THE SUPERIOR COURT FOR THE COUNTY OF MUSCOGEE
STATE OF GEORGIA

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LINDA ELLIS,

Petitioner,

Civil Action File No.: SU13dm409

-against-

Assigned Judge:
Hon. Frank J. Jordan, Jr.

MATTHEW CHAN,

Respondent

----------x

RESPONDENT MATTHEW CHAN'S MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR AN ORDER OF PROTECTION

Respectfully Submitted,

Matthew Chan
Respondent PRO SE
1639 Bradley Park Dr. #500
PMB 110
762-359-0425

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Preliminary Statement

This Memorandum of Law is submitted in opposition to the petition of Linda Ellis ("Petitioner") which seeks an Order of Protection against Matthew Chan ("Respondent") pursuant to Georgia OCGA § 16-5-90. Because Respondent has not engaged in any of the conduct prohibited under the statute and because the statute specifically exempts the Constitutionally-protected activity in which the Respondent was engaged, Respondent asks the court to deny the petition and order such other and further relief as the court deems just and proper.

Statement of Facts

Introduction

This petition arises out a commercial, business matter between the parties. The parties have never met; have never had any form of personal relationship; are not related; do not live in the same community; have never corresponded with each other; and have never even so much as spoken over the phone with each other. This petition was brought because of some Internet discussion forum posts on a website operated by Respondent known as ExtortionLetterInfo.com ("ELI") which were critical of Petitioner's attempts and methods to enforce her copyright in a poem she wrote called "The Dash."

Some of those posts were made by Respondent and some were made by other users of the site. Respondent has never contacted or followed Petitioner nor has Respondent ever placed Petitioner under surveillance.

Petitioner

Petitioner Linda Ellis is the author of a poem called The Dash which she copyrighted with the Library of Congress in 1996. The poem is about a person who speaks at a funeral and comments on how the important part of the tombstone is not the dates which the person was born and died, but the life they lived in between which is represented by "the dash" between the dates. The poem is widely known and has made Petitioner a well-known public figure as both a poet, author, and an inspirational speaker. (See, Lindaellis.net, Petitioner's website). The site invites people to recite the poem at funerals and other events but not re-post or re-print it without permission.

When people do repost it or reprint it without permission, a different side of petitioner emerges. Petitioner is engaged in an aggressive, hard-line method of extracting large sums of money for infringement of her poem to any entity that publishes it on their website in any way. She often demands $7,500.00 for a single infringement and recently demanded as much as $100,000.00 from an alleged infringer. A small sample of some her letter recipients are:

- ATL Foundation
- Turning Point of Tampa, Inc.
- Sermon Central
- Daniel D. Meyer / Christ Church of Oak Brook
- First Baptist Church, Olds Alabama
- Formal Times Newsletter
- South Dakota Chapter American Society Farm Managers
- Green Valley Villas West, Green Valley Arizona
- Garden Court Real Estate Management Corporation
- Bookkeeping 411
- USA Triathlon Mideast Region

- The Magazine of United Methodist Men
- IOWA State USBC Women's Bowling Association
- Bourbon Garden Court
- Marco Island Civic Association
- Main Street Baptist Church
- Neidlinger Garden Court News
- Argos Garden Court News
- Rubel Shelly
- All Saints Church, Rome Italy
- Texas A&M University
- User Talk
- Helium.com
- Kemper Mill Civic Association
- Git Hub
- TARA Association
- Waukegan Public Schools
- Gerry Spence Attorney
- Children's Lit
- The Helixx Group
- The Hindu
- Mount Pleasant Memorials
- Character Education
- Baylor University Seminary
- Neighborhood Link
- David E. Smith Publications
- Church of God, In Truth
- Yasni, UK
- Willet Elementary School PTA
- The Northeastern Pennsylvania Synod
- Autism Resource Central

- First Baptist Church St. Clair, Missouri
- Marco Island Civic Association
- United Methodist Men
- Community Partnerships with Youth, Inc.
- FaithSite.com
- Southern Plaza Homeowners Association
- The Hindu
- The Resilient Journey
- Waukegan Public School District 60
- Real Estate Management Corporation
- United States Judo Association

[1]Petitioner's copyright infringement program is likely a great source of revenue to Petitioner. The letters are sent through Petitioner's company "Linda's Lyrics LLC." A copy of one such letter (name of the recipient has been redacted) is annexed as Exhibit "A."

Respondent

Respondent Matthew Chan is a Georgia businessman specializing in real estate. In addition to his real estate management business, Respondent is an author, independent book publisher, blogger, web publisher, and web broadcaster. In 2008, after he received a letter from digital image warehouse, Getty Images, demanding $1,300 for Respondent's alleged use, he founded the ELI website to help other recipients of these letters gain information about the subject and strategize on how to combat the claims made by Getty and other digital image companies that soon followed Getty's

[1] Getty's program has received wide notice and much negative publicity on the internet and in newspapers. In fact Getty's Wikipedia page references Getty's "Controversial efforts to enforce copyright." http://en.wikipedia.org/wiki/Getty_Images

program.[1] The ELI site is now the foremost source for information on Getty Images and digital image litigation receiving nearly ten thousand unique visitors per month to its pages.

In 2012, after receiving reliable information from April Brown, businesswoman from Seattle, Washington, who received the Linda's Lyrics' letter, emails, and complaints from many other letter recipient describing Respondent's heavy-handed and overbearing attempts to collect money for minimal and one-time infringements of "The Dash", Respondent added a new discussion forum to the ELI website: "Linda Ellis/Linda's Lyrics/Dash Poem Forum." Like the other discussion forums on the ELI site, this discussion forum allows people to post anonymously and openly describe their experiences dealing with the issue. The discussion forum is popular and is now six (6) pages deep on the ELI site with about 170 different and separate topics housing 1,900 individual posts. The discussion forum continues to grow steadily in content and popularity.

Certainly, as with many internet sites, some of the posts can be harsh and critical of Petitioner, mocking and satirizing her enforcement efforts and her ability as a poet, but many of them also detail how Petitioner has harassed, manipulated, and frightened individuals who posted the poem on their family's memorial site after the death of loved one. There is also legal discussion as to the merits and propriety of the content of her enforcement letters and how to defend against the enforcement letters.

ELI's issues with Petitioner's infringement program do not question Petitioner's right to enforce her copyright in her intellectual property. It is that, like Getty Images, Petitioner makes people believe they will be sued for and exposed to hundreds of thousands of dollars in civil damages; that Petitioner overstates and exaggerates the

amount of damages that the alleged infringement would be valued by a court; and that Petitioner is indiscriminate in whom is aggressively pursued, treating an individual who posted the poem for a few days on her husband's memorial site the same as someone who is selling copies of her poem online. Reading even a handful of the posts on the Linda Ellis/Linda's Lyrics/Dash Poem Forum, would show that many folks are truly frightened into believing they will lose their homes; be hit with federal litigation and have to declare bankruptcy as result of posting Petitioner's poem.[2] The ELI site and the users who post it also make comments and express opinions about the apparent hypocrisy between the values stated in Petitioner's poem and the methods by which she enforces her copyright in the work.

