

# Randazza Legal Group

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**Reply to Miami Office  
via Email or Fax**

December 21, 2009

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## Via Email and Fax

Douglas E. Thompson, Esq.  
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*Re: Your notice of demand to cease and desist of Dec. 4, 2009.*

Dear Attorney Thompson:

This law firm has been retained by Thomas J. Alascio with regard to the potential libel action threatened in your letter of December 4, 2009.

### **I. FLA. STAT. § 770.01**

I will begin by saying that I am impressed that you sent a §770.01 letter before filing suit. I have dealt with a fair number of Florida attorneys who seem to believe that §770.01 does not apply to internet communications, and even more who have never heard of §770.01. I am of the opinion that it is malpractice to file a libel suit without first serving a §770.01 demand, and any lawyer who does not even try to serve a §770.01 notice is quite simply, too mentally deficient to practice law.

That compliment out of the way, I will address your §770.01 demand. I believe that your notice is deficient in that it does not meet the statutory requirements. This is not mere nit-picking, since the statute requires that the alleged defamed person must identify the statements within the publication that he or she alleges to be false and defamatory.

Of course, in the interest of courtesy to a fellow member of the Bar, I would not simply respond with a perfunctory “your notice is deficient” letter and a “do over” request. I have reviewed the materials that gave rise to the demand, and I attempted to discover on my own what statements could be considered to be false statements of fact – and thus legally defamatory. I have attached all of the statements that my client made about Route 60 Hyundai as Exhibit A to this letter.

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## II. MR. ALASCIO'S STATEMENTS

Apparently, your client's umbrage stems from my client's tweets concerning your client.<sup>1</sup> Below, I provide a reproduction of his Twitter posts from October 8, 2009 (when my client had a confrontation with one of Route 60 Hyundai's employees) until October 21, 2009, when my client became bored with the subject.

- **Route 60 hyundia in vero beach. There is not a worse call dealership on the planet.** in Vero Beach, FL <http://loopt.us/mliz0g.f> (Thu, 08 Oct 2009 17:20:40 GMT)
- **Skate factory tonight with Kman. Btw. Route 60 Hyundai sucks.** @ 27th Ave & 5th St <http://loopt.us/U-A9iQ.f> (Thu, 08 Oct 2009 22:26:16 GMT)
- **Why does wrapping my credit card in a grocery bag make it work in the swio machine? Btw route 60 Hyundai sucks @ 58th Ave & College Rd** <http://loopt.us/AT1j3g.f> (Fri, 09 Oct 2009 01:13:14 GMT)
- **Sorry swipe.** (Fri, 09 Oct 2009 01:13:53 GMT)
- **Beautiful nite. Pretty moon and btw. Route 60 Hyundai sucks.** (Fri, 09 Oct 2009 02:46:59 GMT)
- **Good morning all. I just heard that Roman Polanski and Woody Allen both get there cars serviced by the crooks at route 60 Hyundia.** @... <http://loopt.us/dvMpEQ.f> (Fri, 09 Oct 2009 11:41:26 GMT)
- **Did you think Kayne West will interupt Obama's Nobel Acceptance Speach?** (Fri, 09 Oct 2009 14:22:40 GMT)
- **Ah. Friday. Time to relax. I here tim teebow might not play for the gators this weekend due to the service he recieved at route 60 H...** <http://loopt.us/CnIDdw.f> (Fri, 09 Oct 2009 20:08:35 GMT)
- **Took the kids to Sonic for dinner. Great food and service. Route 60 hyundai should take lessons in Fort Pierce, FL** <http://loopt.us/9xSB4A.f> (Fri, 09 Oct 2009 23:14:35 GMT)
- **Good night, sleep tight, don't let route 60 Hyundia bite!** @ 60th Ave & 6th St <http://loopt.us/NwBZsQ.f> (Sat, 10 Oct 2009 03:07:19 GMT)
- **This just in! GOP challenges authenticity of Obamas Nobel prize. Forgery they say! Oh yeah! Route 60 Hyundai sucks @ work** <http://loopt.us/pp4jgw.f> (Sat, 10 Oct 2009 11:57:55 GMT)
- **Horse show today. Indian river riding club first show of the season. Hope route 60 Hyundai does not ruin it.** @ 60th Ave & 6th St <http://loopt.us/yi8Cdg.f> (Sun, 11 Oct 2009 11:16:59 GMT)
- **Talula won reserve at the first IRRC show. Watch out Sam, Talula is gunning for you.** @ work <http://loopt.us/2y5tuw.f> (Sun, 11 Oct 2009 21:28:47 GMT)
- **This just in. Route 60 Hyundai still sucks.** @ Home [http://loopt.us/Rs\\_QuQ.f](http://loopt.us/Rs_QuQ.f) (Sun, 11 Oct 2009 21:31:26 GMT)
- **Gotta love costal hyundia. Great service. Car done In 3 hours. Take that route 60 hyundia.** (Mon, 12 Oct 2009 16:09:10 GMT)
- **Wow' been suck for 3 days and couting. Route 60 Hyundia must have given me h1n1** in Vero Beach, FL <http://loopt.us/0LNjDA.f> (Thu, 15 Oct 2009 11:55:26 GMT)

