

EXHIBIT

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1 of 1 DOCUMENT

CONTEL GLOBAL MARKETING, INC., Plaintiff-Appellant, v. DAVID C. DREIFUSS, ESQ., DREIFUSS, BONACCI & PARKER, LLP, WELLS, DREIFUSS, JAWORSKI LIEBERMAN & PATON, LLP, N/K/A WELLS, JAWORSKI & LIEBMAN, LLP, and NAGEL, RICE, DREIFUSS & MAZIE N/K/A NAGEL RICE, LLP, Defendants-Respondents.

DOCKET NO. A-3542-08T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 241

**January 5, 2010, Argued
February 4, 2010, Decided**

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3363-08.

COUNSEL: Glenn A. Bergenfield argued the cause for appellant (Glenn A. Bergenfield, P.C., attorneys; Mr. Bergenfield, on the brief).

Thomas F. Quinn argued the cause for respondents, David C. Dreifuss and Nagel Rice, LLP (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys; Mr. Quinn, of counsel; Joanna Piorek, on the brief).

Andrew C. Sayles argued the cause for respondent, Wells, Jaworski & Liebman, LLP (Connell Foley, LLP, attorneys; Karen Painter Randall, of counsel and Mr. Sayles, on the brief).

David Dreifuss argued the cause for Pro se, respondent, Dreifuss Bonacci & Parker, LLP (Paul H. Mandal, on the brief).

JUDGES: Before Judges Parrillo and Ashrafi.

OPINION

PER CURIAM

Plaintiff, Contel Global Marketing, Inc. (Contel or plaintiff), appeals from an order of the Law Division dismissing with prejudice plaintiff's legal malpractice complaint against defendants¹ for failure to state a claim under *Rule 4:6-2(e)* in that plaintiff could not prove defendants' alleged negligent conduct was the proximate cause of the damages suffered. We affirm.

1 There are four defendants in this action: (1) David Dreifuss, Esq., [*2] who was the attorney for plaintiff and employed by (2) Nagel, Rice, Dreifuss, & Mazie, now known as Nagel Rice, LLP (Nagel), during the time of the alleged malpractice by plaintiff; (3) Dreifuss, Bonacci & Parker, LLP (DBP); and (4) Wells, Dreifuss, Jaworski, Liebman & Paton, LLP, now known as Wells, Jaworski & Liebman, LLP (Wells) (collectively defendants). In April 2003, Dreifuss left Nagel for employment with Wells until December 2003, at which time he joined DBP, which came into existence on December 1, 2003. As will be discussed *infra*, plaintiff's contentions on appeal are directed primarily against Dreifuss and Nagel, Dreifuss' law firm, during the alleged negligent conduct.

According to the complaint, Contel is a New Jersey business that imports fruit from Chile during the winter months via jumbo jets. Contel believed its participants in a joint venture in Chile were overcharging it by approximately \$ 10 million and hired Dreifuss and Nagel to bring an action against Aldo Pesce Cotera (Cotera), Clear

River Corporation (Clear River), Nova Agencia DeCarga S.A. (DeCarga), and Agricola Punta Arenas Ltda (Agricola) (collectively the joint venturers or Cotera defendants) for fraud, [*3] interference with contract, and RICO violations (hereinafter Cotera litigation). Dreifuss filed the complaint in federal district court on January 17, 2001. The Cotera defendants, however, were not served until one to two years later between April and November 2002. None of the joint venturers filed a responsive pleading within a year.

Service on the Chilean joint venturers was to be made pursuant to the Inter-American Convention of Letters Rogatory. Agricola was served on April 20, 2002 and DeCarga was served on August 2, 2002. Defendants Dreifuss and Nagel received notice from the United States Department of Justice (DOJ) advising them of the service on Agricola on July 15, 2002 and of completed service on DeCarga on September 18, 2002, and then filed proof of service as to both DeCarga and Agricola on October 21, 2002. Cotera was served on October 22, 2002; DOJ notice was received by defendants on November 25, 2002; and proof of Cotera's service was filed with the court on December 23, 2002. The final joint venturer, Clear River, was served on November 13, 2002; defendants received notice on December 19, 2002 from the DOJ and filed proof of service with the court on December 31, [*4] 2002.

Meanwhile, on December 18, 2002, the magistrate judge ordered Contel to show cause why Cotera and Clear River were not served and "why the Complaint should not be dismissed as to these defendants for failure to effect service." In the same order, the magistrate judge "directed [Contel] to move for entry of default and default judgment" as to Agricola and DeCarga who had been served, but failed to appear in the action at that time.

However, two days later, on December 20, 2002, counsel for the Cotera defendants appeared in the case and requested a case management conference to address what counsel contended was lack of personal jurisdiction and improper service. In other correspondence to the court two weeks later -- on January 2, 2003, counsel also requested that plaintiff not be permitted to default the Cotera defendants until all jurisdictional and service of process issues were addressed at the scheduled January 29, 2003 conference. The magistrate judge granted counsel's request and in a January 30, 2003 order following the conference discharged the prior order to show cause and established a briefing schedule. Accordingly, the joint venturers filed their motion to dismiss on [*5] jurisdictional grounds pursuant to *Fed. R. Civ. P. 12(b)*, and shortly thereafter, on June 2, 2003, Contel, through defendants Dreifuss and Nagel, cross-moved for entry of default.

On December 2, 2003, the federal district court judge, in denying both parties' motions, commented with respect to Contel's, that had Dreifuss and Nagel Rice moved for default earlier, the Court *may* have granted relief, setting the stage for the possible eventual execution of a final judgment of default in Chile. Specifically, in denying Contel's motion, the judge remarked:

Had Plaintiff filed its cross-motion for default in 2002 (when it says service was effective) and had the Court granted it (as it might have absent objections from then nonparticipating Defendants), Plaintiff could have carried a subsequent federal court judgment to Chile for enforcement. This would have allowed a Chilean court - with expertise - to determine the propriety of service of process under their own law. Additionally, by bringing its cross-motion seeking default after Defendant filed its motion seeking dismissal under *Rule 12(b)*, Defendants entertained significant legal costs relating to arguments wholly unrelated to default. [*6] Had Plaintiff brought its default motion in 2002, Defendants would have been spared these costs. In these circumstances, granting default supplies all the wrong incentives - it would lead dilatory litigants to remain dilatory.

This court does not wish to make light of the timing requirements within the federal rules. Nor is this Court suggesting that an exception to those timing requirements exists for foreign-based defendants otherwise served properly. But in this posture, where the Defendants have begun to actively litigate in this forum and have participated in all pre-trial proceedings as ordered by the Court, the Court squarely favors trial on the merits, rather than by default. *See Hutton v. Fisher, 359 F.2d 913, 916 (3d Cir. 1966)*; 10A Federal Practice and Procedure: Civil P2681 ("A defendant who has participated throughout the pretrial process and has filed a responsive pleading, placing the case at issue, had not conceded liability."). This is especially true when a substantial amount of money is involved. *See Hutton v. Fisher, 359 F.2d 913, 916 (3d Cir. 1966)*; 10A Federal Practice And Procedure: Civil P2681.

In the same decision, the court declined to decide the propriety of [*7] service of process on the joint venturers. Thereafter, Contel fired Dreifuss and Nagel and hired the Sills Cummis law firm to take over its representation in the Cotera litigation. Subsequently, in 2006, a consent order was entered to submit the Cotera litigation to arbitration.

On October 6, 2008, plaintiff filed a legal malpractice action against defendants alleging that their failure to timely seek default caused plaintiff to incur \$ 2 million in legal fees for the remainder of the Cotera litigation, from the point in time default should have and would have been entered. On January 9, 2009, defendants Dreifuss and Nagel filed a joint motion to dismiss the complaint in lieu of answer pursuant to *Rule 4:6-2(e)*, in which defendants DBP and Wells later joined. Following argument, the Law Division judge granted the motion to all defendants with prejudice, finding that "the [c]omplaint, as a matter of law, fails to state a claim for legal malpractice[.]" because "Contel cannot properly allege that the breach of any duty on the part of defendants proximately caused Contel damages." In her February 23, 2009 letter opinion, Judge Chrystal found:

Given [the district court judge's] opinion, [*8] to properly plead proximate cause on its legal malpractice claim, Contel would have to plead that (1) default could have been entered as to the joint venturers before the joint venturers began to actively litigate, (2) the federal court would have entered default against the joint venturers, (3) if default had been entered, that any potential motion to vacate default would have been denied, (4) if default had been entered, that the court would have entered default judgment, (5) any potential default judgment would not have been vacated, and (6) any potential default judgment would have been enforceable in Chile. Given the legal ruling in [the district court judge's] opinion, his reliance on *Hutton v. Fisher*, and the general reluctance of courts to enter default and the liberal standard for motions to vacate default, the Court finds that, as a matter of law, Contel cannot meet, as a matter of law, the proximate causation element of a legal malpractice claim. Therefore as to defendants David C. Dreifuss, Esq. and Nagel Rice, LLP, the motion to dismiss the Complaint is GRANTED.

With respect to defendant Wells, Jaworski & Liebman, LLP, the Complaint merely states that David C. Dreifuss, [*9] Esq. left Nagel Rice and joined Wells, Jaworski & Liebman, LLP in April 2003. The Complaint states that Mr. Dreifuss then left Wells, Jaworski & Liebman, LLP in December 2003 and became a partner at Dreifuss Bonacci & Parker, LLP. However, the defendant law firms Wells, Jaworski & Liebman, LLP and Dreifuss Bonacci & Parker, LLP did not represent Contel during the relevant time periods. Therefore, as to defendants Wells, Jaworski & Liebman, LLP and Dreifuss Bonacci & Parker, LLP, the motion to dismiss the Complaint is GRANTED.

On appeal, plaintiff contends:

I. DEFENDANTS' MOTION TO DISMISS SHOULD HAVE BEEN DENIED AS THE COMPLAINT SETS FORTH A VALID LEGAL MALPRACTICE ACTION AS A MATTER OF LAW.

A. THE COURT SHOULD HAVE ACCEPTED THE FACTS AS TRUE AS ALLEGED IN THE COMPLAINT.

B. IF THE COMPLAINT WAS DEFECTIVE, PLAINTIFF SHOULD HAVE BEEN GRANTED AN OPPORTUNITY TO AMEND.

C. THE DOCTRINE OF COLLATERAL ESTOPPEL DID NOT APPLY.

II. THE COURT'S HOLDING THAT THE DISTRICT COURT MIGHT HAVE VACATED A TIMELY ENTERED DEFAULT.

III. THE TRIAL COURT'S FAILURE TO CONSIDER THIS AS A SUMMARY JUDGMENT MOTION.

IV. A MOTION FOR DEFAULT IS NOT AN ISSUE OF CIVILITY DREIFUSS BREACHED THEIR DUTY OF CARE TO PLAINTIFF BY [*10] FAILING TO TIMELY MOVE FOR DEFAULT.

V. THE ISSUE IS NOT WHAT JUDGE MARTINI WOULD HAVE DONE BUT THE STANDARDS TO BE APPLIED TO LEGAL WORK DONE FOR A CLIENT.

We have considered each of these issues in light of the record, the applicable law, and the arguments of counsel, and we are satisfied that they do not warrant reversal of the dismissal order. Accordingly, we affirm substantially for the reasons stated in Judge Chrystal's comprehensive letter opinion of February 23, 2009. We add only the following comments.

"In reviewing a complaint dismissed under *Rule 4:6-2(e)* our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746, 563 A.2d 31 (1989). "However, a reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" *Id.* (quoting *Di Cristofaro v. Laurel Grove Memorial Park*, 43 N.J. Super. 244, 252, 128 A.2d 281 (App. Div. 1957)). "Every reasonable inference is therefore accorded the plaintiff[.]" Pressler, *Current N.J. Court Rules*, [*11] comment 4.1.1 on *R. 4:6-2(e)* (2010); see also *New Jersey Sports Productions, Inc. v. Bobby Bostick Promotions, LLC.*, 405 N.J. Super. 173, 177, 963 A.2d 890 (Ch. Div. 2007).

In *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 876 A.2d 253 (2005), the Court expressed the standard on such motions:

At this preliminary stage of the litigation [a] [c]ourt [should not be] concerned with the ability of the plaintiffs to prove the allegation contained in the complaint . . . [P]laintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforesaid principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.

[*Id.* at 165 (internal citations omitted).]

Thus, such motions are granted "only in the rarest of instances." *Printing Mart-Morristown*, *supra*, 116 N.J. at 772. "The plaintiff's obligation in order to defeat a motion to dismiss is 'not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action.'" *Schulman v. Wolff & Samson, PC*, 401 N.J. Super. 467, 473-74, 951 A.2d 1051 (App. Div.) (quoting *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 472, 774 A.2d 674 (App. Div. 2001)), *certif. denied*, 196 N.J. 600, 960 A.2d 395 (2008).

By [*12] the same token, however, "[a] complaint may be dismissed for failure to state a claim if it fails 'to articulate a legal basis entitling plaintiff to relief.'" *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 112, 963 A.2d 849 (App. Div. 2009)(quoting *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106, 877 A.2d 267 (App. Div.) (internal citations omitted), *certif. denied*, 185 N.J. 297, 884 A.2d 1267 (2005)). Obviously, "if the complaint states no basis of relief and discovery would not provide one, dismissal is the appropriate remedy." *Banco Popular*, *supra*, 184 N.J. at 166. Specifically, "[a] motion to dismiss 'may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff's claim must be apparent from the complaint itself.'" *New Jersey Sports Productions, Inc.*, *supra*, 405 N.J. Super. at 178 (quoting *Edwards v. Prudential Prop. & Cas. Co.*, 357 N.J. Super. 196, 202, 814 A.2d 1115 (App. Div.), *certif. denied*, 176 N.J. 278, 822 A.2d 608 (2003)).

"The requisite elements of a cause of action for legal malpractice are: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of that duty; and (3) proximate causation." *Conklin v. Hanocho Weisman*, 145 N.J. 395, 416, 678 A.2d 1060 (1996)(internal [*13] citations omitted). Proximate cause has been defined "as being any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." *Fernandez v. Baruch*, 96 N.J. Super. 125, 140, 232 A.2d 661 (App. Div. 1967), *rev'd on other grounds*, 52 N.J. 127, 244 A.2d 109 (1968) (internal citations omitted). "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Reynolds v. Gonzalez*, 172 N.J. 266, 284, 798 A.2d 67 (2002)(quoting *W. Page Keeton, et. al., Prosser & Keeton on the Law of Torts*, § 41, at 259 (5th ed. 1984)).

Plaintiff's essential argument on appeal is that when read liberally, its complaint alleges sufficient causal linkage between defendants' alleged negligent conduct, in failing to timely serve and default the Cotera defendants, and the damages incurred by Contel, in terms of extra legal expenses, and that the motion court erred in holding otherwise as a matter of law. Defendants, on the other hand, maintain that the necessary [*14] causal nexus is based entirely on speculation and the singular remark by the federal district court judge about what 'might' have happened "does not create proximate causation." In particular, defendants contend that because plaintiff alleged joint liability against the joint venturers, defendants could not have moved for default judgment against any one of them until all the Cotera defendants were served and noticed of a proof hearing. *Frow v. de La Vega*, 82 U.S. 552, 554, 21 L. Ed. 60 (1872); 10 James W. Moore, et al., *Moore's Federal Practice*, § 55.25 (3d ed. 1997). Since the last of the Cotera defendants - Clear River - was not served until November 13, 2002, and defendant Dreifuss and Nagel were not notified until December 19, 2002, there was only a minimal window of time to default all Cotera defendants and thereafter obtain default judgment against them.

We agree with the motion judge that plaintiff's complaint fails to allege the requisite foundation for proximate causation. Nothing in the pleading's factual content permits even an inference of a causal connection between defendants' alleged legal malpractice and any damages suffered by plaintiff. In other words, plaintiff has failed to plead [*15] facts establishing how defendant's alleged untimely service of process and failure to seek default caused it to incur \$ 2 million in added legal costs.

The district judge's hypothetical reference affords plaintiff no basis on this score given the actual circumstances of this case. Indeed, once they were all served, the Cotera defendants vigorously defended the underlying matter, as evidenced by plaintiff's own claim of expending \$ 2 million in subsequent litigation costs. As the motion judge cogently observed:

[H]ow can any Court really assume that if default had been entered and even assuming arguendo that a default judgment had been entered, which I think is another leap that the Court would have to take in order to accept plaintiff's damage argument in this case, that the outcome would have been any different. I just can't believe that . . . the Chilean defendants . . . who ultimately did defend the case vigorously would have just rolled over and accepted a default judgment against them.

In this regard, there is no allegation in plaintiff's legal malpractice complaint suggesting that had all the Cotera defendants been served in 2001, and a timely motion for default been made, that [*16] they would not have retained counsel and vigorously litigated the case, as they did beginning in late 2002.

Adding to the speculative nature of plaintiff's proximate cause allegation is well-settled law disfavoring the very result which plaintiff and the federal district court hypothesize. In this regard, a default occurs when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend against a claim within the time allowed by the Federal Rules of Civil Procedure. 10 James W. Moore, et al., *Moore's Federal Practice* § 55.10[2] (3d ed. 1997). Courts have traditionally disfavored default judgments consistent with the strong policy in favor of resolution of disputes on the merits rather than through the application of pleading rules or penalties. *Ibid.* at § 55.20[2][c]. The decision whether to enter a default judgment is within the court's sound discretion and even where a defendant is technically in default, a plaintiff is not entitled to default judgment as a matter of right. *Ibid.* at § 55.20[2][b]. In *Hutton, supra*, the Third Circuit noted:

[T]his court has clearly stated its reluctance to permit the final disposition of substantial controversies [*17] by default. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits.

[359 F.2d at 916 (internal quotations omitted).]

In reversing the denial to vacate a default judgment in *Farnese v. Bagnasco*, 687 F.2d 761 (3d Cir. 1982), the court noted that courts do "not favor defaults, and that in a close case doubts should be resolved in favor of setting aside the default and obtaining a decision on the merits." *Id.* at 764; *Zawadski De Bueno v. Bueno Castro*, 822 F.2d 416, 420 (3d Cir. 1987) (same).

For these reasons, the motion judge held "as a matter of law, Contel cannot meet . . . the proximate causation element of a legal malpractice claim." (emphasis added). Plaintiff now argues that the issue of proximate causation was one for the jury to decide as a matter of fact, and not for the court, as a matter of law. We disagree.

To be sure, issues of proximate cause are generally considered jury questions. *Garrison v. Twp. of Middletown*, 154 N.J. 282, 308, 712 A.2d 1101 (1998) (Stein, J., concurring); *Scafidi v. Seiler*, 119 N.J. 93, 101, 574 A.2d 398 (1990). [*18] Nevertheless, the issue of a defendant's liability cannot be presented to the jury simply because there is some evidence of negligence; the plaintiff must introduce evidence that affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the plaintiff's injury. *Davidson v. Slater*, 189 N.J. 166, 187-88, 914 A.2d 282 (2007). Thus, courts may resolve the issue where reasonable minds could not differ on whether proximate cause was established. *Id.* at 188 (trial court was capable of being the arbiter of "whether a genuine issue of proximate cause had been presented"); *Fluehr v. City of Cape May*, 159 N.J. 532, 543, 732 A.2d 1035 (1999) (noting that proximate cause "may be removed from the fact-finder in the highly extraordinary case in which reasonable minds could not differ on whether that issue has been established" and "conclud[ing] that as a matter of law, any negligence [there] . . . did not proximately cause plaintiff's injuries"); *Vega by Muniz v. Piedilato*, 154 N.J. 496, 509, 713 A.2d 442 (1998) (summary judgment is appropriate where "no reasonable jury could find that the plaintiff's injuries [have been] proximately caused" by the defendant's conduct); [*19] *Lerner v. Laufer*, 359 N.J. Super. 201, 222, 819 A.2d 471 (App. Div.) (concluding that the plaintiff was unable to demonstrate as a matter of law that proximate cause exists between any malpractice on [defendant's] part in the 1994 proceedings resulting in damage to her"), *certif. denied*, 177 N.J. 223, 827 A.2d 290 (2003); *Johnson v. Schragger, Lavine, Nagy & Krasny*, 340 N.J. Super. 84, 91, 773 A.2d 1164 (App. Div. 2001).

Here, we have already determined that plaintiff's complaint does not properly allege the proximate cause element of a legal malpractice claim. *A fortiori*, no reasonable jury could find the requisite nexus between defendants' alleged negligent conduct and plaintiff's claimed damages. As such, the court did not err in concluding the same as a matter of law.

Nor did the court err in dismissing plaintiff's complaint with prejudice or failing to afford plaintiff an opportunity to amend its pleadings. While a motion to dismiss is ordinarily granted without prejudice, *Hoffman, supra*, 405 N.J. Super. at 116, a court has discretion whether to permit an amendment to a complaint to allege additional facts in an effort to state a cause of action. *Ibid.*; see also *Kernan v. One Washington Park Urban Renewal Assocs.*, 154 N.J. 437, 457, 713 A.2d 411 (1998). [*20] In *Johnson v. Glassman*, we found that the trial court did not abuse its discretion by dismissing

the complaint with prejudice where "plaintiffs [had] not offered either a certification or a proposed amended pleading that would suggest their ability to cure the defects that we have noted with respect to the . . . present amended complaint" and that "provision of a further opportunity to amend would not be fruitful." 401 N.J. Super. 222, 246-47, 950 A.2d 215 (App. Div. 2008).

This same reasoning applies here. Plaintiff never offered to replead its case by articulating facts or a legal theory that presented a viable proximate cause claim. For example, plaintiff never claimed that during the time it took for defendants to serve the Cotera defendants, critical evidence or documents were lost that altered the strength of its underlying case. Moreover, plaintiff points to nothing that discovery might offer, other than further speculation, to maintain the necessary causal nexus element of its legal malpractice claim against defendants. As the motion judge said in considering plaintiff's offer to amend the complaint:

Well, I have considered that. I actually have considered that but what would you allege at [*21] this point other than -- I mean, when you say you're going to present expert testimony, I think the problem with that is that the experts would have to speculate that assuming the default had been entered timely, there would not have been a motion to vacate that would not have been successful, and there would not have been subsequent litigation.

....

How can one assume that just because a default was entered, they would not have come in and defended, they would not have come in and made a motion to vacate default or when the application for default was pending they wouldn't have filed an answer at that point, or when an application to enter judgment was entered they wouldn't have come in and filed? They ultimately came in and answered.

....

So given the facts that the Chilean defendants ultimately came in and defended, wouldn't it be a leap for a Court to assume that if a default had been entered a few days earlier, or a month earlier, or two months earlier, that under those circumstances the Chilean defendants that came in and defended ultimately would not have come in.

....

They would have essentially 'thrown in the towel.' They would have said well a default was entered against [*22] us, nothing we could do now.

....

I've pondered the question of whether or not any additional discovery or any additional testimony at trial would prove that. And I think, you know, candidly I think it would be guesswork. I mean, I have to decide whether it would be guesswork and speculation or whether it would be a credibility issue.

We are in accord with this view.

Plaintiff also complains that the motion judge erred by considering other evidence outside the pleadings in granting defendants' motion to dismiss. We disagree.

Rule 4:6-2 provides in pertinent part that, if, on a motion to dismiss:

matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

A motion to dismiss "is based upon the content of the pleading in and of itself." *New Jersey Sports Productions, Inc., supra*, 405 N.J. Super. at 178. An exception to this "general rule is that a document integral to or explicitly relied upon in the complaint may be considered without converting the motion [to dismiss] [*23] into one for summary judgment." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (internal quotations omitted). The Third Circuit thus reasoned:

The rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint -- lack of notice to the plaintiff [iff] is dissipated where plaintiff has actual notice . . . and has relied upon these documents in framing the complaint. What the rule seeks to prevent in the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it

in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent.

[*Ibid.*]

Thus, in *E. Dickerson & Son, Inc. v. Ernst & Young, LLP*, 361 N.J. Super. 362, 825 A.2d 585 (App. Div. 2003), *aff'd*, 179 N.J. 500, 846 A.2d 1237 (2004), we found that consideration of documents specifically referenced in the complaint would not convert the motion to dismiss into a summary judgment motion. *Id.* at 365 n.1. Further, in *New Jersey Sports Productions, Inc., supra*, the Chancery Division similarly held that a letter expressly referred [*24] to in the plaintiff's pleading may properly be considered without converting the motion to dismiss into one for summary judgment. 405 N.J. Super. at 178.

Even more recently, in *Banco Popular, supra*, the Court cited to the federal standard and stated "[i]n evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" 184 N.J. at 183 (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir.), *cert. denied*, 543 U.S. 918, 125 S. Ct. 271, 160 L. Ed. 2d 203 (2004)).

Here, the motion judge considered only matters referenced in the complaint. As the judge noted:

Nevertheless, the court has refrained from considering matters outside the pleadings in deciding this motion to dismiss. The Complaint at paragraph seven indicated that the underlying federal court, in December 2002, ordered Contel to show cause as to why default had not been entered. The Complaint at paragraph nine noted that on December 2, 2003, the federal court denied Contel's motion to enter default. Therefore, because the December 20, 2002 Order to Show Cause and the December 2, 2003 Opinion by [the district [*25] court judge] are referenced in the Complaint, the Court may consider the substance of those documents in deciding the present motion to dismiss. Those decisions are likewise matters of public record.

Plaintiff has offered nothing to the contrary and therefore we discern no error in the motion judge's dismissal decision.

We have considered plaintiff's remaining arguments and deem them without sufficient merit to warrant dis-

cussion in this opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed.



WILLIAM T. JULIANO, et al, Plaintiffs, v. ITT CORPORATION, et al, Defendants

Civil No. 90-1575 (CSF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1991 U.S. Dist. LEXIS 1045

January 22, 1991

NOTICE: [*1] NOT FOR PUBLICATION

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff corporation filed a motion to hold defendants, a protester and a protest organization, in contempt of a consent order pursuant to *18 U.S.C.S. § 401* or in the alternative to modify the order. The consent order granted temporary injunctive relief prohibiting defendants from displaying certain signs, making certain characterizations of the corporation, and from other specified protest activities.

OVERVIEW: In settlement of the corporation's request for injunctive relief, the parties agreed to the entry of a consent order prohibiting defendants from displaying signs containing certain words, from characterizing the corporation's rates of interest as "illegal," "unlawful," or "usurious," and from other activities. Alleging that defendants violated the consent order by sending disparaging letters to various officials and newspapers, the corporation filed a motion to hold defendants in contempt or in the alternative to modify the order. The court denied the motion. The corporation did not show clear and convincing evidence that defendants violated the order's specific terms, nor did it show that the order should be modified. It did not prove that it was likely to prevail in its product disparagement claim because it did not meet its burden of proving that defendants' statements were false or that they failed to make a sufficient investigation into the facts, nor did it prove special damages. The chance that a government agency would take action against the corporation did not demonstrate an immediate risk of irreparable harm because modifying the order would not prevent such action.

OUTCOME: The court denied the corporation's motion to hold defendants in contempt of a consent order which prohibited them from taking certain protest actions or in the alternative for a modification of the order.

LexisNexis(R) Headnotes

*Civil Procedure > Remedies > Injunctions > Contempt
Criminal Law & Procedure > Criminal Offenses >
Miscellaneous Offenses > Contempt > Penalties*

[HN1] The contempt power of a federal court is limited by statute. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as disobedience or resistance to its lawful writ, process, order, rule, decree, or command. *18 U.S.C.S. § 401.*

Civil Procedure > Remedies > Injunctions > Contempt

[HN2] Persons may not be placed at risk of contempt unless they have been given specific notice of the norm to which they must pattern their conduct.

*Civil Procedure > Remedies > Injunctions > Contempt
Civil Procedure > Sanctions > Contempt > Civil Con-
tempt*

[HN3] Civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. The purpose of civil contempt is remedial. Before a court may order a defiant party into compliance, the plaintiff must demonstrate noncompliance by the defendant by clear and convincing evidence.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN4] In order to obtain preliminary injunctive relief, the plaintiff must carry the burden of producing evidence sufficient to convince the court that (1) it has a reasonable probability of success on the merits; (2) it will be irreparably injured by a denial of relief; (3) granting preliminary relief will not result in even greater harm to the defendant; and (4) granting preliminary relief will be in the public interest.

Civil Procedure > Remedies > Damages > Special Damages

Torts > Business Torts > Trade Libel > Elements > Torts > Intentional Torts > Defamation > Elements > Libel

[HN5] In a claim for product disparagement under the law of New Jersey, the plaintiff must demonstrate 1) publication 2) with malice 3) of false allegations concerning its property, product or business, and 4) special damages, i.e., pecuniary harm.

Torts > Intentional Torts > Defamation > Elements > Libel

[HN6] Publication is the intentional or negligent communication of an injurious falsehood to a third party.

Torts > Business Torts > Trade Libel > General Overview

Torts > Intentional Torts > Defamation > Elements > Libel

[HN7] disparaging statement is one which the publisher intends should be understood, or which the recipient reasonably should understand, as tending to cast doubt upon the quality of another's land, chattels or intangible things. There is no presumption that the disparaging statement is false. In a product disparagement action, the plaintiff bears the burden of proving the falsity of the disparaging communications by a preponderance of the evidence.

Torts > Intentional Torts > Defamation > Elements > Libel

[HN8] In order to establish malice, the plaintiff must demonstrate that the defendant knew that the contested statements were false or that they were written with reckless disregard for their truth or falsity.

Contracts Law > Sales of Goods > General Overview

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > Trade Libel > Remedies

[HN9] An action for product disparagement is designed to protect the economic interests of a vendor because it provides a remedy for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability. Because this cause of action is designed to protect the economic interests of a vendor, the plaintiff must plead and prove special damages with particularity. An action for product disparagement is only loosely allied to defamation, being rather an action on the case for special damages flowing from the interference to business. The action requires special damage in all cases, unlike ordinary defamation.

Civil Procedure > Remedies > Damages > Special Damages

Torts > Business Torts > Trade Libel > Elements

Torts > Intentional Torts > Defamation > Elements > Libel

[HN10] In order to carry its burden in a product disparagement action, the plaintiff must plead and prove that, as a result of the letters, others have failed to deal or contract with it. It is necessary for the plaintiff to allege either the loss of particular customers by name, or a general diminution in its business, and extrinsic facts showing that such special damages were the natural and direct result of the false publication. If the plaintiff desires to predicate its right to recover damages upon general loss of custom, it should allege facts showing an established business, the amount of sales for a substantial period preceding the publication, the amount of sales for a subsequent to the publication, facts showing that such loss in sales were the natural and probable result of such publication, and facts showing the plaintiff could not allege the names of particular customers who withdrew or withheld their custom.

Civil Procedure > Remedies > Injunctions > Elements > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN11] In order to justify the imposition of a preliminary injunction, the plaintiff must not only demonstrate irreparable harm, it also has the burden of proving a clear showing of immediate irreparable injury. The requisite feared injury or harm must be irreparable - not merely serious or substantial, and it must be of a peculiar nature, so that compensation in money cannot atone for it. The plaintiff must demonstrate to the court that it is in danger of suffering irreparable harm at the time the preliminary injunction is to be modified.

JUDGES: Clarkson S. Fisher, United States District Judge.

OPINION BY: FISHER

OPINION

OPINION

Before the court is the motion of plaintiff ITT Corporation ("ITT") requesting that this court find defendants William T. Juliano ("Juliano") and Americans Concerned to Improve Our Nation or ACTION ("ACTION") in contempt of the consent order entered on July 31, 1990. In the alternative, ITT requests a modification of that order. For the reasons set forth below, the court will deny this motion.

FACTS

On July 27, 1990, ITT filed a request for injunctive relief and the issuance of a temporary restraining order.¹ The court denied ITT's request for temporary restraints, but ordered Juliano and ACTION to show cause why a preliminary injunction should not issue. On July 31, 1990, the parties consented to the entry of an order granting temporary injunctive relief, which the court approved.

¹ On August 2, 1990, this court consolidated ITT's action, originally styled *ITT Corporation v. Juliano*, No. 90-2980, with *Juliano v. ITT Corporation*, No. 90-1575.

[*2] The consent order provided as follows:

1. Neither Mr. Juliano nor any member of ACTION, nor any other person under Mr. Juliano's or ACTION's direction or control shall display signs containing the words "loan sharks" or "crooks" nor shall they verbally use the term "loan sharks" or "crooks" in any solicitation of verbal communication made as a part of any picketing of offices of ITT or its subsidiaries.

2. Neither Mr. Juliano nor any member of ACTION, nor any other person under Mr. Juliano's or ACTION's direction or control shall characterize the rates of interest charged by ITT or any of its finance subsidiaries as "illegal," "unlawful," or "usurious." This provision shall not be construed to prevent Juliano or ACTION from displaying a Wall Street Journal article previously displayed which characterizes certain activities of ITT in California.

3. No more than three persons shall picket on the sidewalk immediately in front of any office of ITT Financial Services or any other ITT subsidiary and no picketing in front of any ITT Financial Services or ITT

subsidiary office shall at any time block ingress or egress to or from the office involved.

4. In connection with any picketing [*3] of any ITT offices, pickets shall not directly state to customers or potential customers "Don't sign on the dotted line" or "Don't do business with ITT, ITT Financial Services, ITT Consumer Finance" or any other language that the direct impact of which is to urge a potential or actual customer not to do business with ITT or its subsidiaries.

5. It is further ordered that the interim relief reflected in this Consent Order is without prejudice to the position of either side on the merits of any of the pending litigation among the parties. Either side may apply at any time for relief from the Court to modify this Order and to seek such other relief as may be appropriate.

IT IS FURTHER ORDERED that the requirement of an injunction bond imposed in the Court's Order of Friday, July 27, 1990, is hereby vacated and no bond shall be required by reason of the parties' consent to this Order; and

IT IS FURTHER ORDERED that this Court shall retain jurisdiction to enforce this Order.

ITT Corp. v. Juliano, No. 90-2780 (D.N.J. July 31, 1990) (consent order entered with court's approval), *later consolidated with Juliano v. ITT Corp.*, No. 90-1575.

Just days after the entry of this order, [*4] Juliano sent a letter, printed on ACTION stationery and dated August 3, 1990, to Rand V. Araskog ("Araskog"), Chairman of the Board and Chief Executive Officer of ITT. In the letter, Juliano indicated that copies were being sent to:

All Directors of ITT

Central Intelligence Agency - Director Judge William Webster

Federal Bureau of Investigation - Director Sessions

Chief of Staff John Sununu White House

American Civil Liberties Union - Newark, New Jersey

New Jersey Governor James J. Florio

New Jersey State Police

New Jersey Banking Authorities

New Jersey Attorney General Del Tufo

Senator William Bradley

Senator Howard Metzenbaum

Congressman Henry Gonzalez

Congressman Paul E. Kanjorski
 Congressman Schumer
 Director Timothy Ryan - Office of Thrift Supervision

Mount Laurel and Moorestown New Jersey Police Departments

New York Times

Washington Post c/o Kathleen Day

Business Week New York

William B. Baumgartner, Jr. Esquire

Richard Greenfield, Esquire

Frederick Hardt, Esquire

Brief in Support, Exh. A (Letter to Rand V. Araskog from William T. Juliano (Aug. 3, 1990)).

