Superior Court of the Commonwealth of Massachusetts
County of Middlesex

Walter Tuvell
836 Main St.
Reading, MA 01867
Plaintiff, Pro Se

v.

Jack Marshall
2707 Westminster Place
Alexandria, VA 22305
Defendant

Case № 1781CV02701

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

MEMORANDUM (IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS)[1]

Plaintiff hereby files this Memorandum in Opposition **("Opp")** to Defendant's Motion (and Memorandum) to Dismiss **("Diss").**[2]

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1 Throughout this document, all dates are implicitly understood to occur in the year 2017. Reference notations used throughout: **Comp** = Plaintiff's original Complaint (Sep 13); **Diss** = Defendant's Memorandum in Support of Motion to Dismiss (Oct 16); **Opp** = the instant Memorandum in Opposition (Oct 25); **Exh** = Exhibit(s); ℘ = page(s); ¶ = paragraph(s); **§** = section(s); **ƒ** = footnote(s); **MRCP** = Massachusetts Rules of Civil Procedure; **MSCR** = Massachusetts Superior Court Rules; **(ABA) MRPC** = (American Bar Association) Model Rules of Professional Conduct ("Lawyer Ethics"). Where source-document paragraphs are unnumbered (or inadequately/ambiguously numbered), and no better reference technique is available (such as a brief quotation indicating the referent), we fabricate our own (informal) per-page paragraph designators: a *partial* initial paragraph (if present, and *including* structural elements, such as headings) being designated **#0,** the first *full* paragraph being designated **#1,** etc. (or, *negative* numbers (including **#−0**) if counted from the *bottom* of the page).

2 As a general matter, we note that (i) Diss appears to be rendered throughout in 10-point font-size. Since MSCR 9A(a)(5) specifies 12-point font-size, the 10-point size is (by standard typographical convention) acceptable only in footnotes (though Diss has no footnotes). That, together with (ii) Diss's page-length, and the fact that (iii) Diss's side-margins are configured at only ¾″ (standard "legal" convention is 1″), renders Diss in violation ("too dense," "too voluminous," not counting optional/secondary/*pro forma*

DISMISSAL OR SUMMARY JUDGMENT?

While Defendant styles his Oct 16 Motion (with Memorandum) filing(s) as for (i) "Dismissal" (presumably meaning MRCP 12(b)(6), though unstated in Diss; *cf.* "MRCP 8(a)(1) 'notice pleading'," and/or "*Twombly/Iqbal*-style 'plausibility pleading'"), his Motion *may* also, at the Court's discretion/determination, (later) end up being suited/treated as a (ii) Motion for "Summary Judgment" (MRCP 56(b), though unstated in Diss, hinging on "DGIMF," *infra*). Hence Plaintiff herein, mindful/anticipatory of the "Dismissal-to-Summary-Judgment 'Conversion Clause'" of MRCP 12(b),[3] indicates/"flags" via the editorial tag/rubric **"DGIMF,"** (some of) the

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"boilerplate" elements, such as blocks of caption/signature/certification/hearing/appendices/etc.) of the (letter and spirit of) MSCR — absent prior/advance leave of Court (though Plaintiff has not been notified of such). *NB:* Action-initiating Complaints are exempt from the strictest of these procedural formatting rules/guidelines, by judicial policy/design/intent (particularly with respect to *pro se* litigants).

3 To wit (emphasis added): "the motion [to dismiss] shall be treated [at the discretion/determination of the Court] as one for summary judgment … **provided … all parties shall be given <u>reasonable opportunity to present all material</u>** made pertinent to such a [summary judgment] motion." See also ƒ17 *infra.* Pursuant to this provision, nothing in this Opp is to be construed as waiver by Plaintiff of "reasonable opportunity to present all material made pertinent." In particular, **Plaintiff at this Motion-to-Dismiss stage need make *<u>only</u> claims/allegations,* and *<u>need</u> not (but <u>may</u>: MSCR 9A(a)(2))* make proffer of *proof/evidence* of said claims/allegations** — though he is in fact ready/willing/able to do so later (even in the present premature/incipient/unripe posture of the case if need be, absent discovery/deposition/etc.), **if/as/when invited/ordered to do so by the Court:** http://JudicialMisconduct.US/CaseStudies/TUVELLvMARSHALL. First, though, Defendant must be required by the Court to indicate his demurrals precisely, with specificity/particularity (in the sense of MSCR 9A(b)(5)(i)), which Defendant has unfairly not currently provided adequately/consistently/fairly in Diss, relying instead too much on "generalized/unspecified/speculative/conclusory innuendo." *Until such time* (i.e., "conversion to Summary Judgment," with MSCR 9A(b)(5)(i) requirement for specificity/particularity language by Defendant), Plaintiff hereby issues this: **<u>"blanket denial/rejection of Defendant's claims/assertions."</u>** For the *time being* (Motion-to-Dismiss), Plaintiff is content to proffer here just the single "smoking gun" evidence, **"Exhibit A, OppExhA"** attached hereto (MSCR 9A(a)(2)) — and not (yet), for example, excerpts from his own website (which is independently available at http://JudicialMisconduct.US).

