SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

CHRISTOPHER PORCO,	:	Clinton County Clerk's
	:	Index No. 2013/190
Plaintiff-Respondent,	:	
vs.	:	
LIFETIME ENTERTAINMENT SERVICES, INC.	:	
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION BY DEFENDANT-APPELLANT TO VACATE OR STAY A PRIOR RESTRAINT ON SPEECH

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PRELIMINARY STATEMENT

Yesterday, March 19, 2013, the Supreme Court, Clinton County (Hon. Robert J. Muller) entered an extraordinary temporary restraining order that bars Defendant-Respondent Lifetime Entertainment Services, Inc. ("Lifetime") from televising this Saturday night, March 23, a movie about the trial and conviction of Plaintiff- Respondent Christopher Porco ("Porco"). The order constitutes a patently unconstitutional, prior restraint. Emergency relief is urgently needed from this Court to avoid immediate and irreparable harm to Lifetime.

All apart from the plain constitutional error, the injunctive relief entered against Lifetime is based on multiples errors of law Issued just four days before the national television premier of the movie, in response to a motion filed by Porco six weeks earlier, the injunction was entered before service of the summons and complaint. Relief was granted upon Porco's unvarnished allegation that Lifetime's movie about his trial—which he has never seen—provides a "fictionalized" account, and therefore uses his name for "purposes of trade" in violation of N.Y. Civ. Rights Law §51 ("Section 51"). With nothing more than this unexplored claim of "fictionalization," the trial court entered a temporary restraining order, finding that Porco might otherwise be deprived of his "statutory remedy" of injunctive relief if he is able to prevail at a preliminary injunction hearing the Court has now scheduled for late April.

The extraordinary injunctive relief is based on a drastic misreading of the scope of Section 51, and misapplies the burdens required of any plaintiff seeking injunctive relief. The unconstitutional prior restraint imposed should immediately be vacated or, at a minimum stayed, so that the broadcast on March 23 may proceed.

BACKGROUND[1]

In 2006, Porco was convicted by a jury in Orange County of murdering his father and severely maiming his mother with an axe while they slept. He is now serving a sentence of fifty years in prison, and has exhausted all appeals. The case against Porco received extensive news coverage and was also the subject of a one hour program on 48 Hours Mystery broadcast by CBS and an episode of the TruTV series Forensic Files. Sternbach Aff. ¶ 5.

Lifetime has produced a television movie about Porco's crimes entitled "Romeo Killer: The Christopher Porco Story" (the "movie"). The movie is to receive its national television premier on Saturday, March 23, and has been heavily advertised and promoted by Lifetime. Bailey Aff. ¶¶ 3-5. Although Porco has not seen the movie nor the screenplay upon which it is based, he claims in wholly conclusory terms that it is a "substantially fictionalized account . . . about plaintiff and the events that led to his incarceration." Compl. ¶ 7. In fact, the essential elements of movie are true and accurate, and based on court and police records, interviews with persons involved, and historical and other documents. Sternbach Aff. ¶ 6. Specifically, the details of the crimes, the criminal investigation, and the conviction of Porco as presented in the movie are all factually correct and well-documented. *Id*. ¶ 8. *See also id*. ¶ 9 (detailing specific examples).

Nevertheless, four days before the movie's premiere, the trial court granted Porco's Order to Show Cause and enjoined the national broadcast of the movie pending a hearing that is scheduled for April 26, 2013. Although aware that Lifetime had yet to be served with a summons and complaint, Grygiel Aff. ¶3, the court issued this extreme relief against Lifetime

[1] The facts are taken from plaintiff's papers submitted in connection with his order to show cause, and assumed true for the purposes of this motion only, as well as the Affirmations of Darci Bailey and David Sternbach, dated March 20, 2013.

because it was "not persuaded" that monetary damages would be sufficient to redress a violation of Porco's statutory rights under Section 51, and ordered the prior restraint solely on Porco's unsubstantiated allegation that the movie was fictionalized. Indeed, without any factual support at all, and based solely on Porco's hearsay observations about how the movie was being advertised, the court found that "Defendant appears to concede that the movie is fictionalized."

The Supreme Court's order is unprecedented and would cause grave and irreparable damage not just to Lifetime but to the constitutional protections for speech. Lifetime urgently seeks an emergency orde vacating or staying the temporary restraining order entered by the Supreme Court pending its appeal.

