

DAVID W. GRONER

16TH JUDICIAL DISTRICT COURT

VERSUS

PARISH OF IBERIA

WICK COMMUNICATIONS CO., ET AL

STATE OF LOUISIANA

NO. 00126863

DIV. "D"

Filed: _____

Deputy Clerk

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

NOW INTO COURT, through undersigned counsel, comes defendant, Wick Communications Company, d/b/a *The Daily Iberian*, which requests that this Honorable Court, pursuant to Louisiana Code of Civil Procedure Art. 3607, dissolve the Temporary Restraining Order, and for a hearing within two days as provided by that Article.

Undersigned counsel certifies that he has notified the Plaintiff of the potential for an immediate hearing on this Motion as required by law.

Respectfully submitted:

BALDWIN HASPEL BURKE & MAYER, LLC



SCOTT L. STERNBERG (Bar #33390)

1100 Poydras Street, Ste. 3600

New Orleans, LA 70163

Telephone: 504-569-2900

Fax: 504-569-2099

ssternberg@bhbmlaw.com

*Counsel for Defendant, Wick Communications
Company d/b/a The Daily Iberian*

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above and foregoing pleading on all counsel of record by the following designated method:

_____ Hand delivery;

_____ Fax;

_____ United States Mail, properly addressed, postage prepaid;

☒ Electronic transmission to the email address expressly designated by counsel;

in accordance with Louisiana Code of Civil Procedure Article 1313, this 26th day of August, 2015.



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MEMORANDUM IN SUPPORT OF
MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

MAY IT PLEASE THE COURT:

I. Introduction & Relevant Facts

On August 25, 2015, without any notice or opportunity to be heard by the Defendant, this Honorable Court issued a Temporary Restraining Order which constitutes an unconstitutional prior restraint in violation of the First Amendment to the United States Constitution. The Temporary Restraining Order was issued at the request of the Plaintiff, David W. Groner, and restrained Wick Communications Co., d/b/a *The Daily Iberian* (hereinafter "*The Daily Iberian*") and its Website from:

**PUBLISHING OR POSTING ON ITS WEBSITE ANY
ARTICLE OR STORY IN WHICH PLAINTIFF DAVID W.
GRONER IS ACCUSED OF DISHONESTY, FRAUD OR
DECEIT IN CONNECTION WITH A LOUISIANA SUPREME
COURT DECISION OR SIMILAR MATTER.**

On information and belief, Mr. Groner has filed a lawsuit against *The Daily Iberian* for libel based on an anonymous user comment on *The Daily Iberian's* website. *The Daily Iberian* has not seen Mr. Groner's Petition or his request for a Temporary Restraining Order because—despite speaking with *The Daily Iberian's* Publisher, Will Chapman, via e-mail for the previous two days—he chose not to inform the Defendant of his intent to seek extraordinary relief.

Mr. Groner sought a Temporary Restraining Order outside the confines of the law, without notice or bond as required by law. The Temporary Restraining Order is an unconstitutional prior restraint on publication, which the U.S. Supreme Court has declared is presumptively unconstitutional¹ and which the Louisiana Supreme Court has also condemned as "violative of federal and state constitutions."² Mr. Groner has very little chance of success on the merits.

¹ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, (1963); see also *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

² *Gulf States Theatres of Louisiana, Inc. v. Richardson*, 287 So.2d 480, 492 (La. 1973).

For these reasons, and because of the extraordinary relief granted to the Plaintiff, *The Daily Iberian* seeks dissolution of that Temporary Restraining Order pursuant to Louisiana Code of Civil Procedure Article 3607, and a hearing within two (2) days as required by law.

II. Law & Argument

The Louisiana Code of Civil Procedure provides for Temporary Restraining Orders only in the face of clear “irreparable injury, loss, or damage.”³ A Temporary Restraining Order may be granted without notice only upon a verified petition or affidavit of the Plaintiff, when:

(1) It clearly appears from specific facts shown by a verified petition or by supporting affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) The applicant's attorney certifies to the court in writing the efforts which have been made to give the notice or the reasons supporting his claim that notice should not be required.⁴

The Daily Iberian was not given the courtesy of notice or a review of Plaintiff’s petition and affidavit supporting the Temporary Restraining Order. This is despite the Plaintiff’s knowledge of Defendant’s location, his personal relationship with the newspaper’s Publisher and their conversations via e-mail on the same day he filed his lawsuit and the Temporary Restraining Order. The Temporary Restraining Order is supposed to serve “only as a temporary restraint on the defendant until the propriety of granting a preliminary injunction may be determined, objectively preserving the status quo until that determination.”⁵ However, the Temporary Restraining Order issued in this case does much more than that—it effectively deletes the “offensive” comment and restrains *The Daily Iberian* from future publication—all without the required notice or bond, and in conflict with the law of the underlying action.

