conference Order" dated February 3, 2006. In part, that order addressed outstanding discovery issues. For purposes of this appeal, the pertinent portion of the February 3 order provided as follows:

> "Plaintiff is hereby ordered to cease contacting any members of the condominium with respect to this litigation. All inquiries are to be presented to plaintiff's counsel who will then make the appropriate inquiry." (R. 50; emphasis in original)

No formal motion for such relief had been made or briefed by counsel for either side in the litigation and no supporting findings or opinion accompanied the first restraining Order. However, the Court below later commented that its first gag was motivated by the court's "belie[f] that plaintiff's prior counsel had lost the ability to control his client," referring to a series of "at least ten letters and/or publications which [plaintiff] sent to the individual defendants and the owners of the defendant condominium" between December 2005 and February 2006. (R. 11, 13; emphasis in original)

2. <u>The March 24, 2006 Gag Order</u>

The second gag was entered as part of a "Compliance Conference Order" dated March 24, 2006. Again, no formal motion for this relief had been made or briefed and no supporting findings or decision accompanied the Order. Indeed, at the point that this renewed gag was entered, Appellant was not represented by counsel. However, prior to the March 24 compliance conference Respondents' counsel, Mr. Van Der Tuin, sent a letter to Justice Tolub claiming that Appellant had violated the February 3 gag order when he circulated a three-page newsletter containing his views and opinions on matters affecting the Condominium, referring to "The 155 Condo Free Gazette," dated March 10, 2006. (R. 311-16) Respondents contended that Appellant's circulation of this publication was in contempt of the court's order and demanded that Appellant "purge" his contempt. (R. 66-71)[3]

The first part of the March compliance order addressed Appellant's <u>pro se</u> status and stayed all discovery "pending Mr. Ash obtaining counsel

[3] This application for a finding of contempt, based on an informational newsletter circulated by Appellant, during the period when Appellant was acting <u>pro se</u>, provides perhaps the most dramatic evidence of the astounding overbreadth of Respondents' ambition to shut down Appellant's freedom of expression. In fact, the allegedly contemptuous newsletter did essentially limit itself to "new conditions," addressing and criticizing matters entirely unrelated to this litigation, including a "secret special assessment," the Condominium's "worsening financial condition" and a forthcoming Board election. (R. 311-12). The only passing reference to the litigation was to report and comment in three sentences on the fact of Justice Tolub's gag order. (R. 311)

per the requirements of the CPLR (derivative action)." The Court nonetheless continued the gag in effect, the pertinent portion of the March 24 order providing as follows:

> "Plaintiff is further ordered to cease contacting any members of the condominium with respect to this litigation.
>
> This restriction includes contacting any member by any publication whatsoever including flyers, advertisements, etc.
>
> Plaintiff is free to contact members of the condominium with respect to notifying them about new conditions not related in any way to this litigation." (R. 51-52; emphasis in original)[4]

3. The Cross-Motions to Vacate or Continue the Gag Orders

On June 1, 2006, Appellant's then newly-engaged trial counsel moved to vacate the two previous gag orders on "grounds … that the orders violate the First Amendment to the United States Constitution and Art. 1, §8 of the Constitution of the State of New York." (R. 24-25, 45-49).

On June 23, 2006, by Notice of Cross-Motion, Respondents asked the court to deny Appellant's motion to vacate the gag orders and formally cross-moved for a broad order "restraining … plaintiff Allan A. Ash from contacting any unit owners of The 155 Condominium or persons or

[4] At the compliance conference, according to contemporaneous notes, a law clerk advised Appellant, pro se, that "new conditions" meant he could "write about … a garbage problem, not a person. … Okay to send a birthday or Christmas card," but that Appellant "[c]annot discuss anything in the past about the law case …" (R. 75).

employers related to any current or past members of the Board of Managers of The 155 Condominium with respect to the allegations or substance of this litigation." (R. 99-100)

In support of their cross-motion Respondents submitted affidavits that were quite candid in urging the court to suppress Appellant's freedom to communicate his opinions extrajudicially – not on grounds of their impact on the litigation, but rather on grounds that the issues regarding building mismanagement and breach of fiduciary duties that Appellant sought to raise were, allegedly, causing "stress" to Board members, dissension in the Condominium and "damage" to its economic value. (R. 101-112)

4. <u>The October 25, 2006 Decision and Third Gag Order</u>

The October 25 Decision and Order actually addressed two separate motion sequences, one initiated by Appellant (005) seeking to vacate the gag orders and the other by Respondents (006) seeking to limit discovery. (R. 7-21) The instant appeal is addressed solely to the gagging aspects of the October 25 Order.

Although Justice Tolub acknowledged, as previously noted, that the two previous gags were overbroad and violated Appellant's federal and state constitutional rights of free expression (R. 14, 17), the Court below

nonetheless sought to justify its orders, stating that they "were not implemented on a whim" (R. 15).

Relying on courts' "inherent power over the control of their calendars and the disposition of business before them," Justice Tolub claimed that the gag orders were a response to Appellant's "using of the discovery process to not only delay the legal proceedings, but to harass the individual defendants, their families, their neighbors, their employees, and their lawyers." (R. 15) The Court suggested that "[t]he result of this relentless campaign, was essentially a freeze on any meaningful discovery." (Id.) In fact, however, the Court failed to cite, and the record is devoid of, any evidence demonstrating that Appellant's extrajudicial communications had any impact whatever on the timing or completion of discovery.[5]

Based on this defectively truncated analysis of what the Court finally recognized as valid constitutional considerations competing with, but somehow overcome by, asserted litigation concerns, Justice Tolub evidently

