IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO.: 11-17842-CA32

R.K./Fl MANAGEMENT, INC., a Florida corporation, R.K. ASSOCIATES VII, INC., a Florida corporation, 17070 COLLINS AVENUE SHOPPING CENTER, LTD., a Florida corporation, RAANAN KATZ, an individual, and DANIEL KATZ, an individual,

Plaintiffs,

vs.

IRINA CHEVALDINA,

Defendant.

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DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendant, IRINA CHEVLADINA, (hereinafter "DEFENDANT") hereby files this Opposition to the Motion for Preliminary Injunction filed by Plaintiffs, R.K./Fl MANAGEMENT, INC., a Florida corporation, R.K. ASSOCIATES VII, INC., a Florida corporation, 17070 COLLINS AVENUE SHOPPING CENTER, LTD., a Florida corporation, RAANAN KATZ, an individual, and DANIEL KATZ, an individual (collectively "RKA").

I. Introduction

RKA comes to this court seeking extraordinary relief in the form of a prior restraint on Defendant's speech because of an alleged defamation – a form of relief that is not recognized in

this state, nor anywhere else in this Country. Specifically, RKA's motion seeks an order:

> precluding Defendant (or any other person acting on Defendant's behalf or in conjunction with Defendant) from posting **any content on the Blogs** or otherwise engaging in their misconduct against Plaintiffs or their counsel, agents, representatives, employees or affiliates, and further ordering Defendant to instruct the website companies that are hosting the Blogs (Google and Mokono GmbH) to immediately shut down the Blogs, **remove all content therefrom**, (RKA Motion - Conclusion, p. 18.) (emphasis added)

RKA's request for this exceptional relief is a frontal attack on the First Amendment, and a request for this court to impose a prior restraint on Defendant's speech. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Erwin Chemerinsky, Constitutional Law: Principles and Policies 918 (2002) ("The clearest definition of prior restraint is an administrative system or a judicial order that prevents speech from occurring"). The motion should be denied on several grounds.

First, preliminary injunctive relief in defamation cases is unavailable, as such an injunction would impose an unlawful prior restraint of speech, violating the First Amendment.[1]

Second, irreparable harm is not present in this case: Monetary damages are adequate to compensate defamed plaintiffs and are available to RKA if it should prevail in this matter.

Third, RKA is highly unlikely to prevail in this matter, and thus cannot show likelihood of success on the merits, as Defendant's statements range from provably true[2] to matters of opinion, rather than fact.

Fourth, RKA has failed to offer any evidence or a suggested bond amount, failing the bond requirement of Florida Rule of Civil Procedure 1.610(b).

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[1] The term "prior restraint" is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. U.S., 113 S. Ct. 2766, 2771 (1993). The essence of a prior restraint is that is places specific communications under the personal censorship of a judge. Bernard v. Gulf Oil Co., 619 F.2d 459, 468 (5th Cir. 1980).

[2] It is important to note that the Plaintiff must prove the Defendant's statements as false in order to prevail on a defamation claim – the Defendant Defendants not need to prove them as true. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) ("the plaintiff [must] bear the burden of showing falsity, as well as [the defendant's] fault, before recovering damages" whether or not P is a public figure); see alsoMilkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990) (requiring plaintiff to prove statements false in a defamation case).

Collaterally, RKA has not provided and substantive response to *any* of Defendant's document discovery demands and barely responded to the Interrogatories. In contrast, Defendant has been deposed for more than 10 hours in two depositions (and is subject to a forthcoming third deposition), and has produced more than 1,000 pages of documents in response to RKA's three requests for production. Defendant produced all of this evidence to RKA without protest or compulsion from this Court. While RKA's motion fails on its merits, Defendant requests that the Court stay this motion based on RKA's failure to provide Defendant discovery in sufficient time to defend it. See, e.g.,Gallo v. E.I. Dupont De Nemours & Co., Case No. 2:11-cv-680 *2011 U.S. Dist. LEXIS 99470* at *4 (S.D. Ohio Sept. 2, 2011) ("While the factors favoring a stay are not overwhelming, they predominate over the factors which underlie the plaintiffs' arguments"); Greenberg v. Emergency Med. Servs. Corp., Case No. 1:11-cv-496 *2011 U.S. Dist. LEXIS 52858* (D. Colo. May 9, 2011) (staying litigation in connection with pending motion for preliminary injunction).

In seeking a preliminary injunction, RKA asks the Court to disregard the First Amendment and all case law interpreting it and issue a an injunction wiping her writing from existence before any court has evaluated whether or not it is defamatory – and then RKA doubles down and seeks a prior restraint of all future speech about RKA by depriving the Defendant of the right to continue posting any content **whatsoever** on her blog. (RKA's Motion at 5-6, 18). This demand by RKA relies on non-binding, inapplicable, and outdated case law from a New York trial court. Simultaneously, RKA's attorneys never so much as mention the controlling authority prohibiting prior restraints discussed herein. RKA's failure to cite the proper legal standards is not accidental, as its motion cannot succeed if this Court is aware of any case law reviewing requests for such

injunctive relief.

II. The Court's Entry of Preliminary Injunction is Improper in This Case.

RKA argues that all of Defendant's statements are defamatory *per se*.[3] RKA relies on this argument as if it were all it needed say in order to receive an unlawful order, which would require the defendant's speech to cease and be erased from the Internet before any determination as to whether the speech itself is defamatory. Like any book or other publication, Defendant's speech is presumptively entitled to First Amendment protection – a shield that prohibits RKA's planned course of action. Brown v. Entm't Merchants Ass'n, U.S., 131 S. Ct. 2729, 2733 (2011) (communication of "ideas—and even social messages.... suffices to confer First Amendment protection");Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329 (1997) (Extending protection of the First Amendment to Internet communications).

A prior restraint is an administrative or judicial order that forbids certain speech in advance of it being made. Alexander v. United States, 509 U.S. 544, 550 (1993); Shuttlesworth v. City of Birmingham.394 U.S. 147, 150-51 (1969). Any movant seeking a prior restraint must overcome a monumental burden. Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1305 (1983) ("It hardly requires repetition that [a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity") (internal quotation omitted); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (same)). "The presumption against prior restraints is heavier-and the degree of protection broader-than that against limits on

[3] As RKA has done throughout this case, it seems to believe that if it adds the words "per se" to the word "Defamation," then its job is done. RKA seems to argue that if it says the defendant's words are "defamation per se" that this means that they are defamatory by the mere fact that they were published. This demonstrates a fundamental misunderstanding of the law of defamation. "[Defamation] 'per se' is actionable on its face, but [defamation] 'per quod' requires additional explanation of the words used to show they have a defamatory meaning or that the person defamed is the plaintiff." Hood v. Connors, 419 So. 2d 742, 743 (Fla. 5th DCA 1982) citing Campbell v. Jacksonville Kennel Club, 66 So.2d 495, 495 (Fla. 1953). In either event, the plaintiff still bears the burden of proving that the statements are false, were published by the defendant, and were about the plaintiff. In a *per se* case, the only presumption the Plaintiff gets is a presumption that the statements are harmful.

expression imposed by criminal penalties. [...] [A]free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free wheeling censorship are formidable." Id. at 558-559.

