

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

RECEIVED

7/5/2023

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<b>ROBERT A. DOANE</b>	)	
	)	
<b>Plaintiff</b>	)	<b>Civil Action No. 23-CV-719</b>
	)	
<b>v.</b>	)	
	)	
<b>XANADU MARKETING, INC. et al.</b>	)	
	)	
<b>Defendants</b>	)	
_____	)	

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’  
MOTION TO DISMISS AMENDED COMPLAINT**

Now comes Plaintiff, **ROBERT A. DOANE**, by and through undersigned counsel, and for his opposition to the Defendants’ Motion to Dismiss would respectfully show this Court as follows:

**INTRODUCTION**

This is an action seeking damages for defamation and to remedy the breach of a settlement agreement (“Settlement Agreement”) that was entered into between Plaintiff Robert A. Doane (“Plaintiff”) and Defendant Xanadu Marketing, Inc. (“Xanadu”) on February 17, 2020. Through this action, Plaintiff seeks damages and equitable relief resulting from Defendants’ defamation of Plaintiff on the “Deserve to Win” podcast in February 2023 and the willful and purposeful breach of the non-disparagement provision of the Settlement Agreement.

Defendants’ motion is centered on a blatant lie. Defendants claim that Plaintiff was not so much as mentioned on the Podcast and, therefore, Plaintiff’s claims for defamation and breach

of the non-disparagement provision of the Settlement Agreement must be dismissed as a matter of law. This is a complete and purposeful fabrication<sup>1</sup>. A review of the transcript of the Podcast, which is provided herewith, undeniably demonstrates that Plaintiff was in fact called out by name and defamed in the manner set forth in the Amended Complaint. The Amended Complaint likewise demonstrates that Delfgaw knew from his previous interactions with Plaintiff that Plaintiff was a resident of Massachusetts and purposely attempted to harm Plaintiff in Massachusetts by published statements on the Podcast falsely claiming that Plaintiff committed fraud in Massachusetts. Delfgaw, like Xanadu, is therefore subject to the personal jurisdiction of this Court in accordance with the Massachusetts Long-Arm Statute<sup>2</sup>.

### **FACTUAL BACKGROUND**

#### **A. Xanadu's Operations**

1. Xanadu is a corporation organized by Delfgaw under the laws of the State of Michigan. (Amended Complaint at ¶ 4). Delfgaw is the founder of Xanadu<sup>3</sup> and was, at all relevant times, an officer, director, shareholder, agent, and control person of Xanadu. (Id.). At all times relevant, Delfgaw had exclusive control and direction over Xanadu and exclusively formulated, directed, controlled, exercised authority over, and personally participated in the acts and practices set forth in this Amended Complaint for his own personal gain. (Id.)
2. Defendants promote Xanadu as a full-service digital marketing agency specializing in UGC, SEO, PPC, reputation management, lead generation, social media, and chat/messenger

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<sup>1</sup> As set forth in Plaintiff's cross-motion for sanctions, counsel for Defendants was provided with a copy an unedited version of the Podcast prior to the filing of the instant motion. Under these circumstances, for Defendants to persist in claiming that Plaintiff was not mentioned in the Podcast is frankly inexcusable.

<sup>2</sup> Alternative grounds for personal jurisdiction over Delfgaw are likewise set forth herein.

<sup>3</sup> Xanadu is one of 53 companies that Delfgaw individually operates.

marketing. (Amended Complaint at ¶ 11). As part of its services, Defendants claim that they have sent over one billion marketing text messages. (Id.).

3. As part of the conduct of their business, Defendants have regularly and systematically conducted marketing and advertising in Massachusetts. (Id. at ¶ 12). Plaintiff has alleged upon information and belief that Defendants have caused millions of text messages to be sent to Massachusetts consumers. (Id.).

