IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL ACTION

TRICIA MEZZACAPPA,	)	
Plaintiff	)	**No. C-48-CV-2014-4521**
	)	
v.	)	
	)	
BERNIE O'HARE,	)	
Defendant	)	

OPINION OF THE COURT

This matter is before the Court on the "Preliminary Objections of Defendant Bernie O'Hare to the Complaint," which were filed on June 3, 2014.[1] On May 15, 2014, Plaintiff filed a Complaint, in which she alleges

[1] On the same date, Defendant filed a "Motion to Dismiss Count VII of Plaintiff's Complaint as Frivolous Litigation, Pursuant to [Pa.R.C.P. 233.1]" and a "Motion to Dismiss Pursuant to Pa.R.C.P. 240(c)(1)(ii)." By an Order of Court filed on November 6, 2014, the Honorable Stephen G. Baratta granted the former Motion and denied the latter. In that Order, President Judge Baratta refrained from ruling on the instant Preliminary Objections because Plaintiff had filed an Amended Complaint on August 29, 2014, rendering the instant objections, for the time being, moot, as Defendant had filed Preliminary Objections to the Amended Complaint on September 16, 2014, and they had been assigned to the Honorable Michael J. Koury, Jr. but had not yet been disposed of. On November 12, 2014, Judge Koury filed an Order of Court sustaining those objections and striking the Amended Complaint. In that Order, Judge Koury instructed Defendant to file a praecipe to place the instant Preliminary Objections onto the next available Argument Court list, stating, "As a result of [Plaintiff's] Amended Complaint being stricken, [Defendant's] preliminary objections to [Plaintiff's] original complaint are no longer moot." Those objections were

that, from April 1, 2013, to present, she has been the target and subject of defamatory content and comments posted on the Internet blog Lehigh Valley Ramblings ("Blog"),[2] a website owned and operated by Defendant.[3] (Compl. ¶¶ 4-5.) Plaintiff's Complaint contains six counts, which state various claims for defamation and invasion of privacy.[4] Defendant's Preliminary Objections consist of demurrers to all of the remaining counts, asserted under alternative theories outlined in five objections. The Court will address one initial matter before turning to Defendant's demurrers.

On December 9, 2014, Defendant filed a Supplemental Brief in support of the instant Preliminary Objections, wherein he argues that Plaintiff's filing of the Amended Complaint rendered her original Complaint a legal nullity and that, following Judge Koury's striking of the Amended Complaint, the Court may not resurrect Plaintiff's original Complaint, rendering the instant Preliminary Objections moot and the case complete. In support of this argument, Defendant cites to *Hionis v. Concord Twp.*, 973 A.2d 1030, 1036 (Pa. Commw. 2009), which states that "[a]n amended complaint has the effect of eliminating the prior complaint." However, this proposition would

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subsequently placed onto the Argument Court list of December 9, 2014, and were submitted to the undersigned for disposition on brief.

[2] The Blog is located at uniform resource locator ("URL") http://lehighvalleyramblings.blogspot.com. (Compl. ¶ 5.)

[3] In the interest of judicial economy, rather than reproduce, at length, the complained-of content and comments at the outset, the Court will wade into the specifics of the same only as is necessary to dispose of Defendant's objections.

[4] Plaintiff's Complaint also included a claim for fraud in Count VII. As noted above, that claim was dismissed by President Judge Baratta's Order filed on November 6, 2014.

only apply with the result Defendant desires if Defendant had not himself prompted the dismissal of the Amended Complaint by filing Preliminary Objections to it.

In *Vetenshtein v. City of Philadelphia*, 755 A.2d 62 (Pa. Commw. 2000), the Commonwealth Court encountered the inverse of the instant procedural posture, and its reasoning illustrates why Defendant's argument is misplaced. In *Vetenshtein*, the plaintiffs filed a second amended complaint without consent of the adverse parties or by leave of court, in violation of Pennsylvania Rule of Civil Procedure 1033. *Id.* at 64. The second amended complaint removed several claims against the defendant, City of Philadelphia ("Philadelphia"), that were based on federal law and were in the plaintiffs' original complaint and first amended complaint. *Id.* at 64-65. Philadelphia filed an answer to the second amended complaint. *Id.* at 65. One week prior to trial, Philadelphia filed a motion in limine, asking the trial court to preclude the plaintiffs from presenting any evidence in support of the federal claims on the basis of the statute of limitations. *Id.* The trial court granted the motion in limine. *Id.* at 65. On appeal, the plaintiffs argued that, because they had filed their second amended complaint in violation of the Rule 1033, it was a nullity, and the first amended complaint, which contained the federal claims, was the operative pleading. *Id.* at 65-66. The Commonwealth Court rejected the plaintiffs' argument, reasoning that

> the second amended complaint . . . was filed by the Prothonotary. Although the second amended complaint did not strictly conform to [Rule] 1033, it was filed of record with the trial court and did constitute a pleading, albeit not in strict compliance with the rules. However, neither obtaining leave of court [n]or obtaining the filed consent of the defendant involves a matter of jurisdiction and can be waived by failure of opposing counsel to file preliminary objections for failure of the amended complaint to conform to the rules of court. Such a waiver occurred in this case. After [the plaintiffs] filed the second amended complaint, Philadelphia did not object to the [plaintiffs]' failure to obtain the trial court's express consent or to [the plaintiffs]' failure to file Philadelphia's written consent to the amendment. *Because Philadelphia never filed objections to the second amended complaint, it became the operative complaint.* Hence . . . it was the docketing of the second amended complaint by the Prothonotary and Philadelphia's failure to file preliminary objections to the filing of the second amended complaint that effected an amendment of the pleadings in this case by waiving the protection afforded Philadelphia in [Rule] 1033. *See, e.g., Skelton v. Lower Merion Township,* 318 Pa. 356, 178 A. 387 (1935) (when an amendment occurs, it virtually withdraws the originally filed pleading); 5 *Standard Pa. Practice 2d,* 34:89 ("[W]hen an amended complaint is filed it withdraws the original complaint and takes the place of the original pleading . . . [.]"). Since the second amended complaint was the effective complaint and it did not contain any allegations of a federal claim, the trial court did not err in precluding evidence of the federal claims.

