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OPINIONS AND ORDERS

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OPINION* OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (DECEMBER 8, 2020)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHAEL KONOWICZ, A/K/A
MICHAEL PHILLIPS; ISARITHIM LLC,

Appellants,

v.

JONATHAN P. CARR; SEVERE NJ WEATHER, LLC,
D/B/A WEATHER NJ; WEATHER NJ,
LLC, D/B/A WEATHER NJ.

No. 20-1238

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3:15-cv-06913)
District Judge: Honorable Michael A. Shipp

Before: HARDIMAN, SCIRICA, and RENDELL,
Circuit Judges.

HARDIMAN, Circuit Judge.

Michael Konowicz appeals the District Court's summary judgment in favor of Jonathan Carr and

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

affiliated entities. We will affirm in part and reverse in part.

I

Konowicz and Carr are weather aficionados and rivals. A self-described "professional, accredited meteorologist," App. 21, Konowicz maintains a website and various social media platforms, operating under the name "theWeatherboy."[1] He has a Certificate in Broadcast Meteorology from Mississippi State University (MSU) and is a member of the American Meteorological Society (AMS). Carr describes himself as an amateur weather enthusiast. Since 2010, he has operated Weather NJ (formerly Severe NJ Weather), which provides online weather forecasting services through its website and social media platforms. Carr has some 225,000 followers as a result of his forecasting hobby.

This federal case arises out of social media barbs between Carr and Konowicz. From December 2014 to June 2015, Carr wrote a series of Twitter posts attacking Konowicz's education, qualifications, and experience. Carr also published an article, *Beware of the fake "Team of Meteorologists,"* in which he repeated (and expanded on) several assertions made in his earlier tweets.

In response to the Twitter posts and the article, Konowicz sent Carr a cease-and-desist letter in July 2015. The letter accused Carr of spreading "false statements of fact concerning [Konowicz]," and labeled Carr's allegedly defamatory statements "categorically

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[1] Although Konowicz has since assigned the trademark for Weatherboy to Isarithm LLC, references to Weatherboy herein refer to Konowicz in his individual capacity.

false." App. 846–47. Konowicz also provided Carr a copy of Konowicz's MSU certificate with the letter. Konowicz demanded Carr "issue a full and complete retraction" and "take down [his] online defamatory statements." App. 849. Carr did neither.

In September 2015, Konowicz sued Carr for defamation, unfair competition, and violating the Lanham Act. Carr filed an answer and a counterclaim against Konowicz for defamation. The District Court granted Carr summary judgment on Konowicz's claims and granted Konowicz summary judgment on Carr's counterclaim. Only Konowicz appealed.[2]

II

A

Konowicz made two arguments in the District Court: (1) Carr originally published his statements with actual malice—*i.e.*, "knowledge that [they] w[ere] false or with reckless disregard of whether [they] w[ere] false or not," *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); and (2) the statements were republished with actual malice. On appeal, Konowicz focuses on the latter point, arguing that Carr's receipt of the cease-and-desist letter provided him "notice of the falsity of his claims." Konowicz Br. 36. By republishing the statements on his website after receiving the letter, Konowicz argues, Carr acted with actual malice.

At summary judgment, the appropriate question was "whether the evidence in the record could support

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[2] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367(a). We exercise jurisdiction under 28 U.S.C. § 1291.

a reasonable jury finding . . . that [Konowicz] has shown actual malice by clear and convincing evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986). To make that determination, the District Court had to consider each allegedly actionable statement. We do the same here.

1

The first statements under review were made in December 2014. In response to a third party's Twitter thread questioning the identity of Weatherboy, Carr wrote: "Real name Michael Konowicz. No degree or AMA record. fake audience."[3] App. 439. Konowicz argues that because he provided Carr with a copy of his MSU certificate and his AMS membership number, a jury must determine whether Carr acted with actual malice when he republished these statements. Carr responds that a certificate is not the same as a "degree," and that he continued to believe his statement even after receiving the cease-and-desist letter.

Because we look to the speaker's subjective understanding of the truth or falsity of a statement when considering actual malice, *see St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), we agree with Carr and the District Court that Carr's "no degree" comment lacks clear and convincing evidence of actual malice. *See Anderson*, 477 U.S. at 256. Knowledge of the certificate would not have led Carr to possess a "high degree of awareness of [the] probable falsity" of his claim because he reasonably believed that Konowicz's certificate is not a "degree." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

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[3] Both parties agree Carr meant to type "AMS."

As for the claim that AMS had no record of Konowicz, the District Court found that even though Konowicz "provided some objective evidence to Carr that Konowicz [held] at least one type of . . .membership or accreditation" with AMS, this did not raise a genuine issue regarding actual malice. App. 1189. We agree.

Although the cease-and-desist letter provided Carr with Konowicz's AMS membership number as well as a link to a search feature on AMS's website, such evidence does not create a genuine dispute as to actual malice. Under Carr's reasonable subjective belief, "AM[S] record" referred to records of official accreditation, not a more general record of membership. While Carr easily could have verified Konowicz's general affiliation with the organization, the evidence provided did not prove official accreditation. Republication of the statement in light of the cease-and-desist letter did not, therefore, constitute actual malice.

Finally, with respect to the claim that Konowicz had a "fake audience," we agree with the District Court that there was no evidence of actual malice. Carr had many reasons for believing that Konowicz's audience was largely composed of fake accounts. The cease-and-desist letter did little to refute Carr's repeated claims to that effect. So Carr was not put on notice of the "probable falsity" of his statement, *Garrison*, 379 U.S. at 74, and Konowicz failed to show actual malice regarding Carr's "fake audience" claims.[4]

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[4] Carr references Konowicz's "fake audience" repeatedly. Because Konowicz never offers clear and convincing evidence to support a finding of actual malice, the analysis for each reference is identical.

2

In February 2015, Carr warned his Twitter followers to be "careful of Weatherboy Weather. Total fraud. Have unsettling proof." App. 384. When pressed for proof, Carr responded on the same message thread: "check records on Michael Konowicz. Not a pro met. Not a member of AMS." *Id.* As with the December statement claiming Konowicz had "No degree or AM[S] record," App. 439, Konowicz argues Carr's republication of these statements after receiving his certificate and AMS membership number constitutes clear and convincing evidence of actual malice. We disagree.

The District Court did not err when it held that Carr's republication of these statements did not raise an actual malice issue for the jury. As the Court noted, the parties "disagree[d] over the operative portion of the AMS's definition of meteorologist." App. 1187. Carr relied on this definition: "[a] meteorologist is an individual with specialized education . . . most typically in the form of a bachelor's degree or higher." *Id.* at 1187–88. Carr's statement was not made with actual malice because Konowicz's certificate is not "a bachelor's degree or higher." *Id.*

We likewise agree with the District Court that the claim Konowicz was not a "member" of AMS does not create a genuine dispute as to actual malice. As Carr understood the term, "membership" does not encompass Konowicz's generic, non-credentialed participation in the organization. On Carr's understanding, only Certified Broadcast Meteorologist and Certified Consulting Meteorologist AMS accreditations qualify as "membership." Here again, the cease-and-desist letter did not invalidate Carr's reasonable understanding, so Konowicz cannot meet the clear-and-con-

vincing threshold to show Carr made the statement with a "high degree of awareness of [its] probable falsity." *Garrison*, 379 U.S. at 74.

3

Carr continued to make allegedly defamatory statements in March 2015. After Weatherboy wrote that United Airlines invited him to its headquarters in Chicago to study its winter weather operations, Carr responded with a series of four tweets, stating: "Chicago story fake. No names. No credentials. No supporting media. Shots similar to other images on Google images"; "Keep sponsoring fake articles to fake audience while impersonating a fake team of meteorologists. #StayClassy"; "541 likes on a sponsored article to a fan-base of 250k. Sorry, that proves dirty pool. For real unparalleled trust and reach see . . . my page"; and "just some guy impersonating a team of real meteorologists practicing horrible journalism." App. 41.

Konowicz cites his cease-and-desist letter as evidence that contradicts Carr's claims that Konowicz's "team of meteorologists" was "fake." We are unpersuaded.

The cease-and-desist letter states: "*Weatherboy Weather*[ ] is indeed a team effort, from other meteorologists, photographers, designers, and staff." App. 847. As the District Court noted, however, that assertion did not put Carr on notice that his statement was false—it put him on notice that he and Konowicz disagreed. While Konowicz did eventually provide proof that he contracted with two independent meteorologists, this "team" evidence "only came out during discovery." App. 1189. Because this evidence was

adduced well after the statement was made, it does not suggest Carr knew the falsity of his statement when he republished it.

Konowicz also argues he provided clear and convincing evidence that his trip to Chicago was real, so Carr republished the statement with actual malice. Konowicz included several photographs in a second letter sent to Carr in February 2016—four months after Konowicz filed suit and three months after the republication at issue. Konowicz claims these photographs show United invited him to Chicago. We agree with the District Court that these photographs are not clear and convincing evidence of actual malice because they would not cause Carr to understand his statement to be "probabl[y] fals[e]" at the time of republication. *See St. Amant*, 390 U.S. at 731; *see also Gertz v. Welch*, 418 U.S. 323, 334 n.6 (1974) (equating "reckless disregard of the truth" with "subjective awareness of probable falsity"). As Carr explained, the photographs—which lack dates or identifying features—"are merely evidence that [Konowicz] was at some airport at some time for some purpose." Carr Br. 45.

4

Finally, in June 2015, Carr published an article on his website essentially repeating several of his prior statements. App. 43–47. Specifically, Konowicz draws our attention to one line: "The American Meteorological Society (AMS) currently has zero-evidence of him." App. 116; Konowicz Br. 37. The District Court held that Carr's republication of this statement after receipt of the cease-and-desist letter did not create a jury question as to actual malice. We disagree.

Unlike Carr's claim as to AMS's lack of an official accreditation record of Konowicz, *see supra* Section II-A-1, the claim AMS has "zero-evidence of [Konowicz]" is broader, encompassing even general, non-accreditation membership in AMS. As previously noted, however, the cease-and-desist letter provided Carr with Konowicz's AMS membership number as well as a link to a search feature on AMS's website, so Carr easily could have verified Konowicz's general membership and affiliation with the organization.

Carr cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant*, 390 U.S. at 732. Since Carr received explicit evidence contradicting his sweeping statement, the decision to nevertheless republish creates a jury question as to whether Carr acted with actual malice when he said "The American Meteorological Society (AMS) currently has zero-evidence of [Konowicz]." App. 116. *See, e.g.*, *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3d Cir. 1988) ("Where the defendant finds . . . apparently reliable information that contradicts [his] libelous assertions, but nevertheless publishes those statements anyway, the *New York Times* actual malice test can be met.").

B

Konowicz also argues the District Court erred in denying his Lanham Act and unfair competition claims. We address the two together because "the Lanham Act is derived generally and purposefully from the common law tort of unfair competition, and its language parallels the protections afforded by state common law." *Am. Tel. and Tel. Co. v. Winback and Conserve*

Program, Inc., 42 F.3d 1421, 1433 (3d Cir. 1994); *see also Buying For The Home, LLC v. Humble Abode, LLC*, 459 F. Supp. 2d 310, 317 (D.N.J. 2006) ("[T]he elements of a claim of unfair competition under the Lanham Act are the same as for claims of unfair competition . . . under New Jersey . . .law.").

We agree with the District Court that Carr's statements are not actionable under the Lanham Act because they are not commercial speech. *See, e.g.*, *Boule v. Hutton*, 328 F.3d 84, 90 (2d Cir. 2003) (holding that a "statement must be (1) commercial speech" to fall under the Lanham Act (internal quotation marks omitted)); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003) ("The Lanham Act is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the First Amendment.").

Carr's statements from December 2014, March 2015, and June 2015 are not commercial speech because they do not "refer to a specific product or service." *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983)). Carr's remaining statement—"The American Meteorological Society (AMS) currently has zero-evidence of [Konowicz]," App. 116—appeared within an article that perhaps served as an advertisement and referred to Carr's services. We agree with the District Court, however, that Konowicz has failed to establish Carr's economic motivation such that his speech should be actionable under the Lanham Act. Although Carr admits that he makes roughly $1,000 a month from his weather services, the District Court found that Konowicz failed to show these profits—as opposed to

myriad other potential motivations—prompted Carr to publish the article or make the statement.

It is true, of course, that courts have found "[t]hese [*Bolger* factors] are not exclusive . . . and the presence or absence of any of them does not necessitate a particular result." *Radiance Foundation, Inc. v. N.A.A.C.P.*, 786 F.3d 316, 323 (4th Cir. 2015). They are, nevertheless, useful in helping courts make the "'commonsense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Bolger*, 463 U.S. at 64. Recognizing that "we err on the side of fully protecting speech when confronted with works near the line dividing commercial and noncommercial speech," *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1018 (3d Cir. 2008), we perceive no error in the District Court's "'commonsense' distinction" based on the absence of proof of economic motivation. *Bolger*, 463 U.S. at 64.

Because Carr's statements were not commercial speech, Carr was entitled to summary judgment on Konowicz's Lanham Act and unfair competition claims.

[* * *]

For the reasons stated, we will affirm the District Court's judgment regarding all but one of Carr's allegedly defamatory statements. We will vacate and remand for a trial regarding "The American Meteorological Society (AMS) currently has zero-evidence of [Konowicz]." We will affirm the District Court's judgment for Carr on Konowicz's Lanham Act and unfair competition claims.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED UNDER SEAL [UNSEALED] (JANUARY 7, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL KONOWICZ, A/K/A MICHAEL PHILLIPS, and ISARITHIM LLC,

Plaintiffs,

v.

JONATHAN P. CARR; SEVERE NJ WEATHER, LLC, and WEATHER NJ, LLC,

Defendants.

Civil Action No. 15-6913 (MAS) (TJB)

Before: Michael A. SHIPP,
United States District Judge.

This matter comes before the Court upon Plaintiffs Michael Konowicz a/k/a Michael Phillips ("Konowicz") and Isarithim, LLC's (collectively, "Plaintiffs") Motion to Correct a Judgment pursuant to Federal Rule of Civil Procedure 59(e). (ECF No. 102.) Defendants Jonathan P. Carr, Severe NJ Weather, LLC, and Weather NJ, LLC (collectively, "Defendants") opposed. (ECF No. 106.) The Court has carefully considered

the parties' submissions and decides the motion without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth below, Plaintiffs' Motion to Correct a Judgment is denied.

I. Background[1]

On May 31, 2019, the Court granted Defendants' motion for summary judgment, finding: (1) Plaintiffs failed to raise a genuine dispute as to whether Defendants' statements were made with actual malice; and (2) Defendants' statements were not commercial speech. (Mem. Op. 31, ECF No. 99.) On June 28, 2019, Plaintiffs moved to "correct judgment" on their defamation, Lanham Act, and unfair competition claims. (Pls.' Moving Br. 2-3, ECF No. 102.)

II. Legal Standard

The purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Cafe v. Quinteros,* 176 F.3d 669, 677 (3d Cir. 1999). "A proper Rule 59(e) motion[,] therefore[,] must rely on one of three grounds: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Lazaridis v. Wehmer,* 591 F.3d 666, 669 (3d Cir. 2010).

