SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

ELIZABETH COMBIER, INDEX No: 115354/99

Plaintiff/Appellant

AFFIRMATION IN OPPOSITION TO DEFENDANTS-RESPONDENTS' ORDER TO SHOW CAUSE

-AGAINST-

FRED ANDERSON, CHARLES AMSTEIN, J. RICHARD FREY, THE SESSION, THE TRUSTEES, THE DEACONS OF MADISON AVENUE PRESBYTERIAN CHURCH individually and collectively in office on or about March 31, 1998

Defendants/Respondents

----------X

I, Elizabeth Combier, the Plaintiff--Appellant Pro Se before the Courts of the State of New York, affirm the following under the penalties of perjury:

1. I am presently the Plaintiff-Appellant Pro se ("Appellant") in the above-captioned action, and am fully familiar with all the papers and proceedings had herein, and with all the facts and circumstances hereinafter set forth.

2. Appellant is a journalist and reporter, a member of professional organizations, Editor of the website **parentadvocates.org**, and President of The E-Accountability Foundation, a 501 (c) 3 dedicated to posting news stories on politics, education, and the Law as a public service, as well as stories of those individuals and organizations who are succeeding in making America a safer, more ethical and just society. We do not focus only on corruption, but we look at good works as well, and celebrate those who have

enough courage to whistleblow the political, educational or judicial systems with The "A" For Accountability Award.

PRELIMINARY STATEMENT

3. Appellant respectfully submits this Affirmation in Opposition to the Injunction and Temporary Restraining Order signed in this Court on November 22, 2005 and argues that the Injunction be denied, and the Temporary Restraining Order be vacated: (a) There is no case at bar before Supreme Court Judge Lottie Wilkins at this time and thus Judge Wilkins has no jurisdiction over the parties in the case captioned above and, additionally, and most importantly, has no subject matter jurisdiction so as to vest her or this Court with the power to issue a valid injunction binding those whom it purports to bind; (b) Respondents and petitioners in this matter did not file a new case with a new judge, but used the former case Index number 115354/99 and the former judge to issue an order of prior restraint pursuant to the **wrong statute**, CPLR §6301, where it is the Plaintiff in a captioned case who requests a preliminary restraining order and injunction, not the defendants-respondents; (c) Respondents in the above captioned case have no standing to bring a Temporary Restraining Order and Injunction, did not sign or notarize their affirmation and are moving this Court for an injunction in a new case that never involved an injunction and has no complaint asking for injunctive relief; (d) Appellant's Constitutional rights under the 1st and 14th Amendments protect her freedom of speech, and as a member of the press, her right to publish whatever she wants on her website.

ARGUMENT

4. The case captioned above lists as parties "Plaintiff/Appellant" and "Defendants/Respondents" ("Respondents") because the case has been moved up to the

Appellate Division, First Department, where one appeal, the Appeal (#2631) of Judge Wilkins' denial of the Motion to Set Aside the Verdict as a Matter of Justice was perfected on September 8, 2005, and Appeal (#2044) of the Judgment is pending should Appeal #2631 fail. Guide One Insurance Company and the Law Firm of Michael E. Pressman were not parties to the case Combier v Anderson, yet Respondents placed a new case before the former trial court judge anyway, with "Plaintiff/Appellant" still being Combier, not MAPC. This is, therefore, a new case, but with no complaint asking for injunctive relief, involving entirely different issues from the original case which is no longer before this Court.

5. Respondents and petitioners in this matter did not file a new case and requested that the former judge issue an order of prior restraint pursuant to the **wrong statute**, CPLR §6301, where it is the Plaintiff who requests a preliminary restraining order and injunction, not the defendants-respondents, as in the case at bar:

> **§6301. Grounds for Preliminary Injunction and Temporary Restraining Order.**
> A preliminary injunction may be granted in any action where it appears that the **defendant** *(emphasis added by appellant)* threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendancy of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the **defendant is restrained** before the hearing can be had."