“Disputed Genuine Issues of Material Fact” (MRCP 56(c)) that may be relevant to a potential (later) Summary Judgment determination — noting that the *mere existence (without deciding “who wins”) of even a single DGIMF* (asserted in good faith) already defeats a Motion for Summary Judgment (and hence *a fortiori* a Motion for Dismissal).

RESPONSE TO “FACTS” SECTION (DISS℘2–6)

Diss℘3¶2 *(et passim, ad nauseum; DGIMF)* — The mere *assertion* by Defendant, in this place and throughout Diss, that his EthicsAlarms blog “is constituted of [his] opinions” (hinting “only,” as opposed to “facts”) is not dispositive, cannot be trusted, and is in many places disputed by Plaintiff (DGIMF). Instead, in fact, the character of any utterance (oral or textual; with respect to a defamation action) as “fact vs. opinion” is a determination reserved for the ultimate fact-finder (judge (in a bench trial), or jury (as in the present case)). And that is a highly non-trivial determination indeed,

being in fact **the most difficult and complicated question**[4] to be addressed/answered (by ultimate fact-finder) in a defamation action — particularly with respect to the aspect of so-called **"Contextualized Defamatory Implication,"** herein indicated/"flagged" via the editorial tag/rubric **"CTXDEFIMPL."** That is: the fact-vs.-opinion character of a defamatory (oral or textual) utterance can be determined/decided (by ultimate fact-finder) only by a totality-of-circumstances contextual analysis, necessarily including the entire spectrum/nexus of implications/deductions adhering to it:[5]

> To determine ***whether or not*** **a statement is an *opinion,*** a court must examine the statement in its *totality* and in the *context* in which it was uttered or published. The court must consider *all the words* used … Finally, the court must consider *all of the circumstances* surrounding the statement. … Of course, the fact that a statement is an **opinion does not**

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4 In particular, the distinction/difference between "fact vs. opinion" is **decidedly not "easily distinguishable"** — instead, it's highly nuanced/shaded/contingent/nontrivial. Yet, Defendant falsely trivializes this issue on his blogsite (in a post entitled "Now THAT'S Defamation …," https://ethicsalarms.com/2017/09/30/now-thats-defamation, Sep 30). Importantly, "facts" are *independent* of "opinions," that is, facts are objectively verifiable/falsifiable (provable/disprovable), no matter what the defamer subjectively "thinks/opines." Of course, at the time of that post, Plaintiff had already filed the instant defamation/"cyberlibel" action. The only reason (conjecturally) that Defendant blogged about such "triviality" of defamation was to "further slime Plaintiff's suit." The problem is: in doing so, Defendant falsely misleads/deceives his own (> 3,200, Comp℘4¶5) "faithful" readers/followers, thereby committing the very height of legal/ethical hypocrisy/irresponsibility. *Example of non-trivial fact-vs.-opinion interpretation of utterances (oral or textual):* "Do President Trump's so-called 'Travel Ban Executive Orders,' nominally issued in the name of 'national security,' in actuality comprise 'dog-whistle innuendos for racial/religious/national-origin bias/discrimination,' or not?"

5 See generally *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* Rodney W. Ott, 58 Fordham L. Rev. 761 (1990, http://ir.lawnet.fordham.edu/flr/vol58/iss4/8), which begins with these words: "Despite decades of modern first amendment [defamation] litigation, courts continue to struggle with the basic distinction between fact and opinion."

> **automatically shield it from a defamation claim.** After all, expressions of "opinion" may often *imply* an assertion of objective fact. Thus, a cause of action for defamation may still be sustained where an opinion **implies the allegation of [disclosed or] undisclosed defamatory [false] facts as the basis for the opinion [we call this "CTXDEFIMPL"].** — *Yohe v. Nugent,* 321 F.3d 35 (First Cir., 2003; internal quotes/cites omitted, emphasis added).