Juliano sent another to Timothy Ryan ("Ryan"), Director of the Office of Thrift Supervision, also printed on ACTION stationery [*5] and dated August 3, 1990. In this letter, Juliano indicated that copies were being sent to:

Senator Bill Bradley

Senator Howard Metzenbaum

Senator Donald Riegle

Congressman Henry Gonzalez

Congressman Paul E. Kanjorski

Congressman Schumer

William Seidman, Chairman, F.D.I.C.

New Jersey Banking Commissioner Jeff Conner

Washington Post

New York Times

Business Week New York

Directors of ITT

Brief in Support, Exh. B (Letter to Timothy Ryan from William T. Juliano (Aug. 3, 1990)).

ITT maintains that Juliano's letters contain disparaging statements about ITT, in violation of the consent order entered on July 31, 1990. In particular, ITT takes issue with the part of the letter to Araskog in which Juliano writes:

Your company's long ongoing scandalous history of consumer fraud, bribery, CIA involvement even with Chilean President Allende, who was killed in 1973, lead

me to fear for my own well-being and for members of our group.

I believe we have uncovered yet another gigantic fraud on the American people caused by your company and its ongoing unethical business practices.

Brief in Support, Exh. A (Letter to Rand V. Araskog from William T. Juliano (Aug. 3, 1990)).

ITT also takes issue [*6] with the part of the letter to Ryan in which Juliano writes:

How can your office discipline former directors, officers and borrowers from scandal ridden S & L's when a giant like ITT is excepted from the law? We want the law changed to prohibit them from operating or acquiring any of our S & L's and banks and would like to see them divest themselves of their S & L and dismantle its financial services group. Their reputation is not worthy of such involvement. If ITT were a person, it would be in jail!

Brief in Support, Exh. B (Letter to Timothy Ryan from William T. Juliano (Aug. 3, 1990)).

ITT also alleges that Juliano enclosed a particular flier with the Ryan letter. ITT further alleges that the text of this flier violates the terms of the consent order. Juliano and ACTION dispute the enclosure of this flier. Because ITT offers no proof that the flier was in fact enclosed with the letters, it cannot bear its burden of proving by clear and convincing evidence that the consent order was violated by its enclosure and content. *See American Greetings Corp. v. Dan-Dee Imports, 619 F. Supp. 1204, 1225 (D.N.J. 1985)*. Consequently, the court will not consider it.

Objecting to the mailing [*7] and content of the August 3, 1990 letters, ITT now requests that this court find Juliano and ACTION in contempt of the consent order, or, alternatively, that this court modify that order.

ANALYSIS

A. Contempt of the Consent Order

[HN1] The contempt power of the court is limited by statute:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --

...

Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401. Consequently, the question before the court is whether the mailing and content of the letters

dated August 3, 1990 constitute "disobedience or resistance to" the consent order. The court finds that they do not.

The consent order entered July 31, 1990 is clear and unambiguous. Under its terms, Juliano and ACTION may not:

1) use the words "loan sharks" or "crooks" in their picketing;

2) picket immediately in front of ITT Financial Services or any ITT Corporation subsidiary with more than three persons or block any office with their pickets;

3) use any language in their picketing activities the direct impact of which is to urge customers [*8] not to do business with ITT; and

4) characterize ITT's interest rates as "illegal," "unlawful" or "usurious," except that defendants may display an article from the *Wall Street Journal*.

ITT has not presented any evidence that Juliano and ACTION have violated these terms. Instead, ITT argues that, by mailing the August 3, 1990 letters, they have violated the "spirit and letter" of that order. However, [HN2] "persons may not be placed at risk of contempt unless they have been given specific notice of the norm to which they must pattern their conduct." *Inmates of Allegheny County Jail v. Wecht*, 754 F.2d 120, 129 (3d Cir. 1985); *American Greetings*, 619 F. Supp. at 1225.

Further, [HN3] civil contempt "is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). The purpose of civil contempt is remedial. *Id.*; *Latrobe Steel Co. v. United Steelworkers of Am.*, 545 F.2d 1336, 1344 (3d Cir. 1976). Before a court may order a defiant party into compliance, the plaintiff must demonstrate noncompliance by the defendant by clear and convincing evidence. [*9] See *American Greetings*, 619 F. Supp. at 1225. ITT has not demonstrated noncompliance by Juliano or ACTION. Consequently, the court cannot find either in contempt.

Further, in this action, ITT requests the following modification to the consent order in the event the court does not find Juliano or ACTION in contempt:

Neither Mr. Juliano nor any member of ACTION, nor any other person under Mr. Juliano's or ACTION's direction or control shall characterize ITT or any of its finance subsidiaries as having committed or been involved in the commission of crimes, including but not limited to bribery, consumer fraud or murder, including, without limitation, making such a characteristic in writing directed to governmental officials of any kind.

Brief in Support at 21.

By requesting this modification of the consent order, ITT seeks expansion and clarification of the existing order. By so doing, ITT concedes that the conduct forming the basis for its motion for contempt is not prohibited by the existing consent order. See *American Greetings*, 619 F. Supp. at 1217. For all of these reasons, a finding of contempt is inappropriate in this action.

B. Modification of the Consent Order

[*10] [HN4] In order to obtain preliminary injunctive relief, ITT must carry the burden of producing evidence sufficient to convince the court that (1) it has a reasonable probability of success on the merits; (2) it will be irreparably injured by a denial of relief; (3) granting preliminary relief will not result in even greater harm to Juliano and ACTION; and (4) granting preliminary relief will be in the public interest. See *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987); *SI Handling Systems v. Heisley*, 753 F.2d 1244, 1254 (3d Cir. 1985); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982).

1. A Reasonable Probability of Success on the Merits

ITT does not assert that it has a reasonable probability of success on the merits with regard to its claim of tortious interference with contractual relations and with prospective economic advantage. Therefore, in order to obtain a preliminary injunction, ITT must show that it is likely to prevail on its product disparagement claim against Juliano and ACTION.

[HN5] In a claim for product disparagement under the law of New Jersey, ITT must demonstrate 1) publication 2) with malice 3) of false allegations [*11] concerning its property, product or business, and 4) special damages, i.e., pecuniary harm. *System Operations v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1140 (3d Cir. 1977). Therefore, in order to obtain the requested modification of the preliminary injunction, ITT must show a reasonable probability of eventual success in meeting the burden of proving publication, falsity, malice, and special damages. *Id.* at 1141.

a. Publication

[HN6] Publication is the intentional or negligent communication of an injurious falsehood to a third party. *Restatement (Second) of Torts § 630* (1977) [hereinafter *Restatement*]. Neither party disputes that there have been written communications to a third party. However, Juliano and ACTION disputed that the communications were false.

b. Falsity of the Disparaging Communications

[HN7] A disparaging statement is one which the publisher intends should be understood, or which the recipient reasonably should understand, as tending "to cast doubt upon the quality of another's land, chattels or intangible things." *Restatement* § 629; see *U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 924 (3d Cir.), cert. denied, 111 S. Ct. [*12] 58 (1990); *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 408 (E.D. Pa. 1983).

There is no presumption that the disparaging statement is false. W. Prosser, *Law of Torts* § 128, at 925 (4th ed. 1971). In a product disparagement action, the plaintiff bears the burden of proving the falsity of the disparaging communications by a preponderance of the evidence. *System Operations*, 555 F.2d at 1142; W. Prosser, *supra*, at 925. Therefore, ITT bears the burden of proving the falsity of Julianano's writings. The assertions of ITT's counsel that the communications are false does not serve to convince the court that ITT will meet this burden. Brief in Support at 16.

c. Malice

[HN8] In order to establish malice, ITT must demonstrate that Julianano knew that the statements were false or that they were written with reckless disregard for their truth or falsity. See *Restatement* § 623A comment d. As noted above, ITT has failed to indicate that it is reasonably probable that, in an action on the merits, it will establish that the statements were false. Further, ITT is unable to convince the court that it will be able to prove that Julianano failed to make a sufficient investigation into the facts.

[*13] d. Special Damages

[HN9] An action for product disparagement is designed to protect the economic interests of a vendor because it provides a remedy for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability. *U.S. Healthcare*, 898 F.2d at 924; *Zerpol Corp.*, 561 F. Supp. at 408; *Restatement* § 623A comment g.

Because this cause of action is designed to protect the economic interests of a vendor, the plaintiff must plead and prove special damages with particularity. *Zerpol Corp.*, 561 F. Supp. at 409; *Testing Systems, Inc. v. Magnaflux Corp.*, 251 F. Supp. 286, 290 (E.D. Pa. 1966).

As recognized by Prosser, [an] action [for product disparagement] is "only loosely allied to defamation," being rather an action on the case for special damages flowing from the interference to business. *The action requires special damage in all cases, unlike ordinary defamation.*"

Henry v. Vaccaro Constr. Co. v. A.J. DePace, Inc., 137 N.J. Super. 512, 517, 349 A.2d 570 (1975) (emphasis added).

In order to meet the requirement that it plead and prove special damages with particularity, ITT has alleged that it has incurred advertising [*14] and legal expenditures to counteract the letters written by Julianano and ACTION. ITT also alleges that its ability to sell financial services products has suffered and will continue to suffer. Finally, ITT alleges it has suffered irreparable harm to its business reputation and goodwill. Brief in Support at 17.

However, these allegations do not satisfy ITT's burden in a product disparagement action. [HN10] In order to carry its burden, ITT must plead and prove that, as a result of the letters, others have failed to deal or contract with it. See *Henry v. Vaccaro Constr.*, 137 N.J. Super. at 517.

It is necessary for the plaintiff to allege either the loss of particular customers by name, or a general diminution in its business, and extrinsic facts showing that such special damages were the natural and direct result of the false publication. If the plaintiff desired to predicate its right to recover damages upon general loss of custom, it should have alleged facts showing an established business, the amount of sales for a substantial period preceding the publication, the amount of sales for a subsequent to the publication, facts showing that such loss in sales were the natural and probable [*15] result of such publication, and facts showing the plaintiff could not allege the names of particular customers who withdrew or withheld their custom.

Testing Systems, 251 F. Supp. at 291.

ITT has failed to plead and prove with particularity the loss of particular customers or a general diminution in its business. For this reason, it has failed to establish special damages.

ITT has not shown that it will meet its burden of proving the falsity of the disparaging communications, malice or special damages. Consequently, this court is not convinced that ITT has shown a reasonable probability of eventual success in making out its cause of action for product disparagement under the law of New Jersey.

2. Irreparable Harm

[HN11] In order to justify the imposition of a preliminary injunction, ITT must not only demonstrate irreparable harm, it also has the burden of proving a "clear showing of immediate irreparable injury." *ECRI*, 809 F.2d at 226 (quoting *Continental Group, Inc. v. Amoco*

Chems. Corp., 614 F.2d 351, 359 (3d Cir. 1980)). "The 'requisite feared injury or harm must be irreparable - not merely serious or substantial,' and it 'must be of a peculiar nature, so that compensation [*16] in money cannot atone for it.'" *ECRI*, 809 F.2d at 226 (quoting *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)).

ITT must demonstrate to this court that it is in danger of suffering irreparable harm at the time the preliminary injunction is to be modified. *American Greetings*, 619 F. Supp. at 1227 (quoting *SI Handling Systems*, 753 F.2d at 1264). ITT alleges that it runs the risk that a government agency will take some action against it based on the false accusation. Brief in Support at 20. The modification to the consent order requested will not prevent this "irreparable harm." Consequently, the court concludes that ITT is unable to demonstrate that it will suffer irreparable harm if the modification to the consent order is not issued.

Because ITT cannot demonstrate a reasonable probability of success on the merits nor immediate irreparable harm, the court need not consider the harm to Juliano and ACTION and the public interest before denying the request for further preliminary injunctive relief.

C. Conclusion

Because ITT is unable to demonstrate that Juliano and ACTION have violated the terms of the consent order, the court cannot find Juliano and ACTION in contempt. [*17] In addition, the court will not modify the consent order because further preliminary injunctive relief is inappropriate in this case. ITT cannot demonstrate a reasonable probability of success on the merits nor immediate irreparable harm. Consequently, this court will deny the motion to find Juliano and ACTION in contempt and will not permit a modification of the consent order originally entered. An order accompanies this opinion. No costs.

ORDER - January 22, 1991, Filed

This matter having come before the court on motion by plaintiff ITT Corporation to find defendants William T. Juliano and Americans Concerned to Improve Our Nation or ACTION in contempt of the consent order entered on July 31, 1990, or, in the alternative, ITT requests a modification of that consent order; and the court having considered the argument and submissions in support of the motions; and good cause appearing,

IT IS on this 22nd of January, 1991,

ORDERED that the motion to hold defendants in contempt or for a modification of the consent order be and hereby is denied.



RICHARD ZINN, Individually and as Sole Shareholder of Excalibur Bagel & Bakery Equipment, Inc., and EXCALIBUR BAGEL EQUIPMENT, INC., Plaintiffs, v. KARIN SERUGA, Individually and as Sole Shareholder of Excellent Bakery Equipment Co., and EXCELLENT BAKERY EQUIPMENT CO., Defendants.

Civ No. 05-3572 (GEB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2007 U.S. Dist. LEXIS 63693

August 29, 2007, Decided

August 29, 2007, Filed

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Summary judgment denied by *Zinn v. Seruga, 2008 U.S. Dist. LEXIS 11903 (D.N.J., Feb. 19, 2008)*

PRIOR HISTORY: *Zinn v. Seruga, 2006 U.S. Dist. LEXIS 51773 (D.N.J., July 28, 2006)*

COUNSEL: [*1] For RICHARD ZINN, Individually and as Sole Shareholder of Excalibur Bagel & Bakery Equipment, Inc., Inc., a New Jersey Corporation, and Excalibur Bagel & Bakery Equipment, Inc., a New Jersey Corporation, Plaintiff: RICHARD A. JOEL, SR., LEAD ATTORNEY, JOEL & JOEL, ORADELL, NJ.

For EXCALIBUR BAGEL & BAKERY EQUIPMENT INC., a New Jersey Corporation, Plaintiff: RICHARD A. JOEL, SR., LEAD ATTORNEY, JOEL & JOEL, ORADELL, NJ; LORI ELLEN KOLIN, JOEL & JOEL, LLP, ORADELL, NJ.

For KAREN SERUGA, Individually and as Sole Shareholder of Excellent Bakery Equipment Co., a New Jersey Corporation, and Excellent Bakery Equipment Co., a New Jersey Corporation, EXCELLENT BAKERY EQUIPMENT CO., a New Jersey Corporation, Defendants: DENNIS GEORGE HARRAKA, LEAD ATTORNEY, FERRARA, TURITZ, HARRAKA & GOLBERG, PC, HACKENSACK, NJ; WILLIAM F. RUPP, LEAD ATTORNEY, FERRARA TURITZ HARRAKA & GOLDBERG, HACKENSACK, NJ; JACLYN

MICHELE MASON, CONNOLLY BOVE, WILMINGTON, DE.

For EXCELLENT BAKERY EQUIPMENT CO., a New Jersey Corporation, KAREN SERUGA, Individually and as Sole Shareholder of Excellent Bakery Equipment Co., a New Jersey Corporation, and Excellent Bakery Equipment Co., a New Jersey Corporation, Counter Claimants, [*2] Counter Defendants: WILLIAM F. RUPP, LEAD ATTORNEY, FERRARA TURITZ HARRAKA & GOLDBERG, HACKENSACK, NJ; JACLYN MICHELE MASON, CONNOLLY BOVE, WILMINGTON, DE.

JUDGES: GARRETT E. BROWN, JR., U.S.D.J..

OPINION BY: GARRETT E. BROWN, JR.

OPINION

MEMORANDUM OPINION

BROWN, Chief Judge

This matter comes before the Court upon Defendants Karin Seruga and Excellent Bakery Equipment Co.'s (collectively "Defendants") Motion to Dismiss Counts I, II, V and VIII of the Amended Complaint. This matter was transferred to the undersigned on June 15, 2007, and the Court has read and considered all the parties' submissions, and the Court has decided the matter without oral argument pursuant to *Federal Rules of Civil Procedure Rule 78*, and for the reasons set forth below, will deny

Defendants' motion with respect to Count V and grant the motion with respect to Counts I, II and VIII.

I. BACKGROUND

The parties are in the business of manufacturing, servicing and selling bagel and bakery equipment. *See* July 28, 2006, Opinion and Order re: Defendants' Motion to Dismiss the Complaint ("July 28th Opinion") at 2. Zinn and Seruga were formerly husband and wife. *Id.* During their marriage they owned two businesses, Excelsior and Banta, which also manufactured, [*3] serviced and sold bagel and bakery equipment. *Id.* These businesses were licensed distributors of Artofex (the "Mark") products. *Id.* Zinn and Seruga divorced in 1997 and each formed a new business to continue the same line of work they had previously engaged in. *Id.* at 2-3. Thereafter, Seruga purportedly obtained exclusive rights in the Mark and attempted to prevent Zinn from using it in his business. *Id.* at 5. In April of 2004, Defendants filed a law suit against Plaintiffs in state court, alleging Plaintiffs breached the Settlement Agreement that Zinn and Seruga had executed during their divorce by using the Mark inappropriately and otherwise interfering with Defendants' business. *Id.* at 5-6. On July 18, 2005, Plaintiffs filed the present action, seeking, among other things, cancellation of the Mark and a declaratory judgment that the Mark is invalid. *Id.* at 2.

The Mark was originally registered with the United States Patent and Trademark Office ("USPTO") on August 16, 1927, under registration number 231276 ("276 registration"). *Id.* at 3. The 276 registration was re-assigned numerous times, and the parties agree that these assignments contained numerous errors. (Defendants' Brief at [*4] 6-7). On September 17, 2003, Seruga filed a use-based application for the Mark, application number 76/545, 438 ("438 application"). July 28th Opinion at 4. While the application was pending, Seruga's trademark counsel corrected the errors in the 276 registration's assignments. (Defendants' Brief at 7, 18). Additionally, Seruga's counsel amended the dates of first use listed on the 438 application to rely on the dates of first use of Seruga's predecessors in interest listed on the 276 registration. *Id.* at 6-7. On May 30, 2006, the USPTO approved the 438 application and issued a second registration for the Mark, registration number 3,097,038 ("038 registration"). *Id.* at 1 fn.2.

The background of this dispute is described at length in the July 28th Opinion. On July 18, 2005, Defendants filed the first Motion to Dismiss the Complaint. The Court conducted a hearing on this motion on July 27, 2006. During the hearing, the Court held that the Complaint was "not well articulated," but provided Plaintiffs the opportunity to amend Counts I, II, VI and VIII. (Defendants' Brief Ex. 15 at 22-23 (Transcript of Hearing)).

The Court cautioned the plaintiffs that if they filed an amended complaint that [*5] was not based on actual fact, but rather continued to recite unsupported, conclusory allegations, the Court would impose sanctions. *Id.*

On July 28th, the Court issued an Opinion and Order, describing the deficiencies in Counts I, II, VI and VIII of the Complaint and providing case law to aid Plaintiffs in amending the Complaint. In Counts I, II and VI, Plaintiffs sought cancellation of the 276 and 038 registrations on the grounds that these were procured through fraud. Specifically, in Count I, Plaintiffs described four assignments in the Mark's chain of title and alleged that assignments 2-4 were invalid because the assignors did not own the Mark at the time of the assignments. Complaint PP 8-16. Plaintiffs also alleged without explanation that Seruga obtained title to the 276 registration fraudulently. *Id.* at P 16. Count II alleged that assignments 2-4 were invalid because the Mark was assigned without the accompanying good will of the business. *Id.* at PP 19-23. Plaintiffs again alleged without explanation that Seruga obtained title to the 276 registration fraudulently. *Id.* at P 24. Count VI alleged that Defendants obtained the 038 registration fraudulently by claiming April 4, 1927, [*6] and April 1, 1977, as their dates of first use. *Id.* at PP 53-58. Plaintiffs alleged these dates were misrepresentations because these created the impression that Seruga personally used the Mark in 1977, while, in actuality, she used the Mark jointly with Zinn from 1977 to 1995 through their businesses Banta and Excelsior. *Id.* at PP 55-56.

Count VI also alleged that Seruga committed fraud by representing on the 438 application that she had no knowledge of any other person or entity that had the right to use the Mark in commerce. *Id.* at P 60. Plaintiffs allege this statement was fraudulent because Seruga knew that Plaintiffs had the right to use the Mark pursuant to the Settlement Agreement. *Id.* Count VIII alleged that Defendants engaged in product disparagement by publishing disparaging statements about Plaintiffs on their website. *Id.* at PP 71-74. Plaintiffs did not specify their damages, but, rather, generally averred that these statements "caused Plaintiffs to sustain damages." *Id.* at P 75.

In the July 28th Opinion, the Court explained that "[f]raudulent procurement occurs when an applicant 'knowingly makes false, material representations of fact in connection with an application.'" [*7] *Id.* at 19 (quoting *Metro Traffic Control v. Shadow Network*, 104 F.3d 336, 340 (Fed. Cir. 1997)). The Court pointed out the distinction between a false statement based on a misunderstanding or mere omission, which is not actionable, and a fraudulent statement made with an intent to mislead, which is actionable. July 28th Opinion at 20

(citing *Metro Traffic Control*, 104 F.3d at 340)). Further, the Court stated that "[f]raud must be proved by clear and convincing evidence by the party seeking cancellation based on fraudulent procurement." July 28th Opinion at 19 (citing *Metro Traffic Control*, 104 F.3d at 340)). Accordingly, the Court instructed Plaintiffs to amend Counts I and II to allege specific facts tending to prove that Seruga knowingly made misleading statements to obtain the assignments. July 28th Opinion at 20. The Court also instructed Plaintiffs to "revise" Count VI. *Id.* at 21-22.

With respect to Count VIII, the Court explained that pursuant to *Mayflower Transit, LLC, v. Prince*, 314 F. Supp. 2d 362, 377 (D.N.J. 2004), when pleading product disparagement, plaintiffs are required to allege special damages. *Id.* at 26-28.

On August 14, 2006, Plaintiffs filed the Amended Complaint. [*8] They amended Count I to add the following allegations of fraud: (i) Seruga misrepresented that she used the Mark since 1977, while knowing that use of Mark from 1977 to 1995 was in conjunction with Zinn through their businesses, Amended Complaint P 16; (ii) Seruga "falsely corrected" the previous assignments and failed to disclose in her Request for Correction that her use of the Mark from 1977 to 1995 was not personal, *id.* at P 17; and (iii) in procuring registration 038, Seruga knowingly misrepresented that she owned registration 276 and used the Mark since 1977, *id.* at P 18. Plaintiffs amended Count II to add essentially the same allegations as in Count I. Namely, Plaintiffs added that: (i) the corrections made to the previous assignment of registration 276 and the corrections made to the first dates of use in the 438 application were "false," *id.* at P 28; (ii) in procuring registration 038, Seruga knowingly misrepresented that she owned registration 276, *id.* at P 29; and (iii) Defendants committed fraud by failing to disclose that Seruga did not personally use the Mark from 1977 to 1995, *id.* at PP 30-31. Plaintiffs did not amend Count VI, but did rename it Count V. Plaintiffs amended [*9] Count VIII to allege that they sustained damages in the form of "a general diminution in sales." *Id.* at P 73.

On August 31, 2006, Defendants filed the Motion to Dismiss Counts I, II, V and VIII of the Amended Complaint. Briefing on the matter now complete, the Court will address the pending motion.

II. DISCUSSION

A. Governing Legal Standard

In considering a motion to dismiss pursuant to *Rule 12(b)(6)*, a court "must accept as true all of the factual allegations in the complaint as well as the reasonable inferences that can be drawn from them." *Brown v. Phil-*

lip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001). A court may dismiss the complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* "To withstand a motion to dismiss, 'a plaintiff is not required to provide evidence of or prove the truthfulness of his complaint.' However, the Court is not required to accept conclusory allegations." *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 474-75 (D.N.J. 1998) (quoting *Quinones v. Szorc*, 771 F.2d 289, 291 n.3 (7th Cir. 1985)). The complaint must allege sufficient information to outline the elements of the [*10] claims or to permit an inference that these exist. *Fed. R. Civ. P. 8(a)(2)*; *Syncsort Inc. v. Innovative Routines Int'l, Inc.*, 2005 U.S. Dist. LEXIS 15432, 2005 WL 1076043, *1 (D.N.J. May 6, 2005) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

As the Court explained in the July 28th Opinion, to survive a motion to dismiss, Plaintiffs must revise the fraud claims in Counts I, II and VI (now V) to allege that Defendants knowingly made false, material representations to the USPTO in procuring the trademark registrations. Courts have consistently differentiated between a false statement and a fraudulent one. July 28th Opinion at 20 (citing *Metro Traffic Control*, 104 F.3d at 340). "If it can be shown that the statement was a 'false misrepresentation' occasioned by an 'honest' misunderstanding, inadvertence negligent omission or the like rather than one made with willful intent to deceive, fraud will not be found." *Metro Traffic Control*, 104 F.3d at 340 (quoting *Smith Int'l, Inc., v. Olin Corp.*, 209 U.S.P.Q. (BNA) 1033, 1043 (TTAB 1981)).

Additionally, *Fed. R. Civ. P. 9(b)* requires a plaintiff to plead fraud with particularity. Specifically, *Rule 9(b)* provides: "In all averments of fraud or mistake, the circumstances [*11] constituting fraud or mistake shall be stated with particularity." *Rule 9(b)* applies to common law and statutory fraud claims. *See, e.g., Williamson v. Allstate Ins. Co.*, 204 FRD 641, 645 fn.5 (D. Ariz. 2001). "A charge of fraud on the PTO is subject to the strict pleading requirement of *Rule 9(b)*." *Scripps Clinic & Research Foundation v. Baxter Travenol Laboratories, Inc.*, 1988 U.S. Dist. LEXIS 1972, *6-7 (D. Del. March 9, 1988); *see also Scervini v. Miles Laboratories, Inc.*, 11 F.R.D. 542, 543 (S.D.N.Y. 1951) (same).

The purpose of *Rule 9(b)* is to put defendants on notice of the exact misconduct that they are accused of and to safeguard their reputations against unfounded allegations. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). The requirements of *Rule 9(b)* are met "if the complaint describes the circumstances of the alleged fraud with precise allegations of date, time or place. Alternatively, plaintiffs must use some means of 'injecting precision and some

measure of substantiation into their allegations of fraud." *Eli Lilly & Co.*, 23 F. Supp. 2d at 491-492 (citations omitted).

The Court also explained that Plaintiffs must plead special damages [*12] in connection with their product disparagement claim. Pursuant to *Mayflower*, these entail allegations of either the loss of identified customers or a general diminution in business plus extrinsic facts showing that the false publication directly caused the diminution. 314 F. Supp. 2d at 378. Additionally,

if predicated a claim on a general diminution in business, plaintiff "should have alleged facts showing an established business, the amount of sales for a substantial period proceeding the publication, the amount of sales for a [period] subsequent to the publication, facts showing that such loss in sales were the natural and probable result of such publication, and facts showing the plaintiff could not allege the names of particular customers who withdrew or withheld their custom." [*Id.* (quoting *Juliano v. ITT Corp.*, 1991 U.S. Dist. LEXIS 1045, 1991 WL 10023, *6 (D.N.J. Jan. 22, 1991)].

B. Counts I, II and VIII of the Amended Complaint are Subject to Dismissal

In Amended Counts I and II, Plaintiffs failed to plead fraud with the particularity required by the aforementioned case law and *Rule 9(b)*. The allegations added to Count I concerning Defendants' failure to disclose the parties' joint use of the Mark, amendment [*13] to first dates of use, corrections to previous assignments and representation of ownership of the 276 registration are insufficient to support a fraud claim. These do not permit an inference that Defendants knowingly made false, material misrepresentations to the USPTO.

First, Plaintiffs have not plead with particularity that Defendants' failure to disclose the parties' joint use of the Mark was a knowing misrepresentation. Defendants argue that there was no need to represent to the USPTO that the parties jointly used the Mark though Excelsior and Banta because such use did not confer ownership rights on the parties. (Defendants' Brief at 16). Defendants explain that the parties were distributors authorized to use the Mark in the United States in connection with the sale of authentic Artofex products. *Id.* Pursuant to the Trademark Manual of Examining Procedure ("TMEP") Section 1201.06(a), "A distributor, importer or other dis-

tributing agent of the goods of a manufacturer or producer does not acquire a right of ownership in the manufacturer's or producer's mark merely because it moves the goods in trade." Defendants argue that following the divorce, Zinn lost any right to use the Mark, [*14] while Seruga continued to use the Mark as the exclusive distributor of Artofex products. *Id.* Absent a precise and substantiated allegation by Plaintiffs to the contrary, the Court is inclined to conclude that Defendants' failure to disclose the parties' joint use was at worst a misunderstanding of the law or some other mistake.

Second, Plaintiffs have not plead with particularity that Defendants' amendments to the dates of use constitute knowing misrepresentations. Defendants argue that these were in accordance with TMEP Section 903.06, which allows an assignee to claim her predecessor in interest's date of first use. (Defendants' Brief at 16-17). Defendants also argue that they followed the procedure delineated in TMEP Sections 903.05-903.07 in making the amendments. *Id.* [*15] Plaintiffs have again alleged that Defendants' knowledge of the parties' joint use of the Mark in 1977 indicates that they made a knowing misrepresentation in amending their date of use to 1977. Amended Complaint PP 16-17. This allegation is not sufficiently specific. Plaintiffs have not articulated a logical connection between Defendants' knowledge of the parties' joint use and fraud in amending their dates of use.

Third, Plaintiffs have not plead with particularity that Defendants' corrections to the previous assignments were knowing misrepresentations. Plaintiffs merely allege that the corrections were "false." Amended Complaint P 17. Plaintiffs have not substantiated this claim in accordance with *Rule 9(b)*.

Fourth, Plaintiffs have not plead with particularity that Defendants knowingly misrepresented their ownership of the 276 registration on the 438 application. Plaintiffs allege that there are various errors in the Mark's chain of title, but do not allege that Defendants knew about these at the time they submitted the 438 application. Amended Complaint PP 8-15. To the extent that Defendants made a misrepresentation, Plaintiffs have failed to allege that they did so knowingly. Therefore, [*16] Plaintiffs have not pled this claim with particularity in accordance with *Rule 9(b)*.

Plaintiffs amended Count II to add essentially the same allegations as Count I. The Court has addressed these. Additionally, the unamended portion of Count II alleges that assignments 2 through 4 were invalid because they omitted the goodwill of the business. Accepting these allegations as true, the Court concludes that these do not indicate that Defendants made knowing misrepresentations. To allege fraud, Plaintiffs would

have to plead that Defendants knew about or encouraged these omissions. Plaintiffs have not done so. The Court will not hold Defendants responsible for knowing the legal requirements for preparing and recording assignments.

Further, Plaintiffs argue for the first time in their Brief that they have asserted sufficient information to support the claim that the 276 registration was "abandoned by virtue of naked assignments by companies holding no legal interest in the mark or that the purported assignments to Seruga were assignments in gross." (Plaintiffs' Brief at 12). The Amended Complaint makes no reference to these claims. The Court will not address causes of action raised for the [*17] first time in the Plaintiffs' Brief.

Plaintiffs did not revise Count V pursuant to the Court's instructions. In Count V, Plaintiffs allege that Seruga misrepresented in the 438 application that she had no knowledge of another's rights in the Mark while knowing that the Settlement Agreement granted Zinn with ownership rights. Defendants argue that the Settlement Agreement only addressed the truthful, fair use of the Mark and did not grant to Zinn any ownership rights. (Defendants' Brief at 20-21). They argue that Seruga believed that the declaration referred to another's ownership rights and not to the right of fair use; therefore, she did not make a knowing misrepresentation. *Id.*

The Court concludes that Count V is sufficient to withstand the motion to dismiss. Plaintiffs' allegations are specific and substantiated. The Settlement Agreement provides in relevant part:

Each party shall be entitled to purchase, rehabilitate and sell Artoflex equipment; and shall be entitled to make, advertise and sell parts . . . which can be used with or substituted for original Artoflex equipment, and both parties can advertise that they are capable of servicing Artoflex equipment as long as such statements [*18] are true. [Complaint, Ex. 7 Section (f) (Settlement Agreement)].

Whether the Agreement conferred Zinn with the rights referenced in the 438 application and whether Seruga knew or should have known are triable issues of fact.

In Count VIII, Plaintiffs have not plead special damages in accordance with the Court's instructions. Plaintiffs argue that they cannot quantify their diminution in sales absent additional discovery. (Plaintiffs' Brief at 14). Plaintiffs also argue that they are reluctant to name lost customers because the parties are competitors and this information should only be revealed through a Rule 26 protective order. *Id.* at 15.

Pursuant to *Mayflower*, Plaintiffs were required to allege that their business is established, the amount of sales preceding the publication and the amount of sales following the publication. Further, Plaintiffs were also required to allege facts establishing the causal link between the disparaging statements and their diminution in sales. Plaintiffs did not comply with any of these requirements, even though the Court discussed the *Mayflower* decision at the July 27th hearing and in the July 28th Opinion. Plaintiffs' argument that they need further discovery [*19] to plead the aforementioned information is unpersuasive. Plaintiffs have access to their business records. There is no excuse for their failure to allege that their business is established and the drop in sales. Further, Plaintiffs' argument that they cannot disclose the names of lost customers without a Rule 26 protective order is equally unpersuasive. If this were a legitimate concern, Plaintiffs should have raised it at the July 27th hearing when the parties engaged in an extensive discussion of this issue, or alternatively sought a protective order.

III. CONCLUSION

For these reasons, Counts I, II, and VIII of the Amended Complaint are hereby dismissed with prejudice. Defendants' Motion to Dismiss Count V of the Amended Complaint is hereby denied.

Dated: August 29, 2007

s/ GARRETT E. BROWN, JR., U.S.D.J.



**FLOORGRAPHICS, INC., Plaintiff, v. NEWS AMERICA MARKETING
IN-STORE SERVICES, INC. and NEWS AMERICA MARKETING IN-STORE,
INC., Defendants.**

Civil No. 04-3500 (AET)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2006 U.S. Dist. LEXIS 70834

**September 29, 2006, Decided
September 29, 2006, Filed**

NOTICE: [*1] NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Modified by, On reconsideration by *Floorgraphics, Inc. v. News Am. Mktg. In-Store Servs.*, 2007 U.S. Dist. LEXIS 26720 (D.N.J., Apr. 10, 2007)

COUNSEL: For FLOORGRAPHICS, INC., Plaintiff: NATHAN MARC EDELSTEIN, NATHAN M. EDELSTEIN, PC, LAWRENCEVILLE, NJ.

For NEWS AMERICA MARKETING IN-STORE SERVICES, INC., NEWS AMERICA, INC., NEWS AMERICA MARKETING IN-STORE, INC., Defendants: STEVEN P. GOODELL, HERBERT, VAN NESS, CAYCI & GOODELL, PC, PRINCETON, NJ.

JUDGES: Anne E. Thompson, U.S.D.J.

OPINION BY: Anne E. Thompson

OPINION

THOMPSON, U.S.D.J.