> A motion for reconsideration is not a vehicle to reargue the motion or to present evidence which should have been raised before. A party

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[1] After four years of discovery and motion practice, the parties are familiar with the background of this case. The Court, therefore, dispenses with a summation of the factual background.

> seeking reconsideration must show more than a disagreement with the Court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'

Database Am., Inc. v. Bellsouth Advert. & Pub. Corp., 825 F. Supp. 1216, 1220 (D.N.J. 1993) (citations omitted).

III. Discussion

A. Plaintiffs' Defamation Claim

Plaintiffs argue that the Court ignored evidence of actual malice when Defendants "republished demonstrably false statements about Plaintiffs online after being confronted with the falsity of those statements" and that the Court misapplied the test for actual malice as to the republication. (*See* Pls.' Moving Br. 2, 7-11.) Plaintiffs specifically refer to the online "republication" of Can.'s Answer, Separate Defenses, Counterclaim, and Jury Demand dated November 11, 2015 ("Carr's Answer with Counterclaim"). (*See id.* at 7-8 (citing Konowicz Cert. ¶ 39, ECF No. 90).)

Here, Plaintiffs make the same argument as they did in opposition to Defendants' summary judgment motion and cite to the same paragraph of the Konowicz Certification for support.[2] (*See* Pls.' Opp'n

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[2] The Court reiterates its initial finding that Plaintiffs has not raised a genuine dispute of material fact regarding actual malice. (*See* Mem. Op. 22-27.) The Konowicz Certification—which Plaintiffs previously cited as the "Philips Certification"—states, in relevant part:

> Carr filed an Answer with a Counterclaim on or about November 10, 2015, which repeated all of the

Br. to Defs.' Mot. Summ. J. 14, ECF No. 90.) Plaintiffs again point to a July 8, 2015, letter which "put Defendants on notice of the falsity of their claims." (Pls.' Moving Br. 7-8.) The Court, however, had previously considered the July 8, 2015 letter. (*See* Mem. Op. 10, 22-27.) Plaintiffs reargue the same point on Defendants' alleged republication of Carr's Answer with Counterclaim, but do not proffer any newly discovered evidence of actual malice as to the republication—or even evidence of the republication itself. Because a motion for reconsideration is not a vehicle to reargue the motion and because Plaintiffs neither rely on an intervening change in controlling law nor the need to correct clear error of law or prevent manifest injustice, the Court denies Plaintiffs' Motion as to their defamation claim.

B. Plaintiffs' Lanham Act and Unfair Competition Claims

Plaintiffs argue that the Court ignored evidence on the record showing the "Kaboom" article was advertising and was, therefore, commercial speech.

> previously mentioned defamatory statements about me. Soon thereafter, Carr published his Answer with Counterclaim online, even though he had been put on notice of the falsity of the statements therein.

(Konowicz Cert. ¶ 39.) Conclusory self-serving affidavits cannot withstand a motion for summary judgment in the absence of additional support. *See Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 263 (3d Cir. 2012). Without more, the Konowicz Certification does not allow Plaintiffs' defamation claim to survive summary judgment. As the Court previously explained, Plaintiffs have not produced "clear and convincing" evidence of Defendants' actual malice to survive summary judgment. (Mem. Op. 17 (citing *Costello v. Ocean Cty. Observer*, 643 A.2d 1012, 1023 (N.J. 1994)).)

(*See* Pls.' Moving Br. 3, 11-15 (citing Konowicz Cert. ¶ 36).) Plaintiffs relied on the same Konowicz Certification as evidence in their summary judgment opposition.[3] (*See* Pls' Opp'n Br. to Defs.' Mot. Summ. J. 13-14.) Because Plaintiffs do not rely on newly discovered evidence, an intervening change in controlling law, or a need to correct clear error of law or prevent manifest justice, the Motion is denied as to Plaintiffs' Lanham Act and unfair competition claims.

IV. Conclusion

For the foregoing reasons, the Court denies Plaintiffs' Motion to Correct a Judgment. An Order consistent with this Memorandum Opinion will be entered.

/s/ Michael A. Shipp
United States District Judge

[3] As with Plaintiffs' defamation claim, the Konowicz Certification, without more, is a self-serving affidavit that does not create a genuine dispute as to whether the Kaboom article is commercial speech. *See Gonzalez*, 678 F.3d at 263.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED UNDER SEAL [UNSEALED] (JULY 31, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL KONOWICZ, A/K/A MICHAEL PHILLIPS, and ISARITHIM LLC,

Plaintiffs,

v.

JONATHAN P. CARR; SEVERE NJ WEATHER, LLC, and WEATHER NJ, LLC,

Defendants.

Civil Action No. 15-6913 (MAS) (TJB)

Before: Michael A. SHIPP,
United States District Judge.

SHIPP, District Judge

This matter comes before the Court upon Counterclaim Defendant Michael Konowicz's ("Konowicz" or "Counterclaim Defendant") Motion for Summary Judgment. (ECF No. 92.) Counterclaim Plaintiffs Jonathan P. Carr, Weather NJ, LLC, and Severe NJ Weather LLC (collectively, "Carr" or "Counterclaim Plaintiff")

opposed. (ECF No. 98.) The Court has carefully considered the parties' submissions and decides the motion without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth below, Konowicz's Motion for Summary Judgment is granted.

I. Procedural Background

Konowicz initiated this suit on August 16, 2015, asserting three causes of action against Carr. (Compl. ¶¶ 31-54, ECF No. 1.) On November 15, 2015, Carr answered and asserted a single counterclaim of defamation against Konowicz. (*See generally* Answer & Countercl., ECF No. 9.) On June 30, 2016, the Court granted Carr's Motion for Judgment on the Pleadings (ECF No. 12) and denied Konowicz's Cross-Motion to Amend (Order, ECF No. 16).

On October 10, 2016, Konowicz filed an Amended Complaint asserting the same three causes of action. (*See* Am. Compl., ECF No. 28.) On November 7, 2016, Carr answered and asserted the same single counterclaim of defamation against Konowicz. (*See* Answer & Countercl. ("Countercl."), ECF No. 30.)

The parties cross-moved for summary judgment, and on October 12, 2018, the Court terminated both parties' motions because of the parties' mutual failure to comply with Local Civil Rule 56.1 and Konowicz's failure to comply with Local Civil Rule 5.3. (Mem. Op., ECF No. 72.) On October 22, 2018, the parties re-filed their motions. (*See* Mots. for Summ. J., ECF Nos. 75, 78.) Carr's motion addressed the procedural and substantive deficiencies identified in the Court's

October 12, 2018 Memorandum Opinion.[1] Konowicz's motion papers, however, again failed to comply with Local Civil Rule 5.3. After several more attempts at filing his motion papers (*see* ECF Nos. 88, 96), on January 11, 2019, Konowicz appropriately filed the instant Motion for Summary Judgment. (Countercl. Def.'s Moving Br., ECF No. 97.) On January 15, 2019, Carr opposed. (Countercl. Pl.'s Opp'n Br., ECF No. 98.) Konowicz did not submit a reply brief.

II. Factual Background

The Court provided an extensive factual summary in its Memorandum Opinion related to Carr's summary judgment motion. (*See* Carr MSJ Op.) Thus, the Court recites only the facts necessary to decide the instant motion.

The instant matter arises from several statements Konowicz made about Carr on Facebook. (*See* Countercl. ¶ 14.) Carr is an "amateur weather enthusiast who operates on the Internet and social media through . . . Weather NJ, LLC and [previously] through . . . Severe NJ Weather, LLC. (*Id.* ¶ 1.) Carr admits that he has over 225,000 followers on Facebook and has made over twenty radio appearances.[2] (*Compare* KSUMF 1 8, *with* CRSDF ¶ 8.)

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[1] On May 31, 2019, the Court granted Carr's Motion for Summary Judgment. (Mem. Op. ("Carr MSJ Opinion."), ECF No. 99.)

[2] The Court's factual summary draws primarily from Konowicz's Statement of Material Facts Not in Dispute. (Countercl. Def.'s Statement of Material Facts Not in Dispute ("KSUMF"), ECF No. 97-1.) Carr submitted a response to the KSUMF. (*See* Countercl. Pl.'s Response to KSUMF ("CRSDF"), ECF No. 98-1.) Carr also submitted a Supplemental Statement of Disputed Material Facts. (Def.'s Supp. Statement of Disputed Material

On June 23, 2015, one of Carr's online followers sent Carr a photo of what the sender thought was a tornado. (CSUMF ¶ 3.) Carr posted the same photo on Facebook. (*Id.*) Konowicz took the photo and posted it on his Weatherboy Weather Facebook page with a red line through it, and included a statement that the National Weather Service ("NWS") was still investigating if what was depicted in the photo was a tornado. (*Id.* ¶ 6; Countercl., Ex. H. ("NWS Post"), ECF No. 30-2.)[3] Konowicz, as Weatherboy Weather, then stated "We're glad to see the [NWS] take a stand against them." (KSUMF ¶ 6; June 23 Post.) He also stated "the [NWS] was very vocal in calling out [Carr] for spreading harmful misinformation." (June 23 Post.) Carr alleges that these two statements—(1) that the NWS had "called out" Carr for "spreading harmful misinformation"; and (2) that the NWS had

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Facts ("CSUMF"), ECF No. 98-1.) Despite describing the statements as disputed, Carr cites to the record submitted in conjunction with his Motion for Summary Judgment, in which he asserted that the same facts were undisputed. (*Compare* CSUMF ¶¶ 1-7, *with* Def.'s Statement of Undisputed Material Facts ¶¶ 89-94, 96, ECF No. 76-5.) The Court, accordingly, assumes that Carr intended the CSUMF to include undisputed facts. Additionally, because Konowicz did not submit a response to the CSUMF, the Court deems the CSUMF as undisputed. *Easterling v. U.S. Dep't of Educ.*, No. 15-1367, 2016 WL 8674610, at *4 (D.N.J. Dec. 23, 2016) ("Local Civil Rule 56.1(a) deems a . . . statement of material facts to be undisputed where the opposing party does not respond to it or file a counterstatement.")

[3] In support of his Motion for Summary Judgment, Carr submitted a screenshot of the NWS Post and screenshot of comments on the same post. (*See* Def.'s Mot. for Summ. J., Exs. 24, 25 ("June 23 Post"), ECF No. 76-3.) For the parties convenience, the Court refers to both the NWS Post and the subsequent comments as the "June 23 Post".

"taken a stand" against Carr—are defamatory. (*See* Countercl. ¶¶ 14, 18.)

Konowicz asserts that the basis for his statement that the NWS had "called out" Carr was a series of tweets made by Szatkowski.[4] (KSUMF ¶ 12.)[5] In separate tweets, Szatkowski stated:

> Sorry, but the sun is out. Worst of storm has moved on. Why would that be a tornado?
>
> * * *
>
> Well, I just think it's misrepresented as a tornado. But others can have different opinions.
>
> * * *
>
> To be [a] confirmed tornado, a damage survey must be done. It must have a start and end point. Maximum wind speed is evaluated.
>
> * * *

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[4] Konowicz states that Szatkowski worked for the NWS, and Carr testified that Szatkowski previously worked for the NWS. (KSUMF ¶ 11; Cert. of John A. O'Connell, Ex. B, Dep. Tr. of Jonathan P. Carr 31:15-23, ECF No. 97-2.)

[5] Carr denies this paragraph of Konowicz's Statement of Facts on the grounds that it does not cite to the record in accordance with Local Civil Rule 56.1. Carr is correct that this paragraph does not contain a citation to the record in violation of the Local Rules. Konowicz's Certification, however, provides that Konowicz relied upon the series of tweets by Szatkowski when he made the statement that Carr was called out. (Cert. of Michael Konowicz ¶ 5, ECF No. 97-2.) The Court, accordingly, accepts as true Konowicz's statement that Szatkowski's tweets were the basis of his statements.

> For that ever to be more than a pretty picture of an interesting cloud, that is what must happen.
>
> * * *
>
> If its not important that it be confirmed as a tornado, [then] call it what you wish. I simply won't be able to concur.

(*Compare id.* ¶ 10, *with* CRSDF ¶ 10, *and* Cert. of John A. O'Connell, Ex. C, ECF No. 97-2.)

III. Legal Standard

Summary judgment is appropriate if the record demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact—a fact "that might affect the outcome of the suit under governing law,"—raises a "genuine" dispute if "a reasonable jury could return a verdict for the nonmoving party." *Williams v. Borough of W. Chester*, 891 F.2d 458, 459 (3d Cir. 1989) (quoting *Anderson*, 477 U.S. at 248). To determine whether a genuine dispute of material fact exists, the Court must consider all facts and reasonable inferences in the light most favorable to the non-movant. *Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002). The Court will not "weigh the evidence and determine the truth of the matter" but will determine whether a genuine dispute necessitates a trial. *Anderson*, 477 U.S. at 249.

The party moving for summary judgment has the initial burden of proving an absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). Thereafter, the nonmoving party

creates a "genuine [dispute] of material fact if it has provided sufficient evidence to allow a jury to find [for him] at trial." *Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340, 343 (3d Cir. 2000)

"[C]ourts have recognized that the perpetuation of meritless actions, with their attendant costs, chills the exercise of free speech about public affairs." *Berkery v. Estate of Stuart*, 988 A.2d 1201, 1209 (N.J. Super. Ct. App. Div. 2010). Accordingly, "trial courts should not hesitate to use summary judgment procedures where appropriate to bring such actions to a speedy end." *Id.* "On the other hand, the actual-malice standard entails a subjective analysis of the defendant's state of mind[,]" and "the issue of a defendant's state of mind in a defamation action 'does not readily lend itself to summary disposition.'" *Id.* (quoting *Maressa v. N.J. Monthly*, 445 A.2d 376, 387 n.10 (N.J. 1982)). "Courts should carefully examine the circumstances surrounding publication of defamatory allegations of fact to determine whether the issue of actual malice should go to the jury." *Id.*

IV. Discussion

Konowicz advances three principal arguments in support of his Motion for Summary Judgment: (1) that Carr has no damages because he cannot demonstrate any pecuniary loss; (2) that Carr cannot demonstrate actual malice as required by his position as a limited public figure; and (3) that the truth of Konowicz's statements serve as a defense. (Countercl. Def.'s Moving Br.7-9, ECF No. 97.) On the first point, Konowicz states that under New Jersey law a "plaintiff suing on an issue of public concern must show damages." (*Id.* at 8 (citing *Rocci v. Ecole Secondaire*

Macdonald-Cartier, 755 A.2d 583, 587 (N.J. 2000)).) Konowicz argues that "Carr's admission that he suffered no pecuniary damages dooms his counterclaim." (*Id.*) On the second point, Konowicz argues that Carr is a limited public figure because of his radio appearances and "his weather posts [which] reach more than 100,000 people." (*Id.*) Konowicz insists that Carr cannot establish the requisite actual malice because Konowicz's statements were "mere opinion or hyperbole." (*Id.* at 8-9 (citing *LoBiondo v. Schwartz*, 733 A.2d 516, 518 (N.J. Super. Ct. App. Div. 1999)).) On the final point, Konowicz argues that given Szatkowski's tweets, "it was perfectly legitimate—true, in fact—for Konowicz to say that Carr had been 'called out' by the" NWS. (*Id.* at 10.)

