

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS

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CAROLINA GILDRED  
(aka's Ms Carolina Hernandez, Mss Carolina Hernandez Javier  
Garcia senior, Mss Carolina Hernandez Tom Phillip Gildred 111),

Index No: 153554-2017 (K-Civ)

Plaintiff,

- against -

**VERIFIED ANSWER,  
AFFIRMATIVE  
DEFENSES AND  
COUNTERCLAIMS**

MICHAEL FOSTER,

Defendant.

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**PLEASE TAKE NOTICE**, that the defendant, MICHAEL FOSTER appearing Pro Se, reserves the right to amend his pleadings as more information and/or situation may demand in the future; and for his, as and for a Verified Answer, Affirmative Defenses and Counterclaims to the Verified Complaint of the Complainant, respectfully alleges Verified Answers to the OSC and Verified Petition, respectfully, upon information and belief: Defendant's downsides are humongous and therefore ask the court to commit its findings in favor of Defendant in these documents, exhibits and exhibits to counter claims herein describe between Complainants Mss Carolina Hernandez Gildred and Mr. Tom Phillip Gildred.

**INTRODUCTION:**

a) Defendant to his best recollection declares to have had an ongoing but off and on relationship affair with Complainant throughout their friendship of 10-15 years. Of Complainant Carolina as Carolina Hernandez, of Complainant Carolina as Mss Carolina Hernandez Garcia and belatedly of Complainant Carolina as Mss Carolina Hernandez Gildred of spouse to Mr. Tom Phillip

Gildred the 3rd also named/names of Tom Gildred, Jaye Park, Emerald Textiles, FMT Consultants, The Gildred Companies, Lynsey Morin, Lynn Nguyen, Diana Acevedo, Diana Castillo, Bryant Castillo, Lynn Phillip Gildred and Lisa (Tom Gildred's x common law spouse) all alluded to as or defined in complainant's alleged claims as family, business office or group of friends as defined by Complainants alleged claims. Defendant Affirms to be active in the business of Dance and "IA" (Intelligent Art) and have exported his achievements around the world and chiefly noted have occupied active dance studios in the name or names of VirtualTBS.com recently Technique and Balance Studios Times Square New York City and known to have been located at 303 W 42<sup>nd</sup> Streets in floors 315 (3<sup>rd</sup>) 403 (4<sup>th</sup>) and 614 (6<sup>th</sup>) respectively.

b) Defendant affirms that During May of 2016 & on or about August 31st 2016 Complainant stressed to Defendant a need to rekindle that affair. Defendant at first denied further involvement as Defendant's focus was since spent all his time on developing his Dance as a Career business in Dance Choreography Career through a site popularly known to be called TBCelebrity.com and Dance Art in the Business of Dance Programs, and Dance in the business of Technology Art or Intelligent Art (IA) through websites VirtualTBS.com, NewYorkTango.org and MichaelTango.com which Complainant Carolina Gildred have always been fascinated about.

c) On a Wednesday Night nearest 3rd week of May-2016 after Dancing Tango at a Tango Club Complainant Carolina Gildred invited herself to journey Defendant on a 2-3 blocks away journey to Defendants apartment where they both had Intimate moments.

d) Defendant cautioned Complainant if her New Husband Mr. Tom Gildred of roughly 6-8 months wouldn't mind her late incoming and was knowledgeable of Complainants affair with

# EXHIBIT 1

Defendant.

e) Complainants reply was "Yes but he's at the Park Avenue Hotel enjoying one of "His" regular Spa Packages" alluding to a known style of her husband conjivalisms.

f) Throughout the week of June 8th 2016 Complainant schedule herself to return to New York City, this time for 1-week Complainant and Defendant had intimate moments multiple times.

g) Complainant voluntarily catered for the bills associated with each time she spent with Defendant.

h) On the last day of the week of into June 8 2016, Saturday, and That night and on the immediate Sunday noon-time prior to leaving for a 2Pm flight to her San Diego California home, Complainant did a mobile check in to her flight via her cell phone and continued to enjoy a romantic Picnic in the park with Defendant care of Defendant who brought along a Green Black Jack Table Cloth, Champaign, fresh juices, fresh fruits and a variety of cheeses and a bottle 160z of PoM beverage juice on which Complainant replied via texting from amidst the airplane the words "Perfect" to Defendant.