#### **B. Delfgaw's Contacts with Massachusetts**

4. In addition to Xanadu's operations, Delfgaw has independently conducted business in Massachusetts. (Complaint at ¶ 13). By way of example, Delfgaw has promoted himself personally and conducted business in Massachusetts (and nationally) as a "marketing specialist". Delfgaw also operates a personal website where he promotes himself in Massachusetts (and nationally) as an expert trainer. (Id.).

#### **C. The Settlement Agreement**

5. In 2019, Plaintiff brought claims against Defendants in connection with Defendants' advertising and marketing activities. (Id. at ¶ 14). Thereafter, on February 17, 2020, Plaintiff entered into the Settlement Agreement which released Plaintiff's claims against Xanadu and Delfgaw up to the date of the Settlement Agreement. (Id. at ¶¶ 15-16). Delfgaw executed the Settlement Agreement as the authorized representative of Xanadu and was an intended third-party beneficiary of the Settlement Agreement. (Id. at ¶ 17).

6. Pursuant to Section 12 of the Settlement Agreement, Plaintiff and Xanadu specifically agreed that neither would "disparage the other or share any information related to [the Settlement] Agreement with any third party, or party not a signatory to [the Settlement Agreement]". (Id. at ¶ 18).

7. As set forth in Section 11 of the Settlement Agreement, the parties agreed that the Settlement Agreement would “be governed by, interpreted according to, and enforced by and under the laws of the Commonwealth of Massachusetts, and venue shall exclusively be within the courts of competent jurisdiction within Dukes County or Middlesex County, in the Commonwealth of Massachusetts”. (Id. at ¶ 19).

8. Section 6 of the Settlement Agreement provides for a recovery all “costs, damages, and reasonable attorney fees incurred in the enforcement of any of the terms of the [Settlement Agreement]. (Id. at ¶ 20).

**D. Defendants Defame and Disparage Plaintiff on the “Deserve to Win” Podcast.**

9. In February, 2023, Delfgauw was invited to be a special guest on Episode 10 of the “Deserve to Win” podcast (“Podcast”) produced by the California based Telephone Consumer Protection Act (“TCPA”) defense law firm, The Troutman Firm (now known as “Troutman Amin LLP”). (Id. at ¶ 21).

10. During his appearance on the Podcast, Delfgauw described Defendants’ operations and complained that his business was hampered by “professional scammers”, which he made clear included Plaintiff. (Id. at ¶ 22). Specifically, during the Podcast, Delfgauw called Plaintiff out by name and published the following defamatory and disparaging comments (“False Statements”):

A. Delfgauw falsely and disparagingly implied that Plaintiff was a “professional scammer” that fraudulently manufactured claims under the TCPA by opting in on websites. (Id. at ¶ 23).

B. Delfgauw falsely and disparagingly claimed that Plaintiff would not sue Xanadu as Xanadu has evidence of Plaintiff’s fraudulent opt-ins. (Id.).

C. Delfgauw falsely and disparagingly claimed that Plaintiff filed frivolous court cases. (Id.).

D. Delfgauw falsely and disparagingly claimed that Plaintiff is actually “thrown ... out of court” because the Court is “like dude, you again, the judge is like, you again, get out of here.” (Id.).

E. Delfgauw falsely and disparagingly claimed that the Massachusetts courts were “mad” at Plaintiff as a result of Plaintiff’s frivolous lawsuits. (Id.).

11. During the Podcast, Delfgauw likewise disclosed the existence of the Settlement Agreement in violation of Section 11 of the Settlement Agreement. (Id. at ¶ 26).

12. At the time that Delfgauw made and published the False Statements he knew from his previous dealings with Plaintiff that Plaintiff was a citizen of Massachusetts and directed his defamatory comments to cause Plaintiff harm in Massachusetts. (Id. at ¶ 25).

13. The Podcast was widely disseminated and viewed in Massachusetts and across the country on several media sources, including [www.tcpa.world.com](http://www.tcpa.world.com), YouTube and [www.natlawreview.com](http://www.natlawreview.com). (Id. at ¶ 27).

