

Office of the General Counsel

January 28, 2022

Gregg Gordon
Managing Director
SSRN
1239 University Ave., Floor 2
Rochester, NY 14607

Re: *Capital Discrimination*, Professor Ann Lipton

Dear Mr. Gordon:

I write concerning Professor Ann Lipton's article, *Capital Discrimination*, hereafter "the Article." In particular, I write in response to correspondence dated December 23, 2021 and sent on behalf of Philip Shawe claiming that the Article defames Mr. Shawe and demanding that the Article be removed from SSRN. SSRN subsequently notified Professor Lipton that the Article had been removed and invited Professor Lipton to respond.

The Article is a thorough and meticulously-sourced scholarly work. The factual assertions regarding Mr. Shawe are sourced from publicly-available court opinions and filings in the litigation between Mr. Shawe and his former business partner. The source of each statement is set forth in the Article's footnotes. The "cease and desist" letter of December 23, 2021, does not contend that the facts attributed to Mr. Shawe are false. Rather, the letter takes issue with the Article's conclusions and commentary on the facts presented (*i.e.*, that Mr. Shawe's conduct is an example of sex discrimination).

The Article's conclusions constitute opinions protected by the First Amendment. As the United States Supreme Court has observed, "[u]nder the First Amendment 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."¹

Furthermore, it is well-settled that a statement of opinion based on fully disclosed facts is not actionable unless the stated facts are themselves false and defamatory.² The rationale behind

¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974).

² Restatement (Second) of Torts § 566, cmt. C) ("A simple expression of opinion based on disclosed ... nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.").

General Counsel: Victoria D. Johnson

this rule is clear: When the facts underlying a statement of opinion are disclosed, readers understand they are getting the author's interpretation of the facts presented.³ "Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation."⁴

As noted above, the facts underlying *Capital Discrimination's* conclusions are fully and exhaustively disclosed and those facts are fully supported by the sources cited therein.

I note that the Terms of Use posted on www.SSRN.com provide that if a complaint is made regarding posted submissions, SSRN will investigate the complaint carefully, and that SSRN reserves the right to remove a submission if it determines that there has been a violation of the Terms of Use. Here, there has been no violation of the Terms of Use; the Article does not contain any content that is "threatening, harassing, libelous, false, defamatory, offensive, obscene, or pornographic, material, or other material that would violate any other applicable law or regulation." In light of the foregoing, we hereby request that the Article be restored to SSRN, subject to the following.

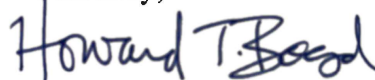
Since the original posting, and following receipt of the December 23, 2021 "cease and desist letter," the Article has been updated to include the following note:

After this article was initially made available online, Philip Shawe, through counsel, claimed that the article defamed him by "falsely assert[ing] that Mr. Shawe engaged in sex and/or gender-based misconduct." The descriptions of the events related to the disputes between Shawe and Elting are based on publicly available court decisions and filings in the litigation between Shawe and Elting. The conclusions and commentary drawn from those events constitute the author's opinion.

A copy of the Article, as revised, is submitted herewith.⁵

We have confidence in SSRN's commitment to the public display and distribution of scholarly research, and appreciate your prompt attention to this matter. If you have any questions, or wish to discuss this matter further, I encourage you to contact me.

Sincerely,



Howard Boyd

Associate General Counsel

³ *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995).

⁴ *Moldea v. New York Times Co.*, 15 F.3d 1137, 1144-45 (D.C. Cir.), modified, 22 F.3d 310 (D.C. Cir. 1994).

⁵ Additional edits that are inapposite to the complaints asserted by Mr. Shawe have also been made as part of the editorial process since the Article was originally posted on SSRN.

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Enclosure