i) Throughout the immediate proceeding weeks Complainant kept in constant contact with Defendant mostly in her back and forth texting Defendant about issues relating to Complainants unhappiness with Mr. Tom Phillip Gildred. During this time Complainant would report all of her trips and what was happening during these trips at different location, gulf clubs functions and one instance a Gildred Family Reunion of which Complainant was have an especially hard time coping with her in-laws specifically Mr. Tom Gildred's Mother Misses Lynn Phillip Gildred.

j) Defendant proceeded to become very much cornered by each of Complainants interest, goals and desires to company in the business of dance partnership and other concerns and most notable

Complainants discomforts with Mr. Tom Phillip Gildred actions which Complainant termed to be “Pathetic”.

k) On more than one occasion Complainant reported to Defendant over multiple telephonic conversations and text messaging of various problematic issues in the marriage.

l) Defendant made it clear in written emails, text messaging that defendant cannot risks the life of his Art for Complainant and Complainant acknowledged in a recorded conversations between August and September of 2016 among other things saying to Defendant "Michael I Know You Don't Love Me".

m) Above all Complainant continued to veer for Defendants commitment emotionally even in her discussions with complainant about having a concern to become impregnated and that “Tom Doesn’t Want To Have Biological Kids” as significant despair in her life.

n) Complainants carefully instigated into Defendants personal and financial needs and induce Defendant with elaborate gifts as in one example Complainant kept upgrading Defendants hotel accommodations to closer to her Del Mar Resident. Complainant took control of Defendants Social Security numbers and made access with it and created new accounts in Defendants name such as hotel membership for discounts at luxurious hotels and air-miles US-Airways Vip Account.

o) Complainant was determine to see defendants goals come to fruition even suggesting via text to defendant "I not only care about you - I care about your welfare".

p) Complainant knew before agreements to become Defendants Dance Partner that to Defendant a Dance Partnership was to him closer than in a marriage and just as important as a marriage.

q) Complainant agreed and understood that Defendant would be making the biggest Sacrifice

ever of his life to have made a commitment by committing to train Complainant into the difficult lengthy learning process of Dance Partnerships.

r) Complainant was aware and further enrolled the support of Mr. Tom Phillip Gildred at which over these periods Defendant met several times with Mr. Tom Gildred to discuss as the ongoing designed of a New Studio at the Home of Mr. & Misses Tom Gildred. Mr. Tom Gildred was in full swing and Complainant had already sent pictures of the studio's interior in admonition to a stipulated Work Oder which Defendant were to referee, Complainants husband Mr. Tom Gildred even assisted in advising for a designing and purposely promised Defendant Quote "Michael the next time your here on your next visit ...Surely That Carpet would be ripped up in time to lay the wooden floors" and 'That he'd already ordered the mirrors, Defendant did confirm in writing and an onsite visit upon installation of the mirrors and on another occasion Complainants husband Mr. Tom Gildred willingly cautioned that Defendant should keep the air-conditions on whilst training and dancing at the Gildred's home.

s) Defendant explicitly explained the details of the especially the Work Order Demands financially, emotionally and professionally to Complainant and that of two Dance Partnership Choreography to be termed and Titled "POOL-SIDE CORP" using the pool area and "Taj-Mahal" using the front of the house entrance of the Gildreds. All letters, emails, pictures, budgets, correspondences was constituted verbally and confirmed as contracting with Defendant and explicit to each verbal and specific written details of the programs vested inputs were contractually constituted by print, verbal and email conversations between Mr. Tom Gildred and Misses Carolina Gildred.

t) Defendant affirms that things however got unpalatable somewhere as text conversations

denotes sometimes between August 28th & August 31st at the end of the second trip and September 9<sup>th</sup> throughout the 27<sup>th</sup> of which booking for the 3<sup>rd</sup> and most important trip The Gildred's Seamed to suddenly disconnect. This most important trip was design for Defendant to commence recuperation for much input of almost 600 hours of work and near 6,000 miles of travel and commuting.

u) Defendant proactively began to explore every opportunity in which to contact complainant or her husband to no avail just about Complainant suddenly stopped communications and purports to send Defendant a Cease and Deices letter which said letter Complainant further request to be ignored Quote "It's Tom's Lawyer isn't mind" and "I have my Own Lawyer" and "I have finally put Tom in his place" and "He won't be a problem for a looong time".

