IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
4DCA CASE NO.: 4D14-4352
(L.T. CASE NO.: 14-276DV)

ALKIVIADES A. DAVID,

Appellant,

v.

JOHN TEXTOR,

Appellee.

APPELLEE'S ANSWER BRIEF

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PREFACE

Appellee appeals an Amended Order Granting Temporary Protective Injunction and Denying Motion to Dissolve Temporary Injunction ("Amended Order") entered on October 17, 2015.

Appellant/Respondent Alkiviades A. David will be referred to as "Mr. David."

Appellee/Petitioner John Textor will be referred to as "Mr. Textor."

Mr. David's Appendix will be referred to as "A: ____."

Mr. Textor's Appendix will be referred to as "Textor App. ___."

The Initial Brief will be referred to as "I.B. ___."

The transcript of the September 24, 2014 hearing will be cited as "A:__ (Tr. p. __)."

STATEMENT OF THE CASE AND FACTS

The Amended Order enjoins extortion and cyberstalking – not speech. A:00671-677. Mr. Textor, a Florida resident, is the Executive Chairman of Pulse Entertainment ("Pulse"), a company with offices in Florida. A:00058-059. Pulse is in the business of providing visual effects involving holographic images and animation, a new kind of visual experience that projects digital images that create the very realistic effect of a human being appearing in a location where they are not physically located. A:00059; A:00365. Mr. David owns and controls Hologram USA, Inc. ("Hologram USA"), which also produces holographic images and content. A:00069. Pulse and Hologram USA are in a dispute over the rights to the intellectual property that creates holographic images. A:00149.

Mr. David is a prolific user of Facebook, Twitter (226,000 followers), Instagram, and other social media outlets. A:00446. Mr. David also owns and controls various other media and entertainment industry news outlets that report on "celebrity" news and Hollywood gossip, including two captive outlets commonly known as FilmOn TV and tvmix.com. A:00063. (Unless otherwise indicated, the social media and entertainment outlets are the "Outlets.")

A. The Initial Extortion.

On the eve of the nationally televised Billboard Music Awards show, Hologram USA filed suit against Pulse in Nevada seeking to enjoin Pulse from

presenting a performance featuring the digitally animated, holographic-style image of Michael Jackson. A:00334. The court refused to enter the injunction, and the digital performance of a deceased pop icon was a music industry hit . A:00117-128.

On May 18, 2014, just prior to the performance, Mr. David sent Mr. Textor a text mandating the terms under which he and Hologram USA would drop the suit or Mr. David would "ruin" Mr. Textor. A:A:00002; A:00062. In material part, the text from Mr. David to Mr. Textor reads as follows:

> Leak to the press that you have reached a last minute agreement with **Alki David and Hologram USA** to let the show go on without acrimony.
>
> We are happy to say that we have reached a last minute deal with Hologram USA and CEO Alki David. This enables us to put on turn on the magic tonight and make every one happy
>
> After the show is done the announcer will also credit Hologram USA and Alki David.
>
> Afterwards you will also follow up with a lot of press around this issue.
>
> **Do this and I'll drop the suit. If you don't I will come after you** and because your lawyer lied in court based on your information,[1] the damages will be multiplied. **You will be ruined I promise you.**

(Emphasis added). A:00002-003; A:00062.

[1] Referring to a case brought in California.

When Mr. Textor did not accede to this demand, Mr. David thereafter individually and through his Outlets made good on his threats of ruination. *See* A:00059-063; A:00095-141. Inclusive in his campaign, Mr. David e-mailed Pulse's Board of Directors, including Rene Eichenberger, Vice-Chairman of Pulse, demanding Eichenberger's total disassociation with Mr. Textor, calling Mr. Textor a "lying, stealing criminal." A:00008. In that same e-mail, Mr. David also stated, "Please be advised that I understand a lot more information on Textor will be released soon which is far more enlightening than what is out there already." A:00008.

B. The Original Petition.

Subsequently, Mr. David escalated his campaign against Mr. Textor. Mr. David was quoted in an article posted on Entrepreneur.com on July 2, 2014, as saying he "would have killed [John Textor] if he could." A:00039; A:00125. It was at that point, on July 16, 2014, that Mr. Textor filed the verified Ex Parte Petition for Protection Pursuant to Florida Statutes Sections 784.046 and 784.0485 ("Original Petition"), seeking an *ex parte* temporary injunction against Mr. David's cyberstalking. A:00001-054.

Based on the allegations of the Original Petition, the trial court declined to enter an injunction, but set a hearing for September 9, 2014, stating, "an injunction may be entered after the hearing, depending on the findings made by the Court at

that time."[2] A:00055. The Order Setting Hearing also provided that the "Petitioner may amend or supplement the Petition at any time to state further reasons why a Temporary Injunction should be ordered which would be in effect until the hearing scheduled below" – referring to the September 9, 2014 hearing date. A:00055.

The campaign continued. In August, Mr. David posted a picture of Hitler and an obscene hand gesture on his Instagram account (the "Hitler Photo"), "tagging" the photo with the name "john_textor" over Hitler's mouth, at the same time apologizing to the neo-Nazis. Textor App. A-001. This tagging resulted in the Hitler Photo being sent to everyone that follows Mr. Textor on Instagram – making it available to no less than 58,842 followers of Mr. Textor and extending the potential exposure of the photo well beyond that number. A:00061.

Mr. David constantly referenced Mr. Textor on his Instagram and Twitter accounts, attributing fraud, theft, and similar conduct to him, as part of his crusade to force Mr. Textor to drop his lawsuit and cave in to Mr. David's demands. See A:00080-092. Mr. David has also "liked," forwarded, or "re-tweeted" these references to achieve the maximum embarrassment and humiliation of Mr. Textor. A:00061-063; A:00080-141.

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[2] "If the only ground for denial is no appearance of an immediate and present danger of stalking, the court shall set a full hearing on the petition for injunction with notice at the earliest possible time." § 784.0485(4)(b), Fla. Stat. (emphasis added.

On September 4, 2014, Mr. David again e-mailed Mr. Textor, furthering his extortion, threatening to expose "photographs, more lawsuits from begrudging ex-employees, illicit money transfers," unless Mr. Textor agreed to Mr. David's demands. A:00059-60; A:00073. In this threat he boasted, "**my madness drives systematic destruction of my opponent**" and gave Mr. Textor 24 hours to respond, concluding, "If not, the opportunity is gone and everything that I have predicted above will become a reality. This is not a threat but a friendly understanding." A:00073. He ended the e-mail with "**I hope for you and your family's sake** you are man enough to put an end to this now." A:00073. Further, unlike in the past, where Mr. David had redacted Mrs. Textor's image from photos used in his communications, Mr. David now included Mrs. Textor's photo in his negative articles by TVmix.com and his tweets. See A:00472.