Most importantly, *The Daily Iberian* is unaware if the Plaintiff certified to this Honorable Court that its Temporary Restraining Order did not only remove a comment from an anonymous poster containing arguably truthful facts or opinions about Mr. Groner, but also prevented *The Daily Iberian* from reporting why Mr. Groner had sued the newspaper. American First Amendment law provides a bulwark of cases which hold that “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment

³ La. Code Civ. Proc. Ann. Art. 3601.

⁴ La. Code Civ. Proc. Ann. Art. 3603.

⁵ *Dauphine v. Carencro High Sch.*, 843 So.2d 1096, 1102. (La. 2003).

rights.”⁶ The U.S. Supreme Court agrees that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”⁷ The distinction between “prior restraints against publication and punishment subsequent to publication” is a fundamental tenant of First Amendment law.⁸ Indeed, our own Supreme Court has also stated that “the doctrine of prohibiting prior restraint of expression without notice and hearing before the expression is ever published has more validity today than even in much earlier times.”⁹

The Code of Civil Procedure sets specific requirements for the issuance of a Temporary Restraining Order because it is an unusual remedy. In *Dauphine v. Carencro High School*, the Louisiana Supreme Court addressed an issuance of a Temporary Restraining Order without notice or a failure to state in the order why the order was granted without notice or a hearing.¹⁰ The Supreme Court noted that the attorney’s certification in *Dauphine* lacked any mention of the attorney’s attempts to give notice and that the Temporary Restraining Order was issued without an affirmative statement as to why the Temporary Restraining Order was granted without notice and a hearing. The Court found the “flaws affect the validity of the TRO.”¹¹ The Court noted that the Article 3603’s comments (a) and (b) state:

This amendment [1985 Acts, No. 204, § 1] changes the requirement for obtaining a temporary restraining order by adding that the applicant’s attorney must show the efforts that have been made to give notice or must show why notice should not be required and further that irreparable injury will result before the adverse party or his attorney can be heard in opposition. **The intent ... is to reduce the practice of issuing ex parte restraining orders without notice of any kind, and to permit the conduct of some type of adversary proceeding before, rather than after, the issuance of injunctive relief.**¹²

The Daily Iberian has not seen the Petition in this case, or any affidavit signed by the Plaintiff which shows that his damage is so great that *The Daily Iberian* should not have been afforded the opportunity to oppose the Temporary Restraining Order. Therefore, *The Daily Iberian* is unaware why the Plaintiff reckoned the Temporary Restraining Order should be issued without notice, or if those facts were certified at all. However, the Louisiana Supreme Court has stated that “A cursory review of the requirements for obtaining a TRO reveals that the applicant

⁶ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976).

⁷ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

⁸ *Gulf States Theatres of Louisiana, Inc. v. Richardson*, 287 So. 2d 480, 490 (La. 1973).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1104.

¹² *Id.* at 1103 (emphasis added).

is required to notify the adverse party of its intention to obtain a TRO before applying or indicate why notice should not be given or what efforts he made to give notice.”¹³

Notably, the Temporary Restraining Order lacks the required bond. Louisiana Code of Civil Procedure Art. 3610 provides that a temporary restraining order “shall not issue” unless the applicant furnishes security. There are certain exceptions to this rule, including “domestic abuse, dating violence, stalking or sexual assault.”¹⁴ None of these exceptions are present in the instant case; therefore, the Temporary Restraining Order, issued without bond, in addition to a lack of notice, is void on its face. Louisiana courts strictly construe this article to “require the posting of security for temporary restraining orders and preliminary injunctions.”¹⁵

As to the merits, the truth is that the Plaintiff has very little chance of success in his claim against *The Daily Iberian* because the law provides several defenses, including that *The Daily Iberian* is not the publisher, that the statement is an opinion, and that the statement is also substantially true given the information which can be gleaned from publicly accessible records.