v) Between August 30th September 5th a series of incidents occurred one of most notable was Complainant request via text and telephonic conversation in which Complainant reported fear for her life at the hand of Mr. Tom Gildred and begged Defendant even to the extent of asking defendant to Quote "Michael your mother" as to inclined Defendant's 78-year old mother as if it was right to rescind a letter subsequently involving the witnessing and quotations of the Complainant on the morning after a previous Saturday night when Complainant having had been allegedly awoken and given a dose of what Complainant believed to have been or might have been "Benadryl". Quote; "Michael he awoke me at 3Am and said HERE Take THAT" That morning after Defendant confirmed with Complainant all that had happened the night before and further cautioned Complainant to instantly make a police report as there were obvious blue & purple marks upon Complainants ankles and the front of Complainants knees, among other places. Complainant was noticeably terrified, shaken and scared and could not immediately

driven from the hotel parking entrance. Complainant further said to Defendant "Michael I don't know what to do, Michael!" And "Michael I can't call my mother in Mexico ... If I do she's going to FRIEK out" in these moments of exasperation and disbelief Defendant unwittingly responded somewhat carelessly but unintentionally saying to Complainant, "He's going to kill you" referring to Complainants husband Mr. Tom Gildred and what had been purported to have happened and what Defendant had notice in the bruises on Complainants Ankles and Knees. In an act of caution and not to afford any delays, Defendant issued a report sufficient to the claims, and Defendant cautioned Complainant to seek a new therapist instead of Debra the therapist of Mr. Tom Phillip Gildred's Liking. The same Therapist Complainant later on defied in Complainants written text messaging to Defendant as not being trustworthy.

w) Further on that said Sunday Morning around August the 30<sup>th</sup> 2016 what Defendant witnessed that morning and insisted to Complainant to go to the police is the same rhetoric Complainant is referring to as cause for false statements by Defendant. Thereafter Defendant upon returning to New York on August 31st lost complete contact with Complainant for a few days unwittingly and was highly emotionally distress and concerned as to what had happened to Complainant. After many calls, emails and text Defendant began to improvise with disconcerted pokes at husband but never intentionally to causing intentional infliction of emotional distress upon Complainant or to disparage or victimized Complainant in any form whatsoever. This in effect continued and earned no response instead made Defendant to issues a scotching video message release via youtube and knowing to appear as if Defendant could become unhinged. Defendant earned a response after Complainant husbands social Website members became a witness to the video message. Complainant seemed to have sudden reprised herself and complainant resumed



communication but all in the pretext not common to previous communications.

x) Defendant affirms to become significantly inflicted with Emotional Distress after complainant's sudden cutting off of the normal communication on all dance related plans and dance partnership agreement and dance as a business plan agreement. Complainant over a few days again appeared to reconnect via a phone conversations as though everything was back to normal but each time defendant found that it was only odd and was only to assuage time and ask Defendant not to talk about Complainants husband actions as Quote "Tom is A powerful Man who does not take it lightly one's accusations of him" of which Defendant replied in writing "Then He's Going to Peel The Skin of your Backs". Defendant affirms that those remarks weren't intentional or intended to induce emotional distress upon Complainant. However Defendant appease to Complainants request and sufficient enough Complainant without any relevant excuse or explanation whatsoever simply stopped communications with Defendant after September 2016 until Complainant contacted Defendant all of 2 times in a text message in the month of March into April of 2016 one in the form of a text message and the other through a phone call which Complainant simply just dialed Defendants' phone number but as soon as Defendant answered Complainant hung up the phone.

y) Defendant suffered great material lost of business\*, general\*\*, professional\*\*\*, personal\*@\* and succumb to health\*\*+\* infractions as a result of lost of income\*==\* due to the cancellations of the business plans for Dance Partnership\*%\*, Dance partnership as a business\*^\*, and Dance partnership as in hundreds of hours in training in a number of strenuous Dance Choreography\*>\*. Defendant suffered the lost of having by default lost pending commercial NYC lawsuit\*##\* due to spending too much time on trips in California at Complainants calls.

