

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

POM WONDERFUL, LLC,

Plaintiff-Appellee,

vs.

ALM MEDIA PROPERTIES, LLC d/b/a
THE NATIONAL LAW JOURNAL/
LEGAL TIMES,

Defendant-Appellant.

2020 JUL 10 A 2 41

COURT REPORTER
CLERK'S OFFICE

CASE NO. _____

**DEFENDANT-APPELLANT ALM MEDIA PROPERTIES, LLC'S
MOTION FOR EMERGENCY APPEAL OF TEMPORARY RESTRAINING ORDER
OR, IN THE ALTERNATIVE, MOTION TO STAY**

I. INTRODUCTION

The Superior Court has restrained a newspaper from publishing truthful information it lawfully obtained from public files in the Superior Court clerk's office. The Superior Court found that the extraordinary remedy of a prior restraint on the publisher was warranted because the information the clerk's office provided to the reporter was supposed to be under seal and was disclosed due to a clerical mistake. Previous prior restraint litigation conducted at the highest levels of the nation's judiciary has rejected attempts to enjoin publications alleged to harm national security and the fair-trial rights of criminal defendants. By contrast, the prior restraint in this case was obtained by a privately-held beverage manufacturer to prevent the public from learning the identity of the regulatory agency that is investigating the company. The granting of a prior restraint under these circumstances is a plain constitutional error and must be reversed.

The newspaper seeks to publish the name of the agency conducting the regulatory inquiry of the beverage maker. To publish this truthful information, however, will now expose the

newspaper to the contempt power of the Superior Court. Because this injunction on publication is unconstitutional under the First Amendment and because “each passing day may constitute a separate and cognizable infringement of the First Amendment” when “a direct prior restraint is imposed upon the reporting of news by the media,” Nebraska Press Ass’n v. Stuart, 423 U.S. 1327, 1330 (1975) (Blackmun, J., in chambers), the newspaper is lodging an emergency appeal pursuant to Rule 4(c)(2) to ask this Court to dissolve the temporary restraining order entered by the Superior Court and to remand with instructions to dismiss the complaint and enter judgment for the newspaper. In the alternative, the newspaper requests a stay of the restraining order under exceptional circumstances pursuant to Rule 8(a)(2)(D).

II. STATEMENT OF FACTS

On July 15, 2010, National Law Journal reporter James T. (“Jeff”) Jeffrey, III went to the clerk’s office for the Superior Court of the District of Columbia to review the file in Hogan & Hartson LLP v. POM Wonderful, LLC, No. 2010 CA 000987B. See Affidavit of James T. (“Jeff”) Jeffrey, III ¶ 2 (“Jeffrey Aff.”), attached hereto. That action involves a fee dispute between a law firm, Hogan & Hartson, now Hogan Lovells (“Hogan”), and POM Wonderful (“POM”), a Hogan client and the plaintiff-appellee in this action. The Hogan-POM case is pending before the Honorable Judith Bartnoff. Id.

Mr. Jeffrey covers the Superior Court and frequently reports on fee disputes of interest to readers of the newspaper. Jeffrey Aff. ¶¶ 1, 2. Founded in 1978, The National Law Journal has the largest paid circulation of any weekly publication serving the legal community. In addition to The National Law Journal, ALM Media Properties also publishes The American Lawyer, Corporate Counsel, GlobeSt.com, Insight Conferences, Law.com, Law Journal Press, LegalTech, and Real Estate Forum.

In March or April 2010, an editor at The National Law Journal had learned about Hogan's lawsuit against POM, a private company based in Los Angeles, during a routine check of the Superior Court's pending docket, and Mr. Jeffrey was following up to learn what he could about the case. Jeffrey Aff. ¶ 2. A manufacturer of pomegranate juice, POM has been the subject of considerable public interest. See, e.g., David Brown, It's a 'Life Preserver'! It's 'Death-Defying'! It's ... A Super Ad Campaign!, Wash. Post (April 21, 2009); William Neuman, F.D.A. Cracks Down on Nestlé and Others Over Health Claims on Labels, N.Y. Times (March 3, 2010).

Mr. Jeffrey viewed the public docket on a computer terminal in the clerk's office. Jeffrey Aff. ¶ 3. He went through each entry of the docket and clicked on the entries he wanted to see, and then printed those entries that appeared relevant to the story on which he was working and that were available to the public. Id. As is customary at the Superior Court, the documents were printed on a printer located behind the clerk's counter and were handed to him by a court official. Id. Mr. Jeffrey paid the clerk's office \$61.00 for 122 pages of documents. Id. The documents remain in his possession. Id. None of the documents that he printed was marked as sealed, and no one working in the clerk's office indicated that they had been placed under seal or were in any way confidential. Id.

From the public materials he obtained from the Superior Court, Mr. Jeffrey learned the names of the lawyers involved in the case and that the dispute over fees arose from POM's retention of Hogan to represent the company in an inquiry undertaken by a regulatory agency. Jeffrey Aff. ¶ 4. He also learned the identity of the specific agency conducting the inquiry. Id. The information regarding the identity of the regulatory agency engaged in the inquiry of POM was contained throughout the publicly-available court materials he received from the clerk's

office. Id. ¶ 5. Specifically, the agency was named in the case docket, in a pleading filed by Hogan on May 3, 2010, and in a pleading filed by POM on June 11, 2010. Id.

On July 19, 2010, Mr. Jeffrey telephoned Barry Coburn, who is identified on the public docket as a lawyer for POM, and left him a voicemail message. Jeffrey Aff. ¶ 6. Later in the day or the next morning, Mr. Coburn telephoned him back. Id. ¶ 7. Mr. Jeffrey told Mr. Coburn that he was working on a story about the Hogan-POM lawsuit and wanted to give POM the opportunity to comment. Id. Mr. Jeffrey told Mr. Coburn that based on information he had learned in the public files he obtained at the Superior Court, Mr. Jeffrey knew that POM had hired Hogan for an agency inquiry and named the particular agency involved in the regulatory inquiry. Id. After hearing Mr. Jeffrey describe the facts he had learned from public court records, Mr. Coburn said that he would contact his client and be back in touch. Id. At no time did Mr. Coburn tell Mr. Jeffrey that the factual information he had learned was incorrect or that he was working with information that was subject to a sealing order. Id.

Over the next several days, Mr. Jeffrey continued to gather material for the article and corroborate information contained in the public court files. Jeffrey Aff. ¶ 8.

On July 22, 2010, Mr. Coburn telephoned Mr. Jeffrey again. Jeffrey Aff. ¶ 9. Mr. Coburn asked him a number of questions about the article he was working on. Id. Mr. Coburn wanted to know if Mr. Jeffrey planned to mention the names of the lawyers involved in the case and the fact that the Hogan-POM fee dispute was related to a regulatory inquiry. Id. He also asked whether Mr. Jeffrey was going to reference the specific agency investigating POM. Id. When Mr. Jeffrey answered in the affirmative to Mr. Coburn's questions, Mr. Coburn said that he would check with POM to see if he could provide the newspaper with a response on the record. Id. Mr. Jeffrey did not hear back from Mr. Coburn. Id. At no time during the second

conversation did Mr. Coburn tell Mr. Jeffrey that the factual information he had learned was incorrect or that he was working with information that was subject to a sealing order. Id.

