STATE OF NEW YORK SUPREME COURT

ONTARIO COUNTY

CIVIL ACTION NO. 126837-2020

MASSA CONSTRUCTION,

Plaintiff,

v.

JAMES MEANEY a/k/a
THE GENEVA BELIEVER

Defendant.

DEFENDANT JAMES MEANEY'S MEMORANDUM OF LAW IN REPLY AND OPPOSITION TO PLAINTIFF MASSA CONSTRUCTION'S REQUEST FOR A TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

How is the government spending taxpayer money? Who decides? And how are those decisions made? Jim Meaney, through his independent watchdog news outlet *The Geneva Believer*, has spent the past four years bringing attention to these and other questions of critical importance to his community. In 2017, he began investigating the relationship between the City of Geneva and a local construction company, Plaintiff Massa Construction, to which the City has awarded millions of dollars in construction contracts over the past decade. Reporting on City Council proceedings and government documents, Mr. Meaney has sought to help members of the Geneva community better understand the relationship between the City and Massa. Now, Massa seeks to silence this citizen journalist in order to prevent him from doing exactly what the First Amendment protects: reporting on issues of public concern in order to allow for uninhibited, robust, and wide-open debate.

Massa contends that Mr. Meaney's reporting has somehow defamed the company and that, as a result, this Court must issue an emergency order requiring *The Geneva Believer* to take down ten articles Massa finds offensive. In fact, far from defaming Massa, Mr. Meaney has fairly and accurately reported on Geneva City Council proceedings and documents obtained through FOIL requests, all of which raise legitimate questions as to the City of Geneva's practices in soliciting bids for and keeping records of city contracts. It is unsurprising, then, that Massa fails to point to a single false statement, suggesting instead that Mr. Meaney has hidden accusations of collusion, bribery, undue influence, and favoritism in his reporting even though not one of these words appears in any of the articles. What Mr. Meaney has actually done is what he and *The Geneva Believer* have done since the publication's founding in 2016: shone a light on issues that matter to local citizens, including the City's payments to and contracts with a construction company that has received millions of dollars from the City government, all while maintaining close ties to both former and current elected officials.

In the end, Massa seeks nothing more than to intimidate Mr. Meaney into silence and, in doing so, to keep the people of Geneva in the dark. Massa's extraordinary request that this Court order Mr. Meaney to permanently remove his reporting from *The Geneva Believer*'s website makes this perfectly clear. To avoid stifling public debate, the TRO should be denied because it violates the First Amendment, because there is no basis for censorship where damages are an available remedy, and because Massa has failed to meet all three of the elements required for relief—including likelihood of success on the merits, irreparable harm, and the balance of equities weighing in its favor.

FACTS

Mr. Meaney is a citizen journalist who runs *The Geneva Believer*, "an independent citizen watchdog news outlet in Geneva" that promotes accountability of the City of Geneva's government.[1] *The Geneva Believer* uses "FOIL requests, publicly available information," and journalistic sources, and has "investigated and spotlighted numerous examples of misconduct, conflicts of interest, and environmental and social injustices."[2] *The Geneva Believer* has provided independent coverage of "the Geneva Foundry environmental disaster, Geneva Police Department, the Geneva Community Compact, the city manager search, the Downtown Revitalization Initiative, Lakefront Park, the City's budget process, and other issues [and] has spurred public involvement and . . . transparency."[3]

According to "records released by the City," Massa is a construction company that has performed millions of dollars' worth of city projects in recent years.[4] Mr. Meaney has covered many of these projects in *The Geneva Believer*. Am. Compl., Exs. 1-10, Dkt. Entries #13-22. His articles consist

[1] *About*, The Geneva Believer, http://www.genevabeliever.com/about/ (last visited Mar. 16, 2020).

[2] *Id.*

[3] *Id.*

[4] *Conflict Of Interest? Gaglianese Talks Massa Project At First Council Meeting*, The Geneva Believer (Jan. 12, 2020), http://www.genevabeliever.com/2020/01/12/conflict-of-interest-new-council-meets-gaglianese-asks-about-massa-contract/.

primarily of reporting based on publicly available information gleaned through public records requests and City Council meetings. *See, e.g.*, Ex. 9, Dk. Entry # 21 (noting information obtained through FOIL, but showing image illustrating the City was unable to locate certain records). In addition, the articles contain strongly-worded editorial commentary and questions that are critical of certain aspects of city governance—namely the City's repeated million-dollar-plus awards to Massa of contracts that Meaney and other members of the community deem unnecessary. *See* Ex. 2, Dkt. Entry #27.

