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For Settlement Purposes Only – Fed. R. Evid. 408

January 17, 2020

via email and United States mail to JEG@manningllp.com

James E. Gibbons
Manning & Kass
Ellrod, Ramirez, Tester LLP
801 Figueroa Street
15th Floor
Los Angeles, CA 90017

Re: Billy Mitchell

Dear Mr. Gibbons:

Throughout its long and distinguished history, Guinness World Records ("GWR") has relied on many organizations and individuals with expertise in particular subject areas for verification of record achievements. This is a collaborative process. GWR's deference to the knowledge and technical skills of people and entities who are subject matter experts in highly specialized fields when it compiles and publishes record achievements is not only reasonable, but fundamental to our client's business. Accordingly, in the regular course of its business, GWR relied on outside expertise when it recognized Mr. Mitchell's records, and it relied on the expertise of the same entity when it withdrew those records.

As you know, GWR has regarded Twin Galaxies as a trusted subject matter expert for information about gaming records for nearly four decades. Twin Galaxies itself published a book of gaming score achievements for a number of years. Dave Hawksett, who currently is the Head Custodian of Twin Galaxies, was first an employee of and then a consultant to GWR for nearly two decades as its Science & Technology editor. Thus, unlike the sources of information in the cases upon which you rely, there was no reason for GWR to doubt, second-guess, or double check on Twin Galaxies's decision with respect to Mr. Mitchell's records. This is particularly true given GWR was aware that Twin Galaxies had conducted a long analysis of the evidence in a public forum about which Mr. Mitchell was no doubt keenly aware and to which he was able to contribute if he so desired.

Against this backdrop, and in order to establish that GWR acted with actual malice against him, Mr. Mitchell will bear the heavy burden of proving by clear and convincing evidence that GWR

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either knew Twin Galaxies's conclusion about his game play was false or that GWR in fact subjectively entertained serious doubt about the truth of Twin Galaxies's conclusion. The evidence must be so clear as to leave no substantial doubt. *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 84, 55 Cal. Rptr. 3d 600, 611 (2007). He will have to do more than demonstrate that it might have been a good idea to investigate before publishing. A failure to investigate must be equivalent to a "purposeful avoidance of the truth" or due to a "deliberate decision not to acquire knowledge of facts that might confirm the probable falsity" of the allegedly defamatory statements. *Id.* at 90, 616. He will need evidence to support a conclusion that GWR "in fact entertained serious doubts as to the truth" of its publication. Your client will have nothing of the sort because GWR reasonably relied on a well-regarded authority in the field of video game achievements in taking its actions, and its words did nothing more than state the truth: Twin Galaxies had concluded that Billy Mitchell's records should no longer be recognized.

Moreover, your position that GWR is guilty of actual malice for failing to question the authority of Twin Galaxies, conduct an independent investigation, call witnesses, or interview Mr. Mitchell is without merit. Mr. Mitchell was apparently content to have GWR rely on Twin Galaxies's conclusions about his achievements so long as those conclusions were in his favor. Furthermore, our client has no record of Mr. Mitchell ever having contacting it to protest GWR's decision; instead, he waited and then threatened to sue. Months passed between the *Variety* story and the publication of GWR's *Gamer's Edition 2019*, during which Mr. Mitchell could have told GWR his side of the story.

Please understand that even if your client is able to prove that Twin Galaxies's conclusion that he achieved his scores using emulations software is false, that would not mean GWR acted unreasonably when it continued to rely on Twin Galaxies as a trusted source of verification for gaming records; unlike the defendants in the cases you cite, GWR had no reason to doubt Twin Galaxies's conclusions about Mr. Mitchell. For instance, there is nothing in GWR's conduct that even remotely approaches the "obvious reasons to doubt the accuracy" of the information that was published in *Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 265, 965 P.2d 696, 702 (1998), *as modified* (Dec. 22, 1998)(reasons to doubt the accuracy of the accusation that the plaintiff killed Robert Kennedy included "massive investigations" by the FBI and other government agencies that accumulated a "vast quantity of evidence" pointing to the guilt of someone else, who was tried and convicted of the crime). Likewise, in *S. Air Transp., Inc. v. Post-Newsweek Stations, Fla., Inc.*, 568 So. 2d 927, 928 (Fla. Dist. Ct. App. 1990), and contrary to your characterization, the appellate court did not find actual malice, but instead remanded the case to the trial court because there was evidence in the record that could support a jury's finding of actual malice, namely that the allegedly defamatory story was based on the word of an unreliable informant and was completely uncorroborated by any other evidence.