Carr opposes, advancing two primary arguments. (Countercl. Pl.'s Opp'n Br. 4-10.) First, Carr argues that "the evidence shows that [Konowicz] fabricated his claims that Mr. Carr had been 'called out' and 'reprimanded' by the [NWS] for 'spreading harmful information.'" (*Id.* at 6.) Carr relies on communications between Szatkwoski and Carr to establish that Szatkwoski's tweets were not a "reprimand". (*Id.* at 7-8.) Carr insists that the fabricated nature of Konowicz's claims shows that there is a disputed issue of material fact regarding actual malice, and the grant of summary judgment is inappropriate. (*Id.* at 8.) Carr's second argument is that if actual malice is established, the doctrine of presumed damages applies, and therefore the damages element is waived, and the award of damages becomes an issue for the jury. (*Id.* at 9-10.)

A defamation claim has three elements: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of

that statement to a third party; and (3) fault amounting at least to negligence by the publisher. *G.D. v. Kenny*, 15 A.3d 300, 310 (N.J. 2011) (quoting *DeAngelis v. Hill*, 847 A.2d 1261, 1267-68 (N.J. 2004)). In cases where the plaintiff is a public figure, the plaintiff also must establish that the defendant made the statements at issue with "actual malice". *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). "Actual malice has 'nothing to do with hostility or ill will; rather it concerns [a] publisher's state of knowledge of the falsity of what he [or she] published. . . . '" *DeAngelis*, 847 A.2d at 1270 (N.J. 2004) (quoting *Lawrence v. Bauer Pub. & Printing Ltd.*, 446 A.2d 469, 477 (N.J. 1982)).

"To determine if a statement has a defamatory meaning, a court must consider three factors: (1) the content, (2) the verifiability, and (3) the context of the challenged statement." *NuWave Inv. Corp. v. Hyman Beck & Co.*, 75 A.3d 1241, 1249 (N.J. Super. Ct. App. Div. 2013), *aff'd*, 114 A.3d 738 (N.J. 2015) (internal quotations and citation omitted). "Whether the meaning of a statement is susceptible of a defamatory meaning is a question of law for the court." *Ward v. Zelikovsky*, 643 A.2d 972, 978 (N.J. 1994).

> Opinions "are generally not capable of proof of truth or falsity because they reflect a person's state of mind," and as such are usually not actionable as defamation. For example, stating a person "was dishonest and lacking in integrity" is an opinion that is generally not subject to verification. However, a "defamatory opinion statement" is actionable when it implies "reasonably specific asser-

> tions" of "underlying objective facts that are false."

NuWave Inv. Corp., 75 A.3d at 1250.

"Another component of a statement's defamatory nature—and thus an element of a prima facie case—is that [the] plaintiff must have been harmed by the alleged defamation. . . . Indeed, to survive a defendant's motion for summary judgment, a plaintiff must raise a sufficient question of fact as to actual injury to his or her reputation." *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, 751 A.2d 1066, 1071 (N.J. Super. Ct. App. Div. 2000). "Damages which may be recovered in an action for defamation are: (1) compensatory or actual, which may be either (a) general or (b) special; (2) punitive or exemplary; and (3) nominal." *W.J.A. v. D.A.*, 43 A.3d 1148, 1154 (N.J. 2012) (quoting *Prosser and Keeton on Torts* § 116A at 842 (5th ed. 1984)).

> Contained within the notion of actual damages is the doctrine of presumed damages—the losses "which are normal and usual and are to be anticipated when a person's reputation is impaired." Presumed damages are a procedural device which permits a plaintiff to obtain a damage award without proving actual harm to his reputation. . . . Presumed damages apply in libel cases. In contrast, slander cases generally require proof of special damage—an economic or pecuniary loss. However, if the slander is *per se* (*e.g.*, accusation of a crime, a loathsome disease, misfeasance in business, or serious sexual misconduct . . . the requirement of proving special or economic damage in a slander case drops away. . . . In that case, slander *per se*, like

> libel, permits the jury to consider presumed damages.

Id. "[T]he doctrine of presumed damages permits [a party] to survive a motion for summary judgment and to obtain nominal damages, thus vindicating his [or her] good name." *Id.* at 1150.

"Once a plaintiff establishes that there was a defamatory statement [and damages], he or she then must prove . . . that the defendant was at fault in publishing the [defamatory statement]." *McLaughlin*, 751 A.2d at 1072. "If . . . the plaintiff is a public figure, [the plaintiff must] prove that the defendant was motivated by 'actual malice—that the defendant either knew the statement was false or recklessly disregarded its falsity.'" *Id.*

Here, the Court finds that Konowicz is entitled to summary judgment because Konowicz's statements are not defamatory in nature and because Carr cannot meet his burden of establishing that the statements were made with actual malice. The Court discusses each of these issues in turn.[6]

A. Konowicz's Statements Were Not Defamatory

"A statement's content must be judged not by its literal meaning but by its objective meaning to a reasonable person of ordinary intelligence." *McLaughlin*,

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[6] The New Jersey Supreme Court has held that the presumed damages doctrine remains viable and a plaintiff can recover nominal damages, even in the absence of actual damages. *See W.J.A.*, 43 A.3d at 1154. As a result, Konowicz's argument regarding Carr's failure to establish a pecuniary loss is unpersuasive as it is contrary to the current state of New Jersey law and the Court will not consider it further.

751 A.2d at 1071. "A statement's verifiability refers to whether it can be proved true or false." *Lynch v. N.J. Educ. Ass'n*, 735 A.2d 1129, 1137 (N.J. 1999).

> Loose, figurative or hyperbolic language is not likely to imply specific facts, and thus is not likely to be deemed actionable. A pure opinion is one that is based on stated facts or facts that are known to the parties or assumed by them to exist . . . ; a "mixed opinion" is one "not based on facts that are stated or assumed by the parties to exist" . . . If a statement could be construed as either fact or opinion, a defendant should not be held liable. An interpretation favoring a finding of "fact" would tend to impose a chilling effect on speech.

Id. (internal citations and certain quotation marks omitted.)

The Court finds that Konowicz's statements were not defamatory. On the one hand, determining whether the NWS had "called out" Carr and "taken a stand" against Carr appears to be a verifiable fact which the Court can whether it is true or false. On the other hand, "the context of a statement can affect significantly its fair and natural meaning." *Id.* Thus, the fact that the statements were made in the comments section of a Facebook post and by Konowicz about Carr—two individuals who had engaged in a years' long social media "war of words"[7]—suggests that Konowicz's

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[7] The Court's recitation of facts in this Memorandum Opinion does not fully document the online interactions between Konowicz and Carr. The Carr MSJ Opinion, however, sets forth the history of the parties' online interactions in detail. The Court, therefore,

statements were not defamatory. *See Wilson v. Grant*, 687 A.2d 1009, 1013 (N.J. Super. Ct. App. Div. 1996) (holding that it was not actionable when a radio host described an adversary as a "sick, no good, pot smoking, wife beating skunk"). Moreover, Konowicz's statement could be either a statement of fact or a hyperbolic expression of his opinion of NWS's actions toward Carr.[8] Because this ambiguity exists and allowing Carr to maintain this suit could have a chilling effect on speech, the Court finds that Konowicz's statements are not defamatory.

B. Carr Has Not Raised a Genuine Dispute of Material Fact Regarding Actual Malice

The Supreme Court has identified two types of public figures: (1) general public figures and (2) public figures for a limited purpose. A general-purpose public figure is defined as someone "who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention,

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does not repeat it here. (*See* Carr MSJ Op.) The record the parties submitted in relation to Carr's Motion for Summary Judgment also details the parties' interactions.

[8] The Court notes that Carr appears to argue that Konowicz's use of the word "reprimand" is actionable. (Def.'s Opp'n Br. 6-8.) A close read of the Facebook post, however, shows that another user requested that Konowicz post the link to what that user described as a "reprimand." (June 23 Post.) Konowicz declined to do so and used the term "reprimand" in response. (*Id.*) Thus, Konowicz's statement regarding a "reprimand" could be Konowicz claiming that the NWS reprimanded Carr, or Konowicz simply parroting the term the other user employed to describe Konowicz's prior post. Even if the Court were to adopt the former view, the Court, for the reasons set forth above, would conclude that the statement is not actionable.

are properly classed as public figures. . . . " *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). "Some [people] occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." *Id.* at 345. Others, however, are only public figures by virtue of the limited controversy in which they find themselves. *Id.*

The New Jersey Supreme Court interpreted the Supreme Court's holding regarding limited purpose public figures as follows:

> *Gertz* refrains from establishing specific criteria against which a plaintiff's status can be measured to determine whether or not he [or she] is a public figure. Rather in instances where the plaintiff is not a public figure for all purposes, *Gertz* calls for a case-by-case examination "looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Important factors that led the Court to conclude that the *Gertz* plaintiff was not a public figure included [the] plaintiff's lack of any calculated relationship with the press and the fact that he neither "thrust himself into the vortex of this public issue, nor [engaged] the public's attention in an attempt to influence its outcome."

Lawrence, 446 A.2d at 475 (quoting *Gertz*, 418 U.S. at 352) (internal citations omitted); *accord MacKay v. CSK Pub. Co.*, 693 A.2d 546, 554 (N.J. Super. Ct. App. Div. 1997).

Here, the Court finds that Carr is a limited purpose public figure. Carr has over 250,000 Facebook

followers, has appeared on the radio over 20 times, and operates a website dedicated to weather reporting. (CRSDF ¶ 8.) There is no doubt that Carr seeks public attention for his weather-related pursuits.

C. Carr Has Not Raised a Genuine Dispute of Material Fact Regarding Actual Malice

In *New York Times v. Sullivan*, the Supreme Court held that in instances where the plaintiff is a "public figure," the plaintiff must establish that the defendant made the statements at issue with actual malice. 376 U.S. 254, 279-80 (1964). In *Saint Amant v. Thompson*, the Supreme Court analyzed the actual malice standard and held that a defendant who made statements about his opponent's character in a political race was not liable for defamation, despite the defendant's failure to investigate his statements and lack of consideration of the consequences for the plaintiff. 390 U.S. 727, 732-33 (1968).

Actual malice requires evidence that the defendant entertained serious doubts about the veracity of his statements. *Id.* at 731. The actual malice standard does not ask whether a reasonably prudent person would have published the statements in similar circumstances. *Id.* "Rather, the focus of the 'actual malice' inquiry is on a defendant's attitude toward the truth or falsity of the publication, on his [or her] subjective awareness of its probable falsity, and his [or her] actual doubts as to its accuracy." *Costello v. Ocean Cty. Observer*, 643 A.2d 1012, 1024 (N.J. 1994). New Jersey imposes a heightened standard in that the plaintiff must establish actual malice by clear and convincing evidence. *Id.* at 1022.

The Supreme Court clarified the actual malice standard in *Garrison v. Louisiana*, holding that reckless disregard in the context of actual malice requires the statements be made with a "high degree of awareness of their probable falsity. . . . " 379 U.S. 64, 74 (1964). Public figures, moreover, are "permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 153 (1967).

A "bald assertion by the publisher that he [or she] believes in the truth of the statement may not be sufficient" to protect the publisher from liability for publication of the statement. *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 516 A.2d 220, 232-33 (N.J. 1986) (citing *St. Amant*, 390 U.S. at 732). "Notwithstanding a publisher's denial that it had serious doubts about the truthfulness of the statement, other facts might support an inference that the publisher harbored such doubts." *Id.* at 233. "Sufficient evidence [for a finding in the plaintiff's favor] does not exist . . . when the only evidence offered is that the defendants 'should have known the articles were false, or they at least should have doubted their accuracy.'" *Costello*, 643 A.2d at 1023 (quoting *Lawrence*, 446 A.2d at 477).

Here, Carr has failed to raise a genuine dispute of fact regarding whether Konowicz made the statements at issue with actual malice. Carr analogizes the instant matter to *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976), as support for his argument that Konowicz fabricated his claims that the NWS "called out" or "reprimanded" Carr for "spreading

harmful misinformation." (Countercl. Pl.'s Opp'n Br. 5-8.) Carr's reliance on *Carson* is misplaced.

In *Carson*, John Carson and Joanna Holland brought suit for the publication of an April 9, 1972 article with the headline "[NBC] Pays For Carson's Love Life! Move To Hollywood Is Just So Johnny Can Be Near Miss Holland." *Carson*, 529 F.2d at 208. The gist of the article was that Carson's Tonight Show was moving from New York City to Hollywood because Holland lived in Hollywood, California. *Carson*, 529 F.2d at 211. Holland, however, did not live in California. *Id.*

The article also emphasized that (1) Holland was the cause of the break-up of Carson's previous marriage, and (2) there was a struggle between Carson and NBC executives because Carson wanted to move the show and the executives were resisting. *Id.* at 212. Based on the record before it, the Seventh Circuit found that nothing in the record supported "the published statements alleging or implying that Holland broke up Carson's prior marriage." *Id.* The Seventh Circuit concluded that those statements were "a sheer fabrication by the defendants[,]" which the Supreme Court has described as an express example of actual malice. *Id.*

In relation to the supposed struggle between Carson and the executives, Carson testified that he had never personally discussed moving the show to Hollywood with the executives. *Id.* Nevertheless, the article included quotes purportedly from the executives on the same subject. *Id.* The Seventh Circuit stated that it "must be a canon that a journalist does not invent quotations and attribute them to [an] actual person[,]" and because the article's writer had done

this, there was evidence of a reckless disregard for the truth. *Id.* at 213.

The Seventh Circuit held that Carson and Holland had established their entitlement to have a jury determine whether actual malice existed. *Id.* The Seventh Circuit stated that based on the record, the defendants "necessarily entertained serious doubts as to the truth of the statements [in the article] and had a high degree of awareness of their probable falsity." *Id.*

Here, the facts are entirely distinguishable from the facts of *Carson* and the defendants' conduct in that matter. Whether the NWS, through Szatkowski, "called out" or "reprimanded" Carr is debatable depending on the reader's interpretation of Szatkowski's statements. More importantly, a call out or reprimand, because of the imprecision of the terms particularly when used online, is not an objective fact that can be readily determined. In contrast, the pertinent facts in *Carson* were readily determinable. The Seventh Circuit determined that (1) Holland did not live in California; (2) the relationship between Holland and Carson began after Carson's prior marriage ended, and (3) that alleged conversations between Carson and NBC executives did not occur. Unlike the defendants in *Carson*, Konowicz did not fabricate quotes and attribute them to individuals who existed but did not provide the statements. At worst, Konowicz's statements were hyperbolic descriptions of Szatkowski's statements. Carr's reliance on *Carson*, thus, is unpersuasive.

