

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 (303) 606-2300	DATE FILED: December 1, 2023 3:46 PM FILING ID: DFF8460AEA66B CASE NUMBER: 2023CV33477
Plaintiff(s): MICHAEL FARB and ASMF HOLDINGS, LLC v. Defendant(s): SPAY, INC. D/B/A STACK SPORTS	▲ COURT USE ONLY ▲
Attorneys for BusinessDen, LLC and its reporter Justin Wingerter Ashley Kissinger, #37739 Ballard Spahr LLP 1225 17th Street, Suite 2300 Denver, Colorado 80202-5596 Telephone: (303) 292-2400 Facsimile: (303) 296-3956 Email: kissingera@ballardspahr.com	Case No.: 2023CV33477 Courtroom: 275
NOTICE OF REASON FOR NONCOMPLIANCE AND MOTION TO VACATE NOVEMBER 30, 2023 ORDER RE: REQUESTS FOR SUPPRESSED FILINGS	

BusinessDen, LLC and its reporter Justin Wingerter (together, “Movants”), by and through undersigned counsel, for their Notice of Reason for Noncompliance and Motion to Vacate November 30, 2023 Order Re: Requests for Suppressed Filings (“Notice and Motion”), state as follows:

CERTIFICATE OF COMPLIANCE

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Movants conferred with counsel for Plaintiffs, J. Lucas McFarland, regarding the relief sought by this Notice and Motion and the basis therefor, and Plaintiffs are considering their position. Defendant has yet to answer or otherwise appear in this action.

INTRODUCTION

Movants respectfully request that Your Honor reconsider the Order Re: Requests for Suppressed Filings entered on November 30, 2023 (“Order”). The Order requires that “all documents obtained by any media outlet, including but not limited to those obtained by Justin Wingerter of BusinessDen, shall be returned to the Court by hand-delivery, specifically Courtroom 275 (1437 Bannock St., Denver, CO 80202), by 4:00 p.m., on November 30, 2023.” It further states that “[a]ll electronic copies of said documents shall be permanently deleted from servers as well. Failure to do so will be considered contempt of this Court’s order.” And it further states that it is “ordered that any future attempt by any person/entity to obtain copies of filings in this case without the Court’s prior written order so authorizing disclosure will be considered a contempt of court.”

The order does not purport to prohibit publication of the information Mr. Wingerter lawfully obtained from the Court, nor could it do so consistent with the Constitution. Nevertheless, the Order, by requiring imminent return of physical documents and destruction of the information in its electronic form, appears designed to inhibit the media from reporting on that information. It also restricts the media (and everyone else) from engaging in lawful information-gathering activities. It is therefore unconstitutional under both the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution. Accordingly, Movants respectfully decline to comply with the Order and urge the Court to vacate it.

ARGUMENT

A court order that prohibits the media from publishing information in its possession is a classic prior restraint. *See, e.g., People v. Denver Publ’g Co.*, 597 P.2d 1038 (Colo. 1979) (orders requiring the media to seek court approval prior to publication are unconstitutional prior

restraints). As the United States Supreme Court has stated emphatically, prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). For this reason, the Court has held that a prior restraint “bear[s] a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (cited by *Denver Publ’g Co.*, 597 P.2d at 1039); *People ex rel. McKeivitt v. Harvey*, 176 Colo. 447, 491 P.2d 563 (1971); accord *Nebraska Press Ass’n*, 427 U.S. at 561 (“the barriers to prior restraints remain high”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) (“the First Amendment erects a virtually insurmountable barrier” to prior restraints).

The barrier to obtaining a prior restraint barring the publication of information is so high because such restraints are “the very essence of censorship.” *In re Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir.), *modified*, 820 F.2d 1354 (1st Cir. 1986). Indeed, the Supreme Court is even reluctant to approve a prior restraint in the name of national security or to protect a competing constitutional right:

Even where questions of allegedly urgent national security or competing constitutional interests are concerned, we have imposed this “most extraordinary remed[y]” only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

CBS Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citations omitted) (quoting *Nebraska Press Ass’n*, 96 S. Ct. at 2804) (alteration in original); *see also, e.g., Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (prior restraint, “under all but the most exceptional circumstances, violates the Constitution”).

