UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GLOBAL DIRECT SALES, LLC, PENOBSCOT INDIAN NATION, CHRISTOPHER RUSSELL and RYAN HILL, Plaintiffs v. AARON KROWNE, individually and d/b/a THE MORTGAGE LENDER IMPLOD-O-METER and ML-IMPLODE.COM, KROWNE CONCEPTS, INC., IMPLODE-EXPLODE HEAVY INDUSTRIES, INC., JUSTIN OWINGS, KRISTA RAILEY, STREAMLINE MARKETING, INC. and LORENA LEGGETT, Defendants.	Case No. 8:08-cv-02468 Hon. Deborah K. Chasanow **DEFENDANTS' (IEHI & KCI) REPLY IN SUPPORT OF THEIR MOTION FOR JUDGMENT & OBJECTIONS TO PLAINTIFFS' EVIDENCE OFFERED IN OPPOSITION TO DEFENDANTS' MOTION**

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT INCLUDING OBJECTIONS TO PLAINTIFFS' EVIDENCE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT

Defendants Implode-Explode Heavy Industries, Inc. ("IEHI") and Krowne Concepts, Inc. ("KCI") (collectively "Defendants" or "Movants")[1] herein respond in two parts to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment ("Opp'n Br." or "Opp'n") pursuant to Rules 12(c) and 56. Part I raises objections to evidence offered in opposition to Defendants' Motion. Part II replies to points set forth in Plaintiffs' opposition brief. Plaintiffs

[1] A third defendant, Krista Railey, the author of the article *sub judice*, remains in default.

fail to refute Defendants' arguments or otherwise establish a single triable issue.[2] Movants therefore reiterate their request for judgment in their favor as to all claims and the dismissal of this case.

I. OBJECTIONS TO PLAINTIFFS' EVIDENCE OFFERED IN OPPOSITION TO MOVANTS' MOTION FOR JUDGMENT

A. Legal Standards

1. Evidence Offered at Summary Judgment Stage

If a defendant makes a properly supported motion for summary judgment, "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1199 (10th Cir. 2006) ("The requirement that the substance of the evidence must be admissible is not only explicit in Rule 56, which provides that '[s]upporting and opposing affidavits shall . . . set forth such facts as would be admissible in evidence,' FED. R. CIV. P. 56(e), but also implicit in the court's role at the summary judgment stage. To determine whether genuine issues of material fact make a jury trial necessary, a court necessarily may consider only the evidence that would be available to the jury.") (citation omitted); In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010) (once the moving party meets shows the absence of a genuine issue of material fact, "[t]he

[2] Plaintiffs fail to even address the judicial opinions at the heart of the Motion: Piscatelli v. Van Smith, 424 Md. 294, 306 (2012); Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980); Seymour v. A.S. Abell Co., 557 F. Supp. 951, 954 (D. Md. 1983); Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); and Samborsky v. Hearst Corp., 2 Med. L. Rptr. 1638 (D. Md. 1977).

non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue."). See also Noviello v. City of Boston, 398 F.3d 76, 84 (1st Cir. 2005) ("Those facts [presented by a nonmovant to avoid summary judgment], typically set forth in affidavits, depositions, and the like, must have evidentiary value; as a rule, '[e]vidence that is admissible at trial, such as inadmissible hearsay, may not be considered on summary judgment.'" (citation omitted); Major League Baseball Props. v. Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008) ("Hearsay testimony . . . that would not be admissible if testified to at the trial may not properly be set forth in [a Rule 56] affidavit." (citations omitted)); United States v. $92,203.00, 537 F.3d 504, 508 (5th Cir. 2008) (holding that the district court erred in declining to strike an affidavit that contained hearsay and was not based on personal knowledge) (citations omitted); Fisher v. Okla. Dep't of Corr. et. al., 213 F. Appx 704, 708 (10th Cir. 2007) (unpublished) (finding affidavits to be "insufficient to withstand summary judgment because they are either based on hearsay or speculation or both, and are therefore inadmissible."); In re Cirrus Logic Sec. Litig., 946 F. Supp. 1446, 1469 (N.D. Cal. 1996) ("It is plainly unfair to hold defendants liable for the reporting of their statements by third parties without independent corroboration of the accuracy of the reported statements."); Patterson v. County of Oneida, 375 F.3d 206, 219 (2d Cir. 2004) ("Rule 56(e)'s requirement that the affiant have personal knowledge and be competent to testify to the matters asserted in the affidavit also means that an affidavit's hearsay assertion that would not be admissible at trial is insufficient to create a genuine issue for trial.") (citation omitted).

