JEFFREY L. CLEMENS
412 Dockway Drive
Huron, Ohio 44839



IN THE UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (BOSTON)

| | |
|---|---|
| UNITED STATES OF AMERICA, | No. 1:10-MJ-01016-JGD-1 |
| Plaintiff, | **DEFENDANT'S MOTION TO DISMISS COMPLAINT** |
| v. | |
| JEFFREY L. CLEMENS | |
| Defendant. | Hon. Judith G. Dien |

The defendant, Jeffrey L. Clemens, does hereby motion to dismiss the instant complaint dated March 16, 2010, on the following grounds:

A) The complaint is insufficient on the face to establish probable cause as for a violation of 18 U.S.C. § 875(c) as the alleged facts do not constitute a "*true threat*";

B) The defendant, in the communications at issue, in fact, makes no threat of any kind and states, at most, mere "thoughts and desires", expressions that clearly fall under First Amendment "*protected speech*";

C) The complaint is fatally defective as it contains prejudicial factual inaccuracies and false characterizations with respect to the public record upon which it relies in greater part;

D) The complaint, given the manner in which it was allowed to impact civil litigation involving Clemens and the alleged "victim" and vice versa, and in light of (A) through (C), has every appearance of have been brought with malice.

## I. INTRODUCTION

Having attempted, through the civil justice system, to bring claims of his own, Clemens now ironically finds himself a subject of a criminal complaint brought in the very courthouse at which he himself sought to resolve matters by rule of law. But it is the rule of the law that offers up one last twist in this tale of tattered litigants. As the following argument will show, the instant complaint is without sufficient basis to charge the defendant and, even more so, is without sufficient basis to warrant a trial as, on its face, there is no triable issue.

## II. STATEMENT OF THE CASE

On October 27, 2009 Clemens brought a civil action in U.S. District Court [Boston] against the Town of Sciutate, Massachusetts [Case No. 09-CA-11821-WGY], and others, for malicious prosecution relating to two misdemeanor criminal charges stemming from an inquiry Clemens made to a Scituate resident in May 2005. The charges remained open, in one way or another, for over three and a half years before their ultimate dismissal and final disposition in late 2008. Upon service of parties, Attorney Stephen Pfaff, on December 26, 2009, answered for the town and two other defendants despite his being a named defendant. On January 13, 2010 Clemens motioned to disqualify Pfaff as counsel to other defendants but the motion was denied.

On March 5, 2010 Attorney Pfaff motioned to dismiss the Clemens civil case on the basis of rulings made in a prior related civil case [Case No. 07-CA-10845-RGS] whose underlying legal basis was contingent upon final disposition of a related state court appeal [Case No. 2008-P-2138, Massachusetts Court of Appeals] otherwise fully briefed and argued as of March 5, 2010 and awaiting a decision. On March 8, 2010, upon receiving Pfaff's dismissal motion, Clemens emailed Pfaff over concerns as for the motion's timing, its avoidance of discovery, misconduct issues, matters relating to disqualification of the judge to whom Pfaff motioned, among others.

On March 9, 2010 the judge to whom Attorney Pfaff motioned, U.S. District Court Judge William G. Young, ordered Clemens to Show Cause as to why his *Clemens* v. *Town of Scituate* case should not be dismissed with prejudice for a supposed "abuse of the civil justice system", an apparent reference [Young gave no cause] to the Clemens email to Pfaff on March 8, 2010 that was presented to Young in an ex parte communication that has not been disclosed publicly,

On March 16, 2010, FBI Special Agent Rachel Boisselle filed a criminal complaint in U.S. District Court [Boston] seeking an arrest warrant for Clemens. Magistrate Judge Judith Dien immediately issued said warrant. The following day, on March 17, 2010, Clemens was arrested at his home in Ohio for an alleged threat in the Pfaff email, detained for five days and, upon conditions, released on March 22, 2010. On April 1, 2010 Clemens attended a hearing in Boston of his civil case at which time Judge Young dismissed the Clemens case against Pfaff, the Town of Scituate and others. As result of the Boisselle complaint, Clemens is ordered home confined with electronic monitoring wherefrom he makes this motion for dismissal and release.