Upset at the negative publicity, on January 23, 2020, Massa sent Mr. Meaney a cease and desist letter attacking Mr. Meaney for making "false claims of collusion and unfair dealing" and "clearly intend[ing] to denigrate Massa's Italian-American heritage."[5] The letter then gave Mr. Meaney twenty-four hours to send "written confirmation" to Massa that he had removed the articles.[6] Before Mr. Meaney could respond to the letter, Massa filed a Complaint in New York Supreme Court on February 5, 2020. Dkt. Entry #1.

Counsel for Mr. Meaney then responded to counsel for Massa, informing Massa that its Complaint was defective because it failed to plead the alleged defamatory statements with particularity, and therefore gave Mr. Meaney insufficient notice with which to respond. Ex. 1, 1. In addition, counsel informed Massa that the lawsuit appeared to be "an attempt to silence and intimidate the truthful reporting of a community journalist on issues of legitimate public concern" and therefore likely violated New York's anti-SLAPP statute. *Id.* at 1-2. Counsel requested that Massa withdraw its lawsuit. *Id.*

Instead, Massa filed an Amended Complaint, which repeated the allegation that "[w]hen read as a whole, the articles [in the ten attached exhibits] convey the falsehood that Massa obtains its

[5] Letter from Anthony Galli, Counsel for Massa, to Jim Meaney, Editor of *The Geneva Believer* (Jan. 23, 2020), http://www.genevabeliever.com/wp-content/uploads/2020/01/ceaseanddesist012420.pdf.

[6] *Id.*

construction contracts with the City of Geneva by means of collusion, bribery, undue influence, and favoritism." Am. Compl. ¶ 12. The Amended Complaint lists no fewer than thirty-four statements in the articles as well as identifying various comic images—never once identifying which portions of those statements are false, or even alleging that they *are* actually false. *See id.* Massa's allegations rest solely on the disfavored theory of libel by implication: That "in the mind of a reasonable reader, the falsehood that Massa obtains its construction contracts with the City of Geneva by means of collusion, bribery, undue influence, and favoritism" is self-evident from the articles, which "impute[] misconduct, dishonesty, and fraud on Massa." *Id.* ¶ 25. According to the Amended Complaint, these alleged implications "constitute libel *per se*." *Id.* ¶ 29.

Shortly after filing the Amended Complaint, counsel for Massa served counsel for Mr. Meaney with a motion for a Temporary Restraining Order ("TRO") that it had filed with the Court *ex parte* and in which it sought a judicial order to take down the offending articles. Am. Compl.; Massa Br., Dkt. Entry # 24. Counsel for Mr. Meaney promptly filed a letter with the Court, setting forth the fact that a TRO would constitute a "prior restraint"[7] in violation of the First Amendment. On March 3, the Court denied Massa's request for an immediate take down of the articles and scheduled a hearing for March 25. Dkt. Entry # 38.

Since the Court's March 3 order, the federal government has declared a national emergency due to the World Health Organization's declaration that the coronavirus disease known as COVID-19 has reached the state of a global pandemic.[8] New York, too, has declared a state of emergency in

[7] "Temporary restraining orders and permanent injunctions—*i.e.,* court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (collecting sources).

[8] *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (March 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

effect until September 7, 2020.[9] On March 17, the Court postponed the scheduled March 25 hearing until May 6 due to "the Office of Court Administration's limitation on Court activities in response to the Coronavirus." Ex. 2.

STANDARD

As a threshold point, temporary injunctive relief "is a drastic remedy [that] is not routinely granted." *Sutherland Global Servs., Inc. v. Stuewe*, 902 N.Y.S.2d 272, 273 (4th Dept. 2010). A court may grant a TRO to prevent a movant from suffering immediate and irreparable harm that would occur before the court can hold a hearing and decide a motion for a preliminary injunction. *See* C.P.L.R. § 6313. Similarly, a court may grant a preliminary injunction to prevent irreparable harm that could occur before a case can be fully adjudicated on the merits. *See* C.P.L.R. §6301; *Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 N.Y.2d 236, 241 (1992) ("[B]ecause preliminary injunctions prevent the litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, they should be issued cautiously and in accordance with appropriate procedural safeguards.").

To prevail on a motion for any temporary injunctive relief, Massa must establish, by clear and convincing evidence, (1) a likelihood of success on the merits; (2) the danger of irreparable harm in the absence of injunctive relief; and (3) a balance of the equities in its favor. *See, e.g.*, *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005). If Massa fails to establish any one of the requisite elements, the request for injunctive relief must be denied. *See, e.g.*, *Doe v. Axelrod*, 73 N.Y.2d 748, 750-51 (1988) (denying request for a preliminary injunction where plaintiff failed to show a likelihood of success on the merits); *Delphi Hospitalist Services v. Patrick*, 163 A.D.3d 1441, 1444 (4th Dep't 2018)

[9] Exec. Order No. 202, *Declaring A Disaster Emergency In the State of New York* (Mar. 7, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf.

