

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

----- X

SUNTRUST BANK AS TRUSTEE	:	
F/B/O EUGENE MUSE MITCHELL	:	Index No. 1:01 CV-701
and JOSEPH REYNOLDS MITCHELL,	:	
	:	
Plaintiff,	:	AFFIDAVIT OF ELLIS
	:	B. LEVINE IN SUPPORT
-against-	:	OF PLAINTIFF'S MOTION
	:	FOR A TEMPORARY
HOUGHTON MIFFLIN, INC.,	:	RESTRAINING ORDER AND
	:	<u>PRELIMINARY INJUNCTION</u>
	:	
Defendant.	:	

----- X

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

I, ELLIS B. LEVINE, being duly sworn, deposes and says:

1. I make this affidavit in support of plaintiff's motion for a temporary restraining order. I have personal knowledge of the matters stated herein.

2. I am a graduate of Harvard Law School and a practicing attorney specializing in literary property matters. From 1989 until 1998 I was Vice President, General Counsel, Secretary and a member of the Board of Directors of Random House, Inc., the world's largest English language publisher of general interest books, after having been an in-house counsel at Random House since 1975. Prior to that I had been associated with two law firms specializing in the representation of book publishers and I had served as counsel to Macmillan, Inc. I am a past Chairman of the Association of American Publishers Lawyers Committee and a former Trustee of the Copyright Society of the U.S.A. In the course of my career I have been a

lecturer/panelist on legal aspects of book publishing and First Amendment issues for such organizations as the American Bar Association, the Practicing Law Institute and the New York Law Journal.

3. I qualified as an expert witness and testified at a hearing in the United States District Court for the Southern District of New York on behalf of John Cheever's Estate against Academy Chicago in a contract and copyright dispute. In 1999 I submitted a written summary of my expected testimony as an expert witness on behalf of the publisher in a libel suit entitled Ruckdeschel v. Penguin Berkley, Avon Books and Nevada Barr in the United States District Court for the Southern District of Georgia, Brunswick Division. I was qualified and testified as an expert witness on behalf of the publisher in the 1999 trial of Rosenfeld, Meyer & Susman v. Carol Publishing Co., a libel suit.

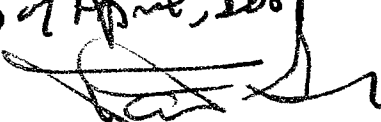
4. I have been informed that Houghton Mifflin has contended that it will suffer significant economic harm if a temporary restraining order is granted and it is therefore forced to postpone the scheduled publication date for THE WIND DONE GONE. However, it has been my experience during over 35 years of representing book publishers that it is not uncommon for publication dates to be changed by publishers. Such changes can range over periods of weeks, months or publishing seasons. Changes in scheduled publication dates can occur for a variety of reasons including instances where (a) the author has failed to complete the book on schedule; (b) the publisher decides to alter the schedule by either advancing the publication date or


postponing it to give the book more visibility; (c) the publisher elects to avoid its book being published at the very same time as another book on the same subject appears; (d) due to scheduling conflicts or illness the author would be unavailable to promote the work at the time that publication was originally scheduled; (e) a television program or magazine feature relating to the book would not coincide with the scheduled publication date; or (f) a legal review might have not yet been completed in time; or (g) a legal claim may have been received on the eve of the scheduled publication and a responsible publisher would not publish the work until it completed its investigation of the claim and was satisfied that the work was not likely to subject the publisher to liability if a lawsuit ensued. Moreover, it is not unusual to find a publication date listed in a publisher's catalogue which turns out to be inaccurate. In the present instance, it is premature and speculative for Houghton Mifflin to assert that it will suffer significant economic harm if publication of THE WIND DONE GONE is delayed temporarily by this Court. For the greatly heightened media attention surrounding this lawsuit may well ultimately lead to greater book sales when and if the temporary restraining order is lifted.

5. I have been informed that the publisher has also alleged that scheduled book tours and other publicity arrangements may be permanently lost if publication were delayed pending the conclusion of this lawsuit. This contention is also speculative. Publicity arrangements surrounding book publication are designed to provide maximum exposure to the author and the

book in the media and at bookstores where potential buyers of the book are present. However, a lawsuit like this one dramatically increases a book's exposure and coverage in the media. In fact this litigation has already been the subject of extensive coverage in The New Yorker Magazine, the Atlanta Journal Constitution and MSNBC, and I have been advised that it has received extensive media coverage elsewhere. A publisher who ultimately prevails over an attempt to halt publication of the book will then have the opportunity to advertise and promote the book as the "one they tried to stop." Moreover, the much higher visibility for the defendant's book in the news media because of this litigation is likely to enable the publisher to have even greater opportunities to secure media coverage to publicize both the book and the author if they prevail in this case. In any event, one of the consequences of this lawsuit that was unintended by the plaintiff is that, in my opinion, defendant's book is already likely to have garnered far more publicity than it would have if there had been no litigation.

6. I have also read the affidavit of Wendy J. Strothman dated March 27, 2001. Contrary to what Ms. Strothman stated, in my experience a publisher's reputation is neither tarnished nor compromised among authors and it does not lose good will with booksellers or the media solely because the publication of one of its books has been enjoined.

Sworn to before Me this 5th day of April, 2001




Ellis B. Levine

CERTIFICATE OF SERVICE

This is to certify that I have this 9th day of April, 2001, caused a true and correct copy of the AFFIDAVIT OF ELLIS B. LEVINE IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION to be hand delivered, addressed to counsel for Defendant as follows:

Miles J. Alexander, Esq.
Jerre B. Swann, Esq.
Joseph M. Beck, Esq.
KILPATRICK STOCKTON LLP
1100 Peachtree Street, N.E.
Suite 2800
Atlanta, Georgia 30309-4530



An Attorney for Plaintiff