SUPERIOR COURT OF PENNSYLVANIA

No. 3084 EDA 2005

HERBERT NEVYAS, M.D., ANITA NEVYAS-WALLACE, M.D.,
and NEVYAS EYE ASSOCIATES, P.C.,

Plaintiffs-Appellees,

v.

DOMINIC MORGAN,

Defendant-Appellant,

and

STEVEN FRIEDMAN,

Defendant.

Appeal from an Injunction Issued by the Court of Common Pleas of
Philadelphia County, First Judicial District of Philadelphia,
on September 29, 2005, November Term 2003, Docket No. 00946

REPLY BRIEF FOR DEFENDANT-APPELLANT DOMINIC MORGAN

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In his opening brief (cited as "Br."), defendant-appellant Dominic Morgan ("Morgan") showed that the trial judge had applied the wrong legal standard in ruling that Morgan had agreed – in some veiled manner that the trial judge never identified or explained – never to criticize plaintiffs-appellees Herbert Nevyas, Anita Nevyas-Wallace, and Nevyas Eye Associates ("Nevyases"), or even to mention their names on any Internet web site ever again, and in imposing a prior restraint on Morgan not to do so. Morgan pointed out that, because the United States Constitution requires clear and convincing evidence of an intentional and knowing waiver for a claimed agreement to surrender First Amendment rights, and because the injunction issued below is a prior restraint, whatever act the trial judge considered to constitute the waiver was required to have been narrowly or strictly construed. Br. at 15-18. Indeed, when First Amendment rights are at stake, the Constitution requires an appellate court to conduct an independent *de novo* examination of the record to ensure that "the judgment does not constitute a forbidden intrusion on the field of free speech." Br. at 2, 18.

Morgan's opening brief demonstrated that, when the correct legal standards are applied, the record is barren of evidence supporting a finding of **any** waiver, Br. at 18-25, and that any other conclusion would have a severe chilling effect on free speech because temporary removal of allegedly defamatory content in an Internet website while legal threats are reviewed is a frequent response to threats of the imminent filing of a libel action. Br. at 25-27. Finally, Morgan argued that even if it could be found that he agreed to remove the material that the Nevyases criticized but the trial judge never found was defamatory, the appropriate remedy would be, at most, to order Morgan not to re-post the same criticisms on his lasiksucks4u.com web site, not to enjoin Morgan from ever mentioning the Nevyases on any website on the Internet . Br. at 27-29. Morgan also argued that any proceedings on remand should be conducted before a different trial judge. Br. at 30-31.

In their opposing Brief (cited as "Opp. Br."), the Nevyases do not even attempt to refute most of Morgan's arguments. They do not dispute that Morgan has stated the proper standard for waiver of First Amendment rights (except to contend that waiver need be found only by a preponderance of the evidence, not by clear and convincing evidence), nor do they attempt to show that, under the standard for waiver in First Amendment cases, the record contains evidence that supports the ruling below. The Nevyases similarly do not contest Morgan's statement of the rule against prior restraints, or the requirement of *de novo* review of factual rulings affecting First Amendment rights. Perhaps most conspicuous of all, the Nevyases never defend or justify the legal or constitutional validity of the trial court's order forbidding Morgan from criticizing the Nevyases on **any** website on the Internet, feebly arguing only that the trial judge showed "patience and respect." Opp. Br. at 18.

Instead, the Nevyases rest their argument for affirmance entirely on the proposition that Morgan failed to preserve his First Amendment contentions. Using this contention to avoid the special rules that govern the type of evidence necessary to find a waiver of First Amendment rights, they argue that the ruling below was supported because Morgan acknowledged that he had removed criticisms of the Nevyases from his web site in response to the threat of litigation and in the hope to avoid being sued. Finally, they close their brief with two procedural contentions – first, without citing any evidence, they claim Morgan was not entitled to proceed in forma pauperis, and second, they deny that Judge Maier told defendant Morgan's lawyer, Steven Friedman, that he would dismiss the Nevyases' claims against Friedman if Friedman's client refrained from appealing.

This reply brief first shows that Morgan preserved his First Amendment rights, and second that, in any event, there is no evidence that Morgan ever agreed not to criticize, let alone even mention, the Nevyases on the Internet. Finally, we show that the record and the law fully support

both Morgan's in forma pauperis status and his request for replacing Judge Maier in any proceedings on remand.