Late in the afternoon of July 22, 2010, POM filed suit against ALM Media Properties, LLC, the parent corporation of The National Law Journal, seeking a temporary restraining order and preliminary injunction to prevent publication of information detailing the substance of any regulatory proceeding against POM or the identity of the regulatory agency conducting the proceeding. POM's complaint and motion papers were filed under seal. In a hearing conducted on July 23, 2010 before Judge Bartnoff, POM argued that the materials in the court record provided to Mr. Jeffrey by the clerk's office identifying the name of the agency were subject to sealing orders that the Superior Court had not properly implemented. On this basis, Judge Bartnoff entered an order prohibiting ALM Media Properties and The National Law Journal from publishing the information. Judge Bartnoff rejected arguments that the order was a prior restraint forbidden by the First Amendment.¹ The order reads as follows:

IT IS HEREBY ORDERED that defendant ALM MEDIA PROPERTIES, L.L.C. d/b/a THE NATIONAL LAW JOURNAL/LEGAL TIMES ("Defendant") ... its agents, servants, employees, representatives, and all persons acting under or in concert with Defendant, be and hereby is enjoined and restrained from directly or indirectly, in any manner or for any purpose, publishing, posting, exhibiting, distributing, or selling any confidential documents or information regarding the substance of any regulatory proceeding against POM, or the identity of the regulatory agency, that were obtained from documents in the Court docket in Case No. 2010CA987 or in the instant case that had been sealed by Order of the Court. This Order shall remain in effect through August 6, 2010.

See Order Granting Plaintiff's Motion for Temporary Restraining Order (July 23, 2010), attached hereto as Exhibit A. See also Notice of Appeal (July 27, 2010), attached hereto as Exhibit B.

¹ A transcript of the July 23, 2010 hearing has been ordered from the Superior Court.

The prior restraint on publication ordered by the Superior Court was issued when The National Law Journal was approaching its regular weekly deadline of 4:00 P.M. each Friday. Jeffrey Aff. ¶ 10. The injunction placed Mr. Jeffrey and his editors under extreme pressure to purge and edit from the article they were about to publish – under pain of contempt – any reference to the regulatory agency in question. Id. The National Law Journal was thus unable to publish to its readers truthful information relevant to a civil case in the Superior Court. Id. ¶ 11. If The National Law Journal and Mr. Jeffrey proceed to publish the truthful information he learned from the public court file, they will expose themselves to the contempt power of the Superior Court.

III. ARGUMENT

A. Standard of Review

In a typical case, an appellate court reviews the issuance of a TRO to see if the trial court abused its discretion in evaluating the standard four factors that determine the plaintiff's entitlement to equitable relief. See District of Columbia v. Group Ins. Admin., 633 A.2d 2, 21 (D.C. 1993).² However, “in the case of a prior restraint on pure speech, the hurdle [for the party moving for the injunction] is substantially higher.” Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 226-27 (6th Cir. 1996). When First Amendment rights are implicated, the issuance of the prior restraint must be reviewed de novo. Id. (citing Bose v. Consumers Union of U.S., 466 U.S. 485, 508 n.27 (1984)). Moreover, in such cases, the factors for granting a prior

² The traditional four factors require the moving party to demonstrate: “(1) that there is a substantial likelihood he [or she] will prevail on the merits; (2) that he [or she] is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to him [or her] from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order.” Group Ins. Admin., 633 A.2d at 21.

restraint “essentially collapse into a determination of whether restrictions on First Amendment rights are justified to protect competing constitutional rights.” Id. Thus, the fundamental question to be considered by this Court is whether the “publication ... threaten[s] an interest more fundamental than the First Amendment itself.” Id. (emphasis added). If it does not, the prior restraint is unconstitutional.

Even temporary restraints on the dissemination of information pending the resolution of a claim on its merits violate the First Amendment because they “disturb[] the status quo and impinge[] on the exercise of editorial discretion.” Id. at 226 (quoting In re Providence Journal Co., 820 F.2d 1342, 1351 (1st Cir. 1986)). As the Court in Procter & Gamble stated: “Where the freedom of the press is concerned ... the status quo is to ‘publish news promptly that editors decide to publish.’” Id.; see also Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976) (the burden on the party seeking to censor a publication is not reduced by the temporary nature of the restraint sought). In other words, the trial court cannot “preserve the status quo” long enough to give the question “due consideration” without offending the First Amendment. Procter & Gamble, 78 F.3d at 226.

A reviewing court thus should not examine the minutiae of the newsgathering at issue that “b[ears] no relation to the right of [a publisher] to disseminate the information in its possession,” such as “how a reporter obtained the documents in question or whether he was aware it was sealed.” Id. at 225. Such questions “are not appropriate bases for issuing a prior restraint.” Id. Instead, the inquiry on appeal must necessarily focus on whether the alleged interest of the party seeking to prevent the exercise of First Amendment rights can overcome the heavy presumption against prior restraints.

The same analysis applies regardless of whether this Court evaluates the present motion as an emergency appeal or as a motion for stay, both of which are suitable vehicles to undo a prior restraint that has created “indefinite delay” in publication and “caused irreparable harm to the news media that is intolerable under the First Amendment.” CBS v. Davis, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (granting emergency stay of injunction against broadcast of news footage alleged to cause potential harm to corporation’s business interests).

B. ALM Media Properties And The National Law Journal Will Prevail On The Merits Because The Injunction Is Unconstitutional

Through decades of First Amendment case law beginning with Near v. Minnesota, 283 U.S. 697, 713 (1931), courts have struck down prior restraints as “the essence of censorship.” The most common type of prior restraint is a judicial order, such as the one entered here, “forbidding certain communications when issued in advance of the time that such communications are to occur.” Alexander v. United States, 509 U.S. 544, 550 (1993) (citations omitted). For this reason, temporary restraining orders “are classic examples of prior restraints.” Id. Put another way, “prohibiting the publication of a news story ... is the essence of censorship.” Nebraska Press, 427 U.S. at 559 (quoting Near, 283 U.S. at 713).

The Supreme Court “has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial.” Procter & Gamble, 78 F.3d at 226-27 (citation omitted) (emphasis added). In addition to the two seminal cases the Sixth Circuit alludes to – New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (the “Pentagon Papers” case) and Nebraska Press – the Supreme Court has rejected the most extraordinary remedy of a prior restraint when weighed against numerous other interests, such as incitement of unlawful activity (Carroll v. President & Comm’rs of Princess Anne, 393 U.S. 175 (1968)); regulation of obscenity (Southeastern Promotions, Ltd. v. Conrad, 420 U.S.

546 (1975)); distribution of leaflets and picketing alleged to violate privacy interests (Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)); punishment for fraudulent solicitation (Sec’y of St. of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984)); protection from defamation (Near); and prevention of economic harm to corporations (CBS).