<sup>1</sup> Mr. Alascio's Twitter account is found at <http://twitter.com/headhunter69>

- **Wow' been sick for 3 days and couting. Route 60 Hyundia must have given me h1n1** in Vero Beach, FL <http://loopt.us/0LNJdA.f>. (Thu, 15 Oct 2009 13:19:34 GMT)
- **Still feel like crap. Feel like route 60 hyundias service.** @ Home <http://loopt.us/BiLSfw.f> (Thu, 15 Oct 2009 21:26:42 GMT)
- Great investment Idea. Switch your car insurnce to the lizard, then to that annoying brunette chick then to the black guy with deep voice and you should get like 200 dollars. (Fri, 16 Oct 2009 15:30:28 GMT)
- Cool this weekend yaah (Sat, 17 Oct 2009 00:54:41 GMT)
- Great day for soccer. Low 70's and a beautiful day. @ 59th Ave & 76th Ln <http://loopt.us/pfCovg.f> (Sat, 17 Oct 2009 13:49:29 GMT)
- My daughters fashion sense is impeccable (Sun, 18 Oct 2009 22:20:08 GMT)
- I have Google wave now, does anyone want an invite?? (Mon, 19 Oct 2009 15:17:05 GMT)
- I think everyone left work and went to the grocery store. @ 43rd Ave & 9th St <http://loopt.us/WQwX1Q.f> (Mon, 19 Oct 2009 21:37:20 GMT)
- surf is up and I am behind a desk BOO HOO! (Tue, 20 Oct 2009 15:43:11 GMT)
- Ahh Tuesday. @ work <http://loopt.us/DnFo1w.f> (Tue, 20 Oct 2009 21:37:16 GMT)
- **Finally back to 100%. Wish I could say the same for route 60 hyundia. There service just stinks!!!** in Vero Beach, FL <http://loopt.us/UkWuwQ.f> (Wed, 21 Oct 2009 13:02:34 GMT)

### III. BACKGROUND OF THE DISPUTE

It seems like a good idea for us to lay out the origin of my client's dissatisfaction with Route 60 Hyundai. The facts (as my client reports them to me) are as follows:

In 2007, my client was given a loaner vehicle by Route 60 Hyundai. Before taking the loaner off the lot, my client's wife told the dealership that the Alascios live at the end of a long dirt road, and perhaps the vehicle would not be appropriate for use on that kind of terrain. The Alascios were told that it would not be a problem.

When the vehicle was returned, its condition was consistent with that of a vehicle that had driven on a long dirt road, as Ms. Alascio warned the dealership that it would be. Although the customer service agent checked it in and signed off on its return as being in "good repair," Mr. Alascio later received a call from Route 60 Hyundai demanding \$1,000 for damage to the vehicle. Mr. Alascio disputed whether any amount should be billed, and furthermore disputed the \$1,000 bill. Therefore, Route 60 Hyundai put in a claim against Mr. Alascio's insurance company.

A few weeks later, Mr. Alascio received a call from his insurance company stating that they had a policy of simply paying claims of this size, and that after his deductible was calculated, they would be paying Route 60 Hyundai \$485.00. My client objected, believing the sum to be unjust, but he acquiesced to his insurance company's wishes.

About an hour later, Mr. Alascio received a call from a Route 60 Hyundai employee who told him that Route 60 Hyundai was willing to compromise, and that they would accept half of the \$1,000 they previously demanded. Mr. Alascio told him that since his insurance company was paying \$485, that he would pay the additional \$15, and the matter could be closed. At that point, the Route 60 employee became enraged.

My client believes that, the Route 60 Hyundai employee was not aware of Mr. Alascio's communication with the insurance company, and was trying to get the full \$1,000 through subterfuge. The Route 60 employee called the police, who came to take a statement from Mr. Alascio, and both Mr. Alascio and the police mocked the Route 60 employee for involving the police in a clearly civil matter.