The foundational case in this area of law, and one that is glaringly ignored in the Motion is Near v. Minnesota, 283 U.S. 697(1931). In that case, the Supreme Court struck down an order that enjoined thea newspaper publisher who had published articles found violating a state nuisance statute from distributing any future "malicious, scandalous or defamatory" publication. Id. at 706.Similarly, in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), 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.

RKA has cited no Florida case, and the Defendant has found none, upholding an injunction enjoining defamatory statements based solely on a mere *allegation* of defamation. To the contrary, Florida's courts reject the enjoining of speech even when it is actually defamatory – not merely alleged to be. The Defendant not need to sift through discarded trial court opinions from other states to prove her point, as the court records are littered with decisions in which similar plaintiffs sought similar relief and courts upheld the Constitution by rejecting the request. Defendant does not request that this court forge any new trail – as the existing road is wide, clearly marked, and well-paved.

"In the absence of some other independent ground for the invocation of equitable jurisdiction, injunctive relief is unavailable to redress a past harm, **or to restrain an actual or threatened defamation**." Rodriguez v. Ram Systems, Inc. 466 So.2d 412, 412 (Fla. 3d DCA 1985) (internal citations omitted) (emphasis added); United Sanitation Services, Inc. v. City of Tampa, 302 So.2d 435, 439 (Fla.2d DCA1974) ("equity will not enjoin either an actual or a threatened defamation"); accord Francis v. Flinn 118 U.S. 385 (1886) ("If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel" as opposed to obtaining an injunction); Moore v. City Dry Cleaners & Laundry, Inc., 41 So.2d 865, 873 (Fla.1949) ("a court of equity will not enjoin the commission of a threatened libel or slander");Reyes v. Middleton, 36 Fla. 99, 108, 17 So. 937 (Fla. 1895) ("a court of equity will never lend its aid by injunction to restrain the libeling or slandering of title to property [...] in such cases the remedy, if any, is at law");Reiter v. Mason, 563 So.2d 749, 750-51(Fla. 3d DCA 1990) ("a court of equity will not enjoin the commission of a threatened libel or slander"); Weiss v. Weiss, 5 So.3d 758, 758 (Fla. 5th DCA 2009) (defamatory comments posted on internet websites); Demby v. English, 667 So.2d 350, 355 (Fla. 1st DCA 1996) (denying "frivolous" claim for injunctive relief against defamation); Murphy v. Daytona Beach Humane Society, Inc., 176 So.2d 922, 924 (Fla. 1st DCA 1965) (holding that courts generally lack jurisdiction to enjoin defamatory speech); Gunder's Auto Center v. State Farm Ins. 617 F.Supp.2d 1222, 1225 (M.D.Fla.2009) (rejecting request for injunctive relief against defamation).

As the First DCA explained in Murphy, "[t]he reason for the rule is threefold. (1) There is an adequate legal remedy, either by an action for damages or by criminal prosecution. (2) Equity jurisdiction is traditionally limited to the protection of property rights. (3) Injunctive relief inhibits

the constitutional guarantees of freedom of speech and press and the right to trial by jury on the question of truth or falsity of the alleged libel." Murphy, 176 So.2d at 924 (Fla. 1st DCA 1965).Accordingly, this Court may not enjoin Defendant from speaking about RKA, and may not require her to shut down the blog.

RKA's reliance on the West Willow decision is misplaced, and further misrepresents that case's underlying facts. 23 Misc.2d 867, 869 (N.Y. Sup. Ct. 1960) (issuing injunction in *breach of contract and construction defect* case). RKA misrepresents the West Willow case's facts and holding. But even if West Willow supported RKA's position, the opinion in that case was issued more than fifty years ago by a foreign state's trial court. The order in that case is not controlling *anywhere* – not even in New York – yet RKA wishes for this Honorable Court to disregard a legion of contrary case law from the U.S. Supreme Court and Florida's appellate courts. Compounding this ludicrous notion, the West Willow case predates even New York Times v. Sullivan, 376 U.S. 254 (1964).Given Sullivan's prominence in modern defamation law, it is unsurprising that RKA needed to search exhaustively for a case prior to it that could even indirectly be cited in support of its request.

In New York and beyond, the correct view of the law is that equity will not enjoin a libel. Rosenberg Diamond Dev. Corp. v. Appel, 735 N.Y.S.2d 528, 529 (N.Y. App. Div. 2002) ("Prior restraints are not permissible, as here, merely to enjoin the publication of libel."); Metropolitan Opera Assn. v. Local 100, Hotel Employees &Restaurant Employees Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001) ("Indeed, for almost a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases"); Kramer v. Thompson, 947 F.2d 666, 677-678 (3d Cir 1991);Community for

Creative Non-Violence v. Pierce, 814 F.2d 663, 672 (D.C. Cir. 1987) ("The usual rule is 'that equity Defendants not enjoin a libel or slander and that the only remedy for defamation is an action for damages'"(citation omitted)); Willing v. Mazzocone, 482 Pa. 377 (1978) (affirming that remedy for defamation is an action for damages.); Cohen v. Advanced Med. Group of Georgia, Inc., 496 S.E.2d 710, 711 (Ga. 1998) ("Consistent with this Court's firm policy to protect the right of free speech, we apply the general rule that 'equity will not enjoin libel and slander...'"); Greenberg v. De Salvo, 229 So. 2d 83, 86 (La. 1969) ("Generally an injunction will not issue to restrain torts, such as defamation or harassment, against the person."); Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253, 255 (Tex. 1983) ("Defamation alone is not a sufficient justification for restraining an individual's right to speak freely."); Nyer v. Munoz-Mendoza, 430 N.E.2d 1214, 1217 (Mass. 1982) ("We note, further, that even allegedly false and defamatory statements are protected from prior injunctive restraint by the First Amendment."); Matchett v. Chicago Bar Ass'n, 467 N.E.2d 271, 275 (Ill. App. Ct. 1984) ("Further, it is settled law that unless a plaintiff can establish the existence of one of a very limited number of exceptions, equity will not enjoin the publication of a libel, so strong are the constitutional guarantees of freedom of speech and of the press.") This rule rests "in large part on the principle that injunctions are limited to rights that are without an adequate remedy at law, and because ordinarily libels may be remedied by damages, equity will not enjoin a libel absent extraordinary circumstances." MetropolitanOpera Assn. v. Local 100, Hotel Employees & Restaurant Employees Internat. Union, supra, 239 F.3d at 177.