B. General Objections to Plaintiffs' Evidence

Movants have one general objection: Plaintiffs' repeated, generic citation to the "Railey Dec." without pincites and without identifying whether it refers to Ms. Railey's Declaration in Opposition to Pls.' TRO Mot. (Exhibit F to the Motion *sub judice*) or another declaration (it presumably refers to Ms. Railey's 2009 declaration). Plaintiffs repeatedly contend that Ms. Railey's declaration establishes a genuine issue of fact as to whether the article is defamatory. Plaintiffs are mistaken. First, Ms. Railey is not (and never has been) in a position to speak (i.e., make admissions) on behalf IEHI. Additionally, Plaintiffs mischaracterize Ms. Railey's statement as an admission of defamation. As to the article's veracity, she declared (1) "there are significant problems with the final published article," Railey Decl. (Dec. 4, 2009) ¶6, (2) "the article contains and implies false statements of fact and is misleading in a material manner," id., and (3) she "advised IEHI and [KCI] that the article was not factual [*sic*] accurate and should be removed from the website or substantially corrected," id. at ¶8). No matter how many times you cite it, this *ipse dixit* is not admissible evidence attributable to IEHI. It is, rather, hearsay without exception, (Fed. R. Evid. 802, 805), and occasionally improper opinion testimony. Fed. R. Evid. 701(a), 702. Moreover, many of the statements (most notably those about advertising practices) Plaintiffs rely on lack proper foundation (see Fed. R. Evid. 602) because they are not based on personal knowledge. See, e.g., Railey Dep. (Ex. B to Opp'n or Ex. L to Borrero Decl.) 157:14-17 ("I don't have firsthand knowledge of that."); 158:11-17; 33:3-5 ("Q. Did you have anything to do with advertising at IEHI? A. No. Except complain."); 33:22-24 (". . . it was just a hobby I was doing. You know, community service, so to speak."). Finally, Ms. Railey's earlier sworn

statements call the veracity of her most recent declaration into question. See, e.g., Railey Aff. (Oct.7, 2008) [Docket No. 18-2] ¶35 ("I stand behind all of the statements I have made in my article about the Plaintiffs, and I believe each and every one of them to be based in truth and supported by my research.").

C. Specific Objections to Plaintiffs' Evidence (Raised in Table 1)

1. Hearsay with no exception (FRE 802 & 805). The evidence is an out-of-court statement offered to prove the truth of the matter asserted.
2. Lacks Authenticity (FRE 901). Rule 901(a) requires "evidence sufficient to support a finding that the matter in question is what its proponent claims."
3. Lacks Foundation/Lack of Personal Knowledge (FRE 602). FRE forbids testimony "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."
4. Improper Layperson Opinion (FRE 701). A lay witness's testimony must be "rationally based on the witness's perception." FRE 701(a).
5. Improper Expert Opinion (FRE 702). An expert's opinion must be based on sufficient facts or data and must be the product of an expert's application of reliable principles and methods.
6. Rule of Completeness (FRE 106 & FRCP 32(a)(4)).
7. Improper Character Evidence (FRE 404 & 405). Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

TABLE 1: SPECIFIC OBJECTIONS

Exhibit/Citation/Opp'n Page No.	Objections
Opp'n 3-4. Russell 12/7/2009 Decl. ¶20: "Prior to writing their defamatory article about LLC, Defendants did not have any mortgage lender advertising on their website." Russell 12/7/2009 Decl. ¶21: "Defendants dedicated an entire section of their website to the "Top-Non-Imploded mortgage lenders—all of which paid Defendant to advertise." Russell 12/7/2009 Decl. ¶22: "Prior to September 9-15, 2008, IEHI had no DPA advertising." Russell 12/7/2009 Decl. ¶23: "Shortly after publishing the article about Plaintiffs, a principal of AFF began advertising on the website."	Lack of Personal Knowledge. The declaration lacks any indication that Mr. Russell would have known about prior mortgage lender advertising on the site.
Opp'n 4 (first 3 paragraphs), citing "Railey Dec."(e.g., "IEHI concealed and removed posts regarding the illegal activities of an advertiser.")	No pincites. Hearsay without exception. Lack of personal knowledge. Railey Dep. 157:14-17 ("I don't have firsthand knowledge of that."); 158:11-17; 33:3-5.
Exhibit C: September 9, 2008 Article	Lack of Authentication. Plaintiffs provide foundation establishing that this version was published/publicly available.[3]
Exhibit F: Unsigned form contract.	Lack of Authentication to the extent Plaintiffs contend this is a contract executed by IEHI and Ms. Railey. It appears to be a form contract used by IEHI, but there is no foundation suggesting IEHI & Ms. Railey executed this contract. In fact, Ms. Railey indicated that she never executed it. Railey Dep. 17:13-14 ("They