And, **CPLR §6311 Preliminary Injunction**.(*emphasis added*)

1. A preliminary injunction may be granted only upon notice to the **defendant**.

CPLR §6312. Motion Papers; Undertaking; Issues of Fact. *(emphasis added)*

(a) Affidavit; other evidence. On a motion for a preliminary injunction the **plaintiff** shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the **defendant** threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the **plaintiff's** rights respecting the subject of the action and tending to render the judgement ineffectual; or that the **plaintiff** has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the **plaintiff.**

Thus, Respondents and petitioner Guide One Insurance Company have no standing to use CPLR §6301 as they are all defendants, not plaintiffs in the case brought to Judge Lottie Wilkins captioned above, and Judge Wilkins has no jurisdiction to order either a Temporary Restraining Order or an Injunction against Plaintiff/Appellant pursuant to CPLR Section 6301.

6. The Order of Judge Wilkins issuing a Temporary Restraining Order on Appellant has similar flaws and is void for the above reasons:

CPLR §6313. Temporary Restraining Order.

(a) Generally. If, on a motion for preliminary injunction, the **plaintiff** shall show that immediate and irreparable injury, loss or damages will result unless the **defendant** is restrained before a hearing can be had, a temporary restraining order may be granted without notice.

As the plaintiff did not bring this action, the Temporary Restraining Order is null and void.

7. There is no specification of the "irreparable harm" that the respondents in this case would suffer if a report was posted on the website parentadvocates.org. Simply saying "harm will be suffered" without saying what harm, makes the issuance of a Temporary Restraining Order against plaintiff void. Additionally, this Court did not require the defendants to give an undertaking in an amount fixed by the Court, upon which Appellant

could claim an appropriate amount in damages for the issuance of the illegal Temporary Restraining Order and Injunction.

8. The claim of injury for an assumption of malice when there isn't any cannot provide appropriate legal standing to move the Court for an injunction or Temporary Restraining Order. Not only did Defendants/Respondents not demonstrate that any claim or interest was real as opposed to speculative or hypothetical, but there is no showing of personal or proprietary damage to justify the violation of Appellant's Constitutional rights under the 1st and 14th Amendments. Appellant never wrote that Guide One Insurance Company was the subject of a report on "fraud" and "corruption".

9. Most importantly, Supreme Court Judge Lottie Wilkins has no jurisdiction over the parties in the case captioned above and has no subject matter jurisdiction so as to vest her or this Court with the power to issue a valid injunction binding those whom it purports to bind. There is no case at bar before Judge Lottie Wilkins at the present time, and Judge Wilkins has no jurisdiction over Appellant's *possible posting in the future* a report that Guide One Insurance Company in West Des Moines, Iowa, *may* not like. If there is no subject matter on which the judgment of the Court can operate, and hence a ruling would not prove "conclusive" and "final", the issue becomes moot. Additionally, the federal courts are the primary interpreters of federal law. The issue of posting a report on a website describing actions of an insurance company in West Des Moines Iowa, and describing possible corruption, is a matter for federal consideration, and this Court cannot decide a federal case, even if the case at bar had been submitted in a valid form, which it was not.

10. The Court has no evidence of harm to determine the relief necessary for any of the parties in this case, therefore the relative seriousness of the petitioner's alleged "injury" – when or if it occurs – cannot be weighed against the detriment to be suffered by the Appellant if the injunction is issued. In the case at bar, Appellant will suffer extreme harm if the injunction is upheld, as this imposes a prior restraint order on her work that applies to the case at bar, her ability to provide information on her website that refers to her discovery in the writing of her report, and in completing the discovery necessary for her case at the Appellate Division. In the attempt to reach a result that is just to both parties in the case at bar, this Court, if it had jurisdiction, which it does not, must impose a very strict burden of proof on the Respondents in order to enjoin Appellant from some *future* conduct from which the petitioner anticipates harm, as opposed to stopping or changing the Appellant's current activity. This court cannot deprive Appellant of her right to make lawful use of her website on a mere chance, or possibility, that she will misuse the privilege. Unless the harm feared by the petitioner is provably certain, this Court must leave Appellant's rights unrestricted, the burden being on her to take whatever precautions are necessary to prevent her proposed use of her website in such a way as to deliberately and maliciously harm Respondents with false statements. If Appellant should fail in this effort and provable harm to the petitioner results, the petitioner has recourse to injunctive relief then, as well as any money damages for the harm done. But this action cannot be brought to this Court with the same Judge as at trial, and the petitioners being the Respondents to an Appeal currently before a higher court. This Court cannot and must not unduly restrain the freedom of Appellant to speak and write what she believes is in the public interest concerning the above captioned case. In

