EXETER TOWNSHIP, Plaintiff, v. JERRY GELEFF, an adult individual; THE EXETER EXAMINER, an unincorporated business; THE EXETER UNDERGROUND, an unincorporated business; and JERRY GELEFF MEDIA, Defendants.	:	**IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA** CIVIL ACTION—LAW NO. 22-16476

DEFENDANTS' ANSWER TO PLAINTIFF'S MOTION FOR CONTEMPT

BACKGROUND

On December 14, 2022, Defendant Jerry Geleff, a local journalist, obtained from a confidential source, in the course of his newsgathering, portions of a 43-page report (the "Report") prepared for Exeter Township by the law firm MacMain, Connell and Leinhauser. The Report describes the law firm's investigation into allegations of sexual harassment made against a Township Supervisor—newsworthy information of obvious public interest. That same day, Mr. Geleff read aloud excerpts from the Report on his podcast, The Exeter Underground, and posted images of portions of the Report on the website of The Exeter Examiner.

On December 15, the Township filed a complaint sounding in replevin and equitable relief in the Court of Common Pleas of Berks County, Pennsylvania. Concurrent with said complaint, the Township filed an Emergency Motion for Preliminary Injunction (the "Emergency Motion"). The Motion sought an injunction requiring Defendants to (1) return all physical or electronic copies of the Report in their possession; (2) destroy all physical or electronic copies of the Report, "and descriptions thereof," in their possession; and (3) refrain from "publishing or otherwise publicly disseminating the Report or the contents thereof."

That same day, the Court (Hon. M. Theresa Johnson) held an emergency hearing on the Emergency Motion at which Defendants, by necessity, appeared *pro se* (through the appearance of Mr. Geleff). Following the hearing, the Court granted the Township's motion and entered an open-ended preliminary injunction (the "Order") reading as follows:

> Defendants are hereby enjoined from publishing or otherwise disseminating any information in the investigative report commissioned by the Township of Exeter (the "Report"), which Defendants have improperly obtained.
>
> Defendants are further ORDERED to return any and all physical or electronic copies of the Report in Defendants' possession and destroy all physical and electronic copies of the Report (or descriptions thereof) in their possession, including but not limited to those on The Exeter Examiner Facebook page, The Exeter Examiner website, and The Exeter Underground podcast.

That afternoon, around 4 p.m., Mr. Geleff removed all existing images of and references to the Report from the Exeter Examiner Facebook page and the Exeter Examiner website. Affidavit of Jerry Geleff ("Geleff Aff.") ¶ 1. Mr. Geleff also removed episode 35 of the Exeter Underground podcast—the episode that discusses the Report—from the site that hosts the podcast's recorded episodes (captivate.fm). Geleff Aff. ¶ 2.

Also on the afternoon of December 15, Mr. Geleff posted a URL, "gardellagate.com," to the Facebook page of the Exeter Examiner. Geleff Aff. ¶ 3. That URL leads to a website containing images of certain pages of the Report. Mr. Geleff does not own or control the content posted on gardellagate.com, and the Facebook post containing the URL "gardellagate.com" neither referred to the Report nor discussed the Report's contents. Geleff Aff. ¶ 4–6. Mr. Geleff did not believe that the Facebook post containing the URL "gardellagate.com" violated the Order. Geleff Aff. ¶ 7. The same evening, at approximately 8 p.m., Mr. Geleff began recording an episode of his podcast, the Exeter Underground. Geleff Aff. ¶ 8. During that episode—Episode 35.1—Mr. Geleff referred to "gardellagate.com." *Id*. Just as with the post on the

Facebook page of the Exeter Examiner, Mr. Geleff did not believe that mentioning "gardellagate.com" on his podcast violated the Order. Geleff Aff. ¶ 9.

