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May 9, 2000

VIA FACSIMILE AND
CERTIFIED MAIL

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Gentlemen:

This firm represents Harvey Rosenfield and the Consumer Education Foundation (hereinafter "CEF"), a non-profit consumer advocacy organization he established and by which he is employed. On Thursday, May 4, 2000, the Orange County Register published an article by Daniel Weintraub (the "Article") concerning Mr. Rosenfield that contains serious errors and omissions. Mr. Weintraub's Article falsely portrays Mr. Rosenfield's and CEF's conduct, implying it is the same or similar to that of Insurance Commissioner Chuck Quackenbush who has been accused of serious, and possibly criminal, misconduct.

I am writing pursuant to California Civil Code §48a to demand that the Register retract and correct the false and defamatory statements and implications contained in the Article and pay reasonable attorneys' fees incurred to obtain a correction and publish it as prominently as the original offending Article.

The Article is replete with suggestions and implications that Mr. Rosenfield has engaged in the same or similar type of improper conduct which has been alleged against Mr. Quackenbush. Mr. Quackenbush has been accused by other newspapers to have engaged in breaches of both his legal and ethical duties. Principally, the allegations against Mr.

Quackenbush center on his alleged misuse of his office and of a non-profit foundation resources for personal gain. In order to understand the disparaging impact of the Article's comparison of Mr. Rosenfield to Mr. Quackenbush, the following is a summary of the allegations levied against Mr. Quackenbush, along with citations to laws governing and/or prohibiting that conduct (the list is not meant to be exhaustive):

- Mr. Quackenbush refused to order or impose fines of up to $3 billion his staff recommended against several insurance companies. Instead, insurance executives were called in and ordered to make tax deductible donations totaling approximately $12 million to non-profit "foundations" Mr. Quackenbush set up. This conduct may constitute extortion under Cal. Penal Code §518, et seq. Moreover, Mr. Quackenbush had no authority to establish non-profit organizations, according to an opinion by the California Legislative Counsel (April 26, 2000). State law requires all fines assessed against insurance companies to be deposited in the state treasury.

- Mr. Quackenbush accepted campaign contributions from insurers during and after the time in which agency proceedings against the companies were underway. This violates Gov. Code §84308 and in these circumstances may also constitute bribery in violation of Penal Code §§67 and 68.

- The non-profit organizations established by Commissioner Quackenbush and directed by him and state employees on his staff arranged for the foundations to donate funds in ways which benefitted Mr. Quackenbush both directly and indirectly. For example, $3,000,000 was spent on television commercials in which Mr. Quackenbush appeared; $500,000 was given to a Sacramento organization in exchange for Mr. Quackenbush personally obtaining a seat on the Board of Directors of the organization; $263,000 was donated to a sports camp attended by Mr. Quackenbush's children. These arrangements may violate Gov. Code §87100. Gov. Code §1090 provides for civil and criminal penalties for such conduct by public officials.

- Foundation money was used to make grants to Quackenbush's business partners. This may represent a violation of state campaign finance laws. (*See* Gov. Code §§89510, et seq.) It may also violate non-profit laws banning self-dealing and misuse of non-profit assets. (*See, e.g.*, Internal Revenue Code §503(b), 26 U.S.C.A. §503(b); California Corporations Code §§5210, 5211, 5213, 5227, 5231 and 5233).

- Foundation money was also used to make grants to other companies or individuals whose principals sit on the Board of Directors of the foundations or were related to such Board members. Unless approved by a disinterested board majority, this is impermissible self-dealing . (*See*, Cal. Corp. Code §§5210, 5211, 5213, 5227, 5231 and 5233).

The allegations against Mr. Quackenbush are extremely serious. Indeed, much of Mr. Quackenbush's alleged conduct may be criminal and punishable by imprisonment. The allegations and accusations against Mr. Quackenbush have received enormous publicity, and have led to investigations of Mr. Quackenbush and his Department by the state Attorney General and two legislative committees.[1] As a lead editorial on Sunday, May 7th, the Los Angeles Times called upon Mr. Quackenbush to resign.

