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FACSIMILE TRANSMISSION SHEET

**TO: The Honorable Reggie B. Walton (202) 354-3292
Christopher Wolf, Esquire (202) 416-6899**

FROM: Robert R. Sparks, Jr.

DATE: March 10, 2005

RE: Memorandum of Additional Points and Authorities

Case: 05 CV 486

Find attached defendant USA's Memorandum, filed in accordance with Judge Walton's invitation from the bench at the conclusion of yesterday's hearing.

In view of Judge Walton's schedule today, if it would be more convenient for the Court, defendant USA has no objection to the Court's delivering its ruling in this case by facsimile transmission. However, unless the Court indicates its desire to proceed in that manner, counsel for USA will be appear at 4:00 p.m. in accordance with Judge Walton's order of yesterday.

Total number of pages (including this cover sheet) 8

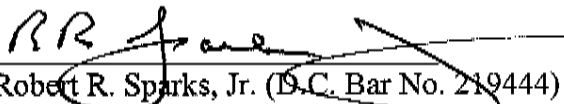
2. This Court is correct in believing that, in assessing plaintiffs' request for a TRO, it is to use the four factors set out in *National Head Start Ass'n v. Dept. of Health and Human Serv.*, 297 F. Supp. 2d 242,246 (D.D.C. 2004). Counsel for USA has found no cases to the contrary.

This case asserts a violation of plaintiffs' right to privacy. They allege that they are private citizens. Complaint ¶ 3. Counts Two and Three of the Complaint explicitly allege Invasion of Privacy. Moreover, in argument, counsel for plaintiffs has made much of his clients' claimed loss of privacy purportedly occasioned by USA's advertisement.

This case is not about a so-called "right to publicity." A right to publicity is a variation of the right to privacy that inheres in prominent persons whose names or faces carry a monetary value. *Lerman v. Flynt Dist. Co., Inc.* 745 F.2d 123,133-34 (2nd Cir. 1984); *Allen v. National Video, Inc.*, 610 F. Supp. 612, 621 (S.D.N.Y. 1985). Here, plaintiffs argue and allege that they are private figures asserting a violation of their right to privacy. This case is not about a right to publicity. But even if it were, a showing of irreparable harm would still be required. *See, e.g., Allen*, 610 F. Supp. at 630 (decided under the Lanham Act).

Where plaintiffs who seek to protect their **right of privacy** have sought injunctive relief, courts have universally required a showing of irreparable harm, along with the other factors normally required in an application for such relief. For example, in *Matos v. Clinton School District*, 367 F.3d 68 (1st Cir. 2004), a high school student sought injunctive relief overturning her suspension from high school which, she claimed, implicated her right of privacy. The lower court denied the student's request for a preliminary injunction. The Court of Appeals affirmed, finding that the student had failed to establish irreparable harm. *See also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981) (in the context of a constitutional claim of a loss of right of privacy, a finding of irreparable injury is still required).

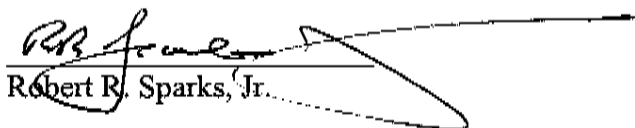
Plaintiffs briefed and argued this case using the standard four-part test applicable in cases seeking injunctive relief. They did so because this case involves a claimed violation of their right to privacy. They must, but cannot, make a showing of irreparable harm, among other things. They have not done so and this Court should therefore deny the requested relief.


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Counsel for United Seniors Association, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum of Additional Points and Authorities, with attachments, was sent by facsimile transmission to:

Christopher Wolf, Esquire
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1233 Twentieth Street NW, Suite 800
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Robert R. Sparks, Jr.

FOR IMMEDIATE RELEASE

March 9, 2005

Contact: John Aravosis

Spokesman for Richard M. Raymen and Steven P. Hansen

202-232-5107 - John@WiredStrategies.com

‘USA NEXT’ SUED FOR \$25 MILLION

Couple Used in Homophobic Anti-AARP Ad Files Federal Lawsuit

WASHINGTON, DC – A \$25 million lawsuit was filed today against right-wing front group USA Next and political consulting firm Mark Montini International for stealing an Oregon couple’s wedding photo and using it without permission in a high-profile gay-bashing ad designed to drum up support for social security privatization.

Following an admission of photo theft by the creator, advertiser and publisher of the ad, the couple whose image was stolen - Rick Raymen and Steve Hansen of Portland, Oregon - today filed a four-count lawsuit in federal court in Washington, DC. The suit alleges that the use of the couple’s image without permission constituted an **invasion of privacy, was libelous, violated their right of publicity and constituted an intentional infliction of emotional distress.**

In one version of the USA Next ad disseminated widely on the Internet in February, and aired repeatedly by television news programs and newspapers nationwide, the couple’s image, superimposed with a green checkmark, is side-by-side a picture of a US soldier with a red “X” across it. Below the photos is the phrase “The REAL AARP Agenda.”