This matter comes before the Court upon Defendants News America Marketing In-Store Services, Inc.'s and News America Marketing In-Store, Inc.'s Motion to Dismiss Certain Counts pursuant to *Fed. R. Civ. P. 12(b)(6)*. The Court has decided this Motion after reviewing the submissions of the parties and hearing oral argument on June 22, 2006. For the following reasons, Defendants' Motion is granted in part as to Count 4 and denied as to Counts 5-10 and 12. Further, it is ordered

that Plaintiff Floorgraphics, Inc. amend its Complaint as directed in the accompanying Order.

BACKGROUND

Plaintiff Floorgraphics, Inc. is a Pennsylvania corporation, based in Princeton, New Jersey. Plaintiff enters into contracts with retailers for the rights to [*2] place advertisements and promotional materials in the retailers' stores, and separately enters into contracts with consumer product goods manufacturers to promote and advertise the manufacturers' products in those stores. Defendant News America Marketing In-Store Services, Inc. ("NAMIS") is a Delaware corporation, based in Wilton, Connecticut. Defendant News America Marketing In-Store, Inc. ("News") is a Delaware corporation, based in Chicago, Illinois. NAMIS and News (collectively, "Defendant") compete directly with Plaintiff.

The Complaint alleges that Defendant engaged in various tortious and unlawful tactics in order to gain competitive advantage over Plaintiff. Defendant illegally accessed Plaintiff's computer system and obtained proprietary information from the computer system; disseminated false, misleading, and malicious information about Plaintiff, and incorrect information about itself, to Plaintiff's existing and prospective clients, all in an effort to induce retailers and clients to avoid doing further business with Plaintiff. Defendant also removed Plaintiff's advertising and promotional materials from stores; hired away key personnel from Plaintiff; and harassed Plaintiff's [*3] employees, all in an effort to harm Plaintiff's business relationships and to compete unfairly with Plaintiff.

Defendant also engaged in various anticompetitive practices, such as threatening to harm retailers that did business with Plaintiff; structuring contracts and business deals in a manner so as to exclude competition; and paying retailers excessive sums not to enter into agreements with Plaintiff, all in furtherance of a concerted effort by Defendant to eliminate Plaintiff as a competitor. Plaintiff claims that it lost contracts with stores and manufacturers, and has suffered monetary damages and loss of goodwill as a result.

DISCUSSION

Defendant asks this Court to dismiss several counts in the Complaint for failure to state a claim for which relief may be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*. A court may dismiss a complaint pursuant to this rule only where it appears that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 559 (3d Cir. 2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). [*4] In deciding a motion to dismiss, all allegations in the complaint must be accepted as true, and all reasonable factual inferences are viewed in the light most favorable to the plaintiff. See *Conley*, 355 U.S. at 48; *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004); *Langford v. City of Atlantic City*, 235 F.3d 845, 847 (3d Cir. 2000). In considering a *Rule 12(b)(6)* motion, a court does not inquire into whether the non-moving party will ultimately prevail, only whether it is entitled to offer evidence to support its claims. *Langford*, 235 F.3d at 847.

Defendant's attack on the Complaint has three distinct and separate components. First, with respect to Count 4 (Tortious Interference with an Existing Contract), Defendant argues that Plaintiff is collaterally estopped from arguing that there was a contract between Kmart and Plaintiff at the time Defendant's Master Agreement with Kmart became effective, therefore Defendant could not have interfered with Plaintiff's contract with Kmart. Second, with respect to Counts 5-9, Defendant argues that Plaintiff's allegations were insufficient, therefore it has failed [*5] to allege that Defendant tortiously interfered with existing contracts (Count 7) or prospective business relationships (Counts 5, 6, 8, & 9). Finally, with respect to Counts 10 (Trade Libel and Business Disparagement) and 12 (Misappropriation of Trade Secrets), Defendant claims that Plaintiff has not alleged facts that would support the elements of these claims. These claims shall be examined in turn.

A. Count 4 - Tortious Interference with Kmart Contract

i. Additional facts pertaining to Count 4

Count 4 alleges that Defendant interfered with a contract ("Contract") between Plaintiff and Kmart. Pursuant to the Contract, Kmart agreed to let Plaintiff place advertising in its stores, and Plaintiff agreed to pay a minimum of \$ 1.3 million in the first year, and \$ 2 million per year thereafter. The Contract, signed in March 1998, had a two-year term. It did not automatically extend past the initial two years, but did provide a mechanism for one-year extensions and included terms for any such extension. One of these terms obligated the parties to meet at least nine months prior to the end of the Contract, as extended, and decide whether or not to renew it. The Contract was [*6] extended by addenda on March 20, 2000 (to March 17, 2001) and again on August 28, 2000 (to March 17, 2002).

Plaintiff and Kmart later agreed, by a letter dated March 24, 1998 (the "Kramer Letter"), that the Contract would be renewed if Plaintiff was not in default. Kmart provided the Kramer Letter so Plaintiff could obtain financing in order to make the payments due to Kmart under the Contract.

In July 2001, Defendant entered into a Master Agreement with Kmart ("Master Agreement") to use the space in Kmart stores for advertising and promotions. The Master Agreement between Kmart and Defendant was to take effect after March 17, 2002, the last day of the latest Contract extension. Upon learning of the Master Agreement between Defendant and Kmart, Plaintiff notified Kmart that Kmart breached the Contract when it entered into the Master Agreement. Kmart conveyed this information, along with proprietary information about the Contract, to Defendant, which agreed to indemnify Kmart from any damages it would suffer as a result of any breach.

Kmart filed for Chapter 11 bankruptcy protection in January 2002 and rejected the Contract. Plaintiff asserted an unsecured creditor's claim against [*7] Kmart, claiming \$ 59 million for breach of the Contract by Kmart. Kmart filed a motion for summary judgment and/or motion in limine, arguing that the Contract did not extend automatically, and that the Kramer Letter was inadmissible parol evidence. The Bankruptcy Court granted Kmart's motion in limine to exclude the Kramer Letter (the "Bankruptcy ruling").

ii. Analysis

Defendant argues that the Bankruptcy ruling should be given preclusive effect by this Court, which would preclude Plaintiff from arguing that the Contract term extended beyond March 17, 2002. In that case, Defendant argues, Count 4 must be dismissed because Defendant could not have interfered in a contract that had expired by its own terms.

Plaintiff argues that the Bankruptcy ruling does not preclude its claim because the Bankruptcy ruling was oral, not appealable, and erroneous, therefore it does not meet the requirements of a ruling that should be given preclusive effect. Plaintiff also argues that the Court cannot consider the papers Defendant submitted in support of its Motion because these materials are outside of the pleadings. Finally, Plaintiff argues that, even if this Court gives the Bankruptcy ruling [*8] preclusive effect and finds that the Contract was not automatically renewable, it still maintains a viable claim for tortious interference because Defendant induced Kmart to disclose confidential information in breach of the Contract.

1. Issue Preclusion

As a threshold matter, Plaintiff argues that the Court may not consider the documents appended to Defendant's brief in support of its motion because it references materials outside of the pleadings. A court that examines the transcript in another case for the purpose of fact-finding in its case will convert a motion to dismiss into a motion for summary judgment. *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 413 (3d Cir. 1999); see also *Brody v. Hankin*, 145 F. App'x 768, 772 (3d Cir. 2005). However, the Third Circuit has held that a court hearing a motion to dismiss may take notice of the existence of a judgment in another case but not the facts therein. *S. Cross Overseas Agencies, Inc.*, 181 F.3d at 413.

Plaintiff argues that Southern Cross permits only a recognition that the Bankruptcy ruling exists, and further suggests that actual reliance [*9] on the substance of the Bankruptcy ruling would convert Defendant's motion to one for summary judgment. The Court finds Plaintiff's interpretation of *Southern Cross* to be inconsistent with the rule that permits issue preclusion to be raised in a motion to dismiss. See *Williams v. Murdoch*, 330 F.2d 745, 749 (3d Cir. 1964).¹ "In issue preclusion, it is the prior judgment that matters, not the court's opinion explicating that judgment." *Yamaha Corp. of Am. v. United States*, 295 U.S. App. D.C. 158, 961 F.2d 245, 254-55 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078, 113 S. Ct. 1044, 122 L. Ed. 2d 353 (1993) (emphasis in original). Accordingly, this Court may consider the judgment of the bankruptcy court for preclusive effect without converting the Motion to one for summary judgment.

¹ While the Court is constrained to examine only those defenses for which there is a predicate in the complaint, see *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 n.10 (3d Cir. 1978), the predicate is provided by Plaintiff's reference to the Kramer Letter and its inclusion of the Kramer Letter as an exhibit.

[*10] To determine if a prior adjudication will have preclusive effect, the Court must find that (1) the prior determination was necessary to the decision; (2) the identical issue was previously litigated; (3) the issue was actually decided in a decision that was final, valid and on the merits; and (4) the party being precluded was adequately represented in the prior action. *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 475, 37 V.I. 526 (3d Cir. 1997). Plaintiff first argues that there is no identity of issues because certain deposition testimony regarding the Kramer Letter had not been taken by the time of the bankruptcy proceeding. Issue preclusion may not be avoided by offering evidence that could have been admitted in the first proceeding, but was not. See *Tonka Corp. v. Rose Art Indus., Inc.*, 836 F. Supp. 200, 211 (D.N.J. 1993) (citing *Yamaha Corp. of Am.*, 961 F.2d at 254-55). Moreover, Plaintiff has not alleged new facts, only new evidence in support of allegations previously made. See *Hawksbill Sea Turtle*, 126 F.3d at 477 (discussing changed facts as basis for reexamination).

Plaintiff also argues that [*11] the Bankruptcy ruling was not "final" in that it was not immediately appealable. The Third Circuit has held that a judgment need not be immediately appealable; it need only be "sufficiently firm." *In re Brown*, 951 F.2d 564, 569 (3d Cir. 1991). A decision is "sufficiently firm" if (1) the parties were fully heard; (2) a reasoned opinion was filed; and (3) the decision was, or could be, appealed. *Id.* With respect to the first element, neither side suggests that the parties were not fully heard and represented by counsel. As for a "reasoned opinion," while the Bankruptcy ruling was not written, it was read into the record by the bankruptcy judge who spoke at length reciting the facts, law, and analysis. Its oral nature notwithstanding, the Bankruptcy ruling appears to satisfy the "reasoned opinion" requirement.² Plaintiff argues next that the Bankruptcy ruling cannot be appealed, therefore it cannot be final. However, opportunity for review is one factor to be taken into account when considering whether or not to give a ruling preclusive effect. C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4434 (1981). The Third Circuit has stated that a [*12] matter is sufficiently firm if there is no reason for a court to revisit that issue in the litigation. *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 360 (3d Cir. 1999); *Dyndul v. Dyndul*, 620 F.2d 409, 411-12, 17 V.I. 623 (3d Cir. 1980). While the Third Circuit has considered appealability as a factor, see, e.g., *Greenleaf*, 174 F.3d at 360; *In re Docteroff*, 133 F.3d 210, 216 (3d Cir. 1997); *Dyndul*, 620 F.2d at 412, it has been afforded varying weight. For example, the Third Circuit found finality in *Brown* even though the decision was not immediately appealable. *Brown*, 951 F.2d at 569-70 (grant of partial summary judgment sufficient).

2 Plaintiff argues that the Court may not consider the appendices to Defendant's reply brief without converting the Motion to one for summary judgment. Such a conversion would occur only if this Court based its fact-finding on the record from the Bankruptcy Court. See *Brody*, 145 F. App'x at 772.

[*13] Plaintiff further argues that a motion in limine cannot, by its very nature, be final. It is well-settled that a ruling should not be "avowedly tentative" if it is to be given preclusive effect. *Glictronix Corp. v. Am. Tel. & Tel.*, 603 F. Supp. 552, 573 (D.N.J. 1984) (quoting *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir.), cert denied, 368 U.S. 986, 82 S. Ct. 601, 7 L. Ed. 2d 524 (1961)). Whether a motion in limine is tentative depends on the facts of the case and whether the court treated it as such. See *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 517 (3d Cir. 1997). There is nothing in the Bankruptcy ruling to suggest that it was "tentative," therefore, it may support issue preclusion. See *In re Brown*, 951 F.2d at 569.

2. Tortious interference with a contract

To prevail on the claim of tortious interference with a contract, Plaintiff must show that (1) there was an existing contractual relationship; (2) intentional or malicious interference with that relationship; (3) loss or breach of a contract as a result; and (4) damages resulting from that interference. *DiGiorgio Corp. v. Mendez and Co.*, 230 F. Supp. 2d 552, 557 (D.N.J. 2002) [*14] (citing *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 563 A.2d 31, 36 (N.J. 1989)). The third element, loss or breach of the contract, requires that there must have been a failure of performance. *Id.* Put another way, "[i]f the contract is performed despite the actions of the defendant, then those actions do not amount to tortious interference with contract." *Id.* at 566. In essence, Defendant asks this Court to find, as the bankruptcy court had, that the Contract ended by its terms on March 17, 2002, therefore Defendant's actions could not have induced a breach.

In response to Defendant's Motion, Plaintiff points out that Defendant, inter alia, induced Kmart to disclose Plaintiff's confidential information to Defendant. This constituted a possible breach of the Contract, and one induced by Defendant's tortious interference.³ Because this breach allegedly occurred during the life of the Contract, it would not be affected by the Bankruptcy ruling.

3 The Contract obligates Kmart to keep Plaintiff's confidential information secret. Further, the definition of "default" in the Contract provides that "failure to observe or perform any other pro-

vision of this [Contract] . . ." constitutes a default if not remedied within 30 days after remedy is demanded. (Am. Compl. Ex. A.)

[*15] iii. Conclusion with Respect to Count 4

The Bankruptcy ruling is entitled to preclusive effect, and Plaintiff will be precluded from alleging that the Kramer Letter shows the term of the Contract to extend beyond March 17, 2002. Thus, Plaintiff fails to state a claim that Defendant interfered with the Contract by inducing Kmart to terminate its relationship with Plaintiff. However, the allegation in Count 4 that Defendant caused Kmart to breach the Contract when Defendant induced Kmart to disclose secret, confidential or proprietary information to Defendant is not dependent upon the Kramer Letter. Therefore, though Defendant's Motion with respect to preclusion in Count 4 is granted, Plaintiff's allegation that Defendant induced Kmart to disclose secret, confidential and/or proprietary information remains.

B. Count 7 - Tortious Interference with Existing Contracts

Plaintiff alleges that Defendant interfered with contracts that it held with numerous retailers (other than Kmart). As noted above, New Jersey recognizes tortious interference with a contractual relationship. *Printing Mart-Morristown*, 563 A.2d at 36. Defendant asserts that the claim is deficient [*16] because Plaintiff does not identify the specific contracts referred to in its Complaint, nor does it claim that these contracts were breached. Defendant cites cases where courts have dismissed similar claims, however these cases involved pleadings where no third parties or contracts were identified. This is not the case here as Plaintiff has identified many retailers by name. Furthermore, in its general allegations, and in other Counts, Plaintiff alleges that Defendant's actions caused retailers to breach contracts.

Fed. R. Civ. P. 8(a) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (quoting *Fed. R. Civ. P. 8(a)(2)*). The purpose of allegations laid out in the complaint is to "give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Id.* *Fed. R. Civ. P. 8(a)*'s simplified notice pleading standard relies upon liberal discovery to define disputed facts and issues, and summary judgment proceedings [*17] under *Fed. R. Civ. P. 56*, to dispose of unmeritorious claims. *Id.* (citing *Conley*, 355 U.S. at 47-48). The facts alleged, which must be accepted as true, support the claim made in this Count.

Defendant's Motion to Dismiss Count 7 is denied. Plaintiff will be ordered to amend the Complaint so as to

identify the contracts allegedly interfered with by Defendant.

C. Counts 5, 6, 8 and 9 - Tortious Interference with Business Relationships and Prospective Contractual Relations

Plaintiff alleges that Defendant tortiously interfered with existing business relationships with Kmart (Count 5) and Winn/Dixie (Count 6), numerous retailers (Count 8) and consumer product manufacturers (Count 9) and that it suffered harm thereby.

New Jersey recognizes a claim for tortious interference with a prospective business relationship as a cause of action separate and distinct from tortious interference with an existing contract. *Printing Mart-Morristown*, 563 A.2d at 36. Rather than proving the existence of a contractual relationship, Plaintiff must instead allege facts "giving rise to some 'reasonable expectation of economic [*18] advantage.'" *Id.* at 37 (citing *Harris v. Perl*, 41 N.J. 455, 197 A.2d 359 (N.J. 1964)). Also, rather than alleging that the interference caused the breach or loss of the contract, the Plaintiff must allege that, but for the interference, there was a reasonable probability that the Plaintiff would have received the anticipated economic benefit. *Printing Mart-Morristown*, 563 A.2d at 37 (citing *Leslie Blau Co. v. Alfieri*, 157 N.J. Super. 173, 384 A.2d 859 (N.J. Super. Ct. App. Div.), cert. denied, 77 N.J. 510, 391 A.2d 523 (N.J. 1978)). Plaintiff has not only made the requisite allegations, but alleged facts that would tend to support a reasonable probability that the relationships would have continued. (Compl. PP 59-60, 77-79, 102, and 104.)

Defendant argues that the mere existence of a business relationship is insufficient. Rather, Plaintiff must have a protectable interest in the relationship as shown by the existence of specific lost business opportunities. Toward that end, Defendant argues that Plaintiff must identify specific lost business opportunities in its pleadings. Again, Plaintiff need not provide the level of specificity sought. *In re Tower Air, Inc.*, 416 F.3d 229, 237 (3d Cir. 2003) [*19] (citing *Alston v. Parker*, 363 F.3d 233 n.6 (3d Cir. 2004)); see also *Syncsort Inc. v. Innovative Routines Int'l, Inc.*, 2005 U.S. Dist. LEXIS 15432, No. 04-3623, 2005 WL 1076043, at *12 (D.N.J. May 6, 2005).

Defendant's Motion to Dismiss Counts 5,6, 8 and 9 is denied. Plaintiff will be ordered to amend Counts 8 and 9 of the Complaint to identify the relevant retailers, consumer product manufacturers, and contracts affected.

D. Count 10 -- Trade Libel and Business Disparagement

Plaintiff claims that Defendant made disparaging and false statements to Plaintiff's customers, and this

caused the customers to end or curtail their relations with Plaintiff or caused Plaintiff to take extraordinary measures, such as audits of its own compliance, in order to assure customers. Defendant argues that the pleading is deficient because trade libel requires Plaintiff to allege (1) "malice" and (2) special damages with particularity, but Plaintiff did not sufficiently plead either element.

To sustain a claim of trade libel or disparagement, Plaintiff must demonstrate (1) publication, (2) with malice, (3) of false allegations concerning its property, product or business, and (4) special [*20] damages. *Mayflower Transit, LLC v. Prince*, 314 F. Supp. 2d 362, 378 (D.N.J. 2004) (citing *Sys. Operations Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1140 (3d Cir. 1997)). Defendant correctly points out that Plaintiff defined "malice" in the Complaint as "without justification or excuse" (Compl. P 113), which is not the correct definition of malice for a claim of trade libel. See *Juliano v. ITT Corp.*, 1991 U.S. Dist. LEXIS 1045, No. 90-1575, 1991 WL 10023, at *5 (D.N.J. Jan. 22, 1991). To show malice in a trade libel or disparagement claim, Plaintiff must establish that Defendant knew the statements were false or that they were published with reckless disregard for their falsity. *Id.* Pointing to the definition provided in the Complaint, Defendant argues that Plaintiff did not allege an element of the claim. The Court finds otherwise—Plaintiff clearly and repeatedly alleges in the Complaint that Defendant "intentionally" made false statements. This comports with the proper definition, *id.*, therefore Plaintiff has alleged malice.

As for special damages, these must be pleaded and proved with particularity. *Patel v. Soriano*, 369 N.J. Super. 192, 848 A.2d 803, 835 (N.J. Super. Ct. App. Div. 2004). [*21] Plaintiff "must establish pecuniary loss that has been realized or liquidated, such as lost sales, or the loss of prospective contracts with customers." *Patel*, 848 A.2d at 835. In its pleadings, Plaintiff "must 'allege either loss of customers *by name*, or a general diminution of business, *and* extrinsic facts showing that such special damages were the natural and direct result of the false publication.'" *Mayflower Transit, LLC*, 314 F. Supp. 2d at 378 (quoting *Juliano*, 1991 U.S. Dist. LEXIS 1045, 1991 WL 10023, at *6) (emphasis added). While Defendant notes that Count 10 refers to "certain" retailers and consumer product manufacturers, the names of these entities are provided elsewhere in the Complaint.

Defendant further argues that Plaintiff must allege very specific facts that show the amount of pre-disparagement sales, post-disparagement sales, and facts showing why Plaintiff cannot name all of the vendors that purportedly withheld their business from Plaintiff. (Def.'s Reply Br. at 15) (citing *Juliano*, 1991 U.S. Dist. LEXIS 1045, 1991 WL 10023, at *6). This requirement is applicable only to a plaintiff that pleads a general

diminution in business, not for one [*22] that names lost customers. *Juliano, 1991 U.S. Dist. LEXIS 1045, 1991 WL 10023, at *6*; see also *Mayflower Transit, LLC, 314 F. Supp. 2d at 378*. In this case, Plaintiff names specific retailers and businesses that refused to deal with it or imposed extraordinary measures as a result of Defendant's conduct. Further, it is not entirely clear from the Complaint that Plaintiff has alleged a general diminution in business from prospective customers that it cannot name, therefore it has no obligation to meet the pleading standard set out in *Mayflower Transit and Juliano, Mayflower Transit, LLC, 314 F. Supp. 2d at 378*; *Juliano, 1991 U.S. Dist. LEXIS 1045, 1991 WL 10023 at, *6*.⁴

4 In its Opposition Brief, Plaintiff states that it has alleged a general diminution in business, and has alleged sufficient facts in support. (Opp'n Br. at 25-26.) Because Plaintiff will be ordered to amend this Count, the Court reserves judgment on whether Plaintiff will plead special damages with sufficient particularity. See *Juliano, 1991 U.S. Dist. LEXIS 1045, 1991 WL 10023, at *6*.

[*23] Where pleadings are unclear, dismissal is not always warranted. See *Arista Records, Inc. v. Flea World, Inc., 356 F. Supp. 2d 411, 419 (D.N.J. 2005)* (citations omitted). Often, a more appropriate remedy for lack of specificity (or clarity) is leave to file an amended complaint or, as Plaintiff suggests, a more particular statement. *In re Tower Air, Inc., 416 F.3d at 237-38*; see also *Brunson Commc'ns, Inc. v. Arbitron, Inc., 266 F. Supp. 2d 377, 382 (E.D. Pa. 2003)* (citing *Forum Publ'ns, Inc. v. P.T. Publishers, Inc., 700 F. Supp. 236, 244 (E.D. Pa. 1988)*) (allowing plaintiff to file amended complaint that contains required level of specificity); accord *Automed Technologies, Inc. v. Heller, 160 F. Supp. 2d 915, 920 (N.D. Ill. 2001)* (citing *Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir. 1985)*). Because Plaintiff has alleged malice and pleaded special damages, Defendant's Motion to Dismiss Count 10 is denied. Further, if Plaintiff intends to allege that it suffered a general diminution of business apart from the loss of specific customers or contracts, it will amend this Count [*24] to clarify its claim and allege sufficient facts. See *Mayflower Transit, LLC, 314 F. Supp. 2d at 378*; *Juliano, 1991 U.S. Dist. LEXIS 1045, 1991 WL 10023, at *6*.

E. Count 12 - Misappropriation of Trade Secrets

Plaintiff claims that Defendant intentionally recruited Plaintiff's employees and induced them to disclose confidential information that Defendant used to compete unfairly with Plaintiff. To prevail upon its claim for misappropriation of trade secrets, Plaintiff must establish that (1) a trade secret exists; (2) the secret information was communicated in confidence by Plaintiff to an em-

ployee; (3) the secret information was disclosed by the employee, in breach of that confidence; (4) the secret information was acquired by a competitor with knowledge of the employee's breach; (5) the competitor used the secret information to the detriment of the Plaintiff; and (6) Plaintiff took precautions to maintain the secrecy of the information. *Rycoline Prod., Inc. v. Walsh, 334 N.J. Super. 62, 756 A.2d 1047, 1052 (N.J. Super. Ct. App. Div. 2000)*.

Defendant argues that the pleadings do not allege the existence of trade secrets. Again, unless there are heightened pleading requirements [*25] as to a particular cause of action, the Federal Rules of Civil Procedure do not require a plaintiff to plead all relevant facts in detail, *In re Tower Air, Inc., 416 F.3d at 237*, and generally do not require a plaintiff to provide specific information about trade secrets at this stage of the litigation. *Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 755 F. Supp. 635, 636 (D. Del. 1991)*. Plaintiff has alleged that it had trade secrets that were disclosed. It is sufficient that the Plaintiff makes an allegation that it reasonably believes it can support with specific information. *Leucadia, Inc., 755 F. Supp. at 636*; see also *Automed Technologies, Inc., 160 F. Supp. 2d at 921*.

Defendant also claims that Plaintiff's bare allegation that the secret information was disclosed to employees in confidence is insufficient to show that it actually took measures to protect its secrets. While the allegation that "trade secrets were communicated in confidence to certain FGI employees" is undoubtedly sparse, it is not dissimilar to the factual findings of other courts that found disclosure in confidence of non-public information [*26] as sufficient to show reasonable protective measures. See *Sun-Dial Corp. v. Rideout, 16 N.J. 252, 108 A.2d 442, 447 (N.J. 1954)*; see also *Atochem N. Am., Inc. v. Gibbon, 1991 U.S. Dist. LEXIS 11670, No. 91-1201, 1991 WL 160939, at *9 (D.N.J. Aug. 15, 1991)*. While the aggrieved parties in these cases were able to show affirmatively that they informed their employees that certain information was secret, *Atochem N. Am., Inc., 1991 U.S. Dist. LEXIS 11670, 1991 WL 160939, at *1-2*; *Sun-Dial Corp. at 447*, this Court must accept the instant allegation as sufficient to survive a *Rule 12(b)(6)* motion, pending further exposition of the measures employed by Plaintiff. *In re Tower Air, Inc., 416 F.3d at 237*. Defendant's Motion to Dismiss Count 12 is denied.

CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss Certain Counts of Plaintiff's Third Amended Complaint [59] is DENIED as to Counts 5-10 and 12, and GRANTED in part as to Count 4. In addition, Plaintiff will be ordered to amend Counts 7 through

10 of the Complaint. An appropriate Order accompanies
[*27] this Opinion.

Date: September 29, 2006

/s/ Anne E. Thompson, U.S.D.J



**JOHN P. MORRIS and JOSHUA JOHNSON, Plaintiffs, v. JAMES P. HOFFA and
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Defendants.**

CIVIL ACTION No. 01-3420

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

2002 U.S. Dist. LEXIS 5975; 169 L.R.R.M. 3082

April 8, 2002, Filed

DISPOSITION: Defendant's motion to dismiss is GRANTED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs alleged that defendants, an individual and an union, intentionally and maliciously defamed them. Plaintiffs initiated an action in state court with the filing of a praecipe to issue a writ of summons. After retaining counsel, plaintiffs filed the instant action. Defendants moved pursuant to *Fed. R. Civ. P. 12(c)* for judgment on the pleadings, alleging that the action was barred by the statute of limitations for defamation cases.

OVERVIEW: Plaintiffs argued that the filing of the praecipe in the state court tolled the limitations period and that because the state court action was timely, the instant action must have been considered timely as well. The statute of limitations for a defamation action was one year. *42 Pa. Cons. Stat. § 5523(1)*. The instant action was filed on July 6, 2001. Therefore, any cause of action which accrued before July 7, 2000 was barred by the statute of limitations. The instant court concluded that the filing of the praecipe did not toll the limitations period for the federal action, where the state court action had not been removed to the instant court, and where plaintiffs filed a separate action in the federal court based on the same operative facts. In plaintiffs' complaint, they alleged that defendants' defamatory remarks were repeated approximately 14 times by defendants and published on the union web site. Any defamatory statements made on or after July 7, 2000 remained actionable. But, because plaintiff's complaint was unclear as to the exact

dates the defamatory remarks were repeated, the instant court could not have concluded that they had adequately pled any actionable claims.

OUTCOME: Defendants' motion for judgment on the pleadings was granted. Plaintiffs' complaint was dismissed without prejudice to plaintiffs filing an amended complaint in which plaintiffs alleged facts sufficient to state a cause of action upon which relief may be granted.

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Judgments > Judgment on the Pleadings

[HN1] When considering a motion for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*, the court must consider as true any well-pleaded factual allegations in the pleadings, must draw any permissible inferences from those facts in the non-moving party's favor, and may grant the defendants' motion only when the plaintiff has alleged no set of facts which, if subsequently proved, would entitle her to relief.

Civil Procedure > Pretrial Judgments > Judgment on the Pleadings

[HN2] Under *Fed. R. Civ. P. 12(c)*, a district court cannot grant judgment on the pleadings unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

[HN3] As a basic premise, federal courts sitting in diversity are required to apply the substantive law of the state whose laws govern the action.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

[HN4] In a federal diversity action, when ascertaining matters of state law, the decisions of the state's highest court constitute the authoritative source.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

Governments > Legislation > Statutes of Limitations > General Overview

[HN5] As a federal court sitting in diversity, the court looks to state law to determine when an action is commenced for purposes of the state's statute of limitations.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

[HN6] Under Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.

Governments > Legislation > Statutes of Limitations > Time Limitations

Torts > Intentional Torts > Defamation > Defenses > Statutes of Limitations

Torts > Procedure > Statutes of Limitations > General Overview

[HN7] Under Pennsylvania law, the statute of limitations for a defamation action is one year. *42 Pa. Cons. Stat. § 5523(1)*.

Governments > Legislation > Statutes of Limitations > Time Limitations

[HN8] The statute of limitations begins to run at the time a plaintiff's action accrues, and accrual occurs at the time a plaintiff's right to institute and maintain suit arises. *42 Pa. Cons. Stat. § 5502(a)*.

Torts > Intentional Torts > Defamation > General Overview

Torts > Procedure > Statutes of Limitations > General Overview

[HN9] The cause of action for defamation accrues on the date of publication of the defamatory statements.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Tolling > Pendency

Governments > Legislation > Statutes of Limitations > Tolling

[HN10] The filing of an action in state court does not toll the statute of limitations against a subsequent action filed in federal court.

Governments > Legislation > Statutes of Limitations > Time Limitations

Governments > Legislation > Statutes of Limitations > Tolling

Torts > Intentional Torts > Defamation > Defenses > Statutes of Limitations

[HN11] The filing of a praecipe to issue a writ of summons in a state court did not toll the limitations period for a federal action, where the state court action has not been removed to the federal court, and where plaintiffs filed a separate action in the federal court based on the same operative facts.

Torts > Intentional Torts > Defamation > General Overview

[HN12] It is the original printing of the defamatory material and not the circulation of it which results in a cause of action.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

Civil Procedure > Pretrial Judgments > Judgment on the Pleadings

[HN13] If a district court grants a defendant's motion for judgment on the pleadings, it is within that court's discretion whether to allow a plaintiff to file an amended complaint.

COUNSEL: [*1] For JOHN P. MORRIS, JOSHUA JOHNSON, PLAINTIFFS: JOHN F. INNELLI, INNELLI AND MOLDER, PHILADELPHIA, PA USA.

For JAMES P. HOFFA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, DEFENDANTS: SUSAN BOYLE, BAPTISTE & WILDER, P.C., WASHINGTON, DC USA. ROBERT M. BAPTISTE, LAW OFFICE, WASHINGTON, DC, USA. THOMAS H. KOHN, MARKOWITZ & RICHMAN, PHILA, PA USA.

JUDGES: CLIFFORD SCOTT GREEN, S.J.

OPINION BY: CLIFFORD SCOTT GREEN**OPINION****MEMORANDUM /ORDER****GREEN, S.J.**

Presently before the Court are Defendants' Motion to Dismiss pursuant to *Rule 12(c)*, Plaintiffs' Response, Defendants' Reply and Plaintiffs' Sur-reply¹. For the following reasons, Defendants' motion will be granted.

1 Plaintiffs filed a Memorandum of Law in Opposition to Defendants' Motion for Leave to File a Reply Brief. I granted Defendants' motion to file a reply brief, and their Reply has been docketed. However, since Plaintiffs did make specific legal arguments in answer to Defendants' Reply brief, I have accepted their Memorandum of Law in Opposition to Defendants' Motion for Leave to File a Reply Brief (Docket # 16) as their Sur-reply to the instant motion, and have taken it into account in my consideration of this matter.

[*2] 1. Factual and Procedural Background

John P. Morris and Joshua Johnson ("Plaintiffs") allege that, in November and December of 1999, James P. Hoffa and the International Brotherhood of Teamsters ("Defendants") intentionally and maliciously defamed them.² The defamatory statements were issued in a November, 1999 "Notice" issued by Defendants to the officers and members of Local 115 of the International Brotherhood of Teamsters in Philadelphia ("IBT"). In addition to the statements made in that "Notice," Plaintiffs allege that Defendants issued a press release containing similar, defamatory material, and that Defendants conspired with as-yet-unknown individuals to plant an article containing false and untruthful material in the December 6, 1999 issue of *Time* magazine. In the "next twelve months the [defamatory statements] were repeated approximately fourteen times by Defendants and published on the IBT web site." (See Compl. P 12.)

2 Unless otherwise noted, all facts have been taken from Plaintiffs' Complaint.

[*3] In November, 2000, Plaintiffs, without assistance of counsel, initiated an action in the Court of Common Pleas of Philadelphia County with the filing of a Praecipe to Issue Writ of Summons. That matter is still pending in the state court.³ After retaining counsel, Plaintiffs filed the instant action in July 2001, citing this Court's diversity jurisdiction under 28 U.S.C. § 1332, and

alleging the facts necessary to satisfy the jurisdictional requirements.

3 Because neither party has specifically stated otherwise, I will assume that the Praecipe to Issue Writ of Summons is the only filing in the state-court action. Furthermore, drawing all assumptions in a light most favorable to the Plaintiff, I will accept the statement in their Sur-reply that, in this action, they pursue the very claim which was the subject of the writ of summons. (See Pltfs.' Sur-reply at 2-3.) Therefore, for the purposes of this motion, the Court will assume that the subject matter of the state-court action is the same as the subject matter of this federal action.

[*4] Defendants filed an Answer to the Complaint, and now move pursuant to *Federal Rule of Civil Procedure 12(c)* for Judgment on the Pleadings. Defendants allege that Plaintiffs' action is barred by the statute of limitations applicable to defamation cases. Plaintiffs argue that the filing of the Praecipe to Issue Writ of Summons in the state court tolled the limitations period and that because the state court action was timely, the instant action must be considered timely as well.

2. Legal Standard

[HN1] When considering a motion for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*, the Court "must consider as true any well-pleaded factual allegations in the pleadings, [] must draw any permissible inferences from those facts in the non-moving party's favor, and [] may grant the defendants' motion only when the plaintiff has alleged no set of facts which, if subsequently proved, would entitle her to relief." *DeBraun v. Meissner*, 958 F. Supp. 227, 229 (E.D. Pa. 1997) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)). [HN2] "Under *Rule 12(c)*, a district court cannot grant judgment on the pleadings . . .

