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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2018-0198

Automated Transactions, LLC et al
Appellant

v.

Credit Union National Association, et al
Appellee

**Rule 7 Mandatory Appeal of the Order of the
Sullivan County Superior Court
Docket No. 220-2016-CV-00133**

**BRIEF OF APPELLEE,
CREDIT UNION NATIONAL ASSOCIATION**

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I. CONCISE STATEMENT OF THE CASE

The plaintiff-Appellant, David Barcelou (“Barcelou”) alleges that he is a “serial inventor” with an “extensive patent portfolio.” APP at 2. The plaintiff, Automated Transactions, LLC (“ATL”) alleges that it holds exclusive licenses to Barcelou’s inventions which ATL licenses to others. Id. The plaintiffs allege that the thirteen defendants,¹ (consisting of trade associations, attorneys, law firms, lending institutions, a publisher of trade newspapers and a media group) engaged in a “defamatory smear campaign” against them, purportedly resulting in irreparable damage to the plaintiffs’ reputation, the value of their patented property and their licensing efforts. Id. The plaintiffs also allege that certain of the defendants violated the Consumer Protection Act (“CPA”). APP at 25-26 (¶¶ 101-112). The Superior Court (Tucker, J.) heard Motions to Dismiss by the various defendants, and in a lengthy and well-reasoned Order, allowed the Motions to Dismiss of Credit Union National Association [hereinafter, “CUNA”] as well as those of other defendants, holding, *inter alia*, that the various statements in questions were constitutionally protected opinions, and therefore, not actionable as a matter of law. ADD at 1-22. Barcelou and ATL then appealed the dismissal.

II. STATEMENT OF THE FACTS

The Appellants’ Amended Complaint concerns just two specific incidents attributable to CUNA – one in a Power Point presentation and the other in testimony before Congress. The Appellants alleged that on September 24, 2013, CUNA’s Assistant General Counsel, Robin Cook gave

¹ The plaintiffs also named “Does” 1-30 as defendants.

a PowerPoint presentation called “Hot Topics in Litigation,” which included a “derogatory picture of a troll.”² APP at 16-17 (¶¶ 69-70).³ The plaintiff further alleged that, “The presentation defined patent troll as an entity that had no intention of marketing a product and acknowledged that the term patent troll is pejorative. It also referred to ATL as a ‘well-known patent troll’... Mr. Cook’s statements on behalf of CUNA, highlighted herein and in Exhibit A, were false defamatory statements that damaged ATL and Mr. Barcelou.” *Id.* APP at 17 (¶ 71). The second incident that serves as the basis for plaintiffs’ defamation claim against CUNA was testimony given on December 17, 2013, by John Dwyer, President and Chief Executive Officer of New England Federal Credit Union of Williston, Vermont, on behalf of CUNA before the United States Senate Committee on the Judiciary at a hearing on “Protecting Small Business and Promoting Innovation by Limiting Patent Troll Abuse.” APP at 19 (¶ 77) and Ex. E to the Amended Complaint (APP at 70-81). The testimony does not refer to the Appellants as “patent trolls.” In fact, the Appellants are not even mentioned by name in the testimony. *Id.* The Appellants alleged that CUNA “republished” Mr. Dwyer’s testimony, but they never alleged where or how the testimony was purportedly republished. *Id.*

² The presentation was made to attorneys who represent credit unions and credit union organizations at CUNA’s annual Attorney’s Conference, which was held in Vermont in 2013.

³ The actual presentation screens are reproduced at APP at 29-44.

III. SUMMARY OF THE ARGUMENT

CUNA's statements constitute personal opinion on a matter for which there is no singular definition, and thus they cannot be considered defamatory. In addition, the statements constituted protected opinion based upon disclosed, non-defamatory facts. Moreover, CUNA is immune from suit as the testimony given to Congress is protected by the legislative privilege and the fair reporting privilege. Because CUNA is a non-profit trade organization, neither statement falls within the ambit of the Consumer Protection Act. In addition, CUNA's testimony to Congress is not subject to the CPA because it was made in a political setting. Furthermore, neither statement was made within the state of New Hampshire and thus, the CPA does not apply at all. Accordingly, the plaintiffs have failed to state a claim upon which relief may be granted and thus all claims against CUNA were properly dismissed.

IV. ARGUMENT

A. CUNA'S STATEMENTS ARE CONSTITUTIONALLY PROTECTED OPINION

The testimony given by Mr. Dwyer and the presentation made by CUNA's Assistant General Counsel are constitutionally protected opinion that is not actionable. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Pease v. Telegraph Pub. Co. Inc., 121 N.H. 62, 65 (1981) or (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S.Ct. 2997, 3007 (1974)). "Whether an allegedly libelous statement is

an opinion or an assertion of fact is a matter of law to be determined by the trial court in the first instance.” Pease, Id. “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)).

