

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ILLINOIS COMPUTER RESEARCH,)
 LLC,)
Plaintiff and Counterclaim Defendant,)
)
 v.)
)
 FISH & RICHARDSON P.C.,)
Defendant, Counterclaimant, Third-)
Party Plaintiff, and Counterclaim)
Defendant,)
)
 v.)
)
 SCOTT C. HARRIS,)
Third-Party Defendant and)
Counterclaimant.)

No. 07 C 5081
 Judge Rebecca R. Pallmeyer
 Magistrate Judge Maria Valdez

**COMBINED REPLY MEMORANDUM IN SUPPORT OF FISH & RICHARDSON’S
RULE 12(C) MOTIONS AGAINST ICR AND HARRIS**

Fish & Richardson P.C. (“Fish & Richardson” or “F&R”) respectfully submits this combined reply memorandum in support of its motions for judgment on the pleadings against Illinois Computer Research, LLC (“ICR”) and Scott Harris.

Introduction

Both ICR’s and Harris’s claims for tortious interference (ICR Count II and Harris Count I) fail as a matter of law. Harris’s Count II for defamation *per se* likewise fails.

Tortious Interference. The gist of this claim is that Fish & Richardson supposedly “intimidated” Harris by making demands upon him in the context of the parties’ dispute and thus interfered with ICR’s attempt to enforce a patent it purchased from Harris against F&R’s client Google (and other unnamed parties). Those allegations fail for multiple reasons. ICR and Harris say nothing in response that can repair their defective claims:

First, with respect to ICR's complaint, all of the alleged "interference" consists of conduct directed at *Harris*, not at any third party with whom ICR claims a business expectancy. That defect is fatal because a claim of tortious interference requires that the alleged interfering conduct be directed at the party with whom the plaintiff expected a business relationship. In its response, ICR does not deny this basic failing, but rather attempts to fall back on a lax understanding of federal pleading standards. Rule 8, however, does not save ICR because ICR has affirmatively pleaded itself out of court and because of the Supreme Court's recent *Twombly* decision, which rejected the very pleading notions that ICR now relies upon.

Second, with respect to Harris's complaint, the claim for tortious interference is foreclosed because Harris pleads that he *sold* his patents to parties like ICR well before any of the "interfering" conduct. Harris pleads no connection between himself and the patents he sold and cannot complain that Fish & Richardson has interfered with *other parties'* efforts to enforce the patents. And while Harris now suggests that he actually retained a contingent or derivative interest in the patents, Harris has *denied* such an interest in his pleadings and in his statements to Fish & Richardson. Harris cannot have it both ways: his pleadings (even if he now admits they are false) deny an interest in the patents. No tortious interference can therefore apply.

Third, both ICR and Harris have failed to plead that Google or any other party actually *contemplated* doing business with them before the alleged interference began, another required element of their claims. In fact, ICR and Harris plead the *opposite*, alleging that Google was hostile to their advances from the very beginning, thus negating this element of the tort. Their only response is to seek refuge again in a mistaken characterization of pleading standards.

Fourth, ICR and Harris fail to allege causation, nowhere alleging that any party's willingness (or unwillingness) to enter into a licensing deal was affected by Fish & Richardson's

actions. Indeed, ICR and Harris again negate a required element by pleading that Google sought F&R's help in turning ICR away. ICR and Harris have no response except to point outside of the pleadings to licensing agreements reached *after* this litigation began. Of course, those agreements say nothing about any party's pre-litigation, pre-"interference" willingness to enter into a deal and, if anything, show that F&R did not cause any party to terminate its dealings.

Fifth, ICR's and Harris's own allegations show that Fish & Richardson's conduct is not actionable because it was privileged and not wrongful. F&R was entitled to assert its own legal interests, to protect its clients, and to communicate under the protection of the litigation privilege. In response, ICR and Harris muster only legally incorrect attacks on the litigation privilege, arguing that it does not apply before litigation begins (false) and that it does not cover the statements that F&R's lawyers allegedly made to Harris's counsel (again, wrong). For each reason, the Court should dismiss ICR's Count II and Harris's Count I.

