VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

Dietz Development LLC, and Christopher Dietz	)	
Plaintiffs,	)	**Case No. CL 2012-16249**
v.	)	
Jane Perez	)	
Defendant	)	

PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION

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On January 31, 2014, the jury returned a verdict in favor of Mr. Dietz and Dietz Development on their defamation claim against Ms. Perez. It is now within the Court's sound discretion to fashion an appropriate equitable remedy. Plaintiffs move for a permanent injunction to prevent Ms. Perez from repeating these defamatory statements. Absent an injunction, Plaintiffs will suffer continuing harm to their professional reputation every time someone uses an online search engine online to research them or otherwise views the posts. Because this particular speech has already been determined to be defamatory—and thus enjoys no First Amendment protection—a narrowly-tailored injunction will not offend the Constitution.

It bears noting at the outset that the Virginia Supreme Court did reverse the trial court's grant of a preliminary injunction in this case. It offered no detailed reasoning, stating only that "the Court also finds that the preliminary injunction was not justified and that the respondents have an adequate remedy at law." *Perez v. Dietz Dev., LLC*, No. 122157, 2012 WL 6761997 (Va. Dec. 28, 2012). The Supreme Court's opinion is not binding here. It addressed whether a *preliminary* injunction was appropriate before a final judicial determination of defamation, not whether a *permanent* injunction is appropriate after a final determination. Moreover, the evidence at trial (which was not before the Supreme Court) demonstrates that monetary damages are insufficient to protect Plaintiffs from irreparable harm for which there is no adequate remedy.

I. Standard for Permanent Injunction

The Virginia Constitution provides, in part, "that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right . . ." Va. Const. Article I, § 12. "That provision recognizes the balance to be struck between the right of free expression enjoyed by the individual and the press on the one hand and the right of defamed

individuals to hold the speakers 'responsible' for damage to reputation on the other." *Gazette, Inc. v. Harris*, 229 Va. 1, 15 (1985).

Ms. Perez defamed Plaintiffs. The Court now has the discretion to fashion appropriate equitable relief to hold Ms. Perez "responsible for [her] abuse" of her free speech right. Specifically, the Court has jurisdiction to award injunctive relief. Va. Code Ann. § 8.01-620 ("Every circuit court shall have jurisdiction to award injunctions"); *Nishanian v. Sirohi*, 243 Va. 337, 340 (1992) ("The decision whether to grant injunctive relief is a matter submitted to the chancellor's discretion and will not be disturbed on appeal unless it is plainly wrong.").

"To secure an injunction, a party must show irreparable harm and the lack of an adequate remedy at law." *Black & White Cars, Inc. v. Groome Transp., Inc.*, 247 Va. 426, 431 (1994). One noted commentator has elaborated on the standard, explaining that a party "must show that [1] there is a legally recognized right that the person against whom the injunction will run is infringing, or is about to infringe, [2] that there is no adequate remedy at law for this action, [3] that the injunction would be an effective and enforceable means of redressing the problem, and [4] that the balance of hardships favors the party seeking the injunction." Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 3.3 (3d ed. 2001) (quoted in *Clark v. Bay Point Condo. Ass'n, Inc.*, No. 02-2138, 2003 WL 23095986 (Va. Cir. Ct. Jan. 13, 2003)).

II. Plaintiffs Satisfy the Permanent Injunction Standard

A. Defendant Infringed on Plaintiffs' Rights

The jury in this case returned a verdict in favor of Mr. Dietz and Dietz Development on their defamation claim. It necessarily concluded, then, that Ms. Perez violated Plaintiffs' right to be free from the publication of defamatory statements about them.[1]

[1] Although Ms. Perez appears for now to have removed the defamatory posts from Angie's List and Yelp, Plaintiffs have no way of knowing if she will re-publish those posts. Throughout the lawsuit, Ms. Perez maintained her posts

B. There Is No Adequate Remedy At Law

There is no legal remedy that can adequately protect Plaintiffs from all of the harm presented by these defamatory posts if they remain online. As an initial matter, the jury awarded zero damages on the defamation claim, despite the Court's conclusion that Plaintiffs were entitled to presumed damages based on Ms. Perez's *per se* defamatory statements and despite Plaintiffs' proof of harm to reputation, humiliation and embarrassment, and injury to business at trial. While we cannot attribute any particular reasoning to the jury's verdict, we do know that Plaintiffs have essentially been denied any legal remedy for the proven harms against them.

