UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELLORA'S CAVE PUBLISHING, INC.
and
JASMINE-JADE ENTERPRISES, LLC

Plaintiffs,

v.

DEAR AUTHOR MEDIA NETWORK, LLC
and
JENNIFER GERRISH-LAMPE

Defendants.

Case No: 5:14-cv-02331

OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

Ellora's Cave is a romance novel publisher. Ms. Lampe writes for a blog, "*Dear Author*," which serves the reader and author community, and this community has come to rely upon Lampe and *Dear Author* for news and information in this field. Ms. Lampe started her blog in 2006, as a site to review novels, with each review being structured as a letter to the author of the novel (hence the name of the blog). Lampe developed a focus on the merits of e-

publishing, publishing houses, and the evolution of the publication of romance novels. Over the years, *Dear Author* has become a respected source for news and information for the romance novel community.

Recently, after hearing rumors of multiple problems at Ellora's Cave, Ms. Lampe did what any good journalist would do – she investigated the rumors.[1] Lampe Decl. ¶50. A number of authors and editors (with first hand knowledge of the internal workings of Ellora's Cave) offered their insight into the underlying facts.[2] Lampe Decl. ¶9-10. After this thorough investigation, Lampe published an article about Ellora's Cave's growth and decline. With the benefit of this research, the article provided a glimpse into Ellora's Cave's finances and business practices. The picture is not rosy, but it was supported by the facts. The report was consistent with Ellora's Cave's overall reputation in the author community. Lambert Decl. ¶16; Scheffler Decl. ¶11-13; Holcomb Decl. ¶16-17; Naughton Decl. ¶14-16; Harris Decl. ¶11-12.

Ellora's Cave is understandably concerned about any negative view of its business, but it has no right to ask this Honorable Court to use its equitable powers to suppress the truth, to suppress fair comment, and to suppress future unknown statements. The First Amendment protects Ms. Lampe right to publish on matters of public concern, and her mission mandates that she share her findings with the author community. Lampe Decl. ¶1-8. Given that her writing is a matter of public concern, about a public figure, Lampe's First Amendment rights are given an exalted position – one which makes sustaining a defamation claim against her in this context a virtually impossible task.

[1] Attached hereto as Exhibit A is the declaration of Jennifer Gerrish-Lampe

[2] Attached hereto as Exhibit B is the declaration of Briana Lambert
Attached hereto as Exhibit C is the declaration of Dee Scheffler
Attached hereto as Exhibit D is the declaration of Roslyn Holcomb
Attached hereto as Exhibit E is the declaration of Julie Naughton
Attached hereto as Exhibit F is the declaration of Mary Harris
A number of others expressed concern over testifying, that Ms. Engler would surely retaliate against them for speaking out against her. But all of these individuals told the same story of a company in dire financial straits.

Ellora's Cave comes to this Court seeking a prior restraint against claimed (and presumed future) defamation. While such injunctions are *hypothetically* possible to grant, no court has issued one in a case like this in the past century – at least no court has issued one that withstood appellate scrutiny. A preliminary injunction against claimed defamation is almost *per se* impermissible. Such an injunction may be permitted in order to hide troop movements or to further national security concerns, but never in a case such as this one.

Even if a prior restraint were constitutionally tolerable, it would not be permissible in this case. The elements of defamation are absent, and the strongest defense against a defamation claim – truth – is proven in this opposition and its evidentiary exhibits.[3]

The motion must be denied. Beyond that, this opposition should make it plain that this case has **no chance of success on the merits** – thus warranting the denial of the motion and a clear message that the wholly unsupportable nature of this case compels its dismissal – not just a denial of the motion.

II. Legal Analysis

Plaintiffs come to this Court seeking a prior restraint on Defendants' speech because of an allegedly defamatory article. There is no judicial determination as to whether Ms. Lampe's article is false, which it is not. Even if it were, the relief sought is questionable. Yet, Plaintiffs come to this Court, requesting Constitutionally impossible relief – the suppression of speech without a full factual and legal determination that the speech falls outside of the First Amendment's broad protections.

Temporary restraining orders against speech are prior restraints. *City of Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 307, citing *Alexander v. United States*, 509 U.S. 544, 550 (1993). "The term 'prior restraint' is used 'to describe

[3] The defendant has gathered what evidence she could, informally. However, should this case continue, and perhaps prior to the hearing on this motion, she intends to depose the management of Ellora's Cave. But, despite the reasonable and exceedingly courteous efforts of counsel for Plaintiffs, Ellora's Cave and its management do not appear willing to provide deposition testimony before the hearing.

administrative and judicial orders *forbidding* certain communications when issued in advance of the time such communications are to occur." *Id*., citing M. Nimmer, Nimmer on Freedom of Speech §4.03, 4-14 (1984). In part, this is what Plaintiffs seek.

The Supreme Court has roundly rejected prior restraint. See *Kinney v. Barnes*, 57 Tex. Sup. J. 1428 at n.7 (Tex. 2014) (citing Sobchak, W., THE BIG LEBOWSKI, 1998). There is a "heavy presumption" against them. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). "Although prior restraints are not unconstitutional per se, there is a heavy presumption against their constitutional validity. This is because 'prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.'" *State ex rel. Toledo Blade Co. v. Henry Cnty. Court of Common Pleas*, 125 Ohio St.3d 149, citing *FW/PBS, Inc. v. Dallas* (1990), 493 U.S. 215, 225; Seven *Hills*, 76 Ohio St.3d at 307; *Tory v. Cochran* (2005), 544 U.S. 734, 738. "In fact, the Supreme Court has never upheld a prior restraint on pure speech." *News Herald v. Ruyle*, 949 F.Supp. 519, 522 (N.D.Ohio 1996). "[E]ven a temporary restraint on pure speech is improper 'absent the most compelling circumstances.'" *P&G v. Bankers Trust Co.*, 78 F.3d 219, 221 (6th Cir. 1996) citing *In re Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986). Those compelling circumstances are not before us.