Diss$_{\wp}$4¶5 — Defendant writes falsely (DGIMF): "posting a series of comments [a.k.a. 'blog-posts'] on this and other posts, primarily pushing his claims that [i] the blog was partisan in nature, and [ii] falsely represented itself as covering other ethics areas, such as judicial misconduct." Instead, in fact, Plaintiff *never made even a single claim in any blog-post* about either of these two items [i], [ii].[6]

Diss$_{\wp}$4¶5 — Defendant writes falsely (DGIMF): "I did not check[/visit] his website at first [nor, seemingly, has he *ever* in-good-faith done so], nor did I read[/understand/comprehend] it." Under the assumption that Defendant writes truthfully here (this being a "statement against his self-interest," hence presumptively true), then Defendant here self-declares/admits his culpability/commission of **"actual malice,"** defined as: (i) **knowledge of falsity** (noting that "knowledge" encompasses

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6 Indeed: issue [i] was raised by Plaintiff only in Plaintiff's original email to Defendant (not a blog-post), then introduced to Defendant's blog by Defendant himself (improperly incompletely/excisively as a partial quotation, hence later merely/properly completed via full quotation by Plaintiff; OppExhA$_{\wp}$7), as an observation (not a "claim") of politicism/partisanship, begging clarification-of-scope; while issue [ii] was never raised (what was raised instead was a *query* about scope of the EthicsAlarms website, not a *claim/accusation* of false representation).

"constructive knowledge ('should-have-known')," by having been referenced directly to Plaintiff's website; OppExhA℘7); and/or (ii) **reckless disregard of the truth** (by "recklessly neglecting/refusing to visit/read Plaintiff's website"). Opp℘11 *infra*.

Diss℘4¶6 — Defendant writes falsely (DGIMF): "Plaintiff's comments had become [i] increasingly irrelevant to the topics of discussion and [ii] continued to impugn my integrity." Instead, in fact, [i] the *one-and-only* "topic of discussion" that Plaintiff introduced (at OppExhA℘7, in his first/initial post) was that regarding Judicial Misconduct (as quoted in Diss℘4¶5 [Defendant writes falsely (DGIMF) "I concluded with this paragraph," whereas in fact it was Plaintiff who posted that quoted paragraph]). Nowhere did Plaintiff [ii] "impugn" Defendant's integrity (Plaintiff only sought clarification to his initial email *query* concerning scope of Defendant's blogsite; OppExhA℘7).

Diss℘4¶6 — Defendant writes falsely (DGIMF): "[i] [Plaintiff's website, http://JudicialMisconduct.US] was not, as he had represented, on the general topic of judicial misconduct, but [ii] was actually a single-minded attack on the integrity of [Judge] Denise Jefferson Casper. … Her offense was ruling against the Plaintiff in one of his [iii] frivolous lawsuits, *Tuvell v. IBM*." Instead, in fact, [i] Plaintiff's website was/is indeed wholly devoted to the general topic of Judicial Misconduct, as Plaintiff correctly represented;

while his [ii] attack on Judge Casper and [iii] discussion of his (non-frivolous [and certainly never nominated as such by any court]) lawsuit both comprise just *one (only) example* (albeit the leading/prototypical example) of Judicial Misconduct, appearing as a "Case Study" on Plaintiff's website (with more Case Studies still in process).

Diss$_{\wp}$5¶7 — Defendant writes falsely (DGIMF): "Plaintiff … [i] false pretenses … [ii] wanted free, expert assistance … [iii] was neither candid or honest about this." Instead, in fact: [i] Plaintiff never made any "false pretense" about anything, much less about [ii] "free, expert assistance,"[7] and was [iii] everywhere scrupulously "candid and honest."

Diss$_{\wp}$5¶7 — Defendant writes falsely (DGIMF), concerning his citation of MRPC 8.2(a).[8] For: (i) That rule is predicated upon "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity,"

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7 Defendant's "freeness" accusation is particularly puzzling/crazy, given that all the services available on https://EthicsAlarms.com are already 100% free-of-charge, to all-comers, always. It appears (without Defendant clarifying) that Defendant is insinuating that Plaintiff was somehow attempting to "steal" some sort of "expert witness/opinion" paid-service, such as Defendant peddles elsewhere (at ProEthics, Ltd., https://ProEthics.com); but Plaintiff never contemplated that, not even for a nanosecond. Finally, the actual language that Defendant used in his blog-post (but falsely omitted from Diss$_{\wp}$5¶7) charged that Plaintiff was seeking "expert opinion that he could use in his crusade against the judge" (OppExhA$_{\wp}$16); but it was "LITERALLY IMPOSSIBLE" for Plaintiff to inject/"use" any such "expert opinion" in his Judicial Misconduct activities. All this is explained in Comp¶14·O (on Comp$_{\wp}$12–14). DGIMF.

