IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) CHRISTOIPHER BARNETT Plaintiff, v. (1) HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.; (2) J. PATRICK CREMIN; (3) JOHNATHAN L. ROGERS, and (4) UNIVERSITY OF TULSA, A PRIVATE UNIVERSITY, Defendants.	)	Case No. 18-CV-64-TCK-FHM

PLAINTIFF'S RESPONSE AND OBJECTION TO DEFENDANT TULSA UNIVERSITY'S MOTION FOR PROTECTIVE ORDER

Comes Now the Plaintiff Christopher Barnett and hereby submits this response and objection to the motion for protective order filed by Defendant Tulsa University [Doc. 14]. In support thereof, Plaintiff asserts the following:

1. That Tulsa University (TU) has filed a motion and requested relief in the form of a court order prohibiting speech-euphemistically referred to as a protective order- but in reality is seeking a prior restraint. Plaintiff for the reasons asserted herein objects to the motion for emergency relief as well [Doc 15].

2. That the undersigned agrees with some of the characterizations of certain commentary by Plaintiff as inflammatory, abhorrent, inappropriate and certainly uncivil. [1] In some instances the speech is wildly inflammatory. The undersigned does not condone such speech or conduct. But, Plaintiff unequivocally has that right.

3. As background information, the conduct of TU is far from a beacon of civility. TU has engaged in deplorable conduct aimed at Plaintiff. This conduct includes: expelling Plaintiff's spouse for statements that Plaintiff allegedly made; interfering with Plaintiff's business relationship by conspiring with public entities to deny Plaintiff leasing from public entities; conspired with public entities to withhold documents, made false statements repeatedly about Plaintiff of alleged threats or threatening conduct of Plaintiff merely because it disagrees with his speech; falsely causing the Court in Tulsa County to be informed of a false threat made by Plaintiff to the Court, causing Plaintiff to be detained, falsely asserting in e-mails that Plaintiff has a criminal record, the list goes on and on. So any animus felt towards TU is certainly well-founded. Further, any conduct directed at the TU's Counsel in the Tulsa County litigation, the Hall Estill Defendants is well-founded as on January 4th 2018 the Hall Estill Defendants communicated with the Oklahoma Attorney General's Office (AG) causing the AG to falsely report a threat made to the Court, resulting in Judge Sellers Court being interrupted by Tulsa County Deputies and causing Plaintiff to be wrongfully

[1] TU has referred to Plaintiff's posts as racist. This is patently untrue as referring to someone as a racist, Klansmen, or Nazi does not make that person a racist.

detained. See Transcripts of January 4th 2018, attached hereto as Exhibit 1, pp. 1-3. It turned out that the AG's the Office was contacted by Counsel in another related matter (later confirmed to be the Hall Estill Defendants) that Plaintiff had made physical and verbal threats. Id. at pp 3-4. The AG's version differs from the Court's in that the Court reported that it was advised that Plaintiff had made a threat to the Court. For now, the precise communications is not pertinent, it will be further developed as the litigation proceeds. However, the situation was serious enough that Plaintiff was detained, the Court got security involved but at the end the Court explained to Plaintiff the need to take reported threat's serious and explained that the Court "encouraged your attorneys if they feel that there's been some foul that has been caused, that they take it up with those people who actually know what happened that caused this today." Id. at p. 12. Thus, any conduct engaged in by Plaintiff pales in comparison to that of TU and its agents. This does not justify Plaintiff's attacks on TU's Counsel in this action but it does provide a background over the volatile nature of the ancillary proceedings and any incivility is certainly not limited to Plaintiff.

4. That notwithstanding the inflammatory nature of some of Plaintiff's speech, the solution, in a society that recognizes and values freedom of speech is to, rather than punish or suppress the speaker, not listen or read the offensive publication. Further, other remedies exists short of suppressing speech, for example, any libelous or defamatory speech can be attacked in a civil suit as can any interference with a business relationship. In fact, the right to file a suit, i.e.,

the right of access, is a constitutional right. What cannot happen is the restricting of speech merely because of disagreeing with the content and issuing an order restraining speech before it is made.

