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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

RALPH SASSON, Plaintiff-Appellant, v. RYAN BRAUN, ONESIMO BALELO and CREATIVE ARTISTS AGENCY, LLC., Defendants-Respondents, DOES 1-50 Inclusive, Defendant	Appeal No: 2014AP001707 Circuit Court Case No.: 13-CV-007014 **PLAINTIFF-APPELLANT'S REPLY BRIEF**

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INTRODUCTION

While Braun does not take issue with the questions presented in Sasson's initial brief, CAA believes that the only issue this Court should address is whether the lower court misused its discretion in issuing case ending sanctions against Sasson. Given that, in order to address Sasson's constitutional arguments, Respondents would be required to occupy indefensible terrain, CAA's belief that this Court should ignore the violations of Sasson's constitutional rights comes as no surprise.

For Sasson to engage in clarifying and unbraiding each of Respondents' deceptive factual recitations, as well as their misconceptions/misstatements of law, would be folly. Thus, Sasson concentrates his fire at the most important issues.

ARGUMENT

I. SASSON CANNOT BE JUDICIALLY ESTOPPED FROM ASSERTING A CONSTITUTIONAL CHALLENGE TO THE JAN.29 ORDER

Respondents argue that Sasson should be judicially estopped from raising any arguments, constitutional or otherwise, related to the Jan.29 Order's validity or applicability because Sasson waived his First and Fourteenth Amendments rights. Respondents also believe valid stipulations sealing Sasson and Balelo's deposition were in effect. Respondents' arguments are devoid of merit.

A. Respondents Fail to Demonstrate How the Jan.29 Order Comported With Due Process

Respondents' due process arguments are undeveloped, misguided, and merely consist of the conclusory assertion that Sasson received "all of the process that was due under the circumstances."[1] (Braun-50-51; *see also*, CAA-48-49) Respondents completely omit any explanation of how or why, given the massive fundamental freedoms at stake, Sasson received meaningful notice and opportunity to be heard. Instead, Respondents simply argue that the notice element of due process was satisfied because "[Sasson] admits he received the notice of motion." (CAA-48; Braun-50) This argument fails to address that Sasson was required to receive *meaningful* notice. *See, e.g., State v. Nordness*, 128 Wis.2d 15, 34, 381 N.W.2d 300 (1986) (Procedural due process requires "notice and an opportunity to be heard at a meaningful time and in a meaningful manner.") Respondents' failure to address the crucial "meaningful" aspect of notice operates as a concession to Sasson's argument that the Jan.29 Order was instituted in violation of due process. *See, e.g.,* S*chlieper v. DNR*, 188 Wis.2d 318, 322, 525

[1] Respondents' conclusory due process arguments are susceptible to this Court's long-standing custom of refusing to address amorphous and insufficiently developed arguments which involve complex constitutional issues. *See, e.g., Cemetery Servs., Inc. v. Department of Regulation & Licensing*, 221 Wis.2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998)

N.W.2d 99 (Ct. App. 1994) ("[P]ropositions of appellants are taken as confessed which respondents do not undertake to refute.")

Respondents' also advance the proposition that Sasson's "attendance" (CAA-48) and "active[] participat[ion] in the hearing" (Braun-50) constituted waiver. Respondents have their legal principles confused. In reality, Sasson would have waived his rights by failing to attend the hearing; not the other way around. *See, e.g.*, *In re Ambac Assurance Corp*., 2012 WI 22, ¶36, 339 Wis.2d 48, 810 N.W.2d 450 (party waives rights when it could have participated in a court proceeding but chose not to.)

Finally, Sasson's failure to object to being denied an opportunity to submit a reply brief to CAA's Jan.27 motion (CAA 48-49; Braun-50) cannot constitute waiver of due process because constitutional rights cannot be waived by mere failure to object. *See, State v. Saunders*, 2011 WI App 156, ¶29 fn.5, 338 Wis.2d 160, 807 N.W.2d 679. Based on the foregoing, Respondents' arguments fail to demonstrate how the Jan.29 Order's institution comported with due process or that Sasson waived his rights to due process.

