VIRGINIA:

IN THE FAIRFAX COUNTY CIRCUIT COURT

DIETZ DEVELOPMENT, LLC, and CHRISTOPHER DIETZ Plaintiffs-counterclaim defendants, v. JANE PEREZ, Defendant-counterclaimant.	)	Case No. CL 2012-16249

DEFENDANT'S OPPOSITION TO MOTION FOR A PERMANENT INJUNCTION

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Defendant-counterclaimant Jane Perez ("Perez") respectfully submits this memorandum in opposition to the motion by plaintiffs Dietz Development, LLC and Christopher Dietz (collectively "Dietz") for a permanent injunction.

INTRODUCTION

The jury's verdict in this case concluded that each side defamed the other, but that neither side suffered any damage as a result. The jury also may have concluded that the dispute between these parties belonged on Yelp and Angies' List, where each party was free to fully rebut any statements made by the other and otherwise defend itself, and that their dispute did not belong in a court, where it imposed on the time of the jury and judges. Perez is ready to accept the jury's verdict, both in its narrower sense and in its broader implications, representing the judgment of her peers about whether this case merits **any** judicial remedies for either side. She is ready to bring this litigation to an end, and to move on with the rest of her life. Consequently, she took down both of her critical posts about Dietz. Regrettably, having been exposed to and basked in the media attention that accompanied this litigation, Dietz is not ready to move on. He now has filed a lengthy brief seeking a permanent injunction – – despite the fact that the jury's verdict conclusively establishes that Dietz has not suffered any injury, much less irreparable injury, and despite the fact that Dietz now seeks to enjoin posts which no longer exist.

As further explained below, the permanent injunction motion is quite unsound for three separate reasons. First, an injunction is barred by the established Virginia rue that equity will not enjoin a libel. Second, an injunction is barred by the Virginia Supreme Court's ruling in this very case. Third, Dietz' motion is especially puzzling as he now seeks to enjoin alleged online posts which no longer exist.

I. EVEN PRIOR TO THIS CASE, IN VIRGINIA EQUITY COULD NOT ENJOIN A LIBEL.

"An injunction is an extraordinary remedy." Unit Owners Ass'n. of BuildAmerica-1 v. Gillman, 223 Va. 752, 770, 292 S.E.2d 378, 387 (1982). "To secure an injunction, a party must show irreparable harm and the lack of an adequate remedy at law." Black & White Cars v. Groome

Transp., Inc., 247 Va. 426, 431, 442 S.E.2d 391, 395 (1994). Even in routine civil cases:

> It is a well-established principle that a court has no jurisdiction to grant relief by injunction where there is a full and adequate legal remedy.

Vol. 10-A, Michie's Jurisprudence of Va. and W.Va., Injunctions § 4, p. 13 (2011 repl. vol.). This principle applies with added force when a litigant seeks an injunction barring the constitutionally protected right of free speech.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976). A court order prohibiting publication constitutes such a prior restraint. "Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities — are classic examples of prior restraints." Alexander v. United States, 509 U.S. 544, 550 (1993). Injunctions barring speech threaten fundamental rights more than statutes with an equivalent effect, because they "carry greater risks of censorship and discriminatory application than do general ordinances." Madsen v. Women's Health Center, 512 U.S. 753, 764-65 (1994).

Given the seriousness of a prior restraint, a preliminary injunction prohibiting speech is justified only when publication would "threaten an interest more fundamental than the First Amendment itself." Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 226-27 (6th Cir. 1996). Only a "grave threat to a critical government interest or to a constitutional right" can justify restraint of publication, and even then only when the threat "cannot be militated by less intrusive measures." Id. at 225; see Nebraska Press Ass'n., 427 U.S. 539 (rejecting prior restraint issued to protect criminal defendant's Sixth Amendment right to a fair trial); New York Times Co. v. United States, 403 U.S. 713 (1971) (declining to enjoin newspapers from publication despite government claim that publication could threaten national security). A businessman's reputation does not rise to that level of importance. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Although Organization for a Better Austin arose from the grant of a preliminary injunction, the Supreme Court's sweeping language condemning injunctions in defamation cases is not so limited:

"No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. " Id. at 419-420. These controlling United States Supreme Court decisions bar the issuance of an injunction in this case.

