



Matthew R. Segal, Legal Director  
Ruth A. Bourquin, Senior Attorney  
(617) 482-3170  
msegal@aclum.org  
rbourquin@aclum.org

November 28, 2017

**Via Email and First Class Mail**

Samuel J. Lieberman  
Sadis Goldberg, LLP  
551 Fifth Avenue, 21<sup>st</sup> Floor  
New York, New York 10176

Re: Camilo Caballero

Dear Mr. Lieberman:

We write on behalf of our client, Camilo Caballero, in response to your letter dated November 21, 2017, threatening a defamation lawsuit against Mr. Caballero on behalf of your client Anthony Scaramucci. Your letter cites, as grounds for this threat, two “op-eds” Mr. Caballero published with *The Tufts Daily*, in which Mr. Caballero expressed his opinion that Mr. Scaramucci should be removed from the Board of Advisors of Tuft University’s Fletcher School of Law and Diplomacy.

We respectfully submit that Mr. Scaramucci’s litigation threat is without merit. Indeed, it may raise serious legal questions under Massachusetts law, including under the Massachusetts Civil Rights Act. Accordingly, and as explained more fully below, we ask that you and your client withdraw this threat of litigation and that Mr. Scaramucci continue to respond to Mr. Caballero’s constitutionally-protected opinions about him in other ways consistent with constitutional protections, such as his open letter to the students and faculty of the Fletcher School posted on Twitter on November 27.

**Background**

Camilo Caballero is a graduate student at the Fletcher School, where he is a Thomas Pickering fellow of Foreign Affairs. As a student at the Fletcher School, Mr. Caballero has expressed *opinions* via op-ed pieces for *The Tufts Daily*, the university’s student-run newspaper. The newspaper’s web site draws a careful

Mr. Samuel J. Lieberman

November 28, 2017

Page 2

distinction between the “op-ed pieces submitted by students” and the paper’s more “traditional news, arts, and sports articles.” Mr. Caballero’s recent pieces voice his opinion that Mr. Scaramucci should not be a member of the Fletcher School’s Board of Advisors. These opinion pieces seek to draw support from Mr. Scaramucci’s conduct as a public figure.

The first such opinion piece was published on November 6, 2017 and was entitled “Seeking Power of Values Over Power of Money.”<sup>1</sup> In that op-ed, Mr. Caballero noted:

More than [240](#) Fletcher students, faculty and alumni signed a student-led petition, requesting the removal of Scaramucci from the board. “His ‘advice’ is not worthy of our institution, and his presence on the board could be a disincentive for new students looking to attend Fletcher and alums looking to donate to the school,” wrote Carter Banker, a student at Fletcher and the originator of the petition to remove Scaramucci.

We need to stand with these petitioners. Let’s make our concerns and voices heard. Let’s not let Scaramucci’s continued presence on the Board of Advisors dull the brilliant shine of our school upon the hill. Our students, our alumni and our supporters need to know at Tufts, the power of values is above the power of money.

Mr. Caballero was clearly expressing his opinion in support of the students and teachers who signed that petition.<sup>2</sup>

The second op-ed, dated November 13, 2017, was entitled “Tufts/Fletcher Administration Fell into Scaramucci’s Trap: Students and Faculty Are Smarter.”<sup>3</sup> Again, the heart of Mr. Caballero’s piece was his opinion supporting the petitioning students and faculty:

The petition represents the efforts of a student to raise concerns about an individual’s appointment to the board. The petition raises a valid question to the administration and the board: is Scaramucci, as a member of the Fletcher School’s Board of Advisors, a person that best represents the values

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<sup>1</sup> See <https://tuftsdaily.com/opinion/2017/11/06/op-ed-seeking-power-values-power-money/> (the “November 6 Op-Ed”).

<sup>2</sup> The Petition is available at [https://docs.google.com/spreadsheets/d/16k\\_spVfEfKGAfIGiXlQzr6cJne64DVt6kQS68P2NgvU/edit#gid=0](https://docs.google.com/spreadsheets/d/16k_spVfEfKGAfIGiXlQzr6cJne64DVt6kQS68P2NgvU/edit#gid=0)

<sup>3</sup> See <https://tuftsdaily.com/opinion/2017/11/13/op-ed-tufts-fletcher-administration-fell-scaramuccis-trap-students-faculty-smarter/> (the “November 13 Op-Ed”).

and [mission](#) for which our school stands: “To be an innovative university of creative scholars across a broad range of schools who have a profound impact on one another and the world.” It has been delivered to the administration and board.

