UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GLOBAL DIRECT SALES, LLC, PENOBSCOT INDIAN NATION, CHRISTOPHER RUSSELL and RYAN HILL, Plaintiffs, -v- AARON KROWNE, individually and d/b/a THE MORTGAGE LENDER IMPLOD-O-METER and ML-IMPLODE.COM, KROWNE CONCEPTS, INC., IMPLODE-EXPLODE HEAVY INDUSTRIES, INC., JUSTIN OWINGS, KRISTA RAILEY, STREAMLINE MARKETING, INC. and LORENA LEGGETT, Defendants.	Case No.: 8:08-cv-02468 Assigned: Hon. Deborah K. Chasanow

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT IMPLODE-EXPLODE HEAVY INDUSTRIES, INC.'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

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INTRODUCTION and PRELIMINARY STATEMENT

Plaintiffs submit this memorandum of law in opposition to Defendant Implode-Explode Heavy Industries, Inc.'s ("IEHI") motion seeking dismissal of Plaintiffs' defamation claim.

The Penobscot Indian Nation ("PIN") is a federally recognized Native American Government which created The Grant America Program ("GAP") with Plaintiff Global Direct Sales, LLC ("GDS"). Plaintiffs Christopher Russell and Ryan Hill are the principals of GDS. Plaintiffs established GAP to help low to moderate-income homebuyers realize the dream of home ownership by providing down payment assistance ("DPA") grants. Defendant Implode-Explode Heavy Industries, Inc. ("IEHI") owns and operates the website ml-implode.com. From July 2008 through August 2008, IEHI was soliciting Plaintiffs to advertise on the website. In August 2008, Plaintiffs advised that they would not advertise and a few weeks later Defendant IEHI published an article containing untrue and defamatory statements regarding Plaintiffs.

Defendant IEHI is seeking the dismissal of Plaintiffs' defamation claim despite the article's author, Defendant Railey, admitting the article is factually false, falsely makes accusations of criminal conduct, has damaged Plaintiffs and was posted and/or not corrected/removed in retaliation for Plaintiffs' refusal to advertise on IEHI's website.

Facing liability for publishing an article the author admits is factually false and damaging, IEHI makes numerous arguments that fall short. IEHI argues that the article is accurate and the First Amendment and various reporting privileges protect the publication. However, neither the First Amendment nor the reporting privileges protect parties publishing of unfair, substantially inaccurate, factual falsehoods and the author concedes that the article is false and unfair. Defendant further argues that Plaintiff Russell, Hill and GDS are public figures, despite having never heard of them, and, therefore, Plaintiffs' must establish actual malice.

However, Defendants' admissions establish that Plaintiffs are subject to a lower showing as private citizens, the majority of the defamatory statements involve aged private concerns and evidence of actual malice, including IEHI's principal calling Mr. Russell a criminal and a "nasty bugger," exists.

Further, IEHI seeks dismissal of Plaintiffs' *per quad* claims, averring that Plaintiffs cannot establish damages. However, it is undisputed that Plaintiffs had a decrease in GAP business after IEHI published the article.

IEHI also argues that no liable attaches for publishing the article because the Communication Decency Act protects websites that passively display content and Defendant Railey was an independent blogger. These arguments fall short because the record demonstrates that IEHI took an active role in creating and developing the defamatory article ad admits the article was a "joint project" with its "analyst" Defendant Railey.

Plaintiffs do not oppose the portions of Defendant IEHI's motion dismissing PIN's defamation claim or dismissing Defendant Krowne Concepts, Inc. as a Defendant and advised defense counsel before its motion was made that Plaintiffs would consider stipulating to portions of the motion.

Lastly, since IEHI did not move to dismiss Plaintiffs' Unfair Business Practice claim, Plaintiffs will do not address the same and because defendant Railey did not move, Plaintiffs will not address her culpability.

Based on the foregoing, Defendant IEHI's motion should be denied.

STATEMENT OF FACTS

A. IEHI Publishes A Defamatory Article After Plaintiffs Decline To Advertise And Have An Unconscionable Advertising/Content Strategy

In or about June, 2008, Defendant IEHI began soliciting Plaintiffs to advertise on its website. (Russell 12/7/2009 Dec. at p. 2, ¶ 7.) IEHI affirmatively represent that it scrutinizes companies considered for advertising. (*Id.* at ¶ 6.) IEHI's solicitation consisted of multiple telephone calls and emails to Plaintiffs. (*Id.* at ¶ 8.) On August 5, 2008, IEHI was still contacting Plaintiffs hoping that it would be "granted the opportunity to advertise Grant America on ml-implode." (*Id.* at ¶ 9.) Just weeks after Plaintiffs declined to advertise, IEHI published the defamatory article. (Ex. C; Ex. B at 103-104.)