Defendant suffered the lost of his brothers business\*!\* a retail store who's opening for 24/hours since 1983 had to suddenly closed its doors between the 3 months Defendant planned and worked with Mr. And Misses Tom Gildred. After all during those times leading up to the these proceeding to the date of this lawsuit Defendant only did what he'd best known to do with the tools best accessible to his reach in efforts earnestly only desirous of a confirmation that Complainant Carolina Gildred was ok, not in harms way and that he'd only wanted to confirm what really went wrong as to why their business partnership was to put of without any apparent reason or excuses whatsoever and that in the Complainant own words all needed to be placed on hold Quote "a Distant 2nd Place" but with no excuse until these days Defendant is heard to have been served on with an harassment, IIED and defamation lawsuit.

z) Defendants now truly continues to suffer due to defamation wherein the lawsuit allows for Public libelously stating in chief via the Daily News and New York Post and hundreds of online media a description of Defendant as "Age 53" (almost 10 years Defendants senior and gross pictures of Defendants and Titles Publicly Naming Defendant as (among others) "Dancing Devil" and Dance Instructor Tried to Black Mail Me" and Dance Instructor Shake Me Down For Money" all libelous, defamatory and false statements indented to Inflict Emotional Distress upon Defendant. Defendant holds to this day no grudge against Complainant except that arising out of this libelous lawsuit as Defendant is paralyzed in every conceivable manner due to the constant harassment stemming from the Public Media Publications. Defendant's downsides are humongous and therefore ask the court to commit its findings in favor of Defendant in these documents and counter claims herein describe between Complainants Carolina and Tom Gildred.

**Defendant further:**

1. Denies each and every allegation contained in paragraph numbered 1, 3, 4, 5, 6, 7, 8, 9, 13, 14, 16, 18, 21, and 23 of the **COMPLAINANT VERIFIED PETITION**.
2. Lacks information or knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph numbered 2, denies lines 4&5 of paragraph number 10, and paragraph number 12 denies sections 12(d) & 12(h), 17, and 19 but denies attempts to contact complainant as in any ways intentional to harm or defame complainant, of the Verified Petition.
3. Admits to each allegation contained in paragraph numbered 11 except that complainant have previously induce her wishes in opposites statements in much emails and text messages and voice messages that such notes were to assuage her husband Tom Gildred Pathetic moods, and 15 but denies attempts to contact complainant or complainants Mexican families were in any ways intended to bring harm or defame, 20 also denies attempts to contact complainant or complainants Mexican families were in any ways intended to bring harm or defame to complainant, 22 but admits that the certain letter have been subsequently rescinded as such the same letter/s of significance was previously ask by the complainant to be written and subsequent request to rescind by complainant.

# EXHIBIT 2

4. **THE COMPLAINANTS FIRST CAUSE OF ACTION**  
**“INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS”**  
**SHOULD BE DENIED BECAUSE OF**

5. **“PRIVELEDGE OF SELF DEFENSE”**

- 1). The conduct of Defendant was action that was involuntary.
2. The Defendant’s conduct may have been consistent to complainants likings, but it was not extreme or outrageous bearing in mind the past closeness of the relationship suddenly became abandoned between Complainant and Defendant and Defendant reasonably sort to engage and to meet Complainant’s personal interest within the courtesies rendered by complainant during hundreds of hours in communications and time spent together..
3. The Defendant did not desire the Complainant to suffer severe emotional distress nor know with substantial certainty that such distress would result from what the Defendant interest was and that it was unintentional to bring harm. Therefore the Defendant was not reckless and the Defendant did not recklessly cause such Intentional Infliction of Emotional Distress as claimed by Complainant.
4. The Complainant could have been embarrassed or upset, but there is not proof of intentional harm by the Defendant which brought complainant to suffer severe emotional distress.
5. The Complainant may have suffered severe emotional distress, but a reasonable person would not have reacted in such a way knowing that the depth of a relationship have been in existence, Defendant himself was intentionally kept under suspicion that Complainant needed his friendship and Complainant overtime convince Defendant that something might be wrong and that Complainant needed Defendants help.
6. “But for” what the Defendant did, the Complainant would still have suffered severe emotional distress; as the Defendant have witness Complainant reports of far worst and horrendous circumstances which needed her dependence on Defendant continuous moral support.

7. The Complainant consented to the Defendant’s conduct continuously and is equally responsible for the severe emotional distress brought on as a cause also to the Defendant.

9. The Complainant’s severe emotional distress may have occurred as a result of Defendant’s constant intent on defending her from someone else an existing circumstance have caused the Defendant and Complainant to become very closely intimate with each other.

10. The Complainant’s severe emotional distress could have occurred while the Defendant was defending himself from the Complainant.

11. The Complainant’s severe emotional distress could have occurred while the Defendant was defending himself from his own emotional distresses, professional property or recapturing loses from the Complainant and Defendants his business proposals.