Despite the gravity of the allegations against Mr. Quackenbush, and the absence of any such conduct on the part of Mr. Rosenfield or the CEF, the Article's theme of comparing Mr. Rosenfield to Mr. Quackenbush begins in the very first sentence of the Article which states:

"Chuck Quackenbush is not alone..." In the very public context of the Quackenbush scandal, the scope and seriousness of which is recognized and reiterated in the Article, this statement implies that Mr. Rosenfield is facing the same charges or the same type of charges that Mr. Quackenbush is facing.

The simple unadorned truth is that no charges of any kind have been leveled against Mr. Rosenfield, nor can any be made, since in the establishment and operation of the foundation, Mr. Rosenfield and the CEF have employed counsel and have scrupulously adhered to and followed all legal requirements.

The Article goes on to state: **"One of Quackenbush's chief accusers, consumer advocate Harvey Rosenfield, has a similar, though not identical foundation of his own, also created with insurance-company money." (Emphasis added).** Once again, the language wrongly equates Mr. Rosenfield's lawful creation of a non-profit foundation with Mr. Quackenbush's improper creation of an organization through what has been described by insurance companies as extortionate tactics.

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1 In fact, last Friday, the Attorney General filed suit against one of Mr. Quackenbush's foundations and its Board of Directors alleging breach of fiduciary duty and seeking to impose a constructive trust and recover restitution. In that case, the Court froze the foundation's assets pending further efforts by the Attorney General to involuntarily dissolve the corporation.

The Article subtly confirms the unlawful comparison by referring to Mr. Rosenfield's foundation as "his own," implying that Mr. Rosenfield owns the organization and is its only beneficiary. This is precisely the kind of misconduct Mr. Quackenbush is alleged to have engaged in, as summarized in the second paragraph of the Article ("The foundations...have so far mostly helped Quackenbush and his friends.") Further, the statement that the CEF was "also created with insurance money" equates Mr. Rosenfield's creation of a non-profit with the entirely different manner in which Mr. Quackenbush improperly and potentially unlawfully established four other foundations - by using his authority as Commissioner to force insurers to make payments.

The Article continues, stating that Mr. Rosenfield **"Created the foundation with $5 million donated by Allstate Insurance when Rosenfield agreed to drop a lawsuit against the firm."** This statement is demonstrably false and it further wrongfully implies that the purpose in bringing the suit was ignored or otherwise not achieved. This statement is clearly intended to equate Mr. Rosenfield's conduct as a lawyer on behalf of Foundation for Taxpayer and Consumer Rights ("FTCR") with Mr. Quackenbush's decision to drop over $3 billion in fines against insurance companies in exchange for "donations" to the foundations Quackenbush established or caused to be established.

In fact, Mr. Rosenfield never "dropped" the lawsuit, rather Mr. Rosenfield settled the lawsuit, in a manner very much different than the approach taken by Quackenbush. Notably, Mr. Weintraub knowingly made the false statements in the article since he knew, from the settlement agreement and other materials Mr. Rosenfield provided to him, that the settlement negotiated by Mr. Rosenfield and attorneys from the Foundation for Taxpayer and Consumer Rights contained the following:

- Allstate's agreement to pay all legitimate policyholder claims by offering to reopen, reinvestigate and reimburse, if necessary, any previously denied or rejected losses. Allstate and other experts estimated the amount that might be returned to policyholders under the settlement between $50 and $150 million. (Mr. Weintraub mentions the settlement of a companion lawsuit brought by other plaintiffs, but neglects to mention that it was part of the overall general settlement negotiated by Mr. Rosenfield's lawyers);

- Allstate's agreement to cover all policyholders' legal expenses and costs above and beyond any repayments;

- Allstate's agreement to rectify all errors it had made and Allstate's commitment to reforms going forward.

