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November 4, 2021

Via E-Mail and U.S. Mail

Hon. Mara W. Elliott
City Attorney
City of San Diego
1200 Third Ave., Suite 1620
San Diego, CA 92101
Email: cityattorney@sandiego.gov

Re: October 19, 2021 Letter to Jeff Light

Dear Ms. Elliott:

We are counsel to The San Diego Union-Tribune (“SDUT”), and I write in response to your October 19, 2021 letter to Jeff Light of SDUT (the “Letter”) concerning SDUT’s October 14, 2021 article titled, “Ash Street memo containing infamous ‘Footnote 15’ surfaces, rekindling debate over San Diego city failures” (the “Article”). Your Letter complains about SDUT’s summary of a memo, commissioned by your office, reviewing the lease-to-own agreement at 101 Ash Street (the “Memo”). In the Article, SDUT summarizes the Memo: “Its bottom line message: city officials, including Elliott and former Councilman Todd Gloria, failed to perform basic scrutiny of the \$200 million-plus Ash Street deal back in 2016.” Contrary to your assertions, the Article cannot give rise to a defamation claim, and there is no basis to demand a correction. SDUT stands by its reporting.

Although much of the Memo focuses on the due diligence phase that you argue was the full responsibility of the previous City Attorney administration, the Memo also is critical of the 101 Ash Street agreement itself, which exposes the City to unusual risk. Although the Article could have named more city officials, the statement “city officials, including Elliott and former Councilman Todd Gloria, failed to perform basic scrutiny of the \$200 million-plus Ash Street deal back in 2016” is accurate. In addition, there is nothing in the Memo that absolves your administration from any of the Memo’s many criticisms of the City Attorney’s office.

The Pertinent Facts Support SDUT

The 101 Ash deal happened, at least in part, on your watch. You were first sworn into office as City Attorney on December 12, 2016. The Ash Street agreement was signed by one of your deputies, beneath your name, one week later, on December 19, 2016. Moreover, the Memo states that “The City entered into the [101 Ash] Lease Agreement on January 3, 2017” – *i.e.*, over three weeks after you assumed the office of City Attorney. Memo at 1.

The Article does not state that you were solely responsible for scrutinizing the Ash Street deal, but the Memo does not absolve you or your administration of responsibility. Your Letter

notes that you did not personally sign the Ash Street agreement, but that it was signed by one of your deputies. There is no dispute, however, that it was signed by someone in your office while you were City Attorney. Your Letter also repeatedly asserts that former Mayor Kevin Falcouner signed the Ash Street deal, but that is not quite right. The Ash Street deal was signed by one of Mayor Falcouner's deputies, Cybele Thompson. You attribute Ms. Thompson's signature to Mayor Falcouner, but you are unwilling to accept responsibility when one of your deputies signed the same document on your watch.

The Memo repeatedly notes the City's deficient due diligence in the Ash Street deal process. Some of those deficiencies included inadequate (or absent) legal analyses of exculpatory provisions in the Ash Street agreement, such as the "as is" clause and the release. Memo at 2. The Memo notes that the "middleman" role played by Cisterra was "problematic" for the City's legal position as it "acts as a potential shield" for both Cisterra and the property's prior owner "against any liability to the City for nondisclosures." *Id.* at 4. The Memo lists several examples of how "the City did not follow best practices regarding due diligence for the subject transaction." *Id.* at 5. The Memo concludes that "the terms of the lease agreement were, in fact, disproportionately unfavorable to the City, on the specific issue of the exculpatory provisions in favor of Cisterra," and that the outside law firm preparing the Memo "would have recommended that either (1) the City conduct the additional due diligence investigation suggested in this report, or (2) require specific disclosures and representations on important issues (such as the Property's condition) from Cisterra, and make those representations a binding part of the contract." *Id.* at 21-22. Is it your contention that your office, which is charged with defending the City's legal interests and which was in power at the time the City entered into the Ash Street deal, bears zero responsibility for the due diligence failures on legal issues identified in the Memo?

The Memo does not pin all the blame on your administration, which is understandable since your office commissioned the Memo. But the Memo also does not absolve your administration of all responsibility, nor does it place all blame on your predecessor.