14. At all times, Delfgauw was acting as an agent of Xanadu during the course of his regular duties for Xanadu and Delfgauw made and published the False Statements for Xanadu’s benefit and with the full knowledge and actual authority and consent of Xanadu. (Id. at ¶¶ 28-29).

15. As a direct and proximate result of Defendants’ wrongful conduct, Plaintiff has suffered harm, including the loss of the benefit of his bargain, undue publicity, invasion of his privacy, damage to his reputation, emotional distress, annoyance, anger, anxiety, waste of time, worry, embarrassment, and attorney’s fees and costs to address Defendants’ False Statements and breach of contract. (Id. at ¶ 30).

## ARGUMENT OF LAW

### **A. This Court Has Personal Jurisdiction Over Delfgaw Under the Massachusetts Long-Arm Statute.**

The exercise of personal jurisdiction over a defendant must be authorized by statute and consistent with the due process requirements of the United States Constitution. *Nowak v. Tak How Inves., Ltd.*, 94 F.3d 708, 712 (1st Cir. 1996); see also *Barrett v. Lombardi*, 239 F.3d 23, 26 (1st Cir. 2001). “The jurisdictional requirements imposed by the Massachusetts long-arm statute are quite similar to, though not completely congruent with, the jurisdictional requirements imposed by the Due Process Clause.” *Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc.*, 825 F.3d 28, 34 (1st Cir. 2016) (citation omitted).

The Massachusetts long-arm statute provides as follows:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the persons (a) transacting any business in this commonwealth; (b) contracting to supply services or things in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth; (e) having an interest in, using or possessing real property in this commonwealth ....

Mass. Gen. Laws ch. 223A, § 3.

Section 3(c) allows for the exercise of “personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person ... causing tortious injury by an act or omission in this commonwealth.” Mass. Gen. Laws ch. 223A, § 3(c).

“[T]he tort of libel<sup>4</sup> is generally held to occur wherever the offending material is circulated.” *Neelon v. Krueger*, 2016 WL 3390686, at \*4 (D. Mass. June 17, 2016) (citing

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<sup>4</sup> As set forth herein, because the False Statements were fixed, recorded and published on the Podcast, the False Statements constitute libel and not slander. See *Brown v. Hearst Corp.*, 862 F. Supp. 622 at n. 6 (D.

*Walden v. Fiore*, 134 S.Ct. 1115, 1124 (2014)) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984)). “This is so ‘because publication to third persons is a necessary element of libel’ and thus that intentional tort ‘actually occurred’ where publication occurred.’ ” *Id.* (quoting *Walden*, 134 S. Ct. at 1124 (citing Restatement (Second) of Torts § 558)). In *Neelon*, the U.S. District Court for the District of Massachusetts found that the requirements of personal jurisdiction under section 3(c) of the Massachusetts long-arm statute were met because the “defamatory statements were purposefully directed towards Massachusetts residents and intended to cause harm in Massachusetts.” *Neelon*, 2016 WL 3390686, at \*5. “Massachusetts trial courts have similarly found that a defamatory statement made out of state or on the internet ‘constitutes an in-forum act for the purposes of [section 3(c)], if it is purposefully directed towards a Massachusetts resident and intended to cause harm in Massachusetts.’ ” *Id.* (quoting *Edozien v. XS Micro, LLC*, 2014 WL 1260511, at \*2 (Mass. Super. Ct. Mar. 7, 2014)), supplemented, 2014 WL 1260516 (Mass. Super. Ct. Mar. 14, 2014); see also *Walker v. Adams*, 2016 Mass. App. Div. 143 (Dist. Ct. 2016) (“[F]or personal jurisdiction to be supported based upon a defamatory internet communication originating outside of Massachusetts, for the defamatory act to be considered as having occurred in Massachusetts for the purposes of G.L. c. 223A, § 3(c), the court must find that the Massachusetts resident harmed was specifically targeted, the publisher knew that such person lived in Massachusetts, and the defendant intended to harm that individual's reputation in Massachusetts.”). Here, Plaintiff has alleged that the Podcast was published in Massachusetts and alleged that Delfgaw knew from his previous dealings with Plaintiff that Plaintiff resided in Massachusetts and made specific references to Plaintiff’s purported claims and legal actions in Massachusetts and interactions with