12. The Complainant’s severe emotional distress could have occurred while the Defendant was continuously misled by Complainant to believe something could have in fact been wrong with the Complainant or the Complainant could have been in grave dangers.

**THE COMPLAINANTS SECOND CAUSE OF ACTION**

**“DEFAMATION”**

**SHOULD BE DENIED BECAUSE COMPLAINANT FAILED TO SATISFY ANY OF THE REQUIRED ELEMENTS FOR MALICIOUS FALSE STATEMENTS**

6. **THE COMPLAINANTS SECOND CAUSE OF ACTION**

**“DEFAMATION”**

**SHOULD BE DENIED BECAUSE COMPLAINANT FAILED TO SATISFY ANY OF REQUIRED ELEMENTS FOR MALICIOUS OR FALSE STATEMENTS**

The burden of proof is upon the complainant, as complainant must meet four

requirements: 1) a “real probability of prevailing on the merits, not merely a remote possibility of doing so;” 2) lesser injury would be done to the defendant by each intent to defame than would result to Complainant by denying it; 3) that Complainant would suffer irreparable injury unless the allege defamation would cease; and 4) that the public interest favored the allege defamation would cease. *Fogle v. H & G Rest., Inc.*, 337 Md. 441, 455- 57, 654 A.2d 449, 456-57 (1995) (reversing decision to defamatory intent). The burden of proving facts sufficient to satisfy each of the four required elements rests on the Complainant, and the “failure to prove the existence of even one of the four factors will preclude the grant of decision or prayer for [injunctive] relief.” *Id.* at 456, 654 A.2d at 456. Complainant failed to meet any of these requirements.

**7. NONE OF THE STATEMENTS ALLEGED ARE ACTIONABLE**

None of the statements referenced by Complainant are actionable. Complainant’s Complaint, which sounds in defamation, also asserts related causes of action such as false statements or allusive admittance to defendants intentionally falsifying, damages and injurious falsehood, however, these other claims ““may not stand unless the claim also meets the standards of defamation.”” See *Piscatelli v. Smith*, 197 Md. App. 23, 38, 12 A. 3d 164, 173 (2011) (quoting *Crowley v. Fox Broadcasting Co.*, 851 F. Supp. 700, 704 (applying Maryland law)). The elements of the cause of action for defamation in New York and California are well settled. “[I]n order to make out a prima facie case of defamation the Complainant must allege that (1) the defendant made a defamatory communication, i.e., that he communicated a statement tending to expose the Complainant to public scorn, hatred, contempt, or ridicule to a third person who reasonably recognized the statement to be defamatory; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffered harm.” *Piscatelli v. Smith*, 197 Md. App. at 37, 12 A.3d at 173 (quoting *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 701 (D. Md. 2000) (citing *Peroutka v. Streng*, 116 Md. App. 301, 311, 695 A.2d 1287, 1293 (1997) and *Shapiro v. Massengill*,

105 Md. App. 743, 772, 661 A.2d 202, 216-17 (1995))). As the Piscatelli Court explained, in the context of defamation, a statement is false only when it is “not substantially correct.” *Piscatelli v. Smith*, 197 Md. App. at 37, 12 A.3d at 173 (quoting *Batson v. Shiflett*, 325 Md. 684, 726, 602 A.2d 1191, 1212 (1992)). The question of whether a statement is defamatory is an issue of law that is determined by the court. *Piscatelli v. Smith*, 197 Md. App. at 37-38, 12 A.3d at 172-73 (citing *Chesapeake Publishing v. Williams*, 339 Md. 285, 296, 661 A.2d 1169, 1174 (1995)). Even if a court were to determine that a particular statement was defamatory, New York law recognizes three defenses that, if applicable, bar recovery. *Piscatelli v. Smith*, 197 Md. App. at 38, 12 A.3d at 173. First, The law recognizes the qualified privilege to report upon judicial proceedings. *Piscatelli v. Smith*, 197 Md. App. at 38, 12 A.3d at 173 (citing *Chesapeake Publishing*, 339 Md. at 296, 661 A.2d at 1174). Second, The law recognizes the fair comment privilege. *Piscatelli v. Smith*, 197 Md. App. at 38, 12 A.3d at 173 (citing *A.S. Abell Co. v. Kirby*, 227 Md. 267, 272, 274, 176 A.2d 340, 343 (1961)). Third, The law recognizes as a defense to defamation that “a person is entitled to express an opinion without liability if ‘the facts from which a defendant forms his or her opinion are given or are readily available and those facts cannot be proved false....’” *Piscatelli v. Smith*, 197 Md. App. at 39, 12 A.3d at 174 (quoting *Peroutka*, 116 Md. App. at 320, 695 A.2d at 1297)). The statements cited by Complainant are not false or defamatory, and in any event, all three defenses preclude recovery.

