THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2018-0198

AUTOMATED TRANSACTIONS, LLC AND DAVID BARCELOU

Plaintiffs, Appellants

v.

AMERICAN BANKERS ASSOCIATION,
CREDIT UNION NATIONAL ASSOCIATION, INC.,
ROBERT H. STIER, JR. AND PIERCE ATWOOD, LLP

Defendants, Appellees

APPEAL FROM SULLIVAN COUNTY SUPERIOR COURT
DECISION ON MOTIONS TO DISMISS

BRIEF OF APPELLEES
ROBERT H. STEIR, JR. AND PIERCE ATWOOD, LLP

By: Debra L. Mayotte
NH Bar #: 8207
Desmarais Law Group, PLLC
831 Union Street
Manchester, NH 03104
603) 623-5524
mayotted@desmaraislawgroup.com

To Be Argued By: Debra L. Mayotte

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Court Rules

Other Authority

STATEMENT OF FACTS

This is a defamation case brought by plaintiffs/appellants, David Barcelou (hereafter "Barcelou") and Automated Transactions, LLC (hereinafter "ATL"), against several defendants, including defendants/appellees Robert H. Stier, Jr. (hereinafter "Stier") and Pierce Atwood, LLP (hereinafter "Pierce Atwood"). App.[1] 1-116. Barcelou alleges that he is a "serial inventor" and that the various defendants/appellees engaged in a "defamatory smear campaign" against him and ATL, purportedly resulting in irreparable damage to the plaintiffs/appellants' reputation, the value of their patented property, and their licensing efforts. App. 1-116. Plaintiffs assert a claim against Attorney Stier and Pierce Atwood for common law defamation (Count I) and alleged violations of NH RSA 358-A:2, the New Hampshire Consumer Protection Act (Count II). App. 1-116.

Barcelou is a "serial inventor" with an "extensive patent portfolio." App. 2, FAC[2] ¶1. His latest business efforts were directed at Internet-based automated transaction machines ("ATM"). App. 2, FAC ¶1. Barcelou formed ATL as a business entity through which he could conduct efforts related to exploiting his patents. App. 2, FAC ¶1. ATL holds exclusive

[1] As used in this brief "App." is an abbreviation for Appendix and refers to the Appendix filed by the Appellants.

[2] As used in this brief "FAC" is an abbreviation for First Amended Complaint.

licenses to Barcelou's inventions which ATL, in turn, attempts to license to others. App. 14, FAC ¶56. Barcelou is the CEO and Manager of ATL. App. 2, FAC ¶3. In the aftermath of 9/11, Barcelou attempted to license his ATM patent technology to interested parties. App. 2, FAC ¶1. However, some banks and other ATM owners chose to fight ATL in court. App. 2, 15, FAC ¶¶ 1, 61.

Stier is an attorney with over 30 years of experience in practicing patent law. App. 3, 83. Stier is a partner at Pierce Atwood, which has offices in Maine and New Hampshire. App. 3, FAC 7. Stier represented over one hundred banks and credit unions who successfully defended patent infringement lawsuits brought by ATL. App. 83, 113, 116.

Barcelou claims that in response to his litigation efforts, the defendants engaged in a "defamatory smear campaign" in the public that targeted ATL's potential licensees. App. 2, FAC ¶1. Barcelou claims that both he and his company have been irreparably damaged. App. 2, FAC ¶1.

Barcelou and ATL's defamation claim and claim under RSA 358-A:2 against Stier and Pierce Atwood arise out of four separate statements allegedly made by Attorney Stier. Plaintiffs' Amended Complaint asserts the following:

1. On April 3, 2013, an article entitled "Banks fighting 'patent troll' can move forward together" appeared on

the Internet. In the article, Stier is quoted as saying "Automated Transaction's suit amounts to nothing more than a shakedown of community banks and that the company has intimidated more than 140 banks into settling." App. 16, FAC ¶68.

2. From 2013 until late January 2014, Stier and Pierce Atwood were publishing a web page on their web site that referred to ATL as a "patent troll." App. 19, FAC ¶78.