Id. at 67 (emphasis added) (citation omitted) (footnotes omitted).

Here, unlike Philadelphia in *Vetenshtein*, Defendant did not waive the issue of Plaintiff filing the Amended Complaint in violation of Rule 1033 because he filed preliminary objections to it. Those objections were successful, and the Amended Complaint was stricken for one reason—Plaintiff's violation of Rule 1033. (*See* Order of Court, Nov. 12, 2014.) Thus, unlike the second amended complaint in *Vetenshtein*, Plaintiff's

Amended Complaint *never became* the operative pleading, and Plaintiff's Complaint is, therefore, not a legal nullity but, in fact, the operative pleading. Accordingly, Defendant's supplemental argument must be rejected.

Having determined that Plaintiff's Complaint is the operative pleading and that Defendant's Preliminary Objections are ripe for disposition, the Court will now turn to Defendant's demurrers. The question presented by a demurrer is whether, on the facts pleaded, the law says, with certainty, that no recovery is possible. *Orange Stones Co. v. City of Reading*, 87 A.3d 1014, 1021 n.7 (Pa. Commw. 2014). The Court must resolve a demurrer solely on the basis of the pleadings, without reference to testimony or other outside evidence. *Hill v. Ofalt,* 85 A.3d 540, 546 (Pa. Super. 2014). When considering a demurrer, the Court must accept, as true, all material facts averred in the challenged pleading, as well as all inferences that can be reasonably deduced therefrom. *Schemberg v. Smicherko*, 85 A.3d 1071, 1073 (Pa. Super. 2014).

> Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Id.

The Court will first address Defendant's third and sixth objections, which are demurrers to Counts V and IV of the Complaint, respectively. Both of those counts concern Defendant's alleged publication of certain character references listed by Plaintiff in her confidential application for a permit to carry a concealed firearm. In Count IV, Plaintiff brings a claim for unreasonable publicity given to private life and in Count V a claim for false-light publicity. These claims constitute alternative versions of the tort of invasion of privacy.

> In *Vogel v. W.T. Grant Co.,* 458 Pa. 124, 327 A.2d 133 (1974), the Pennsylvania Supreme Court adopted section 652 of the Restatement (Second) of Torts, Tentative Draft, as the law of this Commonwealth. Pursuant to section 652, the cause of action for invasion of privacy is not one tort, but four. This complex of theories consists of (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness for commercial purposes; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. *Curran v. Children's Service Center,* 396 Pa. Super. 29, 578 A.2d 8 (1990), *allocatur denied,* 526 Pa. 648, 585 A.2d 468; *Harris by Harris v. Easton Publishing Co.,* 335 Pa. Super. 141, 483 A.2d 1377 (1984).

Jenkins v. Bolla, 600 A.2d 1293, 1295-96 (Pa. Super. 1992).

With regard to Defendant's demurrer to Count IV, as raised in his sixth objection, "[t]he publicity-given-to-private-life tort requires (1) publicity, given to (2) private facts, (3) which would be highly offensive to a reasonable person, and (4) is not of legitimate concern to the public." *Id.* at 1296. There is no doubt that Defendant gave publicity to the identity of

Plaintiff's character references when he wrote on the Blog, "I told you that Northampton County Council candidate Tricia Mezzacappa listed Executive John Stoffa and Attorney Rick Orloski as her two references in her gun permit application last year." (Compl. Ex. A at 1.) Unfortunately, because the Court cannot consider the record in a collateral case when deciding a demurrer, *Kelly v. Kelly*, 887 A.2d 788, 791 (Pa. Super. 2005), it must ignore the record in *Mezzacappa v. Express[-]Times Newspaper*, docketed in this Court at C-48-CV-2013-3384, a case involving Plaintiff, which reveals that the same gun-permit character references were not "private" at the time Plaintiff initiated the instant action because the names of those references had already been revealed to the public by the Express-Times newspaper. In addition, the Court cannot determine, at this stage of the proceedings and as a matter of law, that the disclosure of character references submitted with an application for a concealed-carry permit is not highly offensive to the reasonable person and that the same is not of legitimate concern to the public, as both of these questions are better left to a jury. Therefore, it is not clear and free from doubt that Plaintiff will be unable to prevail on her publicity given to private life claim, and Defendant's demurrer to Count IV, as argued in his sixth objection, will be overruled.

Defendant's demurrer to Count V of the Complaint, as raised in his third objection, also concerns Defendant's disclosure of Plaintiff's gun permit

application character references, which Plaintiff states in Count V as a cause of action for false-light invasion of privacy.