In 2007, Defendant was sued for defamation after publishing that the Loan Center of California, Inc. ("LCC") had gone out of business; which was untrue. (Russell 12/7/2009 Dec. at p. 2, ¶ 18.) Defendants' motion to dismiss under California's anti-SLAPP statute was denied after LCC showed a probability it would prevail on its claims. (*Id.* at ¶ 19; Ex. A.) The court stated that LCC had established a probability it would prevail on its defamation claim, making a *prima facia* showing:

> defendants falsely stated LCC had gone out of business, that LCC was an is in the business, that LCC was damaged by Washington Mutual and Credit Suisse withdrawing at least 3.5 million dollars in funds from LCC's accounts, and that Washington Mutual and Credit Suisse did this after viewing the false information published by defendants on defendants' website. (Ex. A.)

Prior to writing the defamatory article about LLC, Defendants did not have any mortgage lender advertising on their website. (Russell 12/7/2009 Dec. at p. 2, ¶ 20.) Weeks after the defamatory LCC article, Defendants dedicated an entire section of their website to the "Top Non-Imploded" mortgage lenders – all of which paid Defendant to advertise. (*Id.* at ¶ 21.)

In fall of 2008, Railey was also researching an article regarding DPA provider American Family Funds ("AFF") administers of the Dove Foundation (collectively "AFF/Dove"). (Railey Dec.) Prior to September 9-15, 2008, IEHI had no DPA advertising. (Russell 12/7/2009 Dec. at ¶ 22.) Shortly after publishing the article about Plaintiffs, a principal of AFF began advertising on the website. (*Id.* at 23.) Despite Railey's extensively researching AFF/Dove, IEHI never published an article about AFF/Dove. (*Id.* at 24.)

Further, IEHI concealed and removed posts regarding the illegal activities of an advertiser. (Railey Dec.) Specifically, IEHI's senior editor had an advertiser, Green Credit Services ("GCS"), speak with Railey for an article and encouraged her to write a negative story about a GCS competitor. (*Id.*) When Railey's investigation revealed that GCS was engaging in illegal activity, IEHI deleted and moved threads containing negative information about GCS and refused to allow her to publish any articles about GCS. (*Id.*)

Railey concedes that she has "serious questions regarding whether the article was published and/or not corrected/removed from the website because the plaintiffs refused to advertise." (Railey Dec.)

B. IEHI's Active Role in Creating and Publishing the Defamatory Article

IEHI had a contractual relationship with the Railey (Ex. F), gave her an "analyst" title (Ex. B at 33) and helped her create her subpage on Defendant's website. (Ex. E at 32.) Further, Defendant IEHI and Railey shared the ad revenue generated from Railey's subpage on IEHI's website. (Ex. F.)

IEHI's principal Aaron Krowne requested that Railey provide content on SFDPA (Ex. B at 65), Railey worked on the article with IEHI's Medecke and received direct input from Krowne. (*Id.* at 30, 108.) Further, IEHI's senior editor Marquis performed research - recording

a telephone conversation with an article source. (*Id.* at 49.) IEHI's Krowne and Marquis were the editors of the article before it was published, drafts were exchanged with them and Marquis had last say on what was published. (*Id.* at 29-30.) Only Krowne and Marquis had authority to publish articles and Railey never published an article without going through IEHI. (*Id.* at 29.) IEHI described the article as a "joint project." (Ex. H at p 1.) IEHI's principal Krowne instructed Railey to hurry up and get the article on the website. (Ex. B at 66.)

C. Defendants' False and Defamatory Publication

On or about September 9, 2008, shortly after Plaintiffs advised IEHI that they would not be advertising on the website, IEHI published an untrue and defamatory article regarding Plaintiffs. *See* Russell Dec., Railey Dec. and Ex. B at 103-104, 107, 109, 111, 115-116, 118, 119, 126, 131.

IEHI published numerous defamatory statements in the original article that were so wholly unsupportable, knowingly false and intentionally misleading that they were withdrawn. (Russell 12/7/2009 Dec. at ¶ 13.) IEHI claims it negligently published the initial version of the article. (Ex. E at 34.) When IEHI re-published the article, it removed that GAP and Dp Funder are scams and Plaintiffs' Russell and Hill misappropriated funds from AmeriDream. (Ex. C and D.) However, the re-published article still makes false criminal accusations including, extortion, money laundering, and mortgage fraud. (Ex. D.)

While certain incontestably false and *per se* defamatory statements were removed from the article and/or altered, the current article still contains multiple untrue and defamatory statements, including, but not limited to:

> ***False Statement*** - Hence, the Penobscot Indian Tribe isn't really providing "assistance" and is merely laundering the down payment for a fee . . .

The Truth – Defendants' accusation that PIN, through GAP, is laundering the down payment is false. As set forth above, HUD has expressly acknowledged that GAP is HUD compliant, PIN has never been accused of laundering and all aspects of the transaction are completely transparent and disclosed.

False Statements - That Russell had a copycat website of Ameridream and Ameridream claimed Russell attempted to extort $5,000 per domain.

The Truth – Russell did not have, the arbitration decision did not find and AmeriDream did not even allege that Russell had a "copycat website". The arbitrator found that the domain name, not website, was confusingly similar to AmeriDream. AmeriDream has never alleged that Russell attempted to extort money from them.