The next step is for the administration and the board to respond to this petition. In responding, they must ask themselves if Scaramucci’s behavior is indeed what they want representing our school. If the answer is “no,” then they should exercise their authority to remove him, and to send a message to students, faculty, staff and alumni that reaffirms the school’s mission and goals. If the answer is “yes,” then they should explain to students, faculty, staff and alumni why they condone his behavior and the justification for his continued service.

Between November 6 and November 16, Mr. Scaramucci sent a series of emails to Mr. Caballero, a man he has never met. In the first two he asked Mr. Caballero to call and asked what he was “afraid” of and said there is nothing to be “afraid” of, which created just the opposite impression. On November 12, he wrote again, concluding: “Just a bit of caution [sic] you have suggested publicly several times that I have engaged in ‘unethical’ behavior. You will now have to back that up with facts. I ask you to review the Supreme Court’s decision *Re: New York Times v Sullivan* [sic] You can’t make misrepresentation about public figures. So either back it up or you will hear from my lawyer. You may have a difference of opinion from me politically which I respect but you can’t make spurious claims about my reputation and integrity.”

On November 21, 2017—two days before Thanksgiving—you wrote to Mr. Caballero on Mr. Scaramucci’s behalf. Your letter stated that unless Mr. Caballero agreed within five business days to retract certain allegedly false and defamatory statements, and to issue a public apology, Mr. Scaramucci would be “forced” to take legal action. Your letter alleged four defamatory statements by Mr. Caballero:

- “A man who is irresponsible, inconsistent, an unethical opportunist and who exuded the highest degree of disreputability.” November 6 Op-Ed.
- “A man who makes his Twitter accessible to friends interested in giving comfort to Holocaust deniers.” *Id.*
- “[T]he man who sold his soul in contradiction to his own purported beliefs for a seat in th[e] White House.” *Id.*

- Using the term “unethical” in reference to Mr. Scaramucci, and describing him as “someone who cares about gaining attention and nothing more.” November 13 Op-Ed.

## Discussion

### I. A public figure alleging defamation must prove false statements and actual malice.

As your letter implicitly acknowledges, Mr. Scaramucci is a general public figure for purposes of defamation law. Mr. Scaramucci has reached this status for a variety of reasons, including his recent (albeit brief) stint as White House Communications Director, his own publications, and his role as commentator on various news outlets. *See, e.g., Waldbaum v. Fairchild, Publications, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980) (“a general public figure is a well-known ‘celebrity’”). Therefore, under both the First Amendment and the Massachusetts Declaration of Rights, Mr. Scaramucci cannot prove defamation unless he establishes not only that a statement about him was materially false, *see Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 131-32 (1998); *Materia v. Huff*, 394 Mass. 328, 329-32 (1985), but also that it reflected “actual malice.” The actual malice standard requires a public figure libel plaintiff to prove, by clear and convincing evidence, that the defendant published a false statement of fact either knowing it was false or with reckless disregard for the truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 48-49 (2007); *King v. Globe Newspaper Co.*, 400 Mass. 705, 719 (1987).

In addition, defamation liability is limited to the publication of provably false assertion of facts. *See generally Snyder v. Phelps*, 562 U.S. 43, 458 (2011). Accordingly, statements of opinion are not actionable because, by definition, they do not assert objectively verifiable facts. *Scholz v. Delp*, 473 Mass. 242, 249-50 (2015) (quoting *King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987) and *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997)). Likewise, opinion based on disclosed facts is a protected form of opinion. This type of opinion can be a characterization, a conclusion or mere conjecture drawn from facts that are either disclosed to or already known to the audience. *See Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 267 (1993) (“Our cases protect expressions of opinion based on disclosed information because we trust that the recipient of such opinions will reject ideas which he or she finds unwarranted by the disclosed information”).