Florida courts are no different than those courts nationwide, which widely support Defendant's position that no injunction should issue.[4] West Willow, cited by RKA, involved a

[4]The only Florida case giving any respect to West Willow is DeRitis v. AHZ Corp., 444 So.2d 93, 94 (Fla. 4th DCA 1984). In that case, homeowners were enjoined from placing large lemons on their property as a violation of the homeowners' association rules, and were found to have been engaged in extortionate activity – seeking to coerce the

tortious interference claim, rather than one for defamation. Id. at 869-70. Here, there are no allegations of tortious interference with any RKA contract or customer. Even if RKA brought such claims, it has offered no evidence demonstrating Defendant's intent or affirmative conduct to harm RKA as a business competitor.[5] RKA's citation toWest Willow is inapplicable to this case, and its analysis should be rejected.

III. RKA Misrepresents the Procedural History of this Case

RKA argues that the ban on preliminary injunctions in defamation cases is inapplicable because this Court and the Third DCA have rejected the Defendant's claims that her speech is constitutionally protected by the First Amendment. (RKA's Motion at 5).This statement is both factually and procedurally incorrect. An order denying a motion to dismiss is not an adjudication of the case's merits, as the motion is merely a mechanism for testing the legal sufficiency of the complaint. See Augustine v. Southern Bell Tel. & Tel. Co., 91 So.2d 320 (Fla. 1956). The Third DCA rejected Defendant's petition for certiorari on a discovery issue, and similarly did not rule – nor even suggest – that Defendant's statements were defamatory. RKA falsely contends that this judicial silence on the merits of Defendant's statements constitutes affirmation of their defamatory nature.[6]

Even when an alleged defamation may harm a plaintiff's business relationships, a speaker cannot be enjoined from making these statements before their validity is ascertained. The Fifth DCA held that the trial court's enjoining of a woman's speech in the form of allegedly defamatory website comments was inappropriate –despite her statements appearing to be false. Weiss v.

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developer into repurchasing their units at a $12,000 profit. The 5th DCA more recently rejected the DeRitis court's logic. Americas Homes, Inc. v. Esler, 668 So.2d 239, 240 (Fla. 5th DCA 1996).

[5] In fact, RKA initially alleged just such a claim and then withdrew it.

[6] Not only is this incorrect, but it makes a mockery of the instant motion. If the Third DCA has already held that Defendant's statements are defamatory, then why are we here? Why is the case not simply over, with the parties simply discussing damages with this Court?

Weiss, 5 So.3d 758 (Fla. 5th DCA 2009). Even if a defendant's statements may seem to be "wholly false," a court may not enjoin the speaker from making those statements, even in public. Mazzocone, 482 Pa. at 377; Metropolitan Opera Assn., 239 F.3d at 177; Kramer, 947 F.2d at 677-678; Pierce, 814 F.2d at 672. In the instant case, the Defendant's statements have no such indication. In fact, if her statements are reviewed by the Court, they will be shown to be provably true or mere opinion.

Allegedly defamatory speech that is targeted at a plaintiff's existing clients cannot be enjoined either, as the falsity and harm of the supposedly defamatory statements has not yet been ascertained. Jordan v. Metro. Life Ins. Co., 280 F.Supp. 2d 104 (S.D.N.Y. 2003); see also Keefe, 402 U.S. 415, 418-19, 29 L. Ed. 2d 1, 91 S. Ct. 1575 (1971); New Era Publ'n Int'l v. Henry Holt and Co., 695 F. Supp. 1493, 1525 (S.D.N.Y. 1988), aff'd, 873 F.2d 576 (2d Cir. 1989). TheJordan court concluded that it would not delay deciding the merits of the case in an effort to not "exacerbate" the plaintiff's injuries if the allegations were true – but it did not issue an injunction against the defendant's speech. Jordan, 280 F. Supp. 2d at 112.In this case, even if Defendant were targeting her speech at RKA's clients and customers, her conduct would not justify RKA's desired injunction before her statements are **proven** to be *false* and harmful. Id.; seePittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

IV. Test For Preliminary Injunctions

Notwithstanding Florida courts' abhorrence of prior restraints, RKA must establish all four of the following elements to obtain a preliminary injunction: (1) a likelihood of irreparable harm and the unavailability of an adequate remedy at law;[7] (2) a substantial likelihood of success on the

[7] RKA omits discussion of the requirement that plaintiff establish the unavailability of an adequate remedy at law as a subset of the first prong of the standard. Compare RKA's Motion at 13, with Plaza v. Plaza, 78 So.3d 4,6 (Fla. 3d DCA 2011). This omission is discussed further below.

merits; (3) that the threatened injury to the petitioner outweighs any possible harm to the respondent; and (4) the granting of a temporary injunction will not disserve the public interest. Plaza v. Plaza, 78 So.3d 4,6 (Fla. 3d DCA 2011) (citing Cordis Corp. v. Prooslin, 482 So.2d 486 (Fla. 3d DCA 1986)). RKA fails to satisfy each and every prong factually and legally, and cannot obtain a preliminary injunction.

A. RKA Has Not Shown It Will Suffer Irreparable Harm

RKA argues that it will be irreparably harmed because there is no legal remedy available for his alleged injury (RKA's Motion at 15-16) (citing Jewett Orthopedic Clinic, P.A. v. White, 629 So.2d 922, 927 (Fla. 5th DCA 1993) (overruled by King v. Jessup, 698 So.2d 339 (Fla. 5th DCA 1997)(declaratory action to declare covenant not to compete unenforceable)). RKA also argues that there is no legal remedy available because the "damages . . . are not susceptible of monetary calculation or remuneration." (RKA's Motion at 15-16) These arguments fail.

i. RKA's Argument is Circular and Illogical

RKA, in attempting to use each of the disjunctive requirements of the preliminary injunction standard to prove up one another, has created a circular argument as to why it should obtain the ultimate relief without offering any factual support for its claims. RKA cites Jewett Orthopedic for the proposition that irreparable injury is presumed when there is no legal remedy available. The Jewett case dealt with a *statutorily created presumption* of irreparable injury in cases dealing with breaches of covenants not to compete.