ARGUMENT

I.
THIS COURT SHOULD IMMEDIATELY VACATE OR STAY THE UNCONSTITUTIONAL RESTRAINT ENTERED BY THE TRIAL COURT

The trial court granted a temporary restraining order that violates Lifetime's constitutional rights and inflicts immediate, irreparable injury. Under CPLR 5518, the Appellate Division has the power to grant, modify, limit, and vacate either a preliminary injunction or a temporary restraining order while the order is on appeal (i.e. after a notice of appeal has been filed and served). In effect, it gives the appellate division during the appeal stage the same powers that the supreme court has during the action's pretrial and trial stage. *See, e.g., Humane Soc. of U.S. v. County of Monroe*, 192 A.D.2d 1139 (4th Dep't 1993) (vacating preliminary injunction pursuant to CPLR 5518 because plaintiff failed to show likelihood of success on the merits); *Broadwall America, Inc. v. Brum Will-El LLC*, 821 N.Y.S.2d 190, 191 (1st Dep't 2006) (interim relief granted under CPLR 5518 pending application for stay pending appeal).

An application to the Appellate Division for relief pending resolution of an appeal under CPLR 5518 is reviewed de novo, using the same standards as applied by the Supreme Court in

respect of the original order. *See Romano v. Sullivan County Harness Racing Ass'n, Inc.*, 106 A.D.2d 819 (3d Dep't 1984*); see also Humane Soc. of U.S. v. County of Monroe*, 192 A.D.2d 1139 (4th Dep't 1993) (vacating preliminary injunction pursuant to CPLR 5518 because plaintiff failed to show likelihood of success on the merits). Under these standards, emergency relief under CPLR 5518 is properly entered for multiple reasons.

A. The March 19 Order is a Patently Unconstitutional Prior Restraint

The March 19 Order is a classic prior restraint that violates the First Amendment to the United States Constitution and Article 8, Section 1 of the New York State Constitution. Such a prior restraint on speech constitutes "one of the most extraordinary remedies known to our jurisprudence" and is universally recognized to be "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 559, 559, 562 (1976). *See also Columbia Broad. Sys., Inc. v. U.S. Dist. Ct.*, 729 F.2d 1174, 1177 (9th Cir. 1984) ("the First Amendment informs us that the damage resulting from a prior restraint – even a prior restraint of the shortest duration – is extraordinarily grave"). Thus, every prior restraint comes with "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See also N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). Indeed, more than two hundred years of unbroken precedent establish a "virtually insurmountable barrier" against the issuance of just the sort of prior restraint on a media outlet granted by the Supreme Court here. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1979) (White, J., concurring). *See also People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 558 (N.Y. 1986) (prior restraint unconstitutional under New York law "absent a showing on the record that such expression will immediately and irreparably create public injury").

In *Near v. Minnesota*, 283 U.S. 697, 716 (1931), the Supreme Court first emphasized that a prior restraint may be imposed only in "exceptional cases" such as the intended publication of the sailing dates of military transports or the number and location of troops in time of war. In *N.Y. Times Co. v. United States*, 403 U.S. at 723-24, the Court rejected the government's request to enjoin publication of the Pentagon Papers, which allegedly had been stolen, despite government assertions that publication could impair national security. Because the dominant purpose of the First Amendment was to outlaw prior restraints, the Court imposed both a "heavy presumption against [their] constitutional validity" and "a heavy burden of showing justification for the imposition of such a restraint." *Id*. at 714 (internal marks and citations omitted). *See also, e.g., S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) ("[t]he presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties").

These principles were reaffirmed in 1994 in an action seeking to enjoin the broadcast of a news report that included hidden-camera footage. In *CBS Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers), Justice Blackmun wrote:

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." Even where questions of allegedly urgent national security or competing constitutional interests are concerned, we have imposed this "most extraordinary remed[y]" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

Id. at 1317 (citations omitted). As the United States Court of Appeals for the First Circuit stated, "[w]hen ... the prior restraint impinges upon the right of the press to communicate news and involves expression in the form of pure speech - speech not connected with any conduct - the presumption of unconstitutionality is virtually insurmountable." *In re Providence Journal Co*., 820 F.2d 1342, 1348 (1st Cir. 1986).