[3] Curiously, Plaintiffs included a different version of the draft article with their Motions for Default/Summary Judgment (ECF Nos. 109 & 114, Ex. E [109-5 & 114-7]) (dated Aug. 31, 2008 and straightforwardly entitled "Penobscot Indian Tribe Grants: Why They Are a Scam").

	did send me a contract, but I don't recall signing it.") Ms. Railey also stated that she "was just a blogger" (Railey Dep. 23:10), and her relationship with IEHI was never formalized in any way (Railey Dep. 23:22-24 (". . . it was just a hobby I was doing. You know, community service, so to speak."). Rule of Completeness (see additional excerpts *infra*).
Opp'n 5/Railey Decl. ¶29: "Only Krowne and Marquis had authority to publish articles . . . ."	Lack of Foundation/Personal knowledge. There is no indication that Ms. Railey had knowledge of who had "authority" to publish articles to the website. Yet she had the ability to do so without permission. Railey Dep. 18:9-11 ("Robin Medecke posted one blog article, one blog entry. Other than that, I posted everything else.")
Opp'n 7/Railey Decl. ¶¶6-9: (e.g., "I advised IEHI that the article was not factual[ly] accurate. . . . Krowne dissuaded me from making corrections to the article . . . .")	Hearsay without exception. Lacks Foundation. Irrelevant (to the extent this was not expressed at the time of initial publication and for over a year thereafter). (This is nonetheless addressed *infra*.)
Opp'n 8. Railey Decl. ¶10: "I learned of IEHI and Krowne's disparate treatment of advertisers . . . ."	Lacks Foundation.
Opp'n 8/Railey Decl., ¶¶11-19 (e.g., "I have serious questions about whether the [Grant America] article was published and/or not corrected/removed from the website because the plaintiffs refused to advertise...") (¶17)	Hearsay without exception. No Foundation/Lack of Personal Knowledge. Improper Lay Opinion/Speculation/Irrelevant. Improper Character Evidence as to ¶¶13-15, 19.

Opp'n 8/Railey Decl., ¶20-23: "I believe the defendants IEHI and Krowne are utilizing the article and lawsuit to raise funds..."; "Krowne and IEHI are prominently advertising for people who received downpayment assistance from Grant America and were foreclosed by the FHA..."; "IEHI and Krowne are using the lawsuit to raise funds and generate publicity..."	Hearsay without exception. Improper Speculation/Lay Opinion. Lacks Foundation/No personal knowledge.
Opp'n 9 (citing Russell 7/25/13 Decl.) (discussing damages in terms of a "lost opportunity for a Bingo/Slot machine venture on PIN's reservation, which they were already negotiating with PIN.").	Lack of Foundation. Improper Speculation. This was **not** included among, and is inconsistent with, Plaintiffs' Interrogatory Responses. See Borrero Reply. Aff. Ex. A (Pls.' Response to Interrogatory No. 3). Plaintiffs' Interrogatory responses indicate that "Russell, Hill and GDS have suffered economic damages in the amount of $1,440,000, resulting from PIN's cancelling of an existing contract and failing to proceed with an alternative downpayment assistance model following the scandal created by the articles."
Opp'n 7 (citing Railey Dep. 96-98, 102, 107, 120 & Railey Decl. ¶17): ". . . the article did not comply with journalistic or publishing standards . . . and she has 'serious questions regarding whether the article was published and/or not corrected/removed from the website because the plaintiffs refused to advertise."	No Foundation/ Lack of Personal Knowledge. Improper Expert Opinion. See, e.g., Railey Dep. 66:25-67:2 ("I never was a journalist.") Irrelevant.