Not only is Jewett no longer good law c.f.King v. Jessup, it deals with a breach of contract action for non-compete agreements – a body of law entirely separate and distinct from defamation. 698 So.2d 339 (Fla. 5th DCA 1997) ("The 'presumption' of irreparable injury [in breaches of

covenants not to compete] resulted from the recognition that monetary damages are difficult to prove with any certainty and that, even if provable, would not adequately compensate for all aspects of the violation of a covenant not to compete"). While it may be impossible to assess the losses arising from a breached non-compete agreement, it is RKA's duty to prove its damages where it has been defamed and establish its entitlement to monetary damages – the only relief it is entitled to in this case.

ii. Mere Economic Injury or Lost Sales or Lost Customers Are Not Sufficient Evidence of Irreparable Harm

RKA's own filings with this Court undermine its claims that irreparable injury will occur unless this Court issues a preliminary injunction. RKA has filed allegations of continuing defamation with this Court on **five separate occasions**. (RKA's Notice of Defendant's Contined Defamation of RKA dated November 23,2011; RKA's Notice of Defendant's Continuing Defamatory Conduct dated January 4, 2012; RKA's Third Notice of Filing Evidence of Defnedant's Continued Defamation of RKA dated January 18,2012; RKA's Fourth Notice of Filing Evidence of Defendant's Continued Defamation of RKA dated March 21, 2012; RKA's Fifth Notice of Filing Evidence of Defendant's Continuted Defamation of RKA dated May 3, 2012) Until now, RKA has argued that defendant's allegedly defamatory statements constitute defamation *per se*. Now, 11 months after the filing its complaint, RKA moves this Court to issue a preliminary injunction on the grounds that "[t]he damages Defendant is causing [RKA] to incur are not susceptible of monetary calculation or remuneration." (RKA Motion at 16) RKA's demand is inconsistent with the principals governing preliminary injunctions generally, seeks redress for already-lost business to prevent future economic losses. See, e.g., Speer v. Evangelisto, 662 So.2d 1340 (Fla. 2d DCA 1995) ("Generally, injunctive relief is [...] not available to redress

harm which has already occurred").

RKA's claim of damages also cannot be reconciled with the legal requirement that irreparable injury rise to more than mere economic injury or loss of income. Dania Jai Alai Intern., Inc. v. Murua, 375 So.2d 57, 58 (Fla. 1979) (citing State, Department of Health and Rehabilitative Services v. Artis, 345 So.2d 1109 (Fla. 4th DCA 1977) (loss of income); Butler v. Lomelo, 355 So.2d 1208 (Fla. 4th DCA 1977) (employment)); see alsoAmericas Homes, Inc. v. Esler, 668 So.2d 239, 240 (Fla. 5th DCA 1996) (holding incalculable lost sales insufficient to demonstrate irreparable harm absent evidence of directed and intentional anticompetitive conduct directed at competitor's customers). Despite this bar againstusing economic losses as evidence of irreparable harm, these losses are the only damages RKA has alleged and argued. Indeed, the economic losses are the only damages RKA can claim (and must substantiate), and make this Court's entry of a preliminary injunction inappropriate.

iii. RKA's Application for a Preliminary Injunction is Barred by Laches

After 11 months of fierce litigation, RKA has only now sought a preliminary injunction against Defendant to stop the "irreparable harm" emanating from her allegedly defamatory statements. This extreme delay demonstrates that there is *no* risk of any harm to RKA, let alone risk justifying a preliminary injunction. Having waited almost one year to seek relief for this "irreparable harm," RKA is barred from demanding an injunction under laches. "Laches is an omission to assert a[n equitable] right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. Laches is an equitable defense and applied on a case-by-case basis, but "may arise from unexcused inaction and resultant prejudice alone." Hoffman v. Foley, 541 So.2d 145, 147 n.3 (Fla. 3d DCA 1989).

RKA's initial Complaint was filed almost a year ago, and it has filed five supplemental statements of alleged defamation with the Court since then. At any of these times, it would have been logical for RKA to assert that it faced irreparable harm from Defendant's statements (though RKA's argument would have failed for the other reasons contained in this brief). For RKA to delay for this long before seeking preliminary injunction, while simultaneously knowing of and allowing Defendant to continue posting to the blog at issue, belies its claims of irreparable harm. Not only would it be inequitable for RKA to obtain injunctive relief now, its delay undercuts its claims of irreparable harm, and reveals the motion as a blatant attempt to receive a double remedy – monetary damages *and* injunction. The Court shoulddeny RKA's motion for preliminary injunction, as RKA's conduct shows no threat of irreparable harm.

B. RKA Has An Adequate Remedy at Law

The requirement of "no adequate remedy available at law" is contained within the irreparable injury condition for preliminary injunctions. As explained above, one of the three reasons that the courts refuse equitable relief in defamation action is because the remedy for that claim is entirely legal – not equitable. Reyes v. Middleton 36 Fla. 99, 108 (1895) ("In [libel and slander] cases the remedy, if any, is at law."); see alsoMoore v. City Dry Cleaners & Laundry 41 So.2d 865, 873 (Fla. 1949) ("[A]n action at law will ordinarily provide a full, adequate an complete remedy in [libel or slander] cases."); Reiter v. Mason 563 So.2d 749, 750-51 (Fla. 3d DCA 1990) ("[A]n action for damages will ordinarily provide a complete remedy [to threatened libel or slander]".); Weiss v. Weiss 5 So.3d 758 (Fla. 5th DCA 2009) ("Because injunctive relief is generally unavailable, a complainant is typically left to his or her remedy at law."); accordCBS, Inc. v. Davis, 510 U.S. 1315 (1994) ("Subsequent civil or criminal proceedings, rather than prior

restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context.").

Courts that have analyzed this issue have found that defamation is a claim arising under law, not equity, and for which claimants are entitled only to legal relief (i.e., monetary damages). For this reason, RKA cannot satisfy this prong of the preliminary injunctions test as a matter of law, as it may pursue legal relief in the absence of an injunction.