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Mass. 1994) (Applying Restatement (Second) of Torts § 568A (1977) (“Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript).

Massachusetts attorneys and courts. As Plaintiff has further alleged, Delfgauw was plainly attempting to harm Plaintiff's reputation in Massachusetts. Thus, based on the above cited authority, this Court has personal jurisdiction over Delfgauw under G.L. c. 223A, § 3(c).

This Court likewise has personal jurisdiction over Delfgauw pursuant to M.G.L. c. 223A, § 3(a) as, contrary to Defendants' suppositions, Plaintiff has made specific allegations that Delfgauw has purposely availed himself of the benefits and obligations of Massachusetts law by regularly transacting business in this Commonwealth. The "transacting any business" clause of the long-arm statute is construed broadly. See *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 551-52 (Mass. 1994) ("[G]enerally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement."); see also *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 982 (1st Cir. 1986) ("The statute's reference to 'transacting any business' . . . is general and applies to any purposeful act by an individual, whether personal, private or commercial.' ") (citation omitted); *Saturn Mgmt. LLC v. GEM-Atreus Advisors, LLC*, 754 F. Supp. 2d 272, 277 (D. Mass. 2010) ("The notion of transacting business is broadly construed and easy to satisfy."). Actual physical presence of a defendant in the jurisdiction is not required. See *Good Hope Indus., Inc. v. Ryder Scott Co.*, 389 N.E.2d 76, 82-83 (Mass. 1979) (exercising personal jurisdiction over defendant with no place of business or any agents in Massachusetts). Where a non-resident defendant's contacts with the forum have had an effect on the economic life of Massachusetts, the transacting business clause is satisfied. See *Id.* (an isolated transaction or one with little impact on the commerce of the Commonwealth may be sufficient for the transacting business prong); see also *Carlson Corp. v. Univ. of Vermont*, 402 N.E.2d 483, 486 (Mass. 1980) ("Where the nonresident defendant's contacts with Massachusetts had substantial commercial consequence in this State, personal

jurisdiction was found, notwithstanding the absence of actual physical presence in Massachusetts.”).

As set forth in the Amended Complaint, Plaintiff has specifically alleged that Defendants regularly and systematically conduct marketing and advertising in Massachusetts which has resulted in the transmission of *millions* of text messages to Massachusetts consumers. (Amended Complaint at ¶ 12). Defendants do not contest this by affidavit or otherwise. Plaintiff has further alleged that Delfgaw solely directed Xanadu’s efforts and personally engaged in these activities—facts that Defendants likewise decline to contest. Accordingly, it is evident that Delfgaw’s personal business contacts with Massachusetts and Delfgaw’s control over Xanadu’s Massachusetts-directed conduct satisfies the transacting business clause of M.G.L. 223A, § 3(a) and provides an additional basis for personal jurisdiction<sup>5</sup>.