II. MOVANTS' REPLY TO PLAINTIFFS' OPPOSITION BRIEF

A. Points Conceded or Otherwise Resolved

The Court should enter judgment in favor of Krowne Concepts, Inc. ("KCI") and against the Penobscot Indian Nation ("PIN") for the reasons specified in Defendants' Motion because Plaintiffs have thrown-in the towel with respect to those parties. See Pls.' Opp'n Br. (ECF No. 132) at 2 ("Plaintiffs do not oppose the portions of Defendant IEHI's motion dismissing PIN's defamation claim or dismissing Defendant Krowne Concepts, Inc. . . ."). Most properly, the Court should enter a Judgment on the Pleadings against PIN and grant Summary Judgment in favor of KCI (since the Movants' argument as to KCI's liability was based on evidence).

B. Points Unaddressed By Plaintiffs Opposition

Plaintiffs' opposition memorandum fails to address Movants' arguments concerning (1) the First Amendment Freedom of the Press (Mot. at 21), and (2) the ambiguity of the word "scam" rendering it incapable of being defamatory (Mot. at 29-31). Indeed, they never provide a working definition of "scam."[4] This honorable Court may therefore consider those points conceded, and should do so rather than allow Plaintiffs to duck those arguments. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1256 (4th Cir. 1985); Alba v. Merrell Lynch, 198 F. App'x 288, 295 (4th Cir. 2006); Bailey v. ManorCare Health Servs., Inc., 203 F.3d 819, 2000 WL 135105, *1 (4th Cir. Feb. 7, 2000). See also Kutik Photography v. Cochran, 975 F. Supp. 812, 814 (E.D. Va. 1997) (failure to respond to argument in motion to dismiss required court to grant motion); Ciphertrust, Inc.

[4] Examples of newspaper articles (as well as a transcript of a TV news broadcase) are annexed hereto to demonstrate that the term is commonly used to refer schemes or arrangements that are not necessarily criminal, yet are perceived by some as unethical, immoral, or an unfair exploitation (of, e.g., a loophole). See Borrero Reply Decl. (attached hereto) Exs. A-D.

v. Trusecure Corp., No. 04-cv-1232, 2005 U.S. Dist. LEXIS 46322, *1 (E.D. Va. Nov. 28, 2005) (ruling plaintiff conceded defendant's argument by failing to respond to it).

C. Counts III & IV Have Already Been Dismissed or Should Be Dismissed On The Pleadings Under the Law-of-the-Case Doctrine

Plaintiffs state that "since IEHI did not move to dismiss Plaintiffs' Unfair Business Practice claim, Plaintiffs will do [*sic*] not address the same . . . ." Opp'n Br. 2. Plaintiffs therefore suggest that Defendants were incorrect in stating "Defendants herein set forth bases for summary judgment in their favor with respect to **the sole remaining count in this action**: defamation by libel." Pls.' Mot. Sum. J. at 1 (emphasis added). This snafu may be resolved under the law-of-the-case-doctrine since this Court has already found Plaintiffs' Complaint to fall short of alleging a claim with respect to Counts III (Unfair Business Practice) and IV (Injunctive Relief). See Mem. Op. at 13-14 (April 9, 2012) (Docket No. 112). See generally Causion v. State, 209 Md. App. 391, 402 (Md. Ct. Spec. App. 2013) ("To be sure, there is nothing in the rule that explicitly prohibits repeated motions but, as principles such as law of the case and claim and issue preclusion suggest, it is the policy of the State that courts should provide a final resolution to justiciable issues in a single proceeding.).

Plaintiffs' Complaint advanced four counts (1) defamation, (2) libel, (3) unfair business practice, and (4) injunctive relief. In response to Plaintiffs' first dispositive motion (for default judgment, summary judgment, and a permanent injunction) (ECF No. 109), this Court pointed out that the first two counts are duplicative, and the last fails to state a cause of action. Russell v. Railey et. al., No. 08-cv-02468-DKC [ECF No. 112], 2012 U.S. Dist. LEXIS 49370, 11-13 (D. Md. Apr. 9, 2012) (Mem. Op.). With respect to Count III, the Court explained:

> Plaintiffs style Count Three as "Unfair Business Practice," but they do not otherwise identify any statutory or common-law cause of action in this count. At best, they allege that "Defendants engaged in an unfair, deceptive and fraudulent business act [by] publishing false information regarding Plaintiffs in retaliation for Plaintiffs declining to advertise on Defendants' website." (ECF No. 1 ¶ 59). Without more, however, the court cannot discern what, if any, claim Plaintiffs are asserting, let alone whether such claim is viably pleaded. Therefore, liability under this count would not be established.