3. In January 2015, Pierce Atwood published an article entitled "Pierce Atwood Successfully Defends Community Banks and Credit Unions against Aggressive Licensing Demands from Unscrupulous Patent Troll." The article, which Plaintiffs allege was "upon information and belief" written by Mr. Stier, referred to ATL as a "patent troll." App. 21, FAC ¶84.

4. In September 2015, Mr. Stier presented at a Maine Bankers Association Banking Law Seminar and that "upon information and belief" referred to ATL as a patent troll. App. 21, FAC ¶85.

Barcelou and ATL claim that Attorney Stier's references to ATL as a patent troll are false and defamatory. App. 21, FAC 84, 85. Notably, Barcelou and ATL do not allege that any of the statements in the articles posted by Attorney

Stier/Pierce Atwood are in any way untrue. App. 1-116. Barcelou and ATL also do not allege that the statement quoted in paragraph 68 of the FAC ("Automated Transaction's suit amount to nothing more than a shakedown of community banks and that the company has intimidated more than 140 banks into settling") is false. ATL only alleges that Stier and Pierce Atwood "described ATL as a 'patent troll,'" and those statements constitute the basis of Plaintiffs' defamation claim. App. 16, 19, 21, FAC ¶¶ 78, 84, 85.

SUMMARY OF ARGUMENT

Barcelou and ATL have not alleged any statements made by Stier or Pierce Atwood with respect to Barcelou, individually, and thus Barcelou cannot sustain a claim against them. The use of the words "patent troll" by Stier and Pierce Atwood constitute protected personal opinion and therefore cannot be considered defamatory. In addition, any statements by Stier and Pierce Atwood are protected by the absolute litigation privilege. Finally, Barcelou and ATL's claims under the Consumer Protection Act were properly dismissed because the claims are premised on their defamation claims, which fail.

ARGUMENT

A. THE ALLEGED STATEMENTS MADE BY STIER AND PIERCE ATWOOD PERTAINED ONLY TO ATL AND NOT TO BARCELOU INDIVIDUALLY.

Barcelou's claims against Stier and Pierce Atwood were correctly dismissed because the alleged statements made by Stier pertained only to ATL and not to Barcelou, individually. Barcelou asserts in the First Amended Complaint that four alleged statements were made by Attorney Stier/Pierce Atwood, including:

1. On April 3, 2013, an article entitled "Banks fighting 'patent troll' can move forward together" appeared on the Internet. In the article, Mr. Stier is quoted as saying "**Automated Transaction's** suit amounts to nothing more than a shakedown of community banks and that the company has intimidated more than 140 banks into settling." (emphasis added) App. 16, FAC ¶68.
2. From 2013 until late January 2014, Stier and Pierce Atwood were publishing a web page on their web site that referred to **ATL** as a "patent troll." (emphasis added) App. 19, FAC ¶78.
3. In January 2015, Pierce Atwood published an article entitled "Pierce Atwood Successfully Defends Community Banks and Credit Unions against Aggressive Licensing Demands from Unscrupulous Patent Troll." The article,

which upon information and belief was written by Mr. Stier, **ATL** was referred to as a patent troll. (emphasis added) App. 21, FAC ¶84.

4. In September 2015, Mr. Stier presented at a Maine Bankers Association Banking Law Seminar, and upon information and belief, referred to **ATL** as a patent troll. (emphasis added) App. 21, FAC ¶85.

The First Amended Complaint does not include any allegation that Stier or Pierce Atwood made any defamatory statements concerning Mr. Barcelou individually. App. 1-27. Further, the articles and blog entries purportedly authored by Attorney Stier and Pierce Atwood which are attached to the FAC as exhibits likewise do not reference Barcelou. App. 83, 113, 116. Whereas there are no allegations that Stier and Pierce Atwood made any statements concerning Barcelou, the court correctly dismissed Barcelou's defamation claim against them.