Respondent's site offers information and guidance on this and many other copyright issues and presents an obstacle to Petitioner's infringement collection practice and business model. The facts above and those adduced at the upcoming hearing will show that no threats of physical harm were made against Petitioner and that Respondent was engaged in Constitutionally-protected activity.

Petitioner's prior attempts to derail ELI

This baseless petition presently before the court is just the latest strategy by Petitioner to stop ELI from providing advice and commenting negatively about her business

[2] For example, Petitioner in her letters states that it is inevitable that Petitioner will have to expend legal fees to combat this infringement and that she has "recently" sued in Federal Court and been awarded $150,000 in statutory damages (the maximum allowed by law) plus legal fees. In fact, however, a national PACER search reveals that Petitioner has only sued in twice, both times in the Northern District of Georgia: In 2006 (Docket no. 06 cv 02170 Ellis v. Fischer) .There, defendant produced and sold CDs which included a song containing The Dash's lyrics without permission. The case quickly settled for an undisclosed amount; and in 2003 (Docket No. 03-cv-03086, Ellis v. Aronson) where she was awarded a default judgment when defendant's answer was stricken for failure to comply with discovery. The defendant there published without permission a book called The Dash, which contained Petitioner's entire poem and was about to sell and distribute a second book "Dashing Through Your Diet." After entry of a default judgment the court indeed awarded the maximum statutory penalty but that case is not recent and in no way a fair example of the type of infringement most letter recipients engaged in. Both of these cases field involved serial infringers who were making money off of the Petitioner's poem.

methods. On June 6, 2012, an inappropriate DMCA Copyright Takedown complaint was made to Scribd by John W. Jolin (Ellis employee/contractor) regarding a legitimately attained document Chan received and posted. After contesting that complaint, Chan was notified the document was fully restored on June 27, 2012 with no incident. On January 17, 2013, Chan received an "Abuse notice" of Ellis' complaint (death threats, posting of personal info) from Eapps web host. Chan voluntary shut down the ELI Forums and moved the ELI website to RK web host provider. Eapps consequently terminated the 8-year business relationship after the Ellis complaint. On February 6, 2013, Ellis submits a similar complaint to RK web host provider regarding ELI forum content. In this case, the web host provider defended ELI right to free speech and rightfully denies Ellis complaint.

Posts about which Petitioner complains

While the Petition does not expressly state the alleged threats made by Respondent to Petitioner for which she seeks the drastic remedy of an Order of Protection, the Petition does allege that Respondent: "posted threats of death, posted home address, and family and personal info with statements such as: 'We are coming after you' Boasts about driving by subdivision and photos of my home and daughter's employment." Respondent will now discuss the eight posts that he found (among the hundreds of post about Petitioner on ELI) which he believes are the ones to which Petitioner alleges and of which she complains.

Post 1: ELI Hired by Author to Battle $100K Copyright Extortionist, Linda Ellis

This post is dated December 12, 2012 at 10:31PM. In summary it informs the forum that Respondent has been hired to combat "Team Ellis" against a $100,000 demand in a copyright infringement case. It includes in its early paragraphs rhetoric about past successes of ELI using the online forum and publicly available information. But it makes clear that it is a battle that is going to take place on a "PR/online battlefront" first and which then might escalate to a legal battlefront.

Respondent then goes on to post:

"I want to point out that, at all times, we won't be in engaging in any criminal behavior but beyond that, anything goes, as far as I am concerned . . . If that makes some people cringe, so be it. If there is collateral damage that goes beyond Linda that spills over to her friends, family, attorneys, and business associates, so be it."

Clearly, any "collateral damage" would be that which is covered by the "PR/online battlefront" and that context governs the rest of the post. Respondent goes on to state that his purpose is to help those who are in a fight with Petitioner over what he and many others perceive as being an overbearing, intimidating campaign to get more money for an alleged infringement of her poem than is legally proper:

As much as I despise the idea of Team Ellis making money through their extortion letter campaign, I am more disgusted by those victims that won't speak out or stand up against a weak opponent such as Team Ellis. Having said that, those who are willing to step up, step out, and pay me to help them in their fight, I am a very "effective" ally. On top of all this, if someone wants to pay me to support a cause I already believe in? It's a no-brainer for me. They get premium support and my full attention to their case plain and simple.

His post goes on to state his "Goals":

WHAT ARE THE GOALS HERE?

One goal for my writing this piece is to let the world-at-large that ELI is now for hire to hit back and help get revenge against those that legally threaten them. Another goal is to remind Team Linda

know, they have a lot of people who don't like them watching and monitoring them. They constantly feed April Brown and ELI. We talk and share information. Another goal is to further educate people that many problems can be "resolved" without expensive attorneys and going down a road that favors their better-financed opponents. Extorting someone for $100K is a huge game-changer that has compelled my client to stand up and do something radically different and not play defense anymore. It is now time to hit back and hit back very hard where it hurts.

I live in Georgia and I go to Atlanta very frequently. Marietta was my old stomping grounds. I have a video camera. I have access to a lot of financial and real estate records. I know how to track down people. I have a talent for publishing information that gets picked up by search engines. I have a freaky photographer friend from Florida with very expensive camera lenses that is just aching to visit me in Georgia and join me in a tour of Marietta with a video camera

While this post does mention that he has a video camera, it does not mention what his intent is with respect to the video camera and there is no evidence that he acted on this intent. He talks mostly about looking for information from financial and real estate records. That is made clear further in the post by a comment made by Respondent on December 14, 2012:

Just a quick update, Robert and I have had some discussions. There is a LOT of information that can be found on both Linda and Jackass Jolin [Petitioner's copyright lawyer is John Jolin] even without paid database services.

At most, this post shows an intention to possibly do an investigation into Petitioner using free public records, though the details are not actually expressed.

Post 2: The $100K Bryan Baer / Linda Ellis Lawyer Extortion Letter!

This post was made on the ELI forum on December 14 2012 at 12:19AM

The main theme of this post is the infringement claim letter sent by Petitioner's lawyer, Bryan Baer, demanding $100,000 for a single use of the Dash poem. In his initial post discussing what would happen if the recipient paid Petitioner $10K Respondent states:

I want to remind everyone that a typical split is 60/40 with 40% going to the attorney. So if the extortion letter recipients even pay $10K, that is an easy $4K going to the attorney for that one letter and Linda gets to rape someone in the tailpipe without vaseline for $6K which would easily pay 4-6 months worth of her mortgage payments at Roswell Downs.

That prompts another ELI user to post Petitioner's actual address and his belief that a business is being run out of her address:

I guess you are referring to this house located at

3349 PREAKNESS CT

MARIETTA, GA

30062-5553

https://maps.google.com/maps?q=3349+PREAKNESS+CT+MARIETTA,+GA+30062-5553&hl=en&ll=33.979097,-84.452827&spn=0.011939,0.022724&sll=26.841821,-80.163269&sspn=0.205548,0.363579&t=h&hnear=3349+Preakness+Ct,+Marietta,+Cobb,+Georgia+30062&z=16&layer=c&cbll=33.97984,-84.454176&panoid=frtJcd4qXvyhKXPNfLwLaA&cbp=12,9.94,,0,0

and why in the world would a KinderCare center have the same address...is she running a daycare there as well...hmmm pet rescue/rehab, nursing home and daycare center...along with the trolling operation..