The record before the Court does not establish that Konowicz made the statements with a reckless disregard for the truth or knowledge of their probable

falsity. The record shows that Szatkowski made certain statements in response to Carr posting a picture of a possible tornado. Konowicz interpreted those statements, perhaps through the lens of his ongoing dispute with Carr, and then made certain statements of his own. The record before the Court lacks any evidence showing, or even suggesting, that Konowicz ever entertained a serious doubt regarding the accuracy of his statements or that his attitude towards the truth should subject him to liability for defamation. Carr argues that his conversations with Szatkowski proves that the NWS did not call out or reprimand Carr. This argument is effectively that Konowicz should have known that his statements were false or at least doubted their accuracy. Carr, however, cannot meet his burden based on evidence of this type. *See Costello*, 643 A.2d at 1023. The Court, accordingly, concludes that Carr has failed to establish a genuine dispute of material fact regarding whether Konowicz made the statements with actual malice; nor has he established an entitlement to have the facts put before a jury.

V. Conclusion

For the reasons set forth above, the Court finds that the statements at issue are not actionable as defamatory statements. The Court also finds that Carr has failed to raise a genuine dispute of material fact regarding whether Konowicz made the statements with actual malice. Konowicz, accordingly, is entitled to summary judgment. An order consistent with this Memorandum Opinion will be entered.

/s/ Michael A. Shipp
United States District Judge

Dated: July 31st, 2019

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (JULY 31, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL KONOWICZ, A/K/A
MICHAEL PHILLIPS, and ISARITHIM LLC,

Plaintiffs,

v.

JONATHAN P. CARR; SEVERE NJ
WEATHER, LLC, and WEATHER NJ, LLC,

Defendants.

Civil Action No. 15-6913 (MAS) (TJB)

Before: Michael A. SHIPP,
United States District Judge.

This matter comes before the Court upon Counterclaim Defendant Michael Konowicz's ("Konowicz") Motion for Summary Judgment. (ECF No. 92.) Counterclaim Plaintiffs Jonathan P. Carr, Weather NJ, LLC, and Severe NJ Weather LLC opposed. (ECF No. 98.)

For the reasons set forth in the accompanying Memorandum Opinion, and other good cause shown,

IT IS on this 31st day of July, 2019 ORDERED that:

1. Konowicz's Motion for Summary Judgment (ECF No. 92) is GRANTED.

2. Because the accompanying Memorandum Opinion cites sealed documents, the Court files the accompanying Memorandum Opinion under temporary seal. In order for the Memorandum Opinion and the Court's prior Memorandum Opinion (ECF No. 99) to remain under seal, either party must file a Motion to Seal that comports with Local Civil Rule 5.3 by August 16, 2019. If neither party files a Motion to Seal by this deadline, the seal on the accompanying Memorandum Opinion and the Court's prior Memorandum Opinion (ECF No. 99) will be lifted.

/s/ Michael A. Shipp
United States District Judge

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED UNDER SEAL [UNSEALED] (MAY 31, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL KONOWICZ, A/K/A MICHAEL PHILLIPS, and ISARITHIM LLC,

Plaintiffs,

v.

JONATHAN P. CARR; SEVERE NJ WEATHER, LLC, and WEATHER NJ, LLC,

Defendants.

Civil Action No. 15-6913 (MAS) (TJB)

Before: Michael A. SHIPP,
United States District Judge.

SHIPP, District Judge

This matter comes before the Court upon Defendants Jonathan P. Carr ("Carr"), Severe Weather, LLC ("Severe Weather"), and Weather NJ, LLC's ("Weather NJ") (collectively, "Defendants") Motion for Summary Judgment. (ECF No. 75.) Plaintiffs Michael Konowicz a/k/a Michael Phillips ("Konowicz") and Isarithm,

LLC (collectively, "Plaintiffs") opposed (ECF No. 90), and Defendants replied (ECF No. 82). The Court has carefully considered the parties' arguments and decides the motion without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth below, Defendants' Motion for Summary Judgment is granted.

I. Procedural Background

Plaintiffs initiated this suit on August 16, 2015, asserting three causes of action against Defendants: (1) Defamation, (2) violations of the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and (3) New Jersey Common Law Unfair Competition. (Compl. ¶¶ 31-54, ECF No. 1.) On November 15, 2015, Defendants answered and Carr counterclaimed with a single count of defamation against Konowicz. (*See generally* Answer & Countercl., ECF No. 9.) On June 30, 2016, the Court granted Defendants' Motion for Judgment on the Pleadings (ECF No. 12) and denied Plaintiffs' Cross-Motion to Amend (Order, ECF No. 16). On October 6, 2016, the Honorable Tonianne Bongiovanni, U.S.M.J., granted Plaintiffs' Motion to Amend the Complaint. (ECF No. 24.)

On October 10, 2016, Plaintiffs filed an Amended Complaint asserting the same three causes of action. (Am. Compl., ECF No. 28.) On November 7, 2016, Defendants filed an Answer to the Amended Complaint, and Carr asserted the same single count of defamation against Konowicz. (*See generally* Answer & Countercl., ECF No. 30.) The parties conducted discovery, and Judge Bongiovanni resolved discovery disputes between the parties. (*See e.g.*, ECF No. 40.)

On May 11, 2018, Defendants filed a Motion for Summary Judgment (Mot. for Summ. J., ECF No. 52),

and Plaintiffs filed a Cross-Motion for Summary Judgment (Mot. for Summ. J., ECF No. 55). On October 12, 2018, the Court terminated both parties' respective motions because of the parties' mutual failure to comply with Local Civil Rule 56.1 and Plaintiffs' failure to comply with Local Civil Rule 5.3. (Mem. Op., ECF No. 72.)

On October 22, 2018, pursuant to the Court's October 12, 2018 Order, the parties re-filed their motions. (*See* Mots. For Summ. J., ECF Nos. 75, 78.) Defendants' motion addressed the procedural and substantive deficiencies identified in the Court's October 12, 2018 Memorandum Opinion.[1] Specifically, Defendants' Statement of Undisputed Material Facts submitted in conjunction with the current motion was filed as a separate document, apart from the brief. (*See* Defs.' Statement of Undisputed Material Facts ("SUMP"), ECF No. 76-5.) Significantly, it provides a more extensive recounting of the material facts than the statement of facts Defendants submitted along with their original motion.

On October 29, 2018, Plaintiffs filed opposition papers that contained redactions, and Plaintiffs did not file an unredacted version of the papers for the Court's review in accordance with Local Civil Rule 5.3. (*See* ECF Nos. 79, 81.) On December 12, 2018, the Court ordered Plaintiffs to file unredacted versions of Plaintiffs' opposition papers within five days, or Defendants' motion would be considered unopposed.

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[1] Plaintiffs' motion papers, however, again failed to comply Local Civil Rule 5.3. Due to Plaintiffs' repeated failure to comply with the Local Civil Rules (*See* ECF Nos. 88, 96, 97), the Court considers Plaintiffs' motion separately.

(Order, ECF No. 88.) On December 17, 2018, Plaintiffs filed unredacted opposition papers. (*See* ECF Nos. 89, 90.)

Plaintiffs' Opposition Brief, however, is the same brief Plaintiffs filed in response to the version of Defendants' motion the Court previously terminated. As a result, Plaintiffs' brief contains a three-paragraph "Responsive Statement of Material Facts" that purports to respond to the "Statement of Undisputed Material Facts" contained in Defendants' brief. (Pls.' Opp'n Br. 6, ECF No. 90.) Defendants' brief, however, does not contain a "Statement of Undisputed Facts" as Defendants corrected that issue when they refiled their motion. (*See* Defs.' Moving Br. 5, 22, ECF No. 76-1; L.Civ.R. 56.1.) These three paragraphs purport to admit and deny facts that are no longer alleged in Defendants' brief. Moreover, they are entirely unresponsive to the new and significantly different statement of facts submitted as a separate document in support of Defendants' motion. The Court, accordingly, disregards Plaintiffs' Responsive Statement of Material Facts.

Plaintiffs' Opposition Brief contains a three-paragraph Supplemental Statement of Disputed Material Facts. (Pls.' Opp'n Br. 6-7.) These paragraphs violate Local Civil Rule 56.1 as they are arguments and conclusions of law. L.Civ.R. 56.1 ("Each statement of material fact . . . shall not contain legal argument or conclusions of law."). The Court, accordingly, disregards Plaintiffs' Supplemental Statement of Disputed Material Facts.

Plaintiffs' opposition papers include a Counter-statement of Disputed Facts in which Plaintiffs, in accordance with Local Civil Rule 56.1, admitted, denied, or denied as material each paragraph of Defendants'

SUMF. (*See* Pls.' Counterstatement of Undisputed Material Facts ("CDF"), ECF No. 90-7.) The Court considers Plaintiffs' CDF.

II. Factual Background[2]

The instant matter arises from a series of statements made by Carr regarding Plaintiffs. (*See* Am. Compl. ¶¶ 22-37.) Carr is a weather enthusiast who operates Weather NJ[3] through a website, www.weathernj.com, and social media platforms including: Facebook, Twitter, Instagram, and YouTube. (SUMF ¶ 1.) Carr began forecasting weather in or about February 2010 under the name Severe NJ Weather. (*Id.* ¶ 2.) Presently, Carr has 225,000 followers.[4] (*Id.* ¶ 7.) Carr avers that his "weather reporting activities remain 'just a hobby[,]'" and that he earns on average $1,100 per month, and never more than $17,000 in a year, from his weather related activities. (*Id* ¶ 13.) Plaintiffs deny that Carr's "weather-related activities constitute a hobby." (CDF ¶ 13.)

Konowicz is a "professional, accredited meteorologist" who uses the professional name "Michael Phillips." (Am. Compl. ¶ 9.) Konowicz operates a website, www.weatherboy.com, and has a presence on several social

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2 The Court's factual summary draws primarily from Defendants' SUMF. As necessary, the Court notes where Plaintiffs' CDF disputes a fact.

3 Weather NJ was formerly known as Severe NJ Weather. (SUMF ¶ 1.)

4 Carr avers that he has 225,000 followers but does not indicate how these followers are distributed across his social medial platforms and his website. (*Id.* ¶ 7 (citing Decl. of Jonathan Carr ¶ 7, ECF No. 76-2).)

media platforms. (*Id.* ¶ 11.) Konowicz previously owned the registered trademark for *Weatherboy* . . . until he assigned the trademark to Isarithm. (*Id.* ¶ 12.) Konowicz obtained a Certificate in Broadcast Meteorology from Mississippi State University ("MSU") and is a "full Member" of the American Meteorological Society ("AMS"). (*Id.* ¶ 10.)

On December 8, 2014, Carr, using the Twitter username "@myWeatherNJ," posted the following statement on Twitter: "Real name Michael Konowicz. No degree or AMA record. fake audience."[5] (SUMF ¶ 55.) The comment was part of a thread initiated by a third party. (SUMF 50-55; Defs.' Moving Br., Ex. 22) Plaintiffs admit that the statements in the thread were made. (CDF ¶¶ 50-55.) Plaintiffs, however, dispute the substantive truth of the statements. (*See* CDF ¶¶ 50-55.)

Carr asserts that there were four bases for the December 2014 Statement. (SUMF ¶ 56.) First, that he knew "that the Weatherboy's real name was Michael Konowicz because two of [Konowicz's] Facebook followers had sent [Carr] his real identity." (*Id.* ¶ 57.) Second, that "based on Google searches, [Carr] could find no record of . . . Konowicz having a meteorology degree[,]" and that Konowicz's "Linked-In profile . . . makes no mention of any relevant degrees in meteorology." (*Id.* ¶ 58.) Third, Carr "checked for . . .Konowicz on listings kept by the AMS," and Konowicz was not among listings for either of the AMS's accreditation programs. (*Id.* ¶ 59.) Fourth, that for nearly a year,

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[5] The Court refers to this statement as the "December 2014 Statement." Additionally, while Carr wrote "AMA," the parties interpret the statement to refer to the AMS. (*See e.g.* CDF ¶ 55.)

Carr had seen online posts "presenting what he believed at the time (and still believes to this day) to be overwhelming evidence that . . . Konowicz was purchasing 'fake' likes in order to fraudulently boost the social media presence of Weatherboy Weather." (*Id.* ¶ 60.)

Plaintiffs admit Carr's first basis for the December 2014 Statement. (CDF ¶ 57.) Plaintiffs admit an unknown part of Carr's second basis for the statement and state that Carr could have inquired with MSU regarding whether Konowicz had attained the same certificate Mike Masco[6] holds. (*See* CDF ¶ 58.) Plaintiffs deny Carr's third basis and insist that "Konowicz is a member of AMS." (*Id* ¶ 59.) Plaintiffs deny Carr's fourth basis for the December 2014 Statement and "maintain[ ] that alleged evidence of false social media engagement was created by [David] Tolleris and Masco."[7] (*Id.* ¶ 60.)

On February 21, 2015, Carr, as "@WeatherNJ," posted the following statements on Twitter: "careful of Weatherboy Weather. Total fraud. Have unsettling proof"; and "records on Michael Konowicz. Not a pro met. Not a member of AMS."[8] (SUMF ¶¶ 64-75.) The comments were part of a thread initiated on Weatherboy's Twitter feed. (SUMF ¶ 64; Defs.' Moving Br., Ex. 22; Pls.' Opp'n Br. Ex. E.) Plaintiffs admit that the statements in the thread were

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6 Mike Masco is a meteorologist for an ABC affiliate in Baltimore, Maryland. (SUMF ¶ 38.)

7 David Tolleris is a meteorologist. (*Id.* ¶ 46.)

8 The Court refers to these statements as the "February 2015 Statements."

made. (CDF ¶¶ 64-65.) Plaintiffs dispute the substantive truth of the statements. (CDF ¶¶ 64-75.)

Carr relied on five bases for the February 2015 Statements. (SUMF ¶ 66.) The first four bases are the same bases that he relied on when making the December 2014 Statement. (*Compare* SUMF ¶¶ 56-60, *with* SUMF ¶¶ 66-70.) Carr's fifth basis is that he "continued to monitor the Weatherboy's engagement anomalies, fraudulent 'likes' from Turkey and other foreign nations, and lack of transparency regarding the identity of his 'team members,' and this served to "'strengthen [Carr's belief]' that the Weatherboy was engaging in fraudulent practices in order to misrepresent himself to the public and boost his social media profile." (*Id.* ¶ 71.)

Plaintiffs repeat the same admissions, denials, and arguments regarding Carr's first four bases for the February 2015 Statements as Plaintiffs proffered for the December 2014 Statement. (*Compare* CDF ¶¶ 56-60, *with* CDF ¶¶ 66-70.) Plaintiffs deny Carr's fifth basis, asserting that "Plaintiffs' engagement was primarily from the United States[,]" and that Plaintiffs "worked with a team of meteorologists at the time." (CDF ¶ 71.) Plaintiffs also deny "purchasing 'likes'[.]" (*Id.* ¶ 71.)

On March 2, 2015, Carr, responding to a Twitter post by @Weatherboy, posted the following comments: "Chicago story fake. No names. No credentials. No supporting media. Shots similar to other images on Google images"; "Keep sponsoring fake articles to fake audience while impersonating a fake team of meteorologists. #stayclassy"; "541 likes on a sponsored article to a fan-base of 250k. Sorry, that proves dirty pool. For real unparalleled trust and reach see . . . my

page"; and "just some guy impersonating a team of meteorologists practicing horrible journalism."[9] (*See* SUMF ¶¶ 76-88; Ain. Compl. Ex. 4, ECF No. 28-1.) The comments were part of a thread initiated by Konowicz, on his own Twitter page, in which he stated that he had been invited by United Airline's global headquarters in Chicago to "better understand their winter weather ops." (*Id.* ¶ 76.) Plaintiffs admit the March 2015 Statements were made, but dispute their truth. (CDF ¶¶ 76-78.)