## III. ARGUMENT

### A. The complaint is insufficient on the face as there is no *true threat* alleged.

There is absolutely nothing cited in the Boisselle complaint referring to specific actions or expressions on the part of Clemens that represent an intent to communicate a threat of any kind to alleged victim, Stephen Pfaff, and especially, none of a nature or kind that represent an imminent, unequivocal, unconditional and specific threat, what is otherwise called a *true threat*. None whatsoever. Boiselle merely cites a selection of out-of-context rhetorical and adversarial tough talk expressing, if anything, thoughts and desires [*See* Argument B] and not a threat of any kind. Can we garner from the subject email any expression at all that affirmatively answers the all-important question, "What did Clemens say he was going to do to Pfaff, or maybe do, either

now [time of email] or in the near future?" No, we cannot. Such expressions are simply not there. Did Clemens ever say he intended to harm Pfaff? No, he did not. The complaint fails.

The idea of *wishing* to see a so-called "hurt" or "harm", however construed or presented [say, for instance, the "hurt" associated with a lawyer being disbarred or one of his clients going to prison], if it exists anywhere in the Clemens email, is purely in the realm of wishful thinking of which people have an indisputable constitutional right to engage. Even the "taken to a chop shop on Staten Island, whatever" statement [¶ 4] is fantasy and not an act purported to be done by Clemens nor by anyone he may know or direct to do. Any attorney [say, Pfaff] who is alleged to have suborned perjury directly causing someone's imprisonment [as Clemens clearly infers in his email], frankly, must accept impassioned rhetoric as par for the course, as something to be expected of an adversary in litigation wherein an attorney chose to misconduct himself and cause "many days of incarceration" as Clemens, in his email, clearly accuses Pfaff as having done.

In any case, when it comes to discipline or "just reward" for alleged misdeeds, there are numerous forms of "hurt" done to people, notwithstanding how it is threatened, stated, implied or conveyed, that are perfectly legal, say, disbarment or being sent to prison. These actions "hurt" but are, of course, "legal". For communications to have any hope of being deemed "true threats", if referring at all to some event however immediate or far off in the future, and especially that which is non-specific or overly broad as to an actor or act, they must refer, in the minimum, to a "hurt"or "harm" that is unlawful. The Boisselle complaint does no such thing. And for obvious reasons. The Clemens email simply does not at all refer to he taking any unlawful action.

The courts are quite clear on what constitutes a "true threat" and what does not, such as, for instance, "statements expressing musings, considerations of what it would be like to [injure] someone, or desires to [injure] someone, however unsavory, are not constitutionally actionable

under §875(c)." *U.S.* v. *Baker*, 890 F.Supp.1375, 1386 (1995) *Baker* further asserts [Note 16] and clarifies the constitutional standard found in *Kelner*, 534 F.2d 1020 (1976) [a statement charged under §875(c) shall contain, at the very least, some language construable as a serious expression of an intent imminently to carry out some injurious act] :

> This test is not satisfied by the finding that the desires expressed are so deviant that the person making the statement must be unstable, and therefore likely to act in accordance with his or her desires at any moment. *Something in the statement itself must indicate some intention imminently to act. Otherwise, the statement may be unsettling or alarming, but is not a true threat for the purposes of the First Amendment.* [Ibid 1386] [emphasis added]

In other words, absent a statement indicating an intention to act within some reasonable period of time, the statements under scrutiny [e.g. the Boisselle citations in her complaint] may be unsettling or alarming but do not constitute a true threat. *Unsettling* and *alarming*. A person, yes, may be unsettled and alarmed by someone saying, "I really, truly and sincerely wish you were [harmed]", in fact, wholly alarmed but so long as there is no statement indicating that the person saying those words intended to harm the reader of them, there is no true threat by them. This is not only consistent with *Baker* but quite logical as well. *Hoping* and *wishing* are simply not the same as *intending*. Without satisfying either the statutory element of intent or that which may have come to be defined in case law, the complaint fails on the face.

