FAEGRE & BENSON LLP

JOHN P. BORGER
JBorger@faegre.com
612-766-7501

March 23, 2011

Jill Clark
2005 Aquila Avenue North
Golden Valley, MN 55427

BY U.S. MAIL

Paul Godfread
Godfread Law Firm, P.C.
100 South Fifth Street, Suite 1900
Minneapolis, MN 55402

Re: Jerry L. Moore v. John Hoff (a/k/a "Johnny Northside")
Civil File No. 27-CV-09-17778

Dear Counsel:

Enclosed and served upon you by U.S. Mail in the above-referenced matter please find the following documents:

1. Notice of Motion and Motion of Minnesota Pro Chapter, Society of Professional Journalists For Leave to Participate as *Amicus Curiae*;

2. Memorandum of *Amicus Curiae* Minnesota Pro Chapter of the Society of Professional Journalists; and

3. Affidavit of Service by Mail.

Sincerely,

John P. Borger

BORJP:sab
Enclosures
fb.us.6540448.01

STATE OF MINNESOTA

DISTRICT COURT

HENNEPIN COUNTY

FOURTH JUDICIAL DISTRICT

Jerry L. Moore,

Plaintiff,

vs.

John Hoff a/k/a Johnny Northside,

Defendant.

File No. 27-CV-09-17778
The Honorable Denise D. Reilly

NOTICE OF MOTION AND MOTION OF MINNESOTA PRO CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

TO: Parties above-named and their attorneys of record Jill Clark, 2005 Aquila Avenue North, Golden Valley, Minnesota 55427, and Paul Godfread, Godfread Law Firm, P.C., 100 South Fifth Street, Suite 1900, Minneapolis, Minnesota 55402

PLEASE TAKE NOTICE that the Minnesota Pro Chapter, Society of Professional Journalists ("MN-SPJ") will move this Court to participate as *amicus curiae* on the issue of recognizing particular legal principles in the context of online publications. MN-SPJ will support certain positions on behalf of defendant John Hoff in the post-trial motions that it anticipates Hoff will file (based upon Hoff's March 16, 2011, motion for stay of entry of judgment) and may oppose certain positions taken by plaintiff Jerry L. Moore in connection with post-trial motions. MN-SPJ also supports Hoff's March 16, 2011, motion for stay of entry of judgment.

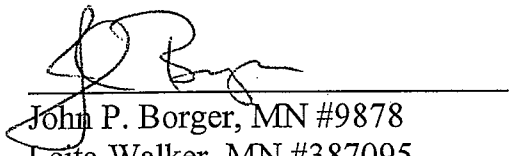
This *amicus* motion will be heard at a time and place to be set by Court.

This motion is based upon the accompanying Memorandum of Law submitted on behalf of MN-SPJ in support of its participation as *amicus* and in support of application

of certain legal principles to allegedly harmful, publicly accessible statements in online publications.

Dated: March 23, 2011

FAEGRE & BENSON LLP



John P. Borger, MN #9878
Leita Walker, MN #387095
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
612-766-7000

Attorneys for Minnesota Pro Chapter, Society of Professional Journalists

fb.us.6505347.04

STATE OF MINNESOTA

HENNEPIN COUNTY

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Jerry L. Moore,

Plaintiff,

vs.

John Hoff a/k/a/ Johnny Northside,

Defendant.

File No. 27-CV-09-17778
The Honorable Denise D. Reilly

MEMORANDUM OF *AMICUS CURIAE* MINNESOTA PRO CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS

Introduction

In this civil lawsuit, a jury returned a special verdict that defendant John Hoff's statement about plaintiff Jerry Moore was not false, but that Hoff nevertheless had intentionally interfered with Moore's employment contract and prospective employment advantage, awarding Moore $35,000 for loss of contractual benefits and $25,000 for "emotional distress or actual harm to reputation."