> The tort of [false-light] invasion of privacy involves "'publicity that unreasonably places the other in a false light before the public.'" *Strickland v. University of Scranton*, 700 A.2d 979, 987 (Pa. Super. 1997) (quoting *Curran v. Children's Serv. Ctr. of Wyoming County, Inc.*, 396 Pa. Super. 29, 578 A.2d 8, 12 (1990)). A cause of action for invasion of privacy will be found where a major misrepresentation of a person's character, history, activities or beliefs is made that could reasonably be expected to cause a reasonable man to take serious offense. *Id.*

Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648, 654 (Pa. Super. 1999).

Defendant argues that Plaintiff has failed to allege exactly how the disclosure of the character references for her gun permit application placed her in a false light. The Court agrees with Defendant's argument.[5] Plaintiff's assertion that because of Defendant's disclosure she "has been deprived of fruitful employment, has suffered fear, anxiety and stress, and has had her reputation lowered in the eyes of the community" does not indicate, in any way, that the disclosure itself *placed her in a false light*. (Compl. ¶ 24.) Neither do any of the paragraphs incorporated into Count V by reference. As a result, Defendant's demurrer to Count V of the Complaint will be sustained.[6]

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[5] The Honorable Leonard N. Zito and the Honorable Craig A. Dally also agreed with this argument in their Orders entered on April 14, 2014, and September 26, 2014, respectively, in the case of *Mezzacappa v. Express[-]Times Newspaper,* docketed at C-48-CV-2013-3384.

[6] As part of his second objection, Defendant also made a demurrer to Count V, which is now moot.

In his first objection, Defendant asserts demurrers to Counts II, III, and VI of the Complaint on the ground that he is immune from liability pursuant to the Communications Decency Act ("CDA"), 47 U.S.C.A. § 230(c). In Counts II and VI, Plaintiff brings claims for defamation, and in Count III, she brings a claim for invasion of privacy, all of which stem, at least in part, from anonymous comments posted on Defendant's Blog and directed at Plaintiff.[7] (*See* Compl. ¶¶ 8(a-i), 10-16, 25.) By asserting his immunity from liability in Counts II, III, and VI, Defendant raises an affirmative defense in his preliminary objections and, in doing so, violates Pennsylvania Rule of Civil Procedure 1030(a), which states that "all affirmative defenses including . . . immunity from suit . . . *shall* be pleaded in a responsive pleading under the heading "New Matter." Pa.R.C.P. No. 1030(a) (emphasis added). However, "courts have permitted [a] limited exception to this rule and have allowed parties to raise the affirmative defense of immunity as a preliminary objection. The affirmative defense, however, must be clearly applicable on the face of the complaint." *Sweeney v. Merrymead Farm, Inc.*, 799 A.2d 972, 975-76 (Pa. Commw. 2002). Here, it is clear from the face of the Complaint that Defendant is entitled to immunity under the CDA with

[7] It is clear from the heading and the substance of Count VI that it deals solely with anonymous comments posted on the Blog. Plaintiff's only claims based on statements made by Defendant himself are contained in Count I and part of Counts II and III of the Complaint. Those counts are the subjects of Defendant's second and fifth objections, which will be discussed *infra*.

regard to any attempt to hold him liable for anonymous comments posted on the Blog.

> [The CDA] was first offered as an amendment by Representatives Christopher Cox (R–Cal.) and Ron Wyden (D–Ore.). *See* 141 Cong. Rec. H8460-01 August 4, 1995). The specific provision at issue here, § 230(c)(1), overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law. As a matter of policy, "Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others." *Blumenthal v. Drudge,* 992 F. Supp. 44, 49 (D.D.C. 1998). Absent § 230, a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of the defamatory text, and, indeed, at least with regard to publishers, even if unaware of the statement. *See, e.g., Stratton Oakmont, Inc. v. Prodigy Services Co.,* 1995 WL 323710 (N.Y. Sup. May 24, 1995) (pre-[CDA] case holding [I]nternet service provider liable for posting by third party on one of its electronic bulletin boards). Congress, however, has chosen to treat cyberspace differently.
>
> Congress made this legislative choice . . . to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce. Section 230(a), "Findings," highlights that:
>
> > (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
> >
> > (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

§ 230(a). Similarly, the listed policy objectives of the section include:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and]
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

§ 230(b).

Batzel v. Smith, 333 F.3d 1018, 1026-27 (9th Cir. 2003) (footnotes omitted).

In furtherance of these objectives, the CDA declares 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." 47 U.S.C.A. § 230(c)(1). The CDA further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). The combination of these two provisions imbues the CDA with preemptive effect, such that it

> creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, 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—are barred.

Zeran v. AOL, 129 F.3d 327, 330 (4th Cir. 1997). "[D]efamation law would be a good example of such liability" in Pennsylvania, since the second element of a defamation claim is publication by the defendant, as would a claim for false-light, which requires that the defendant give "publicity" to the complained-of information.[8] *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003); *see* 42 Pa.C.S.A. § 8343(a)(2); *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d at 654.

As defined by the CDA, an interactive computer service is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C.A. § 230(f)(2). An information content provider 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." *Id.* § 230(f)(3).

> The [CDA] mandates dismissal if (i) [the defendant] is a "provider or user of an interactive computer service," (ii) the information for which [the plaintiff] seeks to hold [the defendant] liable was "information provided by another information content provider," and (iii) the complaint seeks to hold [the defendant] liable as the "publisher or speaker" of that information.