Boisselle's complaint, even assuming that everything Clemens said in his email to Pfaff is "true", still does not state facts sufficient to charge Clemens. There simply is nothing for a jury to conclude about the email that is any different than which can be, and should be, decided as a matter of law. Where the factual proof of a "true threat" is "insufficient as a matter of law", the indictment [i.e. complaint] is properly dismissed before reaching the jury. *U.S.* v. *Baker*, 890 F.Supp. 1375, 1385 (1995) quoting *U.S.* v. *Carrier*, 672 F.2d 300, 306 (2nd Cir., 1982)

**B. The complaint refers to a communication clearly falling under constitutionally *protected speech*.**

We may first draw from *Watts* v. *United States*, 394 U.S. 705 (1969) wherein the court, although not addressing § 875( c) directly, but rather a similar statute [§ 871(a) Threats to the President], recognized that: "[a] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." [at 707] And because § 875 (c) is a general intent crime, intent must be proved by "objectively looking at the defendant's behavior in the totality of the circumstances," rather than by probing the defendant's subjective state of mind. *U.S.* v. *Baker,890* F. Supp. 1375, 1380 (1995) quoting *United States* v. *DeAndino*, 958 F.2d 146, 149 (6th Cir., (1992)

And what are the "totality of circumstances" surrounding Clemens and his email? Issues, *serious* issues of attorney misconduct [by Pfaff], perjury [by Pfaff's client, O'Hara], an ambush trial on a disorderly conduct charge [by Moynahan] leading to a six month term of incarceration for Clemens, disqualification issues [Stearns], the movie Rain Man [credited to a man who went to law school with Judge Young] and a Rule 12 motion [by Pfaff] drawing on a misbegotten trial conviction [on state appeal] and a near worthless Stearns Order. Even so, Clemens, at this time, does not require this court to raise or lower any lawful threshold but to recognize that one exists.

Whether or not a prosecution under § 875 (c) encroaches on constitutionally protected speech is a question appropriately decided by the Court as a threshold matter. [The Supreme Court] has held that "when facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law" requiring a judicial determination". *Dennis* v. *United States*, 341 U.S. 494 (1951)

And if there is any doubt as to the intent behind the Clemens email, the answer lies but in the email itself [last paragraph]: "Here's to law and order. And, yes, *you [Pfaff] can expect a full briefing from me in the coming days addressing your [motion*]" [emphasis added] It seems that Clemens was really just saying that can Pfaff can expect a "full briefing" as for an opposition to his Rule 12 motion. Add a little tough talk, and what does one have? A little constitutionally protected tough talk is all and, at that, talk that does not meet the *Kelner* requirement, that a so-called expression of a threat be "unequivocal, unconditional, immediate and specific [as to] convey a gravity of purpose and imminent prospect of execution." Kelner, 543 F.2d at 1027

**C. The complaint is fatally defective as it contains prejudicial factual errors and false characterizations with respect to the public record upon which it relies in greater part.**

Agent Boisselle states on Page 2 of her affidavit that "[on] August 18, 2009 CLEMENS filed another suit against the Town and others, this time alleging a violation of 28 U.S.C. 1332. [09-11821-WGY], but apparently based upon the same events referred in the earlier suit." This is an absolutely incorrect statement. For one, Clemens filed his second suit on October 27, 2009 and *not* August 18, 2009 [*See Attached* Complaint, Page 1]. This error is highly prejudicial as it gives the wrong impression that Clemens filed his second suit as a reaction to his first suit being dismissed. His first case alleged false arrest on a disorderly conduct charge and his second case alleged malicious prosecution for two other separate and distinct charges.