[5] Id. Although the other portion of the October 25 Order dealt directly with discovery issues, the Record is devoid of any evidence or findings that Appellant failed to appear at a scheduled deposition, failed to provide responses to demanded discovery, or that anyone other than Respondents failed to respond to document demands and/or to preserve or turn over requested documents. Moreover, the Court below never articulated how Appellant's extrajudicial publications could possibly have delayed, much less "frozen," discovery. Neither did the Court discuss or appear to consider whether any such alleged discovery delay could have been remedied – not by means of an unconstitutional gag order, but through the normal procedural mechanisms available to a trial court, such as scheduling orders, discovery deadlines, sanctions for non-compliance with discovery orders, etc. The Court simply referred further discovery proceedings to a Special Referee. (R. 19, 21)

concluded that he could sufficiently narrow the gag orders to avoid their admitted constitutional infirmities by "modif[ying] the orders issued in February and March of 2006 so as to preclude Mr. Ash from directly contacting the defendants involved in this action." (R. 17)

However, in the decretal portion of the Order, Justice Tolub provided a different, confusingly uncertain, but seemingly more expansive formulation of the "modified" gag, as follows:

> "ORDERED that plaintiff's motion (sequence 005) seeking to vacate the portion of the orders issued by this court on February 3, 2006 and March 24, 2006, which sought to prohibit plaintiff Alan (sic) Ash from contacting, in any form, whatsoever, the condominium members about this litigation, is granted to the following extent:
>
> > Plaintiff Alan Ash is prohibited from directly contacting any of the litigants involved in this matter during the duration of this action. Any communications, questions, assertions of opinion, discovery demands, etc. must be presented to plaintiff's counsel, who shall then present such communications, questions, assertions of opinion, discovery demands, etc. to counsel for the defendants. Within three days of receipt, counsel for defendants will present said communications, questions, assertions of opinion, discovery demands to the defendants.
>
> The balance of the portion of this court's orders dated February 3, 2006 and March 24, 2006 which sought to restrict plaintiff Alan (sic) Ash's contact with members of the Condominium Board are (sic) hereby vacated." (R. 19-20)

Thus, although in his decision Justice Tolub appeared to limit his Order to directly contacting "the defendants," in the decretal provisions he referred alternatively to contacts with "any of the litigants" and "the

defendants." Moreover, in referring back to, incorporating, modifying but not fully vacating, the previous two gag orders, the Court added further confusion by vacating only that portion of the previous gag orders "which sought to restrict [Appellant's] contact with members of the Condominium Board," whereas, in fact, both of the prior orders had referred not only to Board members but to "members of the condominium" – a significantly more expansive group than "members of the Condominium Board."

5. The November 10, 2006 Letter Seeking Clarification of the Third Gag Order

Because of the confusion and uncertainty inherent in the October 25 Order, and in a good faith effort to resolve its chilling vagueness so that Appellant could attempt to comply with the Order, Appellant's trial counsel wrote to Justice Tolub requesting further guidance regarding the Order's ambiguities. (See November 10, 2006 letter of Myron Beldock, Exhibit A to the Reply Affidavit of Henry R. Kaufman in Support of Appellant's Motion for a Stay Pending Appeal.)

The November 10 letter requested "clarification on two questions related to the modified order." First, it sought to determine whether Appellant could communicate directly with current and past members of the Board who are unit owners but are not named defendants. Second, it sought

to determine whether Appellant could address correspondence to all Condominium owners, whether or not including unnamed Board members, prior to or simultaneously with the minimum pre-censorship period of three days (or likely substantially more once the mandated exchange has been completed) established in the Order. Although that letter to Justice Tolub was written many weeks ago, to the date of this filing the Court below has not responded or further clarified its October 25 Order.

D. Appellant's Allegedly Offensive Communications

The consistent focus of Respondents' efforts to gag Appellant and restrain his freedom of expression, which also served as the basis for the Court's determination to impose and then to continue the gag orders, has been Appellant's numerous letters and other communications to Condominium owners, Board members and other recipients. (See R. 113-336)

Respondents have broadly complained that Appellant's communications are "false, defamatory and harassing … diatribes" (R. 102). The Court below embraced Respondent's position. It branded Appellant's persistent efforts, as an activist and gadfly, to inform Condominium owners of his views on significant developments and issues in the building, including developments in this litigation, as a "relentless campaign." (R. 15)

In purporting to justify its unconstitutional gag order, the Court cited but a small number of Appellant's more outspoken statements (R. 11-12, 16), which the Court demeaningly labeled "literary 'gems'" (R. 11). It excerpted and wrenched these so-called "gems" out of the context of literally hundreds of pages of Appellant's detailed communications to members of the Condominium or the Board and others that Respondents placed in the Record before the Court in support of its cross-motion for a gag order. (R. 113-336)

This misplaced "literary" criticism, the Court's second-guessing of Appellant's editorial judgments, and its tasking counsel for both sides with the obligation of pre-screening and pre-censoring Appellant's future communications, inappropriately put Justice Tolub – and counsel – "in the editor's chair." These constitutionally-impermissible judgments, and the prior restraint of Appellant's freedom of expression that has followed from them, amount to judicial abridgement of Appellant's rights under the First Amendment and Article I, § 8 of the New York State Constitution.

But Justice Tolub's determination to judge and belittle the value of Appellant's communications was not only insupportable as a matter of constitutional law and prudential judicial restraint. His ill-considered

attempt to gag Appellant was also insupportable as a matter of fact finding on the Record before the Court below.

Thus, evidently influenced by a distaste for the sometimes hyperbolic nature and stridency of Appellant's rhetorical flourishes, the Court seriously misunderstood, and thereby also grossly overstated, the significance and alleged impact of the substantive content of Appellant's letters and other publications on Condominium owners, on Respondents and on the course of this litigation.[6]

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[6] A review of the totality of the communications in the record before the Court below, in their full context, reveals that they address significant matters of public interest and common concern to owners of the Condominium – not only matters involving the underlying derivative action or its prosecution, but also many other related or unrelated matters involving the building, its governance and Board oversight. These communications include both detailed factual information and allegations and expressions of Appellant's constitutionally-privileged views and opinions based on the information presented.