While one may consider the very word “troll” as pejorative based on a famous fairy tale, by calling the Appellants “patent trolls,” no reasonable listener would believe that Mr. Barcelou lives under a bridge, waits for young, succulent goats to pass toward more verdant fields and then seeks to consume them whole.⁴ This is precisely the type of hyperbole, when taking into account the entire circumstances of its utterance, that represents constitutionally protected speech. See e.g Bourne v. Arruda, No. 10-CV-393-LM, 2011 WL 2357504, at *5 (D.N.H. June 10, 2011), aff'd (Oct. 1, 2013) (town selectman referred to litigious plaintiff as a “terrorist” in regard to his litigation tactics and such name calling “could not be understood as an assertion that [the plaintiff] was literally a terrorist”). See

⁴ https://en.wikipedia.org/wiki/Three_Billy_Goats_Gruff

also Letter Carriers v. Austin, 418 U.S. 264, 284-86, 94 S. Ct. 2770, 2781-82, 41 L.Ed.2d 745 (1974) (use of the word “traitor” not basis for defamation action since used “in a loose, figurative sense”); Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970) (the word “blackmail” not actionable in context). This Court has held that the phrase “scum of the earth” was not an assertion of fact that the plaintiff was actually a mass of horrific or putrid bacteria, but a hyperbolic statement that represents an opinion. Pease v. Telegraph Pub. Co., Inc., 121 N.H. at 65.

Even in a case where the alleged defamatory statements were that the plaintiff was *a liar*, the First Circuit has ruled as a matter of law that those statements were entitled to Constitutional protection when taken in context with the entire communication. Riley v. Harr, 292 F.3d 282, 289 (1st Cir. 2002). “Moreover, even if we accepted Riley's premise that the statement “Riley had lied then” constitutes Harr's own declaration that Riley had uttered a falsehood, the statement would *still be protected under the First Amendment*. Like the allegedly defamatory newspaper articles in Phantom Touring, the Book “not only discussed ... the facts underlying [Harr's] views but also gave information from which readers might draw contrary conclusions.” Riley v. Harr, 292 F.3d 282, 292 (1st Cir. 2002) (citing Phantom Touring, 953 F.2d 724, 730 (1st Cir. 1992) (emphasis added).

When viewed in its totality, the Power Point presentation and the Congressional testimony in this case equates to the situations in Riley and in Phantom Touring. There was no reference to any undisclosed facts. Rather, the author put forward his understanding of various pieces of

information and then, based on that body of information, proffered his own opinion about how credit unions could address the situation. In fact, at one point in the presentation, the author suggests that the credit unions, when banding together to address these vague claims of infringement, “[m]ay negotiate better licensing terms.” APP at 40. This is more than an implicit recognition that the audience would have to form its own judgments about how to deal with such situations. Also, the author recognized that credit unions who chose to proceed at the Patent and Trademark Office may suffer the risk of estoppel (i.e., if their challenges to the patent were not upheld). APP at 42. And finally, the author suggested that the existing law needed to be reformed which more than suggests that there was a risk that the patent infringement claims by entities such as the Appellants, under then existing law, might have some viability. APP at 43. Riley and Phantom Touring were both decided after Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990). That is the case the Appellants rely upon most heavily in their Brief to insist that being called a “patent troll” equates to being called a perjurer based on testimony in a specific judicial proceeding.

Milkovich has no parallel to the case at bar. In Milkovich, a high school wrestling coach was said to have lied under oath in a judicial proceeding. These were the words used:

- “ ‘Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
- “ ‘But they got away with it.
- “ ‘Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

“ ‘I think not.’ ”

Milkovich, 497 U.S. at 5, 110 S. Ct. at 2698. Justice Rhenquist, writing for the majority, specifically held that the rhetorical flourish line of cases was still good law and that such speech was constitutionally protected. In other words, the statements made (such as being a troll – of the patent variety or otherwise), could not be interpreted as stating actual facts about an individual. Id. at 497 U.S. at 20, 110 S. Ct. at 2706 (quotation omitted). The statements in Milkovich presented a set of undisclosed facts – i.e., that the speaker was present at the hearing heard the testimony and because he was in possession of other, undisclosed facts, inferred that the plaintiff’s testimony was untruthful. Therefore, the statements were that the plaintiff had indeed perjured himself during a judicial proceeding and the speaker had undisclosed proof of that from his own undisclosed observations. Such is not even vaguely the case here. Milkovich preserves the long standing, prior law that the Superior court relied upon to determine that the use of the term “patent troll” or the phrase “might look like extortion” (APP at 73) did not leave a trail of undisclosed, defamatory facts but was based upon disclosed facts that, in the mind of the speaker, supported the opinion stated, albeit with the assistance of some slight, rhetorical flourishes. ADD at 17; 20.

Moreover, upon significant research, one cannot find a singular definition of the phrase “patent troll,” which does not exist in any dictionary.⁵ Tellingly, the plaintiffs do not allege that there is one

⁵ Even a simple internet search shows that various meanings of “patent troll” have been recognized.