A copy of the ad can be viewed online here:

<http://images.mydd.com/images/admin/antiaarpgop3>

“Our privacy and personal integrity were violated when our wedding photo was stolen and used to portray us as treasonous, unpatriotic, and a threat to American troops,” Rick Raymen said. “We have been harassed and humiliated by this hateful ad campaign and by the bigotry and anger it has generated against us nationwide.”

"Our lawsuit is intended to make USA Next and Mark Montini pay for the harm they have caused and to send a message to them that they cannot recklessly play with peoples' reputations and make them targets of hate, as they have done with us," Raymen said. "When we get our judgment, we intend to donate to those who fight the kind of hate and homophobia that USA Next and Montini have demonstrated."

Christopher Wolf, counsel for the Oregon couple, and a partner in the Proskauer Rose law firm, explained the basis of today’s lawsuit in the complaint filed with the court. “When they created and published the advertisement, defendants knew or should have known that the publication of the plaintiffs’ image would subject them to an invasion of privacy and ridicule,” Wolf wrote in

the complaint. "As a result of the publication of the advertisement, plaintiffs have suffered embarrassment, extreme emotional distress, and invasion of privacy. In addition, as a result of the libelous statement communicated by the advertisement about plaintiffs, their reputations as patriotic American citizens has been severely damaged."

"Our lawsuit seeks to hold the defendants accountable for taking two private citizens and maliciously making them targets for homophobic bigots," Wolf said today. "Our clients did not volunteer to be models in a right-wing hate campaign. There are serious legal consequences for deploying them against their will."

Simultaneously with the filing of the complaint, Wolf filed a motion for a temporary restraining order and a preliminary injunction against USA Next and its ad agency to get them to stop using the photo. The motion also seeks the return of all pictures containing the couple's image and an accounting of all places where the photos have been used or sent, in light of the refusal of USA Next to retract or apologize for its ad.

The dispute leading to the lawsuit began a few weeks ago when Raymen and Hansen noticed their wedding photo published on the conservative America Spectator Web site as part of a homophobic USA Next ad meant to slur AARP. Not having given their permission for use of the photo, Raymen and Hansen contacted the copyright holder, the Portland Tribune, and the paper quickly confirmed that it had not sold the photo to anyone and that the image had likely been stolen from its Web site.

In the meantime, the intentionally controversial ad quickly achieved USA Next's goal of being viral marketed for free to millions of viewers on the Internet, on network television, and in major news publications across the country.

On behalf of Raymen and Hansen, attorney Christopher Wolf wrote USA Next chairman and CEO Charles Jarvis on February 28, 2005, demanding that USA Next immediately stop using photos of the couple and that it publicly apologize for the ongoing harm it is causing. A copy of that letter can be found online here:

<http://www.WiredStrategies.com/lawsuit/letter1.pdf>

While refusing to respond to the letter, USA Next repeatedly told the media that it had lawfully purchased the photo and that Raymen and Hansen were being "silly." In fact, we now know that USA Next and its surrogates were surreptitiously trying to buy the photo at the same time they were assuring the media that it had already been purchased.

Raymen and Hansen have yet to receive an apology from USA Next.

A copy of the letter to USA Next, the lawsuit, and press releases can be found online here:

<http://www.WiredStrategies.com/lawsuit/home.html>

the story

Release: Gay couple file \$25 million lawsuit against Soc. Security group

3/9/2005 @ 2:52 pm EST

From a press release:

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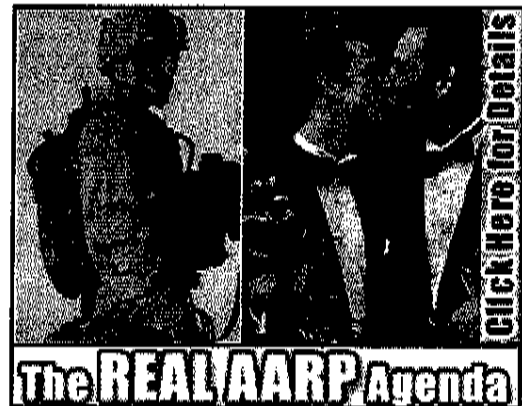
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â€œOur privacy and personal integrity were violated when our wedding photo was stolen and used to portray us as treasonous, unpatriotic, and a threat to American troops,â€™ Rick Raymen said. â€œWe have been harassed and humiliated by this hateful ad campaign and by the bigotry and anger it has generated against us nationwide.â€™

â€œOur lawsuit is intended to make USA Next and Mark Montini pay for the harm they have caused and to send a message to them that they cannot recklessly play with peoples' reputations and make them targets of hate, as they have done with us,â€™ Raymen said. â€œWhen we get our judgment, we intend to donate to those who fight the kind of hate and homophobia that USA Next and Montini have demonstrated.â€™

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â€œOur lawsuit seeks to hold the defendants accountable for taking two private citizens and maliciously making them targets for homophobic bigots,â€™ Wolf said today. â€œOur clients did not volunteer to be models in a right-wing hate campaign. There are serious legal consequences for deploying them against their will.â€™



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