Among the many non-litigation-related issues of public interest and concern that were addressed by Appellant in his communications to the Condominium were the following: problems with the building facade (R. 133-34); building personnel problems including firing of the doorman (R. 135-39); firing and failure to replace the building superintendent (R. 152-60, 177-83, 218-20); payroll and overtime (R. 152-60, 218-20); building security and fire safety (R. 140-46); illegal installation of washers and dryers (R. 140-46); asbestos removal (R. 157); sidewalk repairs (id.); storage bins (R. 218-20); emergency hall lighting (R. 157, 233-36); improper financial expenditures (R. 170-76, 184-89) or diversion of funds (R. 216-17); worsening financial condition of the Condominium (R. 312, 315-16); special assessments and problems with building improvements (R. 152-60, 197-99, 233-36, 274-79, 311-12); depletion of the building's reserve fund (R. 233-36); special treatment of Board members and the building's sponsor (R. 218-20, 233-36); future financial plans and projections (R. 237-38); possible criminal violations (R. 233-36, 264-73); problems with professional services – accountants, managing agents and attorneys (R. 152-60, 266); failure of the Board to pursue debts owed to the Condominium (R. 291-92); proposed discharge of directors (R. 152-60); and Board elections, election process and the qualification of Board candidates (R. 113-15, 161-62, 184-89, 252-53, 278-79, 286-87, 294-95, 312).

As a result, Appellant has been unjustifiably subjected to the improper prior restraint imposed by the Order appealed from, despite the undeniable fact that his communications were, and by the evidence in the Record are likely to continue to be, quintessentially statements which – in providing information, expressions of views and opinions – are clearly subject to constitutional protection. As discussed hereinbelow, the mere fact that the negative tone or particular language of Appellant's communications is a source of frustration, irritation, or even offense to Respondents, or to the Court, falls woefully short of providing any possible constitutional justification for their prior restraint.

SUMMARY OF ARGUMENT

The Order appealed from clearly violates Appellant's freedom and liberty of expression under the First Amendment to the U.S. Constitution and Article 1, §8 of the New York State Constitution. (Point I)

Preeminently, the gag order is an impermissible "prior restraint," recognized as the most serious and least tolerable abridgement of First Amendment rights. (Point I. A.) Procedurally, the Order also cannot pass constitutional muster as it was not based on adequate findings, it was not "narrowly-tailored," – indeed less restrictive alternatives would actually have be more effective in avoiding any delay or disruption in the discovery

process; and, in purporting to second-guess the content, language and tone of Appellant's communications, the Court below impermissibly substituted its views for those of the speaker. (Point I. B.) The Order is also unconstitutionally vague and thus impermissibly overbroad, resulting in the "chilling" of protected expression. (Point I. C.) The censorship regime established by the gag order, requiring presubmission of Appellant's communications to counsel for both sides, is a form of prior restraint and a separate violation of Appellant's constitutional rights. (Point I. D.) Finally, the gag order violates Appellant's equal if not greater state constitutional right of "liberty" of expression under Article I, § 8 of the New York State Constitution. (Point I. E.)

There can be no justification – and no adequate justification was found or articulated in the Court below – for upholding the gag order in the face of these violations of Appellant's clearly-established federal and state constitutional rights. (Point II)

The "inherent power" of the courts to control their calendars and courtrooms does not extend to gagging or censoring extrajudicial statements by parties. (Point II. A.)

The allegedly defamatory content of Appellant's extrajudicial communications also cannot justify entry of a prior restraint, all the more so

where no formal claim of defamation has been made and no prima facie proof of its merit has even been adduced; mere name-calling, hyperbole and other statements of opinion are constitutionally-privileged and the sole remedy for even actionable defamations is a claim for damages and not a prior restraint. (Point II. B.)

Moreover, none of the other harms alleged to have been caused or threatened by Appellant's communications can justify the Order appealed from. (Point II. C.)

Finally, on this appeal the constitutionally-suspect prior restraint entered in the Court below should be strictly scrutinized; application of a mere "abuse of discretion" standard is entirely inappropriate. (Point III)

ARGUMENT

I.

THE GAG ORDER VIOLATES APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF FREEDOM AND LIBERTY OF EXPRESSION

A. The Gag Order Imposes a "Prior Restraint" in Violation of the First Amendment

The United States Supreme Court has characterized "prior restraints" – i.e., injunctions barring expression before publication – as "the most serious

and the least tolerable infringement on First Amendment rights," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) and "one of the most extraordinary remedies known to our jurisprudence." Id. at 562. Indeed, the Supreme Court has described the elimination of prior restraints as the "chief purpose" of the First Amendment. Near v. Minnesota, 283 U.S. 697, 713 (1931).

Any prior restraint thus comes to this court with a "heavy presumption against its constitutional validity." Carroll v. Princess Anne, 393 U.S. 175, 181 (1968). Indeed, in practice, the Supreme Court has never upheld a prior restraint on publication or expression, and has recognized the theoretical possibility of such a restraint only in the most exceptional of circumstances, none of which is present in the case at bar.

For example, in dictum in Near, supra, 283 U.S. at 715-716, the Supreme Court suggested a hypothetical exception during times of war to the otherwise absolute bar on prior restraints ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops"). The Court considered – but it rejected – this theoretical exception when it denied the government's request for a prior restraint

against publication of The Pentagon Papers. New York Times Co. v. United States, 403 U.S. 713 (1971).

Obviously, the speech gagged in the case at bar hardly rises to the gravity of an imminent threat to national security in time of war.

The only other context in which the Supreme Court has entertained the possibility of sanctioning a prior restraint on First Amendment protected expression involved the claim of a serious and imminent threat to a defendant's competing constitutional right, under the Sixth Amendment, to a fair trial in a criminal action. See Nebraska Press Ass'n, supra. Again, however, in that case the Court held that the party seeking a gag order had failed to overcome its "heavy burden of showing justification for the imposition of such a restraint." Id., 427 U.S. at 558.

