Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEINBUCH Plaintiff, v. CUTLER Defendant.	) CASE No. 01:05-CV-00970 (PLF)

MEMORANDUM IN OPPOSITION TO DEFENDANT'S "MOTION TO DISMISS"

INTRODUCTORY STATEMENT

Plaintiff and Defendant met in the Winter of 2004 and entered into a relationship in the Spring of that same year. From the inception of that relationship, unbeknownst to Plaintiff, Cutler revealed and disseminated personal, private, intimate facts about Plaintiff through her Internet website, or weblog (also knows as a "blog"), on the World Wide Web for anyone to read. Cutler also made false claims about Plaintiff in her public blog, painting Plaintiff in a false light. Cutler identified Plaintiff in various ways, including by using his name – for the ready identification by people who know Plaintiff, and people who don't know him.

Cutler sought and received notoriety through her public blog. Cutler went on television and radio, further publicizing her invasion of Plaintiff's privacy, and Cutler republished her privacy-invading public blog in the *Guardian* newspaper and in book form. Cutler's outrageous and tortious actions subjected Plaintiff to pain and suffering beyond that which any reasonable person should be expected to bear.

Plaintiff filed his Complaint in May of 2005. Without providing any discovery, including that required by Fed. R. Civ. P. 26, Cutler filed a motion to dismiss the Complaint.

Cutler be tested for sexually transmitted diseases so that they would not have to make use of a condom, and statements made by Plaintiff regarding sexual positions. Complaint ¶¶ 30-31.[7] Defendant's actions constitute an improper public disclosure of private facts. *See, e.g., McSurely v. McClellan*, 753 F. 2d 88, 112 (D.C. Cir. 1985) (disclosure of intimate, sexual facts constitutes invasion of privacy); *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal 1998) (disclosure of private facts in explicit internet video satisfies elements of tort).

B. Defendant Placed Plaintiff in a False Light

> To prevail on a false light claim . . . [a party] must show that (a) the published material places appellant in a false light which "would be highly offensive to a reasonable person," and (b) "the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

Weyrich v. New Republic, Inc., 235 F.3d 617, 628 (D.C. Cir. 2001).

Cutler published material that places Plaintiff in a false light that would be highly offensive to a reasonable person, and Cutler knew or acted recklessly as to the falsity of the material and how it placed Plaintiff in a false light. Cutler falsely claimed , *inter alia*, that Plaintiff:

1. liked to "do freaky shit" with Cutler,
2. "fucked [Cutler] every which way,"
3. "likes talking dirty [to Cutler]"
4. is "crazy,"

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[7] Defendant argues that because Plaintiff and Defendant were not married, Plaintiff had no reasonable expectation of privacy in his relationship with Defendant. Defendant is mistaken. Unmarried individuals have a right to privacy. "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person . . . ." *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (citing *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972)) (italics in original, underline added). Moreover, in the public blog itself, Cutler speaks in depth about marrying Plaintiff. Cutler's public blog says: "[C]an it go anywhere, i.e.[,] marriage? I don't know. He's Jewish. . . . After a few months, people around the office will start 'hearing wedding bells.' I really just want to be a Jewish housewife with a big rock on my finger." Complaint ¶ 13.

5. "implied that [Plaintiff and Cutler] would be using [handcuffs] next time,"
6. would be "turned on" by Cutler getting "scared and panicky,"
7. and "[Cutler] have nasty sex like animals," and
8. "told [Cutler] that he likes submissive women."

Complaint ¶ 31 & Appendix A.

These assertions constitue false light. *Gill v. Curtis Pub. Co.*, 239 P.2d 630, 634-36 (CA 1952) (depiction of "persons engaged in the so-called 'wrong kind of love'" constitutes false light); *cf. Geisler v. Petrocelli*, 616 F.2d 636, 637-39 (2d Cir. 1980) (valid claim for false depiction of "untoward sexual conduct which is graphically portrayed [in allegedly fictional book]").

