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May 28, 2013

VIA ELECTRONIC AND
FIRST CLASS MAIL

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Re: ***Monsarrat v. Filcman, et al., Civil Action No. MICV2013-00399-C***

Dear Mark:

As you know, our firm represents GateHouse Media Massachusetts I, Inc. d/b/a Somerville Journal ("GateHouse"), publisher of the *Somerville Journal* newspaper and its website (wickedlocal.com/somerville), and its former employee Defendant Deb Filcman ("Ms. Filcman") in connection with the above-referenced proceeding. I write in connection with our recent e-mail and telephone communications concerning this case. The fact that this letter does not address all of the allegations in the Complaint should in no way be construed as an acknowledgment of the truth or accuracy of any such allegation.

When we spoke on the telephone on May 8, 2013, you advised that if Ms. Filcman was employed by GateHouse during February and March 2010 – when she wrote the allegedly defamatory statements challenged by the Complaint – Plaintiff Jonathan Monsarrat ("Plaintiff") would voluntarily dismiss Ms. Filcman. After conferring with our clients, I provided on May 10, 2013, the information you requested; *i.e.*, confirmation that Ms. Filcman was a GateHouse employee from March 22, 2006, until December 22, 2010. In my e-mail to you on that date, I further offered to provide an affidavit testifying as to Ms. Filcman's dates of employment.

Instead of dismissing Ms. Filcman upon receipt of the information you requested (as you had originally agreed to do), you changed your position, and have now offered to dismiss Ms. Filcman only if GateHouse:

(1) removes the article written by Ms. Filcman dated February 4, 2013, and entitled "Will I be arrested? Guess the wheel didn't answer that one" (the "February 4 Article");

(2) removes the article written March 8, 2013, and entitled "Not a question best answered by the Wheel" (the "March 8 Article");

(3) changes the headline of the original article reporting the arrest of Plaintiff entitled "Somerville Police bust Question Wheel creator's underage drinking party" (the "Original Article"); and

(4) publishes an "update" to the Original Article stating that the criminal charges against Plaintiff were dismissed.

Please be advised that we cannot agree to any of the terms of your refashioned demands, which raise serious doubts as to the good faith of you and your client in conducting these settlement discussions. As a matter of its editorial prerogatives protected under the First Amendment, GateHouse maintains the right and ability to publish the true fact of Plaintiff's arrest, as well as the articles and blog posts reporting on Plaintiff's arrest and comments made by Plaintiff on his publicly available website. Further, established constitutional free speech principles preclude your client from mandating that wickedlocal.com/somerville publish an "update" to the true fact of his arrest. *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974); *see also Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973) (the First Amendment protects the press's editorial function, *i.e.*, the "selection and choice of material" for publication).

Moreover, Plaintiff's allegations that Ms. Filcman participated in a "wide-spread cyber-smear campaign to damage his reputation" not only lack any basis in fact or law but are frivolous, abusive, and harassing. Similarly, Plaintiff's claim that Ms. Filcman somehow infringed your client's copyrights is baseless. While our offer to provide a signed affidavit testifying as to Ms. Filcman's dates of employment still stands, we cannot agree to remove or make any changes to the articles identified in the Complaint. In the event you are interested in discussing a settlement consistent with our May 8, 2013 telephone conversation – *i.e.*, GateHouse verifies Ms. Filcman's dates of employment and Plaintiff dismisses Ms. Filcman with prejudice – please contact me ***no later than the close of business (5:00 p.m. Eastern) on May 30, 2013.***

If I do not hear from you by May 30, or if you elect to pursue your claims against Ms. Filcman, please be further advised that we will seek sanctions against you, Attorney Click, and your client for filing the Complaint in bad faith. For the reasons set forth below – and for many of the reasons identified in Co-defendant Ron Newman's comprehensive letter of May 14, 2013, which is incorporated herein by reference – we are persuaded that Plaintiff's claims have no chance of success.

A. Defamation Claims.

The Complaint identifies two statements made by Ms. Filcman that allegedly defamed Plaintiff.