("Inasmuch as plaintiff failed to establish one of the three required elements for a preliminary injunction, we see no need to address the merits of the other two required elements.").

The standard for imposing a TRO in litigation involving the restriction—or censorship—of speech, also referred to as a "prior restraint," *Alexander*, 509 U.S. at 550, is even higher and nearly impossible to meet under binding New York precedent. As the Fourth Department has explained, cases "involving freedom of expression and of speech are subject to special due process rules," so that in the exceptional instance where injunctive relief may even be considered (such as one involving the distribution of pornographic films), "the application under CPLR 6313 for a temporary restraining order" has required the trial court to examine the merits and make evidentiary findings to support any grant of extraordinary relief. *See Gaetano v. Erwin*, 46 A.D.2d 735, 736, 742–43 (4th Dep't. 1974) (collecting New York and U.S. Supreme Court precedent from various contexts). Such procedural protections are also mandated by U.S. Supreme Court cases interpreting the First Amendment, such that prior restraints are only permissible if they "take[] place under procedural safeguards designed to obviate the dangers of a censorship system." *Southwest Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559–62 (1975). These "rigorous procedural safeguards . . . [are] 'but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *Id.*

ARGUMENT

I. MASSA'S REQUEST FOR A TRO VIOLATES THE FIRST AMENDMENT

A. *The Geneva Believer*'s Speech On A Matter of Public Concern Is Protected At The Core of the First Amendment

As a basic constitutional principle, *The Geneva Believer*'s speech is protected by the heart of the First Amendment because it addresses a matter of public concern—*i.e.*, how the City of Geneva conducts its business dealings. In the context of defamation, the Supreme Court has made clear that speech critical of the government, exemplified by *The Geneva Believer*'s articles reporting on certain City officials' actions in the contract procurement process for million-dollar-plus construction projects

(which focus on the City, not Massa as a company), lies at "the very center of the constitutionally protected area of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964). The costs to the press of threatened with liability is inimical to free speech because "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 272.

Speech critical of the government, including the government's relation to industry, is protected even where it "include[s] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. The constitutional endgame is that political criticism is entitled to special solicitude because the "right of free public discussion of the stewardship of public officials" is "a fundamental principle of the American form of government." *Id.* at 275. And in politics, "[c]harges of gross incompetence, disregard of the public interest . . . and hints of bribery, embezzlement, and other criminal conduct are not infrequent," *id.* at 273 n.14 (citation omitted), and do not transmute otherwise protected speech into something that can be censored. Censorship is not justified even if speech results in "[i]njury to official reputation" and even where "the utterance contains 'half-truths' and 'misinformation.'" *Id.* at 273 (citing *Pennekamp v. Florida*, 328 U.S. 331, 342, 343, n.5 (1946)). Accordingly, the Court should deny the TRO because it tramples upon First Amendment protections for speech on a matter of public concern, namely how the City of Geneva allocates public construction projects.

B. The Requested Take Down Order Would Constitute Government Censorship In Violation of the First Amendment

An order to take down *The Geneva Believer*'s articles from its website would violate the First Amendment as an instance of press censorship in its purest form. As explained *supra*, the requested injunction would require *The Geneva Believer* to remove ten articles critical of the City of Geneva and its relationship with Massa Construction based on nothing more than Massa's unsubstantiated and speculative concerns that the articles' online presence will harm Massa's business contracts—with no

evidence whatsoever that the challenged statements themselves are false. If such threadbare allegations were the standard for removing speech, no news outlet in this country would be able to function and reporting on public affairs would grind to a halt.

The Supreme Court has warned against silencing the press through governmental means because "[t]he newspapers, magazines, and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity" such "[t]o allow [the free press] to be fettered is to fetter ourselves." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249–51 (1936). Indeed, as the *Pentagon Papers* case emphasized, "[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints" because "[i]n the First Amendment the Founding Fathers gave the free press the protection it must have . . . The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (the "*Pentagon Papers*" case) (Black, J., concurring).

And while it is permissible under American law to punish publishers of information *after* it has been adjudicated defamatory, such punishment must not take the form of censorship unless it meets certain exceptional requirements not present here. As the Supreme Court has repeatedly recognized, orders such as the one requested by Massa are a classic example of a prior restraint presumptively violative of the First Amendment. *See Alexander*, 509 U.S. at 550 ("[C]ourt orders that actually forbid speech activities [] are classic examples of prior restraints"); *id.* at 553–54. This bar on prior restraints exists, unlike in other countries, because the Framers created a system whereby the press is subject to both "public and private redress by its libel laws" but not "suppression and injunction—that is, for restraint upon publication." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713–15 (1931).

