IN THE ARBITRATION OF

CHICAGO MOTOR CAR CORP.,	)
PARIN SHAH, and FRANK SACCO,	)
Plaintiffs,	)
	)
v.	)
	)
DAVID BATES,	)
Defendant.	)

ARBITRATION MEMORANDUM OF DAVID BATES

> The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. Under our Constitution there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503-04 (1984) (internal quotes omitted)

David Bates is an individual who had a bad experience with Plaintiffs, a used car dealership. He shared his experience with and opinions about Plaintiffs in a series of YouTube videos and on various websites. He hoped that by sharing his experiences and opinions consumers would be better informed and could avoid a similar experience. Plaintiffs did not appreciate the negative press that these videos garnered. But instead of competing in the marketplace of ideas with their own speech, Plaintiffs attempted to silence Bates's speech by suing him for defamation and a host of other legal theories aimed at silencing his criticism. After Plaintiffs faced possible sanctions for filing a false affidavit, the parties agreed to settle. As part of the settlement, the parties agreed to submit to binding arbitration the issue of whether 27 specified YouTube videos were defamatory and therefore should be removed from Bates's YouTube account. *See* **Exhibit 1**.

Facts

I. Bates's Car-buying Experience with Plaintiffs

David Bates is a former customer of Chicago Motor Cars ("CMC"), co-owned by Parin Shah and Frank Sacco (CMC, Shah, and Sacco are collectively referred to herein as "Plaintiffs"). Bates' car-buying experience was a nightmare. It started when Bates contacted Plaintiffs about a vehicle advertised by Plaintiffs online as a Mercedes SL600 with an AMG sports package and two master keys. Plaintiffs' website describes their vehicles as "pristine" and of a quality that exceeds vehicles at other dealerships. In reality, the Mercedes SL600 Plaintiffs sold Bates had very little in common with the vehicle Plaintiffs advertised.

When Bates arrived at Plaintiffs' dealership to test drive the vehicle, he immediately noticed yellow paint and fresh damage to the front bumper. He left the dealership refusing to purchase the vehicle. In an attempt to save the sale, Parin Shah contacted Bates and promised to repair the damage, detail the vehicle, and have it thoroughly inspected before delivering it to Bates's home. Satisfied with Shah's offer, Bates agreed.

When Plaintiffs delivered the vehicle, Bates soon realized that Plaintiffs had not been honest with him. First, Bates learned that the vehicle did not have the AMG sports package. Because the vehicle did not have the AMG sports package, it did not have the better engine, the nicer interior, the upgraded wheels, or any of the other upgrades that make a vehicle an AMG. It also only had one key, which was not even a master, instead of two master keys as advertised. Without a master key, Bates could not use several of the vehicle's luxury features such as the keyless-start, which allows the driver to start the vehicle from outside the vehicle by pushing a button on the key, or the keyless-go, which allows the driver to operate the vehicle without having to place the key in the ignition.

Next, Bates noticed that the bumper was still damaged and had not been properly repaired. The vehicle was dirty inside and out, had dangerously bald tires, a cracked rim. A few days later, a body shop technician revealed to Bates evidence that the vehicle had been in a serious accident and had undergone bodywork and repainting.

To top it all off, Plaintiffs did not provide Bates with the title to the vehicle when it delivered the vehicle which is necessary in order to register a vehicle in the state of Wisconsin. Bates attempted to negotiate a lower price for the vehicle given the fact that the vehicle did not have the AMG sports package or two master keys as advertised and had other defects which left the vehicle in far from the condition advertised. Eventually, the parties agreed to a new price of $37,500 for the vehicle. After reaching this agreement, Plaintiffs inexplicably reneged on the deal by pulling the previously-arranged financing, refusing to accept the alternative financing obtained by Bates, and refusing to communicate further with him.

II. Bates's Internet Activity

Upset, Bates shared his experience with Plaintiffs on the internet. He warned other potential consumers about, what he considered to be, Plaintiffs' deceptive business practices and history of lawsuits from customers that alleged fraud and false advertising. Bates first attempted to share his experience on car forums, but Plaintiffs would promptly contact these forums and have Bates's posts removed. Bates then registered two domains www.chicagomotorcarssuck.com and www.chicagomotorcars.us in order to vent his frustration and share his story with other potential consumers without having to worry about having his information taken down. Bates also posted a series of YouTube videos in which he discussed his experience, read from lawsuits filed by other consumers against Plaintiffs, and exposed what were, in his opinion, Plaintiffs unscrupu-

lous business practices. In all, he posted these videos and information on his websites, on various car forums, consumer review websites, and on a Facebook page he created.