definition. One scholar notes that “[F]rom its inception, the term ‘patent troll’ appears to have had an ambiguous meaning.” E. Lee, Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform, 19 Stan. Tech. L. Rev. 113 (2015). In his recent article, Edward Lee noted that “patent troll” was coined by executives at Intel in 1990. *Id.* at 119-120. One executive “said he [] came up with the term inspired by a blue-haired troll doll that his daughter left at his office. *Id.* Another Intel executive claimed that her husband “hit upon the word troll: the man who hides under the bridge that he has not built to demand a fee from whoever wants to cross.” *Id.* Lee also notes that some trace “the origin of the term even earlier, to an instructional video created by a patent lawyer, Paula Natasha Chavez, back in 1994--although the video uses the term more broadly to describe how one can use broad patent claims like a troll who collects a toll before one passes a bridge.” *Id.* Another scholar wrote, “The magnitude of what contemporary fashion terms the ‘patent-troll problem’ remains substantially unknown, in part because a widely accepted definition of a patent troll has yet to be devised.” J. Golden, “Patent Trolls” and Patent Remedies, 85 Tex. L. Rev. 2111, 2161 (2007) citing M. Lemley & C. Shapiro, Patent Holdup and Royalty Stacking, 85 Texas L. Rev. 1991, 2009 (2007) (“Defining a patent troll has proven a tricky business, but that does not mean the problem does not exist”); R. Mann, Do Patents Facilitate Financing in the Software Industry?, 83 Texas L. Rev. 961, 1023 (2005) (“[A]ny effort to design a suitable definition of the term ‘troll’ is likely to lend credence to the view that the status as a troll is in the eye of the beholder”).

The United States Supreme Court has found that “troll” is a term used “in the patois of the patent community” Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1935 (2016). “Patois” means “a dialect other than the standard or literary dialect,” “the characteristic special language of an occupational or social group,” or “the jargon or informal speech used by a particular social group.” See Meriam Webster Dictionary; The Oxford English Dictionary. Implicit in the Supreme Court’s finding is that there is no definition, but rather the conclusion that one is a “patent troll” is a matter of opinion based on one with experience in the patent industry.

In their First Amended Complaint, the plaintiffs refer to an article in the Washington Examiner which defines “patent trolls” as “companies with false patent claims,” APP at 93-97 (Ex. H to the First Amended Complaint). CUNA’s Assistant General Counsel’s definition was “an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention.” APP at 70-81 (Ex. E to the First Amended Complaint). In their Opposition to the American Bankers Association’s Motion to Dismiss, the plaintiffs provide yet another definition of “patent troll.” APP at 207 citing Advanced Video Techs. LLC v. HTC Corp., No. 1:11 Civ. 06604; No. 1:11 Civ. 08908; No. 1:12 Civ. 00918, 205 U.S. Dist. Lexis 122423, at *7-8 (S.D.N.Y. 2015) (defining “patent trolls” as having a “business model focuse[d] not on developing or commercializing technologies but on buying and asserting patents against companies that have already begun using them....”).

Even more definitions of “patent troll” can be found in case law. See, e.g., Overstock.com, Inc. v. Furnace Brook, LLC, 420 F. Supp. 2d 1217, 1218 (D. Utah 2005) (“A 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. 2008) (“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. DaimlerChrysler Corp., 519 F. Supp. 2d 905, 911 (W.D. Wis. 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.’ ”) (citing InternetAd Sys., LLC v. Oposto, Ltd., 481 F. Supp. 2d 596, 601 (N.D. Tex. 2007)).⁶ Clearly, there are multiple and diverse definitions of “patent troll” and thus, there is no way to objectively verify whether someone is a “patent troll” or not.

CUNA’s Assistant General Counsel’s inclusion of the plaintiff, ATL in its slide referring to “well known trolls” is constitutionally protected opinion that ATL is a “patent troll” based on his understanding of the phrase and his disclosed, non-defamatory facts. Likewise, the

⁶ *See also* Wikipedia’s entry for “patent troll” recognizing that the term is “susceptible to numerous definitions, including a party who: Purchases a patent, often from a bankrupt firm, and then sues another company by claiming that one of its products infringes on the purchased patent; Enforces patents against purported infringers without itself intending to manufacture the patented product or supply the patented service; Enforces patents but has no manufacturing or research base; Focuses its efforts solely on enforcing patent rights; or Asserts patent infringement claims against non-copiers or against a large industry that is composed of non-copiers.
https://en.wikipedia.org/wiki/Patent_troll

Congressional testimony reflects the author’s opinion based on his experience with such entities. Accordingly, where these statements are constitutionally protected opinion, they are not actionable.

Appellants also cite Davis v. Boenheim, 24 N.Y.3d 262, 272, 22 N.E.3d 999 (2014) to support their claim that the phrases “patent troll,” “feeding the troll,” (APP at 39), “might look like extortion” (APP at 73) and the use of the word “shakedown” (APP at 34) constitute a “mixed opinion” as did the following, alleged statements in Davis:

1. “This is alleged to have occurred . . . what? Twenty years ago? Am I in the right neighborhood? . . . So we are supposed to do what? Stop the presses 26 years later? For a false allegation? For what I absolutely believe is a false allegation? *I know [Davis is] lying about me seeing him in his hotel room. That's a lie. If he's going to tell one lie, I'm sure there's a few more of them.*”
2. “The Penn State thing came out and the kid behind this is *trying to get money. He's tried before. And now he's trying again. . . . That's what this is about. Money.*”
3. “*It is a bunch of a thousand lies that [Davis] has told. . . . He supplied four names to the university that would corroborate his story. None of them did . . . there is only one side to this story. He is lying.*” Boenheim continued, “I believe they saw what happened at Penn State, and they are using ESPN to get money. That is what I believe.”
4. “You don't think it is a little funny that his cousin (relative) is coming forward?”
5. Boenheim stated that the timing of Lang's decision to speak out about his abuse seemed “a little suspicious.”

