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SHELBY RESORTS CORP. and LUKE BEGONJA, Plaintiffs, v. JOHN DOES 1-50; JANE DOES 1-50; and ABC CORPS. 1-50, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION OCEAN COUNTY DOCKET NO: C25-19 Civil Action

REPLY IN SUPPORT OF INTERVENTION AND UNSEALING

In its opening brief, Public Citizen justified its motion for leave to intervene and for unsealing of the entire record in this case by showing extensive case law holding that intervention

is the standard procedural prerequisite for seeking unsealing; that intervention is consistently granted as a matter of cost regardless of how the court rules on the motion for unsealing; and that New Jersey case law, as well as decisions in other jurisdictions, holds that there is a presumption in favor of public access to court records and that potential impact on the reputation of one of the parties to the proceeding is decidedly not a proper ground for unsealing. Public Citizen also argued that, because this Court's issuance of an ex parte preliminary injunction against publication of an allegedly defamatory web site runs contrary to longstanding precedent from Supreme Court of the United States, the public has a particular interest in understanding just what speech, aimed at informing consumers about an alleged fraud that could cost them money, was sufficiently harmful as to justify a prior restraint in this case.

Plaintiffs argue in opposition that intervention should be denied because the interests that Public Citizen seeks to protect have already been adequately represented before the Court; that because these plaintiffs' interest in avoiding harm to their reputations is the very reason for this litigation, that same potential harm to their reputations is sufficient reason to seal from public view the specific speech at issue in the litigation; that the Court has already decided that the speech is defamatory: and that the prior restraint precedents on which Public Citizen relied are inapposite because those cases involved leaflets, but this case involves a "static web site." However, as we now explain, none of these arguments justify denial of Public Citizen's motion.

A. Public Citizen Should Be Granted Leave to Intervene to Seek Unsealing.

Plaintiffs offer no sound reason why Public Citizen should be denied leave to intervene in this case. Although Argument Section A of plaintiffs' opposition brief ("Opp."), the argument about intervention (pages 7 to 10), addresses a number of points, in the end plaintiffs argue only two points

directly relevant to intervention: first, that Public Citizen's interests in this matter have already been adequately represented by the anonymous defendant, Opp. 2-3, 7, and second, that intervention is untimely because the motion was filed three weeks after Public Citizen learned of this case and only a few days before the April 1 hearing. Opp. 10.

Neither point is sound. There is no basis in the record for contending that Public Citizen's interest in seeking unsealing has been represented at all, not to speak of represented adequately. There is no evidence that the anonymous defendant has even been notified of the sealing issue in this case, and in any event the anonymous defendant has not appeared in the matter and has never presented any arguments on the issue of sealing. Indeed, although plaintiffs' brief (Opp. 8, 15) recites certain hearsay statements allegedly made by an attorney for GoDaddy in email to plaintiffs' counsel about what GoDaddy planned to do, about what plaintiffs could do to provide notice to the anonymous defendant, and about the forwarding of email to the anonymous defendant, no admissible evidence shows that any of this actually happened. Plaintiffs say that they have never been told that the anonymous defendant did not receive their email, Opp. 8, but at the same time there is no evidence that she did.[1] Moreover, even if there were a sound basis for believing that Doe **did** receive the notice, her non-participation does not constitute effective representation of Public Citizen's interests in unsealing.

Indeed, the interests of the Doe could well be at odds with the interest of Public Citizen, or of its thousands of members and supporters in New Jersey, in unsealing the court records, including Exhibit A. Public Citizen's interest is based in part on its work as a consumer advocacy organization

[1] Public Citizen does not know the gender of defendant Doe. This brief uses female-gender pronouns generically.

that reports on court proceedings and publishes news and analysis on such court proceedings, both on its web site, www.citizen.org, on such Public Citizen blogs as the Conumer Law and Policy blog (pubcit.typepad.com), in its newspaper, *Public Citizen News*, and in its social media accounts. It provides a First Amendment news-gathering function in this respect, comparable to that of newspapers and other media outlets that are frequently granted leave to intervene to further their interests in providing information and analysis to the public. By contrast, the Doe is potentially liable for damages from the publication or republication of Exhibit A. Consequently, just as plaintiff worries that public disclosure of Exhibit A might cost it more business, Opp. 16, at the same time Doe might be worried that she could be assessed damages based on further public disclosures. The interests of Public Citizen and its members in holding the judicial process accountable, and in ensuring that consumers are fully informed about plaintiffs' business practices, could be at variance with Doe's interests.

