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**VIA ELECTRONIC MAIL ONLY**

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Re: **In re: Billy Mitchell**

Dear Ms. Hoover:

Thank you for your letter of September 23, 2019. The following sets forth Mr. Mitchell's response.

First, with respect to the Donkey Kong scores, you are mistaken in stating that the *current* Twin Galaxies ownership verified Mr. Mitchell's scores. In fact, *all* of Mr. Mitchell's Donkey Kong Scores were verified by Walter Day, the original owner of Twin Galaxies until 2014, long before the arrival of Twin Galaxies' current ownership. As Mr. Day sets out in his letter attached to this letter, he owned the Twin Galaxies Scoreboard from 1981 to 2014, was the original authentication source of all the records, and firmly stands behind all of those records, including Billy Mitchell's. With regard to current ownership, we note that at present Twin Galaxies is no longer a verification source for Guinness World Records – presumably because current ownership has proved to be an untrustworthy steward of the records.

In his letter, Mr. Day also points out the overwhelming case supporting the authenticity of Mr. Mitchell's records and the falsity of both Twin Galaxies and Guinness' statements. As we and Mr. Day have noted, there is an overwhelming amount of eye-witness testimony laid out in

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sworn affidavits testifying to the observation of Mr. Mitchell's scores. In addition, an exhaustive game play analysis supported by Robbie Lakeman – a featured player on Guinness' own 2019 Gamers' Edition Book – supports the conclusion that Mr. Mitchell's scores were legitimate. Further, Twin Galaxies' current owner, Jace Hall, undertook a heavily-biased, woefully inadequate investigation. As Mr. Day and Mr. Mitchell relate, Mr. Hall completely dismissed their statements and refused their entreaties to contact eye witnesses that could support Mr. Mitchell. Instead, he bafflingly relied solely – except when it suited his anti-Bill Mitchell agenda – on "science," i.e., an inconclusive technical analysis.

Second, with respect to the Pac-Man scores, you are correct that the Pac-man scores should never have been affected or removed from Guinness. But this is not because Twin Galaxies was not involved in "verifying" the Pac-Man scores; it is because neither Guinness nor Twin Galaxies ever had any evidence of any kind to suggest that the Pac-Man scores were illegitimate, as stated in the 2019 Gamer's Edition Book. For that matter, the Pac-Man scores were never even investigated by Twin Galaxies. And, significantly, Guinness never even contacted the verification source for the Pac-Man records – Walter Day – before stating that Mr. Mitchell's records "never were."

Third, with respect to the falsity of Guinness' statements, the 2019 Gamers' Edition clearly maligned Mr. Mitchell. Under the heading "The Records that Never Were," and with respect to gamer Todd Rogers, the edition stated that Twin Galaxies had concluded his world record in *Dragster* was "not technically possible and he was stripped of his record." In other words, the edition implied, Rogers only achieved his score by cheating and his record, therefore, was nullified. Guinness went on to say (with emphasis in original):

On April 12, 2018, TG repeated the act by stripping Billy Mitchell . . . of all of his records. These included two active Guinness World Records: the **highest score on PAC-Man** and the **first perfect score on Pac-MAN**. TG Member Jeremy Young was able to prove that Mitchell's submitted scores were obtained while using MAME (arcade emulation software), something that's forbidden according to TG's rules.

In fact, though, Twin Galaxies said nothing of the sort. While Twin Galaxies alleged that Mr. Mitchell had cheated, it specifically said that "we cannot definitively conclude that what is on the tapes is MAME." So Twin Galaxies did not conclude that MAME was used. In addition, Mr. Young's investigation was limited solely to Mr. Mitchell's Donkey Kong scores and, therefore, could in no way have played any role in determining that Mr. Mitchell's PAC-man scores were illegitimate. And Guinness did absolutely nothing to investigate or verify the statement that the PAC-man scores were achieved through use of MAME.

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Further, Guinness itself went beyond simply relaying the results of Twin Galaxies' investigation. Instead, Guinness adopted its own editorial statement: i.e., that "Jeremy Young was able to prove that Mitchell's submitted scores were obtained while using MAME (arcade emulation software), something that's forbidden according to TG's rules." In other words, Guinness on its own stated that Jeremy Young had proved that Billy Mitchell cheated, and did not simply state that Twin Galaxies had found that Mr. Mitchell cheated. And, in fact, as the overwhelming evidence submitted in our original letter shows, it is simply false that Mr. Mitchell obtained the scores through cheating.