B. Because the Jan.29 Order Was Instituted in Violation of Due Process, It Cannot Be Validated by Consent, Wavier, or Estoppel

It is well-settled that a judgment or order is void if the court denies a party due process of law. *Neylan v. Vorwald*, 124 Wis.2d

85, 95, 368 N.W.2d 648 (1985). Of particular importance is that not only is the order void, but it is void *ab initio* and "should be treated as legally ineffective." (*Id*. at 99); *see also, Ekern v. McGovern*, 154 Wis. 157, 276, 142 N.W. 595 (1913) ("It would be a reproach to the law if courts were so infirm as to be obliged to treat it as valid, or even voidable.") Thus, when an order or judgment is instituted in violation of a party's due process, it is considered void at its inception and "[a] void judgment *cannot be validated by consent, ratification, waiver, or estoppel*."[2] *Neylan*, 124 Wis.2d at 97 (emphasis added)

The law in Wisconsin is that "The judicial act is complete when the order is announced from the bench". *In re Estate of Popp*, 82 Wis.2d 755, 762, 264 N.W.2d 565 (1978). Prior to Sasson's statement that he had "no problem" with the court's ruling (R.240, 35:1-2; A-App.201), the court stated that "The order is being signed as of this date" (R.240, 32:21-22; A-App.198) and "It's now an order of the Court" (R.240, 34:4-6; A-App.200). Therefore,

[2] Braun cites to *Wengerd v. Rinehart* in arguing that "Due process objections can be waived by subsequent acts." (Braun-51) *Wengerd* is distinguishable from the case at bar in that the Wengerds waived their rights by waiting 3 years to vacate the order (failing to satisfy the "reasonable time" requirement under §806.07) and because, prior to filing a vacate motion on due process grounds, they "fil[ed] at least two other motions which indirectly attacked those orders on numerous other grounds." *Wengerd v. Rinehart*, 114 Wis.2d 575, 588, 338 N.W.2d 861 (Ct. App. 1983)

Sasson's statement that he had "no problem" with the court's ruling, which occurred subsequent to the order's issuance in violation of his due process, cannot serve as waiver because an order is void if the court denies a party due process of law, *Neylan,* 124 Wis.2d at 95, and "A void judgment cannot be validated by consent, ratification, waiver, or estoppel." (*Id.*, 97) Thus, any purported waiver or consent subsequent to the void order's "institution" would be a legal impossibility.[3]

C. If the Trial Court Relied on Sasson's Legal Conclusion/Opinion at his Deposition Concerning the Applicability of the Jan.29 Order, Such Reliance Would Be in Error

Similar to the interpretation and application of a statute, the interpretation and application of a court order is a question of law. *See, e.g., Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶14, 312 Wis.2d 1, 754 N.W.2d 439.

CAA's brief cites to the following exchange at Sasson's deposition as having been made under oath, thereby binding him to this position in perpetuity:

> MR. KRAVIT: So the other thing I would say from this morning is that all the lawyers believe that the testimony being

[3] A "voluntary and intentional relinquishment of a known right" and "intent to waive is regarded as an essential element of waiver." *Gonzalez v. City of Franklin*, 137 Wis.2d 109, 128-129, 403 N.W.2d 747 (1987). In the instant case, Sasson never intended to waive any rights because he was unaware that his right to due process was violated or that the Jan.29 Order operated as a prior restraint. (*See*, R.250, 41:18-45:6; A-Rep-App.101-106)

> taken in this case is subject to the same seal order as the judge entered with respect to filings. Do you agree with that?
>
> MR. SASSON: Right.
>
> MR. KRAVIT: So the transcript can't be used for anything until or unless the parties agree or the judge approves. Okay? Do you agree?
>
> MR. SASSON: Okay.

(CAA-9)

Sasson's foregoing statements, which could objectively be viewed as either Sasson's acknowledgment of opposing counsel's beliefs or Sasson's own legal opinion/conclusion, were statements which could not have been made under oath because "[p]erjury cannot be assigned upon immaterial statements. Nor upon a legal conclusion." *State v. Lloyd*, 77 Wis. 630, 631, 46 N.W. 898 (1890) Consequently, no weight or deference should be afforded to Sasson's acknowledgement of opposing counsel's beliefs concerning their interpretation of the seal order because the applicability and interpretation of the seal order related to a question of law/legal conclusion. *See, e.g., Sands*, at ¶14; *see also, United States v. Endo*, 635 F.2d 321, 323 (4th Cir. 1980) (Opinions and legal conclusions are not subject to perjury convictions).

In light of the foregoing, the court would have committed judicial error and misused its discretion in affording any weight to

these statements – which, under the law, were actually legal conclusions – made during Sasson's deposition. The Jan.29 Order was instituted pursuant to Wis. Stat. §805.03/802.05; not §804.01. Thus, the order was inapplicable to discovery. (R.62; A-App.202) Sasson's acknowledgment/agreement with opposing counsel's incorrect opinions or beliefs concerning the applicability of the Jan.29 Order does not somehow render what is immutably false, to be true. By way of example, if Sasson had agreed with opposing counsel's incorrect belief that the First Amendment allowed people to scream "fire" in a crowded theatre, Sasson's agreement would not change the fact that these beliefs are incorrect. Accordingly, any reliance the court may have placed on Sasson's opinion-based legal conclusions at his out-of-court deposition would be unreasonable. Sasson's statements, absent a valid stipulation, are of no consequence.