[*5] . . . unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187, 193-94 (3d Cir. 1999) (citations and internal quotations omitted).

[HN3] "As a basic premise, federal courts sitting in diversity are required to apply the substantive law of the state whose laws govern the action." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 378 (3d Cir. 1990). [HN4] "When ascertaining matters of state law, the decisions of the state's highest court constitute the authoritative source." *Connecticut Mutual Life Insurance Co. v. Wyman*, 718 F.2d 63, 65 (3d Cir. 1983).

The instant matter is before the Court due to the diversity of the parties, and the Court will apply Pennsyl-

vania law. ⁴ [HN5] "As a federal court sitting in diversity, we look to state law to determine when an action is commenced for purposes of the state's statute of limitations." *Patterson v. American Bosch Corp.*, 914 F.2d 384, 387 (3d Cir. 1990) (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53, 64 L. Ed. 2d 659, 100 S. Ct. 1978). [*6]

4 Defendants argue that Pennsylvania law applies. (See Dfdts.' Mem. at 3.) While Plaintiffs do not specifically argue that Pennsylvania law does or does not apply, they do rely on Pennsylvania law in their brief. (See Pltfs.' Resp. at 4-9.) Generally, in resolving a claim brought under the Court's diversity jurisdiction, the law to be applied is the law of the forum state. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938); see also *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 417, 135 L. Ed. 2d 659, 116 S. Ct. 2211 (1996) (holding that, [HN6] under Erie doctrine, "federal courts sitting in diversity apply state substantive law and federal procedural law"). Therefore, I will apply Pennsylvania law to examine the matter sub judice. See, also, *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1077 (3d Cir. 1985) (holding that Pennsylvania law applies to defamation actions in which plaintiffs reside in Pennsylvania and any harm to their reputation that may have occurred as a result of the challenged publication is largely centered in Pennsylvania).

[*7] 3. Discussion

This case basically comes down to one question: whether the filing of a state court action tolls the statute of limitations for a later-filed and distinct federal action. I conclude it does not.

[HN7] Under Pennsylvania law, the statute of limitations for a defamation action is one year. See 42 Pa. Cons. Stat. § 5523(1). [HN8] The statute of limitations begins to run at the time a plaintiff's action accrues, and accrual occurs at the time a plaintiff's right to institute and maintain suit arises. See 42 Pa. Cons. Stat. § 5502(a); see, also, generally, *Crouse v. Cyclops Ind.*, 560 Pa. 394, 745 A.2d 606, 611 (Pa. 2000). [HN9] The cause of action for defamation accrues on the date of publication of the defamatory statements. See, e.g., *Barrett v. The Catacombs Press*, 64 F. Supp. 2d 440, 443 (E.D. Pa. 1999); *Merv Swing Agency, Inc. v. Graham Co.*, 579 F. Supp. 429, 430 (E.D. Pa. 1983). The instant action was filed on July 6, 2001. Therefore, any cause of action which accrued before July 7, 2000 would be barred by this statute of limitations.

[HN10] "The filing of an action in state court [does not] toll the statute [*8] of limitations against a subsequent action filed in federal court." *Ravitch v. PriceWaterhouse*, 2002 PA Super 49, 2002 Pa. Super. LEXIS 190, No. 373 EDA 2001, 2002 WL 257652 at *3 (Pa. Super. Ct. Feb. 25, 2002) (citing *Falsetti v. Local Union No. 2026, United Mine Workers of America*, 355 F.2d 658 (3d Cir. 1966) and *Royal Globe Insurance Companies v. Hauck Manufacturing Co.*, 335 A.2d 460, 462 (Pa. Super. Ct. 1975)); see, also, *Ammlung v. City of Chester*, 494 F.2d 811, 816 (3d Cir. 1974) ("The running of a Pennsylvania statute of limitations against a federal cause of action is not tolled under Pennsylvania concepts of tolling by the commencement of a similar suit in state court.").

While the state of the law on this question appears to be settled, Plaintiffs attempt to distinguish this matter from the aforementioned Third Circuit cases. Plaintiffs argue that both Falsetti and Ammlung involve "at least two distinct and separate claims - a claim for violation of a state right and a claim for violation of a federal right." (See Pltfs.' Sur-reply at 2.) Plaintiffs contend that these cases "hold the filing of a proceeding in state court on the [*9] state law claim does not toll the limitations on the federal claim." (See Pltfs.' Sur-reply at 2.) This case is different, they argue, because in the instant matter, Plaintiffs are invoking this Court's diversity jurisdiction and "pursue the very claim which was the subject of the writ of summons." (See Pltfs.' Sur-reply at 2-3.) Plaintiffs conclude by arguing that the filing of the state court action "preserved their claims." (See Pltfs.' Sur-reply at 2-3.)

Plaintiffs' arguments are not persuasive. ⁵ While the factual distinctions Plaintiffs note between their case and the Third Circuit cases are technically correct, I conclude that they are not enough to dissuade this Court from applying those cases. The filing of the state court action tolled the limitations period for that action alone. If the state court action were properly removed, then the filing of the action in state court would have sufficed to toll the limitations period. See *Patterson v. American Bosch Corp.*, 914 F.2d 384, 386 (3d Cir. 1990) (applying Pennsylvania law in a diversity action which was removed to federal court, and holding that the filing of a writ and good-faith attempt to [*10] serve the writ tolled the limitations period). However, the state court action is still pending, and cannot be relied on by Plaintiffs in this action. Plaintiffs have not shown - and cannot show - any case which holds that the filing of a state court action tolls the limitation period on state-law claims for all future federal actions. I conclude that [HN11] the filing of the praecipe to issue a writ of summons in the state court did not toll the limitations period for this federal action, where the state court action has

not been removed to this Court, and where Plaintiffs filed a separate action in this federal court based on the same operative facts. Therefore, any cause of action which Plaintiffs seek to pursue in this matter which accrued before July 7, 2000 is barred by Pennsylvania's one year statute of limitations for defamation actions.

5 It should be noted that, if Plaintiffs were able to successfully argue that this case differs from Falsetti and Ammlung on the basis that this federal action has the same factual basis and legal justification as the previously filed state-court action, then the Plaintiffs' instant case may be subject to dismissal under existing abstention doctrines, since the state-court action is still pending, was filed first, was filed by Plaintiffs, state-law issues predominate, and, as Plaintiffs freely and unprovokedly admit, the facts in the state-court action form the exact same factual basis as the instant federal court action. However, since the parties have not briefed this issue, the record is insufficient to make this determination at this time, and the Court declines to draw unsupported suppositions.

[*11] This determination does not end the matter, however. In Plaintiffs' Complaint, they allege that Defendants' defamatory remarks were "repeated approximately fourteen times by defendants and published on the IBT web site." (See Compl. P 12.) The instant action was filed on July 6, 2001. I have just concluded that any defamatory remarks published before July 7, 2000, are barred by the one year statute of limitations for defamation actions. However, any defamatory statements made on or after July 7, 2000 would remain actionable, and the filing of this action may have tolled the limitations period on any claims involving those statements.⁶ But, since Plaintiff's Complaint is unclear as to the exact dates the defamatory remarks were "repeated," I cannot conclude that they have adequately plead any actionable claims. Plaintiffs' Complaint will be dismissed, but Plaintiffs will be given the opportunity to file an Amended Complaint⁷ which definitively sets forth claims which are not time barred.⁸

6 Of course, Plaintiffs must allege - and ultimately be able to prove - that the defamatory statements were issued independent of their original publication. See, e.g., *Graham v. Today's Spirit*, 503 Pa. 52, 468 A.2d 454, 457 (stating that [HN12] "it is the original printing of the defamatory material and not the circulation of it which results in a cause of action"). While I do not, at this time, decide whether the "publication" of remarks over the Internet is subject to the same rules and precedent as the "publication" of writ-

ten material in other media controlled by Graham, at the preliminary stage Plaintiffs must, at least, set forth the specific publication dates of each defamatory statement for which they seek recovery.

[*12]

7 [HN13] If a district court grants a defendant's motion for judgment on the pleadings, it is within that court's discretion whether to allow a plaintiff to file an amended complaint. See *Jablonski v. Pan American World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988). Though Plaintiffs have not specifically moved for leave to file an Amended Complaint, I will give the Plaintiffs an opportunity to set forth claims which are legally sufficient and consistent with this memorandum.

8 Because I am dismissing Plaintiffs' Complaint in its entirety, I need not consider Defendants' argument that Plaintiffs have failed to plead "special harm" from Defendants' allegedly defamatory remarks, as is required under Pennsylvania law. (See Dfdts.' Mem. at 6-7.) It is also unnecessary to consider whether, as Plaintiffs argue, the allegedly defamatory remarks constitute slander per se, which, if proven, may negate the requirement of special damages. (See Pltfs.' Resp. at 8-9.)

4. Conclusion

For the foregoing reasons, I will dismiss Plaintiff's Complaint, as Plaintiffs have failed to [*13] sufficiently set forth any claims that are not subject the applicable statute of limitations. Plaintiffs will be given an opportunity to file an Amended Complaint. An appropriate order follows.

ORDER

AND NOW, this day of April, 2002, upon consideration of Defendants' Motion to Dismiss pursuant to *Rule 12(c)*, Plaintiffs' Response, Defendants' Reply and Plaintiffs' Sur-reply, **IT IS HEREBY ORDERED** that:

1) Defendant's motion to dismiss is **GRANTED**;

\$2) Plaintiffs' Complaint is **DISMISSED, without prejudice to Plaintiffs filing an Amended Complaint by April 29, 2002**, in which Plaintiffs allege facts sufficient to state a cause of action upon which relief may be granted.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.



MARJORIE S. WILDER, SANDRA F. KLEBANOFF v. JAMES S. BREWER

NO. CV94-053 85 73

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF
HARTFORD - NEW BRITAIN, AT HARTFORD

1994 Conn. Super. LEXIS 2386

September 19, 1994, Decided
September 20, 1994, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant town resident requested revisions of a four-count defamation complaint that was filed by plaintiff town counsel. Defendant sought revision on two grounds. The first sought information that was evidential, so as to have allowed defendant appropriate disclosure and inquiries in defense of the claim. The second request dealt with separation of alleged publication counts. Plaintiffs objected revisions.

OVERVIEW: Plaintiff town counsel filed a complaint alleging that defendant town resident forwarded a letter to the Town Clerk containing statements that falsely and maliciously libeled plaintiffs by impugning their integrity and professional performance. Defendant requested revisions of the complaint. A party had the right to plead his case in his own way unless it was clearly in nonconformity with an applicable rule of pleading. A more definite statement should have been ordered only for substantial reasons. Defendant filed a request to revise so that appropriate disclosure and inquiries could have been made in defense of the claim. After reviewing the complaint, it appeared the information sought by defendant was evidential. To the extent that defendant was unaware of any portion of that information, it would have been discoverable under the rules of practice, so such revision was denied. However, as plaintiffs must have either spe-

cifically alleged the date and manner of the republications or, alternatively, removed from the pleading the allegation that defendant "republished" allegedly defamatory statements, the revision request to separate each publication count was granted.

OUTCOME: The requests to revise the complaint were denied in part and granted in part. The evidential information sought would have been discoverable under the rules of practice, so such revision request was denied. The request for separation of each alleged publication count was granted, as plaintiff town counsel must have either specifically alleged the date and manner of republications or removed from the pleading the allegation of republication.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN1] A party has the right to plead his case in his own way unless it is clearly in nonconformity with an applicable rule of pleading. Each pleading shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved. If any such pleading does not fully disclose the ground of claim or defense, the court may order a fuller and more particular statement.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN2] Whenever any party desires to obtain a more complete or particular statement of the allegations of an adverse party's pleading, or separation of causes of action which may be united in one complaint when they are improperly combined in one count the party desiring any such amendment in an adverse party's pleading may file a timely request to revise that pleading. A request to revise seeks an order directing the opposing party to revise his pleading in the manner specified. It has been held that a more definite statement should be ordered with caution and never for unsubstantial reasons.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN3] The power of the trial court to direct a fuller and more particular statement of the ground of a claim or defense contained in any pleading, is largely discretionary, to be exercised with caution, and never for frivolous or unsubstantial reasons.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN4] The motion for a more specific statement has for its limited purpose, the securing of a statement of the material facts upon which the adverse party bases his complaint or defense. The test is not whether the pleading discloses all that the adversary desires to know in aid of his own cause, but whether it discloses the material facts which constitute the cause of action or ground of defense.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Torts > Intentional Torts > Defamation > General Overview

[HN5] Privilege is an affirmative defense in a defamation action and must, therefore, be specially pleaded by the defendant.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Torts > Intentional Torts > Defamation > General Overview

[HN6] Plaintiffs must either specifically allege the date and manner of alleged republications by a defendant, or, in the alternative, remove from the pleading the allegation that defendant "republished" allegedly defamatory statements.

JUDGES: Mulcahy

OPINION BY: MULCAHY

OPINION

RULING RE: PLAINTIFFS' OBJECTION TO DEFENDANT'S REQUEST TO REVISE (FILE #101 AND #102)

Plaintiffs in this action are the Corporation Counsel for the Town of West Hartford and the Mayor of that Town. Defendant is a resident of West Hartford and engages in the private practice of law in said town.

On June 9, 1994, plaintiffs filed a four count complaint in which they allege that defendant forwarded a letter, dated April 6, 1994, to the Town Clerk containing "statements which falsely and maliciously libeled" plaintiffs "by impugning [their] integrity and [their] performance within [their] profession." On June 24, 1994, defendant filed six requested revisions of the complaint. On July 15, 1994, plaintiffs objected to the first, third, fourth, and sixth requested revisions.

Defendant, under Practice Book Section 147, has requested that plaintiffs revise the complaint in the following manner. In the first and fourth revisions, respectively, defendant requests that the letter [*2] containing the allegedly defamatory statements be attached to, and incorporated in, the complaint so as to provide defendant with a more particularized statement of plaintiffs' allegations. Specifically, defendant asserts that the allegations of defamation are so "broad, uncertain and conclusory that it will be impossible for [him] to file a motion to strike without referring improperly to matters outside the complaint." Defendant argues that if the letter is attached, it contains privileged communications, and consequently, the four counts of the complaint will be susceptible to a motion to strike.

Plaintiffs have objected to the first and fourth requested revisions on the grounds that: 1) the complaint adequately sets forth facts in support of their claims; 2) they "should not be compelled . . . to republish" the allegedly defamatory letter; 3) the defendant must plead privilege as a special defense; and 4) the production of the letter is a matter appropriately addressed in discovery and not through a request to revise.

In the third and sixth requested revisions, defendant requests that plaintiffs revise their complaint by setting forth, in additional counts, the date of each [*3] alleged publication by the defendant of the allegedly defamatory statements, as well as the manner thereof, and the allegedly defamatory language utilized. In support of this requested revision, defendant argues that each publica-

tion of defamatory statements is a separate cause of action that cannot be properly pleaded in one count. Plaintiffs object to the third and sixth requested revisions, respectively, on the ground that the plaintiffs have not alleged more than one cause of action. The plaintiffs assert that they "cannot separate different causes of action, as none exist."

It is observed, preliminarily, that "[HN1] a party has the right to plead his case in his own way unless it is clearly in nonconformity with an applicable rule of pleading. *First National Bank v. Blakeslee*, 4 Conn. Sup. 354 (Super. Ct. 1936). Practice Book § 108, entitled "General Rules of Pleading--Fact Pleading," provides, in part:

each pleading shall contain a plain and concise statement of the material facts on which the pleader relies, *but not of the evidence by which they are to be proved* If any such pleading does not fully disclose the ground of claim or defense, the court [*4] may order a fuller and more particular statement (Emphasis added).

With respect to the complaint, Practice Book Section 131 provides, in part, that it "shall contain a concise statement of the facts constituting the cause of action" And, Section 141 states: "where the plaintiff desires to make a copy of any document a part of his complaint, he may, without reciting or annexing it, refer to it as Exhibit A, B, C, etc., as fully as if he had set it out at length" Requests to revise are governed by Practice Book Sections 147 through 149; Section 147¹ provides, in part, as follows:

[HN2] Whenever any party desires to obtain (1) a more complete or particular statement of the allegations of an adverse party's pleading, or . . . (3) separation of causes of action which may be united in one complaint when they are improperly combined in one count the party desiring any such amendment in an adverse party's pleading may file a timely request to revise that pleading.

A request to revise seeks "an order directing the opposing party to revise his pleading in the manner specified." *Royce v. Westport*, 183 Conn. 177, 180, 439 A.2d 298 (1981). [*5] It has been held that a more definite statement should be ordered with caution and never for un-

substantial reasons. *Itzkowitz v. Markow*, 12 Conn. Sup. 68, 69 (C.P. 1943); *but see: Massa v. Union & New Haven Trust Co.*, 12 Conn. Sup. 324, 325 (Super. Ct. 1944).

1 In 1978, the former motion for a "more specific statement" was changed to a request to revise, to obtain a "more complete or particular statement." Its function remains unaltered . . . and the new motion serves essentially the same purpose. As such, prior caselaw as to the old practice book rule can be used to determine the applicability of the new section. *See: Kileen v. General Motors Corporation*, 36 Conn. Sup. 347, 348, 421 A.2d 874 (Super. Ct. 1980).

"[HN3] The power of the trial court . . . to direct a fuller and more particular statement of the ground of a claim or defense contained in any pleading, is largely discretionary, to be exercised with caution, and never for frivolous or unsubstantial reasons." *Prince v. Takash*, 75 [*6] Conn. 616, 619, 54 A.1003 (1903); *see: Multi Mail v. TEK Electronic Mfg. Co.*, Superior Court, Geographical Area #8, Docket No. CV 8-1044 (April 27, 1992). One of the purposes for a request to revise is to set up the complaint for a motion to strike. *Moore v. State*, 15 Conn. Sup. 251, 252, 209 A.2d 280 (C.P. 1947); *see: Scribner v. O'Brien*, 169 Conn. 389, 399-400, 363 A.2d 160 (1975).

In *Kileen v. General Motors Corporation*, *supra*, the defendant filed a request to revise so that "appropriate and direct disclosure and inquiries [could] be made in defense of this claim." (Internal quotation marks omitted.) 36 Conn. Sup. at p. 348. According to the court, the defendant wanted "to become as well informed as possible so that a credible and strong defense [could] be established." *Id.* at p. 348-49. The court stated that "[a] request to revise is permissible to obtain information so that a defendant may intelligently plead and prepare his case for a trial but it is never appropriate where the information sought is merely evidential." *Id.*, 349. "The defendant is not entitled to know the plaintiff's proof but only what he claims as his cause of action." (Citation [*7] omitted.) *Id.* And, in *Brooks v. Borten*, 8 Conn. Sup. 463 (Super. Ct. 1940), it was stated:

"[HN4] The motion for a more specific statement has for its limited purpose, the securing of a statement of the material facts upon which the adverse party bases his complaint or defense. The test is not whether the pleading discloses all that the adversary desires to know in aid of his own cause, but whether it discloses the material facts which constitute the cause of action or ground of defense."

The case of *Golino v. MacDonald*, 2 Conn. L. Rptr. 682 (October 30, 1990) was a two count slander action; there, the defendant filed a request to revise requesting that the plaintiff plead the exact defamatory words uttered by the defendant, and when, to whom, and where the allegedly defamatory statements were made. In sustaining the plaintiff's objection to the request to revise, the court, citing *Kileen v. General Motors Corporation*, *supra*, stated that "these specifics are evidentiary and therefore proper matters for discovery, because material facts upon which the pleading is based are already pled." In *Cronan v. Politano*, Superior Court, Judicial District of Ansonia/Milford, [*8] Dk. No. 03 96 72 (December 21, 1991), the court, noting that Practice Book § 108 provides that "each pleading shall contain a plain and concise statement of the material facts on which the pleader relies. . . .", stated that if a plaintiff's allegations are sufficiently specific to satisfy Practice Book § 108, and it is established that the information sought by the defendant is merely evidential, a plaintiff's objection to the request to revise should be sustained.

A review of the reported case law in this jurisdiction does not reveal any specific authority supporting the proposition that a plaintiff in a libel action must attach to, and incorporate in, the complaint the allegedly libelous documents. After reviewing the complaint, it appears to the court that plaintiffs have set forth allegations sufficient to satisfy the requirements of Section 108 of the

Practice Book. It further appears to the court that the information being sought by defendant on the instant motion is evidential. To the extent that defendant is unaware of any portion of that information, it would be discoverable under the rules of practice; and moreover, our courts have stated that "[HN5] privilege is an affirmative [*9] defense in a defamation action and must, therefore, be specially pleaded by the defendant." *Miles v. Perry*, 11 Conn. App. 584, 594 n.8, 529 A.2d 199 (1987); see *Monczport v. Csongradi*, 102 Conn. 448, 450-51, 129 A. 41 (1925). Accordingly, plaintiffs' objections to the first and fourth requests to revise are hereby *sustained*.

As to the third and sixth requested revisions, the court finds that the defendant is correct in asserting that, generally, in a defamation action, the plaintiff must separate each publication in a separate count. *See: Yavis v. Sullivan*, 137 Conn. 253, 261, 76 A.2d 99 (1950); *Golino v. MacDonald*, *supra*. Therefore, plaintiffs' objections to the third and sixth requested revisions are hereby *overruled* to the extent that [HN6] plaintiffs must either specifically allege the date and manner of the alleged republication(s) by the defendant, or, in the alternative, remove from the pleading the allegation that defendant "republished" allegedly defamatory statements.

Mulcahy, J.



DAVID GRIPPI, ROBERT BIER, AND THOMAS MARTINO, Plaintiffs-Appellants, v. ANTHONY SPALLIERO, DOMENICA SPALLIERO RUSSO,¹ and JOSEPH SPALLIERO, Defendants-Respondents, and MARLBORO ENTERTAINMENT CENTER CORP., THE SPORTS & ENTERTAINMENT DEVELOPMENT CORP., MARLBORO ROUTE 9 AND 520 DEVELOPMENT COMPANY, and MATTHEW V. SCANNAPIECO, Defendants.

1 Incorrectly designated as "Dominique Spalliero" in the original complaint and subsequent pleadings.

DOCKET NO. A-2842-07T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2008 N.J. Super. Unpub. LEXIS 2754

**October 15, 2008, Argued
November 24, 2008, Decided**

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3955-05.

COUNSEL: Alan S. Pralgever argued the cause for appellants (Greenbaum, Rowe, Smith & Davis, LLP, attorneys; Mr. Pralgever and Gary L. Koenigsberg, on the brief).

James J. Addonizio argued the cause for respondent, Anthony Spalliero (Rudnick, Addonizio & Pappa, attorneys; Mr. Addonizio, on the brief).

Michael J. Fasano argued the cause for respondents, Domenica Spalliero Russo and Joseph Spalliero (Lomurro, Davison, Eastman & Munoz, P.A., attorneys; Mr. Fasano, on the brief).

JUDGES: Before Judges Parker, Yannotti and LeWinn.

OPINION

PER CURIAM

Plaintiffs David Grippi, Robert Bier and Thomas Martino appeal from orders entered by Judge John Mullaney on January 2 and 4, 2008, dismissing plaintiffs' claims against defendants Anthony Spalliero (Spalliero), Dominica Spalliero Russo (Russo), and Joseph Spalliero (J. Spalliero).² For the reasons that follow, we affirm.

2 We note that plaintiffs also named Marlboro Entertainment Center Corp. (Marlboro), The Sports & Entertainment Development Corp. (SED), Marlboro Route 9 and 520 Development Company (Marlboro 9/520), and Matthew V. Scannapieco (Scannapieco) as defendants. [*2] We have been advised that those parties never answered the complaint.

I.

A. The prior litigation.

In 1995, plaintiffs and other parties filed an action in the Law Division in which they alleged that they were shareholders of Marlboro, an entity incorporated by Spalliero and Abraham M. Penzer (Penzer). Plaintiffs alleged that in March 1990, Marlboro entered into an agreement with a joint venture called Herraxx Associates (Herraxx) for the purchase of about twenty-one acres of land along Routes 9 and 520 in Monmouth and Middlesex Counties.

According to the complaint, Marlboro intended to construct a movie theater, recreation center, bowling center, restaurant, bank and other structures on the site. Plaintiffs alleged that Herraxx had represented and warranted that it had no knowledge of any fact or circumstance that would interfere with the anticipated development of the property. In May 1990, Marlboro received final major site plan approval for the development of the site.

Plaintiffs further alleged that Herraxx had previously applied to the U.S. Army Corps of Engineers for a wetlands construction permit and had been directed to submit plans to the New Jersey Department of Environmental [*3] Protection (NJDEP) to determine the extent of the wetlands on the site and to obtain authorization for construction of the proposed improvements. According to plaintiffs, the NJDEP only authorized Herraxx to disturb .27 acres of freshwater wetlands on the property for the construction of a sewer line.

Plaintiffs alleged that Marlboro first became aware that there were freshwater wetlands on the site in April 1990. In May 1990, Marlboro commenced construction by dredging and filling the property. In July 1990, the Army Corps issued a letter to Spalliero, who was then Marlboro's president, stating that approximately eight acres of protected wetlands on the property had been cleared and filled without authorization. Even so, on August 21, 1990, Marlboro closed on the purchase of the property and Herraxx transferred title to Marlboro.

Plaintiffs asserted that in November 1990, the NJDEP issued a notice of violation and instructed Marlboro to cease and desist from any further construction on the property. In February 1991, the Army Corps advised Marlboro that about nine acres of wetlands had been impermissibly destroyed and ordered Marlboro to restore the property to its original condition.

Plaintiffs [*4] alleged that Marlboro was faced with the cost of restoring the wetlands as well as extensive fines and penalties. In July and August 1990, Spalliero and Penzer solicited investments in Marlboro from plaintiffs. Plaintiffs claimed that Spalliero and Penzer represented to them that Marlboro was constructing various improvements on the property and that the site was suitable for these purposes.

Plaintiffs further alleged that Spalliero and Penzer failed to inform them that there were wetlands on the property or that the presence of wetlands would have an effect on the proposed construction and development of the property. They also claimed that Spalliero and Penzer never told them that Marlboro had been cited for the "wetlands violations" and ordered to restore the property to its original condition. Plaintiffs stated that after they invested "hundreds of thousands of dollars" in Marlboro,

they learned about the "wetlands problem" on the property.

Based on these allegations, plaintiffs asserted claims against Marlboro for breach of contract, negligence, fraud, and breach of the covenants of good faith and fair dealing. They asserted claims against Spalliero and Penzer for breach of contract, [*5] negligence, breach of the covenants of good faith and fair dealing and breach of fiduciary duty. Plaintiffs additionally asserted claims against Spalliero for fraud and conversion; and a claim against Penzer for legal malpractice. Claims also were asserted against professional engineers Edward A. Patalano and Edward A. Patalano Associates, Herraxx, Herrican Development, Ltd., XAX Group, Inc., Continental Insurance Company, Diraje Corp., and Green Meadows Holdings, L.L.C.

Plaintiffs agreed to settle their claims against Spalliero and Penzer. On March 13, 2000, the settlement was placed on the record before Judge Paul Chalet. Spalliero and Penzer agreed to provide plaintiffs with cash or services in the total amount of \$ 300,000. Plaintiffs, Spalliero and Penzer agreed that, upon full payment, the "standard releases" would be signed and exchanged. They further agreed that the terms of the settlement would remain confidential.

In court, plaintiffs, Spalliero and Penzer were sworn and they stated on the record that they agreed to the terms of the settlement. They also stated that they had not been forced to enter into the settlement and they were satisfied with the efforts of their attorneys. [*6] The record of the settlement was sealed. Thereafter, the plaintiffs provided releases to Spalliero and Penzer.

B. The complaint in this matter.

This action was commenced on September 6, 2005. In their complaint, plaintiffs noted that the prior litigation had been settled. They also stated that United Jersey Bank (UJB) had filed an action to foreclose on a note, Spalliero's personal guaranty and a mortgage on the property. On October 3, 1995, UJB had assigned its rights under the note, guaranty and mortgage to SED.

Plaintiffs alleged that, at the time of that assignment, Spalliero agreed that he would not bid on the property at the foreclosure sale and he would cooperate in the development of the property. Plaintiffs further alleged that they had agreed to the settlement of the prior litigation based upon representations made both on the record and off the record that Spalliero "no longer maintained, and would not maintain, any interest, directly or indirectly, in the [p]roperty."

Plaintiffs claimed that Spalliero had "maintained, either directly or indirectly" an interest in the property through Marlboro, SED and Marlboro 9/520 "prior to

and since the time the settlement was reached." [*7] Plaintiffs also claimed that Spalliero had transferred real and personal property and other assets to the other defendants. Plaintiffs alleged that Spalliero did so with the intent to delay, hinder and defraud plaintiffs.

Plaintiffs sought, among other things, an order vacating the settlement of the prior litigation, restoration of the complaint in the previous action, a declaration voiding the alleged fraudulent transfers of property, restraints against the further transfer of property, as well as compensatory and punitive damages.

C. Federal criminal proceedings.

On October 11, 2005, Spalliero was indicted by a federal grand jury on various charges including offering and giving corrupt payments, scheming to defraud the public of honest services, and conspiracy to defraud the Internal Revenue Service (IRS). On September 17, 2007, Spalliero agreed to plead guilty to two counts involving the making of cash payments to Scannapieco in connection with the construction of housing on the site of the former Marlboro Airport, and one count alleging a conspiracy to defraud the IRS. It was agreed that if Spalliero complied with the terms of the agreement, the remaining charges against him would [*8] be dismissed. Spalliero was scheduled to be sentenced on September 5, 2008.³

3 J. Spalliero also was charged under the indictment. It was expected that the charges against him would be dismissed when Spalliero was sentenced.

D. The trial court proceedings in this case.

On May 26, 2006, Judge Mullaney entered an order directing plaintiffs to file an amended complaint with "a more definite statement addressed to the questions of fraud and/or fraudulent conveyance and/or breach of the settlement of March 13, 2000[.]" Plaintiffs filed an amended complaint on August 17, 2006, which repeated the allegations in the original complaint and added a claim that defendants violated the New Jersey Racketeer Influenced and Corrupt Organizations (RICO) Act, *N.J.S.A. 2C:41-1 to -6.2*, and had engaged in a civil conspiracy.

On February 23, 2007, plaintiffs served defendants with interrogatories and a demand for the production of documents. In July 2007, Spalliero, Russo and J. Spalliero filed a motion to dismiss the claims asserted against them. Plaintiffs opposed the motion and filed a cross-motion to extend the time for discovery and to compel defendants to respond to the outstanding discovery requests.

Judge [*9] Mullaney heard argument on September 20, 2007, and directed the parties to address the issue of

whether plaintiffs' action was barred by the settlement of their claims against Spalliero and Penzer in the prior litigation. On November 8, 2007, Judge Mullaney heard additional argument on the motions and reserved decision.

The judge placed his decision on the record on January 2, 2008. The judge determined that the prior litigation "was well and truly settled" and that the settlement precluded plaintiffs from maintaining their claims in this action. On January 2, 2008, the judge entered an order dismissing the claims against Russo and J. Spalliero with prejudice. The judge entered an order on January 4, 2008, dismissing the claims against Anthony Spalliero with prejudice. This appeal followed.

II.

We note initially that the record submitted by plaintiffs on this appeal failed to disclose whether the trial court's orders of January 2, 2008 and January 4, 2008 were final judgments from which an appeal may be taken as of right pursuant to *Rule 2:2-3(a)(1)*. "To be a final judgment, an order generally must 'dispose of all claims against all parties.'" *Janicky v. Point Bay Fuel, Inc.*, 396 N.J. Super. 545, 549-50, 935 A.2d 803 (App. Div. 2007) [*10] (quoting *S.N. Golden Estates, Inc. v. Cont'l Cas. Co.*, 317 N.J. Super. 82, 87, 721 A.2d 307 (App. Div. 1998)).

Although the orders at issue disposed of plaintiffs' claims against Spalliero, Russo and J. Spalliero, the record did not disclose whether the claims against the other named defendants had been resolved. In a letter dated October 8, 2008, counsel for plaintiffs advised this court that Marlboro, SED, Marlboro 9/520 and Scannapieco never filed answers to the complaint. Counsel did not state, however, whether defaults or default judgments had ever been entered against those defendants.

It appeared therefore that claims were still pending in the trial court against Marlboro, SED, Marlboro 9/520 and Scannapieco. At oral argument, we questioned whether this court had jurisdiction in the matter because it appeared that the orders appealed from were not final judgments and leave to appeal had not been granted.

Thereafter, the trial court issued an order that certified the orders as final and appealable judgments pursuant to *Rule 4:42-2*. Although we suggested at oral argument that such an order might resolve the apparent jurisdictional defect, it is apparent upon further consideration that the preconditions [*11] for certifying an interlocutory order as a final judgment under *Rule 4:42-2* have not been satisfied.

The orders appealed represent an adjudication of the claims against Spalliero, Russo and J. Spalliero but they

do not impose liability against any party. Because the orders are not enforceable as judgments, they may not be certified as final pursuant to *Rule 4:42-2. Janicky, supra, 396 N.J. Super. at 552.*

We are convinced, however, that leave to appeal should be granted *nunc pro tunc* pursuant to *Rule 2:4-4(b)(2)* to resolve the issues raised on this appeal. The appeal has been fully briefed and the interests of justice would be served by addressing the issues raised by plaintiffs at this time rather than after the resolution of the claims against Marlboro, SED, Marlboro 9/520, and Scannapieco.

III.

Plaintiffs raise the following issues for our consideration:

POINT I

THE TRIAL COURT ERRED BY ENFORCING THE PRIOR SETTLEMENT BECAUSE THE PLAINTIFFS HAD RAISED FACTUAL ISSUES OF FRAUD THAT REQUIRED A PLE-NARY HEARING.

POINT II

THE TRIAL COURT IMPROPERLY CONVERTED THE MOTION TO DISMISS AND CROSS-MOTION TO COMPEL DISCOVERY SUA SPONTE INTO A MOTION TO ENFORCE THE SETTLEMENT AND IMPROPERLY ENGAGED IN OFF [*12] THE RECORD DISCUSSIONS WITH THE MARCH 2000 SETTLEMENT JUDGE.

POINT III

THE TRIAL COURT ERRED BY DISMISSING THE COMPLAINT BECAUSE PLAINTIFFS HAD ADEQUATELY PLEAD VARIOUS CAUSES OF ACTION TO VACATE THE MARCH 2000 SETTLEMENT, AND NO DISCOVERY HAD TAKEN PLACE PURSUANT TO THE COURT'S DIRECTION. THUS, THERE WAS NO BASIS TO DISMISS PLAINTIFFS' COMPLAINT.

A. DEFENDANT SPALLIERO'S MOTION TO DISMISS SHOULD HAVE BEEN DENIED BECAUSE HE WAS IN DEFAULT WITH RESPECT

TO [HIS] DISCOVERY OBLIGATIONS.

B. PLAINTIFFS' FRAUD CLAIM SATISFIES THE MATERIAL ELEMENTS OF THE UNDERLYING CAUSE OF ACTION AND IS PLEAD WITH PARTICULARITY PURSUANT TO *RULE 4:5-8*.