B. THE ALLEGED STATEMENTS MADE BY STIER AND PIERCE ATWOOD WERE OPINION STATEMENTS AND THUS DO NOT CONSTITUTE DEFAMATION.

The alleged statements made by Stier and Pierce Atwood with respect to ATL were opinion statements that do not constitute defamation. To establish a claim for defamation, plaintiff must prove that a defendant failed to exercise reasonable care in publishing, without a valid privilege, a false and defamatory statement of fact about the plaintiff to

a third party. Independent Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, Inc., 138 N.H. 110 (1993) (citing Restatement (Second) of Torts § 558 (1997). The statement must tend to lower the people in the esteem of any substantial and respectable group of people. Nash v. Keene Publ'g Corp., 127 N.H. 214, 219 (1985).

"The First Amendment unquestionably protects opinions from defamation liability." See Pease v. Telegraph Pub. Co., Inc., 121 N.H. 62, 65 (1981); Douglas v. Pratt, 2000 D.N.H. 199, 3 (2000). A statement is constitutionally protected opinion unless it is "factual or capable of being proven true or false." Pease, 121 N.H. at 65 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)). An opinion is generally a statement that "involves expressions of personal judgment." Id. (quoting Gray v. St. Martin's Press, Inc., 221 F.3d 243, 348 (1st Cir. 2000)). "Because defamation requires a false statement at its core, opinions typically do not give rise to liability since they are not susceptible of being proved true or false." Piccone v. Bartels, 785 F.3d 766, 771 (1st Cir. 2015). "[A] statement cannot be defamatory if 'it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.'" Id. Quoting Gray v. St. Martin's Press, Inc., 221

F.3d 243, 248 (1st Cir. 2000) (citations and quotations omitted.) "Where an expressive phrase, though pejorative and unflattering, cannot be 'objectively verified,' it belongs squarely in the category of protected opinion." Piccone, 785 F.3d at 772 (quoting Levinsky's v. Wal-Mart Stores, Inc., 127 F.3d 122, 129 (1st Cir. 1997) (term "trashy" is opinion and not actionable defamation where it has numerous interpretations and is quintessentially subjective). Moreover, "The fact that the phrase is not a complimentary one does not automatically make it a libelous one." Catalfo v. Shenton, 102 N.H. 47, 49 (1958) (considering various definitions of phrase "pig-in-the-parlor" when addressing whether phrase could constitute libel in defamation lawsuit by public official).

In testing whether a given statement is a fact or an opinion, the Court considers the words in the context of the publication as a whole. Pease, 121 N.H. at 65. In Pease, the New Hampshire Supreme Court held that allegedly libelous statements made by defendant such as "journalistic smear" and "journalistic scum of the earth" and similar statements were "clearly opinions" that amounted to "a vigorous epithet used by those who consider the plaintiff's journalism deplorable, and not an assertion of fact." Pease, 121 N.H. at 65-66 (quotations and citations omitted).

In Piccone, the First Circuit held, as a matter of law, that the term "unprofessional" is an opinion because it has no "single, readily ascertainable meaning." Id. Additionally, a number of New Hampshire and Federal Court decisions have examined the types of statements that courts consider protected opinion. See Catalfo v. Jensen, 657 F.Supp. 463 (D.N.H. 1987) (term "sleazy" was a protected expression of opinion since it did not have a precise meaning and is subjective); Darbouze v. Toumpas et al, Civil Action No. 10-cv-252-LM (D.N.H. 2011) (court "strongly inclined to agree with defendant that the statement on which [plaintiff]'s defamation claims are based, i.e.,'[t]hat Haitian guy thinks he's all that,'….is a non-actionable statement of opinion"); Bourne v. Arruda et al, Civil Action No. 10-cv-393-LM (D.N.H., 2011) (defendant's reference to plaintiff as a "terrorist" concerning his litigation tactics was "hyperbolic expression of his opinion about [plaintiff] and his litigation tactics" and not actionable defamation).

Similar to the statements made in Pease, Piccione, Catalfo v. Shenton, Catalfo v. Jensen, Darbouze, and Bourne, the expressions of "patent troll" remains "a quintessential expression of personal judgment which is subjective in character." Piccone, 785 F.3d at 772. Statements made by Stier and Pierce Atwood were made based upon their personal

experience with ATL in the context of defending multiple banks and credit unions (successfully) against patent infringement litigation.