D. The Trial Court Never Sealed the Balelo Deposition

It is an axiomatic principle of judicial administration that a judicial act is considered complete "when the order is announced from the bench." *State ex rel. Hildebrand v. Kegu*, 59 Wis.2d 215, 216, 207 N.W.2d 658 (1973); *see also*, *Popp*, 82 Wis.2d at 772 (an order must "be made with due regard to certain formalities such as pronouncement in open court.") It is indisputable that Balelo's

deposition was conducted in the chambers of Judge Paul Van Grunsven ("Van Grunsven"). (R.170, 6). At the outset of the deposition, Van Grunsven stated that "The Court *will order* the deposition transcript sealed." (*Ibid*.) (emphasis added) Van Grunsven's use of the word "will" indicates the limitations of his powers while in chambers and that any oral order made therein would be legally ineffective because orders of the court must be "announced from the bench." *See, e.g., Hildebrand*, 59 Wis.2d at 216. Additionally, had the court truly intended to seal the deposition, it would have exercised its power pursuant to Wis. Stat. §804.01(6), and ordered the original transcript to be filed under seal with the court. *See, e.g., State ex rel. Mitsubishi Heavy Indus. Am., Inc. v. Milwaukee Circuit Court*, 2000 WI 16, ¶38, 233 Wis.2d 1, 605 N.W.2d 868 (Abrahamson, C.J., concurring) ("[T]he fact that the depositions are now retained by parties pursuant to Wis. Stat. §804.01(6) does not change the circuit court's control over the depositions and the circuit court's power to order them filed in court.")

Based on the foregoing, the court never ordered the Balelo transcript sealed. Additionally, even when assuming that Van Grunsven's statements during the Balelo deposition were intended to operate as an effective order, the order would be invalid because

Van Grunsven failed to pronounce the order in open court. *See, e.g.*, *Popp*, 82 Wis.2d at 772.

E. It Would Be Unreasonable to Extend the Jan.29 Order to Discovery on the Basis of Sasson's Statements at the Balelo Deposition

According to Braun, Sasson "caused the Circuit Court and the parties to believe that the Balelo deposition would be sealed and maintained as confidential." (Braun-47). As discussed above, the court never ordered the Balelo deposition sealed. But assuming that the court had ordered the deposition sealed pursuant to the terms of the Jan.29 Order, the court's actions would constitute a misuse of discretion.

As a point of emphasis, the Jan.29 Order required that Sasson's filings shall not be made public in any respect "*until or unless agreed by all counsel for the defendants or further order of this Court*." (R.62, ¶4; A-App.204) (emphasis added) In other words, the documents subject to the seal's restrictions were to remain under seal in perpetuity until or unless otherwise agreed by Respondents' counsel or the court. Sasson's statements and offer to stipulate sealing the Balelo deposition, however, were markedly distinct from the foregoing requirements. The terms of Sasson's stipulation were that the deposition would remain under seal "*pending review of the transcript*" (R.170, 6) (emphasis added), but

once the transcript was reviewed and the errata sheet was signed, the transcript would no longer be sealed.[4] At the May 6, 2014 hearing (one day prior to Sasson contacting Prouty) the court went on the record acknowledging receipt of Balelo's errata sheet. (R.245, 57:15-19; A-Rep-App.114) Thus, assuming a valid stipulation existed, once Balelo signed his errata sheet, the stipulation sealing the deposition would have expired.

Accordingly, even if the court did extend the Jan.29 seal order to cover the Balelo deposition on the basis of Sasson's offer to stipulate, such actions would be unreasonable and constitute a misuse of discretion because Sasson's statements clearly evince an offer to stipulate that the deposition remain under seal pending review of the transcript; not until or unless all counsel for defendants agree. Importantly, Attorney Kravit never agreed to Sasson's offer.

[4] Sasson's use of the term "confidential" (R.170, 6) was intended to convey that the same manner of confidentiality which attached to documents sealed under the Jan.29 Order would, pending review of the transcript, also apply to the deposition. "Confidential" was intended to comport with its generally understood usage within the context of seal orders, *to wit*, preventing public dissemination of the sealed documents. It was unreasonable for the court to ascribe Sasson's use of "confidential" to prevent verbal disclosure because it wasn't until June 11, 2014 when Sasson became aware of the court's intention to utilize the seal as a prior restraint.