III. Plaintiffs' Lawsuit against Bates

Plaintiffs reacted by suing Bates alleging (1) false advertising under the federal Lanham Act and Illinois Uniform Deceptive Trade Practices Act ("UDTPA"), (2) cybersquatting under the Anti-cybersquatting Consumer Protection Act ("ACPA"), (3) defamation and false light, and (4) tortious interference with contraction contractual relations and prospective business advantage. Despite the large number of Plaintiffs' legal theories, all their claims revolved around two specific types of conduct: (1) criticizing Plaintiffs in a number of YouTube videos and on websites and (2) registering two domain names containing the phrase "chicagomotorcars."

Plaintiffs filed a motion for a temporary restraining order and supported that motion with an affidavit from Plaintiff Frank Sacco attesting that all of Bates's statements were false and that Plaintiffs had never been sued for fraud or received complaints of false advertising. Relying on that affidavit the Court entered a temporary restraining order requiring Bates to remove a limited number of statements from his websites. In granting the temporary restraining order, the Court substantially narrowed the scope of the order from what Plaintiffs were seeking by finding that any mention that Plaintiffs were "crooks," "liars," or "scammers" was protected opinion. He also concluded that statements instructing customers "do not buy from this dealership" and "buying from this dealership will be the worst mistake of your life" were nonactionable opinion.

During discovery, Bates proved that, in complete contradiction to Plaintiffs' affidavit, Plaintiffs had in fact been sued a number of times for fraud and had judgments entered against them. He also proved that Plaintiffs received a number of complaints relating to false advertis-

ing—again in contradiction to their affidavit. Plaintiffs' attestations that Bates's statements about them were false unraveled during Plaintiffs' depositions.

In those depositions, Plaintiffs admitted that their affidavit was false, that they had been sued for fraud, that they had received complaints of false advertising, and that they had in fact engaged in fraud and false advertising on a number of occasions. When questioned specifically about lawsuits alleging fraud, Plaintiffs admitted:

> Q: How many times has your company been sued, Mr. Sacco, in an arbitration or a lawsuit?
> A: Over how many years, total?
> Q: Yes, total?
> A: Four or five, if I had to guess.
> . . .
> Q: And you knew about all these lawsuits when you filled out your Affidavit, didn't you, Mr. Sacco?
> A: Yes.
> . . .
> Q: Sir, were you aware when you filed this Affidavit that your company had been sued, regarding the Porsche, the Hummer and the Civic, for false advertising?
> A: Yes.

Exhibit 2, 122:8-124:21, 198:15-19; *see also id*. at 126:6-8; 145:15-17; 163:9-13.

When questioned whether the allegations regarding false advertising were true, Plaintiffs admitted:

> Q: So is he entitled to say that you were sued for selling a Civic that had two VIN numbers and an engine from a salvage title car and that you got sued for that? Is he entitled to say that on the Internet?
> A: He's absolutely allowed to say that.
> Q: And that's something that your business did do, correct?
> A: Yes. We did enter a lawsuit.
> Q: No, your business sold someone a Civic that had two VIN numbers?
> A: Correct.
> Q: And it you advertised it as having 29,000 miles and it really had, the engine had 89,000 miles, correct?
> A: Correct.
> . . .
> Q: Okay. And you falsely advertised the Civic, correct?
> A: Intentionally?

Q: No, I'm not asking intentionally. It was --
A: Yes, it was falsely advertised.

Id. at 30:6-20, 323:21-324:3.

Q: This is Gunthan versus Chicago Motor Cars and Parin Shah, correct?
MR. SHAH: Correct.
Q: Correct, Mr. Sacco?
A: Yes.
Q: And the false representations are no known accidents, no known body work, excellent exterior condition. And we also saw that you had represented that the paint was original, correct, sir?
MR. SHAH: Correct.
Q: Is that correct, Mr. Sacco?
A: Yes.
Q: And then the customer was suing you both for Common Law Fraud and for the Consumer Fraud Act, correct?
A: Yes.
Q: And they attached false advertising to the Complaint which you agree was false, correct, Mr. Sacco?
A: Correct.
Q: So it is true that your company in the Gunthan and Hummer case was sued for false advertising, and you agree the advertising was false, correct?
A: Correct.
Q: And so not only do you agree that your company was sued for that, you agree that your company did in fact provide false advertising, correct?
A: Yes…

Id. at 141:11-142:18.

