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RANDALL C. MARSHALL
LEGAL DIRECTOR

June 17, 2003

United States District Court Clerks Office
701 Clematis Street Room 402
West Palm Beach, FL 33401

Re: *Johnson v. Max*, No. 03-80515 (S.D. Fla.)(Hurley, J.)

Dear Sir:

Enclosed for filing in the above action are the original and one copy each of:

1. American Civil Liberties Union of Florida, Inc.'s Motion for Leave to Appear as *Amicus Curiae* In Support of Defendant's Emergency Motion to Dissolve Temporary Injunction; and

2. Memorandum of *Amicus Curiae* American Civil Liberties Union of Florida in Support of Defendant's Emergency Motion to Dissolve Temporary Injunction.

I am also enclosing a proposed order for Judge Hurley's consideration.

Thank you for your attention to this matter.

Sincerely,

Randall C. Marshall

Enclosures.

c: Michael I. Santucci, Esq.
John C. Carey, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 03-80515-CIV-HURLEY
Magistrate Judge Lynch

KATY JOHNSON,

Plaintiff,

vs.

TUCKER MAX,

Defendant.
_____/

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.'S MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S EMERGENCY MOTION TO DISSOLVE TEMPORARY INJUNCTION

The American Civil Liberties Union of Florida, Inc. ("ACLU"), moves this Court for leave to appear as *amicus curiae* in this removed action in order to submit a memorandum of law is support of Defendant's Emergency Motion to Dissolve Temporary Injunction.

While the Federal Rules of Civil Procedure are silent about participation by *amicus curiae*, a federal district court has the inherent authority to permit the filing of an *amicus curiae* brief. *Resort Timeshare Resales, Inc. v. Stuart*, 764 F.Supp. 1495, 1500-01 (S.D. Fla. 1991). The grant, or denial, of a request, and the extent of participation, is at the Court's discretion. *Id.*

ACLU'S INTEREST

The ACLU of Florida is the Florida affiliate of the American Civil Liberties Union, a nationwide, public interest organization with approximately 400,000 members (including almost

18,000 in Florida) dedicated to advancing and preserving constitutional protections found in the Bill of Rights and, in particular, the First Amendment. As part of that commitment, the ACLU is active in addressing issues of public concern, including the First Amendment right of free expression in various fora, including the Internet. The ACLU is frequently involved in litigation involving issues of constitutional protections and has regularly been permitted to file *amicus* briefs in the Eleventh Circuit and Florida appellate courts.

This case involves a significant First Amendment issue because a Florida circuit court entered a temporary injunction, *ex parte* and without notice to the defendant, which significantly restrains free speech on the Internet. It is the ACLU's view that the injunction entered by the state circuit court is an egregious violation of the First Amendment and cannot be allowed to stand.

The undersigned has contacted the parties' counsel seeking consent to the filing of the brief. Defendant's counsel consents. Plaintiff's counsel responded promptly to counsel's request but needed time to consult with his client before consenting to, or opposing, this motion. Given the likelihood of an expedited review of Defendant's Emergency Motion, the ACLU was unable to wait for a full response before filing this motion in order to ensure an opportunity for the Court to consider the motion for leave to appear as *amicus curiae*.

The ACLU's proposed memorandum has been submitted simultaneously with this motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the forgoing document has been furnished by U.S. mail, this 17th day of June, 2003, with a courtesy copy by e-mail, to the following counsel:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 03-80515-CIV-HURLEY
Magistrate Judge Lynch

KATY JOHNSON,

Plaintiff,

vs.

TUCKER MAX,

Defendant.
_____/

MEMORANDUM OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF FLORIDA

IN SUPPORT OF

DEFENDANT'S EMERGENCY MOTION TO DISSOLVE TEMPORARY INJUNCTION

I. BEAUTY QUEEN V. THE CAD.

This is a case of a beauty queen versus a cad, each with a website on the World Wide Web.[1] *See The New York Times*, Monday, June 2, 2003 (copy attached to DE #1, Notice of Removal, Exhibit C). The beauty queen's website stresses virtue, values ("being in control and saying 'no'" to alcohol; abstinence and respect for sex; personal responsibility; "make it a must that you will not cuss!"),[2] and self promotion, while the cad's website is ostensibly a "date application" site with an amalgamation of debauchery, sexual exploits, and self promotion. The case began when the cad linked

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[1] *See*: www.katyjohnson.com (beauty queen) and www.tuckermax.com (cad, who by his own admission is "a pretty big jerk").