F. No Enforceable Stipulation Existed Which Sealed the Sasson or Balelo Deposition Pursuant to the Terms of the Jan.29 Order

Wisconsin recognizes two types of stipulations: those which are procedural in nature and those which are contractual. *See, State v. Aldazabal*, 146 Wis.2d 267, 269, 430 N.W.2d 614 (Ct. App. 1988). The requirements of §807.05 have nothing to do with in-court procedural stipulations or judicial admissions which dispense with an element of proof. (*Ibid.*) Additionally, procedural stipulations "are always understood to have reference to the trial then pending, and not as stipulations which shall bind at any future trial." *Tesky v. Tesky*, 110 Wis.2d 205, 211, 327 N.W.2d 706 (1983).

CAA contends Sasson is living in a "fantasy world" because even if Balelo's deposition wasn't ordered sealed, an enforceable procedural stipulation would have existed because procedural stipulations are not subject to the requirements of §807.05. (*See*, CAA-31, fn. 3) CAA misunderstands the law as any stipulation which sealed either Sasson or Balelo's deposition subject to the terms of the Jan.29 Order would have been contractual, not procedural.

First, the stipulations would have been out-of-court stipulations – both in terms of where the stipulation would have been consummated and where the duties of the stipulation would have

been imposed. Second, any stipulation between the parties which would have sealed the depositions pursuant to the terms of the Jan.29 Order would have been subject to the requirements of §807.05 because the Jan.29 Order is explicit in maintaining documents under seal "*until or unless agreed by all counsel for the defendants or further order of this Court*." (R.62, ¶4) (emphasis added) Thus, any stipulation sealing documents pursuant to the terms and conditions of the Jan.29 Order would, unless otherwise agreed, remain under seal indefinitely. Such a stipulation would be contractual in nature and subject to the requirements of §807.05 because its vitality had the potential of enduring past the context of the instant litigation. *See, e.g., Tesky*, 110 Wis.2d at 211-12.

With respect to Sasson's deposition, the terms of Kravit's purported offer to stipulate differed from the Jan.29 Order in that, instead of the documents remaining under seal "until or unless agreed by all counsel for defendants", the offer stated that "the transcript can't be used for anything until or unless the parties agree or the judge approves." (CAA-9) Again, the stipulation subjected the deposition to remaining under seal in perpetuity, thereby rendering the stipulation contractual. However, even if this stipulation was procedural in nature – which it wasn't – the stipulation was breached by Attorney Barton one day after Sasson's

deposition concluded when Barton used portions of Sasson's deposition in a reply to Sasson's motions for commission. (R.71, 4-5; A-Rep-App.116-118) Barton's conduct violated the term requiring that "the transcript can't be used for anything until or unless the parties agree". Thus, had a stipulation sealing Sasson's deposition actually existed, Barton's conduct would have voided it.

II. RESPONDENTS' ARGUMENT THAT THE JAN.29 ORDER WAS NEITHER A PRIOR RESTRAINT NOR OVERBROAD LACKS MERIT

In his brief-in-chief, Sasson maintained that the trial court committed judicial error by instituting a prior restraint which lacked good cause, was overbroad, and was not the least restrictive means. Respondents fail to assert any arguments proving otherwise.

A. Respondents' Argument that the Jan.29 Order Was "Appropriate" Relies On Facts Which Are Not In the Record

Respondents argue that Sasson's First Amendment rights were not violated because "a protective order sealing certain discovery materials was appropriate." (CAA-46; *see also*, Braun 40-41). This argument improperly relies on the false premise that a protective order sealing discovery even existed. The record demonstrates that no protective order sealing discovery was ever issued and all arguments predicated on this false premise merit no further discussion.

B. The Jan.29 Order Was an Overbroad Prior Restraint

Respondents argue that the Jan.29 Order was not a prior restraint because "all hearings were open to the public" and the order "did not prohibit 'all commentary' on Sasson's filings". (Braun-42) These arguments lack any factual or legal support.

First, the issuance of a gag order does not preclude the court from holding open hearings. In fact, gag orders have been issued on many occasions wherein, like the case at bar, "[t]he gag order did not apply to the media or the defendants themselves." *United States v. McGregor*, 838 F. Supp.2d 1256, 1262 (M.D. Ala. 2012).

Second, a gag order or prior restraint is "[a]n order which prohibits the publication or broadcast of particular information or commentary". *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) Respondents contend that no prior restraint existed because Sasson's email to Prouty "did not violate any orders in and of itself." (CAA-32) Respondents' position is unambiguously contradicted by the June 11 Order ("Dismissal Order") which stated that "The seal order would be virtually useless if it did not prevent the parties from verbally disclosing the confidential information contained in the sealed record" (R.170, 6) and therefore "Sasson's e-mail to Prouty demonstrates his disregard for the existing seal order…" (*Ibid.*)

Because the Jan.29 Order was intended to prevent Sasson "from verbally disclosing" the contents of documents which were purportedly under seal, the order operated as a prior restraint on his pure speech. Importantly, even assuming that the order covered both Sasson's filings and discovery, it still would be facially invalid because preventing Sasson's filings from being made public "in any respect" would have had the effect of chilling innocuous, constitutionally protected speech. *See, e.g., Bachowski v. Salamone*, 139 Wis.2d 397, 411, 407 N.W.2d 533 (1987).