C. The Renewed Petition and Order Granting Injunction.

The next day, September 5, 2014, Mr. Textor filed a Renewed Emergency Ex Parte Petition for Protection Pursuant to Florida Statutes Sections 784.046 and 784.0485 ("Renewed Petition"). A:00058-141. Based on these additional allegations and exhibits threatening both Mr. Textor and his family, combined with the incidents alleged in the Original Petition, on September 9, 2014 (the date the original hearing had been scheduled), the court entered the Order Granting Renewed Emergency Temporary Protective Injunction Pursuant to Florida Statutes

Sections 784.046 and 784.0485 ("Order Granting Injunction"). A:00142-147. In that order, the court also set a one-hour hearing for September 24, 2014, for the parties to appear and testify, "when the Court will consider whether the Court should issue a Final Judgment of Injunction for Protection against Repeat Violence." A:00142.

Immediately after the Order Granting Injunction was entered, Mr. David gave an interview to Martin County reporter Nicole Rodriguez. A:00441-442. That reporter quoted Mr. David in an article published in Martin County as stating, "It [the injunction] doesn't affect me at all in any way." A:00441. The reporter stated in the article, "David didn't deny communication between the two, but said he never attempted to threaten Textor. David said he will not remove his Internet posts about Textor." A:00441-442.

In another interview, Mr. David is quoted as saying "Textor chose the wrong obsessive, compulsive guy to mess with." A:00443. Shortly thereafter, Mr. David posted a picture of himself brandishing two semi-automatic pistols with the caption "Come at me bro."[3] A:00451; Textor App. B-004 and B-005.

[3] Although counsel has tried to characterize these as "plastic guns," federal law requires every toy gun to have a bright orange barrel marker, so that police officers can immediately tell if someone is pointing a toy gun at them. The picture shows no marker. It is also a federal crime to remove the marker. These guns, as well as the other guns used by Mr. David in photos are clearly not "plastic guns."

D. The Amendment to the Renewed Petition.

On September 15, 2014, Mr. David's counsel filed a motion to dissolve the injunction, under a limited appearance. A:00148-434. On September 22, 2014 Mr. Textor filed an amendment to the Renewed Petition ("Amendment to Renewed Petition"), in which Mr. Textor described in an affidavit more acts by Mr. David after September 9, 2014, notwithstanding the entry of the Order Granting Injunction that Mr. David had publicly acknowledged. A:00435-00476.

Mr. Textor also attached to his Amendment to Renewed Petition certified copies of two complaints of lawsuits in another jurisdiction. One suit described an assault and battery ordered by Mr. David on an ex-employee. A:00452-469, A:00456. The other suit described Mr. David flying into a rage and grabbing at least three different employees and violently throwing them, respectively, against a wall, against a desk, and into a plastic bin. A:00471.

In the Amendment to Renewed Petition, Mr. Textor also included a link to an internet post in which Mr. David gave a reporter's name and phone number out and told Mr. David's internet followers to call this reporter and issue death threats against him. A:00436. Mr. David subsequently wrote to the reporter: ". . . one day soon I will break your nose, you will sue me and I won't give a f—k." A:00436, A:00476. The reporter, Mr. Joe Mullin, also posted "Email from

@alkidavid to me just now: 'If I do see you, i probably will punch you in the face at least a couple of times, you lying prick.'" A:00476.

E. The Non-Evidentiary Hearing.

At this point in the progression of events, Mr. David omits mentioning a critical document to this Court. On September 23, 2014 the day before the scheduled evidentiary hearing, and in light of the lack of service on Mr. David and the various papers filed by the parties, the court supplemented its prior notice of hearing by entering an Order Regarding Case Management ("Case Management Order"). Textor App. C-006-007. The court stated:

> Since there is no service of process on the Respondent, there will be no hearing on September 24 to "consider whether the Court should issue a Final Judgment of Injunction." However, the allotted time will be used to consider the Respondent's motion to dissolve and the Petitioner's response to that motion. **This is a non-evidentiary hearing. No testimony will be taken.** Each party will be allowed 30 minutes to make oral arguments to supplement their written submissions."

Textor App. C-006 (emphasis added). The next day, at the beginning of the hearing, the court reiterated this point, stating, "I sent out an order late yesterday to clarify what we are doing today. The way I see it, this is an oral argument on legal motions only today, not an evidentiary hearing." A:00496.

At the hearing, counsel for Mr. David stated that he sought to dissolve the Order Granting Injunction on three grounds: (1) the pleading requirements of section 784.048, Florida Statutes, to establish personal jurisdiction over Mr. David

had not been met, (2) the pleading requirements of the cyberstalking statutes had not been met, and (3) the Order Granting Injunction was an impermissible prior restraint on speech. A:00498-99.

The court also permitted each counsel to submit a supplemental memorandum of law following the hearing. A:00546-47; A:00564-650; A:00651-670. Attached to Mr. Textor's Supplemental Memorandum was a four-page timeline of the events that were referenced in the Petitions, which is reproduced in Textor App.D-008-012. It clearly demonstrates the relationship of the threats and Mr. David's actions. It shows the buildup of events that culminated in the Order Granting Injunction and the Amended Order Granting Temporary Protective Injunction and Denying Motion to Dissolve Temporary Injunction ("Amended Order") entered on October 17. Textor App.D-008-012.

Importantly, in that Amended Order, the court set an evidentiary hearing for December 11, 2014, reserving three hours. A:00671. Before that evidentiary hearing could be held, however, Mr. David filed his Notice of Appeal and the proceedings were stayed at the request of Mr. David's counsel, pending the outcome of this appeal. A:00678, A:00682. Therefore, no evidentiary hearing has been held to date on either the personal jurisdiction issue or the facts underlying the petitions. Further, Mr. David has filed no affidavits. Thus, the Amended Order

and this appeal are based solely on the allegations of the *ex parte* petitions and their subsequent amendments.

SUMMARY OF ARGUMENT

Mr. David's behavior has been found to be cyberstalking, a criminal act, put Mr. Textor and his family in fear, caused emotional distress, and has no legitimate purpose other than to extort a settlement of lawsuits. Based upon Mr. David's actions and the materials before the court, the court properly entered an order of protection via an injunction.

Mr. David makes four arguments: (1) that the court does not have personal jurisdiction over David, (2) that there were no findings of fact that cyberstalking had occurred, (3) that the Amended Order is not sufficiently specific, and (4) that the Amended Order infringes Mr. David's First Amendment rights. None of these arguments can be sustained.

First, Mr. Textor has alleged numerous acts that establish Mr. David has committed a tort within the State of Florida to support the exercise of personal personal jurisdiction over Mr. David. The very nature of cyberstalking allows the defendant to harm a Florida resident from anywhere. Additionally, because Mr. Textor alleged sufficient facts to establish personal jurisdiction, the burden is shifted to Mr. David to show by affidavit why personal jurisdiction does not exist. Mr. David has filed no affidavits.