24 N.Y.3d at 270–71 (emphasis added).

Again, when the comparison is made to the actual words from the case cited to the instant case, the Appellants’ comparability argument fails. The statements in Davis more than implied significant, undisclosed facts

that the speaker, a fellow head coach, was in a position to know, that the specific charges of sexual assault were fabricated even though he later said that he really did not know. “Here, Boeheim stated that Davis and Lang lied and did so for monetary gain, and that Davis had done so in the past. Boeheim's assertions that Davis previously made the same claims, for the same purpose, communicated that Boeheim was relying on undisclosed facts that would justify Boeheim's statements that Davis and Lang were neither credible nor victims of sexual abuse.” Davis v. Boeheim, 24 N.Y.3d 262, 272 (2014). The obvious difference here was what Judge Tucker held, “[In] each instance the defendant disclosed the facts that supported its description and made ATL, in the defendant’s mind, a patent troll.” ADD at 17. The lower court correctly reasoned that this was pure opinion based on disclosed, non-defamatory facts, and as such is protected by the First Amendment and the New Hampshire Bill of Rights, Art. 22.

An example of the Appellants overly strained characterization of the disclosed facts as “defamatory” relates to the snippet from the PowerPoint slide: “Federal Circuit has invalidated 7 of 13 patents” as being a false statement of fact that is defamatory.⁷ In fact, they claim, the Federal Circuit Court found 7 of 13 claims of the ‘457 patent in question to be **invalid**, but this of course led to the court’s judgment that “[t]he five patents share the same specification and have very similar claims.” In re Transaction Holdings Ltd., LLC, 484 F. App'x 469, 471 (Fed. Cir. 2012). In other words, the seven claims under the ‘457 patent were found invalid based on

⁷ This statement was never raised below as being defamatory (APP at 201-219) but was raised for the first time on appeal, and as such, must be rejected. O’Hearn v. McLammer, 164 N.H. 430, 438 (2012).

“obviousness rejections.” *Id.* at 472. Thus, while some of the subsequently obtained patents⁸ – based on the same patent “claims” – had not yet been challenged at that point, four of the additional ones were added to the same litigation and the Federal Circuit affirmed the district court’s ruling that those five patents were also invalid. While the bullet point in the statement was not precisely, legally correct in the “patois” of patent law, (use of the word patent instead of “claims”) when one examines the actual rulings of the case cited, it was accurate. In any event, the 7 claims that were rejected as obviously *not original* led to the exact same opinion -- that the Appellants’ patents relating to certain Automated Teller machines had been found by the Patent Office and the federal courts not to be valid because the seven (7) “claims” underlying the patents were rejected.⁹

This issue can and should be addressed as a matter of law since this Court can review and interpret the holding of the Federal Circuit. In doing so, it is readily apparent as a matter of law that the snippet, while not legally precise in terms of patent law, was not defamatory as a matter of law since the primary claims that supported the patents were all rejected by the patent office and then by the federal courts. That was and is the import of the statement and it is not defamatory on its face.

⁸ While the underlying litigation was pending and stayed in regard to the ‘457 patent, the Appellants immediately sought and obtained additional patents “that claimed priority to the same parent application as the ‘457 patent.” *In re Transaction Holdings*, 484 Fed.Appx. at 470. Four of those were added by the amended complaint that had originally only the ‘457 patent. Thus, five of the patents were ruled invalid based on a rejection of the 7 primary claims under the original patent.

⁹ The actual, now invalidated patent, may be found here:
<https://patents.google.com/patent/US6945457B1/en>

Incredibly, the Appellants further attempt to equate use of the phrase “patent troll” to the extensive, defamatory statements in a series of newspaper articles that claimed the New York Chief Medical Examiner was “corrupt” and “unethical.” In reversing the lower court’s determination in that case that, “the allegations that plaintiff had ‘lied’ in his professional conclusions regarding the causes of death in controversial cases and had ‘covered up’ for misconduct by city police officers were too ‘[v]ague’ to ‘amount to accusations of criminal misconduct,’” the New York Appeals Court held that such statements, indeed were susceptible of conveying defamatory, undisclosed facts about the Medical Examiner, and as such the lower court should not have dismissed the case. Gross v. New York Times Co., 82 N.Y.2d 146, 151, 623 N.E.2d 1163 (1993). The many statements and articles over a lengthy period of time made the plaintiff out to be a liar and a criminal. This is not even vaguely the situation in the case at bar, and the Appellants reliance on this case is, at best, misplaced.

Finally, in their Brief, the Appellants point to a Second Circuit case as supposed support for their contention that a single phrase such as “patent troll” can have, in and of itself, a defamatory meaning when looking at the context of the entire publication. Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144 (2d Cir. 2000). In fact, the statements in Flamm were reasonably construed “to be stating or implying facts about the defamation plaintiff.” 201 F.3d at 148. Those statements, in the context of a publication for referrals to lawyers for business, were that the lawyer was an “ambulance chaser” and was only interested in “slam dunk cases.” *Id.* at 147. The Court held that the statements in question “can reasonably be understood to imply that [the lawyer] engages in the unethical solicitation

of clients, an accusation that can be proven false.”¹⁰ *Id.* at 146. The phrase “patent troll” is not even vaguely equivalent to the situation in *Flamm* and it cannot be proven true or false because of course, it is an opinion.