But, more important, money damages alone will not remedy the continuing harm to Plaintiffs' reputation or the humiliation and embarrassment caused by the posts. The defamatory statements are publicly available on the internet, accessible to anyone, anywhere, anytime. Every potential customer can read that Plaintiffs are thieves and trespassers.

It was impossible for Plaintiffs to quantify for the jury the number of potential customers who viewed the posts and declined to hire Plaintiffs because of them. In fact, online defamation such as this "mak[es] the ultimate calculation of damages difficult, if not impossible." *N. Am. Recycling v. Texamet Recycling, Inc.*, 2010 WL 4806733, *3 (S.D. Ohio Nov. 17, 2010).

As one court has explained, accepting the argument that "the only remedy for defamation is an action for damages would mean that a defendant harmed by a continuing pattern of defamation would be required to bring a succession of lawsuits if an award of damages was insufficient to deter the defendant from continuing the tortuous behavior." *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1158 (Cal. 2007). Should Ms. Perez repeat her defamatory

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on the two websites, allowing anyone to view them. There is, therefore, a very serious chance that she will once again post the same statements online, thus infringing on Mr. Dietz's protected rights.

statements online, Plaintiffs are left with an impossible choice: permit their professional reputation to be destroyed online or incur legal fees to bring repeated claims for money damages.

Other courts have concluded that defamation that harms a business's reputation counsels in favor of an injunction. *Int'l Profit Assocs. V. Paisola*, 461 F. Supp. 2d 672, 679 (N.D. Ill. 2006) (permitting injunction for false statements on website about company because false statements "will cause it irreparable harm and against which it has no adequate remedy at law"). In *Barlow v. Sipes*, 744 N.E.2d 1, 8 (Ind. Ct. App. 2001), the court rejected the argument that "because damages are recoverable in defamation suits, equitable relief is foreclosed." It explained that a "business flourishes or folds on its reputation in a community." *Id.* In *Barlow*, the court granted an injunction, explaining that the plaintiff "has cultivated a very good reputation" but that the defamatory statements "have somewhat eroded this good name." *Id.* at 9.

As in *Barlow*, Mr. Dietz presented evidence that his good reputation had been "somewhat eroded" by Ms. Perez's statements. According to Mr. Dietz, his reputation is extremely important to the business because "I am the company. And as such my reputation is in essence the company's reputation." Trial Tr. At 16:3-7. The reviews had "dramatically" affected his business because "in today's society, everyone is on-line. They research their dentist on-line, their doctor on-line, their contractor on-line." *Id.* 93:19-94:4. But a customer searching Dietz Development online would find that "the first thing you come up with is accusations of criminal behavior." *Id.* at 94:2-4. Mr. Dietz introduced the results of a Google search for his company's name, where the first result was Ms. Perez's defamatory posts. Exhibit B (trial exhibit 275). Mr. Dietz also explained how he has been "embarrassed . . . [h]umiliated, completed deflated" by the posts. Trial Tr. at 103:1-8.

Mr. Dietz also testified that his business depends on referrals to potential customers from others in his industry. *Id.* at 16:8-15. His "on-line presence" is "very important" to converting referrals into clients, because his "clients check [him] out on-line before they hire [him]." *Id.* at 16:23-17:17. Two of his referral sources testified, Rick Baur (of Reico Kitchen & Bath) and Chris O'Neil (of M&M Appliance). They explained how they had to explain to Mr. Dietz's potential customers that the posts were not true. *Id.* at 96:14-20 (testimony of Chris O'Neil that he told potential customers about the negative online reviews to be "forthcoming with all the information"); *id.* at 108:7-109:19 (testimony of Rick Bauer about having to "explain the situation" with the on-line reviews to one of Mr. Dietz's potential customers). Mr. Dietz authored a letter for Reico to provide to potential customers. *See* Exhibit C (trial exhibit 269). He did so "[a]ll in an effort to hopefully keep potential business." Trial Tr. at 97:9-21 (C. Dietz test.).

Moreover, the Court heard from a potential customer. Dyanne Branand testified that she would not have hired Mr. Dietz after reading Ms. Perez's "disturbing" reviews. Trial Tr. at 188:22-189:14.

If Ms. Perez's posts stay on-line, Mr. Dietz will must try to counteract them. His efforts may be largely futile since he cannot know which potential customer is looking at the reviews. As demonstrated by the trial testimony, the reviews harmed his reputation and business and will continue to do so in the future.

