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SUPREME COURT

Docket No. 2018-0198

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Automated Transactions, LLC, et al. v. American Bankers Association, et al.

Appeal Pursuant to Rule 7
from Order of the Sullivan County Superior Court

BRIEF OF PLAINTIFFS/APPELLANTS
Automated Transactions, LLC and David Barcelou

Steven M. Gordon, NH Bar No. 964
Timothy J. McLaughlin, NH Bar No. 19570
Stephanie K. Annunziata, NH Bar No. 265298
SHAHEEN & GORDON, P.A.
107 Storrs Street, P.O. Box 2703
Concord, NH 03109-2703
(603) 225-7262

To Be Argued By: Steven M. Gordon

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I. QUESTIONS PRESENTED FOR REVIEW

1. On a motion to dismiss a defamation claim, whether the trial court erred in finding Defendants' statements that Plaintiffs were "unscrupulous" "patent troll[s]" were protected opinion when the complaint includes claims that the underlying assertions of fact giving rise to the opinion were false or leave undisclosed facts to be implied.

Appendix ("APP")-17, 19-21 (First Amended Complaint ("FAC") ¶¶ 71, 76, 82, 84, 85, and 87).

2. On a motion to dismiss, whether the trial court erred in finding as a matter of law that the term "patent troll" was incapable of being proven true or false, when the complaint established that "patent troll" was defined and reasonably understood by defendants to be a "pejorative term" and specifically published to describe entities which "buy or license patents from inventors (often failing/bankrupt companies)" and enforce the patents "in an aggressive way with no intention to market the patented invention".

APP-17, 19, 22 and 23 (FAC ¶¶ 71, 76, 88 and 89).

3. On a motion to dismiss, whether the trial court erred in dismissing Plaintiffs' claims that they were defamed as being an extortionist or unscrupulous "patent troll" in numerous statements and publications directed at a specific audience, when in fact, as alleged in the complaint, Plaintiffs were the self-made inventor and original owners of certain patents and were seeking to protect and enforce their property interests.

APP-2, 13, 14 and 21-22 (FAC ¶¶ 1, 53, 54, 58 and 87).

4. On a motion to dismiss, whether the trial court erred as a matter of law in finding the Plaintiffs failed to allege that the factual statements made by the Defendants were false. APP-17, 19-21 and 25 (FAC ¶¶ 71, 76, 82, 84, 85 and 105).

5. On a motion to dismiss, whether the trial court erred in finding as a matter of law that statements asserting that Plaintiffs were committing the criminal acts of a "shakedown", "extortion" or "blackmail" were rhetorical hyperbole that is not actionable when they were seeking to protect and enforce their property interests, as the original inventor and owner, facts of importance not disclosed. APP-21, 22 (FAC ¶ 87).

6. On a motion to dismiss, whether the trial court erred in dismissing the claims against the Defendants for violation of RSA 358-A (Consumer Protection Act) on the ground that the challenged misrepresentations were not factual. APP-25, 26 (FAC ¶¶ 101-112)

II. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

RSA 358-A:2

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. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following: (*I through XVII*).

III. STATEMENT OF THE CASE AND FACTS

Plaintiff/Appellant David Barcelou (“Mr. Barcelou”) is a self-made inventor, a term the United States Supreme Court has recognized in the context of patents:

For example, some patent holders, such as university researchers or **self-made inventors**, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 393 (2006) (emphasis added).

In response to Mr. Barcelou’s legitimate activity as a “self-made inventor,” and as the named inventor of the patents at issue, Defendants/Appellees (“Defendants”) engaged in a defamation campaign to brand him and his company as a “patent troll.” This branding was particularly destructive because “[a] patent troll (a pejorative term for non-practicing entity) is a company whose sole business is to acquire patents for the purpose of bringing infringement claims against third parties.” *In re Teltronics, Inc.*, 540 B.R. 481, 483 (Bankr. M.D. Fla. 2015).

Being an accused “patent troll” has such pernicious force that in underlying patent litigation, involving some of the Defendants, Mr. Barcelou obtained the following Order: “Mr. Barcelou is the named inventor of the patents-in suit; Transactions Holdings is the named assignee. No defendant, for the remainder of this litigation in this jurisdiction,

shall describe Mr. Barcelou or Transactions Holdings otherwise. Sanctions shall be imposed on the offending party (and/or his/her counsel) for any violations of this order.” APP-85 (FAC, Exhibit G). Defendants ignored this caution tarnishing Plaintiffs’ reputation.

The term “patent troll” as used by Defendants was intended to disparage Mr. Barcelou and his company, Plaintiff/Appellant Automated Transactions, LLC (“ATL”) (collectively, “Plaintiffs”) as extortionists, blackmailers and abusers of the legal process seeking moneys to which they were not entitled. Defendants used this weaponized term in specific publications directed to specific audiences defaming Plaintiffs. Defendant Credit Union National Association, Inc. (“CUNA”) confirmed the pejorative meaning of “patent troll” and defined its elements:

“Patent troll” is a pejorative term – polite term is “non-practicing entity”. ... A “patent troll” is an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention. ... Patent trolls buy or license products from inventors (often failing/bankrupt companies).

APP-32 (FAC, Exhibit A). In the banking world, the term “patent troll” is capable of being proven false based on its widely known definition and as defined by CUNA.

Plaintiffs do not meet the underlying elements of being a patent troll. *See, e.g.*, APP-14 (FAC ¶ 58); APP-15 (FAC ¶ 63). Plaintiffs are the original self-made inventors, researchers, developers and owners of their valid patents. APP-12 (FAC ¶ 48-51); APP-13 (FAC ¶¶ 53, 54); APP-14 (FAC ¶ 58); APP-17 (FAC ¶ 71); APP-19 (FAC ¶ 77). They had originally attempted to manufacture and bring to market products based upon their patents, and then later sought to license their valuable patent portfolio to others. APP-14 (FAC ¶ 56). Their business efforts and the patents they were awarded are the result of a lifetime spent inventing, researching, developing and obtaining patent protection. APP-10 (FAC ¶ 43); APP-15 (FAC ¶ 63). When necessary, Plaintiffs defended their patented ideas through court proceedings. APP-13 (FAC ¶ 55); APP-14 (FAC ¶ 56). Plaintiffs did not acquire invalid or spurious patents from failing companies with the intention to monetize them through threats of litigation, which is the hallmark

activity of a “patent troll.” APP-14 (FAC ¶ 58). Rather, they sought to protect and enforce their constitutionally protected property interests in their **own** patented ideas. APP-14 (FAC ¶¶ 56, 58). Defendants’ statements when viewed in context as alleged in the FAC present an inherently factual dispute that cannot be resolved on a motion to dismiss.

For purposes of this appeal, however, the issue is not whether Plaintiffs are “patent trolls.” Rather, the questions are more narrowly tailored to whether the trial court erred in dismissing Plaintiffs’ claims as a matter of law.

A. Procedural background

On September 26, 2016, Plaintiffs filed a Complaint and Demand for Jury Trial. On November 23, 2016, Plaintiffs filed their FAC to remove references to certain non-suited defendants and to add additional language regarding Mr. Barcelou’s residency and a claim under New Hampshire’s Consumer Protection Act. APP-1 to 116 (FAC).

Defendant/Appellees American Bankers Association (“ABA”), CUNA, Pierce Atwood, LLP (“Pierce Atwood”) and Robert H. Stier, Jr. (“Mr. Stier”) (collectively, “Defendants”) filed motions to dismiss for failure to state a claim. APP-117, APP-184 and APP-220. Plaintiffs objected. APP-141, APP-201 and APP-240. On May 16, 2017, the trial court held a consolidated hearing on Defendants’ motions to dismiss for failure to state a claim. APP-269 (Transcript of hearing).

On March 19, 2018, the trial court granted Defendants’ motions to dismiss for failure to state a claim. Addendum (“ADD”) (Order on Motions to Dismiss (“Order”)).

This appeal followed.¹

¹ Trial court defendants Mascoma Savings Bank and Stephen F. Christy filed a motion for summary judgment, which was granted, and which Plaintiffs do not appeal. Trial court defendants Charles von Simson, Ralph E. Jocke, and Walker & Jocke Co., LPA filed motions to dismiss for lack of personal jurisdiction, which were granted, and which Plaintiffs do not appeal. The trial court did not address other defenses to the claims presented and those defenses are not addressed in this brief.

B. Factual background as plead in the FAC

Mr. Barcelou is a self-made inventor and entrepreneur who has pursued businesses based on his inventions. APP-2 (FAC ¶¶ 1); APP-10 (FAC ¶ 42-43). Mr. Barcelou formed ATL to market his original patents. APP-2 (FAC ¶ 1).

Mr. Barcelou had significant success in developing and marketing products based on his patents. APP-13 (FAC ¶ 53). After September 11, 2001, Mr. Barcelou adapted his business to changing economic conditions by choosing to license his patent portfolio to other businesses through ATL. APP-13 (FAC ¶ 54); APP-14 (FAC ¶ 56). Plaintiffs offered sub-licenses and litigated patent infringement cases as necessary. APP-2 (FAC ¶ 1). In response to litigation, Defendants engaged in a defamatory campaign to pejoratively label Plaintiffs as patent trolls. APP-2 (FAC ¶ 1).

When Defendants began their campaign, the term “patent troll” was commonly understood in the banking community and its use was purposely chosen to “lower the plaintiff in the esteem” of his prospective business clientele. APP-15 (FAC ¶ 64); APP-22 (FAC ¶ 88, 89). “Patent troll” was used in conjunction with terms like “extortionist” and “blackmail” to communicate to prospective clients that Plaintiffs were not the inventors of the patents they were seeking to license. APP-15 (FAC ¶¶ 64-65); APP-21 (FAC ¶ 87).

These facts are well-pleaded in the FAC, and the trial court’s Order preempted Plaintiffs’ constitutional right to trial.

1. Mr. Barcelou’s history as a self-made inventor and businessman

The road of a self-made inventor is a long one. In 1977, Mr. Barcelou had an idea for a toy ice-hockey game and raised over \$1,000,000 to develop it. Five years of research and development later, his idea resulted in the CHEXX™ Hockey Game, which was patented as U.S. Patent No. 4,480,833. When a competitor infringed on his CHEXX™ patent, Mr. Barcelou’s company at the time sued the competitor for patent infringement, succeeded in obtaining injunctive relief and the case settled in favor of Mr. Barcelou and his company. APP-10 (FAC ¶¶ 44-45).

By 1983, Mr. Barcelou was exploring “in-car-camera” technologies. Mr. Barcelou successfully raised millions of dollars to develop his idea. After almost a decade of research and development, his product won the International Association of Amusement Parks and Attractions’ top honor -- the “1991 Best New Technology Award” -- and a production model was sent to Six Flags® Texas. APP-11 (FAC ¶ 46). In 1989, BusinessWeek featured Mr. Barcelou in a Science and Technology article that publicized his invention of the first professional race-car simulator, which was based on his “in-car-camera” idea. APP-11 (FAC ¶ 47).

