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April 28, 2017

Via Overnight Mail
Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08625-0970

Re: Petro-Lubricant Testing Labs., Inc. v. Asher Adelman
Docket No. 078597

Dear Honorable Justices of the Supreme Court:

Please accept this letter brief, in lieu of a more formal brief, on behalf of proposed *Amicus Curiae* American Civil Liberties Union of New Jersey ("ACLU-NJ").

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PRELIMINARY STATEMENT

The ACLU-NJ files this brief to encourage the Court to affirm the Appellate Division's holding that the single publication rule rendered Plaintiffs' claims time-barred. In accordance with case law from other jurisdictions and several important public policies, where an author edits time-barred content on the Internet, "republication," which triggers a new time limitations period, does not occur unless 1) the author intended to and did reach a new audience when it edited the old content; and 2) the edits constituted "material and substantial" changes to the old content. However, even where edits may be considered "material and substantial," if they were made to remove the sting of allegedly defamatory material or to soften the tone of the material, the single publication rule should still apply.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

ACLU-NJ adopts the Statement of Facts and Procedural History as stated by Defendant Asher Adelman, but highlights the following:

In August 2010, Defendant published a post on the eBossWatch.com blog which summarized a hostile work environment complaint that had been filed against Plaintiffs. Ja20. In December 2011, in response to a threatening letter he received from Plaintiffs' attorney, Defendant Adelman edited the August

2010 post about the lawsuit. Compare Ja13 to Ja20. The December 2011 alterations did not change the "post published" date, which remains "03 August 2010." Ja20. Defendant testified that the August 2010 post was "updated" in 2011, that he made "minor modifications" to it, and that "[t]here's no indication on the article anywhere that any changes were made or that it's not the article from 2010." Ja220; 99:6-14; 99:20-25.

LEGAL ARGUMENT

I. THE DECEMBER 2011 CHANGES TO THE AUGUST 2010 ARTICLE DID NOT CONSTITUTE A REPUBLICATION THAT TRIGGERED A NEW STATUTE OF LIMITATIONS PERIOD

In New Jersey, "[e]very action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander." N.J.S.A. 2A:14-3. New Jersey follows the single publication rule for mass publications, which means that a single cause of action arises at the first publication of defamatory content regardless of how many copies of the publication are subsequently distributed or sold. Barres v. Holt, Rinehart & Winston, Inc., 131 N.J. Super. 371, 374-375, 379, 390 (Law Div. 1974), aff'd o.b., 141 N.J. Super. 563 (App. Div. 1976), aff'd o.b., 74 N.J. 461 (1977). In adopting the single publication rule, New Jersey rejected the common law "multiple publication" approach, pursuant to which "each repetition of a libel, for example, each sale of a publication,

would create a new cause of action." Churchill v. State, 378 N.J. Super. 471, 478 (App. Div. 2005).

The public policy underlying the single publication rule reinforces New Jersey's short statute of limitations period for libel claims and protects publishers from endless claims:

> The single publication rule prevents the constant tolling of the statute of limitations, effectuating express legislative policy in favor of a short statute of limitations period for defamation. It also allows ease of management whereby all the damages suffered by a plaintiff are consolidated in a single case, thereby preventing potential harassment of defendants through a multiplicity of suits.
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> [Id. at 479.]

In Churchill, the Appellate Division applied the single publication rule to the Internet,[1] which was an important step in

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[1] Though this Court has not yet applied the single publication rule to an Internet publication, it should do so because the Court has declined to treat speech on the Internet differently than other forms of speech. See, e.g., Too Much Media, LLC v. Hale, 206 N.J. 209, 225 (2011) (citing Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997) (finding that there was "no basis" for treating speech on the Internet differently under the First Amendment). Moreover, "every state court that has considered the question applies the single-publication rule to information online." Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 615 (7th Cir. 2013). See also Larue v. Brown, 333 P.3d 767, 772 (Ariz. Ct. App. 2014); Christoff v. Nestle USA, Inc., 213 P.3d 132 (Cal. 2009); T.S. v. Plain Dealer, 954 N.E.2d 213 (Ohio Ct. App. 2011); Ladd v. Uecker, 780 N.W.2d 216 (Wis. Ct. App. 2010); Kaufman v. Islamic Soc. of Arlington, 291 S.W.3d 130 (Tex. App. 2009); Woodhull v. Meinel, 202 P.3d 126 (N.M. Ct. App. 2008); Mitan v. Davis, 243 F. Supp. 2d 719, 724 (W.D. Ky. 2003); McCandliss v. Cox Enterprises, Inc., 593 S.E.2d 856, 858

advancing the single publication rule's underlying public policies, as "[c]ommunications accessible over a public [w]eb site resemble those contained in traditional mass media, only on a far grander scale . . . [and] may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time." Id. at 480 (quoting Firth v. State, 775 N.E.2d 463, 465-66 (N.Y. 2002)). Thus a multiple publication rule "would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise." Ibid.