Q: But the fact that you falsely advertise cars, that's true, being Chicago Motor Cars and Parin Shah?
A: We have falsely advertised cars in the past, yes, we have.

Id. at 328:20-321:1.

When questioned about complaints for false advertising, Plaintiffs admitted that they had received between 10 and 100 complaints for false advertising, including the Mercedes-Benz SL600 that Bates attempted to purchase from Plaintiffs. *Id*. at 183:12-184:9; *see also id*. at 30:6-20, 137:21-138:8, 312:19-313:2, 323:15-324:6. Plaintiffs also admitted that their affidavit was false:

> Q: Let's look at the Affidavit again. So Mr. Sacco, that statement is not true; "We have not received consumer complaints in general regarding anything like what Bates has falsely accused us of." You have. Regarding his complaints about the Mercedes, you've had similar complaints by other customers who have sued you, correct?
> A: Correct.
> . . .
> Q: Well, here [in the affidavit] you said it never happened, right? Here you said it never happened, that you had never been accused of falsely advertising a car, right?
> A: Well, it's a misprint, a mistake.

Id. at 209:6-210:22; *see also id*. at 335:16-336:8.

And when questioned specifically about Bates's allegedly defamatory statements listed in the Complaint, Plaintiffs admitted that statements accusing Plaintiffs of fraud and false advertising were true:

> Q: So when David Bates has said on his websites that you falsely advertise cars, that's actually true, correct?
> A: In particular to the [Mercedes Benz] SL[600] and the other cars, yes.
> . . .
> Q: [Bates' statement that] "This company falsely advertises." That's true, right? You have falsely advertised?
> A: We have, yeah.

Id. at 326:9-334:15; *see also id*. at 245:6-9, 317:19-318:10.

After Plaintiffs admitted that their affidavit was false, Bates filed a motion for sanctions against Plaintiffs. In response, the Court filed a Rule to Show Cause why Plaintiffs should not be held in contempt and scheduled a hearing on Bates's motion for sanctions. Shortly thereafter, the parties agreed to settle the case. Under the terms of that settlement, Plaintiffs would dismiss their lawsuit and release all money damage claims, Bates would withdraw his motion for sanctions and dismiss virtually all claims against Plaintiffs[1], and the parties would submit to binding arbi-

[1] Bates expressly retained his claim against Plaintiffs for allegedly falsely posting on an internet forum that Bates is a registered sex offender.

tration the limited issue of whether certain, specified YouTube videos of Bates should be removed from the internet.

Argument

"[C]ases involving speech are to be considered 'against the background of a profound * * * commitment to the principle that debate * * * should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

This case revolves entirely around speech and more importantly around Plaintiffs' desire to quell speech they do not like. However, Plaintiffs' attempts to silence Mr. Bates and remove his videos from the internet clash head-on with the First Amendment and nearly two centuries of jurisprudence based squarely on the principle that "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see also Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) ("I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe…"). The First Amendment is grounded on the fundamental idea that society benefits from a full and free exchange of ideas and opinions. *Sullivan*, 376 U.S. at 266 (explaining that the First Amendment is designed "to secure the widest possible dissemination of information from diverse and antagonistic sources.") (internal quotes omitted); *Roth v. United States*, 354 U.S. 476, 488 (1957) ("The fundamental freedom of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth.").

That is not to say that the First Amendment absolutely protects all speech. But the speech not protected by the First Amendment is so exceptionally limited that even "the most repulsive

speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn*, 383 U.S. at 63; *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 474 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor."); *see, e.g., Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (finding that First Amendment protects all speech regarding public issues or figures absent proof of actual malice).

Bates's videos are expressions of his opinion plain and simple. They are critical of Plaintiffs to be sure. But "[f]ree speech is not restricted to compliments. . .[M]embers of a free society must be able to express candid opinions and make personal judgments. And those opinions and judgments may be harsh or critical—even abusive—yet still not subject the speaker or writer to civil liability." *Madison v. Frazier*, 539 F.3d 646, 657 (7th Cir. 2008). In expressing his opinions and critique of Plaintiffs, Bates may even make minor errors in detail. But an error in detail does not qualify as "deliberate or reckless untruth" and does not warrant censorship. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *see Bose*, 466 U.S. at 513 ("[E]rroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.'").