In 1993, Mr. Barcelou began developing the computerization of tournament games, where any “game of skill” could accept an entry fee, determine a winner and award an immediate cash prize anywhere in the world. He had the critical idea to add a cash dispensing functionality to his tournament machines, allowing prize money to be dispensed to a winner. As part of this development, Mr. Barcelou spent most of 1993 researching the related automated teller machine industry. APP-12 (FAC ¶ 48).

2. Mr. Barcelou’s idea for Internet-connected automated teller machines

Recognizing the potential profitability of automated teller machines (“ATMs”) and after research yielded no competing product on the market, Mr. Barcelou developed a more functional ATM. APP-12 (FAC ¶ 48-49). In 1994, he completed a prototype. APP-12 (FAC ¶¶ 50). Mr. Barcelou hired a computer scientist to document his ATM and retained an industrial design firm to help create its “look”. This prototype had many advances over then-existing ATMs, most notably because Mr. Barcelou’s could provide a plurality of services over the Internet that were not otherwise available to consumers at that time. APP-12, 13 (FAC ¶¶ 51-52).

Working from his idea for an ATM with Internet functionality, “Mr. Barcelou started filing patents to protect his ideas and started a business to commercialize his inventions. He explored relationships with CoreStates Bank and Hitachi. He began building a management team to build his business. He shipped his prototype ATM to Hitachi for review and sought capital investments.” APP-13 (FAC ¶ 53). Mr. Barcelou

was prepared to launch his ATM in New York City in 2001, but his business plans were disrupted by the aftermath of the 9/11 terrorist attacks. APP-13 (FAC ¶ 54).

In 2005, after ten years of examination in the Patent Office, Mr. Barcelou was granted his first ATM patent, No. 6,945,457 (“Patent 457”), which contains 37 claims. APP-13 (FAC ¶ 55). By 2012, Mr. Barcelou had obtained 12 other ATM related patents, in addition to Patent 457. APP-106 (FAC Exhibit I).

3. Mr. Barcelou and ATL’s enforcement of their patent rights

Having seen his business prospects diminish in the aftermath of 9/11 but observing other companies using his inventions, Mr. Barcelou’s company filed suit against 7-Eleven alleging that its “VCOM” machines infringed upon his patented ATM technology. APP-13 (FAC ¶ 55). In 2012, 7 of the 37 claims within Patent 457 were invalidated: thus, “not all of the claims in the patent were held invalid.” APP-14 (FAC ¶ 57). *See also In re Transaction Holdings Ltd., LLC*, 484 Fed.Appx. 469 (Fed. Cir. 2012) (invalidating claim numbers 1, 2, 3, 5, 9, 10 and 14 within Patent 457).

In 2008, one of Mr. Barcelou’s companies entered into an exclusive licensing agreement with ATL to allow it to offer his patented technologies at reasonable royalty rates. ATL began offering patent licenses and only suing to protect and defend them as necessary. APP-14 (FAC ¶ 56). ATL’s results were mostly successful. In 2011 and 2012, it generated over \$3,000,000 in licensing revenues from approximately two-hundred licensees. APP-15 (FAC ¶ 60).

In 2012, Plaintiffs were investigating the marketplace and learned that the banking industry had begun widely using some aspects of Mr. Barcelou’s technology without licenses. ATL also concluded that other aspects of Mr. Barcelou’s technology, which had not yet been adopted in the banking industry, would be beneficial to end users. Thus, ATL began sending letters to the owners and/or operators of ATMs informing them of its relevant patents and offering a sub-license for use of its technologies. APP-14 (FAC ¶ 59). Specifically, Plaintiffs’ 13 ATM related patents were the basis for ATL’s offers to sub-license its patent portfolio. *See, e.g.,* APP-66.

Some banks agreed to take a license. Others chose to fight in court. Within these approaches a defamatory campaign was initiated by Defendants who branded Plaintiffs as “patent trolls.” APP-15 (FAC ¶¶ 60-62). The result of these statements was the destruction of Plaintiffs’ reputation, business and licensing efforts.

C. Defendants’ defamatory statements and their context

1. CUNA

On September 24, 2013, CUNA published a presentation entitled “Hot Topics in Litigation” to its members. The subject of this presentation was “Patent Trolls.” APP-16, 17 (FAC ¶¶ 69-71). ATL was targeted as a “well known troll.” APP-37.

CUNA’s statement was of fact, not opinion. It defined “patent troll” as “an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention.” APP-32. “Patent trolls buy or license patents from inventors (often failing/bankrupt companies).” *Id.* CUNA then specified that “‘Patent troll’ is a pejorative term” reserved for those who, like ATL, “strong-arm” and “shakedown” small community banks with frivolous demands. APP-32 to 36. CUNA distinguished “patent trolls” from “companies that actually make stuff” and stated that lawsuits from “practicing entities” are “almost unheard of”. APP-32. CUNA then asserted as fact: the “Federal Circuit has invalidated 7 of 13 patents” held by ATL. *Id.*

CUNA’s statements are false. APP-17 (FAC ¶ 71). Mr. Barcelou and ATL are the inventor and original owner of the patents they sought to license. APP-14 (FAC ¶ 58). They did not buy or license patents from other failing or bankrupt companies. *Id.* Mr. Barcelou commercialized his inventions. APP-13 (FAC ¶ 53). The Federal Circuit did not invalidate 7 of Plaintiffs’ 13 ATM related patents. Rather, it invalidated 7 of the 37 claims within Patent 457. Litigation did not impact the remaining 12 patents and they remain valid. As the FAC alleges, the court proceeding “did not affect the vast majority of Mr. Barcelou’s patent portfolio.” APP-14 (FAC ¶ 57).

CUNA’s statements were made to an audience seeking factual information on the intersection between patent law and financial institutions. The branding of Plaintiffs as a

“patent troll” was based on false assertions, such as the “Federal Circuit has invalidated 7 of 13 patents” and other false implications that carried extra meaning and weight in the context of the specific audience targeted. Based on the allegations in the FAC, these falsities were compounded by CUNA’s failure to identify Mr. Barcelou as the actual inventor and original owner of the patents, as well as its failure to disclose to its audience that the “vast majority” of Mr. Barcelou’s patents were intact.

2. ABA

On December 17, 2013, ABA made statements to the Senate, which were later republished elsewhere, regarding “Patent Troll Abuse”. APP-60 (FAC, Exhibit D). ABA described entities known as “PAEs” that “use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country.” APP-62. ABA uses the term PAE interchangeably with the term “patent troll”. APP-63. PAEs, according to the ABA, “take advantage” of community banks and “have amassed significant ‘licensing’ fees from banks literally for the cost of mailing a threatening letter.” *Id.* After laying this factual groundwork, ABA stated ATL is a PAE that has sent abusive demand letters. APP-62, 63. ABA posted these statements to its website, adopted the title “Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse,” placed its logo on the cover and published these statements through the Internet. APP-19 (FAC ¶¶ 75-76).

On April 8, 2014, Rheo Brouillard, the Director, President and Chief Executive Officer of the Savings Institute & Bank, on behalf of the ABA made additional statements to the House of Representatives that were later republished through the Internet on ABA’s website. The ABA stated that ATL is a “patent troll” that “targets” banks. APP-20 (FAC ¶¶ 81-82); APP-98 to 106. ABA claimed to have seen this conduct “first hand” in its interactions with ATL. APP-101. ABA stated that “similar suits” and “claims” “had already been overturned” in other states yet failed to disclose that the vast majority of Mr. Barcelou’s patent portfolio remained intact. APP-101, 102; APP-14 (FAC ¶ 57). ABA stated that ATL used “intimidation to target small businesses”. APP-

101. ABA distinguished ATL from “holders of legitimate patents”. *Id.* ABA claimed that patent trolls, such as ATL, “acquire portfolios of patents for the express purpose of extracting payments from anyone to whom the patent could possibly apply.” *Id.* ABA claimed there is “almost no cost for a patent troll to make a patent infringement claim”. *Id.* ABA did not distinguish ATL from patent trolls which “acquire numerous patents from bankrupt companies for next to nothing.” *Id.* Throughout its statement, ABA used charged language such as “scare targets into paying”; “abusive”; “prey on small businesses”; “intimidation”; “extort”; and “underhanded tactics” imputing criminal-like conduct to Plaintiffs. APP-100, 102 and 103. ABA later published its statements to its website, adopted the title, “Trolling for a Solution: Ending Abusive Patent Demand Letters”, placed its logo on the cover, and published the statements over the Internet. In 2014, ABA also republished its defamatory statements from its December 2013 publications.

Like CUNA’s statements, ABA’s statements of and concerning Plaintiffs are false. APP-19 (FAC ¶ 76); APP-20 (FAC ¶ 82). ATL has licensing agreements with approximately 200 entities including banks and other financial institutions based on its patent portfolio. APP-15 (FAC ¶ 60). Mr. Barcelou and ATL are the inventor and original owner of the patents which they sought to enforce. APP-14 (FAC ¶ 58). ATL’s profits are not generated from the “cost of mailing a threatening letter”, but are the result of significant financial investment and many years of development. APP-62); APP-13 (FAC ¶¶ 52-55); APP-20 (FAC ¶ 82). ATL’s patents are not overbroad, and it maintains a valid patent portfolio exclusive of the few claims that were invalidated in one of its patents. APP-14 (FAC ¶ 57). Plaintiffs did not “acquire portfolios of patents” from anyone for any purpose, let alone “extracting payments from anyone to whom the patent could possibly apply.” APP-101; APP-14 (FAC ¶ 58).

3. Pierce Atwood and Mr. Stier

Mr. Stier is a partner at Pierce Atwood. APP-3 (FAC ¶ 6). On April 3, 2013, Mr. Stier was quoted in an article entitled “Banks fighting ‘patent troll’ can move forward

together,” published on the Internet by bizjournals.com. APP-16 (FAC ¶ 68). Mr. Stier stated: “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). Mr. Stier failed to include that ATL had been offering licenses to financial institutions interested in Mr. Barcelou’s patented technology and that 200 entities had willingly purchased a license from ATL. APP-14 (FAC ¶ 59); APP-15 (FAC ¶ 60).

