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SUPERIOR COUT OF THE STATE OF ARIZONA

COUNTY OF MARICOPA

ALVIN HOGUE, et. al. Plaintiffs, vs. MARK GOUDEAU, et. al., Defendants.	Cause No. CV2010-092705 CV2010-099221 CV2012-095372 CV2012-095373 CV2012-095374 (Consolidated) **PLAINTIFFS' RESPONSE TO CITY DEFENDANTS' MOTION FOR RESTRAINING ORDER** (Assigned to the Honorable Arthur Anderson)

Plaintiffs, by and through undersigned counsel, hereby respond to the City Defendants' Motion for Restraining Order. Plaintiffs request this Court deny the City Defendants' Motion as the City Defendants have failed to show any evidence of a reasonable likelihood of prejudice from media coverage.

MEMORANDUM OF POINTS AND AUTHORITIES

City Defendants argue this Court should grant a restraining order preventing all parties and all counsel in this case from speaking to the press. However, though City Defendants quote the legal standard for such a restraint on parties First Amendment rights, they fail to present anything to substantiate a reasonable likelihood that a jury will be prejudiced by press coverage. Instead, City Defendants offer mere speculation regarding possibilities that

comments made may make it difficult to get a fair jury. They fail to explain how the jury selection process and an admonishment by this Court would fail to resolve any media impact and instead insist this Court limit the parties First Amendment rights. Such a request is excessive and contrary to case law on this matter.

City Defendants have misinterpreted the case law they cite in order to claim it supports their Motion, when in fact the cases cited in their Motion offer no support for their request. City Defendants attempt to apply case law regarding a criminal defendant's right to a fair trial as though the courts rendered the opinions and made them applicable to both criminal and civil trials. Undersigned counsel has been unable to identify any case law regarding imposition of such a strict constraint on parties in a civil trial where the stakes are substantially lower and facts much less sensationalized than in a criminal trial. Further, none of the cases cited by City Defendants contain any dicta about the application of their rulings in civil proceedings. Despite the fact the cases referred to by City Defendants are easily differentiated by the mere fact they are regarding criminal trials and not civil, the remaining facts of the cases represent egregious actions by the parties which warranted restraining orders not at all present here.

In *Sheppard*, the Court reviewed the fairness of a criminal murder trial of a prominent member of the community sensationalized with sexual affairs and a pregnant victim. *Sheppard v Maxwell*, 384 U.S. 362 (1969). The Court found Sheppard was deprived of his right to a fair trial by the judge's failure to impose **any** safeguards against the media frenzy. The Court discussed multiple options the trial judge could have employed in order to control the publicity surrounding this high profile trial. While City Defendants attempt to color the ruling in *Sheppard* as supporting the use of a restraining order on parties involved, a full review of the case shows this to be a gross misinterpretation of the holding in the case.

The Court, in *Sheppard,* discussed all the options the trial judge had at his discretion to ensure a fair trial. *Id*. at 358-61. While the Court did state the trial judge should have

"further sought to alleviate this problem by imposing control over the statements made to news media by counsel," Id. at 360, this quote was taken completely out of context by City Defendants. The Court was referring to a problem that already existed during trial as a result of the trial judge's unwillingness to take **any** steps to control the media during and directly prior to the trial. The trial judge denied a change in venue request by Sheppard, despite massive media coverage, and gave a less than adequate admonishment to the jurors regarding media coverage merely suggesting and requesting they avoid media coverage of the trial before then allowing the jurors to be subjected to extreme media attention. *Id*. at 353. These were things the Court expected the trial judge to have done and his failure to do so led to an increased media frenzy that may have made it necessary for the trial judge to control **some** of the information released by counsel and witnesses; not a blanket restraint of **all** speech. *Id* at 358-61.

The facts in *Sheppard* are not even close to the situation at hand. First, *Sheppard's* facts primarily concern media attention **directly prior to and during trial**. Additionally, the media attention had become so intense the Court described it as a "**carnival atmosphere**." *Id* at 358. In the case at hand, the trial date has not even been set. Additionally, the media attention complained of by City Defendants consists of one report by one news station, Channel 15, run on June 11 and 12, 2013 and some smaller media reports from minor, non-mainstream media sources from 2011 and 2010. The media coverage in this case does not even come close to the "carnival atmosphere" described in *Sheppard*.

City Defendants also cite to *Gentile v State Bar of Nevada*, 501 U.S. 1030 (1991), claiming it upheld a state-disciplinary rule prohibiting counsel from making statements with "a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id*. at 1030. However, this is not what *Gentile* did. The Court, while not discussing the constitutionality of the rule itself, evaluated the application and interpretation of the rule by the State of Nevada ultimately finding it was done so unconstitutionally. *Id*.