Id. (citing Dickson v. Cohn, Goldberg & Deutsch Law Firm, No. PJM 09-937, 2009 WL 4730986, *2 (D.Md. Dec. 7, 2009) (dismissing a count labeled "Unfair Business Practices - Maryland Business & Professional Code" for failure to state a claim because it only included a "vague reference to the Maryland Business & Professional Code" and "set[] forth no discernible cause of action"). Indeed, though Plaintiffs never amended the Complaint, and in their next dispositive motion "for default judgment, summary judgment, and a permanent injunction") they did not even raise this claim (ECF No. 114-1 at 2). Cf. United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. Ill. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments . . . . Judges are not like pigs, hunting for truffles buried in briefs.") (citation omitted).

The Court should therefore dismiss this claim on the pleadings pursuant to Rule 12(c) under the law-of-the-case doctrine. (But if the Court disagrees with this point yet otherwise grants the motion *sub judice*, Defendants would not oppose a surreply or any efficient method of resolving the entire case.)

D. Communications Decency Act ("CDA") Immunity Applies Here Because IEHI Never Went Beyond its Editorial Role as a Website/Blog Operator & Publisher

Pointing to Opp'n Exhibit F, Plaintiffs suggest that IEHI and Krista Railey had a principal/agent relationship, such that CDA Immunity (under 47 U.S.C. § 230) does not apply. Opp'n at 4. This unexecuted contract falls far short of establishing a genuine issue as to whether their relationship renders IEHI liable for the Railey's article, however. This is particularly so since Ms. Railey had authored at least a dozen articles by April 2009, posted on other blogs before getting a subpage on IEHI's site (Railey Dep. 19:4-14), and described herself as an independent blogger. Railey Decl. (ECF No. 117-1, Ex. I at 22); Railey Dep. 65:2-4 (Confirming her former self-description as an "independent analyst and journalist"). Based on Ms. Railey's affirmations, there was every reason to believe the article was accurate at the time, and IEHI nonetheless removed the word "scam" upon complaint and permitted Mr. Russell to post a response or rebuttal. Indeed, IEHI has consistently stated that it will remove or correct any part of the posted article shown to be false or anything other than opinion.

Plaintiffs completely ignore legal authorities cited by Defendants showing that IEHI's actions constitute no more than editorial conduct that does not deprive IEHI of CDA immunity. It may be that "[t]he leading Ninth Circuit decision on the scope of CDA immunity is *Roomates.Com*." Opp'n 25. But while the Ninth Circuit is large, it has yet to engulf the state of Maryland. As noted in the moving papers, the controlling authority here is Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("Lawsuits seeking to hold a service liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."). Mot. at 17-19. (Arguing that statements

posted on a website do not give rise to a cause of action against the website publisher). See also Doe v. Friendfinder Network, Inc., 540 F. Supp.2d 288, 294 (D.N.H. 2008).

E. Each Plaintiff is a Public Figure, At Least for All Purposes Relevant Here

Plaintiffs incorrectly argue that "[t]he degree of fault that Plaintiffs must prove turns on whether they are public or private figures, and whether or not the statements were on a topic of public or private concern." Opp'n 11. See also Opp'n 14 ("Plaintiffs are private businesspersons.") In this case, whether malice must be proven also turns on whether a privilege applies. Mot. at 20-21 (citing Jacron Sales Co. v. Sindorf, 276 Md. 580, 600 (1976)). But to be clear, Movants have alleged that (1) PIN, *qua* a government and municipality is a public figure, GDS was therefore at all relevant times a government contractor in the business of administering PIN's housing agency and providing a service that facilitated the insurance of mortgages by the Federal Housing Administration ("FHA") and was therefore a public figure, and (3) Christopher Russell, as CEO of GDS, former CEO of Ameridream, and the subject of Congressional testimony and magazine articles on Downpayment Assistance Programs ("DAPs"), is at least a limited-purpose public figure for all purposes relevant here. Mot. at 21, 23-25. So too with respect to Ryan Hill, as part owner and CFO of GDS. Russell Dep. 19:9-10. Indeed, in light of their roles as persons benefiting from (and influencing public policy with respect to) DAPs, they could be called *public* businessmen.