A. Morgan Presented His First Amendment Arguments Below.

Morgan repeatedly raised his First Amendment arguments in the court below. This began when the Nevyases sought an emergency temporary restraining order against the maintenance of his web site. Morgan did not have the opportunity to file a written response to the emergency TRO motion, but after the TRO was denied, plaintiffs moved for reconsideration of the denial, and Morgan opposed reconsideration in several written memoranda. His December 15, 2003 "Answer to Plaintiff's Motion for Reconsideration, with Cross-motion for Sanctions" asserted that the injunction sought by the Nevyases would violate his free speech rights under both the United States and Pennsylvania Constitutions, ¶ 12, and he attached as an exhibit an affidavit from James O'Reilly, a law professor who specialized in health law. Professor O'Reilly explained both how useful Morgan's web site was in setting forth the legal and regulatory problems with lasik surgery, and asserted Morgan's First Amendment right to provide the public with information from his "unique perspective" as a victim.

Next, in his January 27, 2004 "Answer to Plaintiff's Supplement to Motion for Reconsideration, with Cross-motion for Sanctions," Morgan thrice asserted his free speech rights in opposition to the contract claim, asserting first that entry of the TRO to enforce the "purported contract" would violate his free speech rights under both the United States and Pennsylvania Constitutions, ¶¶ 16, 17, and then that plaintiffs were seeking a "prior restraint" in violation of both the First Amendment and Article I, Section 7 of the Pennsylvania Constitution. ¶ 21. He again attached the O'Reilly Declaration which interposed the First Amendment as an obstacle to the

injunction. Section III of the accompanying "Memorandum of Law in Support of His Reply to Plaintiffs' Supplement to Motion for Reconsideration, with Cross-motion for Sanctions" was devoted to the First Amendment and Article I, Section 7. That section cited cases about the irreparable injury that the requested TRO would create under the Constitution, and invoked the rule against prior restraints.

In section III of his March 8, 2004, response to the Nevyases' motion for summary judgment, Morgan included several pages contending that plaintiffs' lawsuit was improperly invoking state action to suppress his speech in a public forum, the Internet, in violation of the First Amendment and Article I, Section 7 of the Pennsylvania constitution, and quoting at length from *Willing v. Mazzacone*, 482 Pa. 377, 393 A.2d 1155 (1978), to show that the Nevyases were seeking an improper prior restraint. And, after plaintiffs amended their complaint, Morgan filed his February 24, 2005, Answer and Counterclaim that expressly invoked his rights under the First Amendment and Pennsylvania Constitution and alleged that the Nevyases' contract claim violated his free speech rights. Paragraph 115 contended that there was no contract, but that if there were, the enforcement sought by the Nevyases would improperly restrain free speech, and paragraph 134 alleged that the Nevyases were improperly seeking a prior restraint of his free speech in violation of the Pennsylvania and United States Constitutions.

Morgan's invocation of his free speech rights continued at trial and afterward. At page 78 of the trial transcript, Morgan's attorney began his argument with the fundamental proposition that is at the heart of Morgan's arguments on appeal – "any agreement to restrict speech must be strictly construed." Then, after Judge Maier announced his conclusions from the bench and orally ordered Morgan not to mention the Nevyases on his Internet web site, but before he issued the appealable

written order in the case, Morgan submitted his August 5, 2005, "Motion for Post-Trial Relief," arguing that even if there was a contract, "its terms were not specific enough to allow injunctive relief, and would improperly restrict Morgan's rights to free speech" under the state and federal constitutions. ¶ 2. The court nevertheless issued the written order that is under appeal, without any attempt to explain how it met constitutional muster.

Finally, on December 1, 2005, Morgan submitted a Rule 1925 Concise Statement of Issues on Appeal, the first three paragraphs of which laid out free speech issues:

> 1. Neither in the exchange of correspondence between July 30, 2003 and August 4, 2003, nor in removing certain materials from his web site after being threatened with litigation, did Morgan make any offer to limit or waive his right to say anything he wanted concerning plaintiffs on his website or elsewhere. Accordingly, the exchange of correspondence between July 30, 2003 and August 4, 2003, and Morgan's actions concerning his web site, could not and did not create a binding contract under which defendant gave up his First Amendment right to criticize plaintiffs online.
>
> 2. The First Amendment does not permit a court to prohibit free speech without clear and unmistakable evidence that the defendant knowingly and intentionally waived his free speech rights.
>
> 3. The injunction issued by the Court is an invalid prior restraint of free speech.

The trial court's April 14, 2005 Opinion, docketed on April 25, 2005, did not address the fundamental constitutional issues that the court's order created, nor did the trial judge address them at any other point.