False Statement - The seller contribution to the Grant America Program is clearly a concession that is confirmed by IRS ruling 2006-27. . . The PIN program Seller Enrollment form itself solidifies the fact that it is a sales concession . .

The Truth – The contribution is not a concession and the IRS Ruling involves an entirely different issue – the propriety of an organization's 501(c) status – not whether the contribution is a concession. HUD, not the IRS, is responsible for making this determination and has expressly found that the contribution is not a concession. GAP's forms do not support the defendants' falsehood in any way. This false statement would lead customers into believing GAP was being used to facilitate mortgage fraud. By calling the contribution a concession, Defendants are accusing Plaintiffs of committing mortgage fraud.

False Statements - On April 3, 2008, HUD and the Penobscot Indian Tribe executed a Stipulation to Resolve Remaining Claims and Dismiss Action which the Grant America Program website posts as a HUD approval letter. Click here to view the Stipulation of Dismissal.

Not only is the Stipulation and Dismissal ***not*** an approval letter, it doesn't provide specific approval of seller-funded grants as Sovereign Grant providers claim. The Stipulation and Dismissal is merely a temporary settlement which gave HUD the opportunity to publish a revised proposed rule and re-open the comment period.

The Truth - On April 3, 2008, HUD expressly stipulated:

> that PIN's Grant America Program™ ("GAP") meets HUD's current policies pertaining to the source of gift funds for the borrowers' required cash investment for obtaining FHA insured mortgage financing.

(Russell 12/7/2009 Dec. at ¶ 14); *see also* Railey Dec and Ex. B at 103-104, 107, 109, 111, 115-116, 118, 119, 126, 131.

D. Defendant Railey's Admissions

Defendant Krista Railey wrote the September 2008 article regarding Plaintiffs. (Railey Dec. at ¶ 3.) The article was published by IEHIe on the website and IEHI's Krowne and Randall Marquis were the article's editors. (*Id.* at ¶ 4.) Railey admits that "there are significant problems with the final published article," the "article contains and implies false statements of fact and is misleading in a material manner" (*Id.* at ¶ 6), the article did not comply with journalistic or publishing standards (Ex. B at 98, 102, 107) and she has "serious questions regarding whether the article was published and/or not corrected/removed from the website because the plaintiffs refused to advertise." (Railey Dec. at ¶ 17.)

The website holds itself out as providing factual reporting (Ex. B at 94), but Defendant Railey admits that the article:

- does not meet journalist/publishing standards and is not fair and accurate (*Id.* at 96-98, 120);
- falsely accuses Plaintiffs of criminal activity (Ex. B at 109, 111, 115-116, 118);
- damaged Plaintiffs' profession, business and reputation (*Id.* at 126); and
- is being published because Defendant IEHI has actual malice towards Plaintiffs. (*Id* at 121.)

Defendant Railey also admits that she "advised IEHI and Krowne that the article was not factual accurate and should be removed from the website or substantially corrected" (Raily Dec. at ¶ 8), but that "defendants IEHI and Krowne dissuaded me from making corrections to the article or publishing a corrected article on the website." (*Id.* at ¶ 9.) Defendant IEHI refused to allow Railey to correct the article, continue to publish the article despite her advising that it is

false (*Id.*), have actual malice towards Plaintiffs (Ex. B at 121), called Plaintiff a criminal (*Id.* at 120), advertised for people to sue Plaintiffs, (*Id.*) and called Plaintiff Russell a "nasty bugger." (Ex. G at p. 2.)

Defendant Railey confirms IEHI's disparate treatment of advertisers and non-advertises (Railey Dec. at ¶ 10), including, concealing and removing "posts regarding the illegal activities of an advertiser" (*Id.* at ¶ 11), "encouraged [her] to write a negative story a GCS [advertiser's] competitor" (*Id.* at ¶ 13) and that she as "serious questions regarding whether the article was published and/or not corrected/removed from the website because the plaintiffs refused to advertise." (*Id.* at ¶ 17.)

IEHI would not allow the article to be corrected (*Id.* at ¶ 23), continued publishing it after she advised it contained false statements (*Id.* at ¶ 23) and are using the article and lawsuit to raise funds and generate publicity. (*Id.* at ¶ 23). Railey fired the free (for her) counsel IEHI was providing her because it was wrong to continue publishing the factual false article. (Ex. B at 124.)

E. Plaintiffs Are Not Public Figures

It is undisputed that Plaintiffs are not and have never been public officials. Further, Krowne and Railey admit, despite their extensive knowledge and experience in the mortgage industry in general and far greater than average knowledge of the down payment assistance industry specifically, that they had never hear of Plaintiffs. (Ex. B at 125, Ex. E at 186.) Defendant Railey admits that Plaintiffs are not public figures. (Ex. B at 126.)