1. Statements Made in the February 4 Article.

Plaintiff alleges that the February 4 Article was defamatory because it "alleges that Plaintiff was providing 'alcohol and marijuana' to 'teenagers.'" (Complaint ¶ 39) This assertion lacks any merit whatsoever. Even if Plaintiff's characterization of the text of the article were accurate – which it is not – the article's statement that alcohol and marijuana were accessible to the teenage party-goers is plainly protected by the fair report privilege because, as the underlying Criminal Docket and Incident Report (#10003036) confirm, Ms. Filcman accurately reported on the charges filed by the police against Plaintiff. *See Howell v. Enterprise Publ. Co.*, 455 Mass. 641, 653 (2010) ("Massachusetts has long recognized" that fair report privilege "establishes a safe harbor for those who report on statements and actions so long as the statements or actions are official and so long as the report on them is fair and accurate."); *see also MiGi, Inc. v. Gannett Mass. Broadcasters, Inc.*, 25 Mass. App. Ct. 394 (1988); *Oort v. DaSilva*, 2004 Mass. Super. LEXIS 369 (Mass. Super. Ct., Middlesex 2004); *Yohe v. Nugent*, 321 F.3d 35 (1st Cir. 2003). Accordingly, Plaintiff's claim that the February 4 Article is defamatory is legally unsupportable.[1]

Further, Plaintiff qualifies as a limited purpose public figure because he has voluntarily injected himself into matters of public controversy by continuously dispensing advice on his website with the intention of inviting attention and comment. *See Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156 (1971) ("It is readily apparent to us that much of the publicity the plaintiff received prior to the article and most of the material about him in the article itself derived from his own palpably engineered efforts to project himself into the public limelight and that as a result the plaintiff moved from obscurity to notoriety.") (footnote omitted); *Astra USA, Inc. v. Bildman*, 455 Mass. 116, 145, 914 N.E.2d 36 (2009), *cert. denied*, 130 S.Ct. 3276, 176 L.Ed.2d 1183 (2010) (held, former CEO of company was limited purpose public figure where he made repeated statements in press releases and the issue involved alleged widespread sexual harassment at a publicly traded company employing 1,000 people). The Complaint concedes as much, asserting that Plaintiff "depends to a great degree upon his reputations [*sic*] and the goodwill he has built up with the public at large," and claiming that he "is well known in Somerville, Massachusetts, and in Plaintiff's businesses' communities and industries." (Complaint ¶¶ 21, 31) Because of his public figure status, Plaintiff must show, by clear and convincing evidence, that Ms. Filcman published the disputed statements with actual malice. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). "The standard of actual malice is a daunting one." *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002). It is provable only by evidence that the defendant "realized that h[er] statement was false or that [s]he subjectively entertained serious doubt as to the truth of h[er] statement." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 n.30 (1984); *see also King v. Globe Newspaper Co.*, 400

[1] In *Howell v. Enterprise Publ. Co.*, the Supreme Judicial Court elaborated the policy rationale animating the fair report privilege: (1) to protect the press when it "acts as the public's eyes and ears" by "report[ing] on official actions and statements that members of the public could have witnessed for themselves" (the "agency rationale"); and (2) to serve as a check on the power of government and promote public accountability by keeping citizens informed about the performance of official duties (the "public supervision" rationale). 455 Mass at 652-3. Both policies support application of the privilege to wickedlocal.com/somerville's reportage in this case.

Mass at 720. Actual malice therefore requires proof here of Defendant's state of mind at the time of publication. *St. Amant v. Thompson*, 395 U.S. 727, 731 (1968). In short, Plaintiff must establish that Ms. Filcman "in fact entertained serious doubts as to the truth of [her] publication, but proceeded to publish anyway." *Lane v. MPG Newspapers*, 438 Mass. 476, 485 (2003). Plaintiff does not allege – and will not be able to prove – that Ms. Filcman subjectively knew or seriously doubted the truth of the allegedly defamatory statement in the February 4 Article.

Finally, in your e-mail to me dated May 8, 2013, you suggested that the statement "Shady, right? Well, it gets weirder" is another example of "Ms. Filcman's defamatory journalism." This assertion is baseless; the statement is obviously Ms. Filcman's opinion based on disclosed facts. *See Howell*, 455 Mass. at 671. It is therefore not actionable as a matter of law.