C. RKA Does Not Possess A Substantial Likelihood of Success on the Merits

RKA must demonstrate a substantial likelihood of success on the merits to obtain a preliminary injunction. "Given the extraordinary nature of the remedy, the courts require a movant **to carry its overall burden clearly**. [...] [T]he movant must clearly convince the Court that they are substantially likely to succeed." Anderson v. Upper Keys Business Group, Inc., 61 So.3d 1162, (Fla 3d DCA 2011) (emphasis added) (citing Gulf Coast Commercial Corp. v. Gordon River Hotel Assocs., 2006 WL 1382072, at *4 (M.D.Fla, 2006)). Further, the Florida Rules of Civil Procedure require more than mere naked legal conclusions to support a finding of substantial likelihood of success on the merits. SeeFla.R.Civ.P. 1.610.

As RKA has essentially refused to cooperate in discovery and has failed to provide reasonable respones to Defendant's discovery demands, Defendant is at an evidentiary disadvantage – especially considering that Defendant has adequately and fully responded to all of RKA's many discovery requests. Absent RKA's long-awaited responses, Defendant cannot controvert RKA's evidence and support her positions that: (a) her statements are truthful; and (b) the principals of RKA are public figures. RKA is in possession – possibly sole possession – of evidence concerning both these issues. If RKA refuses to produce these materials, the Court may

draw an adverse inference as to their contents. SeeFla. R. Civ. P. 1.380(b)(2); Golden Yachts, Inc. v. Hall, 920 So. 2d 777 (Fla. 4th DCA 2006)

RKA argues that because Defendant's statements are defamatory *per se*, it is not required to prove any actual malice or damages. This argument fails for several reasons.

First, though not expressly overruled by the Florida Supreme Court, the defamation *per se* rule does not exist in Florida after the U.S. Supreme Court's edicts in Firestone v. Time, Inc.and Gertz v. Welch.As this District recognized in Miami Herald Pub. Co. v. Ane, the United States Supreme Court abolished strict liability in defamation actions for private figures.[8]In Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974), the plaintiff was required to prove at least a negligent disregard for the truth. Miami Herald Pub. Co. v. Ane, 423 So.2d 376 (Fla. 3d DCA 1982) (citing Firestone v. Time, Inc., 305 So.2d 172 (Fla.1974) ("It is, therefore, clear that the ultimate decision of the Florida Supreme Court in this litigation adopted, without discussion, the Gertz-Firestone standard of negligence, and no higher standard, as the controlling law in the case which the trial court was to apply upon remand.")).

Second, even if Florida recognized defamation *per se* actions, RKA misapplies Florida's jurisprudence. The presumption of actual malice and damages in a per se action does not mean that RKA is relieved of the burden of proving its case. Contrarily, these presumptions merely reduce its burden at the *pleading* stages of litigation. Likewise, these presumptions entitle RKA to a presumption on the elements of malice and damages at trial.[9]

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[8] The undersigned notes that there has been no legal determination as to whether RKA constitutes a public figure. Contrary to RKA's argument, the motion to dismiss order Defendants not operate as an adjudication on the merits of a particular issue, but rather as a mechanism for testing the legal sufficiency of RKA's Claims. SeeAugustine v. Southern Bell Tel. & Tel. Co., 91 So.2d 320 (Fla. 1956).

[9] Indeed, one of the cases RKA relies on recognizes the complexity of the pleadings stage in defamation cases as justifying this presumption, stating:

The presumptions do not: **(a)** discharge RKA's underlying burden to prove the rest of its case, seeScott v. Bush 907 So.2d 662, 665-66 (Fla. 5th DCA 2005) (discussing presumption of damages and malice in per se defamation actions during pleading stage); Barry College v. Hull 353 So.2d 575, 578 (Fla. 3d DCA 1977) (same); **(b)** prevent Defendant from overcoming that presumption, see Scott, 907 So.2d at 664-66; **(c)** make RKA a private figure as a matter of law, see Id.; and **(d)** bar the Defendant from asserting any complete defense to defamation, including truth, Article I, § 4, Fla. Const., entitlement to opinion, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974), consent, Miami Herald Pub. Co. v. Brautigam, 127 So. 2d 718 (Fla. 3d DCA 1961), rhetorical hyperbole, Greenbelt Coop. Pub.Ass'n v. Bresler, 893 U.S. 6, 14 (1970), privileged or justification. Applestein v. Knight Newspapers, Inc., 337 So. 2d 1005 (Fla. 3d DCA 1976).

In its motion, RKA Defendants not argue any factual grounds proving there is a substantial likelihood of success on the case's merits other than stamping its feet and parroting the words "defamation per se," without actually understanding what the words mean -- or hiding that degree of understanding from the Court. Based on simply this, RKA asks the Court to accord it a wide variety of undeserved, unfounded presumptions based on and incorrect conclusions of law. RKA's overreliance on its claims of defamation *per se* reveal the frailty of its claims, particularly in light of the foregoing analysis. While RKA is not precluded from prevailing on the merits in this case, it enjoys far less than a substantial likelihood of doing so, which is required to obtain an injunction.

> The law of slander and defamation is so ancient it contains numerous illogical twists and refinements stemming from ecclesiastical law, as well as the common law. Currently it is overlaid with statutory and constitutional requirements and limitations. It is confusing, unclear, illogical, and somewhat in conflict. Courts and judges frequently disagree with one another as to whether an actionable defamation has been established, as a matter of law.

Scott v. Busch 907 So.2d 662, 665-66 (Fla. 5th DCA 2005) (internal citations omitted).

RKA must specifically state the grounds for its motion and convince the Court that it is substantially likely to succeed at trial.Anderson, 61 So.3d 1162. Instead, RKA conclusorily states that "[t]he Blogs are defamatory per se, and the plaintiffs have a substantial likelihood that they will ultimately prevail on the merits." (RKA's Motion at 15) To satisfy this prong of the Plaza test for preliminary injunctions, RKA was required to analyze both the facts of this case and the state of Florida's law on defamation. RKA failed to do so for a clear reason: Both the law and the facts weigh heavily against RKA prevailing on the merits. Thus, RKA has failed to show that it enjoys a substantial likelihood of success on the merits, and the Court should deny its motion for preliminary injunction.

D. An Injunction's Harm to Defendant and the Public Outweigh the RKA's Claimed Injury.

The third and fourth prongs of Plaza's preliminary injunction test require RKA to prove that the alleged threatened injury to it outweighs any possible harm to Defendant, and that the injunction would not disserve the public interest. Because the desired injunction's harm to Defendant and the broader public involves their sacrosanct First Amendment rights, enjoining Defendant's speech in this case would inflict the most egregious harm to free expression itself. Silencing Defendant, ultimately to protect RKA's ego, automatically implicates – and harms – public interest because of the censorship inherent in that relief. For the Court to issue a prior restraint in this case, censoring discourse between the Defendant and among the broader public, would violate core First Amendment principals and impinge on the public right to free expression.

i. **Florida Courts Have Not Found RKA's Desired Relief – a Prior Restraint of Speech – to be Permissible in Prior Situations.**

As Justice Blackstone eloquently wrote:

> The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity * * * thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments destructive of the ends of society, is the crime which society corrects.