The seminal case concerning prior restraints is *Near v. Minnesota ex rel. Olson*. In *Near*, a newspaper appealed from a permanent injunction issued after a case came on for trial. *Id.* at 705-06. The injunction in that case "perpetually" prevented the defendant from publication going forward because, in the preceding trial, the lower court determined that the defendant's newspaper was "chiefly devoted to malicious, scandalous and defamatory articles." *Id.* at 706. The *Near* Court held that such an injunction on future speech, even if preceded by the publication of defamatory material, was unconstitutional. *Id.* at 721-23. This holding *a fortiori* requires denial of the injunction mandating the removal of the challenged articles from *The Geneva Believer*'s website, as there has been no determination on the merits that they are defamatory.

New York courts, too, "strongly disfavor[]" prior restraints, holding that "[p]rior restraints are not permissible, as here, merely to enjoin the publication of libel." *See Rosenberg Diamond Dev. Corp. v. Appel*, 290 A.D.2d 239, 239 (1st Dep't 2002). This outright ban on injunctive relief for libel demonstrates New York courts' severe skepticism of prior restraints, "the most serious and the least tolerable infringement on First Amendment rights." *Ash v. Bd. of Managers of 155 Condo.*, 843 N.Y.S.2d 218, 219 (1st Dep't 2007) (quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976)). Any prior restraint carries a "'heavy presumption against its constitutional validity' and a party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition." *Id.* (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Such restraints "may be imposed only in the most 'exceptional cases'" through "a showing on the record that such expression will immediately and irreparably create public" as opposed to private "injury." *Porco v. Lifetime Entm't Servs., LLC*, 116 A.D.3d 1264, 1265–67 (3rd Dep't 2014). This heavy burden is satisfied only if the challenged speech is "likely to produce a clear and present danger . . . that rises far above public inconvenience, annoyance or unrest," *Rosenberg*, 290 A.D.2d at 239, such as cases involving "true

threats" where the speech threatens violence, *Brummer v. Wey*, 166 A.D.3d 475, 477–78 (1st Dep't 2018).

Two recent cases confirm established First Amendment limitations on prior restraints under analogous circumstances. In both, courts rejected injunctive relief that would have required publishers to remove allegedly defamatory material from the internet. In *Brummer*, a tabloid-style blog posted "highly offensive, repulsive and inflammatory" racist content in response to a ruling made by the plaintiff in his capacity as a financial industry regulator. 89 N.Y.S.3d at 13. The plaintiff sued for libel, and the trial court entered a temporary restraining order requiring the blog to remove the content for the duration of the case. *Id.* The appellate court vacated the order. *Id.* at 14. It stated explicitly that the plaintiff could not meet the "exacting constitutional standard" required for forced removal even if the content was ultimately found libelous. *Id.* The prior restraint could only be justified if the speech constituted a true threat of violence, which the court held it did not. *Id.* Likewise, in *P.D. & Assocs. v. Richardson*, 104 N.Y.S.3d 876, 878 (N.Y. Sup. Ct. 2019), the court rejected the plaintiff lawyer's request that a former client be ordered to take down allegedly defamatory online reviews of the plaintiff's services. Relying on *Brummer*, the court reiterated that prior restraints cannot enjoin the publication of libel. *Id.* at 882. The court held that the plaintiff's unopposed contentions that the reviews were defamatory did not justify a takedown order. *Id.* at 883.

So too here. The only exceptional thing about this case is Massa's breathtaking request. Not only does Massa seek an impermissible prior restraint, it does so despite the fact that *The Geneva Believer*'s articles have not been held libelous and carry with them no risk other than alleged loss of income. *The Geneva Believer*'s speech is fully protected by the First Amendment and thus cannot be ordered removed from Mr. Meaney's website. As such, the TRO should be denied, as more fully explained below.

II. THE TRO SHOULD BE DENIED BECAUSE MONETARY RELIEF IS AN AVAILABLE REMEDY

Massa cannot show the articles should be take down even if *The Geneva Believer*'s articles are ultimately found to be defamatory because Massa can be made whole through an award of money damages.

This principle is evident throughout First Amendment jurisprudence. For example, in *CBS v. Davis*, 510 U.S. 1315 (1994), the Supreme Court stayed an injunction against CBS that prohibited the network from publishing certain stories because money damages were an adequate remedy. *Id.* at 1317. The Court granted the network's emergency motion to stay a trial court order prohibiting it from broadcasting video made by an employee of a meatpacking plant about the company's business practices. *Id.* at 1318. The company contended that broadcast of the video would cause it irreparable harm. *Id.* at 1316. In no uncertain terms, the Court rejected the company's claim that such a prior restraint was permissible under the First Amendment: "Even if economic harm were sufficient in itself to justify a prior restraint, however, we previously have refused to rely on such speculative predictions as based on 'factors unknown and unknowable.'" *Id.* at 1318 (citations omitted). The Court concluded: "If CBS has breached its state law obligations, the First Amendment requires that [the company] remedy its harms through a damages proceeding rather than through suppression of protected speech." *Id.* The same can certainly be said with respect to Massa's application here.