While recording episode 35.1 of the Exeter Underground, Mr. Geleff saw an email from the Township Solicitor demanding that he remove the post containing "gardellagate.com" from the Facebook page of the Exeter Examiner. Geleff Aff. ¶ 10. Mr. Geleff complied with that demand sometime between 8 p.m. and 9 p.m. Geleff Aff. ¶ 11. The same evening, around 11 p.m., Mr. Geleff redacted references to "gardellagate.com" from the recorded version of episode 35.1 of his podcast. Geleff Aff. ¶ 12.

On December 23, Defendants filed a motion to dissolve the Order, arguing that it is both an unconstitutional prior restraint on speech and impermissibly vague. That afternoon, the Township filed a motion (the "Contempt Motion") seeking to hold Defendants in contempt for allegedly violating the Order. The alleged violations asserted in the Contempt Motion include: (1) Mr. Geleff posting the URL "gardellagate.com" to the Facebook page of the Exeter Examiner; and (2) Mr. Geleff mentioning "gardellagate.com" in his podcast recording. The URL "gardellagate.com" appears at least six times in the Township's Contempt Motion (see pages 4 and 5); supporting brief (see page 5); and exhibits (see Exhibits H and I)—all of which are public records.

ARGUMENT

The Township's utterly meritless Contempt Motion attempts to punish Mr. Geleff for constitutionally protected speech. In the process, it only underscores the vagueness, overbreadth, and patent unconstitutionality of the Order. In addition to dissolving the preliminary injunction, this Court should deny the Township's motion.

I. Even if the Township's allegations amounted to a violation of the Order—and they do not—holding Defendants in contempt would be unconstitutional.

The First Amendment prohibits the relief sought by the Contempt Motion as matter of law. The Order underlying the Contempt Motion imposes a transparently unconstitutional prior restraint on Defendants' speech. *See* Mem. of L. in Supp. of Defs.' Mot. to Dissolve Inj. at 3–7. When a court order imposes a "transparently invalid prior restraint on pure speech," a party cannot be held in contempt for violating it. *Matter of Providence J. Co.*, 820 F.2d 1342, 1344 (1st Cir. 1986), *opinion modified on reh'g*, 820 F.2d 1354 (1st Cir. 1987). Indeed, "[r]equiring a party subject to such an order to obey or face contempt would give the courts powers far in excess of any authorized by the Constitution or Congress." *Id.* at 1347. This principle, which controls here, is founded in longstanding First Amendment jurisprudence: when a journalist "lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979) ("*Daily Mail*").

Because the Order is transparently unconstitutional under even the narrowest plausible interpretation, contempt sanctions would be precluded as a matter of law even if the Township's Contempt Motion were based on a modest reading of the Order. Significantly, however, the Township's contention that Mr. Geleff violated the Order is based on an extraordinarily broad interpretation of the Order's terms—an interpretation that cannot withstand even passing constitutional scrutiny and only underscores the legal infirmity of both the Order itself and the Contempt Motion.

According to the Township, Mr. Geleff violated the Order by sharing a link to a third-party website. The logical ramifications of this position are untenable. Under the Township's

theory, if the Philadelphia Inquirer were to independently obtain a copy of the Report and run a front-page article on its contents, the Order would prohibit Mr. Geleff from sharing such an article via social media, email, or other means—even if the article had already been viewed by millions of people throughout Pennsylvania and the United States, and had sparked a heated public debate on local governments' respect for freedom of speech. In this manner, the theory underlying the Township's Contempt Motion contravenes the Supreme Court's instruction that when "truthful information [i]s publicly revealed or in the public domain[,] the court [may] not constitutionally restrain its dissemination." *Daily Mail*, 443 U.S. at 103 (internal quotation marks omitted). Moreover, the Township's theory is fundamentally at odds with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That the Order is even susceptible to the Township's broad interpretation highlights its failure to satisfy the basic requirements of an injunction: it is neither "narrowly tailor[ed]" to the Township's asserted injury nor "as definite, clear, and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it." *Matenkoski v. Greer*, 213 A.3d 1018, 1027 (Pa. Super. 2019) (quotation marks omitted).

