To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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P.D. & ASSOCIATES, and P.D.,

Plaintiffs,

DECISION AND ORDER

-against-

Motion Sequence No. 1
Index No. 53694/2019

HALANA RICHARDSON,

Defendant.

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RUDERMAN, J.

The following papers were considered in connection with plaintiffs' motion for a preliminary injunction and other relief:

Papers	Numbered
Order to Show Cause, Affirmation, Exhibits 1 - 2, Affidavit, Memorandum of Law, and Affirmation in Further Support	1

Plaintiffs are an individual attorney and his law firm, who previously represented defendant Halana Richardson in a personal injury action she brought following a rear-end collision that occurred on September 17, 2002 (*see Richardson v Berggruen*, 2007 NY Misc LEXIS 9365 [Sup Ct, NY County 2007] [denying summary judgment]). That trial concluded on January 23, 2008 with a jury verdict against Richardson (*see Richardson v Berggruen*, 2008 NY Misc LEXIS 8276, 2008 NY Slip Op 30567[U] [Sup Ct NY County, 2008] [denying judgment notwithstanding the verdict]). Despite the adverse jury verdict, plaintiffs claim that they obtained a $20,000 settlement for Richardson. After the settlement, the relationship between the parties

ceased until June 14, 2017, when Richardson posted an unfavorable review of plaintiffs on Yelp.com ("Yelp"). Specifically, it is asserted that the review claimed that the attorney had lied about his fee, called an unrelated party to the witness stand in Richardson's action, and that he is a thief and a liar and a scam artist. Further the review criticized the attorney's height, compared him to a rodent, and called for his disbarment. While Yelp representatives removed it from the website, as well as a second review Richardson posted, plaintiffs assert that defendant went on to publish more unfavorable, allegedly defamatory reviews on Yelp, Facebook.com, internetcheaters.com, and pissedoffconsumer.com.

In another review posted on August 1, 2018, Richardson stated that plaintiffs sabotaged her lawsuit and "fixed" the pleadings in her case so as to claim that someone other than the driver of the other vehicle had struck her vehicle, and that plaintiffs were corrupt and were working with the adversary and cannot be trusted. While this review was deleted on Yelp it remains as a post on Richardson's Facebook page. In additional online statements, Richardson accuses plaintiffs of taking bribes from the opposing party in the personal injury case, intentionally losing the trial by putting an unrelated witness on the stand who falsely claimed to have been the driver of the other vehicle, and attempting to sue her for nonpayment, among other things. She goes on to repeatedly attack P.D.'s professional character as an attorney, criticize his height, and compare him to a squirrel.

On January 4, 2019, plaintiffs' attorneys sent defendant a cease and desist letter demanding that she remove all defamatory remarks from the internet. The letter also included details of the personal injury litigation with the hope that defendant would realize the inaccuracy of her statements. Instead, in response, defendant published additional internet posts about

plaintiffs and, on January 13, 2019, sent an email to P.D. stating that she would continue to post statements about plaintiffs to encourage others not to retain his services. Moreover, the email stated that P.D. would have "Yahweh to answer to very soon." That same day, defendant sent a direct message to another former client of P.D., a Yelp user who had posted a positive review of plaintiffs, asking how much P.D. paid him to post the positive review and further accusing plaintiffs of bribery in relation to her own case.

By order to show cause dated March 11, 2019, plaintiffs seek an order (1) restraining defendant from publishing any statements on any website concerning plaintiffs and plaintiffs' employees, (2) directing defendant to remove certain online posts – which plaintiffs refer to as a "takedown order" – and (3) sealing the instant case record. In support of their motion, plaintiffs contend that defendant's statements inflicted irreparable harm to their reputations as attorneys by targeting their internet presence, on which they rely to retain new clients. Plaintiffs deny ever taking bribes from opposing counsel in any case, including defendant's personal injury case, and contend that defendant's online accusations are directly contradicted by the 2008 trial records. Specifically, with respect to the alleged unrelated party that defendant repeatedly refers to by name, plaintiffs explain that there were two named defendants in the personal injury case: the owner of the other vehicle and his employee, who was driving the vehicle at the time of the accident. Plaintiffs also assert that they did not lie about their fee, which is spelled out explicitly in a retainer agreement. Finally, plaintiffs filed an affidavit in further support on March 27, 2019 informing the Court of additional online posts from defendant related to plaintiffs. The motion was returnable on March 27, 2019.

