UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ASHLEY ST. ANGELO, PPA ANTHONY ST. ANGELO,	:	
Plaintiff,	:	**CASE NO. 1:21-cv-00261-JJM-LDA**
v.	:	
AIDAN KEARNEY AND JULIANNE KEARNEY,	:	
Defendants.	:	

DEFENDANTS AIDAN AND JULIANNE KEARNEY'S
MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(2) AND 12(b)(6)

Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), Defendants Aidan and Julianne Kearney ("Defendants") move to dismiss this action because Plaintiff Ashley St. Angelo has failed to establish personal jurisdiction over Defendants and has failed to state a claim for relief.

1.0 INTRODUCTION

This case concerns a series of news articles written by Mr. Kearney after he became aware of a matter of public concern pertaining to Plaintiff. Mr. Kearney has no contacts with Rhode Island other than these articles.[1]

The fact that this case exists, at all, is Constitutionally misplaced. A journalist is not subject to jurisdiction in Rhode Island by virtue of the fact that someone in Rhode Island doesn't like the journalist exposing their misdeeds. But, to make the facts even more ugly, Plaintiff has brought the author's wife into the case – with zero facts alleged about her – solely to harass her to try to pressure the author of the piece.

[1] However, this is not Mr. Kearney's first trip to this District. He previously appeared as a defendant in *Narcisi v. Turtleboy Dig. Mktg*., LLC, 2020 U.S. Dist. LEXIS 160630 (D.R.I. Sep. 3, 2020), where this very Court found that Rhode Island lacks jurisdiction over Mr. Kearney and his blogs.

Plaintiff fails to assert a claim for relief both in that she does not plead sufficient factual allegations, but also in that she *literally does not assert a claim for relief*. There are no causes of action listed in the Amended Complaint. There are no common law or statutory grounds asserted to support her request for an order requiring Defendants to cease and desist. This requires Defendants to guess what claims Plaintiff is attempting to bring, and should by itself result in dismissal of the Amended Complaint. While Plaintiff filed her initial complaint, perhaps in a rush or without the benefit of an educated legal perspective, the Amended Complaint was filed with plenty of time and input from professionals, including suggestions by the State Court judge. There is no reason for this Court to give Plaintiff a third bite at the apple – especially when the apple is clearly one that is adulterated with constitutionally impermissible claims, a lack of jurisdiction, roping in an improper defendant, and requests for prior restraints.

Charitably construed, Plaintiff appears to be asserting a claim under Rhode Island's harassment laws. But the speech identified in the Amended Complaint is not the kind of thing that the civil harassment statute was designed for. If Ms. St. Angelo believes that the news reports about her are defamatory, then she has a remedy – a civil defamation claim. But, a claim that journalism can subject the author to a restraining order should find no oxygen at all.

Even more egregiously, all of the allegedly actionable statements identified in the Amended Complaint were authored not by Defendants, but rather by third-party commenters. 47 U.S.C. § 230 ("Section 230") unambiguously precludes any liability for such statements, yet there is no attempt in the Amended Complaint to address this federal statutory immunity. Plaintiff cannot possibly amend her complaint to circumvent this immunity, and her claim(s) must be dismissed with prejudice.

2.0 LEGAL STANDARDS

In determining whether a court has personal jurisdiction over a defendant, the plaintiff must "proffer evidence which, if credited, is sufficient to support findings of all facts essential to personal jurisdiction." *Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 26 (1st Cir. 2008). "[U]nsupported allegations in their pleadings" are insufficient to meet this burden. *Platten v. HG Bermuda*

Exempted Ltd., 437 F.3d 118, 134 (1st Cir. 2006). A plaintiff must provide "evidence of specific facts" establishing jurisdiction. *Id*.

In determining whether a motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted, a court must determine whether the plaintiff has alleged "a plausible entitlement to relief that gives the defendant fair notice of the claim and the grounds on which it rests." *Colesanti v. Dickinson*, 2019 U.S. Dist. LEXIS 145578, * 13-14 (D.R.I. July 19, 2019) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The court must distinguish "the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012).

