

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT  
CIVIL ACTION NO. 1879CV00344

RIAN WATERS,  
Plaintiff

vs.

AIDAN KEARNEY,

WORCESTER DIGITAL MARKETING, LLC

TURTLEBOY ENTERPRISES, LLC

HAMPDEN COUNTY  
SUPERIOR COURT  
FILED

FEB 4 2019

*[Signature]*  
CLERK OF COURTS

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

The Defendants motion to dismiss must be denied as they ignored Superior Court Rule 9c, and emailed the Plaintiff stating that a conference is not necessary. The motion also includes two affidavits which are not apart of the Plaintiff's complaint, or public record. Most importantly the Plaintiff has a claim for relief as a matter of law established clearly in Lundin v. Post Pub. Co., 217 Mass. and similar cases. The Plaintiff believes a Mass.R.Civ.P. 16 conference would be more appropriate to simplify the issues.

**Background**

On January 6, 2017, the Defendant's website TurtleboySports.com and social media pages published an article (The Article) that accused the Plaintiff of killing his dog and head butting Samantha Cardin. On May 20, 2018 Defendant Aidan Kearney stated on a recorded online 'live show' that an ex employee named "Rhode Island Turtle Sister" wrote The Article,

and he stated inaccurate details of the related criminal case. On November 6th, 2018 Defendant Aidan Kearney published a book titled "I am Turtleboy" which states that the Plaintiff murders dogs and beats women, and accuses the Plaintiff of several more crimes including selling drugs in California, and shipping drugs through the USPS. The book also contains inaccurate details of the malicious criminal case that was initiated by Samantha Cardin. The Defendants strategically defaulted in this lawsuit, and when the default was removed they were required to answer by November 26th 2018. The Defendants then answered the original complaint, and planned on denying that they received the Amended Complaint. The Plaintiff then tried to initiate a Superior Court Rule 9C conference, and after detailing evidence of service in a email, the Defendants filed a late answer to the Amended Complaint. Now the Defendants file this motion to dismiss without any attempt for a 9C conference. To this date no other media outlet has published any of Samantha Cardin's criminal allegations.

## ARGUMENT

### **Legal Standard For a 12(b)(6) Motion to Dismiss**

In evaluating a motion pursuant to Mass. R.Civ.P. 12(b)(6), a court takes into consideration the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account. Iannacchino v. Ford Motor Co., 451 Mass. 623, 624. (2008) The court examines the sufficiency of a complaint in light of the principles that: (a) the allegations in the complaint, as well as such reasonable inferences as may be drawn therefrom in favor of the plaintiff, are to be taken as true, and (b) a complaint is sufficient unless it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief. Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 427, 583 N.E.2d 228, 229, 1991 Mass. LEXIS 584, \*1, 19 Media L. Rep. 1989 Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). The primary function of pleadings is not to formulate the precise issues for trial but rather to give fair notice of the claims and defenses of the parties. White v. Spence, 5 Mass. App. Ct. 679, 680, (1977)

### **Legal Standard for Defamation**

A statement is defamatory if it "would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community." Phelan v. May Dep't Stores Co., 443 Mass. 52, 56, 819 N.E.2d 550 (2004). "[T]he imputation of a crime is defamatory per se. To constitute defamation on that ground, the publication need not use "direct and explicit language" discrediting or imputing a crime to the plaintiff. Mabardi v. Boston Herald-Traveler Corp., 347 Mass. 411, 413, 198 N.E.2d 304 (1964). "An insinuation may be as actionable as a direct statement." Id., quoting Thayer v. Worcester Post Co., 284 Mass. 160, 162, 187 N.E. 292 (1933). Whether a statement is reasonably susceptible of a defamatory meaning is a question of law for the Court. Phelan, 443 Mass. at 56; Foley v. Lowell Sun Publishing Co., 404 Mass. 9, 11, 533 N.E.2d 196 (1989). With respect to the element of falsehood, courts consider the allegedly defamatory report as a whole to determine whether the gist or tenor of the report was accurate. See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991). The Court considers the impact of the inaccuracy on the reader or listener, as compared to the impact of the truth. See Jones v.