Further, there is a separate and independent source of state law which bars the injunction Dietz seeks. In D'Ambrosio v. D'Ambrosio, 45 Va. App. 323, 340, 610 S.E.2d 876 (Va. App. 2005), the Court of Appeals avoided the First Amendment prior restraint issue by invoking the common law rule that "equity will not enjoin a libel." There, accusatory words by one spouse against another in the course of a bitter custody battle led to the issuance of a permanent injunction (the trial court's "injunction [was] was virtually unlimited in both breadth and duration," 610 S.E.2d at 885). The enjoined spouse appealed on First Amendment grounds as well as Virginia law. The Court of Appeals found it unnecessary to consider the appellant's First Amendment arguments about prior restraint because it reversed the injunction on state-law grounds. First, it concluded that the injunction should be reversed because the trial court made no finding of irreparable harm. It quoted Bradlees Tidewater, Inc. v. Walnut Hill Inv., Inc., 239 Va. 468, 471-72, 391 S.E.2d 304, 306 (1990) for the proposition that "proof of irreparable damage is absolutely essential to the award of injunctive relief." 610 S.E.2d at 885. Second, the Court concluded that the injunction should be reversed because the party obtaining the injunction had an adequate remedy at law. It stated that an adequate remedy at law was available because the party allegedly defamed "would be able to bring a common law action for defamation." Id.

In this regard, D'Ambrosio aligns Virginia with the many jurisdictions where "equity will not enjoin a libel," Willing v. Mazzocone, 482 Pa. 377, 381-382, 393 A.2d 1155, 1157-1168 (1978), because post-publication damages are an adequate remedy at law.[1] As the Louisiana Supreme

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[1] Ramos v. Madison Square Garden Corp., 257 A.D.2d 492, 684 N.Y.S.2d 212, 213 (N.Y. App. Div. 1999); Hopkins v. Hopkins, 591 S.W.2d 716, 718 (Mo. App. E.D. 1979) Greenberg v. De Salvo, 254 La. 1019, 229 So.2d 83, 86 (La. 1969); Moore v. City Dry Cleaners & Laundry, 41 So. 2d 865, 873 (Fla. 1949); Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Employees, 400 Ill. 38, 51, 79 N.E.2d 46, 53 (1948); Ryan v. City of Warrensburg, (fn. continued)

Court explained:

> another libel and slander suit could ensue . . . if there is no injunction and [plaintiff] reiterates her prior statements. If successful, plaintiff would again receive damages. Plaintiff would have to bear his burden of proof, . . . and defendant would have to bear her burden of proving such defenses as she might aver. Under such circumstances, the proof might change from that herein offered.

Greenberg v. De Salvo, 254 La. 1019, 1030-31, 229 So.2d 83, 87-88 (La. 1969).

The Court of Appeals' decision in D'Ambrosio demonstrates that an injunction is unwarranted under Virginia law for two separate reasons. First, Dietz cannot show that he would suffer any irreparable injury. If the jury returned a verdict awarding Dietz damages for defamation, that award would have repaired any injury resulting from the alleged defamation. But the jury's award of no damages to Dietz conclusively establishes that he suffered no injury at all, much less irreparable injury, because of the alleged libel. Second, this Court gave Dietz a fully adequate remedy at law. It allowed him to seek damages for defamation. Having failed to establish any damages, Dietz cannot now obtain the extraordinary remedy of an injunction.

Dietz makes the quite incorrect argument (mem. at 6) that he "lost business" because of Perez' posts. As an initial matter, the undisputable evidence at trial showed that Dietz gained business, instead of losing it, after Perez' posts. Specifically Dietz' tax returns, which he sought to exclude from evidence, show that in 2010 Dietz gross receipts were $47,520 (Ex. 144, Sch. C, line 1), and in 2011 they were $85,000 (Ex. 145, Sch. C, line 1). For all of 2012, after Perez' January 2012 postings, Dietz revenues jumped to $110,500 (Ex. 146, Sch. C, line 1), and Dietz testified that his 2013 gross revenues were at least as high as those for 2012. And although Dietz testified that he lost literally hundreds of jobs because of Perez' postings, Dietz produced not a single contract or proposal from any of his company' files to support that alleged claim. Diane Brannand, whose testimony should have been excluded as conjectural and hypothetical, did not testify that she failed to contract with Dietz because of anything Perez said. Instead, she admitted that she did not contract