In 2013 and 2014, Pierce Atwood published on its webpage articles that state ATL is a “patent troll”. APP-19 (FAC ¶ 78); APP-83 (FAC, Exhibit F). In an article entitled “Community Banks and Credit Unions: Don’t pay the ATM patent troll before you read this!”, Pierce Atwood described how it mounted a defense against “a patent troll” in litigation in 2012. APP-83. ATL is the “patent troll” as the article described only one entity -- ATL. *Id.* Pierce Atwood stated that Mr. Stier had over “30 years experience handling patent cases” and uncovered the “disturbing” truth about ATL; that its patents had been “invalidated” and “significantly limited” and there “was no reason to believe that any bank needed a sub-license.” *Id.* The article described ATL’s conduct as a “shakedown”. *Id.* The article was targeted to an audience of potential clients, including bankers who knew “very little about patents” and promoted Pierce Atwood’s knowledge and expertise. *Id.*

Pierce Atwood’s 2013 and 2014 statements are false. APP-21 (FAC ¶ 87). ATL and Barcelou are not patent trolls, and they own valid and enforceable patents. APP-14 (FAC ¶ 57). Contrary to the FAC, Pierce Atwood misrepresented the status of ATL’s patent portfolio. *Id.*

In 2015, Pierce Atwood published on its website another article: “Pierce Atwood Successfully Defends Community Banks and Credit Unions Against Aggressive Licensing Demands From Unscrupulous Patent Troll.” APP-21 (FAC ¶ 84); APP-113 (FAC, Exhibit K). The only entity referenced in the article to which the term “Patent Troll” referred is ATL. APP-113. In the article, Pierce Atwood stated that ATL’s

demand letters claimed “its patented inventions covered every ATM in the country”. *Id.* Pierce Atwood implied additional, special and undisclosed knowledge of ATL’s business strategies, and further stated that “ATL purposely kept license fees low” to entice banks to pay rather than litigate the “spurious” and “questionable” claims. *Id.* The article further stated that “the appellate court with jurisdiction over the patent cases had invalidated the oldest and broadest of these patents”. *Id.* It concluded that there was “no reason to believe that any bank needed a sub-license.” *Id.*

When promoting his specialized services and knowledge to an audience of bankers, Mr. Stier called ATL an “unscrupulous patent troll” harassing banks and seeking to enforce invalid patents. APP-114. These statements are false. APP-21 (FAC ¶ 85). For instance, the Federal Circuit did not invalidate Patent 457. Rather, it invalidated 7 of the 37 claims within Patent 457. ATL’s demand letters did not claim that it held patents to cover every ATM in the country. APP-65; APP-105. Certain of ATL’s patents are valid. They are not “questionable” or “spurious”. APP-14 (FAC ¶ 57). ATL received payment in exchange for the license of its valid patent portfolio from 200 banks. APP-15 (FAC ¶ 60).

IV. SUMMARY OF THE ARGUMENT

The trial court held that “a common ground for dismissal [] is that the statements attributed to [Defendants] cannot be construed as defamatory because they are protected expressions of opinion or do not otherwise qualify as statements of fact.” ADD-1 (Order, pp. 1-2). The trial court’s ruling was premature.

With this limited analysis in place, the trial court incorrectly held Defendants’ statements are protected because “[a] statement of opinion is not actionable unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion.” ADD-5 (Order, pp. 5-6: citing *Thomas v. Tel. Publ’g Co.*, 155 N.H. 314, 338 (2007) and *Nash v. Keene Publ’g Corp.*, 127 N.H. 214, 219 (1985)). Alternatively, the trial court held that “[e]ven if the plaintiffs didn’t implicitly accept the defendants’ factual underpinning for the term ‘patent troll,’ the facts on which the characterization is

based are evident from the context and the complaint doesn't include an allegation that those facts are false." ADD-16 (Order, pp. 15-16).

The trial court erred. *See, e.g., Nash*, 127 N.H. at 219-220 (stating "[i]f an average reader could reasonably understand a statement as actionably factual, then there is an issue for a jury's determination" and holding that "it was error to find that the letter must be read as a non-actionable expression of opinion."). Just like *Nash*, Defendants' statements "can obviously be read as stating facts" including "a series of statements that were ostensibly factual and defamatory." *Id.* at 220. *Nash* held, just as this Court should hold, that "[w]hether readers actually did understand the statements as factual is, of course, not a matter that is before us. But it is clear that the trial court erred in determining that readers could not understand them as factual. In effect, the trial court's ruling resolved an issue that is properly for the consideration of a jury." *Id.*

At this stage of the proceeding, "patent troll" cannot be determined to be constitutionally protected opinion as the facts supporting Defendants' statement are alleged to be false and/or incomplete. A "patent troll" is capable of being proven false because it is a term with a commonly accepted definition. Certain Defendants provided their audience with a definition within the context of their statements, incorporating elements that are capable of being proven false. Plaintiffs have alleged the falsity of facts disclosed and the negative implication of undisclosed facts. The term "patent troll" is unquestionably pejorative, particularly when preceded with the adjective "unscrupulous". Its use lowered Plaintiffs' reputation in the eyes of Defendants' targeted audiences.

V. ARGUMENT

Defamation law is not merely a restraint on speech. It is an important safeguard of reputation. In this case, the Court must resolve the tension between Defendants' speech and Plaintiffs' right to seek redress for attacks upon their reputation.

Courts distinguish between actionable and protected speech by examining the statements at issue including their substance, context and audience. Defendants cannot avoid liability for false statements and implications on the basis that they are cast as

expressions of opinion or rhetorical hyperbole. A statement that contains a “provably false factual connotation” is actionable. *WJLA-TV v. Levin*, 564 S.E.2d 383, 392 (Va. 2002); *Hatfill v. N.Y. Times Co.*, 416 F.3d 320, 331 (4th Cir. 2005) (“A defamatory charge may be made expressly or by inference, implication, or insinuation.” (internal quotations and citation omitted)); *Carwile v. Richmond Newspapers*, 82 S.E.2d 588, 592 (Va. 1954) (“[I]t matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory.”). Opinion is not a defense, in and of itself, particularly where “expressions of ‘opinion’ may often imply an assertion of objective fact.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990).

A. The trial court’s Order wrongly dismissed Plaintiffs’ defamation claims

This Court reviews the trial court’s Order granting Defendants’ motions to dismiss *de novo*. See *Kukesh v. Mutrie*, 168 N.H. 76, 81 (2015). Plaintiffs’ allegations are assumed true and all reasonable inferences are construed in their favor. See *Sanguedolce v. Wolfe*, 164 N.H. 644, 645 (2013). The standard “is whether the allegations in the plaintiff’s pleadings are reasonably susceptible of a construction that would permit recovery.” *Id.* For a defamation claim, “the issue at this early, pre-answer stage of the litigation is whether plaintiff’s pleadings sufficiently allege false, defamatory statements of fact rather than mere nonactionable statements of opinion.” *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 149 (1993).

The trial court recognized that “the complaint cited each defendant [], as referring to [Plaintiffs] as ‘patent trolls,’ directly or indirectly.” ADD-15 (Order, p. 15). The issue for *de novo* review is whether Defendants’ statements are actionable.

The test for determining whether a statement implies a factual assertion is to evaluate the totality of the circumstances in which it was made.

First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next, we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that

particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995) (applying the appropriate standard to disparate facts and concluding that the statements in that case were not actionable). Whether a statement is actionable must be determined in context. *Sprague v. Am. Bar Ass'n*, 276 F. Supp. 2d 365, 367, 369-75 (E.D. Pa. 2001) (holding that statement that the plaintiff was a “lawyer-cum-fixer” in an ABA Journal article must be treated as lawyers would understand it and whether it was defamatory was a question of fact for the trier of fact); *Rudin v. Dow Jones & Co.*, 510 F. Supp. 210, 215-16 (S.D.N.Y. 1981) (statement that lawyer was a client’s “mouthpiece” when addressed to the financial community was to be interpreted as members of the financial community would understand it and whether it was defamatory is a question for the trier of fact at the motion to dismiss stage).

The dispositive inquiry here, then, is whether the reasonable audience to **which Defendants’ statements were made** (*i.e.*, bankers) would understand them as conveying defamatory facts about Plaintiffs. Where an alleged defamatory statement is prefaced or otherwise surrounded by a compilation of factual statements, there exists an implication to the audience that the defamatory statement is not an opinion, but a fact. *See Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 152 (2d Cir. 2000) (holding that a statement published in a guide for lawyers and other professionals that “[a]t least one [person involved in such suits] has described [the defendant] as an ‘ambulance chaser’ with interest only in ‘slam dunk cases,’” to be an actionable statement of fact). *Flamm* explained that “[e]xaggerated rhetoric may be commonplace in labor disputes, but a reasonable reader would not expect similar hyperbole in a straightforward directory of attorneys and other professionals. Indeed, the opposite is true.” *Id.* Further, “it would not be unreasonable for a reader to believe that the [defendant] would not have printed such a statement without some factual basis and to conclude that the statement did indeed state facts about [the plaintiff].” *Id.* *See also Thomas*, 155 N.H. at 338-339 (explaining that a “statement of opinion is not actionable unless it may reasonably be understood to

imply the existence of defamatory fact as the basis for the opinion. Whether a given statement can be read as being or implying an actionable statement of fact is a question of law to be determined by the trial court in the first instance, considering the context of the publication as a whole. If an average reader could reasonably understand a statement as actionably factual, then there is an issue for a jury's determination and summary judgment must be denied."²

Defendants' statements were made to specific audiences. Recommendations were given based on expert advice. Their statements were made by speakers with specialized knowledge based on their own investigations and were surrounded by factual recitations, giving their statements an authoritative heft. Exaggerated rhetoric is not expected at these kinds of presentations. Dispassionate factual discourse is the expected currency.

1. The dismissal of Plaintiffs' claims against CUNA was wrongly decided

a. The context of CUNA's statements is actionable

Context is critical to evaluating whether a statement is actionable or protected. *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248-49 (1st Cir. 2000) ("Whether calling something a 'fake' is or is not protected opinion depends very much on what is meant and therefore the context."); *Gross*, 82 N.Y.2d at 155-56 (holding that references to a medical examiner as "corrupt" in the context of the published articles was not "mere rhetorical flourish" and explaining that "'John is a thief' is actionable when considered in its applicable context, the statement 'I believe John is a thief' would be equally actionable when placed in precisely the same context." But the statement, "'John is a thief' could well be treated as an expression of opinion or rhetorical hyperbole where it is accompanied by other statements, such as 'John stole my heart,' that, taken in context, convey to the reasonable reader that something other than an objective fact is being

² In *Thomas*, a newspaper published an article about the plaintiff's alleged crime spree containing both analysis from a criminal justice professor and statements from the police officers involved. The Court held that the statements of the professor were opinion based on hypothetical facts, not on alleged undisclosed facts. *Thomas*, 155 N.H. at 339. But the police statements in the article, including that the plaintiff had been "suspected in hundreds of burglaries," and that he had "been good, but now he's getting sloppy," although arguably opinions, were nonetheless actionable because "they [were] clearly based upon undisclosed facts resulting from unspecified investigations." *Id.*, appx. at ¶ 61.

asserted.”); *Garrett v. Tandy Corp.*, 295 F.3d 94, 104 (1st Cir. 2002) (“Context makes the difference – and by ‘context’ we mean such factors as the identity of the speaker, the identity of the audience, the circumstances in which the statement is made, and what else is said in the course of the conversation, and a myriad of other considerations.”).

On September 24, 2013, CUNA made its defamatory statements during a meeting of its members and general counsel. APP-16 (FAC ¶ 69); APP-28. The presentation was an informational meeting where ATL was identified as a “Well Known Troll[]”. APP-37. The gist and sting of the session was to advise CUNA’s members not to do business with ATL -- literally advising against “[f]eeding the troll”. APP-39. *Cf. Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1073 (5th Cir. 1987) (“In determining whether the gist and sting of a story is true, the court must view the story through the eyes of the average reader or member of the audience.”).

CUNA identified the issues for discussion: patents and the potential exposure credit unions may have to patent litigation. APP-31. It then defined “patent troll” in precise factual terms capable of being proven false. APP-32. After defining patent troll, CUNA stated ATL is a “Well Known Troll[]”. APP-37. CUNA’s presentation raised and factually answered such questions as: “How does a patent troll make money?” APP-33. CUNA’s answer is factual: “Infringement Litigation” and “Demand Letters”. *Id.* CUNA’s presentation concludes with what its members “Should Do” and “How To Fight Back” against these “trolls”. APP-38 to 42.