[2] *See, e.g.*: www.katyjohnson.com/hot.html; www.katyjohnson.com/formtemp.html; http://www.katyjohnson.com/charact3.html.

his website to the beauty queen's website and published a chronicle of his claimed sordid relationship with the beauty queen – "The Miss Vermont Story" – a story casting serious aspersions on plaintiff's adherence to the ideals promoted by her website.

The Internet has revolutionized the manner in which we communicate. The Internet is without doubt the most vital and active forum where freedom of speech rights are exercised today – a place where citizens can publish their views to be seen by a few close friends or spread around the world; where citizens can engage with others on thousands of bulletin boards and chat rooms on nearly any topic, create new communities of interest, or communicate anonymously about sensitive topics. It is one of our top entertainment mediums. It is the nation's most comprehensive, flexible and popular reference source. It is the closest thing ever invented to a true free marketplace of ideas. Its breathtaking utility, and openness, for communication appears boundless:

> It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."
>
> The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address – "rather like a telephone number." Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or "site's") author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text – sometimes images.
>
> Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is freely available, but some allow access

> only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.
>
> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web."

Reno v. American Civil Liberties Union, 521 U.S. 844, 852-3 (1997)(footnotes and citations omitted). Through this litigation, plaintiff has found a central point from which information can be blocked from the World Wide Web: a state court's injunction, issued *ex parte*, without service upon, or notice to, the defendant.

Katy Johnson obtained a temporary injunction from the Fifteenth Judicial Circuit Court in Palm Beach County, Florida, enjoining Tucker Max from, *inter alia*:

1. using, including, or even making reference to, "the name 'Katy Johnson,' 'Katy,' 'Johnson' or title 'Miss Vermont' in any periodicals or books, and on his website located at www.tuckermax.com ... ;"
2. "Disclosing any stories, facts or information, notwithstanding its truth, about any intimate or sexual act engaged in by" Katy Johnson; and
3. linking plaintiff's website (www.katyjohnson.com) to defendant's website.

See: Temporary Injunction (Composite Exhibit A to Notice of Removal, DE #1)(emphasis added).[3]

The practical futility in plaintiff's seeking the strong arm of a court order, with its concomitant threat of contempt, is underscored by the power of the Internet. The offending story, "The Miss Vermont Story," is widely available in its entirety across the Internet. *See, e.g.*, www-2.cs.cmu.edu/~dst/Katy-Johnson/ (one of numerous sites carrying the full story and providing links to plaintiff's website, defendant's website, and the multitude of publicity generated by the case). Thus, to the extent that plaintiff seeks to prevent the dissemination of "The Miss Vermont Story," she is, at least in part, responsible for its increased significance.

II. THE TEMPORARY INJUNCTION VIOLATES THE FIRST AMENDMENT.

The United States' Constitution and well-established Supreme Court precedent compel the dissolution of the state court's temporary injunction.

A. PRIOR RESTRAINT.

The classic form of a prior restraint is a court order preventing speech. *See Near v. Minnesota*, 283 U.S. 697 (1931). "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976). A prior restraint is "one of the most extraordinary remedies known to our jurisprudence." *Id.* at 563. For this reason, every prior restraint bears a heavy presumption of

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[3] While the Temporary Injunction also has serious overbreadth problems, *Amicus* concentrates on the fatal prior restraint aspects of the state court's order. Particularly disturbing, however, is the prohibition against Max using any hyperlink on his website to link to Johnson's website. The notion that one World Wide Web user can prohibit another World Wide Web user from utilizing what is essentially a public address is very disturbing. The utility of the Internet would collapse if the use of website addresses is dependent upon permission of the "owner" of the website.

unconstitutionality. *Id.*; *see also New York Time Co. v. United States*, 403 U.S. 713 (1971)(invalidating prior restraint against publication of the *Pentagon Papers*); *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

