ACLJ
AMERICAN CENTER
for LAW & JUSTICE

DISTRICT OF COLUMBIA [redacted]

TENNESSEE [redacted]

VIRGINIA [redacted]

January 16, 2025

David A. Zapolsky
Senior Vice President
Global Public Policy & General Counsel
Amazon.com, Inc.
P.O. Box 81226
Seattle, WA 98108-1226
davidz@amazon.com

Re: Claims Against Amazon from Ms. [redacted]

Dear Mr. Zapolsky,

The American Center for Law & Justice represents Mrs. [redacted] regarding the egregious offense she suffered when her son received racially and ethnically charged slurs graffitied on her order of self-published holocaust memoirs from Amazon.com, Inc. ("Amazon"). The purpose of this letter is to put Amazon on notice of: (1) Mrs. [redacted]'s revocation of any acceptance she may have given of Amazon's shipment of goods identified by order number [redacted]; (2) the damages incurred by Amazon's breach of contract and tortious conduct; and (3) Mrs. [redacted]'s attempt to resolve these matters short of litigation.

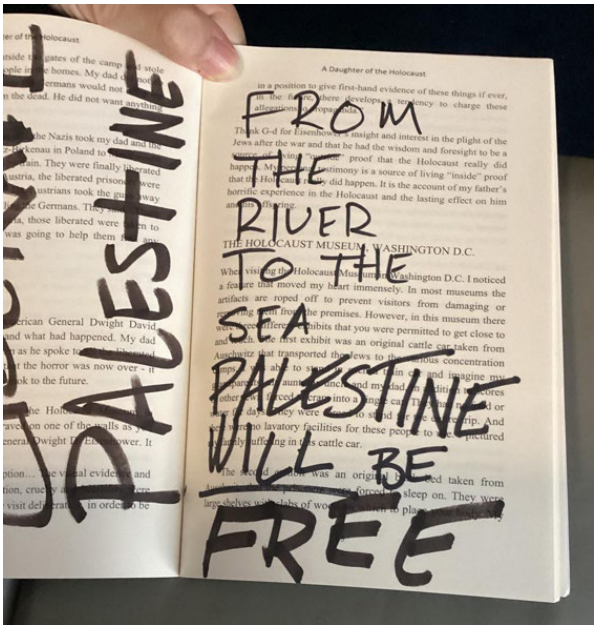
By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion (*see Pleasant Grove City v. Summum*, 555 US 1210 [2009] (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 US 93 [2003] (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 US 384 [1993] (unanimously holding that denying a

church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 US 226 [1990] (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *d. of Airport Comm'rs v. Jews for Jesus*, 482 US 569 [1987] (unanimously striking down a public airport's ban on First Amendment activities).

Statement of Facts

Mrs. [redacted] is an American-Israeli. She wrote a memoir about her father, a survivor of the Holocaust, named "A Daughter of the Holocaust." She self-published this memoir through Amazon's subsidiary, Kindle Direct Publishing. She recently ordered ten copies printed of her book to give out to close friends and family, [redacted]. She mailed them to her son in New York City, as she lives in Israel. Her son did not open the box when it arrived on August 25, 2024, but saved the books for his mother.

But when Mrs. [redacted] and her husband arrived in New York in November, she was shocked after opening the books when she saw that all of the books had been vandalized. Someone had handwritten in black marker derogatory remarks like "Zionism kills Jews," "From the River to the Sea Palestine Will be Free," "What About the Blood of Palestine," and other disparaging terms. These books were printed in Middletown, Delaware, on August 23, 2024. Every single book they received had been defaced. The following is an example of the defacement on the books:



Mrs. [redacted] contacted Amazon about the defaced books and made repeated attempts to seek a satisfactory resolution of this matter, to no avail. She had multiple online chat threads with Amazon support personnel on December 15 and 16, 2024, but none of them resulted in any action

being taken. In fact, Amazon refused to assist her with the defaced books, telling her that the return window had passed, and directed her instead to the manufacturer, Kindle Direct Publishing, a subsidiary of Amazon.

After reaching out to Kindle Direct Publishing several weeks earlier, on Wednesday, January 8, 2025, [redacted] finally received an email from Erick Heizer with Kindle Direct Publishing, Executive Customer Relations. This email acknowledged [redacted]s "incredibly troubling experience and the difficulties you've had thus far in reporting the issue to Amazon." While it did indicate that Amazon was reviewing data to understand why this book defacement occurred, it still did not contain any indication that her defaced books would be replaced. Moreover, this book defacement is not any mere defacement, but targeted antisemitism to attack with slurs a story of a victim of the Holocaust.

Mrs. [redacted] has been distraught, knowing that this person who engages in this antisemitic and threatening activity knows her family's contact information and address.

Statement of Law

1. Federal Claim for Discriminatory Breach of Contract – Sec. 1981

42 USC § 1981(a) provides that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Making and enforcing contracts "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." (42 USC § 1981(b)). This law provides a right that includes private actors as well as governments: "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 USC § 1981(c).