KINDERCARE LEARNING CENTERS INC

3349 PREAKNESS CT

MARIETTA, GA 30062-5553

This information was gleaned from the Google search engine and public records. There is no talk of going to the premises or of doing surveillance there. Recently a newspaper in NY published the addresses of gun owners taken from gun permits on file with the

State. While many felt that was an improper and dangerous no one questioned the paper's First Amendment right to publish public information.

This post presents no conduct which remotely comes close to the statute.

Post 3: Linda Ellis is also a meme... what an Internet icon..!

This post was started on June 27, 2012 6:46pm by an ELI User and not Respondent.

It is just an unflattering image of Petitioner.

Post 4: Linda M. Ellis Personal Information Found

Posted on June 11 2012 at 12:04 AM by Petitioner It starts off with this statement:

Now that I have everyone's attention, I am actually NOT going to reveal everything I now know about Linda Ellis' personal information. I don't know everything but I know a TON. I know Linda (or at least her brother) reads this forum so I will address them directly.

Respondent immediately indicates that he is not going to reveal all he knows about Petitioner. That being said, revealing all about Petitioner (as long as it was the truth and not the subject of illegal surveillance) does not violate the statute. Respondent goes on to post:

Believe me when I tell you I have a LOT on you. I found out about your brother but I have a LOT more personal information on YOU that I don't really want to post. I don't even want to say what information I have simply because it can get out of control very quickly. There are people who hate you and looking to put you into the ground. I don't "hate" you. I simply find your copyright extortions to be outrageous. We may never agree but that is ok. I do have information that I can post that I am certain you would like and not do you well.

But I will leave a few nuggets to let you know I mean business. Some of this will mean very little to most people but YOU should "get it".

1. Linda Marie Hicks Ellis, 50

2. David Lynn Ellis, 52

3. MEE Museum

4. Roswell Downs

5. Planters

6. Kipling

Just so you know, my patience is fairly low. It wouldn't take much to push me over the edge on this. I am content to leave this post as it is if you quietly back off and stop harassing and threatening people. But if not, you will find this thread become one of the most active threads you have ever seen.

The only threat in this post is the threat to reveal more information. It can be stretched to argue that this is an attempt to "contact" Petitioner but that is only one such attempt and it is not an attempt to contact her personally. See the *Mack v. State* case discussed further in the memorandum. This post was also made over seven months ago and no further information was revealed. In the same topic, on December 13, 2012 at 11:54pm Respondent posted:

I have chosen to "bump" this topic to the top to remind Team Linda of the intelligence we have gathered thus far which is stored in our back pocket to assist our author friend and ELI client with fighting the $100K copyright extortion claim.

Again addressing Petitioner is not contacting her or trying to contact her. On January 14, 2013 at 12:35Am Respondent posts:

New personal information on Team Linda will be released soon. Up to recently, there was no reason to turn the info loose. But given the gutsy $100K settlement demand and the fact that ELI is being paid to put the heat on Team Linda, I will be releasing more revealing personal information very soon.

Once again, no violation of the statute here. The only threat is a threat to release personal information legally acquired. Then on February 1, 2013 at 12:09 AM Respondent posts:

I am writing a brand-new article regarding Linda's celebrity and public figure status to help both her fans as well as her copyright extortion victims in case they want to file a lawsuit against her. Using her UPS Store address won't cut it in legal matters. However, whatever you do, don't tread on her property and don't touch any of her property. She could file a trespassing complaint against you. However, staying on public streets and driving by should be fine if you are curious enough. Do NOT step onto private property! I'm not yet sure sure [sic] if Roswell Downs is within a gated community. Perhaps someone can help me find out.

I have assembled some helpful information and links who want to delve further into Linda's affairs. Everything I have found is public information regarding her home address: **3349 Preakness Ct., Marietta, GA 30062**. It is located in the Roswell Downs community and managed by the Roswell Downs Homeowners Association.

http://roswelldowns.com

Do a search on Google Maps to find out what her house looks like.

Cobb County Real Estate Deed Records

http://www.cobbsuperiorcourtclerk.com:8888/LRSSearch/#/MainMenu

I've downloaded quite a few recorded documents and sorting through them. There is quite a few of them, perhaps some duplicates too. I have emailed copies to Robert and Greg to help me.

Cobb County Property Tax Records

http://www.cobbassessor.org/search/genericsearch.aspx?mode=address

Do a search on Trulia and Zillow to find out more details about her house.

Georgia Corporation Search on Linda's Lyrics LLC and Kindercare Learning Center LLC.

http://soskb.sos.state.ga.us

https://cgov.sos.state.ga.us

http://soskb.sos.state.ga.us/corp/soskb/Corp.asp?1898975

http://soskb.sos.state.ga.us/corp/soskb/Corp.asp?715752

More to come...

Respondent here mentions that "driving by" by Petitioner's house is legal, I do not state that I did or that I will. I did not and I have no intention of doing so. Besides, as described in my memorandum of law later on, driving past her house would only violate

the statute if it was done in a course of conduct and with the intent to harass and intimidate her. Curiosity is not prohibited by the statute. There is no campaign orchestrated by Respondent to have people go by her house repeatedly or honk their horns or disturb her in anyway. It was likely this post that drove Petitioner to file her complaint but this does not violate the statute. Respondent follows up with this on February 15, 2013 at 4:33am:

My gift to Linda during this Valentine holiday is making available the screen shots of Clerk of Court, Cobb County, GA Index of Real Estate Records of Linda Ellis. As a bonus, I included her husband's record, David along with them.

http://www.scribd.com/doc/125605790/Clerk-of-Superior-Court-Cobb-County-GA-Linda-Ellis-Documents-1

http://www.scribd.com/doc/125605791/Clerk-of-Superior-Court-Cobb-County-GA-Linda-Ellis-Documents-2

http://www.scribd.com/doc/125605793/Clerk-of-Superior-Court-Cobb-County-GA-David-Ellis-Documents

Through this index, you can see the entire history of deed and mortgage-related transactions of her house on Preakness Ct. in Roswell Downs.

I posted some interesting, recent mortgage-related documents of transactions relating to the house. Specifically, Linda refinanced her house for $120,000 with a new 30-year loan.

http://www.scribd.com/doc/125606887/Linda-Ellis-Mortgage-Document-Sept-2012

Assuming she doesn't sell the house, she won't pay off her house until she is 81-years old!

I am fairly sure Linda, the crunt, won't like me posting this publicly-accessible document from the Cobb County, GA, Superior Court records and showing her personal financial business.