An exception to the single publication rule is "republication." Firth, supra, 775 N.E.2d at 466.[2] "Republication triggers the start of a new statute of limitations and occurs upon a separate aggregate publication

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(Ga. Ct. App. 2004), overruled on other grounds by Infinite Energy, Inc. v. Pardue, 713 S.E.2d 456 (Ga. Ct. App. 2011); Traditional Cat Ass'n, Inc. v. Gilbreath, 13 Cal. Rptr. 3d 353, 361-62 (Ct. App. 2004); Firth v. State, 775 N.E.2d 463 (N.Y. 2002). "[F]ederal courts that have addressed the topic have concluded that the relevant state supreme court would agree." Pippen, 734 F.3d at 615 (citing Shepard v. TheHuffingtonPost.com, Inc., 509 Fed. Appx. 556 (8th Cir. 2013) (Minnesota law); In re Philadelphia Newspapers, LLC, 690 F.3d 161, 174-75 (3d Cir. 2012), as corrected (Oct. 25, 2012) (Pennsylvania law). See also Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137, 144 (5th Cir. 2007) (Texas law).

[2] Because there is a "dearth of New Jersey case law discussing the single publication rule in any context," Churchill, supra, 378 N.J. Super. at 479, the Court should look to the case law from other jurisdictions for guidance.

from the original, on a different occasion, which is not merely a delayed circulation of the original edition." Atkinson v. McLaughlin, 462 F. Supp. 2d 1038, 1052 (D.N.D. 2006). Although this concept is somewhat straightforward when it comes to the republication of "hardcopy" printed media, such as releasing a new edition of a book, it is more complex when it comes to Internet publications, which are in "softcopy" form and can be easily modified as many times as an author wishes. There is no case law directly on point with the facts of this case, where a publisher slightly modified a web posting more than a year after it was originally published in order to soften its tone. As argued below and supported by case law from other jurisdictions, ACLU-NJ submits that a "republication" does not occur when an Internet post is modified unless 1) the author intended to and did reach a new audience when it modified a web post and 2) the modifications constitute material and substantial alterations. Further, as a matter of public policy, even where content is materially and substantially altered, if the changes soften the defamatory content, then the changes should not be considered a "republication" that triggers a new statute of limitations period.

A. Republication Occurs Only Where There Was an Intent to Reach a New Audience and the Content Did Reach a New Audience

Cases that have contemplated whether changes to a website constitute "republication" have focused on whether the author intended to and did reach a new audience. See, e.g., Firth, supra, 775 N.E.2d at 466 ("The justification for [the republication] exception to the single publication rule is that the subsequent publication is intended to and actually reaches a new audience"); Atkinson, supra, 462 F. Supp. 2d at 1052 ("It is clear that the justification for this holding is that the second publication is intended to and does reach a new audience."). The cases draw their reasoning from the Restatement (Second) of Torts, which states:

> So far as the cases heretofore decided indicate, the single publication rule stated in Subsection (3) does not include separate aggregate publications on different occasions. Thus if the same defamatory statement is published in the morning and evening editions of a newspaper, each edition is a separate single publication and there are two causes of action. The same is true of a rebroadcast of the defamation over radio or television or a second run of a motion picture on the same evening. In these cases the publication reaches a new group and the repetition justifies a new cause of action. The justification for this conclusion usually offered is that in these cases the second publication is intended to and does reach a new group.
>
> [Restatement (Second) of Torts § 577A, Comment d (1977).]

Thus, even in instances where online content is reposted on a website, courts have held that there is no republication unless

the author intended to reach a new audience. See, e.g., Martin v. Daily News L.P., 990 N.Y.S.2d 473, 484 (App. Div. 2014) (holding there was no republication where a newspaper reposted three-year-old columns to its website after it noticed the columns were inadvertently deleted when it switched to a new online content-management system).