Cutler intentionally distorted and sensationalized Plaintiff's statements and activities. Notwithstanding Cutler's comments to the contrary, Plaintiff didn't do "freaky shit [to Cutler]," Plaintiff and Cutler didn't have sex "every which way," Plaintiff didn't "like to talk dirty [to Cutler]," Plaintiff isn't "crazy," Plaintiff never "implied that [Plaintiff and Cutler] would be using [handcuffs] next time," Plaintiff wouldn't be "turned on" by Cutler getting "scared and panicky," Plaintiff and Cutler didn't "have nasty sex like animals," and Plaintiff never "told [Cutler] that he likes submissive women." Compliant ¶ 31.

When the public blog is "read as a whole and in context," Defendant's Brief at 26, Cutler's characterizions about Plaintiff's sexual activities with her, including calling them "freaky," gave the false and offensive impression that the Plaintiff demonstrated highly unusual sexual behavior with Cutler. In fact, Plaintiff's sexual activities with Cutler were rather conventional, particularly when compared to what Cutler was doing with her other sex partners. Cutler furthered the false and offensive impression of Plaintiff in her book, Complaint ¶ 31, falsely suggesting, *inter alia,* that Plaintiff was an alcoholic. *See Smith v. Huntington*

Publishing Co., 410 F. Supp. 1270, 1273-74 (D. Ohio 1975) ("The test is neither the intent of the author, nor the recognition by the plaintiff that the article might be about him. The test is whether a reasonable person could reasonably believe that the article referred to the plaintiff. . . . Viewed as an invasion of privacy case, the identification v. fictional problem is the same."); *Cf. Geisler v. Petrocelli*, 616 F.2d 636, 637-39 (2d Cir. 1980) (valid claim for false depiction "untoward sexual conduct which is graphically portrayed [in allegedly fictional book]"). All of this clearly constitutes false light.

C. Defendant Publicized Her Public Blog

1. Defendant Has Admitted That She Intentionally Publicized Her Public Blog

Cutler has admitted satisfying the publicity element of the tort of Invasion of Privacy. In a cover-story interview in the *Washington Post Magazine*, Cutler said: "I was the one writing on the bathroom wall." April Witt, *Blog Interrupted,* Washington Post Magazine, Aug. 15, 2004, at W12. Cutler said: "With a blog, you can't expect your private life to be private anymore."[8] As Cutler admitted "once Blog entries containing the aforementioned disclosures were posted, there was no guarantee that Cutler could remove them without third parties (even limited to the four people to whom she had given access to the Blog) having read them." Defendant's Brief at 37.[9]

Publicity was her goal. Cutler said: "Some people with blogs are never going to get famous, and they've been doing it for, like, over a year. I feel bad for them." *Id.* According to

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[8] http://www.playboy.com/sex/features/dc_intern/dcintern_pop.html

[9] Cutler again admits publicity: "the Blog was not publicized (within the meaning of the caselaw defining the publicity element of the tort) until . . . May 18, 2004."[9] Defendant's Brief at 21 (emphasis added). Cutler suggests that another blogger publicized Cutler's blog. However, as Cutler admits, May 18, 2004 is the date that another blogger hyperlinked to Cutler's public blog: "links to [Cutler's publicly available] Blog . . . were displayed on [Cox's] popular Washington, D.C.-centered gossip site." Defendant's Brief at 9. Cutler tries to confuse the issues by implying that Cox reproduced Cutler's statements; she did not. Cox merely hyperlinked to Cutler's own public blog. Cutler's argument is akin to arguing "I publicized the material on the radio or television, but I'm not responsible because somebody else advertised the program." This is unavailing.