Prior restraints thus require the highest level of scrutiny under the First Amendment. As a result, “any system of prior restraints of expression [bears] a heavy presumption against its constitutional validity,” and a party who seeks such a restraint “carries a heavy burden of showing justification for the imposition of such a restraint.” New York Times, 403 U.S. at 714. POM has not met that burden. The harm that POM asserts – that agency policy provides for the agency, but not a company that is the subject of an inquiry or a third party, to keep a regulatory inquiry non-public while it remains in the investigation stage – shrinks in comparison to the much more serious constitutional and national security interests that the Supreme Court has repeatedly found insufficient to justify the imposition of a prior restraint on the exercise of First Amendment rights. After the resolution of the Pentagon Papers case, Justice Potter Stewart spoke about its meaning for the relationship between the government and the press. The Constitution, he said, is not a “Freedom of Information Act.” But the press would be left unshackled from the burdens of prior restraints so that it “may publish what it knows, and may seek to learn what it can.” Potter Stewart, Or Of the Press, 26 *Hastings L. J.* 631, 636 (1975). This is the balance the Constitution has struck, and the Superior Court order must therefore be reversed.

1. The Executive Branch’s National Security Interests In Preventing Publication Of Highly Classified Information Is Insufficient To Justify A Prior Restraint.

Not even compelling national security interests can justify a prior restraint such as the order entered by the Superior Court. In New York Times, the Supreme Court refused to enjoin

The New York Times and The Washington Post from publishing the Pentagon Papers, a study of the Vietnam War commissioned by Defense Secretary Robert McNamara that had been classified “Top Secret-Sensitive” by the executive branch but was provided to reporters by one of its contributors. According to a later retrospective, the Pentagon Papers “demonstrated, among other things, that the Johnson Administration had systematically lied, not only to the public but also to Congress, about a subject of transcendent national interest and significance.” R.W. Apple, Lessons From the Pentagon Papers, N.Y. Times (June 23, 1996).

The government attempted to prevent publication of the materials, arguing that the need to maintain the secrecy of the highly confidential information contained in those documents – the disclosure of which it argued would significantly harm national security – was subordinate to the newspapers’ First Amendment right to publish free of prior restraint. The Supreme Court historically rejected that argument, holding that the injunctions were unconstitutional and that the government had failed to meet its heavy burden of proof to justify interference with editorial freedoms. “Only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.” New York Times, 403 U.S. at 722-23 (Douglas, J., concurring); see also id. at 726 (Brennan, J., concurring) (prior restraint impermissible “even if the present world situation were assumed to be tantamount to a time of war”).

The ruling in New York Times demonstrates that even disclosure of the “most sensitive and destructive” highly classified national security information that the Supreme Court itself was concerned would “undoubtedly do substantial damage to public interests” was insufficient to satisfy the “heavy burden” on the government to warrant a prior restraint. Id. at 731; see also id.

at 722-23 (Douglas, J., concurring) (“These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press.”). While a prior restraint was impermissible, the newspapers would not necessarily be “immune from criminal action” if they chose to publish. *Id.* at 733 (White, J., concurring). Despite the fact that the government “mistakenly chose to proceed by injunction,” it could still pursue post-publication remedies. *Id.*

New York Times forecloses any argument that POM’s interest or the judiciary’s interest in seeing sealing orders made effective supports the prior restraint in this case. In the Pentagon Papers case, that is precisely the argument the government made to the Supreme Court – that unless publication was enjoined, the nation’s system of sealing sensitive national security material behind layers of classification would lose its integrity. But just as the Supreme Court rejected that argument when it came from the executive branch, this Court should reject it when it comes from a private litigant before the Superior Court, particularly when in the Pentagon Papers case the materials at issue bore on the military security of the nation whereas here they relate to the interests of a beverage manufacturer in keeping out of the public domain the identity of a regulatory agency engaged in an inquiry of the company.

2. Sixth Amendment Fair Trial Rights Are Insufficient To Justify A Prior Restraint.

Nor can individual constitutional rights, such as a criminal defendant’s Sixth Amendment right to a fair trial, overcome the heavy presumption against prior restraints. In Nebraska Press, a state trial court issued an order prohibiting the press from publishing accounts of confessions or admissions made by an accused murderer or any facts implicating him in the crime – all of which had been obtained in open court or from third parties – until a jury had been impaneled. 427 U.S. at 543-44. In striking down the order as unconstitutional, the Supreme Court held that the First Amendment prevailed over the Sixth Amendment in the “confrontation between prior

restraint imposed to protect one vital constitutional right and the explicit command of another.” Id. at 570; see also Oklahoma Publishing Co. v. Oklahoma County District Court, 430 U.S. 308, 310 (1977) (holding prior restraint prohibiting publication of juvenile name obtained from open court proceedings unconstitutional).

The Court in Nebraska Press further explained that, drawing from the “unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers,” it remained “intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation’s press” even when a defendant invokes an interest as fundamental as the Sixth Amendment right to a fair trial. 427 U.S. at 562; see also Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper ... constitute[s] the exercise of editorial control and judgment,” the regulation of which cannot “be exercised consistent with First Amendment guarantees of a free press.”).

The coverage of the judicial system is one of the most important functions of the press, which has been described by the Supreme Court as no less than the “handmaiden of effective judicial administration.” Nebraska Press, 427 U.S. at 559. Thus, any prior restraint on publication of truthful information about the courts lawfully obtained by a reporter takes away from the public something it has a right to know. While “people in an open society do not demand infallibility from their institutions ... it is difficult for them to accept what they are prohibited from observing.” Richmond Newspapers v. Virginia, 448 U.S. 555, 572 (1980).

POM has no claim that its constitutional interests would be impaired by disclosure of the identity of the agency investigating it. As such, the constitutional balancing that the Supreme Court conducted in Nebraska Press is not even necessary in this case.

3. Commercial Business Interests Are Insufficient To Justify A Prior Restraint.

Allegations of harm to a corporation's commercial interests similarly fail to support a prior restraint. See Procter & Gamble, 78 F.3d at 225. In Procter & Gamble, the Sixth Circuit reversed two temporary restraining orders and a permanent injunction against Business Week magazine, which obtained documents sealed pursuant to a protective order from a law firm representing the defendant in a business dispute. The materials at issue there, like the materials at issue here, were incorporated into memoranda of law and other pleadings, and the appellate court repeatedly referred to the materials as being sealed. Id. at 223, 225. The magazine intended to publish an article based on the information. The appellate court held that "private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal, as the District Court ultimately and correctly decided." Id.

Similarly, in CBS, a meat packing company sought a preliminary injunction against a broadcast station to prohibit the airing of videotape footage taken at the company's factory as part of an ongoing investigation into unsanitary practices in the meat industry. 510 U.S. at 1315. The company argued that broadcast of the footage could result in "significant economic harm" to its business interests. Id. at 1318. The Supreme Court rejected economic harm as an interest sufficient to overcome the presumption against prior restraints and held that "even if economic harm were sufficient in itself to justify a prior restraint ... we previously have refused to rely on such speculative predictions." Id.; see also Coulter v. Gerald Family Care, P.C., 964 A.2d 170, 186 (D.C. 2009) ("a prior restraint on speech that is premised merely on protecting business interests fails first amendment scrutiny").