C. FRAUD COUNT PLEAD WITH SPECIFICITY.

D. PLAINTIFFS ADEQUATELY PLEAD FRAUDULENT TRANSFER IN COUNT[S] THREE, FOUR AND FIVE [OF] THE AMENDED COMPLAINT.

E. THE PLAINTIFFS HAVE SUFFICIENTLY PLEAD VIOLATIONS OF NEW JERSEY'S RICO ACT BY THE DEFENDANTS IN COUNT[] SIX.

F. PLAINTIFFS HAVE SUFFICIENTLY PLEAD CIVIL CONSPIRACY IN COUNT SEVEN OF THE AMENDED COMPLAINT.

We have thoroughly reviewed the record in light of these contentions and the applicable law. We are convinced that plaintiffs' arguments are without merit.

We reject plaintiffs' contention that Judge Mullaney erred [*13] by "converting" defendants' motions to dismiss into a motion to enforce the settlement of the prior litigation. Here, defendants sought dismissal pursuant to *Rule 4:6-2(e)* on the ground that plaintiffs failed to state claims upon which relief could be granted. Defendants also asserted that the plaintiffs' fraud claims should be dismissed because they had not been pled with the particularity required by *Rule 4:5-8*.

When Judge Mullaney first considered defendants' motions on September 20, 2007, he noted that the motions raised the issue of whether plaintiffs could pursue their claims in view of the settlement that they reached with Spalliero and Penzer in the prior litigation. Indeed, in their complaint, plaintiffs had squarely placed the validity of that settlement in issue. Although Spalliero had not moved to enforce the settlement, he was in effect asking for that relief through his *Rule 4:6-2(e)* motion.

Thus, the judge did not improperly "convert" defendants' motion to dismiss into a motion to enforce the settlement. In any event, the judge afforded plaintiffs ample time to brief and argue the issue. Accordingly, there is no merit to plaintiffs' contention that they were

denied due [*14] process by the manner in which the judge considered the motions.

Plaintiffs next argue that Judge Mullaney acted improperly by consulting with Judge Chalet regarding the settlement of the prior litigation. As we stated previously, the terms of the settlement were placed on the record before Judge Chalet on March 13, 2000. Plaintiffs maintain that, by speaking to Judge Chalet about the matter, Judge Mullaney violated various provisions of the Code of Judicial Conduct (CJC). We disagree.

In a letter dated February 26, 2008, which was submitted to this court pursuant to *Rule 2:5-1(b)*, Judge Mullaney stated in part that

Judge Chalet sits in the Criminal Division in Monmouth County and has been there for several years. When this matter came to me under the docket number assignment, I determined that the underlying case had been settled but that the settlement had been sealed at the request of counsel. I spoke with Judge Chalet about his recollection, if any, of the settlement and he indicated to me that he had no recollection whatsoever about this matter. He advised me that the only reference he had of this would be the transcript which I would have to arrange to unseal to determine what was [*15] settled and the method and manner of the settlement.

We are satisfied that Judge Mullaney did not act improperly when he asked Judge Chalet if he recalled the settlement of the prior litigation. Although *Canon 3(A)(6) of the CJC* states that a judge may not engage in "ex parte or other communications concerning a pending or impending proceeding," the commentary to that rule states that this proscription "does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities." Moreover, Judge Chalet did not recall the previous litigation and the discussion had no bearing whatsoever on Judge Mullaney's decision on the motions.

Plaintiffs next argue that Judge Mullaney erred by dismissing their claims. Plaintiffs contend that their claims were pleaded with sufficient particularity to survive the motion to dismiss. They also argue that the judge acted prematurely in dismissing their complaint and they should have been afforded an opportunity for discovery. Again, we disagree.

Where, as in this case, a motion is made to dismiss a complaint pursuant to *Rule 4:6-2(e)*, the trial court must determine "whether [*16] a cause of action is "suggested" by the facts." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746, 563 A.2d 31 (1989) (quoting *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 192, 536 A.2d 237 (1988)). The court must examine "the legal sufficiency of the facts alleged on the face of the complaint." *Ibid.* The court must search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of a claim, opportunity being given to amend if necessary." *Ibid.* (quoting *Di Cristofaro v. Laurel Grove Memorial Park*, 43 N.J. Super. 244, 252, 128 A.2d 281 (App. Div. 1957)). We are convinced that Judge Mullaney did not err by finding that plaintiffs failed to plead sufficient facts to support their claims.

As the judge pointed out in his decision on the record, plaintiffs' fraud claims were based on the assertion that Spalliero had induced them to settle the prior litigation by making false and misleading statements that the subject property had been "lost" in foreclosure, was valueless, and could not be developed due to the wetlands issue. Plaintiffs also claimed that Spalliero represented that he would have no further interest in or [*17] involvement with the property.

As Judge Mullaney found, however, the terms of the settlement did not preclude Spalliero from having an interest in the property or involvement in its development. Indeed, plaintiffs stated in their complaint that Spalliero entered into an agreement in 1995 which provided, among other things, that he would not bid on the property at the foreclosure sale and would cooperate in the development of the property. Therefore, plaintiffs' complaint in this action made clear that, before they entered into the agreement to settle the prior litigation, plaintiffs were well aware that the property was going to be developed and that Spalliero would continue to be involved in its development.

In addition, the complaint filed in the prior case indicated that plaintiffs were well aware of the "wetlands problem" with the property. That pleading also showed that plaintiffs knew that the property had been "lost" in the foreclosure action. Furthermore, although plaintiffs alleged that Spalliero continued to maintain some sort of interest in the property, there were no facts in the complaint to support that allegation.

Thus, the facts as alleged in the complaint provided insufficient [*18] support for plaintiffs' claim against Spalliero for fraud. The complaint also failed to include specific factual allegations to support plaintiffs' fraud claims against Russo and J. Spalliero.

In addition, the complaint did not set forth sufficient facts to support the allegations that Spalliero had fraudulently transferred assets to other defendants with the intent to delay, hinder and defraud creditors, that such transfers were made without receiving reasonably equivalent value, and that Spalliero had become insolvent as a result of these transfers. The complaint merely set forth conclusions without any factual basis.

Similarly, plaintiffs failed to plead sufficient facts to support their claims under New Jersey's RICO Act, *N.J.S.A. 2C:41-1 to -6.2*. The Act provides that it is

unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he has participated as a principal within the meaning of *N.J.S.A. 2C:2-6* to sue or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation [*19] of any enterprise which is engaged in or the activities of which affect trade or commerce.

[*N.J.S.A. 2C:41-2a.*]

To establish "a pattern of racketeering activity," a plaintiff must show that the enterprise is

(1) [e]ngaging in at least two incidents of racketeering conduct one of which shall have occurred after the effective date of this act and the last of which shall have occurred within 10 years . . . after a prior incident of racketeering activity; and

(2) [a] showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims . . . or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

[*N.J.S.A. 2C:41-1d.*]

Plaintiffs alleged that defendants had engaged in "racketeering activity," specifically fraud and the fraud-

ulent transfer of property. Plaintiffs claimed that the "purpose" of the "racketeering enterprise" was "to defraud the plaintiffs through the improper transfers and development of the [p]roperty[.]" However, as with plaintiffs' other causes of action, the complaint did not set forth sufficient facts to support these allegations.

The same is true of plaintiffs' [*20] claim that defendants had engaged in a civil conspiracy. To support such a claim, a plaintiff must establish:

a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.

[*Morgan v. Union County Bd. of Chosen Freeholders*, 268 N.J. Super. 337, 364, 633 A.2d 985 (App. Div. 1993) (internal citations omitted), *certif. denied*, 135 N.J. 468, 640 A.2d 850 (1994).]

In their amended complaint, plaintiffs alleged that the purpose of the conspiracy "was to fraudulently deny [p]laintiffs their interest in the property by way of fraudulent property transfers and bribery of public officials so as to be able to develop the property after representing that A. Spalliero no longer had an interest in the [p]roperty[.]" However, as we have explained, plaintiffs did not plead sufficient facts to support their fraud allegations. Moreover, they failed to allege sufficient facts to show that there was an agreement by defendants to commit the alleged wrongs.

We recognize that dismissal of a claim pursuant to *Rule 4:6-2(e)* [*21] is ordinarily without prejudice. *Smith v. SBC Commc'ns, Inc.*, 178 N.J. 265, 282, 839 A.2d 850 (2004). However, before ruling on the motions to dismiss, the judge gave plaintiffs the opportunity to amend their complaint. They failed to come forward with sufficient facts to support their claims. We are convinced that further amendment or additional discovery would not cure the fundamental defects in the causes of action that plaintiffs purported to assert in their complaint.

Affirmed.



ART OF LIVING FOUNDATION, Plaintiff, v. DOES 1-10, Defendants.

Case No.: 10-CV-05022-LHK

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SAN JOSE DIVISION**

2011 U.S. Dist. LEXIS 63507; 39 Media L. Rep. 2520

June 15, 2011, Decided

June 15, 2011, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *Art of Living Found. v. Does*, 2011 U.S. Dist. LEXIS 88793 (N.D. Cal., Aug. 10, 2011)

COUNSEL: [*1] For Art of Living Foundation, a California corporation, Plaintiff: Karl Stephen Kronenberger, LEAD ATTORNEY, Jeffrey Michael Rosenfeld, San Francisco, CA.

For Does 1-10, Defendant: Joshua Kathriel Koltun, LEAD ATTORNEY, Joshua Koltun Attorney, San Francisco, CA.

JUDGES: LUCY H. KOH, United States District Judge.

OPINION BY: LUCY H. KOH

OPINION

**ORDER GRANTING MOTION TO DISMISS AND
DENYING MOTION TO STRIKE**

(re: dkt. #26 and #27)

It has long been settled that an author's decision to remain anonymous is an aspect of freedom of speech protected by the *First Amendment*. The right to speak anonymously, however, is not unlimited. This case centers on the contours of balancing the *First Amendment* rights of online authors' decisions to speak anonymously and critically of an organization against the claims of the organization that the speech is simply the false and malicious rants of disgruntled former students and teachers.

Plaintiff Art of Living Foundation is a California non-profit corporation, and is the United States branch for the international Art of Living Foundation based in

Bangalore, India. Plaintiff is dedicated to teaching the wellness and spiritual lessons of Ravi Shankar, the founder of the Art of Living Foundation. [*2] Defendants Doe Skywalker and Doe Klim are former adherents of the Art of Living Foundation, but are now critical of both the Foundation and Shankar. Plaintiff alleges that Defendants have posted defamatory statements on blogs, published trade secrets, and infringed copyrighted materials. Defendants, appearing specially via counsel, have moved to dismiss for lack of personal jurisdiction, and for failure to state a claim with respect to the defamation and trade libel claims. Defendants have also filed a motion to strike the defamation, trade libel, and trade secrets claims under *California Code of Civil Procedure* § 425.16 (California Anti-SLAPP Statute). The Court held a hearing on Defendants' motions on May 26, 2011. For the reasons explained below, Defendants' motion to dismiss for lack of personal jurisdiction is DENIED. Defendants' motion to dismiss the defamation and trade libel claims for failure to state a claim is GRANTED with leave to amend. Defendants' motion to strike the defamation, trade libel, and trade secrets claim is DENIED WITHOUT PREJUDICE. However, discovery on the trade secrets claim may not proceed until Plaintiff identifies the trade secrets with reasonable particularity.

I. [*3] BACKGROUND

A. The Parties

The Art of Living Foundation is an international educational and humanitarian organization based in Bangalore, India, but with chapters in more than 140 countries. Compl. ¶¶ 1, 21. The Art of Living Foundation was founded by "His Holiness Sri Sri Ravi Shankar" in 1981. *Id.* at ¶ 16. Plaintiff here, also called Art of Living

Foundation (Plaintiff or "AOLF-US"), is a California nonprofit corporation based in Goleta, California and is the United States chapter of the international Foundation. *Id.* at ¶¶ 2, 13. Plaintiff offers courses that employ breathing techniques, meditation, and yoga, focusing on "Sudarshan Kriya," an ancient form of stress and health management via rhythmic breathing. *Id.* at ¶ 3.

Defendants are Does, but have specially appeared through counsel under their blogger names of "Skywalker" and "Klim." Plaintiff alleges that Defendants are "disgruntled student-teacher and/or students of Plaintiff, AoL [Art of Living Foundation], and/or Ravi Shankar." *Id.* at ¶ 52. In or around November 2009, Defendants started the blog called "Leaving the Art of Living," located at artoflivingfree.blogspot.com. *Id.* at ¶ 53. In or around November 2010, Defendants started [*4] the blog called "Beyond the Art of Living," located at aolfree.wordpress.com. *Id.* at ¶ 54.

B. AOLF-US's Allegations and Claims

Plaintiff alleges that an essential component of its practice is the training of teachers. *Id.* at ¶ 34. These teaching methods are contained in several written manuals, including: the Training Guide Phase One; the Continuation Manual; and the Yes! Teacher Notes. *Id.* at ¶ 39. However, Plaintiff alleges that the teaching methods for the "Sudarshan Kriya" have intentionally not been memorialized in writing and are kept "strictly confidential." Plaintiff alleges that although the ostensible purpose of Defendants' blogs is to provide a forum for former students/adherents of Art of Living, Defendants really use the Blogs to defame Plaintiff, misappropriate Plaintiff's trade secrets, and infringe on Plaintiff's copyright materials." *Id.* at ¶¶ 56-58.

Specifically, Plaintiff's first claim is that Defendants committed copyright infringement by publishing the Breathe Water Sound Manual on the blogs. *Id.* at ¶¶ 75-88. Plaintiff alleges that it first published the Breathe Water Sound Manual on June 1, 2003. Plaintiff has applied to the Copyright Office for registration of the [*5] Manual, and has not licensed the Manual's use to Defendants. *Id.*

Plaintiff's second claim is that its teaching Manuals and teaching processes for "Sudarshan Kriya" (the latter of which is intentionally not written down) are trade secrets. *Id.* at ¶¶ 89-107. Plaintiff submits that the Manuals and teaching processes have independent economic value (i.e., Plaintiff charges students for lessons based on the Manuals and teaching processes) and that Plaintiff engages in diligent efforts to keep the information confidential. *Id.* at ¶¶ 94-96. Plaintiff alleges that Defendants agreed to keep the trade secrets confidential, but then used the information to instruct students without author-

ization. *Id.* at ¶ 98. Moreover, Plaintiff continues, Defendants published the confidential Manuals on their blogs, and hyperlinked to another website that had a written summary of Plaintiff's teaching processes for "Sudarshan Kriya." *Id.* at ¶¶ 99-100. Defendant Skywalker concedes publishing the alleged trade secret documents and the Breath Water Sound Manual in June and July, 2010, but argues: (1) the documents are not actually trade secrets because they are well-known in the yoga community and are not kept strictly [*6] confidential; and (2) in any event, Skywalker's publication of the materials is protected by the *First Amendment* because it arises from free speech on a "public issue." *See* Defs.' Mot. to Strike at 2, 12.

Plaintiff's third claim is that Defendants use the blogs to intentionally disparage and defame Plaintiff, the Art of Living Foundation, and Ravi Shankar. *Id.* at ¶ 62 (providing list of 18 alleged examples of defamatory statements on the blogs). For example, one statement on one of the blogs is: "The truth is more disgruntled people should come out to do something about all the illegal activities that occur thru and in his organization, ranging from exploitation, to swindling, to cheating, to physical abuse, to sexual harassment and fondling, etc." *Id.* Another statement is: "Again answer is obvious, the master is a charlatan (is a person practising quackery or some similar confidence trick in order to obtain money) in disguise." *Id.* And: "The 'dollar a day' program was started in the US. The money never went to that cause."

Finally, Plaintiff's fourth claim that Defendants have committed trade libel because their disparaging statements have attacked Plaintiff's teaching methods and services, [*7] and have discouraged other potential students from registering for Plaintiff's courses. *Id.* at ¶¶ 116-121.

In its prayer for relief, Plaintiff seeks monetary damages and injunctive relief "restraining Defendants from operating the Blogs and requiring that the Blogs be removed the Internet." *Id.* at p. 19 ("Prayer for Relief").

II. DISCUSSION

A. Motion to Dismiss for Lack of Personal Jurisdiction

Defendants move to dismiss for lack of personal jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(2)*. Specifically, Defendants allege: (1) that Plaintiff has not alleged personal jurisdiction over any of the Defendants in the Complaint; and (2) that neither Defendant Skywalker nor Defendant Klim are citizens of the United States, let alone California. Plaintiff responds that there are sufficient contacts between Defendants and California to make personal jurisdiction reasonable, es-

pecially in light of the "harmful effects" felt by Plaintiff in California.

1. Legal Standard

In order to establish personal jurisdiction, a plaintiff must first show that the forum state's jurisdictional statute confers personal jurisdiction over defendants, and that the exercise of such jurisdiction "accords [*8] with federal constitutional principles of due process." *Federal Deposit Ins. Corp. v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1441 (9th Cir. 1987). California's "long-arm" statute extends jurisdiction to the maximum extent permitted by due process. See *Cal. Civ. Proc. § 410.10*. Accordingly, the jurisdictional inquiries under state law and constitutional due process principles can be conducted simultaneously. In the Ninth Circuit, a three-part test is applied to determine whether specific jurisdiction may be exercised over a defendant consistent with due process principles: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable. See *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1999). In the context of websites on the Internet, there has to be "something more" [than a web-site] to indicate [*9] that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." See *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)).

2. Analysis

Under the Ninth Circuit's "effects test" for tort actions of defamation, a court should consider whether defendants purposefully availed their activities at the forum state or whether defendants should have known that the "effects" of their actions would be felt in the forum state. See *Gordy v. Daily News, L.P.*, 95 F.3d 829, 835 (9th Cir. 1996) (finding personal jurisdiction in California over out-of-state defendants where defendants published defamatory article about California resident and circulated article to only 13-18 subscribers in California); see also *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1097-99 (N.D. Cal. 1999) (finding personal jurisdiction in a defamation action where defendant created a website with a defamatory article about a California resident and circulated e-mails to California residents).

Here, Plaintiff's Complaint, along with additional documentary evidence, establishes [*10] a prima facie

case of personal jurisdiction over Defendants. See *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003) ("the plaintiff need only make a prima facie showing of jurisdiction to avoid the defendant's motion to dismiss"). Plaintiff is incorporated in California and is the Art of Living branch for the entire United States. In addition, certain critical statements by Defendants on the Blogs are, in part, directed at Plaintiff's activities in the United States and exhibit knowledge of Plaintiff's incorporation in California. See *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998) (finding personal jurisdiction where out-of-state defendant's website postings injured plaintiff in California, where plaintiff had its principal place of business). In addition, the Blogs are hosted in California using northern California-based companies Google, Inc. (based in Mountain View, California) and Automatic, Inc. (based in Redwood City, California). Defendants, in creating and using the Blogs, agreed to terms and conditions with California choice of law and venue provisions.

Moreover, Plaintiff represents that its office, located in Goleta, [*11] California, has received multiple inquiries from individuals throughout the United States about the critical and negative statements on the Blogs. See *Nicosia*, 72 F. Supp. 2d at 1099 (in determining personal jurisdiction, a court looks to where the injury is felt); compare *Church of Scientology v. Adams*, 584 F.2d 893, 898-99 (9th Cir. 1978) (pre-dating "effects" test, finding no personal jurisdiction over out-of-state defendants where those defendants' statements did not concern or affect California residents). Significantly, there appears to be no other alternative forum state for Plaintiff, a California nonprofit corporation, to raise its claims because Defendants' United States contacts are centered in California. See *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1442 (9th Cir. 1987) (an important factor in determining reasonableness of asserting jurisdiction over a non-resident defendant is the existence of an alternative forum). Finally, in addition to the allegedly defamatory statements posted on the Blogs hosted by northern California companies, Plaintiff alleges that Defendants have also published trade secrets and committed copyright infringement by publication of Plaintiff's [*12] confidential teaching materials. These allegations, combined with the allegations regarding defamation, establish the "something more" requirement necessary for assertion of personal jurisdiction. See *Cybersell*, 130 F.3d at 418.

Accordingly, the Court denies Defendants' motion to dismiss, pursuant to *Rule 12(b)(2) of the Federal Rules of Civil Procedure*, for lack of personal jurisdiction.

B. Motion to Dismiss Defamation and Trade Libel Claims

Aside from the jurisdictional challenge, Defendants have moved to dismiss the defamation and trade libel claims for failure to state a claim.¹ The Court begins with analysis of the allegations of defamation, which form the heart of the dispute between the parties.

1 Defendants have not moved to dismiss or strike Plaintiff's copyright claim. Thus, it is not at issue in these particular motions.

Defamation

Defendants offer four challenges to Plaintiff's defamation claim: (1) that they have an "absolute right" under the *First Amendment* to urge persons to avoid a religious organization; (2) that the alleged defamatory statements are not "of and concerning" Plaintiff (i.e., that the statements are not specifically targeted at the *United States branch* of the [*13] Art of Living Foundation, which has the same name as the international organization based in India); (3) that the statements are constitutionally protected "opinions" that are not actionable under defamation law; and (4) that Plaintiff is a "public figure," which triggers a higher actual malice standard to prove defamation.

1. Legal Standard

The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. *Wong v. Jing*, 189 Cal. App. 4th 1354, 1369, 117 Cal. Rptr. 3d 747 (Cal. App. 6th Dist. 2010). *Civil Code section 45* provides, "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." "Statements that contain such a charge directly, and without the need for explanatory matter, are libelous per se. A statement can also be libelous per se if it contains a charge *by implication* from the language employed by the speaker and a listener could understand the defamatory [*14] meaning without the necessity of knowing extrinsic explanatory matter." *See Wong*, at 1369. Although potentially limited by the context of the statement, an allegation the plaintiff is guilty of a crime is generally libelous on its face and is actionable without proof of damages. *See Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal. App. 4th 1138, 1145, 12 Cal. Rptr. 3d 493 (Cal. App. 2d Dist. 2004).

Whether a statement is an assertion of fact or opinion is a question of law for the court. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1193 (9th Cir. 1989). Pure opinions -- "those that do not imply facts capable of

being proved true or false" -- are protected by the *First Amendment*. *Partington v. Bugliosi*, 56 F.3d 1147, 1153 *fn.10* (9th Cir. 1995). Assertions of fact and statements that "may imply a false assertion of fact, however, are not protected." *Id.* To determine whether a statement implies an assertion of fact, the Ninth Circuit applies the following three-part test. First, a court reviews the statement in its "broad context," which includes the general tenor of the entire work, the subject of the statement, the setting, and the format of the work. Next, the court turns [*15] to the "specific context" and content of the statement, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, the court inquires whether the statement itself is sufficiently factual to be susceptible of being proved true or false. *See Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995).

2. Analysis

a. No "Absolute Right" to Defame under *First Amendment*

Defendants' assertion that they have an "absolute right" to make defamatory statements about religious organizations misses the mark. As a preliminary matter, it is not clear that Plaintiff is a religious organization. According to the allegations in the Complaint, Plaintiff is a non-profit corporation that offers courses that employ breathing techniques, meditation, and yoga, focusing on "Sudarshan Kriya," an ancient form of stress and health management via rhythmic breathing. Compl. at ¶ 3. Moreover, the *First Amendment* does not protect "knowingly false" speech. *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002). It is correct that a religious organization's practice of "shunning" is protected by the *First Amendment*. [*16] *See Paul v. Watchtower Bible & Tract Soc.*, 819 F.2d 875, 880 (9th Cir. 1987). Here, even assuming Plaintiff is a religious organization, the allegedly defamatory statements at issue in the Complaint are not all directed at religious conduct or religious ideology, but are instead directed at business and financial practices and alleged criminal activity. *See Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1250 (9th Cir. 1999) (courts may resolve disputes based on "neutral, secular principles," without impermissible entanglement into religious doctrine).

Accordingly, Defendants' motion to dismiss on this ground is denied.

b. Of and Concerning Plaintiff

The *First Amendment* requires a plaintiff to establish that the statement on which the defamation claim is based is "of and concerning" the plaintiff. *Blatty v. New*

York Times Co., 42 Cal. 3d 1033, 1042, 232 Cal. Rptr. 542, 547, 728 P.2d 1177 (1986). "However, when the statements concern groups, as here, plaintiffs face a more difficult and sometimes insurmountable task. If the group is small and its members easily ascertainable, plaintiffs may succeed. But where the group is large -- in general, any group numbering [*17] over twenty-five members -- the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning' them." *Barger v. Playboy Enterprises*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983). The rationale for this rule is to protect freedom of public discussion, except to prevent defamatory statements *reasonably susceptible* of special application to a given individual. "In California, whether statements can be reasonably interpreted as referring to plaintiffs is a question of law for the court." See *SDV/ACCI*, 522 F.3d at 959 (citing *Alszev v. Home Box Office*, 67 Cal. App. 4th 1456, 80 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1998)).

Here, Ravi Shankar would have a good argument that Defendants' statements are "of and concerning" him because the statements expressly mention his name numerous times. However, Plaintiff, which has the same name as the international organization (and presumably the same name as some 140 other international branches), has not established that the allegedly defamatory statements at issue, as opposed to the Blogs in general, are "of and concerning" AOL-US. See *SDV/ACCI*, 522 F.3d at 960 (establishing defamation [*18] requires more than ambiguous statements referring to a group). Most of the statements described in the Complaint only refer to "Art of Living," or to "teachers" or "lackeys" of Art of Living. For example, the statement "all the illegal activities that occur thru and in his organization, ranging from exploitation, to swindling, to cheating, to physical abuse, to sexual harassment and fondling, etc." (Compl. at ¶ 62) only refers to "his organization," while the statement "I am fully convinced that AOL is front-end name for a group of fraudulent NGOs. My lawyer tells me that what they are doing amounts to large-scale organized fraud according to the laws of several countries" does not clearly implicate the United States branch of the Art of Living Foundation, and appears focused on the international organization in India.

As currently pled, the allegations in the Complaint are insufficient to satisfy the "of and concerning" requirement of defamation law.

c. In Context, Statements are Constitutionally Protected Opinions

Under Ninth Circuit law, the Court must consider the broad context of the statements, the specific context of the statements, and whether the statement is sufficiently factual [*19] to be proved true or false. The

Court's review of these factors leads to the conclusion that the statements at issue are constitutionally protected opinions rather than verifiable facts.

In the broad context, the statements are made on obviously critical blogs ("Leaving Art of Living" and "Beyond Art of Living") with heated discussion and criticism of the Art of Living Foundation and Ravi Shankar. In this context, readers are less likely to view statements as assertions of fact rather than opinion. See *Nicosia*, 72 F. Supp. 2d at 1101 (N.D. Cal. 1999) (statements made on personal website, through Internet discussion groups, and as part of heated debate are less likely viewed as statements of fact). The *First Amendment* protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)).

As to the specific context, the Court considers the "content of the allegedly defamatory statements, which includes the extent of figurative and hyperbolic language and the reasonable expectations of the readers." *Id.* at 1102. Certain statements are [*20] obviously critical, and do use words like "embezzle," "fraud," and "abuse." For example, there are statements that: "they obtained money from participants on false, deceitful declarations"; "companies, individuals give money to AOL organisation for specific projects, but the money never reaches those projects...None of this money goes toward helping any poor or disadvantaged people"; and "if you...want to launder your black money...then AOL is for you." Plaintiff has its strongest case for defamation when these particular statements are read in isolation.

With context, however, these statements of hyperbole reflect poorly on Art of Living, but do not amount to factual accusations of criminal activity, especially on Blogs that readers obviously expect are critical of Art of Living. See *Nicosia*, 72 F. Supp. 2d at 1104 (in context of heated debate on the Internet, "statements accusing [plaintiff] of being a 'fraud,' a 'criminal' and acting illegally are rhetorical hyperbole"). Courts have extended *First Amendment* protection to such statements in recognition of "the reality that exaggeration and non-literal commentary have become an integral part of social discourse." By protecting speakers [*21] whose statements cannot reasonably be interpreted as allegations of fact, courts "provide[] assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20 (quoting *Falwell*, 485 U.S. at 53-55). In addition, the Blogs do link to the Art of Living website and other articles about Art of Living that are positive, evincing a forum for debate and discussion.² See *id.* at 1101 (state-

ments published on Internet as part of "heated debate" are less likely to be viewed as assertions of fact).

2 As the Court is dismissing Plaintiff's defamation claim with leave to amend, the scope of any potential remedy for Plaintiff is not yet ripe for decision. The Court notes its concern, however, that Plaintiff requests an extremely broad injunction "restraining Defendants from operating the Blogs and requiring that the Blogs be removed from the Internet." Compl. at p. 19 ("Prayer for Relief"). Even if certain statements on the Blogs are eventually found defamatory, Plaintiff has cited no authority for the proposition that the remedy is for "the Blogs to be removed from [*22] the Internet" altogether just because they are critical of Art of Living and Shankar.

Finally, the statements as to the Art of Living Foundation (as opposed to Ravi Shankar, who is not a plaintiff in this action) are too loose and hyperbolic to be susceptible of being proven true or false. *See Milkovich*, 497 U.S. at 21-22 ("loose, figurative, or hyperbolic language" negates impression that author is making statement of fact). For example, the statement "Money from courses does not go into 'service projects' it goes into RS's [Ravi Shankar's] bank account" could be verifiable with respect to Shankar, but does not even refer to Art of Living. The statement "I am fully convinced that AOL is front-end name for a group of fraudulent NGOs. My lawyer tells me that what they are doing amounts to large-scale organized fraud according to the laws of several countries" is clearly harsh, but, as noted above, does not clearly implicate Plaintiff. Rather, the statement voices an opinion ("fully convinced") in connection with the author's beliefs about the international organization's lack of financial transparency, and relays what the "lawyer" told the author about the international organization's [*23] practices. *See Underwager*, 69 F.3d at 367 (denying defamation claim where defendant's statement that plaintiff was "lying" in a deposition may have been an exaggeration, but did not imply a verifiable assertion of perjury).

In sum, under the totality of circumstances, the statements at issue are not assertions of fact, but are instead constitutionally protected opinions.

d. Actual Malice

Public figures must prove actual malice in order to recover on defamation claims. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Actual malice means that the defamatory statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* Reckless disregard, in turn, means that the publisher "in fact entertained serious doubts as to the truth of his

publication." *See St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). To prove actual malice, a plaintiff must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement." *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), [*24] the Supreme Court defined two classes of public figures. The first is the "all purpose" public figure who has "achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." The second category is that of the "limited purpose" public figure, an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351. Unlike the "all purpose" public figure, the "limited purpose" public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his or her role in a public controversy.

Plaintiff is likely a limited public figure because it is part of a relatively well-known international organization and voluntarily solicits media attention. In addition, Plaintiff is part of a "public controversy" with respect to the allegations that Plaintiff is a "cult" and allegations regarding Art of Living's international activities. *See Reader's Digest Assn. v. Superior Court*, 37 Cal. 3d 244, 256, 208 Cal. Rptr. 137, 690 P.2d 610 (Cal. 1984). Given the Court's dismissal of the defamation claim with leave [*25] to amend on other grounds, however, the Court need not decide the "actual malice" issue at this time.³

3 The Court notes that Plaintiff has requested discovery with respect to Defendants' intent and knowledge when publishing the allegedly defamatory statements, including discovery of Defendants' identities. The Court agrees with Defendants that discovery on Defendants' intent and knowledge (e.g., "actual malice") is inappropriate when Plaintiff has not stated a valid defamation claim for the various reasons explained above.

e. Conclusion on Defamation Claim

Although "the purpose of the anti-SLAPP statute is 'to allow early dismissal of meritless *first amendment* cases aimed at chilling expression," the Ninth Circuit has clearly ruled that "granting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with *Fed. R. Civ. P. 15(a)*'s policy favoring liberal

amendment." See *Verizon Del., Inc. v. Covad Commun. Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004). Here, because it is not clear that leave to amend would be futile, and this is Plaintiff's initial complaint, striking Plaintiff's initial Complaint would "directly [*26] collide" with *Rule 15's* liberal amendment policy. Accordingly, for all the reasons explained above, the Court GRANTS Defendants' motion to dismiss the defamation claim with leave to amend. In light of this dismissal, the Court does not reach the motion to strike the defamation claim. Of course, Defendants may re-raise their anti-SLAPP arguments in opposition to any amended complaint. See *id.* ("If the offending claims remain in the first amended complaint, the anti-SLAPP remedies remain available to defendants.").

Trade Libel

Trade libel is defined as "an intentional disparagement of the quality of property, which results in pecuniary damage. . . ." *Erllich v. Etner*, 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256, 258 (1964). The cause of action for trade libel thus requires: (1) a publication, (2) which induces others not to deal with plaintiff, and (3) special damages.

To the extent that it is just a re-characterization of Plaintiff's defamation claim, the trade libel claim falls for the reasons that the statements at issue in the Complaint are not "of and concerning" Plaintiff and are not verifiable factual assertions. See *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1043, 232 Cal. Rptr. 542, 728 P.2d 1177 (Cal. 1986) ("the [*27] various limitations rooted in the *First Amendment* are applicable to all injurious falsehood claims and not solely to those labeled 'defamation' is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values").

To the extent that Plaintiff's trade libel claim is distinct from the defamation claim, Plaintiff has failed to specifically plead special damages in the form of pecuniary loss. See *Fed. R. Civ. P. 9(g)* ("If an item of special damage is claimed, it must be specifically stated."). The allegations in the Complaint are simply that Plaintiff "has been substantially harmed" and that "due to the continuing presence of the Blogs, and their false and defamatory statements, Plaintiff continues to suffer irreparable injury." Compl. ¶¶ 73-74. These general statements of harm do not sufficiently identify special damages. See *Luxpro Corp. v. Apple Inc.*, 2011 U.S. Dist. LEXIS 35008, *42 (N.D. Cal. Mar. 24, 2011) ("Although a plaintiff does not need to plead a specific dollar amount, the plaintiff should allege an "established business, the amount of sales for a substantial [*28] period preceding the publication, the amount of sales subsequent to the publication,

[and] facts showing that such loss in sales were the natural and probable result of such publication.").

Accordingly, the Court GRANTS Defendants' motion to dismiss the trade libel claim. The Court, however, grants Plaintiff leave to amend its trade libel claim because it is not clear that amendment would be futile, and because this is Plaintiff's initial complaint. As with the defamation claim, striking Plaintiff's trade libel claim pursuant to the California Anti-SLAPP Statute at this point would "directly collide" with *Rule 15's* liberal amendment policy. See *Verizon*, 377 F.3d at 1091. Defendants may re-raise their anti-SLAPP arguments in opposition to any amended complaint.

C. Motion to Strike Trade Secrets Claim (CCP §425.16)

Defendants did not move to dismiss the trade secrets claim, but instead moved to strike the trade secrets claim under the California Anti-SLAPP Statute. Defendants argue that: (1) the alleged trade secrets are actually known within the yoga community; (2) it is not clear that the alleged secrets have "independent economic value;" and (3) Plaintiff has not taken reasonable efforts [*29] to protect the confidentiality of the secrets. Plaintiff responds that the California Anti-SLAPP Statute does not apply to its trade secrets claim because publishing the trade secret was not protected First Amended speech, and that, even if the statute applies, it has established a probability of prevailing on the claim.

