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September 23, 2019

Via Hand Delivery and First Class Mail

Mescal J-6 Fire District Board
98 North Oak Drive
Benson, AZ 85602

RE: August 16, 2019 Retraction Letter

Dear Members of the Board:

This letter is in response to your August 16, 2019 letter to Mary McCool ("McCool") and the J-6/Mescal Community Development Organization (the "CDO") in which you demand the CDO retract certain portions of its August newsletter pursuant to A.R.S. § 12-653.02. Specifically, this letter is to decline your demand and outline why (1) the statute does not apply and (2) any legal action threatened by the Mescal-J6 Fire District (the "District") or its individual board members is legally frivolous and without merit. Additionally, demand is hereby made that the Fire District and its individual board members cease and desist from making any further libelous or slanderous statements about McCool, the CDO, and any of its other members whether in official District publications or at District board meetings.

First, A.R.S. § 12-653.02 is inapplicable to the CDO's newsletter. The statute applies to magazines and newspapers which are defined as publications "which may be mailed at the second-class rates established by the United States post office." A.R.S. § 12-653.01(4). Clearly, the newsletter posted online by the CDO does not meet this definition. Further, the statute simply allows a plaintiff who was libeled to recover additional damages if the plaintiff makes the demand for retraction, the retraction is not made, *and* "his cause of action is maintained." *Id.* at 653.03. The statute does not allow a person, entity, and especially a public agency, to demand private citizens remove unflattering online publications about the person or entity.

Second, even if the retraction statute did apply to the CDO newsletter, the District could not maintain a cause of action for libel against McCool, the CDO, or any of its other members because the District is a governmental agency. The United States Supreme Court has expressly stated that "[f]or good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *New York Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964). Even more

emphatically, the Supreme Court followed up by stating in a different case that "the Constitution does not tolerate in any form" "prosecutions for libel on government." *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (emphasis added). The Supreme Court is clear: government entities cannot sue private citizens for libel. Such an action would be directly contrary to the purpose of the First Amendment and therefore such demands have no "place in the American system of jurisprudence."

Similarly, the District's individual board members also cannot maintain a cause of action against McCool , the CDO, or any of its other members. The District's board members are public elected officials. The District's actions as a public agency are of public concern. Under the First Amendment, "[a] statement regarding matters of public concern must be provable as false before a defamation action can lie. Because truth is an affirmative defense, the burden of proving falsity lies only on those plaintiffs who are defamed by speech that is a matter of public concern." *Turner v. Devlin*, 174 Ariz. 201, 205, 848 P.2d 286, 290 (1993) (internal citations omitted). "To be actionable" words alleged to be libelous "must be capable of being reasonably interpreted as stating actual facts about" the plaintiff bringing the action. *Turner v. Devlin*, 174 Ariz. 201, 207, 848 P.2d 286, 292 (1993). Furthermore, a statement about a public official must be made with "actual malice," meaning that it was made with knowledge of its falsity or with reckless disregard of whether it was true or false before the speaker can be held responsible for defamation. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Specifically, "an other wise impersonal attack on governmental operations" cannot, as a matter of constitutional law, "be utilized to establish…a libel of an official responsible for those operations." *Rosenblatt*, 383 U.S. at 81.

The statements made in the CDO newsletter are protected by all of the tests outlined in the preceding paragraph. None of the statements you cite in your August 16, 2019 letter are "capable of being reasonably interpreted as stating actual facts about" individual District board members. None of the District's board members' names are mentioned in any of the statements you cite in the letter and no specific individuals are even referenced. All of the statements in the letter are regarding the District's financial operations and are therefore a matter of public concern. Based on emails and recordings of conversations between CDO board members and various employees of the State of Arizona, everything contained in the CDO newsletter is true. Even if the statements about the District's operations were false, the CDO newsletter was an "impersonal attack on governmental operations" and therefore, as a matter of law, cannot "be utilized to establish…libel of" District board members. As a result, based on general principles of defamation law and because the District's board members are public officials, none of the District's individual board members may maintain an action against McCool , the CDO, or any of CDO's other members for defamation.

If the District decides to proceed with legal action against McCool , the CDO, or any of its members, we will seek dismissal of the action under Arizona's Anti-Strategic Lawsuits

Against Public Participation ("Anti-SLAPP") law, A.R.S. § 12-752, and recovery of all attorneys' fees incurred in obtaining dismissal of the action pursuant to that statute.

Additionally, demand is hereby made that the District and its individual board members cease and desist from making defamatory statements about McCool , the CDO, or any of its other members at the District's public meetings or in official District publications. If the District or its individual board members continue with such defamatory acts, those individuals and the CDO are prepared to pursue all legal action to protect their own reputations.

Thank you for your attention to this matter. Please feel free to contact me at the above listed email or phone number if you have any further questions regarding this matter.

Sincerely,

Lisa Anne Smith

c: Mark Lee, Chair
Bruce Andrews, Member and Clerk of the Board
Mary Bowen, Member
Owen Kieley, Member
Brian Hughes, Member
J-6/Mescal CDO

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