The commercial interests of POM, a private company, and any speculative harm to those interests that could result from identification of the agency, thus cannot justify a prior restraint.

4. Cases Involving Clerical Mistakes Demonstrate That Prior Restraints Are An Improper Response To Accidental Disclosures From Court Files.

A prior restraint cannot be justified on the grounds that the information to be published was contained in a public court file due to the clerk's failure to seal documents. Once information is in the public domain, it is an exercise in futility to try to reclaim the cloak of secrecy over it or punish its publication. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), for example, a reporter learned the identity of the victim of a rape from indictments protected under state law that were inadvertently made available for inspection by the court clerk during the trial of the alleged rapist. Id. at 472 n.3. The Supreme Court held that the accurate publication of the name of the rape victim could not be punished as an invasion of privacy because the Constitution mandates that the press be permitted to "truthfully publish[] information released in official court records," even where that release is unintentional. Id. at 496.

A similar clerical mistake led to the identification of a rape victim in violation of a state statute in Florida Star v. B.J.F., 491 U.S. 524 (1989). In B.J.F., a Florida sheriff's department prepared a report on a sexual assault and then placed a copy in the department's pressroom, where it was picked up by a reporter who prepared a brief article on the crime. Id. at 526-27. The victim's family then filed suit against the newspaper for a violation of a state statute. Id. at 528. The Supreme Court held that the imposition of civil damages on a newspaper for publishing truthful information that was lawfully obtained from police records violated the First Amendment absent a state interest of the "highest order" – an interest which was not present in the case. Id. at 541-42; see also Bartnicki v. Vopper, 532 U.S. 514, 527-28 (2001) (holding that publication of the contents of a private telephone conversation made available to the media by a

third party could not be constitutionally punished because the media had “lawfully obtain[ed] truthful information about a matter of public significance”).

In Ashcraft v. Conoco, 218 F.3d 288, 292-94 (4th Cir. 2000), the Fourth Circuit overturned criminal and civil contempt citations against a reporter to whom a court clerk had mistakenly provided a case file containing a sealed settlement agreement. The reporter published a story the day after receiving the information which disclosed the amount of the \$36 million settlement. Id. at 294. In vacating the contempt sanctions, the Fourth Circuit noted that even if the reporter could be found to have violated the sealing order or the “directive” on the envelope that the material inside was sealed and confidential, the reporter was neither a party to the underlying proceedings nor aware that the directives might have applied to her, and thus could not be punished. Id. at 296-97, 298 n.7.

The holdings of these cases – all of which involve inadvertent disclosures by a court or by public officials – make clear that the accidental release of confidential information to the public does not permit a second mistake, this time of constitutional magnitude, of imposing liability for publication of the information. Thus, because “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,” Southeastern Promotions, 420 U.S. at 559, if the use of mistakenly disclosed information does not warrant post-publication punishment, it certainly cannot meet the higher constitutional bar for a pre-publication prior restraint. Where, as here, The National Law Journal could not be held liable for damages for publishing truthful information about the identity of the agency investigating POM, it cannot consistent with the First Amendment be enjoined from publishing that information in the first instance.

5. The Two Cases Cited By POM Do Not Support The Decision Of The Superior Court To Enjoin The Newspaper.

POM relied on two cases before the Superior Court to support its request for a TRO. Neither case provides support for the Superior Court's extraordinary action.

In Howard Publications, Inc. v. Lake Mich. Charters, 649 N.E.2d 129 (Ind. Ct. App. 1995), the Indiana Court of Appeals affirmed an injunction restraining a newspaper from publishing discovery material sealed pursuant to a protective order. The court mistakenly rested its decision on Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). In Seattle Times, the Supreme Court enjoined a newspaper, which was a litigant in the underlying case, from publishing discovery materials obtained pursuant to the newspaper's own discovery request and sealed under a protective order. The Howard court, led astray by its focus on discovery materials, extended Seattle Times to a non-party and held that the fact that the information obtained by the reporter was not "traditionally public" and "compiled and available in the court's file only because of a discovery order is the distinguishing factor in this case." 649 N.E.2d at 132. The same situation is not present here, where the information was obtained from a docket and related pleadings, see Jeffrey Aff. ¶ 5, both of which are presumptively and customarily open to the public.

Furthermore, the Howard decision – which has never been cited by any other court – erred in applying Seattle Times to a non-party. The Court in Seattle Times found that where the newspaper as a party obtained information "pursuant to a court order that both granted [it] access to that information and placed restraints on the way in which the information might be used," it had no right to disseminate the information. 467 U.S. at 31. But where the newspaper subject to an injunction is not a party to the underlying litigation, Seattle Times is inapplicable. See Procter

& Gamble, 78 F.3d at 225 (Seattle Times “does not govern the situation where an independent news agency, having gained access to sealed documents, decides to publish them.”).

The second case on which POM relies, In re Zyprexa Litig., 474 F. Supp. 2d 385 (E.D.N.Y. 2007), also involves discovery material and similarly fails to provide support to POM. In Zyprexa, a consultant hired by the plaintiffs who agreed to be bound by a protective order schemed to obtain and publish documents sealed pursuant to that order. Id. at 392-93. Upon receipt of the documents, The New York Times published an article about their contents. Id. The court issued preliminary and permanent injunctions against those involved in the scheme and those to whom they had distributed the documents. Id. at 393. But as the court repeatedly emphasized, it did not enjoin reporters for The New York Times and NPR from publishing the discovery material sealed pursuant to the protective order. Id. at 393, 407, 427-28.

C. The TRO Has Caused ALM Media Properties And The National Law Journal To Suffer An Immediate Irreparable Injury

From the moment ALM Media Properties and The National Law Journal were restrained from publishing details regarding the regulatory investigation against POM, they suffered irreparable harm. It is well-established that “the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373 (1976). As Justice Blackmun noted, the inevitable effect of a prior restraint is that “the suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable.” Nebraska Press, 423 U.S. at 1330 (1975) (Blackmun, J., in chambers). As such, the TRO cannot be justified even by its temporary nature.

Nor can the prior restraint be reasoned away as an attempt to maintain the status quo while the Superior Court studies the issue more closely. As the Sixth Circuit in Procter &

Gamble stated: “Where the freedom of the press is concerned ... the status quo is to publish news promptly that editors decide to publish.” 78 F.3d at 226; see also Nebraska Press, 427 U.S. at 562 (“As a practical matter ... the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”). Damage to the First Amendment is thus “particularly great when the prior restraint falls upon the communication of news and commentary on current events.” Nebraska Press, 427 U.S. at 559.

POM’s alleged irreparable injury – disclosure of the identity of the agency investigating the company – is an injury based on agency policy that provides for the agency (not third parties) to keep any investigation secret. No constitutional interest of POM’s is at stake. The National Law Journal, on the other hand, seeks to exercise its First Amendment rights to publish additional information it obtained in public records and has been enjoined under pain of contempt from doing so. Jeffrey Aff. ¶ 11. The irreparable injury to The National Law Journal is greater, and the Superior Court erred in finding to the contrary.

