

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN CURLEY,

Plaintiff,

v.

MONMOUTH COUNTY BOARD OF CHOSEN
FREEHOLDERS, SERENA DIMASO, in her
individual and official capacity
as Monmouth County Chosen
Freeholder, THOMAS ARNONE, in his
individual and official capacity
as Monmouth County Chosen
Freeholder, GARY RICH, in his
individual and official capacity
as Monmouth County Chosen
Freeholder, LILLIAN BURRY, in her
individual and official capacity
as Monmouth County Chosen
Freeholder, MICHAEL FITZGERALD,
ESQ., in his individual and
official capacity as County
Counsel, and TERI O'CONNOR, in her
individual and official capacity
as County Administrator,

Defendants.

Civil Action No.:

3:17-cv-12300-BRM-TJB

Civil Action

RETURN DATE: January 16, 2018

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO HOLD DEFENDANTS AND
DEFENDANTS' COUNSEL IN CONTEMPT AND FOR SANCTIONS**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS.....	2
A. THE COURT ORDERS THAT EXHIBITS A AND B TO CURLEY’S COMPLAINT (ECF NO. 2) SHALL REMAIN UNDER SEAL.	2
B. DEFENDANTS’ DISREGARD OF THE COURT’S ORDER.	4
LEGAL ARGUMENT.....	9
I. THE COURT’S SEALING ORDER IS VALID.	9
II. DEFENDANTS AND THEIR COUNSEL CONSENTED TO THE ORDER AND HAD KNOWLEDGE OF ITS REQUIREMENTS.	12
III. DEFENDANTS AND THEIR COUNSEL DISOBEYED THE COURT’S ORDER AND THE COURT SHOULD ORDER SANCTIONS.	13
CONCLUSION.....	16

TABLE OF AUTHORITIES

CASES

<u>Apple Corps Ltd. v. Int’l Collectors Society,</u> 15 F. Supp. 2d 456 (D.N.J. 1998)	12
<u>Bond v. Floyd,</u> 385 U.S. 116 (1966)	11
<u>Carson v. Vernon Twp.,</u> No. 09-6126, 2010 WL 2985849 (D.N.J. July 21, 2010)	12
<u>Carver v. Foerster,</u> 102 F.3d 96 (3d Cir. 1996)	10
<u>Chambers v. NASCO, Inc.,</u> 501 U.S. 32 (1991)	9
<u>Cook v. Ochsner Found. Hosp.,</u> 559 F.2d 270 (5th Cir. 1977)	15
<u>Damiano v. Sony Music Entertainment, Inc.,</u> No. 95-4795, 2000 WL 1689081 (D.N.J. Nov. 13, 2000)	14
<u>G.D. v. Kenny,</u> 411 N.J. Super. 176 (App. Div. 2009), <u>aff’d</u> , 205 N.J. 275 (2011)	15
<u>Hill v. Borough of Kutztown,</u> 455 F.3d 225 (3d Cir. 2006)	11
<u>INS v. Chadha,</u> 462 U.S. 919 (1983)	11
<u>Landmark Legal Found v. E.P.A.,</u> 272 F. Supp. 2d 70 (D.D.C. 2003)	13
<u>Link v Wabash Railroad Co.,</u> 370 U.S. 626 (1961)	9
<u>Marshak v. Treadwell,</u> 595 F.3d 478 (3d Cir. 2009)	9
<u>McDonald’s Corp. v. Victory Inv.,</u> 727 F.3d 82 (3d Cir. 1984)	14
<u>Monteiro v. City of Elizabeth,</u> 436 F.3d 397 (3d Cir.), <u>cert. denied</u> , 549 U.S. 820 (2006)	11-12