3.0 ARGUMENT

3.1 There is No Personal Jurisdiction Over Defendants

A court may have general or specific personal jurisdiction over a defendant. General jurisdiction exists when a defendant engages in systematic and continuous contacts with the forum state. *Foster-Miller, Inc. v. Babcock & Wilcox Can.*, 46 F.3d 138, 144 (1st Cir. 1995). Specific personal jurisdiction exists where the forum state's long-arm statute is satisfied and the exercise of personal jurisdiction would comport with the limits of the Federal Constitution. *Id*. Neither type of jurisdiction exists here.

Defendants are Massachusetts residents (Doc. No. 1-2 at ¶¶ 2-3.) Plaintiff's factual allegations are based solely around Mr. Kearney owning and operating "two blogging websites," "routinely provid[ing] merchandise and accept[ing] donations to and from Rhode Island residents on his websites . . . and other Turtleboy enterprises," and appearing at a hearing in this matter prior to removal (Doc. No. 1-2 at ¶¶ 4-6.) There is not a single factual allegation regarding Mrs. Kearney, whether as to jurisdiction or Plaintiff's claims. Mrs. Kearney is only mentioned in a single paragraph in alleging her place of residence, and every single other allegation refers only to *a*

singular Defendant, Mr. Kearney. In the absence of any allegations regarding Mrs. Kearney other than her living outside Rhode Island, she should be dismissed for lack of personal jurisdiction.[2]

As for Mr. Kearney, there is no general personal jurisdiction. Plaintiff only alleges in a conclusory fashion that Kearney sells merchandise to and accepts donations from Rhode Island residents. Plaintiff fails to allege facts supporting this conclusion – rather, the allegations are simply placed in the Amended Complaint with no attempt to tether them to any provable fact. Further, even if she did make such allegations, Mr. Kearney does not direct any of his business activities specifically at Rhode Island, nor does he direct any of the advertisements on his news websites that he uses to generate revenue to Rhode Island. (Declaration of Aidan Kearney ["Kearney Decl."], attached as **Exhibit 2**, at ¶¶ 5-7, 10, & 22-23.)[3] He does not conduct business or have any regular presence in Rhode Island, and only rarely visits the state to see its beaches or tourist attractions. (*Id*. at ¶¶ 4-6.) Operating an interactive website that can be accessed by residents of a state does not establish general personal jurisdiction. *Cossaboon v. Me. Med. Ctr.*, 600 F.3d 25, 35-36 (1st Cir. 2010). Similarly, merely selling merchandise or soliciting donations on a publicly accessible website that may be accessed by Rhode Island residents does not establish general personal jurisdiction. *Sostre v. Leslie*, 2008 U.S. Dist. LEXIS 10015, *19-21 (D.R.I. Jan. 4, 2008).

Regarding specific personal jurisdiction, a plaintiff must show both that personal jurisdiction is appropriate under the statue's long-arm statute and that the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). A court must consider:

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[2] Plaintiff admitted previously that she has no factual basis to allege personal jurisdiction over Mrs. Kearney. (*See* transcript of April 7, 2021 hearing in state court, attached as **Exhibit 1**, at 7:2-8.)

[3] This Declaration was previously submitted in support of Mr. Kearney's motion to dismiss the original Complaint. It is re-submitted in support of this Motion because its contents are just as germane to the instant Motion.

> (1) whether the claim 'directly arise[s] out of, or relate[s] to, the defendant's forum state activities;' (2) whether the defendant's in-state contacts 'represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable;' and (3) whether the exercise of jurisdiction is reasonable.

C.W. Downer & Co. v. Bioriginal Food & Sci. Corp., 771 F.3d 59, 65 (1st Cir. 2014).

For the "relatedness" requirement, Plaintiff "must show a nexus between its claims and [Mr. Kearney's] forum-based activities." *A Corp. v. All Am. Plumbing, Inc.*, 812 F.3d 54, 59 (1st Cir. 2016). Plaintiff's claim(s) are not related to Mr. Kearney selling merchandise or soliciting donations; they are based on his writing a story and on what third parties said about the story. There are no allegations in the Amended Complaint that Kearney's websites are targeted at Rhode Island residents, or that they are operated from Rhode Island. They are not. (Kearney Decl. at ¶¶ 4-7, 10, & 22-23.) There is thus no relatedness between Plaintiff's claim(s) and Mr. Kearney's forum-related activities, and this Court lacks personal jurisdiction.