Other courts throughout American history have uniformly held that damages, not injunctions, are the appropriate remedy for libel plaintiffs. "If the publications in the newspapers are false and injurious, [plaintiff] can prosecute the publishers for libel. If a court of equity can interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation belonging to courts at law." *Francis v. Flinn*, 118 U.S. 385, 389 (1886); *see also Near*, 283 U.S. at 718–20; *Pennekamp v. Florida*, 328 U.S. 33, 346–71 (1946). New York courts are in accord. "Where, as here, a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue." *Dana Distributors,*

Inc. v. Crown Imports, LLC, 853 N.Y.S.2d 111, 112 (2d Dep't 2008); *see also Norton v. Dubrey*, 983 N.Y.S.2d 679, 681 (3rd Dep't 2014) (affirming denial of preliminary injunction where monetary damages constituted an adequate remedy).

Simply put, under New York law, temporary injunctive relief should not be granted where, as here, the movant has an adequate remedy at law. *See Rosenbaum v. Rosenbaum*, 130 N.E.2d 902, 904 (1955) ("Since plaintiff thus has an adequate remedy under [the law], equity should refrain from granting the drastic relief of injunction."); *Main Evaluations v. State of New York*, 296 A.D.2d 852, 854 (4th Dep't 2002) (denying injunctive relief because "plaintiff, if successful, [could] be adequately compensated with money damages"); *Ramos v. Madison Square Garden Corp.*, 257 A.D.2d 492, 492 (1st Dep't 1999) (refusing to grant declaratory relief in defamation suit because "plaintiff has an adequate remedy at law, *i.e.*, post-publication damages"); *U.S. Re Companies, Inc. v. Scheerer*, 41 A.D.3d 152, 155 (1st Dep't 2007) (finding no irreparable harm where money damages were available, as "this quantifiable remedy precludes a finding of irreparable harm"); *Linro Equipment Corp. v. Westage Tower Associates*, 233 A.D.2d 824, 827 (3rd Dep't 1996) ("Supreme Court erred in rendering injunctive relief since plaintiff can, if necessary, be fully compensated by monetary damages").

Here, Massa has failed to show that it would suffer irreparable harm in the absence of injunctive relief because monetary damages are an adequate remedy for defamation plaintiffs. *See Ramos*, 257 A.D.2d at 492 (refusing to grant declaratory relief in defamation suit because "plaintiff has an adequate remedy at law, *i.e.*, post-publication damages"). Massa's only alleged harm is the enormously speculative contention that it might lose business during its Spring bidding season due to *The Geneva Believer*'s articles. Massa Br. at 6-7. Such bald assertions of speculative and contingent harm cannot support a finding of irreparable injury in a defamation case, as this is precisely the type of non-irreparable injury that is appropriately compensated with money damages. An injunction in this case would be a grave affront to the First Amendment and New York precedent.

III. MASSA HAS FAILED TO SATISFY ANY OF THE REQUIREMENTS NECESSARY TO SECURE TEMPORARY INJUNCTIVE RELIEF

A. Massa has failed to show a likelihood of success on the merits

Massa cannot succeed on the merits—now or ever. Before injunctive relief can be granted, the movant bears the burden of presenting clear and convincing evidence sufficient to demonstrate its likelihood of success on the merits. *See Doe v. Axelrod*, 73 N.Y.2d 748, 750-51 (1988) (denying request for a preliminary injunction where plaintiff failed to show a likelihood of success on the merits). Speculative or conclusory assertions will not suffice. *See State v. Fine*, 72 N.Y.2d 967, 969 (1988); *Scheerer*, 41 A.D.3d at 155. To succeed on a defamation claim, a plaintiff bears the burden of proving, among other things, falsity and fault.[10]

1. Massa has failed to plead an essential element of the claim of defamation: falsity.

Here, Massa has failed to show a likelihood of success on the merits because Massa has failed to plead or prove—by other than mere speculation or conclusory assertions—*which* of the statements published in *The Geneva Believer* is actually false. For example, in its Amended Complaint, Massa reproduces thirty-four statements excerpted from articles published by *The Geneva Believer*, but fails to show that *any* of those statements is actually false, a foundational element of a claim of defamation.