The dispute remained dormant until October 8, when my client brought his car to be serviced at Route 60. Apparently, the employee who called the police during the prior incident informed Mr. Alascio that he would not service his car, would not give him a loaner, and that he would put Mr. Alascio's name in a database so that no Hyundai dealer in America would either service his vehicle or give him a loaner vehicle.

My client considers this to be adequate justification to form the opinion that "Route 60 Hyundai sucks."

#### **IV. LEGAL EVALUATION OF YOUR CLAIM**

I was unable to find a single statement on Mr. Alascio's Twitter account that was actionably defamatory. I am certain that your client does not like being called "the worst car dealership on the planet," nor does your client enjoy seeing statements that say that "Route 60 Hyundai sucks." Furthermore, I am certain that your client does not appreciate being the butt of my client's jokes. Unfortunately for Route 60 Hyundai, American defamation law would not support a claim under these facts.

##### **A. Florida Defamation Law**

In order to sustain a cause of action for defamation in Florida, the plaintiff must allege that there were false statements of fact, published to a third person, which caused damage to the Plaintiff. Without these essential elements, there is no defamation. See, e.g., Valencia v. Citibank, 728 So.2d 330 (Fla. 3d DCA 1999). See also Cape Publications, Inc. v. Reakes, 840 So.2d 277, 279-80 (Fla. 5th DCA 2003) ("A plethora of cases exist which proclaim that a required element of defamation is a false statement made about another") (citing Linafelt v. Beverly Enterprises-Florida, Inc., 745 So.2d 386, 388 (Fla. 1st DCA 1999); Smith v. Cuban Am. Nat'l Found., 731 So.2d 702, 705 (Fla. 3d DCA 1999)).

##### **B. The Substantial Truth Doctrine**

Even if there were isolated false facts, under the "substantial truth doctrine," isolated and cherry-picked errors or falsehoods will not sustain a cause of action for libel. Smith v. Cuban American Nat. Foundation, 731 So.2d 702, 706 (Fla. 3d DCA 1999) ("Under the substantial

truth doctrine, a statement does not have to be perfectly accurate if the ‘gist’ or the ‘sting’ of the statement is true.”); See Masson v. New Yorker Magazine, 501 U.S. 496, 517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir.1993); Nelson v. Associated Press, Inc., 667 F.Supp. 1468, 1477 (S.D.Fla.1987); Woodard v. Sunbeam Television Corp., 616 So.2d 501, 503 (Fla. 3d DCA 1993); McCormick v. Miami Herald Publ'g Co., 139 So.2d 197, 200 (Fla. 2d DCA 1962).

### **C. The Rhetorical Hyperbole Doctrine**

My client admits that neither Woody Allen nor Roman Polanski purchased cars from your client. Furthermore, my client admits that Route 60 Hyundai might not be the absolute worst car dealership in the world, and my client admits that he has not contracted H1N1. However, none of these statements are remotely legally actionable. See Greenbelt Coop. Pub. Ass'n. v. Bresler, 398 U.S. 6 (1970) (when it is apparent, in the context of a statement, that its meaning is figurative and hyperbolic, the falsity of the literal meaning does not equal a knowing falsehood or reckless disregard for the truth, thus a public figure can not prove actual malice as a matter of law); Lampkin-Asam v. Miami Daily News, Inc., 408 So. 2d 666 (Fla. 3d DCA 1981) (even otherwise defamatory words are hyperbolic, and thus protected speech when taken "in their proper context."); Horsley v. Rivera, 292 F.3d 695, (11th Cir. 2002) (a claim that plaintiff was an "accomplice to homicide" protected as rhetorical hyperbole when taken in context); Fortson v. Colangelo & NY Post, 434 F.Supp.2d 1369 (S.D. Fla. 2006) (when words literally accuse plaintiff of a crime, there is no defamation when the context makes it clear that it is rhetorical and hyperbolic speech).