Plaintiffs' suggestion that they were "not involved in any public controversy" (Opp'n 14) and "no controversy existed until IEHI published the defamatory statements . . . ." (Opp'n 15, 16) is ridiculous. Equally insane is their statement that "No evidence demonstrates that Plaintiffs

had voluntarily assumed a role in the controversy." Opp'n 16.[5] For starters, see Russell Dep. 63:21-64:8 (describing lobbying on behalf of Ameridream). To reiterate, additional evidence of the pre-existing controversy includes, *inter alia*, Congressional testimony, the passage of HERA, legislation that was pending at the time, blog articles, a Forbes Magazine article, and Ms. Railey's testimony. Mot at 21-23. These are not "aged private concerns," but rather very current, very public concerns. With respect to the SFDPA controversy, Plaintiffs are at least limited-purpose public figures, even under the five-part test Plaintiffs attribute to Foretich (Opp'n 15-16).

F. Other Disputed Statements of Fact

1. "[I]t is undisputed that Plaintiffs had a decrease in GAP business after IEHI published the article." Opp'n 2, 9. Well, yes and no. Naturally, GAP's business decreased, as it was explicitly outlawed by HERA and shut down. But even GAP's founder and CEO, Christopher Russell, indicated that GAP began winding down even before the article was published (after HERA was passed, but before its relevant provision went into effect). Russell Dep. 65:14-66:17 (describing four to five month wind-down period). So Defendants certainly dispute that the article *caused* any decrease.

2. ". . . Defendants dedicated an entire section of their website to the 'Top Non-Imploded' mortgage lenders—all of which paid Defendant to advertise." (Opp'n 3 (citing Russell 12/7/2009 Decl. ¶20). "Defendant Railey confirms IEHI's disparate treatment of advertisers and non-

[5] Also absurd is the argument that the fact that Mr. Krowne had not heard of Mr. Russell at the time the article was published means that he is not a public figure is ridiculous. Opp'n 8. Can it be that, in a nation where many people cannot name their local representatives, and Kim Kardashian, J.Lo's boyfriend, and Honey Boo Boo are public figures but a man who has run for public office and has also run multiple DAPs (nominally in the form of a non-profit corporation as well as a "government program") is not?

advertisers . . . ." Opp'n 8 (citing Railey Decl. ¶10). To the contrary, IEHI never refused to edit or remove any portion of the article shown to be false. See., e.g., Opp'n Ex. G at 3 (email from Krowne to Railey, stating "Do you think there is any factual weakness in what you wrote, or is he just trying to be intimidating?"; to which Railey replied (p. 6-7) ". . . if you read the blog and follow all the links, you'll find that the documentation is factual. I spent weeks on this, and I had already made the connections before I found Mr. House's testimony."). See also id. at 5 (email from Robin Medecke stating "Spam it, and tell him he's welcome to respond if he can do so with a degree of civility" regarding Russell's initial comment/reply to Railey's article); Ex. A to Defs.' Mot. to Vac. Def. (ECF No. 117-1) (email from Krowne to Railey on Sept. 10, 2008 stating "I don't (even remotely) have the time necessary to look into this case and make the call one way or another on whether this is "safe" for us to post . . . If you think this is worth pursuing, I would recommend getting an investigative journalist to do an "assist" on the story."); Ex. D to Defs.' Mot. to Vac. Def. (ECF No. 117-1) (Russell email stating "No the rebuttal is not part of the settlement. That's just something you said you would do all along. So, I wanna see if you keep your word?").

3. "Defendant IEHI and Railey shared the ad revenue generated from Railey's subpage on IEHI's website." Opp'n 4 (citing Ex. F). Exhibit F is an unexecuted form contract providing no support for this contention. But to the extent it is admissible evidence, it bears noting that ¶7 of the contract ("Relationship Between Parties") states, *inter alia*, "The Independent Contractor shall not be considered as having an employee status or as being entitled to participate in any plans, arrangements, or distributions . . . .". And ¶9 ("Professional Responsibility") states: "Nothing in this Agreement shall be construed to interfere with or otherwise affect the rendering

of services by the Independent Contractor in accordance with his independent and professional judgment."