The fundamental problem with Plaintiffs' entire approach is that they are attempting to single out one dissonant voice—one viewpoint—and silence it. Most notably, Plaintiffs do not seek to silence the compliments of the customers they feature in their internet advertisements. They are perfectly content to allow that speech to remain in the marketplace of ideas accessible to all consumers. Instead they seek only to remove critical speech. In effect, Plaintiffs seek to "silenc[e] one side of a public debate" which is "a drastic measure that would severely harm the public interest in freedom of speech…" *Ameritech v. Voices for Choices, Inc.*, 03 C 3014, 2003

WL 21078026, at *3 (N.D. Ill. May 12, 2003). Consumers are entitled to have access to and consider all viewpoints—positive and negative—when deciding whether to do business with Plaintiffs. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. . . This right to receive information and ideas, regardless of their social worth is fundamental to our free society.") (internal citation omitted).

I. Plaintiffs Must Make a Prima Facie Case of Defamation for Every Video

Before the arbitrator must even consider the extent to which the First Amendment protects Bates's videos from being removed from the internet, Plaintiffs bear the burden of proving the strict requirements of a claim for defamation for each allegedly defamatory statement. But even making a prima facie case of defamation does not end the inquiry; it only shifts the burden to Bates to show that the statement is protected by one or more defenses to defamation.

Plaintiffs bear the initial burden of proving: (1) that the video contains a false statement of fact, (2) about the Plaintiffs, (3) published to others, (4) that injured Plaintiffs' reputation and caused damages. *Global Relief Found., Inc. v. New York Times Co.*, 390 F.3d 973, 981 (7th Cir. 2004). As part of the settlement agreement executed by all parties, Plaintiffs do not need to prove monetary damages resulting from a statement. *See* **Exhibit 1** at Exhibit C. They must still prove, however, that the false statement harmed their reputation. *Id*. Additionally, Plaintiffs must also prove that Mr. Bates made the statement with "actual malice."

A. Plaintiffs cannot make a prima facie case of defamation because many of Bates's allegedly defamatory statements are expressions of opinion or rhetorical hyperbole

Plaintiffs cannot make a prima facie case of defamation for a couple of reasons. The first reason is that most of the statements Plaintiffs allege are defamatory are not statements of fact but are nonactionable statements of opinion or rhetorical hyperbole. *See id*. (defining the legal

standard stipulated to by the parties regarding "opinion" and "rhetorical hyperbole" particularly as it relates to statements made on the internet). "Words that are mere name calling or found to be rhetorical hyperbole or employed only in a loose, figurative sense have been deemed nonactionable." *Madison*, 539 F.3d at 654 (quoting *Pease v. Int'l Union of Operating Engineers Local 150, et al.*, 208 Ill. App. 3d 863 (2d Dist. 1991). A defamation claim must be based on a false statement of **fact**. *Id*. at 653; *see Wilkow v. Forbes, Inc.*, 2000 WL 631344, at *12 (N.D. Ill. May 15, 2000) aff'd, 241 F.3d 552 (7th Cir. 2001) (explaining that a statement must be both a "factual assertion" and false to be actionable).

Opinions are generally considered "statements that cannot 'reasonably [be] interpreted as stating actual facts' [and] are protected under the First Amendment." *Madison*, 539 F.3d at 654. Rhetorical hyperbole "is a well-recognized category of, as it were, privileged defamation" characterized by the use of loose, figurative, or colorful language that, like opinions, will not reasonably be interpreted as stating actual facts. *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996); *see, e.g., Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (finding that "even the most careless reader must have perceived that [accusing the plaintiff of blackmail] was no more than rhetorical hyperbole, a vigorous epithet…"); *Horowitz v. Baker*, 168 Ill. App. 3d 603, 609 (3d Dist. 1988) (finding use of the terms "sleazy," "cheap," "pull a fast one," "secret" and "rip-off" to be "rhetorical hyperbole"). "These statements (or 'opinions') cannot give rise to a cause of action for defamation in the interest of 'provid[ing] assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation.'" *Madison*, 539 F.3d at 654.

Due to the nature of the internet, courts have been quick to find statements made online to be nonactionable statements of opinion or rhetorical hyperbole. *See* **Exhibit 1** at Exhibit C

(setting forth the legal standard for online statements agreed to by parties as part of settlement agreement); *see, e.g., LeBlanc v. Skinner*, 2012 WL 6176900, at *7 (N.Y. App. Div. Dec. 12, 2012) (reasoning that finding by trial court that calling someone a "terrorist" online is nonactionable hyperbole "is especially apt in the digital age, where it has been commented that readers give less credence to allegedly defamatory Internet communications than they would to statements made in other milieus"); *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 44, 925 N.Y.S.2d 407, 416 (2011) (finding statements made online nonactionable because "readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts"); *Art of Living Found. v. Does*, 2011 WL 2441898, at *7 (N.D. Cal. June 15, 2011) (finding statements "made on obviously critical blogs. . . with heated discussion and criticism" nonactionable hyperbole because "[i]n this context, readers are less likely to view statements as assertions of fact rather than opinion."); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1104 (N.D. Cal. 1999) (in context of heated debate online "statements accusing [plaintiff] of being a 'fraud,' a 'criminal' and acting illegally are rhetorical hyperbole").