**B. Delfgaw is Bound by the Forum Selection Clause in the Settlement Agreement.**

Although the facts of this case amply demonstrate that Delfgaw is subject to this Court’s jurisdiction in accordance with M.G.L. c. 223A, § 3, Plaintiff asserts in the alternative that Delfgaw is likewise subject to the forum selection clause in the Settlement Agreement. On this issue, Plaintiff has alleged that Delfgaw both signed the Agreement and was a designated third-party beneficiary. (Amended Complaint at ¶ 17). It is generally accepted that even nonsignatory third parties can be bound to a contractual provision where the nonparty is

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<sup>5</sup> Further, the exercise of personal jurisdiction over Delfgaw in this case amply satisfies the requirement of due process. An exercise of jurisdiction satisfies due process when it meets three requirements, all of which are met in this action: (1) the defendant must have purposely availed himself of the privilege of conducting activities within the state, thus invoking the benefits and protection of the law (referred to as “minimum contacts”); (2) the claim must arise out of or relate to defendant’s contacts with the forum; and (3) the assertion of jurisdiction over the defendant must be reasonable.” *Bulldog Investors Gen. P’ship v. Commonwealth*, 929 N.E. 2d 293, 300 (Mass. 2010). Because the Massachusetts long-arm statute is “coextensive with the limits permitted by the Constitution” the contacts analysis under the long-arm statute set forth above likewise supports a finding that the due process requirement is satisfied. See *Adelson v. Hananel*, 652 F.3d. 75 (1<sup>st</sup> Cir. 2011).

sufficiently closely related to a signatory that it is foreseeable that the nonsignatory will be bound. *Ajemian v. Yahoo!, Inc.*, 83 Mass. 565, 577-78 (2013). As the Court in *Ajemian* noted, “[o]ne situation where a non-party may invoke a contractual forum selection clause, or it can be invoked against the non-party, is where the non-party is a third-party beneficiary of the contract.”). *Ajemian* at 578; see *Roskind v. Hanna*, 1998 WL 1198799 (Mass. Super. Ct. Aug. 10, 1998) (unpublished). Here, Delfgauw, as signatory and Xanadu’s sole control person, was both well aware of the forum selection provision and directly benefited as Plaintiffs’ claims against Delfgauw personally were likewise released. He is, therefore, personally bound by the forum selection clause.

**C. To The Extent That There is Any Doubt Concerning Jurisdiction, Plaintiff Should Be Afforded Jurisdictional Discovery.**

Plaintiff has provided three independent bases for asserting personal jurisdiction over Delfgauw. To the extent that there is any doubt concerning personal jurisdiction, however, the hearing on Defendants’ subject motion should be continued and Plaintiff should be afforded the opportunity to conduct jurisdictional discovery. See *United Elec. Radio & Mach. Workers of Am. (UE) v. 163 Pleasant St. Corp.*, 987 F. 2d 39, 47-48 & N. 18 (1<sup>st</sup> Cir. 1993) (“[I]f, on the record before it, the district court had decided the personal jurisdictional issue adversely to plaintiff without at least affording them the opportunity to respond to [the defendants’] argument and/or to request discovery, we almost certainly would have declined to affirm the district court’s judgment”); *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 764 (1994) (court evaluated the evidence of personal jurisdiction after jurisdictional discovery).

**D. Plaintiff has Sufficiently Pled His Claim for Defamation**

**1. Standard of Review**

When evaluating the sufficiency of a complaint under the motion to dismiss standard of Mass. R. Civ. P. 12(b)(6), the court must accept as true the factual allegations of the complaint and all reasonable inferences drawn from those allegations that are favorable to the plaintiff. *Blank v. Chelmsford Ob/Gyn, P. C.*, 420 Mass. 404, 407 (1995); see generally *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-557 (2007); see also *Jarosz v. Palmer*, 436 Mass. 526, 530, 766 N.E. 2d 482 (2002). Questions of fact cannot be adjudicated on a motion to dismiss for failure to state a claim upon which relief can be granted. *Fabiano v. Boston Redevelopment Authority*, 49 Mass. App. Ct. 66, 72, 726 N.E. 2d 428, 433 (2000). “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim.” *Brum v. Dartmouth*, 44 Mass.App.Ct. 318, 321, 690 N.E.2d 844 (1998), rev'd on other grounds, 428 Mass. 684, 704 N.E.2d 1147 (1999), quoting from *Nader v. Citron*, 372 Mass. 96, 98, 360 N.E.2d 870 (1977) . “[A] complaint is sufficient against a motion to dismiss if it appears that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely may not be appropriate.” *Brum, supra* at 321, 690 N.E.2d 844, quoting from *Nader, supra* at 104, 360 N.E.2d 870. Therefore, “[a]ll that a plaintiff need do to resist such a motion is present a complaint that does no more than ‘sketch[ ] the bare silhouette of a cause of action.’ ” *Brum, supra* at 322, 690 N.E.2d 844, quoting from *Coolidge Bank & Trust Co. v. First Ipswich Co.*, 9 Mass. App. Ct. 369, 371, 401 N.E.2d 165 (1980).