Carr states that he relied upon six bases in making these statements. (SUMF ¶ 79.) Five of the six bases are the same bases for his previous statement. (*Compare* SUMF ¶¶ 66-70, *with* SUMF ¶¶ 80-86.) Carr's sixth basis was that he "used Google Images to search for the images that the Weatherboy used in his posting. That search revealed very similar images, which led [Carr] to believe that the Weatherboy had simply copied the images from public sources on the Internet." (SUMF ¶ 85.)

Plaintiffs repeat the same admissions, denials, and arguments regarding the first five bases for the March 2015 Statements as Plaintiffs proffered for the February 2015 Statements. (*Compare* CDF ¶¶ 66-70, *with* CDF ¶¶ 80-84.) In regard to Carr's sixth basis, Plaintiffs "[admit] that [Carr] searched" and

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[9] The Court refers to these statements as the "March 2015 Statements." Defendants' SUMF does not explicitly identify all the statements Carr made on March 2, 2015, as shown in Exhibit 4 to the Amended Complaint. (*Compare* SUMF ¶¶ 76-88 *with* Am. Compl. Ex. 4, ECF No. 28-1.) Defendants, nevertheless, cite to the Amended Complaint and Exhibit 4 in the SUMF. (SUMF ¶¶ 76-78.) The Court, accordingly, does not view Defendants' failure to cite all of the statements as a material fact in dispute.

"[deny] as to any conclusion [Carr] drew from 'very similar images.'" (CDF ¶ 85.) Plaintiffs state that Konowicz "was invited to Chicago and provided a letter confirming his visit afterward." (*Id.* ¶ 85.)

On June 23, 2015, one of Carr's online followers sent Carr a photo of what the sender thought was a tornado. (SUMF ¶ 91.) Carr posted the same photo on Facebook. (*Id.* ¶ 91.) Konowicz took the photo and posted it on his own webpage with a red line through it, and included a warning that the National Weather Service ("NWS") was still investigating whether what was depicted in the photo was a tornado. (*Id.* ¶ 92.) In the same post, Konowicz stated that the NWS had "taken a stand against [Carr]" and had been "very vocal in calling [Carr] out for spreading harmful misinformation." (*Id.* ¶ 93.) The parties dispute whether Carr was "reprimanded" or "called out." (*Compare* SUMF ¶ 91, *with* CDF ¶ 91.)

Carr contacted Gary Szatkowski at the NWS to confirm whether the NWS had reprimanded him, and Szatkowski responded. (SUMF ¶¶ 96-97.) In separate tweets, Szatkowski stated:

> Sorry, but the sun is out. Worst of storm has moved on. Why would that be a tornado?
>
> * * *
>
> Well, I just think it's misrepresented as a tornado. But others can have different opinions.
>
> * * *
>
> To be confirmed tornado, a damage survey must be done. It must have a start and end point. Maximum wind speed is evaluated.

* * *

> For that ever to be more than a pretty picture of an interesting cloud, that is what must happen.
>
> * * *
>
> If its not important that it be confirmed as a tornado, [then] call it what you wish. I simply won't be able to concur.

(*Id.*)

On June 25, 2015, Carr published an article entitled "Beware of the fake 'Team of Meteorologists'" (the "June 2015 Article") on Weather NJ's website. (SUMF ¶ 98, Ex. 5.) Defendants aver that this article repeated statements Carr previously made on Twitter, "including: (1) Weatherboy's fraudulent, purchased 'likes' and followers on his social media accounts; (2) his history of low engagement rates despite a large audience because he purchases 'likes' and 'followers'; (3) his lack of transparency regarding the identities and credentials of himself and his 'team members'; and, (4) his history of attacks on [Defendant] and other members of the online weather community." (SUMF ¶ 99.)

Carr asserts that he had seven bases for the June 2015 Article. (SUMF ¶ 100.) Six of the seven bases are the same bases for the March 2015 Statements. (*Compare* SUMF ¶¶ 80-86, *with* SUMF ¶¶ 101-106.) Can's seventh basis was Konowicz's statement regarding the online dispute over the alleged reprimand by the NWS, Szatkowski's confirmation that the NWS had not reprimanded Carr, and

that Szatkowski was "not aware of any problems" with Carr. (SUMF ¶ 107.)

Plaintiffs repeat the same admissions, denials, and arguments regarding the first six bases for the March 2015 Statements as proffered for the June 2015 Article. (*Compare* CDF ¶¶ 80-86, *with* CDF ¶¶ 101-106.) Regarding the seventh basis, Plaintiffs assert that "Weatherboy's post was false as the NWS had called Carr out for making his post and Defendants' post was misleading." (*Id.* ¶ 107.)

On July 8, 2015, Plaintiffs' Counsel sent Defendants a cease-and-desist letter. (Decl. of Jonathan Carr ("Carr Decl."), Ex. 32, ECF 76-3.) In that correspondence, Plaintiffs' Counsel stated that Konowicz is "a full 'Member' of AMS, a designation which is reserved for those that demonstrate 'professional or scholarly expertise in the atmospheric or related sciences, technologies, applications, or services.'" (*Id.*) After the instant lawsuit was filed, Defendants' Counsel applied to become a member of the AMS, and received an AMS Membership Certificate similar to Konowicz's AMS Membership Certificate. (SUMF ¶142. *Compare* Carr Decl., Ex. 34, *with* Carr Decl. Ex. 35.) On February 8, 2016, Plaintiffs' Counsel sent Defendants' Counsel a cease-and-desist letter. (Decl. of David P. Heim, Ex. L, ECF No. 90-8.)

III. Legal Standard

Summary judgment is appropriate if the record demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). A material fact—a fact "that might affect the

outcome of the suit under governing law," *Anderson,* 477 U.S. at 248—raises a "genuine" dispute if "a reasonable jury could return a verdict for the nonmoving party." *Williams v. Borough of W. Chester,* 891 F.2d 458, 459 (3d Cir. 1989) (quoting *Anderson,* 477 U.S. at 248). To determine whether a genuine dispute of material fact exists, the Court must consider all facts and reasonable inferences in a light most favorable to the non-movant. *Curley v. Klem,* 298 F.3d 271, 276-77 (3d Cir. 2002). The Court will not "weigh the evidence and determine the truth of the matter" but will determine whether a genuine dispute necessitates a trial. *Anderson*, 477 U.S. at 249.

The party moving for summary judgment has the initial burden of proving an absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 330 (1986). Thereafter, the nonmoving party creates a "genuine [dispute] of material fact if it has provided sufficient evidence to allow a jury to find [for him] at trial." *Becton Dickinson & Co. v. Wolckenhauer,* 215 F.3d 340, 343 (3d Cir. 2000)

A. Defamation

A defamation claim has three elements: "(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher." *G.D. v. Kenny,* 15 A.3d 300, 310 (N.J. 2011) (quoting *DeAngelis v. Hill,* 847 A.2d 1261, 1267 (N.J. 2004)). In cases where the plaintiff is a public figure, the plaintiff also must establish that the defendant made the statements at issue with "actual malice." *NY. Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964). "Actual malice has 'nothing

to do with hostility or ill will;' rather it concerns [a] publisher's 'state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it.'" *DeAngelis,* 847 A.2d at 1270 (N.J. 2004) (quoting *Lawrence v. Bauer Pub. & Printing Ltd.*, 446 A.2d 469, 477 (N.J. 1982)).

"[C]ourts have recognized that the perpetuation of meritless actions, with their attendant costs, chills the exercise of free speech about public affairs." *Berkey v. Estate of Stuart,* 988 A.2d 1201, 1209 (N.J. Super. Ct. App. Div. 2010). Accordingly, "trial courts should not hesitate to use summary judgment procedures where appropriate to bring such actions to a speedy end." *Id.* "On the other hand, the actual-malice standard entails a subjective analysis of the defendant's state of mind[,]" and "the issue of a defendant's state of mind in a defamation action 'does not readily lend itself to summary disposition.'" *Id.* (quoting *Maressa v. N.J. Monthly,* 445 A.2d 376, 386 n.10 (N.J. 1982)). "Courts should carefully examine the circumstances surrounding publication of defamatory allegations of fact to determine whether the issue of actual malice should go to the jury." *Id.*

B. The Lanham Act

Section 43(a) of the Lanham Act provides, in pertinent part:

> Any person who, on or in connection with any . . . services, . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or

> promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B).

> The Lanham Act does not define "advertising" or "promotion." However, courts have held that commercial advertising or promotion consists of four elements: (1) commercial speech; (2) by a defendant in commercial competition with the plaintiff; (3) for the purpose of influencing customers to buy the defendant's goods or services; and (4) disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within the industry.

Bracco Diagnostics, Inc. v. Amersham Health, Inc., 627 F. Supp. 2d 384, 456 (D.N.J. 2009).

"Every circuit that has addressed the issue has found that the Lanham Act restricts only commercial speech, as commercial speech is entitled to reduced protection under the First Amendment." *Farah v. Esquire Magazine, Inc.,* 863 F. Supp. 2d 29, 40 (D.D.C. 2012) (collecting cases), *aff'd sub nom., Farah v. Esquire Magazine*, 736 F.3d 528 (D.C. Cir. 2013). The Third Circuit Court of Appeals has not explicitly held that the Lanham Act only applies to commercial speech. Nevertheless, the District Court for the Eastern District of Pennsylvania recently dismissed Lanham Act claims because the statements at issue were not

commercial speech. *See Golo, LLC v. Highya, LLC,* 310 F. Supp. 3d 400, 507 (E.D. Pa. 2018) ("[The] [d]efendants' reviews of [the] [p]laintiff's product do not qualify as commercial speech, with the result that [the] [p]laintiff's Lanham Act claims and state law unfair competition claim must be dismissed.").

C. New Jersey Common Law Unfair Competition

Under New Jersey common law, relief is granted for the tort of unfair competition upon the following grounds:

> [E]ither that the means are dishonest, or that, by imitation of name or device, there is a tendency to create confusion in the trade, and enable the seller to pass off upon the unwary his goods as those of another, and thereby deceive the purchaser; or that, by false representation, it is intended to mislead the public, and induce them to accept a spurious article in the place of one they have been accustomed to use.

Squeezit Corp. v. Plastic Dispensers, 106 A.2d 322, 325 (N.J. Super. Ct. App. Div. 1954) (citation omitted).

"There is no distinct cause of action for unfair competition. It is a general rubric which subsumes various other causes of action." *C.R. Bard, Inc. v. Wordtronics Corp.*, 561 A.2d 694, 696 (N.J. Super. Ct. App. Div. 1989). This is because it is intended to encompass generally unfair play in the commercial arena: "the concept is deemed as flexible and elastic as the evolving standards of commercial morality demand." *Ryan v. Carmona Bolen Home for Funerals,* 775 A.2d 92, 95 (N.J. Super. Ct. App. Div. 2001) (inter-

nal quotation marks and citation omitted). "The judicial goal should be to discourage, or prohibit the use of misleading or deceptive practices which renders competition unfair." *Id.* "Generally, . . . unfair competition claims under New Jersey statutory and common law mirror unfair competition claims under . . . the Lanham Act." *Cozzens v. DaveJoe RE, LLC,* No. 17-11535, 2019 WL 522071, at *4 (D.N.J. Feb. 11, 2019) (quotations omitted).

IV. Discussion

Defendants advance two principal legal arguments in support of their Motion for Summary Judgment: (1) that Plaintiffs have failed to establish actual malice in publishing the allegedly defamatory statements; and (2) that summary judgment on Plaintiffs' Lanham Act claim should be granted in Defendants' favor because the statements at issue in the matter were not commercial in nature. (Defs.' Moving Br. 5, 22.) The central proposition of Defendants' motion, as related to Plaintiffs' defamation claim, is that at the time Carr made the statements, Carr believed in the truth of his statements and his belief was supported by objective facts which he observed. (*See id.* at 11, 15, 18, 20 (discussing Carr's investigations and beliefs at the time he made the statements).) Regarding Plaintiffs' Lanham Act claim, Defendants argue that Carr's statements are not "commercial advertising or promotion" under 15 U.S.C. § 1125(a)(1)(B). (*Id.* at 22.) Defendants advance no specific arguments regarding Plaintiffs' Unfair Competition claim. (*See generally id.*)

Plaintiffs oppose Defendants' motion arguing that Carr published the statements at issue "knowing

that they were false or with a reckless disregard for their truth or falsity" and that Carr's "statements fit squarely within the parameters of commercial speech as identified by the Supreme Court." (Pls.' Opp'n Br. 5.) Plaintiffs also argue that, at the least, there are genuine disputes of material fact and summary judgment must be denied. (*Id.* at 5.)

After a careful review of the record, including exhibits containing numerous hard-to-read printouts of social media posts, the Court concludes that there are no genuine disputes of material fact and Defendants are entitled to summary judgment on all claims. Furthermore, the Court finds that Carr's statements are not commercial speech or advertising, thus the statements are not actionable under the Lanham Act.

A. Konowicz Is a Public Figure

The threshold inquiry is whether Konowicz is a public figure. *Schwartz v. Worrall Publ'ns, Inc.,* 610 A.2d 425, 428 (N.J. Super. Ct. App. Div. 1992) ("[T]he judge should decide at the threshold whether a defamation plaintiff is a public official or figure since the existence of the *New York Times* privilege is itself dependent on the status of the person defamed."). The Supreme Court has identified two types of public figures: (1) general public figures and (2) public figures for a limited purpose. A general-purpose public figure is defined as someone "who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures. . . . " *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342 (1974). "Some [people] occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." *Id.*

at 345. Others, however, are only public figures by virtue of the limited controversy in which they find themselves. *Id.*

The New Jersey Supreme Court interpreted the Supreme Court's holding regarding limited purpose public figures as follows:

> *Gertz* refrains from establishing specific criteria against which a plaintiff's status can be measured to determine whether or not he is a public figure. Rather in instances where the plaintiff is not a public figure for all purposes, *Gertz* calls for a case-by-case examination "looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Important factors that led the Court to conclude that the *Gertz* plaintiff was not a public figure included [the] plaintiff's lack of any calculated relationship with the press and the fact that he neither "thrust himself into the vortex of this public issue, nor [engaged] the public's attention in an attempt to influence its outcome."

Lawrence v. Bauer Pub. & Printing Ltd., 446 A.2d 469, 475 (N.J. 1982) (quoting *Gertz,* 418 U.S. at 352) (internal citations omitted); *accord MacKay v. CSK Pub. Co.,* 693 A.2d 546, 554 (N.J. Sup. Ct. App. Div. 1997).

Here, the parties appear to agree that Konowicz is a public figure. Plaintiffs submitted evidence regarding Konowicz's prominent place in the meteorological community, beginning when Konowicz appeared on the David Letterman show in high school. (Pls.'