F. Defendant Had Actual Malice

Krowne referred to Mr. Russell as a "nasty bugger" before intentionally publishing the article and has referred to him as a criminal. (Ex. G, Ex. B at 120.) Defendant is using the article

and lawsuit to raise funds and generate publicity (Railey Dec. at ¶ 23, Ex. B at 120, 123) and refused to correct or remove the article when its author admitted that it was factually false. (Railey Dec. and Ex. B at 120.) Defendant is advertising for people to sue Plaintiffs. (*Id.*) Defendant Railey admits that IEHI's conduct evidences actual malice. (Ex. B at 121.)

G. Plaintiffs Have Been Damaged

After Defendant IEHI published the article and before law regarding the source of DPA was changed, Plaintiffs had a decrease in business. (Russell 7/25/2013 Dec.) Additionally, Plaintiffs Russell, Hill and GDS lost the opportunity for a Bingo/Slot machine venture on PIN's reservation, which they were already negotiating with PIN. (*Id.*) Plaintiffs Russell, Hill and GDS went forward with a Bingo/Slot machine business in Maryland and PIN, without them, did the same on the reservation. (*Id.*)

LEGAL ARGUMENT

POINT I

LEGAL STANDARD

A motion for summary judgment is properly granted only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not proper where any dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences from that evidence in the non-movant's favor. *Id.* at 255; *see Perini Corp. v. Perini Constr., Inc.* 915 F.2d 121, 123-24 (4th Cir. 1990). Additionally, the Court must keep in mind which party bears the burden of proof as to each element or fact at trial. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 324 (1986).

POINT II

DEFENDANT IEHI'S MOTION SHOULD BE DENIED BECAUSE IT IS LEGALLY RESPONSIBLE FOR THE PUBLICATION OF THE DEFAMATORY ARTICLE

Plaintiffs bring a claim before this Court for defamation. The material facts set forth above demonstrate that a jury needs to resolve these claims.

To prove that Defendant IEHI defamed Plaintiffs, Plaintiffs must demonstrate that: 1) Defendant IEHI made a false and defamatory statement concerning Plaintiffs; 2) the unprivileged publication was made by IEHI to a third party; 3) fault on IEHI's part in publishing the statement; and 4) the existence of special harm caused by the publication or the actionability of the statement irrespective of special harm. *See Erickson v. Jones Street Publishers, LLC*, 629

S.E.2d 653, 664 (S.C. 2006). A reasonable jury can and will find that Plaintiffs can satisfy each of these elements – particularly since the author, Defendant Railey, has admitted that each element is satisfied.

Defendant raises several arguments in its attempt to avoid a jury trial on Plaintiffs' defamation claim. First, IEHI contends Plaintiff must prove "actual constitutional malice." It attempts to justify application the highest standard by arguing that Plaintiffs are public figure for first amendment analysis and that this standard applies to a qualified privilege Defendant IEHI contends it was exercising. Neither contention is correct. Next, it contends Plaintiffs cannot prove that the defamatory statement was false. Again, the argument fails. In making these arguments, Defendant IEHI spurns substantive law regarding defamation claims, ignores applicable burdens of proof, and demands that this Court make a number of legal and factual determinations that precedent and the evidence do not support.

I. Plaintiffs' Defamation Claim Is Not Subject To The New York Times "Actual Constitutional Malice Standard"

The degree of fault that Plaintiffs must prove turns on whether they are public or private figures, and whether or not the statements were on a topic of public or private concern. If Plaintiffs are public figures and the subject matter of the statements were on a public concern, Plaintiffs have to prove by clear and convincing evidence that the defamatory statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public officials must prove "actual malice" before recovering damages for harm to reputation in a state law defamation claim); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (limited purpose public figures must prove actual malice when the challenged statements arise as a result of a public controversy; the States may determine the level of fault to apply to private figure defamation plaintiffs); *see also Time,*

Inc. v. Firestone, 424 U.S. 448 (1976); *see also Erickson v. Jones Street Publishers, LLC*, 629 S.E.2d 653, 668 (S.C. 2006); *see also Flemming v. Rose*, 567 S.E.2d 857, 860 (2002). If Plaintiffs are private figures, all that must be established is that IEHI made a defamatory communication-i.e., that it communicated a statement tending to expose the plaintiff to public scorn, hatred, contempt, or ridicule to a third person who reasonably recognized the statement as being defamatory, that the statement was false, that IEHI was at fault in communicating the statement; and that the plaintiff suffered harm or the statements are *per se* defamation. *Peroutka v. Streng*, 116 Md.App. 301, 311, 695 A.2d 1287 (1997) (quoting *Shapiro v. Massengill*, 105 Md.App. 743, 772, 661 A.2d 202, cert. denied, 341 Md. 28, 668 A.2d 36 (1995)).