1. Legal Standards

a. Section 425.16

The California legislature enacted *section 425.16* to "provide a fast and inexpensive unmasking and dismissal of SLAPP" suits. SLAPP suits are "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances in connection with a public issue." *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 819, 33 Cal. Rptr. 2d 446 (1994) (quoting *Cal. Civ. Proc. Code § 425.16(a), (b)*). A defendant who brings a *section 425.16* motion has the initial burden of presenting a prima facie case that the suit arises "from any act of [defendant] in furtherance of [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue." *Wilcox*, at 820 (quoting *Cal. Civ. Proc. Code § 425.16(b)*) (internal quotations omitted).

If defendant meets [*30] this burden, the burden shifts to the plaintiff to establish "a probability that plaintiff will prevail on the claim." *Wilcox*, at 823 (quoting *Cal. Civ. Proc. Code §425.16(b)*). To show a proba-

bility of prevailing, "the plaintiff must demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilcox*, at 824. The determination is made on the basis of the pleadings, as well as supporting and opposing affidavits stating the facts upon which the liability or defense is based. *Cal. Civ. Proc. Code § 425.16(b)(2)*. Pleadings by themselves are inadequate to demonstrate a prima facie case -- the plaintiff must submit admissible evidence to show a probability of prevailing at trial. *Evans v. Unkow*, 38 Cal. App. 4th 1490, 1497-98, 45 Cal. Rptr. 2d 624, 628-29 (1995).

b. Trade Secrets

Under California's Uniform Trade Secrets Act, a "trade secret" is defined as information that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [*31] (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *Cal. Civ. Code § 3426.1(d)*. "[I]nformation can be a trade secret even though it is readily ascertainable, so long as it has not yet been ascertained by others in the industry." *ABBA Rubber Co. v. Sequist*, 235 Cal. App. 3d 1, 21, 286 Cal. Rptr. 518 (Cal. Ct. App. 1991). Moreover, "[c]ombinations of public information from a variety of different sources when combined in a novel way can be a trade secret." 2 *Micro Intern. Ltd. v. Monolithic Power Systems, Inc.*, 420 F. Supp. 2d 1070, 1089 (N.D. Cal. 2006). Whether information is publicly known is a factually intensive analysis. *DVD Copy Control Ass'n, Inc. v. Bunner*, 116 Cal. App. 4th 241, 252, 10 Cal. Rptr. 3d 185 (Cal. Ct. App. 2004). Finally,

2. Analysis

a. Defendants' Initial Burden

Under the burden-shifting framework of the California Anti-SLAPP Statute, Defendants must first show that the suit "arises from" any act in furtherance of Defendants' freedom of expression on a "public issue." *See Cal. Civ. Proc. Code § 425.16(b)*; see also *Tuck Beckstoffer Wines LLC v. Ultimate Distribs.*, 682 F. Supp. 2d 1003, 1009 (N.D. Cal. 2010) ("the court [*32] must determine whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity"). Here, Defendants' anonymous statements that the Art of Living Foundation is basically a cult and a sham is speech on a "public issue." *See Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 649, 49 Cal. Rptr. 2d 620 (Cal. App. 2d Dist. 1996) (allegations that Church of Scientology harmed and

abused its members was speech in connection with a "public issue"). Defendant Skywalker appears to have published the alleged trade secrets documents -- Art of Living teaching manuals -- as part of a larger effort to debunk the notion that the Art of Living Foundation and Ravi Shankar possess some "secret higher knowledge." Thus, Defendants have satisfied the initial anti-SLAPP burden by establishing a direct connection between Defendant Skywalker's disclosure and Defendants' other protected speech on a public issue. *See World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.*, 172 Cal. App. 4th 1561, 1568, 92 Cal. Rptr. 3d 227 (Cal. App. 2d Dist. 2009) (in determining whether the "arising from" requirement is met, the critical point is whether the plaintiff's cause of action [*33] itself was based on an act in furtherance of the defendant's right of petition or free speech."). The Court now turns to Plaintiff's burden of establishing a prima facie trade secrets claim.

b. Plaintiff's Responsive Burden

As Defendants have met their initial burden, the burden shifts to the Plaintiff to establish a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. Plaintiff has made such a showing. *See Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, 923 F. Supp. 1231, 1250-51 (N.D. Cal. 1995).

Defendant Skywalker (and only Defendant Skywalker) has admitted to posting the alleged trade secrets documents in June and July 2010. *See* Defs.' Mot. to Strike at 6 ("Skywalker, in June and July 2010, posted the alleged trade secret documents"). In addition, the "spiritual" nature of the works does not remove them from trade secrets protection. As the Honorable Ronald M. Whyte noted in a similar case:

"thus, there is at least some precedent for granting trade secret status to works that are techniques for improving oneself (though not specifically spiritually). Conversely, there is no authority for excluding religious [*34] materials from trade secret protection because of their nature. Indeed, there is no authority for excluding any type of information because of its nature. While the trade secret laws did not necessarily develop to allow a religion to protect a monopoly in its religious practices, the laws have nonetheless expanded such that the Church's techniques, which clearly are 'used in the operation of the enterprise,' Restatement § 39, at 425, are deserving of protection if secret and valuable."

Religious Technology Center, 923 F. Supp. at 1252.

Moreover, Plaintiff has submitted credible evidence that it derives independent economic value from the secret teaching manuals and has established reasonable efforts to keep the manuals confidential. According to declarations submitted with the opposition to the motion to strike, Plaintiff generates revenue from its courses and lessons based on the confidential teaching manuals. *See* Declaration of Ashwani Dhall, Chairperson of the Board of Directors for AOL-F-US, ¶¶64-69 ("Dhall Decl.") [dkt. #40]. Plaintiff distinguishes itself from other organizations that teach breathing, yoga, and meditation by offering classes based on its confidential teaching manuals. [*35] *See ABBA Rubber Co. v. Seaquist, 235 Cal. App. 3d 1, 18, 286 Cal. Rptr. 518 (Cal. App. 4th Dist. 1991)* (information that obtains value from its secrecy to competitors is subject to trade secret protection).

With respect to maintaining secrecy, Plaintiff has submitted evidence that it keeps its manuals and lessons on password-protected computers, limits access to the electronic files, requires teachers to agree not to disclose the manuals and lessons, and requires teachers to agree to not use the manuals and lessons for any other purpose than teaching Plaintiff's courses. *See* Dhall Decl. at ¶¶ 29-36. Although the students do not sign non-disclosure agreements, the students also do not receive the actual manuals and lessons. On balance, these efforts at maintaining secrecy are reasonable under these circumstances. *See Religious Technology Center, 923 F. Supp. at 1254* ("Efforts at maintaining secrecy need not be extreme, just reasonable under the circumstances.").

Defendants object that the manuals and lessons are not confidential because they are based on techniques that are already known within the yoga community. Information generally known to the public is not protectable as trade secret information. However, [*36] "[t]he secrecy requirement is generally treated as a relative concept and requires a fact-intensive analysis." *See DVD Copy Control Assn., Inc. v. Bunner, 116 Cal. App. 4th 241, 251, 10 Cal. Rptr. 3d 185 (Cal. App. 6th Dist. 2004)* (citing 1 *Milgrim on Trade Secrets* (2003) § 1.07[2], pp. 1-343, 1-352.). Defendants have not established that the manuals and lessons are generally known to the public. "Publication on the Internet does not necessarily destroy the secret if the publication is sufficiently obscure or transient or otherwise limited so that it does not become generally known to the relevant people, i.e., potential competitors or other persons to whom the information would have some economic value." *See id.* Moreover, Defendants cannot rely on their own improper postings to support the argument that the works are no longer se-

crets. *See Religious Technology Center, 923 F. Supp. at 1256.*

Defendants are correct, however, that Plaintiff has not identified the "secret aspects" of their teaching manuals and lessons with sufficient particularity. *See id. at 1252* ("Although trade secret status may apply to works that are techniques for spiritually improving oneself, the secret aspect of those techniques must [*37] be defined with particularity"). From the Court's review of the alleged trade secrets (filed under seal), it is clear that the works, in their entirety, are not entitled to trade secret protection. For example, as counsel for Plaintiff conceded at the May 26, 2011 hearing, some of the information is simply biographical information about Ravi Shankar and the Art of Living Foundation.

Defendants argue that the trade secrets claim should be completely stricken for insufficient particularity. However, counsel for Defendants cited no case law in their briefing or at the May 26, 2011 hearing for the proposition that a trade secrets claim may be stricken for insufficient particularity, and the Court has found none. Instead, "[i]n any action alleging the misappropriation of a trade secret ..., before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity ..." (§ 2019.210). *See Perlan Therapeutics, Inc. v. Superior Court, 178 Cal. App. 4th 1333, 1343, 101 Cal. Rptr. 3d 211 (Cal. App. 4th Dist. 2009)*. This "rule assists the court in framing the appropriate scope of discovery and in determining whether plaintiff's discovery [*38] requests fall within that scope. *Id.* Thus, discovery on the trade secrets claim may not proceed until Plaintiff identifies the scope of its trade secrets with reasonable particularity.

As a final point, the Complaint alleges that "Doe Defendants" misappropriated its trade secrets. However, on the record before the Court, only Doe Skywalker acknowledged publishing the alleged trade secrets. Thus, even if Plaintiff does identify its trade secrets with sufficient particularity (which it has not yet done), discovery on the trade secrets claim would only proceed against Doe Skywalker. *See Anonymous Online Speakers v. United States Dist. Court (In re Anonymous Online Speakers), 2011 U.S. App. LEXIS 487, *16 (9th Cir. Jan. 7, 2011)* (in the context of anonymous speech under the *First Amendment*, requiring a party seeking discovery to meet a "heightened relevance standard requiring plaintiffs to demonstrate an interest in obtaining the disclosures . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association.>").

In sum, although the Court is denying Defendants' motion to strike the trade secrets claim, Plaintiff [*39]

may not obtain discovery with respect to that claim until it identifies, with reasonable particularity, the genuinely secret aspects of its teaching lessons and manuals.

III. CONCLUSION

For all the reasons explained above, Defendants' motion to dismiss for lack of personal jurisdiction is DENIED. Defendants' motion to dismiss the defamation and trade libel claims is GRANTED with leave to amend. Defendants' motion to strike the defamation, trade libel, and trade secrets claims is DENIED WITHOUT PREJUDICE. However, discovery on the trade

secrets claim may not proceed until Plaintiff identifies the confidential trade secrets with sufficient particularity. Any amended complaint must be filed within thirty (30) days of this Order.

IT IS SO ORDERED.

Dated: June 15, 2011

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge



**FOXTONS, INC., Plaintiff-Appellant, v. CIRRI GERMAIN REALTY and SANTO
CIRRI, Defendants-Respondents.**

DOCKET NO. A-6120-05T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2008 N.J. Super. Unpub. LEXIS 189

**September 19, 2007, Argued
February 22, 2008, Decided**

NOTICE: NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3
FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-1421-06.

COUNSEL: Monica A. Brescia argued the cause for
appellant (Kenny, Stearns & Zonghetti, attorneys; Gino
A. Zonghetti and Ms. Brescia, on the brief).

Robert M. Brigantic argued the cause for respondents,
Cirri Germain Realty and Santo Cirri (Maloof, Lebowitz,
Connahan & Oleske, attorneys; Jack A. Maloof, on the
brief).

JUDGES: Before Judges AXELRAD, SAPP-Peterson
and MESSANO.

OPINION

PER CURIAM

Plaintiff Foxtons, Inc. (Foxtons) appeals from the
motion judge's order of June 27, 2006, dismissing its
complaint against defendants Cirri Germain Realty and
Santo Cirri. Foxtons contends that the motion judge mis-
takenly converted defendants' motion to dismiss for fail-
ure to state a claim, *R. 4:6-2(e)*, into a motion for sum-
mary judgment, *R. 4:46*, because no discovery had taken
place. It further argues that the motion judge erroneously
applied the standards governing a motion to dismiss con-
cluding its complaint was insufficient as a matter of law.

We have considered these arguments in light of the mo-
tion record and applicable legal standards. We affirm.

This lawsuit arose from a single letter or flyer (the
flyer) admittedly [*2] drafted and circulated on Febru-
ary 1, 2006, by defendants, a licensed real estate agency
and its principal. Prepared on the agency's letterhead, and
signed by Santo Cirri, the flyer in its entirety read:

*The Misleading 6% vs. 3% Commis-
sion Myth*

Dear Home Owner:

Please don't be fooled with the adver-
tised concept that there is a 3% saving in
real estate commission fees that will put
thousands of dollars in your pocket!

Keep in mind commissions by law
are negotiable. There are no set fees.
Claiming that most other offices charge
6% fees is ridiculous! Most offices do not
charge what is asserted. So why then is
this type of advertising continued? This is
easy to answer, to mislead and to gain a
competitive advantage over quality offic-
es.

Most reputable offices will not em-
phasize or advertise that they too are full
service, and will not place a commission
fee and state full service on signs. Why?
A highly regarded office doesn't have to!
Remember all commissions are negotia-
ble; *we evaluate each situation* and then
discuss a fair commission fee that will
generate maximum exposure by all agents
in our Multiple Listing System.

Since home values have escalated, the real estate industry has overwhelmingly [*3] made adjustments in reducing fees to home owners. Most offices like ours today negotiate on an average 4.5%-5% commissions.

But if your house sits below towers or power lines, or adjacent to a busy highway, it's only logical to negotiate with your real estate agent a commission that will cause more agents to show your home.

Don't be fooled by the 3% commission, which offers 1% for agents to sell your home. Real estate agents must earn a living like anyone else. What is the likelihood of an experienced agent bringing their buyer to view a house for a 1% commission? Well the probability is not good at all, *extremely risky and time consuming to you*, which results in fewer showings, less offers and less money in your pocket.

Today homeowners and buyers are more prone to use an experienced well-trained real estate agent. Our sales staff for example averages 18 years of real estate experience.

Given honest facts, you decide what is best if you're looking to buy or sell a home. Feel free in calling our office. My agents have a wealth of information to help in your real estate needs.

Sincerely,

/s/

Santo Cirri

Plaintiff filed its complaint on February 9, 2006. Describing itself as a "full-service [*4] real estate brokerage" that offered the public a "discounted commission rate of three percent," plaintiff alleged defendants' flyer was defamatory and libelous per se, and it also sought damages under the theories of tortious interference with a prospective economic advantage and product disparagement. Although the complaint claimed to have attached a copy of the flyer and incorporated its contents "*pro hac verba*," no copy was attached and only limited snippets of its contents were recited in the pleading.

On May 5, 2006, defendants moved to dismiss the complaint for failure to state a claim and in support of

the motion attached three exhibits. The first was a complete copy of the flyer. The second exhibit, a reprint of a Wall Street Journal.com article dated September 20, 2004, noted plaintiff "recently announced that it [was] raising its standard commission to 3% from 2%." The third exhibit, a downloaded article from the Asbury Park Press dated February 6, 2005, quoted plaintiff's new executive officer, Van Davis, as stating, "The 2 percent model failed, and it failed in every respect of the word." He went on to explain that increasing the commission percentage to three percent would [*5] hopefully reinvigorate the company's financial outlook.

Defendants argued that the flyer was not defamatory because the statements it contained were merely opinions expressed by a competitor and were privileged speech. Defendants further contended that because the real estate business was highly regulated, plaintiff must plead actual malice in the publication of the flyer and had failed to do so.

Defendants further noted that the flyer never mentioned Foxtons by name. Relying upon the motion's exhibits which demonstrated plaintiff had recently changed its commission structure, defendants claimed that plaintiff had failed to demonstrate any exclusive relationship between itself and any particular commission rate--specifically the three percent rate referenced in the flyer. Defendants argued the complaint must fail as a matter of law because plaintiff could not demonstrate the allegedly defamatory statements were "of and concerning" plaintiff. Lastly, defendants contended that plaintiff failed to plead with the requisite specificity that it actually suffered damages as a result of the flyer's dissemination.

As to the two remaining counts of the complaint, defendants argued that the claim [*6] of tortious interference with a prospective economic advantage must fail because plaintiff failed to plead actual malice and specifically identify those "clients or transactions" that were lost because of the flyer's contents. Lastly, defendants contended plaintiff's product disparagement claim also must fail because plaintiff failed to plead with specificity the falsity of the flyer's statements, actual malice, or "special damages."

In a comprehensive written opinion that accompanied his order, the motion judge considered the arguments raised and plaintiff's opposition as to each of the three counts in the complaint. As to the defamation claim, the judge reasoned the complaint was inadequate for a number of reasons. First, he found that since the flyer never mentioned Foxtons by name, and because "plaintiff could not lay claim to exclusive identification with a particular commission rate," the complaint failed to establish that the defamatory statements "concern[ed]

the complaining party as required." Because "extrinsic facts [were] obviously necessary to draw some connection between the alleged defamatory statements and plaintiff," the flyer was not "defamatory per se," and plaintiff [*7] failed to adequately plead actual damages were suffered, instead, making only "conclusory allegations" of harm. He further found the complaint failed to "plead actual malice." Lastly, he reasoned that "[b]y actively taking a public position on the relative merits of discount brokers, plaintiff invited a public response," and could not complain if that consisted of "opinion, comment or criticism . . . adverse to its own views on the subject."

The judge then considered the remaining two counts of the complaint. As to the claim for tortious interference, he found that plaintiff had not sufficiently pled malice, or claimed that defendants' conduct was "legally wrongful . . . and not sanctioned by the rules of the game." With respect to the product disparagement claim, the judge determined plaintiff failed to allege malice, "failed to plead the publication of false allegations concerning its property, product or business, and special damages." He found defendants' statements were "intended to persuade potential customers to use the competitor's services rather than those of plaintiff," and concluded, "By commencing this litigation, plaintiff seeks to be able to comment on commission rates [*8] and level of service while attempting to foreclose [defendants'] *First Amendment* rights from doing the same." The judge entered an order dismissing the complaint in its entirety, and this appeal followed.

We first consider plaintiff's claim that the judge erroneously converted defendants' motion to dismiss into one for summary judgment. While conceding that this procedure is specifically provided for by *Rule 4:6-2*, plaintiff argues that it was unfairly utilized in this case because no discovery whatsoever had taken place.

The materials supporting defendants' motion were submitted to prove a single fact--that plaintiff had only recently raised its own commission rates from two to three percent. Therefore, it was defendants' argument that the flyer which referred to "the 3% commission," a phrase plaintiff claims to extensively employ in its advertising, would not be understood by anyone reading it necessarily as a reference to plaintiff. In short, defendants argued, and the motion judge found, "plaintiff could not lay claim to exclusive identification with a particular commission rate," and therefore could not demonstrate the flyer was "of or concerning" Foxtons. See *Durski v. Chaneles*, 175 N.J. Super. 418, 420, 419 A.2d 1134 (App. Div.) (holding [*9] that "[a]n indispensable prerequisite to an action for defamation is that the [] statements must be of and concerning the complaining party"), *certif. denied*, 85 N.J. 146, 425 A.2d 298 (1980).

Plaintiff acknowledges the flyer did not contain its name but contends that with further discovery, it could have demonstrated that those reading the flyer would have known it was about Foxtons. We note that plaintiff's objection below to the conversion of the motion to one seeking summary judgment was cursory at best. *Instead, in opposition to the motion, it furnished its own exhibits*, a copy of the National Association of Realtors' Code of Ethics, and an unreported Appellate Division decision, but nothing else.

At oral argument before us, plaintiff conceded that it did not seek an adjournment of the motion to furnish other materials or otherwise specifically demonstrate how further discovery was important to resisting defendant's motion. See *R. 4:6-2* (permitting all parties "a reasonable opportunity to present all material pertinent to such a motion"). Plaintiff posited no other reason--beyond the need to demonstrate the flyer was "of and concerning" Foxtons--why discovery was necessary to resist defendants' [*10] motion.

In *Dijkstra v. Westerink*, we noted, "[T]he actual naming of plaintiff is not a necessary element in an action for libel. It is enough that there is such reference to him that those who read or hear the libel reasonably understand the plaintiff to be the person intended." 168 N.J. Super. 128, 133, 401 A.2d 1118 (App. Div.) (citing *Restatement (Second) of Torts*, § 564 comment a (1977)), *certif. denied*, 81 N.J. 329, 407 A.2d 1203 (1979). Additionally, if the defamatory comment fails to mention any specific name but is directed toward a group or class of individuals, a plaintiff may still establish a claim for libel. *Mick v. American Dental Asso.*, 49 N.J. Super. 262, 285, 139 A.2d 570 (App. Div.), *certif. denied*, 27 N.J. 74, 141 A.2d 318 (1958). Under such circumstances, a successful plaintiff must show "he is a member of the defamed class and must establish some reasonable application of the words to himself." *Ibid*.

We accept plaintiff's contention that further discovery on this sole issue could have adduced sufficient facts to demonstrate it was the flyer's intended target. For example, it may have been able to demonstrate that its advertising was uniquely identifiable by the public, or that the population that received the flyer was [*11] targeted to overlap a geographical area where its own efforts were extensive and without significant other competition.

It is clear to us, however, that with the exception of the flyer itself, the motion judge did not rely on the other exhibits attached to defendants' motion to decide the issue. Instead, he applied the standards of review that govern a motion to dismiss under *Rule 4:6-2(e)*. Our review, therefore, employs the same standard as the trial court. *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106, 877

A.2d 267 (App. Div.), certif. denied, 185 N.J. 297, 884 A.2d 1267 (2005).

A motion to dismiss under *Rule 4:6-2(e)* should be "approach[ed] with great caution" and should only be granted in "the rarest of instances." *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 771-72, 563 A.2d 31 (1989). We view the allegations in the complaint with liberality and without concern for the plaintiff's ability to prove the facts alleged in the complaint. *Id.* at 746. "A motion to dismiss a complaint under *Rule 4:6-2(e)* for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." *Donato v. Moldow*, 374 N.J. Super. 475, 482, 865 A.2d 711 (App. Div. 2005). [*12] The plaintiff's obligation on a motion to dismiss is "not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action." *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 472, 774 A.2d 674 (App. Div. 2001).

In defamation actions, which by their nature implicate the potential curtailment of cherished freedoms of expression, a plaintiff must plead its cause of action with a greater level of specificity. *Darakjian v. Hanna*, 366 N.J. Super. 238, 248-49, 840 A.2d 959 (App. Div. 2004). As the Supreme Court has noted,

In addition to alleging defamatory statements, the complaint must plead facts sufficient to identify the defamer and the circumstances of publication. Also, the circumstances must show that the statements are "of and concerning" plaintiff. It must appear that a third person understood the statements to relate to the plaintiffs.

It is not enough for plaintiffs to assert . . . that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can "bolster a defamation cause of action through discovery, but not [] file a conclusory complaint to find out if one exists." *Zoneraich v. Overlook Hosp.*, 212 N.J. Super. 83, 101-02, 514 A.2d 53 (App. Div.), [*13] certif. denied, 107 N.J. 32, 526 A.2d 126 (1986) [A] plaintiff must plead the facts and give some detail of the cause of action.

[*Printing Mart-Morristown*, supra, 116 N.J. at 767-768 (emphasis added)(other internal citations omitted).]

In other words, it was plaintiff's significant burden to plead with specificity sufficient facts to demonstrate that the flyer was "of and concerning" Foxtons without any further discovery. This it clearly failed to do.

Plaintiff's complaint claimed that "[r]easonable persons of ordinary intelligence who read defendants' libelous writing could only understand that plaintiff was the sole target." But, there were no facts asserted to support that rather broad claim. For example, though not a mandatory requirement, the complaint did not assert that any specific third party thought the flyer was referring to Foxtons. At most, the complaint contained a general statement that "upon information and belief [Foxtons is] the only real estate brokerage concern in New Jersey that actively markets and advertises itself as providing 'full service' . . . at a discounted commission rate of '3%'."

Plaintiff pled no facts to support its belief as to the exclusivity of its marketing [*14] campaign. In fact, as defendants have argued, real estate commissions are by law entirely negotiable. Therefore, it is difficult to imagine how one could claim that a reference to a particular commission rate in the flyer could be interpreted as applying only to plaintiff. We note plaintiff's own belief that it was the flyer's intended target is insufficient; the test is whether reasonable third parties who read the flyer would surmise it referred to Foxtons. *See Taj Mahal Travel v. Delta Airlines*, 164 F.3d 186, 189 (3d. Cir. 1999) (reviewing court must place itself "in the position of the expected reader" to determine whether the alleged defamatory statement sufficiently identifies plaintiff).

We also agree with the motion judge that the contents of the flyer were not defamatory but were rather fair comment by a competitor extolling the virtues of its own services in comparison to those provided by other brokers. Whether a statement is defamatory is a matter of law to be determined by the court. *Dello Russo v. Nagel*, 358 N.J. Super. 254, 262, 817 A.2d 426 (App. Div. 2003). "When determining if a statement is defamatory on its face 'a court must scrutinize the language according to the fair and natural [*15] meaning which will be given it by reasonable persons of ordinary intelligence.'" *Id.* at 263 (quoting *Romaine v. Kallinger*, 109 N.J. 282, 290, 537 A.2d 284 (1988)). In deciding whether a statement is defamatory a court examines its content, verifiability, and context. *Ibid.* In *Nagel*, we explained:

[First, a] statement's content is judged by its objective meaning to a reasonable person of ordinary intelligence. Secondly, only verifiable statements can be defamatory. Finally, a statement's meaning can be affected by its context. The focus is on the effect of the alleged defamatory statement on third persons, that is, wheth-

er they viewed the plaintiff in a lesser light as a result of hearing or reading the offending statement.

[*Nagel*, 358 N.J. Super. at 263-64 (citations omitted).]

"In assessing the language, the court *must view the publication as a whole* and consider particularly the context in which the statement appears." *Romaine*, *supra*, 109 N.J. at 290 (emphasis added).

Plaintiff's complaint cited five specific portions of the flyer's contents and alleged these were defamatory. In each instance, however, those allegations were taken out of the full context of the flyer or otherwise recited in incomplete [*16] fashion. As we noted above, plaintiff failed to include the flyer as an exhibit to the complaint.

As a result, this truncated version of the flyer's contents unfairly skews its overall thrust--that contrary to plaintiff's assertions, defendants were willing to negotiate their commission charges, frequently agreeing to accept less than six percent, and that defendant's fee structure and experience would more likely produce a sale for the client.

Whether the flyer's allegedly defamatory statements are "verifiable" requires an examination of whether they reflect facts or opinions. "Factual statements, unlike non-factual statements, are uniquely capable of objective proof of truth or falsity. Opinion statements, in contrast, are generally not capable of proof of truth or falsity because they reflect a person's state of mind." *Ward v. Zelikovsky*, 136 N.J. 516, 530-31, 643 A.2d 972 (1994). "Harm from a defamatory opinion statement is redressable when the statement implies underlying objective facts that are false." *Id.* at 531.

It is clear from a review of the entire flyer that by and large it contains expressions of defendants' opinions regarding the value of its services and those offered by others claiming [*17] to charge a lesser commission rate. Our Supreme Court has noted that boasts of a competitor concerning the prices of goods and services offered and their value are not defamatory. *See Printing Mart-Morristown*, *supra*, 116 N.J. at 767 (1989).

These observations also inform our consideration of the context of defendants' statements, which helps us ascertain how a reasonable person would interpret the flyer. *Ward*, *supra*, 136 N.J. at 532. The flyer was circulated on defendants' agency stationary and signed by Cirri himself. Plaintiff's complaint alleges it was mailed to "consumers in, among other areas, Middlesex County." We note defendants' place of business is Edison, which is located in that county. Therefore, the context of

the flyer's dissemination further supports the conclusion that it was in the nature of a solicitation of prospective customers with which defendants sought to place a positive spin on their own virtues, and that it was not defamatory.

We therefore affirm the motion judge's dismissal of plaintiff's defamation claim without considering the other reasons set forth in his written opinion.

Plaintiff argues that its complaint adequately stated a claim for tortious interference [*18] with prospective economic advantage. To establish such a claim, a plaintiff must prove: 1) actual interference with a contract; 2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; 3) that the interference was without justification; and 4) that the interference caused damage. *Nagel*, *supra*, 358 N.J. Super. at 268. Interference with a contract is intentional "if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." *Id.* at 268 (citing *Restatement (Second) of Torts*, § 766A comment e (1977)).

However, the fact that a party acted to advance its own interest and financial position does not establish the necessary malice or wrongful conduct. *Ibid.* A claim for tortious interference with the performance of a contract must be based on

facts claiming that the interference was done intentionally and with 'malice'. . . . For purposes of this tort, '[t]he term malice is not used in the literal sense requiring ill will toward plaintiff' . . . Rather, malice is defined to mean that the harm was inflicted intentionally and without justification or excuse.

[*Id.* at 269 [*19] (citing *Printing Mart-Morristown*, *supra*, 116 N.J. at 751).]

When a business targets its competitor's customers, it exercises a valid business judgment and that alone does not constitute tortious interference with prospective economic advantage. *Nagel*, *supra*, 358 N.J. Super. at 268. Rather, a plaintiff must demonstrate the defendant's "conduct was [not] sanctioned by the 'rules of the game,' for where a plaintiff's loss of business is merely the incident of healthy competition, there is no compensable tort injury." *Lamorte Burns & Co. v. Walters*, 167 N.J. 285, 306, 770 A.2d 1158 (2001)(quoting *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, 282 N.J. Super. 140, 199, 659 A.2d 904 (App. Div.), *certif. denied*, 141 N.J. 99, 660 A.2d 1197 (1995)).

Although plaintiff's complaint alleged defendants "acted intentionally and without justification of excuse," precisely the terms we used to define malice in *Ideal Dairy Farms, ibid.*, it fails to set forth any facts regarding defendants' conduct other than the publication of the flyer. Considering our prior discussion, we agree with the motion judge that plaintiff's complaint failed to plead with sufficient specificity the acts of defendants demonstrating malice and therefore the claim [*20] for tortious interference with a prospective economic advantage was properly dismissed.

Lastly, plaintiff argues that it sufficiently pled a prima facie claim for trade libel. The elements of trade libel are: 1) publication; 2) with malice; 3) of false allegations concerning plaintiff's property, product or business; and 4) special damages--pecuniary harm. *Mayflower Transit, L.L.C. v. Prince*, 314 F. Supp. 2d 362, 378 (2004). Even a most liberal reading of this count of plaintiff's complaint demonstrates a complete failure to allege that defendants acted with malice. We therefore affirm the motion judge's decision to dismiss this count of plaintiff's complaint.

Affirmed.



NXIVM CORPORATION, formerly known as EXECUTIVE SUCCESS PROGRAMS, INC.; and FIRST PRINCIPLES, INC., Plaintiffs, v. MORRIS SUTTON; ROCHELLE SUTTON; THE ROSS INSTITUTE; RICK ROSS a/k/a "RICKY ROSS"; STEPHANIE FRANCO; PAUL MARTIN, PH.D.; and WELLSPRING RETREAT, INC., Defendants.

Civil Action No. 06-cv-1051 (DMC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2007 U.S. Dist. LEXIS 46471

June 27, 2007, Decided

June 27, 2007, Filed

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Motion denied by *NXIVM Corp. v. Sutton*, 2009 U.S. Dist. LEXIS 112700 (D.N.J., Nov. 30, 2009)

PRIOR HISTORY: *NXIVM Corp. v. Ross Inst.*, 2005 U.S. Dist. LEXIS 44789 (N.D.N.Y., Aug. 2, 2005)

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JUDGES: Dennis M. Cavanaugh, U.S.D.J..

OPINION BY: Dennis M. Cavanaugh

OPINION

OPINION

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon motion by Defendants Morris and Rochelle Sutton (collectively the "Suttons")¹ for dismissal of the Second, Fourth, Fifth, Sixth and Seventh Counts of Plaintiff's Amended Consolidated Complaint ("Complaint") pursuant to *Federal Rule of Civil Procedure 12(c)*. Pursuant to *Rule 78 of the Federal Rules of Civil Procedure* no oral argument was heard. After carefully considering [*3] the submissions of the parties, and based upon the following, it is the finding of this Court that the Suttons' motion to dismiss is **granted** as to Counts Two, Five, Six as to all Defendants, **granted** as to Count Seven as to the Suttons and **denied** as to Count Four.

¹ Additionally, in a letter sent on August 24, 2006, counsel for the Ross and Wellspring Defendants stated that they join the Suttons' motion to dismiss, except as to the claim for copyright infringement. The letter simply states that Counts Two, Three, Four, Five and Six should be dismissed against the Ross and Wellspring Defendants "for substantially the same reasons they must be dismissed against the Suttons."

I. BACKGROUND

A. Factual Background

1. Parties

Plaintiff NXIVM Corporation ("NXIVM") was formerly known as Executive Success Programs, Inc. Compl. P 6. NXIVM's primary business involves con-

ducting Executive Success training programs designed primarily for managers, chief executives and other business professionals. Compl. P 6. Plaintiff First Principles, Inc. ("First Principles") has developed many of the proprietary materials that are used by NXIVM in its business. Compl. P 7. NXIVM has a license agreement with First Principles [*4] for the trade secret and patent pending technology underlying the work. Compl. P 7. Both NXIVM and First Principles are corporations formed and existing under the laws of the State of Delaware and are authorized to do business in the State of New York, with their principal place of business located at the same address in Albany, New York. Compl. PP 6, 7.

Plaintiffs' training programs provide training in areas such as logical analysis and problem-solving skills and are based primarily on the Rational Inquiry TM system developed by Keith Raniere ("Raniere"). Compl. P 16. The Rational Inquiry TM theory and practice allegedly involves analyzing and optimizing how the mind handles data. Compl. P 18. These training programs utilize comprehensive proprietary written materials developed by Plaintiffs. Compl. P 18. The proprietary materials are trademarked, patent pending, copyrighted and are proprietary in nature (collectively the "protected materials"). Compl. P 18. Additionally, Plaintiffs allege that they have taken extensive steps to safeguard the protected materials, including placing the materials offsite, in a single computer, and limiting access to only three individuals within Plaintiffs' [*5] organizations. Compl. P 20. Additionally, Plaintiffs require all enrollees in their training programs to sign a Confidentiality Agreement and to refrain from any disclosure of Plaintiffs' proprietary materials. Compl. P 20.

Defendants Morris and Rochelle Sutton are individuals residing in the state of New Jersey. The Suttons' son, Michael Sutton, enrolled in one of Plaintiffs' courses in the fall of 2000, eventually becoming one of Plaintiffs' coaches. Compl. P 25. When Michael Sutton first enrolled in Plaintiffs' programs he was employed as an executive of Lollytogs, Inc. ("Lollytogs"), a company owned by Defendant Morris Sutton. Compl. P 22.

Defendant Stephanie Franco, daughter of Defendant Morris Sutton and half-sister to Michael Sutton, is an individual residing in the state of New Jersey. Compl. P 11. Defendant Franco is also a former participant in Plaintiffs' training programs. Compl. P 11. Like her half-brother, Franco was accepted into several increasing levels of Plaintiffs' coaching program to learn the Rational Inquiry TM method. Compl. P 31. From this additional training, Franco acquired portions of Plaintiffs' protected materials that are available only through the coaching [*6] program to clients who represented their intent to become trainers exclusively for Plaintiffs.

Compl. P 31. Franco signed a confidentiality agreement with Plaintiffs that prohibited her from sharing or disclosing the protected materials to third parties. Compl. P 31.

