COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss. **SUPERIOR COURT**

Civil Action No. MICV2013-00399-C

JONATHAN GRAVES MONSARRAT,

Plaintiff,

v.

DEB FILCMAN, RON NEWMAN, and JOHN AND JANE DOES 1-100,

Defendants.

MEMORANDUM IN SUPPORT OF RON NEWMAN'S MOTION TO DISMISS PURSUANT TO MASS. R. CIV. P. 12(b)(6)

Pursuant to Superior Court Rule 9A, Defendant Ron Newman ("Newman") provides this memorandum in support of his Motion to Dismiss Pursuant to Mass. R. Civ. P. 12(b)(6).

Plaintiff Jonathan Graves Monsarrat ("Monsarrat") alleges that four comments Newman made online are defamatory. Those comments are not actionable. They state opinions based on disclosed facts that Monsarrat may not sue out of the public record. The Court should dismiss all claims against Newman because, even accepting as true all allegations in the First Amended Complaint ("Complaint"), it fails to state any claim upon which relief could be granted.

STANDARD OF REVIEW

Massachusetts Courts follow the standard for reviewing the adequacy of a complaint set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). "'Factual allegations must be enough to raise a right to relief above the speculative level … [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635 (2008) (*quoting Twombly*, 550 U.S. at 556). "What is required at the

pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief, in order to 'reflect[] the threshold requirement … that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* (*quoting Twombly*, 550 U.S. at 557). Thus the Court "look[s] beyond the conclusory allegations in the complaint and focus[es] on whether the factual allegations plausibly suggest an entitlement to relief." *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2012) (*citing Iannacchino*, 451 Mass. at 635-36).

Courts "take the many attachments and exhibits in the record to be part of the pleadings." *Midland States Life Ins. Co. v. Cardillo*, 59 Mass. App. Ct. 531, 536 (2003). The pleadings include "public documents that are referenced in the complaints and that were provided to the motion judge." *Boston Med. Ctr. Corp. v. Sec'y of the Exec. Office of HHS*, 463 Mass. 447, 450 (2012). "Where, as here, the plaintiff had notice of … documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment." *Marram v. Kobrick Offshore Fund, Inc.*, 422 Mass. 43, 45 (2004). "[A] 12(b)(6) evaluation can properly include the entirety of documents integral to, referenced in, or explicitly relied upon in the complaint." *McKenna v. Scherr*, Misc. Case No. 293427, 12 LCR 332, 333 (2004) (*citing Marram*).

"Conclusory allegations in the complaint that contradict the facts as demonstrated in the exhibits attached to the complaint may be disregarded." *Gilbert v. Fannie Mae*, No. 2010-3158, 2011 Mass. Super. LEXIS 147, at *5 (Mass. Super. Ct. Mar. 31, 2011) (citations omitted), *aff'd*, 81 Mass. App. Ct. 1128 (2012). "[A]llegations in a complaint ... cannot contradict documents they purport to characterize." *President & Fellows of Harvard College v. Michaud*, 28 Mass. L. Rep. 601, 19 LCR 314, 314 n. 4 (Mass. Super. Ct. 2011) (citation omitted).

FACTUAL BACKGROUND

LiveJournal (http://www.livejournal.com) is an interactive online social network where users create message-board style threads through posts and comments that may be replied to individually. Newman is a user of LiveJournal under the user name ron_newman. He is also one of the maintainers, or "moderators," of http://davis-square.livejournal.com, a LiveJournal forum (or "user community") focused on Somerville's Davis Square neighborhood. Compl. ¶ 41. Monsarrat also uses that forum, under the user name make_you_laugh. Compl. Ex. 4 p. 19.

In 2003, Monsarrat established a matchmaking service that served thousands of MIT, Harvard, and Wellesley students and alumni. *See* Tiffany Kosolcharoen, *Online Match-Up Service Gets Dates for Students*, The Tech, v. 123, issue 5, pp. 1 & 8 (Feb. 18, 2003), attached as Ex. A hereto.[1] "Some Harvard students later complained to MIT and the Harvard police about e-mails they received from Monsarrat, who, in addition to running the service, participated and matched himself up with more people than any other participant." Keith J. Winstein, *Harvard/ MIT Matchup Service Will Keep Contacts Anonymous*, The Tech, v. 124, issue 1, p. 29 (Feb. 3, 2004), attached as Ex. B hereto. Female participants "filed a series of harassment complaints with MIT and Harvard campus police … about persistent e-mails they received from Jonathan Monsarrat '89, the matchup's creator and operator."[2] Compl. Ex. 13 p. 1. Harvard University police warned Monsarrat to cease and desist, "saying that further e-mails to Harvard students

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[1] Monsarrat alleges that Newman is liable for posting hyperlinks to the three articles attached as Exhibits A, B & C hereto, and a fourth attached to the Complaint as Exhibit 13. "These articles coupled with the other false and untrue statements in this blog are collectively damaging Plaintiff." Compl. p. 15. Monsarrat explicitly relied on the articles in framing the Complaint, so their review does not require converting this motion to one for summary judgment. *Marram v. Kobrick Offshore Fund, Inc*., 422 Mass. 43, 45 (2004); *McKenna v. Scherr*, 12 LCR 332, 333 (2004).