In sum: because the Order is transparently unconstitutional, contempt sanctions for ***any*** alleged violation of the Order are prohibited as a matter of law. This is especially true of the conduct alleged in the Contempt Motion, which relies on the Township's exceptionally broad construction of the Order's terms—one that ignores decades of black-letter First Amendment law, which Mr. Geleff could not reasonably have anticipated.

II. Defendants have already complied with the Township's demands, and the Contempt Motion is nothing more than a thinly veiled attempt to punish Defendants for their speech on a matter of public concern.

A. There is no basis upon which to hold Defendants in civil contempt.

Even if contempt sanctions were not prohibited here as a matter of constitutional law (they are), there would be no basis upon which to grant the relief sought by the Township's Contempt Motion. Civil contempt sanctions—which the Township purportedly seeks—are intended to "coerce" compliance with a court order; to that end, they generally require the contemnor to perform (or abstain from) certain acts to either ***avoid*** a penalty or obtain ***relief*** from a penalty. *Kramer v. Kelly*, 401 A.2d 799, 801 (Pa. Super. 1979); *see also Schnabel Assocs., Inc. v. Bldg. & Const. Trades Council of Philadelphia & Vicinity, AFL-CIO*, 487 A.2d 1327, 1338 (Pa. Super. 1985) ("A civil contempt penalty must state the condition which upon fulfillment will result in the release of the defendant or the remission of the fine.").[1] "Stated simply, in a civil contempt order the contemnor is able to purge himself of the contempt and thus holds the keys to the jailhouse door." *Diamond v. Diamond*, 715 A.2d 1190, 1194 (Pa. Super. Ct. 1998).

Here, conditional sanctions meant to coerce compliance with the Order would serve no purpose, because Defendants have ***already complied*** with the Order—even the broad interpretation of the Order advanced by the Township. Once the Order issued, Defendants made every effort to follow its instructions and to meet the Township's demands, including by removing references to "gardellagate.com" from the Facebook page of the Exeter Examiner and the Exeter Underground podcast less than twelve hours from the Order's issuance. Geleff Aff. ¶

[1] The Township states that "[t]he court may impose an unconditional fine upon a contemnor in order to encourage future compliance for the benefit of the injured private party." *Schnabel Assocs., Inc. v. Bldg. & Const. Trades Council of Philadelphia & Vicinity, AFL-CIO*, 487 A.2d 1327, 1338 (Pa. Super. 1985) (internal citation omitted) (emphasis added). But the Township's reliance on that isolated quotation is misplaced: the Township is not a private party.

11–12. The Township's Contempt Motion and brief in support omit that Defendants complied with the Township's demands almost immediately—over a week before the Township filed its Contempt Motion. There is nothing to remediate. *See Com. v. Ashton*, 824 A.2d 1198, 1202 (Pa. Super. 2003) ("The purpose of a civil contempt proceeding is remedial."). For this additional reason, the Contempt Motion must be denied.

B. There is no basis on which to hold Defendants in criminal contempt.

Because Defendants have already complied with the Order (and the Township's demands pursuant thereto), any sanctions imposed on Defendants as a result of the conduct alleged in the Contempt Motion would be essentially punitive and criminal. The Pennsylvania Supreme Court has described the difference between civil and criminal sanctions as follows: "A civil adjudication of contempt coerces with a conditional or indeterminate sentence of which the contemnor may relieve himself by obeying the court's order, while a criminal adjudication of contempt punishes with a certain term of imprisonment or *a fine which the contemnor is powerless to escape by compliance*." *In re Martorano*, 346 A.2d 22, 28 (Pa. 1975) (emphasis added); *see also Diamond*, 715 A.2d at 1194 ("In this case, the fine imposed was both unconditional and payable to the court. Thus the punishment was both 'certain' and beyond appellant's power to escape. These facts clearly render that part of the judge's order criminal instead of civil."). To be more specific, the Township's Contempt Motion (despite its misleading insistence that it seeks "civil" sanctions) seems designed to make out a claim of "indirect criminal contempt"—*i.e.*, "a claim that a violation of an order or decree of court occurred outside the presence of the court." *Com. v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003). Viewed against the requirements for criminal contempt, the Township's motion is even more obviously inadequate.