Lower state and federal courts in New York have also consistently rejected litigation gag orders as unconstitutional prior restraints on protected expression, even in cases arguably implicating a criminal defendant's Sixth Amendment rights to a fair trial and even where the orders were directed solely at attorneys, in reliance on the unique ethical obligations (pursuant to DR 7-107) that may under certain circumstances constitutionally constrain attorneys' activities and expression as officers of the court to a greater extent than non-attorneys. See Gentile v. State Bar of Nev., 501 U.S. 1030 (1991);

but see New York Times Co. v. Rothwax, 143 A.D.2d 592 (1st Dept. 1988) (vacating gag order enjoining attorneys and their employees from discussing the case with news media). See also National Broadcasting Co. v. Cooperman, 116 A.D.2d 287 (2d Dept. 1986) (same); U. S. v. Salameh, 992 F.2d 445 (2d Cir. 1993) (vacating gag order on media as overly broad prior restraint); In re Application of The New York Times Co., 878 F.2d 67 (2d Cir. 1989) (vacating media gag order on first amendment grounds); U. S. v. Gotti, 2004 U.S. Dist. LEXIS 24192 (S.D.N.Y. 2004) (rejecting, as threatening an unconstitutional prior restraint, criminal defendant's motion to gag non-attorney witness from making repeated, outspoken, "invective"-laden, remarks about defendant and his alleged guilt in the action, on witness's own widely-heard radio talk show, notwithstanding that such "diatribes" were designed "to sway the minds of potential jurors" and were thus "quintessentially prejudicial.")

Here, the gag order is a prior restraint on the expression of a non-attorney party in a civil case that neither rises nor was found to rise to the level of a breach of Respondent's rights to a fair trial, much less their constitutional rights under the Sixth Amendment. The Order appealed from thus violates Appellant's substantive constitutional rights of free expression under the First Amendment.

B. Entry of the Gag Order Was Procedurally Defective

Respondents not only failed to meet their heavy – if not impossible – substantive burden of justifying entry of the gag order in this case. The Court below also failed to accord the strict and protective procedural safeguards required in order to assure that constitutional rights are not abridged by the improper entry of a prior restraint.

Thus, it has long been recognized that before a gag order can be entered, the issuing Court must make and set forth "adequate factual findings" to conclude that the defendants' competing constitutional rights to a fair trial would be impaired. See New York Times Co. v. Rothwax, supra, 143 A.D.2d at 592 (1st Dept. 1988). See also National Broadcasting Co. v. Cooperman, supra, 116 A.D.2d at 293 (2nd Dept. 1986) (gag order vacated because "[r]ecord is devoid of any evidence to support a finding that the extrajudicial statements of counsel are reasonably likely to pose a serious threat to the defendants' Sixth Amendment right to a fair trial"); People v. Fioretti, 135 Misc.3d 541, 544, (Sup. Ct. N.Y. Co. 1987) ("gag" order may be upheld "only when it is clearly established that there are serious and imminent threats to the fairness of the trial").

The "adequate factual findings" that must be made were identified by the Supreme Court when it required the court being asked to issue the prior

restraint to consider "whether other measures would be likely to mitigate the effects [of the perceived risk to a defendants' right to a fair trial]" and "how effectively a restraining order would operate to prevent the threatened danger." Nebraska Press Ass'n, supra, 427 U.S. at 562; see also U.S. v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993) (overturning a gag order on the ground that, before trial court "issues a blanket prior restraint, it must, inter alia, explore whether other available remedies would effectively mitigate the prejudicial publicity, and consider the effectiveness of the order in question to ensure an impartial jury.")

In Nebraska Press Ass'n, after carefully "examin[ing] the evidence before the trial judge" to determine whether the record in fact supported entry of the gag order, 427 U.S. at 562, the Supreme Court found that it was "far from clear" that the prior restraint would have been effective in protecting the defendant's rights. Id. at 567.

Here, because the Court below gave no indication of any attempt to comply with these indispensable procedural requirements, the record is devoid of evidence or findings: (i) that the gag order would actually protect against the alleged threat of discovery delay and disruption – even if that interest had risen to the requisite level of a substantial or imminent threat to Respondents' right to a fair trial, which it did not – (ii) that other, narrower

remedies were considered by the Court and found to be ineffective to remedy the perceived threat to the litigation, and (iii) that the gag order was in any event likely to be effective in achieving the desired result of avoidance of delay or disruption.

Finally, the Order appealed from was procedurally defective in one additional respect, as it impermissibly put the Court, as a self-appointed literary critic – and also ultimately counsel on both sides in their roles as pre-censors – in the "editor's chair," second-guessing, censoring and sanctioning Appellant's extrajudicial communications (letters, circulars, even newsletters) with other owners in the Condominium, his home.

Such a procedure has been condemned in no uncertain terms by the Court of Appeals. See Gaeta v. New York News, Inc., 62 N.Y.2d 340, 349 (1984) ("Determining what editorial content is of legitimate public interest and concern is a function for editors. … The press, acting responsibly, and not the courts must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable."); see also Huggins v. Moore, 94 N.Y.2d 296, 303 (1999) ("Absent clear abuse, the courts will not second-guess editorial decisions as to what constitutes matters of genuine public concern," citing Gaeta, supra.)

C. The Gag Order is Unconstitutionally Vague and Overbroad

Glossing over the procedural defects that render the entry of these gag orders constitutionally infirm, and ignoring Judge Tolub's admission that the two earlier gag orders were constitutionally suspect, Respondents now claim that the Order appealed from has been narrowed sufficiently to avoid vagueness and overbreadth and thus that it should be deemed to pass constitutional muster.

Unfortunately, as previously reviewed – see discussion supra, pp. 11-14 – the Court's allegedly "narrowed" gag order did not resolve the problems of either its vagueness or consequent overbreadth, and this is yet another reason to overturn the Order appealed from as unconstitutional prior restraint.