Perhaps after a trial, if the allegedly defamatory speech is *proven* to be unlawful, a narrow injunction *might* issue, but even *that* would be a challenging exercise, for even injunctions against speech that come after a trial are usually impermissible prior restraints. See Erwin Chemerinsky, Injunctions in Defamation Cases, 57 SYRACUSE L. REV. 157, 165 (2007); see also *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1089 (C.D. Cal. 2012) ("Injunctions against any speech, even libel, constitute prior restraints: they prevent[] speech before it occurs, by

requiring court permission before that speech can be repeated" (citation and internal quotation marks omitted)).

Nevertheless, Ellora's Cave asks this Court to commit a grave First Amendment transgression. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (holding that prior restraints are "the most serious and least tolerable infringement on First Amendment rights"). This Court must decline. "[P]rohibiting the publication of a news story… is the essence of censorship." *P&G v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). Prohibiting the publication of news is precisely what the Plaintiffs are requesting.

A. Elements Required for a Preliminary Injunction:

First, the plaintiff must demonstrate a probability of success on the merits of their claims. However, Plaintiffs here are unlikely to succeed on the merits, as Defendants' statements range from demonstrably true to protected opinion. Even if they were neither, they do not rise to the level required under the actual malice test, and thus would be unactionable even if provably false. Second, the plaintiff must demonstrate that there will be irreparable harm absent the injunction. Plaintiffs have done nothing to demonstrate this harm. Monetary damages are sufficient to compensate a defamed plaintiff should they prevail. Lastly, the plaintiff would have to demonstrate that there would be no harm to others or to the public interest from the injunction. However, unconstitutional injunctions harm both the defendants and the public interest. *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir.2003); *Diamond Co. v. Gentry Acquisition Corp.*, 48 Ohio Misc.2d 1, 2 (C.P.1988).

1. Plaintiffs do not possess a likelihood of success on the merits

Plaintiffs must demonstrate a substantial likelihood of success on the merits to obtain a preliminary injunction. "When, as here, a preliminary injunction would infringe upon a constitutional right, the likelihood of success on the merits is often the determinative factor." *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003). Furthermore, a "showing of a mere 'possibility' of success would

render the test for a preliminary injunction virtually meaningless. Therefore, we reiterate that the plaintiffs must demonstrate a strong or substantial likelihood or probability of success on the merits." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228-1229 (6th Cir.1985).

a. Defamation

To prevail on a claim for defamation in Ohio, the plaintiff must prove "(1) a false and defamatory statement, (2) unprivileged publication to a third party, (3) a requisite amount of fault on the part of the publisher, and (4) actionability or special harm caused by the statement." *SPX Corp. v. Doe*, 253 F.Supp.2d 974, 978 (N.D.Ohio 2003); see *Pollock v. Rashid*, 117 Ohio App. 3d 361, 368 (1996). Plaintiffs fails at the first prong. "As is evident by the first requirement of falsity, truth is a complete defense to a defamation action." *Andrews v. Prudential Sec.*, 160 F.3d 304, 308 (6th Cir.1998); *Grabow v. King Media Enters., Inc.*, 156 Ohio App.3d 443 (8th Dist.), citing *Sethi v. WFMJ TV, Inc.*, (1999), 134 Ohio App. 3d 796, 806, *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St.3d 433, 445. The contents of the article are not provably false. See *Varanese v. Gall*, 35 Ohio St.3d 78, 80 (1988); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The statements made in the subject article were all either truthful assertions of fact, and thus provably true, or protected opinion, which can never be either true or false. See *Scott v. News-Herald*, 25 Ohio St.3d 243, 245 (1986); *Gertz v. Robert Welch*, 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea").

Plaintiffs allege that the defamatory contents of Ms. Lampe's article include the assertion that editors, authors, and cover artists are going unpaid, that Ellora's Cave is liquidating assets, that Ms. Engler is financially mismanaging the company, and that Ellora's Cave is facing financial problems. Lambert Decl. ¶5-8; Scheffler Decl. ¶9-10; Holcomb Decl. ¶13; Naughton Decl. ¶10-11; Harris Decl. ¶11-12. While she is not required to prove them true (as Ellora's bears the burden of proving them false), Ms. Lampe can demonstrate, even at this point,

that each of these statements are true. A number of individuals with firsthand, personal knowledge of the inner workings of Ellora's Cave came forward to tell their story. Five of their declarations are attached. At trial, if necessary, more will likely testify.