In sum, it is apparent that Morgan fully preserved his First Amendment arguments at every turn. Accordingly, appellees' main argument on appeal should be rejected.

B. The Evidence Does Not Support the Prior Restraint Under Appeal.

Because the Nevyases' appellate brief does not contend that they can satisfy the First Amendment standards either to show a waiver of Morgan's free speech rights, or to meet the

stringent requirements for justifying a prior restraint, the foregoing section of this brief, showing that those issues were preserved below, is alone sufficient to demonstrate that the order below should be reversed. But the order below should also be reversed because the trial record does not contain any evidence that Morgan "agreed" to refrain from criticizing the Nevyases on his lasiksucks4u.com web site, not to speak of evidence that is clear and unambiguous enough to support a claim of intentional waiver under constitutional standards.

In considering this question, this Court does not apply the highly deferential standard that the Nevyases advocate to determine the supposed contents of the contract. Opp. Br. 12. According to the trial judge, the supposed "contract" is to be found in the parties' exchange of correspondence between July 20 and August 4, 2003. This Court reviews de novo what the terms of the alleged contract were:

> The interpretation of any contract is a question of law and this Court's scope of review is plenary. *Highmark Inc. v. Hospital Serv. Ass'n Of Northeastern Pa.*, 785 A.2d 93, 98 (Pa. Super.2001), appeal denied, 568 Pa. 720, 797 A.2d 914 (2002). Moreover, "[w]e need not defer to the conclusions of the trial court and are free to draw our own inferences. . . .*Id.*
>
> *Abbott v. Schnader, Harrison, Segal & Lewis*, 805 A.2d 547, 552 (Pa. Super. 2002).

Moreover, as previously noted, when First Amendment rights are at stake, the Constitution requires an appellate court to conduct an independent, de novo examination of the record to ensure that "the judgment does not constitute a forbidden intrusion on the field of free speech." Br. 2, 18,

Morgan of course does not dispute that parties **can** agree to refrain from speaking or that they **can** settle disputes through enforceable contracts to do or not to do things in return for avoiding litigation in the future. Nor is there any dispute that, in July 2003, the Nevyases threatened Morgan with litigation, or that, in response to those threats, Morgan initially removed all content from that

web site that was critical of the Nevyases. But the key issue is whether, in addition to engaging in conduct – removal of material from his web site – Morgan made any commitment or agreement to refrain from posting such material in the future in order to avoid a lawsuit by the Nevyases, and further, whether he did so as an intentional and knowing waiver of his free speech rights.

The trial judge never articulated exactly what he viewed as forming a contract or agreement. His September 29, 2003 written Order, which was docketed on October 19, 2003, ambiguously states that an agreement was reached "on or about the period 7/30/03 through 8/4/03." In fact, the record not only contains no evidence that Morgan made any commitment or agreement, it contains dispositive evidence that he **refused** to make any commitment that would waive his Free Speech rights and expressly warned the Nevyases that he would post criticisms of them in the future. Thus, Morgan's August 1 letter to Leon Silverman, the Nevyases' lawyer, set forth in the Addendum to Morgan's opening Brief (cited here as "Add.") at page 5 – which is one the letters that purportedly resulted in a contract for Morgan not to criticize the Nevyases in the future – expressly stated that Morgan would be updating "this site or others with the facts of my care, treatment, history . . . and all necessary documentation," and "**no one will stop me from telling the truth. I . . . will expose and report the Nevyas' as to the damages they've inflicted on me, as well as the wrongdoings they've done** . . .." (Emphasis added). The trial judge expressly recognized in his oral ruling that, as of the date of this letter, Morgan still had the right to post criticisms of the Nevyases on his web site or any other web site. Tr. 81-82, Add. 11-12, cited in Opening Brief at 11, 20-21. Appellees do not cite any evidence, and in fact there is no evidence they could cite, showing that Morgan or his then-counsel ever said, did or wrote anything that made a complete about-face and could constitute an express and unambiguous waiver of Morgan's right to say anything he wanted about

the Nevyases.

Having no such evidence, appellees mischaracterize the trial testimony and the discovery materials that were read into the record to make it appear that Morgan or his then-counsel admitted that an agreement had been made. In this regard, all of the quotations are accurate, but the non-quoted material adjacent to the quotations is inaccurate. The quoted matter shows only that, in response to the Nevyases threats, Morgan removed material from the web site, and that the removal was motivated by Morgan's desire not to be sued. It is only the non-quoted material that contains such words as "accepted" or "agreed," but the use of those words is consistently inaccurate as a characterization of what Morgan or Mr. Friedman actually said.