Thus, the Supreme Court has "repeatedly recognized that the dangers inherent in vague statutes are magnified where laws touch upon First Amendment freedoms." Parker v. Levy, 417 U.S. 733, 775 n. 5 (1974) (Stewart, J., dissenting). "Where a statute's literal scope, unaided by a narrowing … interpretation, is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 572-73 (1974). And where a vague statute "abut[s] upon sensitive

areas of basic First Amendment freedoms," … it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," Grayned v. City of Rockford, 408 U.S. 104, 109 (1972), quoting Speiser v. Randall, 357 U.S. 513, 526 (1958).

Here, where no "narrowing interpretation" has been forthcoming, Appellant's freedom has been improperly chilled which is an additional reason to overturn the gag order.

D. Presubmission to Counsel is Also an Impermissible Prior Restraint

Any claim that the Order appealed from merely sets up a process of presubmission rather than prior restraint would also not save the gag order from a finding of constitutional infirmity. As the Supreme Court has noted, "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Freedman v. Maryland, 380 U.S. 51, 57 (1965) (invalid to require submission of motion pictures for prior screening and censorship of obscenity, at least absent rigorous procedural safeguards).

In sum, settled First Amendment principles are more than sufficient to support reversal of the gag order on all of the foregoing federal grounds.

E. The Gag Order Also Violates Article I, § 8 of the New York State Constitution

In addition, Appellant argued in the Court below, and Justice Tolub properly agreed, that the gag orders also implicated Appellant's state constitutional rights under Article I, §8 of the N. Y. S. Constitution.[7]

The protection of liberty of speech under our State Constitution is not only fully consistent with, but in some respects has been held to provide even greater protection of freedom of speech, than the Federal Constitution. As the Court of Appeals observed in People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557-58, on remand from, 478 U.S. 697 (1986):

> "The Supreme Court's role in construing the Federal Bill of Rights is to establish minimal standards for individual rights applicable throughout the Nation. The function of the comparable provisions of the State Constitution, if they are not to be considered purely redundant, is to supplement those rights to meet the needs and expectations of the particular State.
>
> ***
>
> New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community … . Thus, the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression." (citation omitted)

[7] Article I, § 8 of the New York State Constitution provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

The constitutional proscription against prior restraints on expression or publication is most frequently associated with the First Amendment. Historically, however, the rule against prior restraints has been adopted with equal, if not greater, force under Article I, § 8.

Thus, as early as 1902 – more than a quarter century before the U. S. Supreme Court's landmark prior restraint decision in Near v. Minnesota, supra – the Court of Appeals had already held that under Article I, § 8 "the right to publish is … sanctioned and secured," by which the Court meant that the Legislature only has constitutional authority to punish "abuse of that right" – i.e., abuse as evidenced by, and by definition occurring subsequent to, free exercise of the initial right of publication. See People v. Most, 171 N. Y. 423, 431 (1902); accord, People v. Gitlow, 234 N.Y. 132 (1922) ("That every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint … " (quoting Story's Commentaries on the Constitution, § 1874) (emphasis added)[8]

[8] This construction of Article I, § 8, based on the crucial distinction between prohibited prior restraints on expression and the possibility of subsequent punishments, is inherent in the very structure of Article I, § 8. Thus, unlike the First Amendment's strong but unitary formulation in the speech and press clause ("Congress shall make no law") the initial phrases of Article I, § 8, which have no express parallel in the language of the First Amendment, are built around the bilateral dichotomy between the Article's expectation of the unrestrained "freedom to speak write and publish" (i.e., the prohibition against prior restraints – "Every citizen may freely speak, write and publish his sentiments on all subjects") and the potential availability of subsequent punishments ("being responsible for the abuse of that right") – but only after exercise of the right.

In a similar vein more than seventy years ago this Court refused to restrain the defendants from publishing notices falsely stating that plaintiff's product infringed defendants' patent, holding that Article I, § 8 prevented issuance of an injunction in advance of publication regardless of whether such a publication was false or otherwise unlawful . See Zenie v. Miskend, 245 A.D. 634, 636 (1st Dept. 1935), aff'd, 270 N.Y. 636 (1936).

More recently, this Court reaffirmed the strong state constitutional rule against prior restraints, except in the most limited circumstances, stating, "there is no power in government under our Constitution to exercise prior restraint of the expression of views, unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal … ." Rockwell v. Morris, 12 A.D.2d 272 (1st Dept.), aff'd, 10 N.Y.2d, 721, cert. denied, 368 U.S. 913 (1961). The Court of Appeals later quoted this Court's language approvingly in East Meadow Community Concerts Ass'n v. Board of Education, 18 N.Y.2d 129, 134 (1966).

Other principles and proscriptions adopted under Article I, § 8 also support reversal of the gag order on state constitutional grounds. Thus, in Arcara, supra, the Court of Appeals upheld broader protections for a bookseller than required by the First Amendment, while also adopting a rule under Article I, § 8 that the burden is on the proponent of a restriction on

speech "to prove that … it has chosen a course no broader than necessary to accomplish its purpose." (Id. at 558)

In Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370 (1977), the Court of Appeals expressly addressed the issue of "gag orders" under both the First Amendment and Article I, § 8. In that case, the media claimed the "right to be free from prior restraint on publication" in the context of "reporting or commenting on judicial proceedings which had been held in open court." The Court recognized that "when a restraint is imposed to prevent commentary on known facts about a pending criminal case, tensions between First and Sixth Amendment rights are greatest." Id. at 379. Commenting on Nebraska Press Assn., supra, the Court of Appeals clearly recognized the principle that a "gag order" in a judicial proceeding is "subject to a 'heavy presumption against' prior restraint …" Id. Although the Court of Appeals in Gannett upheld a restriction (not relevant here) on media access to judicial proceedings, it held that such restrictions would only be warranted, under state and federal constitutional principles, where there was "an imminent threat to the impaneling of a constitutionally impartial jury." Id. at 380.