Defendant Rick Ross is an individual residing in the State of New Jersey. Ross is the founder and Executive Director of The Ross Institute, also a Defendant in this case (collectively the "Ross Defendants"). Compl. P 9. The Complaint alleges that The Ross Institute is Ross's "for-profit" business, although it has advertised itself as a not-for-profit entity since 1996. Compl. PP 9, 10. Additionally, Ross allegedly holds himself out as "an internationally known expert on cults and other radical, extreme and often unsafe groups." Compl. P 9. The Complaint states that Ross appears to earn revenue primarily from conducting "cult deprogrammings" of individuals and through the sales of related products such as audio and video tapes. Compl. P 43. Specifically, Ross was hired by the Suttons to conduct an "intervention" concerning Michael Sutton's association with Plaintiffs, part of an effort by the Suttons and Stephanie Franco [*7] to encourage Michael Sutton to disassociate himself from Plaintiffs. Compl. P 28.

Additionally, the Ross Defendants operate several websites. Compl. P 45. According to the Complaint, the Ross Defendants represent that their websites contain "a database of information about cults, destructive cults, controversial groups and movements." Compl. P 45. However, the Complaint concedes that "[i]n actuality, however, the sites are a mere advertisement and marketing tool for the Ross Defendants and their services and products." Compl. P 45.

Defendant Paul Martin, Ph.D., is a licensed psychologist, with a principal place of business located in Albany, Ohio, and is the acting Chief Executive Officer of Wellspring Retreat, Inc. ("Wellspring"), also a defendant in this case. Compl. P 12. Wellspring operates a "retreat and cult recovery resource center" located in Albany, Ohio. Compl. P 13. Defendants Martin and Wellspring allegedly provided materials containing or referring to Plaintiffs' protected trade secrets on the Ross Defendants' websites. Compl. PP 12, 13. More broadly, Plaintiff contends that the Ross Defendants and Defendants Martin and Wellspring are collaborators in "deprogramming" and [*8] other "anti-cult" business and marketing activities. Compl. P 35.

2. Ross's "Interventions" with Michael Sutton

This dispute originated with the Suttons' alleged employment of Ross. As stated above, the Suttons hired Ross to conduct "interventions" with Michael, in an attempt to urge him to disassociate himself from Plaintiffs. Compl. P 28. Beginning in or about November 2002, Ross conducted several "interventions" with Michael

Sutton on three separate occasions. Compl. P 29. The first "intervention" took place over the course of five days, during a family vacation in Florida. Next, the Complaint alleges that a one day "intervention" took place at the Suttons' home in New Jersey. Compl. P 29. The Suttons were present during both of these interventions. Compl. P 29. Defendant Franco was present during the New Jersey "intervention." Compl. P 31.

During the "interventions," Ross allegedly requested that Michael Sutton provide him with Plaintiffs' protected materials. Compl. P 30. Michael Sutton refused to provide the protected materials to Ross, stating that they were confidential. Compl. P 30. The Complaint further alleges that the Suttons were present for these discussions and were aware [*9] of the confidential nature of Plaintiffs' protected materials. Compl. P 30. At some point, Ross obtained from Franco a copy of all of Plaintiffs' protected materials in her possession, allegedly in violation of Franco's confidentiality agreement with Plaintiffs. Compl. P 33.

3. Ross Websites and Martin/Hochman Articles

The Complaint further alleges that Michael Sutton eventually told his father that he would not disassociate from Plaintiffs and would continue to reduce his role at Lollytogs. Compl. P 32. Morris Sutton allegedly responded angrily and indicated to Michael that he would do whatever was necessary to destroy Plaintiffs' business. Compl. P 32. The Complaint alleges that the Suttons "directed their agents, the Ross Defendants, to engage in a series of activities . . . to disparage and damage Plaintiffs' business." Compl. P 34. Such acts included obtaining and distributing Plaintiffs' protected materials to others; and hiring individuals to write articles disparaging Plaintiffs' and their programs. Compl. PP 33-36.

The Suttons hired Defendant Martin and non-party John Hochman, M.D. ², to provide negative and damaging written analyses of Plaintiffs and Plaintiffs' training courses. [*10] Compl. P 34. The Ross Defendants, at the direction of the Suttons, provided all or some of Plaintiffs' protected materials to Defendants Martin and Wellspring as well as to Hochman. Compl. P 35. The Complaint further alleges that the Suttons paid Martin and Hochman to use the protected materials to write analyses of Plaintiffs' training programs, concluding that Plaintiffs are a "cult" or are "cult-like." Compl. P 35. Specifically, Defendant Martin authored two pieces: *A Critical Analysis of the Executive Success Programs, Inc.*, and *Robert Jay Lifton's Eight Criteria of Thought Reform as Applied to the Executive Success Programs* ("the Martin articles"). Compl. P 36. The Martin article quotes from portions of Plaintiffs' protected materials, allegedly mischaracterizing the nature of Plaintiffs' materials and Plaintiffs' training programs. Compl. P 36.

Plaintiffs allege that Martin's articles have the effect of misleading readers into believing that Plaintiffs and their programs constitute a "cult." Compl. P 36. Hochman authorized a piece entitled, *A Forensic Psychiatrist Evaluates ESP* ("the Hochman article"). Compl. P 39. The Complaint alleges that this piece also mischaracterizes Plaintiffs' [*11] materials and training programs, misleading readers regarding the nature of Plaintiffs and their programs. Compl. P 39.

2 Dr. Hochman was originally a party to this case; however, Plaintiffs voluntarily dismissed those claims after Dr. Hochman challenged personal jurisdiction in the Northern District of New York. Plaintiffs have re-filed the claims against him in California, where Hochman lives.

Both the Martin articles and the Hochman article were published on the Ross Defendants' websites. Compl. PP 38, 40. Specifically, the Complaint alleges that Defendants Martin and Wellspring authorized the Ross Defendants to publish the Martin articles on their websites. Compl. P 38. Moreover, the Ross Defendants allegedly intended to obtain commercial gain through the use of Plaintiffs' protected materials and disparagement of Plaintiffs and their programs and services. Compl. P 41. The Ross Defendants obtained such commercial gain by receiving payment from Defendant Morris Sutton and by attracting more potential buyers of the Ross Defendants' merchandise or services through their websites. Compl. P 41. Additionally, Defendants Martin and Wellspring allegedly obtained commercial gain by receiving [*12] payment from Defendant Morris Sutton and by the advertising exposure gained by the publication of the Martin and Hochman articles on the Ross Defendants' websites. Compl. P 42.

The Martin and Hochman articles are not the only place on the Ross Defendants' websites where Plaintiffs are mentioned. The Ross Defendants have also included Plaintiffs on a list of organizations contained on the websites, designating the included organizations as "cults." Compl. P 47. Additionally, the Ross Defendants' websites contain sections including "Warning Signs," and "Intervention," which are allegedly designed to frighten family members and friends into seeking intervention and deprogramming services by Ross. Compl. P 47.

4. Agreements Between Plaintiffs and Defendant Franco

On or about May 5, 2001, Defendant Franco completed and submitted an application for enrollment in Plaintiffs' training program. Compl. P 50. The application required Franco to represent, *inter alia* that she does not compete with Plaintiffs and will return all of Plain-

tiffs' materials upon leaving the program. Compl. P 50. However, the Complaint alleges that Franco was acting in competition with Plaintiffs in two different capacities. [*13] Compl. PP 51-52. First, prior to enrolling in Plaintiffs' training program, Franco completed a five-day training course administered by Taibi Kahler Associates, Inc. ("Taibi Kahler") through which she received her master training certification and was thereafter marketed as a certified trainer on the Taibi Kahler website. Compl. P 51. Second, Franco is the sole officer and director for the Center for Personal Growth, Inc., a New Jersey for-profit corporation, which is allegedly a competitor of Plaintiffs. Compl. P 52.

Additionally, Defendant Franco signed confidentiality agreements in conjunction with her participation in Plaintiffs' program. See Certification of Harold L. Kofman, Esq. ("Kofman Cert.") Ex. B and Certification of Gage Andretta, Esq. ("Andretta Cert.") Ex. B. These confidentiality agreements prohibited Franco from distributing the materials she received through her training.

B. Procedural Background

This case was originally commenced as two separate actions in the Northern District of New York in August 2003, alleging that Franco, among others, violated the Lanham Act and is liable for copyright infringement. Both actions sought *ex parte* temporary restraining orders to [*14] remove the Hochman and Martin articles from the Ross Institute's websites. The District Court denied both *ex parte* applications. Additionally, the District Court denied Plaintiffs' applications for preliminary injunctions. The Second Circuit Court of Appeals affirmed the District Court's denial of the preliminary injunction applications, finding that Plaintiffs could not demonstrate a likelihood of success on the merits. See *NXIVM v. Ross Inst.*, 364 F.3d 471 (3d Cir. 2004). The United States Supreme Court denied Plaintiffs' petition for a writ of certiorari. 543 U.S. 1000, 125 S. Ct. 607, 160 L. Ed. 2d 458 (2004).

Thereafter, the District Court granted Defendant Franco's motion to dismiss Plaintiffs' Lanham Act, Copyright Act, tortious interference and common-law fraud claims. Additionally, the District Court granted in part and denied in part Plaintiffs' motion to amend their pleadings and to add the Suttons as defendants. Specifically, the District Court denied Plaintiffs leave to plead fraud, conversion and prima facie tort claims and granted Plaintiffs leave to assert breach of contract and misappropriation of trade secrets claims. The District Court denied Plaintiffs leave to file claims against the Suttons for [*15] conversion, Lanham Act violations, unfair competition and prima facie tort. Plaintiffs were granted leave to assert claims against the Suttons for product disparagement, tortious interference with contract, inter-

ference with prospective contractual relations and copyright infringement.

On April 19, 2005, Plaintiffs filed their Amended and Consolidated Complaint. Thereafter, the District Court granted the Suttons' motion to transfer this action pursuant to 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406.

C. Plaintiffs' Claims

Plaintiffs seek relief on the following claims: misappropriation of trade secrets (Count One), product disparagement (Count Two), breach of contract (Count Three), interference with contractual relations (Counts Four and Five), tortious interference with prospective contractual relations (Count Six), and copyright infringement (Count Seven). The Sutton Defendants do not seek dismissal of Counts One or Three. Joining in the arguments of the Sutton Defendants, the Ross and Well-spring Defendants also seek dismissal of the product disparagement and tortious interference claims.

II. STANDARD OF REVIEW

The standard that a court applies on a motion for judgment on the pleadings is [*16] the same standard on a motion to dismiss pursuant to *Rule 12(b)(6)*. See *Spruill v. Gillis*, 372 F.3d 218, 223 n.2 (3d Cir. 2004). In reviewing a motion to dismiss on the pleadings made pursuant to *Federal Rule of Civil Procedure 12(c)*, a Court must take all allegations in the Complaint as true, viewed in the light most favorable to the plaintiff. See *Gomez v. Toledo*, 446 U.S. 635, 636 n.3, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); *Robb v. Philadelphia*, 733 F.2d 286, 287 (3d Cir. 1984). If no relief could be granted under any set of facts that could prove consistent with the allegations in the Complaint, the Court may dismiss the Complaint for failure to state a claim. See *Hishon v. Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984); *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986). Additionally, the Supreme Court recently clarified the *Rule 12(b)(6)* standard in *Bell Atlantic Corporation v. Twombly*. 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007). Specifically, the Court "retired" the language contained in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80, (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief." *Id.* at 1968 [*17] (citing *Conley*, 355 U.S. at 45-46). Instead, the Supreme Court instructed that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965.

Ordinarily, a motion to dismiss must be decided only upon the allegations set forth in the complaint, without considering any outside documents or available facts. If on a 12(b)(6) motion to dismiss, a party "presents matters

outside the pleadings, the district court must convert the motion to dismiss into a motion for summary judgment, and give all parties a reasonable opportunity to present all material pertinent to such a motion under *Rule 56*." *In re Bayside Prison Litig.*, 190 F. Supp. 2d 755, 760 (D.N.J. 2002). In deciding a 12(b)(6) motion to dismiss, the district court may only consider the complaint and limited categories of documents in order to "protect plaintiffs against, in effect, summary judgment by ambush." *Id.* (citing *Bostic v. AT & T of the Virgin Islands*, 166 F. Supp. 2d 350, 354-55 (D.V.I. 2001)). However, conversion to a motion for summary judgment is not required when a district court considers the following documents: (1) matters attached to the complaint; (2) matters incorporated [*18] into the pleadings by reference; (3) matters of public record; (4) matters integral to or upon which plaintiff's claim is based." *In re Bayside*, 190 F. Supp. 2d at 760 (internal citations omitted). The Third Circuit allows district courts to consider such documents because "neither party can claim prejudice or surprise by the court's reliance on the document." *Id.*

In this case, the Court may consider several documents outside the pleadings because they are either incorporated into the pleadings by reference or integral to or upon which the claim is based. Such documents include the Franco Confidentiality Agreements and the Hochman and Martin articles published on the Ross Defendants' websites. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)

III. CHOICE OF LAW

Several of Plaintiffs' claims assert state causes of action. Both parties recognize that there is a colorable question as to whether the Court should apply New York or New Jersey law to Plaintiffs' state claims. However, where no actual conflict of law exists, no choice of law need be made. See *IBM Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 333 (D.N.J. 2005).

In [*19] this case, there is no apparent conflict of law regarding the state law claims at issue. In fact, New York and New Jersey law concerning product disparagement and tortious interference are virtually identical. See *The Score Board, Inc. v. Upper Deck Co.*, 959 F. Supp. 234, 238, n.1 (D.N.J. 1989); *IBM Corp.*, 363 F.3d at 143. Accordingly, this Court need not engage in a choice of law analysis.

IV. PRODUCT DISPARAGEMENT OR TRADE LIBEL (SECOND COUNT)

New Jersey and New York³ generally recognize the same elements for a claim of "product disparagement" or trade libel: (1) publication; (2) with malice; (3) of false allegations concerning the property, product or business;

and (4) special damages such as pecuniary loss. See *Mayflower Transit, LLC v. Prince*, 314 F. Supp. 2d 362 (D.N.J. 2004); See also *C.R. Bard, Inc. v. Wordtronics, Corp.*, 235 N.J. Super. 168, 561 A.2d 694 (Law Div. 1989); *DeMarco-Stone Funeral Home Inc. v. WRGB Broad. Inc.*, 203 A.D.2d 780, 610 N.Y.S.2d 666, 667-68 (3d Dep't 1994); *Redeye Grill, L.P. v. Rest. Opportunities Ctr. of N.Y., Inc.*, 13 Misc. 3d 1212A, 824 N.Y.S.2d 758, 2006 WL 2726823, *2 (N.Y. Sup. Aug. 16, 2006) (citing *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 277 F. Supp. 2d 269, 276 (S.D.N.Y. 2003)).

3 Both Plaintiffs [*20] and the Sutton Defendants agree that New Jersey and New York law concerning product disparagement and tortious interference claims are virtually identical. See Defs. Br. at 18 n.6; Pls. Opp'n Br. at 17. Thus, no choice of law analysis is necessary.

A. Liability of Suttons

As an initial matter, the Suttons make the unsupported argument that Plaintiffs' product disparagement claim must fail as a matter of law because "none of the views were expressed by the Suttons." Defs. Br. at 23. Contrary to the Suttons' argument, the Complaint repeatedly alleges that the Suttons hired Ross and Martin to engage in activities on their behalf. See Compl. PP 34-36, 41-42. The Complaint adequately alleges that the Ross Defendants and Martin were engaging in activities at the behest of the Suttons. Moreover, Defendants cite no cases stating that liability on a product disparagement claim requires that the defendant personally express the allegedly disparaging statements. Accordingly, this argument is unavailing.

B. Constitutional and State Law Protections

In order for Plaintiffs to prevail on the product disparagement claim, Defendants' statements may not be pure expressions of opinion. See *Cassidy v. Merin*, 244 N.J. Super. 466, 479, 582 A.2d 1039 (App. Div. 1990); [*21] *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 21 A.D.3d 826, 801 N.Y.S.2d 38, 39-40 (1st Dep't 2005). This requirement derives from both constitutional and state law protections for speech. As the New Jersey Supreme Court explained, "[i]nsofar as defenses to product disparagement are concerned, a qualified privilege should exist whenever it would exist for a defamation action . . . it follows that the right to make a statement about a product should exist whenever it is permissible to make such a statement about the reputation of another." *Dairy Stores, Inc. v. Sentinel Publ'g Co., Inc.*, 104 N.J. 125, 137, 516 A.2d 220 (1986); see also *Guerrero v. Carva*, 10 A.D.3d 105, 779 N.Y.S.2d 12, 17 (1st Dep't 2004) (recognizing constitutional protection for state-

ments of opinion); *Penn Warranty Corp. v. DiGiovanni*, 10 Misc. 3d 998, 810 N.Y.S.2d 807, 814 (N.Y. Sup. 2005) (noting that courts have been "loathe to stifle's one's criticism of goods or services").

Nevertheless, there is no "wholesale defamation exception" for anything that is capable of being labeled as "opinion." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990). Rather, "[h]arm from a defamatory opinion statement is redressable when the statement implies underlying objective facts that [*22] are false." *Ward v. Zelickovsky*, 136 N.J. 516, 531, 643 A.2d 972 (1994) (citing *Milkovich*, 497 U.S. at 18-20). See also *Long v. Marubeni Am. Corp.*, 406 F. Supp. 2d 285, 296 (S.D.N.Y. 2005). Here, Plaintiffs argue that the Martin and Hochman articles imply additional "facts" unknown to the readers; and accordingly, are not pure opinion and are actionable as defamatory statements. Pls. Opp'n Br. at 24-25 (quoting "[t]here is much in the content and the format of ESP that is not at all original, and is quite similar to aspects of a number of cults and cult-like organizations with which I am familiar." Kofman Cert. Ex. C at 1 (emphasis added)).

In this case, the Court must decide whether the opinions contained in the Martin and Hochman articles are non-actionable opinions, actionable opinions mixed with fact or actionable opinions that are impliedly based upon unknown facts. Generally, the question of whether a communication is defamatory is a question of law. See *Farber v. City of Paterson, No. 03-4535*, 2006 U.S. Dist. LEXIS 86548, 2006 WL 3485919, *4 (D.N.J. Nov. 29, 2006) (citing *Restatement (Second) of Torts (1977) § 614*; *DeAngelis v. Hill*, 180 N.J. 1, 14, 847 A.2d 1261 (2004); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 189 (3d Cir. 1998)); [*23] *Mayflower Transit*, 314 F. Supp. 2d at 372. However, "[i]f the words are susceptible of either a defamatory or non-defamatory meaning . . . resolution must be left to the trier of fact." *Farber*, 2006 U.S. Dist. LEXIS 86548, 2006 WL 3485919 at *4. Critical to the question of whether or not Defendants' statements are actionable are three factors: "(1) the content, (2) the verifiability, and (3) the context of the challenged statement." *Id.* (citing *Ward*, 136 N.J. 516, 643 A.2d 972); see also *Brian v. Richardson*, 87 N.Y.2d 46, 51, 660 N.E.2d 1126, 637 N.Y.S.2d 347 (1995).

1. Content of Statements

First, the Court must evaluate the content of the allegedly defamatory statements. "The content analysis requires an evaluation of the language in question according to the fair and natural meaning that would be given it 'by reasonable persons of ordinary intelligence.'" *Farber*, 2006 U.S. Dist. LEXIS 86548, 2006 WL

3485919 at *4 (quoting *Romaine v. Kallinger*, 109 N.J. 282, 290, 537 A.2d 284 (1988)). Here, the Court must pay close attention to whether the opinions contained in the Martin and Hochman articles "purport[] to be based on actual facts, and to be pointing out their implications." *Church of Scientology Int'l v. Eli Lilly & Co.*, 778 F. Supp. 661, 668 (S.D.N.Y. 1991). Particularly, the Court must be concerned [*24] with whether "[t]he impression created by these words in the mind of a reasonable person could be that they were purporting to state the truth of the matter, not merely the author's opinion." Id. As explained by the New York Court of Appeals, "[i]n making this inquiry, courts cannot stop at literalism," but consider the impression created by the words used." *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 243, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991). Specifically, the Court should look at the "content of the whole communication, its tone and apparent purpose." Id. (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 293, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986)).

Plaintiffs argue that the content of the Martin and Hochman articles is defamatory because they contain assertions of fact and/or mixed fact and opinion. Pls. Opp'n Br. at 18. Specifically, Plaintiffs allege that "the central defamatory statement - that Plaintiffs constitute a cult - is not presented as the mere opinion of the authors; rather, this statement is presented as a fact capable of being proven to the readers on the basis of the criteria provided by the writings themselves." Pls. Opp'n Br. at 21-22. On this basis, Plaintiffs argue that a reasonable reader would assume that the authors have reviewed [*25] Plaintiffs' programs and that they have undisclosed evidence that supports the conclusion that Plaintiffs' organization constitutes a cult. Pls. Opp'n Br. at 25. Finally, Plaintiffs argue that "reasonable readers of the Ross Defendants' website and the Hochman and Martin writings are likely to understand that scholars in the field are revealing to them scientific facts or 'truths' about Plaintiffs, not mere opinions." Pls. Opp'n Br. at 22 (citing *New Testament Missionary Fellowship v. E.P. Dutton & Co.*, 112 A.D.2d 55, 491 N.Y.S.2d 626, 627-28 (1st Dep't 1985)).

Upon review of the Hochman and Martin articles it is the conclusion of this Court that a reasonable reader would not believe that the articles contain assertions of fact that Plaintiffs' organization constitutes a cult. As discussed more thoroughly below, this finding is supported by the context of the alleged defamatory statements. See *Farber*, 2006 U.S. Dist. LEXIS 86548, 2006 WL 3485919 at *5 (stating that the determination of whether the content of an article was defamatory could not be made without examining the context within which the statements were made). Moreover, the content of the Hochman and Martin articles, while including statements

of fact from their respective [*26] fields of study, do not explicitly state that Plaintiffs' organization constitutes a cult. Rather, the articles state that NXIVM has some characteristics of a cult and cult-like elements. In fact, Martin's articles do not state any conclusions about NXIVM and do not state that NXIVM is a cult. Rather, Martin's articles quote from Robert Jay Lifton's academic writing listing characteristics of cults and quote from Plaintiffs' own materials. See *Kofman Certif. Ex. D, E*. Thus, the articles adequately state the facts upon which the authors' opinions are based.

More importantly, the context of the articles would inform a reasonable reader that these articles constitute an academic critique or analysis of Plaintiffs' program. This type of academic critique is bolstered by research from the authors' respective fields; however, it is evident that the authors are offering their opinions based on their academic and occupational training. A reasonable reader would discern that the authors' conclusions do not constitute fact, but rather, the opinion of an individual who is writing from a particular perspective.

2. Verifiability

The verifiability factor requires the Court to determine whether describing [*27] a group as a "cult" constitutes a verifiable statement of fact; or instead, if characterizing a group as a "cult" is a non-actionable expression of opinion. "An analysis of verifiability requires distinguishing between statements of fact and opinion. Only if a statement suggests 'specific factual assertions that could be proven true or false' can it qualify as actionable defamation." *Farber*, 2006 U.S. Dist. LEXIS 86548, 2006 WL 3485919 at *4 (internal citations omitted). Thus, for Plaintiffs to prevail, Defendants' allegedly false statements must be verifiable statements of fact. See *Mayflower Transit*, 314 F. Supp. 2d at 372; *Singer v. Beach Trading Co., Inc.*, 379 N.J. Super. 63, 80, 876 A.2d 885 (App. Div. 2005); *Immuno AG*, 77 N.Y.2d at 243.

This Court does not find that the Martin articles contain any statements that could be characterized as facts regarding NXIVM. The Martin articles do not identify NXIVM as a cult at any point. Martin's articles merely compare the scholarly work of Robert Jay Lifton on cults and their common, shared characteristics with the materials distributed by NXIVM to its enrollees. Accordingly, in the absence of any statements of fact contained in the Martin articles, this Court need not engage in [*28] a verifiability analysis.

Next, this Court must determine whether there are statements of fact contained in Hochman's articles that are verifiable and thereby actionable. In regard to the Hochman article, Plaintiffs allege that the following statements are defamatory ⁴:

G. "ESP Intensive participants are signing up for sixteen ten-hour days, which will either be experienced successively, or in five-day segments." *A Forensic Psychiatrist Evaluates ESP*, John Hochman, M.D., www.rickcross.com (accessed December 20, 2004).

H. "Participants are told to promise not to tell non-participants of what they learn in the Intensive, as well as its methods . . . They will be unable to respond to routine questions they would be expected to receive, such as, 'What did you learn today?' or 'What's going on at the seminar you are attending?'" *A Forensic Psychiatrist Evaluates ESP*, John Hochman, M.D., www.rickcross.com (accessed December 20, 2004).

I. "[O]ngoing participants are required to make a daily brief phone call to 'check-in' with a 'coach'." *A Forensic Psychiatrist Evaluates ESP*, John Hochman, M.D., www.rickcross.com (accessed December 20, 2004).

J. Section heading: "Cult-Like Elements of the ESP Intensive." [*29] *A Forensic Psychiatrist Evaluates ESP*, John Hochman, M.D., www.rickcross.com (accessed December 20, 2004).

K. "The group claims unprecedented results training over 400,000 individuals." *A Forensic Psychiatrist Evaluates ESP*, John Hochman, M.D., www.rickcross.com (accessed December 20, 2004).

L. That "emotional appeals or any other manipulation" occur to encourage participants in Plaintiffs' seminars to stay longer at the end of the day or to return for successive days of training. *A Forensic Psychiatrist Evaluates ESP*, John Hochman, M.D., www.rickcross.com (accessed December 20, 2004).

M. That Plaintiffs' program involves "a kingdom of sorts, ruled by a Vanguard, who writes his own dictionary of the English language, has his own moral code, and the ability to generate taxes on subjects by having them participate in his seminars. It is a kingdom with no physical borders, but with psychological borders - influencing how his subjects spend their

time, socialize, and think . . ." *A Forensic Psychiatrist Evaluates ESP*, John Hochman, M.D., www.rickcross.com (accessed December 20, 2004).

Compl. P 48. Plaintiffs contend that these statements are "demonstrably false and were disseminated and published [*30] by the Ross Defendants solely with the intent to disparage Plaintiffs' products and services and to convince readers that Plaintiffs' programs are "cult-like" and emotionally harmful to participants." Compl. P 49.

4 Plaintiffs may only seek relief based on the statements that are pled in their Second Amended Complaint. Both New York and New Jersey law require plaintiffs to identify in their pleadings the particular statements that they allege are defamatory. See *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 109 (3d Cir. 1988) cert. denied, 489 U.S. 1078, 109 S. Ct. 1528, 103 L. Ed. 2d 834 (1989); *FDIC v. Bathgate*, 27 F.3d 850, 875 (D.N.J. 1996); *Reserve Solutions, Inc. v. Vernaglia*, 438 F. Supp. 2d 280 (S.D.N.Y. 2006).

It is the finding of this Court that the statements contained in paragraphs 48J, L and M of the Complaint are not verifiable statements of fact. First, the section-heading cited in paragraph 48J is clearly part of the author's scholarly critique of Plaintiffs' programs. Moreover, as set forth more fully below, it is the finding of this Court that "cult" is not a verifiable assertion of fact. Next, it should be noted that the Complaint misquotes Hochman's article in paragraph 48L. Specifically, the Hochman [*31] article states that the long hours of Plaintiffs' programs "suggests to me that emotional appeals or manipulation may occur to get everyone to stay around even longer." Kofman Cert., Ex. C, p.1 (emphasis added). This statement, especially in the context of a scholarly article, is a statement of opinion, not fact. Finally, the rhetorical and metaphorical language cited in paragraph 48M of the Complaint also is non-verifiable opinion, and not a statement of fact. Much like the articles in question in *Church of Scientology of Cal. v. Siegelman*, "[n]one of these statements go beyond what one would expect to find in a frank discussion of a controversial religious movement . . . and thus none of these statements may be the basis for an action in defamation." 475 F. Supp. 950, 956 (S.D.N.Y. 1979).

The statements cited in paragraph 48G, H, I and K of the Complaint appear to be verifiable statements of fact. However, even if these statements are false statements of fact, they do not disparage Plaintiffs' program.

Even more importantly, these statements are found in a scholarly critique of Plaintiffs' program.

Plaintiffs also argue that the articles as a whole imply that NXIVM is a cult or has cult-like [*32] characteristics. Plaintiffs set forth a unique argument as support for this theory of relief: they do not argue that calling a group a "cult" or "cult-like" is a verifiable statement of fact and thereby actionable. Instead, Plaintiffs argue that "the statement that Plaintiffs constitute a cult that employs mind control techniques is not pure opinion in this context because it is 'capable of being proven true or false' . . . by matching up Plaintiffs' characteristics against those defined and described in the writings themselves." Pls. Opp'n Br. at 23 (citing *New Testament Missionary Fellowship*, 112 A.D.2d 55, 491 N.Y.S.2d 626; *Landmark Educ. Corp. v. Conde Nast Publication*, No. 114814/93, 1994 WL 836356 (N.Y. Sup. July 7, 1993)). Specifically, Plaintiffs rely heavily on *Landmark Education Corporation*, wherein the New York trial court found that

cult has a precise meaning which is readily understood as it was defined in the article. The statements made are capable of being proven true or false as 'the Forum's' procedures can be matched against the defined qualities of cults as described in the article, any consistency will establish the claimed truth or falsity.

1994 WL 836356 at *3. The Court is unpersuaded [*33] by this argument. As Defendants note, *Landmark Education* is a distinguishable case because the article at issue therein "accused plaintiff of brainwashing, fraud in fundraising, harassment and causing physical and emotional damage." Defs. Reply Br. at 10-11 (citing *Landmark*, 1994 WL 836356 at *2). No such similar statements are at issue here. Additionally, the context of the statements at issue in *Landmark* was identified as a piece of reporting. Here, the articles on the Ross Defendants' websites do not purport to be pieces of reporting. Rather, the articles are written from a scholarly perspective by individuals with an academic background.

Moreover, this Court is unpersuaded by Plaintiffs' theory that the characterization of NXIVM as a cult is verifiable because it can be verified by the criteria provided in the Martin and Hochman articles. The Hochman and Martin articles respectively offer a psychiatrist and clinical psychologist's evaluations of Plaintiffs' programs. That they must offer criteria by which to define or describe cult-like behavior underscores the fact that "cult" is a term without a universal or concrete meaning and is not a verifiable fact.

Moreover, as recognized [*34] by other jurisdictions, the term "cult" is not an easily verifiable term because "the truth or falsity of the statement depends upon one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law." *Harvest House Publishers v. Local Church*, 190 S.W.3d 204, 212 (Tex. App. 1 2006); (citing *inter alia Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alaska 2001); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 707, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976); *United States v. Ballard*, 322 U.S. 78, 86, 64 S. Ct. 882, 88 L. Ed. 1148 (1944)). Even though NXIVM does not identify itself as a religious group, the overarching point of these cases is still relevant. "Cult" is not a term with a concrete meaning. Thus, when an individual states or opines that a group constitutes a "cult" or is "cult-like," no verifiable fact is communicated to the listener or reader. For these reasons, this Court concludes that the alleged statements of fact or implied statements of fact contained in the Hochman and Martin articles are not verifiable statements of fact.

3. Context

The context of alleged defamatory statements may be the most important of the three factors used to assess a reasonable reader's [*35] impression. See *Brian*, 87 N.Y.2d at 51 (stating that the context factor "lends both depth and difficult to the analysis"); *Nanavati*, 857 F.2d at 107; *Eli Lilly & Co.*, 778 F. Supp. at 667. Evaluating what a reader's reasonable impression would be "involves assessing the 'impression created by the words used, as well as the general tenor of the expression, as experienced by a reasonable person.'" *Farber*, 2006 U.S. Dist. LEXIS 86548, 2006 WL 3485919 at *5 (quoting *Ward*, 136 N.J. at 532; see also *Immuno AG*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906. Furthermore, the New York Court of Appeals has stated that "courts are required to take into consideration the larger context in which the statements were published, including the nature of the particular forum." *Brian*, 87 N.Y.2d at 51. The context of the alleged defamatory statements as well as the nature of the forum are relevant to the meaning a reasonable reader would attribute to the statement in question.

Plaintiffs contend that Defendants' characterization of Plaintiffs' organization as a "cult" is in a context that would lead a reasonable reader to believe that Defendants' statements are not opinions but facts. Pls. Opp'n Br. at 20. Specifically, Plaintiffs claim that the Ross Defendants' [*36] website purports to provide readers with factual information concerning certain groups that the website identifies as cults." Pls. Opp'n Br. at 20. Further, the Hochman and Martin articles "present themselves as scholarly or academic analyses by professionals with advanced degrees in psychiatry and bio-behavioral sci-

ences (Hochman) and clinical psychology (Martin)." Pls. Opp'n Br. at 20. Plaintiffs liken the context of the Hochman and Martin articles to the context of the article at issue in *Eli Lilly*, which the Southern District of New York described as "substantially equivalent to an internal memo, and its tone is business-like and solemn." 778 F. Supp. at 668.

To properly evaluate the context of the statements contained in the Hochman and Martin articles, the Court must consider not only the tone and tenor of the articles but also the broader context of the Ross Defendants' website. Tellingly, the Complaint itself alleges that "[i]n actuality, however, the sites are a mere advertisement and marketing tool for the Ross Defendants and their services and products." Compl. P 45. A person that accesses the Ross Defendants' websites would understand that it offers a particular viewpoint [*37] on cults and their techniques. The Ross Defendants' websites do not purport to offer reporting coverage or news on cults. In fact, the disclaimer contained on the website indicates that the materials therein offer viewpoints: "[t]he Ross Institute, its Advisory Board and/or Rick Ross do not specifically endorse or support any of the *views expressed* within the documents, articles, reports and testimonies archived within this website, with the exception of those specifically attributed." Supplemental Certification of Harold L. Kofman, Esq. ("Supp. Kofman Cert.") Defs. Ex. A. (emphasis added). Thus, the broader context of the Hochman and Martin articles indicates to a reasonable reader that information contained on the website is rife with opinions and viewpoints. It does not contain statements of fact.

Additionally, the Hochman and Martin articles themselves are of an analytical tone and tenor, filled with opinions. A reasonable reader would understand that the articles are scholarly critiques. For example, the titles of two of the articles indicate that the author is evaluating Plaintiffs' programs and offering his opinion: *A Forensic Psychiatrist Evaluates ESP, A Critical Analysis of* [*38] *the Executive Success Programs Inc and A Critical Analysis of the Executive Success Programs*. See Kofman Cert. Exs. D, E. (emphasis added). Furthermore, the Martin articles contain disclaimers, indicating to the reader that the author is offering his opinion from a particular viewpoint.⁵ For all the foregoing reasons, this Court concludes that a reasonable reader would not be under the impression that the Hochman and Martin articles contain assertions of fact regarding Plaintiffs' programs. Accordingly, these statements are not actionable as defamatory and Plaintiffs have failed to state a claim for product disparagement.

⁵ Both of Martin's articles indicate that he is the Director of Wellspring Retreat and contain

the following additional note: "Wellspring Retreat & Resource Center is a licensed residential treatment facility that provides a program of counseling and instruction to victims of abuse, religious abuse and/or thought reform." See Kofman Cert. Exs. D, E.