However, Defendants will likely not need such extensive testimony. Public records reveal that Ellora's Cave is indeed selling off assets, holding liquidation sales, and dumping items on Ebay. Naughton Decl. ¶21. Lampe Decl. Exhibit 1. Furthermore, Ellora's Cave listed its Akron office for rent. Naughton Decl. ¶20. A company in good financial condition would not go liquidating assets, clearing out its office space, and selling posters and tchotchkes on Ebay.[4]

Secondly, as consistently demonstrated across all declarations, Ellora's Cave stopped paying its authors their royalty payments in a timely manner. Scheffler Decl. ¶5-7; Holcomb Decl. ¶4-13. Ellora's Cave also failed to pay editors or cover artists on time. Lambert Decl. ¶4-6; Naughton Decl. ¶3-6; Harris Decl. ¶4. Ellora's Cave still owes payments to many editors and cover artists. Lambert Decl. ¶7; Naughton Decl. ¶6; Harris Decl. ¶5, 8. In July, Ellora's Cave told editors that they should delay editing "blush" novels (as opposed to higher earning "erotic" novels) until September because they will not be paid for those works before that time.

Thirdly, Ellora's Cave issued mass layoffs, terminating all fifteen freelance editors at the same time. Lambert Decl. ¶10; Naughton Decl. ¶7-8. Those editors remain unpaid for their work. Lambert Decl. ¶12. Ellora's Cave also laid off its cover artists the week prior in one mass email. This is the first time in Ellora's Cave's history that such large-scale layoffs have occurred. Lambert Decl. ¶11.

[4] Even if Ellora's Cave were in perfect financial health, these are the symptoms of an ailing company. It is as if a perfectly healthy person were suffering from a severe headache, muscle pain, weakness, diarrhea, vomiting, and abdominal pain. A reasonable person might say, with all candor and right to do so, that the patient appears to have Ebola symptoms. Of course, the subject might counter that they were only suffering from a hangover. But, the First Amendment would permit either observation.

In addition to layoffs, a number of key upper level staff members have resigned. Naughton Decl. ¶12-13. This is newsworthy, and a sign of financial illness.

Additionally, in recent months, even checks that the authors, editors, and cover artists received, were backdated by up to six weeks. Lambert Decl. ¶5-6; Scheffler Decl. ¶6; Naughton Decl. ¶4. These checks were mailed in envelopes that lacked postmarks. Lambert Decl. ¶5; Naughton Decl. ¶22. These are all telltale signs of a company in decline.

Ellora's Cave provided no credible excuses for these clear indications of financial malaise. The excuses ran the gamut from "new accounting software," to "postal service glitches," to blaming those requesting payment for their own delay. Harris Decl. ¶9; Naughton Decl. ¶22-23; Lambert Decl. ¶9; Scheffler Decl. ¶3; Holcomb Decl. ¶5-12. But when the same excuses appeared month after month, with no resolution, the truth became apparent. Over time, the validity of those excuses went from "possible" to widely-perceived as responses that were lacking in candor. Harris Decl. ¶10; Naughton Decl. ¶23; Holcomb Decl. ¶12.

There is no actionable defamation in this case. None at all. Either the statements are true, which they appear to be after reviewing the evidence, or there was every justification for publishing them. Ellora's Cave nit picks minor *possible* factual inconsistencies, as a child might try to remove peas from goulash. However, even if a child despises peas, it does not make the goulash itself poisonous. Analysis of a defamation claim like this is like reasoning with the child who complains that because there are peas in the goulash, the goulash itself is inedible.

The goulash here is savory, even if the plaintiffs would prefer not to eat the peas. In determining whether a statement is defamatory as a matter of law, a court must review the totality of the circumstances and by reading the statements in the context of the entire publication to determine whether a reasonable reader would interpret it as defamatory. *SPX Corp. v. Doe*, 253 F.Supp.2d 974, 980 (N.D. Ohio 2003) citing *Scott v. News-Herald*, 25 Ohio St.3d

243, 253. Simply nit-picking a nuanced statement out of an entire article to say that it is incorrect is not sufficient to support a cause of action for defamation.[5] Given the authors', editors', and cover artists' testimony, the article, taken as a whole, in context, shows that the publication is not defamatory. Instead, the company's image, outside and inside, is of one that is financially ailing. Its failure to pay its authors, editors, and cover artists in a timely manner, as they are contractually obligated to do, is clearly symptomatic of corporate illness. See Exhibits B, C, D, E, and F. Companies that are financially healthy and operative do not function this way. The only other logical conclusion is that Ellora's Cave is able to meet its obligations, but would prefer not to. If Ellora's Cave would like to present testimony that it is *able* to meet its obligations, but it chooses to do otherwise, it might paint a different picture – but not one that would support a claim for defamation.

As further support for the story of financial woes, Ellora's Cave's owner and founder, Ms. Engler, has owed nearly a half a million dollars in unpaid taxes. If the company is not meeting its obligations, and its founder is not meeting hers either, and the story relied on publicly available documents, then the publication is privileged from defamation claims under the fair report privilege. Ohio Rev. Code §2317.05. When a publication is a substantially accurate report of the official record, it receives the benefits of the privilege. *Alsop v. The Cincinnati Post*, 24 F.App'x 296, 297 (6th Cir.2001). See also *Pollock v. Rashid*, 117 Ohio App.3d 361, 368 (1st Dist.1996). According to the Summit County, Ohio Clerk's records, nearly every year since 2008, Ms. Engler has had a judgment against her for unpaid taxation claims.[6] In order to satisfy the judgments against

[5] Indeed, the seminal case in American defamation law was based on a publication that contained many factual inaccuracies, but the overall gist of the publication was not defamatory. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[6] *Ohio Dept. of Taxation v. Jasmine Jade Enterprises, LLC*, JL-2008-9420 (Judgment: $11,836.95); *Ohio Dept. of Taxation v. Tina Engler-Keen*, JL-2009-9031 (Judgment: $26,972.74); *Ohio Dept. of Taxation v. Tina Engler-Keen*, JL-2009-10056 (Judgment: $83,586.11); *Ohio Dept. of Taxation v. Tina Engler-Keen*, JL-2011-0599 (Judgment: $29,271.98); *Ohio Dept. of Taxation v. Tina Engler-Keen*, JL-2011-6371 (Judgment: $44,391.84); *Ohio Dept. of Taxation v. Tina Engler-Keen*, JL-2012-

her, a lien has been placed on Ms. Engler's real property. Furthermore, the Bureau of Workers Compensation has also placed liens on real property owned by Jasmine Jade Enterprises for nonpayment.[7] Attached hereto as Exhibit G are true and correct copies of the judgment liens currently available from the Summit County Clerk's Office's online records. Any reports of financial mismanagement relying on these records cannot be fairly called "defamatory."