Linda might cry again to another web host provider claiming that I am "inciting violence", "threatening her life", "stalking her", or "harassing her". Sure..... posting her real estate and mortgage documents on this forum qualifies as all of that. She brags about being an inspirational speaker, celebrity author, poet, author of the famous/infamous Dash Poem, and a public figure. Hence, public information such as real estate and mortgage records is more than fair game for a celebrity of her caliber and stature.

While this post is indelicate in some places (calling her a “crunt”), it actually vindicates Respondent. Here I clearly indicate my intention and goal: to publish publicly available information on Petitioner. Respondent’s assessment that Petitioner is a public figure also shows that Respondent believes to be acting within the bounds of the law. While ignorance of the law is no excuse, when you have to establish that the perpetrator had a criminal or illegal intent, a statement of a legal intent by Respondent disproves that element of the case.

That is reinforced by the unsolicited reply by ELI user “skosh” at 11:15 am the same day:

Matthew,

I'm realizing a side of you that is very impressive. You are mostly a tiger, but also a lamb.

Linda, though she doesn't play the role very well, is a human being. While perhaps a disgrace to humanity, she has friends and family who are innocent in all this. Instead of reacting to her threats by destroying her publicly, you are first trying to get her to come to her senses and stop her efforts to destroy others who are simply trying to protect good human beings from her wicked trolling. I hope she somehow appreciates that, and stops the consequences that will follow if she continues her senseless and stupid rampage.

Ron Tranmer

Post 5: Linda M. Ellis Personal Information Found

This was posted on February 1, 2013 At 12:09 AM and is just a repeat of the above post.

Post 6: Linda Ellis Engages ELI Through ELI Facebook Page

This was posted by Respondent on June 17, 2012 at 7:43PM. It shows a running dialogue between Petitioner and Respondent regarding the issue on the ELI Facebook page. Respondent then states to Petitioner in his initial post: Quite honestly, I am not sure we have anything to discuss. Matthew Chan.

This again shows an intent not to contact her or engage in a dialogue with her. He reiterates that in the following follow up post on June 17 2012 at 8:15PM:

If I cared enough or had the inclination to spend more time on this, I could reach out to her. After all the invitation is open. But I don't care enough at the moment.
Linda is goofy, in denial, and seems to think putting her head in the sand is the way to do it.
She claims to have only read one paragraph of my open letter (which hardly seems likely), but here are two links she better re-read.
http://www.extortionletterinfo.com/forum/linda-ellis-lindas-lyrics-dash-poem-letters-forum/what-is-defamation-%28for-linda-ellis-copyright-extortionist%29/
http://www.extortionletterinfo.com/forum/linda-ellis-lindas-lyrics-dash-poem-letters-forum/linda-m-ellis-personal-information-found/
If she pisses me off again with her defamation talk, I don't need to use the court system to make her eat her words. Roswell Downs is only 2 hours away and I have 2 camcorders dying to be used.

Again, in the last sentence Respondent indicates an intent to go to her home with 2 camcorders but the statute only applies when someone has actually done surveillance not threatened to do surveillance. This more than shows a lack of intent to contact her than anything else. If Respondent wanted to follow or surveill Petitioner, I have her address, I have 2 camcorders, I live close by, I have the opportunity to do so but I do not and never have. That I never have despite having many opportunities to do so clearly indicates that I have no intention of doing so; this was posted over seven months ago. The benign nature of this post is reflected by an ELI user's comment dated June 17, 2012 at 11:55pm on the posts:

Additionally she stated on FB that "I will explain my position and my platform, which will remain intact as long as I am alive." Well, her position is publicly stated on her website and how she acts on her position is well documented on this site. So, what is there to discuss? I would put the odds of her having a discussion with Matthew, having an epiphany, and taking the good advice given to her here by Oscar, Mathew, and Ron at something close to 0.0% (though if she did take their advice, I think she would be received fairly well by most of the ELI community and would increase her fanbase).

This again establishes that Respondent and ELI are trying to get Petitioner to see the errors of her ways and to stop extorting people for their use of The Dash. That is and has always been Respondent's intent: it is not to contact, follow her or harass her.

Post 7: Linda's Lyrics $7500 Extortion Letter by Dash Poem Author Linda Ellis

Posted June 13, 2012 at 9:33PM by RESPONDENT. It references a new letter from Team Ellis that demands $7,500 for infringement of The Dash. The letter was posted on ELI's Scribd account and Petitioner had tried to take down two other similar documents. Respondent posts:

I can safely say that if ELI gets hit a 3rd time, some serious drama will ensue and it won't be pretty. And there is a good chance there will be quite a bit of collateral damage.

Consider everyone warned and notified.

This is not a threat of physical harm nor would anyone believe it to be that when in the past all ELI and Respondent did was at worse try to embarrass Petitioner online. Respondent posts nothing else in this topic and the ELI users don't post anything worth mentioning.

Post 8: What is Defamation? (For Linda Ellis, Copyright Extortionist)

Posted June 10, 2012 at 2:36PM by RESPONDENT. This was done in response to an allegation made by Petitioner about her being defamed by ELI and Respondent. Respondent takes great pains in his initial post to explain that Petitioner is a public figure and therefore has to put up with some negative opinions of her. He then states:

And since I am quite familiar with Cobb County and the government center (I did live in Marietta for 3 years in case you didn't know) and still visit the area frequently, I might be inclined to see what I could find in public records. Maybe pull up your real estate deeds, mortgages, and any other interesting documents. I would want to see how big your house is, how much its worth, how much property taxes you pay, and any other properties you might own. I bet you live in the East Cobb area. I love that area. . . I could probably go digging through public records to see if you have any traffic infractions, see how many times you have been married and divorced. Did I mention that since I am not that camera shy, I would become like a reporter and maybe produce a documentary of my adventures? I have 2 camcorders orders that I could carry around to record all this. Did I mention I have a long history of turning lemons into lemonade?

Again, a clear indication of my intent – to post public information about her. Here Respondent also indicates that the 2 camcorders are to record what he finds from public information. This post even weakens the possible threat to do surveillance by further explaining what was meant by having 2 camcorders. I add:

I could even find your house to see what it looks like and where you live. Don't worry I won't trespass or threaten any physical harm. But I definitely would get some video footage of your house from a safe distance and maybe provide directions to your house. Remember, as a self-proclaimed public figure and celebrity author, this would be of public interest. I could be a one-man paparazzi.

Once again, this vindicates the intention to not to follow her or do surveillance, just find her house, see what it looks like and where she lives. Respondent states he will not do physical harm. While most Petitioner may argue he is saying that to protect himself, the statute requires proof of an intent to harass and intimidate one into fearing physical danger. Respondent states the opposite here. "Being a one-man paparazzi" would not be doing surveillance as taking pictures of whatever is in plain view from a public street is constitutionally protected – that's why the paparazzi exist. According to Petitioner, TMZ, People, The National Enquirer etc. are all illegal stalkers. They are not as long as they shoot from a public street. Surveillance is defined by Merriam-Webster Dictionary as "close watch kept over someone or something (as by a detective)." Occasional photos or paparazzi-type pictures are not surveillance because it is not done by a close watch over a period of time. The law here requires "a course of conduct." Respondent then posts about his successful self-defense of a tax claim with the IRS and a speeding ticket. Again Respondent is showing his intent and ability to battle legally and by the rules against Petitioner by himself through self-representation. Another user then posts a white pages link to a possible address for Petitioner on June 10, 2012 at 3:14PM. This post comes nowhere near a violation of the statute and was made over seven months ago.