Moreover, and as cited by Judge Tucker, the First Circuit has recently made it clear that so long as the person making the statements adequately discloses the non-defamatory facts underlying the opinions, there can be no defamation liability. *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017). In that case, the plaintiff was an alleged victim of a rape by Bill Cosby. She had made her allegations public in a newspaper article, and Cosby’s attorney sent a letter to a newspaper admonishing the paper essentially for printing any story without verification. As part of that critique, the author disclosed the facts upon which he based his opinion that the defamation plaintiff lacked credibility and that her allegations of rape were not true. In so doing, he was proffering an opinion of his own based on those disclosed facts. The *McKee* Court held, “Nevertheless, even if we treat the Singer Letter as asserting both that McKee lacks credibility and that McKee’s rape allegations are not truthful, Singer adequately disclosed the non-defamatory facts underlying these assertions, thereby immunizing them from defamation liability.” 874 F.3d at 63.

¹⁰ In particular, the context of the publication was considered: “In the present case, the challenged language appears in a national directory nearly seventy pages in length, compiled and distributed by a reputable professional organization with a 100 year history of supporting education. The directory purports to list “attorneys and other specialists” willing to consult with women involved in higher education who are seeking redress for sex-based discrimination. The directory provides names, addresses, phone numbers and, generally, a short statement of the person’s area of interest or expertise. In such a *fact-laden context*, the reasonable reader would be “less skeptical and more willing to conclude that [the directory] stated or implied facts.” *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 154 (2d Cir. 2000) (emphasis added).

Neither the Power Point presentation nor the Congressional testimony attributed to CUNA contains factual assertions that are capable of a defamatory meaning. Merely because a patent or patents (or even “claims” that underlie the patent) have been invalidated is not defamatory as a matter of law. The other, disclosed non-defamatory facts relating to targeting financial institutions within a given area (by sending demand letters as more fully explicated in the Congressional testimony) and suing many banking institution in New England (APP at 37) were never alleged by the Appellants to be defamatory. Even if the act of attaching the actual communications to the complaint without specific allegation is deemed adequate allegation of defamatory facts, when analyzed, they are not such as a matter of law. They do not morph into defamatory statements merely because the Appellants hang that label on them. Neither the lower court nor this Court need accept as true statements which are not well-pled, “including the statement of conclusions of fact and principles of law.” See Chalifoux v. Chalifoux 2017 WL 4770563, at *1 (2017), quoting Snierson v. Scruton, 145 N.H. 73, 76 (2000).

Simply because someone sues someone else, or sends multiple demand letters claiming patent infringement to all financial institutions within a given area, does not imply a defamatory meaning. That the speaker concludes from those disclosed, non-defamatory facts that a particular entity is a “patent troll” is pure opinion that both the Constitution and Art. 22 protect.

The *Restatement (Second) of Torts* § 566 (1977) also makes clear that a statement in the form of an opinion is only actionable when it implies the existence of undisclosed, defamatory facts that are false. This is also the

holding of this Court in Nash v. Keene Publishing Corp., 127 N.H. 214 (1985):

[A] statement of opinion is not actionable, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3006-07, 41 L.Ed.2d 789 (1974); Pease v. Telegraph Pub. Co., Inc., 121 N.H. 62, 65, 426 A.2d 463, 465 (1981), unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion. Duchesnaye v. Munro Enterprises, Inc., *supra*, 125 N.H. at 249, 480 A.2d at 125; *Restatement (Second) of Torts* § 566 (1977). Whether a given statement can be read as being or implying an actionable statement of fact is itself a question of law to be determined by the trial court in the first instance, Pease v. Telegraph Pub. Co., Inc., *supra* 121 N.H. at 65, 426 A.2d at 465, considering the context of the publication as a whole. See Morrisette v. Cowette, 122 N.H. 731, 733, 449 A.2d 1221, 1222 (1982).

127 N.H. at 219. Again, it is instructive to compare the alleged defamatory statements in the reported case to the case at bar. In Nash, the following were the applicable statements:

Specific facts

To The Sentinel:

As for specific facts:

1. I was stopped at the corner of Victoria and Water Streets when Officer Nash's cruiser hit my vehicle.
2. He hit me: The dent and blue paint on the driver's side door proves it. (He can't drive.)
- *218 3. Because of one cop's stupidity Keene just lost another cruiser (myself a car).
3. This is his sixth cruiser he zeroed, and I don't drive with my lights off.
4. Nash is a Wyatt Earp who likes to assault perpetrators (allegedly).
5. He muscled me with both hands handcuffed, lying in a hospital bed (a real man).

6. He's done it before, and will do it again to you.
7. Assistant City Attorney David Park has numerous complaints on the matter of Nash.
8. Eh, what's happening Keene? Go to sleep. Don't get involved.

