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: C-25-19 Civil Action

INTERVENOR PUBLIC CITIZEN'S BRIEF IN SUPPORT OF MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF SEEKING UNSEALING, AND TO UNSEAL JUDICIAL RECORDS

HARTMAN & WINNICKI, P.C.
Richard L. Ravin, Esq. (017731986)
74 Passaic Street
Ridgewood, NJ 07450
Phone: 201-967-8040
Fax: 201-857-4124
Rick@Ravin.com

Paul Alan Levy (DC Bar 946400)
(*pro hac vice* to be sought)
Patrick D. Llewellyn (1033296)
(*pro hac vice* not sought)
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7725
plevy@citizen.org

Attorneys for proposed Intervenor
Public Citizen Inc.

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PRELIMINARY STATEMENT

Public Citizen, a national consumer advocacy organization, moves the Court pursuant to Rule 4:33 to grant it leave to intervene for the limited purpose of moving to unseal the record in this case, especially the complaint, any transcripts of court hearings leading to the grant of injunctive relief, and Exhibit A to the complaint, which sets forth a printout of the web site that plaintiffs claim defames them. This motion also seeks unsealing, and is supported by the attached Memorandum.

Counsel for plaintiffs has indicated that they do not consent to this motion. Because the defendants are anonymous and no contact information for them is available. Proposed intervenor has been unable to contact them to seek their position on the motion.

ARGUMENT

When a company is criticized over its product or its sales practices and responds with a libel suit, consumers naturally have an interest in learning more about the dispute. Were the criticisms legitimate, or were they deliberately false? Are the criticisms matters of fact or do they represent only differences of opinion? If the criticisms were factual, is there evidence to support those criticisms, or were the criticisms purely the product of an overly active imagination (or, even worse, an exploit by a competitor to disable a rival in the marketplace)?

In this case, Shelby Resorts Corporation, a South Carolina company that markets vacation opportunities in timeshares, and its owner Luke Begonja, who lives in New Jersey, filed suit against Doe defendants who operated a web page, located at the Internet address shelbyresortscam.com, contending that the company does not own sufficient timeshare credits to enable consumers to rely on the company as a reliable seller of vacation rentals. The verified complaint alleged both defamation and trademark claims (the latter, on the theory that the use of the company's logo on the web page could infringe by creating confusion in the minds of consumers about whether a criticism site whose name included the word "scam" in its title was owned or sponsored by the trademark holder). Along with the complaint plaintiff requested a temporary injunction, sought ex parte; the papers were labeled "provisionally sealed." The clerk's office is maintaining the entire casefile under seal.

Paragraphs 19, 20 and 21 of the complaint contain blocked quotations from the web site at issue and allege, in fairly conclusory fashion, that they are "false, misleading and defamatory." The Court issued the requested temporary restraining order, which, among other things, ordered that the web site, as well as any "identical or substantially similar defamatory content" be taken

off line and called for Google to delete the web site from its search engine's database. The court's order postponed until the next hearing the issue of whether to authorize the issuance of discovery seeking to identify the persons responsible for the web site. Finally, the order provided that Exhibit A to the complaint, which included screenshots of the web site in question, was to be maintained under seal. However, the entire case file, not just the Exhibit, has been kept under seal by the Clerk's office.

The existence of the TRO, and thus of this litigation, came to light when the order appeared posted to the Lumen Database, https://www.lumendatabase.org/file_uploads/files/4447126/004/447/126/original/OTSC_ORDER_2.22.2019.pdf?1551741139. That database is an online archive of orders, demands and requests to remove material from the Internet. A subsequent request to the Clerk's office was unsuccessful. Levy Affidavit, Exhibit A. Counsel for proposed intervenor contacted plaintiffs' counsel, who was willing to send Public Citizen a copy of the verified complaint (with Exhibit A redacted). *See* Levy Affidavit Exhibit C.

During the course of these discussions, plaintiffs' counsel initially implied that, assuming that the temporary restraining order was converted into a preliminary injunction at the show cause hearing scheduled for April 1, 2019, plaintiffs might never take steps to identify the persons responsible for the allegedly defamatory web site, and thus seek to secure permanent injunctive relief as well as damages. After further discussion, however, plaintiffs' counsel indicated that such further steps might be pursued after consulting with plaintiffs. *Id.*

Public Citizen now seeks leave to intervene for the purpose of seeking the unsealing of the entire record, subject to redaction of an individuals' private cell phone number.