D. The Public Interest In Truthful Reporting On The Courts Is Paramount

The public interest lies in dissolving the temporary restraining order and permitting The National Law Journal to continue to do what it and other publications covering the legal system do on a daily basis – provide their readers with information about the important business of the nation’s courts. The press “does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” Nebraska Press, 427 U.S. at 559-60 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)). While the public has an interest in the ability of the courts to maintain the integrity of their orders, it has an even stronger First Amendment interest in “receiving information about our legal system, including its defects and mistakes,” so that it

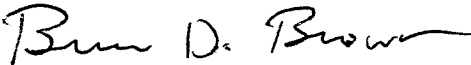
can “learn about the law and the moral principles on which it is based, as well as the law’s capacity for self correction and stability.” Orr v. Argus-Press Co., 586 F.2d 1108, 1117 (6th Cir. 1978). When the press reports on the judicial system, it is “simply performing its assigned role.” Id. Indeed, the role of the press in truthful reporting on the courts is “essential to public confidence in the system.” Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986) (Press-Enterprise I). A prior restraint on truthful information lawfully obtained from public court files only serves to undermine that necessary confidence.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the emergency appeal, dissolve the temporary restraining order entered by the Superior Court, and remand with instructions to dismiss the complaint and enter judgment for ALM Media Properties. In the alternative, the Court should enter a stay of the restraining order entered by the Superior Court.

Respectfully submitted,

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Laurie A. Babinski (D.C. Bar No. 976505)

lbabinski@bakerlaw.com

1050 Connecticut Avenue, NW

Washington Square, Suite 1100

Washington, DC 20036

Telephone: (202) 861-1500

Facsimile: (202) 861-1783

*Attorneys for Defendant-Appellant
ALM Media Properties, LLC*

IDENTIFICATION OF INTERESTED PARTIES

Pursuant to Court of Appeals Rules 27(d)(5) and 28(a)(2)(a), Defendant-Appellate ALM Media Properties, LLC identifies the following parties, intervenors, amici curiae, and their counsel in the trial court proceeding:

1) ALM MEDIA PROPERTIES, LLC

Counsel: Bruce D. Brown (D.C. Bar No. 457317)
Laurie A. Babinski (D.C. Bar No. 976505)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW
Washington Square, Suite 1100
Washington, DC 20036

2) POM WONDERFUL, LLC

Counsel: Barry Coburn
COBURN & COFFMAN PLLC
1244 19th Street, NW
Washington, DC 20036

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rules 27(d)(5) and 28(a)(2)(b), Defendant-Appellant ALM Media Properties, LLC d/b/a The National Law Journal and Legal Times, states that it has no parent corporation and that, as a private company, no publicly-held corporation holds 10% or more of its stock.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2010, I caused a copy of the foregoing to be served electronically pursuant to written consent on:

Barry Coburn, Esq.
Coburn & Coffman PLLC
1244 19th Street, NW
Washington, DC 20036
barry@cclegal.us

Attorney for Plaintiff-Appellee POM Wonderful, LLC

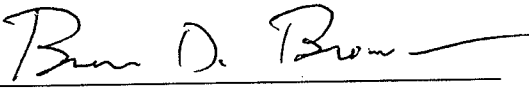


EXHIBIT A

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division
500 Indiana Avenue, NW, Rm-JM-170
Washington, DC 20001

FILED
IN OPEN COURT
JUL 23 2010
Superior Court
of the District of Columbia
Washington, D.C.

POM WONDERFUL, L.L.C.,
11444 W. Olympic Blvd.
Los Angeles, CA 90064

Plaintiff,

vs.

ALM MEDIA PROPERTIES, L.L.C. d/b/a
THE NATIONAL LAW JOURNAL/LEGAL
TIMES,
120 Broadway
5th floor
New York, NY 10271

Defendant.

C.A. No. 2010 CA 533

Judge Barhoff

**~~PROPOSED~~ ORDER GRANTING PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER**

Having read all of the papers filed in connection with plaintiff POM Wonderful, LLC's ("POM") Motion for Temporary Restraining Order and Preliminary Injunction, having considered each of the issues raised therein, and good cause having been shown, *at the hearing on July 23, 2010,*

IT IS HEREBY ORDERED that defendant ALM MEDIA PROPERTIES, L.L.C. d/b/a THE NATIONAL LAW JOURNAL/LEGAL TIMES ("Defendant") ~~appear on~~

~~at _____ in Department _____ of this Court, located at 500 Indiana Avenue, NW, Rm JM-170, Washington, DC 20001, or as soon thereafter as the matter may be~~

~~heard, then and there to show cause, if any it has, why Defendant and its agents, servants,~~

~~employees, representatives, and all persons acting under or in concert with Defendant, should not~~

{039250.3}

- 5 -

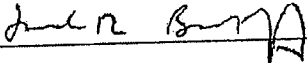
LA2063458.2
666666-66666

JUL 23 2010

be and here by is enjoined and restrained from directly or indirectly, in any manner or for any purpose, publishing, posting, exhibiting, distributing, or selling any confidential documents or information regarding the substance of any regulatory proceeding against POM, or the identity of the regulatory agency, that were obtained from documents in the Court docket in Case No. 2010CA987 or in the instant case that had been sealed by Order of the Court.

This Order shall remain in effect through August 6, 2010. A status hearing on the motion for preliminary injunction will be held before Judge Robert Richter at 10:00 a.m. in Courtroom 213.

Dated: July 23, 2010



Judge Judith Bartnoff

EXHIBIT B

APPENDIX OF FORMS

Form 1. Notice of Appeal (Tax, Civil, Family (Except Juvenile Cases), and Probate).

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
NOTICE OF APPEAL (____ CROSS APPEAL)
TAX, CIVIL, FAMILY (EXCEPT JUVENILE CASES), AND PROBATE**

Superior Court Case Caption: POM Wonderful, LLC v. ALM Media Properties, LLC
d/b/a The National Law Journal/Legal Times

Superior Court Case No.: 2010 CA 005533 B

- A. Notice is given that (person appealing) ALM Media Properties, LLC
d/b/a The National Law Journal/ is
Legal Times
appealing an order/judgment from the:
- Tax Division Civil Division Family Court Probate Division

1. Date of entry of judgment or order appealed from (if more than one judgment or order appealed, list all):

July 23, 2010

2. Filing date of any post-judgment motion: N/A

3. Date of entry of post-judgment order: N/A

4. Superior Court Judge: Robert I. Richter/Judith Bartnoff

5. Is the order final (*i.e.*, disposes of all claims and has been entered by a Superior Court Judge, not a Magistrate Judge)? YES NO

If no, state the basis for jurisdiction: D.C. Code Sec. 11-721(a)(2)

Has there been any other notice of appeal filed in this case: YES NO

If so, list the other appeal numbers: N/A

6. If this case was consolidated with another case in this court, list the parties' names and the Superior Court case number: N/A

- B. Type of Case: Civil I Civil II Landlord and Tenant
 Neglect TPR Adoption Guardianship
 Mental Health Probate Intervention

C. Indicate Status of Case: Paid In Forma Pauperis CCAN

Was counsel appointed in the trial court? YES NO

D. Provide the names, addresses, and telephone numbers of all parties to be served. For persons represented by counsel, identify counsel and whom the counsel represents. For each person, state whether the person was a plaintiff or defendant in the Superior Court (use additional sheets of paper if necessary):

NAME	ADDRESS	PARTY STATUS (Plaintiff, Defendant)	TELEPHONE NOS.
(See attached)			

E. Identify the portions of the transcript needed for appeal, including the date of the proceeding, the name of the Court Reporter (or state that the matter was recorded on tape if no Court Reporter was present), the courtroom where the proceeding was held, and the date the transcript was ordered, or a motion was filed for preparation of the transcript.* Attach additional pages if needed.