The dispute involves a statement published on Hoff's online blog. Outside the context of online publications, Minnesota courts long have held that merely providing truthful information cannot provide the basis for an action for tortious interference with contract or with prospective economic advantage, and both federal and state courts have rejected attempts by plaintiffs to evade the requirements of defamation law when the claim essentially is a defamation claim. Because a ruling on this issue could affect its members, the Minnesota Pro Chapter of the Society of Professional Journalists ("MN-SPJ") seeks leave of court to participate as *amicus curiae* in connection with defendant's post-trial motions.[1]

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[1] No party authored this memorandum in whole or in part. No person other than the *amicus* made a monetary contribution to the preparation or submission of this memorandum.

Argument

I. The Court Should Allow the Minnesota Pro Chapter of the Society of Professional Journalists to Participate as *Amicus Curiae.*

Rule 129 of the Minnesota Rules of Appellate Procedure provides for submission of briefs *amicus curiae*. Such briefs can "broaden the discussion of important points of law" in pending cases, "inform the court of facts or matters of law that may have escaped its consideration," and "point out to the court practical or legal consequences of a particular decision beyond those involved in the case pending before the court." D. Herr & S. Hanson, APPELLATE RULES ANNOTATED §§129.1 & 129.3, p. 650 (2009). Although less common, *amicus* briefs can serve the same purposes in the district courts.

The Society of Professional Journalists, a voluntary, non-profit organization, was founded as Sigma Delta Chi in 1909. It is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism, and for more than a century has been dedicated to perpetuating a free press. The Minnesota Pro Chapter has become one of the nation's largest and most active professional chapters since its founding in 1956.

The work of the Society's members centers upon written and broadcast journalism, and increasingly appears online. A legal rule that exposes journalists and anyone else who communicates on the internet to risks of liability for tortious interference based on truthful statements or on a different standard than defamation could impair the free flow of information and vigorous debate on public issues. MN-SPJ has a significant continuing interest in ensuring that Minnesota courts at every level do not

apply such a rule. Statements appearing online should have the same level of protection as other means of mass communication. MN-SPJ has a public interest in assisting this court in analyzing the tradition of legal protections for such speech.

Accordingly, MN-SPJ respectfully moves this court to grant it leave to participate in this action as *amicus curiae*.

II. The Court Should Reject Tortious Interference Liability based upon Providing Truthful Information.

In *Glass Service Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871 (Minn. App. 1995), the Minnesota Court of Appeals affirmed summary judgment in favor of the defendant, an insurance company that provided truthful information to its insureds, and rejected the tortious interference claims of the plaintiff, a company that repaired windshields. The court expressly invoked the RESTATEMENT (SECOND) OF TORTS, §772 cmt. b (1979) (no liability for interference on part of one who merely gives truthful information to another). The Eighth Circuit has applied *Glass Service* as settled Minnesota law. *Fox Sports Net North, LLC v. Minnesota Twins Partnership*, 319 F.3d 329, 337 (8th Cir. 2003.) This court should rule the same way – particularly when the alleged tortious interference arises from an allegedly defamatory statement.

III. When the Claim is Essentially a Defamation Claim, the Court Should Apply the Law of Defamation even if the Plaintiff Labels his Claim One for "Tortious Interference."

A. Plaintiff Cannot Recast his Defamation Claim as a Claim for Tortious Interference with Contact or with Prospective Employment Advantage.

Courts do not allow plaintiffs to evade the requirements of libel law by presenting their claims under a different legal label. Injuries to reputation are defamation-type damages, for which plaintiffs must prove the elements of a defamation claim regardless of

how the claim is labeled. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988); *Mt. Hood Polaris, Inc. v. Martino (In re Gardner)*, 563 F.3d 981, 992 (9th Cir. 2009) ("[W]hen a claim of tortious interference with business relationships is brought as a result of constitutionally-protected speech, the claim is subject to the same First Amendment requirements that govern actions for defamation."); *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) ("At the outset we note the malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements. This is only logical as *a plaintiff may not avoid the protection afforded by the Constitution* and federal labor law *merely by the use of creative pleading*." (emphasis added)); *Johnson v. Columbia Broadcasting System, Inc.*, Court File No. CIV-3-95-624, Order filed June 24, 1997, at 4 (D. Minn. 1997) (plaintiff "must satisfy the defamation standard to establish his claim for tortious interference") (copy attached as Exhibit A); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (First Amendment applies to claims for tortious interference with business relations).