Despite this demanding burden, the Supreme Court granted plaintiff's request for a prior restraint based solely on its observation that an injunction was an available statutory remedy under the Civil Rights Law, and that it was "not persuaded" that monetary damages would be sufficient to redress any alleged harm to plaintiff. The sole authority relied on by the lower court was a fifty-two year old case from New York County in which the constitutional issues were apparently not raised by the parties and not addressed by the court. *See Durgom v. Columbia Broadcasting Sys*., 29 Misc. 2d 394 (Sup. Ct., N.Y. Cty. 1961). Contrary to the lower court's holding, even the authority for injunctive relief contained in Section 51 does not allow entry of a prior restraint that violates "the constitutional principles of freedom of the press." *De Gregorio v. CBS, Inc*., 123 Misc. 2d 491, 495, (Sup. Ct. N.Y. Cnty 1984).

This is not a case where national security concerns are in jeopardy. It is not even a case involving potential irreparable injury from the disclosure of trade secrets or other confidential information—it involves a movie based on the *public* facts of a murder prosecution. While plaintiff may not want the story of his crime repeated in a television movie, the constitutional protection of speech and press on matters of public concern flatly prevent the issuance of an order enjoining the broadcast of the movie.

The Supreme Court's unprecedented order enjoining speech on a matter of legitimiate public interest is patently unconstitutional and should immediately be vacated or stayed.

B. Plaintiff Completely Failed to Meet His Burdens To Obtain Preliminary Relief

The March 19 Order should be vacated or stayed for the further reason that Porco failed to meet any of his burdens. Under New York law any preliminary injunctive relief is viewed as a drastic remedy that requires the party seeking such relief to make a clear showing of "a probability of success on the merits, danger of irreparable injury in the absence of an injunction

and a balance of equities in its favor." *Nobu Next Door*, *LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005); *see also Cliff v. R.R.S. Inc*., 207 A.D.2d 17, 19, 620 N.Y.S.2d 190, 192 (3d Dep't 1994) (same); *Morrison v. Woolley*, 45 A.D.3d 953, 953, 845 N.Y.S.2d 508, 509 (3d Dep't 2007) (same). A party "seeking to invoke such stringent relief is obliged to establish a clear and compelling legal right thereto based upon undisputed facts." *Estate of Hemingway v. Random House Inc.*, 49 Misc. 2d 726, 728 (Sup. Ct. N.Y. Cnty.), *aff'd,* 25 A.D.2d 719 (1st Dep't 1966). *See also FAMO, Inc. v. Green 521 Fifth Ave., LLC*, 17 Misc. 3d 1108(A), 2007 WL 2890236, at *6 (Sup. Ct. N.Y. Cnty. 2007) (same); *Grumet v. Cuomo,* 162 Misc. 2d 913, 929 (Sup. Ct. Albany Cnty. 1994) (same standard for a temporary restraining order). Plaintiff failed to make *any* of these necessary showings.

1. Plaintiff has no likelihood of success on the merits.

To state a claim under Section 51, a plaintiff must establish that a) defendant used his name, portrait, picture, or voice within the state of New York, b) for purposes of trade or advertising, c) without his written consent. *Finger v. Omni Publ'ns Int'l*, *Ltd.,* 77 N.Y.2d 138, 141-42 (1990). It is well settled that a person's likeness is used for "advertising purposes" within the meaning of Section 51 only when it is used in "'an advertisement or solicitation for patronage of a particular product or service.'" *Kane v. Orange Cnty. Publs.,* 232 A.D.2d 526, 527 (2d Dep't 1996) (quoting *Beverley v. Choices Women's Med. Ctr., Inc.*, 78 N.Y.2d 745, 751 (1991)). "Trade purposes" as used in Section 51 "involves use which would draw trade to the firm." *Kane,* 232 A.D.2d at 527 (citing *Flores v. Mosler Safe Co.,* 7 N.Y.2d 276, 284 (1959). New York courts have consistently reaffirmed the principle that "trade or advertising purposes" do not include narratives of newsworthy events and matters of public interest. *See, e.g., Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 441 (2000).