Although no Court has examined whether the phrase "patent troll" is protected opinion in the context of a defamation claim, several Courts have examined definitions of patent trolls and there is no "single readily ascertainable meaning" of the phrase. Overstock.com, Inc. v. Furnace Brook, LLC, 420 F. Supp. 2d 1217, 1218 (D. Utah 2005) ("patent troll is 'somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and…[have] never practiced.'"); Amgen, Inc. v. F. Hoffman-La Roche Ltd, 581 F. Supp. 2d 160, 210 (D. Mass. 208) ("patent trolls are 'nonpracticing entities' who 'do not manufacture products, but instead hold . . . patents, which they license and enforce against alleged infringers) (citing Taurus IP v. Daimier Chrysler Corp., 519 F. Supp. 2d 905, 911 (W. D. Wisc. 2007)); Highmark, Inc. v. Allcare Health Mgmt. Sys., 706 F. Supp. 2d 713, 727 n. 6 (N.D. Tex. 2010) ("patent troll" is a pejorative term used to describe an entity that 'enforces patent rights against accused infringers in an attempt to collect licensing fees, but does not manufacture products or supply services based upon the patents in question").

The fact that there are differing definitions of the term "patent troll" highlights that there is no universally accepted definition for the term "patent troll."

Stier's reference to "patent trolls" appears in discussions regarding ATL's litigation tactics and ways to mount successful defenses against those tactics. No reasonable listener, attending the conference, could understand the statements by Stier and Pierce Atwood to be based on actionable, undisclosed defamatory facts regarding ATL, or Barcelou who is not ever even referenced by name. The only reasonable interpretation of the statement is that Stier or Pierce Atwood was expressing opinion about ATL and its litigation tactics. As such, the statements that ATL was a "patent troll" cannot reasonably be construed as actionable defamation.

Plaintiffs also complain that Stier and Pierce Atwood referred to ATL as an "unscrupulous patent troll." App. 21, FAC ¶84. The term "unscrupulous" is an adjective, a modifier of a noun. Adjectives admit of numerous interpretations. Phantom Touring, Inc. v. Affiliated Publications, et al, 953 F. 2d 724, 727 (1992). The adjective, "Unscrupulous", like the term "unprofessional" does not have a single readily ascertainable meaning and cannot be objectively verified. Piccone, 785 F.3d at 772. The only reasonable interpretation

of "unscrupulous patent troll" is that it is an expression of opinion. Adding the word "unscrupulous" to "patent troll" is a type of imaginative expression that writers use to enliven their prose. Phantom Touring, 953 F. 2d at 727.

The last term complained of by the plaintiffs against Stier and Pierce Atwood is "shakedown" that was used in the context of Stier's opinion that "Automated Transaction's suit amounts to nothing more than a shakedown of community banks…" App. 16, FAC ¶68. Of significance, plaintiffs did not attach the article to their FAC[3] nor did plaintiffs assert that the purported quoted statement was false[4]. Thus the claim that the term "shakedown" constitutes defamation fails on its face.

Even if the claim was properly pled, such an expression of "shakedown" is comparable to terms like "rip-off", "a fraud", "a scandal" and "snake-oil job" all of which have been found to be commentary figurative and hyperbolic, having no objective evidence to disprove. Phantom Touring, 953 F. 2d at 728 (1992).

---

[3] Plaintiffs apparently are making a new claim in their brief at page 11 that the article on the internet by bizjournals.com does not include certain facts. The article is not part of the FAC and not part of the record in this appeal. Therefore, Plaintiffs claim that the article does not contain certain alleged facts is not supported by the record.

[4] Compare FAC ¶¶68, 84 and 85. Plaintiffs allege the statements in ¶¶84,85 are false. Plaintiffs do not allege statements in ¶68 are false. App. 16, 21.

For these reasons, the Court correctly decided that the alleged statements by Stier and Pierce Atwood referring to ATL as a "patent troll" or "unscrupulous patent troll" or to ATL's prior lawsuit as a "shakedown" are not actionable.