**8. NONE OF THE STATEMENTS ARE DEFAMATORY**

As a matter of law, none of the statements cited by Complainant are defamatory. See *Piscatelli v. Smith*, 197 Md. App. at 38, 12 A.3d at 173. Every one of the statements alleged by Complainant in its Complaint is from an independent nonparty source cited above. See *supra* pp. 2- 13. These are facts that were stated by courts and other independent nonparty sources. These facts are available in numerous ways, including through the Internet at the websites cited above. Even if Defendant made any statement



of these facts or expressed any opinion about these facts, the statements are not defamatory as a matter of law because they are true factual statements or statements of opinion. Even if one or more of the underlying factual statements were not true, the statements were made by independent nonparty sources, and thus Defendants did not make any statements that are defamatory.

**9. ACTION COMPLAINANT FAILED TO PROVE LESSER INJURY WOULD BE DONE TO DEFENDANTS BY GRANTING AN INJUNCTION THAN WOULD RESULT TO COMPLAINANT BY DENYING IT**

**“DEFAMATION”**

The Defense of the Right to Express an Opinion Precludes Recovery. The right to express an opinion provides another applicable defense to defamation – that “a person is entitled to express an opinion without liability if ‘the facts from which a defendant forms his or her opinion are given or are readily available and those facts cannot be proved false.’” See *Piscatelli v. Smith*, 197 Md. App. at 39, 12 A.3d at 147 (quoting *Peroutka*, 116 Md. App. at 320, 695 A.2d at 1297)). Where the defendant makes a factual statement or expresses an opinion based on facts supplied by third parties, the defendant is not liable for the statements if the statement of facts is not defamatory or if both the defendant and the person receiving the communication assume the facts stated are true. See *Piscatelli v. Smith*, 197 Md. App. at 39, 12 A.3d at 174 (citing Restatement (Second) of Torts § 566 Comment c (1976)). Here, Defendant are not even accused of stating facts known only to Defendants; Complainant complains that it disagrees with the opinions allegedly expressed by Defendants. The right to express an opinion supersedes Complainant’s claim. Complainant may not like the characterization of its conduct and integrity, but “an ordinary person, reading the matter complained of, [would] be likely to understand it as an expression of [opinion]” and the factual basis for those opinions are readily ascertainable from the same quotation.” *Piscatelli v. Smith*, 197 Md. App. at 39, 12 A.3d 174 (quoting *A.S. Abell Co. v. Kirby*, 227 Md. at 274, 176 A.2d at 343). Expressing a

negative opinion of Plaintiff's business practices is clearly an opinion protected by Maryland law. Despite the fact that complainant's entire Complaint rests on the defamation allegations, Complainant failed to cite even a single defamation case anywhere in its voluminous Motion. Complainant lacks even a remote possibility of prevailing on any defamation claim.

**10. ACTION COMPLAINANT' FAILED TO PROVE LESSER INJURY WOULD BE DONE TO DEFENDANTS BY GRANTING AN INJUNCTION THAN WOULD RESULT TO COMPLAINANT'S BY DENYING IT**

Complainant seeks a wholly unwarranted and unsupported prior restraint on the freedom of speech of Defendants. The Constitutional magnitude of harm to a defendant presented by a prior restraint on the freedom of speech has been recognized under the law. See *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 576, 841 A.2d 10, 30 (2004), The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech." Truthful commercial speech enjoys meaningful First Amendment protection. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978). The Court of Special Appeals further noted that the United States Supreme Court "has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary – orders that impose a 'previous' or 'prior' restraint on speech." *City of Frederick v. Randall Family, LLC*, 154 Md. App. at 576, 841 A.2d 10 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556, 96 S.Ct. 2791, 2801, 49 L.Ed.2d 683 (1976)). As the Court of Special Appeals explained, because "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,' any prior restraint bears a heavy presumption against its constitutional validity." *City of Frederick v. Randall Family, LLC*, 154 Md. App. at 576, 841 A.2d at 30 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 556 and

citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577-78, 29 L.Ed.2d 1 (1971)). Before a restraint can be deemed Constitutional, the test is whether “the magnitude of the danger the restraint seeks to prevent, ‘discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.’” *City of Frederick v. Randall Family, LLC*, 154 Md. App. at 577, 841 A.2d at 30 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.), *aff’d*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951)). Determining the actual truth or falsity of a defendant’s speech is not appropriate on a cause of action for an injunctive relief. “An injunction is not an adjudication on the merits, but a device for preserving the status quo and preventing the irreparable loss of rights before judgment.” *Textile Unlimited, Inc. v. A. BMH & Co.*, 240 F.3d 781, 786 (9th Cir.2001). Against this clear harm to Defendants, Complainants asserts in conclusory fashion at pages 24- 25 of the Action that J.G. Wentworth’s reputation, good will, and business interests will be irreparably harmed. But Complainant offers no factual support or any citation to the record supporting this weak claim. All of the facts showing Complainant’s conduct, including facts supplied by independent nonparties, demonstrate that it is Complainant’s own record and conduct, and not any particular website, that affects Complainant’s reputation. Indeed, issuing the unwarranted injunction requested by Complainant will not make the facts of Complainant’s conduct disappear. Complainant utterly failed to show that any alleged business loss and harm to Complaint’s interests results from a website as opposed to the reality of Complainant’s conduct. Because Complainant has not shown that lesser injury would be done to Defendants by granting the injunction than would result to Complainant by denying it, the Cause Of Action lacks merit and should be denied for this additional, independent reason.

#### **11. COMPLAINANT FAILED TO PROVE IRREPARABLE HARM**

Complainant’s Motion nowhere demonstrates irreparable harm based on any alleged statements by Defendants. To the contrary, Complainant appears to argue with the

independent, sources (nonparty) that have documented complainant's conduct. Even assuming Complainant lost of sleep as a result of potential public learning of Complainant's record, such a circumstance does not establish irreparable harm to Complainant. For this reason as well, the Second Cause Of Action fails as a matter of law.

#### **12. THE PUBLIC INTEREST WOULD BE HARMED**

Robust debate on matters of public concern lies at the heart of the right of freedom of speech recognized by the courts of New York. See, e.g., *City of Frederick v. Randall Family, LLC*, 154 Md. App. at 576, 841 A.2d at 30. There is no public interest whatsoever in preventing any member of the community from speaking out on matters of public concern and commenting on facts reported by independent nonparty sources. The Complainant's allegations are a matter of public concern. Complainant's aquavits' a dubious history is a matter of public record. Issuing a prior restraint on free speech with regard to this matter of public concern would harm the public interest. Complainant certainly has not shown that granting the injunction will help the public interest in any way. Accordingly, this factor also cuts decidedly against the injunction.

#### **13. EVEN IF THIS COURT WERE TO ENJOIN DISPARAGEMENT, ANY SUCH ORDER SHOULD BE MUTUAL**

Even if this Court were inclined to enjoin any disparagement during the pendency of this litigation, any such order should be mutual – it would be inherently unfair to subject Defendant to an order limiting his freedom of speech and ability to defend himself against statements by Complainant unless Complainant also was ordered not to disparage Defendant.

#### **AS AND FOR AN ACCOUNT OF CONTINUED AFFIRMATIVE DEFENSE**

4. The Court lacks personal jurisdiction over the defendant in that the defendant was not served with process within the meaning of the Civil Practice Laws and Rules.

**AS AND FOR AN ACCOUNT OF ADDITIONAL AFFIRMATIVE DEFENSE**

5. The Complainant failed to include a necessary party.

**AS AND FOR AN ACCOUNT OF CONTINUED AFFIRMATIVE DEFENSE**

6. The Complaint fails to state a valid cause of action to which relief can be granted.

**AS AND FOR AN ACCOUNT OF ADDITIONAL AFFIRMATIVE DEFENSE**

7. The Complainant failed to adequately mitigate damages.

**AS AND FOR A FIRST COUNTERCLAIM**

8. The Complainant knowingly, intentionally and maliciously misrepresented the terms of the alleged contract in the business of dance as dance partner to Defendant and dance business partner to Defendant, if any, in order to induce the defendant to enter into the agreement.

9. The deceptive act of the Complainant occurred in the course and conduct of the Complainant's normal course of personal, trade and commerce.