Indeed, the New York Court of Appeals "time and again" reaffirmed that Sections 50 and 51 cannot be applied to newsworthy information. Whether a matter is "newsworthy" for purpose of limiting liability under Sections 50 and 51 has been "defined in [the] most liberal and far-reaching terms," to include "all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general." *De Gregorio*, 123 Misc. 2d at 493; *see also, e.g., Lemerond v. Twentieth Century Fox Film Corp.*, 2008 WL 918579, at *3 (S.D.N.Y. Mar. 31, 2008) (holding that issues addressed by the fictional movie *Borat* were newsworthy for purposes of Section 51 liability); *Alfano v. NGHT, Inc.*, 623 F. Supp. 2d 355, 358-61 (E.D.N.Y. 2009) (docudrama about organized crime and trial of mob boss newsworthy and not subject to Section 51 liability).

In *Messenger*, the Court of Appeals was very specific about the clear limits to Section 51 liability in the context of "newsworthy" publications. It rejected in that case a Section 51 claim based upon the use of a 14-year-old girl's photograph to illustrate a letter written by a different 14-year-old girl seeking advice on her experience of getting "drunk at a party and [having] sex with her 18-year-old boyfriend and two of his friends." Finding no Section 51 liability for this entirely fictional use of the plaintiff's photograph, the Court held emphatically that "there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise." *Id.* at 442-43. 94 N.Y.2d at 439, 444-45.

The trial court nonetheless entered its prior restraint in this case on the mere allegation that the movie is "fictionalized," which Porco claimed automatically to trigger his rights under Section 51. But Section 51 is to be "narrowly construed" and "'strictly limited to nonconsensual *commercial appropriations* of the name, portrait or picture of a living person.'" *Messenger,* 94 N.Y.2d at 441 (citations omitted; emphasis added). It makes no reference to fictionalized

accounts, and to the contrary is "'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.'" *Id. See, e.g.; Finger,* 77 N.Y.2d at 141-42 (Section 51 "prohibit[s] the use of pictures, names or portraits 'for advertising purposes or for the purposes of trade' only, and nothing more"). A federal court thus rejected a claim of "fictionalization" in *Alfano v. NGHT, Inc,,* where the plaintiff contended that the use of his image to illustrate a docudrama about organized crime falsely suggested he was a member of the mafia. Because the activities of organized crime were a matter of public interest, the use of plaintiff's image to illustrate that story – even a fictionalized use – was held not to state a Section 51 claim. 623 F. Supp. 2d at 360.

Under the *Messenger* test, "fictionalization" is not the issue. The use of Porco's name in reference to a matter of public interest could potentially violate Section 51 only if there was "no real relationship" between his name and the matter of public interest, or its use was an advertisement in disguise. Porco makes no such allegation and cannot possibly establish that either exception applies in this case. The movie plainly relates to Porco—it recounts his prosecution, and relies on the transcripts and court records to accurately portray the facts. Sternbach Aff. ¶ 6. *See also McCormack v. Cnty. of Westchester*, 286 A.D.2d 24, 29 (2d Dep't 2001) (even where use of plaintiff's name in editorial content "may create a false impression, there is no liability under [Section 51] if the [name] bears a real relationship to the article"). And the movie relating to Porco's murder of his father and axe attack on his mother cannot possibly be construed as "an advertisement in disguise." *See Wallach v. Bacharach*, 192 Misc. 979, 980 (Sup. Ct. N.Y. Cnty) (using "a person's name in a commentary or news report unrelated to the advertising of any product or business" does not violate Section 51), *aff'd*, 274 A.D. 919 (1948). Porco failed to establish any likelihood of success on the merits.

In seeking the injunction Porco simply ignored the controlling *Messenger* test and instead cited two outdated and inapposite cases to support his argument that any fictionalization entitled him to relief. Reply at 2-3, citing *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543 (1966), *vacated sub nom. Julian Messner, Inc. v. Spahn.*, 387 U.S. 239, 87 S. Ct. 1706, 18 L. Ed. 2d 744 (1967); *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 58, 103 N.E. 1108 (1913). But, as *Messenger* court observes, both *Spahn* and *Binns* involve wholly "invented biographies of plaintiffs' lives," where the stories were "so infected with fiction, dramatization, or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception." *Messenger*, 94 N.Y.2d at 446. In *Spahn* the publication was both "qualitatively" and "quantitatively" affirmatively untrue;[2] *Binns* similarly involved a story that was "mainly a product of the imagination". *Binns*, 210 N.Y. at 56; *see also Messenger*, 94 N.Y.2d at 445.