The proponent of a prior restraint bears a heavy burden to overcome that presumption by demonstrating justification for such a restraint. *Nebraska Press Association v. Stuart*, 427 U.S. at 559. It has been said that the need for prior restraint must be "manifestly overwhelming." *See Jacksonville Television, Inc. v. Florida Department of Health and Rehabilitative Services*, 659 So.2d 316, 317 (Fla. 1st DCA 1994)(citing *Florida Publishing Co. v. Brooke*, 576 So.2d 842 (Fla. 1st DCA 1991)(citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (1978)(Stewart, J., concurring))). A prior restraint cannot be sustained absent "the highest form of state interest. Prior restraints have been accorded the most exacting scrutiny in previous cases." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). The abject failure of the plaintiff to even attempt to meet this burden, let alone acknowledge the clear First Amendment ramifications raised by her request for an injunction, combined with the state court's silence on these issues should be grounds alone to dissolve the temporary injunction.

Amicus will not dwell on the glaring improprieties inherent in the state court's adoption of plaintiff's proposed Temporary Injunction, which was adopted in full by the court with the exception of a paragraph prohibiting public statements about the litigation. The Injunction flagrantly ignores the requirements of Fla.R.Civ.P. 1.610(a)(2) by failing to "define the injury, state findings by the court why the injury may be irreparable, and give the reasons why the order was granted without notice if

notice was not given." More importantly, however, "there is no place within the area of basic freedoms guaranteed by the First Amendment for such [prior restraint] orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. at 180.

B. TORTIOUS SPEECH IS INSUFFICIENT TO JUSTIFY PRIOR RESTRAINT.

In the specific context of cases where the movant is seeking a prior restraint to prevent a party from engaging in defamatory or otherwise tortious speech, the Supreme Court has held that the interest in protecting individuals and businesses from tortious speech is not sufficient to justify the restraint.[4] In *Near v. Minnesota*, 283 U.S. 697 (1931), the Court examined the constitutionality of a statute that authorized issuance of an injunction against a "defamatory newspaper." The defendants in the *Near* case had engaged in extensive defamatory publication before the injunction was requested. Justice Butler, in the dissent, noted that "defendants' regular business was the publication of malicious, scandalous, and defamatory articles concerning the principal public officers, and the Jewish race. It also shows that their purpose at all hazards [is] to continue to carry on the business. In every edition slanderous and defamatory matter predominates to the practical exclusion of all else. Many of the statements are so highly improbable as to compel a finding that they are false. The articles themselves show malice." 283 U.S. at 724 (Butler, J., dissenting).

The Court, however, reasoned that "[t]he preliminary freedom extends as well to the false

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[4] Particularly perplexing about the litigation is Ms. Johnson's allegation in her Complaint (Count II) that Mr. Max "has, and continues to publicly disseminate private facts of and concerning Plaintiff" while her counsel's press release states that "Katy Johnson emphatically denies the story contained on Tucker Max's website." Both documents are attached to the Notice of Removal, DE #1. In either event, plaintiff's Complaint involves alleged tortious speech and harm to her business.

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and to the true" *Id.* at 714 and "whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws." *Id.* at 715. Thus, the Court invalidated the statute at issue because of the threat to freedom of speech posed by injunctions against defamation.

The prevention of alleged tortious interference is as impermissible a justification for prior restraint of speech as is the prevention of alleged defamation. The Supreme Court has unambiguously held that speech tending to interfere with or affect another's business or profit is as strongly protected by the First Amendment as is defamatory or libelous speech. In *Organization For A Better Austin v. Keefe*, 402 U.S. at 419, the plaintiff, a real estate agent, had engaged in "blockbusting" or "panic peddling" in an attempt to convince people to sell their homes so that African Americans could move into the Austin area. The defendants, a racially integrated community organization in the Austin neighborhood opposed plaintiff's actions. To try to persuade plaintiff to change his real estate practices, members of the organization distributed leaflets in plaintiff's neighborhood, at the doors of his neighbors, and to parishioners on their way to or from plaintiff's church describing plaintiff's practices, requesting recipients to call plaintiff at his phone number and urge him to stop his real estate practices, and accusing him of being a 'panic peddler' *Id.* at 417. The challenged publications were critical to plaintiff's real estate practices. *Id.*

The Circuit Court of Cook County, Illinois enjoined defendants from distributing leaflets "anywhere" in the plaintiff's town. The Supreme Court reversed, holding that the injunction at issue, which suppressed the distribution of literature including the distribution of the same to the movant's neighbors criticizing his business practices, was an unconstitutional restraint of speech. *See id.* at 419-20.