Date of Proceeding/Portion	Reporter/Courtroom	Date ordered
July 23, 2010 / all	Tape /Room 100	July 26, 2010

(Note: ordered, but not needed for appeal)

Check this box if no transcript is needed for this appeal.

F. Person filing appeal: Plaintiff Pro Se Defendant Pro Se
 Third Party/Intervenor Counsel for Plaintiff
 Counsel for Defendant

ATTACH A COPY OF THE ORDER, JUDGMENT OR DOCKET ENTRY FROM WHICH THIS APPEAL IS TAKEN

Laurie A. Babinski
Print Name of Appellant/Attorney

Laurie A. Babinski
Signature

976505
Bar No.

* Appellant is responsible for ordering transcript(s) from the Court Reporting and Central Recording Division, Room 5500. If appellant has been granted In Forma Pauperis status, or had an attorney appointed by the Family Court, and transcript is needed for this appeal, appellant must file a Motion for Transcript in the Appeals Coordinator's Office, Room 3148. That office number is (202) 879-1731. If that motion is granted, transcript will be prepared at no cost to appellant.

Baker & Hostetler LLP
1050 Connecticut Avenue, NW

(202) 861-1500

Address

Telephone Number

Suite 1100
Washington, DC 20036

- D. Provide the names, addresses, and telephone numbers of all parties to be served. For persons represented by counsel, identify counsel and whom the counsel represents. For each person, state whether the person was a plaintiff or defendant in the Superior Court (use additional sheets of paper if necessary):

Bruce D. Brown (D.C. Bar No. 457317)
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1050 Connecticut Avenue, NW
Washington Square, Suite 1100
Washington, DC 20036
(202) 861-1660
bbrown@bakerlaw.com

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Washington Square, Suite 1100
Washington, DC 20036
(202) 861-1762
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Counsel for Defendant ALM Media Properties, LLC

Barry Coburn
COBURN & COFFMAN PLLC
1244 19th Street, NW
Washington, DC 20036
(202) 470-6706
barry@cclegal.us

Counsel for Plaintiff POM Wonderful, LLC

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division
500 Indiana Avenue, NW, Rm-JM-170
Washington, DC 20001

FILED
IN OPEN COURT
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Plaintiff,

vs.

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THE NATIONAL LAW JOURNAL/LEGAL
TIMES,
120 Broadway
5th floor
New York, NY 10271

Defendant.

C.A. No. 2010 CA 533

Judge Barhoff

PROPOSED ORDER GRANTING PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER

Having read all of the papers filed in connection with plaintiff POM Wonderful, LLC's ("POM") Motion for Temporary Restraining Order and Preliminary Injunction, having considered each of the issues raised therein, *at the hearing on July 23, 2010,* and good cause having been shown,

IT IS HEREBY ORDERED that defendant ALM MEDIA PROPERTIES, L.L.C. d/b/a THE NATIONAL LAW JOURNAL/LEGAL TIMES ("Defendant") ~~appear on~~

~~at _____ in Department _____ of this Court, located at 500 Indiana Avenue, NW, Rm JM-170, Washington, DC 20001, or as soon thereafter as the matter may be~~

~~heard, then and there to show cause, if any it has, why Defendant and its agents, servants,~~

~~employees, representatives, and all persons acting under or in concert with Defendant, should not~~

{039250.3}

- 5 -

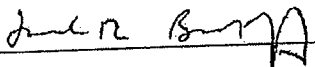
LA2063458.2
666666-66666

JUL 23 2010

be and here by is enjoined and restrained from directly or indirectly, in any manner or for any purpose, publishing, posting, exhibiting, distributing, or selling any confidential documents or information regarding the substance of any regulatory proceeding against POM, or the identity of the regulatory agency, that were obtained from documents in the Court docket in Case No. 2010CA987 or in the instant case that had been sealed by Order of the Court.

This Order shall remain in effect through August 6, 2010. A status hearing on the motion for preliminary injunction will be held before Judge Robert Richter at 10:00 a.m. in Courtroom 213.

Dated: July 23, 2010



Judge Judith Bartnoff

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

POM WONDERFUL, LLC,

Plaintiff-Appellee,

vs.

ALM MEDIA PROPERTIES, LLC d/b/a
THE NATIONAL LAW JOURNAL/
LEGAL TIMES,

Defendant-Appellant.

CASE NO. _____

AFFIDAVIT OF JAMES T. ("JEFF") JEFFREY, III

1. I am a reporter at The National Law Journal and the author of the news article that is the subject of the temporary restraining order in this case. The District of Columbia Superior Court is a part of my regular beat. I am over the age of 21, have personal knowledge of the facts set forth herein, and am competent to testify to the same.

2. On July 15, 2010, I went to the Superior Court clerk's office to review the public file in the case of *Hogan & Hartson LLP v. POM Wonderful, LLC*, Case No. 2010 CA 000987B, a fee dispute between a law firm and a former firm client over a substantial amount of money. My editor had learned about the case during the month of March or April in a routine check of the Superior Court's pending docket, and I was assigned to follow up about the case to see what I could learn. The National Law Journal frequently covers fee disputes, and this matter, pending before the Honorable Judith Bartnoff, was therefore of interest to our readers.

3. I viewed the public docket on a computer terminal in the clerk's office. I went through each entry of the docket and clicked on the entries I wanted to see and then printed those that appeared relevant to the story and that were available to the public. As is customary at

Superior Court, the documents were printed on a printer located behind the clerk's counter and were handed to me by a court official. I paid the clerk's office \$61.00 for 122 pages of documents. The receipt is attached as Exhibit 1. The documents remain in my possession. None of the documents that I printed was marked as sealed and no one working in the clerk's office indicated that they had been placed under seal or were in any way confidential.

4. From the public materials I obtained from the Court, I learned the names of the lawyers involved in the case and that the dispute over fees arose from POM's retention of Hogan to represent the company in an inquiry undertaken by a regulatory agency. I also learned the identity of the specific agency conducting the inquiry against POM.

5. The information regarding the identity of the regulatory agency engaged in the inquiry of POM was contained throughout the publicly-available court materials I received from the clerk's office. Specifically, the agency at issue was named in several documents, including by POM itself. For example, it was identified in the case docket, in a pleading filed by Hogan on May 3, 2010, and in a pleading filed by POM on June 11, 2010.