"[M]any Web sites are in a constant state of change, with information posted sequentially on a frequent basis," Firth, supra, 775 N.E.2d at 467, but not every change to old content is intended to reach a new audience. In this case, there is nothing in the record which suggests that the December 2011 alterations to the August 2010 web post were intended to reach a new audience. Defendant testified that he made the alterations in 2011 to the 2010 post simply to appease the Plaintiffs after receiving their threatening letter. Ja220; 99:9-20. The post remained located in the August 2010 section of the website's archives and retained its "03 August 2010" publication date. Ja14. There is also nothing in the record that indicates that the 2011 changes caused the 2010 post to rise to the website's home page with new blog entries, nor anything in the record that demonstrates that attention would have been drawn to the revised August 2010 post by new visitors of the website. As Defendant testified, "[t]here's no indication on the article anywhere that

any changes were made or that it's not the article from 2010." Ja220; 99:6-14; 99:20-25.[3]

In other words, all Defendant did was go into an old post and re-phrase some of the language. The mere modification of old content on the Internet, without taking any actions to bring the old content to a new audience, should not trigger a new statute of limitations period.

B. Republication Occurs Only Where Content is Materially and Substantially Changed

Even where an author intends for old content to reach a new audience, there still is not republication unless the old content was also materially and substantially altered. Atkinson, supra, 462 F. Supp. 2d at 1055. For example, if a person creates an entirely new online article that hyperlinks to an old article that contains defamatory content, no republication has occurred even though the author's intent was clearly to bring attention to the old, defamatory article and have it reach a new audience. See, e.g., In re Philadelphia Newspapers, supra, 690 F.3d at 175 ("Websites are constantly linked and updated. If each link . . . [was] an act of

[3] While the change to the August 2010 article's headline automatically resulted in a new URL address for the post (Ja221-222), courts have held that re-locating an article at a new URL address does not constitute republication. See, e.g., Canatella v. Van De Kamp, 486 F.3d 1128, 1135 (9th Cir. 2007) (noting that "due to the continually evolving nature of technology," URL addresses often change even when a page's content does not).

republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated."); Salyer v. Southern Poverty Law Center, Inc., 701 F. Supp. 2d 912 (W.D. Ky. 2009) (holding hyperlink to old article "is simply a new means for accessing the referenced article," not a republication). Similarly, if a website is technologically changed so that old, defamatory content may be accessed in new ways, there is no republication. See, e.g., Churchill, supra, 378 N.J. Super. at 478 (holding multiple modifications to state's website that contained an allegedly defamatory investigative report did not constitute republication, even where a menu bar titled "investigative reports" was added to make it easier to find the allegedly defamatory investigative report).

What constitutes "material and substantial alterations" has not been clearly defined by case law. One court has held that there is no republication "so long as there is not substantive editing of the content such that it becomes a *'new' story*." Ghrist v. CBS Broad., Inc., 40 F. Supp. 3d 623, 628 (W.D. Pa. 2014) (emphasis added). Another court has held there is no republication so long as the edited or new content is "*qualitatively* identical" to the original. Rare 1 Corp. v. Moshe Zwiebel Diamond Corp., 822 N.Y.S.2d 375, 377 (N.Y. Sup. Ct. 2006) (emphasis added).

The plain meaning of the terms suggest that minor alterations or the mere rewording of an online article would not constitute material and substantial changes. See ALTERATION, Black's Law Dictionary (10th ed. 2014) ("Material alteration: A significant change in something; esp., a change in a legal instrument sufficient to alter the instrument's legal meaning or effect"); SUBSTANTIAL, Black's Law Dictionary (10th ed. 2014) ("Of, relating to, or involving substance; material."). In contrast, where entirely new content is added to an old webpage and that new content relates to the old defamatory material, republication occurs. See In re Davis, 347 B.R. 607, 612 (W.D. Ky. 2006) (holding defendants had republished a website containing allegedly defamatory material when they updated it to add "Breaking News!" and "Update!" sections which "list[ed] additional nefarious activities in which [the plaintiffs were] ... alleged to have participated.").

In this case, although there were admittedly some modifications made to the August 2010 post in December 2011, the post remained "*qualitatively* identical" to how it first appeared in August 2010 and no allegedly defamatory charges were added. Rare 1 Corp., supra, 822 N.Y.S.2d at 377. The December 2011 alterations certainly did not amount to making the August 2010 post a "new story," as there was no new substantive content added to the post, which remained posted in the website's August

2010 archive. Rather, certain paragraphs in the August 2010 article were merely reworded "to make it even more clear than it already was that that these allegations [in the posting] are simply [reporting] allegations that were made in the complaint." Ja220; 100:14-20.

Even Plaintiffs themselves stated in a pleading that "[w]ith the exception of a *few minor changes*, the second publication is *almost identical* to the original publication." (emphasis added). Ja413. Their own table on page 12 of their Appellate Division brief, which purports to show "significant changes" between the August 2010 version and the December 2011 version of the post, actually shows that no changes were material or substantial. As the Appellate Division correctly noted, both versions of the article were six paragraphs long and the fourth, fifth, and sixth paragraphs were identical.