[10] Although certain lower courts in New York apply a negligence standard for fault, that approach is incompatible in this case with the landmark decision in *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975)—which, at a minimum, is controlling here. *Chapadeau* establishes a standard for the press reporting on private figures involved in legitimate matters of public concern that coheres with the constitutional protections of the First Amendment repeatedly recognized by the U.S. Supreme Court and the New York Court of Appeals. As explained by the Court of Appeals in *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595 (1989), adopting a negligence standard for press reportage is contrary to the First Amendment because making a judgment call about what constitutes "legitimate public concern" is "precisely the sort of line-drawing that . . . is best left to the judgment of journalists and editors, which [the court] will not second-guess absent clear abuse." *Accord Gaeta v. New York News, Inc.,* 62 N.Y.2d 340, 349 (1984) ("[D]etermining what editorial content is of legitimate public interest and concern is a function for editors. . . . The press, acting responsibly, and not the courts must make the *ad hoc* decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable.").

Tannerite Sports, LLC v. NBC Universal News Grp., 864 F.3d 236, 247 (2d Cir. 2017) (applying New York State law). Instead, Massa's claims rest solely on the bald assertion that the publications are defamatory by implication "when read as a whole" because they "[c]onvey the falsehood that Massa obtains its construction contracts with the City of Geneva by means of collusion, bribery, undue influence, and favoritism." Am. Compl. ¶ 12. Aside from this blanket assertion of falsity, Massa has not pointed to *any* specific statement published by *The Geneva Believer* that is false.

This undifferentiated approach has no traction in the law. The Second Circuit has recognized that "the defamatory 'impact' of the publication is the same as the defamatory implication conveyed by each of the individual statements." *Herbert v. Lando*, 781 F.2d 298, 307 (2d Cir. 1986); *accord Biro v. Conde Nast*, 883 F. Supp. 2d 441, 482 (S.D.N.Y. 2012) ("There can be no claim for an overall defamatory impact from the reporting of true statements beyond the specific defamatory implications that may arise from those specific statements.") (applying New York State law).

Under New York law, defamation by implication is also highly disfavored. *See Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 36-38 (1st Dep't 2014); *Partridge v. State*, 173 A.D.3d 86, 91-92 (3d Dep't 2019); *Udell v. NYP Holdings, Inc.*, 169 A.D.3d 954, 957 (2d Dep't 2019). Here, Massa's defamation-by-implication claims fail because Massa has not made the required "rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference." *See Stepanov*, 120 A.D.3d at 37-38. Further, "[t]he words must be construed in the context of the entire statement or publication . . . tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Aronson v. Wiersma*, 65 N.Y.2d 592, 593–95 (1985).

Massa has failed to show that the publications it disputes convey the inference that Massa obtains its construction contracts through collusion, bribery, undue influence, or favoritism because

Massa has failed to show that the articles imply any conclusion at all, let alone this one. Rather, when the articles are considered in their full context, a reasonable reader would understand the publications as an effort to raise legitimate questions—not supply conclusions—regarding the relationship between Massa and the City of Geneva. Similarly, "the plain language" of the publications does not suggest that *The Geneva Believer* affirmatively endorsed an inference of collusion, bribery, undue influence, or favoritism—words nowhere contained in the published accounts. *See Partridge*, 173 A.D.3d at 94. And publications that raise questions cannot form the basis of a defamation lawsuit because they are not statements of fact, but rather protected opinions. *See Biro*, 883 F. Supp. 2d at 471 ("But if the implication arises from unchallenged facts and not from the words complained of, then the inference would be protected as expressive of the author's opinion (based on the disclosed and unchallenged facts.)") (applying New York State law); *see also Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4th Cir. 1993) ("Questions are not necessarily accusations or affronts. Nor do they necessarily insinuate derogatory answers.").

Take for instance the article published on January 12, 2020, which is Plaintiff's Exhibit 2. Ex. 2, Dkt. Entry # 27. In the January 12 article, *The Geneva Believer* first supplies detailed factual information concerning the relationship between Massa, the City of Geneva, and City Councilman Frank Gaglianese. Only then does *The Geneva Believer* discuss Gaglianese's potential conflict of interest in question and answer format—with *The Geneva Believer* answering rhetorical questions with what could only be understood as statements of pure opinion protected by the First Amendment. A reasonable reader would not understand such language to have endorsed a conclusion of collusion, bribery, undue influence, or favoritism because a reasonable reader would not understand *The Geneva Believer* to endorse a definitive conclusion at all. Many of *The Geneva Believer*'s articles follow a similar format, in which *The Geneva Believer* sets forth detailed factual information and proceeds to pose questions regarding these facts. In short, Massa has failed to demonstrate a likelihood of success on

the merits because Massa has failed to make the rigorous showing required to succeed on a claim of defamation by implication.