III. RESPONDENTS' POSITION THAT THE COURT ORDERED SASSON TO PRODUCE DOCUMENTS NOT IN HIS POSSESSION PARADOXICALLY EVINCES THE COURT'S MISUSE OF DISCRETION

The Dismissal Order states that "Sasson was expressly ordered by this Court to produce evidence" of publication underlying his libel claim against Braun. (R.170, 14) As pointed out in Sasson's brief-in-chief, no such "express order" existed and Respondents' briefs do nothing to prove otherwise. According to CAA, however, the court's order requiring Sasson to provide "meaningful responses" translates into ordering production of the libelous documents. (CAA-36)

It is well-settled that "A party may serve on any other party a request within the scope of s. 804.01(2): a) to produce…items in

the responding party's possession custody, or control." Wis. Stat. §804.09(1); *see also, Schlesinger v. Ellinger*, 134 Wis. 397, 400-401, 114 N.W. 825 (1908) (§804.09 "only authorizes permission of one party to an action to inspect and take copies of…documents in the possession or under the control of the adverse party…Indeed, no authority would seem to be needed on the question. The statute is plain.") However, a party must make diligent efforts to obtain the items before asserting he does not possess them. *See, Domanus v. Lewicki*, 742 F.3d 290, 301 (7th Cir. Ill. 2014) [5] But if a party does not possess such items, they cannot be sanctioned for failing to produce documents they do not have. (*Ibid*.)

In this case, once Sasson made diligent efforts to obtain proof of publication by serving discovery, filing a motion to compel, and even asserting the theory of self-compelled publication, Sasson's failure to obtain proof of publication was not sanctionable conduct and sanctioning Sasson for failing to produce materials which were not in his possession, custody, or control would constitute a misuse of discretion – especially since Sasson had not been afforded a reasonable opportunity to engage in discovery.

[5] Sasson's 2nd Amended Discovery Responses objected to the requests for these documents on the grounds that they were "premature" and that "a diligent search and reasonable inquiry have been made in an effort to comply with this demand. The demand requests documents that are not in the possession, custody or control of Plaintiff." (R.134, 16-22; A-Rep-App.126-132)

IV. SASSON NEVER REPEATEDLY PROPOUNDED HARASSING AND IRRELEVANT DISCOVERY

The record demonstrates that the court never properly ruled on the relevance of Sasson's written discovery. Moreover, Sasson's motions for commission, which Respondents categorize as demonstrating that Sasson *repeatedly* filed "irrelevant and harassing discovery requests" (Braun 36-38) were never found to be irrelevant.

First, evidentiary determinations are within the trial court's broad discretion. *State v. Lindh*, 161 Wis.2d 324, 348, 468 N.W.2d 168 (1991). The criterion of relevancy is whether the evidence *sought to be introduced* would shed any light on the subject of inquiry. (*Ibid.*) (emphasis added)

In this case, Sasson never sought to introduce Respondents' written discovery responses into evidence and Respondents never moved for a protective order to avoid answering these requests. Thus, no proffer relating to the relevancy of Sasson's written discovery requests was ever made. However, even if some of Sasson's initial discovery requests sought irrelevant information, these requests were made at the very outset of the case and were intended to obtain what Sasson believes to be relevant evidence.

After these initial requests, however, none of Sasson's further discovery requests can be described as irrelevant.

Citing to the Dismissal Order, Braun argues that the court ruled Sasson's motions for commissions for Bosch, Albir, and Crafton "had no bearing on his claims; it was merely an attempt to 'seek irrelevant and embarrassing information about the defendants through discovery.'" (Braun 37-38) The court's position in the Dismissal Order, however, is markedly different than its position during the February 19, 2014 hearing wherein it expressed its willingness to revisit the issue in the future.

> THE COURT: I've reviewed everything and as I said I find the defendants' arguments on this issue and on this record to be more persuasive.
>
> MR. SASSON: If there is, though, an issue in the future, Your Honor, then this may change, this isn't like a with prejudice kind of –
>
> THE COURT: No, no, no, no, I'm saying on this record I don't see the good cause for allowing these depositions to go forward, okay…if you're going to come back and ask it again, you better have some pretty damn good reasons for it.