## **2. Delfgauw Called Plaintiff Out by Name and Defamed Him on the Podcast.**

“Defamation is the publication of material by one without a privilege to do so which ridicules or treats the plaintiff with contempt.” *North Shore Pharmacy Servs., Inc. v. Breslin*

*Associates Consulting LLC*, 491 F.Supp.2d 111, 124 (D.Mass. 2007) (quoting *Correllas v. Viveiros*, 410 Mass. 314, 319, 572 N.E.2d 7 (1991)). “To prove defamation, the plaintiff must establish that the defendant was at fault for the publication of a false statement regarding the plaintiff, capable of damaging the plaintiff’s reputation in the community, which either caused economic loss or is actionable without proof of economic loss.” *Dragonas v. School Comm. of Melrose*, 64 Mass.App.Ct. 429, 437, 833 N.E.2d 679 (2005) (internal quotation and citation omitted). Claims for defamation are subject to the notice pleading requirement, and therefore, plaintiffs “are not required to set forth the alleged defamatory statements verbatim.” *North Shore Pharmacy Servs., Inc.*, 491 F.Supp.2d at 124.

Defendants begin by attempting to deceive this Court and insisting that Plaintiff could not have been defamed as Plaintiff was *not so much as mentioned* on the Podcast. This, as Defendants are well aware, is entirely false. It is indisputable from the transcript of the Podcast<sup>6</sup> that Delfgauw specifically referenced Plaintiff by name on the Podcast and published each of the False Statements complained of. It is likewise indisputable that Delfgauw presented each of these highly derogatory and disparaging statements as fact in an effort to damage Plaintiff’s reputation in Massachusetts.

Defendants next half-heartedly claim that Plaintiff did not allege sufficient proof of damages. This is also false. Four types of statements are actionable without proof of economic loss: (1) statements that constitute libel, see *Shafir v. Steele*, 431 Mass. 365, 373, 727 N.E. 2d 1140 (2000); (2) statements that charge the plaintiff with a crime; (3) statements that allege that plaintiff has certain diseases; and (4) statements that may prejudice the plaintiff’s profession or business. *Ravnikar v. Bogojavlensli*, 438 Mass. 627, 782 N.E. 2d 508 (2003) citing *Lynch v.*

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<sup>6</sup> A copy of the transcript is attached to the Affidavit of Richard B. Reiling. As set forth in Plaintiff’s Cross-Motion for Sanctions, the False Statements are contained on pages 50 and 70-71.

*Lyons*, 303 Mass. 116, 118-119, 20 N.E. 2d 953 (1939). If the statements come within one of the four exceptions, a plaintiff may recover noneconomic damages, including damages to reputation. See *Sharif v. Steel*, *Supra*; Restatement (Second) of Torts at § 622 comment b, § 623 comment a.

Libel involves the act of publishing a false statement about an individual, either in a written form or by broadcast over media platforms such as radio, television, or the internet. See *Brown v. Hearst Corp.* 862 F. Supp. 622, 627 (D. Mass. 1994) (Holding that because alleged offensive statements were fixed, recorded, and widely distributed in a television program, it would constitute libel and not slander if defamation existed.); Restatement (Second) of Torts § 568A (1977) (“Broadcasting of defamatory manner by means of radio or television is libel, where or not it is read from a manuscript). Here, the defamatory statements complained of constitute libel as they were broadcasted on the Podcast. The statements are, therefore, actionable without proof of economic damages<sup>7</sup>.