<u>Morton v. Beyer,</u> 822 F.3d 364 (3d Cir. 1987)	11
<u>Mosaid Techs. Inc. v. Samsung Elecs. Co.,</u> 348 F. Supp. 2d 332 (D.N.J. 2004)	15
<u>Nixon v United States,</u> 506 U.S. 224 (1993)	10
<u>Perna v. Electronic Data Systems, Corp.,</u> 916 F. Supp. 388 (D.N.J. 1995)	9
<u>Reed Publ'g (Ned.) B.V. v. Execulink, Inc.,</u> No. 98-1049, 2000 WL 1023356 (D.N.J. June 8, 2000)	10
<u>Robin Woods Inc. v. Woods,</u> 28 F.3d 396 (3d Cir. 1994)	9, 14, 15
<u>Schering Corp. v. Vitarine Pharms., Inc.,</u> 889 F.2d 490 (3d Cir. 1989)	14
<u>Survivor v. Our Kids of Miami-Dade/Monroe, Inc.,</u> No. 11-CIV-24611, 2016 WL 950952 (S.D. Fla. Mar. 7, 2016)	12
<u>Thomas v. Independence Twp.,</u> 463 F.3d 285 (3d Cir. 2006)	11
<u>U.S. ex rel. Bibby v. Wells Fargo Home Mortg. Inc.,</u> 76 F. Supp. 3d 1399 (N.D. Ga. 2015)	14
<u>York Group, Inc. v. Pontone,</u> No. 10-1078, 2014 WL 3811014 (W.D. Pa 2014)	9, 13
<u>Zivotofsky ex rel. Zivotosfky v. Clinton,</u> 566 U.S. 189 (2012)	10

STATUTES

28 U.S.C. § 1331.....	10
<u>N.J.S.A.</u> 47:1A-1.1.....	3

PRELIMINARY STATEMENT

On December 4, 2017, counsel for the parties in this case – Plaintiff, Freeholder John Curley; and Defendants the Monmouth County Board of Chosen Freeholders, Freeholder Serena DiMaso, Freeholder Thomas Arnone, Freeholder Gary Rich, Freeholder Lillian Burry; County Counsel Michael Fitzgerald, and County Administrator Teri O'Connor ("Defendants") – appeared before this Court to discuss resolving the preliminary injunction motion that Plaintiff had previously filed. Plaintiff and Defendants Fitzgerald and O'Connor were also present in Court. After four hours of discussions mediated by the Court, the parties agreed to terms that mooted some of Plaintiff's motion and Plaintiff agreed to withdraw the remainder of the motion. Separately, the parties agreed, and the Court so ordered, that the confidential report and Plaintiff's rebuttal to that report, both of which were attached to Plaintiff's complaint, would remain under seal.

Four days later, the Freeholders convened, first in executive session and later in a public meeting, to discuss the Report and vote on a resolution censuring Plaintiff. Notwithstanding the parties' agreement and the Court's December 4, 2017 Order that the Report remain under seal, during the public session, Defendants and their counsel directly quoted and paraphrased from portions of the Report in the public

meeting. These actions are in direct defiance of the Court's Order and should not be tolerated. Defendants and their counsel should be held in contempt for their deliberate contravention of this Court's valid order and the Court should award an appropriate sanction.

STATEMENT OF FACTS

A. The Court Orders That Exhibits A And B To Curley's Complaint (ECF No. 2) Shall Remain Under Seal.

Plaintiff, an elected Freeholder serving on the Monmouth County Board of Chosen Freeholders (the "Board"), filed a Verified Complaint in this action on December 1, 2017, along with a proposed order to show cause seeking a temporary restraining order and preliminary injunction. (ECF No. 1.) Curley is an outspoken member of the Board, who has been known to take positions contrary to those in his own party and who has, accordingly, angered the County's political bosses. (Amended Verified Compl. ¶¶ 1-3.)¹ Beginning this summer, Curley alleges, Defendants, the other Freeholders, the County Counsel and County Administrator, used an allegation that Curley had made an "unseemly" comment at a parade to launch a full-scale investigation into his conduct and relationships with County employees and other Freeholders for the past 6 years. (Amended

¹ Plaintiff filed a First Amended and Supplemental Verified Complaint ("Amended Verified Compl.") in accordance with Fed. R. Civ. P. (a)(1). (ECF No. 7.)

Verified Compl. ¶¶ 4-6.) Ultimately, the investigation resulted in a Report written by an investigator that includes unverified and false statements about Curley. (Amended Verified Compl. ¶¶ 53-56.)

At the time he filed the Complaint, the Freeholders had not taken any official action, but the County Counsel and Administrator, acting on their own, ordered that Curley could not enter the County Hall of Records building without notifying them in advance, and prohibited him from having contact with any County employees, including his own aide. (Amended Verified Compl. ¶¶ 75-77.) The County Counsel then called for an executive session and public meeting to occur on December 4, 2017, to discuss the Report and introduce a resolution censuring Curley. (Amended Verified Compl. ¶ 75.)