Taibbi, 400 Mass. 786, 795-96, 512 N.E.2d 260 (1987) But the Court must address the question of truth or falsehood by reference to the communication in its entirety and the context in which it was published, as well as "the emotions, prejudices and intolerance of mankind." Ingalls v. Hastings & Sons Pub. Co., 304 Mass. 31, 33, 22 N.E.2d 657 (1939).

**Aidan Kearney's Alter Ego Corporations do not give him any protection for his actions.**

"A person who is an operator of a facility is not protected from liability by the legal structure of ownership." United States v. Bestfoods, 524 U.S. 51, 55, (1998) Additionally the book doesn't identify Worcester Digital Marketing LLC's (WDM) as owning or publishing the book, and on or about December 19, 2018 Aidan Kearney said on his live recorded show that he will continue to sell the book after WDM is bankrupt.

The Defendants have purported to the public they are a credible news source that pays writers and checks facts. The Defendants are telling this court that they operate a social media platform. But WDM's filings with the Secretary of State (Exhibit A) only list two very different services to be rendered. "Worcester Digital Marketing will sell ad space on popular local websites to local businesses, as well as writing promotional blogs.." WDM's filings do not say that the company owns a website, writes books, or even hosts online live shows, so it's very unclear how they think Aidan Kearney's actions were done under the scope of his employment with WDM. Turtleboy Enterprises LLC (TBE) filings say that they "Engage in all aspects of hosting and maintaining online forums and blogs in social media" (Exhibit B) So it would make more sense for the Defendants to argue that Aidan Kearney was working for TBE when he wrote the book and hosted the live shows. But the Defendants argue that TBE is a defunct company

that has not been properly dissolved. I argue that in light of the foregoing the 12 factors are not necessary to show that the business structures are misleading. "The supreme judicial court has not considered these factors mandatory; it has merely approved of the trial judge's use of them to analyze whether the corporate form properly protects the defendant from derivative liability."

Commonwealth v. Springfield Terminal Ry. Co., 80 Mass. App. Ct. 22, 23, 951 N.E.2d 696, 699, 2011 Mass.

App. LEXIS 1100, \*1 "One examines the 12 factors that are considered in deciding whether to penetrate the corporate form to form an opinion whether the over-all structure and operation misleads. There is present in the cases which have looked through the corporate form an element of dubious manipulation and contrivance, finagling, such that corporate identities are confused and third parties cannot be quite certain with what they are dealing." Evans v. Multicon Constr. Corp., 30 Mass. App. Ct. 728, 729, (1991) If this motion is decided under rule 12(b)(6) standards, then the allegations in the Second Amended Complaint (Complaint) should be accepted as true. I will go through the 12 factors identified in Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc. one at a time identifying where the facts are alleged in the complaint and describing the currently available evidence.

(1) Common ownership, ¶ 12(b) On August 20th 2018, Aidan Kearney said under oath that he is the sole owner of WDM, The Plaintiff served his first set of interrogatories on December 6, 2018, so the answers should be received once this motion is dismissed;

(2) Pervasive control, ¶ 12(a) Aidan Kearney holds all of the officer positions of both companies (Exhibit A&B), and has admitted on several occasions that he runs the business (Exhibit C page 14);

(3) Confused intermingling of business assets, ¶ 12(e) discovery is needed, although neither company lists an accurate address with the State, and as stated above it is unclear which business provides what service;

(4) Thin capitalization, ¶12(c) TBE is now “defunct”;

(5) Nonobservance of corporate formalities, ¶ 12(f) Aidan Kearney has not filed an annual report for WDM since 2016, and they never filed one for TBE. The most recent filings are included as Exhibit A&B;

(6) Absence of corporate records, The Defendants argue that TBE is defunct, and Aidan Kearney said at a deposition in August of 2018 that he was unaware that he was supposed to update the companies addresses with the Secretary of State (Exhibit C page 21), if he is unaware of such basic obligations it is unlikely that he has done his other obligations;

(7) No payment of dividends, This is likely not applicable, but very doubtful if it is;

(8) Insolvency at the time of the litigated transaction, ¶ 12(d) I need discovery, although it is likely their excuse for not filing annual reports;

(9) Siphoning away of corporation's funds by dominant shareholder, need discovery first;

(10) Nonfunctioning of officers and directors, I repeat my response to number 6;

(11) Use of the corporation for transactions of the dominant shareholders, ¶12(c) need discovery to assess, but Aidan Kearney has represented the corporation in small claims court;

(12) Use of the corporation in promoting fraud. ¶12(h)& ¶ 64-70 On or about December 19th 2018 Aidan Kearney said on his online show that if the Plaintiff wins a judgment he will bankrupt the company, and continue to sell books and collect advertising money.