Blackstone's Commentaries 34, pp. 1326-27.

Under the U.S. Constitution and Florida's Declaration of rights, although prior restraints over a publication are not *per se* unconstitutional, they are the most serious and least tolerable infringements of First Amendment rights. New York Times Co. v. United States, 403 U.S. 713, 714, (1971) (reversing injunction on newspapers' publication of classified Viet Nam historical studies); Bernard v. Gulf Oil Co. 619 F.2d 459, 467 (5th Cir. 1980) (reversing injunction prohibiting parties and counsel from communicating with potential class members without court approval). They are presumptively unconstitutional. Such restraints have *never* been constitutionally permitted simply to protect business interests. See Animal Rights Foundation of Florida, Inc. v. Siegel 867 So.2d 451 (Fla. 5th DCA 2004) (reversing injunction covering picketing and leafleting protesting animal show practices that allegedly tortiously interfered with plaintiff's business interest, invaded plaintiff's privacy rights and defamed plaintiff; "there is **no** 'compelling state interest' which is met by the instant injunction terms, which merely regulate the private rights

of the parties"); see also Baily v. Systems Innovation, Inc. 852 F.2d 93, 99-100 (3d Cir. 1988) (finding restriction on attorney statements about pending cases unconstitutional); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Florida's courts have affirmed the First Amendment principles enunciated by these federal courts. In Post-Newsweek Stations Orlando, Inc. v. Guetzloe, Mr. Guetzloe lost private records, including his medical records and those of his family, when he failed to pay rent to a mini-warehouse. While Guetzloe is hardly a household name, he was a public figure in his particular community.[10] Despite his status as a local public figure, Guetzloe claimed that his privacy rights would be violated by the publication of the medical records because the public had no legitimate interest in that information. The trial court entered the requested injunction against publication of those records finding that they would violate Mr. Guetzloe's privacy rights.

The Fifth DCA weighed the parties' respective claims and concluded that Guetzloe's privacy rights could not trump the First Amendment, even where the public had no lawful interest in the published information. Given the clarity of the analysis and the obvious similarity to the legal theories asserted by RKA, a lengthy quotation is warranted:

> Although the Supreme Court has never articulated a clear test that we can apply to determine when this "heavy burden" has been met, the Court has demonstrated the weight of this burden by consistently holding that the prohibition against such restraints attaches even when substantial competing interests are at stake. *See, e.g.*, Butterworth v. Smith, 494 U.S. 624, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990) (invalidating criminal statute to extent it prohibited witness from disclosing content of witness's grand jury testimony); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (invalidating state's criminal statute prohibiting publication of information regarding judicial review commission

[10] RKA and Ranaan Katz are public figures. While not a household name, he is well known in this area – he is a part owner of the Miami Heat, he has streets and days named after him by local governments, and he is frequently in the press. *See, generally*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974) (Setting malice standard for limited public figures); Mile Marker, Inc. v. Petersen Publ'g, L.L.C., 811 So. 2d 841 (Fla. 4th DCA 2002) (Finding hydraulics manufacturer to be a limited public figure for purposes of article comparing hydraulics gear).

proceedings); Neb. Press Ass'n, 427 U.S. 539, 96 S.Ct. 2791 (invalidating, as improper prior restraint, pretrial gag order prohibiting publication of defendant's confession in highly publicized murder trial, despite state's competing interest in protecting defendant's right to fair trial); New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (prohibiting injunction, as improper prior restraint, against publication of stolen, classified government documents). Indeed, in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here. *See*Matter of Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986). (footnote omitted).

> Here, Appellee asserts that his privacy interest in his private papers, and in particular his medical information and attorney-client communications, is sufficient to sustain his burden....Notwithstanding any suggestion by the Court that privacy rights might trump the First Amendment in a given circumstance, time after time, when the high court has been called upon to consider whether the free exercise of speech under the First Amendment may be curtailed to protect privacy rights, it has not been hesitant in resolving the ostensible conflict in favor of the exercise of free speech. The Court has done so by prohibiting both prior restraints and the constitutionally less-intrusive, post-publication imposition of criminal and civil liability. (lengthy citations omitted).... Appellee seeks to enjoin the publication of documents that, based on the nature of the documents, are of no obvious public concern. We particularly observe that in most instances, an individual's medical records would not be of public interest....The abstract issue framed by the parties in this case, therefore, involves the extent to which privacy interests in information, which is of no apparent public concern, may be asserted as a basis for limiting the First Amendment's prohibition against censored expression by a publisher who comes into possession of the information without resort to improper means.... Although we can certainly conceive of hypothetical situations when publication of sensitive medical records or attorney-client communications might meet this element, we cannot conclude that the publication of any such records will necessarily meet this threshold merely because of their nature. Speculation cannot suffice to rebut the heavy presumption against a prior restraint. Se. Promotions, 420 U.S. at 561, 95 S.Ct. 1239; New York Times Co., 403 U.S. at 725-26, 91 S.Ct. 2140 (Brennan, J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.")

Id. at 611-13.

Gagliardo v. Branam Children, 32 So.3d 673 (Fla. 3d DCA 2010) is an analogous Florida case which brings home the point that prior restraints against publication will not be tolerated. In that case, a family friend wished to write a book concerning minor children whose parents were

lost at sea – a story which apparently garnered international attention. The trial Court enjoined the publication of pictures of the children or any information concerning their story or the loss of their parents. The Third District Court of Appeal reversed finding that the prior restraint could not be supported even in circumstances where the minor children may be harmed:

> Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights. As such, prior restraints are presumed unconstitutional. Therefore, only in "exceptional cases," will the courts consider censorship of publication acceptable. Guetzloe, 968 So.2d at 610.
>
> We determine that this is not an "exceptional case" that triggers infringement on our precious First Amendment rights. Here, the order enjoined the writer from speaking about or publishing any information relating to the children and/or circumstances surrounding their parents' widely publicized disappearance at sea. There were no exceptional circumstances present to justify censoring the writer. Thus, the trial court improperly entered this order.

Id. at 674.