Nash v. Keene Pub. Corp., 127 N.H. at 217–18. The Nash Court held that these statements raised a jury question because “the letter itself can obviously be read as stating facts. The defendant printed “Specific facts” in large print above the letter, and the letter began with the phrase, “As for specific facts:” There followed a series of statements that were ostensibly factual **and defamatory**: the plaintiff had “zeroed” six police cruisers; the plaintiff “likes to assault perpetrators (allegedly);” the plaintiff “muscled” Desmarais when the latter was handcuffed in a hospital bed.” Id. at 220 (emphasis added). The quasi-factual based assertions in the Power Point presentation or the Congressional testimony are not defamatory in and of themselves, and therefore, there can be no viable defamation claim. “Whether an allegedly libelous statement is an opinion or an assertion of fact is a matter of law to be determined by the trial court in the first instance.” Pease v. Telegraph Pub. Co., Inc., 121 N.H. 62, 65 (1981). The lower court held as such and this Court should affirm that holding.

B. CUNA’S TESTIMONY TO CONGRESS IS PROTECTED BY THE LEGISLATIVE PRIVILEGE AND THUS CUNA IS IMMUNE FROM THE PLAINTIFFS’ DEFAMATION CLAIM

The plaintiffs must demonstrate that CUNA “failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the

communication.” Pierson v. Hubbard, 147 N.H. 760, 763 (2002).¹¹ If a privilege applies to the statement, CUNA is immune from suit. *Id.* at 763. Privileged communications are generally divided into two classes: (1) those that are absolutely privileged; and (2) those that are qualifiedly or conditionally privileged. *Id.* at 764. “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).

“A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.” *Restatement (Second) of Torts § 590A* (1977). “The absolute privilege of witnesses in legislative hearings and other legislative proceedings is similar in all respects to that of witnesses in judicial proceedings, as stated in § 588. The Comments to that Section are applicable here so far as they are pertinent. As to what legislative bodies are included, see Comment *c* under § 590.” *Id.* at Comment *a*. The legislative privilege applicable to legislators of the United States Congress “extends to the work of legislative committees or sub-committees that are engaged in an investigation or other work authorized by the legislative body.” *Restatement (Second) of Torts § 590*. Accordingly the absolute

¹¹ Judge Tucker’s decision made clear that nothing in the Appellants’ pleadings alleged that the CUNA Congressional testimony was “of or concerning” the named plaintiffs. ADD at 11. This Court need go no further than that to affirm on this basis. Nonetheless, even assuming that testimony was “of or concerning” the named plaintiffs, it is still subject to the legislative privilege as a matter of law as analyzed in this section.

privilege of witnesses in legislative hearings applies to testimony given by a witness to a congressional committee.

This Court has adopted portions of the *Restatement (Second) of Torts* applicable to defamation. See Independent Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, 138 N.H. 110, 118 (1993), citing *Restatement (Second) of Torts* § 558 (1977); McCarthy v. Manchester Police Department, 168 N.H. 202, 210 (2015), citing *Restatement (Second) of Torts* §§ 577, 580. See also Pierson v. Hubbard, 147 N.H. at 763. This Court has also held that statements made in the course of judicial proceedings are absolutely privileged provided that they are pertinent to the subject of the proceeding. See McGranahan v. Dahar, 119 N.H. 758 (1979); Provencher v. Buzzell-Plourde Assocs., 142 N.H. 848 (1998). The recognition of this privilege, “[R]eflects 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.” McGranahan, 119 N.H. at 763.

"The privilege of a witness appearing before a committee of the Legislature, in a matter within the jurisdiction of the committee, is undoubtedly the same as that of a witness in proceedings before a court of justice." Wright v. Lothrop, 149 Mass. 385, 389 (1889); see also Sheppard v. Bryant, 191 Mass. 591, 593 (1906) ("The reason for the rule is applicable as much to a hearing before a committee of the Legislature as to one before a court."); Bio/Basics Int'l Corp. v. Ortho Pharm. Corp., 545 F. Supp. 1106, 1114 (S.D.N.Y.1982) (collecting authority in four states establishing that "a witness who appears before a legislative committee is absolutely immune" and adopting same with respect to New York law). "[T]he strong public

policy of encouraging full and open citizen participation in legislative proceedings outweighs such an individual's interest in his reputation. The adoption and application of the absolute privilege in legislative proceedings allows for open and frank discussion of the issues which are the subject of the proceedings.” Krueger v. Lewis, 359 Ill. APP at 3d 515, 521–22 (2005). “[The legislative] privilege eliminates the chilling effect of defamation suits by ensuring that citizens will be allowed to speak freely and without fear that their participation in this democratic process will result in a lawsuit.” *Id. citing* 50 Am.Jur.2d *Libel & Slander* § 275 (1995).

Although this Court has not formally recognized the legislative privilege, based upon its adoption of the privilege applicable to judicial proceedings, as well as its adoption of other portions of the *Restatement (Second) of Torts* as it applies to defamation, it should now explicitly recognize the legislative privilege in this case. Here, Mr. Dwyer’s testimony falls squarely within the legislative privilege applicable to legislative witnesses. There is no question that the hearing on “Protecting Small Business and Promoting Innovation by Limiting Patent Troll Abuse” held by the United States Senate Committee on the Judiciary was a legislative proceeding and that Mr. Dwyer’s testimony concerning his experience with parties alleging patent infringement had “some relation to that proceeding.” *Restatement (Second) of Torts* § 590A (1977).

