IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

JIM BUTLER CHEVROLET, INC.,	)	
	)	
Plaintiff,	)	
	)	Cause No. 14SL - CC00556
v.	)	
	)	Division No. 20
DWAYNE COONEY,	)	
	)	
Defendant.	)	

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND OPPOSITION TO PRELIMINARY INJUNCTION

Defendant Dwayne Cooney moves the Court to dissolve the temporary restraining order that has been entered against him, and at the same time urges the Court to deny the requested preliminary injunction, on the ground that both are strictly forbidden by the United States Constitution, the Missouri Constitution, and the common law of Missouri, for the following reasons:

1. Late last Friday afternoon, plaintiff Jim Butler Chevrolet ("Butler"), filed a complaint alleging that defendant Dwayne Cooney ("Cooney"), a former customer, had defamed it by posting a video on YouTube that showed some work being performed on his car. Plaintiff's claim is apparently that defendant represented that the video showed the entire body of work that had been done. The complaint alleged what plaintiff considered to be the gist of the defamation, but contrary to the requirement of Missouri law, it did not set forth the allegedly defamatory words verbatim. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 313 (Mo. banc 1993); *Tindall v. Holder*, 892 S.W.2d 314, 327 (Mo. App. S.D. 1994); *Neal v. Helbling*, 726 S.W.2d 483, 488 (Mo. App. E.D. 1987).

2. Plaintiff also moved the Court for a temporary restraining order ("TRO"). The motion was served on defendant after the close of business on Friday, too late for defendant to obtain an attorney for the hearing scheduled at 9 AM Monday morning. Because defendant was unable to find counsel, plaintiff was able to obtain a TRO from the Court by withholding significant legal authority that strictly forbade the relief sought.

3. "[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). 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).

4. Specifically, the Supreme Court of the United States has ruled that a preliminary injunction or temporary restraining order cannot be issued over claims of defamation. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). The Supreme Court said this:

"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. Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." *Id.* at 419-420.

5. Moreover, while there is some *dicta* in Missouri cases to the effect that a permanent injunction could be issued **after** a jury verdict determined that words were defamatory, (*see e.g. Flint v Hutchinson Smoke Burner Co.*, 19 S.W. 804 (Mo. 1894) *and cases following*,) Missouri has decided, as a matter of state law, that even injunction cannot be issued against the publication of defamatory words. *Ryan v. City of Warrensburg*, 342 Mo. 761, 771, 772, 117 S.W.2d 303, 308 (Mo. 1938); *Hopkins v. Hopkins*, 591 S.W.2d 716, 718 (Mo. App. E.D. 1979). The Missouri Supreme Court adopted this rule not just because the targets of defamation have an adequate remedy at law (that is, an award of damages), but also because Article 1, Section 8 of the Missouri Constitution forbids such relief: "...that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." Mo. Const. Art.1, §8.

6. And even in those jurisdictions where a permanent injunction may issue against the repetition of words found by a jury to be false, defamatory, and uttered with the requisite mens rea, such injunctions must be limited to the exact words found to have met those standards. *Balboa Island Village Inn v. Lemen*, 40 Cal.4th 1141, 1149-1154, 156 P.3d 339, 344-348 (Cal. 2007); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-1209 (6th Cir. 1990) (limiting a preliminary injunction to "statements which have been found in this and prior proceedings to be

false and libelous"). Butler has neither alleged nor proved that every word in the video is false; hence it is not entitled to an injunction barring the entire video. Nor is the general injunction against unspecified "false statements . . . relating to the subject matter underlying the Video" permissible under the First Amendment, the Missouri Constitution, or the law of Missouri.

7. After the Court issued its TRO, defendant immediately made the video "private" on YouTube, which had the effect of disabling all third-party access to the video. Plaintiff's counsel took the position that this action was not sufficient compliance with the injunction. Still unrepresented by counsel, and out of excess of caution, Cooney then deleted the entire page, which contained a number of comments by members of the public responding to the video. Cooney acknowledges that, to the extent that his video were held to be false and defamatory, he could potentially be liable for damages, but under federal law he cannot be held liable for what **other** people post to a YouTube page that he has created to display his video. 47 U.S.C. § 230; *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Nemet Chevrolet v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir.2009); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162–64 (9th Cir.2008) (en banc).

CONCLUSION

The motion for a preliminary injunction should be denied. The temporary restraining order should be dissolved immediately as it is violative of the First Amendment of the United States Constitution, and the Constitution of the State of Missouri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was hand-delivered on this 28th day of February, 2014 to: Dutro E. Campbell, II and Sandra Oh, Husch Blackwell, LLP, 190 Carondelet Plaza, Clayton, Missouri 63105, Attorneys for Plaintiff.

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