There are no allegations that Mr. Kearney purposefully availed himself of Rhode Island's laws or protections, though this is not the first time someone has tried to sue the Turtleboy publications in Rhode Island based on a theory of mere accessibility. In *Narcisi v. Turtleboy Dig. Mktg*., LLC, 2020 U.S. Dist. LEXIS 160630 (D.R.I. Sep. 3, 2020), this Court correctly analyzed an almost identical situation and found that there was no jurisdiction over the publication or the author, Mr. Kearney. The *Narcisi* analysis clearly applies to Mr. Kearney here, and Plaintiff's claim(s) should be dismissed.

In *Broadvoice, Inc. v. TP Innovations LLC*, 733 F. Supp. 2d 219 (D. Mass. 2010), this Court found personal jurisdiction did not exist over a nonresident defendant who had created a website that attacked a business and its officers. The court found the website did not establish purposeful availment for the personal jurisdiction test, noting that the:

> defamatory website was aimed at Massachusetts only in the sense that it could be accessed by Massachusetts residents (along with the rest of the world). [Defendant] did nothing to incite residents of Massachusetts – as opposed to the world at large – to take up arms against Broadvoice. Nor do [plaintiffs] even allege that [defendants] intended that 'the brunt of the harm' be felt in Massachusetts.

Id. at 226 (quoting *Calder v. Jones*, 465 U.S. 783 at 789-90 (1984). Here, similarly, there are no allegations that Mr. Kearney did anything other than operate a few blogging websites and allow third parties to leave comments on his blog posts. There is no allegation that he targeted any Rhode Island residents or that he intended any harm at all to be felt in Rhode Island. There is no purposeful availment.

In determining reasonableness, a court will consider multiple so-called "gestalt" factors, but this prong "evokes a sliding scale: the weaker the plaintiff's showing on the first two prongs . . ., the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Ticketmaster-New York v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994). Where a plaintiff has failed to demonstrate relatedness or purposeful availment, a court "need not dwell" on these factors. *A Corp*, 812 F.3d at 61-62.

Beyond his operation of two blogs, Plaintiff also asserts personal jurisdiction exists because Mr. Kearney appeared at a hearing on April 7, 2021 before this matter was removed to this Court "and consented to a Court Order and did not contest personal jurisdiction." (Doc. No. 1-2 at ¶ 5.) Mr. Kearney appeared *pro se* at a hearing on a request for a temporary restraining order that Plaintiff made, where the Court specifically refused to permit him to appear remotely. (**Exhibit 1** at 14:20-22; 17:2-6; 30:1-4; 61:6-62:11.) Being a layperson, Mr. Kearney showed up to the hearing, as he believed he had no other option. Mr. Kearney filed no motion and did not seek any relief from the Court, nor did the Court act on anything he did. He did not "consent" to a court order, except to the extent he did not vow to violate a restraining order that had already been entered against him *ex parte*.

Fed. R. Civ. P. 12(h)(1) provides that certain defenses, including lack of personal jurisdiction, are waived in one of two circumstances: "(A) if omitted from a motion in the circumstances described in [Rule 12(g)], or (B) if it is neither made by motion under this rule nor included in a responsive pleading . . . ." This means that a defendant must raise lack of personal jurisdiction "in their first defensive move, be it a Rule 12 motion or a responsive pleading." *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983). The fatal flaw in Plaintiff's argument is that

Mr. Kearney had not filed an answer or a motion to dismiss at the time of the April 7, 2021 hearing, and thus had not made a "defensive move" at that point. His first "defensive move" was filing his motion to dismiss the original complaint on May 21, 2021, which was based in part on lack of personal jurisdiction. There is no authority to suggest that, in opposing a request for injunctive relief made before he has an opportunity to answer, a defendant must assert lack of personal jurisdiction or forever waive it.

A defendant may also waive the defense of lack of personal jurisdiction by conduct or express submission. *Precision Etchings & Findings v. LGP Gem, Ltd.*, 953 F.2d 21, 25 (1st Cir. 1992). "A general appearance does not constitute a waiver of the defense; however, once the defendant appears, he must raise the personal jurisdiction defense in a timely fashion." *Terzano v. PFC*, 986 F. Supp. 706, 710 (D.P.R. 1997) (citing *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983)). Less than two months after making his initial appearance to respond to Plaintiff's request for a restraining order, Plaintiff asserted the defense of lack of personal jurisdiction by a motion to dismiss. This assertion was thus timely and he did not waive this defense. Contrast *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993) (finding personal jurisdiction waived where defendants participated in litigation for 2.5 years before raising defense); *Marcial Ucin*, 723 F.3d at 997 (finding waiver where defendant raised lack of personal jurisdiction defense four years after filing initial appearance).