That is to say, likewise, Boisselle errs by, instead of citing malicious prosecution as basis for the second Clemens suit, which is clear and obvious [*See Attached* Complaint, Page 1], her stating that Clemens brought suit for a "violation of 28 U.S.C. 1332", a statute relating merely to jurisdiction and not to any actionable cause. In an affidavit seeking to have someone arrested and taken into custody, these are serious and questionable errors.

But Boisselle's initial errors are not nearly as revealing as her ultimate and most damning error, that is, her statement that Clemens, in his first suit, "alleged violations stemming from his arrest and conviction for disorderly conduct and impersonating a private investigator." [Page 2] For one, at the time Clemens filed his first suit [May 2007] a disorderly conduct conviction was as yet 16 months away [September 2008], other dispositions over 18 months way. These errors. willful misrepresentation, detract from the tone and tenor – call it the very message – of the email communication in question, that Pfaff, as inferred by Clemens, was responsible for the disorderly conduct conviction by acts attributable to perjury by his client [O'Hara] in a trial conducted by "Moynahan" who, as judge, sentenced Clemens to "many days of incarceration" that, as implied in the email, led to Clemens, while "at PCCH [Plymouth County Correctional Facility]", being "punched in the face". [Email, ¶¶ 4-7] The disorderly conviction [and the subsequent Clemens jailing], referred by footnote in the Boisselle complaint [Page 2], had almost everything to do with why Clemens, as should be clear to a reasonable person [removed from "politics"] reading it, sent his email to Pfaff in the first place. By willfully misconstruing the Clemens lawsuits and the disorderly conduct issue, Boiselle is wantonly misleading the court to say nothing of the fact that Clemens at no time was arrested or charged with [or, for that matter, "admitted to sufficient facts" with regard to] "impersonating a private investigator". Again Boisselle presents verifiably incorrect information in her complaint that serves to entirely detract the reader from knowing and understanding the underlying Clemens litigation.[1] [*See* Footnote 1]

[1] The actual offense at issue is "*unlicensed* private detective". There is no such thing as a charge of "*impersonating* a private investigator". As Clemens has argued for years [but no one, even the FBI, Boisselle especially, took note], he was never required to be licensed for making a personal inquiry. As to why the FBI is calling the charge "impersonating a private investigator" is a good question as it appears to be willful error. What is the reader, in this case, a magistrate judge, to think? *Impersonating* already sounds like there was something premeditated about the actions of

But this is not the end to the errors. Boisselle further notes, in her affidavit, that "[the] email is produced in its entirety as Attachment A." [Page 3] Not true. As is evidenced in her second attachment [Attachment B], the email to Pfaff, as all email messages have the capacity to do, contained a header message that clearly said to Pfaff, "For Your Information". Again, by Attachment A not showing this header message, from Clemens to Pfaff, dramatically affects the perceived tone and tenor of the email in question. It [the header] says from the beginning, "What follows is *for your information*" and surely does not suggest language of a coercive, threatening or extortionate nature. Why does Boisselle continually err as she does? To prejudice the complaint? Yes, of course. But are there other reasons? Indeed, there are.

**D. The complaint, by all appearances, has been brought with malice.**

The government's witness and supposed victim, Stephen Pfaff, has much to gain from the charging of Clemens to say nothing of the benefits to accrue Pfaff's clients, who have already gained considerably from a recent order [*See Attached* Young Order Dated April 2, 2010] by the very judge referred in the very first paragraph of the very communication for which the current complaint alleges is a violation of 18 USC § 875(c) . A 47-page civil complaint and numerous amendments were summarily dismissed in one fell swoop of the mighty pen of Judge Young who, as noted in what he eloquently referred to as the "scurrilous and threatening communication", was a former law school colleague of Ron Bass, a named defendant in an important related civil case preceding *Clemens* v. *Town of Scituate* [Complaint, 42] entitled *Clemens* v. *Creative Artists* [Case No. 01-00125-CAS, USDC/Los Angeles]. Although Shakespeare might say that something is rotten in Denmark, Clemens would have to say that indeed something is afoul in Boston.