(R.241, 32:18-33:7; A-Rep-App.120-121)

Thus, Sasson did not "repeatedly" propound harassing and irrelevant discovery and the court explicitly stated that it would be receptive to revisiting Sasson's motions to take out-of-state

depositions in the future.[6] Accordingly, Respondents' have no basis on which to predicate their argument that Sasson "repeatedly" propounded irrelevant discovery in bad faith.

V. THE RECORD CONTRADICTS RESPONDENTS' ARGUMENT THAT SASSON'S PRIVILEGE OBJECTIONS WERE UTILIZED FOR THE PURPOSE OF WITHOLDING EVIDENCE

Respondents argue that Sasson's attorney-client objections were improper because "they cannot be used to withhold evidence substantiating Sasson's claims" (Braun-32) and "Sasson as a nonlawyer and pro se litigant, had no legitimate basis to assert the attorney-client privilege". (CAA-39)

As a threshold issue, Sasson set forth his legitimate basis for asserting the objection of attorney-client privilege in his brief-in-chief. (Sasson App. Brf. 35-37) With respect to the contention that Sasson utilized privilege objections to withhold evidence, such contentions demonstrate Respondents' failure to acknowledge the hollow nature of the objections – which were lodged solely for the sake of posterity.

[6] Prior to the Dismissal Order's issuance, Braun was the only party who was definitively found to have propounded harassing/irrelevant discovery when he filed two separate motions to take the depositions of Sasson's former girlfriends. At a March 3 hearing the court stated "This is not, for any party, going to be a fishing expedition, as to why I question the need for the depositions of the girlfriends and former girlfriends." (R.242, 24:14-17; A-Rep-App.134)

To be sure, the language of Sasson's discovery responses clearly demonstrates that he did not claim to withhold any documents on the grounds of privilege.

> "Plaintiff objects to Production Request No. 1 *to the extent* that it seeks materials protected by the attorney-client and/or work product privileges…Subject to and without waiving these objections, Plaintiff *does not believe he has any such privileged documents in his possession which are responsive to this request* and…*he will fully comply with Defendant's demand…and provide Defendant with all documents responsive to this request which are in his possession at this time*."

(R.134, 16-22; A-Rep-App.126-132) (emphasis added)

Based on the foregoing, any argument that Sasson utilized privilege objections for the purpose of withholding evidence is clearly without merit.

VI. THE TRIAL COURT'S INFERENCE THAT SASSON INTENDED TO DISPARAGE BALELO WAS EXPRSSLY PREDICATED ON WHAT IT BELIEVED TO BE THE IRRELEVANT NATURE OF HIS INQUIRY

CAA contends that Sasson "misses the point" in his argument that his email to Prouty was entirely relevant. CAA believes that it was not the relevance (or lack thereof) of Sasson's inquiry which prompted the court to determine that Sasson had misused the legal process, but rather, "it was the ***substance*** of Sasson's communication which was problematic." (CAA-31-32) (emphasis in original) CAA is incorrect.

Contrary to CAA's position, the Dismissal Order made explicit that it was Sasson's inquiry's lack of relevance which allowed the court to infer that Sasson's intention was to disparage Balelo.

> "Whether or not Balelo engaged in misconduct has nothing to do with Sasson or the claims remaining in this action…There does not appear to be any legitimate purpose underlying Sasson's email to Prouty. Given Sasson's behavior throughout the case, the inference can easily be drawn that Sasson intended to disparage Balelo by making allegations of misconduct and dishonesty."

(R.170, 7)

In his brief-in-chief, Sasson comprehensively explained the relevance of his email and why Balelo's misconduct was directly at issue.[7] Respondents have not countered this argument. Therefore, Sasson's establishment of relevant and legitimate reasons underlying his inquiry to Prouty renders the court's inference unreasonable. CAA's attempt to rewrite the Dismissal Order is simply another example of its penchant for unreasonable advocacy and intention to avoid addressing the indefensible.

Additionally, CAA's position that it was the substance of Sasson's email which was problematic is further belied by the court's description of the email's contents as a "misleading characterization of Balelo's testimony". (R.170, 6) Importantly, the

[7] CAA's contention that Sasson's relevancy argument had "no legal or factual support" (CAA-31) is demonstrative of either its failure to read Sasson's brief or its intention to mislead this court. *See*, Sasson Brf. 37-40

court did not refer to the contents of the email as "false" or "untrue." This distinction is critical. False and untrue mean contrary to fact; "misleading", on the other hand, suggests something literally correct, but likely to direct the listener away from the truth.