For example, at page 7 of their brief, the Nevyases characterize Mr. Friedman's deposition testimony as follows: "Mr. Friedman further testified that as Morgan's counsel, he understood the contract to be that '[o]n the basis [sic] the way the website was after Morgan made his changes in July or August of 2003 you [Nevyas] were not going to sue.' Tr. 41-42." In the actual testimony at the cited page of the transcript, it was only the interrogator who suggested that an agreement had been made – "And am I correct that the agreement was that he was to make the changes . . .?" However, Mr. Friedman rejected the misleading question, saying, "I don't think there was an agreement on that . . . it was really your stating what was going to be done." Tr. at 41.

Similarly, the Nevyases' brief claims that Morgan agreed with a **question** from the trial judge that appellees characterize as being "whether Morgan intended to enter into a contract" and "if he [Morgan] removed the Nevyas name from the web in order to accept Nevyas' offer." Br. at 7, 11. But neither the Court's question nor Morgan's answer used either the word "contract," or the word "enter," or the word "accept." The question was whether Morgan had put the web site back to its

original condition, which contained no discussion of the Nevyases, "to comply with his offer then not to sue you . . .." Morgan's answer was not an unconditional yes but only "Yes, partly. Yes your Honor." Tr. 74-75. Neither the judge nor appellees' counsel followed up to learn why Morgan used the word "partly" to qualify his answer, but Mr. Friedman did ask those questions immediately thereafter. In response, Morgan reaffirmed his denial that he had ever promised not to change the site from that condition, and that he "sent Mr. Silverman's law firm a letter stating that I would be updating it. Q. Did you ever promise anyone that you would not [put] Nevyas' name on that website? A. No, I did not." Tr. 75-76. Appellees conveniently omit and ignore that testimony.

The correspondence in the record is similarly consistent with Morgan's testimony denying that he entered a contract or that he ever promised anything about what his web site would say in the future. Morgan's express warning that he **was** going to add criticisms of the Nevyases in the future has already been quoted, *supra* at 7. And on August 14, 2003, after the web site had been changed, and after it had been shut down entirely by Yahoo! following the Nevyases' earlier threat to sue Yahoo! (which they never revoked after Morgan made the changes they had sought), Mr. Silverman sent Mr. Friedman a letter that did use the word "agree," but **only** to characterize what Dr. Nevyas had done – "Dr. Nevyas has agreed to take no legal action against Mr. Morgan provided that" two conditions continue to be true. Add. 8. These two conditions make clear that Morgan did not, in fact, make any **agreement** about the future contents of his web site, but rather that the Nevyases recognized that changes remained a possibility, and they therefore felt they needed to threaten retaliation, in the form of a lawsuit, if Morgan took the actions described. Morgan's opening brief (at 22-23) discussed this flaw in the trial court's reasoning, and faulted the trial judge for failing to discuss the August 14 letter. The Nevyases brief compounds the error by failing to explain away the

language of the letter or to defend the trial court's failure to take that letter into account.

Appellees' brief, at 8, relies on testimony from plaintiff-appellee Herbert Nevyas to characterize what had transpired as representing an "agreement" by Morgan. Specifically, Dr. Nevyas related that he understood from his lawyer that Morgan had made an agreement with respect to the future condition of his web site, and that when he learned that he and his daughter had been criticized there, he felt that Morgan had violated that agreement. But Dr. Nevyas had no first-hand knowledge of what Morgan or Mr. Friedman had said – he knew only what Mr. Silverman had told him about such contacts. His characterizations of Morgan's supposed agreement were strictly hearsay, and Mr. Silverman, who could have testified on first-hand knowledge, refused to be questioned, no doubt because he knew that he could not support his client's factual claims. In short, there was, in fact, no competent testimony that Morgan had **agreed** to do anything or not to do anything with respect to his web site.

At best, what the evidence shows is a unilateral contract, in which the Nevyases made a promise about what they would do or refrain from doing if Morgan first removed existing criticisms from his web site, and then continued to refrain from restoring that material to his web site. Even if one decides that Morgan initially did that which would have been required under the terms of the "offer," that does not mean that Morgan was agreeing to anything himself. Here, if there was any contract, it consisted only of the Nevyases' commitment not to sue if Morgan continued to meet their stated condition. Although Morgan contends that he has met the condition because the criticisms he later placed on his web site were not the same as the ones he removed, that dispute is irrelevant to the contract question on appeal because the fact remains that Morgan made no promises and he cannot be sued for violating the promises that he did not make.