Opp'n Br., Ex. L-A ("Monroe teenager is TV's Weatherboy".) Additionally, Plaintiffs submitted many articles written by and about Konowicz in relation to meteorology. (*See* Pl.'s Reply Br., Exs. A, L-B, L-C.) Plaintiffs' Twitter account, username "Weatherboy," has at least 20,000 followers, and at one time had many more. (Defs.' Moving Br., Ex. 43.) According to Plaintiffs, Konowicz's page has received over 270,000 "likes, and @Weatherboy on Twitter has over 104,000 followers. Finally, after Defendants advanced arguments based on the conclusion that Konowicz is a public figure, Plaintiffs did not dispute this conclusion and advanced arguments assuming Konowicz is a public figure. (Pls.' Opp'n Br. 8-23; Defs.' Moving Br. 5-22.) The Court, accordingly, finds that Konowicz is a public figure.

B. Plaintiffs Have Not Raised a Genuine Dispute of Material Fact Regarding Actual Malice

In *New York Times v. Sullivan,* the Supreme Court held that in instances where the plaintiff is a "public figure," the plaintiff must establish that the defendant made the statements at issue with "actual malice." 376 U.S. 254, 279-80 (1964). In *Saint Amant v. Thompson,* the Supreme Court analyzed the actual malice standard and held that a defendant who made statements about his opponent's character in a political race was not liable for defamation, despite the defendant's failure to investigate and lack of consideration of the consequences for the plaintiff. 390 U.S. 727, 732-33 (1968). Actual malice requires evidence that the defendant entertained serious doubts about the veracity of his statements. *Id.* at 731. The actual malice standard does not ask whether a reasonably prudent person would have published the statements in similar circumstances. *Id.* "Rather, the focus of the

'actual malice' inquiry is on a defendant's attitude toward the truth or falsity of the publication, on his subjective awareness of its probable falsity, and his actual doubts as to its accuracy." *Costello v. Ocean Cty. Observer,* 643 A.2d 1012, 1024 (NJ. 1994). New Jersey imposes a heightened standard in that the plaintiff must prove actual malice by clear and convincing evidence. *Id.* at 1022.

The Supreme Court clarified the actual malice standard in *Garrison v. Louisiana,* holding that reckless disregard in the context of actual malice requires the statements be made with a "high degree of awareness of their probable falsity . . . " 379 U.S. 64, 74 (1964). Public officials, moreover, are "permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity." *Curtis Pub. Co. v. Butts,* 388 U.S. 130, 153 (1967).

A "bald assertion by the publisher that he believes in the truth of the statement may not be sufficient[,]" to protect the publisher from liability for publication of the statement. *Dairy Stores, Inc. v. Sentinel Pub. Co.,* 516 A.2d 220, 232-33 (N.J. 1986) (citing *St. Amant,* 390 U.S. at 732). "Notwithstanding a publisher's denial that it had serious doubts about the truthfulness of the statement, other facts might support an inference that the publisher harbored such doubts." *Id.* At 233.

> The finder of fact must determine whether the publication was made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product

> of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant, 390 U.S. at 732. "Sufficient evidence [for a finding in the plaintiff's favor] does not exist . . . when the only evidence offered is that the defendants 'should have known the articles were false, or they at least should have doubted their accuracy.'" *Costello,* 643 A.2d at 1023 (quoting *Lawrence v. Bauer Pub. & Printing Ltd.*, 446 A.2d 469, 477 (N.J. 1982)).

> [T]ruth is a defense to a defamation action even if a report on a matter of public concern contains minor inaccuracies. But a statement that is not substantially accurate, a statement whose "substance," "gist," and "sting" cannot be justified will not be protected under the shield of truth. [The plaintiff] bears the burden of proving that the defamatory statements were not substantially accurate and therefore false.

Kenny, 15 A.3d at 316-17 (citations omitted).

1. The December 2014 Statement

Here, despite Plaintiffs' denials of Carr's bases for the December 2014 Statement, Plaintiffs have not demonstrated that there is a material fact in dispute requiring a jury to determine whether the December

2014 Statement was made with actual malice. Specifically, none of Plaintiffs' denials of facts show that Carr entertained serious doubts about the falsehood of the December 2014 Statement at the time the statement was made. For example, Plaintiffs aver that Carr could have contacted MSU to inquire whether Konowicz held a certificate from MSU. (CDF ¶ 58.) This, however, could not establish that when Carr made the December 2014 Statement, Carr knew that Konowicz held the certificate from MSU or that Carr entertained any doubts regarding the truth of the statement.

Both parties dedicate a significant portion of their briefs and Rule 56.1 statements to debating whether Konowicz is a member of the AMS. In Defendants' view, Konowicz's membership as a "full member" is materially distinguishable from two accreditation programs AMS provides. (*See* Defs.' Moving Br. 16-18.) Defendants state that AMS accredits (1) Certified Broadcast Meteorologists and (2) Certified Consulting Meteorologists, and that Konowicz does not have either accreditation. (SUMF ¶¶ 137-140.) Defendants insist that the only "membership" Konowicz holds from AMS is the same membership Defendants' counsel secured from AMS. (*Id.* ¶ 142.) Plaintiffs insist that Defendants have admitted that Konowicz is a member of AMS, and that is sufficient to show that Carr's statement was false. (*See* CDF ¶ 141; Pls.' Opp'n Br. 18-20.)

Plaintiffs' proffered facts and arguments regarding his AMS membership are unavailing. The relevant issue is whether Plaintiffs can show that Carr publicized the statement that Konowicz was not a member of AMS with actual malice or reckless dis-

regard for the truth. On this issue, Plaintiffs have failed to proffer any evidence to raise a genuine dispute regarding whether at the time Carr made the December 2014 Statement he entertained any doubts as to the accuracy of the statement or that he was aware of the potential falsity of the statement. Rather, Carr's online investigation supports Defendants' position regarding Carr's belief in the truth of the statement. Plaintiffs have not pointed the Court to any evidence to contradict these facts. Thus, while Konowicz may be a member of AMS per his operative definition of a "full member" and in direct contradiction to Carr's operative definition of membership, that fact does not raise a genuine dispute over whether Carr made the statement with knowledge of its falsity or with reckless disregard.

Plaintiffs assert that Carr's fourth basis for the December 2014 Statement—prior social media posts by third parties—is false. (CDF ¶ 60.) Assuming, *arguendo*, Plaintiffs are correct, and these third-party social media posts were substantively false, Plaintiffs have cited no facts suggesting that Carr would have known, or should have known, about the falsity of these posts prior to making the December 2014 Statement. Plaintiffs merely deny the veracity of Defendants' proffered facts, not whether Carr himself questioned the veracity of the posts. (CDF ¶ 60.)

In sum, Defendants have proffered facts about the bases for Carr's belief that the December 2014 Statement was true at the time he made the statement. (SUMF ¶ 56-63.) In response, Plaintiffs either admitted or denied those bases and proffered facts regarding the truth of the information Carr states were the bases of his beliefs. (*See* CDF ¶¶ 56-63.) Plaintiffs,

however, have offered no facts suggesting that Carr entertained any doubt regarding the truth of his statements. Plaintiffs, accordingly, have not raised a genuine dispute of material fact.

Plaintiffs repeat their approach of attacking the truth of the facts that Defendants advance in support of their motion for summary judgment for each of the remaining statements. While the Court analyzes each statement on its own, Plaintiffs' fail to bring to the Court's attention sufficient, if any, evidence to raise a genuine dispute of material fact regarding Carr's attitude toward the falsity of his statements, his subjective awareness of the probable falsity of his statement, or whether Carr had actual doubts regarding the accuracy of his statements. Moreover, because the Court concludes that Plaintiffs failed to meet their burden to raise a genuine dispute of material fact, the Court does not analyze whether the substantive truth of the statements would serve as a defense.

2. The February 2015 Statements

Despite Plaintiffs' denials of Defendants' bases for the February 2015 Statements, Plaintiffs have failed to reference evidence of record sufficient to raise a material dispute of fact regarding the February 2014 Statement. Specifically, Plaintiffs' denial of Defendants' fifth basis for the February 2015 Statement is based on the substantive truth of (1) whether Plaintiffs' social media and online engagement was from the United States, or other countries, (2) whether Plaintiffs purchased "likes", (3) and the identity of Plaintiffs' team members. (CDF ¶ 71.) This denial does not address Carr's attitude toward the truth or falsity of the statements nor does it address Carr's

subjective awareness of the probable falsity, and his actual doubts about the accuracy of the statements. The fact that Carr "monitored . . . [Plaintiffs'] engagement anomalies," and made certain conclusions regarding his observations suggests that Carr did not entertain a serious doubt about the truth of the February 2015 Statement. (SUMF ¶ 71.) Plaintiffs do not dispute that Carr monitored Plaintiffs' engagement or that he drew certain conclusions. (*See* CDF ¶ 71.) As a result, Plaintiffs cannot meet their burden of establishing that there is a material fact in dispute.

3. The March 2015 Statements

Plaintiffs have not met their burden of showing that there is a material fact in dispute regarding the March 2015 Statements. The parties disagree about the substantive truth of the March 2015 Statements, specifically whether Konowicz was invited by United Airlines to see its weather-related operations and whether Konowicz attended the same. Plaintiffs admit that Carr conducted a Google search and located images similar to those he viewed regarding Konowicz's social media. (CDF ¶ 85.) While Plaintiffs deny that Carr came to certain conclusions regarding the similarity between the images, Plaintiffs do not point the Court to any evidence supporting that denial. (*See id.*) Plaintiffs bear the burden of demonstrating that there is a material fact in dispute, and cannot do so merely by denying the truth of Carr's March 2015 Statements and what conclusions Carr drew from his internet searching for similar images.

4. The June 2015 Article

As with the previous statements, Defendants have advanced facts that establish the bases for Carr's belief that the statements he made in the June 2015 Article were true at the time he made them. (SUMF ¶¶ 100-110.) In response, Plaintiffs either admitted those bases, or denied the bases and offered facts that speak to the underlying veracity of the statements. (CDF ¶¶ 100-110.) Despite Plaintiffs' denials of Defendants' bases for the statements made within the June 2015 Article, Plaintiffs have failed to offer any evidence that Carr made these statements while knowing they were false or with reckless disregard of their probable falsity. Moreover, assuming that the statements by Gary Szatkowski were "reprimands" does little to help Plaintiffs meet their burden. Carr's statement disputing whether he was reprimanded by the NWS is not in and of itself defamatory of Plaintiffs. Plaintiffs, accordingly, have failed to meet their burden.

5. Failure to Retract and Substantive Truth

The thrust of Plaintiffs' arguments is that the combination of (I) the fact that Carr's statements were factually inaccurate at the time they were made and (2) Carr's failure to retract the statements when he was provided information and evidence that purportedly established the falsity of the statements shows that Carr made the statements with actual malice. These arguments, however, are unpersuasive because the parties disagree about the objective truth of certain facts. The Court briefly reviews each of these disagreements to explain why Plaintiffs have not met their burden of establishing that a material fact is in

dispute and why there is no issue that should be put to a jury.

New Jersey precedent on the impact of a retraction, or the failure to publish a retraction, on the actual malice analysis is sparse. In a matter in which the publisher issued a retraction, the Appellate Division noted that a delay in publication of the retraction "says little, if anything, about the [publisher's] state of mind at the time of publication." *Schwartz v. Worrall Publ'ns, Inc.*, 610 A.2d 425, 431 (N.J. Super. Ct. App. Div. 1992). The Appellate Division also noted that:

> [T]he failure to promptly retract may be relevant in evaluating a media defendant's motives. However, like evidential factors concerning journalistic care (or lack thereof), motive evidence is relevant only circumstantially, and courts must be careful not to place too much reliance on such factors.

Id. (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989)).

Plaintiffs' arguments regarding retraction are inextricably intertwined with Plaintiffs' arguments regarding the substantive truth about the following issues: (1) whether Konowicz is a meteorologist, (2) whether Konowicz is a member of AMS, (3) whether Konowicz had a team of meteorologists, and (4) whether Konowicz's posting regarding visiting United Airline's hub was false. The parties' disagreements on these issues support the conclusion that Plaintiffs cannot raise a material dispute of fact with respect to whether the statements were made with actual malice and, accordingly, there is no issue for a jury to decide.

Konowicz states that his peers consider him a meteorologist, he has a certification from MSU in meteorology, and he has over two decades of experience in broadcast meteorology. (Pls.' Opp'n Br. 14-15.) Plaintiffs also proffer Carr's testimony regarding Mike Masco, an individual who holds the same MSU certificate as Konowicz. (*Id.* 15-16 (citing Jonathan Carr Dep. Tr. ("Carr Dep.") 126-130, ECF No. 76-6).) Carr's deposition testimony shows that he was aware of this fact. (Carr Dep. 126:23-127:6.) It also reveals that in Carr's personal opinion "because [Masco] lacks the bachelor's degree, he's not a true meteorologist." (*Id.* 128:7-17.) Plaintiffs' Counsel asked Carr if he ever contacted Masco to "call him out" about not being a "meteorologist." (*Id.* 128:19-22.) Carr stated that he "saw no reason to." (*Id.* 128:23.)

Plaintiffs construe Carr's testimony to demonstrate that "[Carr] singled out [Konowicz], and purposely sought to discredit him." (Pls.' Opp'n Br. 16.) Carr's differential treatment of Masco and Konowicz provides evidence that Carr had ill will or hostility toward Konowicz. However, "[a]ctual malice has nothing to do with hostility or ill will. . . . " *DeAngelis*, 847 A.2d at 1270.

The parties' disagreement over the operative portion of the AMS's definition of a meteorologist reinforces the conclusion that Plaintiffs cannot show that Carr made the statements with actual malice. The AMS's guidelines provide, in pertinent part:

> A meteorologist is an individual with specialized education. . . . This specialized education is most typically in the form of a bachelor's degree or higher in, or with a major or specialization in, meteorology or

> atmospheric science consistent with the AMS Statement or a Bachelor's Degree in Atmospheric Science.
>
> There are cases where an individual has not obtained a degree in meteorology or atmospheric science but has gained sufficient knowledge through coursework and/or professional experience to successfully fill professional positions, such as military weather forecasters or positions held by degreed meteorologists. These individuals can also be referred to as meteorologists.

(*Compare* SUMF ¶ 117, *with* CDF ¶ 117 (agreeing on the language of the AMS's guidelines on the use of the term "meteorologist")) Plaintiffs aver that Konowicz is a meteorologist pursuant to the latter portion of the definition that allows an individual to be considered a meteorologist based on coursework and professional experience. (CDF ¶ 117.) Defendants focus on the former part of the definition that requires a bachelor's degree or higher degree. (Defs.' Moving Br. 13-15.) Plaintiffs assert that Defendants were provided with Konowicz's professional credentials and a copy of the AMS's definition of a meteorologist. (Pls.' Opp'n Br. 21.) According to Plaintiffs, Carr's failure to retract after receipt of these materials is evidence of Carr's actual malice. (*Id.*) Plaintiffs fail to acknowledge that the materials provided to Defendants also support Carr's reliance on the first portion of the AMS definition to determine that an individual who lacks a bachelor's degree and only has a certificate, like Konowicz, is not considered a meteorologist pursuant to the AMS guidelines. Thus, Plaintiffs' proffered evidence of actual

malice also undermines Plaintiffs' claim of actual malice.

