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

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| **(1) CHRISTOPHER BARNETT,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 4:18-CV-00064-TCK-FHM** |
| | ) | |
| **(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.** | ) | |

## OBJECTION TO RULING BY MAGISTRATE

COMES NOW Defendant University of Tulsa [hereinafter "TU"], by and through its attorney of record, John David Lackey, and pursuant to F.R.C.P 72 and 28 U.S.C. §636, submits this *Objection to Ruling by Magistrate* regarding the Honorable Frank H. McCarthy's ruling (Doc. #28), denying TU's *Motion for Protective Order* (Doc. #14). In support thereof, TU would state:

### Procedural Background

1. This *Objection* is filed within 14 days of the *Order* denying TU's *Motion for Protective Order*, filed by the Court on February 26, 2018, requiring a *de novo* review and determination of those objections identified by TU (See, 28 U.S.C. §636(b));
2. TU objects to the Order by the Magistrate denying the *Motion for Protective Order* (Doc. #28);
3. TU hereby incorporates its *Motion for Protective Order* (Doc. #14) by reference.

4. TU hereby incorporates its *Reply to Plaintiff's Response to Motion for Protective Order* (Doc. #22) by reference.
5. TU hereby incorporates arguments and authority cited by TU in the *Transcript of Recorded Proceedings* (Doc. #33) by reference.

**Argument and Authority**

As stated in both the *Motion for Protective Order* and at the Hearing on said *Motion*, TU does not seek to restrain the speech of Plaintiff with regard to the litigation. TU does not seek to limit Plaintiff's ability to comment on the allegations or pleadings, Plaintiff's ability to comment on the operative facts, or even limit Plaintiff's ability to publish to the public via his billboard, direct mailings, social media, or his website. Rather, TU merely seeks an Order that this Court's rules on decorum and conduct are enforceable both as to counsel for the parties and the parties themselves while the litigation is ongoing.

While TU does not believe that enforcement of conduct during litigation is a prior restraint in the context described by the courts in cases cited by Plaintiff in his *Response* (Doc. #18), the magistrate judge found TU's *Motion* a request for prior restraint and evaluated the *Motion* under that standard. Using a prior restraint analysis, the Magistrate denied TU's *Motion*, stating: "But the court was unable to find any Supreme Court authority that would permit the type of prior restraint that the motion of TU is asking for in this case. Therefore, TU's motion for protective order, our docket number 14, is going to be denied." (Doc. #33, P. 27, lines 8-12).

TU submits the Magistrate's ruling on the Motion for Protective Order was error for several reasons, each of which will be addressed in more detail, *infra*. First, even under a prior restraint analysis, the Magistrate was provided at the Hearing with several U.S. Supreme Court decisions

that provide a legal basis for the Order sought in TU's Motion. To the extent the Magistrate's ruling suggests the Court requires factually identical Supreme Court precedent before issuing relief, then such a decision is not legally supported, especially when there is no factually similar authority where relief was denied. Second, both Plaintiff and the Magistrate agree that *at some point*, the Court could properly restrain Plaintiff's speech even when made out of court. Apparently, the Magistrate found that while outrageous, Plaintiff's conduct was not yet actionable because it was not close enough to trial. The Court's authority to control the conduct of the parties do not only attach within an arbitrary timeframe close to trial.

<u>The Test for Prior Restraint</u>

The 10th Circuit has not recently articulated the test district courts should use when making determinations of prior restraint in the judicial context, but in *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969), the court ruled that a "reasonable likelihood" of prejudice test was appropriate when determining prior judicial restraint of speech. *Id*. at 666. *Tijerina* specifically addressed issues related to the right to a fair trial, and the 10th Circuit's *dicta* is illuminating, stating:

> The order against extrajudicial statements was designed to maintain the atmosphere essential to the preservation of a fair trial, "the most fundamental of all freedoms." Both the defendants and the public have the right to expect that justice will be done. The defendants have the protection of the order and the responsibility to obey it. Their rights under the First Amendment were not infringed. *Id*. at 667.

Absent Court relief, TU has been and will continue to be prejudiced by Plaintiff's harassment and threatening conduct, impacting its right to a fair trial. As will be discussed further, *infra*, both Plaintiff and the Magistrate concede that the Court may restrain speech that impacts a fair trial, but apparently believe such prejudice must be closer to the actual trial date, not throughout the course of litigation when it first arises, to be actionable.

The United States Supreme Court has, not surprisingly, looked at multiple first amendment prior restraint cases. Those cases hold that the Court does have authority, when crafted narrowly and properly, to restrain prior speech when it impacts a fair trial. The responsibility of a trial judge to exercise the control necessary to assure a fair trial is emphasized by the decision in *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966) (Control of the sources of prejudicial news items is "concededly within the court's power" and that the court "might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters."). *See also, Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (Prior restraints must be narrowly tailored to be the least restrictive means for achieving a significant government interest); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) ("[Prior restraints] must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (In evaluating the constitutionality of prior restraints, courts "must ask … whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (To withstand constitutional scrutiny, the circuit court's restrictive order must fit within one of the narrowly defined exceptions to the prohibition against prior restraints); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (the inherent power of the court by necessity reaches beyond the court's confines). Both Plaintiff and Defendants have a right to a fair trial, and Plaintiff's conduct threatens that right. A narrow and carefully crafted Order, as sought by TU in the *Motion for Protective Order,* does not infringe on Plaintiff's First Amendment rights.