3.2 Plaintiff Fails to State a Claim Against Defendants

Plaintiff's Amended Complaint should be dismissed out of hand due to its failure even to identify, much less factually substantiate, a claim for relief. Plaintiff does not allege she has suffered any damages, but does assert that the complained-of publications "are of such a nature as to create imminent fear of serious bodily harm that they will bring about the possibility of violence against Plaintiff." (Doc. No. 1-2 at ¶ 17.) As with everything else in the Amended Complaint, there are no factual allegations supporting this conclusion. Furthermore, as with the issue of personal jurisdiction, there is not a single allegation that Mrs. Kearney did anything at all other than reside in Massachusetts. This suit **must** be dismissed as to her, without delay.

3.2.1 Mr. Kearney is Immune Under Section 230

Whatever claim Plaintiff is attempting to bring against Mr. Kearney is immaterial because Section 230 immunizes him. 47 U.S.C. § 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The effect of the statute is to bar '"lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content."' *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 472 (E.D.N.Y. 2011) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)). The statue thus reflects the policy decision by Congress to '"overrule . . . any . . . decisions which have treated [interactive computer service] providers and users as publishers of or speakers of content that is not their own."' *Ascentive*, 842 F. Supp. 2d at 472. Accordingly, "[c]ourts across the country have repeatedly held that the CDA's grant of immunity should be construed broadly." *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 700-01 (S.D.N.Y. 2009). Deciding the applicability of Section 230 on a motion to dismiss is appropriate because "Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009). Dismissal on Section 230 grounds "is appropriate unless the complaint pleads non-conclusory facts that plausibly indicate that 'any alleged drafting or revision by [the defendant] was something more than a website operator performs as part of its traditional editorial function,' thereby rendering it an information content provider." *Westlake Legal Group v. Yelp, Inc.*, 599 F. App'x 482, 485 (4th Cir. 2015).

A provider of an interactive computer service for purposes of the statue is one who operates '"any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."' *Gucci Am. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 412 (S.D.N.Y. 2001); *see Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003). "Courts generally conclude that a website falls within this definition." *Ascentive*, 842 F. Supp. 2d at 473 (collecting cases and finding that operators of consumer review web site were interactive service providers

for purposes of Section 230). Plaintiff pleads no plausible factual allegations in her Amended Complaint that Defendants acted in any capacity other than as the provider of an interactive computer service here, with the sole exception of an allegation that Mr. Kearney published Plaintiff's home address. (Doc. No. 1-2 at ¶ 19.) Even receiving notice that third-party content is unlawful "is not enough to make it the service provider's own speech." *Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007).

An information service provider is distinct from an information content provider, which is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Plaintiff premises this suit on third-party comments published in response to five different blog posts published by Mr. Kearney. (Doc. No. 1-2 at ¶¶ 7-11.) Though Plaintiff references the titles of the blog posts, she does not assert that any of the statements in those posts are actionable, instead choosing only to identify specific statements *authored by third parties*. (*Id*.) Plaintiff asserts Mr. Kearney is liable for these statements because his blog posts "are a conduit for hate speech directed at the Plaintiff and/or his identification with no apparent restrictions or filters set in place to remove hate speech towards her or transgender individuals." (Doc. No. 1-2 at ¶ 12.) Plaintiff alleges he is "acting as a facilitator, host and agent for subscribers who gather and is offering a voice and a platform for hateful speech foreseeably calculated to cause violence on the Plaintiff." (*Id*. at ¶ 13.) Plaintiff then makes the conclusory allegations that the above statements "precipitated violence and death threats against her and her son by unknown third parties,"[4] and that the blog posts "incited lawless conduct." (*Id*. at ¶¶ 14-15.) The information content providers in question are thus the authors of these comments, and not Mr. Kearney himself.