C. PLAINTIFFS NEW CLAIMS ARE NOT PROPERLY BEFORE THE COURT FOR APPELLATE REVIEW

The plaintiffs are attempting to expand their claims by asserting for the first time in their brief that other allegedly defamatory statements were made by Stier and Pierce Atwood. The new allegedly defamatory statements include referring to plaintiffs' claims as "spurious" and "questionable". Brief of Plaintiffs/Appellants page 12. This issue is not properly before the Court as it was not raised in the Plaintiffs Notice of Appeal[5] nor is it part of the record in this case. See Notice of Mandatory Appeal, App. 240-260[6], App. 269-366[7] and App. 1-369 generally. Where these alleged defamatory statements were not a specific question raised in the Notice of Mandatory Appeal, the issue is waived. Waterfield v. Meredith Corporation, 161 NH 707, 711 (2011). (Argument not raised in Notice of Appeal is therefore waived.); Flaherty v. Flaherty, 138 NH 337, 342 (1994) (since

[5] The Notice of Mandatory Appeal includes 10 specific questions to be raised on appeal. Not one of the specific questions makes reference to allegations of the terms "spurious" or "questionable" giving rise to plaintiffs defamation claim.

[6] Plaintiffs' Objection to Motion to Dismiss Plaintiffs' Amended Complaint by Defendants Robert H. Stier, Jr. and Pierce Atwood, LLP and Memorandum of Law in Support of Plaintiffs' Objection to Motion to Dismiss Plaintiffs' Amended Complaint by Defendants Robert H. Stier, Jr. and Pierce Atwood, LLP.

[7] Motion Hearing before the Honorable Brian T. Tucker, May 16, 2017

the issue challenging the division of property was not raised in the motion to reconsider or in his notice of appeal, the Supreme Court will not address it on appeal.) See also New Hampshire Supreme Court Rule 16(3)(b). Because Plaintiffs did not raise the issue of whether the court erred in dismissing plaintiffs' defamation claim in its Notice of Mandatory Appeal based on the alleged defamatory statements "spurious" or "questionable", the Supreme Court should decline to address the issue.

Even if the issue was properly before this Court, such statements do not constitute an actionable claim. Expressive phrases like "spurious" and "questionable" cannot be objectively verified and belong squarely in the category of protected opinion. Piccone, 785 F.3d at 772.

Another category of allegedly defamatory statements and/or allegedly supporting background for plaintiffs' defamation claims raised by plaintiffs in their brief that are not properly before the court for appellate review are the alleged defamatory and/or background statements contained within the attachments to plaintiffs FAC[8] and raised for the

[8] The new allegedly defamatory statements from plaintiffs brief pages 11-12 that the plaintiffs are attempting to make part of this appeal include: "disturbing truth about ATL"; "that its patents had been invalidated and significantly limited"; "there was no reason to believe that any bank needed a sub-license"; "ATL's demand letters claimed its patented inventions covered every ATM in the country"; "ATL purposely kept license fees low to entice banks rather than litigate the spurious and questionable claims"; "the appellate court with jurisdiction over the patent case had invalidated the oldest and broadest of these patents"; and "there was no reason to believe that any bank needed a sub-license."

first time in this appeal. Brief of Plaintiffs/Appellants pages 11-12. The reason these statements are not properly before this Court for appellate review is threefold: 1) plaintiffs did not preserve the issue in their Notice of Mandatory Appeal; 2) the statements are not included in the FAC; and the issue was not raised in plaintiffs' pleadings or argument in the Superior Court.

As outlined above, issues not raised in the Notice of Mandatory Appeal are waived. Plaintiffs' new claims apparently pertain to comments in articles allegedly authored by Stier or Pierce Atwood that were attached to the FAC. An argument that attachments to the FAC amount to defamation is without merit. See White v. Ortiz No. 13-cv-251-SM (D.N.H. September 14, 2015) (holding that attachments to an amended complaint containing allegedly defamatory statements do not suffice) citing Ford v. Clement, 834 F. Supp. 72 (S.D.N.Y. 1993) ("In pleading an action for defamation, the allegations of the complaint must afford defendant sufficient notice of the communications complained of to enable him to defend himself"); see also Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 n.6 (1st Cir. 1992). Further, the plaintiffs never asserted that the allegedly defamatory statements in the attachments to the FAC were false. Additionally these statements were not even part of the record

below and were not considered by the Superior Court in the decision being appealed. Thus these new claims cannot be part of this Appeal.