The distinction between civil and criminal contempt—which the Township's Contempt Motion elides—is important because, among other things, "a contemnor who will be sentenced to . . . a fixed fine, which he is powerless to escape by purging himself of his contempt, is entitled to the essential procedural safeguards that attend criminal proceedings generally." *In re Martorano*, 346 A.2d at 29; *see also Ashton*, 824 A.2d at 1202 ("The determination of whether a particular order contemplates civil or criminal contempt is crucial, as each classification confers different and distinct procedural rights on the defendant."). Notably, where criminal contempt is concerned, "[g]uilt must be established beyond a reasonable doubt," and "[a] colloquy at which the contemnor may argue his or her position is not sufficient to satisfy the strict procedural due process requirements that apply prior to a conviction for indirect criminal contempt." *Ashton*, 824 A.2d at 1203. "Moreover, proof of non-compliance alone is insufficient to support" a conviction of indirect criminal contempt. *Diamond*, 715 A.2d at 1196. "Instead, it must be proven, inter alia, that the alleged contemnor's failure to comply with the order was willful or at least reckless," and that the alleged contemnor acted with "wrongful intent." *Id.*

Even if the Township had moved to hold Defendants in indirect criminal contempt and set forth the correct legal arguments in support of its motion (it has not), the Township's case would fail at the outset for at least three reasons. First (again), because imposing any contempt sanctions—***especially*** criminal sanctions—in these circumstances would violate the Constitution. *See supra.* Second, because the Order is neither "definite, clear, [nor] specific," such that it leaves "doubt [and] uncertainty in the mind of the person to whom it was addressed of the conduct prohibited." *Fenstamaker v. Fenstamaker*, 487 A.2d 11, 14 (Pa. Super. 1985). And third, because Defendants' indisputable good-faith efforts to comply with the Order—including

by acceding to the Township's demands related to "gardellagate.com"—preclude any finding that Defendants acted with the requisite wrongful intent.

Finally, imposing contempt sanctions, civil or criminal, on Defendants for a promptly-deleted reference to a URL that the Township has since reproduced no fewer than six times in public filings would be—in a word—perverse. The Township's own conduct in this litigation makes it patently clear that the Township is not primarily concerned with preventing dissemination of the portions of the Report obtained through Defendants' newsgathering; if that were the Township's primary concern, then the Township would not have made "gardellagate.com" the centerpiece of its public Contempt Motion. In reality, the Township seeks to use this Court's inherent power to impose contempt sanctions as a means of punishing Defendants, by proxy, for constitutionally protected newsgathering. The Court should not indulge the Township's efforts.

CONCLUSION

The Township's Contempt Motion carries on the pattern established by the Township's Complaint and Motion for a Preliminary Injunction: an effort to convince this Court to issue extraordinary and unconstitutional relief without apprising the Court of—much less engaging with—well-established, controlling case law. This behavior would be troubling from a private litigant. From the Township, a local government seeking to punish one of its residents for speech on a matter of public interest, it shocks the conscience. The Court should reject the Township's Contempt Motion in the strongest possible terms.

Respectfully submitted,

Dated: January 10, 2023

/s/Paula Knudsen Burke

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify service of the foregoing ANSWER TO PLAINTIFF'S MOTION FOR CONTEMPT, as well as all attachments thereto, upon the persons, in the manner, and on the date indicated below:

BY EMAIL

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I further certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke
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Date: January 10, 2023