Even if *Spahn* remains good law after *Messenger*, there is nothing similar in the movie, which accurately portrays the material events surrounding Porco's investigation and prosecution. *See* Sternbach Aff. ¶¶ 6-9. Plaintiff entirely failed to demonstrate any possible likelihood of success on his claim under Section 51.

2. Plaintiff has demonstrated no irreparable injury.

Porco alleged a violation of his rights under Section 51, and presented no evidence of any other harm absent preliminary injunctive relief. The trial court made no finding of irreparable harm, but citing *Durgom v. Columbia Broadcasting Sys.*, 29 Misc. 2d 394, 396 (Sup Ct, NY County 1961), concluded that Porco was not required to make the usual showing of irreparable injury where Section 51 provides a remedy of injunctive relief for its violation. The statutory

[2] *Spahn*, 18 N.Y.2d at 329, citing *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 232, 250, N.Y.S.2d 529 (Sup. Ct. 1964). The plaintiff in *Spahn* supplied specific instances of falsification, including lies that Spahn had been decorated with the Bronze star, that his father had signed his first baseball contract, and that he had suffered serious injuries in the war, errors that were directly contradicted by available testimony and evidence. *Id.* at 232.

authority for injunctive relief, however, does not properly supplant the traditional factors required to be considered in awarding any provisional equitable remedy. *See, e.g., Schoeman v. Agon Sports*, LLC, 11 Misc.3d 1077(A) (N.Y. Sup. Ct. 2006) (considering the three preliminary injunction factors as part of the "more complete" reasoning required for preliminary relief under Section 51); *Marshall v. Marshall*, No. 08 CV 1420, 2012 WL 1079550, at*30 (E.D.N.Y. Mar. 30, 2012) (same); *Baldeo v. Majeed*, No. 16140/2011, 2011 WL 6187149, at *2–4 (N.Y.Sup.Ct.2011) (same). Moreover, even those courts that have viewed the statutory remedy as supplanting the necessary equitable analysis have done so only when "a violation of the statute has been established or been conceded." *Marcinkus v. NAL Pub. Inc*., 138 Misc.2d 256, 265, 522 N.Y.S.2d 1009, 1015 (N.Y. Sup. Ct. 1987). That did not occur here and, as demonstrated above, a violation could not be demonstrated.

3. The balance of hardships tips entirely to Lifetime.

The entry of provisional relief was improper for the further reason that Porco cannot demonstrate that the balance of hardships weighs in his favor. It tips entirely to Lifetime.

A preliminary injunction will have a devastating financial and reputational impact on Lifetime, with millions of dollars in investment, lost revenues, and untold harm to its brand. Bailey Aff. ¶ 2. Lifetime has spent over two million dollars acquiring the United States and International rights to the movie, and nearly one million dollars promoting the premiere of the movie on March 23, 2013. *Id.* ¶ 3. Lifetime has promoted the movie as "appointment viewing" to be premiered on a Saturday night. *Id.* ¶ 4. The timing of the premiere is intended to create the largest audience and to increase the value of advertising sold in and around the premiere. *Id.* Lifetime has sold advertising for the premiere based on projected ratings for the movie which, if not delivered, will require Lifetime to "make good" to advertisers the diminished value caused by having to replace the movie. *Id*. It has also taken valuable air time from its sister cable

networks to promote the premiere this weekend—air time that could have sold to advertisers. *Id.* ¶ 5. In addition, Lifetime's cable affiliates, local cable operators which distribute Lifetime's channel, have spent their own airtime promoting the premiere of the movie, the value of which they will lose if the movie is not broadcast. *Id.* There are also significant labor costs that Lifetime will incur to remove the movie from all media in which it is scheduled to be presented, and to remove and replace promotional material in all formats across all platforms. *Id.* ¶ 7. Even now, Lifetime employees are scrambling to comply with the Supreme Court's order at great cost in human and financial resources. *Id.*