Racial discrimination in the performance or termination of a contract, among other things, may violate Section 1981's contract clause (*see McDonald v. Santa Fe Trail Transp. Co.*, 427 US 273, 295 [1976]) (Section 1981 was intended to "proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race"). In *Runyon v. McCrary*, the Supreme Court held that Section 1981 meant what it said and regulated private conduct as well as governmental action (427 US 160, 168 [1976]). Jewish people are part of the group of people protected by the civil rights statutes (s*ee Shaare Tefila Congregation v. Cobb*, 481 US 615, 616 [1987]). Since its 1975 decision in *Johnson v. Railway Express Agency, Inc.*, the Supreme Court has interpreted Section 1981 to permit a private suit for remedies such as "equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." (421 US 454, 460 [1975]).

This statute prohibits "when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." (*Patterson v. McLean Credit Union*, 491 US 164, 177 [1989]). It prohibits intentionally denying contractual rights (*General Bldg. Contractors Ass'n v. Pa.*, 458 US 375, 396 [1982]). *Patterson* had originally limited the statute to the making of contracts, and Congress afterwards intentionally broadened the right protected to contract performance and breach. In 1991, "with the design to supersede *Patterson*," Congress enacted the expansive definition of "make and enforce contracts" now contained in Section 1981(b) (*CBOCS West, Inc. v. Humphries*, 553 US 442, 450 [2008]). "Far from confining §1981's guarantee to discrete moments, the language of the statute covers the entirety of the contracting process." (*Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 589 US 327, 343 [2020]) (Ginsburg, J., concurring). The statute defines "make and enforce contracts" to "includ[e] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." §1981(b). That all-encompassing definition ensures that § 1981 "applies to all phases and incidents of the contractual relationship." (*Rivers v. Roadway Express, Inc.*, 511 US 298, 302 [1994]).

"To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." (*Comcast Corp.*, 589 US at 341). "[A] plaintiff cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes 'to make and enforce.'" (*Domino's Pizza, Inc. v. McDonald*, 546 US 470, 479-80 [2006]). This statute has been applied against retailers for their service decisions: for example, it applied to a salon's refusal to serve, (*Denny v. Elizabeth Arden Salons, Inc.*, 456 F3d 427 [4th Cir 2006]), or to other retailer contracts(*Green v. Dillard's, Inc.*, 483 F3d 533 [8th Cir 2007]).

The elements of a cause of action under Section 1981 are "(1) that the plaintiff is a member of a racial minority; (2) that the defendant intended to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute." (*Jackson v. BellSouth Telecomms*., 372 F3d 1250, 1270 [11th Cir 2004]) (internal citation omitted). Here, the alleged act of racial discrimination is the failure to properly and fully perform the delivery contract, and to instead deliver a racially offensive message on the document. [redacted] a Jew, a member of an ethnic minority. ***But for*** the racial discrimination here, the product would have been properly delivered. "To establish a deprivation of § 1981 rights in the retail context, the plaintiff must demonstrate 'the loss of an actual, not speculative or prospective, contract interest.'" (*Arguello v. Conoco, Inc.*, 330 F3d 355, 358 [5th Cir 2003]) (citation omitted). Here, [redacted] has lost precisely such an actual interest; her contractual interest to the proper delivery of the books she ordered.

2. Breach of Contract under Article 2 of the New York UCC

Books are goods covered by Article 2 of the New York Uniform Commercial Code ("UCC"). (*Simon & Schuster, Inc. v. Howe Plastics & Chemicals Co.*, 105 AD2d 604, 606 [1st Dept 1984]). After accepting tender, a buyer "must within a reasonable time ***after he discovers*** or should have discovered any breach notify the seller of breach or be barred from any remedy." NY UCC Law § 2-607(3)(a). A buyer may also revoke acceptance of a unit of goods whose value has been substantially impaired by non-conformity if at the time of acceptance there was a "reasonable assumption that its non-conformity would be cured and it has not been seasonably cured." NY UCC Law § 2-608(1)(a). A buyer who does so has no less rights than a buyer who had originally rejected the goods. *Id*. at (3).

Under the New York UCC, express warranties are easy to create. In Section 2-313, the New York UCC states:

> (1) Express warranties by the seller are created as follows:
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Furthermore, New York courts construe warranties liberally to protect consumers. In *BMW Grp., LLC v. Castle Oil Corp.*, the court found that defendants' "failure to uphold its end of the bargain and to deliver what was promised" warranted denial of a Motion to Dismiss, even though plaintiff did not show any "ill effect or negative impact on the product's performance." (139 A.D.3d 78, 82 [1st Dept 2016]). This is because "'[t]he wrongful act in a no-injury products suit is. . . the placing of a dangerous/defective product in the stream of commerce' whereas 'the wrongful act alleged by [a breach of contract plaintiff] is [the defendant's] failure to uphold its end of their bargain and to deliver what was promised.'" (*Id*., citing *Coghlan v. Wallcraft Mar. Corp.* 240 F3d 449, 455 n 4 [5th Cir. 2001]).