8 Defendant uses the mis-moniker "R.P.C.," instead of the proper/correct "MRPC," with emphasis on the "Model," as clarified ever since the late-1970's era, and the Kutak Commission. https://en.wikipedia.org/wiki/American_Bar_Association_Model_Rules_of_Professional_Conduct; https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts.html; http://www.kutakrock.com/kutak-commission; Ronald D. Rotunda, *Legal Ethics in a Nutshell (Third Ed., 2007),* Thomson/West, $_{\wp}$3–5.

whereas instead, in fact, all of Plaintiff's representations (regarding *Tuvell v. IBM,* or otherwise) are quite true (as any competent lawyer can verify at-a-glance, in the case of *Tuvell v. IBM*). Further: (ii) If Defendant were *really* interested in his own legal ethics (which is why Plaintiff approached him in the first place), he'd instead have consulted/obeyed MRPC 8.3(b): "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

Diss¶8 (on Diss℘5–6) — It is agreed that Defendant has the right to ban anyone from his blogsite — provided it's not for an illegal/wrongful reason, as here. However, Defendant's writing in explaining his reasons for the banning (as quoted in Diss¶8; OppExhA℘15–16) is false (DGIMF). This falsity is explained in detail at Comp¶14·A–Q (on Comp℘7–15).

Diss℘6¶9 — Defendant writes falsely (DGIMF): "Because … I blocked any further e-mail contact from him." Instead, in fact, the two acts of (i) "banning" someone from a blogsite, and (ii) "blocking email" from someone, are two completely distinct/independent/orthogonal/unrelated activities. And in any event, (iii) Defendant's website itself continued to prominently advertise, unconditionally (but falsely, emphasis added): "*I <u>can</u> be reached*

for this and <u>any</u> other purpose at **jamproethics@verizon.net**."[9,10]

RESPONSE TO "ARGUMENT" SECTION (DISS℘7–19)

As an initial observation, we observe that a significant percentage of Diss's "Argument" section is mere "boilerplate blather," *a propos* of nothing. Hence, such boilerplate is properly passed over in silence here.

Diss℘7¶1A — Defendant writes falsely, concerning MGL Pt.I Tit.XV 93A (specifically, its provision for a "demand letter," §9(3)). Instead, in fact, MGL 93A is a consumer protection law, applicable only to unfair/deceptive acts/practices in the business/conduct of trade/commerce. The instant defamation action is taken under the law of tort, not of statute MGL 93A (which is, therefore, in no sense applicable in the instant case).[11]

Diss℘7¶1B — Defendant writes falsely: "Summons … was not delivered by registered mail." Instead, in fact, Plaintiff's service of (Comp and) Summons was fully compliant with the Rule, MRCP 4(e)(3) (which does not require so-called "registered" mail; Plaintiff used "certified" mail), as

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9 Certainly, Defendant never notified Plaintiff that his emails were being blocked. And, now, Plaintiff doubts Defendant has ever implemented such blocking at all. DGIMF.

10 For a recent case concerning the "ethics of spam filters as inexcusable neglect," see *Emerald Coast Utilities Authority v. Bear Marcus Point, LLC,* __ So.3d __ (Fla. 1st DCA, No. 1D15-5714, 10/6/2017) (on rehearing), 2017 WL 4448526.

11 Indeed, in a defamation action, it *does not even make sense* for a "pre-defamation" demand letter to be required, since the damage as already been done. Thus, it's incomprehensible why Defendant contends/pretends otherwise. (Though, in fact, Plaintiff did send a demand letter to Defendant — but, as a simple/hopeful/unrequired courtesy, not as a requirement. Comp℘15¶16.)

proven in Plaintiff's Proof of Service (filed with this Court on Sep 25).[12]

Diss$_{\wp}$7¶2 — Defendant writes falsely, where he quotes/cites *Yohe v. Nugent's* quotation/citation of *Lynch v. Lyons,* regarding "special damages" (as distinguished/opposed to *per se* defamation).[13] Indeed, in fact, while Defendant quotes/cites *Yohe v. Nugent* "sort-of more-or-less 'literally correctly'," he does so only improperly/excisively/out-of-context.[14] Namely, he falsely conceals that said quotation/citation is, not only mere *dicta* without precedential *(stare decisis)* value/force, but most relevantly it speaks only to (oral) *slander*, as opposed to the (textual) *libel* involved in the instant case.[15]