blog even acknowledges as being on notice that Plaintiff is "discreet" and that she should "keep [his private facts] quiet."[20] Indeed, when Defendant announced that she was writing a book, Plaintiff requested not to be in her book. Notwithstanding that, Cutler made Plaintiff the centerpiece of that book. According to Cutler's publisher (and agent), Cutler writes a "semi-autobiographical novel that is sure to initiate a new Washington parlor game of *Who's Who*. In a witty, unapologetic voice, the novel's narrator Jackie tells the story of . . . the staff counsel whose taste for spanking she 'accidentally' leaks to the office." Hyperion/Disney Advertisement for Cutler's book (reproduced on numerous sites including Amazon.com). Moreover, Cutler continues to ignore Plaintiff's request for privacy, even in the face of litigation, by now selling her book to HBO for broadcast.

2. Even if Defendant's Assertions from Outside the Complaint Were True, Which They're Not, Cutler Cannot Make a Claim for Waiver

Even if Defendant's false claims of Plaintiff somehow retroactively consenting to Cutler's limited disclosures were true and were contained in the Complaint, both of which they are not, they would not act as a waiver of Plaintiff's right to privacy. "The Court is not prepared to conclude that public exposure of one sexual encounter forever removes a person's privacy interest in all subsequent and previous sexual encounters." *Michaels v. IEG*, 5 F. Supp 2d at 845; *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 561 (Cal. Ct. App. 1988) (plaintiff's right to privacy not diminished by telling "neighbors, friends, family members, and officials" the private facts); *Y.G. v. Jewish Hospital*, 795 S.W.2d 488 (Mo. Ct. App. 1990) (plaintiff's right to privacy not diminished after telling several people); *Multimedia WMAZ, Inc.*

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[20] Similarly, Cutler again relies on her own public blog as dispositive and falsely asserts that Plaintiff approved of her inappropriate office disclosure. Cutler further claims that this somehow would constitute "approval" of all other disclosures about which Plaintiff didn't know. Indeed, each time Plaintiff and Cutler discussed her inappropriate office disclosure, she apologized. Why would she apologize if she thought Plaintiff's actions constituted some curious form of after-the-fact consent to her previous actions?

leaving out Cutler's request of both), Plaintiff's intimate personal conversations with Cutler during sexual activity and the course of their relationship, physical descriptions of Plaintiff's naked body, the physical details of the sexual positions Plaintiff assumed during sexual activity, Plaintiff's suggestion that he and Cutler be tested for sexually transmitted diseases so that they would not have to make use of a condom, and statements made by Plaintiff regarding sexual positions bear any necessary nexus to that newsworthy topic. Complaint ¶¶ 30-31.

Moreover, in speaking of the "proportionality" element of the nexus test, the Court in *Bonome* recognized, "it is of importance that [defendant in that case] did not use [plaintiff's] name in the book. The defendants did not subject [plaintiff] to unnecessary publicity or attention." *Id.* At *20. In contrast, Cutler took pains to identify Plaintiff, using his first name (Rob), his initials (RS), his religion (Jewish), his job (Committee Counsel to the Senate Committee on the Judiciary), his specific place of residence (Bethesda, MD), the fact that he has a twin; his appearance; his resemblance to a commonly known individual; and the one specific and identifiable detail of Cutler's intimate relationship with Plaintiff that Cutler apparently had previously disclosed to colleagues and co-workers without Plaintiff's permission or knowledge at the time. Complaint ¶¶12-13.

Thus, instead of minimizing Plaintiff's exposure, Defendant exploited it. Indeed, Cutler used Plaintiff's identity to advertise the book she wrote based on the public blog: According to Cutler's publisher (and agent), Cutler writes a "semi-autobiographical novel that is sure to initiate a new Washington parlor game of *Who's Who*. In a witty, unapologetic voice, the novel's narrator Jackie tells the story of . . . the staff counsel whose taste for spanking she 'accidentally' leaks to the office." Hyperion/Disney Advertisement for Cutler's book (reproduced on numerous sites including Amazon.com); Complaint ¶¶ 27-28.