The strong, if not greater, force of state constitutional protection for liberty of expression in New York has also been recognized in other contexts relevant to an analysis of the claimed justifications for the gag order – see Point II. C., infra, regarding defamation and statements of opinion and Point II. D., infra, regarding claims of harassment.

In sum, Article I, §8 of the N. Y. S. Constitution no more tolerates the restraint or abridgement of Appellant's "liberty" of expression caused by the Order appealed from than does the First Amendment. Under either constitutional provision, reversal of the gag order is clearly mandated.

II.

JUSTIFICATIONS FOR THE GAG ORDER ARE CONSTITUTIONALLY DEFICIENT

A. Courts' "Inherent Power" to Control Their Calendars and Courtrooms Cannot Justify the Gag Order

The Court below evidently recognized that its first two gag orders represented violations of state and federal constitutional principles, and that, "to a certain extent," it "may have erred in barring Mr. Ash from voicing his opinions." (R. 14, 17) However, the Court nonetheless claimed authority to continue its gag order pursuant to "an 'inherent power over the control of their calendars and the disposition of business before them." (R. 14)

Respondents recently expanded on this claim, contending that the gag order raises no issue at all as to constitutional rights of expression because it should be viewed as no more than an exercise of "the court's power to conduct a litigation … in some semblance of order and efficiency." (Affirmation of John Van Der Tuin in Opposition to Motion for Stay Pending Appeal ¶6)

But Respondents' mantra about discretionary "control" or "management" of the court's calendar or of discovery is disingenuous at best and cannot justify the gag order. The gagging aspect of the Order neither controlled the calendar, nor did it set discovery deadlines or the disclosure obligations of the parties. Those aspects, as Respondent readily acknowledges, were addressed when the Court below "took other steps to bring the litigation to a conclusion, including quashing certain subpoenas and referring the case to a Special Referee." (Id.) Rather than court or calendar control, the gag order was, as Respondents' opposition to the stay motion openly acknowledges, aimed at the "content and tone" of Appellant's communications – "letters, memos, 'Gazettes' and other writings" (Van Der Tuin Aff. ¶9) and even Appellant's "assertions of opinion" (Van Der Tuin Aff. ¶3, citing language from the gag order) – the very essence of protected First Amendment expression.

Not one of the cases cited by the Court below or by Respondents in support of the gag order restricts a litigant's extrajudicial right to communicate freely, without prior review or restraint, to other persons potentially interested in a civil litigation or about other matters of common interest that a litigant wishes to discuss. Indeed, the cases Respondents cite to suggest that a court's inherent powers could possibly extend to the issuance of a constitutionally-suspect prior restraint are ludicrously wide of the mark.

Thus, neither Hynes v. George, 76 N.Y.2d 500 (1990) (court not required to grant prosecutor's requested adjournment), Feldsberg v. Nitschke, 49 N.Y.2d 636 (1980) (upholding trial court's determinations about the order and admissibility of evidence at trial) nor Matter of Goldberg v. Extraordinary Special Grand Juries Onondaga County, 69 A.D.2d 1 (4th Dept.), app. den., 48 N.Y.2d 608 (1979) (court may order procedures to avoid grand jury witness tampering), the latter case also cited by the Court below, can justify the disputed gag order at issue in this case, which plainly has nothing to do with the logistics of granting a continuance, regulating trial testimony or preventing inadvertent disclosure of grand jury witness identities.

Likewise, Hochberg v. Davis, 171 A.D.2d 192 (1st Dept. 1991) (requiring trial court to rescind rules which mandated prior court approval for motions), centrally cited by Justice Tolub and relied on by Respondents in support of their claim that the court below "properly exercised its jurisdiction in enforcing the court rules," actually stands for quite the contrary proposition – i.e., that the courts' inherent powers to control their calendars and dispose of business must be carefully exercised and must give way when the "fundamental rights" of litigants are at stake. See also Costigan & Co. v. Costigan, 304 A.D.2d 464 (1st Dept. 2003)(court-imposed rule prohibiting motions without advance permission violated litigant's statutory rights).

Thus, as this Court held in Hochberg, supra, 171 A.D.2d at 194-95:

> "[I]t is undisputed that courts have an inherent power over the control of their calendars and the disposition of business before them … . * * * [W]e nonetheless must again caution the courts to ensure that the fundamental rights to which a litigant is entitled are not ignored, " 'no matter how pressing the need for the expedition of cases'". " (emphasis supplied; citation omitted)

Indeed, the calendar control argument ignores that this Court has, based on the reasoning of Hochberg, repeatedly reversed trial court orders which tread on "fundamental rights," such as a party's ability to make motions or engage in additional discovery – surely rights far less "fundamental" than Appellant's constitutionally protected freedom of

expression. See, e.g., Kamhi v. Dependable Delivery Service, Inc., 234 A.D.2d 34 (1st Dept. 1996) (abuse of discretion to direct immediate trial without discovery); Heist v. Cameron, 211 A.D.2d 429 (1st Dept. 1995) (where Court sua sponte dismissed case for failure to prosecute in the face of a legitimate request for an adjournment, "[t]he inherent power of courts to control their own calendars and the disposition of business is not the issue here.")

Here, too, the "inherent power of courts to control their own calendars and the disposition of business" is not the issue. What is the issue is that the trial court overstepped its bounds by entering a vague, ambiguous, overbroad gag order, in violation of Appellant's constitutional rights. "Calendar control" and like formulations simply "cannot be used as a premise for imposing" such an unjustified and unconstitutional gag order.

B. Appellant's Alleged Defamations Are Not Subject to Prior Restraint

The contention that the Court below, in the context of a derivative action alleging mismanagement of a Condominium, had the power to reach out and sanction or gag assertedly defamatory extrajudicial communications, in advance of their publication, on the ground that they were potentially defamatory, is at least a triple absurdity. The Court had before it no formal

claim of defamation. Neither did it find – nor could it have found in the absence of formal litigation – that Respondents had established a prima facie case of defamation on the merits. And even if those deficiencies were ignored, it is black letter law that even proven defamations are not generally subject to injunctive relief – only to a claim for damages.