Plaintiff premises liability on the content of statements authored by third parties posted on blogs operated by Mr. Kearney, along with Mr. Kearney allowing such comments to exist on these

[4] This allegation is so tenuous it is almost comical. Plaintiff is alleging that the statements of unidentified third parties caused other unidentified third parties to make unidentified death threats against her. And somehow Mr. Kearney is responsible – and so is his wife.

blogs. The decision of whether to allow a statement to remain on a website is exactly the kind of traditional editorial function to which Section 230 immunity applies. Merely alleging that operating a website somehow makes "it marginally easier for others to develop and disseminate misinformation . . . is not enough to overcome Section 230 immunity." *Lycos*, 478 F.3d at 420. The operation of a website itself also falls within the scope of Section 230:

> If the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider's decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally . . . Lycos's decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting. Section 230 immunity does not depend on the form that decision takes.

Id. at 422; *see also Green v. Am. Online (AOL)*, 318 F.3d 465, 470 (3d Cir. 2003) (finding that liability for the "alleged negligent failure to properly police [AOL's] network for content transmitted by its users . . . would 'treat' AOL 'as the publisher or speaker' of that content"). Mr. Kearney is immune under Section 230, and thus Plaintiff fails to assert a claim. But even if this immunity was not available, Plaintiff has failed to identify or substantiate a claim for relief.

3.2.2 Plaintiff Fails to Assert a Harassment Claim

Because Plaintiff complains of statements that make her fear for her safety and seeks injunctive relief but no damages, it appears she is bringing a claim for harassment under Rhode Island law. Under Rhode Island law, the term "harassing", in general:

> means following a knowing and willful course of conduct directed at a specific person with the intent to seriously alarm, annoy, or bother the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, or be in fear of bodily injury.

Compare R.I. Gen. Laws § 15-15-1; *accord* R.I. Gen. Laws § 11-59-1(2). "Constitutionally protected activity is not included within the meaning of 'course of conduct.'" R.I. Gen. Laws §§ 11-59-1(1) and 15-15-1(1).[5] To date, the Rhode Island Supreme Court has not yet addressed the

[5] Plaintiff has not alleged a statutory claim of harassment. The Supreme Court of Rhode

intersection of a complaint for harassment and the defendant's constitutionally-protected right to free speech. However, Massachusetts and other states have.

In overruling a constitutional challenge to Massachusetts's statute that affords the ability to obtain a harassment protection order against an unrelated person, Mass. Gen. Laws, ch. 258E, the Massachusetts Supreme Judicial Court determined that the statute only deemed "harassment" to include unprotected speech, *i.e.* "fighting words" and "true threats."[6] *O'Brien v. Borowski*, 461 Mass. 415, 425-26, 961 N.E.2d 547, 556-57 (2012). Otherwise, the statute would not survive the freedoms protected by the First Amendment to the United States Constitution and the state constitution. The same is necessarily true of the Rhode Island law on which Plaintiff relies.

As observed in *O'Brien*, "the 'true threat' doctrine applies not only to direct threats of imminent physical harm, but to words or actions that – taking into account the context in which they arise – cause the victim to fear such harm now or in the future and evince intent on the part of the speaker or actor to cause such fear." 461 Mass. at 425. Similarly, the "fighting words" exception "is limited to words that are likely to provoke a fight: face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace." *Id*. at 423. Such provocation must be immediate. *See Byrnes v. City of Manchester*, 848 F. Supp. 2d 146, 157 (D.N.H. 2012) citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

Comments on a blog post, without any implication of immediate physical contact, do not constitute fighting words. "To characterize speech as actionable 'fighting words,' the [plaintiff] must prove that there exist 'a likelihood that the person addressed would make an immediate

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Island has not yet outlined the contours of a common law cause of action for harassment or asserted that the criminal prohibition of harassment contains a private right of action. However, the statutory analogs must be relied upon for purposes of this motion.

[6] Plaintiff makes repeated reference to "hate speech" in the Amended Complaint, but this is a meaningless category. "Hate speech," to the extent anyone can actually explain what this is, has no legal definition. So long as it does not fall into an established category of unprotected speech, "hate speech" receives the full protections of the First Amendment, as does any online platform that chooses to host it. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

violent response.'" (emphasis added) *United States v. Poocha*, 259 F.3d 1077, 1080-81 (9th Cir. 2001) quoting *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). Accordingly, in order to invoke this exception to the First Amendment, Plaintiff would need to allege and show that Mr. Kearney was within physical striking distance of Plaintiff, and Plaintiff would be then unable to control her temper to the point that she would at least morally feel justified in causing him physical harm – all based on the statements of third parties. She has made neither this allegation nor showing. Allowing third parties to comment on a blog post one state away and Plaintiff being upset about it places the parties far from striking distance and at no risk of imminent violence. If Plaintiff's allegations could demonstrate constitutionally unprotected fighting words, perhaps none of us would have ever heard of Bernie Madoff – as all he would have needed to do was to lose control of his emotions when he read Providence Journal articles about his crimes. Simply put, there is no plausible allegation, let alone showing, of fighting words.