2. Statements Made in the March 8 Article.

The second allegedly defamatory statement attributed to Ms. Filcman is made in an article analyzing Plaintiff's response to a question that had been submitted to him. (Complaint ¶ 39) In the article, Ms. Filcman quotes the question submitted to Plaintiff: "Should I forgive my molester? Do I have to?" She then approves of one aspect of Plaintiff's response, and critiques another aspect of Plaintiff's response.

Notwithstanding that Ms. Filcman has *quoted verbatim, from Plaintiff's website,* a "Wheel Question" submitted to Plaintiff, Plaintiff asserts in his Complaint that Ms. Filcman "alleges that . . . Plaintiff is a child 'molester' and that she does not want to 'forgive' him." Plaintiff's preposterous interpretation would be laughable if it were not so egregious and such a serious affront to First Amendment principles. Even the most cursory reading of the March 8 Article reveals that Ms. Filcman does not remotely allege that Plaintiff is a child molester. Twisting the question quoted by Ms. Filcman into the bizarre allegation that she somehow refuses to forgive Plaintiff for committing molestation is frivolous, in bad faith, and so obviously devoid of merit that it gives rise to a violation of Rule 11.[2]

Further, for the reasons discussed above, Plaintiff is a limited purpose public figure and has not alleged or shown – nor could he – that Ms. Filcman acted with actual malice when she quoted from Plaintiff's own website.

B. <u>Copyright Claims</u>.

The Complaint also alleges that Ms. Filcman "has posted images taken from Plaintiff's websites . . . by publishing Plaintiff's photograph and literary work" in the March 8, 2010, article. As a result, Plaintiff claims that Ms. Filcman is liable for "common law infringement of the[se] copyright materials."

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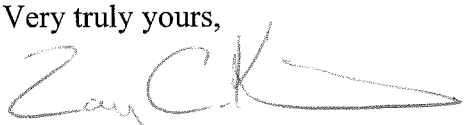
[2] Another example (of many) of a patently frivolous assertion is the Complaint's claim of entitlement to "trebled damages" pursuant to M.G.L. ch. 229, § 2 (Complaint, item 11, p. 28), which applies to wrongful death claims. The implausibility -- indeed, impossibility -- of this contention is obvious on its face. The First Amendment precludes Plaintiff from recovering any type of punitive or exemplary damages in this proceeding.

This is pure fiction. As a threshold matter, the Copyright Act has preempted all common law copyright claims. And, of course, even if Plaintiff wished to allege a Copyright Act claim, he could not do so; the alleged "copyright materials" – *i.e.*, an image of a response to a question and a photograph of Plaintiff – are not federally registered. Further, Ms. Filcman did not actually "post" any "images" from Plaintiff's website. Comparing the article with Exhibit 17 to Plaintiff's Complaint makes clear that Ms. Filcman did not cut and paste any image from Plaintiff's website, but simply quoted Plaintiff's response to a question. And Ms. Filcman certainly did not "post" any "image" of Plaintiff. The photograph of Plaintiff to which Plaintiff apparently refers appears in a comment to the article that is not attributed to Ms. Filcman. Perhaps most fundamentally, Plaintiff's copyright "claim" cannot possibly succeed because Ms. Filcman was simply commenting on Plaintiff's response to a question in a news article. Such works are unquestionably protected by the "fair use" doctrine. *See* 17 U.S.C. § 107 (no copyright infringement under "fair use" exception where reproduction is "for purposes such as criticism, comment, news reporting").

We respectfully but emphatically submit that the Complaint fails to satisfy the threshold pleading standards required under Massachusetts law. *Iannachino v. Ford Motor Co.*, 451 Mass. 623 (2008). As stated above, if Ms. Filcman is forced to file a formal motion to dismiss this transparently frivolous action, we will seek appropriate sanctions in the form of an award of her attorneys' fees and costs incurred on the motion.

I look forward to hearing from you by the close of business on May 30, 2013. Please note that GateHouse and Ms. Filcman deny any liability or wrongdoing, and hereby reserve all rights, remedies, and defenses available at law and/or in equity with respect to this proceeding.

Very truly yours,



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ZCK/rsb
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