As for timeliness, plaintiffs have cited no cases supporting their argument, Opp. 10, that a delay of three weeks before the filing of a motion to intervene and to unseal makes intervention untimely. To the contrary, a host of decisions from New Jersey and elsewhere have allowed intervention that was much more delayed than that. The New Jersey cases include *Hammock by Hammock v. Hoffmann-LaRoche*, 662 A.2d 546, 550 (N.J. 1995) (sealing order entered May 1989, Public Citizen sought leave to intervene in April 1992); *Verni ex rel. Burstein v. Lanzaro*, 960 A.2d 405, 407 (N.J. Super. App. Div. 2008) (sealing order entered June 2007, Public Citizen sought leave to intervene in October 2007). Cases from elsewhere include *Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015) (sealing was apparently in 2012; intervention was sought a year later in 2013), and *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 779 (3d Cir. 1994) (sealing order entered and case

terminated based on a settlementin June 1992, intervention sought in October 1992). In *Pansy* the United States Court of Appeals for the Third Circuit noted "the growing consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated." *See also Public Citizen v. Liggett Group*, 858 F.2d 775, 786 (1st Cir. 1988) (where Public Citizen's delay in filing could be said to be three, four or eight weeks, intervention was timely; citing many cases involving delays measured in years, not weeks or months).

Moreover, although plaintiffs make much of the fact that Public Citizen/s motion came only a few days before the Court's April 1 hearing, Opp. 10, that date is irrelevant—that was the return date for the Court's decision on whether to extend the temporary restraining order and convert it into a preliminary injunction. No decision on unsealing was set for that date, and we would like to assume that plaintiffs did not make arguments about unsealing, knowing that a hearing was set on that issue in the future, in proposed intervenor's absence. The return date on unsealing is set to be held this month. Public Citizen's motion for leave to intervene is timely.

B. The Entire Record Should Be Unsealed.

Plaintiffs urge the Court to disregard the wealth of decisions, citing in Public Citizen's opening brief, holding that the danger to a defamation plaintiff's reputation is not a sufficient reason to seal records of the litigation, sniffing that most of them are not binding in New Jersey because the are only rulings of states and federal appellate and trial courts in other jurisdictions. Opp. 11. However, plaintiffs offer no reason to believe that appellate courts in New Jersey would hold otherwise, particularly in light of the facts that such decisions as *Hammock* and *Lederman v. Prudential Life Ins. Co. of Am.*, 897 A.2d 362, 369 (N.J. Super. App. Div. 2006), heavily relied on sealing discussions in other jurisdictions in formulating and applying New Jersey's standards.

Moreover, although plaintiffs seek to distinguish the Appellate Divison's unsealing decisions on their particular facts, Opp. 11-14, they ignore that Court's central reasoning in *Lederman,* which rejected damage to a **party's** reputation as a basis for sealing (damage to third parties' reputations gets different treatment), stating "No more embarrassment would be suffered by the parties here than would a wrongfully accused defendant in a criminal case, or a professional in a malpractice action where the charges were ultimately found to be without merit. If embarrassment were the yardstick, sealing court records would be the rule, not the exception." 385 N.J. Super at 320. Public Citizen's opening brief (at 8 to 9) quoted this language; plaintiffs' opposition ignores it. Indeed, plaintiffs' argument does not offer any basis for distinguishing its interest as a defamation plaintiff from the interests of any plaintiff who sues for defamation or other forts of injurious falsehood, for invasion of privacy, or other claims based on speech that plaintiffs claim is actionable or harmful. Indeed, plaintiffs never distinguish their interests in court secrecy from the interests of defendants who are sued based on allegations of fraud, deceptive trade practices, racial discrimination, sexual abuse, or the like, all of which might eventually be found wanting. On plaintiffs' theory, all of these cases would have to be litigated behind closed doors—as the Appellate Division warned in *Lederman*, "sealing court records would be the rule, not the exception." *Id.*

Nor do plaintiffs' explain how the specific sealing order that they seek would serve their purported interests. Plaintiffs say that they do not object to the unsealing of the body of their verified complaint, Opp. 3, 10, 17, even though paragraphs 19, 20 and 21 of the complaint recite, verbatim, four separate paragraphs from the web site, presumably part of what is redacted from Exhibit A, that castigate the plaintiffs in very strong terms. These are the **only** specific statements on Doe's web site that are expressly claimed to be false and defamatory. Presumably, these are among the seven

pages of web site printouts that are redacted from Exhibit A. Plaintiffs do not explain how unsealing those parts of Exhibit A is justified, or how the remainder of Exhibit A will cause any greater danger to their reputation than the parts that of the record they are willing to have unsealed.[2]