CUNA’s audience provides the context for its statements. Its membership is comprised of credit unions and other small financial institutions with limited knowledge and contact with intellectual property law or patents. APP-72 (FAC, Exhibit E). CUNA’s speaker was its Assistant General Counsel. From its presentation, the audience would reasonably understand ATL to be a “patent troll” peddling false wares. APP-29. The trial court erred as a matter of law because CUNA’s statements, when examined in context, “can obviously be read as stating facts”. *See Nash*, 155 N.H. at 220 (“it is clear that the trial court erred in determining that readers could not understand them as factual.

In effect, the trial court's ruling resolved an issue that is properly for the consideration of the jury.").

b. CUNA's statements are not protected opinion

The trial court wrongly held that because CUNA provided a recitation of facts to support its assertion that ATL is a "patent troll," its statements are protected opinion. This is not the law. *Cf. Milkovich*, 497 U.S. at 18-19 ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if the assessment of them is erroneous, the statement may still imply a false assertion of fact."). There is no wholesale exception for all statements that can be labeled opinion. *Gast v. Brittain*, 277 Ga. 340, 341 (2003) ("An opinion can constitute actionable defamation if the opinion can reasonably be interpreted, according to the context of the entire writing in which the opinion appears, to state or imply defamatory facts about the plaintiff that are capable of being proved false."); *Gross*, 82 N.Y.2d at 155 ("In all cases ... the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts, to determine whether the reasonable listener or reader is likely to understand the remark as an assertion of provable fact."). "[A]n opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, is a 'mixed opinion' and is actionable." *Davis v. Boenheim*, 24 N.Y.3d 262, 267, 269 (2014) (explaining what "differentiates an actionable mixed opinion from a privileged, pure opinion is 'the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person' being discussed.").

When Plaintiffs' allegations are accepted and construed favorably, as they must, CUNA's statement that Plaintiffs are "patent trolls" is not protected. Its statement that ATL is a patent troll is similar to the actionable statements in *Gross*. There, the New York Times published a series of investigative articles regarding the conduct of a medical examiner, concluding that he was "corrupt." *Gross*, 82 N.Y.2d at 155. The New York Court of Appeals, relying on the framework in *Milkovich*, determined that the plaintiff's

complaint was improperly dismissed at the pre-answer stage because the statement was not “a mere rhetorical flourish or the speculative accusation of an angry but ill-informed citizen made during the course of a heated debate,” but rather “made in the course of a lengthy, copiously documented newspaper series that was written only after what purported to be a thorough investigation.” *Id.* at 155-56. In the same way, CUNA’s statements to its audience gave the listener cause to be “less skeptical and more willing to conclude that the articles contained assertions or implication of fact.” *Id.*

CUNA’s statement that ATL is a patent troll was made in the context of a presentation by its counsel for “Special Projects” that contained 13 slides, containing mostly factual assertions. APP-29. CUNA’s audience would have readily accepted as true its statements about ATL because it would expect that the legal advice given by its counsel to be based on a detailed factual investigation, allowing them to be less skeptical of the statements and more willing to accept the content as factual.

In *Flamm*, the Second Circuit reversed the dismissal of a claim based upon statements made by a professional organization that plaintiff was an “ambulance chaser” surrounded by other statements of fact, which, when understood in the context of the audience they were addressed to, were actionable. *Flamm*, 201 F.3d at 152. As in *Flamm*, the audience receiving CUNA’s statements regarding ATL and its business practices would reasonably understand the conclusion that ATL is a patent troll to be a statement of fact rather than opinion.

c. Plaintiffs alleged that CUNA’s statements are false

When an “opinion” is based on facts that are incorrect or incomplete, it may be actionable. *Milkovich*, 497 U.S. at 18-19. In the context of *de novo* review, this Court needs only to determine whether Plaintiffs have plead sufficient facts (which are assumed true and construed favorably) to put at issue CUNA’s statement that ATL is a patent troll as being either incorrect or incomplete. *See id.* (“Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”).

See also Rodriguez v. Panayiotou, 314 F.3d 979, 986 (9th Cir. 2002) (explaining that “statements including provably false factual assertions which are made or implied in the context of an opinion are not absolutely protected from defamation liability under the First Amendment” before reversing the trial court’s dismissal of defamation claims for failure to state a claim).

The trial court erred when it found that Plaintiffs did not allege CUNA’s statement that ATL was a patent troll, or the facts underlying that statement, were false. ADD-16 (Order, p. 16). Plaintiffs alleged both that the express use of the term “patent troll” as well as the disclosed and implied foundation for that statement are false. *See, e.g.*, APP-10, 12, 13, 14 and 17 (FAC ¶¶ 43, 50, 53, 57, 58 and 71).

Plaintiffs have pleaded that CUNA’s representation that ATL is a “patent troll” is false and based on incorrect and/or incomplete assertions of fact. For instance, CUNA stated that a patent troll is distinguishable from a company which actually creates and markets a product. APP-32. CUNA based its statement that ATL is a patent troll on ATL’s failure to “make stuff”. In doing so, CUNA misrepresents Plaintiffs’ manufacturing history and the fact that Mr. Barcelou developed and marketed products based on his patented technology. APP-13 (FAC ¶ 53). CUNA also stated that the “Federal Circuit has invalidated 7 of 13 patents” belonging to Plaintiffs. APP-37. This is false. *See In re Transaction Holdings*, 484 Fed.Appx. 469.

d. CUNA’s statements are capable of being proven false

The trial court further erred in holding that “patent troll” is incapable of definition and thus incapable of being proven false. ADD-17 (Order, pp. 17-18). CUNA provided a clear definition of “patent troll” stating that it is commonly understood to include three elements: (1) use of litigation as a primary business model with no intention to market or produce a product; (2) attempted enforcement of invalid and spurious patent rights; and (3) purchase of those rights from the original inventor. *See also, e.g. Highmark, Inc. v. Allcare Health Mgmt. Sys. Inc.*, 706 F.Supp.2d 713, 727 n.5 (N.D. Tex. 2014) (“‘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 on upon the patents in question’ ... the term ‘patent troll’ [has a] negative connotation.”) (vacated and remanded on unrelated grounds).

The critical issue is not what a law professor may think but what would CUNA’s audience reasonably conclude based on its presentation that ATL is “an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention”; that ATL’s patents were purchased from a “failing/bankrupt company”; and that Plaintiffs do not “actually make stuff.” Or that 7 of Plaintiffs’ 13 patents were invalidated by the Federal Court of Appeals. Each of these factual predicates are alleged to be false. When the allegations in the FAC are accepted and all reasonable inferences drawn in Plaintiffs’ favor, it is clear that CUNA’s statements, underlying and undisclosed facts and implications are actionable.

e. The trial court erred in concluding the term “patent troll” is not pejorative

A statement is defamatory if it tends to lower the plaintiff’s reputation in the eyes of **any** substantial and respectable group, even if that group is a small minority. *Thomson v. Cash*, 119 N.H. 371, 373 (1979). The alleged defamatory meaning must be analyzed as reasonably understood by the audience to whom the language was directed.

CUNA’s statements must be examined in the context of how “patent troll” would have been reasonably understood by the audiences it was directed to, particularly the banking community. *Veilleux v. Nat’l Broadcasting Co.*, 206 F.3d 92, 108 (1st Cir. 2000). Within this community, “patent troll” is a widely accepted and objectively understood pejorative term.³ Pointedly, CUNA’s target audience would have understood “patent troll” to be pejorative because CUNA said so. APP-32 (“‘Patent troll’ is a pejorative term”). These pejorative definitions and understandings are consistent with the body of authorities on the subject. Being labelled a “patent troll” is sufficiently prejudicial that litigants routinely move for the prohibition of its use. APP-20, 85 (FAC ¶

³ See, e.g., Kris Frieswick, *The Real Toll of Patent Trolls*, Inc. Magazine, (Feb. 14, 2013), <https://www.inc.com/magazine/201202/kris-frieswick/patent-troll-toll-on-businesses.html> (“Troll is a derogatory term for the most aggressive types of [Non-Practicing Entities].”).

78 and Exhibit G). Such motions are routinely granted. *See, e.g., Parthenon Unified Memory Architecture LLC v. Apple, Inc.*, No. 15-cv-621, 2016 WL 7743510, *1 (E.D. TX Sept. 21, 2016) (holding that “pejorative terms such as ‘patent troll’ ... [and] ‘shakedown’” are excluded from use during argument); *Carucel Investments, L.P. v. Novatel Wireless, Inc.*, No. 16-cv-118, 2017 WL 1215838, *14 (S.D. Cal. Apr. 3, 2017) (“Plaintiff moves to preclude Defendants from using derogatory or misleading characterizations ... including ... ‘patent troll’ ... Defendants state they agree not to use derogatory terms, such as ‘patent troll’ ...”).

Despite the overwhelming weight of authority that the term “patent troll” is pejorative, the trial court held that the term does not necessarily carry a pejorative meaning based on two academic articles that define it “more neutrally.” ADD-18 (Order, pp. 18-19).⁴ In so holding, the trial court created and relied upon a false equivalence between two academic articles, on one hand, and the overwhelming weight of authority, industry knowledge, common sense and actual use, on the other hand. CUNA’s audience was advised against “feeding the troll” and to “fight back.” On a motion to dismiss, the statement is clearly defamatory. The very purpose of the presentation was to tarnish Plaintiffs’ reputations and to dissuade CUNA’s audience from doing business with them.

f. CUNA’s use of the term “patent troll” is not rhetorical hyperbole

The trial court’s holding that “to call one a ‘patent troll’ ... is [also] protected as ‘mere rhetorical hyperbole’” is wrong for the reasons above and because that term’s use in context carries an understood, defined and pejorative meaning. Just as it failed to consider the full context of Defendants’ statements when interpreting them as opinion, so too did the trial court fail to consider the context of those statements and the reasonable understanding of the audiences when determining that the term “patent troll” was used as “loose, figurative language, hyperbole and epithet.” ADD-19 (Order, pp. 19-20).

⁴ Both articles relied on by the trial court recognize the pejorative meaning of “patent troll.” Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?* 83 TEX. L. REV. 961, 1023 (2005) (describing patent trolls as a “problem”); John R. Allison, Mark A. Lemley & David L. Schwarz, *How Often Do Non-Practicing Entities Win Patent Suits?* 32 BERKELEY TECH. LAW J. 237, 242 (2018) (describing “patent troll” as a pejorative).

The context of CUNA's use of the term "patent troll" with its accompanying false statements, implications and undisclosed facts cannot find safety in rhetorical hyperbole because its use was not loose or figurative nor was it an epithet. By way of comparison, CUNA's use of a cartoon troll, standing alone, might be protected as rhetorical hyperbole. *See* APP-17 (FAC ¶ 70). But Plaintiffs' claim is not that CUNA used a cartoon troll to state or imply that they are actual trolls, *inter alia*, because everyone knows that trolls do not exist. Thus, Defendants' publication of the cartoon troll, without more, might be rhetorical hyperbole. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding a plaintiff could not recover against a defendant that published a parody without showing in addition that the publication contained false statements of fact).