POINT I PUBLIC CITIZEN SHOULD BE ALLOWED TO INTERVENE TO SEEK UNSEALING

Public Citizen is a nonprofit research, litigation and advocacy organization that represents the public interest before Congress, the executive branch, and the courts at both the state and federal levels. It has played an active role in the enforcement of the public right of access in New Jersey and elsewhere. For example, in *Hammock by Hammock v. Hoffman-LaRoche*, 142 N.J. 356, (1995), the New Jersey Supreme Court granted Public Citizen leave to intervene for the purpose of lifting a sealing order that barred access to documents filed with the Court pursuant to a protective order. The Court held that the common law creates a presumption that court records are open for public inspection, subject to a party's ability to show that trade secrets, confidential information and privileged information should remain under seal. In many other cases, Public Citizen played an active role in seeking or supporting intervention to seek unsealing in the New Jersey courts, *e.g., Verni ex rel. Burstein v. Lanzaro*, 404 N.J.Super. 16 (2008), as well as by the federal courts in other jurisdictions. *E.g.*, *Flynt v. Lombardi*, 782 F.3d 963, 966 (8th Cir. 2015); *Company Doe v. Public Citizen*, 749 F.3d 246, 257 (4th Cir. 2014); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 657 (3d Cir. 1991); *Public Citizen v. Liggett Grp.*, 858 F.2d 775, 783 (1st Cir.1988); *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987); *Rocky Mt. Bank v. Google, Inc.*, 2010 WL 11545710, at *2 (N.D. Cal. Jan. 27, 2010), *rev'd on other grounds*, 428 Fed. Appx. 690, 692 (9th Cir. 2011) (not reported; copy attached); *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, 2006 WL 3043180, at *2 (D. Minn. Oct. 24, 2006)(not reported; copy attached); *Chao v. Estate of Fitzsimmons*, 349 F. Supp. 2d 1082, 1085 (N.D. Ill.

2004), *opinion clarified*, 2004 WL 3094821 (N.D. Ill. Dec. 9, 2004) (not reported; copy attached).[1]

Moreover, Public Citizen has several interests specific to the court records in this case: First, as a consumer advocacy organization, it has worked to ensure that consumers have a fair opportunity to use the Internet both to communicate their criticisms of businesses and to find information posted online about businesses so that they can decide what companies deserve their business.[2] Second, it had fought against the use of unfair tactics to remove consumer criticisms from search engine databases through various techniques that lead to unopposed orders.[3] Third, Public Citizen has represented consumers in invoking the rule barring prior restraints in defamation cases, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), to oppose the use of temporary restraining orders and preliminary injunctions to remove consumer criticisms from the Internet before a full and fair hearing has been held.[4] All of these concerns are implicated by the judicial records being kept under seal.

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[1] *See also Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896–98 (7th Cir.1994); *Brown v. Advantage Eng'g*, 960 F.2d 1013 (11th Cir. 1992); *United Nuclear Corp. v. Cranford Ins. Co*., 905 F.2d 1424, 1427 (10th Cir. 1990); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods*, 823 F.2d 159 (6th Cir. 1987); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979)

[2] *E.g.*, *Bosley Medical Institute v. Kremer*, 403 F.3d 672 (9th Cir. 2005); *TMI v. Maxwell*, 368 F.3d 433 (5th Cir. 2004); *Jenzabar v. Long Bow Group*, 82 Mass. App. Ct. 648 (2012).

[3] *Smith v. Garcia*, 2017 WL 412722, at *2 (D.R.I. Jan. 31, 2017) (not reported; copy attached); (granting motion to vacate order calling for search engine delisting)

[4] *Anthes v. Callender*, 2015 WL 6951150, at *7 (Md. Spec. App. Nov. 10, 2015) (not reported; copy attached); (reversing contempt sanctions for violating preliminary injunction against alleged defamation by a consumer); *Perez v. Dietz Dev.*, 2012 WL 6761997, at *1 (Va. Dec. 28, 2012) (not reported; copy attached); (reversing preliminary injunction against alleged defamation by a consumer); *Taubman v. WebFeats*, Nos. Nos. 01-2648 and 01-2725 (6th Cir. March 11, 2002)(not reported; copy attached)(granting stay pending appeal of preliminary injunction commanding removal of web site at taubmansucks.com), *injunction reversed*, 319 F.3d 770 (6th Cir. 2003). *See also Ex parte Wright*, 166 So. 3d 618, 631 (Ala. 2014) (vacating preliminary injunction against criticism of a business by lawyers representing its customers, allegedly sought to protect jury venire).