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12 In Diss$_{\wp}$7¶1B, Defendant *may* be objecting to the *manner* in which he *"received"* service (as opposed to any shortcoming of Plaintiff's manner of "providing" service). *If so,* that would still be equally false, but would be even more absurd/inane/insane/insipid/ frivolous (it's almost beyond belief that a lawyer/Defendant would be so unethical/ shameless/arrogant as to try to "put a fast one over" on the Court like this) — given that Defendant himself has already long ago (Sep 21) freely self-declared/admitted (*cf.* Plaintiff's Proof of Service), "against self-interest" (hence presumptively [and even, in this case, provably] truly), that **Defendant did indeed *actually* receive service:** "Although the *manner* in which the paper *reache[s]* the attorney or party *[i]s not essential*, *actual* delivery [i]s *crucial*" (MRCP 5(d), Reporter's Note 1973, emphasis added).

13 See ƒ15 *infra.*

14 *Six-lines aphorism of Cardinal Richelieu:* "If you give me [just/merely] six lines written by the hand of the most honest/honorable of men, I will find something [falsely out-of-context] in them which will hang him."

15 *Sharratt v. Housing Innovations,* 365 Mass. 141 (Mass. 1974) (already cited at Comp$_{\wp}$17ƒ3) (i) explicitly/expressly holds/pronounces (emphasis added): **"[W]e now hold that *all libel* is actionable *per se* [as opposed to *per quod*]."** The footnote to *Sharratt* further (ii) explains that *"per se"* ("obvious," "facial," "on-its-face," "not requiring extraordinary/specialized study/explanation/interpretation," at least to the community-of-interest) entails, by definition, "without pleading special damages [usually monetary/economic/commercial];" and it also (iii) explicates/emphasizes the differing law of (oral) slander vs. (textual) libel, with reference to *Lynch v. Lyons.*

Diss℘8¶A — The classification of Plaintiff as a "limited- (as opposed to all- or general-) purpose public figure" **(LPPF)** (in the sense of, say, *LaChance v. Boston Herald*)[16] is a "particularized determination" for this Court (not Defendant) to make (*Bruno & Stillman v. Globe* 633 F.2d 583, 589 (First Cir. 1980), noting that the concept is in legal limbo/flux in the Internet era (Katherine D. Gotelaere, *Defamation or Discourse?: Rethinking the Public Figure Doctrine on the Internet,* 2 Case W. Res. J. L. Tech. & Internet 1 (2011)). Be that as it may, Defendant writes falsely (emphasis added): "[i] [Plaintiff] has the burden of *showing* actual malice … [ii] He does not meet this burden." Instead, in fact, the only practical consequence of the LPPF classification at this stage of proceedings (Motion to Dismiss (or, potentially, Summary Judgment, Opp℘2 *supra*)) is Plaintiff's burden to merely [i] *plead/claim/assert* (not *show/prove*) "actual malice" (*LaChance v. Boston Herald; Biro v. Condé Nast,* USCA Second Cir №14-3815-cv (2015)); and this burden he has [ii] obviously met (and is continuing to meet, again, herein) (Comp℘16¶18; Opp℘5 *supra*).

Diss℘8¶B — Defendant writes falsely: "None of the statements Plaintiff has alleged … meet any accepted definition …" DGIMF. CTXDEFIMPL.

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16 Noting, though, that since Defendant also qualifies as a "media" defendant, the *Restatement (Second) of Torts* (§580A Cmt.h, §580B Cmt.) applies: the same standard of fault — whether it be "negligence" or "actual malice" (depending on the plaintiff) — should apply to media and non-media defendants alike.

Diss$_{\wp}$9¶#4 — Defendant writes falsely: "… hard to determine what the complaint is alleging in many cases," (falsely) indicting Comp's degree of "particularity." Instead, in fact, Comp cannot be improved in that respect.[17]

Diss$_{\wp}$9 at "Paragraph 7, pg. 5" — Defendant writes falsely: no defamation is claimed in Comp$_{\wp}$5¶7.