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The other cases you rely upon in this regard are equally unavailing. In *Hunt v. Liberty Lobby*, 740 F.2d 630 (11th Cir. 1983), in determining there was sufficient evidence for the jury to conclude that the plaintiff had met his burden of proving with convincing clarity that the defendant had published the article with actual malice, the court of appeals cited a long list of facts that could support an inference of actual malice, including the "inherent improbability" of the story at issue. In *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 579 (Tex. App. 2007), the court cited evidence that showed that at the time the statements were made the defendant had serious questions about their accuracy. In sharp contrast to the defendants in these cases, GWR had absolutely no reason to doubt Twin Galaxies's conclusions regarding Mr. Mitchell.

In a further effort to cast GWR's conduct as defamatory, you assert that GWR cannot have relied on Twin Galaxies for its headline, "The Records That Never Were" in the *Gamer's Edition 2019*, supposedly because Twin Galaxies had not made that explicit statement. Yet in your September 9, 2019 letter you admit that Twin Galaxies stripped your client of "all of his records and achievements." There is no material difference in the meaning of "stripping [Mr. Mitchell]" of all of his past records and saying that the records "never were." Withdrawing recognition that records were achieved is equivalent to saying they were not achieved, and GWR's characterization was absolutely accurate.

Nor is GWR's statement in the *Gamer's Edition* that "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," defamatory. First, the phrase "Jeremy Young was able to prove" is an expression of opinion. See *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) ("a defendant publishes a "pure opinion" when the defendant makes a comment or opinion based on facts which are set forth in the publication or which are otherwise known or available to the reader or listener as a member of the public."). Second, MAME can be understood as a shorthand generic reference to emulation software, and more to the point, whether or not Twin Galaxies concluded that it was a specific type of emulation software is not material to the substance of its finding that Mr. Mitchell's score was achieved in a way that was forbidden by Twin Galaxies's rules. Contrary to the statement in your October 10, 2019 letter, GWR did not say that Young had proved that Billy Mitchell "cheated;" in fact, the word "cheat" does not appear in the article at all.

Notwithstanding the fact that GWR adamantly denies that it has defamed your client, GWR intends to restore the records it had previously listed for Mr. Mitchell. In addition, if your client releases his bogus, threatened claims, GWR is prepared to make a public announcement of the restoration on its website:

In the light of compelling new evidence received by Guinness World Records, the Records Management Team has decided to reverse several decisions made

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regarding videogame high-scores achieved by Billy Mitchell between 1982 and 2010. As of 9 December 2019, the following historical records have been reinstated:

Highest score on Donkey Kong (four occurrences: 7 November 1982, 4 June 2005, 16 July 2007, 1 August 2010)

First perfect score on PAC-Man

Highest score on PAC-Man

Guinness World Records is always open to accepting new evidence for historical achievements, and to reviewing new and existing evidence for disputed titles. In this case, the emergence of key eyewitness testimonials led to a reversal of earlier disqualifications and the reinstating of Mr Mitchell's original records. The records archive has been updated accordingly to reflect this.

While this statement should be more than satisfactory to your client, if Mr. Mitchell has edits to suggest, I will pass them along to my client for consideration. However, GWR will not consider making any payment whatsoever to Mr. Mitchell, and under the circumstances, we see no purpose in involving a mediator in the matter.

Should your client pursue his claims, GWR will vigorously defend them. Indeed, given the foregoing facts, litigation against our client would clearly demonstrate bad faith on the part of your client, and GWR will not hesitate to pursue all available remedies against him for knowingly filing a meritless lawsuit.

Sincerely,



Marsha K. Hoover

cc: Raymond Marshall