C. The Injunction Would be an Effective and Enforceable Means To Redress the Harm

A permanent injunction will effectively redress the reputational harm here because it will prevent Ms. Perez from repeating the online statements about Mr. Dietz and his company. As

explained above, Mr. Dietz has lost business because of these posts and his reputation has been damaged.

Preventing Ms. Perez from repeating her defamatory statements online will effectively redress the harm to Mr. Dietz and his company since once she removes the posts, potential customers will not be able to view it. Such an injunction is also enforceable as Mr. Dietz can monitor his online presence and determine whether there have been any violations of the injunction. If so, he can raise those violations with the court for redress.

D. The Balance of Hardships Favors Mr. Dietz and His Company

The final step is whether the "balance of hardships" in granting the injunction favors Plaintiffs or Defendant. There is no hardship on Defendant to grant this injunction. She has apparently temporarily taken down the posts and thus need not take ***any*** action (or incur ***any*** hardship) to comply. Her only "hardship" is not to repeat her defamatory statements. She cannot claim that she suffers a hardship in losing her right to free speech; as explained below, her defamatory statements enjoy no First Amendment protection.

On the other hand, should the posts remain online, Mr. Dietz must shoulder a considerable burden to counteract the accusations, particularly those accusing him of crimes. For example, as shown by the trial evidence, he may need to provide a written statement to prospective customers explaining the posts (*e.g.*, Exhibit C), or ask his referral sources to advocate for him with potential customers. Even with those efforts, there is no guarantee that the potential customers will risk hiring him, particularly if their first online search reveals accusations of crimes. *See e.g.*, Exhibit B. On balance, granting an injunction imposes lesser burden on Ms. Perez than would the denial of an injunction to Mr. Dietz.

III. The First Amendment Does Not Preclude an Injunction Where, as Here, the Statements Have Been Adjudged to be Defamatory

Defendant will no doubt contend that any injunction as to these statements against Ms. Perez is an unconstitutional prior restraint, likely relying on the oft-repeated maxim that "equity will not enjoin a libel." But this argument misses the point. ***First***, Ms. Perez's speech has already been judicially determined to be defamatory and thus is not entitled to any constitutional protection. ***Second***, the Supreme Court has noted that once there has been a judicial determination that speech is not protected, injunctions are an appropriate remedy. ***Third***, although it appears to be an issue of first impression in Virginia, numerous other jurisdictions have enforced injunctions where, as here, the statements have been adjudicated to be defamatory.

Neither the Virginia nor the United States Supreme Court has ever addressed the precise question here—whether an injunction prohibiting the repetition of statements found to be defamatory at trial violates the First Amendment. But both courts' decisions support the conclusion that such an injunction would not constitute an impermissible prior restraint.

In *Near v. Minnesota*, 283 U.S. 697, 716 (1931), the Supreme Court cautioned against imposing prior restraints on speech. Yet the Court also recognized in *Near* that 'the protection even as to previous restraint is not absolutely unlimited." *Id.* In fact, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 437 (1957), the Court upheld a state law that authorized an injunction against "the sale and distribution of written and printed matter found after due trial to be obscene." Critical here, the *Kingsley Books* Court cautioned that a party cannot simply proclaim that a government action is a "prior restraint" and expect to prevail: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Id.* The Court was careful to note that the only booklets that could not be displayed were those that had been "adjudged to be obscene." *Id.* at 444.

Other cases followed this precedent. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973), the Court upheld a Georgia statute authorizing an injunction prohibiting the exhibition of obscene materials because the statute "imposed no restraint on the exhibition of the films involved in this case until after a ***full adversary proceeding and a final judicial determination*** by the Georgia Supreme Court that the materials were constitutionally unprotected." (emphasis added). Likewise, in *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (1973), the Court explained that an order prohibiting a newspaper from publishing "help wanted" advertisements in gender-designated columns was not a prohibited prior restraint on expression. "The special vice of a prior restraint is that communication will be suppressed . . . ***before an adequate determination*** that it is unprotected by the First Amendment." (emphasis added).

Defamatory speech is not protected by the First Amendment. "From 1791 to the present," the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *R.A.V. v. St. Paul*, 505 U.S. 377, 382–383 (1992). One of these categories, of course, is defamation. *Beauharnais v. Illinois*, 343 U.S. 250, 267 (1952) ("[l]ibelous utterances [are not] within the area of constitutionally protected speech."). These are "well-defined and narrowly limited classes of speech, the ***prevention and punishment*** of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942) (emphasis added); *see also Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."). The "prevention and punishment" of defamation, then, does not present a constitutional problem particularly where there has been a full trial on the merits.