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342 Mo. 761, 771, 772, 117 S.W.2d 303, 308 (Mo. 1938). See also Hajek v. Bill Mowbray Motors, 647 S.W.2d 253, 255 (Tex. 1983) (Texas constitution); Nyer v. Munoz-Mendoza, 385 Mass. 184, 430 N.E.2d 1214, 1217 (Mass. 1982) (prior restraint).

with Dietz because he could not meet her insurance company's software requirements. Tr., 1/28/2014, pp. 187-88. She also testified that she had no idea whether the online reviews critical of Dietz she saw were posted by Perez, or instead by others wholly independent of Perez, and that she had no idea whether the work Dietz did at Perez' house was good or bad. Id., pp. 188, 193

In any case, the jury's verdict is far more important than the evidence going to Dietz' alleged loss of business claim. The jury was charged with assessing all of the evidence, and it concluded that Perez' postings caused Dietz no damage. Once the jury rendered a verdict on his defamation claim, that verdict necessarily would bar any injunction of Perez's postings. If the jury had awarded Dietz damages for defamation, an injunction would be barred because the injury suffered was repaired by the monetary award. And if, as was the case here, the verdict was that Dietz suffered no damages, that establishes that there was no injury to repair. The jury's verdict that Dietz suffered no damage conclusively establishes that Perez' statements did not cause Dietz any injury at all, much less irreparable injury.

In his memorandum (at pp. 3 - 4) Dietz cites cases from various other jurisdictions on the issue of injunctive relief. To the extent any of these decisions stand for principles which are inconsistent with Virginia law, they are inapplicable. But Dietz does not even cite, much less address the Virginia decision in D'Ambrosio, which is squarely against him.

II. THE SUPREME COURT'S PRIOR RULING IN THIS CASE STRENGTHENS THE CONCLUSION THAT NO INJUNCTION AGAINST SPEECH SHOULD ISSUE.

Early in this case, Dietz sought a preliminary injunction barring Perez from continuing to post online many of her statements about Dietz. After a full evidentiary hearing, this Court (the Honorable Thomas Fortkort) refused to enjoin Perez from continuing to post many of her criticisms of Dietz, but did enjoin her from posting two specific criticisms. On December 26, 2012 counsel for Perez filed an appeal, and a motion with the Virginia Supreme Court to vacate Judge Fortkort's injunction. Two days later, on December 28, 2012, and before receiving any filings or opposition from Dietz, the Virginia Supreme Court entered an order summarily reversing this Court on the

ground, inter alia, "that the preliminary injunction was not justified and that [Dietz] has an adequate remedy at law." A copy of the Supreme Court's order is attached as Exhibit A.

The Supreme Court's order makes explicit that the existence of an adequate remedy at law bars Dietz from obtaining injunctive relief. The fact that in this case the Supreme Court summarily reversed a preliminary injunction instead of a permanent one does not make its order any less controlling. As D'Ambrosio makes clear, a permanent injunction is an extraordinary remedy and cannot issue to enjoin a libel unless the moving party can show both irreparable injury and the lack of an adequate remedy at law. The Supreme Court's ruling also bars an injunction.

III. SINCE PEREZ HAS REMOVED HER ONLINE POSTS, THERE NOW IS NOTHING TO ENJOIN.

As explained in Perez's Second Declaration attached as Exhibit B, shortly after the trial Perez took down all of her prior Yelp and Angies' List postings at issue in this case. Though Dietz seems aware of this fact (mem. at 2, n. 1), he persists in seeking an injunction, and presents no evidence that Perez is likely to re-post her reviews. Perez' removal of her postings provides another separate reason no injunction should issue. There now is nothing to enjoin.

CONCLUSION

For these reasons, the motion for a permanent injunction should be denied.

Respectfully submitted,

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