Thus, appellees' question presented (Brief at 2), and their argument that "a contract is formed when party A demands that party B remove material . . ., party B complies with the demand, and party A refrains from suing party B," Brief at 11, apart from the fact that appellees cite no authority whatsoever that supports that argument, are quite beside the point.[1] The prior restraint from which Morgan has appealed does not rest on the proposition that the Nevyases are bound by a contract because of what **they** agreed to do, but rather on the proposition that Morgan is bound by a contract based on something that **he** allegedly agreed to do. But no showing has ever been made that Morgan agreed to do anything.

Finally, appellees' evidentiary argument ignores the main issue on this appeal – the remedy that is appropriate even if an agreement could be found as a matter of ordinary contract law. As discussed above, under established constitutional law principles, a prior restraint of speech is not a permissible remedy absent clear showing of an intentional and knowing waiver of the right of free speech, with the act(s) alleged to constitute the waiver being narrowly or strictly construed. Even if party B's compliance with the demand, and party A's refraining from suing, were sufficient for contract law principles, such conduct does not even begin to establish the requisite intentional and knowing waiver of constitutional rights to justify a prior restraint injunction of free speech. Nor does anything else in this record.

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[1]Both cases that appellees cite pertaining agreements not to sue involved express agreements that specified the mutual promises there were being exchanged. *Cohen v. Sabin*, 452 Pa. 447, 307 A.2d 845 (1973), involved an express compromise over the terms of a union officer's pension; the retiree accepted increased payments provided by the compromise for several years and then sued claiming he was entitled to even more. *Muhammed v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 526 Pa. 541, 587 A.2d 1346 (1991), involved an express, written and signed settlement agreement of a medical malpractice claim; the court held that, having accepted the medical malpractice settlement, the plaintiffs could not sue their attorneys in that case for malpractice.

C. Morgan's Appeal Should Not Be Dismissed for Nonpayment of Costs.

Appellees repeat the contention that they raised in a motion to quash the appeal – the canard that Morgan has not fully accounted for the $100,000 that the Nevyases allegedly paid him several years ago, and therefore should not be allowed to proceed in forma pauperis. Opp. Br. 18-19. Morgan showed the falsity of this contention in his opposition to the motion to dismiss, and we repeat those factual points below, but first we respond to the new but mistaken procedural argument advanced for the first time in appellees' brief.

Appellees assert that Morgan's in forma pauperis status in this Court rests on Appellate Rule 551 and is based solely on his status below, and thus they argue that because Judge Maier has questioned the adequacy of Morgan's factual showing in support of his in forma pauperis status in the lower court, his in forma pauperis status should be revoked in this Court. Brief at 19. This argument is wrong. Morgan is proceeding in forma pauperis not under Appellate Rule 551 but under Appellate Rule 552(d), because his appellate counsel certified that they represent Morgan pro bono and that Morgan is indigent. (Because he was thus satisfied, Mr. Levy arranged for his own organization to bear the expense of the trial transcript so that this appeal could go forward). Under Rule 552(d), this is all that is required.

However, because appellees' brief contains erroneous factual assertions about Morgan's finances, albeit without citing any **evidence**, this brief responds to those assertions. Appellees make the following factual assertion at page 18 of their brief: "Nevyas paid [Morgan] $100,000 as a result of the [medical malpractice] arbitration." (There is no citation to omit). This assertion is highly misleading. What the record shows is that, in July 2003, a check was issued payable **jointly** to Morgan and his counsel, Mr. Friedman, and that the check was sent to Mr. Friedman, not to Morgan.

As reflected by paragraph 6 of the affidavit of Mr. Friedman that was filed with the opposition to appellees' motion to quash this appeal, Mr. Friedman deducted his fees and expenses and paid the remainder to Morgan; that remainder was only $33,900.