The rights of a buyer are all supported by the "obligation of good faith" in the performance of a contract. NY UCC Law § 1-304. Indeed, in New York, *all* contracts imply a covenant of good faith and fair dealing, and "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

[redacted] entered into a contract with Amazon and/or its subsidiary when she ordered the printing of ten books. While [redacted] has paid for the service, Amazon has yet to fulfil its end of the bargain. Indeed, Amazon tendered goods completely out of compliance with the contract, and the books are unusable in their current, permanently altered, state. After an attempt to remedy the situation, Amazon's defense that the defect in the goods was not timely raised is legally inadequate, and given the circumstances, offensive. Her time to raise the issue began when she knew or should have known of the defect. She discovered the defect as soon as she arrived in New York, and the defect was not so obvious for her son to have warned her in advance. Given that the defect in this case was intentional and therefore intentionally hidden, the timeliness defense in this case does not apply. As soon as she discovered the defect, she contacted Amazon to try to return the product.

3. New York Law on Infliction of Emotional Distress

In New York any plaintiff "to whom a duty of care is owed . . . may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations." (*Johnson v. State of New York*, 37 NY2d 378, 381 [1975]) (citations omitted). A breach of the duty of care "resulting directly in emotional harm is compensable even though no physical injury occurred" (*Kennedy v. McKesson Co.*, 58 NY2d 500, 504 [1983]) when the mental injury is "a direct, rather than a consequential, result of the breach" (*id*. at 506) and when the claim possesses "some guarantee of genuineness . . . ." (*Ferrara v. Galluchio*, 5 NY2d 16, 21 [1958]). The term "pain and suffering" has been utilized to encompass all items of general, non-economic damages (see CPLR 4111 (e), (f); *McDougald v. Garber*, 73 NY2d 246, 256 [1989]; *Lamot v. Gondek*, 163 AD2d 678, 679 [3d Dept 1990]).

Generally, damages for emotional distress are not available to a plaintiff alleging a breach of contract, however an exception exists when there is a "willful breach accompanied by egregious and abusive behavior." (*Brown v. Gov't Emps. Ins. Co.*, 156 AD3d 1087 [3rd Dept 2017]). When the New York Court of Appeals has described such "wanton conduct," they have included "foul language, abuse of the plaintiff, accusations of immorality, and special circumstances of humiliation and indignity." (*Johnson v. Jam. Hosp.*, 62 N.Y.2d 523, 529, [1984]).

Given [redacted] emotional reaction to this intentional act, there is no question that [redacted] can also request psychological trauma damages for Amazon's breach of contract. Quite unlike a misprint or other technical noncompliance, Amazon's breach here was racially motivated hate speech. This conduct is squarely within the list mentioned above: "foul language, abuse of the plaintiff, [and] accusations of immorality." The graffiti included all of this and in a targeted way intentionally designed to cause psychological trauma.

4. New York Law on Trespass to Chattels

The elements of a trespass to chattels claim that plaintiff must establish are that defendant: "intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in [plaintiff's] possession" (*Jackie's Enterprises, Inc. v. Belleville*, 165 AD3d 1567 [3d Dept 2018], quoting NY PJI 3:9). "Liability for trespass to chattels will be imposed only if the interference results in harm to the physical condition, quality or value of the chattel or if the owner is deprived of use of the chattel for a substantial time." *Id.* Without conceding that [redacted] did effectively accept the goods, if she did, her goods have been damaged so as to permanently and physically interfere with any possible use she could have for the chattels.

Demand

In conclusion, it is apparent that an Amazon agent, employee John Doe, became aware that a customer was a Jewish descendant of a Holocaust survivor. John Doe then wrote egregiously offensive, threatening and outrageous comments with full knowledge of the particular type of customer that would receive these messages. Given this knowledge, no reasonable person would expect [redacted] to survive these racially abusive comments without emotional distress. Further, by delivering these books to her, Amazon delivered nonconforming goods in direct breach of the contract for sale. Then, Amazon's refusal of [redacted] good faith request for replacement/refund based on the return period is insufficient to address her legal rights given that these defects were only discoverable after opening and going through each book. Moreover, Amazon's agent John Doe trespassed to [redacted] books in a way rendering them completely unusable for their intended purpose.

Rather than being comforted by copies of her own memoir preserving a precious personal history of the Holocaust, [redacted] is now in possession of racially abusive hate-speech in the form of veiled death threats. She now knows that her shipping address, her son's home, is known by the person who wrote these vile words. In light of the foregoing, we demand the following: (1) that Amazon restore the destroyed books; (2) that Amazon investigate this hateful act; (3) that Amazon provide a report of said investigation to Mrs. [redacted] to assure her that this person's employment with Amazon, Amazon-Kindle, or any other subsidiary, affiliate, or agent of Amazon is terminated; and (4) that Amazon respond to this letter no later than January 23, 2025.

We reiterate that our goal is to settle this matter short of litigation, and we are optimistic that we can collaborate with Amazon to investigate this situation and make Mrs. Webster whole. We look forward to your response.

Respectfully,

Nathan J. Moelker*
Associate Counsel
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

*Admitted to practice in Virginia

Jeffrey Ballabon*
Senior Counsel
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

*Admitted to practice in New York