[2] One complainant "said that Monsarrat contacted at least one woman after she repeatedly asked him to stop, and quotes Monsarrat as saying to one participant, 'you've made me wait too long; I am getting impatient.'" Compl. Ex. 13 p. 1. Monsarrat "'started sending [another participant] charts of his weight loss, promising that he would lose more weight in the future … and begging her to meet up with him." *Id.* p. 15 (quoting complainant). *See also* Emily Bearg, *Dating service creator accused of harassing students*, The Record (Apr. 16, 2003) (Compl. Ex. 14).

will result in criminal prosecution." *Id*. p. 15. The service continued operations the next year, but with Monsarrat no longer involved in its administration. *See* Ex. B. Its new managers announced that they would not participate in the service to avoid conflicts of interest, and would "address the concerns over privacy that arose" under Monsarrat. Waseem S. Daher, *Matchup Inspires Online Love*, The Tech, v. 124, issue 4, p. 17 (Feb. 13, 2004), attached as Ex. C hereto.

Monsarrat has stated that, "in 2009, I tried my hand at being an artist, running the Wheel Questions project in Harvard Square." Compl. p. 12 (quoting Monsarrat email); *see also* Compl. ¶ 60 (describing the quoted email as Monsarrat's "literary work"); Ex. 5 p. 4; & Ex. 19 pp. 4-5. In July 2009, his Wheel Questions art installation was displayed in the plaza of Davis Square. Compl. Ex. 11 p. 8. Monsarrat and Wheel Questions were discussed on at least two threads on the Davis Square LiveJournal forum that summer. Compl. ¶¶ 50-51 & Exs. 11-12. Newman took part in the discussions on both threads. Compl. Ex. 11 pp. 2, 8, & 9; Ex. 12 pp. 1-6, 10, 13 & 15.

On Wednesday, January 27, 2010, Monsarrat posted on his Wheel Questions website an open invitation to a party he would be holding: "I'm holding a party Friday in the Boston area. RSVP to johnny@wheelquestions.org and say a little about yourself for the location." Compl. Ex. 4 p. 69; Ex. G p. 72 (same). The party was held at Monsarrat's residence. Compl. ¶ 24.

According to the Somerville Police Department incident report attached as Ex. D hereto,[3] dozens of teenagers, many served alcohol, attended that party on Friday, January 29, 2010. Monsarrat was then 41 years old. Ex. D p. 1. "A small amount of marijuana was discovered in open view," and in the kitchen, "alcohol bottles [were] everywhere in open view clearly

[3] Exhibit D is a true and correct copy of Somerville Police Department incident report No. 10003036. The Complaint repeatedly references this police report. *See* Compl. ¶¶ 33 & 58. As a public record explicitly relied on by Monsarrat in framing the Complaint, its review does not require treating this motion as one for summary judgment. *Boston Med. Ctr. Corp. v. Sec'y of the Exec. Office of HHS*, 463 Mass. 447, 450 (2012); *Marram*, 422 Mass. at 45; *McKenna*, 12 LCR at 333. *See also Globe Newspaper Co. v. Evans*, 7 Mass. L. Rep. 239 (Mass. Super. Ct. 1997) (police incident report was public record within scope of Public Records Law).

accessible to all." *Id.* p. 2. One intoxicated 19-year-old guest[4] was taken to the hospital. *Id.* The arresting officer reported:

> … [U]pon arrival, we observed a group of three teenagers entering the front door on the first floor. We made our way inside the apartment and instructed the disc jockey to stop the music. The apartment had two floors and was full of what appeared to be teenagers attempting to hide beer and other alcoholic beverages. I observed at least twenty five to thirty teenagers in the apartment, there were also people on the stairs leading to the second floor. I summoned for an adult and there was no response from anyone. A few minutes later, a man who was later identified as Jonathan Monsarrat came down from the second floor. **Mr. Monsarrat identified himself as the host of the party**.[5]
>
> I instructed Mr. Monsarrat to inform his guests that the party was ending and that they had to leave. He became argumentative by not following my instructions. He assured me that there was no alcohol at the party.[6] I informed him that I observed teenagers with beer bottles and he stated that "that was not the case." I ask some of the attendants for identification and they could not produce any stating "we're in high school, we don't have ID.["]

Ex. D p. 2 (emphasis added).

Monsarrat was arrested and charged with keeping a noisy and disorderly house in violation of G.L. c. 272, § 53, and with furnishing alcohol to minors in violation of G.L. c. 138, § 34. Compl. Ex. 1. A clearer, more complete copy of the criminal docket report is attached as Ex. E hereto.[7] At his arraignment on February 1, 2010, the Somerville District Court found probable cause for a criminal complaint to issue, based on facts in the incident report. Ex. E p. 1.

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[4] Though the police report lists the victim's age (19) and date of birth, the Complaint states that she "was five months from her twenty-first birthday." Compl. ¶ 30. The victim's name is redacted from Exhibits D and E hereto.

[5] Monsarrat's prior statements, on his blog and to the police officer, contradict his current claim that "[t]he party leading to Plaintiff's arrest was hosted by another third party, 'Trano', and not by Plaintiff." Compl. ¶ 25.