Determining whether a particular Plaintiff is a public official, public figure, or private figure is a question of law for the court, and IEHI bears the burden of proving Plaintiff's public figure status. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994); *Carr v. Forbes, Inc.*, 259 F.3d 273, 278 (4th Cir. 2001). As described below, IEHI did not, and cannot show, that Plaintiffs are anything but a private figures. Irrespective of their status, Plaintiffs can prevail at trial because a reasonable jury could conclude that IEHI published the statements with the requisite level of fault.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court classified defamation plaintiffs along a spectrum. At one end of the spectrum are "private individuals." At the other end are "public officials" and "public figures" whom the Court divided into the following three categories:

(1) "involuntary public figures," who become public figures through no purposeful action of their own;

(2) "all-purpose public figures," who achieve such pervasive fame or notoriety that they become public figures for all purposes and in all contexts; and

(3) "limited-purpose public figures," who voluntarily inject themselves into a particular publiccontroversy and thereby become public figures for a limited range of issues.

Foretich, 37 F.3d at 1551-52 (4th Cir. 1994) (citing *Gertz*, 418 U.S. at 345 and 351). The Supreme Court defined a public figure as "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention" have assumed roles of special prominence in the affairs of society. *Gertz*, 418 U.S. at 342 and 345. Indeed, absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all purposes and in all contexts. *Id.* at 352. The Court recognized that in most instances those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. *Id.*

The Fourth Circuit recognizes an initial presumption that a defamation plaintiff is a private individual, subject to defendant's burden of proving that the plaintiff is a public figure to whom the *New York Times* standard applies. *Foretich*, 37 F.3d at 1551-1552; *Carr*, 259 F.3d 273, 278 (4th Cir. 2001). While IEHI makes the conclusory allegation that Plaintiffs are public figures, it refuses to identify which category of public figure and does not, and cannot, even allege that Plaintiff s have thrust themselves to the forefront of particular public controversy in order to influence the resolution of the issues involved. In fact, each member of IEHI admits having never heard of any of the Plaintiffs and the majority of the defamatory statements involve aged private concerns.

A. Plaintiffs Are Not "All-Purpose Public Figures"

The United States Supreme Court defines public figures as those who have "assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive

power and influence that they are deemed public figures for all purposes." *Erickson*, 368 S.C. at 472 (citing *Gertz*, 418 U.S. at 345) (an attorney was not a public figure even though he voluntarily exposed himself to receive extensive media exposure.). Plaintiffs are private businesspersons. Tellingly, IEHI has presented no evidence that Plaintiffs names are recognizable to a wide segment of the population. In fact, IEHI admits not knowing their names despite being intimately familiar with their industry.

IEHI's public figure argument flatly ignores the Supreme Court's rulings in *Gertz, Times, Inc. v. Firestone*, 424 U.S. 448 (1976), and its progeny and centuries of common law. Accordingly, IEHI novel effort to transform Plaintiffs they admit having never heard of into famous public figures fails.

B. Plaintiffs Cannot Be A Limited Purpose Public Figures Because No Public Controversy Gave Rise To The Defamation And Certainly None That Plaintiffs Had Voluntarily Thrust Themselves Into

Plaintiffs are not "limited purpose public figure" because they were not involved in any public controversy and the majority the false defamatory comments, such as Russell and Hill's misappropriation of AmeriDream funds, extorting money from AmeriDream and having a copycat website, were dated non-public matters. From *Gertz* and its progeny, the Fourth Circuit has adopted a two-part test for determining whether a defamation plaintiff is a limited purpose public figure. First, was there a particular "public controversy" that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify "public figure" status? *Foretich*, 37 F.3d at 1553. An examination of each of these inquiries reveals that Plaintiffs are not a limited purpose public figure and IEHI did not, and cannot, establish otherwise.

The first question the Court must address is whether there was a public controversy giving rise to the defamation. *Foretich*, 37 F.3d at 1554. Though *Gertz* provided no express definition of a "public controversy," subsequent Supreme Court decisions have made clear that the term is not synonymous with all controversies of interest to the public. *Id.* A particularly cogent definition was expressed by the Court of Appeals for the District of Columbia Circuit, which was subsequently adopted by the Fourth Circuit, after carefully sifting through Supreme Court precedent:

> A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way...[E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention...Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.

Id. (citing *Waldbaum*, 627 F.2d at 1296). Here, IEHI has offered no competent or undisputed evidence to demonstrate a "pre-existing controversy." Instead, the facts suggest that no controversy existed until IEHI published the defamatory statements and, even then, that this controversy was not "public" as that term is typically used because the majority of the defamatory statements involve aged private concerns.

Assuming *arguendo* that this Court were to find a public controversy existed prior to publication of the defamatory statements, the Court must next inquire as to whether Plaintiffs' participation in the controversy is sufficient to deem it a limited purpose public figure. The Fourth Circuit has developed five criteria to utilize in rendering such a determination. *Fitzgerald v. Penthouse Intern, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982) *cert. denied* 460 U.S. 1024 (1983). Under the test, in order for the court to properly hold that a plaintiff is a public figure for the limited purpose of comment on a particular public controversy, the defendant must show: (1) the

plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public figure status at the time of the alleged defamation. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (1994); *Erickson v. Jones Street Publishers, LLC,* 368 S.C. 444, 474 (2006). IEHI's moving papers do not address or allege any of these factors.