Other circuit and district courts have analyzed similar situations and found that carefully crafted orders do not violate the 1st Amendment, where disclosure of information

concerning pending litigation by the parties or their counsel would present a clear and present danger or a reasonable likelihood of a serious and imminent threat to the litigants' right to a fair trial. *See, Hirschkop v. Snead,* 594 F.2d 356 (4th Cir. 1979), *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 251 (7th Cir. 1975); *CBS, Inc. v. Young*, 522 F.2d 234, 239 (6th Cir. 1975); *Chase v. Robson,* 435 F.2d 1059, 1061 (7th Cir. 1970); *Ruggieri v. Johns-Manville Products Corp.,* 503 F. Supp. 1036, 1040 (D.R.I. 1980); *United States v. Marcano Garcia*, 456 F. Supp. 1354, 1357-58 (D.P.R. 1978); *Derzack v. County of Allegheny*, 173 F.R.D. 400, 411 (W.D.PA 1996) (a federal court has the authority to, and must not avoid the responsibility for, monitoring the conduct of all litigants and attorneys who come before it.). The Fifth Circuit in *Marceaux v. Lafayette City-Parish Consol. Gov't*, 731 F.3d 488 (5th Cir. 2013) (a case cited heavily by Plaintiff in his *Response*), utilized a "substantial likelihood of prejudice" test, finding that narrowly tailored and specific restraints on speech were proper (but not wholesale striking of an entire website) stating:

> The district court faithfully and carefully addressed numerous precedents surrounding the use of "gag orders" and applied a careful and nuanced approach in much of the challenged order. When it came to the Website, however, the nuanced approach gave way to a more wholesale striking of its entire content—indeed, the very website itself. For the reasons set forth below, we conclude that this wholesale striking cannot stand in its current form. (*Id*. at 492-493).

Further, the court held that "Considerable discretion is vested in district courts in ensuring fair trials and avoiding a "circus atmosphere" or "chaos" that can be occasioned by unfettered aggression on the part of one or both sides in litigation." (*Id*. at 492).

As stated both in the *Motion*, the *Reply*, and at the Hearing, TU does not seek to proscribe Plaintiff's speech regarding this litigation, his comment on the pleadings and facts, or even proscribe the various forums in which he seeks to make those comments. TU does not seek an order preventing Plaintiff from speaking to the press. Rather, TU merely seeks to remedy the prejudice that has occurred because of Plaintiff's unacceptable vitriol toward officers of this Court

and individual employees of TU that prevent TU from fairly defending itself in this litigation. The *Motion for Protective Order* should be granted.

Prejudice to TU

TU did not send a representative to the Hearing with the Magistrate and has not had additional counsel enter the litigation due to fear and concern for the harassment any employee or attorney would be subjected to by Plaintiff (Doc. #33, Pg. 15, line 7 through Pg. 16, line 4). These decisions expend additional resources and deny TU the representation they have a right to expect. TU's fear is not without basis, as Plaintiff has posted abhorrent statements, including home addresses and photos, of multiple TU employees throughout his other pending litigations. Further, Plaintiff posted harassing and threatening statements, again including home addresses and photos, about counsel for TU (and counsel's family) as well as counsel for other defendants after merely entering appearances in the instant litigation.

Plaintiff does not dispute that these actions are prejudicial. Rather, Plaintiff suggests a *Sophie's Choice*: TU must choose whether to defend itself normally – and subject its employees and other attorneys to harassment, or, choose not to defend itself normally and therefore avoid defaming and harassing conduct (Doc. #33, Pg. 19, lines 10-15). Respectfully, this position is without legal support. This Court absolutely has the authority to ensure that both parties can properly prosecute and defend this litigation. Plaintiff's conduct prejudices TU's ability to defend itself, and the Court should grant the *Motion for Protective Order*.

Timing of Court Protection

Both Plaintiff and the Court agree that at some point, the Court may restrain Plaintiff's speech, even if made out of court (Doc. #33, Pg. 19, lines 5-10, and Pg. 22, line 19 through Pg. 25, line 5). Without citing any legal authority, Plaintiff suggested, and the Magistrate apparently agreed, that the Court could only act to restrain Plaintiff's out of court statements closer to a trial date *and* that the only actionable prejudice would be to seating an impartial jury. Respectfully, this suggestion is without legal support. TU does not dispute that any prior restraint of speech must be narrowly crafted and limited to prevent prejudice, but no case holds that the court's authority only extends to some arbitrary time period temporal to a trial date or that the only prejudice to a litigant may be the ability to seat an impartial jury. The Court's authority to act exists when the prejudice occurs, not only two weeks before trial. The Magistrate's ruling was error, and this Court should grant the *Motion for Protective Order*.

## **Conclusion**

As a *de novo* review, this Court must determine two things. First, whether Plaintiff's conduct creates a substantial likelihood of prejudice to TU, and second, whether the relief requested is narrow in focus and scope in addressing the prejudice. Based on the law and evidence, this Court should determine both issues in favor of TU. Certainly, the Court may determine different remedies are appropriate, both more or less restrictive, but it is without question that this Court is vested with authority to control the conduct of the parties to ensure both sides can litigate fairly. The *Motion for Protective Order* should be granted.

WHEREFORE, premises considered, Defendant the University of Tulsa prays that the Court grant the *Motion for Protective Order* (Doc. #14); and for such other and further relief as is just and equitable.

/s/ John David Lackey
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 9th day of March, 2018, a true and correct copy of the above and foregoing document was transmitted *Electronically via Court ECF System* to the following attorney(s) of record:

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