On April 8, 2019, defendant mailed an unsigned document to this Court purportedly in response to plaintiffs' motion, without serving a copy on opposing counsel. That unsigned, unsworn document is inadmissible, and therefore cannot be considered in opposition to the instant motion. The Court notes, however, that while the April 8 document denies service of the order to show cause, it also refers to steps defendant took "after receiving this order to show cause," and the address on plaintiffs' affidavit of service matches the return address on the envelope that defendant used to mail the April 8 document to the court.

Analysis

Use of Pseudonymous Caption

Preliminarily, this Court must address plaintiffs' unilateral adoption of a caption that does not state their names. "In a summons, a complaint or a judgment the title shall include the names of all parties" (CPLR 2101[c]). Although the Second Department does not appear to have addressed the issue, the First Department has reiterated that "the trial court should not pro forma approve an anonymous caption, but should exercise its discretion to limit the public nature of judicial proceedings sparingly and then, only when unusual circumstances necessitate it" (*Applehead Pictures LLC v Perelman*, 80 AD3d 181, 192 [1st Dept 2010], quoting *Anonymous v Anonymous*, 27 AD3d 356, 361 [1st Dept 2006]). If a litigant seeks to employ any means of identification other than his or her name, such relief may be sought by order to show cause when commencing an action (*see Matter of K.R. v Clerk of New York County*, 2017 NY Slip Op 31778[U], 2017 NY Misc LEXIS 3193 [Sup Ct, NY County, 2017] [" by simply denominating himself as 'K.R.' in the caption without court approval, the petitioner did not follow the proper procedure for using an anonymous caption"]).

"The determination of whether to allow a plaintiff to proceed anonymously requires the court to use its discretion in balancing plaintiff's privacy interest against the presumption in favor of open trials and against any potential prejudice to defendant" (*Anonymous v Lerner*, 124 AD3d 487, 487 [1st Dept 2015] [internal quotation marks and citations omitted]). An action may not properly be brought pseudonymously if the plaintiffs have not "alleged a matter implicating a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings" (*"J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 215 [1st Dept 2005]).

Some trial-level courts of this State have considered the showing necessary for a pseudonymous caption. "[C]ourts have discretion in determining the issue and do so by balancing the privacy interests of the party seeking anonymity against the general presumption favoring open trials and the risk of prejudice to the opposing party" (*Doe v Szul Jewelry, Inc.*, 2008 NY Slip Op 31382(U), 2008 NY Misc. LEXIS 8733, *15 [Sup Ct, NY County 2008]). "Embarrassment or economic harm to the plaintiffs is insufficient, but factors to consider as to whether plaintiffs' situation is compelling, involving highly sensitive matters including social stigmatization, or 'where the injury litigated against would occur as a result of the disclosure of the plaintiff's identity" (*Doe v New York Univ.*, 6 Misc 3d 866, 879 [Sup Ct NY County 2004] [citation and internal quotation marks omitted]).

Plaintiffs suggest that the professional embarrassment and injury to their reputation warrants the pseudonymous caption. However, notwithstanding their desire to preserve their privacy, and to prevent further dissemination of defendant's criticisms and claims against them, this matter does not involve the type of truly sensitive and highly personal claims that create

a "privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings" (*"J. Doe No. 1" v CBS Broadcasting*, 24 AD3d at 215).

It has been suggested that "allowing plaintiff to proceed under a pseudonym does not significantly hamper the public's interest in open trials because the public will still have access to the court records for [the] case" (*Stevens v Brown*, 2012 NY Slip Op 31823(U), 2012 NY Misc LEXIS 3340, *13 [Sup Ct NY County 2012], citing *Anonymous v Anonymous*, 191 Misc 2d 707, 708 [Sup Ct NY County 2002]). Nevertheless, the failure to satisfy the controlling rule requiring "a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings" (*"J. Doe No. 1" v CBS Broadcasting*, 24 AD3d at 215) precludes a pseudonymous caption here.