Furthermore, under *Venetian Salami*, the minimum contacts test for personal jurisdiction is not even triggered unless Mr. David contests personal jurisdiction by

affidavit. At that time, the court will have to hold an evidentiary hearing on the issue. Until then, Mr. Textor has established personal jurisdiction.

Second, the very nature of an ex parte injunction is to prevent further harm, and Mr. Textor pled sufficient facts in his verified Petitions for the trial court to enter an ex parte injunction against Mr. David. Having stopped the process midstream before an evidentiary hearing could be held, Mr. David cannot now complain that the court did not make the necessary factual findings. The only question currently before this Court is whether the pleadings stated a cause of action for cyberstalking and whether grounds existed based on the allegations in the verified pleadings for the entry of an ex parte injunction.

Third, the Amended Order contains sufficient specificity to advise Mr. David what conduct was not permitted: extortion and acts in furtherance of extortion conveyed over the internet. The court made a clear distinction between the criminal extortion and other activities having a legitimate purpose.

Fourth, as applied to the facts of this case, First Amendment arguments are inapposite. There is no First Amendment protection for illegal conduct. Cyberstalking and extortion constitute illegal conduct, and any speech in furtherance thereof is not protected.

Mr. David incorrectly starts from the premise that all speech is protected. He then tries to establish that unless there is a "true threat," the speech must be

protected by the First Amendment. But the established First Amendment tests constrain courts from prior restraint of legal speech. Cyberstalking and the "speech" that goes with it is not legal speech in the first place. In essence, Mr. David is saying that he can yell "Fire" in a crowded building, and unless he is holding a match, there is no "true threat" of fire, therefore the yell is protected speech. That is simply not the law of this land.

Mr. David is more clever than the average yeller and believes the law will protect his conduct if he carries out his threats via his Outlets. However, the law will not protect illegal conduct, whether carried out by a single person, at his direction or via his entities.

All of the elements supporting personal jurisdiction and a cause of action for an injunction against cyberstalking are alleged in the petition, and an ex parte injunction was warranted under the circumstances that were presented to the trial court in the verified pleadings. This case should now be remanded for an evidentiary hearing on those allegations, so the court can hear the witnesses, judge their credibility, and weigh the evidence.

STANDARD OF REVIEW

A motion to dismiss for lack of personal jurisdiction is a challenge to the legal sufficiency of the pleadings. Whether Mr. Textor pled sufficient facts to assert personal jurisdiction and thus shift the burden of contesting jurisdiction to Mr. David is reviewed *de novo*. *See Emerson v. Cole*, 847 So. 2d 606, 609 (Fla. 2d DCA 2003). Whether Mr. David stated a cause of action for an injunction against cyberstalking is also reviewed *de novo*. *Id.*

ARGUMENT

I. The court correctly exercised specific personal jurisdiction under the long-arm statute because Mr. David committed the tort of cyberstalking and directed his tortious actions into Florida at specific Florida residents.

A party may allege personal jurisdiction by pleading the basis for service in the language of the statute without supporting facts. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). Alternatively, a party may allege jurisdictional facts without referencing the long-arm statute to plead that the court has personal jurisdiction over the defendant. *Lester v. Arb*, 658 So. 2d 583, 584-85 (Fla. 3d DCA 1995). Here, as set forth below, Mr. Textor alleged the necessary jurisdictional facts in the Petitions to bring Mr. David within the court's jurisdictional ambit. Further, Mr. David filed no affidavits contesting jurisdiction, as required under *Venetian Salami*. 554 So. 2d at 502 (Fla. 1989).

Florida's long-arm statute provides that a non-resident submits himself to the jurisdiction of the Florida courts by, *inter alia*, doing any of the following acts:

> (1)(a)(2.) "Committing a tortious act within this state.
>
> * * *
>
> (1)(a)(6.) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
>
> a. The defendant was engaged in solicitation or service activities within this states; or

> b. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

§§ 48.193(1)(a)(2.), 48.193(1)(a)(6.)(a.), (b.), Fla. Stat.

As an initial matter, Mr. David erroneously combines sections 48.193(1)(a)(2.) and 48.193(1)(a)(6.) into one basis for personal jurisdiction by stating, "Specific jurisdiction may be established by a defendant's tortious act that causes injury to persons or property within Florida while engaged in solicitation or service activities in Florida," citing to two cases arising under (1)(a)(6.). I.B. 18. He then argues that unless Mr. David is engaged in solicitation or service activities, there can be no specific personal jurisdiction under these facts. That is simply not the law. Sections 48.193(1)(a)(6.)(a.), (b.), are largely directed at product liability claims. On the other hand, section 48.193(1)(a)(2.) requires only "Committing a tortious act within this state."

The court correctly ruled in the Amended Order that cyberstalking is a tortious act under section 48.193(1)(a)(2.).[4] Indeed, the cyberstalking statute itself creates the civil cause of action: "There is created a cause of action for an injunction for protection against stalking . . . the offense of stalking shall include the offense of cyberstalking." § 784.0485(1), Fla. Stat. Thus, Mr. Textor was only

[4] This section was previously numbered 48.193(1)(b) and is so cited in numerous cases as well as the Amended Order.

required to allege jurisdictional facts showing that Mr. David committed the tort of cyberstalking within Florida. The elements of cyberstalking are:

(1) engaging in a course of conduct
(2) to communicate or cause to be communicated
(3) words, images, or language by or through the use of electronic mail or electronic communication
(4) directed at a specific person
(5) causing substantial emotional distress
(6) with no legitimate purpose.

§ 784.048(1)(d), Fla. Stat.

A. Course of conduct.

A "course of conduct" is statutorily defined as "a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose that does not include "constitutionally protected activity such as picketing or other organized protests." § 784.048(1)(b), Fla. Stat.

The Renewed Petition alleges that Mr. David expressly directed numerous electronic communications at Mr. Textor and his family in Florida over a continuous period of several months. These communications plainly constitute a "course of conduct" that satisfies the statutory definition.

B. Pattern of conduct evidencing continuity of purpose.

The continuity of purpose of Mr. David's cyberstalking campaign was and is[5] to make good on his extortion threats, in an effort to force resolution of the

[5] Mr. David continues his acts to this day.

lawsuits "or else." He reiterates his extortion threat in an email to Mr. Textor's business associates, on June 7, 2014, wherein Mr. David demands that Mr. Textor's company "disassociate" from Mr. Textor. Mr. David again refers to his threat to continue with his acts of ruination, even referring to the large team that he has engaged to commit such acts. He refers to his campaign again in his final extortion, stating that he will only stop if his demands are met. The "continuity of purpose" is clear.