The Article gives you credit for at least doing a "limited" review of the lease, but we read your Letter to assert that, in reality, you performed absolutely no scrutiny of the Ash Street deal in 2016 before the City entered into the agreement. Reading the timeline, the Memo and your Letter together, it is reasonable to conclude that you did not perform "basic scrutiny" of the deal.

You Have No Viable Defamation Claim Against SDUT

Your Letter does not expressly threaten to sue, which we appreciate, but it does contain implicit threats and buzzwords alleging defamation and demanding "corrective action," which is not warranted. Any defamation claim has no prospect of success, and no "corrective action" is needed.

First, you would have the burden to prove that any allegedly defamatory statement was false. *Miller v. Nestande*, 192 Cal. App. 3d 191, 198 (1987). Regardless of your interpretation of the Article, and without conceding the complete truth of the Article, the Article is protected under the substantial truth doctrine. A statement is constitutionally protected and cannot give rise to a defamation claim if it is substantially true. *Campanelli v. Regents*, 44 Cal. App. 4th 572, 581-82 (1996) (a publication is protected "so long as the imputation is substantially true"); *accord Masson v. The New Yorker*, 501 U.S. 496, 516 (1991) (holding that a statement is constitutionally protected if "the substance, the gist, the sting, of the libelous charge be

justified”). A statement is considered “substantially true” and not false “unless it would have a different effect on the mind of the reader from that which the ... truth would have produced.” *Carver v. Bonds*, 135 Cal. App. 4th 328, 344-345 (2005) (internal quotation marks omitted; ellipses in original). Substantial truth is an issue of law to be decided by the court. *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1382 (1999).

The Memo outlines substantial deficiencies in basic scrutiny of the Ash Street agreement in 2016, before the deal was executed by the City in early 2017. The Memo does not exempt your office, which signed the deal in 2016. Your Letter essentially concedes that you did no scrutiny in 2016. Put together, the Article, including the sentence at issue, is substantially – if not completely – true.

Second, in addition to having to prove falsity, as a public official you would have to demonstrate with clear and convincing evidence that SDUT acted with constitutional actual malice. *See, e.g., Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 952-53 (1996). In order to prove actual malice, a plaintiff must show that the defendant published an allegedly defamatory statement “with ‘knowledge that it was false or with reckless disregard of whether it was false or not.’” *Masson*, 501 U.S. at 510. The actual malice standard focuses solely on the defendant’s subjective state of mind “at the time of publication.” *Bose Corp. v. Consumer Union*, 466 U.S. 485, 512 (1984). The term “knowledge of falsity means simply that the defendant was actually aware that the contested publication was false.” *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 484 (7th Cir. 1986). The term “reckless disregard” for the truth means “that the defendant actually had a ‘high degree of awareness ... of probable falsity.’” *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989). “Reckless disregard” is not measured “by what a reasonably prudent man would have published, or would have investigated before publishing.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Instead, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* A defamation plaintiff bears a heavy burden in that she must prove actual malice by “clear and convincing” evidence. *Beilenson*, 44 Cal. App. 4th at 952-53; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-57 (1986) (actual malice must be proved by “clear and convincing” evidence). “Actual malice cannot be implied and must be proven by direct evidence,” which must “be such as to command the unhesitating assent of every reasonable mind.” *Beilenson*, 44 Cal. App. 4th at 940.

SDUT did not act with knowledge of falsity or reckless disregard for the truth when it recounted the Memo’s conclusion that many city officials – which necessarily includes you as one of only two citywide elected officials at the time the Ash Street deal closed – did not sufficiently scrutinize the agreement. You would not be able to prove otherwise, let alone with clear and convincing evidence such as to command the unhesitating assent of every reasonable mind.

Third, the Article constitutes a fair and true report of statements made in the course of an official proceeding, which warrants absolute protection under Civil Code § 47(d) (“Section 47(d)”). *See Carver*, 135 Cal. App. 4th at 341, 351 (article in newspaper and posted on its website qualify for protection under Section 47(d)). Section 47(d) applies to examinations of the conduct by government officials, such as the Memo at issue here which was designed to review the 101 Ash Street transaction. *See Braun v. Chronicle Publ’g Co.*, 52 Cal. App. 4th 1036 (1997) (newspaper report on confidential audit of government activities is subject to Section

47(d) privilege). Whether a publication falls within the scope of the fair and true report privilege is a question of law for the court to determine. *McClatchy Newspapers v. Superior Ct.*, 189 Cal. App. 3d 961, 961, 976-77 (1987).