But there is much more, including that CUNA's publications contained false and/or undisclosed facts and implications that its audience would have understood and been led to believe. *See Morrissette v. Cowette*, 122 N.H. 731, 734 (1982) (explaining "We must take into consideration 'all the circumstances in which the words were written, their context, [and] the meaning which could reasonably be given to them by the readers. ...'" while holding that the challenged language was protected under circumstances not present in this case). Context remains key. While certain contexts may alert an audience that a statement contains hyperbole, other contexts (like the ones here) create a reasonable presumption that the statements are or imply facts. *See Morrissette*, 122 N.H. at 734 (holding that hyperbolic speech "predictably accompanies political endorsements" as compared to other contexts).

Plaintiffs' claims are based upon the fact that the term "patent troll" has a commonly accepted meaning that does not apply to them. CUNA's statements are dissimilar to the political flyer in *Morrissette*. CUNA's statements were not made in a context where the audience "could only reasonably conclude" that the purpose was not to defame the Plaintiffs. Rather, the context of CUNA's presentation is more like the statements in *Thomas*. There, defamatory statements regarding a plaintiff's criminal activity were published in the context of "objective reporting". 155 N.H. at 340.

Although the *Thomas* defendants tried to analogize their statements with statements made in a “clearly opinionative” letter, the Supreme Court held there is a material difference between statements presented as an “objective reporting of the plaintiff’s alleged ... criminal activities” and statements that due to their “unique nature and tenor” are “hyperbole” or a “call to action”. *Thomas*, 155 N.H. at 340.

CUNA’s statements were presented to an audience in the context of an objective presentation on the intersection between intellectual property and the banking industry. APP-28. CUNA used language like its reference to “Well Known Trolls” and false statements like as 7 of Plaintiffs’ 13 patents being invalid to reinforce these understandings. CUNA’s audience would have reasonably understood its statements about Plaintiffs to be factual and/or based on undisclosed facts that support the statement and thus actionable.

2. The dismissal of Plaintiffs’ claims against ABA was wrongly decided

a. The context of ABA’s 2013 statements is actionable

The context of the statements made by ABA in 2013 support a finding that the statements are assertions of fact. For instance, ABA’s December 2013 statement on the topic of “Patent Troll Abuse,” which was republished outside of a legislative context, sought to limit the conduct of “patent trolls”. APP-61. This context implies the factual and defined content of the ABA’s statement because legislation cannot address an issue that cannot be defined.

ABA begins by defining entities known as “Patent Assertion Entities” as entities that “use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country.” APP-62. The term is then used interchangeably with the term “patent troll”. APP-63. ABA then identified ATL as a PAE. The implication is that ATL is a patent troll entity that uses overly broad patents to extort payments from others. APP-62.

b. The context of ABA's 2014 statements is actionable

On April 8, 2014, ABA made defamatory statements about ATL, claiming that ATL is a “patent troll” that targets banks. APP-20 (FAC ¶¶ 81-82). The statements to the House of Representatives, which were later published on the ABA’s website, were presented as a series of factual assertions regarding ATL’s extortionist business practices. APP-100 (FAC, Exhibit I). Legislation is to be based on facts and not hyperbole. The statement began by defining “PAEs” and “patent trolls” interchangeably to describe entities that “use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country.” APP-100. ABA then elaborated, describing the low cost of entry for entities like ATL that make claims for patent infringement “for nothing more than the price of a postage stamp and the paper the claim is written on.” *Id.*

ABA made no effort to distinguish between ATL, on one hand, and other PAEs, on the other hand, that do “acquire portfolios of patents for the express purpose of extracting payments” from other entities and use “overly broad patents”. The audience would reasonably understand ABA’s statements to mean that all the factual allegations regarding PAEs and/or trolls applied to ATL, as it directly references ATL in the article.

c. ABA's statements are not protected opinion

ABA’s statements regarding ATL are not constitutionally protected opinion as they are based on facts that are incorrect or incomplete or leave untrue implications to be made or all of the above. *A. S. Abell Co. v. Kirby*, 227 Md. 267, 274 (1961) (“the imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact and as such not within the defense of fair comment.”).

ABA represents that ATL “had already had its claims overturned in another state”, implying that ATL’s patent infringement claims in their entirety are invalid as they are on “shaky legal standing”. This statement implies that an investigation had been undertaken that supports these factual claims – the facts of the investigation are not disclosed. APP-

101-103. Additionally, ABA references ATL's patent portfolio by placing the words in quotes: *i.e.*, "This firm purported that it held a 'patent portfolio' which covers the manner in which ATMs communicate over the internet.". *Id.* The use of quotes surrounding the term "patent portfolio" imputes a false quality to ATL's patent portfolio.

ABA describes patent trolls as entities "that acquire portfolios of patents for the express purpose of extracting payments from anyone whom the patent could possibly apply" and that the troll acquires its patents "from bankrupt companies for next to nothing". APP-102. ABA's repeated use of such emotionally-charged words as "abusive", "extort", "threatening", "intimidation", "perpetrator" and its limited description of its interaction with ATL adds further weight to the statements being actionable as the descriptors are based on facts that are false, incomplete and the implications are inaccurate.

d. Plaintiffs alleged that ABA's statements are false

The trial court erred when it held that Plaintiffs did not allege ABA's statements were false. ADD-16 (Order, p. 16). The FAC alleges the ABA's statement that ATL is a patent troll is false. APP-19 (FAC ¶ 76). The FAC also challenges ABA's statement that ATL's patents are overly broad because it states that the "vast majority" of its patent portfolio remained unaffected by adverse decisions in other matters. APP-14 (FAC ¶ 57). Plaintiffs expressly denied ABA's claim that its patent claims were based on the cost of a postage stamp due to the actual cost of research and development. APP-20 (FAC ¶ 82). Plaintiffs also alleged that it did not purchase patents from failing companies. APP-14 (FAC ¶ 58). Plaintiffs are the original owners of the valid patents upon which their licensing demands were based. APP-14 (FAC ¶¶ 57, 58).

e. ABA's statements are capable of being proven false

For the reasons above, ABA's statements including its use of the term "patent troll" is capable of being proven false.

f. ABA's statements about Plaintiffs are pejorative

Throughout its statements, ABA references the manner that trolls "take advantage", "extort payments", "use underhanded tactics", "intimidate businesses", "scare targets into paying," "prey" on others, "target" smaller institutions, and "drain the U.S. economy". APP-100 to 103. These are not neutral words. In context, they are words designed to lower Plaintiffs' esteem before a targeted audience and encourage banks not to do business with ATL.

g. ABA's use of the term "patent troll" is not rhetorical hyperbole

For the reasons above, ABA's statements including its use of the term "patent troll" do not constitute rhetorical hyperbole.

3. The dismissal of Plaintiffs' claims against Pierce Atwood and Mr. Stier was wrongly decided

a. The context of Pierce Atwood and Mr. Stier's statements is actionable

Pierce Atwood and Mr. Stier published their defamatory statements on their professional website. The statements were presented in a series of articles concerning ATL and promoting Pierce Atwood's services to the banking industry, an audience that knew "very little about patents". APP-83. The articles carried the titles of: "Community Banks and Credit Unions: Don't pay the ATM patent troll before you read this!" and "Pierce Atwood Successfully Defends Community Banks and Credit Unions Against Aggressive Licensing Demands From Unscrupulous Patent Troll". *Id.*; APP-112; APP-116 (FAC, Exhibit L). ATL is the target of the articles. APP-83; APP-113. The articles are authoritative in purpose and purport to be factually based.

Within each article are statements of fact intended to support the conclusion that ATL is an "unscrupulous patent troll". The articles state that ATL had its patents "invalidated", that there was no reason to believe that any bank needed a sub-license for the use of ATL's technology and that ATL's demands were a "classic shakedown". APP-83. The statements are factually buttressed by Mr. Stier's expertise as an attorney with "more than 30 years' experience handling patent cases" and implied special,

undisclosed knowledge about ATL's patent portfolio, or, more importantly, the lack thereof. *Id.*; APP-113. The article touts Mr. Stier's investigation and study of ATL's patents in support of his assertion that ATL was an "unscrupulous patent troll." APP-114. There is no language to alert the audience that the statements contained within the article are expressions of opinion.

b. Pierce Atwood and Mr. Stier's statements are not protected opinion

The trial court erred in concluding that Pierce Atwood and Mr. Stier's statements are constitutionally protected opinion because their articles contained statements of fact which were incomplete and/or untrue. The articles premise their conclusion that ATL is a patent troll on the following facts: (1) a court "invalidated (ATL's) oldest and broadest patent; (2) "the scope of other patents had been significantly limited by court rulings"; (3) there was no reason to believe that any bank needed a sub-license; (4) ATL claimed "its patented inventions covered every ATM in the country"; (5) ATL "purposely kept license fees low" and (6) ATL's conduct was a "shakedown" and it was continuing. APP-113.

Similar to the statements of CUNA and ABA, Plaintiffs allege facts that put these assertions in issue. APP-14, 15, 21 and 22 (FAC ¶¶ 57, 60 and 87). The essence of the articles is that ATL's patents are not enforceable and if you receive a "threat letter" call call Pierce Atwood. It is directed to the banking community, seeking clients. APP-83. The FAC disputes this claim and alleges that the "vast majority of Mr. Barcelou's patent portfolio" was not affected by the court's ruling and that the patents are enforceable. APP-14 (FAC ¶¶ 57, 58). As the allegations in the FAC are "reasonably susceptible to a construction that would permit recovery", this dispute cannot be resolved on a motion to dismiss.

Additionally, the statements in the articles that form the conclusion that ATL is a patent troll and its patents invalid inferring the existence of undisclosed facts. For instance, by claiming that ATL "purposely" kept licensing fees low or that no sub-license fee was needed, Pierce Atwood implies it has a special knowledge of ATL's business strategy and the law, leading the target audience to conclude that ATL knew its claims

were without merit and that it intentionally set its licensing fees below the legal fees to be incurred in defending a potential suit. APP-113. These statements implied, contrary to the allegations in the FAC, that the entirety of Plaintiffs' patent portfolio was invalid and not enforceable. *Milkovich*, 497 U.S. at 18 ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."). The implication of the undisclosed facts is the assertion that ALT's patent claims are without merit and there is no legal basis to pay the sub-licensing fees. Like the policeman in *Thomas*, the statements are not privileged because they are based on undisclosed facts resulting from Mr. Stier's investigation. The actionability of these statements cannot be determined on a motion to dismiss in light of Plaintiffs' allegations in their FAC.

c. Plaintiffs alleged that Pierce Atwood and Mr. Stier's statements are false

The trial court erred when it found that Plaintiffs did not allege that Mr. Stier and Pierce Atwood's statements regarding ATL were false. ADD-16 (Order, p. 16). Plaintiffs specifically denied that ATL is a patent troll. APP-21 (FAC ¶ 84). Plaintiffs affirmatively pleaded that ATL had a valid patent portfolio. APP-14 (FAC ¶ 57). Plaintiffs pleaded that payments from over 200 entities were made in exchange for licensing privileges. APP-15 (FAC ¶ 60).

d. Pierce Atwood and Mr. Stier's statements are capable of being proven false

For the reasons above, Pierce Atwood and Mr. Stier's statements including its use of the term "unscrupulous patent troll" is capable of being proven false.

e. Pierce Atwood and Mr. Stier's statements about Plaintiffs are pejorative

Mr. Stier described ATL as an "unscrupulous patent troll". In labeling ATL in this manner, the Defendants were seeking to have banks hire them to litigate against ATL's

false claims and thwart its “shakedown”. This clearly had the effect to reduce Plaintiffs’ reputation before the targeted audience.

f. Pierce Atwood and Mr. Stier’s use of the term “patent troll” is not rhetorical hyperbole

For the reasons above, Pierce Atwood and Mr. Stier’s statements including its use of the term “patent troll” do not constitute rhetorical hyperbole.