Even if there are some inaccuracies in articles, "[c]ourts have accorded protection to variances from the verbatim record as long as the 'gravamen,' 'gist' or 'sting' or 'substance' of the underlying proceeding or report is substantially correct." *Young v. Gannett Satellite Info. Network, Inc.*, 837 F.Supp.2d 758, 763 (S.D. Ohio 2011) citing *Oney v. Allen*, 39 Ohio St.3d 103, 106 (1988). Not only has Ms. Lampe provided the gist of the records against Ms. Engler, Ms. Lampe has entirely and correctly reported Ms. Engler's history of failure to pay her taxes, both on behalf of herself and her company. Ms. Lampe's reporting of the public record as to what Ms. Engler owes in taxes is protected as a fair report of the essence of the official record, and therefore cannot give rise to a defamation claim.

i. The Public Figure Status of the Plaintiffs Mandates Dismissal – Not Injunctive Relief

Even if the allegedly defamatory statements were false, the claims would still fail. The Plaintiffs are public figures, and as such, must prove **actual malice** on the part of Ms. Lampe in order to prevail in a claim for defamation. While Ellora's Cave may not be a household name, it is still a 'limited purpose public figure,' "which is a plaintiff who becomes a public figure for a specific range of

7885 (Judgment: $62,769.64); *Ohio Dept. of Taxation v. Tina Engler-Keen*, JL-2013-6511 (Judgment: $35,853.21); *City of Akron v. Jasmine Jade Enterprises LLC*, CV-2014-03-1269 (Judgment: $29,679.52); *Ohio Dept. of Taxation v. Tina Engler-Keen*, JL-2014-4608 (Judgment: $105,819.92).

[7] See *Bureau of Workers Compensation v. Jasmine Jade Enterprises, LLC*, JL-2007-6088 (Judgment: $1,000.96); *Bureau of Workers Compensation v. Jasmine Jade Enterprises LLC*, JL-2007-7485 (Judgment: $571.85); *Ohio Bureau of Workers Compensation v. Jasmine Jade Enterprises, LLC*, JL-2014-1971 (Judgment: $255.75).

issues from which the person gains general notoriety in the community." *Clark v. Am. Broad. Cos.*, 684 F.2d 1208, 1217 (6th Cir.1982); *Great Lakes Capital, Ltd. v. Plain Dealer Publ'g. Co.*, 2008-Ohio-6495, ¶ 19 (8th Dist.) citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "Public figures include those who achieve fame 'by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention.'" *LL NJ, Inc. v. NBC - Subsidiary (WCAU-TV), L.P.*, 36 Media L. Rep. 1746 (E.D. Mich. 2008).

Plaintiffs are public figures within the romance author community. In fact, the Complaints' allegations themselves establish this. Ellora's Cave "became a powerhouse selling hundreds of thousands of ebooks a year in a world where ebooks did not exist for the most part." Plaintiffs' Exhibit A to Complaint at 10. By their own words, Ellora's Cave "is a leading online publisher of female romance novels." Motion for Preliminary Injunction at 2. As such, Plaintiffs will be required to demonstrate actual malice, instead of mere negligence, to prevail on a claim of defamation. They most certainly are estopped from arguing now, inconsistently, that they are mere private figures.[8]

Although the term "actual malice" seems to laypeople to mean "actually malicious," this is legally inaccurate. In fact, even if the defendants were driven by malice or any other negative emotion, that is constitutionally irrelevant. "The actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term. Rather, actual malice is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true." *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206 (6th Cir.1990) citing *Harte-Hanks Comm'n v. Connaughton*, 491 U.S. 657, 666 (1989).

While this is the national standard, Ohio law provides for more protection than the First Amendment demands. Under Ohio law, "the plaintiff must demonstrate, **with convincing clarity**, that the defendant published the

[8] Even if they were, the evidence reflects that the plaintiffs could not even meet the negligence standard, and therefore, the analysis would not shift in their favor.

defamatory statement either with actual knowledge that the statement was false, or with reckless disregard as to whether it was false." *Great Lakes Capital, Ltd. v. Plain Dealer Publ'g. Co.*, 2008-Ohio-6495, ¶ 26 (8th Dist.) (emphasis added), see *Lothschuetz v. Carpenter*, 898 F.2d 1200, citing *Harte-Hanks,* 491 U.S. at 657. "A plaintiff may not recover under the malice standard unless there is 'clear and convincing proof' that the defamation was published 'with knowledge of its falsity or with reckless disregard for the truth.'" *Street v. Nat'l Broad. Co.*, 645 F.2d 1227, 1236 (6th Cir.1981) citing *Gertz* at 342. While Plaintiffs claim that the article was "published by Defendants with malice, hatred and ill will towards Plaintiffs," Plaintiffs fail to demonstrate ***legal actual malice***. As outlined *supra*, Ms. Lampe published statements that she reasonably believed to be true after conducting a good faith investigation. Lampe Decl. ¶47-50. Without surmounting that hurdle, Plaintiffs fail.