B. Plaintiffs cannot make a prima facie case of defamation because they cannot prove that a specific video harmed their reputation

The second reason that Plaintiffs defamation claims fail is that they cannot prove that a specific statement of Bates caused a specific harm to their reputation. The *sine qua non* to a defamation claim is harm to one's reputation. *Marczak v. Drexel Nat. Bank*, 186 Ill. App. 3d 640, 644 (1st Dist. 1989). Plaintiffs must prove actual harm to their reputation when "the defamatory character of a statement is not apparent on its face, and extrinsic facts are required to explain its defamatory nature." *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 694 (1st Dist. 2000); *see Boellner v. Clinical Study Centers, LLC*, 2011 Ark. 83, 378 S.W.3d 745, 757 (2011) ("In defamation actions, there must be evidence that demonstrates a causal connection between defamatory state-

ments made and the injury to reputation."); *Roeben v. BG Excelsior Ltd. P'ship*, 344 S.W.3d 93, 98 (Ark. App. 2009) ("A plaintiff in a defamation case must prove reputational injury in order to recover damages."); *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1109 (Fla. 2008) ("[A] defamation plaintiff must prove injury to his or her reputation in the community.").

Here, Plaintiffs must prove the specific injury to their reputation because the defamatory character of Bates's statements is not apparent on the face of those statements. In virtually every instance, Plaintiffs allege that Bates defamed them by misstating the price Plaintiffs paid for a vehicle or the location from where Plaintiffs purchased it. But the harm to Plaintiffs' reputation from misstating these facts is not obvious. Thus, Plaintiffs must provide extrinsic facts to show why these statements, assuming they are false, harmed their reputation. This adds an extra hurdle that Plaintiffs must overcome to prove a claim for defamation. Plaintiffs must establish first why a statement is harmful to their reputation, next that the statement is false, and finally what specific harm to their reputation that statement caused. Without sufficient proof to clear each of these hurdles, Plaintiffs cannot make a prima facie case for defamation and have no legal basis for demanding censorship of Bates's videos.

II. The Substantial Truth Doctrine Protects Bates's Videos from Removal

Even if Plaintiffs are able to make a prima facie case for defamation on one or more statements, that does not end the inquiry. It simply shifts the burden to Bates to show that some defense applies to his statement and shields his video from removal.

A video that contains factual inaccuracies may nonetheless be absolutely protected from removal if Bates is able to show that the video is still "substantially true." *Global Relief*, 390 F.3d at 982. A video is substantially true if the "gist" or "sting" of the video is true. *Id*. When the

gist or sting of a statement is true, "error in detail is not actionable." *Id*. (*citing Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

The substantial truth doctrine is based on the reasoning that misstating minor facts does not harm a plaintiff's reputation more than do the true statements that make up the gist or the sting of a statement. *Id*. at 987-88. This means that one of Bates's videos may be removed only if the video containing inaccuracies harms Plaintiffs' reputation significantly more than would the same video without inaccuracies. *Haynes*, 8 F.3d at 1228. Thus, the arbitrator must disregard any factual inaccuracies that do not harm Plaintiffs' reputation any more than the truth would. *Global Relief*, 390 F.3d at 987 ("We will thus ignore inaccuracies that do no more harm to [the plaintiff] than do the true statements in the articles.").

As detailed below, the gist of each of Bates's videos is true. Plaintiffs do not contest the truth of the gist of his videos but instead attack minor errors in detail or metaphors they do not like. In other videos Plaintiffs simply create inferences not supported by what Bates actually says and then proceed to attach those inferences as false. In each case, though, Plaintiffs concede the truth of the statements that form the gist or sting of the video. And by doing so, they concede that the videos are substantially true which is fatal to their defamation claims. *See Global Relief*, 390 F.3d at 982. Even if Plaintiffs could prove the falsity of every minor detail they complain about, the arbitrator must disregard those errors that "do not harm the [Plaintiffs'] reputation more than a full recital of the true facts about [them] would do…" *Haynes*, 8 F.3d at 1228.