Cutler improperly cites *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888, 894 (Mass. Ct.

IV. Defendant Incorrectly Asserts the Statute of Limitations

Defendant claims that part of her invasion of privacy is time barred. Defendant is mistaken for four independent reasons: (1) the statute of limitations is three years for virtually all of Plaintiff's claims; (2) the public blog cannot be parsed into different parts; (3) the statute of limitations only starts to run when a victim could reasonably discover the harm caused by a tortfeasor; and, (4) even under Defendant's calculations, Plaintiff filed timely.

A. The Statute of Limitations Is Three Years for Most Invasion of Privacy Claims

Maryland and D.C. apply the three-year statute of limitation provided for by statute to most invasion of privacy claims.[31] Only those invasion of privacy claims that mimic defamation claims are limited to a one-year statute of limitations, i.e., false-light claims. *Smith v. Esquire, Inc.*, 494 F. Supp. 967, (D. Md. 1980).

Accordingly, in *Smith*, the Court held that if a plaintiff brings a claim for defamation and false light for the same underlying facts, the statute of limitations for the defamation action shall control both claims, because of their similarity. *Id.* If, however, if there is a distinct invasion of privacy claim, such as for the disclosure of private facts, then there is no such restriction on the

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> imposed for publicizing matters concerning the private life of another "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." As [the Restatement] points out, not all matters are of legitimate public interest:
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> > The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public, with decent standards, would say that he had no concern.

Id. at 308 (citations omitted).

[31] Although, a choice of law analysis would have to investigate the applicability of Maryland law as the domicile of Plaintiff, the law of Maryland and the District of Columbia are the same on these issues. *Cf. McSurely v. McClellan*, 753 F. 2d 88, 110 (D.C. Cir. 1985) ("We discern no substantial disparity in the premises underlying privacy tort law in the two jurisdictions [of the District of Columbia and Kentucky]").

statute of limitation.[32] The District of Columbia articulated the same distinction in deciding whether the statute of limitations applicable to any invasion of privacy claim shall be the one-year statute that applies to defamation actions or the general three-year limit. *See Grunseth v. Marriott Corp.*, 872 F. Supp. 1069, 1074-1075 (D.D.C. 1995) (invasion of privacy only limited to one year because the claim was the same as the one for defamation).

In the instant case, there is no defamation action, and even if there were, Cutler acknowledges that Plaintiff brought an invasion of privacy claim based on the disclosure of private facts – which is clearly independent from any claim of defamation. Defendant's Brief at 10-11. Accordingly, Plaintiff's claim for the disclosure of private facts is governed by the three-year statute of limitations. The false light claim is governed by the one-year statute, and, as discussed below, Plaintiff filed within that period, as well.

B. Defendant's Attempt to Parse Her Single Public Blog into Separate Documents Is Unavailing

Cutler's public blog cannot be parsed into pieces. It is one document, and when accessed on the Internet, the whole document is produced -- as one. Complaint Exhibit A. Cutler admits exactly this in her brief; she says, "read as a whole and in context, Cutler's Blog . . . ." Defendant's Brief at 26 (emphasis added); *see also* Defendant's Brief at 33 ("Read in context, Cutler's . . . Blog entry for 9:53 a.m., . . . appears to reflect . . ."). In fact, Plaintiff's colleague who made him aware of the public blog, identified him as the subject based on the entirety of the public blog. Defendant cannot now claim that the document that she herself admits is one text, should now be parsed for the benefit of her strained statute of limitations' argument.

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[32] The reason why this limitation only applies to the false light branch of the invasion of privacy tort and not to the rest of the branches is because false light has significant overlap with defamation. To have a different statute of limitations for these very similar causes of action would allow parties to use false light as an end-around the statute of limitations on defamation. As such, the three year statute of limitations applies to the public disclosure of private facts claim and the intentional infliction of emotional distress claim.