More devastating, Lifetime's reputation with its cable affiliates, advertisers, and viewers will be damaged. Because Lifetime has promoted the movie as "appointment viewing" on a Saturday night, it has promised to deliver a quality production to large audiences. *Id.* ¶ 8. If the movie is not broadcast as scheduled, Lifetime will be viewed as unreliable and incapable of delivering on its promises. *Id.* The damage to Lifetime will be difficult to estimate, but will lead to a reluctance among cable affiliates and advertisers to spend money on Lifetime. *Id.* In addition, because the movie has been heavily promoted and because it is too late for many cable affiliates to change their promotional and scheduling materials, viewers will be disappointed when they discover that the movie is not being broadcast as scheduled. *Id.* ¶ 9. They, too, will come to see Lifetime as unreliable and not trustworthy, which will have long-term negative effects on Lifetime's "brand" and reputation, and may ultimately lead to declines in its ratings. *Id.*

For each and all of these reasons, the March 19 injunction was improperly entered and should immediately be vacated or stayed, all apart from the manifest constitutional violation which itself inflicts irreparable harm. It is axiomatic that "[t]he loss of First Amendment

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). *See also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) ("[e]ach passing day may constitute a separate and cognizable infringement of the First Amendment" and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (internal marks and citations omitted).

C. The Court Has Not Yet Established Personal Jurisdiction over Lifetime

As set forth in the Grygiel Affirmation (¶3), the trial court entered injunctive relief before Porco has served the summons and complaint. This Court should therefore vacate or stay the temporary restraining order for the further reason that, in absence of service, the trial court did not have jurisdiction to enjoin Lifetime from televising the movie. *See, e.g. Kaplan v. Kaplan*, 94 A.D.2d 788, 463 N.Y.S.2d 36 (2d Dep't 1983) (court lacks authority to issue preliminary injunction against named defendant who was not served with the summons and complaint).

II. THE REQUEST FOR IMMEDIATE EMERGENCY RELIEF IS PROPERLY BEFORE THIS COURT AND SHOULD BE GRANTED

A. This Court Has Authority To Stay a TRO Pending An Appeal

A party may appeal, as a matter of right, the entry of a temporary restraining that was made on notice. *See* CPLR § 5701(2)(i) (appeal as of right to any order made on notice that grants provisional remedy); *Pikus v. Dudley*, 90 A.D.2d 700, 455 N.Y.S.2d 772 (1st Dep't 1982) (temporary restraining order that was made on notice and where opposition papers were served is appealable). Here, the temporary restraining order entered yesterday was made after Lifetime had notice and was able to serve and file opposition papers (without waiving their objection based on a lack of service). Porco also submitted a lengthy reply. Lifetime may thus appeal the

order as a matter or right pursuant to CPLR § 5701(2)(i), and it has filed a notice of appeal and pre-calendar statement with the Supreme Court, and served them on Porco by first class mail. Grygiel Aff. ¶4.

While this appeal is pending, this Court has the power to vacate the temporary restraining order pursuant to CPLR § 5518, which expressly provides that the "appellate division may grant, modify or limit a preliminary injunction or temporary restraining order pending an appeal." *See State of Israel v. St. Martin's Press, Inc.*, 166 A.D.2d 251, 560 N.Y.S.2d 450 (1st Dep't 1990) (vacating temporary restraining order, which prohibited the publication and dissemination of a book, pursuant to CPLR § 5518).

B. Lifetime Could Not Give Notice Of This Motion Without Significant Prejudice

Given the exigent circumstances presented, it would be appropriate for this Court to grant the order to show cause and stay the prior restraint without requiring notice first to be given to Porco, as required by 22 NYCRR § 800.2. New York state courts recognize that a notice requirement can and should be waived in certain situations. For example, under the Uniform Rules for the New York State Trial Courts, a party is not required to give its opponent notice if the party provides "an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by the giving of notice." 22 NYCRR § 202.7(f). Such extreme circumstances exist here.

Porco is proceeding *pro* se in this action and is currently an inmate at the maximum security prison at Dannemora, New York. There is simply no practical way that Lifetime could provide notice to him in time for the Court to hear Porco's opposition to the order to show cause in advance of the broadcast on March 23. Requiring advance notice to Porco before a stay is

entered would effectively enforce a prior restraint and deny Lifetime any ability to obtain judicial relief from a clear constitutional violation.

For this reason, this Court's notice requirement should be waived in this exceptional circumstance.

CONCLUSION

For all the foregoing reasons, Lifetime's request for an order to show cause should be granted and the March 19, 2013 injunction vacated or stayed pending appeal, together with such other and further relief as the Court deems appropriate.

Dated: Albany, NY
March 20, 2013

Respectfully submitted,

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