In *Gentile*, a criminal defense attorney made a statement to the press in which he addressed negative information, already in the media, concerning his client. The attorney was found in violation of the ethical rule by the Nevada State Disciplinary Board. However, the Supreme Court overturned this decision and the decision of the reviewing court, stating "neither the disciplinary board nor the reviewing court explains any sense in which petitioner's statements had a substantial likelihood of causing material prejudice." *Id* at 1039. While not questioning the standard of substantial likelihood of causing material prejudice, the Court found the disciplinary board's use of a list of statements counsel should not make an unconstitutional restraint on free speech. *Id*. Similarly, City Defendants wish this Court to completely ignore the requirement of a finding of reasonable likelihood of prejudice and simply conclude any statements to the media should be assumed to create a risk of prejudice and should all be restrained. This, however, is not the standard nor is it supported by any of the cases City Defendants cite to.

In *Dow Jones & Co. v Simon*, 842 F.2d 603 (2d Cir. 1988), the court deals with yet another criminal trial. In this case, the trial court found it necessary to impose an order prohibiting the prosecutors, defense attorneys, and defendants from making statements to the press. While City Defendants would like the case at hand to be analogous to *Simon*, it simply is not even close. The conclusion of the opinion in *Simon* makes clear the issue in that case: "the problem begins not with the publishing of news by a free press, but with a **hemorrhage of small leaks of secret grand jury information released to the media**." *Id* at 612. In *Simon*, leaks of secret grand jury proceedings representing serious violations of grand jury secrecy rules provided in Fed.R.Crim.P. 6(e), led defense counsel to request a limited order to protect against "further abuse of the judicial process" until he could address the Government's violation in a motion. *Id* at 610. However, despite this limited order, leaks continued to be made by government sources. *Id*. This is what ultimately led to the broad restraining order imposed by the trial court and upheld by the Court of Appeals. *Id* at 612.

Again, *Simon* is in no way similar to the extremely limited media attention complained of here. There has been no violation of rules, no violation of prior limited orders, or any conduct such as what led to the restraining order in *Simon*.

Additionally, the court in *Simon* discussed a second crucial step completely ignored by City Defendants in their Motion. After a determination of a **reasonable likelihood** of prejudice, the court explains the necessity of considering less restrictive alternatives. *Id* at 611. Not only do City Defendants fail to establish or even present any evidence of a reasonable likelihood of prejudice, they never bother to even mention the requirement of less restrictive alternatives, despite the mandate to do so, as required by cases they cite to in support of their Motion. This Court has several options at its disposal should it determine they are necessary which do not infringe on the parties' First Amendment rights that must be considered prior to imposition of a restraining order. Those alternatives can be considered, if necessary, closer to trial once there is better understanding of the media attention and how it might affect the trial.

While City Defendants wish this Court to simply ignore the requirements of a finding of reasonable likelihood of prejudice and the review of less restrictive means and instead arbitrarily limit the parties First Amendment rights with a restraining order, the cases cited to, by City Defendants, make it clear a restraining order of this type is a last resort to be employed in only the most extreme of situations. The Court in *Gentile* states, "only the **occasional** case presents a danger of prejudice for pretrial publicity. Empirical research suggests that in the **few instances** when jurors have been exposed to **extensive and prejudicial publicity**, they are able to disregard it and base their verdict upon evidence presented in court." *Gentile*, 501 U.S. at 1055. In this case, City Defendants cannot realistically make a claim of **extensive and prejudicial** publicity from the one referenced news story from Channel 15 news and the minor news stories from marginal media sources.

"Although often appearing unfair in the eyes of the public, pretrial publicity, 'even pervasive, adverse publicity – does not inevitably lead to an unfair trial.'" *Simon*, 842 F.2d at 609.

As stated in *Sheppard*, "freedom of discussion should be given the **widest range** compatible with the essential requirement of the fair and orderly administration of justice." *Sheppard* 384 U.S. at 350. Nothing presented by City Defendants gives cause to believe media coverage of this matter would interfere with the fair and orderly administration of justice. In fact, given this is a matter in which the City is being accused of gross negligence which resulted in the deaths of several innocent citizens, the "extensive public scrutiny and criticism" *Sheppard* states is a necessary guard against the miscarriage of justice, is crucial here. *Id* at 1515 *See also Simon*, 842 F.2d at 609 ("A free press is particularly important when public officials face criminal charges relating to their use of office.").

CONCLUSION

Given the importance of the parties' First Amendment rights, the nature of this case, the limited media attention, and the lack of any claim that there is a reasonable risk of prejudice, the City Defendants' Motion must be denied.

RESPECTFULLY SUBMITTED this 22nd day of August, 2013.

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