6. On July 19, 2010, four days after I obtained the case files from the Court, I telephoned Barry Coburn, a lawyer at the law firm of Coburn & Coffman P.L.L.C. Mr. Coburn is identified on the public docket as a lawyer for POM. I left a voicemail message for Mr. Coburn. I also sent an e-mail seeking comment to two POM spokesmen asking to be put in touch with two company executives whose names were contained in the public files I reviewed and which were provided to me by the clerk's office. The e-mail is attached as Exhibit 2.

7. Later in the day or the next morning, Mr. Coburn telephoned me back. I told him that I was working on a story about the Hogan-POM lawsuit and wanted to give POM the opportunity to comment. Based on information I had learned in the public files I obtained at the

Superior Court, I told him that I knew that POM had hired Hogan for an agency inquiry and named the particular agency involved in the regulatory inquiry. After hearing me describe the facts that I had learned from public court records, Mr. Coburn indicated that he would contact his client and be back in touch. At no time did Mr. Coburn tell me that the factual information I had learned was incorrect or that I was working with information that was subject to a sealing order.

8. Over the next several days, I continued to report the story and corroborate information contained in the public court files.

9. On July 22, Mr. Coburn telephoned me again. He asked me a number of questions about the article I was working on. He wanted to know if I planned to mention the names of the lawyers involved in the case and the fact that the Hogan-POM lawsuit was related to a regulatory inquiry. He also asked whether I was going to reference the specific agency investigating POM. When I answered in the affirmative to his questions, he said that he would check with POM to see if he could provide the newspaper with a response on the record. I did not hear back from him. At no time in this second conversation with Mr. Coburn did he tell me that the factual information I had learned was incorrect or that I was working with information that was subject to a sealing order. Later that day, I learned that Mr. Coburn had filed a motion for a temporary restraining order against The National Law Journal.

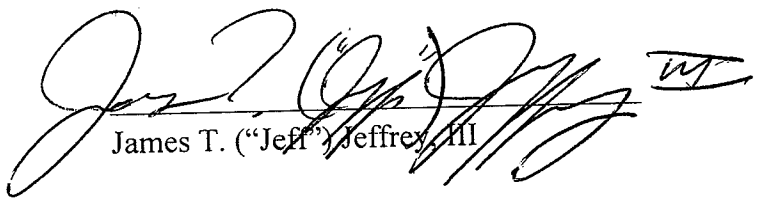
10. The weekly deadline for The National Law Journal is approximately 4:00 P.M. each Friday. Late in the afternoon on Friday, June 23, 2010, upon learning that Judge Bartnoff had just then granted a temporary restraining order enjoining the newspaper from publishing the name of the regulatory agency investigating POM, I worked with my editors under extreme deadline pressure to eliminate from the article we were about to publish any reference to the

agency in question. A true and correct copy of the expurgated story as it was published is attached as Exhibit 3.

11. I was unable to publish to my readers truthful information relevant to a civil case in the Superior Court. If The National Law Journal and I proceed to publish the truthful information I learned from the public court file, we now do so under the pain of contempt.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 27, 2010


James T. ("Jeff") Jeffrey, III

Sworn to before me this 27th day of July, 2010


Notary Public

BARBARA J. MALLOY
NOTARY PUBLIC FOR DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES 11/14/2012

EXHIBIT 1

#1

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

DATE: 7/15/10

Non Case Receiving Civil Action Branch

CASE NO: 10CA987

Hogan + Hartson vs Pom Wonderful, LLC
LLP

CODE	DESCRIPTION	FEE	NUMBER
CIVCCR	CERTIFIED COPY	\$5.00	
CIVCPP	COPIES PER PAGE	\$0.50	122
CIVNF	NOTARIZATION	\$1.00	
CIVRECS	RECORD SEARCH	\$10.00	

NOTE:

Fee must be paid before copies are made. No more than ten (10) pages will be copied while you wait. Place a paper clip on each page that you wish to be copied. If you desire more than ten (10) pages copied, your request will be ready for pick-up within two (2) business days from the date of your request. After receipt of payment, returned this form to the Clerk.

Name: Jeff Jeffrey

Address: _____

Telephone No. _____

OFFICIAL USE ONLY
122
Total pages
SN
Deputy Clerk

Superior Court of the District of
Columbia
Civil Division
Civil Actions Branch

Receipt 170054 Date 07/15/10

Description Receipt for: Copies Per Page

Received From jeff
On Behalf Of

Payment Type	Amount	Reference
Cash	61.00	

Disbursements	Amount
Fines	61.00

Change	0.00
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Cashier Blanche Richardson	Trans Date 07/15/10 11:35:46
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Comments

EXHIBIT 2

Jeff Jeffrey

From: Jeff Jeffrey
Sent: Monday, July 19, 2010 12:19 PM
To: 'DPortolan@PomWonderful.com'
Cc: 'RSix@Roll.com'
Subject: National Law Journal: Story on lawsuit filed against POM Wonderful

Mr. Portolan,

I am working on a story about a lawsuit filed against POM Wonderful in D.C. Superior Court alleging that the company has failed to pay over \$666,000 in legal fees. I would very much like to speak with Mr. Craig Cooper, the vice president and general counsel of Roll International, and Ms. Kristina Diaz of Roll Law Group. Both Mr. Cooper and Ms. Diaz are named in the court filings. Please let me know the best way to reach either or both of them. Thanks in advance for your time and help with this matter.

Regards,
Jeff

Jeff Jeffrey

The National Law Journal / Legal Times

Washington, D.C. Bureau

M: 225-505-5999 | W: 202-828-0366

Fax: 202-785-4539

jjeffrey@alm.com

www.nlj.com

Please note my e-mail address is now jjeffrey@alm.com.

EXHIBIT 3



Carol Steiker '09 is the author for this article.

THE NATIONAL LAW JOURNAL

JULY 26, 2010

THIS WEEK @NLJ.COM

Sign up for our new newsletter all about the U.S. Supreme Court at nlj.com/scinsider/reg.

An ALM publication

Hogan's POM punch-up

Hogan Lovells sues juice maker over unpaid \$666K legal bill.

BY JEFF JEFFREY

How does a long client relationship crumble? With \$666,265 in unpaid legal bills and accusations of "unnecessary and substandard legal services," according to a suit in District of Columbia Superior Court, Hogan Lovells says former client POM Wonderful has failed to pay more than a half-million dollars in legal fees and

expenses the pomegranate juice maker incurred during nine months last year. The firm filed suit on Feb. 22, alleging breach of contract. POM fired back in court filings attacking Hogan's work and calling its fees "exorbitant."

POM's most notable response, however, has been an aggressive push to seal any document referring to the matter on

SEE FEES, PAGE 8

TO OUR READERS

What appears here is not the full story. Minutes before our deadline Friday, D.C. Superior Court Judge Judith Bartnoff signed a temporary restraining order against *The National Law Journal* enjoining it from publishing certain details that we legally obtained from court documents. Specifically, we are not allowed to name a government agency conducting a regulatory inquiry into one of the subjects of the article, POM Wonderful. We fought this order vigorously in court; we thought and continue to think that it is a violation of the First Amendment, and we are working on an appeal. Bartnoff, as she considered the order, said, "I am throwing 80 years of First Amendment jurisprudence on its head, so be it." She said the court's interest in maintaining the "integrity" of its docket trumped the First Amendment concern. We strongly believe Bartnoff's action harms the integrity of the court by placing process concerns over fundamental constitutional rights. Sadly, however, because of Bartnoff's order, we were forced to scrub this article of any reference to the agency. We apologize to our readers for being unable to provide the fullest report possible. — David L. Brown, editor in chief

POM sued by Hogan Lovells over legal tab

FEES, FROM PAGE 1

which it ran up those legal bills. On Friday, July 23, Superior Court Judge Judith Bartnoff signed a temporary restraining order preventing *The National Law Journal* from publishing the name of the regulatory agency before which Hogan represented POM.