Plaintiffs rely heavily on the assertion that this Court has already determined that Exhibit A is defamatory per se, Opp. 6, 8, 9, 15, 17, contending that this ruling should control the weighing of plaintiffs' interest in secrecy. That argument overstates ths Court's ruling. To be sure, the complaint alleges falsity, and those allegations are verified; it is logical to assume that the Court accepted these averments as true for the purpose of adopting the restraining order and then the preliminary injunction. But Public Citizen does not share plaintiffs' confidence that the Court has determined that every single word and phrase in Exhibit A is false and defamatory, and even if it had, that decision was not made in an adversary proceeding, and it has never been addressed by a jury. To the contrary, the Court has received a verified complaint from one side in the case, and it has received no argument from the other side in this case. It has had no basis for deciding as a final and binding matter that anything in this web site is false. The Court has, at best, made only preliminary findings based on its predictions of plaintiffs' likelihood of success on the merits. Plaintiffs are wrong, therefore, in asking that the Court treat its ruling as having any finality with respect to the defamatory character of each and every phrase in Exhibit A, or the factual inaccuracy of those statements that are matter of claimed fact. For example, nothing in the Court's written orders in this case reflects application of the distinction between actionable statements of fact and

[2] It is possible that additional disclosure of assertions by Doe harmful to plaintiffs' reputation are contained in the letter brief that plaintiffs submitted in support of the temporary restraining order, Public Citizen cannot address that question because its counsel have not seen that letter brief. Only the verified complaint and written order of the Court have been sent to Public Citizen counsel; *see* Opposition at 5, and as noted about, the entire record remains sealed on the Court's docket.

constitutionally protected opinions, *see Dairy Stores v. Sentinel Pub. Co.*, 516 A.2d 220, 231 (N.J. 1986), and such angry epithets as "scammer" and "lowlife" would likely be deemed opinion rather than matters of fact on which a defamation claim may properly be based. *Ward v. Zelikovsky*, 643 A.2d 972, 978 (N.J. 1994).

Moreover, plaintiffs are wrong in their implicit argument that allowing Exhibit A to be unsealed will defeat their purpose in bringing this litigation. Assuming that plaintiffs (1) succeed in identifying defendant Doe, by justifying the discovery if need be under the principles of *Dendrite International v Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. Super. App. Div. 2001), (2) succeed in serving process on Doe, thus bringing her under the Court's authority; and then (3) succeed in persuading the Court (and a jury) to enter a final judgment that specific statements in the website are false and defamatory, any person who republishes Exhibit A would be on notice of the Court's determinations in that regard. At that point, republication of Exhibit A would expose such a person to the possibility of liability for defamation, unprotected by the fair report privilege, unless the Court's determinations of falsity were also reported.

Finally, plaintiffs are wrong to argue that the Supreme Court's prohibition against temporary injunctions against defamation, enunciated in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), applies only to leaflets and not to a "static web site" such as the one created by Doe. Opp. 9.[3] Plaintiffs offer no reasoning to support a distinction between dissemination of a leaflet found on a preliminary basis to be false and defamatory, and a web site determined on a preliminary

[3] Because the entire record is sealed, Public Citizen cannot say whether plaintiffs; letter brief in support of the restraining order was called to the Court's attention in the letter memorandum supporting the requested temporary injunction. After the TRO was entered, Public Citizen called plaintiffs' attention to *Organization for a Better Austin*, Levy Affidavit, Exhibit C. Plaintiffs did not file aby further brief calling the Court's attention to this controlling Supreme Court authority

basis to be false and defamatory. A piece of paper containing defamatory matter is, after all, by definition "static." Moreover, plaintiffs offer no basis for contesting the many lower court rulings, cited in Public Citizen's opening brief, at 7 to 8, that applied the principles of *Organization for a Better Austin* to web sites. Several other such cases are *Beter v. Murdoch*, 2018 WL 3323162, at *9 (S.D.N.Y. June 22, 2018) (copy attached)*; Fox v. Hamptons at Metrowest Condo. Assn.*, 223 So. 3d 453, 455-456, 457–58 (Fla. 5th Dist. App. 2017); *McCarthy v. Fuller*, 810 F.3d 456, 457-458, 460, 462–63 (7th Cir. 2015);*Doe v. Oesterblad*, 2013 WL 12085541, at *6 (C.D. Cal. May 9, 2013) (copy attached).[4] In short, plaintiffs have offered a distinction without a difference.

CONCLUSION

Public Citizen should be granted leave to intervene, and the docket should be unsealed in its entirety.

[4] Since Public Citizen's opening brief was filed, *TM. v MZ* , cited at page 8 of that brief, has been officially reported at 326 Mich. App. 227.

Respectfully submitted,

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