The Court reasoned that while the petitioners found the practices of the movant to be offensive and the views and practices of the petitioners were no doubt offensive to others, "so long as the means are peaceful, the communication need not meet standards of acceptability." *Id.* at 419. The Court also noted that the claim that the "expressions were intended to exercise coercive impact on respondent does not remove them from the reach of the First Amendment." *Id.*

Subsequent to *Keefe*, the Supreme Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), dissolved a permanent injunction entered *after* a jury found the defendants liable for maliciously interfering with the plaintiff's business by engaging in and persuading others to join a widespread boycott of all-white owned establishments until the local government met the demands for equality and justice made by African-American residents of Claiborne county. Promoters of the boycott stood outside the boycotted stores and identified those who traded with the merchants. The names of persons who violated the boycott were read out loud at meetings of the Claiborne County NAACP and violators were labeled as "traitors" and called demeaning names. *Id.* at 903-4. One of the NAACP leaders, Charles Evers, who played the primary leadership role in the organization of the boycott told a crowd of "several hundred people" that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

After a trial on the merits, the court issued a permanent injunction enjoining petitioners from "stationing 'store watchers' at respondents' business premises; from 'persuading' any person to withhold his patronage from respondents; from 'using demeaning and obscene language to or about any person' because that person continued to patronize respondents; from 'picketing or patroling' the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property." *Id.* at 893.

In reversing the injunction, the Supreme Court noted that "the boycott was supported by speeches and nonviolent picketing, and [p]articipants repeatedly encouraged others to join in its cause" *Id.* at 907, and "each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and the Fourteenth Amendments." *Id.* The Court reiterated that "peaceful picketing was entitled to constitutional protection" even if the purpose of the picketing is to '"advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer.'" *Id.* (*quoting Thornhill v. Alabama*, 310 U.S. 88 (1940)). Put another way, "Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action." *Id.* The Court concluded that Evers' emotionally charged rhetoric also enjoyed constitutional protection because "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id.* at 928.[5]

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[5] Florida law is similar in this regard. As early as 1839, ninety-two years before the First Amendment was first applied through the Fourteenth Amendment to the states, New York's Chancellor Walworth said that the power to enjoin a libel 'cannot safely be entrusted to any tribunal consistently with the principles of a free government.'" Robert D. Sack, Sack on Defamation §10.6.1 at 10-54 (3d ed. 1999)(citations omitted). "The absoluteness of the rule is critical. It forecloses the possibility of frequent lawsuits based upon a person's fear that adverse commentary is about to be published." *Id.*

Florida courts have followed this absolute rule. In *Demby v. English*, 667 So.2d 350 (Fla. 1st DCA 1995), the First District Court of Appeal awarded attorneys' fees pursuant to section 57.105 to the defendant after dismissing a complaint seeking to enjoin future defamation, in recognition of the "well established rule that equity will not enjoin either an actual or a threatened defamation." *See also Reiter v. Mason*, 563 So. 2d 749 (Fla. 3d DCA 1990)(reversing injunction against future defamation by comedian Jackie Mason because "a court of equity will not enjoin the commission of a threatened libel or slander"); *Rodriguez v. Ram Systems, Inc.*, 466 So.2d 412, 412 (Fla. 3d DCA 1985)("injunctive relief is unavailable ... to restrain an actual or threatened defamation"); *United Sanitation Services of Hillsborough, Inc. v. City of Tampa*, 302 So.2d 435, 439 (Fla. 2d DCA (continued...)

Neither the plaintiff in the instant case nor the state trial court addressed the patent First Amendment issues in granting the Temporary Injunction. The trial court's granting of injunctive relief was clearly contrary to law and cannot be allowed to stand.