As far as malice, the law is clear that constitutional malice is present when a publisher makes no attempt whatsoever to check the veracity of the material it publishes. In *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, a football coach sued a magazine for publishing an article accusing him of fixing games. The evidence showed that this was not "hot news," that the charges were serious, that the editors recognized "the need for a thorough investigation," that the reporter's superiors did not look at the reporter's notes prior to the publication, that a key witness was not interviewed, and that "no attempt was made to screen the films of the game." *Curtis Publishing Co., supra*, 388 U.S. at 157. Under those facts, the Supreme Court held that a jury could properly infer that the magazine "had been anxious to publish an expose and had, thus, wantonly and recklessly seized on a questionable affidavit." *Id.* at n. 20.

Similarly, in *Hunt v. Liberty Lobby* 631 (11th Cir. 1983) 720 F.2d 631, the court affirmed a jury finding of actual malice. The court noted that "when an article is not in the category of 'hot news,' that is, information that must be printed immediately or it will lose its newsworthy value, 'actual malice may be inferred when the investigation for a story... was grossly inadequate in the circumstances.'" *Hunt, supra*, 720 F.2d at 643.

Likewise, in *Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.* (Tex. App. 2007) 219 S.W.3d 563, the court cited a combination of circumstantial evidence from which the jury could have legitimately inferred malice. These factors included: i) omitting pertinent information that would have prevented a "false impression" from the information included in the defamatory communication; ii) a failure to attempt verification of the defamatory information; and iii) "inconsistent" and "equivocating" testimony from the defendant. *Texas Disposal Systems Landfill, supra*, 219 S.W.3d at 578-579.

And in *Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 275-276, the California Supreme Court found that where actual malice is based on the republication of a third party's defamatory falsehoods, an "actual malice finding may be upheld 'where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports' and the republisher failed to interview obvious witnesses who could have confirmed or disproved the allegations or to consult relevant documentary sources." *Khawar, supra*, 19 Cal.4th at 276 [punctuation and internal citations omitted].

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In *Khawar*, the California Supreme Court found that, because the statement was obviously defamatory:

the jury could properly conclude that Globe acted with actual malice in republishing that claim if it found also, as it impliedly did, that Globe failed to use readily available means to verify the accuracy of the claim by interviewing obvious witnesses who could have confirmed or disproved the allegations or by inspecting relevant documents or other evidence.

*Khawar*, 19 Cal.4th at 276.

The court further noted that republishing defamatory material without taking steps to determine the veracity of the material was particularly egregious when the circumstances did not involve "a situation in which time pressures made it impossible or impractical to investigate the truth of the accusation." *Id.* at 276. Before publishing the article, the court found, "Globe could well have afforded to take the time necessary to investigate the matter with sufficient thoroughness to form an independent judgment before republishing an accusation likely to have a devastating effect on the reputation of the person accused. But Globe did not do so." *Id.* at 277. *See also Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 682 [actual malice found when publisher failed to interview a key witness].

In addition, malice can also be shown where the publisher fails to give the subject of the defamatory statement a chance to reply. *See, e.g., Southern Air Transport, Inc. v. Post Newsweek Stations Florida, Inc.* (Fla. 3d DCA 1990) 568 So. 2d 927 [malice found where the media aired an uncorroborated claim that the plaintiff was a drug trafficker without giving the plaintiff a fair opportunity to reply].

Here, Guinness obviously made no attempt of any kind to verify before publishing the defamatory information it published, including any attempt to contact Mr. Mitchell. We are attaching an addendum addressed solely to the issue of actual malice, and the addendum provides ample evidence of it.

Lastly, Mr. Mitchell demands the restoration of *all* his records. These include, besides PAC-man and Donkey Kong, Ms. PAC-man, Donkey Kong Jr, and BurgerTime. These records occurred in the 1980's, Walter Day's tenure. There is no need for Mr. Mitchell to make new attempts at his scores. Even if there were, however, it is noteworthy that Mr. Mitchell has broken his own record-setting Donkey Kong scores in the past year on multiple occasions in very public settings.

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We look forward to your response.

Very truly yours,

**MANNING & KASS  
ELLROD, RAMIREZ, TRESTER LLP**

JAMES E. GIBBONS

JEG/jeg

Encl. (Walter Day letter and  
Malice Addendum)

cc: Billy Mitchell