The Daily Iberian has no idea what opposing counsel certified or represented to this Honorable Court about the posting on www.iberianet.com. However, the comment, which stated that Mr. Groner had “a reputation” for dishonesty, fraud, or deceit, and then linked to a Louisiana Supreme Court Consent Discipline Order which affirmatively states that the Office of Disciplinary Counsel “commenced an investigation into allegations” that Mr. Groner “engaged in conduct involving dishonesty, fraud, deceit or misrepresentation,” is a comment protected under many facets of the law.

First and foremost, the law provides that *The Daily Iberian* is not the offending speaker. Federal law provides that *The Daily Iberian* shall not be treated “as the publisher or speaker of any information provided by another information content provider.”¹⁶ This essentially means that an online intermediary, such as www.iberianet.net, cannot be held liable for things its users say or do. Second, the comment is an opinion. The Louisiana Supreme Court has held that “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.”¹⁷ Even a statement of

¹³ *Id.* at 1104-5 (citing *John W. Fisk Co. v. Michel*, 709 So.2d 1061, 1064-64 (La. App. 4. Cir 1998).

¹⁴ Louisiana Code of Civil Procedure Art. 3610.

¹⁵ *Yokum v. Van Calsem*, 935 So.2d 736, 739 (La. App. 4 Cir. 2006).

¹⁶ 47 U.S.C. 230.

¹⁷ *Fitzgerald v. Tucker*, 98-2313 (La. 6/29/99), 737 So.2d 706, 716.

opinion accompanied by express statements of fact may only be actionable if it was made with “knowing or reckless falsity.”¹⁸

Whether or not someone has a “reputation” for fraud, deceit or misrepresentation is surely an opinion a reasonable member of the public could have after reviewing the Consent Discipline Petition. The facts are the facts: The ODC did investigate Mr. Groner, and Mr. Groner, in his Joint Memorandum in Support of Consent Discipline, agreed that “the Respondent has violated duties owed to clients and the profession. It is further agreed that the Respondent’s mental state was knowing.” Therefore, the speaker’s opinion (which is not necessarily the opinion of *The Daily Iberian*) that Mr. Groner has a reputation for fraud and misrepresentation could have been formed because Mr. Groner had a bad relationship with a former client, or because the poster did not like Mr. Groner’s last political campaign, or any number of reasons.

Louisiana Code of Civil Procedure art. 3607 states that *The Daily Iberian* may move for the dissolution “upon two days’ notice to the adverse party, or on shorter notice as the court may prescribe.” Undersigned counsel certifies that on August 25, 2015 he provided notice to opposing counsel and that opposing counsel acknowledged that notice via e-mail August 26, 2015. *The Daily Iberian* therefore seeks a dissolution hearing as early as the Court will allow, or “as expeditiously as the ends of justice may require,” as provided for in Louisiana Code of Civil Procedure Art. 3607.

III. Conclusion

Pursuant to Louisiana Code of Civil Procedure Art. 3607, *The Daily Iberian* respectfully requests that this Honorable Court dissolve the Temporary Restraining Order and all other general and equitable relief as provided by law.

Respectfully submitted:

BALDWIN HASPEL BURKE & MAYER, LLC



SCOTT L. STERNBERG (Bar #33390)

1100 Poydras Street, Ste. 3600

New Orleans, LA 70163

Telephone: 504-569-2900

Fax: 504-569-2099

ssternberg@bhbmlaw.com

Counsel for Defendant, Wick Communications
Company d/b/a The Daily Iberian

¹⁸ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above and foregoing pleading on all counsel of record by the following designated method:

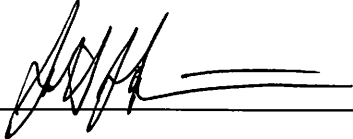
_____ Hand delivery;

_____ Fax;

_____ United States Mail, properly addressed, postage prepaid;

☒ Electronic transmission to the email address expressly designated by counsel;

in accordance with Louisiana Code of Civil Procedure Article 1313, this 26th day of August, 2015.



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PARISH OF IBERIA

STATE OF LOUISIANA

NO. 00126863 DIV. "D"

Filed: _____

Deputy Clerk

RULE TO SHOW CAUSE

Considering the Motion to Dissolve Temporary Restraining Order filed herein by Defendant, Wick Communications Company d/b/a *The Daily Iberian*,

IT IS ORDERED that Plaintiff, David W. Groner, show cause on the _____ day of _____, 2015, at _____ o'clock _____.m., why the Motion should not be granted and the Temporary Restraining Order dissolved as prayed for.

New Iberia, Louisiana, this _____ day of _____, 2015.

JUDGE