In the alternative, even if Plaintiffs were somehow not public figures, they would still have to demonstrate negligence on Ms. Lampe's part in order to prevail on their claim of defamation. They cannot meet this lower standard either, given the facts. "Insofar as the truth or falsity of the defamatory statement is concerned, the question of negligence has sometimes been expressed in terms of the defendant's state of mind by asking whether he had reasonable grounds for believing that the communication was true." *Lopez v. Thomas*, 2014-Ohio-2513, ¶ 11 (9th Dist.), citing *Bays v. Northwestern Local School Dist. 9th Dist. Wayne No. 98CA0027*, 1999 Ohio App. LEXIS 3343. As demonstrated by the declarations presented, Ms. Lampe adequately and diligently researched her story. Lampe Decl. ¶30, 34, 40, 47-50. The reports were true. Further investigation revealed only more support for the publication. Ellora's Cave is, seemingly, in more dire financial straits than reported. Lambert Decl. ¶13; Scheffler ¶11; Holcomb Decl. ¶13; Naughton Decl. ¶23; Harris Decl. ¶11.

"The plaintiff must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity

or defamatory character of the publication." *Lopez v. Thomas*, 2014-Ohio-2513, ¶ 11 (9th Dist.), citing *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180 (1987); *Patrick v. Cleveland Scene Publ'g,* 582 F.Supp.2d 939, 947 (N.D.Ohio 2008) ("the plaintiff in a defamation suit carries the burden of proving allegedly defamatory statements false by clear and convincing evidence"). Plaintiffs will never meet this burden. Ms. Lampe acted entirely reasonably in her research and investigation of the claims regarding Ellora's Cave that were presented to her. Lampe Decl. ¶47-50. In conducting research and interviews, Ms. Lampe did everything a reasonable person would do, and more, in her attempt to determine the truth and accuracy of her story. Lampe Decl. ¶30, 34, 40, 47-50.

An element of a defamation claim is damage to the plaintiff's reputation because of the publication. The public perception of the company, prior to Ms. Lampe's article, was that its founder, Ms. Engler, was notoriously difficult to work with, was a generally offensive person, who mismanaged money, who had a history of being delinquent on her taxes, who maintained an offensive and embarrassing social media profile, who suffers from severe mental health issues, who engages in nepotism at the expense of other employees, and who was generally incapable of running a large successful company. Holcomb Decl. ¶14-15; Naughton Decl. ¶17-20. The public perception of Ellora's Cave's financial viability was woefully poor, long before Ms. Lampe's article was published. Lambert Decl. ¶13-16; Scheffler Decl. ¶11-13; Holcomb Decl. ¶13, 17; Naughton Decl. ¶9-12; Harris Decl. ¶11-12. With the filing of this lawsuit, and the evidence it has required to be placed in the record, this perception is now revealed as reality. However, nothing that the Defendants published caused any damage to Ellora's Cave's reputation – it was already poor, and declining. *Id.*

Therefore, at the time of the writing, and even more so now, Ms. Lampe harbored no doubts as to the accuracy of her article. The article merely confirmed the public perception – it did nothing to change the Plaintiffs'

already-sullied reputation. Ms. Lampe stands behind the factual accuracy of the article, as do five sworn witnesses and a multitude of public records.

b. Libel per se

Plaintiffs also allege libel per se. Libel per se is a particular breed of defamation. "In order for words to be libelous per se, they must be of such a nature that courts can presume as a matter of law that they tend to degrade or disgrace the person of whom they are written or spoken, or hold him up to a public hatred, contempt or scorn." *Conway v. Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers*, 209 F.Supp.2d 731, 755 (N.D. Ohio 2002); see *Gosden v. Louis*, 116 Ohio App.3d 195, 207 (9th Dist. 1996). However, the statement must first and foremost be false. So, while the article may subject Ellora's Cave to ridicule, it does not give rise to libel per se, because the statements are not false. In fact, the negative attention it thought that it might have suffered as a result of the article must pale in comparison to what it will now weather, now that it has compelled Ms. Lampe to definitively prove the truth of the matters asserted. Merely because the result of the article is a negative public perception of the Plaintiffs does not automatically give rise to a claim for libel per se. Simply because a plaintiff is alleging libel per se, does not relieve the plaintiff of meeting all other elements of a claim of defamation.

"Defamation is injury to reputation… [W]hat matters is what was known by others in the community." *Gosdon v. Louis*, 116 Ohio App.3d at 216-217; see *Dorricott v. Fairhill Ctr. for Aging*, 2 F.Supp.2d 982, 993 (N.D. Ohio 1998), fn. 15 ("The reputation of another is harmed when the publication lowers the community's estimation of that person"). As evidenced by the declarations from a number of editors, authors, and cover artists that have been in contract with Ellora's Cave, the reputation of Ellora's Cave in the romance novel writing community is in a state of rapid decline. The community of authors, editors, cover artists, and readers already perceived that Ellora's Cave suffered from financial mismanagement, that Ellora's Cave was not using money that was

coming in, to pay its editors and authors as it should have been, that the writing is on the wall and Ellora's Cave is ailing. Harris Decl. ¶11-12; Lambert Decl. ¶13-15; Scheffler Decl. ¶11-13; Holcomb Decl. ¶13; Naughton Decl. ¶16. A number of individuals expressed concern with the ethics and operations of the business, with the way these authors, editors, and cover artists are treated. The reputation in the community was poor, long before Lampe wrote her article. Lambert Decl. ¶13-16; Scheffler Decl. ¶11-13; Holcomb Decl. ¶13-17; Naughton Decl. ¶14-17.