### **D. The “Effect on the Reader” Issue / Damages Element**

I can not see how anyone could stretch the definition of “actionable falsehood” to fit these facts. A statement is not considered to be a defamatory falsehood unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’ ” Woodard v. Sunbeam Television Corp., 616 So.2d 501, 503 (Fla. 3d DCA 1993); Early v. Palm Beach Newspapers, Inc., 354 So.2d 351, 352 (Fla. 1977); Bishop v. Wometco Enters., Inc., 235 So.2d 759 (Fla. 3d DCA 1970); Hill v. Lakeland Ledger Publ'g Corp., 231 So.2d 254, 256 (Fla. 2d DCA 1970); Hammond v. Times Publ'g Co., 162 So.2d 681, 682 (Fla. 2d DCA 1964); McCormick v. Miami Herald Publishing Co., 139 So.2d at 197, 200 (Fla. 2d DCA 1962). Again, since I do not know which statements your client alleges are false, I cannot fully evaluate the claim. Nevertheless, Mr. Alascio’s Twitter feed appears, even out of context, to be a collection of opinions, gags, jokes, and hyperbolic statements. There do not appear to be very many alleged facts, and the non-flattering opinion statements are clearly protected by the First Amendment.

Presuming that these deficiencies in your client’s position were not present, I still do not believe that your client would ultimately prevail in a defamation action, as it seems that Route 60 Hyundai has suffered no damage to its reputation as a result of my client’s tweets.<sup>2</sup>

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<sup>2</sup> On the other hand, Route 60 Hyundai seems to have taken a bit of a public relations beating once word of its attempted bullying of my client reached the media.

As you can see in the comments to the news article about this dispute, it appears that the general opinion of Route 60 Hyundai is not very positive.<sup>3</sup> It appears that much of the community already had a pre-existing negative opinion of this particular car dealership. Accordingly, your client's standing in the community was not diminished by Mr. Alascio's statements, but rather Mr. Alascio's statements reflect Route 60 Hyundai's existing negative reputation. As you recall from the Valencia v. Citibank case, in order to sustain a claim for defamation, the plaintiff will need to show that even if there was an actionable falsehood, the falsity of the statement must have caused injury to the plaintiff.

#### **IV. Conclusion**

I presume that we may consider this matter to be closed. However, if you wish to provide a more detailed 770.01 notice, I assure you that it will be given a deferential and respectful review.

On the other hand, I must make it clear that it is our position that a lawsuit based on these facts would be factually and legally unsupportable. Accordingly, it would be my unfortunate duty to respond to any such frivolous lawsuit with a motion for sanctions under Fla. Stat. § 57.105. Furthermore, my client will counterclaim for abuse of process, and once the action is dismissed in his favor, he will file a malicious prosecution claim against Route 60 Hyundai.

I must also point out how utterly foolish it would be for your client to do anything except back away from this dispute. My client posted his tweets about your client six weeks ago. A few of his friends and family had a chuckle about them, Mr. Alascio became bored with the subject, moved on, and it was all doomed to fade into obscurity. Because your client chose to attempt to bully my client into removing his obscure tweets, thousands of people are now aware of the fact that Route 60 Hyundai has customer service issues, and even more are aware of the fact that Route 60 Hyundai is trying to intimidate a dissatisfied customer from sharing his opinions. You may wish to do some research on a concept known as the "Streisand effect," before advising your client further, or simply include the dealership's marketing manager in on any strategy meetings before taking further action.

Rather than finding ourselves locked in an unpleasant dispute, from which Route 60 Hyundai will emerge covered in a thick and sticky coating of humiliation, I might suggest that we try to find a way that Route 60 Hyundai can emerge from this with its reputation somewhat rehabilitated. Naturally, asking you to send your demand letter was an ill-advised maneuver, and I am willing to wager that you told them so.

I suggest that Route 60 Hyundai withdraw its legal threat and engage in discussions with my client as to how they can improve their customer service. My client would be willing to speak to the owner of the dealership in a civil and constructive discussion about the problems that he encountered there. Perhaps thereafter, the parties could issue a joint statement that

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<sup>3</sup> Direct your attention to the comments about this story here: <http://www.tcpalm.com/news/2009/dec/16/russ-lemmon-auto-dealership-demands-comments-be/> it seems that Route 60 Hyundai may be a "libel proof plaintiff."

they were able to resolve their differences amicably, and that both parties were able to better understand each other. My client has little to gain from that, but he's a good guy and willing to help out. Your client has a lot to gain from that approach, and nothing to lose.

I give you my assurance that if the facts are as they appear at this time, and your client still insists on prolonging this issue, my client does not intend to merely play defense. We will counterclaim, seek sanctions, and rather than governing our actions according to the demands in your letter, we will govern them by the principle of *murum aries attigit*.

Best regards,

A handwritten signature in blue ink, reading "Marc J. Randazza", with a long horizontal flourish extending to the right.

Marc. J. Randazza, Esq.

cc: Hyundai of North America