C. Electronic communications directed at a specific person in Florida also establish specific personal jurisdiction.

The communications that support the "directed at" element also support the exercise of personal jurisdiction. The Renewed Petition specifically alleges that Mr. David expressly directed numerous electronic communications in the form of emails, texts, tweets, Facebook posts, Instagram posts, and other internet posts and website postings at Mr. Textor and his family in Florida. Mr. David's acts were both "directed at" a Florida resident and made "into Florida."

"The determination of whether certain acts constitute communications into Florida is straightforward when the case concerns . . . electronic communications in the form of e-mails . . . because those communications are directed to reach a specific recipient in a specific forum." *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1208 (Fla. 2010); *see also Price v. Kronenberger,* 24 So. 3d 775, 776 (Fla. 5th DCA 2009) (holding that the allegation that a nonresident committed a

tortious act directed into Florida by emailing individuals living in Florida was sufficient to establish personal jurisdiction).

Significantly, electronic communications that are made "into Florida" and "directed at" Florida residents are not limited to specific person-to-person communications, such as emails, texts, and tagged Instagram photos. The Florida Supreme Court has held that material about a Florida resident placed on the internet[6] and accessible in Florida also constitutes an "electronic communication into Florida" sufficient to satisfy section 48.193(1)(b) "when the material is accessed (or 'published') in Florida." *Internet Solutions*, 39 So. 3d at 1214. The Court reasoned that, given the pervasiveness of the World Wide Web:

> [A]n alleged tortfeasor who posts allegedly defamatory material on a website has intentionally made the material almost instantly available everywhere the material is accessible. By posting allegedly defamatory material on the Web **about a Florida resident**, the poster has directed the communication about a Florida resident to readers worldwide, **including potential readers within Florida**.

Id. at 1214-15 (emphasis added).

Similarly, in *Becker v. Hooshmand*, 841 So. 2d 561 (Fla. 4th DCA 2003), this Court found an out-of-state defendant's electronic communications were sufficiently directed at Florida to confer personal jurisdiction where a plaintiff alleged that the defendant had posted in an internet chat room "numerous

[6] The terms "internet" and "World Wide Web" are used interchangeably in this brief.

defamatory comments about him that were targeted to Florida residents . . . which resulted in injury to his reputation and business." *Id.* at 561. Whether the tort is defamation or cyberstalking, the personal jurisdiction analysis is the same.

The text and emails alone are sufficient tortious conduct for the court to exercise personal jurisdiction. But Mr. David claims that beyond "one email and one text" sent by him directly to Mr. Textor, his other electronic communications were not "directed at" Mr. Textor and thus there is no personal jurisdiction. This claim is belied both by the verified allegations presented and established precedent concerning when communications are directed at Florida persons. The *Internet Solutions* case is controlling, as the trial court recognized in its Amended Order.

In addition to texting and emailing Mr. Textor, Mr. David generated electronic communications into Florida directed at Mr. Textor by "tagging" him in a photo of Hitler posted on Instagram. The apology to the neo-Nazis makes it clear it was directed at Mr. Textor. Tagging is a process by a which a person "posts a picture and links people in the picture to their [social media] profiles so that the picture will appear in the profiles of the person who 'tagged" the people in the picture, as well as on the profiles of the people who were identified in the picture." *Davenport v. State Farm Mut. Auto. Ins. Co.,* No.3:11–cv–632–J–JBT, 2012 WL 555759, at *2, n3 (M.D. Fla. Feb. 21, 2012), citing *EEOC v. Simply Storage Mgmt., LLC,* 270 F.R.D. 430, 436 n.3 (S.D. Ind. 2010). Thus, by "tagging" Mr.

Textor, Mr. David not only identified Mr. Textor in the Hitler image, but placed it on Mr. Textor's Instagram profile page, thus directing his actions at a Florida resident, as well as other Instagram followers within Florida.

At the time of the entry of the Order Granting Injunction, the communications encompassed at least 3 emails, 1 text, 2 Facebook posts, 4 Instagram posts, 13 tweets, 5 re-tweets, and 20 internet "articles" of "words, images or language," all specifically directed at the Textors, residents of Florida, as well as discrediting Pulse, a company with Florida offices. *See* Timeline, Textor App. D-008-012.

Here, as in *Internet Solutions* and *Becker*, the electronic communications were not only directed at the Florida resident Mr. David "tagged," but he also intended that his disparaging comments about Mr. Textor would be seen by other Florida residents, including those who: (a) read Florida newspapers, including the Martin County Times (b) had an interest in Florida businesses, (c) followed actions and investigations by their state government, or (d) had an interest in the music industry or the production and use of holographic images.

In addition, the same day the original Order Granting Injunction was entered, Mr. David gave an interview to a local Florida reporter for publication within Martin County, boasting that "it [the injunction] didn't apply to him and he wasn't going to take down his postings." This is clear evidence of Mr. David's

intent to direct his message at Mr. Textor in Florida. It also evinces Mr. David's acknowledgment of the Order Granting Injunction, as well as his intent to disobey it.

D. Causing substantial emotional distress.

The extreme nature and content of Mr. David's acts included multiple threats of extortion, references of Mr. Textor being worse than Adolph Hitler, gun slinging pictures, and a barrage of communications and publications over a period of months. When these electronic communications are viewed as a whole, it is clear that Mr. David's communications jeopardized Mr. Textor's continued employment, were calculated to cause him embarrassment and humiliation, and were extremely threatening. Taking the allegations in the verified complaint as true, as the court must, they were designed to and did cause substantial emotional distress to Mr. Textor and his family.

E. Serving no legitimate purpose.

Mr. David's assertion that these activities had a legitimate purpose, that is, that they were a "negotiation" of a settlement and "not a threat but a friendly understanding" is unfathomable. The Florida statute prohibiting extortion states as follows:

> Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously **threatens an injury to the** person, property or **reputation of another**, or maliciously **threatens to**

> **expose another to disgrace, or to expose any secret affecting another,** or to impute any deformity or lack of chastity to another, **with intent thereby to extort** money or **any pecuniary advantage** whatsoever, or **with intent to compel the person so threatened, or any other persons, to do any act or refrain from doing any act against his or her will**, shall be guilty of a felony of the second degree, punishable as provide in s. 775.082, s. 775.083, or s. 775.084.

§ 836.05, Fla. Stat. Mr. David threatened to ruin the reputation of Mr. Textor for pecuniary advantage – to get Mr. Textor to cause Pulse not to fight suits involving Mr. David's entity and thereafter to cause desired results in other suits. That is extortion, not a negotiation, and it has no legitimate purpose. Counsel's suggestions now that these were "playful" photographs, that Mr. David was "joking," that the guns were "plastic guns," and that his acts were nothing more than "aggressive" negotiations is an admission that Mr. David was seeking to gain an economic advantage in the suits and further belied by the context of the acts.