the area of injunctions against free speech, the element of public interest is of extreme importance. The policy favoring freedom of speech is so strong that practically no demonstration of harm by petitioner should overcome the court's reluctance to restrain that freedom and preserve the public benefit that flows from maintaining a society of free and open communication. The Supreme Court has held that the First Amendment prohibits even the awarding of damages for defamatory falsehoods against public officials in the absence of a showing of willful or reckless disregard for the truth. New York Times v Sullivan, 376 U.S. 254 (1964).

11. If this Court presumes that there are grounds for assuming jurisdiction in the type of case before it, then this Court *should* not issue an injunction, because: no "investigative report" has been published on parentadvocates.org or withoutaprayerofrelief.com by Appellant on the Respondents in this case and/or Guide One Insurance Company. Respondents and petitioner are only fabricating some kind of "irreparable harm" to occur based upon an assumption of what this unwritten "investigative report" will take. Petitioner has an adequate remedy at law, which is to sue The E-Accountability Foundation, a non-commercial not for profit entity, (Appellant has an Indemnification Not To Sue policy) for libel AFTER an "investigative report" describes the parties in the case captioned above in a false and libelous way, although Foundation President Betsy Combier only writes what has been published in major newspapers and is already public information, or writes articles in good faith that she believes should be read by the public as a public service.

12. Respondents in their Affirmation state: *"an injunction would simply preclude plaintiff from publishing false statements, rather than require their removal"* (emphasis added by

Appellant) which, Appellant believes, simply says, "all we want to do is violate Appellant's constitutional right to free speech and freedom of expression" and not sue her after we see the statements on her website that may not be libelous. This Court does not have the subject matter jurisdiction or discretionary power to order prior restraint based upon assumptions of future libel and harm to Defendants-Respondents ("Respondents") because this Court's discretion must be focused primarily on the relative rights and interests of all of the parties involved, including Appellant. If a permanent order is issued, Appellant will be irreparably harmed in her work as a reporter in a nation where trust is placed by its' citizens in a free press, and Appellant will suffer irreparable harm as the litigant in the Appeal of Judge Wilkins' denial of the Motion to Set Aside the Verdict as a Matter of Justice. Relevant to this issue is the chilling fact that Judge Wilkins, as the trial Court judge in the case Combier v Anderson that is now before the Appellate Division First Department, at the first trial of this case in her Court March 31 – April 7, 2004 and the second trial May 10-13, 2004, allowed the jury to hear that the Defendants "believed" that Plaintiff Combier (now Appellant) *would* bury her mother's ashes without her sister, based upon an *"assumption"* by Defendants, now Respondents, and therefore the Defendants' withholding of the ashes from Appellant – also the acting Executrix – was *justified. No evidence to support this false claim was presented, presumably because Judge Wilkins would not allow any evidence that presented the defendants from MAPC in a bad light.*

13. If the proper authorities find criminal conduct involving Guide One Insurance Company, the Law Firm of Michael E. Pressman, and/or MAPC, this court at this time still has no jurisdiction over the information as there is no case presently at bar to hear,

and this court should never interfere with the criminal law process by preventing any member of the press, including Appellant, from posting information on a website that is not defamatory, libelous, written in good faith and without malice. Appellant, as the Editor of parentadvocates.org, has the same rights as any other person to post information on her website, even if she is the former Plaintiff and currently the Appellant in the case with Index #115354.