[6] Monsarrat now concedes knowing there would be "bouncers and beer" at the party before it began. Compl. ¶ 26.

[7] The Trial Court criminal docket sheet for Monsarrat's arrest was discussed in the Complaint (see Compl. ¶¶ 22-23 & 33), but was reproduced as a mostly illegible copy thereto (Compl. Ex. 1). Exhibit E is a clearer, true and correct copy that also includes the Application for Criminal Complaint No. 1010CR235 from Monsarrat's arraignment, referenced by the same docket number on the docket sheet. The Court may review that complete public record, referenced in Complaint Exhibit 1, without converting this motion to one for summary judgment.

The *Somerville Journal* reported on the party and Monsarrat's arrest on February 4, 2010. Auditi Guha, *Somerville Police bust Question Wheel creator's underage drinking party*, Somerville Journal (Feb. 4, 2010) (the "Guha article"), attached as Ex. F hereto.[8] The Guha article sparked online discussions about Monsarrat and his arrest among the local community. Compl. ¶ 2 & Ex. 4. Defendant Deb Filcman ("Filcman") made two blog posts on the *Journal*'s website about Monsarrat, his arrest, and Wheel Questions. Compl. ¶¶ 34-35 & Exs. 2 & 3. Newman and others added comments to her *Journal* blog posts. Compl. ¶ 39 & Exs. 2 & 3.

Between February 4 and 7, 2010, tales of Monsarrat and his arrest were discussed on a Davis Square LiveJournal forum thread entitled "Today's Somerville Police Blog." Compl. ¶¶ 41-43 & Ex. 4 (hereafter, the "Long Thread"). A clearer, more complete reproduction of the Long Thread, as it appeared on February 10, 2010, is attached at Ex. G hereto.[9] Monsarrat was also discussed on other LiveJournal forums between February 4 and 14, 2010, including http://davis-snark.livejournal.com and http://sf-drama.livejournal.com.[10] Compl. ¶ 42. As one LiveJournal user wrote, "[g]etting involved is part of what being in a neighborhood is about. Neighbors, whether they know each other or not, watch out for one another." Compl. Ex. 6 p. 9.

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[8] The Guha article at Exhibit F may be reviewed as part of the Complaint without converting this motion to one for summary judgment, because the Complaint incorporates by reference several Exhibits that include hyperlinks to and quotations from the article. *See* Compl. at Ex. 2 p. 2 (hyperlink to Guha article under text reading "busted up a party at a 41-year-old's Summer Street apartment"), Ex. 3 p. 2 (hyperlink to Guha article under text reading "Monsarrat's had enough of his own problems") & Ex. 4 p. 1 (hyperlink and quoted excerpt of two paragraphs from article). *See also* Compl. ¶¶ 34 and 35 (incorporating Exhibits 2 and 3); Compl. ¶ 42 (incorporating Exhibit 4).

[9] Due to formatting, Complaint Exhibit 4 shows only parts of the Long Thread, cutting off at least some (and in some cases, all) text from the majority of its comments. *See, e.g.,* Compl. Ex. 4 pp. 32-47. Some users have deleted their comments in the intervening three years, so Exhibit G includes more comments than the version of the Long Thread seen in Complaint Exhibit 4, which was generated more recently.

[10] The Complaint identifies Newman as a moderator/maintainer of the Davis Square LiveJournal forum, Compl. ¶ 41. That role is filled by others on Davis Snark and other LiveJournal forums. *See* Compl. ¶ 44 (identifying two Doe Defendants as owner of Davis Snark page).

Newman participated in some of the February 2010 LiveJournal discussions. *See* Compl. ¶¶ 43-47 & Exs. 4-8. Monsarrat did as well, making more than 70 comments in the Long Thread on February 5 and 6, 2010. Compl. Ex. 4 *passim*; Ex. G *passim*. Newman tried to engage him in open dialogue there. *See, e.g.,* Compl. Ex. 4 pp. 26-27; Ex. G p. 25 (same). Newman posted factual statements and links to newspaper articles about Monsarrat and his matchmaking service. *See, e.g.,* Compl. Ex. 4 pp. 18 & 71 (providing link to Harvard Law student newspaper article); *id.* p. 79 (providing links to four MIT student newspaper articles); Ex. G pp. 17, 79 & 81 (same). Newman also posted his opinion about certain matters. *See, e.g.,* Compl. Ex. 4 p. 19 ("I don't see this news article, or the discussion thereof, as 'bullying.'") & p. 27 ("I've read those articles; I don't think they paint you [Monsarrat] in an especially favorable light."); Ex. G pp. 17 & 25 (same). Once the Long Thread surpassed 500 comments, Newman, his fellow maintainers, and the user who began the thread decided to freeze it, blocking users from adding new comments. *See* Compl. ¶ 42, Ex. 4 p. 1 (update added to original post), & Ex. 5 pp. 13-14.

ARGUMENT

Monsarrat raises claims against Newman for defamation, commercial disparagement, Chapter 93A violations, intentional infliction of emotional distress, and conspiracy. The Complaint fails to satisfy the elements of each cause of action.