The same result applies as a matter of state common law, as the Minnesota Supreme Court established decades ago:

> It seems to us that, regardless of what the suit is labeled, the thing done to cause any damage to [plaintiff] eventually stems from and grew out of the defamation. Business interests may be impaired by false statements about the plaintiff which, because they adversely affect his reputation in the community, induce third persons not to enter into business relationships with him. We feel that this phase of the matter has crystallized into the law of defamation and is governed by the special rules which have developed in that field.

Wild v. Rarig, 302 Minn. 419, 447, 234 N.W.2d 775, 793 (1975). That court and others have applied the principle repeatedly in the following years.[2] No reason exists for this court to depart from that established precedent.

B. This Plaintiff Cannot Recover for Tortious Interference, because the Jury Determined that the Statement was not False.

A defamation plaintiff bears the burden of proving that the allegedly harmful statement was not true. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986); *Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997) (defamation plaintiff must establish that the alleged statement was false). This plaintiff did not meet that burden; the jury determined that the statement as issue was not false. For the same reasons that plaintiff Moore could not prevail on his defamation claim, he cannot prevail on his claims for tortious

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[2] *See, e.g., MSK EyES Ltd. v. Wells Fargo Bank*, 546 F.3d 533, 544 (8th Cir. 2008) ("Claims arising out of purported defamatory statements, such as tortious interference, are properly analyzed under the law of defamation."); *European Roasterie, Inc. v. Dale*, Civ. No. 10-53 (DWF/JJG), 2010 WL 1782239, at *5 (D. Minn. May 4, 2010) ("Tortious interference claims that are duplicative of a claim for defamation are properly dismissed."); *ACLU v. Tarek Ibn Ziyad Acad.*, Civ. No. 09-138 (DWF/JJG), 2009 WL 4823378, at *5 (D. Minn. Dec. 9, 2009) (same); *Guzhagin v. State Farm Mut. Auto. Ins. Co.*, 566 F.Supp.2d 962, 969 (D. Minn. 2008) (dismissing tortious interference claim with prejudice because "a Minnesota plaintiff is not permitted to avoid defenses to a defamation claim by challenging the defamatory statements under another doctrine"); *Pinto v. Internationale Set, Inc.*, 650 F. Supp. 306, 309 (D. Minn. 1986) ("[I]n Minnesota, a plaintiff cannot elude the absolute privilege by relabeling a claim that sounds in defamation."); *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 310 (Minn. 2007) ("Regardless of the label, appellant's claims are in essence defamation claims . . . , and we find that absolute privilege operates to bar all of the claims at issue on this appeal."); *Pham v. Le*, Nos. A06-1127, A06-1189, 2007 WL 2363853, at *7-8 (Minn. App. Aug. 21, 2007) (unpublished; copy attached as Exhibit B) (applying *Wild v. Rarig* and *NAACP v. Clairborne Hardware*, dismissing tortious interference claim arising from same statements as unsuccessful defamation claim); *Zagaros v. Erickson*, 558 N.W.2d 516, 523 (Minn. App. 1997) (plaintiff asserted claim of "negligent trial testimony"; court followed *Wild* and held that defamation standards and privileges apply to any "claim [that] is essentially relabeling a defamation claim"); *McGaa v. Glumack*, 441 N.W.2d 823, 827 (Minn. App. 1989) ("In Minnesota, one 'cannot evade the absolute privilege by relabeling a claim that sounds in defamation'") (citations omitted).

interference with employment contract and with prospective employment advantage, to the extent that those claims are based upon an allegedly defamatory statement.

* * *

This court should follow the foregoing clear state and federal precedents and reject the plaintiff's attempt to recover under a theory of tortious interference when that claim is based upon the same statement as his failed claim for defamation.

Conclusion

The court should allow the Minnesota Pro Chapter of the Society of Professional Journalists to participate in this action as an *amicus curiae*. In considering defendant's post-trial motions, the court should apply the same rules to publicly accessible online statements that it would to a print version of the same material.

Dated: March 23, 2011

FAEGRE & BENSON LLP

John P. Borger, MN #9878
Leita Walker, MN #387095
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
612-766-7000

Attorneys for the Minnesota Pro Chapter of the Society of Professional Journalists

fb.us.6505845.05