That none of the defendants has chosen to pursue a defamation action here, instead of seeking a constitutionally-impermissible prior restraint, may also reflect recognition of the well-settled body of law that immunizes the types of "vigorous epithets" and "rhetorical hyperbole" which characterize Appellant's communications as non-actionable, constitutionally-protected expressions of opinion. See Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) (in context of a labor dispute, "scab" and "traitor" are protected hyperbole); Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (characterization of real estate developer's negotiating position as "blackmail" is protected "rhetorical hyperbole"); 600 West 115th Street Corp. v. Gutfeld, 80 N.Y.2d 130 (1992) (in context of strident and emotional statements aired at a public hearing, charges of "illegal" and "fraudulent" activity that "smells of bribery and corruption" is protected as hyperbole); Steinhilber v. Alphonse, 68 N.Y.2d 283 (1977) (in context of labor dispute, accusation that a union opponent is a "scab" is protected hyperbole).

In fact, the Court of Appeals has held that statements of opinion are subject to even greater protection under Article I, § 8 than under the First Amendment. Immuno A. G. v. Moor-Jankowski, 77 N. Y.2d 235 (1991):

> "This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas … . That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that 'every citizen may freely speak, write and publish * * * sentiments on all subjects.' (NY Const, art I, § 8.) Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms … .
>
> The expansive language of our State constitutional guarantee (compare, NY Const, art I, § 8, with US Const 1st Amend), its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States * * * the recognition in very early New York history of a constitutionally guaranteed liberty of the press * * * and the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events' * * * all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference … ."(citations omitted)[9]

But even if Appellant's communication were claimed and ultimately found to be actionably defamatory, the proper, indeed the only, remedy

[9] Although the Court of Appeals in Immuno referred to the interests of a "free press," the case is equally applicable to any individual speaking or publishing on matters of public concern. Thus, the defendant in Immuno was not the New York Times, CBS, or some other major media outlet; it was an individual who had been the editor of a small scientific journal, and the publication at issue was not an article by a professional journalist, but rather a letter to the editor of the journal written by a private citizen activist attempting to draw attention to an issue she felt was of concern to the public.

would be an action for damages, for it is hornbook law that – absent extraordinary circumstances – courts will not enjoin a libel. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); American Malting Co. v. Keitel, 209 F. 351, 354 (2d Cir. 1913); Donnelly v. United Fruit Co., 4 A.D.2d 855 (1st Dept. 1957).

Indeed some courts have refused to enjoin a libel even following a verdict for the plaintiff in a defamation suit. See Rombom v. Weberman, 309 A.D.2d 844 (2d Dept. 2003) (affirming jury verdict awarding damages but reversing order requiring removal of defamatory statements from defendant's web site); Metropolitan Opera Ass'n v. Local 100, 239 F.3d 172 (2d Cir. 2001) ("We have never held in this Circuit that a libel becomes subject to an injunction once its libelous character has been adjudicated.")

Bingham v. Struve, 184 A.D.2d 85 (1st Dept. 1992), relied on by Respondents in the Court below, is not to the contrary. The preliminary injunction ultimately entered there was directed primarily at the defendant's conduct – i.e., her picketing. To the extent the injunction was also addressed to allegedly libelous expression, in conjunction with the defendant's enjoinable conduct, libel was the basis of the underlying action, unlike the case at bar, and the court had already found that plaintiffs had "established a prima facie case of libel on the merits." 184 A.D.2d at 89. See also Feinberg

v. Poznek, 12 Misc. 3d 1185A (Sup. Ct. N. Y. Co. 2006) (although the Court had sustained plaintiff's claim for intentional infliction of emotional distress, it still denied an injunction against the defendant, distinguishing Bingham v. Struve, and holding that "the potential danger in not protecting defendant's right to free speech outweighs the potential damage to plaintiff. Thus, plaintiff's request for injunctive relief is denied.")

C. Other Harms Alleged Do Not Justify the Gag Order

Although Appellant's alleged defamations cannot possibly justify entry of a prior restraint, at the very least before the initiation and successful conclusion of a defamation action, Respondents and the Court below have alleged other harms they claim to have also been caused by Appellant's extrajudicial communications.

For example, the Court below suggested that Appellant was using his letters ("the stack of documents") as "a weapon to harass others" (R. 17) and Respondents have similarly complained of his "harassing … demands continually made on the parties." (Van Der Tuin Aff. ¶5)

Respondents have also emphasized the emotional distress they claim Appellant's communications have imposed – see, e.g., Affidavit of Gary Dong in Support of Cross-Motion [for Restraining Order]: "[Appellant's] vicious attacks … cause … emotional harm to my family … have been

frightening to my wife and children … [and] cause … [me] more and more personal distress." (R. 103-04)

But neither of these theories – harassment or emotional distress – can perform an end-run around either the well-established constitutional constraints on defamation claims, nor can they overcome the stringent bar on prior restraints.

In regard to an action for intentional infliction of emotional distress, the law is clear that such claims may not be used to circumvent constitutional limitations that require proof of factual falsity and the requisite constitutional standard of fault before expression on issues of public concern – however upsetting or even "outrageous" – can be stripped of constitutional protection. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." (Id., 485 U.S. at 55) Cf., Howell v. New York Post Co., 81 N.Y.2d 115, 126 (1993) (holding, in reliance on Hustler Magazine, supra,

that publication of newsworthy information may be "privileged," and non-actionable, "even if defendants were aware that publication would cause plaintiff emotional distress." Only to the extent that the defendant's conduct is proven to be "atrocious, indecent and utterly despicable" might recovery be available.