The parties' disagreement over whether Konowicz is a member of AMS also supports dismissal and undermines Plaintiffs' arguments. Plaintiffs aver that Konowicz is a member of AMS and that Defendants have admitted as such. (Pls.' Opp'n Br 20; CDF ¶ 141.) Defendants aver that Konowicz has the same membership that is open to any member of the public and the same membership as Defendants' counsel despite his counsel having zero experience in meteorology. (Defs.' Moving Br. 16-17; SUMF ¶ 141.) The record shows that Carr investigated Konowicz's AMS "membership" by searching two directories for AMS's accreditation programs AMS makes available to the public and Carr did not locate Konowicz in those directories. (SUMF ¶¶ 59, 69) Plaintiffs insist that they provided Defendants with evidence of Konowicz's AMS membership through the cease and desist letters as well as through the complaint in this matter and Defendants' failure to print a retraction is evidence of Carr's actual malice. (Pls.' Opp'n Br. 21 (quoting Carr Dep. 63:15-22).)

Plaintiffs' evidence regarding Konowicz's membership in AMS, his providing of the same information to Defendants, and Defendants' failure to retract provides little support to Plaintiffs' assertion that Carr made the statements with actual malice. Plaintiffs' evidence shows that they provided some objective evidence to Carr that Konowicz holds at least one type of the several types of membership or accreditation AMS offers, Plaintiffs' proffer, however, fails because the evidence does not reflect that Carr knew of Konowicz's membership at the time the statements

were made, nor does it undercut the results of Carr's contemporaneous investigation into the AMS directories.

Plaintiffs' evidence regarding Konowicz's "team" of meteorologists also provides scant support for actual malice. Konowicz proffers evidence that he employed two independent meteorologists, Aeris (a company that directly employs meteorologists), a photographer, and a designer. (*See* Pls.' Opp'n Br. 21-23.) Accepting all of this as true and that this group of individuals constitutes a "team", the evidence of these employment relationships only came out during discovery in this matter. Plaintiffs provide no evidence that Carr would have known of this evidence at the time he made the statements. Because the evidence regarding Konowicz's "team" of meteorologists was disclosed in the midst of the instant litigation, the evidence does little to show what Carr's mental state was at the time he made the statements. That Carr has failed to retract the statements in the midst of litigation does little to help Plaintiffs to meet their burden of establishing that there is a material fact in dispute regarding actual malice.

Plaintiffs argue that four photographs attached to the February 6, 2016 cease-and-desist letter and Carr's failure to retract certain statements in light of those photos is further evidence of Carr's actual malice, (Pls.' Opp'n Br. 23-24.) Specifically, Plaintiffs argue that the photos rebut the February 2015 Statements because they show that Konowicz actually visited United Airlines in Chicago. (*Id.*) Defendants argue that prior to making the February 2015 Statement, Carr searched and found similar images on Google and that the photos Plaintiffs have provided

"are merely evidence that [Konowicz] was at some airport at some time for some purpose." (Defs.' Moving 13r. 19-20.) Plaintiffs argue that Defendants admit that Carr could have updated the February 2015 Statements after receiving the photos. (Pls.' Opp'n Br. 23.) The fact that Carr could have adjusted his posts after receiving countervailing evidence months after the fact is significantly undercut by Carr's testimony that he continued to entertain doubts about what Plaintiffs' proffered images purported to show. (*See* Carr Dep 43:7-9 (stating "If I had to go back and supplement my tweet I would say, oh look, another photograph with no direct proof.").)

In sum, when the statements at issue are analyzed individually and in the larger context of whether the statements were factually accurate, Plaintiffs have not raised a genuine dispute of material fact sufficient regarding whether Carr made the statements at issue with actual malice. In Plaintiffs' view, large portions of the statements were factually false and this, and other factors, establish that the statements were made with actual malice. The record evidence reflects that Carr made the statements believing that they were true at the time. Defendants have proffered evidence showing that Carr continues to believe the statements. Plaintiffs have not pointed the Court to any evidence rebutting those assertions. Plaintiffs' theories that Defendants' ill will, failure to inquire with Plaintiffs regarding the truth of the posts, and failure to retract after the fact are undercut by the fact that Carr investigated prior to making certain statements and continues to believe in the truth of certain statements. For these reasons, the Court concludes that Plaintiffs have failed to demon-

strate a genuine dispute of material fact regarding whether the statements at issue were made with actual malice.

C. Carr's Statements Are Not Commercial Speech

When deciding whether speech is commercial, "the Third Circuit requires courts to assess whether the speech (i) is an advertisement, (ii) refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech." *Golo, LLC*, 310 F. Supp. 3d at 504 (citing *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008)). "An affirmative answer to all three questions provides 'strong support' for the conclusion that the speech is commercial." *Facenda*, 542 F.3d at 1017 (quoting *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990)). "Stated succinctly, the commercial speech doctrine rests heavily on 'the common sense distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" *U.S. Healthcare, Inc.*, 898 F.2d at 933 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)).

In discussing the Lanham Act, the parties cite *Edward Lewis Tobinick, MD v. Novella (Tobinick)*, a case from the Eleventh Circuit Court of Appeals. 848 F.3d 935 (11th Cir. 2017), *cert. denied sub nom.*, *Tobinick v. Novella*, 138 S. Ct. 449 (2017). In *Tobinick,* both parties were doctors, one of whom invented a novel treatment procedure and administered said procedure to patients. *Id.* at 936. The defendant published an article detailing: (1) how he learned of the plaintiff's treatment procedures, (2) "the typical characteristics of 'quack clinics' or 'dubious health clinics,' [(3)] the

key features of [the plaintiff's] clinic, and [(4)] lastly, the plausibility of and the evidence supporting [the plaintiff's] allegedly effective use of a certain drug. *Id.* at 940. The defendant also quoted a Los Angeles Times article which reported that the plaintiff's "claims about the back treatment led to an investigation by the California Medical Board, which placed him on probation for unprofessional conduct and made him take classes in prescribing practices and ethics." *Id.* After the plaintiff filed a complaint against the defendant in the District Court for the Southern District of Florida, the defendant published another article detailing the lawsuit and argued that the suit was "designed to silence his public criticism of [plaintiff s] practices." *Id.* at 941. The defendant was the executive editor of, and contributor to, a blog operated by a non-profit entity. *Id.* at 940.

The Eleventh Circuit found that the defendant's statements were not actionable under the Lanham Act. Specifically, the Court of Appeals concluded that there was "no genuine dispute of material fact regarding whether [the defendant's] articles are commercial speech[,]" because a "plain reading of the first and second articles makes clear that they do not fall within the core notion of commercial speech as they do not propose a commercial transaction." *Id.* at 950. Moreover, the "articles evoke many characteristics of noncommercial speech[,]" as they "communicate[ ] information, express[ ]opinion, [and] recite[ ] grievances." *Id.* (quoting *N.Y Times Co.*, 376 U.S. at 266).

In the instant matter, Defendants argue that the Court should grant summary judgment in their favor because the Eleventh Circuit's analysis in *Tobinick* applies. (Defs.' Moving Br. 25.) Specifically, Defend-

ants argue that a "plain reading" of Carr's statement makes clear that the statements were not commercial speech. (*Id.*) Defendants also assert that "Carr is not in the weather business; it is just his hobby." (*Id.* at 22.)

Plaintiffs oppose the grant of summary judgment arguing that *Tobinick* is materially distinguishable from the instant matter. (Pls.' Opp'n Br. 24.) First, Plaintiffs argue that Carr's statements are "merely personal attacks on Plaintiff[s,]" and "not entitled to the same level of protection, as the statements in *Tobinick.*" (*Id.* at 25.) Plaintiffs further argue that the parties in *Tobinick* were not competitors, while, here, "[Konowicz] is [Carr's] largest competitor in New Jersey." (*Id.*) Plaintiffs insist that in the March 2015 Statements, Defendants solicited Plaintiffs' followers, and in the June 2015 Article, Carr promoted himself. (*Id.*) Plaintiffs refute Defendants' "just a hobby" argument by arguing that Carr has an economic motivation for attempting to discredit Plaintiffs and increase Carr's own online profile. (*Id.* at 26.)

The Court agrees with Defendants that a plain reading of the statements makes clear that the statements are not commercial speech. Neither the December 2014 Statement nor the February 2015 Statements refer to a specific product or service nor do they propose a commercial transaction. As Plaintiffs concede, these statements are closer to personal attacks on Plaintiffs. (Pls.' Opp'n Br. 25.) Moreover, these statements communicated information—the Weatherboy's real name—and expressed opinion—that Konowicz had a "fake audience," was a "total fraud," and not a member of AMS. *See N Y. Times Co.*, 376 U.S. at 266. These statements, accordingly,

are not commercial speech. *Id.; Tobinick*, 848 F.3d at 950.

The content of the March 2015 Statements and the June 2015 Article require a more fulsome analysis. The March 2015 Statements are not an advertisement in the traditional sense. Nevertheless, Carr's statement, "For real unparalleled trust and reach see . . . my page," is the sort of comparative language that is usually found in commercial advertisements. Moreover, by referring to his own webpage, Carr specifically referenced the service he provides—weather forecasts through his webpage and social media outlets. The June 2015 Article was posted on Defendants' website and contains negative descriptions of Plaintiffs followed by a positive description of Carr and Defendants' website. Arguably, these statements satisfy the three factors the Supreme Court set out in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983), which are: (1) if the speech at issue was "conceded to be advertisements", (2) the statement included a "reference to a specific product", (3) and if the speaker had an "economic motivation" for making the statement. *Id.* If all of these factors are satisfied, there is "strong support for [a] District Court's conclusion that the [speech is] properly characterized as commercial speech." *Id.* at 67.

Here, as in *Tobinick,* the Court finds that Plaintiffs' implied theory regarding Defendants' economic motivation is too attenuated to establish economic motivation in the commercial speech context. Plaintiffs have not identified any evidence in the record to establish Carr's economic motivation. The record, nevertheless, does reflect that Defendants generated revenue from Defendants' website. (Carr Dep. 117:9-122:17.) To

the extent Plaintiffs' theory is that Defendants derive revenue from driving viewers to Defendants' website, this theory is insufficient. As the *Tobinick* Court stated, "the placement of . . .articles next to revenue-generating advertising [is] [in]sufficient in this case to show a liability-causing economic motivation. . . . " *Tobinick*, 848 F.3d at 952.

> Both advertising and subscriptions are typical features of newspapers, whether online or in-print. But, the Supreme Court has explained that "if a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment."

Id. (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413* U.S. 376, 385 (1973)). The Court, accordingly, concludes that the March 2015 Statements and June 2015 Article were not commercial speech, and, as a result, they are not actionable under the Lanham Act.

The Court further finds that based on its findings related to Plaintiffs' Lanham Act Claim, Defendants are entitled to Summary Judgment on Plaintiffs' Unfair Competition Claim. *See Buying for The Home, LLC v. Humble Abode, LLC,* 459 F. Supp. 2d 310, 317 (D.N.J. 2006) ("Because the elements of a claim of unfair competition under the Lanham Act are the same as for claims of unfair competition and trademark infringement under New Jersey statutory and common

law, the [c]ourt's analysis . . . extends to [p]laintiff's state law claims as well."); *see also Bracco Diagnostics, Inc.,* 627 F. Supp. 2d at 454 (stating "unfair competition claims under New Jersey statutory and common law generally parallel those under § 43(a) of the Lanham Act.").

V. Conclusion

For the reasons set forth above, the Court finds that Plaintiffs have failed to raise a genuine dispute of material fact regarding whether Carr made the December 2014 Statement, the February 2015 Statements, the March 2015 Statements, and published the June 2015 Article with actual malice. The Court also finds that these statements are not commercial speech, and, as a result, the statements are not actionable under the Lanham Act and do not support a New Jersey common law unfair competition claim. Defendants, accordingly, are entitled to summary judgment and the Court grants Defendants' motion. An order consistent with this Memorandum Opinion will be entered.

/s/ Michael A. Shipp
United States District Judge

Dated: May 31st, 2019

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (MAY 31, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL KONOWICZ, A/K/A MICHAEL PHILLIPS, and ISARITHIM LLC,

Plaintiffs,

v.

JONATHAN P. CARR; SEVERE NJ WEATHER, LLC, and WEATHER NJ, LLC,

Defendants.

Civil Action No. 15-6913 (MAS) (TJB)

Before: Michael A. SHIPP,
United States District Judge.

This matter comes before the Court upon Defendants Jonathan P. Carr, Severe Weather, LLC, and Weather NJ, LLC's (collectively, "Defendants") Motion for Summary Judgment. (ECF No. 75.) Plaintiffs Michael Konowicz a/k/a Michael Phillips and Isarithm, LLC (collectively, "Plaintiffs" opposed (ECF No. 90), and Defendants replied (ECF No. 82).

For the reasons set forth in the accompanying Memorandum Opinion, and other good cause shown,

IT IS on this 31st day of May, 2019 ORDERED that:

1. Defendants' Motion for Summary Judgment (ECF No. 75) is GRANTED.

2. The accompanying Memorandum Opinion shall remain filed under temporary seal until Plaintiffs' Motion to Seal (ECF No. 86) is decided.

/s/ Michael A. Shipp
United States District Judge

ARTICLE BY JONATHAN CARR IN WEATHERNJ.COM (JUNE 25, 2015)

BEWARE OF THE FAKE "TEAM OF METEOROLOGISTS"
By: Jonathan Carr
June 25, 2015, 19:15

I've kept my mouth shut about this for a while now but after Tuesday's blatant (not the first) attack on me, it's time to reveal some painful truth. This is not a NJ weather-related post so don't waste your time if that's what you are looking for. However, if you like drama then make some popcorn and pull up a chair.

Weatherboy's Attack

While storm chasing Tuesday on Long Beach Island, NJ I got caught in some pretty damaging severe winds. I saw, with my own eyes, what appeared to be rotation. This, after observing several tornado warnings by the NWS for PA and SWNJ in-alignment with LBI, as well as numerous pics and reports, led me to believe that the sky was indeed capable of producing a tornado. In my own error, I posted a picture that was submitted by a credible source of

what appeared to be a tornado—with the caption "Tornado Footage." The area where the pic was taken was tornado-warned and rotation was visible on advanced radar software, specifically GRLevel3 and GR2Analyst. Hindsight is always 20-20 but moving forward I'll use terminology like "possible tornado footage" instead of "tornado footage" before official NWS confirmation. Lesson learned.