CONCLUSION

These posts, taken both individually and together do not constitute stalking. They do not amount to following, contacting or doing surveillance on her. The law does not prohibit an attempt or an intent to do any of those things. It only prohibits actually doing those things. At most, Respondent shows an intent to go past her house, maybe

video her house or take pictures from a public street. Even doing those things would not violate the statute but certainly talking about maybe doing those things does not violate the statute.

ARGUMENT

POINT I

THE CHARGES BROUGHT BY PETITIONER ARE INAPPROPRIATE UNER THE OCGA § 16-5-90(a) and 94(d)

The statute authorizing a permanent protective order is OCGA §16-5-94(d), which provides in pertinent part: "The court may grant a protective order or approve a consent agreement to bring about a cessation of conduct constituting stalking. Orders or agreements may: (1) Direct a party to refrain from such conduct; [and] (2) Order a party to refrain from harassing or interfering with the other...."

In order to obtain a protective order based on stalking, the petitioner must establish the elements of the offense by a preponderance of the evidence. The grant or denial of a motion for protective order generally lies within the sound discretion of the trial court. *Sinclair v. Daly*, 295 Ga.App. 613, 614 (2009). In order to show that Respondent was stalking Petitioner, the evidence must show "that [Respondent's] actions ... placed [Petitioner] in reasonable fear for [her] safety by establishing a pattern of harassing and intimidating behavior." *Id.; Wright v. State*, 292 Ga. App. 673, 676 (2008). The Supreme Court of Georgia has held that verbal taunts, including cursing, threatening someone's livelihood or employment or belittling someone's intelligence are not sufficient to place a person in reasonable fear for their safety and do not fall within the statutory definition of stalking. *Pilcher v. Stribling*, 282 Ga. 162, 167 (2007).

Because the allegations alleged by Petitioner do not meet this high burden and do not make out the charges of stalking, as described below, the court cannot issue an order of protection under 16-5-94(d).

POINT II

PETITIONER'S ALLEGATIONS AND RESPONDENT'S CONDUCT DO NOT CONSTITUTE THE ELEMENTS OF THE CHARGE OF STALKING AS RESPONDENT DID NOT CONTACT PETITIONER AND DID NOT FOLLOW OR PLACE HER UNDER SURVEILLANCE

OCGA 16-5-90(a)(1) prohibits very specific conduct only and does not reach conduct that is not listed in the statute. Under OCGA 16-5-90(a)(1) A person commits the offense of stalking when:

"he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person."

Respondent did not follow Petitioner nor is there any allegation that he did.

Respondent not place Petitioner under surveillance nor is there any allegation that he did. Respondent did not contact Petitioner nor is there an allegation that he did.

The elements of the statute (all of which need to be met) are only met when a person:

(a) "follows" or

(b) "places under surveillance" or

(c) "contacts"

(d) another person

(e) at or about a place or places

(f) without the consent of the other person

(g) for the purpose of harassing AND intimidating

(h) the other person.

The Georgia Supreme Court in *Johnson v. State*, 264 Ga. 590 (1994) in assessing the constitutionality of the stalking statute set forth definitions of the key terms that the court said rendered it constitutional:

1. "Both OCGA §§ 16-5-90 and 16-5-91 require, in relevant part, that the proscribed act of making non-consensual contact with another person be 'for the purpose of harassing and intimidating the other person.' " *Johnson v. State* 264 Ga. at page 591). There is no proof that this was the purpose behind the posts complained of;
2. "To 'contact' is readily understood by people of ordinary intelligence as meaning '[t]o get in touch with; communicate with.' American Heritage Dictionary (3d ed. 1992)." *Johnson v. State* 264 Ga. at page 591. There is no proof or claim that Respondent got in touch with or communicated with Petitioner. In the case of *Marks v. State*, 306 Ga. App.824 (2010) the Georgia Court of Appeals specifically held that posting on the internet about someone does not constitute "contact" under the statute. In *Marks*, a defendant's conviction for stalking and violating an order of protection was reversed because the court found that his posting on the internet of several untrue statements about his victim (his ex-wife) and his having emailed links to the postings to several people was not "contact" under the statute.

The petition must be dismissed on this element alone as petition only complains of internet posts and the Georgia Court of Appeals has held that internet posts are not governed by or prohibited by this statute. Moreover, as discussed further on page 27 of Respondent's Memorandum, none of these pots were sent to Petitioner by Respondent. Rather, Petitioner accessed them of her own free will.

3. In *Pilcher v. Stribling*, 278 Ga. App. 889 (2006), the Georgia Court of Appeals held that the term "place or places" shall include any public or private property occupied by the victim other than the residence of the defendant. The law only applies therefore to contact made at a public or private piece of property occupied by the person – so while emails repetitively sent to someone's home would qualify, general posts about the person on the internet would not meet the definition of "place or places.";
4. "Moreover, the term "harassing and intimidating" is further defined in OCGA 16-5-90 as a *knowing and willful course of conduct* directed at a specific person which causes emotional distress by placing such person in reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family, and which serves *no legitimate purpose.*" *Johnson v. State* 264 Ga. at pages 591-592. (emphasis in original) There is no proof that Respondent engaged in a willful course of conduct with no legitimate purpose. In *Daker v. Williams,* the Supreme Court of Georgia instructed that a "'course of conduct 'refers to a series of successive actions, and, as such, is equivalent to a ' *pattern of behavior*.' " 279 Ga. 782,785 (2005). Accordingly, in *State v. Burke*,267 Ga. 377 (2010), where there was only a single act at issue, one violation of a protective order, the Georgia Supreme Court held that the evidence "simply [did] not establish 'a *pattern* of harassing and intimidating behavior.' " 267 Ga. at 379. Indeed, in *Burke,* the Court reiterated that the " 'harassing and intimidating' conduct must be established by, among other things, 'a *pattern* of harassing and intimidating behavior.' " *Id.*(internal citation omitted; emphasis in original). So that it is clear that not only must there be a pattern, but it must be a pattern of harassing and intimidating behavior (as that is defined, see below); see also *Krepps v. State,* 301 Ga.App. 328, 330(2), (2009) (noting that a conviction for stalking requires the state to prove, as part of

establishing the element of "harassing and intimidating" behavior, a pattern or a course of conduct).

Petitioner complains about posts that talk of taking picture of her home and driving past her subdivision. The Eleventh Circuit has held that "[t]raditionally, watching or observing a person in a public place is not an intrusion upon one's privacy. However, Georgia courts have held that surveillance of an individual on public thoroughfares, where such surveillance aims to frighten or torment a person, is an unreasonable intrusion upon a person's privacy." *Summers v. Bailey*, 55 F.3d 1564, 1566 (11th Cir. 1995). Of course there is no proof here that Respondent engaged in any of this conduct; Respondent certainly did not place Petitioner under surveillance and certainly did not intend to so for the purposes of frightening or tormenting her.