I. The Complaint fails to state a claim for defamation against Newman.

Monsarrat claims Newman defamed him but does not allege facts that support the claim. Newman is immune from liability for statements by other online users. As a basis for direct liability, Monsarrat identifies only four allegedly "misleading, false, defamatory and damaging" comments Newman made on LiveJournal in February 2010, but none of those comments is

defamatory. *See* Compl. ¶¶ 43-45 & 47. He argues that liability lies for statements that go beyond "what was alleged in the police report." Compl. ¶ 33; *see also id.* ¶ 58. Yet he does not attribute to Newman any statement contrary to the facts disclosed in the police report.

A. Section 230 of the Communications Decency Act immunizes Newman from liability for all comments by others on LiveJournal threads and the Somerville Journal Blog.

Pursuant to Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, Newman is immune from liability for online comments by third parties, including the more than 1,000 third-party comments in the Exhibits. "No 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. § 230(c)(1). "Section 230 immunity should be broadly construed." *Univ. Commc'n Sys., Inc. v. Lycos, Inc.*. 478 F.3d 413, 418 (1st Cir. 2007). Newman cannot be held liable for third-party comments on an "interactive computer service," such as LiveJournal or the *Somerville Journal* website, as if he had made the comments himself. "[A] third-party user of a website, who posts statements on it, qualifies as an 'information content provider' under the broad definition given to that term in the Act." *Delle v. Worcester Telegram & Gazette Corp.*, 29 Mass. L. Rep. 239, 2011 Mass. Super. LEXIS 295, at *9-10 (Mass. Super. Ct. Sept. 14, 2011) (*citing Lycos*).

CDA immunity applies even when a provider or user is notified of unlawful third-party material and asked to remove it. *Id.* at *10 (citing *Lycos*, 478 F.3d at 420). The immunity applies to all tort claims: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).[11] Newman's

[11] See, e.g., *Doe v. Friendfinder Network, Inc.*, 540 F. Supp .2d 288, 298 (D.N.H. 2008) ("Because the plaintiff seeks to hold the defendants liable as the publisher or speaker of information provided by another content provider, her state-law claims ... are barred by the CDA.").

liability, if any, is limited to his own speech. *Lycos*, 478 F.3d at 419. Any allegation of liability against Newman for statements by others must be dismissed pursuant to Section 230 of the CDA.

B. Newman's four statements identified in the Complaint do not defame Monsarrat.

The Complaint alleges that four comments Newman made in 2010 were "damaging." However, none of the comments is susceptible of a defamatory meaning as a matter of law.

"Defamation is the intentional or negligent publication to a third person, without privilege to do so, of a false statement of fact that discredits the plaintiff in the minds of any considerable and respectable segment in the community." *Howell v. Enterprise Publ'g Co., LLC*, 72 Mass. App. Ct. 739, 742 (2008) (citations and internal quotations omitted). "To be actionable, the allegedly defamatory utterance must be false." *Id.* Also, "to be actionable, defamatory matter must of course be shown in some objective sense to be 'of and concerning' the complainant." *MiGi, Inc. v. Gannett Mass. Broadcasters*, 25 Mass. App. Ct. 394, 396 (1988) (citations omitted).

To the extent that Newman's comments were "of and concerning" Monsarrat, they either stated protected fact or protected opinion. "'Massachusetts law protects an opinion, framed as a factual assertion, that discloses or implies its non-defamatory factual basis.'" *Delle*, 29 Mass. L. Rep. 239, 2011 Mass. Super. LEXIS 295, at *7 (*quoting Nat'l Ass'n of Gov't Employees/Int'l Bhd. of Police Officers v. BUCI Television, Inc*., 118 F. Supp. 2d 126, 131 (D. Mass. 2000)).[12]

When a plaintiff is a public figure, "the falsity of the defendant's defamatory statement regarding matters of public concern remains a prerequisite to recovery." *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 132 (1998) (*citing Gertz v. Robert Welch, Inc.*, 418 U.S.

[12] "Where a speaker offers an opinion, but does not suggest that additional undisclosed facts support that opinion, no claim for defamation lies." *Id*. *See also Flotech, Inc. v. E.I. DuPont de Nemours Co.*, 627 F. Supp. 358, 368 (D. Mass. 1985) ("An opinion is not actionable in defamation because '[u]nder the First Amendment, there is no such thing as a false idea.'") (*quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)).

323, 348 (1974)). Sexual harassment allegations about a plaintiff are a matter of public concern. *See id.* at 130. Where Newman's comments were made about Monsarrat among the LiveJournal user community, "the plaintiff's status as a public figure is determined in relation to [its] members, rather than to the community at large." *Materia v. Huff*, 394 Mass. 328, 331 (1985). "When 'an individual voluntarily injects himself or is drawn into a particular public controversy [, he] thereby becomes a public figure for a limited range of issues.'" *Id.* (*quoting Gertz*, 418 U.S. at 351). Monsarrat was a "limited issue public figure" in that community, first drawn into controversy by his arrest, then injecting himself through more than 70 comments on the Long Thread. *See Arnold v. Flook*, No. 06-00356, 27 Mass. L. Rep. 91, 2010 Mass. Super. LEXIS 112, at *11-12 (Mass. Super. Ct. Jan. 29, 2010). Thus, the First Amendment requires that he "must establish the existence of a 'defamatory falsehood.'" *Shaari*, 427 Mass. at 131 (*citing Gertz*).