Whether a statement is one of fact or opinion is a threshold question for the court to decide. *Id.* at 263. Determining whether a statement asserts fact or opinion entails “examin[ing] the statement in its totality in the context in which it was

uttered or published.” *Downey v. Chutehall Constr. Co.*, 86 Mass. App. Ct. 660, 663-64 (2014) (quoting *Cole v. Westinghouse Bdcst., Co.*, 386 Mass. 303, 309 (1982)). The relevant context includes “all the words used, not merely a particular phrase or sentence,” as well as “the medium by which the statement is disseminated and the audience to which it is published.” *Id.* It is also relevant whether any undisclosed facts are implied, or if any are implied whether they are defamatory. As the Supreme Judicial Court has ruled: “By laying out the bases for their conclusions, the articles ‘clearly indicated to the reasonable reader that the proponent of the expressed opinion engaged in speculation and deduction based on the disclosed facts.’” *Scholz*, 473 Mass. at 253-54 (quoting *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 266 (1993)).

Finally, statements that do no damage to reputation beyond what a true report would occasion do not provide the basis for an action for defamation. *Jones v. Taibbi*, 400 Mass. 786, 795-96 (1987); *Locke v. WHDH-TV, Inc.*, 86 Mass. App. Ct. 1126 (2014).

## **II. Mr. Caballero’s opinion pieces did not defame Mr. Scaramucci.**

Particularly in light of the overall context of Mr. Caballero’s opinion pieces, the above legal principles demonstrate that Mr. Scaramucci was not defamed by the four specific statements you have identified.

### **A. Mr. Caballero’s pieces overwhelmingly comprise opinion.**

The context of Mr. Caballero’s op-eds cuts sharply against your assertion that they contain any statement capable of being defamatory. For starters, Mr. Caballero is a student whose pieces were published in his school newspaper as op-eds—not news stories—based on his personal concerns about the mission and integrity of the school about which he cares. The school newspaper exists within the Tufts University setting, including its mission to “provid[e] transformative experiences for students and faculty in an inclusive and collaborative environment where creative scholars generate bold ideas, innovate in the face of complex challenges and distinguish themselves as active citizens of the world.”<sup>4</sup> Mr. Caballero’s op-eds expressed opinions on a subject he believes to be at the core of that mission: membership on the Fletcher School’s Board of Advisors. *See generally Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 735 (1986) (appearance of column on op-ed page indicates the statements are opinions).

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<sup>4</sup> *Mission, Vision, & Themes*, TUFTS, <https://www.tufts.edu/about/mission-vision> (last visited Nov. 28, 2017).

Consistent with that purpose, Mr. Caballero's op-eds articulate in detail his opinion that Mr. Scaramucci should not serve on the Board of Advisors. At no point in either op-ed does Mr. Caballero suggest that he is engaging in investigative journalism, news reporting, or any other means of reporting new facts. Instead, Mr. Caballero uses a variety of rhetorical flourishes designed to express Mr. Caballero's view of Mr. Scaramucci's character, as is typical in an opinion piece. *See Howell v. Enterprise Publishing Co., LLC*, 455 Mass. 641, 671-72 (2010) ("As a matter of law, these were statements of opinion").

Mr. Scaramucci himself is no stranger to rhetorical flourishes. For example, following news reports about your letter, some have criticized Mr. Scaramucci for threatening to sue a school newspaper and graduate student at his alma mater. In response, Mr. Scaramucci has reportedly called such criticism "baby-ish."<sup>5</sup> We view this remark as rhetoric expressing your client's constitutionally-protected opinions about his critics. We do not interpret Mr. Scaramucci's statement as an assertion that his critics are, in fact, infants.<sup>6</sup>

Of course, we believe the critics of Mr. Scaramucci's threat to sue Mr. Caballero have the more persuasive opinion. By using wealth and power to try to silence freedom of the press, your client is proving the very point that Mr. Caballero was making in urging Mr. Scaramucci's removal from the Board of Advisors: "Our students, our alumni and our supporters need to know at Tufts, the power of values is above the power of money."

**B. The challenged statements are not defamatory because they express opinion based on true facts.**

The statements you have identified in your letter are expressions of constitutionally-protected opinion based on disclosed facts. They are therefore not defamatory as a matter of law.

- **Statement 1:** "A man who is irresponsible, inconsistent, an unethical opportunist and who exuded the highest degree of disreputability." (November 6).

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<sup>5</sup> Ben Kesslen, *Anthony Scaramucci Speaks to The Observer About Why He Is Threatening To Sue A Student Newspaper*, TUFTS OBSERVER, Nov. 27, 2017, at <http://tuftsoobserver.org/anthony-scaramucci-speaks/>.