The First DCA has also rejected the notion that possible harm from the disclosure of embarrassing information could serve as grounds for the imposition of a prior restraint. In Florida Pub. Co. v. Brooke, 576 So.2d 842, 846 (Fla. 1st DCA 1991), the trial judge entered a gag order prohibiting the publication of the contents of a letter from a juvenile psychologist that was critical of a state agency. The concern was that the minor child who was the subject of a dependency case would be harmed by the public disclosure of information concerning his case. The appellate court struck down the injunction order finding that this justification was insufficient in light of the presumption that all prior restraints are unconstitutional:

> Prior restraints have been described as presumptively unconstitutional. Nebraska Press Association v. Stuart, 427 U.S. 539, 558, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683, 697 (1976). Although a government may deny access to information and punish its theft, government may not prohibit or punish the publication of the information once it falls into the hands of the press unless the need for secrecy is manifestly overwhelming. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 849, 98 S.Ct. 1535, 1546, 56 L.Ed.2d 1, 17 (1978) (Stewart, J., concurring); *see also*Oklahoma Publishing Co. v. District Court in and for Oklahoma County,

> 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977). In the instant case, the judge's written order made no findings as to the need for the restraint of the press. At the hearing, Judge Brooke orally expressed his concern that E.B. could be injured by the publication of the letter, but he was not specific as to what the possible injury might be. In an analogous situation, the protection of a juvenile from the adverse effects of the publication of his name was held not to be a sufficiently strong state interest to withstand a First Amendment challenge. (citation omitted).

Id. at 846; See also Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904 (1976) (Gag order on trial reporting held to be an invalid prior restraint).

It is possible (although entirely speculative at this time), that the information posted on the Defendant's website will be embarrassing and may cause injury to the Plaintiff's reputation.[11] However, there are no circumstances where the possibility of embarrassment to an individual is so extreme that the "need for secrecy is manifestly overwhelming." Id. Even if the information is embarrassing to the Plaintiff, the law provides a complete remedy through a defamation action so that a prior restraint cannot be justified.

The common law of Florida does not allow for entry of an injunction against defamatory statements, as the law provides a complete and adequate remedy through a defamation action:

> [E]quity will not enjoin either an actual or threatened defamation. Demby v. English, 667 So.2d 350 (Fla. 1st DCA 1995); Reiter v. Mason, 563 So.2d 749 (Fla. 3d DCA 1990). In fact, most prior restraints on an individual's constitutional right of free expression are presumptively unconstitutional. Animal Rights Foundation of Fla., Inc. v. Siegel, 867 So.2d 451, 457 (Fla. 5th DCA 2004). Because injunctive relief is generally unavailable, a complainant is typically left to his or her remedy at law. Moore v. City Dry Cleaners & Laundry, 41 So.2d 865 (Fla. 1949); United Sanitation Servs.of Hillsborough, Inc. v. City of Tampa, 302 So.2d 435 (Fla. 2d DCA 1974).

Weiss v. Weiss, 5 So.3d 758, 759 (Fla. 5th DCA 2009).[12]

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[11] The Defendant denies that the information she has published and seeks to publish is defamatory because the information is entirely truthful. Falsity is a required element of all defamation actions. SeeInternet Solutions Corp. v. Marshall, 39 So. 3d 1201 (Fla. 2010). Furthermore, the Plaintiff is a public figure and the information Defendant wishes to disseminate is of interest to the public. The Motion seeking an injunction simply assumes that the contents of the website are defamatory without analyzing the contents, addressing the privilege of truthful communications, or evaluating the parties' relative burdens of proof.

[12] This common law principle appears to be accepted in every state in the Union. *See, e.g.*, Cohen v. Advanced Med.

ii. RKA Cannot Show Its Interest in Relief Outweighs the Free Speech Rights of Defendant and the Public.

The Supreme Court places a heavy – almost insurmountable – burden on the plaintiff in seeking an injunction against speech:

> The presumption against prior restraints is heavier-and the degree of protection broader-than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others before hand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

SE. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975).

RKA faces an impossible task in creating a justification for imposition of a prior restraint on constitutionally protected speech. See Miami Herald Pub. Co. v. Morphonios, 467 So.2d 1026, 1028 (Fla. 3d DCA 1985) (reversing trial court's entry of injunction against publishing story concerning ongoing court proceedings); State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So. 2d 904, 911 (Fla. 1976) (quashing injunction entered against publication of news items regarding ongoing trial).

The Supreme Court has consistently held that the prohibition against these restraints attaches even when substantial competing interests are at stake. SeePost-Newsweek Stations Orlando, Inc. v. Guetzloe, 968 So.2d at 608 citing Matter of Providence Journal Co., 820 F. 2d at

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Group of Georgia, Inc., 496 S.E.2d 710, 711 (Ga. 1998) ("Consistent with this Court's firm policy to protect the right of free speech, we apply the general rule that 'equity will not enjoin libel and slander...'"); Greenberg v. De Salvo, 229 So. 2d 83, 86 (La. 1969) ("Generally an injunction will not issue to restrain torts, such as defamation or harassment, against the person."); Rosenberg Diamond Dev. Corp. v. Appel, 735 N.Y.S.2d 528, 529 (N.Y. App. Div. 2002) ("Prior restraints are not permissible, as here, merely to enjoin the publication of libel."); Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253, 255 (Tex. 1983) ("Defamation alone is not a sufficient justification for restraining an individual's right to speak freely."); Nyer v. Munoz-Mendoza, 430 N.E.2d 1214, 1217 (Mass. 1982) ("We note, further, that even allegedly false and defamatory statements are protected from prior injunctive restraint by the First Amendment."); Matchett v. Chicago Bar Assn., 467 N.E.2d 271, 275 (Ill. App. Ct. 1984) ("Further, it is settled law that unless a plaintiff can establish the existence of one of a very limited number of exceptions, equity will not enjoin the publication of a libel, so strong are the constitutional guarantees of freedom of speech and of the press.")

1348.The First Amendment forbids judicial restraints of the press based on mere allegations and speculation – such as the "incalculable" damages RKA alleges it will suffer (yet cannot identify). SeeNew York Times Co., 403 U.S. at 725–26 (Brennan, J., concurring).

RKA shrugs off this burden in its motion and does not even attempt a balancing of the equities. Rather than articulate a balance of First Amendment protections that favors RKA, the plaintiff dismisses this analysis to focus on the alleged interference with its business (despite not supplying any evidence of business loss). (RKA's Motion at 17). RKA has not, and cannot, demonstrate any compelling state or public interest justifying its attempted act of censorship.