1. Newman's comment—"17 and 24 is a lot different from the situation described in that newspaper article, however."—is not defamatory.

Monsarrat takes issue with a comment Newman made on the Long Thread in response to a LiveJournal user with the user name turil. On February 4, 2010, turil added a comment on the thread, describing as consensual her own past experience with an older boyfriend: "When I was 17 I had a boyfriend who was 24 … If anyone said I was a victim they would have been full of shit because I wasn't." Compl. Ex. 4 p. 28; Ex. G p. 27 (same). Newman responded, "17 and 24 is a lot different from the situation described in that newspaper article, however." Compl. Ex. 4 p. 32; Ex. G p. 30 (same). That statement was of and concerning turil, not Monsarrat.

Monsarrat alleges that, "by Newman's own words, he is reading the articles to mean CHILDREN, rather than 18 to 21 year olds." Compl. p. 11. There is no basis for that speculation, as Newman never discussed the partygoers' ages. Even if Newman had stated such an opinion,

based on disclosed facts in the police report and the Guha article (linked in the Long Thread's opening post), it would be protected from defamation claims. "'A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.'" *Nat'l Ass'n of Gov't Employees, Inc. v. Cent. Broad. Corp.*, 379 Mass. 220. 227 (1979) (*quoting* Restatement (Second) of Torts § 566 cmt. c (1977)). *See also Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 262 (1993); *Walsh v. Town of Lakeville*, 431 F. Supp. 2d 134, 153 (D. Mass. 2006) (opinion based on disclosed facts is not actionable even if the factual basis proves false).

His statement also cannot be defamatory because it cannot be proven false. *See generally Fitzgerald v. Town of Kingston*, 13 F. Supp. 2d 119, 126 (D. Mass. 1998); *Tuper v. North Adams Ambulance Serv., Inc.*, No. 94-0495, 1996 Mass. Super. LEXIS 20, at *11 (Mass. Super. Ct. Aug. 27, 1996) (citations omitted) ("the words, to be actionable, must be shown to be false"). Guha reported that, according to the police report, Monsarrat was the 41-year-old host of a party was attended by dozens of teenagers. *See* Exs. D & F. That 20+ year age gap is, as Newman said, greater than the 7-year age gap turil described. His statement was as factual as a math equation.

2. Newman's comment—"I'm another of the moderators and will confirm what surrealestate said above. She and Mare and I jointly decided on this course of action at last night's Ball Square Bowling event, and I subsequently got the agreement of moderator prunesnprisims as well. Mare has now edited the post with an explanation and has turned on comment screening."—is not defamatory.

Monsarrat complains of Newman's February 7, 2010 comment above. Compl. p. 12. His comment was not "of and concerning" Monsarrat; it described the maintainers' decision to freeze the Long Thread, of which Monsarrat was a subject and participant. *See* Compl. Ex. 5 pp. 13-14. So tangential a reference, which does no damage Monsarrat's reputation, does not defame him.

Monsarrat's allegations about the comment fail to transform it into defamation. The Complaint contends, "Defendant Newman admits to making editorial changes to his blogs." Compl. p. 12. That allegation is refuted by the comment itself. Newman did mention an edit—one made not by Newman (LiveJournal maintainers cannot edit the content of other users' posts), but by the user who posted the original post (also called the thread "owner"; *see* Compl. ¶ 42). That edit, and the joint decision to freeze comments on the Long Thread, fall squarely within the statutory immunity of Section 230, which shields "any action voluntarily taken in good faith" to moderate such third-party statements. 47 U.S.C. § 230(c)(2)(A).

The Complaint further alleges, "Newman's statements confirm that Newman has made the other davis square [*sic*] moderators aware of the abuse." Compl. p. 12. Newman never suggested that he deemed any of the comments "abusive"; he stated instead: "I don't see this news article, or the discussion thereof, as 'bullying.'" Compl. Ex. 4 p. 19. But again, the CDA would keep him immune from liability even if he had known of wrongful comments. "It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." *Delle*, 29 Mass. L. Rep. 239, 2011 Mass. Super. LEXIS 295, at *10 (*citing Lycos*, 478 F.3d at 420).

3. Newman's comment—"I didn't realize this was a public entry rather than a friendslocked one, so maybe we should clobber this whole subthread."—is not defamatory.

Monsarrat argues that Newman, by his February 11, 2010 comment quoted above, "Newman admits that his unlawful conduct may cause him to be liable to Plaintiff." Compl. p. 13. Newman made no such admission. *See* Compl. Ex. 6 p. 5. His comment offers no basis for liability, because it is not susceptible of a defamatory meaning. "Words may be found to be

defamatory if they hold the plaintiff up to contempt, hatred, scorn, or ridicule, or tend to impair his standing in the community." *Eyal v. Helen Broad. Corp.*, 411 Mass. 426, 429 (1991). Furthermore, the comment is not "of and concerning" Monsarrat and it is a statement of pure opinion. *Id.* at 430-31; *see also Lyons*, 415 Mass. at 262.