2. Massa has failed to plead a second essential element of the claim of defamation: constitutional fault.

Moreover, Massa has failed to show a likelihood of success on the merits because Massa has failed to plead or prove fault under either of the potentially applicable standards. In fact, in its briefing, Massa argues that the elements of a defamation claim "are as follows: the plaintiff must show that, (1) the defendant communicated to a third person (2) a false statement about the plaintiff that (3) tended to harm plaintiff's reputation in the eyes of the community or to cause others to avoid plaintiff." Massa Br. at 5-6.[11] But in propounding the supposed elements of a defamation claim, Massa fails to acknowledge—or intentionally omits—a critical fourth element: the plaintiff must show that the statements were published with the level of fault required by the First Amendment. Massa's utter failure to engage with well-established constitutional fault standards should be enough for this Court to find that Massa has not demonstrated a likelihood of success on the merits.

Specifically, Massa has failed to plead or prove that *The Geneva Believer* published the articles at issue with actual malice—as required by N.Y. Civ. Rights Law § 76-a(1)(a) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)—or that *The Geneva Believer* published the articles at issue "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties"—as required by *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d at 199. Massa's only contention that even peripherally relates to fault is its assertion that *The Geneva Believer* published the articles at issue without acknowledging General Municipal Law

[11] Of note, Massa alleges libel *per se*, namely that *The Geneva Believer* has imputed ill character in business dealings such that damages need not be established. However, the New York Court of Appeals has observed that "[t]he presumed-damages rule has been found unconstitutional in certain First Amendment cases . . . and criticized for use in defamation cases." *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 n.1 (1992).

§ 103 (McKinney 2019), which, according to Massa, "requires a bidder to be the lowest, responsive, responsible bidder." Am. Compl. ¶ 21. This claim has no bearing on whether the published articles were posted with reckless disregard for their truth or falsity, or, in the alternative, with gross irresponsibility.

In fact, Section 103 has nothing to do with the point of *The Geneva Believer*'s reportage—*i.e.*, concerns that certain members of the Geneva City Council may have operated under conflicts of interest with Massa when they used their City Council positions to advocate for the creation or continuation of municipal construction contracts, Ex. 2, Dk. Entry #27, and that the City of Geneva lost crucial documents related to the bidding process, Ex. 9, Dk. Entry #34. Because Massa's reliance on General Municipal Law § 103 is misplaced and insufficient to demonstrate a likelihood of success on the merits, Massa's request for temporary injunctive relief must therefore be denied.

B. Massa has failed to show irreparable harm.

As discussed above, Massa has failed to establish the second element required for relief: that failure to grant a preliminary injunction will cause irreparable harm. To secure injunctive relief, a movant must demonstrate that it will suffer irreparable harm if injunctive relief is not granted. *See Nobu*, 4 N.Y.3d at 840; *Haulage Enters. Corp. v. Hempstead Res. Recovery Corp.*, 74 A.D.2d 863, 864 (2d Dep't 1980) (reversing preliminary injunction where plaintiff failed to establish irreparable harm, without addressing likelihood of success on the merits or the balance of equities). A movant must show by clear and convincing evidence that the irreparable harm is "imminent, not remote or speculative." *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dep't 1995); *see also Faberge Int'l Inc. v. Di Pino*, 109 A.D.2d 235, 240 (1st Dep't 1985) (denying injunctive relief because plaintiff's "proof rested solely on 'speculation and conjecture'"). Such evidence must be in "the record," *Golden*, 216 A.D.2d at 442, and must "be by affidavit and other competent proof, with evidentiary detail," *Faberge*, 109 A.D.2d at 240. "If key facts are in dispute, the relief will be denied." *Id.* For example, in *Eljay Jrs.,*

Inc. v. Rahda Exports, 99 A.D.2d 408, 409 (1st Dep't 1984), the plaintiff sought a preliminary injunction against fraud committed by certain international banks. Although the plaintiff attempted to prove the "banks met with the shippers," a former agent of plaintiff "refused to sign an affidavit attesting to matters discussed at the meeting." *Id.* The court therefore denied the injunction, holding the proof's insufficiency made it "unnecessary" to conduct "any inquiry into the possible harm plaintiff would suffer if the demands for payment [were] honored." *Id.*

Here, Massa's brief provides textbook examples of speculative and conclusory assertions of harm such as the sweeping statement that it is "generally understood in Upstate New York[] [that] the construction season really launches in the early spring" and "[d]efendant's articles loom out on the internet for a public owner to see, and deny Massa's bid as a non-responsible bidder." Massa Br. at 7. Indeed, these statements are striking for what they *omit*, which is the absence of any affirmative statement that it will suffer any business loss, and of what size, and for what duration, due to articles that have been posted since 2017. The only other statement that comes close to alleging harm is that the articles "harm [Massa]'s reputation in the eyes of the community in which Massa operates, and cause others to avoid [Massa]." *Id.* at 6-7. But Massa has given no examples of actual business opportunities lost due to *The Geneva Believer*'s articles that have been posted for years—evidence that should be easy to come by were it true. Such threadbare allegations are insufficient to demonstrate irreparable harm.