Significantly, a defendant in a defamation action may not transform a private figure into a limited public figure by dragging an unwilling participant into the spotlight of a public controversy through the defendant's own words or actions. *Erickson,* 368 S.C. at 473. This is in accordance with the principle set forth in *Gertz*, and reiterated by subsequent precedent, that the individual must have voluntarily assumed the role in the public controversy. Moreover, courts make this examination under the lens of the fourth factor: whether the controversy existed prior to the publication of the defamatory statement. *See MRR Southern, LLC v. Citizens for Marlboro County,* 2012 WL 10161801, 3 (D.S.C. March 26, 2012). Courts have referred to this factor as a "critical" part to its analysis of limited public figure status. *Kelley-Moser Consulting,* 2012 WL 5546431, 9 (D.S.C. Feb 21, 2012). In this case, no public controversy existed prior to publication, the majority of the defamatory statements, such as the misallocation of AmeriDream funds, are aged private concerns. No evidence demonstrates that Plaintiffs had voluntarily assumed a role in a controversy. Plaintiffs are not limited purpose public figure.

Thus, IEHI has not met its burden to establish that Plaintiffs are either a general purpose public figure or limited purpose public figure by reference to undisputed material facts. The import of this failure is two-fold. First, based on the disputed material facts, Plaintiffs cannot

properly be classified as a public figure subject to the New York Times "actual constitutional malice" standard. Second, Plaintiffs' defamation claim cannot be dismissed for failure to set forth facts sufficient for a reasonable jury to conclude it has met its burden of proof regarding fault on Defendant IEHI's part in publishing the defamatory statements at issue.

II. IEHI' Article Is Not Protected By The 1st Amendment And No Privilege Applies Because The Article Contains False Statements Of Fact

Where a defendant asserts a privilege in a motion for summary judgment in a defamation action, we consider first whether the asserted privilege applies. *See Rosenberg v. Helinski,* 328 Md. 664, 675–76, 616 A.2d 866, 871–72 (1992); *Peroutka v. Streng,* 116 Md. App. 301, 312, 695 A.2d 1287, 1293 (1997). It is assumed that the plaintiff's allegations of defamation are true when evaluating whether the privilege exists. *Rosenberg,* 328 Md. at 675–76, *Peroutka,* 116 Md.App. at 312, 695 A.2d at 1293. Whether a conditional privilege exists is a question of law, and the defendant bears the burden of proof to establish the privilege. *Woodruff v. Trepel,* 125 Md.App. 381, 402, 725 A.2d 612, 622 (1999)

A. The Article Is Not Protected By The 1st Amendment

Speech – particularly defamatory and otherwise tortuous speech – is not protected by the first amendment. Likewise, the defendants' false statements of fact are not protected by the first amendment because "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Defendant Railey admits that the "article contains and implies false statements of fact and is misleading in a material manner." False statements of fact and implications of false statements of fact are not protected by the First Amendment.

There is a line separating protected rhetorical hyperbole from unprotected misrepresentations of fact. *See Mercy Health Servs. v. 1199 Health and Human Serv. Employees*

Union, 888 F.Supp. 828 (W.D.Mich.1995). The First Amendment offers no protection for false or deceptive speech. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

This applies to both fact and opinion misstatements. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court clarified that the *Gertz* dicta "was [not] intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id.* at 18. An unsupported opinion that implies defamatory facts, like "'[i]n my opinion Jones is a liar,' can cause as much damage to reputation' and may be just as actionable 'as the statement, 'Jones is a liar.'" *Id.* at 19. Thus, the *Milkovich* Court declined to create "an artificial dichotomy between 'opinion' and fact." *Id.*

IEHI's article contains both false statements of fact and unsupported opinion that implies defamatory facts. The article contains statements that are provably false and which the author admits are false.

B. The Article Is Not Protected By Reporting Privileges

The various reporting privileges IEHI cites do not apply because, as Defendant Railey admits, the article does not meet journalist or publishing standards, is not fair and accurate, contains and implies false statements of fact and accuses Plaintiffs of criminal activity based on falsehoods.

The fair reporting privilege is a qualified privilege to report legal and official proceedings that are, in and of themselves defamatory, so long as the account is "fair and substantially accurate." *Chesapeake Publ'g Corp. v. Williams,* 339 Md. 285, 296, 661 A.2d 1169, 1174 (1995) (citing *Rosenberg v. Helinski,* 328 Md. 664, 676–77, 616 A.2d 866, 872 (1992)). The privilege arises from the public's interest in having access to information about official proceedings and