Sealing the Court File

Plaintiffs also seek a sealing order, on the ground that the statements contained in the complaint are devastating to their reputation. A court may only order the sealing of court records upon a finding of good cause. "In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties" (22 NYCRR § 216.1[a]). "The party seeking to seal court records must demonstrate compelling circumstances" (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 502 [2d Dept 2007]), and the court must then balance that compelling interest in preventing public access to the documents at issue against the presumption in favor of open trials (*see id.; Danco Lab., Ltd. v Chemical Works of Gedeon Richter*, 274 AD2d 1 [1st Dept 2000]). The mere potential for embarrassment, damage to

reputation, or the general desire for privacy does not constitute good cause to seal court records (*Mosallem v Berenson*, 76 AD3d 345 [1st Dept 2010]).

Plaintiffs have merely established embarrassment and alleged damage to their reputation, and have therefore failed to demonstrate grounds to seal the court file in this matter.

Preliminary Injunction

The injunctive relief plaintiffs seek on this motion includes an order restraining the defendant from creating, publishing, and/or disseminating any statements concerning plaintiffs on any websites including, but not limited to, Yelp.com, Facebook.com, Internetcheaters.com, and pissedconsumer.com, for the purpose of defaming, denigrating, threatening, harassing, or attempting to injure plaintiffs in any way, including by attempting to cause plaintiffs emotional distress; they further seek a direction that defendant remove specifically named posts on Facebook, Yelp, pissedconsumer.com and internetcheaters.com.

"To prevail on a motion for a preliminary injunction, the movant must demonstrate by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position" (*Amana Express Int'l v Pier-Air Int'l*, 211 AD2d 606, 606 [2d Dept 1995]). However, "[a] preliminary injunction should not be granted, absent extraordinary circumstances, if . . . the plaintiff would thereby receive the ultimate relief requested" (*MacIntyre v Metropolitan Life Ins. Co.*, 221 AD2d 602, 602 [2d Dept 1995] citing *Bachman v Harrington*, 184 NY 458, 464 [1906]). "In addition, mandatory preliminary injunctions are not favored and should not be granted absent extraordinary or unique circumstances, or where the final judgment may otherwise fail to afford complete relief, especially if the status quo would be disturbed (SHS

Baisley, LLC v Res Land, Inc., 18 AD3d 727, 728 [2d Dept 2005]). Even an unopposed motion for preliminary injunctive relief must be supported by the necessary showing.

The heightened standard for mandatory preliminary injunctions requiring the removal of posted materials from on-line platforms is discussed in *Garcia v Google, Inc.* (786 F3d 733, 740 [9th Cir 2015]). There, the plaintiff sought an order requiring Google to remove from all its platforms, including YouTube, a film called *Innocence of Muslims*, which included a five-second clip of a performance by the plaintiff for which the plaintiff claimed copyright protection. The Court explained that "this relief is treated as a mandatory injunction, because it orders a responsible party to take action, [and] as we have cautioned, a mandatory injunction goes well beyond simply maintaining the status quo pendente lite [and] is particularly disfavored" (*Garcia v Google*, 786 F3d at 740 [internal citations and quotation marks omitted]). It elaborated that "[t]emporary restraining orders and permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints" and that "[p]rior restraints pose the most serious and the least tolerable infringement on First Amendment rights" (*id.* at 747, quoting *Alexander v United States*, 509 US 544, 550 [1993] and *Hunt v NBC*, 872 F2d 289, 293 [9th Cir 1989]).

The particular concerns that arise with requests to enjoin a party from the on-line posting of highly critical statements about another party were recently addressed by the First Department in *Brummer v Wey* (166 AD3d 475, 475 [1st Dept 2018]). There, the Court reversed a motion court's grant of the plaintiff's motion for a preliminary injunction order both enjoining the defendants from posting articles about him on line, and requiring the defendants to remove all articles they had posted about him. The Court initially observed that "[p]rior restraints on speech

are the most serious and the least tolerable infringement on First Amendment rights, and any imposition of prior restraint, whatever the form, bears a heavy presumption against its constitutional validity" (*id.* at 476). Because "to obtain such a restraint . . . [the applicant] must show that the speech sought to be restrained is 'likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest' [such as] an intent to commit an act of unlawful violence to a particular individual or group of individuals," even highly offensive, repulsive and inflammatory speech does not meet this exacting constitutional standard (*id.*)

Importantly, the Court in *Brummer v Wey* emphasized that "although it may ultimately be determined that defendants have libeled plaintiff, "[p]rior restraints are not permissible . . . merely to enjoin the publication of libel" (166 AD3d at 477, quoting *Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239, 239 [1st Dept 2002]).