Many have even said that Ms. Lampe's article told them nothing new, that it was not anything they did not already witness or believe themselves. Harris Decl. ¶12, Holcomb Decl. ¶17, Naughton Decl. ¶14-16, Lambert Decl. ¶16. Some have even warned other authors and editors to avoid Ellora's Cave and its disreputable business practices, nearly a year before Ms. Lampe wrote her article. Holcomb Decl. ¶15-16. Ms. Lampe's article just expressed the community's existing concerns. Ms. Lampe held a mirror up to Ellora's Cave; Ellora's Cave cannot complain about its own reflection.

2. Irreparable harm

Plaintiffs claim that "*[i]t is clear that Ellora's will suffer irreparable injury if Defendants are allowed to continue to publish the Blog Publication on the internet*." Motion for Preliminary Injunction at 4. However, Plaintiffs provide nothing to support this. Irreparable harm requires a showing that there is an insufficient remedy at law. Furthermore, for the harm to be irreparable, there must be more than monetary damages. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974). "A finding of irreparable harm is necessary before granting a preliminary injunction." *Bettcher Indus. v. Bunzl USA, Inc.*, 692 F.Supp.2d 805, 822 (N.D.Ohio 2010). Before a movant can obtain a preliminary injunction, they must demonstrate "that any harm to the business would not be quantifiable in terms of money damages." *Economou v. Physicians Weight Loss Centers*, 756 F.Supp. 1024, 1039 (N.D.Ohio 1991). Plaintiffs

acknowledge that it is difficult to see how their damages amount to more than mere allegations of economic losses. Motion for Preliminary Injunction at 5. They then say that there may be some intangible, unarticulated damages that cannot be classified as monetary damages, and therefore serve as the basis for their request for injunctive relief. This makes no sense. Plaintiffs have not made any showing that there is irreparable harm, much less the required clear showing.

3. Harm to the Defendant

Plaintiffs believe that Ms. Lampe can continue to author a publication that discusses the ins and outs of the publishing world, while barring her from discussing one of the largest publishing houses in its genre. This contention fails. The credibility of a journalist is dependent on her ability to tell her readers the truth, and to focus on issues most important to her readers. For a subject of an article to receive a prior restraint against her continuing to publish would cause great harm to the Defendants. Lampe Decl. ¶51-55. Granting Plaintiffs' request for injunctive relief would not serve any interest other than satisfying the Plaintiffs' desire to operate free from criticism, and would severely impair Ms. Lampe's interests, as her First Amendment rights would be directly and egregiously harmed by the injunction. And it would likely result in her shutting down altogether. Lampe Decl. ¶53. To say that any individual who is dissatisfied with the way they are portrayed in the media can then enjoin a publication from writing about them is beyond unconstitutional. This factor weighs heavily against issuing the injunction.

4. Harm to the public

"[T]he public interest is served by preventing the violation of constitutional rights." *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004). Plaintiffs fail to show that their needs outweigh the harm to the public. The author and editor communities have a right to know about Ellora's Cave and its business practices, and Ms. Lampe serves the public in a way that censorship never will. If the Court issues a prior

restraint, it will silence discourse between Defendants and the broader public, and deprive the public of its right to know about and discuss matters of public concern. Many people have placed their professional and monetary well being in the hands of Ellora's Cave, only to watch it implode. The public has a right to this information, in order to make informed decisions of where it wants to trust its writings, its professional reputation, and its money. Plaintiffs have offered nothing to show why its demanded prior restraint is constitutional and of greater significance than the First Amendment and the interests of the public.

Furthermore, this is not mere idle gossip or a spectator sport. The financial well being of a publishing house is of great importance for every author that submits a work to it, or who may do so in the future. At stake is nothing less than the fruit of the author's labor, the sweat of their brow, and the ability to continue to practice their craft.

When a publishing house undergoes bankruptcy, the intellectual property rights of each work are subject to involuntarily transfer. In other words, if an author publishes with a company that mismanages itself, the author (through no fault of her own) can lose every bit of control over her works, from that moment forward. Ms. Lampe addressed this topic on her blog seven years ago, following the announcement of the bankruptcy of another publishing house.[9] In the event of bankruptcy, the assets of the publishing house include the contracts those publishers hold, which include the intellectual property rights to the works published. When an entity files for bankruptcy, all of its property rights, including its intellectual property rights, become part of its estate. See 11 U.S.C. §544.

Furthermore, any royalties that authors are already contracted to receive from third party vendors will not be paid out during the duration of the bankruptcy proceedings, which could take months or even years to resolve. In the case of *In re Stein & Day, Inc.*, 80 B.R. 297, 303 (U.S. 1987), the Court

[9] Dear Author, *Author's Rights When a Publisher Files Bankruptcy*, (http://dearauthor.com/features/letters-of-opinion/authors-rights-when-a-publisher-files-bankruptcy/ published June 24, 2007, last visited October 15, 2014).

determined that while the author believed that, under contract, it was owed royalties that were to be paid to the publisher by third party vendors, the royalty monies were not yet received and therefore not specifically earmarked for the author, and would not be paid to the author first. Royalty monies were deemed to be an asset on the books of the publishing company. Therefore, all royalty payments that would go to the author were not paid out during the entire duration of the bankruptcy stay.