public meetings. Restatement (Second) of Torts § 611 cmt. a (1977); *Rosenberg,* 328 Md. at 679–80, 616 A.2d at 873–74. A defendant abuses his or her fair reporting privilege when the defendant's account "'fails the test of fairness and accuracy.'" *Chesapeake Publ'g Corp.,* 339 Md. at 297, 661 A.2d at 1175 (citing *Rosenberg,* 328 Md. at 677–78, 616 A.2d at 872–73). Fairness and accuracy is satisfied when the reports are substantially correct, impartial, coherent, and bona fide. *Batson v. Shiflett,* 325 Md. 684, 727, 602 A.2d 1191, 1213 (1992) (citing *McBee v. Fulton,* 47 Md. 403, 417, 426 (1878)). The privilege to report violations of the law only applies to the "publication, of substantially accurate reports about police investigatory activity." *Seymour v. A.S. Abell Co.,* 557 F.Supp. 951, 955 (D.Md.1983). The fair comment privilege only protects an opinion where "'the facts on which it is based are truly stated or privileged or otherwise known either because the facts are of common knowledge or because, though perhaps unknown to a particular recipient of the communication, they are readily accessible to him.'" *Kirby,* 227 Md. at 279–80, 176 A.2d at 346 (quoting 1 Harper and James, *The Law of Torts* § 5.28 (1954)). Conversely, an opinion based on undisclosed facts, or that permits the inference of an undisclosed factual basis, is not privileged. *Kirby,* 227 Md. at 274, 176 A.2d at 343.

Defendant Railey's admissions set forth why the article does not meet the criteria for any of the cited privileges.

III. The Defamatory Statements Were False And IEHI Has Not Met Its Burden Of Proving They Are True

Both Plaintiffs and Defendant Railey indentify a litany of factual falsehoods in the article. Defendant IEHI cannot establish the truth of these falsehoods and for the majority of the falsehoods, such as accusing Russell and Hill of misappropriating AmeriDream funds and committing mortgage fraud, did not try.

A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third parties from associating or dealing with him. *See Flemming v. Rose*, 567 S.E.2d at 860. Defamation can fall in several categories: either libel (written) or slander (spoken), and either *per se* and *per quod*. *See Holtzscheiter v. Thompson Newspapers, Inc.*, 332 S.C. 502 (1998) (Majority Opinion). Defamation *per se* means that the defamatory meaning is obvious on the face of the statement; defamation *per quod* makes it necessary to refer to facts or circumstances beyond the language itself in order to make the defamatory meaning of the statement clear. *White v. Wilkerson*, 328 S.C. 179, 185, 493 S.E.2d 345, 348 n.1 (1997); *Holtzscheiter*, 332 S.C. at 526 (Toal, J., concurring). For that reason, insinuation may be defamatory and actionable as a positive assertion if it is false and malicious and the meaning is plain. *See Cooper v. Laboratory Corp.*, 150 F.3d 376 (4th Cir. 1998); *Eubanks v. Smith*, 292 S.C. 57 (1987); *Tyler v. Macks Stores*, 275 S.C. 456 (1980); *Timmons v. News & Press, Inc.*, 232 S.C. 639 (1958); *Murray v. Holnam, Inc.*, 344 S.C. 129 (Ct. App. 2001).

Here, there is no doubt, and Defendant Railey admits, that the statements at issue were false and defamatory in that they tended to diminish Plaintiffs' reputation. Because the statements are so clearly defamatory *per se*, they are presumed to be false and IEHI must prove that they are either wholly true (citing undisputed material facts) to make out an absolute defense or substantially true to make out a sufficient defense. IEHI did neither.

The defamatory statements about Plaintiffs are presumed to be false. Truth may be asserted as an affirmative defense, but the burden to prove truth falls squarely on the defendant. As set forth above, the evidence demonstrates that IEHI's claims were untrue and it, for example can produce no evidence that Russell and Hill misappropriated AmeriDream funds or committed

mortgage fraud. Thus, IEHI cannot prevent Plaintiffs' claim for defamation from proceeding to the jury because it has not established it is entitled to judgment on its affirmative defense.

While truth is an absolute defense to a defamation claim, "substantial truth" is only a sufficient defense. *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976). A "substantial truth" defense is made out if a defendant can establish by a preponderance of the evidence that the gist or thrust of its defamatory statement was true. *Id.* When the truth or substantial truth of a defamatory communication is in dispute, the issue is a question for the jury. *See Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 515 (1993).

Not only are the false statements defamatory *per se* and actionable without a showing of damages, but they did damage Plaintiffs. After Defendant IEHI published the article and before law regarding the source of DPA was changed, Plaintiffs had a decrease in business. Additionally, Plaintiffs Russell, Hill and GDS lost the opportunity for a Bingo/Slot machine venture on PIN's reservation, which they were already negotiating with PIN. Plaintiffs Russell, Hill and GDS went forward with a Bingo/Slot machine business in Maryland and PIN, without them, did the same on the reservation.

IV. Even If The "Actual Constitutional Malice" Standard Of Fault Does Apply, There Is Evidence Sufficient For A Reasonable Jury To Conclude That Defendant IEHI Published The Defamatory Statements With Knowledge Of Falsity Or With Reckless Disregard For Their Truth Or Falsity

Even if this Court were to determine that Plaintiffs are public figures, the evidence demonstrates that a reasonable jury could conclude that IEHI acted with "actual constitutional malice" in publishing the defamatory statements at issue. Actual constitutional malice is defined as knowledge of falsity or reckless disregard as to truth or falsity.