Moreover, Public Citizen is seeking leave to intervene in a timely fashion, less than a month after first learning about the existence of this case. It promptly contacted plaintiffs' counsel to seek unsealing, Levy Affidavit, Exhibit C; plaintiffs cannot complain that they have been prejudiced by the three-week delay between first being contacted and the filing of this motion for leave to intervene and to seal.

Consequently, pursuant to Rule 4:33, Public Citizen should be granted leave to intervene for the limited purpose of seeking unsealing.

POINT II SUBJECT ONLY TO THE REDACTION OF PRIVATE CELL PHONE NUMBERS, THE ENTIRE DOCKET SHOULD BE UNSEALED.

Both the common law and the First Amendment guarantee a right of access to all judicial records. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *Publicker Industries v. Cohen*, 733 F.2d 1059, 1067 (3d Cir. 1984); *Verni ex rel. Burstein v. Lanzaro*, 404 N.J.Super. 16 (2008); *Lederman v. Prudential Life Ins. Co. of Am.*, 897 A.2d 362, 367 (N.J. Super. App. Div. 2006). Although that right of access is not absolute, there is a strong presumption of access to all records, and the burden rests on the party seeking to conceal records to prove the need for confidentiality. *Hammock by Hammock*, 142 N.J. at 375, 662 A.2d at 556.

Granting the right of access to the complaint and the attached Exhibit A will allow members of the public to understand just what specifics the defendants offered as a reason to believe that plaintiffs' timeshare sales were fraudulent, and what the plaintiffs' showing of falsity was, so that consumers can assess whether they ought to entrust their vacation dollars to the plaintiffs. At the same time, the public will be able to monitor the performance of the courts, determining what showing was sufficient to cause the Court to grant a temporary restraining order despite the general

rule that preliminary injunctions barring speech are impermissible prior restraints, forbidden when issued to protect the reputation of a business. Thus, in *Organization for a Better Austin*, 402 U.S. at 419 (1971), the Supreme Court vacated a temporary restraining order that forbade leafleting accusing a realtor of blockbusting, holding that "[n]o 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.*

The states differ on the question whether a permanent injunction may issue to proscribe the repetition of a libel that has been found to be such following a trial on the merits. *Compare Balboa Island Vill. Inn v. Lemen*, 40 Cal.4th 1141, 156 P.3d 339, 343 (Cal. 2007) (permanent injunction allowed) *with Willing v. Mazzocone*, 482 Pa. 377, 393 (Pa. 1978) (permanent injunction not allowed). Intervenor has not found any reported New Jersey decisions on this issue, although an unreported Appellate Division followed *Balboa Island* to allow a permanent injunction to issue against a fully adjudicated defamation. *Chambers v. Scutieri*, 2013 WL 1337935 (App. Div. Apr. 4, 2013) (not reported; copy attached). But even in states that allow injunctions against libel determined to be unprotected by the First Amendment in a final judgment, preliminary injunctions against libel, issued before there has been a final determination on the merits that particular statements are unprotected by the First Amendment, are held to be an impermissible prior restraint. *Brummer v. Wey*, 89 N.Y.S.3d 11, 14 (N.Y. App. Div. 1st Dept. 2018); *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302, 309 (Ky. 2010); *Evans v. Evans*, 76 Cal. Rptr. 3d 859, 868 (Cal. App. 4th Dist. 2008) *Cohen v. Adv. Med. Group of Georgia*, 496 S.E.2d 710 (Ga. 1998). Moreover, *Organization for a Better Austin*'s ban on preliminary injunctions in libel cases extends to allegedly defamatory web sites as well as to allegedly defamatory leaflets. *Brummer*, 89 N.Y.S.3d at 14; *Am. Univ. of Antigua College of Med. v. Woodward*, 2010 WL 5185075, at *3 (E.D. Mich.