Diss$_{\wp}$9 at "Paragraph 8, pg. 5" — Defendant writes falsely: Defendant's attribution to Plaintiff of being "an academic" (OppExhA$_{\wp}$1) *is* defamatory,[18] because (i) Defendant intended it to be defamatory,[19] and (ii)

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17 Namely, Comp's usage of its (i) "†" convention, and (ii) everywhere-interpolated comments, are expressly designed for (and succeed at) the very purpose of the "particularity" requirement (Comp$_{\wp}$16¶17). ***Notice:*** In this regard of "particularity," Plaintiff hereby takes this opportunity to proactively/voluntarily correct an **error** in Comp (which, though, has no further ramifications for the instant case, because it was a side-remark, which Plaintiff nowhere relies upon), with his apology. At Comp$_{\wp}$17ƒ5, *Alba v. Sampson* was inadvertently misquoted as standing for the proposition, "Summary judgments are disfavored in defamation cases" — whereas the correct quote proposes the opposite. *However,* we do here note that said *"favor" extends no further than the requirement for "particularity"* in "Pleading Special Matters" (MRCP 9(b)), which Comp has accomplished (Comp$_{\wp}$16¶17), as just noted: "[If] allegedly defamatory statement[s] [are] set out verbatim [actually, only "particularity" is required, by MRCP 9(b)] and publication and extrinsic facts are *stated with particularity* [at Motion-to-Dismiss stage, then] the plaintiffs' … complaint is to be analyzed under the *traditional standard* governing rule 12(b)(6) motions [Motion-to-Dismiss], leaving fatal defects in the potential proof to be more properly decided under Mass.R.Civ.P. 56 [Summary Judgment], after the *completion of a more expanded record*." — *Eyal v. Helen Broadcasting,* 411 Mass. 426 (1991) (emphasis added, internal citations omitted).

18 Plaintiff concedes, though, that this "academic" defamation is not actionable *as to Plaintiff,* for the simple reason that it did not identify Plaintiff to others. The reason the "academic" vignette has been included in the narrative is that it illustrates the "baked-in mindset/pattern" that Defendant held against Plaintiff from the very beginning. And, we have no insight/guarantee that Defendant didn't have pre-knowledge about Plaintiff (say, by "Googling") before issuing the "academic slur." These are questions for the ultimate fact-finder: Why else would Defendant be so antagonistic against Plaintiff blindly/right-off-the-bat? Was Defendant really hateful of all well-educated people? Was Defendant using academicism as a "set-up" so his later attacks would seem "justified?"

19 For a more full-throated harangue by Defendant "against academics" (in the "purest" form of "academics," namely "colleges" and "professors," which Defendant originally viewed Plaintiff as), see his blogpost at https://ethicsalarms.com/2017/09/20/ethics-

(some of) the audience on Defendant's website considers it to be defamatory. Comp℘5¶8–9. CTXDEFIMPL. Furthermore, (iii) Defendant's claimed "apology" may speak to mitigation (see Opp℘18 *infra*) (at trial-time, not Motion-to-Dismiss stage), but it doesn't blot out the original defamation.

Diss℘9 at "Paragraph 8, pg. 5" — Defendant writes falsely: (i) the referenced post (OppExhA℘1) *is* an attack on Plaintiff personally (albeit unidentifiably, ƒ18 *supra*). Further, (ii) "no rational person … average person in the community" is false, because the "community" in question is the "EthicsAlarms community," so Comp℘5–6¶8-9, and the preceding paragraph (and its footnotes ƒ18–19), *supra,* are applicable. CTXDEFIMPL.

Diss℘10 at "Paragraph 9, pg. 6" — Defendant writes falsely: "no offer of proof," because no such offer is required/acceptable at Complaint-time (some is *now* presented herewith, as OppExhA; ƒ3 *supra*). And, yes, the attacks therein are false (and defamatory). DGIMF. CTXDEFIMPL.

Diss℘10 at "Paragraph 1–2, pg. 7" — Defendant writes falsely: while Plaintiff consented to reasonable criticism from other commenters, he did not consent to false/defamatory/illegal/wrongful criticism. CTXDEFIMPL.

Diss℘10 at "Paragraph 13, pg. 8"[20] — Defendant writes falsely: no

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observations-on-the-trump-deranged-profs-2016-post-election-freak-out.

20 Beginning at this place (and many places thereafter), Defendant (falsely) quotes/cites *Yohe v. Nugent* for the proposition that: "statements of opinion based upon disclosed facts … [do not provide] a basis for a defamation cause of action." But, while this quote/cite is "sort-of more-or-less 'literally correct'," it is really false (just as Defendant's other quote/cite of *Yohe v. Nugent* concerning "special damages" was false, as explained

defamation is claimed in Comp℘8¶13.