14. This Court must not prejudice Appellant's discovery under CPLR §31 by enjoining her from obtaining relevant information from visitors to her website who, upon reading a report about MAPC from already published, public documents readily available on the Internet, may email Appellant with additional information for her litigation in the higher Court, the Appellate Division First Department. The "report" once written may be favorable to the Respondents and third party Guide One Insurance Company, but if not, Respondents and any third party non defendants still do not have the opportunity to enjoin Appellant from writing a report that they may not like. The principle of lack of standing has developed that unless petitioner can show that he/she suffered an injury different in kind, rather than merely in decree, from that suffered by the rest of the public affected by the 'public nuisance', he/she has no standing to bring the action. Only the appropriate public official, such as the Attorney General or district attorney has standing to prosecute the action. In this case, the assumed harm suffered by the petitioner is similar to that which might be suffered by the public generally, if and when a libelous statement is posted on a website, and differs only in, perhaps, degree.

15. If the "prior restraint" order is imposed on Appellant to enjoin her from posting information she has gathered from public data, this is discriminatory, prejudicial, and a violation of Appellant's Constitutional rights to freedom of the press, freedom of speech, and protection accorded her for "symbolic speech" and to "speech-plus-conduct":

> As much a part of the "free trade in ideas"…as in verbal expression, more commonly thought of as "speech". It, like speech, appeals to good sense and to "the power of reason as applied through public discussion…just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak, a protected "liberty" under the Fourteenth Amendment…to mere verbal expression. [Garner v. Louisiana, 368 U.S. 157 (1961)]

As a reporter and member of the press, Appellant sees "public information"- that readily available to the average person - and it's "public use" as constituting anything that contributes to the general welfare and prosperity of the whole community. Likewise, "public interest" is that which is best for society as a whole, and Appellant believes that her quest to publish information on her website on the insuring of the entity known as Madison Avenue Presbyterian Church ("MAPC") by Guide One Insurance Company is of great importance to the 900+ members of MAPC because first, members make donations to the church and have a right to know how their money is being used, and second, Appellant is seeking relevant information for her Appeal currently before the Appellate Division to Set Aside the Verdict as a Matter of Justice. Appellant started her website to gather and expose information of corruption and fraud as well as highlight the actions of good people in America struggling to reform the "system". Appellant is preparing for litigation in the way she knows best, as a writer/reporter.

16. As the Supreme Court in Thornhill v. Alabama, 310 U.S. 88 (1940), observed,

> "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern

> without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times…Freedom of discussion, if it would fulfill its historical function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

The order for prior restraint cannot withstand the constitutional principles for freedom of the press based on the recognition that "speech concerning public affairs…is the essence of self-government [Garrison v. Louisiana, 379 U.S. 64 (1964)].

17. Consistent with "the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public", in Associated Press v United States, 326 U.S. 1 (1945), the Court reaffirmed that "Any System of prior restraint of expression…[bears] a heavy presumption against its constitutional validity" in New York Times v. United States, 403 U.S. 713 (1971).

The Doctrine of No Prior Restraint was the touchtone for freedom of the press in English common law and generally assumed to be incorporated into the First Amendment:

> "[T]he main purpose of [the Free Speech and Press] provisions is to 'prevent all such *previous restraints* upon publications as had been practiced by other governments', and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." [Patterson v Colorado, 205 U.S. 454 (1907)].

US Supreme Court Justice O'Connor, in Simon & Shuster, Inc. v Members of the New York State Crime Victims Board, 502 U.S. 105 (1991), wrote:

> "the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively derive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of government."

In New York Times Co. v. United States, 403 U.S. 713 (1971) the U.S. Supreme Court denied as a prior restraint the government's attempt to enjoin the publication of the

315 East 65th Street
New York, NY 10021

Law Firm of Michael E. Pressman
125 Maiden Lane
New York, NY 10038