Damages for libel include compensatory damages for actual injury, including harm to reputation and mental suffering. *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 858, 330 N.E. 2d 161 (1975). Plaintiff has alleged that as a direct and proximate result of the Defendants’ wrongful conduct Plaintiff suffered loss of the benefit of his bargain, undue publicity, invasion of privacy, damage to his reputation, emotional distress, annoyance, anger, anxiety, waste of time, worry, embarrassment, and attorney’s fees and costs to address Defendants’ false statements and breach of contract<sup>8</sup>. (Amended Complaint at ¶ 30). Contrary

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<sup>7</sup> In the alternative, the False Statements are actionable without proof of economic damages as the statements suggest that Plaintiff engaged in perjury, fraud, theft by deception and extortion—all criminal actions.

<sup>8</sup> Feelings of being “bludgeoned”, “stunned” and then later experiencing outrage and anger are the “natural result” of defamation, sufficient to prove mental suffering. *Sharif v. Steel*, *Supra*; see *Mahoney v. Belford*, 132 Mass. 393, 394 (1882); *Hastings v. Stetson*, 130 Mass. 76 (1881). Based on this standard, Plaintiff has unquestionably alleged actionable emotional distress damages.

to Defendants assertions, therefore, Plaintiff has sufficiently alleged both economic and non-economic damages.

**E. Plaintiff has Sufficiently Pled Breach of Contract**

Under Massachusetts law, a claim for breach of contract requires the plaintiff to show the existence of a valid and binding contract, that the defendant breached the contract's terms, and that the plaintiff suffered damages as a result of that breach.” *Scholz v. Goudreau*, 901 F.3d 37, 43 (1st Cir. 2018). There is no dispute here that the Settlement Agreement is a valid and binding contract and there is no dispute that Settlement Agreement contained a non-disparagement provision. As clearly alleged in the Amended Complaint, this provision was willfully breached when Xanadu, by and through its control person Delfgauw, repeatedly disparaged Plaintiff on the Podcast.

As a result of the Defendants’ breach, Plaintiff has alleged that he suffered harm, including the attorney’s fees and costs to address the False Statements. The Settlement Agreement provides for the recovery of attorney’s fees and costs incurred in the enforcement of any term of the agreement. Further, as the U.S. District Court for the District of Massachusetts recently held in *Cognitive Edge Pte Ltd. v. Code Genesys, LLC.*, 2021 WL 2829555 (D. Mass. Jan. 19, 2021), when addressing a breach of a non-disparagement clause, attorney’s fees incurred in seeking to remove disparaging statements from the internet constitute recoverable damages. Accordingly, Plaintiff is entitled to recover not only for harm to his reputation, but likewise for his attorney’s fees and costs accrued to enforce his rights under the Settlement Agreement and to attempt to mitigate his damages.

**F. Plaintiff has Sufficiently Alleged that Delfgauw is Xanadu’s Alter-Ego and is Personally Liable for its Breach of Contract.**

