

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:19-cv-00313-KMT

JULIE SLIVKA,

Plaintiff,

v.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION  
OF THE PIKES PEAK REGION, and CARLOS LOZANO,

Defendants.

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**DEFENDANT THE YOUNG MEN'S CHRISTIAN ASSOCIATION  
OF THE PIKES PEAK REGION'S MOTION FOR GAG ORDER**

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Defendant, The Young Men's Christian Association of the Pikes Peak Region ("Defendant YMCA"), by and through their undersigned counsel, Tyson & Mendes LLP, hereby moves for a Gage Order. In support of this Motion, Defendant YMCA states as follows:

**I. CERTIFICATION PURSUANT TO D.C.COLO.LCivR 7.1(a)**

Counsel for Defendant YMCA certifies, pursuant to D.C.COLO.L.CivR 7.1(a), he conferred in good faith with counsel for Plaintiff, Julie Slivka ("Plaintiff"), on April 29, 2019 concerning this matter and counsel for Plaintiff has advised he opposes the relief sought herein.

**II. RELEVANT PROCEDURAL BACKGROUND**

On February 4, 2019, Plaintiff filed her Complaint (Docket No. 1). Undersigned counsel for Defendant YMCA, on April 29, 2019, spoke with counsel for Plaintiff and agreed to waive and accept service on behalf of Defendant YMCA only. On the same date, undersigned counsel for Defendant YMCA also conferred with counsel for Plaintiff regarding this Motion, as well as two additional motions Defendant YMCA intended to file upon receipt of a Waiver and Acceptance of

Service; namely, a Motion to Restrict Access, pursuant to D.C.COLO.LCivR 7.2(c), and a Motion to Strike Portions of Plaintiff's Complaint, pursuant to Fed. R. Civ. P. 12(f). Despite the offer to waive and accept service, Plaintiff's counsel elected to personally serve Defendant YMCA on June 3, 2019. On the date of filing of the instant Motion, Defendant YMCA simultaneously filed the other aforementioned pre-Answer Motions it had contemplated.

### **III. INTRODUCTION**

Defendant YMCA seeks the imposition of a Gag Order, in conjunction with its separately filed Motion to Strike immaterial and scandalous allegations in Plaintiff's Complaint, on the ground Plaintiff and her counsel have publically disclosed false and baseless allegations, which Defendant YMCA asserts were brought in bad-faith, to gain an advantage in this litigation, provide fodder to the media, and taint the prospective jury pool. Should Plaintiff and her counsel be allowed to continue to provide such information to the press and public at large, including potential jurors, it would negatively affect Defendant YMCA's overall credibility and continue to place Defendant YMCA in a position where it must dispel the false allegations and erroneous comments on the evidence which have been and will continue to be placed before the public at large, thus prejudicing the defense of this case.

### **IV. ARGUMENT**

#### **A. Law Applicable to Motion for Gag Order.**

It was long ago stated, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. State of Colorado ex rel. Attorney General*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907).

Just as in criminal cases, "[t]here is a constitutional right to a fair trial in a civil case."

*See Latiolais v. Whitley*, 93 F.3d 205, 207 (5th Cir.1996) (quoting *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir.1993)).

To protect a defendant's right to a fair trial, a trial court may impose reasonable restrictions on the release of information to the media by any lawyer, party, witness, court officials, or governmental employees within its jurisdiction. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Indeed, "[t]he courts may take such steps by rule and regulation that will protect their processes from prejudicial outside influence. Neither prosecution, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be free to frustrate its function." *Sheppard*, 384 U.S. at 363. A motion for a gag order on trial participants does not raise free speech issues because they limit what trial participants may say to media, but do not infringe on media's speech. *See United States v. McVeigh*, 964 F. Supp. 313 (D. Colo. 1997).

"[T]rial courts have a wide discretion in being able to protect the judicial process from influences that pose a danger to effective justice." *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir.1986). This would include the authority to issue a civil gag order. A party seeking to impose a gag order on any trial participant must show that there is a "reasonable likelihood" that media attention or extrajudicial commentary will prejudice a fair trial. *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.1969); *see also Pfahler v. Swimm*, No. CIV.A. 07-CV-01885-M, 2008 WL 323244, at \*1 (D. Colo. Feb. 4, 2008).

Before issuing the gag order, a trial judge must make specific findings, based on record evidence, justifying the restraint including, "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.... [The

court] must then consider whether the record supports the entry of a prior restraint on publication [or speech], one of the most extraordinary remedies known to our jurisprudence.” *Pfahler*, 2008 WL 323244, at \*2 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562, 96 S. Ct. 2791, 2804, 49 L. Ed. 2d 683 (1976))

It was sufficient that an order prohibiting extrajudicial discussion of merits of pending criminal case was based on reasonable likelihood of prejudicial news, which would make difficult the impaneling of impartial jury and tend to prevent fair trial, and it was not necessary the order be based on clear and present danger. *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969).