Curley contends that these actions were *ultra vires* and that they violated his due process and free speech rights under the Federal and State Constitutions. (Amended Verified Compl. ¶ 12.) As part of the filing, Curley filed the Report and his counsels' response to the Report under seal because of the sensitive personnel discussions that it contained. (Amended Verified Compl. ¶ 95.) Since the County had deemed it a "sexual harassment" investigation, the Report is shielded from public disclosure under New Jersey's Open Public Record Act, N.J.S.A. 47:1A-1.1.

After talking with counsel, Defendants agreed to postpone the meetings scheduled for December 4, 2017. (ECF No. 4.) Instead, the counsel for the parties convened on December 4, 2017, and with the Court's assistance, attempted to discuss a resolution of the immediate issues in Curley's preliminary injunction motion. (Amended Verified Compl. ¶ 92.) In addition to counsel, Curley, and Defendants Fitzgerald and O'Connor were present. (Amended Verified Compl. ¶ 93.) After hours of discussions, the parties reached an agreement, which the Court ordered on the record. (Amended Verified Compl. ¶¶ 94-95.) Curley would be granted access to the Hall of Records and his confidential aide would be restored to him. (Amended Verified Compl. ¶ 92.) Curley would withdraw the remainder of his preliminary injunction motion and allow the Freeholders to reschedule the meeting. (Amended Verified Compl. ¶ 94.) Separately, the parties agreed, and the Court ordered that the Report and the response to the Report (ECF No. 2) would "remain sealed." (Amended Verified Compl. ¶ 95.)

B. Defendants' Disregard the Court's Order.

After Curley withdrew the motion, Defendants immediately noticed an executive session and public meeting for December 8, 2017. (Amended Verified Compl. ¶ 96.) After the executive session, the Freeholders met at a public session, where they proceeded to consider Resolution # 2017-1002, censuring Curley.

(Amended Verified Compl. ¶ 108 & Ex. F.) The Freeholders would ultimately vote 4-0 in favor of the resolution.² (Amended Verified Compl. ¶ 117.)

In violation of the Court's Order sealing the Report, Defendants and Defendants' counsel quoted from or paraphrased numerous portions of the Report in the Censure Resolution:³

[[*REDACTED per Sealing Order (ECF No. 6)***]]**

² All Freeholders participated in the discussion and vote even though Freeholder DiMaso was one of the individuals making accusations in the Report and several of the other Freeholders were discussed as witnesses.

³ Despite Defendants' violation, the Court's sealing order (ECF No. 6) remains in effect. Accordingly, Curley is filing this brief under seal. Per Local Civ. R. 5.3(c)(7), Curley will file a public version of the documents redacting the portions of the brief that quote from the Report. Curley reserves the right to move to unseal the Report to present a complete picture of the excerpts that Defendants have already placed in the public domain.

[[***REDACTED per Sealing Order (ECF No. 6)***]]

Further, in discussing the Censure Resolution, counsel for Defendants on numerous occasions quoted from the Report:

[[***REDACTED per Sealing Order (ECF No. 6)***]]

[[*REDACTED per Sealing Order (ECF No. 6)***]]**

Although they quoted from the sealed Report, Defendants and their counsel failed to present a complete picture of the Report, including that the author of the Report found that Curley had not committed any actions that would constitute a violation of law. (Amended Verified Compl. ¶ 113.) The Censure Resolution also purports to rely on statements that Curley allegedly made that were not included in the Report. (Amended Verified Compl. ¶ 114.)

LEGAL ARGUMENT

Federal courts possess the inherent authority to punish for contempt. Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991); see also Perna v. Electronic Data Systems, Corp., 916 F. Supp. 388, 396 (D.N.J. 1995) (courts possess the "inherent power to supervise and sanction parties before it . . . to manage their own affairs to as to achieve the orderly and expedition disposition of cases.") (citing Link v Wabash Railroad Co., 370 U.S. 626 (1961)). To warrant a finding of contempt, the Court must find, by clear and convincing evidence, "(1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order." Marshak v. Treadwell, 595 F.3d 478, 485 (3d Cir. 2009). "A plaintiff, however, is not required to prove that the defendant willfully violated a court order." York Group, Inc. v. Pontone, No. 10-1078, 2014 WL 3811014, at *5 (W.D. Pa 2014) (quoting Robin Woods Inc. v. Woods, 28 F.3d 396, 400 (3d Cir. 1994)) (emphasis added). Each of these elements is satisfied here and the Court should issue an appropriate sanction for Defendants and their counsel's conduct.