In contrast to RKA's disregard for principles of free speech, Defendant is a member of the media and, as an author of a news blog, enjoys special rights and protections for commentary. The First Amendment exists to protect unfavorable, uncomfortable and unpleasant forms of expression. While Defendant's speech may be subsequently punished with monetary damages if it is found to be false and harmful, the Court cannot silence it *a priori*. To do so would subject all speech, both legitimate and otherwise, to any prior restraint obtained by an easily offended and well-heeled plaintiff. "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss a loss in the immediacy, the impact, of speech." A. Bickel, The Morality of Consent 61 (1975) (quoted in Nebraska Press Association v. Stuart, 427 U.S. at 609 (Brennan, J., concurring)).

RKA has offered nothing to show why its demanded prior restraint is constitutional and of greater significance than the First Amendment interests of Defendant and the public. Whether borne of disregard for others' free expression rights or an inability to overcome them with its own specious injuries, RKA has not tipped this balancing test in its favor. Having failed to satisfy the

final two Plaza factors, RKA's motion for preliminary injunction must be denied.

IV. RKA's Failure to Pledge or Discuss Bond Requires Denial of Motion

Florida Rule of Civil Procedure 1.610 requires a movant to give bond in an amount the court deems proper before issuing a preliminary injunction. Fla.R.Civ.P. 1.610(b) "The purpose of an injunction bond is to provide sufficient funds to cover the adverse party's costs and damages in the event the injunction is later determined to have been improvidently entered." Bieda v. Bieda, 42 So.3d 859, 862 (Fla.3d DCA 2010); Fla.R.Civ.P. 1.610(b). The Court may also consider factors other than anticipated costs and damages, including the adverse party's chances of overturning the temporary injunction. Longshore Lakes Joint Venture v. Mundy 616 So.2d 1047, 1047 (Fla. 2d DCA 1993). A trial court may not enter a preliminary injunction without complying with the bond requirement. RKA's motion includes no discussion of the bond requirement as delineated by Florida Rule of Civil Procedure 1.610(b). This requires denial of the instant motion for several reasons.

First, the fact that RKA has proffered no evidence in support of a bond means that the instant motion is deficient on its face and must be denied. See Bieda, 42 So.3d at 862. Further, Florida Courts have repeatedly reversed the issuance of preliminary injunctions where the movant failed to establish direct evidence in the record of what the opposing parties costs and damages would be in the event the injunction is improvidently entered. See Bieda v. Bieda, 42 So.3d 859, 862 (Fla.3d DCA 2010); see also Parker Tampa Two, Inc.v v. Somerset Dev. Corp., 544 So.2d 1018, 1021 (Fla. 1989); Braswell v. Braswell, 881 So.2d 1193, 1202 (Fla. 3d DCA 2004); Longshore Lakes Joint Venture v. Mundy, 616 So.2d 1047, 1047 (Fla. 2d DCA 1993). This State's appellate courts have time and time again remanded improvidently issued preliminary

injunctions for full evidentiary hearings to establish bond amounts. Eldon v. Perrin, 78 So.3d 737 (Fla. 4th DCA 2012). Thus, RKA's silence on the bond issue requires denial of the instant motion.

Second, even if RKA had offered any evidence on the bond requirement, the damage to Defendant's first amendment rights should this Court improvidently issue a preliminary injunction goes beyond mere litigation costs into the incalculable realm of first amendment injury. "[P]rior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause *irremediable loss*. . . ." Nebraska Press Ass'n, 427 U.S. 539 at 609; see also International Broth. Of Teamsters v. Miami Retail Grocers, Inc., 76 So.2d 491 (Fla. 1954) (holding absence of evidence on movant's inability to give an appropriate bond required reversal of preliminary injunction). What RKA's motion demands is nothing less than a price tag on the First Amendment. Defendant's irremediable risk of loss means that a bond amount is wholly incalculable anyway, requiring detail of the instant motion.

For these reasons, RKA's failure to offer any evidence regarding Florida Rule of Civil Procedure 1.610(b)'s bond requirement means that his instant motion is deficient and should be denied.

V. Conclusion and Request for Sanctions

The Court must not enjoin Defendant's speech, and must deny RKA's motion. At the time of this motion, RKA's claims of defamation are exactly that – mere allegations – and have not been adjudicated on their merits. Any injunction issued by this court would impermissibly gag Defendant's statements of opinion and, as will be established when RKA finally produces responsive discovery, truth.

RKA has failed to prove any of the four elements required to obtain a preliminary injunction, and has offered no law or evidence substantiating its claim of irreparable harm. The plaintiff has further submitted no proof that legal damages are unavailable for redress of any injury Defendant causes, no proof that it is substantially likely to succeed on the case's merits, and no proof that the alleged injury Defendant has caused RKA outweighs Defendant's substantial First Amendment rights – or the public's right to receive and participate in Defendant's criticisms of RKA. The public's interest in free speech and debate would be seriously impacted by an injunction against Defendant in this case. The injunction RKA seeks would constitute an impermissible prior restraint on speech one that courts in Florida and around the country have consistently rejected.

For these reasons, this Court should deny RKA's motion for preliminary injunction. Furthermore, as the motion is so patently frivolous, the court should use its inherent power and/or Fla. Stat. § 57.105 to impose the costs of defense, including attorneys fees, upon the Plaintiff. The First District Court of Appeal has deemed arguments in support of such an injunction to be frivolous:

> [W]e address and readily dispose of the frivolous claim for injunctive relief in Count II of the complaint, i.e., the request that appellant be enjoined from "writing or otherwise making further defamatory statements" about appellee. It is a "well established rule that equity will not enjoin either an actual or a threatened defamation." United Sanitation Services, Inc. v. City of Tampa, 302 So.2d 435 (Fla.2d DCA 1974).

Demby v. English, 667 So.2d 350, 355 (Fla. 1st DCA 1995); See also United Sanitation Svcs. of Hillsborough, Inc. v. City of Tampa, 302 So.2d 435 (Fla. 2d DCA 1974) (Court recognized "the well established rule that equity will not enjoin either an actual or a threatened defamation").

While Fla. Stat. § 57.105 normally requires 21 days' notice to the sanctioned party, in this case, such a period of time was unavailable. The Plaintiff should not escape liability for bringing

what any court would deem to be a frivolous motion.

Dated: May 15__, 2012_____

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing was sent via U.S. Mail and hand delivery this _15___ day of _May_____, 2012___, to attorney for Plaintiffs:
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