Although the first and second paragraphs were slightly reworded, the changes were immaterial and the two versions remained substantially the same. "After witnessing and enduring 17 years of abuses while working as a chemist at Petro-Lubricant . . ." (Ja20) in the 2010 version was reworded to "After working as a chemist for 17 years at Petro-Lubricant . . ." in the 2011 version. Ja13. Similarly, "Laforgia claims that she realized early on in her employment with Petro-Lubricant that she entered a 'bizarre work environment'" was slightly changed to "According

to the 11-page complaint, Laforgia claims that 'within several days of starting at Petro-Lubricant, it became clear to Laforgia that she had entered a bizarre environment.'" Ja20. Neither of these changes were material and substantial changes, as they did not change the "meaning and effect" of the paragraphs.

Because paragraphs one, two, four, five, and six clearly were only minor, non-material alterations of the original, the Appellate Division focused on the third paragraph of the article. The original August 2010 version of the post stated:

> Laforgia claims that John Wintermute is a violent bully, a racist, and a womanizer who regularly brought guns to the workplace and target practiced, hunted and gutted birds, which he then fed to his guard dogs, on company property. He also allegedly forced workers to listen to and read white supremacist materials, drank alcohol regularly throughout the workday, and was a violent, raging drunk.
>
> [Ja20.]

The December 2011 altered version of the post stated:

> Laforgia claims that John Wintermute is a "dangerous and violent alcoholic" who allegedly regularly brought guns to the workplace and target practiced, hunted and gutted birds, which he then fed to his dogs, on company property. John Wintermute also allegedly regularly subjected his employees to "anti-religion, anti-minority, anti-Jewish, anti-[C]atholic, anti-gay rants."
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> [Ja13-14.]

The Appellate Division correctly held that the "differences

between the articles are immaterial" because the "alleged defamatory information is the same in both articles." Petro-Lubricant Testing Labs., Inc. v. Adelman, 447 N.J. Super. 391, 401 (App. Div. 2016). The third paragraph was "minimally altered to quote specific phrases contained in the complaint," but the substance of the content nonetheless "stayed constant."[4] Ibid. The "meaning and effect" of the 2010 article remained "qualitatively" the same after the 2011 alterations were made, but the paragraph was softened so that the actual language from the complaint was used rather than a characterization of the allegations in the complaint. No entirely new charges were added.

Because there was no intent to bring the modified August

[4] To the extent that the December 2011 version of the post provided more specifics than the earlier post ("anti-religion, anti-minority, anti-Jewish, anti-[C]atholic, anti-gay" rather than "white supremacist"), it also reflected an attempt to soften the tone, as discussed, infra, Point I, C. Indeed, the term "white supremacist" is widely understood to include animus based on race, religion, and sexual orientation. See, e.g., Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (noting that in a Ku Klux Klan ceremony, the cross is used as a symbol for white supremacy and the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and other groups). Although the December 2011 version uses specific terms instead of the umbrella term "white supremacy," the modifications are protected by the fair-report privilege because they are direct quotations from Laforgia's complaint. See Salzano v. N. Jersey Media Grp. Inc., 201 N.J. 500, 520 (2010). It would be inequitable to subject Defendant to a new time period of liability where the modifications were made in response to an attorneys' letter and the modified content is protected by a privilege.

2010 article to a new audience in December 2011 when the modifications were made and because the changes were not material or substantial, this Court should hold that there was no republication which triggered a new statute of limitations time period.

C. Even if the Changes Can be Considered "Material and Substantial," Important Public Policy Considerations Weigh Against Finding a Republication Occurred Where The Content is "Softened"

Even if the Court did find the December 2011 alterations to the August 2010 to be material and substantial, several important public policy reasons weigh against finding that a republication occurred in this case. First, authors should not be subjected to new liability when the material modification of the article serves to soften the content, especially when that occurs after being contacted by a reader who is unhappy with an article or claims the material is defamatory. Our State has a "clear and long-standing public policy" in favor of not punishing "prompt remedial measures" by a person who is notified of an existing harm. Szalontai v. Yazbo's Sports Cafe, 183 N.J. 386, 402 (2005). This means that in a defamation context, our courts should not punish authors who try to appease those who complain about potentially defamatory content by rewording online articles, so long as no entirely new defamatory content is added.

This is especially true in the context of the Internet, a medium that has permitted individuals to take on the role of "citizen journalists" and reach audiences far wider than they could have ever reached simply by handing out pamphlets on a street corner or publishing a print newsletter:

> The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.
>
> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information.
>
> . . .
>
> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.
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> [Reno, supra, 521 U.S. at 870.]