### **B. The Nature and Extent of Pretrial News Coverage.**

Defendant YMCA has separately identified in its Motion to Strike Portions of Plaintiff’s Complaint specific paragraphs as containing baseless, immaterial, and scandalous allegations, some of which rising to the level of *per se* defamation and *ad hominem* attacks on Defendant YMCA and its Chief Executive Officer, Boyd Williams (“Mr. Williams”), all well beyond the scope of the operative Complaint and having no place in publically accessible pleadings (Docket No. 1, ¶¶ 18, 19, 63, 64, 65, 66, 67, and 69).

Shortly after the filing of Plaintiff’s Complaint in February of 2019, Colorado Public Radio, Legal Reader, KKTV, and Google Alerts<sup>1</sup> all reported on portions of the Complaint, which was no doubt the intention of Plaintiff’s counsel as he granted interviews during the month of February commenting on the evidence. Copies of the Colorado Public Radio and Legal Reader articles are annexed hereto as Exhibits A and B, respectively. What’s more, social media also picked up the story. Colorado Public Radio posted its article on its Facebook page and “Colorado

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<sup>1</sup> Google Alerts is a content change detection and notification service, offered by the search engine company Google. The service sends emails to the user when it finds new results, such as web pages, newspaper articles, blogs, or scientific research, that match the user's search term.

Springs Hub” tweeted the Colorado Public Radio story. “Fight Sex Crimes” retweeted the Colorado Springs Hub tweet, adding the hashtags “#MeToo” and “#TimesUp,” propelling the story to literally any individual using twitter, both in the United States and internationally. To be clear, on most social media networks, like Twitter, the use of a hashtag allows anyone who does a search for that hashtag to find the tweet or post. A copy of the social media report showing the Twitter tweets and Facebook posting is annexed hereto as Exhibit C.

Within the Colorado Public Radio article, Plaintiff’s counsel is quoted as follows:

Slivka’s lawyer, Ryan Gilman, said that after Slivka reported the assault to the organization and asked to be kept from working with Lozano, the YMCA did not take the account seriously, and rather told her to ‘pray on it.’

‘They did a slipshod investigation and did nothing to protect her, or her wellbeing, from this abuser,’ Gilman said.

*See Exhibit A.* The article goes on to incorrectly state:

The lawsuit also alleges that the workplace culture at the YMCA created an environment where male supervisors felt safe behaving inappropriately to female colleagues.

*See Exhibit A.*

Within the Legal Reader article, Plaintiff’s counsel is similarly quoted as follows:

Soon after the alleged incident, Slivka reported the assault to the ‘organization and asked to be kept from working with Lozano.’ However, according to Slivka’s lawyer, Ryan Gilman, ‘the YMCA did not take the account seriously, and rather told her to ‘pray on it.’ When commenting on how the organization handled Slivka’s complaint, Gilman said, ‘They did a slipshod investigation and did nothing to protect her, or her wellbeing, from this abuser.’

*See Exhibit B.* The article goes on to also incorrectly state:

Additionally, the suit argues that the “workplace culture at the Colorado Springs-based YMCA created an environment where male supervisors felt safe behaving inappropriately to female colleagues.”

*See* Exhibit B.

As stated in Mr. Williams' Affidavit in Support of Defendant YMCA's Motion to Strike Portions of Plaintiff's Complaint, but germane to this Motion, attached hereto as Exhibit D, Defendant YMCA's internal documents will demonstrate a thorough and independent investigation -- contrary to Plaintiff's assertions -- into Plaintiff's allegations of misconduct by Defendant Carlos Lozano ("Defendant Lozano"), which occurred afterhours. *See* Exhibit D, p. 3, ¶ 9. Defendant YMCA's internal documents also detail the actions taken by Defendant YMCA against Defendant Lozano, at the request of Plaintiff and her counsel, despite an independent investigator determining Defendant Lozano's version of events was more credible than Plaintiff's version of events. *See* Exhibit D, p. 3, ¶ 11. Lastly, Defendant YMCA's internal documents also demonstrate implementation of accommodations, including those requested by Plaintiff. *See* Exhibit D, p. 3, ¶ 12.

Furthermore, the YMCA of the Pikes Peak Region's Leadership team consists of a male President and CEO, a male Executive VP and COO, a female Senior VP and Chief Human Resources Officer, a female Senior VP/Chief Development and Marketing Officer, a male Senior Vice President/CFO, a female VP of Program Development, and a female Executive Offices Director. *See* Exhibit D, p. 3, ¶ 8. Plaintiff was not a subordinate to Defendant Lozano and they did not report through the same channels. *See* Exhibit D, p. 3, ¶ 10. This roster of executives contradicts Plaintiff's claim of older males in positions of power preying on younger female subordinates.