I. THE COURT'S SEALING ORDER IS VALID.

For purposes of a contempt motion, a Court order is valid unless the Court lacked subject matter jurisdiction over the dispute or personal jurisdiction over a party subject to the

order. See, e.g., Reed Publ'g (Ned.) B.V. v. Execulink, Inc., No. 98-1049, 2000 WL 1023356, at *1 (D.N.J. June 8, 2000). The Court possesses jurisdiction here because Curley raises Constitutional claims under the First Amendment and Due Process clauses, pursuant to the federal civil rights statutes, 42 U.S.C. §§ 1983 and 1985. See 28 U.S.C. § 1331; see, e.g., Carver v. Foerster, 102 F.3d 96, 99 (3d Cir. 1996).⁴

Defendants have at times suggested that this Court lacks jurisdiction under the "political question" doctrine, citing the fact that the parties are politicians and Curley alleges that Defendants' actions were politically motivated. Defendants' argument rests on a fundamental misunderstanding of the political question doctrine, which only divests the Court of jurisdiction if there is "a textually demonstrable constitutional commitment of the issue to a coordinate department, or a lack of judicially discoverable and manageable standards for resolving it." Zivotofsky ex rel. Zivotosfky v. Clinton, 566 U.S. 189, 195 (2012) (quoting Nixon v United States, 506 U.S. 224, 228 (1993)). "Political" in the "political question doctrine" refers to an issue for which the Constitution commits the final interpretation to one of the "political" branches, not the courts. See Nixon, 506 U.S. at 240 ("[T]he

⁴ The Court unquestionably possesses personal jurisdiction over the Defendants, all New Jersey citizens.

issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.""). The political question doctrine does not prevent the Court from ruling on issues "merely 'because the issues have political implications.'" Id. at 196 (quoting INS v. Chadha, 462 U.S. 919, 943 (1983)).

Plaintiff's claims that Defendants violated his constitutional rights are not textually committed to a coordinate branch of government; rather, they are the type of claims that federal courts routinely adjudicate. Thomas v. Independence Twp., 463 F.3d 285 (3d Cir. 2006) (First Amendment political retaliation claim); Hill v. Borough of Kutztown, 455 F.3d 225 (3d Cir. 2006) (due process claim under "stigma-plus" test); Morton v. Beyer, 822 F.3d 364 (3d Cir. 1987) (procedural due process claim relating to failure to provide adequate hearing before punishment).

That the parties are elected officials does not divest the Court of subject matter jurisdiction. The Supreme Court and Third Circuit have allowed district courts to exercise jurisdiction over First Amendment retaliation claims made by elected officials. See, e.g., Bond v. Floyd, 385 U.S. 116, 132 (1966) (exclusion of legislator based on statements criticizing Vietnam War violated elected official's free speech rights); Monteiro v. City of Elizabeth, 436 F.3d 397, 405-06 (3d Cir.),

cert. denied, 549 U.S. 820 (2006) (affirming jury verdict in favor of elected official on claim of First Amendment political retaliation); see also, e.g., Carson v. Vernon Twp., No. 09-6126, 2010 WL 2985849, at *14 (D.N.J. July 21, 2010) (denying motion to dismiss First Amendment claim by former elected official because "[p]olitical expression such as Plaintiff's positions and votes on Township matters is unquestionably protected under the First Amendment.").

Therefore, the Court possesses subject matter jurisdiction over this action and its Order sealing the Report is valid.

II. DEFENDANTS AND THEIR COUNSEL CONSENTED TO THE ORDER AND HAD KNOWLEDGE OF ITS REQUIREMENTS.

There can be no dispute that all Defendants were aware of the Order. As noted above, the Court's Order that the Report and rebuttal to Report remain under seal was issued only after counsel for the parties (along with Defendants Fitzgerald and O'Connor) appeared and agreed to the Order. (Amended Verified Compl. ¶ 95.) As in the case of any consent order, the parties' knowledge of the order is necessarily established. See, e.g., Apple Corps Ltd. v. Int'l Collectors Society, 15 F. Supp. 2d 456, 465-66 (D.N.J. 1998); see also Survivor v. Our Kids of Miami-Dade/Monroe, Inc., No. 11-CIV-24611, 2016 WL 950952, at *9 (S.D. Fla. Mar. 7, 2016) ("Given that DCF agreed to the filing of the document under seal, its claim of ignorance that the GAL

Report was ultimately sealed rings hollow. Attorneys—and the parties they represent—cannot be allowed to maintain deliberate ignorance of an order to avoid contempt.”).⁵

Indeed, even if Defendants could somehow feign ignorance, during the public session, a member of the public unrelated to Curley interrupted and pointed out that talking about the Report violated this Court’s sealing Order, but Defendants continued to quote portions of the Report (Amended Verified Compl. ¶ 109.) Counsel for Curley also objected on this basis. (Id. ¶ 112.)