III. Analysis of YouTube Videos and Reasons why They Should not be Removed

Attached hereto as **Exhibits 3-31** are Bates's analysis and position regarding each YouTube video at issue in this arbitration. In these exhibits, Bates details for each video Plaintiffs' failure to prove a prima facie case of defamation. In addition, he sets forth what defenses,

nonetheless, apply to the complained-of statements in each video along with any evidentiary support required to prove that the video should not be removed from the internet.

Dated: March 22, 2013

DAVID BATES

By: /s/ Andrew C. Murphy
One of his attorneys

Peter S. Lubin
Vincent L. DiTommaso
Andrew C. Murphy
DITOMMASO ♦ LUBIN, P.C.
17W 220 22nd Street, Suite 410
Oakbrook Terrace, IL 60181
(630) 333-0000
amurphy@ditommasolaw.com

EXHIBIT 3

YouTube Video #2
Url: http://www.youtube.com/watch?v=iFZzxGPBSQg

YouTube Video #2
Title: Chicago Motor Cars Benz SL600; This certainly wasn't disclosed!!
Url: http://www.youtube.com/watch?v=iFZzxGPBSQg

Plaintiffs' argument: Bates made a false statement by stating that the vehicle he purchased was delivered to him with 23,143 miles when in reality it only had 23,144 miles on it.

Defendant's position: Plaintiffs cannot prove that any statement in the video is (i.e. they fail to make a prima facie case of defamation). In fact, Plaintiffs do not contest any statements made in the video itself but instead contest the accuracy of the text description of the video located below the video on the webpage where the video is located. Thus, Plaintiffs have no legal grounds for demanding that the video itself be removed. But even if Plaintiffs could prove the actual mileage on the vehicle when they delivered it to Bates, the video is substantially true and thus is absolutely protected from removal. *Global Relief*, 390 F.3d at 982.

The gist of this video is that the vehicle suffers from some electrical malfunction which causes the vehicle's instrument not to function properly and Plaintiffs did not disclose this problem before selling the vehicle to Defendant. Bates's expert witness, Phillip Grismer who is an A.S.E. certified Master Automobile Technician opined that the electrical problems displayed in the video are "consistent with an electrical short in the cluster wiring harness, or internally to the cluster printed circuit panels." **Exhibit A**, 8. Plaintiffs have not contested or submitted any evidence that would disprove the truth of the images being shown in the video. Thus, they concede the truth of the video.

It is important to note that the video itself contains no speaking and never states the mileage of the vehicle. The only place where the mileage is mentioned is in the text description of the video located below the video on the webpage where the video is located. In that description Bates states that the vehicle was delivered with 23,143 miles. Plaintiffs claim they

delivered the vehicle to Bates with 23,144 miles on it. This represents a difference of 1 mile or 0.004%. Misstating the mileage by a single mile is not defamatory because it in no way harms Plaintiffs' reputation. *Madison*, 539 F.3d at 652-53 ("Defamation is the publication of any statement that tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with [him].") (internal quotes omitted).

Furthermore, Plaintiffs have no reliable proof of what the precise mileage of the vehicle was at the time they delivered it to Bates. Plaintiffs rely entirely on an odometer disclosure report, dated over a week before the vehicle was delivered, to substantiate their claim of the vehicle's mileage at the time of delivery. This odometer disclosure report is not a reliable means of determining the mileage of the vehicle at the time of delivery and Bates has evidence to prove this. The odometer disclosure report stated the vehicle's mileage as 23,143 on March 19, 2012. **Exhibit B**. Nine days later, on March 28, 2012, Plaintiffs took it to Mercedes-Benz of Naperville where the mileage was recorded as 23,191 on that date. **Exhibit C**. The vehicle was delivered to Bates that same day of March 28, 2012. This proves that the odometer disclosure report Plaintiffs so heavily rely upon is not the accurate statement of the vehicle's mileage at the time of delivery. Thus, Plaintiffs cannot prove that 23,144 is a true statement of the vehicle's mileage at time of delivery or that stating any other number of miles is false.

Defendant's statement that the vehicle had 23, 143 is substantially true and even if this is a factual error it should be disregarded as it does no more harm to Plaintiffs' reputation than the facts of the video that Plaintiffs sold a vehicle without disclosing that the vehicle had electrical malfunctions that caused the vehicle's instrument panels not to operate properly. *Global Relief*, 390 F.3d at 987.