Weatherboy saw this opportunity to pounce on my mistake and post the following:

Weatherboy Weather

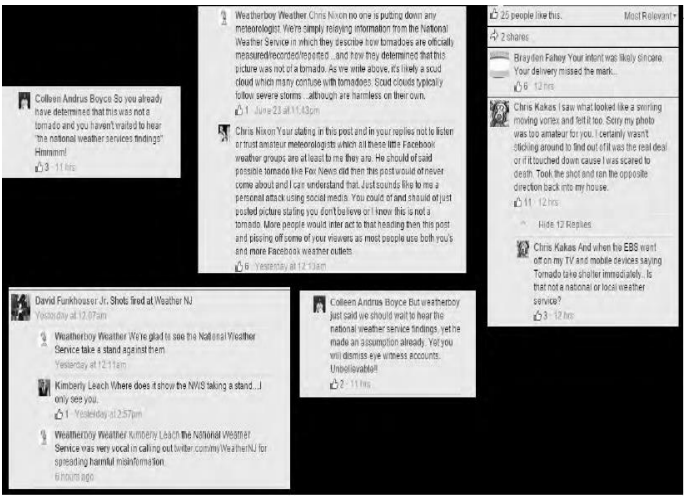
SOCIAL MEDIA POST TRANSCRIPTION

While some things may look like tornadoes they may simply be harmless clouds in the sky. Trust only the confirmation reports from the National Weather Service about actual tornadoes—do not trust untrained amateurs in social media that claim otherwise, as this photograph shows.

The National Weather Service office in Mount Holly, NJ, will survey, if needed, storm damage in southern NJ to determine whether or not any tornado touched down. It appears most damage and damage reports in New Jersey today were the result of straight-line winds that were blowing at or greater than hurricane force in the area. The National Weather Service can identify different calling cards left by tornadoes to determine if any actually touched down.

If a tornado actually touched down, the National Weather Service will release their findings in a report that describes the intensity and path of such an event.

What's funny are the comment reactions to his own attack post. Also, the NWS confirmed a waterspout in the LBI region. I believe this is called a backfire.



SOCIAL MEDIA POST TRANSCRIPTION

Colleen Andrus Boyce: So you already have determined that this was not a tornado and you haven't waited to hear "the national weather services findings". Hmmmm!

David Funkhouser Jr.: Shots fired at WeatherNJ

Weatherboy Weather: We're glad to see the National Weather Service take a stand against them.

Kimberly Leach: Where does it show the NWS taking a stand . . . I only see you.

Weatherboy Weather: Kimberly Leach the National Weather Service was very vocal in calling out twitter.comWeatherNJ for spreading harmful misinformation.

WeatherboyWeather: Chris Nixon no one is putting down any meteorologist. We're simply relaying information from the National

Weather Service in which they describe how tornadoes are officially measured/recorded/ reported . . . and how they determined that this picture was not of a tornado. As we write above, it's likely a scud cloud which many confuse with tornadoes. Scud clouds typically follow severe storms . . . although are harmless on their own.

Chris Nixon: Your stating in this post and in your replies not to listen or trust amateur meteorologists which all these little Facebook weather groups are at least to me they are. He should of said possible tornado like Fox News did then this post would of never come about and I can understand that. Just sounds like to me a personal attack using social media. You could of and should of just posted picture stating you don't believe or I know this is not a tornado. More people would interact to that heading then this post and pissing off some of your viewers as most people use both you's and more Facebook weather outlets.

Colleen Andrus Boyce: But weatherboy just said we should wait to hear the national weather service findings, yet he made an assumption already. Yet you will dismiss eye witness accounts. Unbelievable!!

Brayden Fahey: Your intent was likely sincere. Your delivery missed the mark . . .

Chris Kakas: I saw what looked like a swirling moving vortex and felt it too. Sorry my photo was too amateur for you. I certainly

> wasn't sticking around to find out of it was the real deal or if it touched down cause I was scared to death. Took the shot and ran the opposite direction back into my house.
>
> Chris Kakas: And when the EBS went off on my TV and mobile devices saying Tornado take shelter immediately . . . Is that not a national or local weather service?

So the National Weather Service is taking a stand against me? This almost made me spit my drink on the laptop screen. If Weatherboy is referring to the synoptic discussion that NWS Mt. Holly's Gary Szatkowski had with me well that's just funny. As pictured, one of his own fans recognized that this was a personal attack on me and not a general post whatsoever. The relationship between the NWS and Weather NJ couldn't be better and there are no "alleged repremands" to me from the NWS. Try to find a single tweet from the NWS suggesting such. Just personal conversation with Gary's personal twitter account:

SOCIAL MEDIA POST TRANSCRIPTION

WeatherNJ @myWeatherNJ: Craziest storm video I've seen yet from yesterday. From Gibbstown, NJ

Gary Szatkowski @GarySzatkowski: @my WeatherNJ Great video. And best dialogue for this event. Girl: There's your dad. Guy: Keep going.

I feel bad for the citizen who captured the cloud during severe conditions. As also pictured above, he actually felt attacked himself by weatherboy. As another citizen, who works for Hunterdon County OEM, states, his delivery missed the mark. The bottom line . . . this post was a poor effort to put someone down and very unprofessional. I would never engage in such an attack but you can be sure as hell I'll defend myself.

Who Weatherboy Pretends to Be

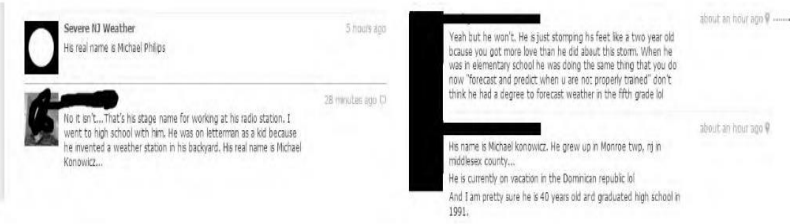
Weatherboy states that they are a team of professional meteorologists with many years of experience. To this day, he has yet to reveal the names or credentials of his "professional team of meteorologists." He has taken creative measures to fake his story including bogus classroom visits and dishonest campaigns . . . none of which again, state names or credentials. He constantly posts shock-factor articles and videos for traffic-bait but slams others for posting actual weather observations.

The American Meteorological Society (AMS) currently has zero-evidence of him despite his proposed trip to the AMS convention last year. He actually snapped a pic of the departure monitors in the airport

and posted it with the caption, "On the way to national AMS convention." Later that day his own neighbor informed me that he left for vacation to the Dominican Republic . . . lol

Who Weatherboy Really Is

He goes by a radio stage name of Michael Phillips. At least for a while I thought that was his name until I received the following messages from my own fans. I was still Severe NJ Weather at the time and Weatherboy had just posted an article pointing out how many meteorologists were wrong about snowfall totals (shocking). His own neighbors and schoolmates came to me with this information:



SOCIAL MEDIA POST TRANSCRIPTION

Severe NJ Weather: His real name is Michael Phillips

[redacted]: No it isn't . . . That's his stage name for working at his radio station. I went to high school with him. He was on letter-man as a kid because he invented a weather station in his backyard. His real name is Michael Konowicz . . .

> [redacted]: Yeah but he won't. He is just stomping his feet like a two year old because you got more love than he did about this storm. When he was in elementary school he was doing the same thing that you do now "forecast and predict when u are no: properly trained" don't think he had a degree to forecast weather in the fifth grade lol
>
> [redacted]: His name is Michael Konowicz. He grew up in Monroe twp, NJ in Middlesex county . . .
>
> He is currently on vacation in the Dominican republic lol
>
> And I am pretty sure he is 40 years old and graduated high school in 1991.

So I did some research and found the facebook page for Michael Konowicz. Under the about section for Michael Konowicz, a website was listed for "weatheronline.com." I then noticed that Weatherboy listed weatherboy.com on his facebook about section. So after visiting weatherboy.com and viewing the HTML page source, I found that the following HTML code:

His LinkedIn page also listed the same web site. Deduce what you will but the following is, in-fact, true: Weatherboy, at the age of 5 helped build a weather station in his back yard. For this effort he was hosted by the Letterman show. Ever since, he was dubbed the weatherboy. He also claims years of broadcasting experience but good luck getting specifics on that. Regardless, he has yet to reveal his identity publicly or any meteorological credentials.

Who I Pretend to Be

[data does not exist]

Who I Am

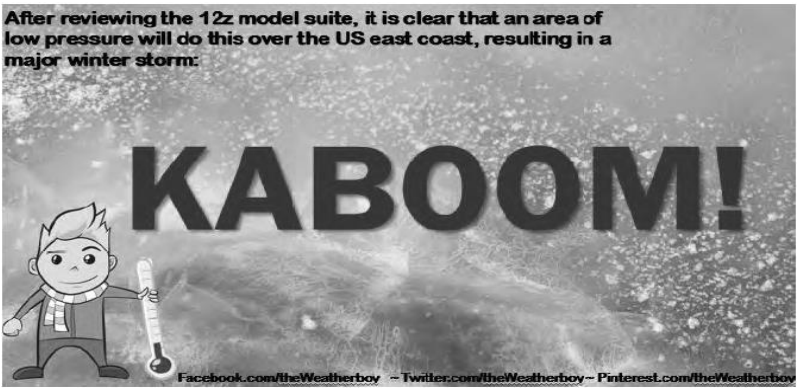
My name is Jonathan Carr. I graduated with a bachelor's degree in computer science and information systems from Stockton University. My primary career is in software development and systems engineering. I have no formal education in meteorology and I wear that proudly on my sleeve. My entire atmospheric knowledge-base is self-taught and under the wing of some good friends who are professional meteorologists (EPAWA FTW)! I learn more and more every day, from both success and failure, and plan to acquire formal education in meteorology some day.

I started Severe NJ Weather in February of 2010 simply to inform the public, through actionable discussion, of major storm systems that were out of local forecast reach. Weather safety information/ aggregation was my primary intended function. I was able to alert the public well in-advance about the 2010-2011 blizzards, Hurricane Irene, the Halloween Snow Storm of 2011, the 2012 Derecho, the 2012 Freehold Microburst, Superstorm Sandy, the Polar Vortex influence

of 2013/2014, and many other smaller-impact storm systems to date.

In 2014 I re-branded as Weather NJ with a centralized web presence. Today I represent the largest independent weather reporting agency in the State of New Jersey. My collective social media following of 215k+ over multiple social media platforms is 100% organic of which I am VERY proud of! My website has been visited 5.4 million times since launch last July from over 170 countries around the world—from 6 of 7 continents (due to international airport travel weather interest—PHL/EWR/JFK/LGA). PS: if you're in Antarctica, please visit somehow!

I was voted 2014 Citizen Journalist of the Year by the Citizen's Campaign as well as featured in many traditional media articles. I'm followed by the governor, senators, state and national congressmen, multiple OEM/EMS/law enforcement organizations, over 60 professional network meteorologists and reporters in the New York/Philadelphia metropolitan areas, and a handful of celebrities. Although this feels amazing now, I expect to continue solid growth as New Jersey's #1 trusted weather site. I'm not going anywhere!



Weatherboy's Strange Obsession with Me

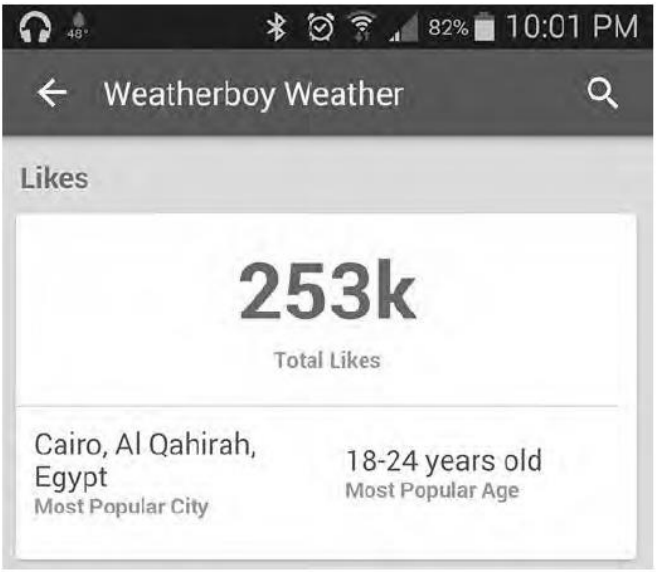
Last winter, Jeff Edelstein of the Trentonian wrote an article about my rising popularity. Immediately afterwards, Weatherboy practically harassed Jeff Edelstein because I was chosen for the article over him. Ever since then, there has been a creepy obsession detected. You all know my KABOOOM phrase that I used many times in 2013/2014 and also above. Well this past winter, Weatherboy posted the following image before a predicted snow storm:

Creepy, right? The evidence leads me to believe that he's been waiting for me to slip up. Therefore Tuesday's tornado image post must of been his lucky day. Or not.

Weatherboy's Fake Audience

After Sandy my following leveled off at around 80k on facebook. Weatherboy's following topped out at around 30k. Soon after, Weatherboy's followership increased dramatically to where it is today. The growth was achieved during normal boring dry weather conditions. I found this to be bizarre. One day a fan

messaged me and told me to check out his about section, specifically the "likes" part. What did it reveal?



His most popular city was listed by facebook as Cairo, Al Qahirah, Egypt and his most popular demographic was listed by facebook as 18-24 years old. This was when I began suspecting that he might have purchased most of his audience through various "buy likes now" sites. Bizarre cities and unlikely demographics are normally giveaways for big facebook sites who purchase their likes (fake profiles) to simulate large presences. Obviously Egypt is not a reasonably valid location as most of his posts are about the United States. Also, the 18-24 year old demographic is statistically the least interested demographic in weather. My most popular age group is 35-55 and 68% female . . . how real weather site demographics should look. Also I was wondering why there were so few comments on his posts in comparison to mine. I also noticed that he likes to sponsor a lot of his posts

in-attempt to fake high engagement. Based on his actual engagement of his non-sponsored posts, I would estimate his true following size to be 30-40k. Keep in mind that busiest cities and age groups refresh every few weeks based on who is actually engaging with the page. So his data now will show a US city. This screenshot was taken during the period that his facebook page blew up in likes and therefore reflected the most active city at the time.

What Weatherboy Will Now Do

It's a shame I've had to but I've noticed a few trends in how Weatherboy fakes his presence.

First, he mght [sic] delete the post he made about me on Tuesday, especially after my most loyal fans begin making numerous comments on the post. Here is the link to it. Once this link stops working, you know what happened lol (https://www.facebook.com/theWeatherboy/photos/a.261480430121.304779.127583470121/10155838856115122/?type=1&theater) That's why I took screen shots (above).

If he doesn't delete the post then he will likely delete your comments (on the post and on his page in general) and ban you. Take screenshots of your comments if you think I'm kidding. Post them on my page before or after he deletes them, only if you wish.

Also, if he does not delete, he will likely bury the post with new articles about random traffic-bait headlines.

He will insist that his page represents real meteorologists with formal educational credentials in meteorology. He will not, however, give the names of real people. He will likely also reference years of

broadcasting experience in the greater Philadelphia area. He might even try to post vague images that he "thinks" will prove his story. Again, he will not give specifics. He will try his hardest for you to walk away believing the "professional team of meteorologists" story.

He will change the subject in his comment responses to vague "lip-service style" condescending remarks. Again, unfortunately I've observed his style enough to predict his actions. This is the 3rd or 4th time this has happened.

Conclusion

I thought very long and hard about whether to write this article or not. This is not the first time he has done something like this. Also, the idea that some people actually believe his story makes me nauseous. It's very dishonest and manipulative. Thank you for listening to my side of story. Stay safe and properly informed New Jersey! JC