“The corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf.” United States v. Bestfoods, 524 U.S. 51, 55, 118 (1998) (There are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied.... There are instances in which the parent has not sufficiently overstepped the bounds of corporate separateness to warrant piercing, yet is involved enough in the facility's activities that it should be held liable as an operator.)

**The Plaintiff's complaint states sufficient facts and inferences to support his claims.**

The Defendant's Memorandum claims that the “Plaintiff has not alleged any facts that he did not in fact assault Samantha Cardin.” This is a blatant lie as Paragraph 35 does list Samantha Cardin's allegations as false statements “On January 5 2017 The Defendant Samantha Cardin wrote the following false statements... That the Plaintiff intentionally caused a black eye, That the Plaintiff killed the family dog.”, and paragraphs 17, 19, 40, 41, and 46 strongly infer that all the criminal allegations are false. Additionally paragraphs 10, 12, 20, 26, 36, and 54 provide various reasons that the Defendants are liable. Although the Plaintiff will gladly amend his complaint so that all the facts that support the inferences are clearly stated and placed neatly in the beginning of the complaint.

Paragraph 25 of the Complaint states that “Defendants John Doe 1-10 wrote and caused to be publicated numerous false statements about the Plaintiff including the following... c. That the Plaintiff found his dog crushed underneath a big metal cabinet.” The John Doe writer used the defamatory allegation from Paragraph 25(c) as the basis for his opinion that the Plaintiff is

guilty. "Where the defamatory communication consists of a statement in the form of an opinion, it is actionable only if the statement implies the allegation of undisclosed defamatory facts as the basis for the opinion." King v. Globe Newspaper Company, 400 Mass. 705 at 713, 512 N.E.2d 241 (1987)

In the Plaintiff's Memorandum for his preliminary injunction he included plenty of case law that establishes a right of action as a matter of law. "An accusation purporting to rest on hearsay is none the less defamatory." Maloolf v. Post Pub. Co., 306 Mass. 279, 280, 28 N.E.2d 458, 458-459, 1940 Mass. LEXIS 931, \*3-4 "the right of a party to make charges gives no right to others to spread them" Lundin v. Post Pub. Co., 217 Mass. 213, 215-217, 104 N.E. 480, 481-482, 1914 Mass. LEXIS 1211, \*2-6 "An imputation of crime is defamatory per se" Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 850, 330 N.E.2d 161, 164, 1975 Mass. LEXIS 907. "The defendant published in its newspaper a statement that it was alleged that the plaintiff had committed an assault upon a woman named, which had resulted in stated personal injuries to her. For this publication the plaintiff had a right of action, unless it was privileged, or unless it was true, or unless for some other reason it was not libellous." Lundin v. Post Pub. Co., 217 Mass. "The mere fact that the charge against the plaintiff was not made by direct averment but only by saying that such an allegation had been made was not material; for the statement of unfounded charges is none the less actionable that it is made only by way of repeating them as having been made by others." Kimball v. Post Publishing Co. 199 Mass. 248, 251, et seq.

### **Considering Samantha Cardin's Affidavit would be improper and unfair.**

"If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary

judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Mass. R. Civ. P. 12 (B)

Additionally the eleventh hour affidavit of Samantha Cardin that states conclusory statements and opinions, did not exist when the defamatory article and book was published. “Where a plaintiff’s amended defamation complaint sets forth facts it will be analyzed under the traditional standard governing Mass. R. Civ. P. 12 (b)(6) motions, leaving fatal defects in the potential proof to be more properly decided under Mass. R. Civ. P. 56, after the completion of a more expanded record.” Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 427, 583 N.E.2d 228, 229, 1991 Mass. LEXIS 584, \*1, 19 Media L. Rep. 198 It would be unfair, and raise Fifth Amendment Due Process issues to accept her affidavit as fact for this motion. The Plaintiff intends to depose Samantha Cardin on or before the 8th of March 2019.