D. THE ALLEGED STATEMENTS MADE BY STIER AND PIERCE ATWOOD ARE PROTECTED BY THE ABSOLUTE LITIGATION PRIVILEGE AND ARE THEREFORE IMMUNE FROM A DEFAMATION CLAIM.

The alleged statements made by Attorney Stier and Pierce Atwood are protected by the absolute litigation privilege. Therefore, they are immune from a defamation claim. When a privilege applies to an alleged defamatory statement, there is immunity. Privileged communications fall into two categories: (1) those that are absolutely privileged and (2) those that are qualifiedly or conditionally privileged. Pierson v. Hubbard, 147 N.H. 760, 764 (2002). "If a communication is absolutely privileged, the speaker is absolutely immune from suit regardless of his or her motive in making the communication. Id. citing Pickering v. Frink, 123 N.H. 326, 328 (1983). Under New Hampshire law, absolute privilege extends to statements made by an attorney in the course of judicial proceedings, provided they are pertinent to the subject of the proceeding. McGranahan v. Dahar, 119 N.H. 758 (1979). The policy of granting absolute immunity for such statements "reflects a determination that the potential harm to an individual is far outweighed by the need to encourage participants in litigation, parties, attorneys, and witnesses,

to speak freely in the course of judicial proceedings." Id. The New Hampshire Supreme Court also extended the absolute litigation privilege to expert witnesses who provided an opinion and made statements prior to litigation.[9] "We join those courts which have concluded that pertinent pre-litigation communications between a witness and a litigant or attorney are absolutely privileged from civil liability if litigation was contemplated in good faith and under serious consideration by the witness, counsel, or possible party to the proceeding at the time of the communication." Provencher v. Buzzell-Plourde Assoc, 142 N.H. 848, 855 (1998). The Provencher Court limited the extension of this privilege to communications that have "some relation to a proceeding that is actually contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding." Id. The Court reasoned, in part, that "the potential harm to an individual is far outweighed by the need to encourage participants in litigation, parties, attorneys, and witnesses, to speak freely in the course of judicial proceedings." Id. citing McGranahan, 119 N.H. at 763.

[9] Though it does not appear that a defamation claim was asserted, other claims including negligence, negligent misrepresentation, fraud, breach of contract, and negligent infliction of emotional distress. The court granted defendant expert's motion to dismiss and plaintiff appealed. On appeal the New Hampshire Supreme Court upheld the granting of the motion to dismiss.

Similarly, many Courts follow the Restatement (Second) Torts extending the privilege to statements made by an attorney preliminary to a proposed judicial proceeding, which provides:

> [a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Restatement (Second) of Torts § 586 (1977); see e.g., Simpson Strong-Tie Co. v. Stewart, 232 S.W.3d 18, 24 (Tenn. 2007). In Simpson Strong-Tie Co., the defendant law firm announced in a newspaper and on an internet website that it was investigating screws manufactured by plaintiff. Among other statements, the defendant law firm advertised on its website: "Class Action Investigations: Phillips Screws and Fasteners and/or Simpson's Screws and Fasteners - We are investigating the accelerated corrosion due to defectively manufactured screws and fasteners caused by pressure treated wood." Id. at 24. In the screw manufacturer's defamation claim against the law firm, the Tennessee Supreme Court held that communications made by an attorney preliminary to a proposed judicial proceeding, where such communications are directed at recipients unconnected with the proceeding in hopes of soliciting them to become parties to it are also