5. That TU has attached copies of Plaintiff's postings simply in an attempt to poison the well and turn the assigned Judge against Plaintiff. TU attached postings regarding the initial assigned Judge, Honorable Judge Dowdell, and also postings regarding the current Judge, Honorable Judge Kern. The undersigned certainly does not share the same views as Plaintiff but recognizes and understands the protected nature of these ill-advised, inflammatory and hyperbolic posts.

6. To illustrate the strength of the First Amendment, several cases are illustrious. In Cohen v. California, 403 U.S. 15 (1971), Mr. Cohen was arrested for wearing a jacket in the public courthouse that bore the words F**k the draft. His conviction was overturned and the U.S. Supreme Court stated:

> To many, the immediate consequence of this freedom [of speech] may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' [internal citations omitted], and why, so long as the means are peaceful, the communication need not meet standards of acceptability,' [Citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)]. Cohen 403 U.S. at 25-26.

Justice Harlan famously stated: "one man's vulgarity is another's lyric." Id. at 27.

7. In National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977), the Court held that the right of the National Socialist Party, i.e., Neo-Nazism and White Supremists, to march is constitutionality protected. Id. at 44.

Very few rationale people would argue that the beliefs of the National Socialist Party of America are appropriate or of any value. In fact most, indeed all rational people would argue that these beliefs are disgusting, racist and moronic. Certainly Plaintiff is entitled to the same protections.

8. The strength and power of the First Amendment freedoms was set forth by the Indiana Supreme Court in Brewington v. Indiana, Case No.15S01-1405-CR-309, (In. 2014), Opinion of May 1, 2014, attached as Exhibit 2. There, the Court invalidated a criminal conviction based on inflammatory statements made by the Defendant. The Court stated:

> "The First Amendment aims to ensure that debate on public issues remains 'uninhibited, robust, and wide-open.' [citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)]. 'The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office"—but "'[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.' [citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988)]. 'Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.'[citing Falwell,]. Even when those attacks are unfair, offensive, or ignorant, the First Amendment protects them so that legitimate debate will not be stifled. Id at pp. 9-10.

The Court continued:

> None of this is this is a defense of Defendant's conduct. But free speech principles would be meaningless if they ceased to apply when a statement is ignorant, offensive, or unfair. Indeed, that is when the need for free-speech protection is at its greatest. The First Amendment is broad enough to protect "Priests Rape Boys" picket signs as protected political speech in connection with a funeral Mass for a fallen soldier. [citing Snyder v. Phelps, __ U.S. ___, 131 S. Ct. 1207, 1213, 1216-17 (2011).] And it is broad enough to protect the crude "outhouse rendezvous" parody in Falwell. [citing 485 U.S. at 57]. It is therefore certainly broad enough to protect Defendant's ill-informed—but by all indications, sincere—beliefs that the Judge's child-custody ruling constituted "child abuse" or "child abducting," and that the ruling was based on improper motives. The Court of Appeals erred in relying on Defendant's overheated rhetoric about "child abuse," or the falsity of that characterization, to affirm his conviction for intimidating a judge. Even if Defendant's "child abuse" and other statements about the Judge could be understood as assertions of fact, not hyperbole, they are protected by the First Amendment because there is no proof of actual malice.

The Court concluded:

" It is every American's constitutional right to criticize, even ridicule, judges and other participants in the judicial system—and those targets must bear that burden as the price of free public discourse." Id. at 35.

9. That much of the speech at issue are public records or are critical of public officials, even if untrue or ill-advisedly.

10. That TU relies on a Local Court Rule. However, a Court rule cannot conflict with a constitutional right and to the extent it does, the court rule is inferior.

11. Notwithstanding the above, Defendant would be willing to a limited protective order from making extrajudicial comments regarding all Current

Counsel of record in this suit. Defendant obviously will abide by all Court orders and rules.