**There is no evidence that the Plaintiff hurt his dog, or sold or shipped drugs in California.**

Samantha Cardin has said many times that she did not see or hear the Plaintiff hurt his dog. The Defendants do not offer any evidence that the Plaintiff committed the listed crimes.

**The Defendants do not operate a “social media platform.”**

Social Media Platforms are not well defined, but all social media platforms have a few common characteristics that Turtleboy Sports does not share. 1) Users are able to create profiles that usually have their own unique address. 2) Users are able to send messages to other users. 3) Account access is open to the public whether free or paid.

The Turtleboy Sports website is hosted through Wordpress which does have a feature that allows administrators with the website owners permission create accounts for publishing blogs and other various levels of backend access. The account that published The Article was “Turtleboy”

which is likely the original account with complete backend access. Regardless Turtleboy is written at the top of every page of their website, and is the name the writers use when referring to the business. Paragraph 10 and 32 of the complaint touch on this issue, but if permission to amend is granted then I certainly could add more useful facts to the complaint.

**Vicarious liability should apply in this case even if the identity of the John Doe blogger is unknown.**

“A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” Burlington Indus. v. Ellerth, 524 U.S. 742, 746, 118 (1998) (A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.)

**The Defendants should not be allowed to file subsequent dismissive motions based on defenses currently available.**

Mass. R. Civ. P. 12G&H were created “to conserve judicial time by preventing a defendant from serially raising objections which the plaintiff might well be able to meet.” Comments under Mass.R.Civ.P. 12 The Defendants argue that they should be allowed to argue additional defenses since the complaint is “devoid of any facts” to put the Defendant’s on notice. Assuming arguendo, the Defendant’s could have addressed it by not ignoring Superior court rule 9(C). As stated above the facts and inferences in the complaint, and the case law presented with the preliminary injunction motion give the Plaintiff a claim of action as a matter of law.

Restructuring and rewording the complaint is not going to shed new light on the Defendant's ability to file a SLAPP motion. I also argue that the intentions behind the Defendants default strategy and this instant motion are in line with the intentions the SLAPP statute intended to prevent.

### **LEAVE TO AMEND**

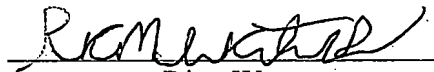
The Defendants seem to argue that they want all the facts to be clearly pled and placed neatly at the top of the complaint instead of spread out in the body of the complaint. The Plaintiff will be happy to do so, although the Plaintiff believes holding a Mass.R.Civ.P. 16 conference first would be helpful to simplify the issues. The Defendants have refused to sign a Mass.R.Civ.P. 41 stipulation, and have refused to have a Superior Court Rule 9C conference, and it takes a week to get a response to any questions. When the Plaintiff filed the Second Amended complaint Samantha Cardin was still in default, so the Plaintiff was very careful not to alter any facts that pertained to her. Shortly after filing the Defendants started a harassment campaign, and said they did not think Samantha should have been sued. In court on January 9th 2019, the Plaintiff voluntarily dismissed Samantha Cardin. Justice requires that leave be granted to amend the complaint.

### **CONCLUSION**

The Defendants motion must be denied as they did not meet any of the requirements of a Mass.R.Civ.P: 12 (b)(6) motion, and misrepresented the complaint. No concise statement, includes outside matters, and no Superior court rule 9(c) conference. The Plaintiff will soon file a motion for leave to amend, although strongly believes that holding a Mass.R.Civ.P. 16 conference first would be helpful to simplify the case. If the court converts the motion to a

Mass.R.Civ.P.56 Summary Judgment motion, the Plaintiff recommends scheduling it in March so that Samantha Cardin can be deposed first.

Respectfully Submitted



1/28/2019

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(above is an old address, new address will be used after it is impounded.)

**Certificate Of Service**

I, Rian Waters, hereby certify that on January 2nd, 2019, I served a copy of the above document and the Request for Cassette upon the parties in the action by mailing U.S. first class, to:

Kevin Chrisanthopoulos, Esq.  
KC Law  
30 Court Street, Suite 1  
Westfield, MA 01085

Subscribed under the penalties of perjury. 1/28/2019