protected by the absolute litigation privilege. Specifically, the Court held that a pre-litigation solicitation is protected by the privilege if: "(1) the communication was made by an attorney acting in the capacity of counsel; (2) the communication was related to the subject matter of the proposed litigation (3) the proposed proceeding must be under serious consideration by the attorney acting in good faith; and (4) the attorney must have a client or identifiable prospective client at the time the communication is published." Id. The Simpson Strong-Tie Court reasoned that the privilege exists to protect zealous advocacy and favors "a public policy of security to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." Id. citing Restatement (Second) of Torts § 586 (1977), comment a. See also Helena Chemical Co v. Uribe, 281 P.3d 237, 245-246 (N.M. 2012) ("pre-litigation statements made by [the attorney] are absolutely privileged because the statements were made when a mass-tort lawsuit was seriously and in good faith contemplated, and when the objectives of investigating the merits of potential litigation and identifying for the community those members who may have had a good faith-basis to pursue the litigation….[and] the statements were made when [the attorney] had both identifiable prospective clients and while she was acting in her capacity

as prospective counsel."); Rubin v. Green, 847 P.2d 1044 (CA 1993) (absolute privilege applied to attorneys who solicited residents of mobile home park as clients in anticipated litigation over park conditions); Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc., 774 A.2d 332 (D.C. App. 2001) (judicial proceedings privilege is available, if its requirements are met, to cover statements made by an attorney to a prospective client in a pre-retention meeting) (overruled on other grounds); Arundel Corp. v. Green, 540 A.2d 815, 819 (Md. App. 1988) (statements contained in letter sent to customers of putative defendant as part of attorney's pre-suit investigation); Kittler v. Eckberg, Lammers, Briggs, Wilff & Vierling, 535 N.W.2d 653, 654 (Minn. App. 1995) (absolute judicial proceedings privilege protected a law firm from being sued for defamatory statements in solicitation letter to potential plaintiffs in possible shareholders' action); Prokop v. Cannon, 583 N.W.2d 51, 58 (Neb. Ct. App. 1998) (news releases made by defendants and their counsel following conclusion of litigation are privileged communications made as part of judicial proceeding).

A review of the timeline of the allegedly defamatory statements made by Stier and Pierce Atwood demonstrates that the statements should be protected by the absolute litigation

privilege. According to the First Amended Complaint, the timeline was as follows:

1. **On April 3, 2013**, an article entitled "Banks fighting 'patent troll' can move forward together" appeared on the Internet. In the article, Attorney Stier is quoted as saying "Automated Transaction's suit amounts to nothing more than a shakedown of community banks and that the company has intimidated more than 140 banks into settling." App. 16, FAC ¶68.
2. **From 2013 until late January 2014**, Mr. Stier and Pierce Atwood were publishing a web page on their web site that referred to ATL as a "patent troll." App. 19, FAC ¶78.
3. **In January 2015**, Pierce Atwood published an article entitled "Pierce Atwood Successfully Defends Community Banks and Credit Unions against Aggressive Licensing Demands from Unscrupulous Patent Troll." The article, which Plaintiffs allege was "upon information and belief" written by Mr. Stier, referred to ATL as a "patent troll." App. 21, FAC ¶84.
4. **In September 2015**, Mr. Stier presented at a Maine Bankers Association Banking Law Seminar and that "upon information and belief" referred to ATL as a patent troll. App. 21 FAC ¶85.

Each of these articles pertained to the patent litigation brought by ATL against banks and credit unions, which was defended by Attorney Stier and Pierce Atwood. The first two statements were published during the underlying litigation and before it concluded. The statements made by Attorney Stier and Pierce Atwood while defending their clients during the ATL litigation are absolutely privileged. App. 16 FAC ¶68 (describing statements made by Attorney Stier during the ATL litigation); see also App. 83.

ATL continued to file complaints against various banks throughout 2013 and 2014. Stier and Pierce Atwood continued to attract members to the joint defense group through January 2015, when ATL's attorneys abandoned the litigation.

The absolute litigation privilege should be extended to statements made by Stier and Pierce Atwood subsequent to the litigation because such statements were made in an effort to solicit banks and other potential clients who were threatened by others making similar patent infringement claims. The fact that the underlying litigation had ceased did not mean that the general problem had gone away.