4. Newman's comment—"More links, from the MIT student newspaper in 2003-04."—is not defamatory.

Newman made the above-quoted comment on February 5, 2010. Compl. Ex. 8 pp. 8-9. His comment included a link to a comment he had made on the Long Thread earlier that day, *id.* Ex. 4 p. 79, which included links to four MIT newspaper articles about the matchmaking service. *See* Exs. A-C & Compl. Ex. 13. Newman is not liable for any statement in those articles.[13]

Monsarrat does not allege that the articles have any false or defamatory content, or point out any such content in the articles or Newman's statement linking to them. Instead, Monsarrat asserts they are damaging when "coupled with … other false and untrue statements." Compl. p. 15.[14] But a defamation plaintiff must "plead with some particularity as to the alleged defamatory statements." *Endodontic Assoc. of Lexington v. Johnston-Neeser*, No. 05-3319, 20 Mass. L. Rptr. 677, 2006 Mass. Super. LEXIS 145, *18 (Mass. Super. Ct. March 16, 2006) (*citing Eyal*, 411 Mass. at 432 n. 7). Monsarrat has failed to plausibly allege facts sufficient to state a claim. Even if he had, Section 230 immunity would apply. "[T]hat immunity depends on the source of the information in the injurious statement, not the source of the statement itself … the CDA does not

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[13] Merely posting links to articles is not actionable as defamation because a hyperlink, even to a defamatory article, does not constitute a republication of the article. *See In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012); *cf. Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 704-05 (D. Md. 2000), *aff'd*, 11 Fed. App'x 99 (4th Cir. 2001) (defendant's publication of an opinion with accompanying hyperlink constituted protected opinion based on disclosed facts); *Sandals Resorts Int'l Ltd. v. Google*, *Inc.*, 86 A.D.3d 32, 43 (N.Y. App. Div. 1st 2011) (same).

[14] *See also* Compl. ¶¶ 53-54 (alleging that "through content published at [among others, one of the MIT newspaper articles] ... Defendants ... make false and damaging comments," without specifying any falsity therein).

allow liability against the defendants on the theory that they adopted the third party's statements by consciously—or unconsciously—deciding to re-post them on other sites." *Doe v. Friendfinder Network, Inc.*, 540 F. Supp .2d 288, 298 n. 10 (D.N.H. 2008) (citations omitted).

C. The Complaint does not point to any other defamatory statements by Newman sufficient to support a claim.

The Complaint asserts generally that Defendants, including Newman, may be subject to liability for online comments not specifically recited in the Complaint, including some of the more than 1,000 online comments in the Exhibits. Conclusory allegations about such unspecified statements fail to state a claim with sufficient plausibility or particularity. *See Endodontic Assoc. of Lexington*, No. 05-3319, 20 Mass. L. Rptr. 677 (Mass. Super. Ct. March 16, 2006).

Newman also has no liability for comments by third parties on websites where he never participated. Monsarrat alleges that Newman published comments on an sf-drama LiveJournal thread[15] (Compl. ¶ 49), and also refers to third-party comments in other forums, such as a journalfen.net thread (Compl ¶ 48 & Ex. 9) and Encyclopedia Dramatica (Compl. ¶ 53 & Exs. 15 & 16). The Complaint does not specifically identify, and its Exhibits do not show, any comments made by Newman anywhere other than the *Somerville Journal* website and the Davis Square and Davis Snark LiveJournal forums. Pursuant to Section 230 of the CDA, Newman cannot be liable for third-party online comments there, or on any other interactive site.

II. The Complaint fails to state a commercial disparagement claim against Newman.

Monsarrat fails to state a claim for commercial disparagement. This cause of action[16] protects a plaintiff's right "that he shall not be libelled in his business or trade." *Hartnett v.*

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[15] Monsarrat identifies no such comments by Newman, and the Exhibit for that thread includes none. Compl. Ex. 10.

[16] "The tort of 'commercial disparagement' also is known as 'injurious falsehood,' 'disparagement of property,' 'slander of goods,' and 'trade libel.'" *HipSaver, Inc. v. Kiel*, 467 Mass. 517, 518 n. 1 (2013) (citation omitted).

Plumbers' Supply Ass'n, 169 Mass. 229, 236 (1897). "Commercial disparagement is defined by the Restatement (Second) of Torts, § 623A (1979), as a false statement intended to bring into question the quality of a rival's goods or services in order to inflict pecuniary harm." *Picker Int'l v. Leavitt*, 865 F. Supp. 951, 964. (D. Mass. 1994). The Complaint never suggests that Newman is a commercial rival of Monsarrat, and points to only one statement by Newman concerning any of Monsarrat's businesses: Newman's February 5, 2010 comment linking to articles about Monsarrat's former matchup service. *See* Compl. Ex. 8 pp. 8-9. The Complaint identifies no false and disparaging statement in those articles or in Newman's comment. Moreover, Monsarrat has no standing to allege disparagement on behalf of the matchup service. New management took it over nine years ago, and he does not allege that he still has any role in it. *See* Ex. B (Feb. 3, 2004 article on new management) & Compl. ¶ 20 (list of businesses Monsarrat owns making no mention of matchup service). No claim may lie against Newman for commercial disparagement.