10. The deceptive act of the Complainant had a broad impact on Defendant and its consumers at large.

11. The deceptive act of the Complainant caused actual injury to the defendant.

12. As such, the act of the Complainant constituted unlawful deceptive act and practice in violation of General Business Law Section 349.

13. By virtue of the Complainant violation of General Business Law Section 349, the defendant is claiming damages to the sum of Two Million Eight Hundred and Twenty-Five Thousand (\$2, 825,000.00) Dollars.

**AS AND FOR A SECOND COUNTERCLAIM**

14. Defendant repeats, reiterates and realleges the allegations contained in Paragraphs “1, 2, 3 & 5” through “13” inclusive, as though fully set forth herein.

15. The Complainant had a duty to disclose material information, such as the decline of investment interest and the consequences of a deficiency in the dance business partnership contract, among other things.

16. As such, the acts of the Complainant constituted fraudulent concealment.

17. By virtue of the Complainant’s fraudulent concealment, the defendant has been damaged in a sum of Two hundred and Twenty-Five Thousand (\$225,000.00) Dollars

**AS AND FOR A THIRD COUNTERCLAIM**

18. Defendant repeats, reiterates and reallege the allegations contained in Paragraphs “1” through “23” inclusive, as though fully set forth herein.

19. The complainant has been unjustly enriched by its wrongful act in that certain provisions in the contract were improper and the Complainant accepted the training expertise and transferred it and has received the appropriate and just rewards.

20. By virtue of the Complainant’s unjust enrichment, the defendant is claiming damages to the sum of Two Hundred Twenty-Five Thousand (\$225,000.00) Dollars.

**AS AND FOR A FOURTH COUNTERCLAIM**

21. Defendant repeats, reiterates and realleges the allegations contained in Paragraphs “y” through “z” inclusive, as though fully set forth herein.

22. The Dance business and dance partnership verbal contract contained clear and there was no hidden language and there was a mutual balance in the knowledge, understanding as well as acumen of both parties.

23. Complainant further accepted the Dance for business and the business of dance partnership contract with terms reasonably favorable to the Complainant and there was mutual meaningful choice on the part of both parties.

24. As such, the acts of the Complainant constituted unconscionable conduct and the breach contract itself was unconscionable.

25. By virtue of the Complainant’s unconscionable conduct and the unconscionability of the purported breach of dance partnership and the business of dance contract, if any, it is yet valid as a matter of equity and the Complainant has thus yet to stand by each and all of the dance partnership and the business of dance contract.

# EXHIBIT 3



**CONCLUSION:**

The actions both Intentional Infliction of Emotional Distress and Defamation Cause of Actions and injunction against defendant should be denied in its entirety. In both Actions Complainant failed to establish any factors necessary for an injunction. Not a single statement referenced by complainant is actionable, and none of the claims asserted by Complainant have any merit whatsoever, Complainant's request for damages for emotional distress and humiliation or punitive damages is moot because Complainant's claim have been self inflicted and have already substantiate the Law on defamation and Intentional Self Infliction of Emotional Distress. Even if this Court were inclined to enjoin any disparagement during the pendency of this litigation, any such order should be mutual – it would be inherently unfair to subject Defendant to a prior restraint on the freedom of speech and the ability to defend himself against statements of Complainant unless Complainant also was ordered not to disparage Defendant.

**WHEREFORE**, the defendant, MICHAEL FOSTER, demands judgment that:

- i. Dismissing the complaint herein, together with costs and disbursements in this action;
- ii. On the First Counterclaim in the amount of Two Million Eight Hundred and Twenty-Five Thousand (\$2, 825,000.00) Dollars;
- iii. On the Second Counterclaim in the amount of Two Hundred and Twenty-Five Thousand (\$225,000.00) Dollars;
- iv. On the Third Counterclaim in the amount of Two Hundred and Twenty-Five Thousand (\$225,000.00) Dollars;
- v. On the Fourth Counterclaim, the plaintiff has forfeited its right to receive any form of recovery, whether in equity and/or law; and
- vi. Granting such other and further relief as this Court may deem just and proper.

**JURY DEMAND**

Defendant, MICHAEL FOSTER, demands a trial by jury.

Dated: New York, New York  
May 18, 2017

Yours etc.,

BY:

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**MICHAEL FOSTER**

PRO SE

Defendant

**MICHAEL FOSTER**

PO Box 28

New York, New York 10002

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TO: RAFKIN ESQ  
Attorneys for the Plaintiff  
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See Exhibit