Here, Mr. Kearney is not alleged to have even addressed Plaintiff, but rather he addressed third parties. The third parties he addressed are, indeed, the ones who authored the statements Plaintiff alleges are so threatening. These were not face-to-face insults nor were they abusive – much less so abusive as to provoke an immediate violent reaction or breach of peace. Compare *Baker v. Glover*, 776 F. Supp. 1511, 1516 (M.D. Ala. 1991) ("To the extent that there are any true fighting words left, the court is of the opinion that the phrase 'Eat Shit' does not fall within this category. Such words do not 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.'") quoting *Chaplinsky*, 315 U.S. at 572. *See also Nolan v. Krajcik*, 384 F.Supp.2d 447, 459 (D. Mass. 2005) ("the use of epithets or otherwise profane language alone is not a basis for regulating speech as fighting words."); *Commonwealth v. A Juvenile*, 368 Mass. 580, 589, 334 N.E.2d 617 (1975) (noting state cannot sanction "[v]ulgar, profane, offensive or abusive speech" alone under First Amendment). In fact, as a matter of law, because they were not face-to-face, they cannot be actionable. Accord *State v. Dugan*, 2013 MT 38, ¶43, 369 Mont. 39, 54, 303 P.3d 755, 767 (2013) ("Words spoken over the telephone are not proscribable under the 'fighting words' doctrine because the person listening on the other end of the line is unable to react

with imminent violence against the caller.") Thus, none of the allegations relating to Defendant's alleged harassment of Plaintiff constituted unprotected "fighting words"; rather, it all arose from Defendant's Constitutionally protected speech.

Similarly, blog posts and comments on them do not constitute a true threat. They were not directed to Plaintiff—they were directed to the public at large, just like any other news report. "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). "A true threat [is] where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person[.]" *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990). None of the statements at issue involve an expression, serious or otherwise, of an intent to commit an act of violence, and certainly none of Mr. Kearney's alleged conduct communicates such an intent.

Plaintiff claims to have received death threats based on these third-party comments, but the Amended Complaint is bereft of any allegations as to who made these threats, when, or why, except that she makes one thing clear – that whoever made them, it was not Mr. Kearney. Even if these alleged threats came from Mr. Kearney's readers, to adjudge Mr. Kearney liable for the acts of his readers would similarly violate his First Amendment rights. "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 920 (1982). There is no group. There are no unlawful goals. Mr. Kearney had no specific intent to further any illegal activity. Mr. Kearney's First Amendment right to speak about Plaintiff cannot be infringed merely because a reader or viewer did something wrong in response.

Plaintiff also asserts Mr. Kearney "published the address of Plaintiff on his social media platform which is calculated to incite individuals seek [sic] out and foreseeable [sic] injury [sic] Ms. St. Angelo in the manner described in the publications cited above." (Doc. No. 1-2 at ¶ 19.)

As already explained, Mr. Kearney is not liable for any of the statements of third-party commenters. There is no allegation that anyone has actually threatened Plaintiff as a result of publishing her address or that her address was non-public information. The allegation that doing so was "calculated to incite individuals" to seek out and harm Plaintiff is conclusory and should be ignored, as there are no supporting factual allegations as to how publication of an address could even potentially have a tendency to incite others to violence.

4.0 CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's claim(s) for lack of personal jurisdiction or, in the alternative, because Plaintiff has failed to state a claim for relief.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Defendants request oral argument and estimate that 30 minutes will be required.

Respectfully submitted,

Defendants Aiden & Julianne Kearney,
By their attorneys,

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Dated: June 22, 2021

CERTIFICATE OF SERVICE

I, Sean McAteer, hereby certify that a true and correct copy of the foregoing document was served upon all attorneys of record in the State Court case by electronic mail and First-Class Mail, postage prepaid, this 22nd day of June 2021, as follows:

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/s/ Sean M. McAteer
Sean M. McAteer