Accordingly, with regard to Mr. Dwyer’s testimony on behalf of CUNA, CUNA is immune from suit for defamation.

C. **CUNA’S PURPORTED REPUBLICATION OF ITS
CONGRESSIONAL TESTIMONY IS PROTECTED BY THE FAIR
REPORTING PRIVILEGE**

This Court has already recognized the fair reporting privilege. See Hayes v. Newspapers of New Hampshire, Inc., 141 N.H. 464, 466 (1996); Thomas v. Telegraph Publishing Co., 155 N.H. 314, 327-334 (2007). “The privilege applies to ‘[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern...if the report is accurate and complete or a fair abridgement of the occurrence reported.’” Hayes, 141 N.H. at 466 quoting *Restatement (Second) of Torts § 611* (1977). The Restatement provides an exception to the privilege which states, “A person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated.” *Restatement (Second) of Torts § 611*, comment c. However, it has been aptly noted by the Court of Appeals of Maryland that:

The *Restatement* offers no case law in support of its blanket denial of the privilege to those persons who report their own defamatory statements made during a court proceeding. The commentary quoted above does not appear in either of the two tentative draft versions of § 611 produced before the current, published text. See *Restatement (Second) of Torts § 611* (Tentative Draft No. 20, 1974) and *id.* (Tentative Draft No. 21, 1975). The decision to include the commentary was made after a brief discussion at a meeting of the American Law Institute, during which one participant called the proposed comment “a flat contradiction of the black letter” law as set forth in § 611.

Rosenberg v. Helinski, 328 Md. 664, 684–85 (1992) citing 52 A.L.I. Proceedings 188 (1976). Thus, Courts have held that the privilege is only

forfeited if the party making the defamatory statement acts with malice to appear in the privileged forum in the first place. *Id.* at 867; Stover v. Journal Pub. Co., 105 N.M. 291, 296 (1985). Green Acres Trust v. London, 141 Ariz. 609 (1984); Williams v. Williams, 23 N.Y.2d 592, 298 N.Y.S.2d 473, 477 (1969). See also Boley v. Atl. Monthly Grp., 950 F.Supp.2d 249, 258-259 (D.D.C. 2013) (holding defendant’s summary of prior testimony protected by fair reporting privilege).

“[A]n important purpose of the fair report privilege [] is to allow the report of that which the public could have independently heard or read.” Stover, 105 N.M. at 296. Indeed, long before its formal adoption of the fair reporting privilege in McGranahan, this Court stated that newspapers “that might have carried reports of [the plaintiff’s] arrest, trial, and the ultimate acquittal had full access to the trial and to the complaint, *which was a public record*, and could not be held liable for accurately reporting that information.” McGranaha, 119 N.H. 758, 770 (1979) (emphasis added). Furthermore, this Court has only recognized an exception to the fair reporting privilege where the plaintiff can establish actual malice. Thomas, 155 N.H. at 329. The Court held, “Allowing plaintiff to try to establish common law malice, where appropriate, will guard against abuse of the privilege and ensure that the privilege continues to be used as a shield, not a sword.” *Id.*

Here, the plaintiffs allege that CUNA “republished its testimony,” and they attach as an exhibit to their First Amended Complaint CUNA’s copy of Mr. Dwyer’s testimony to Congress. APP at 19 (*First Amended Complaint* at ¶ 77 and *Ex. E thereto*). Aside from the obvious omission that the plaintiffs fail to allege where the copy of the testimony was

published, they did not allege that the testimony is not fair or accurate.¹² The plaintiffs did not allege that CUNA fraudulently and with malice gave testimony to Congress (which is absolutely privileged) as a sham to spread it around later. The plaintiffs' general statement in paragraph 97 of their First Amended Complaint that the statements of all defendants "were made maliciously" is a bare conclusion that is insufficient to overcome the fair reporting privilege. APP at 24. "A plaintiff cannot allege fraud in general terms, but must specifically allege the essential details of the fraud and the facts of the defendants' fraudulent conduct." Snierson v. Scruton, 145 N.H. 73, 77 (2000). Accordingly, even assuming CUNA republished the testimony given to Congress, that republication is privileged and cannot, as a matter of law, serve as basis for a defamation claim against CUNA.

D. THE PLAINTIFFS' CLAIMS UNDER THE CPA FAIL BECAUSE (I) CUNA IS A NON-PROFIT TRADE ORGANIZATION (II) CUNA'S TESTIMONY TO CONGRESS OCCURRED IN A POLITICAL SETTING AND (III) CUNA'S CONDUCT DID NOT OCCUR WITHIN THE STATE OF NEW HAMPSHIRE¹³

New Hampshire's Consumer Protection Act ("CPA") provides, "It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce *within this state*." RSA 358-A:2 (emphasis added). The statute

¹² The website for the Committee on the Judiciary contains a copy of Ex. E to the First Amended Complaint APP at 19. *See* <https://www.judiciary.senate.gov/meetings/protecting-small-businesses-and-promoting-innovation-by-limiting-patent-troll-abuse>.