In regard to the viability of any claim of harassment arising out of the substance of Appellant's letter writing, significant constitutional limitations would again be brought into play.[10] Thus, in People v. Dietze, 75 N.Y.2d 47, 50 (1989), the Court of Appeals overturned, "independently" under Article I, § 8, in addition to the First Amendment (id., n.1), a New York criminal statute proscribing "the use of 'abusive' language with the intent to 'harass' or 'annoy' another person." The Court held that:

> "Because the statute, on its face, prohibits a substantial amount of constitutionally protected expression, and because its continued existence presents a significant risk of prosecution for the mere exercise of free speech, we hold [it] to be invalid for overbreadth,

[10] The Court below cited two cases in support of an alternative theory of harassment – i.e., that "the discovery process" may not be used "as a weapon to harass others." Id. However, both cases are inapposite. Scomello v. Firestone, 11 Misc.3d 1009A (Sup. Ct. Suffolk Co. 2006), involved an order of preclusion of further litigation – not the gagging extrajudicial expression – in the "unique" circumstances of a pro se litigant who had pursued twelve years of "relentless" litigation including many motions "of highly questionable validity." Kane v. City of New York, 468 F.Supp. 586 (S.D.N.Y.), aff'd, 614 F.2d 1288 (2d Cir. 1979), also involved an attempt to preclude the further prosecution of multiple frivolous actions pursued by a pro se litigant and not a prior restraint against extrajudicial speech. In this case Justice Tolub has declined to dismiss the action, so there can be no claim here that the underlying claims are "questionable," much less "frivolous."

under both the State (art I, § 8) and Federal (1st & 14th Amends) Constitutions." (Id.)

In Dietze, the defendant had been convicted under the statute for his use of language which the Court of Appeals characterized as "name-calling," with the intent to "harass" or "annoy." Despite this, the Court reversed the conviction, in words equally applicable here, finding application of the criminal statute unconstitutional and reasoning, 75 N.Y.2d at 51-52, that:

> "Defendant's words do not, however, fall within the scope of constitutionally proscribable expression, which is considerably narrower than that of the statute. Speech is often "abusive" -- even vulgar, derisive, and provocative -- and yet it is still protected under the State and Federal constitutional guarantees of free expression unless it is much more than that … . Casual conversation may well be "abusive" and intended to "annoy"; so, too, may be light-hearted banter or the earnest expression of personal opinion or emotion. But unless speech presents a clear and present danger of some serious substantive evil, it may neither be forbidden nor penalized … ." (citations omitted)[11]

[11] That the Dietze case addressed the constitutional deficiencies of a criminal statute rather than a civil cause of action is not relevant for purposes of evaluating the constitutionality of a prior restraint which is actually deemed to be a greater burden on speech than subsequent criminal punishment. As the Supreme Court explained in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975):

> "The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (emphasis in original)

Finally, of course, at this juncture no claims of either of these kinds have been brought or pursued by Respondents against Appellant. So whatever constitutional limitations would be brought to bear, and whatever potential for a viable claim there might theoretically be, these other theories of alleged harm cannot possibly justify the gag order at this juncture.

III.

THE GAG ORDER SHOULD BE STRICTLY SCRUTINIZED ON THIS APPEAL; AN "ABUSE OF DISCRETION" STANDARD IS NOT APPROPRIATE

The strict procedural safeguards and careful findings required at the trial court level when considering an order that may impose an unconstitutional prior restraint on protected expression should be matched on this appeal by an equally stringent standard of review.

"The reviewing court must examine closely both the record and the 'precise terms' of the restrictive order." U.S. v. Quattrone, 402 F.3d 304, 310-11 (2d Cir. 2005) (citing Nebraska Press Ass'n, supra, 427 U.S. at 562); see also New York Times Co., v. Rothwax, supra, 143 A.D.2d at 593 ("[A] careful review of the record before us fails to disclose adequate factual findings or basis upon which to conclude that the [defendant's right to a fair trial] here is so threatened. Absent this requisite showing of necessity for

prior restraints, respondent's imposition of a gag order upon the attorneys and other participants in the trial is constitutionally impermissible."). Cf., Arcara v. Cloud Books, Inc., 65 N.Y.2d 324, 332 (1985), rev'd on other grounds, 478 U.S. 697 (1986): "A regulation which suppresses speech in advance of its publication or distribution may be subject to particularly close scrutiny as a prior restraint." (emphasis added)

Despite the searching review ordinarily applied to prior restraints, Respondents have argued here that the gag order "is not reviewable save for a clear abuse of discretion." (Affirmation of Van Der Tuin in Opposition to Motion for Stay Pending Appeal, ¶13) With respect, such a relaxed standard of review is clearly inappropriate.[12]

In any event, even under some less demanding standard it is difficult to see how entry of a series of unconstitutional prior restraints, without adequate findings, and without due consideration of means less restrictive than curtailing free expression in order to deal with any alleged discovery problems, could be anything other than a clear abuse of discretion. See, e.g., Kenner v. Kenner, 13 A.D.3d 52 (1st Dept. 2004) ("With respect to the

[12] The sole case Respondents have cited in support of this proposition, Feldsberg v. Nitschke, 49 N.Y.2d 636, 643 (1980), presented the question on appeal of whether the trial court had abused its discretion in excluding use of a deposition on re-examination to highlight an alleged inconsistency in the witness's testimony. Such an evidentiary issue is hardly comparable to this Court's review of the entry of a constitutionally-suspect prior restraint. Neither do Respondents' efforts to cast the Order appealed from as a mere housekeeping matter detract from the essential identity of the Order as a gag.

protective order, the IAS court abused its discretion by granting defendant a 'gag' order which enjoined plaintiff from disseminating to third persons any financial information about defendant.")

Conclusion

For all of the foregoing reasons, it is respectfully submitted that the gag order is an unconstitutional and impermissible prior restraint that violates Appellant's freedom and liberty of expression. As such, the speech-restraining elements of the Order appealed from should be reversed, and the gag lifted in its entirety, at the earliest possible moment.

Dated: New York, New York
January 2, 2007

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