The Order is antithetical to this unbroken line of precedent rejecting prior restraints in all but the most “exceptional cases” – such as the intended publication of military plans during

wartime. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). More than 50 years ago, the Supreme Court held that a newspaper could not be enjoined from publishing the Pentagon Papers, even where the papers had been provided to the newspaper by a third-party who stole them and even where disclosure of the papers could threaten the security of the country. *See generally New York Times Co. v. United States*, 403 U.S. 713 (1971). In light of the extraordinary burden imposed on those seeking to impose a prior restraint, the Supreme Court has never permitted such a restraint to stand. *See Procter & Gamble Co.*, 78 F.3d at 226-27 (stating that, where a party seeks to enjoin protected speech, “the hurdle is substantially higher” than for an ordinary injunction). Indeed, it has even struck down an order seeking to restrict the press from reporting on a criminal case in light of concerns about the impact that publicity might have on a defendant’s right to a fair trial and on the jury. *See Neb. Press Ass’n*, 427 U.S. at 570.¹

The Order entered by this Court does not satisfy the extraordinarily high bar necessary for a prior restraint and cannot withstand constitutional scrutiny. The fact that the Order does not expressly order anyone not to publish the information in the documents the Clerk of Court provided to Mr. Wingerter does not save it from constitutional infirmity. Court orders designed to restrict publication of information lawfully obtained by implicit threat or coercion are unlawful forms of prior restraint. As the Colorado Supreme Court put it, “the basic proposition that statutes or court decisions which *tend to prohibit or suppress* the publication of truthful and

¹ In *Nebraska Press Association*, the Supreme Court struck down a gag order imposed by the trial court, ruling that the trial court’s “conclusion as to the impact of . . . publicity on prospective jurors” was “speculative,” the high barriers to imposing a prior restraint had “not been overcome,” and the order’s restrictions on what the press could report were “clearly invalid.” 427 U.S. at 563, 570. In holding that order to be unconstitutional, the Supreme Court made clear that trial courts must consider “other measures short of prior restraints on publication” before contemplating a gag order – including less-restrictive alternatives such as “searching questioning of prospective jurors” during voir dire and a “change of trial venue.” *Id.* at 563-64.

lawfully obtained information can seldom satisfy constitutional standards.” *Denver Publ’g Co.*, 597 P.2d at 1039-40 (emphasis added). Thus, “in cases involving First Amendment rights [the Court] will closely scrutinize statutes [or court orders] that seek to prohibit or penalize the free exercise of those rights.” *Id.* at 1039.

Here, the apparent purpose of requiring return and destruction of the documents is to prevent the press from disseminating the information contained in them, or at least to convey to the press that it should not do so. This runs counter to the law protecting the press from prior restraints imposed by courts and other government actors.

Moreover, any effort to enforce the Order by issuing a citation for contempt would be unconstitutional. The Supreme Court has “repeatedly held that ‘if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.’” *Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)). This is true even where information is obtained from the government or a court and the information was meant to be confidential. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 535, 541, 546 (1989) (holding that First Amendment barred newspaper from being punished for publishing sexual assault victim’s name even though the reporter understood she was not allowed by court regulations “to take down that information” because “once . . . truthful information [is] ‘publicly revealed’ or ‘in the public domain’ the court could not constitutionally restrain its dissemination”); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. at 103 (juvenile delinquent’s name discovered by monitoring police band radio frequency and interviewing eyewitnesses was lawfully obtained and First Amendment did not permit punishment for publishing it). In short, once information has been placed “in the public domain,” whether

purposefully or accidentally, “reliance must rest upon the judgment of those who decide what to publish or broadcast.” *Florida Star*, 491 U.S. at 538; *see also, e.g., People v. Denver Publ’g Co.*, 597 P.2d at 1038 (striking down as unconstitutional a statute proscribing publication of information about persons appearing as witnesses in juvenile proceedings open to the public).

Finally, subjecting BusinessDen, Mr. Wingerter, and other members of the public to a threat of contempt for any “attempt . . . to obtain copies of filings in this case without the Court’s prior written order so authorizing disclosure”—which is exactly what Mr. Wingerter did here—is similarly unconstitutional. *Cf. id.* (orders requiring the media to seek court approval prior to publication are unconstitutional prior restraints). Mr. Wingerter obtained access to these court records simply by asking the Court for them. He submitted an open records request to the Court through an online form. This is ordinary, lawful, newsgathering activity. The Order purports to elevate such lawful activity, should it occur again by him or anyone else, to an offense punishable by contempt. But when the government makes information publicly available, whether on purpose or by mistake, it gives “implied representations of the lawfulness of dissemination.” *Florida Star*, 491 U.S. at 536; *see id.* (noting that otherwise the media would be burdened with the “onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication”); *see also Ashcraft v. Conoco*, 218 F.3d 288, 297-99 (4th Cir. 2000) (holding that newspaper reporter could not be subject to criminal contempt for having inspected a sealed court record where the legend on the envelope indicating the sealing order were not sufficiently “definite, clear [and] specific” so as to “le[ave] no doubt or uncertainty in the minds of those to who it is addressed.” (quoting *United States v. McMahon*, 104 F.3d 638, 642 (4th Cir. 1997))); *Procter & Gamble Co.*, 78 F.3d at 225 (reversing temporary

restraining order on press obtained by parties in civil litigation when Business Week obtained documents that had been placed under seal by stipulation of the parties).