4. "IEHI described the article as a 'joint project.'" Opp'n 5 (citing Ex. H at 1), 23. The email string in Ex. H does not state what article the conversation is about, but it appears to be about pending federal legislation (specifically, H.R. 6694, a bill pushed by SFDAP operators in 2008-2009 in an attempt to undo the ban in HERA and *legalize* SFDPA)–not GAP. See, e.g., Ex. H at 1 (email from Robin Medeke stating, "You DO know that Aaron, Justin, Randall and I are all completely against this legislation, and we've turned away more than one company trying to advertise their snake oil on our site.").

5. "IEHI claims it negligently published the initial version of the article." Opp'n 5 (citing Ex. E at 34). The quote from Ex. E (Dep. of Aaron Krowne) is "I believe Railey or Robin Medeke probably accidentally clicked publish instead of save at some point in going through the production system." This is hardly an admission of negligence on IEHI's part. Rather, the overwhelming weight of the evidence shows that IEHI was not negligent, and certainly never acted maliciously. See Railey Dep. 50-51 (describing her diligent research into 990s (public tax records) and other public filings), 70:13-14 (describing her interview of Mr. Russell and noting that he understood it was for an article she was writing).

6. "It is undisputed that Plaintiffs are not and have never been public officials." Opp'n 8. PIN is a government. GDS ran PIN's housing agency. Russell was CEO of GDS. Absent any authority on this point, Movants cannot concede this point. And while Mr. Krowne stated that he doesn't believe he had heard of Christopher Russell prior to hearing about Railey's article, he had heard of Ameridream, the earlier DAP provider founded by Russell. Opp'n Ex. E at 186.

G. Other Disputed Points of Law

1. A jury needs to resolve these claims. Opp'n 10. In Maryland, a jury may find facts, but the determination of whether a publication is defamatory is a question of law for the trial judge. Mot. at 12 (citing Piscatelli, 424 Md. at 306).

2. "Speech—particularly defamatory and otherwise tortious speech—is not protected by the first amendment." Opp'n 17. This statement ignores scores of legal doctrine applying the First Amendment Freedom of Speech and Freedom of the Press, and blatantly ignores pages 21-25 of the Motion. See generally Amperstand Publ'g, LLC d/b/a Santa Barbara News-Press v. NLRB, (DC Cir. Dec. 18, 2012) ("The First Amendment affords a publisher—not a reporter—absolute authority to shape a newspaper's content . . . ." (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974)). See also Cusumano, 162 F.3d at 714 ("The medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work . . . . Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended 'at the inception of the newsgathering process' to use the fruits of his research 'to disseminate information to the public.'" (quoting Von Bulow, 811 F.2d at 144); Branzburg, 408 U.S. at 704 ("almost any author may accurately assert that he is contributing to the flow of information to the public . . . .").

The conclusory statement that "Defendant Railey's admissions set forth why the article does not meet the criteria for any of the cited privileges" (Opp'n 19) is simply insufficient to establish a genuine issue as to whether a privilege applies. Actual malice must therefore be proven, and there is simply no evidence of it. See Krowne Reply Decl. (annexed hereto) ¶¶5-12, Ex. A (other articles posted to IEHI's website critical of GCS, an advertiser). Railey Dep. 50-51 (describing her diligent research into 990s (public tax records) and other public filings), 70:13-14

(describing her interview of Mr. Russell and noting that he understood it was for an article she was writing).

3. Attempting to mask a lack of substance with assertiveness, Plaintiffs contend that "[b]ecause the statements are so clearly defamatory *per se*, they are presumed to be false and IEHI must prove that they are either wholly true (citing undisputed material facts) to make out an absolute defense or substantially true to make out a sufficient defense." Opp'n 20. Plaintiffs cite no authority for this proposition, and again get it wrong. As explained in the moving papers, the burden of proving falsity rests entirely on Plaintiffs. Mot. at 11-12. Though the burden does not rest with them, Movants have provided sufficient evidence to show that the article was published without malice and is at least "substantially true." Mot. at 26-35 (describing factual bases behind article). For these reasons, there is no genuine issue as to falsity.

CONCLUSION

Conclusory, speculative testimony is insufficient to raise issues of fact and defeat summary judgment. See, e.g., Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). For this and the foregoing reasons, Plaintiffs have failed to establish any genuine issue as to any material fact in this case. Movants accordingly reiterate their request that judgment be entered in their favor as to all claims, and that this case be dismissed with prejudice.

Respectfully submitted,

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