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[continued] Clemens who otherwise never represented himself as being in the business of private investigation. This is at the very root of why the proceedings brought by the Town of Scituate were so wholly malicious and justifying a lawsuit, as Boisselle does not want the reader to know.

Take, for instance, Judge Dien, who signed the Clemens warrant, and U.S. Attorney Nadine Pellegrini, noted on record as a prosecutor against Clemens. They both hail from the same town [ omitted] as Judge Young and but a stone's throw from Attorney Pfaff's domicile [again, respectfully omitted]. As Boston is a metro region with 42 official suburbs and a hundred other accessible towns and villages, this is a rather odd coincidence. But not nearly as coincidental as the fact that a Pellegrini and Shine associate, U.S. Attorney David Tobin [with potential to affect the Clemens prosecution], is a former law school colleague of not only Pfaff [Suffolk, 1988] but Neil Connolly who is central to the allegations Clemens cited in his *Scituate* complaint against Attorney Pfaff. [*See* Civil Complaint, USDC/Boston, Case No. 09-CA-11821-WGY, Page 36][2]

But most revealing of all is the fact that the civil docket in *Clemens* v. *Scituate* is entirely void of any explanation as to how the Pfaff email [dated March 8, 2010] ever got to Judge Young. Presumably, it was a result of actions taken by Rachel Boiselle, signer of the instant complaint, or, of course, a close colleague of hers at the FBI. As the email contains no threat against Young, we can reasonably infer that a wrongful motive drove such person to contact Young and, of course, this smacks of malicious intent behind the Boisselle complaint. As one court long ago observed:

> It is not the policy of the law to punish those unsuccessful threats which it is not presumed would terrify ordinary persons excessively; and there is so much opportunity for magnifying or misunderstanding undefined menaces that probably as much mischief would be caused by letting them be prosecuted as by refraining from it. *The People* v. *B.F. Jones*, 62 Mich. 304, 28 N.W. 839 (1886) as quoted in *U.S.* v. *Baker*, 890 F.Supp. 1375, 1378 (1995)

The present court [2010], notwithstanding the exigencies of the 1800's, would do well to consult *U.S.* v. *Baker* for valuable insight into what does, and does not, constitute a true threat.

[2] The essence of said complaint, with respect to allegations against Pfaff, is that Neil Connolly is a close colleague of Andrew McAleer who rents a family home in Duxbury to Michael Schneiderat, a named defendant in *Clemens* v. *Scituate* and eye witness to the events [May 2005] that brought

## IV. CRIMINAL v. CIVIL

The events leading to the Boiselle criminal complaint against Clemens are indisputably tied with civil case matters involving Clemens. On March 9, 2010, one week *prior* to the Boiselle complaint, Judge Young made a ruling – a determination – that Clemens was responsible for some kind of "threatening communication" supposedly justifying dismissal with prejudice. Clemens was given opportunity to show cause but for what? His case, as of March 9, 2010, was already thrown out barring a show of cause by Clemens that his case should *not* be. In considering this pleading, it looks as though the same person responsible for Young knowing about the Pfaff email is the same person responsible for the Boisselle complaint which potentially prejudiced Young's April 2, 2010 final order. Notwithstanding any other argument given herein, this is wrong and requires remedy.

## V. CONCLUSION

Given the above argument, we can only conclude that the present complaint against Clemens is insufficient on the face and its very filing but an act of malice.

## VI. REMEDY SOUGHT

Given the above conclusion, the Boisselle complaint must be quashed. the prosecution ceased and the defendant released immediately from the custody so imposed upon him.