IEHI conduct evidences actual malice. IEHI admittedly scrutinize companies considered for advertising beforehand, solicited the plaintiffs to advertise on their website for weeks and

directly after the plaintiffs declined to advertise on the website, publishing the article on their website. Defendants' made numerous defamatory statements in the original article - Defendants' GAP is a scam, Dp Funder is a scam, Plaintiffs' Russell and Hill treated AmeriDream like their own personal piggy bank, Russell attempted to extort AmeriDream and that the Penobscot Indian Tribe is laundering down the payment for a fee - that were so wholly unsupportable, knowingly false and intentionally misleading that they were withdrawn. Lastly, after the author advised that the article contained false statements of fact and should be removed and/or revised, the defendants failed to revise and/or stop publishing the article. Krowne referred to Mr. Russell as a "nasty bugger" before intentionally publishing the article and has referred to him as a criminal. Defendant is using the article and lawsuit to raise funds and generate publicity and refused to correct or remove the article when its author admitted that it was factually false. This, as Defendant Railey concedes, evidences actual malice.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710 (1964) the Court defined actual malice as knowledge that a defamatory statement is false or reckless disregard of a statement's truth or falsity. Reckless disregard means a "high degree of awareness of ... probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)(citations omitted). The Court has cautioned, however, that reckless disregard "cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication...." *Id.* at 730. A court or jury may infer actual malice from objective circumstantial evidence, which can override a defendants' protestations of good faith. *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3d Cir.1988); *Tavoulareas v. Piro*, 817 F.2d 762, 789 (D.C.Cir.) (en banc), cert. denied, 484 U.S. 870 (1987); *Bose Corp. v. Consumers Union of U.S., Inc.*, 692 F.2d 189, 196 (1st Cir. 1982). "These facts should provide evidence of negligence, motive, and intent such

that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." *Id.*

IEHI did not allow Defendant Railey to correct the article, continued to publish the article after Railey advised it contained false statements and are using the article and lawsuit to raise funds and generate publicity.

IEHI's conduct provides ample evidence for the inference of actual malice.

V. Defendant IEHI Is Legally Responsible For Publishing The Defamatory Article Because It Was Working With Defendant Railey As A Content Provider

The Communications Decency Act or "CDA" does not protect IEHI because it was intimately involved in developing and creating the article, which it described as a "joint project." Likewise, calling Defendant Railey an independent blogger does not absolve IEHI for the defamatory "joint project."

A. Defendant IEHI Is Not Protected By The Communications Decency Act Because It Was Not Passively Displaying Content But Creating And Publishing The Article With Railey

The CDA does absolve Defendant IEHI's malicious defamation because from the outset, Defendant IEHI was responsible for both creating and developing the "joint project" – the defamatory article.

The CDA can be found at 42 U.S.C. § 230. Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties: "No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c); *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC,* 521 F.3d 1157, 1162 (9th Cir.2008) ("Roomates.Com"). Section 230 defines an "interactive computer service"

as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." *Id.*, § 230(f)(2).

However, this grant of immunity does not apply if the interactive computer service provider is also an "information content provider," which is defined as someone who is "responsible, ***in whole or in part***, for the creation or development of" the offending content. 47 U.S.C. § 230(f)(3) (emphasis added). "In other words, Congress sought to immunize the removal of user-generated content, not the creation of content . . ." *Roommates.Com,* 521 F.3d at 1163. As noted by the Ninth Circuit, "[i]ndeed, the section is titled 'Protection for 'good samaritan' blocking and screening of offensive material' . . . and should be interpreted consistent with its caption." *Id.*

Section (f)(3) defines "Information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." By its terms, the grant of immunity found in Section 230(c)(1) and (2) applies only if the interactive computer service is not also an "information content provider."

A website operator can be both an "interactive service provider" and a "content provider." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162-1163 (9th Cir. 2008) (hereinafter "*Roomates.Com*"). If the website "passively" displays content that is created entirely by third parties, then it is only a service provider with respect to that content. *Id.* However, as to content that it creates itself, or is "responsible, in whole or in part" for "creating or developing," the website is a content provider and not entitled to CDA immunity. *Id.*

The leading Ninth Circuit decision on the scope of CDA immunity is *Roommates.Com*. In this case, the Ninth Circuit went to great lengths to describe under what circumstances a service provider may become an "information content provider" that is not entitled to CDA immunity. Noting the difference between "creating" and "developing" content for a website, the court found that the definition of a "content provider" encompasses much more than just the entity that created the content that appears on the website. Rather, a website will be deemed a "content provider" even if it did not "create" the content as long as it "materially contributes to the alleged illegal conduct." *Id.* at 1167-1168.

B. IEHI's Claims That It Had No Role In The Article And Railey Was Not Its Agent Belies The Evidence

The facts prevent IEHI from simply putting its hands up and blaming an independent blogger. For the reasons set forth above, IEHI's active role in creating and publishing the defamatory "joint project" establishes its liability for the article.

CONCLUSION

Based on the foregoing, Defendants' motion should be denied in its entirety.

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