In Massachusetts, corporations and their shareholders are generally deemed to be distinct legal entities. See *Berger v. H.P. Hood, Inc.*, 416 Mass. 652, 624 N.E.2d 947, 950 (1993). However, under certain circumstances, a court may disregard the corporate form, particularly to defeat fraud or remedy an injury. See *Id.*; see also *In re Plantation Realty Trust*, 232 B.R. 279, 282 (Bankr.D.Mass.1999). “The incidents of common ownership and management, standing alone, are not enough to pierce the corporate veil.” *Plantation Realty*, 232 B.R. at 282. However, “shareholders may be held liable where they control the operation of the corporation and run it for their personal benefit, and where justice requires that the separate existence of the corporation be ignored.” *Pepsi-Cola Metro. Bottling Co., Inc. v. Checkers, Inc.*, 754 F.2d 10, 15 (1st Cir.1985) (“Pepsi-Cola”). Indeed, Massachusetts has recognized that it is the “right and the duty of courts to look beyond the corporate forms” when necessary “for the defeat of fraud or wrong, or to the remedying of injustice”. *Rodrigues v. Osorno (In re Osorno)*, 478 B. R. 523, 536 (Bankr. D. Mass. 2012); *Zimmerman v. Puccio*, 613 F. 3d 60 (1st Cir. 2010); *Hanson v. Bradley* 298 Mass. 371, 10 N.E. 2d 259, 264 (1937).

Piercing the corporate veil is a well-recognized, yet fact specific, remedy. See *Zimmerman v. Puccio*, 613 F.3d 60, 74 (1st Cir. 2010); *My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 620, 233 N.E.2d 748 (1968). The Massachusetts Supreme Judicial Court has described two situations when piercing the corporate veil is appropriate: “(1) when there is active and direct participation by the representatives of one corporation, apparently exercising some form of pervasive control, in the activities of another and there is some fraudulent or injurious consequence of the intercorporate relationship, or (2) when there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity

about the manner and capacity in which the various corporations and their respective representatives are acting.” *My Bread Baking Co.* at 752; see *Evans v. Multicon Constr. Corp.*, 30 Mass. App. Ct. 728, 732 (1991). Adopting the *My Bread* standard, the Court of Appeals for the First Circuit set forth twelve factors to consider when deciding whether to pierce the corporate veil:

- (1) common ownership;
- (2) pervasive control;
- (3) confused intermingling of business activity, assets, or management;
- (4) thin capitalization;
- (5) nonobservance of corporate formalities;
- (6) absence of corporate records;
- (7) no payment of dividends;
- (8) insolvency at the time of the litigated transaction;
- (9) siphoning away of corporate assets by the dominant shareholders;
- (10) nonfunctioning of officers and directors;
- (11) use of the corporation for transactions of the dominant shareholders; and
- (12) use of the corporation in promoting fraud.

*Pepsi-Cola*, 754 F.2d at 16; see also *Evans v. Multicon Constr. Corp.*, 30 Mass.App.Ct. 728, 574 N.E.2d 395, 398 (1991) (applying the *Pepsi-Cola* factors); *The George Hyman Constr. Co. v. Gateman*, 16 F.Supp.2d 129, 151 (D.Mass.1998) (same). The Amended Complaint sufficiently alleges that many of these factors exist here. Specifically, Plaintiff has alleged that Xanadu was solely owned and exclusively controlled by Delfgaww, thinly capitalized, failed to observe legal formalities and failed to keep adequate financial records. (Amended Complaint at ¶¶ 4; 50-52).

Plaintiff has further alleged that Delfgauw, as the company's sole owner and control person, commingled his business activities, assets, funds and liabilities with those of Xanadu, siphoned away the assets of Xanadu for his own benefit and utilized Xanadu to commit wrongful actions, including the unlawful harassment of Plaintiff and consumers across the country. (Id. at ¶¶ 12; 53-54). Plaintiff has, therefore, alleged each element necessary to pierce the corporate veil and hold Delfgauw personally liable for Xanadu's breach.

### **CONCLUSION**

Based on the foregoing, Plaintiff respectfully submits that Defendants' Motion is wholly without merit and prays that same be denied in its entirety.

Respectfully Submitted  
Robert A. Doane,

By his Attorney

/s/Richard B. Reiling Esq.  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon counsel for Defendants Jeremy R. Bombard, Esq., Bombard Law Office, P.C., 945 Concord St., Framingham, MA 01701 by E-Mail this 3<sup>rd</sup> day of July, 2023.

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