C. The balance of equities weighs against injunctive relief.

Instead of favoring Massa, the balance of equities favors *The Geneva Believer*. To succeed on a motion for temporary injunctive relief, a movant must establish, "through the tender of evidentiary proof," that "the harm to [the movant] from denial of the injunction as against the harm to defendant from granting it" tips the balance of equities in the movant's favor. *See Delphi*, 163 A.D.3d 1441 (citation omitted). An equitable remedy that functions as a prior restraint on speech is "strongly

disfavored" and "[p]rior restraints are not permissible . . . merely to enjoin the publication of libel." *Rosenberg*, 290 A.D.2d at 239 (citing *Ramos*, 257 A.D.2d at 492). Accordingly, a plaintiff seeking injunctive relief in a defamation case must demonstrate "extraordinary circumstances" to justify such a restraint. *Rombom v. Weberman*, 309 A.D.2d 844, 845 (2d Dep't 2003) ("[A]bsent extraordinary circumstances, injunctive relief should not be issued in defamation cases"). Such extraordinary circumstances can only be shown if "the objectionable speech is part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose,'" *see Rosenberg*, 290 A.D.2d at 239 (quoting *Trojan Elec. & Mach. Co. v. Heusinger*, 162 A.D.2d 859, 860 (3d Dep't 2002)), or where the equitable "restraint becomes essential to the preservation of a business or other property rights threatened by tortious conduct in which the words are merely an instrument of and incidental to the conduct," *Trojan Elec.*, 162 A.D.2d at 860. *See also LoPresti v. Florio*, 899 N.Y.S.2d 10, 11 (1st Dep't 2010) (ruling that injunctive relief was properly denied because there was no evidence of a "sustained campaign to interfere with plaintiff's business that would justify a prior restraint on speech").

For example, in *Rombom v. Weberman*, a jury found that the defendant made several defamatory statements about the plaintiff, including that he had "kidnapped people" and that he "was confined to a mental institution during much of his youth because he was a dangerous psychopath." No. 1378/00, 2002 WL 1461890, *1-2 (Sup. Ct. 2002). Following a jury verdict holding defendants liable for defamation, the trial court granted a permanent injunction "directing defendants to remove any and all published statements about plaintiffs [found by the jury to be libelous] . . . from their web sites . . . and from all mirror cites [sic] . . . and prohibiting defendants from publishing any statements about plaintiffs [found to be libelous]." *Id.* at *13. Despite the trial court stating that "the continued presence of the defamatory statements on defendants' web sites will . . . render much of the judgment academic," *id.* at *12, the Second Department made clear that such considerations are insufficient to justify injunctive relief. The appellate court reiterated that "[a]bsent extraordinary circumstances,

injunctive relief should not be issued in defamation cases" and concluded that no such circumstances were present in that case. *See Rombom*, 766 N.Y.S.2d at 89.

Here, the requested injunctive relief will function as a prior restraint by forcing *The Geneva Believer* to retract statements and refrain from speech before such speech is found to be defamatory. Accordingly, Massa's request for temporary injunctive relief should be denied because Massa has not met its burden in showing that extraordinary circumstances justify injunctive relief. Massa has not shown, nor can it, that *The Geneva Believer* published the articles at issue with a "fraudulent or unlawful purpose" or that the publications were merely "an instrument of and incidental to tortious conduct." *See Trojan Elec.*, 162 A.D.2d at 860.

Moreover, *The Geneva Believer* will face irreparable harm if an injunction is issued in this case. It is well established that a deprivation of the right to free speech—even if only for "minimal periods of time"—is "unquestionable[] . . . irreparable injury." *Elrod*, 427 U.S. at 373; *Time Square Books, Inc. v. City of Rochester*, 645 N.Y.S.2d 951, 958 (4th Dep't 1996) (same); *Pentagon Papers*, 403 U.S. at 715 (Black, J., concurring) ("[E]very moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."). And unlike Massa's alleged economic loss—a loss fully compensable through money damages—the damages affiliated with the censorship of speech are immeasurable and incapable of being fully remedied through money damages. Considering the harm to Mr. Meaney's constitutional rights if this court were to grant injunctive relief, the balance of equities clearly weigh against an injunction.

CONCLUSION

For the foregoing reasons, this Court should deny Massa's request for an injuction or for any order that would require Mr. Meaney and *The Geneva Believer* to take down the articles challenged by Massa.

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