If a court finds that an allegedly defamatory statement falls within the scope of Section 47(d), then the statement is ***absolutely privileged*** regardless of whether the statement is a verifiable fact or what the defendant's motive was for reporting it. *Id.* at 974-75 (Section 47(d) provides "an absolute privilege"). The absolute nature of the privilege means that even if the "media publish an accurate report of a statement they ***know to be false***, the protective cloak of subdivision 4 remains intact." *Id.* at 975 (emphasis in original).¹ Without conceding that there is any support for your suggestions that SDUT harbors a bias against you (it does not), any purported bias would not matter in an analysis under Section 47(d) because "malice on the part of the media," even if such malice could be shown, will not "defeat the media privilege codified" by Section 47(d). *Howard v. Oakland Tribune*, 199 Cal. App. 3d 1124, 1128 (1988). So long as the ***report*** on the underlying proceeding, record or issue – *i.e.*, not the underlying matter itself – is "fair and true," the report is absolutely privileged. Civ. C. § 47(d)(1).

Courts apply the absolute privilege for "fair and true" reports in Section 47(d) ***broadly***: "[s]everal cases have been decided under [Section 47(d)], and all permit a certain degree of flexibility/literary license in defining 'fair report.'" *Jennings v. Telegram-Tribune Co.*, 164 Cal. App. 3d 119, 125 (1985) (citation omitted). The Section 47(d) privilege allows the media to report the general substance of the proceedings or records. *Reader's Digest*, 37 Cal. 3d at 262 n.13 (only capturing the "gist or sting" is required for absolute protection under Section 47(d)); *Handelsman*, 11 Cal. App. 3d at 386-87 (1970) (report must only be "substantially in accord" with the record). A report is considered "fair and true" even if it does not resolve what actually happened, or fails to present the plaintiff's version of the facts, *Rollenhagen v. City of Orange*, 116 Cal. App. 3d 414, 427 (1981), and even if the report contains "some errors," *Colt v. Freedom Communications, Inc.*, 109 Cal. App. 4th 1551, 1559 (2003). There is no requirement under Section 47(d) that the report place the underlying proceeding "in context," or that it include what the plaintiff considers to be "key facts." *Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1355 (2008). "As the case law amply demonstrates, journalists may simply report the facts of proceedings without providing an explanation of those facts." *Id.*

Here, SDUT fairly recounted the gist and sting of the Memo, which was essentially an examination of the Ash Street deal, concluding that city officials did not sufficiently scrutinize the deal before it was enacted in 2017 – and you were one of those city officials.

Anti-SLAPP Motion

Again, we appreciate that your letter does not expressly threaten to sue, but, if you do sue, then SDUT will mount a vigorous defense. SDUT will file an anti-SLAPP motion pursuant to Code of Civil Procedure § 425.16. SDUT will easily satisfy its burden in the first step of the analysis by showing the speech concerned official proceedings and matters of public interest. You will not be able to satisfy your burden in the second step of the anti-SLAPP analysis, and,

¹ Civil Code § 47 was amended in 1990 to letter, rather than number, its sub-sections. Thus, pre-amendment decisions that reference Section 47(4) refer to Section 47(d).

when it prevails, SDUT will be entitled to a shifting of attorney's fees under C.C.P. § 425.16(c). *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131 (2001) ("under Code of Civil Procedure section 425.16, subdivision (c), any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees").

Conclusion

As you recognize in your Letter, it is important for SDUT and your office to have open, honest and professional lines of communication. SDUT is committed to that and welcomes the same from you and your office going forward.

However, SDUT does not take baseless threats of legal action – whether express or veiled – lightly. SDUT stands by its reporting on the Article, and will defend itself and its staff from any suggestion or suit alleging that the Article was false or defamatory.

The foregoing is not a full recitation of facts or law. SDUT expressly reserves all rights, remedies and positions.

Very truly yours,



Jean-Paul Jassy
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