The reality is that Sasson did not intend to mislead Prouty, nor was it his intention to sully Balelo's reputation. Importantly, had Balelo been telling the truth that Michael Weiner had, in fact, granted him permission to transmit to Sasson the confidential documents in question, then confirming the truth of Balelo's testimony would have only bolstered his credibility.

In sum, CAA is incorrect in its assessment that it was the substance of Sasson's email which was at issue. The court made it abundantly clear that it was the seeming lack of relevance which was the basis for its inference that Sasson intended to disparage Balelo.

VII. RESPONDENTS UTILIZE RHETORIC AND NOT FACTS OF RECORD TO SUPPORT THE ARGUMENT THAT SASSON ENGAGED IN UNPROFESSIONAL CONDUCT

Respondents argue that "[t]he record is replete" (CAA-40) with "innumerable instances of Sasson's unprofessionalism". (Braun-38) Despite the record purportedly being replete with innumerable instances of Sasson's unprofessionalism, Respondents can only point to the same two issues: "Sasson accus[ing] the

defendants of spoliating evidence" and a voicemail Sasson left for Attorney Barton on February 21, 2014 wherein Sasson jocularly referred to Barton as "cupcake."[8] (CAA-41; Braun-38) Respondents' inability to point to any other instances of Sasson's purported unprofessionalism – despite their contention that the record is "replete" with "innumerable examples" of such misconduct – is emblematic of Respondents' aversion to candor and tendency to substitute facts with exaggerated rhetoric.

Respondents do not and cannot cite to Sasson ever making any on-the-record allegations of spoliation. Indeed, Sasson's only allegations of spoliation were in his original responses to Braun's discovery requests, and in what was an out-of-court, private voicemail left for Barton on Feb.21, 2014. Importantly, it was Respondents, not Sasson, who introduced these communications into the record. During a May 6, 2014 hearing, Sasson raised his valid concerns arising out of Braun's obstructionist discovery responses and Braun's refusal to respond to a preservation letter sent to Braun's attorneys on three separate occasions. Given that "The sheer quantity of information, and the nature of electronic storage

[8] Sasson has taken full responsibility for his unprofessional voicemail and apologized to Attorney Barton. At the June 5, 2014 hearing, Sasson again acknowledged that "I've made some mistakes, as far as my communications with opposing counsel…" (R.246, 58:20-59:21; A-Rep-App.136-137)

systems, means that such information may be automatically deleted or modified without any intentional action by the information's owner" Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N.Ill. U. L. Rev. 79, 80 (2008), Sasson's concerns were well founded.

Yet, despite the well-founded nature of Sasson's concerns, the colloquy between Sasson and the court demonstrates the court's perception of Sasson's concern as being tantamount to accusations of spoliation. Sasson explicitly refuted the court's contention and stated that "The plaintiff is not making the allegation that that is the case…but my concerns haven't been alleviated as a result of Mr. Braun's failure to acknowledge that he would comply with Mr. Sasson's request [to preserve electronic evidence]." (R.245, 53:5-56:18; A-Rep-App.110-113) Based on the foregoing, Sasson voicing his concern related to potential destruction of electronically stored information cannot be deemed misconduct or tantamount to accusations of spoliation.

The reality is that Respondents are unable to point to another example of Sasson engaging in unprofessional conduct subsequent to the court's March 3, 2014 warning expressing its expectation that the parties engage with professionalism and civility and Respondents' failure in this regard is fatal to their argument.

VIII. SASSON DID NOT FILE FIRST AND ASK QUESTIONS LATER AND THE COURT MISUSED ITS DISCRETION IN STAYING DISCOVERY

Braun argues that Sasson engaged in "a file first and ask questions later approach to this litigation". (Braun-34, citing *Jandrt ex rel. Brueggman v. Jerome Foods*, Inc. 227 Wis. 2d 531, 568-69, 597 N.W.2d 744 (1999)). Braun's citation to *Jandrt* is contextually misrepresentative of its holding. *Jandrt* expressed that filing first and asking questions later was an improper tactic only when a cause of action's "required factual basis could be established without discovery." (*Id.* at 568) But when "a party [has] a reasonable basis in fact for each claim and that when, and only when, that factual basis cannot be established but for discovery, 'safe harbor' may be provided to help the party establish a factual basis." (*Id*. at 568-69)

In cases where facts or evidence proving liability are in the possession of the opposing party, a plaintiff is provided a safe harbor to file a lawsuit as long as they have a reasonable basis in fact for their claims. As stated in his brief-in-chief, Sasson pled libel on information and belief because the evidence of publication was in Braun's possession. Therefore, Sasson believed he would be a afforded a reasonable opportunity for discovery pursuant to §802.05(2)(c). Sasson's reasonable belief that the evidence of publication was in Braun's possession demonstrates that Sasson did

not file first and ask questions later. Instead Sasson was provided a "safe harbor" to file his claims and obtain the supporting evidence in discovery. If such was not the case, the court would have dismissed the libel claim from the outset.

