



Plaintiff's Response to Motion to Strike, Ex. 1 (Jan. 2008 Fernald Deposition) at 26:17-23 ("Q. All right. Has Down East Enterprise done any self-publishing? A. Define self-publishing for me in that sense. Q. Okay. Let's put it this way: Does Down East accept payment from potential authors or contributors to print or publish material? A. Yes"). It is hard to understand how, in combing Mr. Fernald's deposition transcript for their request to strike, Booksurge missed this key passage. In addition to Mr. Fernald's experience with self-publishing, he also has nearly forty years experience in publishing, including the practices and standards observed in the publishing industry. Plaintiff's Statement of Additional Material Facts ¶¶ 56-57, 62.

The issue of Booksurge's status as a "print-on-demand" publisher versus a "traditional" publisher remains a distinction without merit. As more fully set forth in Plaintiff's Motion for Partial Summary Judgment (Docket No. 87), "publisher" has broad meaning in the defamation context and includes "any person who automatically republishes or distributes" defamatory material. *Batzel v. Smith*, 351 F.3d 904, 907 (9<sup>th</sup> Cir. 2003) (citing W. Page Keeton et al, *Prosser and Keeton on the Law of Torts* § 113 (5<sup>th</sup> Ed. 1984)). There are "primary publishers" and "secondary publishers" or distributors, disseminators or transmitters. Beyond these main-line distinctions, as pointed out in Plaintiff's Motion for Summary Judgment, further differentiation is not made between so-called "traditional" publishers such as Random House, academic publishers such as Cambridge University Press, magazines, vanity presses, print-on-demand companies and the other types of publishers in the marketplace. To the extent they publish, republish or distribute defamatory material, they can be held legally liable for defamation regardless of the exact title they hold, or position they occupy in the literary marketplace.

The issue, as set forth in Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment (Docket No. 129), is one of negligence as defined by Maine law: what a



CERTIFICATE OF SERVICE

I, Bernard J. Kubetz, hereby certify that on May 16, 2008, I electronically filed the foregoing Response to Booksurge's Request to Strike with the Clerk of the United States District Court using the CM/ECF system, which will send notification of such filing to the following:

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