B. The trial court’s Order wrongly dismissed Plaintiffs’ Consumer Protection claims

The trial court wrongly held that “since the challenged misrepresentations are not factual, the Consumer Protection Act claim in Count II is dismissed as well.” ADD-21 (Order, p. 21). The trial court’s reasoning and holding is wrong because, as described above, Defendants’ statements about Plaintiffs are factual and thus actionable under RSA 358-A:2. Accordingly, the trial court’s dismissal of the Plaintiffs’ Consumer Protection claims, based on that analysis, must be reversed.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this honorable Court reverse the trial court’s Order granting Defendants’ motion to dismiss for failure to state a claim and remand for further proceedings in accordance therewith.

VII. REQUEST FOR ORAL ARGUMENT

Oral argument is requested.

VIII. CERTIFICATION OF COMPLIANCE

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

Respectfully submitted on behalf of
Plaintiffs/Appellants,

DAVID BARCELOU and
AUTOMATED TRANSACTIONS, LLC

By their Attorneys,

SHAHEEN & GORDON, P.A.

Dated: August 16, 2018



Steven M. Gordon, NH Bar # 964
Timothy J. McLaughlin, NH Bar # 19570
Stephanie K. Annunziata, NH Bar # 265298
107 Storrs Street
P.O. Box 2703
Concord, NH 03302-2703
Telephone: (603) 225-7262
Facsimile: (603) 225-5112
sgordon@shaheengordon.com
tmclaughlin@shaheengordon.com
sannunziata@shaheengordon.com

ADDENDUM

The State of New Hampshire

SULLIVAN, SS.

SUPERIOR COURT

No. 220-2016-CV-00133

AUTOMATED TRANSACTIONS, LLC and DAVID BARCELOU

v.

AMERICAN BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, INC., ROBERT H. STIER, JR., PIERCE ATWOOD LLP, CHARLES VON SIMSON, W. JOHN FUNK, GALLAGHER, CALLAHAN & GARTRELL, P.C., RALPH E. JOCKE, WALKER & JOCKE CO., LPA, MASCOMA SAVINGS BANK, and STEPHEN F. CHRISTY

ORDER ON MOTIONS TO DISMISS

Plaintiffs Automated Transactions, LLC ("ATL") and David Barcelou sued the defendants named above for both defamation and New Hampshire Consumer Protection Act violations. The plaintiffs contend that in an effort "to exclude others from making, using, and selling patented inventions that they wanted only for themselves," the defendants embarked on a campaign to publicly "denigrate the property rights of . . . patent owner[s] and holder[s]." (Amended Complaint, ¶ 40.) Defendants American Bankers Association, Credit Union National Association, Inc., Robert H. Stier, Jr., Pierce Atwood LLP, W. John Funk, and Gallagher, Callahan & Gartrell, move to dismiss the complaint, while Mascoma Savings Bank and Stephen F. Christy seek summary judgment. A common ground for dismissal or for summary judgment is that the statements attributed to them cannot be construed as defamatory because they are protected expressions of

opinion or do not otherwise qualify as statements of fact. They contend as well that because the Consumer Protection Act claim is based on statements about the plaintiffs that are not assertions of fact, it should be dismissed as well.

Background

The following facts are taken from the plaintiffs' first amended complaint. ATL is a limited liability company incorporated in Delaware and headquartered in New Hampshire. (Amended Compl. ¶ 2). David Barcelou is a recognized inventor and ATL's founding CEO and manager. *Id.* at ¶¶ 3, 42. He has been a New Hampshire resident since 2011. *Id.* at ¶ 3.

After achieving success with various inventions in the 1980's, Mr. Barcelou began working in 1993 toward "automating tournaments." *Id.* at ¶ 48. He hoped to develop a system "where any 'game of skill' could automatically accept an entry fee, administrate a winner, and award the winner an immediate cash prize, anywhere in the world." *Id.* Mr. Barcelou began his development process by researching the ATM industry for most of 1993. *Id.* In 1994 he created a prototype of an "Automated Tournament Machine." *Id.* at ¶ 50. He hired a computer scientist and an industrial design firm to document his new invention. *Id.* at ¶ 51. Subsequently, he built more prototypes of the "Automated Tournament Machine," and developed many advances over existing ATMs. *Id.* at ¶ 52. He filed patent applications to protect the commercial viability of these advances, *id.* at ¶ 53, and started exploring relationships with CoreStates Bank and Hitachi, assembling a management team, and seeking capital investments. *Id.*

Mr. Barcelou's efforts to commercialize his ideas in the late 1990's and early 2000's proved unsuccessful, but he received a consolation prize in 2005 when the United States Patent Office granted him his first ATM-related patent. *Id.* at ¶¶ 54-55. A short time later, he sued 7-Eleven alleging that the corporation's "VCOM" machines infringed on his patent. *Id.* Then, in 2008, he designated ATL as the exclusive licensor of his patent technology. *Id.* at ¶ 56. ATL began to offer patent licenses, suing when necessary, and defending patents in the Patent Office. *Id.* The licensing venture paid off — between 2011 and 2012 ATL generated over \$3 million in licensing revenues from approximately 200 licenses. *Id.* at ¶ 57. The Patent Office also granted Mr. Barcelou more ATM-related patents. *Id.*

Mr. Barcelou and ATL contend that in the wake of ATL's success in 2011 and 2012, the defendants engaged in a "defamatory smear campaign" against them. *Id.* at ¶¶ 62, 64. First, in October 2012 an article on the website bizjournals.com analogized ATL's licensing efforts to bank robbery. *Id.* at ¶¶ 66, 67. Then, in April 2013, another article on bizjournals.com referred to ATL as a "patent troll." *Id.* at ¶ 68. Other pejorative statements by the various defendants followed the articles. *Id.* at ¶¶ 69-85. The plaintiffs attribute a severe decline in ATL's revenue and loss of licensing opportunities to defamatory statements by the defendants whose motions to dismiss and for summary judgment are pending. They say the statements also "permanently damaged" Mr. Barcelou's reputation and caused him emotional distress. *Id.* at ¶¶ 93-94.

The first group of motions is from defendants who seek to dismiss the complaint. The plaintiffs raise a preemptive challenge to the motions, citing cases in which the determination of whether a statement was protected opinion was decided on summary judgment. They contend a motion to dismiss is an appropriate vehicle for such an analysis. They identify no case that says this, and one recent decision addressed the issue when it was raised in a dismissal motion. See *Sanguedolce v. Wolfe*, 164 N.H. 644, 645–46 (2013). In fact, “the nature of a libel action lends itself to judicial scrutiny in the early stages of a defamation lawsuit.” *Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1258, n.10 (S.D. Miss. 1988).

Dismissal of defamation suits for failure of the complaint to state a cause of action or to state a claim upon which relief may be granted occurs with relative frequency. One substantial factor is that the communication complained of is usually before the court at the outset; indeed in many jurisdictions it is required that complaints themselves set forth the allegedly defamatory statement. Thus, unlike most litigation, in a libel suit the central event—the communication about which suit has been brought—is usually before the judge at the pleading stage. He may assess it upon a motion to dismiss first hand and in context.

Id. (quoting R. Sack, *Libel, Slander and Related Problems* 533–34 (1980)). So, there is no bar to addressing the issue through the various dismissal motions.

Whether there is merit to a motion to dismiss depends on “whether the allegations in the petitioner’s pleadings are reasonably susceptible of a construction that would permit recovery.” *Morrissey v. Town of Lyme*, 162 N.H. 777, 780 (2011). The facts alleged in the complaint are presumed to be true and reasonable inferences from those facts are drawn in the light most favorable to the plaintiff. *Id.* “The plaintiff must, however, plead sufficient

facts to form a basis for the cause of action asserted.” *Mt. Springs Water Co. v. Mt. Lakes Village District*, 126 N.H. 199, 201 (1985). Mere conclusions of law need not be credited. *Id.* (citation omitted).

In order to make a claim of defamation, the plaintiff must allege facts that show “the defendant 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). The “language complained of . . . must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority,” and “the defamatory meaning must be one that could be ascribed to the words by ‘hearers of common and reasonable understanding.’” *Thomson v. Cash*, 119 N.H. 371, 373 (1979) (quotation omitted).

The defendants contend the statements identified in the complaint as defamatory, are in reality opinions or otherwise not actionable factual assertions.

A statement of opinion is not actionable, unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion. 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, considering the context of the publication as a whole. If an average reader could reasonably understand a statement as actionably factual, then there is an issue for a jury's determination.

Nash v. Keene Publishing Corp., 127 N.H. 214, 219 (1985) (citations omitted). And,

even a provably false statement is not actionable 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. . . .” *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)). As the Ninth Circuit has explained, “when an author outlines

the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.” *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995).

Riley v. Harr, 292 F.3d 282, 289 (1st Cir. 2002). See *Thomas v. Telegraph Publishing Co.*, 155 N.H. 314, 339 (2007) (opinion not defamatory when based on disclosed non-defamatory facts).

The statements the plaintiffs allege are defamatory may be separated into two categories. The first consists of instances in which a defendant referred to a plaintiff as a “patent troll.” The second is composed of characterizations of the plaintiffs’ conduct as a “shakedown,” “extortion,” or “blackmail.” The first amended complaint attributes to each defendant the specific statement claimed to be defamatory, and refers to the documents (attached as exhibits to the amended complaint) in which the statement appears. As they appear in the documents (the exhibits), the challenged statements are noted in **bold** print. I have used the documents to show the statements in context, but I consider the statements alleged to be defamatory to be those specified in the complaint. See *White v. Ortiz*, No. 13-CV-251-SM, 2015 WL 5331279, at *5–6 (D.N.H. Sept. 14, 2015).

Defamation (Count 1)

A. Statements by American Bankers Association

The plaintiffs claim the American Bankers Association defamed them by referring to them as “patent trolls.”

On December 17, 2013, the ABA . . . made statements for the record before the Senate Committee on the Judiciary. The ABA's statements are published in a publication entitled "Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse." The statement was republished on ABA's website at <http://www.aba.com/Advocacy/LetterstoCongress/Pages/default.aspx> and continues to be republished on ABA's website as of the date of the filing of this Complaint. See Exhibit D. The title of the ABA statement includes the phrase "limiting patent troll abuse." The ABA's statement describes ATL's legitimate licensing efforts and then refers to "patent trolls," plainly calling ATL a patent troll. This references [sic] to ATL as a patent troll are false and defamatory and have damaged ATL.