F. Florida's impact rule does not apply to cyberstalking.

Mr. David argues that Mr. Textor did not allege his conduct caused Mr. Textor any actual personal injury and that emotional distress without more is not a redressable injury in Florida. I.B. pp. 21-22. This flies in the face of the cyberstalking statute. The case of *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846 (Fla. 2007), cited by Mr. David for this proposition, is not applicable to the present claim at all. Mr. Textor is not making a claim for personal injury damages arising out of negligent infliction of emotional distress, as in *Willis*. Instead, Mr.

Textor sought injunctive relief for protection against cyberstalking, a statutorily-created cause of action. In fact, cyberstalking is defined as "causing substantial emotional distress" and does not include any requirement for physical injury.

G. Mr. David cannot hide behind the corporate shield doctrine to conduct his cyberstalking and extortion and avoid personal jurisdiction.

Mr. David asserts that activities on websites that were not controlled or operated by him do not subject him to personal jurisdiction, relying on the case of *Two Worlds United v. Zylstra*, 46 So. 3d 1175 (Fla. 2d DCA 2010) to invoke the corporate shield doctrine. *Two Worlds* distinguished the Florida Supreme Court case of *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201 (Fla. 2010), by concluding that the website at issue in *Two Worlds* was not owned by the defendant personally and therefore did not subject him to personal jurisdiction for defamation.

The statutory definition of cyberstalking goes beyond *Two Worlds*:

> "Cyberstalk" means to engage in a course of conduct to communicate, **or to cause to be communicated**, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.

§ 784.048(1)(d), Fla. Stat. (emphasis added). Mr. David cannot hide behind the corporate shield doctrine to absolve himself of words or images that he caused to be communicated.

Mr. David further argues, "No evidence was presented that Mr. David personally owns any of the websites at issue in this case . . . Mr. Textor's conclusory allegations do not provide any basis for jurisdiction." I.B. pp. 20-21. The allegations, however, raise the very real question of whether Mr. David directed or caused the publication of many of the articles in his stated attempt to ruin Mr. Textor, given Mr. David's ownership of media outlets. *See e.g., Diller v. Barry Driller, Inc.*, 2012 WL 4044732, *1, (C.D. Cal. Sept. 10, 2012) ("defendant Alki David founded FilmOn.com Inc. and admitted to founding barrydriller.com, and when Plaintiff sought the TRO, the barrydriller.com domain name began pointing to the filmonx.com website"); *CBS Broadcasting Inc. v. FilmOn.com, Inc.*, 2014 WL 3702568 (S.D.N.Y. July 24, 2014) (plaintiffs moved for an order to show cause to hold FilmOn.com, Inc., and its Chief Executive Officer, Alkiviades David, in civil contempt). Whether Mr. David did or did not cause certain words, images or language to be communicated and whether there was a legitimate purpose for those communications are factual questions to be decided at an evidentiary hearing.

Mr. Textor's verified allegations state a cause of action against Mr. David for the tort of cyberstalking and are also jurisdictional facts that support the court's exercise of personal jurisdiction over him. Indeed, it would thwart the very purpose of the cyberstalking statute if cyberstalking Florida residents – an act

which, by its very nature, can cause injury from a distance – does not give rise to a Florida court's personal jurisdiction over the cyberstalker.

II. The minimum contacts analysis comes into play only after the respondent has filed an affidavit challenging personal jurisdiction and an evidentiary hearing has been held, if necessary.

A. Mr. David did not comply with the *Venetian Salami* procedure; thus, the minimum contacts analysis was never triggered.

The question of jurisdiction is subject to a two-step process. As a threshold issue, the plaintiff must allege sufficient facts showing that the defendant's actions fit within one or more of the subsections of section 48.193, Florida's long-arm statute. *Washington Capital Corp. v. Milandco, Ltd. Inc.*, 695 So. 2d 838, 841 (Fla. 4th DCA 1997). "If the allegations of the complaint are sufficient to establish Florida's long-arm jurisdiction, the burden shifts to the defendant to contest jurisdiction by a legally sufficient affidavit or other similar sworn proof contesting the essential jurisdictional facts." *Id.* Once affidavits are filed, the burden then returns to the plaintiff to refute the proof in the defendant's affidavit. *Id.* A defendant wishing "to raise a contention of minimum contacts must file affidavits in support of his position." *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989).

Mr. David has filed no affidavits contesting jurisdiction; therefore, the question of minimum contacts has not been engaged. Significantly, none of the

cases about minimum contacts cited by Mr. David involve a situation where the defendant had not filed an affidavit contesting jurisdiction.

B. Mr. David's alleged actions nonetheless provide the minimum contacts necessary to support the court's exercise of personal jurisdiction.

The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum state. *Id.* Even a single act can support jurisdiction when it creates a substantial connection to the forum. *Id.* at 476 n.18, citing *McGee v. Int'l Life Ins. Co.*, 355 U. S. 220, 223 (1957).

For instance, in *Emerson v. Cole*, 847 So. 2d 606, 608 (Fla. 2d DCA 2003), "several telephone interviews, given for a story to be published in Florida" were sufficient to bring a California defendant within the jurisdiction of this court. The court held that because the defendant's comments were made for publication in Florida, he should reasonably expect to be called upon in Florida to defend statements he knew would be published in Florida. *Id.* at 610.

Importantly, intentional torts may support the exercise of personal jurisdiction over a nonresident defendant who has no other contacts. *Licciardello*

v. Lovelady, 544 F.3d 1280, 1285 (11th Cir. 2008). The Eleventh Circuit noted that many courts have employed the "effects" test set out by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), when the plaintiff's claim involves an intentional tort. *Id.* at 1286. The *Calder* effects test for personal jurisdiction requires a tort that is (1) intentional, (2) aimed at the forum state, and (3) caused harm that the defendant should have anticipated would be suffered in the forum state. *Id.*

In this case, Mr. David electronically communicated numerous false and defamatory posts, extortionate demands, texts, images, and distributed or caused to be distributed articles specifically targeting Mr. Textor, a Florida resident. Under *Burger King*, these acts by Mr. David created the substantial connection necessary to satisfy minimum contacts. They also are an intentional tort and meet the effects test of *Calder* for establishing minimum contacts.

Nevertheless, after merely counting the number of contacts with Florida, Mr. David declares the case of *Norris v. Davis,* 958 F. Supp. 606, 609 (S.D. Fla. 1997), is "on all fours" because in that case the defendant made four defamatory telephone calls and mailed two defamatory letters into the State of Florida. To the contrary, jurisdictional analysis does not turn on any talismanic formula or magic number, and the number of contacts is only one aspect of the analysis. *Caiazzo v. Am. Royal Arts Corp.,* 73 So. 3d 245, 259 (Fla. 4th DCA 2011). The court must

also consider "the relationship among the defendant, the forum, and the litigation to determine whether the exercise of jurisdiction is consistent with due process." *Norris v. Davis,* 958 F. Supp. at 611.