While the number of pretrial news articles is presently at two, the sheer reach of the articles is undoubtedly profound. Both articles remain readily and easily accessible through the Colorado Public Radio and Legal Reader websites to anyone who has access to the internet. *See* Exhibits A

and B. Moreover, the Colorado Pubic Radio article was made and still is available to any of the hundreds of millions of Twitter users<sup>2</sup> who search the “#MeToo” hashtag or is an individual follower of “Colorado Springs Hub” and/or “Fight Sex Crimes,” and can still be accessed by all of Colorado Public Radio’s Facebook followers. *See* Exhibit C. Lastly, any Google user<sup>3</sup> who set a search term in Google Alerts matching one in the article would have received an email about it.

**C. Other Measures would Not Likely Mitigate the Effects of Unrestrained Pretrial Publicity.**

Defendant YMCA is hard-pressed to identify any other measures, besides a Gag Order, which could alleviate its concerns about an unfair trial advantage and tainting of the jury pool. Since Plaintiff and her counsel are the ones that have caused the allegations in her Complaint to gain traction, with Plaintiff’s counsel falsely commenting on the evidence in articles which are accessible to literally hundreds of millions of people on social media platforms, the only measure to mitigate the prejudicial unrestrained pretrial publicity is to enter a Gag Order restricting Plaintiff and her counsel’s ability to continue to influence the outcome of this litigation.

It is important to note Plaintiff filed her Complaint on February 4, 2019 (Docket No. 1), yet failed to initiate service of process until June 3, 2019. In the interim, on April 29, 2019, undersigned counsel for Defendant YMCA contacted Plaintiff’s counsel and offered to waive and accept service. Despite the offer, Plaintiff’s counsel never provided a Waiver and Acceptance of Service to be signed and continued to sit on the Complaint until June 3, 2019. The only plausible explanation for the delay, as Defendant YMCA is an entity easily susceptible to service of process, was an expectation or hope the filed Complaint lingering the Court’s public files would be picked

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<sup>2</sup> In February 2019, Twitter claimed to have 321 million monthly active users and 126 million daily active users. [https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/?noredirect=on&utm\\_term=.c9a3db1a3ce8](https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/?noredirect=on&utm_term=.c9a3db1a3ce8).

<sup>3</sup> As of 2019, Google has 90.46% of the search engine market share worldwide (Source: Stat Counter).

up by additional news outlets or be recycled by the media during their news cycles. This demonstrates the further gamesmanship being perpetrated by Plaintiff's counsel in the hopes of gaining an unfair advantage at the time of trial.

**D. How Effectively a Restraining Order would Operate to Prevent the Threatened Danger.**

In order to prevent the continuing public disclosure of the false and baseless allegations in the Complaint, as well as the erroneous comments being made on the evidence, Defendant YMCA asserts a Gag Order is the only effective method to cease Plaintiff's efforts to gain an advantage in this litigation, provide fodder to the media, and taint the prospective jury pool. Should a Gag Order not be entered, Plaintiff and her counsel will be permitted to continue to provide such information to the press and public at large, including potential jurors. Defendant YMCA's credibility will continue to be eroded placing Defendant YMCA at a disadvantage walking into the courtroom on the first day of trial, as it would be in a position where it must defeat falsely created public perception of the evidence, prejudicing Defendant YMCA's ability to adequately defend itself at trial.

The entry of a Gag Order on the parties and counsel in the instant matter would not raise free speech issues, because this Court would simply be limiting what the trial participants may say or leak to the public and media. It would not infringe on the media's ability to report on the daily trial proceedings, should the media even care to do so. *See United States v. McVeigh*, 964 F. Supp. 313 (D. Colo. 1997).

**E. The Record Supports the Entry of a Prior Restraint on the Parties' and Counsels' Speech.**

In addition to the instant Motion, Defendant YMCA has also filed a Motion to Strike Portions of the Plaintiff's Complaint seeking the striking of immaterial and scandalous allegations



from Plaintiff's Complaint, as well as a Motion for Restricted Access, redacting the offensive allegations from Plaintiff's Complaint already filed pleading and shielding the discussion of those offensive allegations from public view. Beyond Defendant YMCA's efforts to limit the prejudicial effect of Plaintiff's Complaint, it also seeks the entry of a Gag Order in order to remove the threat of further prejudice from this litigation and eliminate the potential for Plaintiff and her counsel to influence public opinion based upon immaterial and scandalous allegations and what has been shown in these pre-Answer Motions to be false comments on the evidence. Based upon the record created thus far, the Court has ample support for the entry of a Gag Order on the parties and counsel to the above-captioned matter.

## **VII. CONCLUSION**

Plaintiff should not be permitted to further taint the jury pool or conduct trial by public opinion. Defendant YMCA asks this Court to enter a Gag Order so that this case may be decided on its merits in the courtroom, rather than in months before trial before the public at large.

WHEREFORE, Defendant YMCA seeks entry of a Gag Order imposing reasonable restrictions on the release of information to the media and members of the public by any parties or counsel in this litigation and for such other and further relief as this Court deems just and proper. Respectfully submitted the 19<sup>th</sup> day of June, 2019.

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