III. The complaint fails to state a claim against Newman under Chapter 93A.

Monsarrat's failure to support a defamation claim also defeats his claim against Newman for unfair or deceptive acts or practices under Mass. Gen. L. ch. 93A ("Chapter 93A"). "[W]here allegedly defamatory statements do not support a cause of action for defamation, they also do not support a cause of action under G. L. c. 93A." *Dulgarian v. Stone*, 420 Mass. 843, 853 (1995).

The Complaint also fails to satisfy the elements of a Chapter 93A claim. Monsarrat does not allege that Newman made his online statements as part of a commercial transaction from which he sought to profit. Chapter 93A prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." G.L. c. 93A, § 2(a). It does not apply to a defendant's non-commercial conduct. The defendant must act in the course of "'trade or commerce,' which refers

to transactions in a business context." *Feeney v. Dell*, 454 Mass. 192, 212 (2009) (*quoting Lantner v. Carson*, 374 Mass. 606, 611 (1978)). "Chapter 93A imposes liability on persons seeking to profit from unfair practices. The deterrence goals of c. 93A are inapplicable in a non-business context." *Poznik v. Mass. Med. Prof'l Ins. Ass'n*, 417 Mass. 48, 53 (1994) (citing *Manning v. Zuckerman*, 388 Mass. 8, 12 (1983)).

The allegation that Monsarrat himself has business interests is irrelevant. *See* Compl. ¶¶ 5, 20-21 & 75. "[T]he distinguishing mark for G. L. c. 93A applicability ... [is] interactive business transactions but with independent business entities." *Grand Pac. Fin. Corp. v. Brauer*, 57 Mass. App. Ct. 407, 416 n. 7 (2003). The Complaint does not even allege that Monsarrat was engaged in trade or commerce when he took part in the online discussions, or at the 2010 party. *See* Compl. ¶¶ 25-29 & 56-57. Without a nexus to a commercial transaction, the facts alleged are not actionable under Chapter 93A.

IV. The complaint fails to state a claim for relief for the intentional infliction of emotional distress against Newman.

The Complaint fails to plausibly allege facts to support a claim for intentional infliction of emotional distress ("IIED"). "A principal bulwark against excessively broad recovery [for IIED] is the requirement that the defendant must have engaged in 'extreme and outrageous' conduct." *Foley v. Polaroid Corp.*, 400 Mass. 82, 99 (1987), citing *Agis*, 371 Mass. at 144-45.

> Thus, liability cannot be predicated upon "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," nor even is it enough "that the defendant ... has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort"; rather, "[l]iability [may be] found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Id., quoting Restatement (Second) of Torts § 46 cmt. d (1965).

The Complaint's allegation that Newman exhibited "extreme and outrageous" conduct is belied by its Exhibits, which show he treated Monsarrat with civility. Newman did not assert that Monsarrat was guilty as charged. He referred to Monsarrat as "the arrested suspect." Compl. Ex. 4 p. 16; Ex. G p. 15 (same). *See also* Compl. Ex. 8 p. 8 ("To my knowledge he hasn't been found guilty of any crime in a court of law."). In discussing Monsarrat, Newman reserved judgment about him: "How long should we hold his past offenses against him, and is it possible that he has genuinely changed and found a new path (as reflected by this [Wheel Questions] installation? I've never met this guy, and I don't know the answers to either question, but they're worth asking." Compl. Ex. 12 p. 3. Newman repeatedly stated that Monsarrat was welcome to join the discussions. Compl. Ex. 11 p. 9; Compl. Ex. 4 p. 18; Ex. G p. 17 (same). Evidently Newman engaged in those discussions with an open mind, though Monsarrat did not sway his opinion. When Monsarrat posted links to articles about the matchmaking service, Newman replied, "I've read those articles; I don't think they paint you in an especially favorable light." Compl. Ex. 4 pp. 25-26; Ex. G p. 25 (same). But failing to parrot Monsarrat's opinion about the details of his life is neither extreme nor outrageous.

Liability for IIED also does not attach unless the defendant acted "without privilege." *Howell v. Enter. Publ'g Co., LLC*, 455 Mass. 641, 672 (2010) (*citing Agis v. Howard Johnson Co.*, 371 Mass. 140, 142 (1976)). The First Amendment protects opinion from liability for IIED claims to the same extent that it operates in the defamation context. "A privilege which protected an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort." *Correllas v. Vivieros*, 310 Mass. 314, 324 (1991).

The allegations also do not support Monsarrat's frivolous prayer for relief from IIED under Massachusetts' wrongful death statute. *See* Compl. ¶ 121 & Prayer for Relief Nos. 10-11. The Complaint does not allege that Newman killed anyone. G.L. c. 229, § 2. Nor is there any basis for Monsarrat's frivolous claim of IIED caused in part by a "conspiracy to ... infringe upon Plaintiffs' intellectual property." Compl. ¶ 116. That claim is based on the common-law copyright cause of action raised against other defendants. *See* Compl. ¶¶ 59-63, 100-114. "These common law [copyright] claims ... have clearly been preempted by the 1976 Copyright Act." *Sicari v. Raccula*, 2 Mass. L. Rep. 109 (Mass. Super. Ct. May 8, 1994); *see also* 17 U.S.C. § 301 (a); *Burke v. NBC, Inc.*, 598 F.2d 688, 691 n.2 (1st Cir. 1979) ("Under the Copyright Act of 1976 ... common law copyright is abolished."). Monsarrat fails to state a claim for IIED.