In addition, while published statements that "charg[e] plaintiffs with a serious crime" or "tend to injure another in his or her trade, business or profession" constitute libel per se (*see Liberman v Gelstein*, 80 NY2d 429, 435 [1992]), the circumstances and context of the publication is important in determining whether a statement is actionable (*see Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). In *Frechtman v Gutterman*, the defendant, who had been a client of the plaintiff attorney, sent letters, allegedly read by third parties, stating: "We do not believe you adequately represented our interest," "We believe your failure to act in our best interest in reference to certain matters upon first engaging in the matter may equate to misconduct, malpractice, and negligence," and "We believe that your future representation on this matter only became necessary, as a result of mistakes and oversights made by you acting as

counsel" (*Frechtman v Gutterman*, 115 AD3d at 104). While the Court acknowledged that the use of "we believe" would contribute to the impression that these statements were opinion, it emphasized that it is "the context of the communication" that is most important in deciding what is actionable (*id.* at 106; *see also Stolatis v Hernandez*, 161 AD3d 1207 [2d Dept 2018]).

It has been observed that "[t]he culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a 'freewheeling, anything goes writing style'" (*Sandals Resorts Intl. Ltd., v Google, Inc.*, 86 AD3d 32, 43 [1st Dept 2011] [citations omitted]). In the context of on-line sites such as Yelp, Facebook, and pissedconsumer.com, where users post criticisms of professional services, even such assertions as calling a person a thief, a liar, dishonest, corrupt and a scam artist may be found to "amount to the opinions and beliefs of dissatisfied clients about their attorney's work" (*see Frechtman v Gutterman*, 115 AD3d at 106). While the portions of defendant's posted statements that use the words "law firm takes bribes" read as defamation per se, and while this Court does not question plaintiffs' professionalism, the falsity of the statement may not be assumed, but rather, must still be proved for it to constitute defamation. The same holds true for defendant's assertion that "the lawyer knew the individual rear ended me and did put someone else on the stand instead of the individual that rear ended me," which has the indicia of actionable mixed opinion that "implies that it is based upon facts which justify the opinion" (*Steinhilber v Alphonse*, 68 NY2d 283, 289, 290 [1986]). Without a hearing, plaintiffs' denials of the asserted misconduct, in papers submitted at the commencement of the action on a motion

for a preliminary injunction, even though unopposed, do not establish the truth of their assertions so as to justify a "takedown" order at this time.[1]

None of the foregoing precludes a determination that defendant's statements are defamatory. It merely precludes a grant of the preliminary injunction "takedown order" plaintiffs seek.

Based upon the foregoing, it is hereby,

ORDERED that, upon the court's own motion, the caption is hereby amended to reflect the names of the plaintiffs as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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PETER DeFILIPPIS & ASSOCIATES and
PETER DeFILIPPIS,

Plaintiffs, Index No. 53694/2019

-against-

HALANA RICHARDSON,

Defendant.
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and it is further,

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[1] As plaintiff observes, New York courts have granted preliminary injunctions removing and precluding allegedly libelous internet postings (*see Dae Hyun Chung v Google, Inc.*, 153 AD3d 494, 495 [2d Dept 2017]; *Dennis v Napoli*, 148 AD3d 446, 447 [1st Dept 2017]). However, the *Dae Hyun Chung* case was decided solely on procedural grounds, and contains no discussion of constitutional concerns. The ruling in *Dennis v Napoli* is distinguishable from the instant matter, in that the information used by the defendant there to harass and defame the plaintiff had been improperly obtained through an intrusion into the plaintiff's own work email account and personnel file; moreover, there was no merit to the defendant's constitutional argument that "her unsolicited communications to plaintiff's professional colleagues, friends, and family about plaintiff's alleged sexual proclivities are constitutionally protected speech" (148 AD3d at 447).

ORDERED that the Clerk's Office is directed to amend its files accordingly, and it is further,

ORDERED that plaintiffs' motion for a preliminary injunction and an order sealing the court records is denied; and it is further

ORDERED that the parties are directed to appear on Monday, August 12, 2019 at 9:30 a.m., in the Preliminary Conference Part of the Westchester County Supreme Court, room 811, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
June 25, 2019

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN, J.S.C.