[8] Thus, it is clear that the causes of action contained in Counts II, III, and VI of Plaintiff's Complaint are the types of actions for which immunity may be granted by Section 230(e)(3) of the CDA.

Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (quoting 47 U.S.C.A. § 230(c)(1)); *see also Parker v. Google, Inc.*, 242 Fed. App'x 833, 838 (3d Cir. 2007) ("The elements required for [CDA] immunity are: (1) that the defendant is a provider or user of an "interactive computer service;" (2) that the asserted claims treat the defendant as the publisher or speaker of the information; and (3) that the information is provided by another "information content provider.") (quoting 47 U.S.C.A. § 230(c)(1)). When it is clear, as it is in the instant case, that the complained-of statements were not uttered by the named defendant, "[t]he only question, then, is whether holding [the defendant] liable for its alleged . . . failure to properly police its network for content transmitted by its users, [for example,] derogatory comments[,] would 'treat' [the defendant] 'as the publisher or speaker' of that content." *Green v. AOL*, 318 F.3d 465, 470 (3rd. Cir. 2003). In *Green*, the Third Circuit held that a claim against AOL for harmful comments made by anonymous Internet users *did* attempt to treat AOL as the publisher or speaker of those comments, in contravention of the CDA's immunity. *Id.*

The Court has located only two Pennsylvania state court decisions that have analyzed the issue of immunity under the CDA. In *D'Alonzo v. Truscello*, April Term, 2004 No. 0274, 2006 WL 1768091, at *1 (C.P. of Philadelphia Cnty. May 31, 2006), the plaintiffs filed a defamation action against the operator of www.dumpfumo.com, a website which reproduced

articles written by the Philadelphia Daily News containing alleged libelous information. The court determined that the defendant's website was an interactive computer service and that the defendant was therefore immune from liability under the CDA and entitled to summary judgment, noting that "[a] party acting as a passive conduit of information is deemed not to have created or developed information, even if the party's role is aggressive in the dissemination of the contents developed by someone else." *Id.* at *5. In explaining that summary judgment for the defendant was warranted, the court stated:

> [T]he website involved here simply acted as a conduit to reproduce and disseminate the articles published by the *Daily News.* [The d]efendant clearly was not the author nor the creator of the article or of the allegedly defamatory statements contained in the story which [the p]laintiffs attributed to [the d]efendant. Since the reproduction of the newspaper article in the website is exactly the situation the [CDA] contemplated for immunity purposes, no error was committed in granting Defendant's motion for summary judgment

Id. at *6.

More recently, in *Supplementmarket.com, Inc. v. Google, Inc.*, No. 09-43056, 2010 WL 8752835, at *1 (C.P. Montgomery Cnty. July 26, 2010), the plaintiff sued Google, alleging that Google failed to remove libelous messages that had been posted on a discussion board accessible through Google's Internet search engine. The court sustained Google's demurrer and dismissed the plaintiff's complaint with prejudice. *Id.* In explaining its decision, the court noted that because the allegedly libelous statements

originated from an information content provider other than Google, any claim that would hold Google liable as the speaker or publisher of such statements failed as a matter of law pursuant to the CDA. *Id.*

Courts have not limited application of the CDA's immunity to large-scale interactive computer services, such as AOL or Google, nor have they refused to apply the definition of internet content provider to anonymous commenters. In *Donato v. Moldow*, 865 A.2d 711, 713 (N.J. Super. Ct. App. Div. 2005), the court considered "the potential liability of the operator of an electronic community bulletin board website based on allegedly actionable messages posted anonymously by others."[9] In that case, the defendant was the owner and operator of "Eye on Emerson," a website strikingly similar to the Blog, where the defendant

> posted information about local government activities, including, for example, minutes of meetings of the borough council, planning board and board of education. Public opinion polls were conducted on the site, which included approval ratings of local elected officials. The site included a discussion forum, in which any user could post messages, either with attribution or anonymously.

Id. at 713. Like the instant Plaintiff,

> [the plaintiffs'] overriding allegation against [the defendant] [was] that he [was] liable as a publisher of the defamatory statements made by others. They further allege[d] that [the defendant] was more than passive in his role as publisher, and

[9] "While it is a truism that decisions of sister states are not binding precedent on this Court, they may be persuasive authority . . . and are entitled to even greater deference where consistency and uniformity of application are essential elements of a comprehensive statutory scheme like that contemplated by the" CDA. *Commonwealth v. Nat'l Bank & Trust Co. of Cent. Pa.*, 364 A.2d 1331, 1335 (Pa. 1976) (citation omitted).

> "ha[d] actively participated in selective editing, deletion and re-writing of anonymously posted messages on the Eye on Emerson website and, as such, [was] entirely responsible for the content of the messages."

Id. at 716. The court found that the defendant website-operator was protected by the CDA regardless of whether he was a provider or user of an interactive computer service and ultimately affirmed the trial court's dismissal of the plaintiffs' case. *Id.* at 719. In explaining its rationale, the court stated the following after outlining the relevant case law:

> [W]e are satisfied that [the defendant], by virtue of his conduct, cannot be deemed an information content provider with respect to the anonymously-posted defamatory statements. His status as a provider or user of an interactive computer service garners for him the broad general immunity of [the CDA]. That he allows users to post messages anonymously or that he knows the identity of users of the website are simply not relevant to the terms of Congress' grant of immunity. The allegation that the anonymous format encourages defamatory and otherwise objectionable messages "because users may state their innermost thoughts and vicious statements free from civil recourse by their victims" does not pierce the immunity for two reasons: (1) the allegation is an unfounded conclusory statement, not a statement of fact; and (2) the allegation misstates the law; the anonymous posters are not immune from liability, and procedures are available, upon a proper showing, to ascertain their identities.