Thus, even though the Clerk of Court apparently erred in releasing the requested records to Mr. Wingerter, this Court may not, now, take steps designed to prohibit further dissemination of this information. *See, e.g., Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783, 787 (3d Cir. 2005) (affirming dismissal of tort claim against newspaper because newspaper could not be held liable for publishing information about a child's arrest even though the police "violated Pennsylvania law prohibiting the release of juvenile arrest records" by giving the information to the newspaper); *Ostergren v. Cuccinelli*, 615 F.3d 263, 280 (4th Cir. 2010) ("Even where disclosure to the press was accidental, *Florida Star* indicates that the press cannot be prevented from publishing the private information.").

Indeed, this argument was expressly raised and rejected by the Supreme Court in *Florida Star*. In that case, a Florida state statute made it unlawful to publish the name of a victim of sexual assault. A weekly newspaper obtained a sexual assault victim's name from a police report that had been provided to the press. The newspaper published a story on the crime and included the name of the victim. 491 U.S. at 526-27.

The victim sued the newspaper and argued to the Supreme Court that, "under Florida law, police reports which reveal the identity of the victim of a sexual offense are not among the matters of 'public record' which the public, by law, is entitled to expect." *Id.* at 536. The State's own failure to protect this highly sensitive information was not relevant to the Court's determination of whether the newspaper had a constitutional right to publish it; what mattered, in the view of the Court, was whether the newspaper lawfully obtained it from the state: "The fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them

when furnished by the government.” *Id.* (holding that imposition of damages against press, for violating state statute prohibiting publication of sexual offense victim’s name, was unconstitutional).

Similarly, in *Oklahoma Publishing Company*, the Supreme Court struck down as an unconstitutional prior restraint a trial court order enjoining newspapers from publishing the name or picture of a minor child involved in a juvenile proceeding, because the press had obtained this information lawfully. The trial court had permitted the press to attend a hearing in a juvenile’s case, despite the fact that state law required the proceedings to be closed to the public. Subsequently, after the judge attempted to prevent publication by issuing an injunction, the Supreme Court reversed, holding that once such truthful information is “publicly revealed” or otherwise “in the public domain,” its further dissemination could not be constitutionally restrained. *Id.* at 311; *see also, e.g., In re The Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990) (vacating as unconstitutional prior restraint an injunction prohibiting the press from reporting information inadvertently disclosed in the course of an open hearing).²

In short, the Court’s order contravenes long-settled federal constitutional law. It also violates Article II Section 10 of the Colorado Constitution, which provides, without qualification, that “every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty.” The Colorado Supreme Court has repeatedly held that

² *People v. Bryant*, 94 P.3d 624 (Colo. 2004), in which the Colorado Supreme Court affirmed a trial court’s prior restraint on publication of information that was mistakenly distributed by a court clerk, is distinguishable and limited to the unusual facts presented there. The information that was inadvertently disclosed in *Bryant* was a rape test kit concerning the alleged rape victim, which is statutorily declared confidential to prevent discouraging rape victims from coming forward and reporting suspected crimes. The Court held that “[t]he state has an interest of the highest order in this case in providing a confidential evidentiary proceeding under the rape shield statute” *Id.* at 632. This reasoning could not extend to the dispute in this civil action.

this provision affords greater protection for individuals' free speech rights than does the First Amendment to the United States Constitution. *See, e.g., Bock v. Westminster Mall*, 819 P.2d 55, 59-60 (Colo. 1991) (collecting cases). Moreover, the Court has cautioned that this constitutional scheme “expressly prohibits [prior] restraints” and contemplates other less restrictive remedies for the abuse of the freedom of speech. *See In re Hearings Concerning Canon 35*, 132 Colo. 591, 296 P.2d 465, 470 (1956).

CONCLUSION

For all these reasons, BusinessDen, LLC and Justin Wingerter respectfully request that the Court reconsider and vacate its Order to rescind the restrictions imposed. *See, e.g., CBS v. U.S. Dist. Ct.*, 729 F.2d 1174, 1177 (9th Cir. 1984) (damage resulting from “even a prior restraint of the shortest duration . . . is extraordinarily grave”).

DATED: December 1, 2023.

BALLARD SPAHR LLP

By: *s/ Ashley I. Kissinger*
Ashley I. Kissinger, #37739

*Attorney for BusinessDen, LLC and its reporter
Justin Wingerter*

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023, a true and correct copy of the foregoing was filed and/or served via the Colorado Courts E-Filing System, upon all counsel of record.

By: s/ *Brandon Blessing*