Weintraub's Article fails to mention any of these crucial elements of the settlement, all of which achieve very significant legal protections for Allstate's policyholders. (Mr. Quackenbush's decision to forego litigation against certain insurers included no such protections.) To describe the lawsuit as having been "dropped" in exchange for money is grossly inaccurate, misleading and unlawfully reinforces the false and defamatory implication of wrongdoing by our clients. In fact, such a *quid pro quo* would be a violation of the ethical duties and responsibilities of Mr. Rosenfield and the other attorneys at the FTCR. Therefore, not only is the statement false, its implication of such ethical impropriety renders the statement defamatory per se. *See*, Cal. Civil Code §45a.

The Article continues on the same theme. It states, **"More than a year after it was created, however, the foundation has little to show for its money. Like Quackenbush's foundations, [the CEF's] big plans have yet to be fulfilled."** This statement, facetious and false on its face, also equates Mr. Quackenbush's conduct with that of Mr. Rosenfield in the operation of the foundations. Again, such an equation fails. Mr. Quackenbush's foundations have spent most or all of the money they received on expenditures that appear to be outside the mission of the organizations. In many cases, newspapers have reported, the funds were utilized to benefit Mr. Quackenbush, his family, their acquaintances and political consultants, both directly and indirectly. Such misuse of monies and self-dealing is unlawful under state and federal laws governing non-profit organizations. Any officer or director of a non-profit organization which engaged in such conduct, or permitted the organization to do so, would be in breach of his or her fiduciary duties and could face civil penalties as a result.

By contrast, virtually none of the funds of the CEF have been spent; indeed, the Board of Directors directed Mr. Rosenfield to carefully consider how best to spend the money in pursuit of its mission and then make recommendations to the Board. Mr. Rosenfield went so far as to provide Mr. Weintraub, on a confidential basis, a detailed, fourteen-page list of the projects presently underway. Mr. Rosenfield has not handled any funds in the way Mr. Quackenbush has. To suggest otherwise is defamatory.

In the face of these inaccurate "comparisons," the Article's weak attempt to differentiate Mr. Rosenfield from Mr. Quackenbush is virtually meaningless. The Article states, **"To be sure, there are differences..." Mr. Quackenbush used his office to "extract money from insurers, while Rosenfield is a private citizen."** Far from correctly describing the enormous differences between the two, this statement in fact encourages and reinforces the impression of common wrongdoing. The fact that Mr. Rosenfield is a "private citizen" would not excuse extortion - the "extraction" of money from insurer that the sentence implies both engaged in. Indeed, the true difference is that Mr. Rosenfield did not "extract" money from Allstate at all, instead, he negotiated a settlement of a lawsuit.

Furthermore, Mr. Rosenfield did not negotiate the Allstate settlement as a "private citizen," but as a lawyer for a non-profit organization. This, in itself, is a crucial distinction, because Mr. Rosenfield's conduct and obligations as an employee of a non-profit are significantly different and greater than those applicable to a private attorney. Nowhere in the article does Mr. Weintraub identify the crucial fact that FTCR brought the lawsuit, not Mr. Rosenfield. The clear impression intended by Mr. Weintraub is that Mr. Rosenfield was acting alone and for his own self-interest.

Finally, the glaring omission of the many other differences between Mr. Rosenfield, the FTCR settlement of the Allstate case and Mr. Quackenbush's conduct is highly damaging to Mr. Rosenfield's reputation. Instead of accurately reporting on the work that Mr. Rosenfield conducts on behalf of consumers, the Article states, **"Rosenfield, 47, is drawing a $100,000 annual salary from the nonprofit foundation, and will do so for life if he wants to."** This false statement reveals the malicious nature and intent of the reporter and the Register. Mr. Rosenfield has no guarantee of a lifetime salary. As your reporter should know, executive compensation decisions are required by law to be made by independent majorities of the board of directors of a non-profit. Mr. Rosenfield has no guarantee that the Board will decide to retain him, any more than does the head of any foundation. Further, Mr. Rosenfield does not have an employment contract with the CEF.