Id. at 725.

In the instant case, Plaintiff proceeds under the same theory rejected in *Donato*. She argues that Defendant "controlled exclusively" the anonymous comments on the Blog. (Compl. ¶ 8.) In her Brief, Plaintiff expounds that Defendant "will delete comments that he deems

inappropriate, and often comments on his blog, that certain anonymous comments were disapproved. By engaging in this type of moderation, the reckless and defamatory anonymous comments in Plaintiff's [C]omplaint are allowed to stand, and are approved of by Defendant." (Pl.'s Br. at 6.) However, none of the facts alleged in Plaintiff's Brief are pleaded in the Complaint and, thus, cannot be considered in ruling on Defendant's demurrers. Nevertheless, even if the Court could consider the allegations, "[t]hese activities . . . are nothing more than the exercise of a publisher's traditional editorial functions, namely, whether to publish, withdraw, postpone or alter content provided by others. This is the very conduct Congress chose to immunize by [the CDA]." *Donato*, 865 A.2d at 725-26 (citation omitted).

Lastly, in *DiMeo v. Max*, 248 Fed. App'x 280, 281 (3d Cir. 2007), the Third Circuit affirmed the district court's dismissal of the plaintiff's defamation claim against the defendant, who was the "owner of a website (www.tuckermax.com) that allow[ed] users to write comments on various topics on message boards." The court found that the defendant's website was an interactive computer service and that the comments posted on his website were supplied by third-party information content providers, the combination of which triggered immunity under the CDA. *Id.* at 282.

Here, it is clear from the allegations in the Complaint that Defendant has satisfied all three elements required for immunity, pursuant to the CDA,

with regard to the anonymous comments posted on the Blog. First, Defendant is a provider or user of an interactive computer service. "The term 'blog' is a portmanteau of 'Web log' and is a term referring to an online journal or diary." *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 (5th Cir. 2008). As noted above, the URL for the Blog is http://lehighvalleyramblings.blogspot.com. Because the URL bears the suffix "blogspot.com," the Blog was created and is maintained using "Blogger." *See Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM SHX, 2010 WL 9479060, at *7 (C.D. Cal. July 30, 2010), *aff'd*, 653 F.3d 976 (9th Cir. 2011).

> Blogger is a service that Google owns and operates that allows Blogger account holders to create their own blogs hosted on Google's servers. Most of these Blogger web pages bear the suffixes "blogspot.com" or "blogger.com." Google does not charge users to set up Blogger accounts. Blogger account holders may display images on their blogs. In some cases the images are uploaded onto Google's servers and in other cases a user hyperlinks to content hosted on other servers. In either case, the user decides to display the image on the Blogger site; Google's servers passively process users' upload requests.

Id. (citations omitted). Based on the above, it is clear that the Blog is an "interactive computer service." For immunity to apply, the Court does not have to determine whether Defendant is a provider or user of an interactive computer service, for as outlined *supra*, both users and providers of

interactive computer services can be immune under the CDA.[10] As to the second element, Plaintiff treats Defendant as the publisher or speaker of the anonymous comments in Counts II, III, and VI of her Complaint. As to the final element, it is apparent that the anonymous comments posted on the Blog originated from "information content providers" other than Defendant. For all the above reasons, it is clear from the Complaint that Defendant cannot be held liable as the publisher or speaker of the anonymous comments identified in Counts II, III, and VI of Plaintiff's Complaint, and the Court will therefore sustain Defendant's first objection and will dismiss Count VI, which relies solely upon anonymous comments, and will dismiss any claim contained in Counts II and III that is based upon an anonymous comment.

In light of the above disposition of Defendant's first objection, Defendant's fourth objection, which is a demurrer to Count VI, which will be dismissed, has been rendered moot. Also rendered moot is that portion of Defendant's second objection which is a demurrer based on the anonymous comments identified in Count II of the Complaint. Remaining to be disposed of are the remainder of Defendant's second objection and his fifth objection.

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[10] "[I]n cases where an individual's role as operator of a Web site raised a question as to whether he was a 'service provider' or a 'user,' the courts found it unnecessary to resolve the issue because the statute confers immunity on both." *Barrett v. Rosenthal*, 146 P.3d 510, 527 (Cal. 2006).

Defendant's second objection contains demurrers to Counts I, II, III, and V of the Complaint. As previously stated, Defendant's second objection is moot to the extent that it concerns Count V, which will be dismissed as a result of Defendant's third objection. Defendant's second objection has also been rendered moot to the extent that it pertains to claims in Counts II and III that are based on anonymous comments. Hence, all that remains of Defendant's second objection are demurrers based on the statements made by Defendant *himself* that are identified in Counts I, II, and III. These statements are as follows.

In Count I, Plaintiff claims defamation based on the following statements made about Plaintiff by Defendant ("Threat/Gun Statements"): 1) "So public safety menace [Plaintiff], who has actually threatened to kill an elected official, can prance around like Annie Oakley" (Compl. Ex. A at 1.); 2) "A good gun control law, and one that might just prevent [Plaintiff] from showing off her guns to customers at Giant Supermarket, would be to give the Sheriff more time to conduct an appropriate investigation" (*Id.*); 3) "But then again, a gun in the hands of the wrong person can kill innocent people" (*Id.*); and 4)

> [S]he has threatened to kill an elected official, has publicly fantasized about killing me three times, shows off her guns to people in Giant and has advocated the use of deadly force against a 14 year old girl. On top of that, she has impulse control issues. [S]he is a menace to public safety.