Additionally, Sasson's contention that the court's stay on discovery obstructed his ability to obtain evidence supporting his libel claim is an accurate assessment of what transpired. To be sure, when a court's exercise of discretion implicates a party's constitutional rights, the court must balance those constitutional rights against the public policy in the prompt and efficient administration of justice. *See, e.g., State v. Echols*, 175 Wis. 2d 653, 680, 499 N.W.2d 631 (1993). A court erroneously exercises its discretion when it gives too much weight to one factor in making its determination. *See, Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998).

It is well-settled that "[P]retrial discovery is a fundamental due process right." *State v. Maday*, 179 Wis.2d 346, 354, 507 N.W.2d 365 (Ct. App. 1993). In this case, the court's decision to stay discovery on the basis of Respondents' legal expenses, even though the stay completely obliterated Sasson's due process right to pre-trial discovery, constituted a misuse of discretion. This stay was especially prejudicial given that, after the stay was issued, the court

erroneously concluded that Sasson "realized that discovery would not produce the necessary evidence of publication." (R.170, 14).

Simply put, Sasson's right to due process outweighed the negligible expenses imposed on Respondents during the discovery process. Because the court failed to properly include Sasson's due process rights in the calculus of whether to impose a stay on discovery, it placed too much weight on one factor – the Respondents' monetary expenses – and thereby misused its discretion. Under the circumstances, Sasson's right to discovery outweighed the monetary expenses imposed by the trial process on a man with a guaranteed $145,000,000 contract and a multi-billion dollar talent agency.

IX. THE AUGUST 11 ORDER IS APPEALABLE

Generally speaking, any order which denies a §806.07 motion is appealable as a matter of right. *See, e.g., Milwaukee Sewerage Comm'n v. DNR*, 104 Wis. 2d 182, 311 N.W.2d 677 (Ct. App. 1981).

Citing *Verhagan v. Gibbons*, 55 Wis.2d 21, 25, 197 N.W.2d 752 (1972), Respondents argue that Sasson's §806.07 motion for relief from judgment is not appealable because the only issues raised by the motion were disposed of by the original judgment or order. (CAA-50; Braun-52-53) Sasson's §806.07 motion for relief from

judgment raised constitutional arguments, as well as the court's mistakes of law and fact. Indeed, by Braun's own admission, the Dismissal Order never addressed Sasson's constitutional challenge to the seal order. (Braun-ix)

Alternatively, CAA argues that "If a decision on another point disposes of the appeal, the appellate court will not decide other issues raised." (CAA-49) Sasson's appeal from the Aug.11 Order, however, is predicated on the court's misuse of discretion by failing to consider the five interest of justice factors when denying his §806.07 motion for relief from judgment. (Sasson App. Brf. 44) Therefore, because the court was not required to consider the five interest of justice factors when issuing the Dismissal Order, the grounds of Sasson's appeal of the Aug.11 Order are not disposed of by this Court's consideration of his appeal from the Dismissal Order.

CONCLUSION

For the reasons set forth herein, Appellant Ralph Sasson respectfully requests that this Court reverse the trial court's Dismissal Order and Aug.11 Order denying his §806.07 motion for relief from judgment.

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Dated: January 30, 2015 By: _____

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §809.19(12)

I hereby certify that I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed on or after this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,993 words.

Dated: January 30, 2015

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

RALPH SASSON, an individual, Plaintiff-Appellant, v. RYAN BRAUN, ONESIMO BALELO and CREATIVE ARTISTS AGENCY, LLC., Defendants-Respondents, DOES 1-50 Inclusive, Defendant	Appeal No: 2014AP001707 Circuit Court Case No.: 13-CV-007014 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the following were dispatched by FedEx 3-day mail to the Wisconsin Court of Appeals on January 30, 2015. I further certify that copies of the following were dispatched by FedEx and electronic mail to Timothy Hansen, Esq., 316 N. Milwaukee St., Suite 200, Milwaukee, WI 53202 and Stephen Kravit, Esq., 825 N. Jefferson St. – Fifth Floor, Milwaukee, WI 53202, and by electronic mail to Jeremiah Reynolds, Esq., 808 Wilshire Blvd., 3rd Floor, Santa Monica, CA 90401 and on this 30th day of January, 2015.

1. Plaintiff-Appellant's Reply Brief and Supplemental Appendix to Reply Brief
2. Certificate of Service

Dated: January 30, 2015 By:_____

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