The very nature of these communications, which include threats of violence and extortion against a Florida resident, compels the court's jurisdiction. *See Caiazzo*, 73 So. 3d at 254 (noting that Florida courts look to "the nature of the alleged wrongful acts and their link to Florida" when conducting a minimum contacts analysis in cases involving internet activity). "Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of consequences within the forum from activities outside it . . . relate to whether it can be said that the defendant's actions constitute 'purposeful availment.'" *Norris*, 958 F. Supp. at 611.

Several important factors also distinguish *Norris* from the instant case. First, the court noted that Florida did not have a special interest in adjudicating the dispute, especially where considerations of comity existed. *Id.* There was already a state court action pending in Utah, and the court stated, "In order to give effect to the laws and judicial decisions of the state of Utah, out of deference and respect, this court must carefully consider the declination of jurisdiction." *Id.* at n.1. The court also recognized that "declining jurisdiction would not harm Plaintiff's interests as she could address all of the allegations in her Complaint in Utah, in the

case that was currently pending there." *Id.* at 611. Unlike *Norris*, there is not another forum in which Mr. Textor, a Florida resident, can protect his individual interest against cyberstalking.

Like many states, Florida has legislatively concluded it has a significant interest in protecting its citizens from cyberstalking, as well as extortion. All these factors must be weighed when conducting any minimum contacts analysis. That analysis, however, is premature at this point.

C. The court did not address general jurisdiction in its Amended Order.

The trial court does not appear to have exercised personal jurisdiction over Mr. David based on general jurisdiction. Nonetheless, continuous and systematic conduct can create general jurisdiction, even if it relates to the same issue. A continuous and systematic contacts determination requires a holistic analysis of the defendant's relationship with Florida. *Caiazzo v. Am. Royal Arts Corp.*, 73 So. 3d 245, 259 (Fla. 4th DCA 2011). The course of conduct in this case presents sufficient continuous and systematic contacts to support a finding of general jurisdiction.

III. The injunction contains the necessary factual findings alleged in the verified Petitions for an ex parte order restraining cyberstalking.

The trial court followed the procedure set forth in section 784.0485, Florida Statutes, which provides in pertinent part:

(4) Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, before the hearing.

(5)(a) **If it appears to the court that stalking exists, the court may grant a temporary injunction ex parte, pending a full hearing**, and may grant such relief as the court deems proper, including an injunction restraining the respondent from committing any act of stalking.

(b) Except as provided in s. 90.204, in a hearing ex parte **for the purpose of obtaining such ex parte temporary injunction, evidence other than verified pleadings or affidavits may not be used as evidence**, unless the respondent appears at the hearing or has received reasonable notice of the hearing. A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. If the only ground for denial is no appearance of an immediate and present danger of stalking, the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. This paragraph does not affect a petitioner's right to promptly amend any petition, or otherwise be heard in person on any petition consistent with the Florida Rules of Civil Procedure.

(c) Any such ex parte temporary injunction is effective for a fixed period not to exceed 15 days. A full hearing, as provided in this section, shall be set for a date no later than the date when the temporary injunction ceases to be effective. **The court may grant a continuance of the hearing before or during a hearing for good cause shown by any party, which shall include a continuance to obtain service of process.** An injunction shall be extended if necessary to remain in full force and effect during any period of continuance.

§ 784.0485(4), (5)(a)-(c), Fla. Stat. (Emphases added.)

In addition, once an ex parte order has been entered, it cannot be vacated without a hearing. *Schock v. Schock*, 979 So. 2d 1201, 1202 (Fla. 4th DCA 2008). Before that evidentiary hearing could take place, however, this appeal was filed.

A. Factual findings.

Mr. David's argument confuses an ex parte injunction with a temporary injunction entered after an evidentiary hearing. He claims that "[a] temporary injunction is not permitted where the circuit court merely accepts the allegations of the Petitioner as true without any factual findings." I.B. p. 26. But that is exactly what the statute prescribes the court must do. In fact, the court would err if it heard any other evidence ex parte.

The various arguments made by Mr. David fail to make this distinction. Furthermore, with the exception of *Weltman v. Riggs*, 141 So. 3d 729 (Fla. 1st DCA 2014), all of the cases cited by Mr. David for his "findings of fact" argument involve temporary injunctions entered after an evidentiary hearing was held. The *Weltman* case involved an ex parte injunction on the execution of stock options, not an injunction entered in accordance with statutorily-prescribed terms.[7]

[7] Similar to the court's comments in the *Weltman* case, 141 So. 3d at 731 n.1, although Mr. David is entitled to immediate appellate review, the more expeditious process would have been to wait until after the evidentiary hearing was held. Procedurally, after being personally served (which after he acknowledged the ex parte order suggests that he was avoiding service), the court could have held an evidentiary hearing on personal jurisdiction if Mr. David contested it with affidavits and also decided whether the injunction should be continued, based on

In Section II, Findings, of the Order Granting Injunction, the court made four factual findings based on the verified petition:

> 1. On or about May 19, 2014, Respondent David began to send and post threating [sic] and harassing tweets, text messages, and emails and caused harassing articles to be published on his proprietary websites directed at John Textor personally and serving no legitimate business or information sharing purpose.
>
> 2. On or about July 2, 2014, David escalated the danger by threatening physical harm to Textor by issuing a death threat to Textor through an article published on Entrepreneur.com.
>
> 3. In August, 2014, David posted a picture of Hitler and an obscene hand gesture on his Instagram account and tagged Textor.
>
> 4. Additionally, on or about September 4, 2014, David sent an email to Textor attempting to extort Textor under the threat of publication of photos, lawsuits and illicit money transfers.

A:00143. The Amended Order, entered after hearing the arguments of the parties, contains these same four findings (including the misspelled "threating" in item one), but each one is preceded by "The Petitioner has alleged that . . . ." Because an ex parte temporary injunction must be based solely on the verified pleadings and affidavits filed at that time and nothing else, there is virtually no difference between the two orders. Any other evidence must be reserved for the evidentiary hearing, which has been stalled pending this appeal.

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testimony from both parties. That is likely what the court had in mind when it scheduled the evidentiary hearing on December 11 for three hours.

Finally, the requirements of the cyberstalking, repeat violence and stalking statutes already encompass the four elements Mr. David claims should be included in the Amended Order pursuant to Rule 1.610(c). The status quo to be maintained is for the person to be free of cyberstalking, which the injunction is intended to accomplish, thus cyberstalking necessarily constitutes irreparable harm. The cause of action is for an injunction and may be brought without bringing any other action, thus there is no adequate remedy at law. If the person pleads in a verified petition the elements necessary to obtain an ex parte injunction against cyberstalking, that establishes the clear legal right to relief until an evidentiary hearing can be held for the court to make a determination of whether the facts as found by the court support continuing the injunction. Finally, the fact that the legislature created the cyberstalking statute in the first place, as have many other states, shows that an ex parte injunction entered in accordance with its terms serves the public interest.