Bankruptcy courts rarely treat authors as priority debtors, and as a result the copyrights to their works are auctioned off to satisfy the publisher's debts. The long term implications of this is that these authors lose the ability to reprint and resell their own works, and **may even lose the ability to write sequels to the works**, because the rights to the work have been transferred to someone else.

This is not a subject that is readily apparent to an author. Journalists like Lampe are here to educate the community, so that they can make informed decisions. If authors have adequate and transparent information about the financial condition of the publishing house, the authors have the opportunity to pursue reclamation of the rights to their own works, or to at least enter into contracts with all the relevant concerns in mind. This would allow them to preserve their long-term rights in republication and sequels, or to at least be able to foresee the loss of such rights (indeed, for some it might not be a concern, or would present an acceptable risk). Ms. Lampe's article on *Dear Author* is doing a public service by creating transparency and opening the door to discussion, in order to create a more informed community of authors.

This presentation of information from one who knows, to others who have a right to know, is known as the "common interest privilege," which further dissolves a defamation action. This privilege applies when a person who has a common interest in a "particular subject matter" reasonably believes that "there is information that another sharing the common interest is entitled to know." Restatement (Second) of Torts §596 (1977). Ohio recognizes a very

expansive view of the common interest privilege. The Ohio Supreme Court first recognized the privilege in *Hahn v. Kotten*, 43 Ohio St.2d 237, 331 (1975).

"A qualified privilege attaches where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty." *Conway v. Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers*, 209 F.Supp.2d 731, 757 (N.D. Ohio 2002). "The qualified privilege concept is based in public policy, and is therefore, applicable where society's interest in being protected by the dissemination of information outweighs the loss of reputation to the party defamed." *Am. Readers Servs. v. Amos Press, Inc.*, 2004-Ohio-346, P17 (Ohio Ct. App., 2004). Ms. Lampe's article was true, and focused on the public interest of the romance novel author and editing community at large. Any embarrassment Ellora's Cave may feel as a result of the article is a subservient interest to the public interest in being well-informed as to the condition of their employer, and as a result, their own financial health as well.

"Implicit in the defense is a commonality of interest between the speaker and recipient, a public or private duty, either legal or moral, to speak on the matter." *Thompson v. Webb* (1999), 136 Ohio App. 3d 79, 84. Ms. Lampe had a moral duty to speak to other authors and editors due to the prospective bankruptcy issue and how this could impact their federal intellectual property rights. She shares a deep, common interest with the authors and editors, and has been a wealth of information for them for a number of years, through her blog.

This defense applies when (1) the publication was made in good faith, (2) there was an interest to be upheld, (3) the publication was limited in scope to that interest, (4) the publication was made on the proper occasion, and (5) the publication was done in a proper manner and to the proper parties. As demonstrated above, Ms. Lampe made her publication in good faith, relying on

statements made by individuals directly involved in Ellora's Cave and emails and comments made by corporate executives within Ellora's Cave, addressing an interest common to any author, editor, or cover artist that has worked with Ellora's Cave, limited in scope to the current financial conditions of Ellora's Cave, and published on her blog, which is read by authors and editors in the romance novel publishing community. This factor weighs heavily against issuing the requested injunction.

C. Entry of Preliminary Injunction is Constitutionally Impermissible

Plaintiffs seek a prior restraint of Defendant's speech by seeking to prohibit her from continued publication of her article, or publication of any future article that may contain any reference to the Plaintiffs whatsoever. Plaintiffs want to curtail Ms. Lampe's lawful exercise of her First Amendment rights. Constitutional rights are "so fundamental to our legal system and to our society that any violation thereof will cause irreparable harm irrespective of the financial impact." *Stile v. Copley Twp.*, 115 F.Supp.2d 854, 865 (N.D.Ohio 2000) citing *Bannum, Inc. v. City of Memphis*, 666 F. Supp. 1091, 1096 (W.D. Tenn. 1986).

While Plaintiffs cite to *Bluemile Inc. v. Yourcolo, LLC*, in support of their Motion for Preliminary Injunction, the facts of that case are starkly different of the facts at hand. The only connection seems to be that a Preliminary Injunction was granted there and Plaintiffs are requesting one here. In *Bluemile*, the Southern District of Ohio confronted an intellectual property case and enjoined the defendant's use of the plaintiff's trademark, enjoined defendants from using a website confusingly similar to plaintiff's name, which then used that website to publish statements that were *already* determined to be defamatory. That case was premised on Lanham Act violations and trademark infringement, and the defamatory statements were merely an accessory to the Lanham Act violations. Trademark violations are more readily granted injunctive relief because the irreparable harm is presumed in such cases. *Too, Inc. v. TJX Cos.*, 229 F.Supp.2d

825, 838 (S.D.Ohio 2002), *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003). This is precisely the opposite of the law surrounding defamation.

