



ACLU FOUNDATION OF SOUTHERN CALIFORNIA

1616 BEVERLY BOULEVARD LOS ANGELES CA 90026-5711 T: 213 977 9500 F: 213 250 3919 WWW.ACLU-SC.ORG

Chair  
Jarl Mohn

December 21, 2006

President  
Douglas Mirell

Via facsimile and US Mail

Mr. A. Barry Cappello  
Cappello & Noël  
831 State Street  
Santa Barbara, CA 93101-3227

Chairs Emeriti  
Danny Goldberg  
Allan K. Jonas  
Burt Lancaster†  
Irving Lichtenstein, MD†  
Laurie Ostrow†  
Stanley K. Sheinbaum  
†DECEASED

Re: December 13, 2006 letter to Highlights Hair Salon

Dear Mr. Cappello:

Chief Executive Officer  
Ramona Ripston

I am writing on behalf of the ACLU of Southern California's Santa Barbara Chapter and Mr. Eric Zahm, the owner of Highlights Hair Salon, who received your cease and desist letter of December 13, 2006. In that letter, you write that the sign Mr. Zahm had posted in his shop stating "McCaw Obey the Law" was defamatory and demand that Mr. Zahm remove the sign.

Legal Director  
Mark Rosenbaum

Your letter is incorrect under well-established law for at least three reasons. First, since this particular statement is being made in the context of a labor dispute between the *Santa Barbara News-Press* and its owner, Ms McCaw, on the one hand, and the paper's employees on the other hand, courts will not treat the sign as a statement of fact. As the California Supreme Court has stated, when "potentially defamatory statements are published in a public debate, a *heated labor dispute*, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which might generally be considered as statements of fact may well assume the character of statements of opinion." *Gregory v. McDonnell Douglas Corp* (1976) 17 C.3d 596, 601 (emphasis added); *see also Steam Press Holdings, Inc. v. Hawaii Teamsters* (9th Cir. 2002) 302 F.3d 998, 1006 ("In such a heated and volatile setting [of a labor dispute], even seemingly 'factual' statements take on an appearance more closely resembling opinion than objective fact."). Since a court would not treat the sign as containing a statement of fact, there cannot be any defamation. *See Seelig v. Infinity Broadcasting Co., Inc.* (2002) 97 Cal.App.4th 798, 809 ("Thus, to state a defamation claim that survives a First Amendment challenge, plaintiff must present evidence of a statement of fact that is provably false.") (citation omitted).

Chief Operating Officer  
Heather Carrigan

Managing Attorney &  
Manheim Family Attorney  
for First Amendment Rights  
Peter Eliasberg

Development Director  
Lindsay Rachelefsky

Director of Investments &  
Gift Planning  
Hal Gunn

Director of Finance &  
Administration  
Brenda Maul

Communications Director  
Elizabeth Brennan

Associate Director for  
Program Support  
Elizabeth Schroeder

Second, even if a court were to decide that "McCaw Obey the Law" is akin to an assertion that Ms. McCaw is not obeying the law, the statement still would not subject Mr. Zahm to liability for defamation. At most, the inference that you claim must be drawn from Mr. Zahm's sign would be treated as the opinion of a layperson

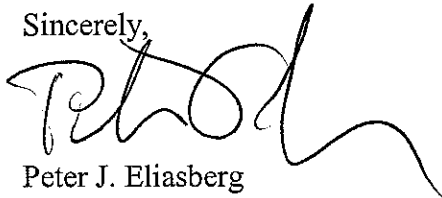
concerning the contested legal issue whether the *News-Press* is violating the National Labor Relations Act (NLRA), rather than as a statement of fact. As I am sure you are aware, the National Labor Relations Board is currently prosecuting unfair labor practice charges against the *Santa Barbara News-Press* and investigating charges of other unfair labor practices. The law is well-established that statements regarding contested legal issues will be treated as opinion, not fact. See, e.g., *Rodriguez v. Panayiotou* (9th Cir. 2002) 314 F.3d 979, 986; *Coastal Abstract Services, Inc. v. First American Title Ins. Co.* (9th Cir. 1999) 173 F.3d 725, 731. Obviously, as long as the NLRB has concluded, based on the investigation of its General Counsel, that there is enough merit to some of the unfair labor practice charges against the *News-Press* to prosecute those charges, no court would treat the text of Mr. Zahm's sign as a demonstrably false fact. Moreover, courts would likely also conclude that Mr. Zahm's sign is a non-defamatory statement of opinion that the proper thing for Ms. McCaw to do under the NLRA is to negotiate with the union, which received a 33-6 vote in favor of unionization, rather than refusing to negotiate, as Ms. McCaw has done.

Finally, even if you could show that Mr. Zahm's sign contains a demonstrably false statement of fact – which you could not for the reasons stated above --Ms. McCaw still could not prevail in a defamation claim. She is obviously a public figure. Accordingly, under *New York Times v. Sullivan* (1964) 376 U.S. 254, she would have the burden of proving by clear and convincing evidence that Mr. Zahm knew the statement on the sign to be false, or acted with reckless disregard for whether it was false or not. The probability of her being able to satisfy this exceedingly high standard of proof is nil.

While the gist of your letter is that Mr. Zahm is in violation of the law, and he may be subject to legal liability if he does not take the sign down, the fact is that the only realistic legal danger here is what Ms. McCaw would face under California's anti-SLAPP statute, CCP § 425.16, if she were to bring a defamation or other similar action against Mr. Zahm or anyone else who has chosen to exercise his or her First Amendment rights to post the "McCaw Obey the Law" signs.

In light of the well-established law, I trust neither you or any other lawyer for Ms. McCaw or the *News-Press* will be sending threatening letters to Santa Barbara residents who choose to weigh in with opinions on the *News-Press*'s labor dispute with its employees.

Sincerely,



Peter J. Eliasberg  
Managing Attorney,  
Manheim Family Attorney  
for First Amendment Rights

cc: Mr. Eric Zahm (Via e-mail)