B. Repeat violence.

Mr. David also claims that the Amended Order is defective because the court did not make a finding that there were two incidents of stalking that were each supported by competent, substantial evidence, citing *Power v. Boyle*, 60 So. 3d 496, 498 (Fla. 1st DCA 2011). The *Power* case did not involve cyberstalking, and

the court held that the incidents in question between neighbors did not rise to the level of violence or stalking at all.

Mr. David asserts that Mr. Textor's filings did not present any competent substantial evidence of repeat violence. I.B. 47. In support of that claim, he quotes the definitions of violence and repeat violence out of context. Section 784.046 defines violence and repeat violence as including stalking. Under section 784.0485, however, "the offense of stalking shall include the offense of cyberstalking." Therefore, the definitions of violence and repeat violence encompass cyberstalking.

The Second DCA recognized this very point, stating, "Although stalking, especially cyberstalking, may not appear intuitively to be an act of violence," its repeated nature constitutes repeat violence. *Branson v. Rodriguez-Linares*, 143 So. 3d 1070, 1071 (Fla. 2d DCA 2014) (cyberstalking can be domestic violence, even without any threats of physical harm); *see also* § 784.046(1)(b), Fla. Stat. (defining repeat violence). The cases cited by Mr. David holding that there must be an overt act taken to put someone in fear of imminent violence are assault cases, not cyberstalking. Indeed, the very term "cyber" connotes something not done in person, but using the internet to achieve the same result as stalking in person.

In addition, the First District has considered the two-incident requirement in the context of stalking and concluded that for an injunction against repeat violence

arising out of stalking, only one incident of stalking is required. *Lukacs v. Luton*, 982 So. 2d 1217 (Fla. 1st DCA 2008). That is because the definition of stalking itself calls for repeated acts. "If we were to hold that section 784.046(1)(b) requires two incidents of stalking, a person would be allowed to follow or harass a victim at least four times before a court could issue a protective injunction." *Id.* The court held that such an interpretation is contrary to legislative intent and would lead to an absurd result. *Id.* Further, by definition, cyberstalking requires a series of acts over a period of time.

IV. The temporary ex parte injunction sets forth the enjoined activity with specificity.

The court prohibited Mr. David from the following:

> b. Respondent David shall immediately cease and desist from sending any text messages, emails, posting any tweets (including the re-tweeting or forwarding), posting any images or other forms of communication directed at John Textor without a legitimate purpose. Threats or warnings of physical or emotional harm or attempts to extort Textor or any entity associated with Textor by Respondent David, personally or through his agents, directed to John Textor, directly or by other means, are prohibited.

Amended Order, p. 5. The purpose of the court's order was clear: extortion is not a legitimate purpose. Anything intended to further the extortion, that is, to ruin Mr. Textor, is prohibited. Tweeting or retweeting any words or images directed at John Textor, unless there is some specific purpose not related to the extortion, are prohibited. Threats, or innuendoes intended to act as a threat, including but not

limited to threats of physical violence, directed at Mr. Textor or his family are prohibited. Had Mr. David not first sent the extortion demands, this argument might have merit, but the extortion demands were made and acts in connection with those demands followed. Furthermore, the court here made a clear distinction between actions in furtherance of extortion and other legitimate purposes.

V. Speech constituting a crime is not protected by the First Amendment.

A. The injunction is not a prior restraint.

The Florida Supreme Court, in upholding the constitutionality of the stalking statute, reasoned, "Stalking, whether by word or deed, falls outside the First Amendment's purview." *Bouters v. State*, 659 So. 2d 235, 237 (Fla. 1995). "While the First Amendment confers on each citizen a powerful right to express oneself, it gives the [citizen] no boon to jeopardize the health, safety, and rights of others." *Id.* "When protected speech translates into criminal conduct, even the Free Speech Clause balks." *Id.* The Florida Supreme Court is very clear – stalking is not protected by the First Amendment.

Mr. David starts from the erroneous premise that all speech is protected and then avers that his statements did not constitute a "true threat" of violence. Mr. David's position is that he could say anything with impunity on the internet short of a "true threat." To the contrary, speech that constitutes illegal conduct is not

protected at all. Therefore, speech that meets the requirements of the cyberstalking statute is not protected. There is no need for further analysis.

A review of the transcript reflects that the lower court well understood the issue and got right to the heart of it:

> THE COURT: If it's not cyberstalking, then free speech prohibits prior restraint, right?
>
> MR. BETENSKY: That is correct.
>
> THE COURT: So, if it is cyberstalking, then it's not protected speech.
>
> MR. BETENSKY: Well, it has to rise to that level where you get into an exception to the First Amendment which would be a real threat of violence, would be a continuous ongoing pattern of conduct that rises to the level of criminal behavior.
>
> THE COURT: So, you're saying that cyberstalking is only prohibited in the Florida Statute if it's a threat of physical violence?
>
> MR. BETENSKY: No, I'm not saying that, your Honor.
>
> THE COURT: That's what I thought you just said.
>
> MR. BETENSKY: It was just one –
>
> THE COURT: So far, the other option is you're saying the statute is overbroad and unconstitutional.

Tr. pp. 23-24. Of course, the Florida Supreme Court has already held in *Bouters v. State* that the stalking statute is not overbroad and is constitutional.

Mr. David's actions, although occurring over the internet instead of in person, are analogous to the case of *United States v. Quinn*, 514 F.2d 1250 (5th

Cir. 1975), where the course of an entire conversation added up to extortion. *Quinn* involved a labor representative who threatened picketing of a store, which would destroy his victim's business, unless a donation was paid to the church of which the defendant was a minister. *Id.* at 1253, 1266. Although the defendant attempted to characterize the conduct as "merely a sale of influence," the district court described the taped conversation as "some of the most subtle extortion that could be consummated." *Id.* Although "no isolated segment of the conversation constituted a threat," the court concluded that a review of the events taken as a whole substantiated the government's claim. *Id.*

It was also not necessary that the government prove fear was a consequence of a direct threat in *Quinn*. 514 F.2d at 1266. Instead, the question was whether the victim's fear that the threat would be carried out was reasonable under the circumstances. *Id.* at 1266-67. The stalking statute likewise imposes a reasonable fear standard. Mr. Textor's fear of further action by Mr. David was reasonable, especially in light of the physical altercations that he was already aware of involving Mr. David.

In affirming the verdict in *Quinn*, the court held, "Extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over money." *Quinn*, 514 F.2d at 1268. "Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although

it is verbal." *Id.* Making statements over the internet and on social media does not make the conduct any less wrongful or give it additional protection.