Diss℘10 at "A" — Defendant writes falsely: "the act of banning [OppExhA℘15] was not defamatory" (paraphrased). It *was* defamatory (CTXDEFIMPL), as explained at Comp℘8¶14·A.

Diss℘10 at "B" — Defendant writes falsely: the (i) spamming and the (ii) "jerk" insult (OppExhA℘14) *are* defamatory (CTXDEFIMPL), as explained at Comp℘8¶14·B.[21]

Diss℘11 at "C" — Defendant writes falsely: "sandbagged … without revealing his motives … whiny … denying," as explained at Comp℘8¶14·C, ℘9¶14·F, ℘9¶14·G, ℘10¶14·J. DGIMF.

Diss℘11 at "D" — Defendant writes falsely: "posted a comment … confuses …," as explained at Comp℘8¶14·D. DGIMF.

Diss℘12 at "E" — Defendant writes falsely: "bitching comment," as explained at Comp℘9¶14·E. DGIMF.

Diss℘12 at "F" — Defendant writes falsely: "finally revealed," as explained at Comp℘9¶14·F. DGIMF.

Diss℘12 at "G" — Defendant writes falsely: "finally get the link," as

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supra, ℘10). In this case, the falsity derives from the construction: "disclosed facts." Defendant pretends this construction means "*any* disclosed facts" (even "*false* statements of fact," which is how Defendant consistently applies it), whereas the construction obviously does mean "*true/correct/valid* disclosed facts, *only*."

21 Noting that Defendant has **destroyed evidence (obstructed justice)** by "spamming"/ deleting (OppExhA℘14) the two posts from his blogpage mentioned at Comp℘8¶14·B.

explained at Comp℘9¶14·G. DGIMF.

Diss℘12 at “H” — Defendant writes falsely: “about his own case … single issue,” as explained at Comp℘9¶14·H. DGIMF. (Defendant’s further comment about “average person in the community” has been addressed at Opp℘13 *supra;* CTXDEFIMPL.)

Diss℘13 at “I” — Defendant writes falsely: “messy post … edge of madness … opinion … not assertion of fact … lousy,” as explained at Comp℘9¶14·I. DGIMF.

Diss℘14 at “J” — Defendant writes falsely: “didn’t have the courtesy or honesty,” as explained at Comp℘10¶14·J. DGIMF.

Diss℘14 at “K” — Defendant writes falsely: no defamation is claimed at Comp℘10¶14·K (the part Defendant is addressing here) regarding Defendant’s mischaracterization of Plaintiff’s website as a “blog.”

Diss℘15 at “L” — Defendant writes falsely: “a few cherries short of a sundae,” as explained at Comp℘11¶14·L. CTXDEFIMPL.

Diss℘15 at “M” — Defendant writes falsely: “I characterized the plaintiff’s own words,” as explained at Comp℘11¶14·M. DGIMF. CTXDEFIMPL.

Diss℘15 at “N” — Defendant writes falsely: “… long rambling…,” as explained at Comp℘11¶14·N. DGIMF. CTXDEFIMPL.

Diss$_{\wp}$16¶ at 1st Bullet — Defendant writes falsely: “court cites and exclamation points,” as explained at Comp$_{\wp}$11¶14·N. DGIMF. CTXDEFIMPL.

Diss$_{\wp}$16¶ at 2nd Bullet — Defendant writes falsely: “Plaintiff offers no proof.” This is a meaningless *non sequitur,* no doubt intended to obfuscate: (i) the “first time” assertion is Defendant’s own, not Plaintiff’s, so can be taken at face value as true; (ii) nothing hinges on whether or not this is the “first time” anyway (it only matters that Defendant asserts so).

Diss$_{\wp}$16¶ at 3rd Bullet — Defendant writes falsely: “he was not honest … misrepresented … insulting my integrity … withholding information …,” as explained at Comp$_{\wp}$12¶14·O. DGIMF. CTXDEFIMPL.

Diss$_{\wp}$16¶ at 4th Bullet — Defendant writes falsely: “I can’t be bought,” as explained at Comp$_{\wp}$13¶14·O. DGIMF. CTXDEFIMPL.

Diss$_{\wp}$16¶ at 5th Bullet — Defendant writes falsely: “crusade against the judge … Using the information meant including anything by or from me on his … website.” This is a transparent (lacking even *de minimus* plausibility; doesn’t pass the “sniff test”) *new* lie by Defendant. For, the context here (Comp$_{\wp}$13¶14·O) is inextricably bound up with Defendant’s charges about Plaintiff somehow desiring to “use cheap, free, expert opinion” services from Defendant (OppExhA$_{\wp}$16) — yet, the only conceivable venue for Plaintiff to potentially want/need to “use expert opinion” (free or paid) was in formal legal proceedings, which was

"LITERALLY IMPOSSIBLE," as explained at Comp℘13¶14·O. DGIMF. CTXDEFIMPL.