Respectfully submitted,

Jeffrey L. Clemens

Jeffrey L. Clemens

Dated this 14th day of April 2010

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[continued] about the [malicious] prosecution of Clemens by the Scituate Police in the first place. Schneiderat is a former 5-year tenant of Jerry Laveroni who [though he defaulted] is, as well, an important named defendant and, in fact, a person central to the recent disqualification of Judge Stearns who preceded Judge Young but who for which nonetheless sent *Clemens* to the graveyard for, of course, not only the benefit of Laveroni and the Town of Scituate but for other Pfaff clients, too. It is not comforting to know that, in addition to Mike Schneiderat, Assistant U.S. Attorney Ken Shine, who is lead prosecutor against Clemens, presently lives in Duxbury as well.

JEFFREY L. CLEMENS
412 Dockway Drive
Huron, OH 44839
(419) 433-4438



IN THE UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| JEFFREY L. CLEMENS,<br><br>Plaintiff,<br><br>v.<br><br>TOWN OF SCITUATE, SHELLY LAVERONI, JERRY LAVERONI, MICHAEL J. O'HARA, JOHN C. ROONEY, TIMOTHY J. GOYETTE, RALPH SOZIO, MICHAEL SCHNEIDERAT, ROBERT M. GREENSPAN, JEANETTE M. LANGLOIS, SUSAN SMITH, STEPHEN C. PFAFF, GAVIN DE BECKER, INC., RONALD F. MOYNAHAN, and RICHARD LINEHAN,<br><br>Defendants. | ) | No.<br><br>**COMPLAINT**<br><br>09 CA 11821 RGS<br><br>Malicious Prosecution |

**Parties**

1. Plaintiff Jeffrey L. Clemens is a resident of Huron, Ohio and a citizen of the State of Vermont. His address is: 412 Dockway Drive, Huron, Ohio 44839;

2. Defendant Town of Scituate is a municipal corporation located in the Commonwealth of Massachusetts about 10 miles southeast of Boston. Its address is: 600 Chief Justice Cushing Hwy, Scituate, Massachusetts 02066;

3. Defendant Shelly Laveroni a.k.a. Shelly Dell is a resident of Scituate, Massachusetts and a citizen of the Commonwealth of Massachusetts. Her address is: 52 Old Oaken Bucket Road, Scituate, Massachusetts 02066;



ATTACHMENT A

# UNITED STATES DISTRICT COURT
# DISTRICT OF MASSACHUSETTS

**Civil Action**
**No: 09-11821-WGY**

**JEFFREY CLEMENS**
**Plaintiff**

**v.**

**TOWN OF SCITUATE, SHELLEY LEVERONI, JERRY LEVERONI, MICHAEL O'HARA JOHN C. ROONEY, TIMOTHY GOYETTE, RALPH SOZIO, MICHAEL SCHNEIDERAT, ROBERT M. GREENSPAN, JEANETTE M.LANGLOIS, SUSAN SMITH, STEPHEN C. PFAFF, GAVIN DE BECKER,INC., RONALD F. MOYNAHAN ROBERT LINEHAN**

**Defendant**

## ORDER

**YOUNG, D.J.**

**This action is dismissed with prejudice due to the plaintiff's abuse of litigation process through his scurrilous and threatening communications.**

**By the Court,**

**/s/ Elizabeth Smith**
**Deputy Clerk**

**April 2, 2010**

**To: All Counsel**

ATTACHMENT B

DECLARATION OF MAILING

I am a citizen of the United States and a resident of the State of Ohio. I am over the age of eighteen. My address is:

412 Dockway Drive Huron, OH 44839

On April 14, 2010 I served the within document:

DEFENDANT MOTION TO DISMISS COMPLAINT

on the defendants in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon prepaid for FIRST CLASS in the United States mail, Huron, Ohio addressed as follows:

| | |
|---|---|
| Kenneth G. Shine<br>United States Attorney's Office<br>1 Courthouse Way<br>Boston, MA 02210 | **Lead Attorney**<br>**United States** |

I declare under penalty of perjury that the foregoing is true and correct.

Signature: Donald J. Clemens
Donald Clemens

Date: 4-14-10