UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DOCKET NO. 13-13122-FDS

Mara Feld, PhD.,

Plaintiff

v.

Crystal Conway,

Defendant

PLAINTIFF MEMORANDUM OF LAW

CONCERNING DEFENDANT MOTION TO DISMISS

Now comes the Plaintiff to oppose the Defendant Motion to Dismiss under Federal Rules of Civil Procedure 12(B)1; 12(B)2, and 12(B)6.

DEFAMATORY COMMENT IN QUESTON

"Mara Feld aka Gina Holt - you are fucking crazy."

MOTION TO DISMISS CONCERNING SUBJECT MATTER JURISDICTION

"In considering a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P 12(b)(1), the Court assumes that all material allegations set forth in the complaint are true. *See Mulloy v. United States,* 884 F. Supp. 622, 626 (D. Mass. 1995); Williams v. City of Boston, 784 F. 2d 430, 433 (1st Cir. 1986). The averments of the complaint, as well as their proper inferences,

are construed in favor of the plaintiff and the claim will not be dismissed unless "it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief." *Williams* at 433; Mulloy at 622." [Defendant Memorandum Page 2].

Plaintiff Takes Exception

Contrary to the position of the Defendant, the statement in question is not, *"obviously a statement of opinion."* The statement stands factually alone without explanation.

Further, the use of profanity preceding the statement, literally that the Plaintiff is, "fucking crazy," does nothing to strengthen the Defendant's position that the statement is opinion.

Indeed, if a person says someone is a, "fucking thief;" then the statement isn't given *opinion* status anymore than simply stating that the person is a, "thief." The use of profanity doesn't transform the statement into mere opinion, or water it down in any way.

Moving along in the Defendant's Memorandum, "The Plaintiff offers no facts from which any other construction can be made on the events, such as laying out a case that shows that the Defendant had any actual contacts with the Plaintiff or had any basis of knowledge or ability to render any kind of clinical judgment on the Plaintiff or show any facts beyond the mere statement of opinion itself." [Defendant Memorandum Page 2-3].

To be sure, this is the gravamen of the *Plaintiff's* complaint—that the statement stands alone, published in a media of infinite readership—an unexplained indictment of Mara Feld's sanity, which can be accessed by merely typing the name, "Mara Feld," into an Internet search-engine.

Before the advent of the Internet, if someone in the position of the Defendant had approached the publisher of a local newspaper—that she wished to publish a statement in a box without further explanation, "Mara Feld aka Gina Holt - you are fucking crazy," the publisher would likely have refused on the grounds that the statement would be defamation of character.

MOTION TO DISMISS REGARDING PERSONAL JURISDICTION

"In analyzing the exercise of specific personal jurisdiction, a court may apply a three-part test: 1) whether the claims arise out of or are related to the defendant's in-state activities, 2) whether the defendant has purposefully availed itself of the laws of the forum state and 3) whether the exercise of jurisdiction is reasonable under the circumstances." [Defendant Memorandum Pages 3-4].

"The Plaintiff and the Defendant have not communicated directly and do not know each other *nor have they ever intentionally directed any communication to the other*." [(emphasis supplied.) Defendant Memorandum Page 4].

On the contrary, the communication concerning Mara Feld that, *"You are fucking crazy,"* was most certainly directed toward Mara Feld.

To state—as the Defendant has—that, "The comment made was made on a world-wide public bulletin board," and to contend that comments made by the Defendant on *that* world-wide bulletin board, "has no contact[s] with the Commonwealth of Massachusetts discernable from the pleadings," is to have one's cake and eat it too.

In fact, a 2012 study of 36 million *Twitter* user accounts found that five out-of-ten or more than 18 million Twitter users are from the United States. [www.beevolve.com/twitter-statstics].

It would be absurd to assume that a person posting on *Twitter* envisions no readership in Massachusetts.

"As in *Rodrigues v. Samsung Electronics Co*., 827 F. Supp. 2d. 47 (D. Mass. 2011), Conway has not advertized her business in Massachusetts…" [Defendant Memorandum Page 4].

On the contrary, the Defendant *does* advertize her business in Massachusetts. The Defendant is the office manager of Royal Pegasus Farm, a Kentucky thoroughbred breeding facility with a web site accessible by performing an Internet search of the Defendant's name at the Plaintiff's home in Massachusetts. In a recent tally on the *Pegasus* site, more than 16,000 people had visited. [*www.royal**pegasusfarm**.com*].

Pagasus Farm actively solicits business in Massachusetts, and consequently purposefully avails itself of the laws of Massachusetts. "Because the plaintiffs operated a Web site accessible in Massachusetts and sent a solicitation that is prohibited by Massachusetts law to a Massachusetts resident, it was reasonable for the plaintiffs to anticipate being held responsible in Massachusetts." *Bulldog Investors General Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010).

By that same token, the Defendant knows that defamation is actionable, and it's reasonable for the Defendant to expect to be sued by the person she defamed in the place where that person lives. Both *Twitter* and Royalpegasusfarm.com are accessible in Massachusetts, and consequently do business there.

Contrary to the opinion of the Plaintiff, the First Amendment privilege cannot act as a shield against the defamation of character in this case. The statement involved—that Mara Feld, "you are fucking crazy," stands alone on a *Twitter* page. If the contention had been expressed within

the dialog of a heated Internet debate, or published in a newspaper article, matters would be different.

Every privilege has limits. "The rule long established by this court is that an occasion which would justify such a communication may be abused in such a manner as to deprive the party making it of the excuse of privilege.... The jury may ... [find for the plaintiff] from proof that the defendant knew the charges to be false, or had no reason to believe them to be true [and] also from the terms in which the communication is made." *Sheehan* v. *Tobin,* 326 Mass. 185, 192 (1950), quoting *Atwill* v. *Mackintosh,* 120 Mass. 177, 183 (1876).

Here, the Defendant had no credible reason to believe the Plaintiff insane. And to describe her as, "fucking crazy," is all the more disparaging.

In Summary

The Internet allows defamation on a grand scale. Something recklessly written in Kentucky is broadcast worldwide with the stroke of a key. With this new technology comes new responsibility. The publisher in the days of the old hometown newspaper would never publish, "Mara Feld aka Gina Holt - you are fucking crazy," unless perhaps it was an opinion in a news story.

But those with a *Twitter* account can. It's incumbent on the Courts to set new guidelines lest reputations be damaged by thoughtless Internet postings.

WHEREFORE, the Plaintiff asks that this Honorable Court rule against the Defendant Motion to Dismiss.

REQUEST FOR ORAL ARGUMENT

The Plaintiff respectfully requests oral argument in this matter.

9 April 2014

Mara Feld by her Attorney,

_____/s/_____

Mark Ellis O'Brien BBO#674736
17D Fernwood Drive
Leominster, MA 01453
978.728.4991.
justice457@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on 11 April 2014, a true copy of this document was sent to Counsel for the Defendant, Kathleen A. Reagan, Esq., by the CM/ ECF filing system, and by first class mail to: 400 Crown Colony Drive, Suite 601, Quincy, MA 02169.

_____/s/_____
Mark Ellis O'Brien