<sup>6</sup> *See also* Joe Concha, *Charles Krauthammer: Scaramucci's Attacks Disgraceful*, THE HILL, July 27, 2017, at <http://thehill.com/homenews/media/344239-krauthammer-scaramuccis-attacks-disgraceful>

This statement in the November 6 Op-Ed is thoroughly opinion. It uses the adjectives “irresponsible,” “inconsistent,” “unethical,” “opportunist,” and “disreputab[le]” to express his and others’ views about Mr. Scaramucci’s character, not to make factual assertions about any breach of a legal responsibility or ethics law. No reasonable person would view these statements as assertions of provable fact, rather than classic expressions of opinion. *See Lyons*, 415 Mass. at 264 n. 6 (“These utterances readily fall into the category of mere vituperation and verbal abuse and reasonably could not be construed to state facts”).

The case on which you almost solely rely, *Van Liew v. Eliopoulos*, 92 Mass. App. Ct. 114, 122 (2017), is entirely distinguishable. In that case, Mr. Van Liew repeatedly claimed that Mr. Eliopoulos committed violations of law, including “illegal State ethics violations.” *Id.* He made these claims in spite of no evidence and in spite of the ethics commission having declined to proceed with any action against Mr. Eliopoulos after ethics claims were presented to it. 92 Mass. App. Ct. at 122-23. He expressly said his claims were “fact.” *Id.* at 122.

Nowhere does Mr. Caballero say that Mr. Scaramucci committed “illegal State ethics violations” or refer to any other allegedly illegal actions that had been rejected by those with jurisdiction over such matters, as was the case in *Van Liew*. Rather, Mr. Caballero was speaking in purely moral, not legal, terms. In developing his *opinion*, Mr. Caballero relied on conduct by Mr. Scaramucci that is not and cannot be disputed by Mr. Scaramucci, his respect for the petitioners asking for Mr. Scaramucci’s removal and his concern for his University.<sup>7</sup>

What is more, Mr. Caballero’s op-ed discloses the facts on which he bases his opinion, and those facts are completely truthful. For example, the op-ed states that Mr. Scaramucci “began his infamously short career as the White House communications director by [uttering profanity-laced comments](#) on national news outlets.” That’s true. Mr. Scaramucci did utter profanity-laced comments about others in the White House during his brief time as White House Communications Director. And it [links](#) to Mr. Scaramucci’s prior criticisms of the Republic presidential candidate in 2016 and contrasts those with his more recent praise of the person who had since offered him a job.

- **Statement 2:** “... [a] man who makes his Twitter accessible to friends interested in giving comfort to Holocaust deniers.”

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<sup>7</sup> Contrary to the implication of your letter, *Van Liew* does not stand for the proposition that any statement not supported by a finding of a governmental body is defamatory. Free speech need not await a ruling from a governmental authority.

This statement seems to cause your client—and you on his behalf—the most concern. Yet, once again, it is protected opinion. The poll published by the Scaramucci Post was part of the basis for the petition to remove Mr. Scaramucci and was widely publicized and known to all reasonably informed readers. At bottom, it expresses Mr. Caballero’s view that a person whose media organization (here, one named the Scaramucci Post) posts a “poll” about how many died in the Holocaust must be doing so at least in part because of an “interest” in comforting Holocaust deniers. This sort of opinion can offend, but it is still an opinion. See *Dunn v. Gannett New Hampshire Newspaper, Inc.*, 833 F.2d 446, 454 (3d Cir. 1987) (discussing a letter that compared the plaintiff to Hitler).

Mr. Caballero’s opinion about the interests underlying the poll is distinguishable from the factual allegations at issue in *Tech Plus, Inc. v. Ansel*, 59 Mass. App. Ct. 12, 23 (2003), which you cite in your letter. In that case, the plaintiff—who was not a public figure—alleged that the defendant had falsely stated that the plaintiff was anti-Semitic, had told anti-Semitic jokes in his presence, and constantly persecuted him because he was Jewish. Similarly, in *Herlihy v. Metropolitan Museum of Art*, 608 N.Y.S.2d 770, 771 (1st Dept. 1995), the defendant allegedly had falsely accused the plaintiff, another non-public figure, of making very specific anti-Semitic statements. Mr. Caballero has made no such claims as to your client.