Virginia case law is no different. "Our constitutional guarantees of free speech, as we have seen, protect expressions of opinion from action for defamation. Those constitutional guarantees have never been construed, however, to protect either criminal . . . or tortious conduct." *Chaves v. Johnson*, 230 Va. 112, 121–22 (1985); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 62 Va. App. 678, 691-92 (2014) ("This is because defamatory speech is not entitled to constitutional protection.") (online defamation case).

Having shown that Ms. Perez's defamatory statements enjoy no First Amendment protection, then, the imposition of an injunction against them is plainly permissible. Many cases from other jurisdictions have drawn a distinction between pre- and post-trial motions for injunctions. Where a statement has been judicially determined to be defamatory, court have regularly permitted an injunction against their repetition in the future. *See, e.g.*, *Balboa Island Village*, 40 Cal. 4th at 1148 ("an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment"); *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302 (Ky. 2010) ("Under the modern rule, once a judge or jury has made a final determination that the speech at issue is defamatory, the speech determined to be false may be enjoined.").[2]

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[2] Other cases have reached the same conclusion to order injunctions in defamation cases.

Federal courts: *Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990) (granting injunction for statements "which have been found in this and prior proceedings to be false and libelous"); *Barlow*, 744 N.E.2d 1 (Ind. Ct. App. 2001); *North American Recycling LLC v. Texamet Recycling, Inc.*, 2010 WL 4806733 (S.D. Ohio Nov. 17, 2010) (granting injunction in internet defamation case); *Am. Univ. of Antigua College of Medicine v. Woodward*, 837 F. Supp. 2d 686, 701-02 (E.D. Mich. 2011) (granting limited injunction in defamation case on seven statements adjudged to be defamatory); *Saadi v. Maroun*, 2009 WL 3617788 (M.D. Fla. 2009) (granting injunction in online defamation case as to statements found to be defamatory); *Eppley v. Iacovelli*, 2009 WL 1035265, *4 (S.D. Ind. 2009) (granting preliminary injuction in defamation case where defendant engaged in "campaign" against plaintiff).

State courts: *Advanced Training Systems, Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984) ("the injunction below, limited as it is to material found either libelous or disparaging after a full jury trial, is not unconstitutional and may stand"); *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245

The First Amendment does not protect defamatory speech. Ms. Perez cannot hide behind its protections to contend that she should be permitted to repeat the defamatory statements here.

IV. Plaintiffs Request A Narrowly-Tailored Injunction

The jury did not decide on a statement-by-statement basis which of Ms. Perez's statements are defamatory. Given space constraints in this brief, an analysis as to why each of these statements is defamatory is not possible. However, counsel has created a chart, attached as Exhibit A, that includes all of the defamatory statements, and will be prepared to discuss them during the motions hearing.[3] Of course, the Court heard all of the evidence as well, and was able to judge the credibility of the witnesses.

Plaintiffs do not request that Ms. Perez be enjoined from ever making any statement about Plaintiffs. To the contrary, Plaintiffs request only that Ms. Perez be permanently enjoined from making the same, or substantially similar, statements as those that are determined by the Court to be defamatory.

Plaintiffs request that any order entered by the Court require that Ms. Perez cease and desist in perpetuity from making or publishing the statements that are determined by the Court to be defamatory. Should Ms. Perez discover facts that would make these defamatory statements "true" and not defamatory, she can move to modify the injunction to allow her to make the statements in the future.

(1975) ("Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper."); *Retail Credit Company v. Russell*, 234 Ga. 765 (1975) (granting injunction and explaining that "[t]he jury verdict necessarily found the statements of Retail Credit to have been false and defamatory, and the evidence authorized a conclusion that the libel had been repetitive.").

[3] As the Court instructed the jury, Plaintiffs bore the burden at trial to prove that (1) Ms. Perez made the statements, (2) they were about the Plaintiffs, (3) they were seen by someone other than Plaintiffs, (4) they were false, and (5) Ms. Perez made the statements either knowing them to be false or acting negligently in failing to ascertain the facts upon which they were based. The first three elements were not in dispute at trial.

Respectfully Submitted,

By: _____

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