In contrast to the benign activities that Petitioner believes Respondent *may* engage in (there is no allegation in the petition that Respondent did any actual act) the serious nature and deep extent of the pattern necessary to reach the intent of the statute is shown by the Georgia Court of Appeals decision in *Autry v. State*, 306 Ga.App. 125 (2010). In that case, a defendant was charged under OCGA §16-5-90(a)(1) and was convicted after a jury trial. In appealing his case to the Georgia Court of Appeals he argued that the evidence presented against him did not amount to "a course of conduct." At trial, the complainant, Angie Reed, testified that she saw the defendant observing her from his car while she was parked in her car outside a sporting goods store. The defendant then got out of his car and walked past her car on the driver's side and appeared to be heading to the sporting goods store. Reed got out of her car and also headed to the sporting goods store where she found that the man had not gone inside and instead she had to walk past him to go into the store. When she came out of the

store after 25 minutes, the defendant was back in his car. When she pulled out, he followed her in his car till they got to a stop sign. Though the defendant pulled away from the stop sign first, Reed noticed a short while later, that he was following behind her again in his car. She went to her next destination, another store, and noticed that the defendant parked in the same parking row but at the opposite end. She left the store after asking if there were security personnel and being told there was not. She went behind the defendant's car and recorded his license plate because "I felt like he was following me and I thought it was too coincidental that we had gone from location to location and he just sat in his car the whole time." As she left the lot and traveled along the road for some time, he continually followed her in his car until they turned in different directions at an intersection. Reed testified that she had been afraid that day that he would follow her home or somehow track her based on her license plate. Three weeks later, Reed was again followed in her car by the same man as she walked to her vehicle which was parked in a store parking lot. The defendant followed her in his car with the window rolled down as she walked. When she got to her car, he parked in the spot next to her and followed her as she pulled out of the lot. She lost him after a series of quick turns. She filed a complaint with the police and the defendant was arrested. *See, Autry v. State,* 306 Ga.App at 125-127. In overturning his conviction, the Court of Appeals stated "it was apparent that Autry's behavior underlying Count 1—"to wit: followed [Reed] in her vehicle to a store and watched her going into and out of said store"—fell short of demonstrating the requisite *pattern*." *Id.* at 128 (emphasis added). The General Assembly in 1998 specifically added the requirement that the victim's emotional distress must be established by "a pattern of harassing and intimidating behavior." This requirement was added "to help avoid abuse of the system by people

who overreact or become vindictive." Review of Selected 1998 Georgia Legislation, 15 Ga. St. U. L. Rev. 62 (Fall 1998). Petitioner has overreacted and the statute was explicitly amended to avoid this abuse of the system by requiring a pattern of harassing and intimidating conduct.

5. "A person of ordinary intelligence can readily appreciate what action, in a given context, will constitute "harassing and intimidating" conduct on his part sufficient to provoke a "reasonable fear of death or bodily harm" in another person" *Johnson v. State* 264 Ga. at page 592. The fear must be reasonable and the actor must have engaged in a course of conduct that would knowingly provoke such a reasonable fear. No such conduct is alleged here and no reasonable person would be placed in fear of her physical safety by this conduct.

Other Georgia courts have held that "physical assaults [that]occurred during basketball games initiated by an employer for the legitimate purpose of physical training [and] . . . verbal taunts, which occurred at various times during working hours and included "cursing, threatening employees' jobs, and belittling employees' intelligence, personal life, weight, sexual inexperience or financial situation," were not sufficient to create a reasonable fear for the safety of the alleged victims or their families. *Pilcher v. Stribling*, 278 Ga. App. 889 (2006).

A Georgia appellate court struck down an order of protection issued to a priest against a parishioner because there was no evidence that the parishioner's conduct would place a reasonable person in fear of his safety. The parishioner repeatedly threatened to sue the priest; called the priest repeatedly at night; improperly gained access to the priest's locked office and left a note; threatened to have the priest defrocked in ecclesiastical court; and showed signs of instability and possible suicidal

ideation. *Sinclair v. Daly*, 295 Ga. App 613 (2009). The court felt that all of the above still did not rise to the level of sufficient evidence to reasonably place someone in fear of their own safety even though the priest testified "if [Sinclair] was suicidal, if he was willing to do violence to himself, would he do violence to me or my family?" The court stated that the statute focuses on the behavior of the alleged stalker and that concern over the mental stability of the alleged stalker is insufficient. *Id. See Also*, See *Wright v. State* 292 Ga. App. 673 (2008)(evidence failed to show defendant stalked his ex-wife because, although the defendant entered his ex-wife's house after she revoked his consent to do so, her testimony showed that she did not think he would hurt her or their children); *In the Interest of C.C.*, 280 Ga.App. 590, 592(1)(2006) (evidence insufficient to establish crime of stalking where, among other things, the alleged victim and his wife did not testify that they were afraid when a truck in which the defendant was a passenger pulled into their driveway and remained in front of their house).

At best, Respondent operated an internet discussion forum where Petitioner was discussed by Respondent and others. The only post that comes close to resembling a threat is a post mentioning Petitioner and saying "We are coming after you." It is important to note that Respondent is not the person who posted this. Also, when taken in context it is clear that the poster is not threatening violence and what it is meant is that the poster and others will scrutinize and alert the public to Petitioner's doings regarding her copyright infringement scheme. That post was also made over seven months ago.

Because the Georgia Court of Appeals has specifically ruled that internet posts do not constitute "contact" under this statue and because Respondent has not engaged in any other conduct governed by the statute as defined by the Georgia Supreme Court and

because Petitioner cannot make our her burden that she was reasonably placed in fear of physical harm by this conduct, the Petition must be denied and dismissed.

POINT III

RESPONDENT'S CONDUCT INCLUDING THE POSTING OF PETITIONER'S HOME ADDRESS IS CONSTITUTIONALLY PROTECTED SPEECH AND AS SUCH IS EXEMPT FROM THE STATUTE'S REACH

OCGA § 16-5-92 of the statute ("Applicability") states:

The provisions of Code Sections 16-5-90 and 16-5-91 shall not apply to persons engaged in activities protected by the Constitution of the United States or of this state or to persons or employees of such persons lawfully engaged in bona fide business activity or lawfully engaged in the practice of a profession.

a. Federal Constitutional Analysis

A brief analysis of the balancing done by courts including the US Supreme Court in deciding between (a) speech that incites persons to commit crimes or which involves criminal activity and (b) speech that is protected by the First Amendment is therefore helpful at this point.