(*Id.* at 2.)

In Count II, Plaintiff claims defamation based on Defendant's blog post entitled "[Plaintiff] Must Pay Me $67,000 for Internet Defamation" ("$67,000 Article") and Defendant's response to an anonymous commenter on the Blog in which Defendant states that the commenter "instigated a mentally ill woman" ("Mental Health Statement"). (Compl. Ex. B at 1, 5.)

Because Plaintiff incorporates into Count III Exhibits A and B of the Complaint as well as the aforementioned statements made by Defendant, she, affording her Complaint a liberal reading as the Court must do,[11] essentially brings a false-light claim based on the Threat/Gun Statements as well as the $67,000 Article and the Mental Health Statement in Count III. Thus, the demurrers in Defendant's second objection will only be sustained if Counts I, II, and III are legally insufficient as they pertain to the Threat/Gun Statements, the $67,000 Article, and the Mental Health Statement.

As stated above, Counts I and II are for defamation. The elements of defamation are as follows:

> **(a) Burden of plaintiff.**--In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
>
> (1) The defamatory character of the communication.
>
> (2) Its publication by the defendant.
>
> (3) Its application to the plaintiff.

[11] *See Danysh v. Dep't of Corr.*, 845 A.2d 260, 262-63 (Pa. Commw. 2004) ("The allegations of a *pro se* complainant are held to a less stringent standard than that applied to pleadings filed by attorneys.").

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

42 Pa.C.S.A. § 8343(a)(1)-(7).

The first element of defamation is "[t]he defamatory character of the communication." *Id.* § 8343(a)(1).

> A communication is considered defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *MacElree*. "It is not enough that the victim of the [statements] . . . be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of respectable society." *Tucker v. Phila. Daily News*, 577 Pa. 598, 616, 848 A.2d 113, 124 (2004).
>
> Further, statements alleged to be defamatory must be viewed in context. *Baker v. Lafayette Coll.,* 516 Pa. 291, 532 A.2d 399 (1987). . . .
>
> Alleged claims for defamation should not be dismissed on the basis of a preliminary objection in the nature of a demurrer unless it is clear the communication is incapable of defamatory meaning. *Petula v. Mellody*, 138 Pa. Cmwlth. 411, 588 A.2d 103 (1991) (*Petula I*). Whether a communication is capable of a defamatory meaning is a question for the court in the first instance. *Id.* However, if the court concludes the communication could be construed as defamatory, the final determination is for the jury. *Petula I*. Under Pennsylvania law, courts act as gatekeepers to determine whether statements are

> incapable of defamatory meaning in deciding whether any basis exists to proceed to trial. *Mzamane*.

Balletta v. Spadoni, 47 A.3d 183, 197 (Pa. Commw. 2012) (footnote omitted).

The Court finds that the Threat/Gun Statements satisfy not only element one and are therefore capable of defamatory meaning but also elements two through five. To the contrary, the Court finds that the $67,000 Article fails to satisfy element one, as it appears to be a report on legal proceedings involving the parties and does not contain any defamatory statements that would lower Plaintiff's reputation in the community. Thus, the demurrer in Defendant's second objection will be sustained as to the portion of Count II concerning the $67,000 Article. Defendant does not argue that the Mental Health Statement fails to satisfy element one; therefore, the Court declines to find that the Mental Health Statement is incapable of defamatory meaning. Defendant raises no argument concerning the sixth element of defamation, special harm, as to either the Threat/Gun Statements or the Mental Health Statement.[12] Instead, Defendant's primary argument is that because Plaintiff was a limited-purpose public figure at the time the relevant statements were made, and

[12] In any event, "although the statute indicates that 'special harm' must be proven, our courts have held that a libel plaintiff need not prove 'special harm.'" *Joseph v. Scranton Times, L.P.*, 89 A.3d 251, 261 (Pa. Super.), *appeal granted*, 105 A.3d 655 (Pa. 2014). Plaintiff is a libel plaintiff because her claims are based upon written statements, and libel is defamation taking the form of printed words. *See id.* n.3.

because Defendant qualifies as a media defendant, Plaintiff was required to plead facts that would support a finding of actual malice in Counts I, II, and III. As she has not done so, Defendant argues, those counts must be dismissed.

Regarding the claims for defamation based on the Threat/Gun Statements and Mental Health Statements brought in Counts I and II,

> [c]aselaw prescribes additional elements that arise in relation to the character of the statement, the role of the defendant as a media outlet, or the role of the plaintiff as a public official or public figure. If the statement in question bears on a matter of public concern, or the defendant is a member of the media, First Amendment concerns compel the plaintiff to prove, as an additional element, that the alleged defamatory statement is in fact false. *See Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986); *see also Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 2, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990); *Ertel v. Patriot-News Co.,* 544 Pa. 93, 674 A.2d 1038, 1041 (1996). If the plaintiff is a public official or public figure, she must prove also that the defendant, in publishing the offending statement, acted with "actual malice," i.e. "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Curran v. Philadelphia Newspapers, Inc.,* 376 Pa. Super. 508, 546 A.2d 639, 642 (1988) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)).
>
> "Actual malice" is a fault standard, predicated on the need to protect the public discourse under the First Amendment from the chill that might be fostered by less vigilant limitations on defamation actions brought by public officials.
>
> > [T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.

> Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

Curran, 546 A.2d at 643 (quoting *St. Amant v. Thompson,* 390 U.S. 727, 731-32, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)). Thus, the actual malice standard, by design, assures "that public debate will not suffer for lack of 'imaginative expression' or 'rhetorical hyperbole' which has traditionally added much to the discourse of this Nation." *Milkovich,* 497 U.S. at 2, 110 S. Ct. 2695. "[T]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Hepps,* 475 U.S. at 778, 106 S. Ct. 1558.

Thus, the "actual malice" standard is a constitutionally mandated safeguard and, as such, must be proven by clear and convincing evidence, the highest standard of proof for civil claims. *See Sprague v. Walter,* 441 Pa. Super. 1, 656 A.2d 890, 904 (1995). Moreover, evidence adduced is not adjudged by an objective standard; rather, "actual malice" must be proven applying a *subjective* standard by evidence "that *the defendant in fact entertained serious doubts as to the truth of his publication.*" *See Curran,* 546 A.2d at 642 (quoting *St. Amant,* 390 U.S. at 731, 88 S. Ct. 1323) (italics in *Curran,* boldface added). This determination may not be left in the realm of the factfinder:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice".

Curran, 546 A.2d at 644 (citing *Bose Corp. v. Consumers Union,* 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). We have recognized accordingly that the question of "actual malice" is not purely one of fact, but rather may be described as one of "ultimate fact," a "hybrid of evidential fact on the one hand and conclusion of law on the other." *Id.* (quoting *Bose,* 466 U.S. at 510-11, 104 S. Ct. 1949).

Lewis v. Phila. Newspapers, Inc., 833 A.2d 185, 191-92 (Pa. Super. 2003).

In *New York Times v. Sullivan,* 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 155, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), the United States Supreme Court mandated that public officials and public figures must prove "actual malice" in order to recover damages in a defamation action against the media, that is, "that the defamatory statements were made with knowledge of their falsity or with reckless disregard of the truth." *Avins v. White,* 627 F.2d 637, 646 (3d Cir. 1980), *cert. denied,* 449 U.S. 982, 101 S. Ct. 398, 66 L. Ed. 2d 244 (1980). Subsequently, in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), *cert. denied,* 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983), the Court identified two classes of public figures:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id., 418 U.S. at 351, 94 S. Ct. 2997. A person may become a limited purpose public figure if he "thrust[s] himself into the vortex of the discussion of pressing public concerns." *Rosenblatt v. Baer,* 383 U.S. 75, 86 n. 12, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966). Such a person uses "purposeful activity" to thrust "his personality" into a "public controversy." *Curtis Publishing Co.,* 388 U.S. at 155, 87 S. Ct. 1975. He becomes a limited[-]purpose public figure because he invites and merits

> "attention and comment." *Gertz,* 418 U.S. at 346, 94 S. Ct. 2997. A person may become a limited[-]purpose public figure if he attempts to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants. *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287, 1292 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980). "A private individual," however, "is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston v. Reader's Digest Assoc.,* 443 U.S. 157, 167, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979).
>
> It is the function of the court to ascertain in the first instance whether the plaintiff is a public or private figure. *Smith v. A Pocono Country Place Property Owners Assoc., Inc.,* 686 F. Supp. 1053, 1056 (M.D. Pa. 1987). "The classification of a plaintiff as a public or private figure is a question of law to be determined initially by the trial court and then carefully scrutinized by an appellate court." *Id.,* 686 F. Supp. at 1056 (*quoting Marcone v. Penthouse Int'l Magazine,* 754 F.2d 1072, 1081 n. 4. (3d Cir.1985)); *see also Wolston,* 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450.

Joseph v. Scranton Times, L.P., 959 A.2d 322, 338-39 (Pa. Super. 2008).

The Threat/Gun Statements were made on or about April 1, 2013. (Compl. Ex. A.) This Court has already determined that, as of that time, Plaintiff was, at minimum, a limited-purpose public figure, and the Court will not disturb that finding as to the Threat/Gun Statements. *See* Order of Court at 7, *Mezzacappa v. Express[-]Times Newspaper*, No. C-48-CV-2013-3384 (Northampton Cnty. Sept. 26, 2014); Order of Court at 25, *Id.* (Apr. 14, 2014). Therefore, to withstand the demurrer in Defendant's second objection as it pertains to Count I, Plaintiff must have alleged both: 1) actual

malice on the part of Defendant; and 2) the falsity of the Threat/Gun Statements. The Court is satisfied that Plaintiff has met this burden. She alleges that "[Defendant] knowingly and falsely states with malice [the Threat/Gun Statements] with full knowledge that [Plaintiff] was never charged with this crime." (Compl. ¶ 5.) Plaintiff further avers that "[Defendant] has directly accused Plaintiff of being a person who would kill innocent people [and] is well aware that [Plaintiff] does not have a criminal history." (*Id.*) Plaintiff also pleads that Defendant posted a comment "falsely and maliciously" and that this "false publication" caused her damages. (*Id.* ¶¶ 6-7.) These allegations are sufficient to meet the additional pleading requirements required by virtue of Plaintiff's status as a limited-purpose public figure at the time the Threat/Gun Statements were published. Accordingly, the demurrer in Defendant's second objection will be overruled as to Count I.