BRIEF IN SUPPORT

THE GAG ORDER SOUGHT BY TU REPRESENTS AN IMPERMISSIBLE PRIOR RESTRAINT

In the instant case, TU is seeking a gag order against Plaintiff that amounts to a prior restraint. TU attempts to soften the severity of its requested gag order by referring to it as a protective order. This brings to mind the expression: "If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck." See Wikipedia:Duck (accessed 2/14/2018). The request for a protective order seeks a is a gag order- a prior restraint. Prior restraints are "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. United States, 509 U.S. 544, 550 (1993). "Court orders that actually forbid speech activities are classic examples of prior restraints. " Id. at 550. Even short speech prohibitions raise significant First Amendment concerns. See Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 182 (1968) Any prior restraint "comes to [a court] bearing a heavy presumption against its constitutional validity...." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), Further, to justify a prior restraint the party seeking one "carries a heavy burden of showing justification." Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

Based on the draconian nature of a prior restraint, orders limiting speech before it is spoken, are presumptively unconstitutional. See Nebraska Press Association v. Stuart, 427 U.S. 539, 562-69 (1976). To this end, the 10th Circuit has stated: "We have made no attempt to indicate all restraints which the court may or may not impose. We indicate only that the court's power to impose prior restraints on first amendment rights is limited and that with few exceptions it must be exercised in response to specific compelling reasons." JOURNAL PUBLISHING CO. v. MECHEM, 801 F. 2d 1233, 1237 (10th Cir. 1986). The protections of the First Amendment are not limited to the press but includes within its ambit "every sort of publication which affords a vehicle of information and opinion." Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). This right was described in Branzburg v. Hayes, 408 U.S. 665, (1972), as "a fundamental personal right that is not confined to newspapers and periodicals." Id. at 704.

Courts are reluctant to issue a prior restraint. The Sixth Circuit in CBS, Inc. v. Young, 522 F. 2d 234, 239 (6th Cir. 1975) held that an order silencing, *inter alia,* the parties was impermissibly overbroad and vague. The Court reasoned that such orders are only warranted if the trial participant speech poses a "clear and present danger of a serious or imminent threat" to the fair administration of justice." Id. at 241 (stating that "[a]ny restrictive order involving a prior restraint upon First Amendment freedoms is presumptively void

and may be upheld only on the basis of a clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial.").

The circumstances allowing a gag order are indeed limited. A gag order prohibiting extrajudicial comments may be entered only when necessary to ensure a fair trial, and must be tailored narrowly to preclude only extrajudicial comments that are substantially likely to materially prejudice the trial – the specific speech to be restrained must pose a certain, direct and imminent threat to a fair trial right or other constitutional interest. Young, 522 F.2d at 238; Chase v. Robinson, 435 F.2d 1059, 1061 (7th Cir. 1970) (speech must pose "'a serious and imminent threat to the administration of justice'") (citation omitted). The entry of a gag order requires a Court finding that no adequate alternative measures can mitigate the effects of pretrial speech and the restraint is necessary to prevent a harm. See United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993), In re N.Y. Times Co., 878 F.2d 67, 68 (2d Cir. 1989).

Another case with heated vitriol that a court nevertheless frowned on a gag orders is instructive. In Marceaux v. Lafayette City-Parish Consolidated Government, 731 F.3d 488 (5th Cir. 2013), current and former police officers sued and they communicated with the media about the case and maintained a Web site that contained certain unfavorable information. The Magistrate Judge issued a protective order and on appeal the 5th Circuit vacated the protective order. Id. at 493. The Court stated:

We analyze this issue under the prior restraint doctrine. Court orders aimed at preventing or forbidding speech 'are classic examples of prior restraints.' [citing Alexander 509 U.S. at 550.] Indeed, this court has recognized that '[d]espite the fact that litigants' First Amendment freedoms may be limited in order to ensure a fair trial, gag orders ... still exhibit the characteristics of prior restraints.' [Internal citations omitted]. The order here explicitly restricts the expression of attorneys and parties in this litigation as it relates to the media and prevents the Officers from expression in the Website. As a result, the protective order qualifies as a prior restraint. "Prior restraints 'face a well-established presumption against their constitutionality.' [Internal citations omitted.] We must therefore balance the First Amendment rights of trial participants with our 'affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.' Marceaux 731 F. 3d at 492.

The proposed protective order requested by TU suffers from the same maladies as that in the cases set forth herein. Principally, that it is overbroad, not limited to the least restrictive means and it violates the constitution in many respects.

Wherefore, for all the foregoing reasons the motion for protective should be denied.

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CERTIFICATE OF ELECTRONIC FILING

This is to certify that a correct copy of the above document has been sent via the Court's ECF notification system this 14th day of February 2018 to:

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_s/ Brendan M. McHugh___

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