(Amended Complaint, ¶¶ 75-76.)

Exhibit D is a "Statement for the Record on Behalf of the American Bankers Association For the Hearing 'Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse' Before the Senate Committee on the Judiciary." As background, it describes "abusive patent litigation," by "patent assertion entities (PAEs) who use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country." It continues,

Faced with threats of expensive patent litigation, many banks, and especially smaller banks, find that their only option is to settle rather than face paying millions to defend against extortive claims of patent infringement. Well-funded and sophisticated PAEs take advantage of community banks with limited resources and little patent experience, and have amassed significant 'licensing' fees from banks literally for the cost of mailing a threatening letter.

A recent example of this involves a PAE known as Automated Transactions, LLC (ATL), which targeted banks throughout New England, New York, New Jersey, Georgia, Virginia, Pennsylvania, in addition to an ever-growing number of states. ATL claims that transactions facilitated by the use of the banks' ATMs infringe one or more of its patents. What ATL fails to mention, however, is that several of ATL's claims have been invalidated by courts. In particular, the Supreme Court denied certiorari on ATL's appeal of an April 23, 2012, decision by the Federal Circuit to affirm a ruling by the Board of Patent Appeals and Interferences invalidating several of ATL's patent claims. Despite this, the

company continues to assert those patents and sue banks across the country, including banks that do not even have ATMs. While ATL is only one of many different entities that operate as PAEs filing frivolous patent infringement cases against all industries, ATL's tactics and efforts are a prime example of the problem banks and other companies face, primarily with regard to vague and threatening demand letters.

The Association goes on to use the terms "patent assertion entities (PAEs)" interchangeably with "patent troll." For instance, it discusses "legislation intended to alleviate some of the incentives that drive abusive litigation by patent PAEs," and the Association's support for legislation "that could potentially deter **patent trolls** from sending abusive demand letters. . . ." Later, it discusses "other provisions that should be included in **patent troll** legislation."

A second statement attributed to the Association provided an additional source for the plaintiffs' defamation claim against it. According to the complaint,

On April 8, 2014, Rheo Brouillard testified on behalf of the ABA in the House of Representatives. See Exhibit I. He described ATL as a "patent troll." He stated that

These patent trolls use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country. . . . At present patent trolls are able to make patent infringement claims for nothing more than the price of a postage stamp and the paper the claim is written on.

Mr. Brouillard's statements on behalf of the ABA were false and defamatory statements that damaged ATL. ATL was trying to capitalize on its extensive research and development and marketing efforts that resulted in numerous patents – it was not extorting payments. Further, ATL's efforts cost far more than a postage stamp and a few sheets of paper.

(Amended Complaint, ¶¶ 81–82.)

Exhibit I is a statement of testimony by the head of a Connecticut bank before a subcommittee of the House of Representatives' Committee on Energy and Commerce. It discusses that "abusive patent litigation remains a serious threat for banks and financial institutions," and how as "end users of technology," banks "have been inundated by abusive and deceptive patent demand letters by patent assertion entities (PAEs), commonly referred to as '**patent trolls**.'" The statement continues with the excerpts quoted in the amended complaint.

The gist of the testimony is the same as in the other Association statement. It describes how "well-funded and sophisticated **patent trolls** take advantage of community banks with limited resources and little patent experience, and have amassed significant 'licensing' fees from banks," who find "their only option is to settle, rather than paying millions to defend against extortive claims of patent infringement."

The witness mentions ATL specifically, stating,

I have seen this first hand at my bank. We, along with 30+ other Connecticut banks, received a vague notice from a firm called Automatic Transactions, LLC (ATL). The notice asserted that our ATMs operated in a way that infringed upon their 'patent portfolio,' and simply listed thirteen sets of seven digit numbers as proof. What the notice failed to mention was that similar suits in other states had already been overturned. A settlement would have cost at least \$27,000 for my bank alone, and would likely have amounted to \$300,000 for the 30 Connecticut banks targeted.

B. Statements by Credit Union National Association

The plaintiffs make the following claim against the Credit Union National Association.

Upon information and belief, on or about September 24, 2013, Robin Cook, Assistant General Counsel for the Credit Union National Association, presented a PowerPoint presentation entitled "Hot Topics in Litigation." See Exhibit A. This presentation makes extremely defamatory statements regarding ATL. For example, it includes a derogatory picture of a troll. The presentation defined patent troll as an entity that had no intention of making a product and acknowledged that the term patent troll is pejorative. It also referred to ATL as a "well-known patent troll." As set forth in earlier paragraphs in this Complaint, ATL was simply pursuing a return on its constitutionally authorized patent rights after having failed in its business efforts to bring Mr. Barcelou's inventions to market. Mr. Cook's statements on behalf of CUNA, highlighted herein and in Exhibit A, were false defamatory statements that damaged ATL and Mr. Barcelou.

(Amended Complaint, ¶¶ 69-71.)

The PowerPoint presentation at Exhibit A, titled "Hot Topics in Litigation," starts with a picture of a troll. The presentation continues with the question "What is a Patent Troll?" and defines the term as "an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention." It says it is a "pejorative term," with "non-practicing entity" being the "polite term." It describes the tactics of trolls as a "shakedown" in the form of demand letters threatening litigation in order to "strong-arm entities into accepting a license," while "know[ing] that you will pay for a license instead of going to court." ATL is listed with other entities under the heading "Well-Known Trolls." The presentation concludes with suggestions on how credit unions may "fight back."

The plaintiffs cite a second set of statements from this defendant, which they claim are defamatory.

CUNA also testified before the Senate and republished its testimony under the same title as the ABA did. See Exhibit E. The CUNA representative stated patent trolls made a business out of what “might look like extortion.” It also referred to ATL’s licensing activities as being generated based on the “costs of a stamp.” It also states the need to control “trolls.” These statements are false and defamatory and have damaged ATL. ATL’s business was based on decades of research and development, manufacturing, and business development efforts as set forth in prior paragraphs, and was based on far more than the cost of a stamp. ATL’s efforts were not akin to extortion, but were instead the efforts to make its technology that was protected through the constitutionally authorized Patent System. Further, ATL was attempting to license patents that resulted from the inventive and business efforts of its manager, David Barcelou over many years. ATL was not a patent troll.

(Amended Complaint, ¶ 77.)

The testimony in question was before the United States Senate Committee on the Judiciary. Testifying on behalf of Credit Union National Association, the head of a Vermont credit union said “the problem of **patent trolls** has gotten out of control.” He described his own experience with receiving “an ill-researched, vague demand letter from a company that has made a business out of what, in my opinion, in another context, might look like extortion.” He described the letter as being “from an entity vaguely suggesting that one or more of our ATM machines infringed one or more of 13 patents.” Later in the testimony, the speaker refers to the entity sending the letters as “**the troll**.” But there is no reference to Barcelou or ATL in the testimony.

C. *Statements by Robert Stier and Pierce Atwood*

The claims against Robert Stier and Pierce Atwood are as follows:

On April 3, 2013, an article entitled “Banks fighting ‘patent troll’ can move forward together” appeared on the Internet at <http://www.bizjournals.com/boston.print-edition/2013/04/02/mass-banks-address-atm-patent.html>. Bob Stier is quoted as saying “Automated

Transactions's suit amounts to nothing more than a shakedown of community banks and that the company has intimidated more than 140 banks into settling." Upon information and belief, this article continued to appear on the Internet.

(Amended Complaint, ¶ 68.)

From 2013 until January 2014, Stier and Pierce Atwood were publishing a defamatory web page on their web site that referred to ATL as a patent troll. ATL was involved in patent litigation at the time and ATL's counsel wrote to the judge in the case to bring these defamatory remarks to the Court's attention. See Exhibit F, which is two different web pages that were downloaded from Pierce Atwood's web site in January 2014. ATL's trial counsel wrote a letter to Court requesting an order barring the defendants from referring to Mr. Barcelou as a patent troll. The Court issued such as [sic] order. See Exhibit G. Stier's and Pierce Atwood's defamatory statements irreparably harmed the plaintiffs.

(*Id.* at ¶ 78.)

The article in Exhibit F begins with a description of how a New York lawyer sent letters to banks informing them that ATL had patents bearing on the operation of their ATMs, and asking about their interest in obtaining a "sub-license" in advance of ATL suing for patent infringement. It continues that Attorney Stier found decisions in which courts invalidated an ATL patent and limited the scope of others. It concluded, "there was no reason to believe that any bank needed a sub-license. The demand for a sub-license was a **classic shakedown**." It described how Pierce Atwood formed "a group of banks and credit unions willing to resist the **shakedown**," known as the "National Automated Transactions Opposition."

Exhibit G is a series of orders issued in litigation by ATL against a number of defendants. There the court ordered the defendants to refer to Mr. Barcelou as "the named inventor of the patents-in-suit," and Transactions Holding as "the named assignee." The

plaintiffs say the orders were prompted by a posting on Pierce Atwood's website that referred to ATL as a "patent troll."

A third alleged instance of defamation is described as follows:

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." See Exhibit K. In the article, which upon information and belief was written by Mr. Stier, ATL was referred to as a patent troll. For the reasons previously discussed, this was a false and defamatory statement that damaged ATL. 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. See Exhibit L. Mr. Stier's statements were false and defamatory and damaging to ATL.

(Amended Complaint, ¶¶ 84-85.)

Exhibit K appears to be an article from Pierce Atwood's website that describes Attorney Stier's success in defeating claims by ATL that ATMs belonging to a group of banks infringed on ATL's patents. It relates to how ATL encouraged settlements by keeping its licensing fees below the cost of litigating a defense to a lawsuit. It concludes by quoting Attorney Stier about his strategy, which "protected an entire class of institutions from harassment by an unscrupulous patent troll."

Another article on the Pierce Atwood website (Exhibit L) makes a similar claim in promoting Attorney Stier's appearance before a Maine Bankers Association Banking Law Seminar, at which he will present a "Patent Troll Update." It describes how "after more than 100 banks were brought together in 2012 to defend against a patent troll that demanded licenses for their ATMs, that particular patent troll lost its appetite for patent

litigation and abandoned its claims.” It says “Bob Stier . . . successfully assembled the joint defense group that stood up to Automated Transactions, LLC. . . .”

D. Statements by W. John Funk and Gallagher, Callahan & Gartrell

This claim involves statements made during a podcast. The complaint alleges that

Upon information and belief, on November 12, 2013, a transcript of an interview with John Funk appeared on the website of Gallagher, Callahan and Gartrell. The webpage was entitled “‘Businesses Offering ATM Services – Beware Patent Trolls’ with John Funk, Gallagher, Callahan & Gartrell in New Hampshire.” Funk refers to ATL and Mr. Barcelou and notes that there’s a whole industry of patent trolls . . .” This implication that ATL is a patent troll was a defamatory statement that has damaged ATL. See Exhibit B. Mr. Funk and GCG have made numerous other references to ATL as a patent troll.

(Amended Complaint, ¶ 72.)