There can be no greater protected activity than speaking in a public forum and while the Internet is not technically a public forum, when a government places restrictions on the content that may be placed on the Internet, it acts as a regulator of private activity, and its restrictions are subject to strict scrutiny. *Reno v. ACLU,* 521 U.S. 844 (1997). Court's understanding of the internet in *Reno v. ACLU* proved prescient when it observed that the internet constituted a:

dynamic, multifaceted category of communication [that] includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

Reno v. ACLU, 521 U.S. 844, 870 (1997). The Supreme Court in *Reno,* also noted that the District Court below specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' *Id.* at 869. [3] Other Supreme Court precedent likewise requires that illegal *action* be almost contemporaneous with the inciting speech if the speech is to be excluded from First Amendment protection. *See e.g. Brandenburg v, Ohio,* 395 U.S. 444, 447 (1969). The reason for an imminence requirement derives from the notion that the means to deter unlawful conduct is to punish the *actor* rather than the *advocate*. *Bartnicki v. Vopper,* 532 U.S. 514 (2001). In *Hess v. Indiana,* 414 U.S. 105 (1973), the Court found no imminent action in a demonstrator's shout, "We'll take the fucking street later [or again]," as police attempted to move a crowd of demonstrators off the street. *Id. at* 106-108. Speech that incites others to violate the law is not protected by the First Amendment, but the incitement to lawless action must be imminent and likely. *Id.* Here, the speech did not incite anyone to lawless action but it was also not imminent or likely.

In fact, Respondent's posts arose out of a desire to get people to help combat what he believes is Petitioner's abusive and extortionate copyright infringement scheme.

[3] This holding also undermines the claim that by posting about Petitioner, Respondent "contacted" Petitioner. Here, Petitioner learned of the posts because she chose to read them – they were not emailed to her by Respondent or posted by respondent on Petitioner's own social media pages.

It was a call to "rally the troops" to use public information about Petitioner to discredit her and her supporters, including her legal counsel. This type of language and speech is afforded great protection. For example, in *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982) involving the efforts of civil rights leader Charles Evers and others to organize an NAACP-sponsored boycott of white-owned businesses in Claiborne County, the Court noted that the boycott had a "chameleon like character...; it included elements of criminality and elements of majesty." *Id. at* 888:

> The boycott was mostly peaceful but was peppered by some violence as a few boycott violators were beaten and shots were fired through some of their windows. Violators were publicly disclosed and "store-watchers" recorded which blacks patronized white-owned stores and then printed their names in a local newspaper and announced them in church. *Id. at* 903-04. Evers publicly proclaimed that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Id. at* 900 n.28. He "warned that the Sheriff could not sleep with boycott violators at night," and told his audience, " 'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.' " *Id. at* 902.
>
> The Court found that Evers' speech - even set against a backdrop of violence, and even including apparent threats - did not exceed the limits of protected speech. The Court noted that the speeches consisted of impassioned political pleas within which Evers' seemingly threatening language was used, and that no imminent unlawful conduct followed the speeches. *Id.* Focusing on the political nature of Evers' speeches, the Court wrote:
>
> Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.
>
> *Id.*

While not comparing Respondent's speech to that of Evers', and while not comparing the issue over Petitioner's poem to the civil rights movement, the enforcement of copyright infringement and the use of extortionate methods in that process (called copyright trolling) is an issue of national importance that is the subject of a large amount of speech on the internet. *See, for example* www.fightcopyrighttrolls.com; www.eff.org/issues/copyright-trolls; www.extortionletterinfo.com; www.eff.org/issues/copyright-trolls; and www.techdirt.com/blog/?tag=copyright+trolls.

Even a small discussion forum like ELI is entitled to protection similar to that of the traditional press. The United States Supreme Court has upheld an inclusive definition of "press," noting that the press includes individual publishers who may not have special affiliations or education, but who may use leaflets and other sorts of publications that provide both information and opinion. *Lovell v. City of Griffin,* 303 U.S. 444, 452 (1935). In *Branzburg v. Hayes,* 408 U.S. 665 (1972), the Court noted that the newsgatherer's privilege applied to "the lonely pamphleteer" as much as the "large metropolitan publisher." *Id. at* 704.

Petitioner most likely objects to the posting of her home address on ELI. But the U.S. Supreme Court has long held that there is nothing actionable about the posting of publicly available information. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 494–96, (1975*)* (no privacy claim can be based on a fact open to public inspection in government records; "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man."). In deciding that there was no invasion of privacy when a reporter in Georgia published the name of a rape victim in

contravention of a Georgia law prohibiting such publication, the Court held that to the extent the law prohibits the publication of information already contained in a public document, the law is unconstitutional and unenforceable. *Id.* At 496-497. In so holding the Court stated:

> By placing information in the public domain on official court records, the state must be presumed to have concluded that the public interest, as opposed to the individual interest in the right to privacy, is thereby being served.

Id. All of the postings concerning Petitioner disseminated only public information about her all of which was derived from public documents and records.

While the *Cox* case alone is sufficient to exempt Respondent's conduct from the statute, persons who are public personalities have an even lower expectation of privacy. *See, Carafano v. Metrosplash.com Inc.* 207 F. Supp 1055 (Cent. Dist.Ca. 2002)(television actress could not complain of publication of a false profile of her on match-making site which contained her true address). The U.S. Supreme Court has recognized two classes of public figure, a limited public figure and a general public figure: A limited public figure refers to an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. A general purpose public figure refers to an individual who has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 373 (1974). Petitioner's own website touts her notoriety and success as an author, poet and inspirational speaker. She notes that The Dash has been read by, talked about and even tattooed on various celebrities. She has an inspirational speaker's program where she can be hired to speak to groups and the website contains various videos of her and other reading the Dash. The poem has entered the national consciousness and is widely

popular and well known. She has held herself out to be and is a public figure and therefore has an even lower expectation of privacy than the average American citizen.

b. State Law Analysis

The Georgia Constitution provides that "[n]o law shall be passed to curtail or restrain the freedom of speech or of the press." Constitution of the State of Georgia of 1983, art. I, sec. I, para. V. Georgia courts have held that our state constitution provides even broader protection of speech than the First Amendment to the United States Constitution. *Statesboro Pub. Co. Inc. v. City of Sylvania*, 271 Ga. 92, 95 (1999); *State v. Miller*, 260 Ga. 669, 671 (1990). These statements are deemed privileged under Georgia law as well. OCGA § 51–5–7 (3) and (4) specifically exempts from tort claims certain statements which are entitled to privilege. Subsection (4) protects "[s]tatements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern...." And under subsection (3) privilege cloaks "[s]tatements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned." Petitioner cannot seek to be protected from activities which do not even rise to the level of a tort and which are specifically privileged under Georgia law.

Georgia courts have also required orders of protection to be given only to prevent conduct that clearly constitutes stalking and not to curtail protected speech. For example, in *Collins v. Bazan*, 256 Ga.App. 164 (Ga.Ct. of App. 2002), the court refused to uphold an order of protection that prevented the plaintiff's former boyfriend from

discussing her medical condition with third parties. The court stated that while such behavior was "extremely insensitive" and socially "unacceptable" it was still protected speech and further stated that the restriction on speech *is clearly limited to* a knowing and willful course of harassment and intimidation, which is not protected expression under the First Amendment." Id. at page 165 (citing the Georgia Supreme Court in *Johnson v. State*, 264 Ga. 590 (1994)(emphasis in the original)).