Dec. 16, 2010) (not reported; copy attached); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184, 196 (N.H. 2010); *Bihari v. Gross*, 119 F. Supp. 2d 309, 324 (S.D.N.Y. 2000). *See also TM v. MZ*, — N.W.2d —, 2018 WL 7377288, at *5 (Mich. App. Oct. 23, 2018) (not reported; copy attached); (applying *Organization for a Better Austin* to personal protection order against web site). Hence, the members of the public should be allowed to see the entire record in this case so that it can understand the basis for this Court's issuance of a prior restraint.

Plaintiffs apparently seek to have the court's records kept confidential because, they say, they are suing over a defamatory web site and the objective of their lawsuit is to seek injunctive relief against the publication of that web site. But the Appellate Division has held that adverse impact on a party's reputation is not a sufficient basis for sealing court records. *Lederman*, 897 A.2d at 370 (N.J. Super. App. Div. 2006). And other courts have held that a plaintiff suing over the publication of unflattering material may not conceal the details of the publication against which it is alleging claims. *Company Doe*, 749 F.3d at 269-270, 270-71 (4th Cir. 2014); *S.C. v. Dirty World, LLC*, 11-CV-392, 2011 WL 13334174, at *2 (W.D. Mo. June 1, 2011) (not reported; copy attached); *Upshaw v. United States*, 754 F. Supp. 2d 24, 30 (D.D.C. 2010). *See also Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (embarrassment flowing to plaintiff based on allegations in her own complaint regarding ongoing feud with family and disclosure of Alzheimer's diagnosis did not outweigh strong presumption in favor of public access).

The court in *Dirty World* could have been discussing this case when it reasoned, "A plaintiff would likely want to seal any case alleging defamation, libel, false light, or similar claim. Consequently, granting the Motion here would be tantamount to sealing all future cases alleging any such claim. This result would be unquestionably contrary to our public judicial system." 2011 WL 13334174, at *2. Or, as the Appellate Division said in *Lederman*, "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." 897 A.2d at 370.

Moreover, at this stage of the litigation, it has not been finally established that defendants' statements are false and defamatory; the Court has thus far had the opportunity to consider only the plaintiffs' verified complaint, with no service on or response from the defendants. Indeed, it is not clear that the Court will ever have the opportunity to receive the defendants' justification for their accusations—the TRO requires service of the order on a search engine (Google), the web hosting service for defendants' web site (GoDaddy), and the domain name registrar through which defendants obtained the domain name (Domains by Proxy), but it does not require plaintiffs to undertake any steps to identify the defendants and thereby to notify them of the relief that is being sought against them.[5]

With public access, members of the public who access the Court's files can see both defendants' online accusations against plaintiffs and plaintiffs' response. In this way, the members of the public will be able to make their own judgments about the facts. Indeed, after a final decision on the merits, members of the public who access the court file will be able to take the Court's decision into account in assessing the situation. Consequently, plaintiffs' argument that the allegedly defamatory nature of the web site that is at issue in this litigation warrants sealing either its complaint, or the attachment to the complaint that sets forth screenshots of the web site, do not

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[5] Plaintiffs' counsel indicated, in the course of intervenor's effort to meet and confer before filing this motion, that plaintiffs had not yet decided whether to pursue efforts to identify the defendants. Levy Affidavit, Exhibit C. Yet, only once the defendants are notified will they have a fair opportunity to counter plaintiffs' defamation claims.

override the public interest in seeing the complete record of this litigation.

That said, proposed Intervenor agrees that one part of Exhibit A may warrant redaction: the complaint alleges that the web site contains the personal cell phone number of plaintiff Begonja. Proposed Intervenor does not seek disclosure of that information, which could be redacted from the public record, even though preliminarily enjoining the web site for that reason would likely be a prior restraint in violation of *Organization for a Better Austin. Publius v. Boyer-Vine*, 237 F. Supp. 3d 997 1014 (E.D. Cal. 2017).

CONCLUSION

For the foregoing reasons, the motions to intervene and to unseal should be granted.

Respectfully submitted,

HARTMAN & WINNICKI, P.C.

Dated: March 27, 2019 By: 

Richard L. Ravin, Esq. (017731986)
74 Passaic Street
Ridgewood, New Jersey 07450
Telephone: (201) 967-8040
Fax: (201) 967-0590
Rick@Ravin.com

Paul Alan Levy (DC Bar 946400)
(*pro hac vice* to be sought)
Patrick D. Llewellyn (1033296)
(*pro hac vice* not sought)
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