¹³ The superior court held that since the assertions were constitutionally protected opinion, they could not be "false assertions of fact." ADD at 21. CUNA obviously concurs in that analysis but raises herein, as it did below, the additional reasons that the Consumer Protection statute is inapplicable to this case as a matter of law.

“lists thirteen representative categories of unlawful acts or practices, each dealing with transactions for the provision of goods or services to consumers.” Roberts v. Gen. Motors Corp., 138 N.H. 532, 538 (1994). The phrase “including but not limited to” which precedes the list, “limits the applicability of [the Consumer Protection Act] to those *types* of [acts] therein particularized.” *Id.* In determining whether conduct falls within the CPA, the New Hampshire Supreme Court applies the rascality test, meaning “the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.” Becksted v. Nadeau, 155 N.H. 615, 619 (2007) (citation omitted).

The CPA states that “‘trade’ and ‘commerce’ shall include the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.” RSA 358-A:1. The plaintiff has the burden of establishing that the alleged statutory violation occurred in “trade or commerce.” McMullin v. Downing, 135 N.H. 675, 680 (1992). Although the New Hampshire Supreme Court has not reached the issue of whether a non-profit corporation falls within the definition of “trade or commerce” under the CPA, it has noted that “there is a well-developed body of law defining trade and commerce in Massachusetts where the consumer protection statute, Massachusetts General Laws Ann., ch. 93A § 1 (West 1980) contains *exactly the same definition of trade and commerce* as is contained in RSA ch. 358-A.” Chase v. Dorais, 122 N.H. 600, 602 (1982) (emphasis added).

Massachusetts courts have held that non-profit organizations are not subject to the state's consumer protection statute where the organization does not act in the business context. All Seasons Servs., Inc. v. Comm'r of Health & Hosps. of Boston, 416 Mass. 269, 271 (1993); Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 436, 439 (1998); Poznik v. Mass. Medical Prof'l Ins. Ass'n, 417 Mass. 48, 52-53 (1994).

There is no dispute that CUNA is a non-profit organization. In addition, by giving testimony to Congress and making a presentation concerning "Hot Topics In Litigation," CUNA was not engaging in any business transaction. Rather, CUNA was acting in furtherance of its purpose as a trade association. Accordingly, where CUNA was not acting in "trade or commerce" within the meaning of RSA 358-A, the plaintiff's consumer protection claim fails. In addition, RSA 358-A does not apply to CUNA's testimony to Congress, which occurred obviously in a political setting. This Court has held that, "the *Noerr-Pennington* doctrine applies to claims brought under the CPA." Green Mountain Realty Corp. v. Fifth Estate Tower, 161 N.H. 78, 85 (2010). Under the doctrine "concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability." *Id.* at 83, *citing* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1988). The New Hampshire Supreme Court has recognized that the doctrine applies to "traditional lobbying." *Id.* at 84. Here, CUNA's testimony to Congress urging the enactment of legislation to address excessive patent litigation and providing examples of ways to address such litigation, is traditional lobbying that is subject to the *Noerr-Pennington* doctrine.

In addition to the foregoing, the Appellants' claims under the CPA fail because CUNA's alleged tortious behavior did not take place in New Hampshire. The CPA extends to conduct in the course of "trade or commerce *within this state*." RSA 358-A:2. This has not directly addressed whether conduct in trade or commerce must occur in New Hampshire to be actionable under the CPA. However, the District of New Hampshire has portended that this Court will hold that the offending conduct must actually occur in New Hampshire to be actionable under the CPA. See Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F. Supp. 491 (D.N.H. 1996); Mueller Co. v. U.S. Pipe & Foundry Co., No. Civ. 03-170-JD, 2003 WL 22272135 (2003); Precourt v. Fairbank Reconstruction Corp., 2012 WL 707080 (D.N.H. 2012); BAE Systems Info. & Electronics Systems Integration Inc. v. Spacekey Components, Inc., No. 10-cv-370-lm, 2011 WL 1705592 (D.N.H. 2011). Here, CUNA's testimony to Congress was given outside of New Hampshire in Washington, D.C. The Assistant General Counsel's presentation was made in Vermont. See Footnote 3, *supra*. Thus, where the conduct which serves as the basis for the plaintiffs' claim under the CPA did not occur "within the state," the Appellants' claims fail as a matter of law.

V. CONCLUSION

CUNA respectfully requests that this Court affirm the decision of the superior court dismissing Appellants' complaint for failure to state a claim for which relief can be granted.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 16 (3) (h), Credit Union National Association respectfully requests oral argument not to exceed 15 minutes before the full Court. Mark A. Darling is hereby designated as the attorney to be heard at oral argument.

CERTIFICATE OF COMPLIANCE

The below signed certifies that the decisions being appealed are in writing and are appended to the Appellants' Brief, and that an original and eight copies of this brief were delivered to the Clerk of Supreme Court of New Hampshire via Federal Express and two copies of this brief were served via first class mail, postage pre-paid, to all counsel of record.

Respectfully Submitted,
Credit Union National Association,
By its attorneys,



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