The interview begins with the moderator describing Automated Transactions, LLC as having “been quite busy with suits around patent infringement, which has impacted quite a few businesses large and small.” Mr. Funk responds that he has known about ATL “for about two years,” and that he “had clients who first started receiving letters from Automated Transactions claiming that they had infringed a patent that it holds that relates to an interface between automated teller machines, so-called ATMs, and the internet.” When the moderator asks if “suing for patent infringement is Mr. Barcelou’s primary source of income,” Funk says “there’s a whole industry of **patent trolls** these days that secure patents that may or may not be valid when challenged, proceed to make claims on companies and harvest monies that they may not be entitled to.”

E. *Statements by Mascoma Savings Bank and Stephen Christy*

With respect to these defendants, the plaintiffs allege,

On or about April 6, 2014, the Washington Examiner published an article by the Associated Press entitled “New Hampshire bill aims to nip false patent claims” on the Internet. In the article, Steve Christy, as President of Mascoma, describes his bank’s business with ATL and is quoted as calling ATL’s activities as “outright blackmail.” See Exhibit H. On April 7, 2014, the article referred to in the preceding paragraph was published by the Concord Monitor on the Internet and in print. (Amended Complaint, ¶¶ 79–80.)

This Associated Press report in Exhibit H discusses how “lawmakers are considering making it harder for companies with false patent claims – known as patent trolls – to demand that business pay licensing fees or be sued.” It describes how

New Hampshire banks and credit unions – with one exception so far – have paid license fees when accused of patent infringement for dispensing cash through their ATMs. Two years ago, Mascoma Savings Bank joined 96 other banks and credit unions in challenging the claim in court. ‘It’s outright blackmail and we’re not going to be a party to it,’ said Mascoma President Steve Christy. Christy paid a lawyer a fee that was less than the roughly \$40,000 demanded by patent holder Automated Transaction LLC.

It quotes an attorney for ATL as saying that while “there are some companies that are patent trolls,” which “go out and buy up patents,” ATL “isn’t one of them.”

Discussion

The References to “Patent Troll”

Viewed favorably to the plaintiffs, the complaint cites each defendant with the exception of Mascoma Savings Bank and Mr. Christy, as referring to them as “patent trolls,” directly or indirectly. In each instance, however, the facts upon which the label is based are evident from the context, and the complaint’s specific allegations against the defendants do

not include claims that the underlying assertions of fact are false or leave undisclosed facts to be implied. For instance, the plaintiffs accuse the American Bankers Association of “describ[ing] ATL’s legitimate licensing efforts and then refer[ing] to ‘patent trolls,’ plainly calling ATL a patent troll.” The plaintiffs only cite the reference to ATL as a “patent troll” as false and defamatory. Similarly, the plaintiffs don’t contest Rheo Brouillard’s factual assertions leading up to his conclusion that the conduct amounts to that of a “patent troll.” Instead, the plaintiffs explain that ATL was simply “trying to capitalize on its extensive research and development and marketing efforts that resulted in numerous patents.”

The plaintiffs also dispute the conclusion in Credit Union National Association’s powerpoint that ATL is a “patent troll,” on the basis that the underlying facts describe an effort by ATL to “pursu[e] a return on its constitutionally authorized patent rights after having failed in its business efforts to bring Mr. Barcelou’s inventions to market.” Understandably, the plaintiffs disagree that their efforts make them deserving of the label, “patent troll,” but clearly it is a matter of opinion.

Even if the plaintiffs didn’t implicitly accept the defendants’ factual underpinning for the term “patent troll,” the facts on which the characterization is based are evident from the context and the complaint doesn’t include an allegation that those facts are false. Neither does it say the existence of other undisclosed facts is implied. Instead, the plaintiffs contend

Each of these defamatory statements described herein were published by the respective Defendants to third parties, without a privilege to do so. Each is also

false. Neither ATL nor Mr. Barcelou are trolls, shakedown artists, extortionists or blackmailers.

It is well known that being labeled a patent troll, an extortionist, as conducting a shakedown, and the like, are disparaging and damaging, particularly to businesses. The damaging effects of being labeled a “patent troll” are well known.

(Amended Complaint, ¶¶ 87–88).

When the opinion is based on facts that are disclosed and when it wouldn't be understood to imply the existence of undisclosed facts, then the opinion is not actionable. *Bourne v. Arruda*, No. 10-CV-393-LM, 2011 WL 2357504, at *4 (D.N.H. June 10, 2011) (citing *Pease v. Telegraph Publishing Co.*, 121 N.H. 62, 66 (1981)). See *McKee v. Cosby*, 874 F.3d 54, 60–61 (1st Cir. 2017) (“[W]hen the speaker outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.” (quotation omitted)). From the context, each defendant used “patent troll” to characterize entities, including ATL, which engage in patent litigation tactics it viewed as abusive. And in each instance the defendant disclosed the facts that supported its description and made ATL, in the defendant's mind, a patent troll. As such, to the extent the defendants accused the plaintiffs of being a “patent troll,” it was an opinion and not actionable.

A second reason the statements qualify as protected opinion is that to be actionable, the statement cannot be one that is “incapable of being proven true or false.” *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (statement that plaintiff engaged in a “scam” was protected opinion, since “readers may have disagreed with the conclusion that it was a

scam, but they could not have said that the conclusion was false, because there is no core meaning of scam to which Rattiner's facts and allegation can be compared.")

To be sure, some courts have defined the term. The plaintiffs cite one such case and there are others. See *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.'") (quoting *Taurus IP v. DaimlerChrysler Corp.*, 519 F.Supp.2d 905, 911 (W.D.Wis.2007)).

There are other definitions and not all of them are necessarily pejorative. See Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?* 83 TEX. L. REV. 961, 1023-24 (2005) (defining "patent 'trolls'" more neutrally as "firms that have no interest in a licensing equilibrium because they produce no products of their own," but concluding that "trolls are serving a function as intermediaries that specialize in litigation to exploit the value of patents that cannot be exploited effectively by those that have originally obtained them. That is not in and of itself a bad thing").

The pejorative term "troll" is used by some to refer to any party that doesn't actually produce goods or services. Indeed, some use "troll" to refer to anyone who is suing them, even practicing entities. Others would exclude some entities—notably universities and individual inventors—from the troll definition. Still others would limit patent trolls further, to include only PAEs—companies whose primary line of business is filing patent suits. And even that definition is too broad for some, who would limit the term patent troll to those who assert patents they bought from others, only those who assert invalid patents, or only those who engage in certain "abusive" tactics in patent litigation, such as pressuring allegedly infringing manufacturers by threatening those manufacturers' end-user customers, or seeking nuisance-value settlements. The definitional question is sufficiently muddled that two of the authors designed a

taxonomy of twelve different entity types, allowing people to decide for themselves who fits in the troll category.

John R. Allison, Mark A. Lemley, & David L. Schwarz, *How Often Do Non-Practicing Entities Win Patent Suits?* 32 BERKELEY TECH. LAW J. 237, 242 (2018).

The broad range of activity encompassed by the term makes it difficult to define. See Jason Rantanen, *Slaying the Troll: Litigation As an Effective Strategy Against Patent Threats*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 159, 164 (2006); John M. Golden, "Patent Trolls" and Patent Remedies, 85 Tex. L. Rev. 2111, 2161, n. 7 (2007) ("[T]he 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."). Given the imprecise meaning, calling another a "patent troll" doesn't enable the reader or hearer to know whether the label is true or false, just as statements that a person "is racist are clearly expressions of opinion that cannot be proven as verifiably true or false." *Squittieri v. Piedmont Airlines, Inc.*, No. 3:17CV441, 2018 WL 934829, at *4 (W.D.N.C. Feb. 16, 2018).

Lastly, the statements are not actionable because to call one a "patent troll" or "unscrupulous," or to say one's conduct is like "extortion" or "blackmail," is protected as "mere 'rhetorical hyperbole.' This is a well-recognized category of, as it were, privileged defamation," [which] consists of terms that are either too vague to be falsifiable or sure to be understood as merely a label for the labeler's underlying assertions." *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

In this sense, “patent troll” is “loose, figurative language, hyperbole and epithet.” *Douglas v. Pratt*, No. 98-CV-416-M, 2000 WL 1513712, at *4 (D.N.H. Sept. 29, 2000). It is stated as an alternative description for bodies otherwise known as “patent assertion” or “non-practicing” entities.

The References to “Shakedown,” “Extortion,” and “Blackmail”

A similar analysis applies to the descriptions of the plaintiffs’ conduct as a “shakedown,” “extortion,” or “blackmail.” “Courts have consistently found that statements calling into question the legitimacy of litigation are non-actionable statements of opinion.” *Live Face on Web, LLC v. Five Boro Mold Specialist Inc.*, No. 15 CV 4779-LTS-SN, 2016 WL 1717218, at *2 (S.D.N.Y. Apr. 28, 2016). So, statements by an American Bankers Association representative that “these patent trolls use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country,” and by Mr. Christy that “ATL’s activities [constitute] ‘outright blackmail,’” and by Mr. Stier that ATL’s lawsuit was a “shakedown,” are “of the ‘loose, figurative, or hyperbolic’ sort that is not actionable for defamation.” *Small Business Bodyguard Inc. v. House of Moxie, Inc.*, 230 F. Supp. 3d 290, 312 (S.D.N.Y. 2017) (quotation omitted). See *Bourne v. Arruda*, No. 10-CV-393-LM, 2011 WL 2357504, at *5 (D.N.H. June 10, 2011) (reference to plaintiff as “terrorist” was, in context, a “hyperbolic expression of his opinion about Bourne and his litigation tactics”); *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997) (citing as examples of hyperbolic opinion, *Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (use of the word “traitor” to define a worker who crossed a picket line was not actionable); *Greenbelt Co-op.*

Publishing Assoc. v. Bresler, 398 U.S. 6, 13–14 (1970) (newspaper’s characterization of a developer’s negotiating position as “blackmail” was not defamatory; the word was simply an epithet and, under the circumstances, did not suggest commission of a crime); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir. 1992) (calling a play “a rip-off, a fraud, a scandal, a snake-oil job” was mere hyperbole and, thus, constitutionally protected)).

The plaintiffs say they disagree with Mr. Brouillard’s assertion that that their litigation “requires only a piece of paper and a postage stamp,” but that statement is readily understood as hyperbole and not a statement of fact.

The claims for defamation against the defendants in Count I are dismissed, except as to Mascoma Savings Bank and Stephen Christy who are granted summary judgment.

Violation of Consumer Protection Act (Count II)

The plaintiffs base their claim of violations of the Consumer Protection Act on the disparagement of their patent activity. The claimed disparagement is based on the defendants’ purportedly false assertions of fact. See RSA 358-A:2, VIII (statute violated by “disparaging the goods, services, or business of another by false or misleading representation of fact”). Since the challenged misrepresentations are not factual, the Consumer Protection Act claim in Count II is dismissed as well. See *Douglas v. Pratt*, at *7.

Conclusion

For the reasons given, the motions to dismiss filed by the American Bankers Association (doc. no. 39), Credit Union National Association (doc. no. 73), Robert Stier and

Pierce Atwood, LLP (doc. no. 77), W. John Funk and Gallagher, Callahan & Gartrell (doc. no. 79), and the motion for summary judgment of Mascoma Savings Bank and Stephen F. Christy (doc. no. 87) are GRANTED.

SO ORDERED.

DATE: MARCH 19, 2018



BRIAN T. TUCKER
PRESIDING JUSTICE