Moreover, the official by-laws of the organization as approved by the Board Members at the first Board meeting in April of last year state that Board Members are <u>not</u> appointed by Mr. Rosenfield, but are elected to the Board by the Board. (As incorporator of the CEF, Mr. Rosenfield designated the initial board members).

Falsely stating that Mr. Rosenfield has a "lifetime" job with the CEF conveys the impression, which the article strives to confirm, that Mr. Rosenfield is treating the organization as a personal sinecure. This is both false and defamatory.

Read as a whole, the article is a dismaying effort to impugn Mr. Rosenfield's integrity and credibility by comparing and associating Mr. Rosenfield with an individual whose questionable and perhaps unlawful conduct may cause him to be removed from his office and sued and/or criminally prosecuted. Yet, despite its false and disparaging nature and despite the fact that Mr. Rosenfield informed the reporter <u>after</u> Thursday's publication that the story contained errors and was disparaging, the Register revealed its true motive to harm Mr. Rosenfield by publishing <u>another</u> story on Friday, May 5, 2000, which reiterated the main points of the Thursday story, including, but not limited to, the false statement that Mr. Rosenfield has a "lifetime" salary. Moreover, on Sunday, the lead editorial in the Register reiterated the allegations yet a third time.

As you are no doubt aware, Mr. Rosenfield's work as a public interest lawyer and as a consumer advocate is based on the public's trust in his actions and reliance on his integrity. Mr. Rosenfield has worked for years to develop this public trust and respect. Your unjustified disparagement and publication of false information about Mr. Rosenfield could have significant consequences for his ability to pursue his profession. Indeed, a fair reading of the articles suggests that that is your purpose.

No doubt the Register will defend itself on the ground that the suggestion that Mr. Quackenbush and Mr. Rosenfield are engaged in the same misconduct is qualified in several places in the article. But, as noted above, the insincere qualification is juxtaposed in such a manner as to exacerbate the disparagement, not minimize it. For example, the assertion that Mr. Rosenfield's actions are "well within the law" itself employs a cliched phrase associated with legalese and suggests that Mr. Rosenfield's lawful conduct may only comply in a technical sense.

However, even if it were a less shaded statement of the fact that Mr. Rosenfield has scrupulously respected non-profit requirements, that one phrase cannot exculpate the Register for the parade of "similarities" the article raises between the Commissioner Quackenbush and Mr. Rosenfield. A person reading the article as a whole could reasonably come to the conclusion that Rosenfield has acted improperly. Thus the article defames not only Mr. Rosenfield, but the CEF as well. The damage done to Mr. Rosenfield cannot be underestimated. The Article remains "alive" and accessible forever throughout the United States and the world due to the availability of computer retrieval systems such as Nexis. The damage to Mr. Rosenfield, therefore, will continue.

This is not the first time your paper has defamed Mr. Rosenfield. On September 28, 1997, the Register published a hostile, poorly-researched article by one of Mr. Weintraub's colleagues in the Sacramento Bureau essentially alleging, like the current article, that Mr. Rosenfield's work benefits only himself. I refer you to Mr. Rosenfield's extensive explication of the flaws in that piece of work in that article. At that time, Mr. Rosenfield pointed to earlier Register publications, such as the editorial "Rosenfraud," to raise the question of the newspaper's malicious intent. With respect to that 1997 article, Mr. Rosenfield chose to accept the paper's retraction - one of the more lengthy I have come across - and let the matter rest. I believe his willingness to do so reflects his support of the First Amendment and his respect of the importance of a free press.

Mr. Rosenfield further understands and respects that as a well-known figure in the area of consumer rights, he is properly subject to intense public scrutiny (although until Thursday's piece, it appears that other than the 1997 piece, the Register has apparently not thought Mr.