To the contrary, the factual assertions underlying Mr. Caballero’s opinion are once again true. As your letter concedes, a colleague of Mr. Scaramucci posted “the poll” about the number of deaths in the Holocaust on Mr. Scaramucci’s Twitter account. Although you emphasize that Mr. Scaramucci alleges this was done without consultation with him, Mr. Caballero never asserted otherwise; he asserted the inarguable fact that Mr. Scaramucci had made his Twitter account “accessible” to the person or persons who did post the “poll.”

Likewise, although you assert that Mr. Scaramucci expressed concern about the fact the poll was used as a platform by Holocaust deniers, that after-the-fact expression of concern by Mr. Scaramucci does not render Mr. Caballero’s statement inaccurate. To the contrary, the fact that Mr. Scaramucci later took steps to try to distance himself from the poll—while also choosing to repost it—tends to justify Mr. Caballero’s opinion that the poll gave comfort to Holocaust deniers.

And neither Mr. Caballero nor any other person is required to accept at face value your client’s claims about the “interests” motivating the posting (and/or reposting) of a “poll” giving Holocaust deniers a platform to express views inconsistent with documented history. Moreover, even if one could argue that it might have been slighter more precise if the statement had read: “a man who made his Twitter



accessible to a friend who posted a poll that gave comfort to Holocaust deniers,” such slight rephrasing could not have had any material impact on Mr. Scaramucci’s reputation. *See Jones, supra* and *Locke, supra*.

In other words, Mr. Caballero is entitled to hold and implicitly express an *opinion* that the poll at issue here inherently gave succor to Holocaust deniers. Your client’s disagreement with that opinion does not rob it of constitutional protection.

- **Statement 3:** “[T]he man who sold his soul in contradiction to his own purported beliefs for a seat in that White House.”

Mr. Caballero’s statement about Mr. Scaramucci’s selling of his soul is both a constitutionally-protected statement of opinion and a statement that is not actionable because it does not contain objectively verifiable facts. *See Scholz*, 473 Mass. at 250. The “contradiction” underlying this purported sale is of course well-documented; Mr. Scaramucci appeared to change his prior positions when he accepted his White House appointment.<sup>8</sup> But the purported sale is an idiom meant to express an opinion about Mr. Scaramucci’s integrity, and it cannot be proved true or false. Your client clearly understands the idiom; he has in fact devoted a book to it.<sup>9</sup>

- **Statement 4:** Using the term “unethical” in reference to Mr. Scaramucci, and describing him as “someone who cares about gaining attention and nothing more.”

These are clearly statements of opinion based on facts disclosed in the November 6 Op-Ed concerning Mr. Scaramucci’s use of profanity (including calling the then-White House Chief of Staff a “f\*&+@g paranoid schizophrenic”), his braggodicio about being able to fire White House staff, and his independently reported flip-flopping on political issues. As discussed with respect to Statement 1, these statements of opinion based on disclosed facts cannot be defamatory.

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<sup>8</sup> *See, e.g.,* Rex Huppke, *How Much Did Anthony Scaramucci Sell His Soul For?*, CHICAGO TRIB., July 24, 2017, available at <http://www.chicagotribune.com/news/opinion/huppke/ct-scaramucci-trump-huppke-20170724-story.html>.

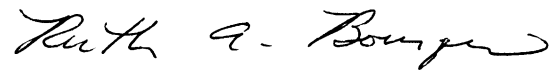
<sup>9</sup> *Compare* Anthony Scaramucci, GOODBYE GORDON GEKKO: HOW TO FIND YOUR FORTUNE WITHOUT LOSING YOUR SOUL at 3 (2010) (referring to people on Wall Street “who have traded in their souls for an astronomic paycheck and a multi-million dollar bonus”), *with* PULP FICTION (1994) (implying that a soul is a tangible item that can be carried in a briefcase).

Mr. Samuel J. Lieberman  
November 28, 2017  
Page 10

### Conclusion

For all these reasons, Mr. Scaramucci's allegations of defamation are wholly without merit. We therefore ask that you and your client immediately stop threatening a student op-ed contributor simply because your client does not like what the student has to say. The protections in our state and federal constitutions—not to mention basic human decency—require no less.

Sincerely,



Matthew R. Segal  
Ruth A. Bourquin

cc: Camilo Caballero