The Internet has resulted in hundreds of digital publications here in New Jersey, using platforms such as "TapInto.net"[5] and "Patch.com"[6] to bring local news to citizens.

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[5] "TAPinto.net covers more than 100 towns in New Jersey and New York and is accredited by the New Jersey Press Association." https://www.tapinto.net/pages/about-us.

Although some of these sites are run by journalists with professional training, many are not and they do not have access to the same resources that traditional news organizations might have, such as legal counsel. This case presents the risks of such a scenario, where a perhaps unsophisticated digital publisher was lured into changing content that was already time-barred because he received a threatening letter from a lawyer and feared being sued. Defendant's minor alterations to the article, done in response to the letter and with the intent to make it even clearer to the public that he was simply reporting on what was alleged in a lawsuit, should not lead to him losing the protection of the single publication rule.

Second, this Court has recognized that there is a great responsibility placed upon the media to report fully and accurately to the public. See Salzano, supra, 201 N.J. at 513 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975)). News organizations thus need the ability to edit their online content when they know that errors have been made without opening themselves up to new time periods for defamation claims. Articles can be corrected in real time when an author is

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[6] Patch.com is a "community-specific news, information and engagement network driven by passionate and experienced media professionals" and "welcomes and encourages community members to post directly to the site." https://patch.com/about. It publishes in approximately 90 towns in New Jersey. https://patch.com/new-jersey

notified of an inaccuracy and thus the public can depend on the online articles they read being up-to-date and accurate. If the Court finds that republication occurred in this case, news sites might be leery of even adding an "editor's note" at the top of a webpage to point readers to corrections in the article below or to update the readers on events that occurred after the article was first published. Because the media serves as the "eyes and ears" of the public, South Jersey Pub. Co. v. New Jersey Expressway Auth., 124 N.J. 478, 496 (1991), any rule that dissuades corrections to online news articles will result in a less informed citizenry.

Finally, defamation cases like this require the balancing of "two competing interests - the right of individuals 'to enjoy their reputations unimpaired by false and defamatory attacks,' and the right of individuals to speak freely and fearlessly on issues of public concern in our participatory democracy." Senna v. Florimont, 196 N.J. 469, 479 (2008) (Swede v. Passaic Daily News, 30 N.J. 320, 331 (1959)). This Court has recognized that the "fair-report privilege" immunizes "full, fair, and accurate" accounts of judicial proceedings, including complaints filed in civil cases. Salzano, supra, 201 N.J. at 516-522. "The fair-report privilege reflects the judgment that the need, in a self-governing society, for free-flowing information about matters of public interest outweighs concerns over the uncompensated injury

to a person's reputation." Id. at 513. To bolster this privilege and preserve the short statute of limitations for defamation claims, our courts must adopt rules that make it more difficult to raise a defamation claim against an author reporting on a judicial proceeding, not easier.

The August 2010 article in its original format was shielded because it represented a full, fair and accurate portrayal of what was alleged in Laforgia's complaint and thus Defendant was shielded from any liability pursuant to the fair-report privilege. The December 2011 alterations were made in response to a threatening letter that Defendant received and simply modified the original post so that direct quotes from the complaint were provided "to make it even more clear than it already was that that these allegations are simply allegations that were made in the complaint." Ja220; 100:14-20. Both the original post and the December 2011 alterations fall directly in line with the fair-report privilege.

An author should not be potentially subjected to new liability by performing minor edits to an article to ensure that it is even clearer that what is being reported is merely a replication of what was alleged in a publicly filed lawsuit. Permitting such conduct to constitute republication certainly does not advance "the right of individuals to speak freely and fearlessly on issues of public concern in our participatory

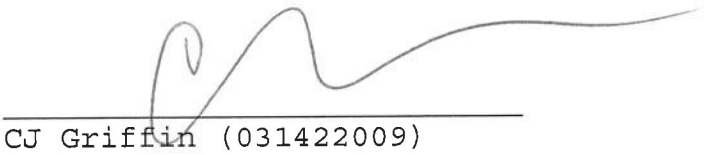
democracy." Senna, supra, 196 N.J. at 479. If such minor changes constitute republication and subject an author to a new time period for liability, there will no doubt be a chilling effect on such corrective speech.

Accordingly, because Defendant did not intend to reach a new audience when he edited the August 2010 post in December 2011, and because those edits were not material or substantial and only softened the sting of the alleged defamatory content, there was no republication and the Plaintiffs' claims are barred by the single publication rule.

CONCLUSION

For the reasons argued above, this Court should affirm the Appellate Division's decision.

Respectfully Submitted,



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