The Mental Health Statement was made on or about March 28, 2014. (*See* Compl. Ex. B.) The Complaint provides the Court with no basis to determine that Plaintiff was anything but a private figure at that time. Consequently, for purposes of ruling on Defendant's demurrer, Plaintiff was not required to plead that the Mental Health Statement was made with actual malice or falsely. Therefore, having already determined that Plaintiff has met her *prima facie* burden with regard to the Mental Health Statement,

the demurrer in Defendant's second objection will be overruled as it pertains to that statement.

In a demurrer in his second objection, Defendant additionally argues that Plaintiff is also required to plead actual malice in Count III, her claim for false-light based on the Threat/Gun Statements, the $67,000 Article, and the Mental Health Statement. As Plaintiff has not alleged actual malice in that count, Defendant argues that Count III should be dismissed. The Court has already determined that Plaintiff has adequately alleged actual malice in Count I; and as that count is incorporated into Count III, Defendant's argument has no merit as to that portion of Count III dealing with the Threat/Gun Statements. As for that portion of Count III that is based on the Mental Health Statement, the Court finds that Plaintiff's allegation that "by virtue of the foregoing paragraphs, [Defendant] has placed Plaintiff . . . in false light, in a manner that is highly offensive to any reasonable person, and with reckless disregard of the intentionally slanted, false, and biased nature of [his] online blogs," sufficiently pleads the elements of a false-light claim as stated in the Restatement (Second) of Torts § 652E. (Compl. ¶ 11.) Finally, despite the Court's earlier finding that the $67,000 Article is incapable of defamatory meaning, the Court finds that Plaintiff has pleaded sufficient facts for the $67,000 Article to remain part of Plaintiff's Count III false-light claim. Accordingly, the demurrer in Defendant's second objection will be overruled as it pertains to Count III.

Lastly, in the demurrer in Defendant's fifth objection, which is solely directed at that portion of Count I involving Defendant's statements that Plaintiff displayed her guns in a supermarket, Defendant asserts that such statements are incapable of defamatory meaning. Because Pennsylvania is an open-carry state, the Court agrees with Defendant and will sustain the demurrer in Defendant's fifth objection with regard to any claim for defamation, in Count I, based upon that portion of the Threat/Gun Statements.[13]

WHEREFORE, the Court enters the following:

[13] Pennsylvania requires a license to carry a firearm concealed on one's person or in a vehicle. 18 Pa.C.S.A. § 6106. There is also a statute prohibiting one from openly carrying a firearm in the City of Philadelphia. *Id.* § 6108. The law is silent as to the legality of openly carrying a firearm in other situations, making it *de facto* legal. In Plaintiff's Complaint, she complains that Defendant defamed her by stating that she displayed "her guns to customers at Giant Supermarket" and that she "shows off her guns to people in Giant." (Compl. Ex. A at 1.) These statements are incapable of defamatory meaning in light of the above, unless the displays were a brandishing type threat or display, which has not been stated by Defendant or pleaded.

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL ACTION

TRICIA MEZZACAPPA,	)	
Plaintiff	)	**No. C-48-CV-2014-4521**
	)	
v.	)	
	)	
BERNIE O'HARE,	)	
Defendant	)	

ORDER OF COURT

AND NOW, this 31st day of March, 2015, upon consideration of the "Preliminary Objections of Defendant Bernie O'Hare to the Complaint," it is hereby **ORDERED** as follows:

1) Defendant's "Preliminary Objections in Nature of a Demurrer to Counts II, III, & VI of the Complaint Under Communications Decency Act," are hereby **SUSTAINED**, in part, and **OVERRULED**, in part. Any claim contained in Counts II and III that is based upon an anonymous comment

posted on Defendant's blog is hereby **DISMISSED**, with prejudice. Count VI of Plaintiff's Complaint is hereby **DISMISSED**, with prejudice;

2) Defendant's "Preliminary Objections, in the Nature of a Demurrer, to Counts I, II, III, and V of Plaintiff's Complaint" are hereby **SUSTAINED**, in part, and **OVERRULED**, in part. Any claim in Count II based upon the "$67,000 Article," as defined in the above opinion, is hereby **DISMISSED**, with prejudice;

3) Defendant's "Preliminary Objection[] in the Nature of a Demurrer to Count V of Plaintiff's Complaint for Failing to State a Cause of Action Upon Which Relief Can be Granted" is hereby **SUSTAINED**. Count V of Plaintiff's Complaint is hereby **DISMISSED**, with prejudice;

4) Defendant's preliminary objection on the basis that "Count VI of Plaintiff's Complaint, Based Upon Advocating an Act of Violence Against Her, Fails to State a Claim Upon Which Relief Can Be Granted Because There is No Allegation that Defendant is the Author," is hereby **OVERRULED**, as moot, since Count VI has already been dismissed; and

5) Defendant's "Preliminary Objection[] in Nature of a Demurrer to That Portion of Count I of the Complaint Focused on Showing Off Gun at a Supermarket" is hereby **SUSTAINED**. Any claim in Count I based on Defendant's statement about Plaintiff displaying a gun at a supermarket is hereby **DISMISSED**, with prejudice.

Defendant shall file an answer to Plaintiff's Complaint within twenty (20) days.

BY THE COURT:

/s/ Anthony S. Beltrami
ANTHONY S. BELTRAMI, J.