Diss℘17 at "P" — Defendant writes falsely: "… asshole …," as explained at Comp℘14¶14·P. CTXDEFIMPL.

Diss℘17 at 1st Bullet — Defendant writes falsely: "justify wasting my time," as explained at Comp℘14¶14·P. DGIMF. CTXDEFIMPL.

Diss℘18 at "Q" — Defendant writes falsely: "banning … defamatory," as explained at Comp℘14¶14·Q. DGIMF. CTXDEFIMPL.

Diss℘18 at "Conclusion" — Defendant writes falsely: "[Complaint does not] meet[] the Massachusetts standards for defamation." Instead, in fact, the Comp does certainly meet all *pleading standards* for defamation (namely, DGIMFs, CTXDEFIMPLs, etc.), as proved herein *passim.*

Diss℘18¶3 — Defendant writes falsely: "… special damages …," (falsely) citing *Yohe v. Nugent.* Instead, in fact, this has already been scotched by our earlier discussion of "special damages," Opp℘10 *supra,* esp. Opp℘10ƒ15 (all libel being *per se,* special damages need not be pled).

Diss℘19¶#0 — Defendant writes falsely: "no more than 250 individuals [strangers] read it." Instead, in fact: (i) that's an entirely conjectural/unsupportable figure (there existing no means/technique/ technology available to measure "number of readers" of webpages, noting

that Defendant admits the webpage in question has had, to date, more than 8,000 “hits,” some of which could well have been downloads for later “reading”); as is (ii) the conjecture about “strangers” (since Defendant’s website allows anonymous access, some of whom could well have known about Plaintiff by other means); (iii) the “ensuing outside gossip/chatter” (potentially “viral”) is absolutely/unquestionably unquantifiable; and (iv) this whole “extent-of-exposure” issue is irrelevant at this preliminary Motion-to-Dismiss stage (being a question for the jury/trial), since Defendant has already stipulated “publication” (Diss℘8¶#0), which suffices at this stage.

Diss℘19¶#1 — Defendant writes falsely: “far from mitigating damages … published his complaint on his own website.” Instead, in fact: (i) Plaintiff *did* promptly seek/attempt the most proper mitigation measure, via his “demand letter” to Defendant (Opp℘9f11 *supra*), which Defendant aggressively belatedly rejected (*cf.* Plaintiff’s Proof of Service); (ii) Plaintiff’s lawsuit, and the publishing of Comp, *is* (following (i)’s rejection) the strongest mitigation measure that can now be taken (noting Comp presents the truth, countering Defendant’s lies, and certainly cannot “make the situation worse”); (iii) in a defamation case, Plaintiff-side mitigation is essentially/virtually “unheard-of,” except for extraordinary circumstances, not present here (it’s only Defendant-side mitigation that really musters force-of-law: MGL Pt.III Tit.II Ch.231 §93); (iv) mitigation (either Plaintiff- or Defendant-side) is irrelevant at this preliminary Motion-to-Dismiss stage

(being a question for the jury/trial); (v) damages (be they actual, compensatory, assumed/presumed, harm-to-reputation (see Comp℘16¶18), medical, shame/mortification/hurt-feelings, punitive,[22] fees, expenses, or any of the dozens other categories (*cf. Black's Law Dictionary*)) are irrelevant at this preliminary Motion-to-Dismiss stage (being a question for the jury/trial), and are (vi) (especially in defamation cases) notoriously difficult/impossible to quantify (there being (vii) no defined/delineated limits/contours to what damages the jury may award, due to the amorphous nature of quantifying "harm-to-reputation").

CONCLUSION

For all the reasons presented herein, individually and collectively *in toto,* Defendant's Motion to Dismiss should emphatically be **DENIED.**

REQUEST FOR HEARING

Pursuant to MSCR 9A(a)(2), Plaintiff hereby requests a hearing on this matter (Defendant's Motion to Dismiss, and Plaintiff's Opposition thereto).

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22 Noting that, at the present time, only a "handful" of states do *not* allow punitive damages in defamation cases (though *all should*).

SIGNATURE; VERIFICATION

Respectfully submitted, and signed, under the pains and penalties of perjury:

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