The Florida Supreme Court recognized the line between protected and unprotected speech in *Carricarte v. State*, 384 So. 2d 1261 (Fla. 1980), relying on a Tennessee case that is right on point. *Id.* at 1263 (citing *Moore v. Newell*, 401 F. Supp. 1018 (E.D. Tenn. 1975). There, a Black Panther leader sought contributions for various charities from the manager of a supermarket in a black neighborhood. *Moore v. Newell*, 401 F. Supp. at 1021. When the manager refused, the defendant and others picketed the store for several hours, though without violence. *Id.* Analzying the distinction between protected and unprotected speech, the Court stated, "[t]he federal district court noted that the defendant was not convicted for engaging in the constitutionally protected activity of picketing 'but for threatening to picket for the purpose of extorting a payment.'" *Carricarte*, 384 So. 2d at 1263.

Importantly, "[s]talking is a series of actions that, when taken individually, may be perfectly legal." *T.B. v. State*, 990 So. 2d 651, 654 (Fla. 4th DCA 2008). Here, Mr. David is attempting to isolate each action he undertook and analyze it separately, to avoid the result described in *Quinn* and *Moore v. Newell*. But Mr. David undertook a course of conduct to implement his illegal, extortionate threats, using the internet and social media. That course of conduct constitutes

cyberstalking as well as extortion, even though some of his actions, taken individually, might otherwise have constituted legal, protected speech.

On the other hand, the case of *Curry v. State*, 811 So. 2d 736 (Fla. 4th DCA 2002), cited by Mr. David, is not on point. It involved a neighbor's complaints to government of violations of statutes and requests for public records. This Court held that petitioning the government is constitutionally protected activity and therefore does not constitute stalking. *Id.* at 743.

This case differs from *Curry* because making extortionate threats is not a constitutionally-protected activity. Furthermore, as pointed out in *Curry*, the stalking statutes are intended to fill gaps in law by criminalizing conduct that falls short of assault or battery. *Id.* at 741. The intent of the statute is to stop the stalker before a more serious criminal offense befalls the victim. *Id.*

Mr. David suggests that Mr. Textor is using the cyberstalking statute not as a shield for protection but as a sword in his business disputes with Mr. David. I.B. p. 33. To the contrary, knowing that what he is doing is wrong, Mr. David, like Mr. Quinn, engaged in a deliberate attempt to cloak his actions with the protection of the First Amendment to justify his course of conduct directed at Mr. Textor. The suggestion that Mr. Textor is a public figure and therefore all of Mr. David's articles on the internet are somehow legitimized fails to put the issue into context. Mr. Textor was threatened with extortion and these publications were part of the

carefully-crafted campaign to carry out those threats under the guise of the First Amendment.

As counsel for Mr. Textor argued below, what we have here are bookends of extortion: an initial threat of extortion, various escalating communications intended to carry out the extortion, including threats against Mr. Textor and his family (which were not nearly as subtle as the ones in *Quinn*), followed up by another extortion threat. The First Amendment does not protect this conduct.

The case of *Chevaldina v. R.K./FL Management, Inc.,* 133 So. 3d 1086 (Fla. 3d DCA 2014) relied on heavily by Mr. David is not on point. First, as with virtually all of the cases cited by Mr. David, the injunction was entered after an evidentiary hearing. *See id.* at 1090.

Second, *Chevaldina* involved plaintiffs who complained about a landlord's treatment of them and suggested on a blog their reasons that others should stay away. *Id.* at 1088-89. In essence, the Chevaldinas gave the landlord a bad review. The case dealt with defamation, which is not subject to injunctive relief, unlike cyberstalking. *Id.* Further, in *Chevaldina* there was no actual testimony regarding stalking and trespassing, and the verified pleadings failed to form the basis upon which relief against stalking could be granted under section 784.048(2). *Id.*

If the conduct meets the elements of cyberstalking, then it is a crime, and it is not protected by the First Amendment. There was more than sufficient behavior

alleged in the verified pleadings here to establish the grounds for the ex parte injunction. The very purpose of the cyberstalking statute, like any stalking statute, is to prevent harm where there is a reasonable fear that, if unchecked, it will continue and escalate. Courts are not required to wait until something terrible happens before acting.

B. The strict scrutiny standard does not apply to unprotected speech.

Mr. David's analysis that any content-based restriction must overcome strict scrutiny misses the boat. He argues that an injunction that enjoins the exercise of an individual's fundamental rights must further a compelling state interest. I.B. 39. But an individual does not have a fundamental right to violate the law, by word or deed. Moreover, the state has a compelling interest in seeing that its laws are not violated, including its extortion and cyberstalking laws. The cases cited by Mr. David for his strict scrutiny proposition are not cases where violation of the law was at issue – instead they address the usual First Amendment questions of whether pure criticism of someone else's actions can be enjoined, particularly in the political arena. The analysis in the amicus brief by the ACLU suffers from these same defects.

The legislature has passed laws prohibiting cyberstalking and these statutes have been upheld as constitutional, here and elsewhere. Moreover, these statutes are not limited to protecting women being harassed by ex-husbands or former

boyfriends, as suggested by Mr. David. That would be judicially limiting the scope of the legislation. The court's only duty at this point was to determine whether cyberstalking had occurred, taking the allegations of the verified complaint as true. If someone is stalking or cyberstalking, then the victim is entitled to an injunction to prevent its continuance. If the allegations are such that the victim has a reasonable fear of physical harm or emotional distress before an evidentiary hearing can be held, then an ex parte injunction is warranted.

CONCLUSION

In this brave new world of internet communications and social media, threats and stalking are carried out on a new platform. The legislature has fashioned a response to this insidious behavior, and courts will have to apply the statute to situations involving these new methods of communications. The court here properly exercised personal jurisdiction and acted correctly in entering the injunction. In fact, it acted with restraint, not even entering an order until things continued to escalate. When the allegations justify it, as here, it is the court's duty to act to prevent further harm.

This case should be remanded for further proceedings and to hold an evidentiary hearing. In fact, this Court does not even need to decide some of the questions presented here until that takes place. Until then, the ex parte injunction should remain in place.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of April, 2015**,** a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court using ECF. I also certify that the foregoing document is being served on this day via E-Mail to: **Gary S. Betensky, Esquire**., Richman Greer, P.A., 250 Australian Avenue South, Suite 1504, West Palm Beach, Florida 33401, gbetensky@richmangreer.com; mfarach@richmangreer.com; lmetz@richmangreer.com; lsabatino@richmangreer.com and **Ryan G. Baker, Esquire**., Baker Marquart LLP, 10990 Wilshire Boulevard, Fourth Floor, Los Angeles, California 90024, rbaker@bakermarquart.com; **Nancy G. Abudu**, ACLU Foundation of Florida, Inc., 4500 Biscayne Boulevard., Suite 340, Miami, Florida 33137; nabudu@aclufl.org; and **Benjamin James Stevenson**, ACLU Foundation of Florida, Inc., P.O. Box 12723, Pensacola, Florida 32591-2723; bstevenson@aclufl.org.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that Appellant's Initial Brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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