Earlier in the week, Bartnoff at POM's urging handed down an order sealing six more documents that had previously been in the public record. Hogan contends in court documents that because POM has pushed to keep the majority of the filings under seal, the firm can't fairly defend itself against POM's allegations.

POM, which is being represented by Barry Coburn of Washington's Coburn & Coffman, a former Justice Department lawyer, has declined to comment on this case. The public docket notes that another lawyer who has made an appearance for POM in the fee case is John Graubert, a partner at Covington & Burling who served as the Federal Trade Commission's deputy general counsel from 1998 until 2008. Graubert, who the docket says withdrew from the case on July 21, did not return calls seeking comment.

Hogan's lawyer, Washington solo practitioner Randell Ogg, dubbed POM's criticism of his client "outrageous" and said, "We have a complete and meritorious defense. We plan to prove that in superior court."

POM is a subsidiary of privately held Roll International Corp., which Hogan has represented since 1989. POM itself was launched in 2002. According to court documents, Roll Vice President and General Counsel Craig Cooper signed the original engagement letter for POM with Hogan on Dec. 6, 2002, agreeing to pay then Los Angeles partner Laurence Pretty for "various legal services."

Hogan began representing POM on the regulatory matter in February 2009, court records say. According to court records, Washington food-and-beverage partners Richard Silverman and Steven Steinborn worked on the matter. According to Hogan's complaint, by November, the firm and the company were at loggerheads, and POM turned to Covington & Burling to handle the regulatory matter. Court records do not show whether the fee dispute caused the rupture or followed it.

DON'T MENTION IT

In an April 9 letter to Ogg, filed shortly after POM moved to dismiss the case, Kristina Diaz, a senior counsel in the Roll general counsel's office, threatened sanctions if Hogan or Ogg disclosed any information about the investigation.

Diaz wrote in the letter, which has since been placed under seal, "Among other things, we consider any reference to the [regulatory agency], its investigation or inquiry privileged facts, not necessary to Hogan's opposition to POM's pending motion. Please be advised that if you dis-



RANDELL OGG: The Washington solo practitioner represents Hogan Lovells in its attempt to collect from POM Wonderful for nine months of legal work on a regulatory investigation.

close these facts, you and Hogan will be violating your ethical duties and responsibilities and we will exercise all available legal rights and remedies against you personally, as well as Hogan for breach of these duties."

Hogan contends in court documents that it's simply trying to defend against the allegations its work was substandard and its fees unwarranted. Ogg wrote in a May 3 pleading, "This combination of the public filing of these immaterial allegations of malpractice was intended by POM Wonderful to publicly embarrass [Hogan Lovells], exploit the attorney-client privilege, and strip [Hogan Lovells] of its right to publicly defend itself against frivolous public charges." Ogg also wrote that sealing so much of the record will "unduly burden the Court and the Plaintiff."

Keeping the dispute in open court in Washington may be Hogan's wish. But POM wants the confidentiality of arbitration—and it would prefer the talks proceed in Los Angeles, where it is headquartered. In a Feb. 16 letter to Silverman, six days before the suit was filed, Cooper wrote, "Please be advised that whatever action Hogan decides to take, we expect it to abide by the California State Bar's Mandatory Fee Arbitration requirements." Under California law, a client has a statutory right to request arbitration when fee disputes arise, and that arbitration becomes mandatory for the attorney involved in the dispute.

However, the 2002 engagement letter between POM and Hogan says nothing



BARRY COBURN: In court papers, the Coburn & Coffman partner called Hogan's legal work "unnecessary and substandard" and its fees "exorbitant."

about how or where disputes would be resolved should they arise. Ogg said none of the subsequent letters between POM and Hogan contained dispute-resolution clauses, either.

In March, POM petitioned the Los Angeles County Bar Association's arbitration board to resolve the dispute there, according to court records. The company also filed a motion in Washington to stay Hogan's suit pending the outcome of the California proceeding. POM said in court papers that, because the majority of the actual work on the regulatory matter had taken place in California and because Hogan has three offices in the state, California's mandatory arbitration statute applied. Hogan argued in court papers that the "legal services [were] rendered in the District of Columbia by attorneys licensed in the District of Columbia relating to a federal law mat-

ter pending in the District of Columbia."

Hogan and POM are splitting victories in this early maneuvering. In a July 9 hearing that was closed to the public, Bartnoff considered POM's motion to dismiss and, according to the docket, determined that the suit would proceed in D.C. Superior Court. On July 12, the Los Angeles arbitration board declined to move forward on POM's petition in light of Bartnoff's ruling.

On the other hand, Bartnoff also ruled that any reference to the regulatory investigation would be held under seal, even going so far as to redact references to it in the hearing's transcript and from the docket. POM's answer on the merits to Hogan's complaint is due by Aug. 6. The next hearing in the case is Aug. 20.

'STRONG FEELINGS'

POM is known for its tough litigation stance. In 2009 and 2010, the company filed seven lawsuits against such beverage giants as Welch Foods Inc., Tropicana Products Inc., Ocean Spray Cranberries Inc. and Coca-Cola Co., which distributes Minute Maid juices. In each suit, POM alleges that its competitor is falsely advertising a pomegranate drink as offering the same health benefits as POM's 100% pomegranate beverage, even though the rival products are often blended with other juices. POM's lead outside counsel on most of these suits is Loeb & Loeb.

Rick Shackelford, a Los Angeles partner at Greenberg Traurig who is defending Welch's and Tropicana in the suits, called POM an aggressive adversary. He said, "It's accurate to say POM has strong feelings about its cases and its products."

At the same time, POM has drawn fire from federal regulators over its own health claims. On Feb. 23, the U.S. Food and Drug Administration issued a warning letter, saying the labeling for POM's 100% Pomegranate Juice makes "therapeutic claims" that essentially promote the juice as a drug in violation of the Federal Food, Drug, and Cosmetic Act. POM responded on its website that it is "confident about the depth of our research" and looks forward "to working with the FDA to resolve these issues."

Although POM's effort to switch the battle to California has failed, the company likely still has the option of moving the fee dispute into arbitration in Washington. Arthur Burger, who chairs Washington-based Jackson & Campbell's professional responsibility practice, said that, because POM has not yet answered Hogan's complaint directly, the company may not have waived its right to demand arbitration of a fee dispute under District of Columbia Bar rules. "If I were advising POM as counsel," Burger said, "I'd have them lodge a petition for arbitration and then wait to see how Hogan responded."

Jeff Jeffrey can be contacted at jjjeffrey@alm.com.