III. THE MERITS.

Amicus takes no view upon the ultimate merits of Ms. Johnson's state law claims against Mr. Max, save to the extent that those claims infringe upon the First Amendment. However, consonant with First Amendment concerns, a thorough vetting of the legal underpinnings of plaintiff's claims are in order. Count I of the Complaint claims a violation of Fla. Stat. §540.08. Yet *Tyne v. Time Warner Entertainment Company, L.P.*, 204 F.Supp.2d 1338, 1340-42 (M.D. Fla. 2002), makes clear that the statute's use is limited under Florida law and is constrained by the First Amendment. *See also Lane v. MRA Holdings, LLC*, 242 F.Supp.2d 1205, 1212-14 (M.D. Fla. 2002)(discussing requirements necessary to establish a claim under §540.08 and holding that it requires the direct promotion of a product or service). On its face, it is difficult to see how "The Miss Vermont Story" appearing on defendant's website falls within these narrow legal standards as constrained by the First Amendment.

Similarly, Count II claims invasion of privacy by the publication of private facts. Under Florida law, that claim requires "(1) the publication, (2) of private facts, (3) that are offensive, and (4) are not of public concern." *Cape Publications, Inc. v. Hitchner*, 549 So.2d 1374, 1377 (Fla.1989). Given

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[5] (...continued)
1974)("equity will not enjoin either an actual or threatened defamation"); cf. *Reyes v. Middleton*, 17 So. 937, 939 (1895)("It seems to be well-settled that a court of equity will never lend its aid, by injunction, to restraining the libeling or slandering of title to property ..., but that in such cases the remedy, if any, is at law, and that the alleged insolvency of the libelant, in such cases, will not, of itself, authorize the interference of the court of equity").

the public image plaintiff conveys on her website and the contrary image portrayed by defendant's rendition of his relationship with her, a thorough consideration of the public interest aspect of the publication at issue is necessary – again through the lens of the First Amendment. Further, as outlined in footnote 4, *supra*, plaintiff's counsel's press release issued upon entry of the Temporary Injunction calls into question the truthfulness of the offending story. If that story is not factual, there is no claim for publication of private facts. *Tyne v. Time Warner Entertainment Company, L.P.*, 204 F.Supp.2d at 1344.

Certainly before an injunction enjoining defendant's speech should even be considered, these issues must be dealt with.

IV. CONCLUSION.

The state court's entry of the Temporary Injunction in this action constitutes an egregious violation of the First Amendment. While plaintiff is entitled to her day in court on her underlying claims, she is not entitled to enjoin defendant's constitutionally protected speech in the process. The American Civil Liberties Union of Florida urges this Court to dissolve the Temporary Injunction forthwith.

Respectfully Submitted,

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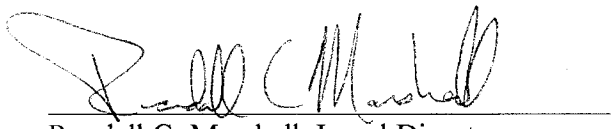

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the forgoing document has been furnished by U.S. mail, this 17th day of June, 2003, with a courtesy copy by e-mail, to the following counsel:

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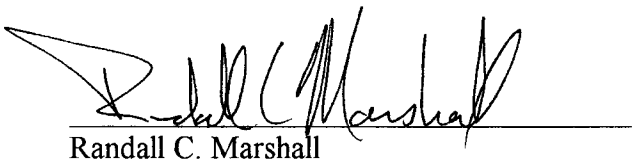

Randall C. Marshall

UNITED STATES DISTRICT COURT
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Magistrate Judge Lynch

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ORDER GRANTING MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

Before the Court is the American Civil Liberties Union of Florida, Inc.'s Motion for Leave to Appear as *Amicus Curiae* in Support of Defendant's Emergency Motion to Dissolve Temporary Injunction. While the Federal Rules of Civil Procedure are silent about participation by *amicus curiae*, a federal district court has the inherent authority to permit such appearance. *Resort Timeshare Resales, Inc. v. Stuart*, 764 F.Supp. 1495, 1500-01 (S.D. Fla. 1991). The extent and manner of participation by *amicus curiae* is at the discretion of the Court. *Id.* at 1501. The Court finds that submission of a memorandum by the ACLU will assist the Court and the parties in framing the issues in this case.

IT IS THEREFORE ORDERED that the ACLU's Motion for Leave to Appear as *Amicus Curiae* is granted and the Court will consider the ACLU's Memorandum submitted with the Motion.

SO ORDERED this ___ day of June, 2003.

_____
Daniel T. K. Hurley
United States District Judge

c: attached service list

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