As discussed above, "a prior restraint on speech carries a 'heavy presumption' against its constitutional validity." *City of Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 307, citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). In *Organization for a Better Austin v. Keefe*, the Supreme Court struck down an injunction prohibiting the petitioners' distribution of leaflets criticizing respondent's business practices. "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. Furthermore, the Supreme Court has repeatedly recognized that government restriction of speech in the form of a prior restraint against the media constitutes "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Insofar as the plaintiffs' demand for a permanent injunction is concerned, 'the usual rule is that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.'" *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206 (6th Cir.1990). See also *Renoir-Large v. Lane*, 2011 U.S. Dist. LEXIS 93546, 2011 WL 3667424 (S.D. Ohio July 20, 2011) ("Here, although the usual rule provides that defamation may be remedied only by an action for damages, even application of the modern rule bars plaintiffs' requested injunction. First, there has been no final determination that defendant's statements are false and libelous. Second, even if this Court later determines after such adjudication that an injunction is appropriate, plaintiffs' requested relief extends well beyond the allegedly defamatory statements posted by defendant.") *Id*., citing *Lothschuetz*, 898 F.2d at 1206.

Plaintiffs' request for injunctive relief is so broad in scope and unlimited in time that it could not be permitted, even after a full trial on the merits. Courts could, in an incredibly limited scope, permit injunctive relief against defamation

where, the injunction is "clearly and narrowly drawn" and that there be an adjudication of falsity or illegality, established "by at least clear and convincing evidence," prior to the issuance of the injunction. *Lassiter v. Lassiter*, 456 F. Supp.2d 876, 884 (E.D. Ky. 2006). Here, Ms. Lampe's article has not been deemed to be defamatory, and as shown in this opposition, could never be found to be legally defamatory. Furthermore, the relief requested is neither clearly nor narrowly defined. Plaintiffs' requested relief goes far afield of the article at issue published by Ms. Lampe. Plaintiffs are seeking to impose restrictions on speech that is not defamatory and even speech that has not yet even been spoken.

D. Plaintiffs lack standing in relation to statements made concerning Ms. Engler

Some of the comments Plaintiffs complain of specifically address Ms. Engler, who is not a party to this case. While Ms. Lampe's statements regarding Ms. Engler are not defamatory, they are also irrelevant unless and until Plaintiffs bring Ms. Engler into this litigation as a plaintiff. Plaintiffs lack the requisite standing to complain on behalf of Ms. Engler. "Elements of standing are an indispensable part of a plaintiff's case." *Bourke v. Carnahan*, 163 Ohio App.3d 818 (10th Dist. 2005). The onus is on Plaintiffs to demonstrate that they have suffered an injury, which is causally related to the defendants' actions. *Id*. Plaintiffs are not entitled to recovery for statements made about individuals other than themselves. Statements about Ms. Engler's personal life are not statements about Ellora's Cave, and therefore, Plaintiffs lack the standing to sue over those statements. Courts in the Sixth Circuit have affirmed that a "plaintiff cannot bring claims for damages suffered by someone other than himself." *Archibald v. Metro. Gov't of Nashville & Davidson County*, 2011 U.S. Dist. LEXIS 104293, 2011 WL 4343742 (M.D. Tenn. Sept. 13, 2011). Therefore, certain statements at issue in this case should be stricken from any consideration with regard to whether they are defamatory or not. Namely, the statements

regarding Ms. Engler's nonpayment of taxes, Ms. Engler's spending habits and high-end shopping sprees, and Ms. Engler's taking up residence in the West Hollywood Hills should not be at issue, as there is no standing for a third party to bring a defamation claim on behalf of the reputation of another. If Ms. Engler wishes to join this case as a plaintiff, then the statements can be at issue. But, she is not here today, and she should not be permitted to litigate by proxy.

E. Plaintiffs have failed to post a bond or security

Lastly, Plaintiffs have failed to offer up a bond, in violation of Fed. R. Civ. P. 65(C) and Ohio R. Civ. P. 65(C). Rule 65(C) requires the plaintiff post a bond, in order to ensure that damages may be accounted for, in the event the court later determines that the injunction was wrongly issued. "Pursuant to Rule 65(c), no preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by defendant. Fed. R. Civ. P. 65(c). A district court must expressly consider the question of requiring a bond before issuing a preliminary injunction." *Golden v. Kelsey-Hayes Co.*, 845 F.Supp. 410, 416 (E.D.Mich.1994) citing *Roth v. Bank of the Commonwealth*, 583 F.2d 527 (6th Cir. 1978). An injunction may not be issued without the issuance of a bond. Therefore, Plaintiffs must post a bond great enough to compensate Defendants before an injunction may be considered. In this case, the Defendants would likely need to close down altogether, therefore the bond should be for at least $150,000, to account for at least $75,000 in lost revenue and $75,000 in other damages. Lampe Decl. ¶52-55.

/ / / / /

/ / / / /

/ / / / /

III. Conclusion

The Plaintiffs' Motion for Preliminary Injunction must be denied. It is without support, it would be unconstitutional, and Plaintiffs' case is so gossamer thin that it could not support the weight of such heavy and disfavored relief.

Respectfully Submitted,

/s/Marc John Randazza
Marc J. Randazza, Esq.
Admitted N. D. Ohio
Nevada Bar No.: 12265
California Bar No.: 269535
Florida Bar No.: 625566
Massachusetts Bar No.: 651477
Arizona Bar No.: 27861
RANDAZZA LEGAL GROUP
3625 S. Town Center Drive, Suite 150
Las Vegas, Nevada 89135
Tele: 702-420-2001
Fax: 305-437-7662
Email: ecf@randazza.com

ATTORNEY FOR DEFENDANTS

CASE NO.: 5:14-cv-02331

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served upon: Steven W. Mastrantonio, Esq., counsel for Plaintiffs, via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ T. Haan
Employee of
Randazza Legal Group