V. The complaint fails to state a claim for conspiracy against Newman.

The Complaint does not plead facts sufficient to state a claim for conspiracy. Monsarrat alleges that the conspiracy was conducted "by way of false and defamatory Internet postings." Compl. ¶ 116. CDA immunity preempts any liability for civil conspiracy grounded on third-party acts, and courts have often dismissed conspiracy claims on that basis. *See Cornelius v. DeLuca*, No. 1:09-cv-72, 2009 U.S. Dist. LEXIS 72812, at *8 (E.D. Mo. Aug. 18, 2009) (plaintiffs alleged that "defendants conspired with the other defendants to post or allow to be posted the allegedly libel[ous] statements"; Court held that "the complaint sets forth no facts that make it plaus[i]ble that, given the CDA, the moving defendants could be held liable for the statements of others."); *Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 U.S. Dist. LEXIS 109069 (C.D. Ill. Aug. 3, 2012), *aff'd*, 2013 U.S. App. LEXIS 5549 (7th Cir. Mar. 19, 2013); *Barrett v. Rosenthal*, 51 Cal. Rptr. 3d 55, 78-79 (Cal. 2006) (Moreno, J., concurring). The same result is called for here.

The Complaint also fails to plausibly allege a civil conspiracy. Massachusetts recognizes a "form of civil conspiracy, reflected in the Restatement (Second) of Torts § 876 (1977), [that] derives from 'concerted action,' whereby liability is imposed on one individual for the tort of another." *Kurker v. Hill,* 44 Mass. App. Ct. 184, 188 (1988) (*quoting Aetna Cas. Sur Co. v. P&B Autobody*, 43 F.3d 1546, 1564 (1st Cir. 1994)). "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... does a tortious act in concert with the other or pursuant to a common design with him." *Kyte v. Philip Morris, Inc.*, 408 Mass. 162, 167 n.5 (1990) (quoting Restatement (Second) of Torts § 876(a)). "To establish a civil conspiracy, a plaintiff must demonstrate that a combination of persons acted pursuant to an agreement to injure the plaintiff. ... It is not sufficient to prove joint tortious acts of two or more persons." *Gutierrez v. Mass. Bay Transp. Auth.*, 437 Mass. 396, 415 (2002) (quotations omitted).

Monsarrat alleges a "common scheme" against him, Compl. ¶ 124, but does not allege supporting facts that plausibly suggest a tortious common design. "The mere conclusory allegation of participation in a conspiracy … fails to state a claim." *Hiles v. Episcopal Diocese of Mass*., 51 Mass. App. Ct. 220, 232 (2001) (citations omitted). *See also Advanced Tech. Corp. v. Instron, Inc.*, Civ. A. No. 12-10171-JLT, 2013 U.S. Dist. LEXIS 26052, *16-17 n. 51 (D. Mass. Feb. 26, 2013) ("[L]egal conclusions, including allegations that Defendants 'conspired,' 'agreed,' and 'colluded' ... are not entitled to the assumption of truth.") (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 679-80 (2009) & *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009) (quotations omitted).

Monsarrat contends, "Defendant Filcman and Defendant Newman intentionally planned and orchestrated this cybersmear attack ... through their means of solicitation and engagement of

Does Defendants as alleged herein this Complaint." Compl. ¶ 9. No plausible factual allegations support that claim. Monsarrat identifies no act by which Newman could have agreed to injure him. The only specific joint decision by Newman and others alleged is freezing the Long Thread. Compl. p. 12 & Ex. 5 pp. 13-14. Monsarrat characterized that discussion as abusive, so Newman could not have intended to injure him by staunching its flow. Monsarrat's Exhibits, which show that Newman withheld judgment and tried to engage him and others in dialogue about the news stories, contradict his conclusory allegation of an intent to injure him. Compl. ¶ 127. Monsarrat's allegations also do not plausibly suggest Newman and Filcman "orchestrated" anything together. He does not even allege that they knew each other before he filed this action.

Because the Complaint does not plausibly allege that Newman joined any agreement to injure Monsarrat, the speculative conspiracy claim must be dismissed.

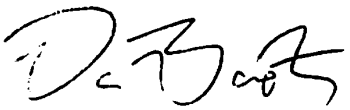
CONCLUSION

Wherefore Defendant Newman respectfully requests that the Court dismiss all claims against Newman in their entirety and with prejudice, and grant Newman such other further relief that the Court deems just and proper.

Dated: June ____, 2013

RON NEWMAN

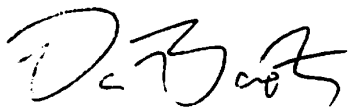
By his attorney,



Daniel G. Booth (BBO# 672090)
BOOTH SWEET LLP
32R Essex Street, Suite 1
Cambridge, MA 02139
Telephone: (617) 250-8602
Facsimile: (617) 250-8883
dbooth@boothsweet.com

CERTIFICATE OF SERVICE

I hereby certify that on this day, a true copy of the above document was served by mail upon the attorney of record for each party who has entered an appearance in this action.



Dated: June ____, 2013

Daniel G. Booth (BBO# 672090)