Without any threat of imminent illegal activity and without any incitement of anyone to imminently engage in illegal activity, even if the court finds that the actions of Respondent make out the elements of the statute, the statute's exemption for constitutionally protected speech would apply to exempt the posts from the statute's reach. Allowing Petitioner to succeed on this petition would cast a chilling effect on future speech and discussion on ELI which covers a great number of topics of national importance in the field on intellectual property and internet law. It would expose countless other site owners to be subjected to orders of protection for similar legal behavior.

POINT IV

RESPONDENT MOVES THIS COURT FOR SANCTIONS AGAINST PETITIONER FOR FILING A PETITION WITHOUT SUBSTANTIAL JUSTIFICATION PURSUANT TO OCGA § 9-15-14

OCGA § 9-15-14 provides in pertinent part:

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment . . . . As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

This petition was completely void and absent of any justiciable issue of law or fact under OCGA § 16-5-90 and 94. It not only lacked substantial justification, it lacked any justification. It was merely the latest action Petitioner brought to harass and intimidate Respondent into exposing her copyright infringement business model. The standard of review for motions under OCGA § 9-15-14 (a) is the "any evidence" rule – that is, the movant must show that there was not "any evidence" that substantially justified the claim or action. *Gibson v. Southern General Ins. Co.*, 199 Ga. Ap..776 (1991)

The Petition alleges the following conduct against Respondent: "Posted threats of death, posted home address, and family and personal info with statements such as: 'We are coming after you', Boasts about driving by subdivision and photos of my home and daughter's employment." There was not any evidence that (a) Respondent did these things or (b) that doing so would violate OCGA § 16-5-90.

a. "Posted Threats of Death": Respondent never posted threats of death against Petitioner. This (the most serious allegation in the petition) is baseless and utterly false.

b. "Posted home address and family and personal info": Respondent has established that this is Constitutionally-protected as whatever was posted was derived from public records so that even if Petitioner was not a public figure, there would be no expectation of privacy about this information. Also, this conduct is not prohibited by this statute.

c. "[Posted statements] such as 'We Are Coming After You.' ": Respondent did not post this statement. The statement (which was posted by another user on ELI) was taken completely out of context as it referred that the poster was going to expose the overly-aggressive and hypocritical demands Petitioner makes to secure large unwarranted copyright infringement fees from the general public. It was also posted over seven months ago.

d. "Boasts about driving by subdivision and photos of home and daughter's employment." Boasting is not prohibited by the statute. Driving by a subdivision is not prohibited by the statute, but in any event Respondent did not do that. Posting photos of home is not prohibited by statute but, in any event, Respondent did not do that. Posting her daughter's employment information is not prohibited by statute but, in any event, Respondent did not do that. None was done by Respondent nor would it be prohibited had Respondent done it anyway.

e. The statute exempts Constitutionally-protected activity. This is clearly Free Speech and protected by The US and Georgia Constitutions as described in Point III of this Memo.

f. Georgia Court of Appeals has already ruled that internet posts do not constitute contact and are therefore not governed or prohibited by this statute. See *Marks v. State* discussed on page 22 of this Memorandum.

g. The Georgia Legislature specifically added "course of [harassing and intimidating] conduct" as an element of this statute in order to avoid just this kind of abuse from occurring. See pages 25-26 of this Memorandum.

Petitioner is not your average litigant. She is an educated, sophisticated user of the courts, lawyers, and social media who has ready access to several lawyers who are

part of her copyright infringement program. This Memorandum of Law has established that this petition has no factual basis and no legal basis. Petitioner made false claims about Respondent posting death threats when such activity did not occur. This conduct is exactly what OCGA § 9-15-14 is intended to penalize.

Where controlling precedent (like *Marks v. State*) establishes that a claim will be unavailing, sanctions under OCGA § 9-15-14 are warranted. *Executive Investments, LLC v. Martin Bros. Investments, LLC*, 309 Ga. App. 279, 288 (2011)(In light of the controlling precedent clearly establishing that a valid lis pendens is privileged . . . we agree that the sellers' argument is unavailing. Accordingly, the trial court's attorney fee award predicated on this basis was authorized.)

Similarly, where there is no question of fact or any ambiguity under the law that the claim lacks merit, sanctions are appropriate under OCGA § 9-15-14. *Brunswick Floor, Inc. v. Carter*, 199 Ga.App. 110 (1991)(contractor who sued to collect under an agreement labeled "proposal" had to pay fees and costs to defendant as claim was substantially groundless).

Finally, just a few days ago On February 20, 2013, the Court of Appeals of Georgia awarded attorneys fees and costs to a man who was forced to defend a claim brought by his ex-wife that he had violated a visitation order. *Bankston v. Warbington*, 2013 WL617076 (2013). In *Bankston*, the trial court found that, for purposes of harassment, Bankston used a motion for contempt to "unnecessarily expand what was otherwise an honest disagreement" over an ambiguity in a custody order as to which airports in the Los Angeles area could be used to exchange the child after visitation. The Court of Appeals upheld the finding. *Id.* Here, petitioner has used this petition to unnecessarily expand what was an honest disagreement over the propriety and nature of

Petitioner's copyright infringement scheme. It was just the latest step taken by Petitioner and utterly lacked any foundation in factor law.

Accordingly, the court should award sanctions under OCGA § 9-15-14.

Summary and Conclusion

The actions complained of do not meet the elements of the statute. Respondent is not accused of following Petitioner; contacting Petitioner; or conducting surveillance on Petitioner. Respondent did not make any death threats to Petitioner as alleged in the Petition. Respondent did not contact Petitioner at her home, place of business or any public or private piece of property. Respondent did not engage in a course of conduct. Respondent did not harass or intimidate Petitioner nor was that his intention. Petitioner voluntarily accessed and read the blog posts of which she complains; they were not sent to her or posted on her own social media pages. Georgia law specifically has held that Internet posts alone do not violate the statute and the courts have required a steady course of criminal behavior in order to violate the statute. Petitioner cites to not one instance of conduct done by Respondent that fits the statute's protection. The law is meant to prohibit *actors* – those who DO things against other people- not those who talk or even threaten other people (unless through a course of conduct it reasonably places them in fear of physical harm to themselves or their family). Most of these posts occurred months and months ago with no action taken by either Respondent or Petitioner. Respondent has had the time, the opportunity and knowledge to act on any intent to engage in conduct prohibited by the statute but did not do so and has expressly and repeatedly stated that his intent was the exact opposite.

Petitioner is engaging in the exact kind of abuse of the system that the Georgia Legislature wanted to prevent by adding the course of conduct requirement. Respondent was engaging in the type of speech protected by the First Amendment and State law. The court must not allow Petitioner to abuse the court to stifle protected speech. Her Petition utterly fails to allege that which is necessary to have the court issue an order of protection. It is clear that her motivation in bringing this is to stop Respondent from harming her business model by truthfully publishing information about her and by criticizing her as is allowed under law. Respondent asks that the court consider penalizing Petitioner under OCGA §9-15-14 for filing this baseless petition against Respondent.

Dated: February 27, 2013

Respectfully Submitted,

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