Because the statements made by Stier and Pierce Atwood were germane to the ongoing litigation and were made in close proximity to and surrounding the litigation, the absolute litigation privilege should apply and Stier and Pierce Atwood

should be immune from liability. The articles discussed continuing threats by "patent trolls" and were directly related to the prior litigation and were directed at potential new clients such as other banks and credit unions under fire by ATL for patent infringement. App. 113, 116.

While the New Hampshire Supreme Court has not formally applied the absolute litigation privilege to statements made by attorneys pre- and post-litigation, based upon its adoption of the privilege applicable to judicial proceedings and its extension of that privilege to expert witnesses for statements made prior to litigation, it should extend the privilege to statements made by attorneys pre-and post-litigation. Like the defendant attorneys in Simpson Strong-Tie or the expert witness in Provencher, supra, additional litigation by ATL was anticipated in good faith.

At a minimum, the first two statements, one of which includes the term "shakedown", which were made during the litigation, are protected by the absolute litigation privilege. The Court should extend the privilege to the latter two statements made before and after the litigation which includes the terms "patent troll" and "unscrupulous patent troll."

E. THE CONSUMER PROTECTION ACT CLAIM FAILS AS A MATTER OF LAW

Plaintiffs' claim under New Hampshire RSA c. 358-A, the so-called Consumer Protection Act (Count II), is derivative of the Plaintiffs' defamation claim. Although New Hampshire Courts have not addressed how to handle a situation where a Consumer Protection Act claim is derivative of a defamation claim, Massachusetts Courts have held that "where allegedly defamatory statements do not support a cause of action for defamation, they also do not support a cause of action under G.L. c. 93A [Massachusetts' Consumer Protection Act]." Dulgarian v. Stone, 420 Mass. 843, 853 (1995) (citing A.F.M. Corp. v. Corp. Aircraft Mgmt., 626 F. Supp. 1533, 1551 (D. Mass. 1985)).

Plaintiffs' Consumer Protection Act claim is based on allegations that Attorney Stier and Pierce Atwood referred to ATL as a patent troll. As discussed above, those statements are protected opinion. The statements are not factual.

Because the Plaintiffs' defamation claims against Attorney Stier and Pierce Atwood fail as a matter of law, the Plaintiffs' Consumer Protection Act claims also must fail as a matter of law.

CONCLUSION

For the foregoing reasons, the lower court order should be affirmed.

WHEREFORE, the Appellees Robert H. Steir, Jr. and Pierce Atwood, LLP respectfully request that this Honorable Court:

A. Affirm the lower Court's decision granting Robert H. Steir, Jr. and Pierce Atwood, LLP Motion to Dismiss; and

B. Order such other and further relief as may be just.

Respectfully submitted,
ROBERT H. STEIR, JR. AND PIERCE ATWOOD, LLP

By their attorneys,
DESMARAIS LAW GROUP, PLLC

Dated:9-13-2018 By: _____

Debra L. Mayotte, Esquire
N.H. Bar No. 8207
Desmarais Law Group, PLLC
831 Union Street
Manchester, NH 03104
603-623-5524 (Telephone)
603-623-6383 (Facsimile)
mayotted@desmaraislawgroup.com

REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16(3)(h), the undersigned requests oral argument on behalf of Robert H. Steir, Jr. and Pierce Atwood, LLP before the full court and designates Debra L. Mayotte, Esquire, to be heard.

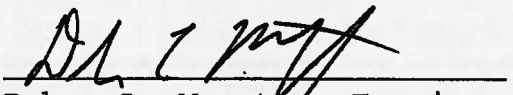
CERTIFICATE OF SERVICE

Pursuant to New Hampshire Supreme Court Rule 16(10), the undersigned certifies that two copies of this Brief have been served via first class mail to all counsel of record.

The undersigned further certifies that pursuant to New Hampshire Supreme Court Rule 16(7), that the original copy of the Brief and eight copies of this Brief have been filed with the Clerk of the New Hampshire Supreme Court. In addition, the Defendants-Appellees have submitted a C.D. with an electronic copy of the Defendants-Appellees' Brief in Portable Document Format (PDF) to this Court.

Dated:9-13-2018

Respectfully submitted,



Debra L. Mayotte, Esquire
N.H. Bar No. 8207