Rosenfield's public interest work to be of sufficient interest to cover it at all in the intervening three years). Indeed, Mr. Rosenfield's opinions, views and actions have been challenged - vociferously and in a personal manner - on many occasions. What has not been challenged is his honesty and integrity - except by the Orange County Register.

In reviewing the conduct of the Register in 1997, I am not sure I would have counseled Mr. Rosenfield under those circumstances to forego a judicial decision vindicating his reputation. However, Mr. Rosenfield's tolerance of false and defamatory statements and the implications of civil and criminal wrongdoing by the Register is unquestionably at an end. Last Thursday's article, while written in a less clumsy fashion than the previous article, unlawfully disparages Mr. Rosenfield in a manner that is both unacceptable and impermissible.

For these reasons, Mr. Rosenfield intends to clear his name in a court of law unless the Register immediately retracts and corrects the defamatory implications set forth above. As demonstrated, Mr. Weintraub and the Register have carefully and deliberately sought to imply to their readers that Mr. Rosenfield's actions and conduct are virtually the same as Mr. Quackenbush's and that Mr. Rosenfield is guilty of serious wrongdoing. Your blatant and malicious conduct is, without doubt, actionable. Liability will attach not only to the false statements of fact that you have made in the Articles, but to the defamatory implications arising therefrom. See Milkovich v. Lorain Journal, 497 U.S. 119 (1990). As the California Supreme Court has stated:

> "We have long recognized that false inferences or implications raised by the arrangement and phrasing of apparently non-libelous statements can be as injurious as explicit epithets."

Kapellas v. Kaufman, 1 Cal.3d 20, 33, 81 Cal.Rptr. 360 (1969). *See also*, Forsher v. Bugliosi, 26 Cal.3d 792, 155 Cal.Rptr. 628, 634 (1980) (test is whether by reasonable implication a defamatory meaning may be found in the communication); Eastwood v. National Enquirer, 123 F.3d 1249, 1256 (1997); Selleck v. Globe International, Inc., 166 Cal.App.3d 1123, 212 Cal.Rptr. 838 (1985).

Moreover, publication of the Article is not merely negligent but malicious. As you are well aware, malice can be proven in a libel case by evidence of the publisher's failure to investigate properly, by fabricating information, by falsely attributing quotes, by reliance on sources known to be unreliable, by reliance on sources known to be biased against the subject of the article, and by reliance on persons who are not in a position to know the information communicated, among other factors. *See, e.g.* St. Amant v. Thompson, 390 U.S. 727 (1968); Readers Digest Association, Inc. v. Superior Court, 37 Cal.3d 244 (1984).

Additionally, the Register may not escape liability by purposefully avoiding the truth. Harte-Hanks v. Connaughton Communications, Inc., 491 U.S. 657 (1989). Mr. Rosenfield's pre-publication contact with Mr. Weintraub, as well as Mr. Rosenfield's contact with you after Thursday's publication placed the Register on notice that any publication making such statements and implications would be false. Your decision to re-publish false and defamatory statements after your receipt of such information reveals your intention to avoid the truth.

Based on its reckless conduct, the Register may also be subjected to substantial punitive damages in addition to compensatory damages should Mr. Rosenfield decide to litigate. Mr. Rosenfield stands ready to protect his rights by filing a suit for defamation in Los Angeles if a full and complete correction and apology is not promptly published as prominently as the original piece. A failure to retract may be considered probative of actual malice. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

This letter does not purport to comprehensively or exhaustively state all of Mr. Rosenfield's rights, claims or contentions. Nothing contained herein is intended as, nor should it be deemed to constitute, a waiver or relinquishment of any of his rights or remedies, whether legal or equitable, all of which are hereby expressly reserved.

Sincerely,

GLASSMAN, BROWNING & SALTSMAN, INC.

By: ANTHONY MICHAEL GLASSMAN

AMG:bb
cc: Harvey Rosenfield

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