Even if the receipt of $33,900 three years ago had any bearing on the indigency status today of an individual who was left legally blind by appellees' surgery and who is subsisting on social security disability checks, that money was expended as described in some detail in the Friedman affidavit. *Id.* ¶¶ 7-9. Indeed, Morgan's lack of funds and income were so serious that his car, used by others to drive him wherever he had to go, has been repossessed. *Id.* ¶ 10. Morgan is still in debt to the attorney who successfully defended him against an earlier lawsuit brought by the Nevyases. *Id.* ¶¶ 11-15. Moreover, Morgan's own affidavit submitted below attests to his lack of assets and that his sole income is his disability check, to which he is entitled because of appellees' surgery. That financial status more than qualifies him to proceed in forma pauperis.[2]

D. Any Further Proceedings Below Should Be Before a Different Trial Judge.

Appellees finally take issue with Morgan's request for an order that Judge Maier not preside

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[2]Appellees' representation that Morgan never presented "evidence" showing how the funds represented by the $100,000 check were dissipated such that Morgan has nothing left is mystifying. The Friedman affidavit, which was filed both with the opposition to the motion to quash the appeal and with Morgan's motion for in forma pauperis status below, is made on personal knowledge and shows the basis for his knowledge. Moreover, as indicated, Morgan filed his own affidavit in seeking in forma pauperis status. These affidavits are evidence. After this Court rules on his appeal, Morgan will address below, if necessary, Judge Maier's stripping of his in forma pauperis status in that court, and his refusal to reinstate it after Morgan filed his personal affidavit and Friedman's, but his status below has no bearing on whether he has met this Court's requirements. In their effort to oppose Morgan's request that Judge Maier not preside over any further proceedings that may be necessary, appellees rely on Morgan's indigence as a basis for speculating that Mr. Friedman withdrew from representing Morgan because Morgan did not pay him rather than because of the conflict of interest that appellees and Judge Maier created. Opp. Br. at 17. Appellees cannot have it both ways about whether Morgan is indigent.

in the event any further proceedings are necessary in this case. Appellees acknowledge that "pitting Morgan against his counsel by offering to dismiss Nevyas' defamation claim against Friedman if Morgan refrained from appealing his Order" would be a "gross impropriety." Brief at 16. However, appellees object to Morgan's request on the sole ground that Mr. Friedman's representation that Judge Maier stated that he would dismiss Nevyas' defamation claim against Friedman if Morgan refrained from appealing his Order purportedly has "absolutely no support in the record." *Id.*[3]

In fact, the record supports Mr. Friedman's representation, and the record basis was cited in Morgan's opening brief, although it is ignored by appellees. In the praecipe that Mr. Friedman filed to withdraw as Morgan's counsel, Mr. Friedman cited what Judge Maier had stated as the basis for having to withdraw. The praecipe was served on appellees' counsel and on Judge Maier. When the Prothonotary resisted docketing the praecipe, Mr. Friedman requested that Judge Maier order that it be docketed, and Judge Maier did so by Order of October 18, 2005. Judge Maier's statement was also cited in Morgan's Rule 1925 Concise Statement Issues on Appeal, docketed on December 1, 2005, which was also served on appellees' counsel. Yet, at no time before Morgan filed his appellate brief did appellees or their counsel ever question whether Judge Maier made these comments. Moreover, in ordering that Mr. Friedman's praecipe be docketed, and in his Rule 1925 Opinion issued on April 14, 2006 (docketed on April 25, 2006), Judge Maier also did not take issue with Mr. Friedman's recounting that Judge Maier had stated that he would dismiss Nevyas' defamation claim against Friedman if Morgan refrained from appealing his Order

[3]This section of Nevyases' brief (at 17) contains various representations about things Morgan allegedly says on his current web site. Because the contentions are not a matter of record, are irrelevant to the issues on this appeal, and have no place being raised in this appeal, undersigned counsel have not looked at the web site or consulted Morgan in order to address them.

Mr. Friedman's representation is supported by the record, and the request that Judge Maier not preside should any additional proceedings be necessary should be granted.[4]

CONCLUSION

The injunction on appeal should be reversed. Judge Maier should be disqualified from participating in any further proceedings in the case.

Respectfully submitted,

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[4] After Morgan filed his brief in this Court, he also filed a motion in the court below seeking a stay pending appeal. The Nevyases' brief opposing that request also questioned whether Judge Maier had ever made the statements, and asserted that Judge Maier had never made the statements "in the presence of plaintiffs' counsel." In support of his recent motion to this Court seeking a stay pending appeal of the Order restraining his free speech rights, Morgan has attached an affidavit from Mr. Friedman reaffirming that Judge Maier made the statement, but clarifying that Judge Maier had met separately with counsel and parties from each side, and made these statements in the meeting with Mr. Morgan and Mr. Friedman. Thus, Mr. Silverman was in fact not present when Judge Maier made the statement. Significantly, however, even in denying the motion below for a stay pending appeal, and despite the Nevyases' opposition questioning whether Judge Maier had made the statement, Judge Maier did not question the accuracy of Mr. Friedman's recounting of his statement.