As previously stated, the Ross and Wellspring Defendants join in this motion to dismiss Plaintiffs' product disparagement claim. The Court's above conclusion that the allegedly defamatory statements constitute protected [*39] speech compels the conclusion that Plaintiffs also may not prevail on this claim against any Defendants.

Because the Court finds that Plaintiffs have failed to state a claim for product disparagement based on the protected nature of the speech at issue, the Court will not address Defendants' additional arguments for dismissal of this claim: that Plaintiff First Principles may not assert a claim for product disparagement, that Plaintiffs' claims are time barred on statute of limitations grounds, and that Plaintiffs lack standing to recover on a product disparagement claim based on statements relating to non-party Keith Ranieri.

V. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS (FIFTH COUNT) & TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE (SIXTH COUNT)

Claims for tortious interference with contractual relations and prospective economic advantage cannot lie where plaintiffs may not prevail on a product disparagement claim. See *Cassidy*, 244 N.J. Super. at 483 (citing *Dairy Stores*, 104 N.J. at 137; *Binkewitz v. Allstate Ins. Co.*, 222 N.J. Super. 501, 515-16, 537 A.2d 723 (App. Div.) cert. denied, 113 N.J. 378, 550 A.2d 481 (1988)); *In re Quality Botanical Ingredients, Inc.*, 249 B.R. 619, 628-29 (Bankr. D.N.J. 2000). [*40] Where a claim for tortious interference with contractual relations or prospective economic advantage implicates constitutionally protected speech, the same qualified privilege is applicable. As explained by the New Jersey Appellate Division,

[t]he libel action privilege grows out of the public policy favoring free expression in statutorily-required informal dispute resolution proceedings, without fear of ensuing libel action, short of outright lies or reckless disregard of falsity. An action for tortious interference based on the same verbal conduct would equally chill the free expression we seek to protect.

Binkewitz, 222 N.J. Super. at 515. Accordingly, Plaintiffs' claims for relief contained in the Fifth and Sixth

Counts depend upon the viability of Plaintiffs' product disparagement claim. Notably, Plaintiffs fail to contest this point in their Opposition Brief.

It is the finding of this Court that Plaintiffs' Fifth and Sixth Counts fail to state a claim upon which relief can be granted. Plaintiffs' Fifth and Sixth Counts allege tortious interference based on the statements contained on the Ross Defendants' websites. See Compl. PP 96, 104. As set forth above, these statements constitute [*41] protected speech and thus, may not be the basis for either product disparagement or tortious interference claims.

Also, as was the case with the product disparagement claim, the Court's finding that these statements constitute protected speech requires dismissal of these claims against all Defendants.

VI. TORTIOUS INTERFERENCE WITH CONFIDENTIALITY AGREEMENT (COUNT FOUR)

New York and New Jersey law on tortious interference are essentially the same and in accord. See *Marks v. Struble*, 347 F. Supp. 2d 136, 142 (D.N.J. 2004) (citing *DiGiorgio Corp. v. Mendez & Co. Inc.*, 230 F. Supp. 2d 552, 557-58 (D.N.J. 2002); *Hidden Brook Air, Inc. v. Thabet Aviation, Int'l, Inc.*, 241 F. Supp. 2d 246, 278 (S.D.N.Y. 2002)). Accordingly, no choice of law analysis is necessary. Under both states' laws the essential elements for a claim for tortious interference with contractual relations are: (1) existence of a contract; (2) defendant's knowledge of that contract; (3) defendant's intentional and improper procuring of the breach; and (4) damages. *Id.* at 144. See also *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 751-52, 563 A.2d 31 (1989); *Lama Holding Cop. v. Smith Barney Inc.*, 88 N.Y.2d 413, 423, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996).

The [*42] contested element in this case is the third element: the impropriety of Defendants' conduct and/or whether Defendants acted with malice when they interfered with Plaintiffs' contract with Defendant Franco. Defendants do not contest the existence of the confidentiality agreement, do not deny having knowledge of the contract and do not dispute that Plaintiffs allege damages resulting from the breach. Malice, for purposes of a claim for tortious interference with contract, "is not used in the literal sense requiring ill will towards the plaintiff. Rather, malice is defined to mean that the harm was inflicted intentionally and without justification or excuse." *Printing Mart-Morristown*, 116 N.J. at 751 (internal citations omitted). In other words, to prevail on this claim, Plaintiffs must show legal malice. See *id.* at 756 (quoting *Louis Schlesinger Co. v. Rice*, 4 N.J. 169, 181, 72 A.2d 197 (1950)).

In this case, there is no question that Defendants' actions were done intentionally. As alleged in the Complaint, Defendants acted "with the intent to influence or induce Defendant Franco to breach the confidentiality agreement." Compl. P 87. Thus, the next question is whether Defendants acted without justification [*43] or excuse. The New Jersey Supreme Court has explained that "the ultimate inquiry is whether the conduct was both injurious and transgressive of generally accepted standards of common morality or of law. In other words, was the interference by defendant sanctioned by the rules of the game." *Printing Mart-Morristown*, 116 N.J. at 756 (quoting *Sustick v. Slatina*, 48 N.J. Super. 134, 144, 137 A.2d 54 (App. Div. 1958)) (quotation marks omitted); see also *Woods Corp. Assocs. v. Signet Star Holdings, Inc.*, 910 F. Supp. 1019, 1031 (D.N.J. 1995).

In this case, the Complaint alleges that Defendants intentionally sought to induce and influence Franco to breach the confidentiality agreement. Moreover, as to Defendant Morris Sutton, at least, such intentional actions were taken as part of an effort to "do whatever was necessary to destroy Plaintiffs' business." Compl. P 32. The Complaint alleges that Defendants urged and successfully influenced Franco to breach the confidentiality agreement so that she would provide Plaintiffs' protected materials to Ross and ultimately to Hochman and Martin. Compl. PP 33-34. Further, Defendants allegedly hired Martin and Hochman to "provide negative and damaging written analyses [*44] of Plaintiffs and Plaintiffs' training courses in furtherance of their intention to cause harm to Plaintiffs." Compl. P 34. From a review of the Hochman and Martin articles, it is evident that the "protected materials" play a key role in the authors' analysis of Plaintiffs' program. Accepting these allegations as true, it is the finding of this Court that Plaintiffs' adequately claim that Defendants acted with malice by intentionally interfering with the contractual relationship between Plaintiffs and Franco. Specifically, these allegations adequately state a claim for tortious interference with contractual relations because urging a party to a contract to breach a confidentiality agreement in order to destroy another's business is outside of the "rules of the game." Accordingly, this Court denies Defendants' *Rule 12(b)(6)* motion as to Plaintiffs' Fourth Count.

Additionally, Defendants argue that First Principles may not assert a claim for tortious interference with the Franco confidentiality agreement because First Principles is not a party to that contract. However, as Plaintiffs note, First Principles is explicitly listed as a party to the Second Confidentiality Agreement signed [*45] by Franco. See *Andretta Cert., Ex. B*. Contrary to Defendants argument, this Court may consider this document because it is referenced in and is integral to the Complaint: Plaintiffs claim a right to relief based on the vio-

lation of the Confidentiality Agreements between Plaintiffs and Franco. See *In re Bayside*, 190 F. Supp. 2d at 760.

VII. COPYRIGHT INFRINGEMENT (COUNT SEVEN)

To state a claim for copyright infringement under a theory of vicarious liability Plaintiffs must satisfy two elements. First, Defendants must have a right and ability to control the infringing conduct. Second, Defendants must have a direct financial interest in the exploitation of the copyrighted materials. See *Shapiro, Bernstein & Co. v. H.L. Green*, 316 F.2d 304, 307 (2d Cir. 1963); *Arista Records, Inc. v. Flea World, Inc.*, 356 F. Supp. 2d 411, 423 (D.N.J. 2005). In this case, Plaintiffs do not adequately plead that the Sutton Defendants are vicariously liable for the alleged infringement of Plaintiffs' copyright. The Complaint fails to allege that the Sutton Defendants had any ability to control the distribution of Martin and Hochman's articles on the Ross Defendants' websites. Moreover, there is no indication that [*46] the Sutton Defendants had any direct or even an indirect financial interest in the distribution and alleged exploitation of Defendants' copyrighted materials.

Plaintiffs argue that the Court must consider additional theories for the Sutton Defendants' liability on the copyright claim, including theories of contributory infringement and inducement. However, as the Sutton Defendants note, the Complaint fails to set forth such theories of relief. Defs. Reply Br. at 13-14. Specifically, the Complaint alleges that "[t]he Suttons are liable for the Ross Defendants' conduct, both vicariously and because these Defendants were acting as their agents." Compl. P 115. Contrary to Plaintiffs' argument, contributory copyright infringement and inducement are not a form of vi-

carious liability. See Pls. Opp'n Br. at 27. Rather, "related defendants become liable indirectly either . . . through theories of vicarious liability, contributory infringement, or inducement." 3 *Nimmer on Copyright Law* § 12.04(A)(1997); see also *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930, 125 S. Ct. 2764, 2776, 162 L. Ed. 2d 781 (2005) (identifying and defining contributory infringement and vicarious infringement as separate theories [*47] of relief).

This Court concludes that it is inappropriate for Plaintiffs to attempt to set forth an additional theory for relief for the first time in their Opposition Brief. Plaintiffs may not attempt to amend their Complaint through their brief in opposition to a motion to dismiss. See *Pennsylvania ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988); see also *In re Omeprazole Patent Litig.*, 258 F. Supp. 2d 221, 235 (S.D.N.Y. 2001).

VIII. OPPORTUNITY TO AMEND

Plaintiffs' request to amend their Complaint is meritless. Plaintiffs have had ample opportunity to assert properly pled, cognizable claims. This Court will not give Plaintiffs an additional opportunity to assert grounds for relief.

IX. CONCLUSION

For the reasons stated, it is the finding of this Court that Suttons' motion to dismiss is **granted** as to Counts Two, Five, Six as to all Defendants, **granted** as to Count Seven as to the Suttons and **denied** as to Count Four. An appropriate Order accompanies this Opinion.

S/ Dennis M. Cavanaugh, U.S.D.J.

Date: June 27, 2007

Jim L. Fun
Judge



CIRCUIT COURT OF OREGON
TWENTIETH JUDICIAL DISTRICT

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July 23, 2012

RE: Beaverton Grace Bible Church and Charles O'Neal v. Julie Anne Smith, Hannah Smith, Kathy Stephens, Jason Stephens and Meaghan Varela, Wash. Co. Case No. C121174CV

Counsel,

Plaintiffs Grace Bible Church and its Pastor Charles O'Neal bring this action for defamation against defendants Julie Ann Smith, her daughter Hannah Smith and Meaghan Varela.¹ Pursuant to ORS 31.150, defendants Julie Ann Smith and Hannah Smith each filed a Special Motion to Strike plaintiff's claims pursuant asserting that each of plaintiff's claims was directed at protected speech². While defendant's Special Motions to Strike claims in the original complaint

¹ Claims against defendants Kathy Stephens and Jason Stephens were dismissed on motion of the plaintiff.

² Defendant Meaghan Varela filed Special Motions to Strike on June 12, 2012.

were pending, plaintiff filed an amended complaint. The amended complaint restated the original claims of defamation against defendant Julie Ann Smith and 6 separate claims of defamation were added. The single claim of defamation in the amended complaint against defendant Hannah Smith and the claims of defamation against defendant Varela were unchanged by the amended complaint. Thereafter, the Smith defendants and defendant Varela filed Motions to Strike the claims set forth in the amended complaint.

Defendant Julie Ann Smith's invitation to consider defendant's Special Motions directed against the original complaint in addition to those same Special Motions filed against the claims in the amended complaint is declined. Plaintiff's amended complaint simply adds 6 additional claims of defamation to the claims set forth in the original complaint³. No purpose would be served by ruling separately on the claims of the original complaint that are repeated in the amended complaint⁴.

Each Defendant has requested an award of costs and attorneys fees as provided by ORS 31.152(3).

These claims of defamation in the amended complaint began with a dispute regarding church governance between plaintiff O'Neal and defendants that were posted on two internet locations. The claimed defamatory statements by defendant Julie Ann Smith in paragraphs 10(b) – (k), and defendant Hannah Smith in paragraph (t) were posted on plaintiff O'Neal's Google website, and 6 additional claims against defendant Julie Ann Smith in paragraphs 10(l) – (q), and defendant Meaghan Varela in paragraphs 10(x), (y), (z) and (aa) were posted on defendant Julie Ann Smith's internet blog.

The claims of defamation from the amended complaint as regards defendant Julie Ann Smith are as follows⁵:

Paragraph 10(b): *"the pastor has chosen to mislead congregation and destroy relationships"* and *"accuses the pastor of narcissism in the pulpit"*

Paragraph 10(d): *"the pastor of this church thrives on control"* and that sadly, BCBG is more about the reputation of the pastor than real church and it is important for people to have an

³ The 6 additional claims appeared on Defendant Julie Ann Smith's internet blog, Beaverton Grace Bible Church Survivors (bgbc survivors/blogspot/com)

⁴ *Sylmar Air Conditioning v. Pueblo Contracting Services Inc.*, 122 Cal App 4th 1049 (2004) cited by plaintiff is inapposite. In *Sylmar* the trial court had granted a motion to strike the claim, and the amended complaint remained pending requiring another motion to strike to be filed notwithstanding the court's previous ruling dismissing the claim.

⁵ Paragraphs (e) and (f) allege republication of paragraph d, paragraph (i) alleges republication of paragraphs (g) and (h), paragraph (j) alleges a republication of paragraph (g), (h) and (i).

understanding of why this church is not a healthy place and would shout from the rooftop if my review prevents another family from getting sucked into the spiritual abusive environment and false teaching of the teaching presented by the current pastor and, To Chuck: if you would have manned up and acknowledged that we were parting ways because we weren't seeing eye to eye on certain issues, you would have never heard from us again. *But for you to lie to the congregation...and ...I am calling you out as a wolf for lying...* and we had information that would be damaging to your reputation...also you are really brilliant Chuck, but not so brilliant. Quite a few people can see through the false teaching and self aggrandizement.”

Paragraph 10(g): *“leaders of cults convince their people that their church is the only true place to be...and turn a blind eye to known sex offenders in the church [and this is] spiritual abuse.”*

Paragraph 10(h): republication of paragraph (g) adding, *“What we had was indoctrination...That is how cult leaders work. Don't waste your precious lives and relationships by being held emotionally/spiritually captive at this so called church”*

Paragraph 10(i): republication of paragraphs (g) and (h), adding *“how can she forget that her own beloved pastor knew about a sex offender in the church that had access to the nursery and children in the church and did not have any safeguards in place.”*

Paragraph 10(k): *“This is a very destructive and disturbing church... The extra biblical teaching is wrong. The gossip/slander, disclosure of what goes on in private counseling sessions, sex offenders having free reign in children's areas with no disclosure to parents... This is not a safe place”*

Paragraph 10(l): *“[people had] suffered at the hands of the pastor of Beaverton Grace Christian Church.”*

Paragraph 10(n): *“[Chuck O'Neal was a liar who] was forced to fabricate a lie that we were under church discipline.”*

Paragraph 10(o): *“[the pastor] abused them...they were spiritual abuse victims...and spiritual lives are at stake.”*

Paragraph 10(q) *“[a] former pastor was interfering in our lives.”*

The Claims of defamation as regards defendant Hanna Smith read as follows:

Paragraph 10(t): *“Chuck micro manages everything down to the tiniest detail, like having to have every song approved by him before it's sung. But he ignores, or shoves under the carpet dangerous activities and bullies people to get his way...this is no way biblical. Grace is the last thing you'll find at that church.”*

The claims of defamation as regards defendant Varela are as follows:

Paragraph 10(x): “Meaghan Varela posted a comment [on defendant Julie Ann Smith’s blogspot] falsely stating *Chuck yelled all kinds of reviling remarks about us and came to her house with a mob of 30 or more with hatred in their faces*. She also stated [people at the church] were being *blindly persecuted*. Further that many folks were abused at *Beaverton Grace Christian (sic) Church and that the website was established by Julie Ann Smith exposing the darkness and deception that existed at Beaverton Grace Bible Church*.

Paragraph 10(y) “Meaghan Varela posted a comment [on defendant Julie Ann Smith’s blogspot] *she was harassed by church members*.

Paragraph 10(z) “Meaghan Varela posted a comment [on defendant Julie Ann Smith’s blogspot] stating *I cry for the abuse I allowed my children to endure because I was doing what I and my husband thought was the right thing to do...and her children suffered humiliation and shame*.

Paragraph 10(aa): “Meaghan Varela posted a comment [on defendant Julie Ann Smith’s blogspot] stating that members of the church were being *spiritually abused and silenced through fear*.

I. Defendant’s Special Motions to Strike

In a civil action involving claims of defamation, the court’s pretrial evaluation of those claims is proscribed by ORS 31.150. The trial court’s review of a Special Motion to Strike the claimed defamatory statements must determine if the statements are protected speech. The evaluation of the claimed defamatory statements occurs in a two part process as set forth in ORS 31.150(2)(c) and (d). First, defendants are required to make a threshold showing the claimed defamatory statements were made in a public forum in connection with an issue of public interest, or implicate constitutional free speech rights in connection with a public issue, or an issue of public interest. If defendants establish those elements, the burden of proof shifts to plaintiffs to demonstrate there is a probability they will prevail on the claims by presenting substantial evidence of a prima facie case. ORS 31.150(3). *Staten v. Steele*, 222 Or App 17 (2008).

a. Whether the Claimed Defamatory Statements Were Made in a Public Forum in Connection With an Issue of Public Interest

Plaintiff does not dispute that the internet is a public forum. Moreover, the claimed defamatory statements posted on the blogs and websites herein were accessible to the public, which is consistent with other courts holding that the blog posts on the internet is a public forum. The parties however disagree whether the claimed defamatory statements made over the internet constitute an issue of public interest.

Defendants rely on the language of ORS 31.152(4) which requires the court to liberally construe

the statute in favor of the defendants and contend that Oregon courts have approved a broad interpretation on “issues of public interest”. Defendants argue the facts in this case demonstrate the claimed defamatory statements concern an issue of church governance touching on issues of salvation, Biblical interpretation and church doctrine, and by their nature concern issues of public interest. Moreover, plaintiffs argue that because the church and its affiliated churches are widespread, and plaintiff’s use of the internet and other media to attract others to his teachings, demonstrate plaintiff treated his beliefs and practices regarding church governance as an issue of public interest.

No Oregon court has directly addressed whether statements involving church practices are matters of public interest. Oregon trial courts have considered situations regarding internal or shareholder communications, newspaper and internet publications regarding statements made in a classroom which were posted on a website, and statements made over the radio regarding business practices and statements by church officials for statements that pastor had misappropriated funds and was dishonest. *See Gardner v. Martino*, 563 F3rd 981 (9th Cir 2009) However, Oregon Courts look to California case law for guidance regarding the application of ORS 31.150 to ORS 31.155. *Page v. Parsons*, 249 Or App (2012).

Plaintiffs’ contend that the claimed defamatory are not matters of public interest. They assert the claimed defamatory statements arise from a private controversy and the issue of church governance is a concern to a relatively small audience. However, the public/private distinction analysis in the California cases relied upon by plaintiff is not fully determinative of the issue herein. The record in this case demonstrates the claimed defamatory statements were part of an ongoing conversation regarding church governance that was conducted over the internet which was accessible by the public. In *Traditional Cat Association Inc. v. Gilbreath*, (118 Cal App 4th 392 (2004), the court held that statements on a web site regarding a controversy between cat associations concerned a matter of public interest for California’s version of ORS 31.150⁶. In this case, plaintiff O’Neal’s website and defendant Julie Smith’s blogs attracted widespread attention beyond the members of the immediate church.⁷ The widespread public interest in the content of the dispute between the plaintiff and his congregation, in addition to the interest in the effect of that relationship with the larger church community is reflected by the number of responses and messages on the blog.

In addition, as regards paragraphs 10 (g), (i) and (k) the issues of child protection and child sexual abuse within the church, are topics of widespread concern and media attention and therefore matters of public interest. Given the record and the plain wording of ORS 31.152(4) which requires the court to liberally construe the statute in favor of the exercise of rights of

⁶ Compare *Weinberg v. Feisel*, 110 Cal 4th 1122 (2003) cited by plaintiffs which the court found that because accusations of criminal conduct to a group of 20 enthusiasts was a private dispute about a private controversy.

⁷ Exhibits A-F 3rd Williams Declaration

expression, the court finds that each of the claimed defamatory statements concern issues of public interest.

b. Analysis of Plaintiffs Prima Facie Case

Consequently, the court having found that each of the claims of defamatory statements concern a matter of public interest, the burden shifts to plaintiff to present substantial evidence of a prima facie case of defamation. ORS 31.150(3). Plaintiff must present substantial evidence that defendants made defamatory statements that were published; and plaintiff suffered harm as a result. In identifying what words constitute a defamatory statement, several general principles apply. The 9th Circuit Court adopted a three part test to evaluate alleged defamatory statements: 1) The meaning must be evaluated in the full context of the statements; 2) whether the general tenor of the entire work, including the subject of the statements, setting and format negates the impression of a provable fact, and 3) whether the statement is sufficiently factual to be susceptible of being proved true or false. *Underwager v. Channel 9 Australia*, 69 F3rd 361 (9th Cir 1995)

i. Claimed Defamatory Statements by Defendant Julie Ann Smith

Applying the foregoing analysis to the claims against Julie Ann Smith, the claimed defamatory statements can be separated into two groups. The first group must be viewed in the context of the entire blog posts that concern plaintiff O'Neal's manner of church governance.⁸ If the statements viewed in their context cannot be taken literally as assertions fact then they are not actionable. *Art of Living Foundation v. Does* 2011 WL 2441898 (ND Cal June 15, 2011). Said differently,

⁸ Paragraph 10(b): "the pastor has chosen to mislead congregation and destroy relationships" and [accuses the pastor of] narcissism in the pulpit", Paragraph 10(d): "the pastor of this church thrives on control" and...is more about the reputation of the pastor than real church and it is important for people to have an understanding of why this church is not a healthy place and would shout from the rooftop if my review prevents another family from getting sucked into the spiritual abusive environment and false teaching of the teaching presented by the current pastor and, To Chuck: if you would have manned up and acknowledged that we were parting ways because we weren't seeing eye to eye on certain issues, you would have never heard from us again. But for you to lie to the congregation...and ...I am calling you out as a wolf for lying... and we had information that would be damaging to your reputation...also you are really brilliant Chuck, but not so brilliant. Quite a few people can see through the false teaching and self aggrandizement." Paragraph 10(h): "What we had was indoctrination...That is how cult leaders work. Don't waste your precious lives and relationships by being held emotionally/spiritually captive at this so called church", Paragraph 10(i): "[people had] suffered at the hands of the pastor of [BGC C]." Paragraph 10(n): "[Chuck O'Neal was a liar who] was forced to fabricate a lie that we were under church discipline", Paragraph 10(o): "the pastor] abused them...they were spiritual abuse victims...and spiritual lives are at stake", Paragraph 10(q) "[a] former pastor was interfering in our lives."

none of the claimed defamatory statements in paragraphs 10(b), (d), (h), (l) and (o) can be characterized as provable assertions of fact. The claimed defamatory statements in these paragraphs are expressions of defendant's subjective belief that her values and ideals regarding plaintiff's manner of church governance are superior. Each of defendant Julie Ann Smith's claimed defamatory statements read in their context internally, and as a group, within the ongoing internet discussion between the parties, are critical of the manner in which plaintiff O'Neal managed the relationship with his parishioners and conducts his church practices. Plaintiff has the right to govern his congregation in the manner in which he chooses, and defendant Julie Ann Smith is authorized by law to express her disagreement with his performance of those activities. Consequently, the foregoing claimed defamatory statements are dismissed.

As regards the second group of statements involving issues of child protection within the church identified in paragraphs 10 (g)(i) and (k), given the emotional nature of this issue, the court will comment specifically to explain the courts finding these statements also constitute opinion and do not amount to factual accusations. The claimed defamatory statement that the "*pastor knew about a sex offender in the church that had access to the nursery and children in the church and did not have any safeguards in place.*", or the claim that "*sex offenders having free reign in children's areas with no disclosure to parents... [and] is not a safe place*" are not factual allegations of criminal activity on behalf of plaintiff O'Neal. Defendant's statements argue plaintiff did not appreciate the risk or appropriately evaluate the dangerousness of others - which is her opinion. For example, who or what a "sex offender" is, can be interpreted differently by reasonable people. Consequently, whether or not "sufficient safeguards [were] in place" is defendant Julie Ann Smith's opinion.

ii. Claimed Defamatory Statements Made by Defendant Hannah Smith

As regards defendant Hanna Smith, the court finds that the claimed defamatory statement she posted on the internet, viewed internally and in the context of her internet discussion herein is an opinion⁹.

iii. Claimed Defamatory Statements Made by Defendant Meaghan Varela

As regards defendant Meaghan Varela, the court finds for the same reasons stated above, that the claimed defamatory statement she posted on the internet, viewed internally, and in the context of the defendant Varela's other internet postings herein, are opinions¹⁰.

⁹ Paragraph 10(t): "Chuck micro manages everything down to the tiniest detail, like having to have every song approved by him before it's sung. But he ignores, or shoves under the carpet dangerous activities and bullies people to get his way...this is no way biblical. Grace is the last thing you'll find at that church."

In summary, defendants Julie Ann Smith, Hannah Smith and Meaghan Varela's Special Motions to Strike are granted. The court finds that the defendant's internet postings on plaintiff's website and defendant Julie Ann Smith's blog site, were made in a public forum and concern an issue of public interest. The court further finds that plaintiff has not met the burden of presenting substantial evidence the defendant's statements are defamatory.

2. Award of Costs and Attorney Fees

Each defendant has requested in their Special Motions to Strike an award of costs and attorneys fees. A defendant who prevails on a special Motion to Strike made under ORS 31.150 shall be awarded reasonable attorneys fees and costs. ORS 31.152(3). As regards defendants Kathy Stephens and Jason Stephens, as prevailing parties, and as required by law, costs together with \$16,750.00 in attorney's fees are awarded. The invitation to reduce the requested amount of defendants Kathy and Jason Stephens' attorney's fees is declined. Although plaintiff dismissed the claims of defamation against the Stephen's defendants, dismissal did not occur until after their Special Motions to strike were filed¹¹. Moreover, plaintiff presented no evidence in response to Defendant Stephens Special Motions that demonstrate an objective basis for the claimed defamatory statements set forth in the amended complaint.¹² Counsel for defendants Kathy and Jason Stephens is asked to prepare a judgment consistent with the foregoing.

Defendant's Julie Ann Smith, Hannah Smith and Meaghan Varela are invited to submit Statements for Costs and Attorneys Fees.

Respectfully,



Jim Fun
Circuit Court Judge

C: court file

¹⁰ Paragraph 10(x): "Meaghan Varela posted a comment [on defendant Julie Ann Smith's blogspot] falsely stating *Chuck yelled all kinds of reviling remarks about us and came to her house with a mob of 30 or more with hatred in their faces.* She also stated [people at the church] were *being blindly persecuted.* Further that *many folks were abused at Beaverton Grace Christian (sic) Church and that the website was established by Julie Ann Smith exposing the darkness and deception that existed at Beaverton Grace Bible Church.*

¹¹ See *Sylmar Air Conditioning v. Pueblo Contracting Services Inc.*, 122 Cal App 4th 1049 (2004) (an award of attorneys fees is not barred by plaintiff's dismissal of the claims)

¹² See plaintiff's Memorandum in Opposition to Special Motion to Strike and Declarations, together with Second declaration of Charles O'Neal and Second declaration of Tonya Marie O'Neal.

Not Reported in N.Y.S.2d, 1994 WL 836356 (N.Y.Sup.), 23 Media L. Rep. 1283
(Cite as: 1994 WL 836356 (N.Y.Sup.))



NOT APPROVED BY REPORTER OF DECISIONS
FOR REPORTING IN STATE REPORTS. NOT
REPORTED IN N.Y.S.2d.

Supreme Court, New York County, New York,
IAS Part 3.
LANDMARK EDUCATION CORPORATION,
Plaintiff,
v.

The CONDE NAST PUBLICATION, INC. d/b/a
Self Magazine, Advance Magazine Publishers, Inc.
d/b/a Self Magazine, and Dirk Mathison, Defendants.

No. 114814/93.
July 7, 1994.

WILLIAM J. DAVIS, Justice.

*1 Defendants move for an order pursuant to [CPLR 3212](#) granting summary judgment in their favor and dismissing the complaint in its entirety.

Plaintiff Landmark Education Corporation (“Landmark”) is an employee owned, for profit corporation engaged in the business of making education programs available to the general public and corporations, on subjects including communication, time management and productivity. Its basic program is “The Forum” a three day one evening seminar which requires payment of \$290.00 for the four sessions. Participants in the Forum may and are urged to take additional seminars given by Landmark. Participants are also encouraged to recruit new participants for the program. This program is reported to have evolved from EST and was originally given by Werner Erhard and Associates whose employees bought the corporation and renamed it Landmark in 1991. Plaintiff asserts it was defamed when “The Forum” was listed as a cult in an article appearing in the February 1993 edition of Self magazine.

Defendants are Dirk Mathison, a freelance writer and author of the alleged defamatory article, Advance Magazine Publications, Inc., d/b/a Self Magazine and the Conde Nast Publications, Inc., d/b/a Self magazine. Defendant Conde Nast Publication, Inc., is a

division of Advance Magazine Publications, Inc.

The article was titled “White Collar Cults: they want your mind”. On the first full page in bold eye-catching text the caption continues “and your money and six of your friends. A look at the new, white collar world of cults where ‘personal growth’ means brainwashing.” Mathison uses the definition of cult as given by the director of the International Cult Education Program who states “we define it as a group that, one, uses coercive pressure and deception to get people to join in and, two, uses mind manipulation techniques without the consent or knowledge of the participants”.

Defendant Mathison as a stylistic tool begins the article by describing the thoughts and actions of a participant in the initial sessions of an unidentified, “white collar cults”. He continues by providing a definition of cult, identification of the alleged cults, their founders and leaders interspersed with additional first hand experience of the participant as she apparently goes through a weekend seminar seemingly quite similar to “the Forum”.

The article refers to the “The Forum” only in one paragraph as follows:

In 1991 after Erhard was publicly charged with sexual and mental abuse by his daughter on 60 Minutes, he filed suit against CBS. He has moved to Cost Rica, but the Forum (a toned down reincarnation of EST) continues to draw thousands of followers.

The article further advised that Erhard founded “EST, the mass movement that talked about ‘getting it’ and most famously, wouldn’t let enrolles go to the bathroom for hours”. A sidebar to the article entitled “America’s most-wanted cults” specifically identifies the Forum in a list of nine alleged cults. The introduction to the sidebar identifies the sources for the cult list as the American Family Foundation, the Commission of Cults and Missionaries and the Cult Awareness Network who are referred to as leading cult awareness organizations.

*2 Plaintiff in its complaint alleges that in the ar-

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ticle it is defamed in the inclusion of its program as a cult and by the combination of individual statements and juxtaposition of words and statements as to cults. The article plaintiff claims states Landmark is among “American most wanted cults”, and falsely alleges, *inter alia*, that Landmark (a) is a “cult” which (b) uses “brainwashing” and other “mind control techniques” (c) practices “manipulative recruitment” (d) causes “psychological and emotional damage” to participants, (e) engages in “fraud and deceit in fundraising” (f) harasses its critics and their families as well as former followers, and (g) cuts participants off from family and friends.

Defendants deny the allegations in their answer and assert herein that summary judgment is warranted in their favor because as a matter of law each of the statements complained of is (1) substantially true, (2) non-actionable opinion, and/or (3) not “of and concerning” plaintiff.

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor ([CPLR 3212](#) subd [b]) and he must do so by tender or evidentiary proof in admissible form.” [Friends of Animals v. Associated Fur Mfrs.](#), 46 NY2d 1065, 1067. To defeat the motion defendant must “show facts sufficient to require a trial of any issue of fact (CPLR § 3212 subd [b]).”*Id*

Any writing which “tends to expose a person to hatred ... or to induce an evil or unsavory opinion of him ... [or] which tends to disparage a person in the way of his office, profession or trade “is libelous per se” ([New Testament Missionary Fellowship v. E.P. Dutton & Co., Inc.](#), 112 AD2d 55, 57 citing [Tracy v. Newsday Inc.](#), 5 NY2d 134, 135-136).

The interspersed facts and opinions throughout the article herein concerning cults “tars all the groups covered by the [article] with the same brush with language that appears to be libelous per se as it addresses the office, profession or trade of plaintiff”. (*Id*) Thus, the Court finds the article is “of and concerning” plaintiff.

Determining whether a defamatory statement may serve as the predicate for an action in damages depends on balancing the First Amendment protec-

tion for media defendants and protection for individual reputation. [Immuno AG v. Moor-Jankowski](#) (77 NY2d 235). In *Immuno AG* the New York State Court of Appeals in applying rules set forth by the U.S. Supreme Court in [Milkovich v. Lorain Journal Co.](#) 497 US 1 determined that “except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false facts will likely be actionable”. [Immuno AG v. Moor-Jankowski](#) 77 NY2d 235, 245.

A libel plaintiff has the burden of showing the falsity of factual assertions *Id*. Whether there are factual assertions in the article entails an examination of the challenged statements to determine.

*3 1) Whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to “ ‘signal ... readers or listeners that what is being read or heard is likely to be opinion not fact’ ”

[Gross v. New York Times](#) 82 NY2d 146, 153.

Plaintiff specifically asserts that the qualities attributable to the cults as defined and described by the article are not its characteristics. Defendants annex and point to numerous prior media articles allegedly suggesting “the Forum” is a cult, to justify their conclusion that plaintiff is a cult. Plaintiff on the other hand points to its own manuals and procedures and submits letters of Forum participants and scholars to support its claim it does not practice the “cult like” actions described in the article.

In applying the previously outlined test it cannot be questioned that cult has a precise meaning which is readily understood as it was defined in the article. The statements made are capable of being proven true or false as “the Forum’s” procedures can be matched against the defined qualities of cults as described in the article, any consistency will establish the claimed truth or falsity.

Finally, the article appears to be asserting facts given the documentation of the experience of a participant and the numerous quotes and information provided by those who on one hand assert the groups

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(Cite as: **1994 WL 836356 (N.Y.Sup.)**)

are cults and those who assert they are merely vehicles for “human potential”.

As such the article appears to be one of mixed opinions and fact and is actionable. Given the voluminous supporting documentation by each side concerning whether “the Forum” is a cult this Court believes it is for a jury to determine whether the words directed generally to the “cults” covered in the [article] would lead the reasonable reader to believe, in the context of the whole [article] that the plaintiffs had indulged in these practices. *New Testament Fellowship v. E.P. Dutton & Co. supra*

The motion for summary judgment is denied.

This constitutes the decision and order of this Court.

N.Y.Sup.,1994.
Landmark Educ. Corp. v. Conde Nast Publication, Inc.
Not Reported in N.Y.S.2d, 1994 WL 836356 (N.Y.Sup.), 23 Media L. Rep. 1283

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