**III. DEFENDANTS AND THEIR COUNSEL DISOBEYED THE
COURT’S ORDER AND THE COURT SHOULD ORDER
SANCTIONS.**

As detailed above, Defendants and their counsel on multiple occasions quoted directly or paraphrased from the Report. These actions are in direct violation of the Court’s valid sealing order. Defendants and their counsel should be sanctioned for their conduct. District courts have not hesitated to hold parties in contempt for violating sealing orders. For instance, in York Group, the court issued monetary sanctions against plaintiffs for violating a protective order which kept certain documents under seal. York Group, 2014 WL 3811014, at *12. Further, that Defendants quoted from the Report instead of

⁵ Indeed, since the Defendants are parties, actual notice of the order is not necessary to find them in contempt of the Court’s valid order. Landmark Legal Found v. E.P.A., 272 F. Supp. 2d 70, 82 (D.D.C. 2003) (“To find contempt, it need not be proven that a party to an order had actual notice of that order.”)

releasing it directly does not diminish their violation. U.S. ex rel. Bibby v. Wells Fargo Home Mortg. Inc., 76 F. Supp. 3d 1399, 1403 (N.D. Ga. 2015) (sanctioning plaintiff for violating order sealing False Claim Act complaint after he discussed the lawsuit with a reporter).

Sanctions are appropriate in this case. "Sanctions for civil contempt serve two purposes: 'to coerce the defendant into compliance with the court's order and to compensate for losses sustained by the disobedience.'" Robin Woods, 28 F.3d at 400 (quoting McDonald's Corp. v. Victory Inv., 727 F.3d 82, 87 (3d Cir. 1984)) (emphasis added). In determining an appropriate sanction this Court should also consider the goal of deterring future non-compliance with its orders. See, e.g., Damiano v. Sony Music Entertainment, Inc., No. 95-4795, 2000 WL 1689081, at *2 (D.N.J. Nov. 13, 2000) (award of attorneys' fees to deter future non-compliance); cf. Schering Corp. v. Vitarine Pharms., Inc., 889 F.2d 490, 495 (3d Cir. 1989) (contempt proceedings "are designed to deter misbehavior before the Court").

Defendants have already revealed portions of the contents of the Report to the public and cannot at this point "un-ring the bell." However, there are several remedial sanctions that the Court could consider imposing. First, Curley has alleged that the comments in the Report are defamatory and that their revelation to the Freeholders constitutes publication, a

necessary element of a defamation claim. (Amended Verified Compl. ¶ 60); see G.D. v. Kenny, 411 N.J. Super. 176, 186 (App. Div. 2009), aff'd, 205 N.J. 275 (2011). Since Defendants have now read these exact statements to the public in violation of the sealing order, the Court should order that Defendants are precluded from contesting the publication element in Plaintiff's defamation and Constitutional "slander-plus" counts. Cf. Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 336 (D.N.J. 2004) (court's imposition of adverse inference under inherent authority).

Second, in situations where coercion with further compliance would not be fruitful, the Third Circuit has approved the issuance of monetary sanctions and "the cost of bringing the violation to the attention of the court is part of the damages suffered by the prevailing party and those costs would reduce any benefits gained by the prevailing party from the court's violated order." Robin Woods, 28 F.3d at 400 (quoting Cook v. Ochsner Found. Hosp., 559 F.2d 270, 272 (5th Cir. 1977)). Here, the Court should also award monetary sanctions both to compensate defendants for the necessity of filing this motion and to deter future non-compliance with the Court's orders.

CONCLUSION

For the foregoing reasons the Court should find Defendants and their counsel in contempt of this Court's Order keeping the Report under seal, and award an appropriate sanction.

Respectfully submitted,

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By: /s/ Angelo J. Genova, Esq.
ANGELO J. GENOVA, ESQ.

Dated: December 22, 2017