Defamation. The Court should also dismiss Harris's Count II for alleged defamation *per se*. The statements that Harris alleges—a telephone call for which Harris makes no allegation as to what was said, and a statement in which Fish & Richardson said that Harris's various patent dealings were "not authorized" by the firm—are not defamatory *per se*. Harris's only response, citing cases in which the challenged statements were not even in the same league as the words "not authorized" (such as calling a lawyer a "crook" or a political candidate a "communist"), only underscores his failure to allege anything that rises to the level of defamation *per se*. Further, the Court should award F&R its attorneys' fees in connection with this motion under the Illinois "anti-SLAPP" statute. Harris has no substantive response.

Argument

I. ICR's And Harris's Claims For Tortious Interference Fail.

A. ICR's Claim Fails Because The "Interference" Was Directed At Harris.

As Fish & Richardson has demonstrated (Dkt. No. 50, F&R ICR Mem. at 5-6), ICR's Count II fails because all of the allegedly interfering conduct ICR has pleaded was directed at Harris, not at any party with whom ICR expected to do business. A required element of the tort is that the "interference" was "directed towards the party *with whom the plaintiff expects to do business.*" *Mercury Skyline Yacht Charters v. Dave Matthews Band, Inc.*, 2005 WL 3159680, at *9 (N.D. Ill. Nov. 22, 2005) (emphasis added, internal quotations and citations omitted) (Ex. B to F&R ICR Mem.); *see also Schuler v. Abbott Lab.*, 265 Ill. App. 3d 991, 994-95 (Ill. App. Ct. 1993) (same rule). The expectancy at issue here was ICR's alleged expectation of "offering and entering into patent license agreements *with Google and other infringers* of the '252 Patent." (Dkt. No. 16, ICR Am. Compl. ¶ 22, emphasis added.) But under ICR's own pleadings, all of the alleged "interference" was directed at Harris, not at Google or "other infringers." F&R supposedly "pressure[d]" and sought "to intimidate" Harris, made various demands on him and his lawyer, and read his email. (ICR Am. Compl. ¶¶ 15-18, 24.) Those allegations foreclose an essential element of ICR's claim.

In response, ICR fails to point to a single sentence in its complaint alleging any misconduct directed at a third party with whom it sought to do business. Instead, ICR relies on *Cook v. Winfrey*, 141 F.3d 322 (7th Cir. 1998), which allowed a bare-bones tortious interference claim to proceed past the pleading stage despite "unstated facts" omitted from the complaint. *Id.* at 328. The *Cook* court made clear that it was judging the complaint according to the belief that dismissal should apply "only if it is clear that no relief could be granted under *any set of facts*

that could be proved consistent with the allegations of the complaint.” *Id.* at 327 (emphasis added, internal quotations omitted). That analysis, however, does not save ICR.

In the first place, ICR’s problem is not only that it failed to allege facts necessary to establish an element of its claim, as in *Cook*, but that it affirmatively chose to plead facts that *contradict* and preclude that element. Even under notice pleading standards, “a plaintiff who pleads facts that undermine the allegations of his complaint can plead himself out of court.” *BSE v. IBM*, 2005 WL 1766374, at *1 (N.D. Ill. July 20, 2005) (dismissing tortious interference claim) (Ex. A); *Shah v. NASD*, 1999 WL 240342, at *7 (N.D. Ill. Apr. 9, 1999) (same) (Ex. B); *see also Thomas v. Farley*, 31 F.3d 557, 558-59 (7th Cir. 1994) (“if a plaintiff does plead particulars, and they show that he has no claim, then he is out of luck—he has pleaded himself out of court”). ICR has foreclosed its own legal theory by alleging that all of the misconduct at issue was directed at Harris, not a third-party with whom ICR wished to do business.

Further, in a recent case unnoted by ICR, the Supreme Court expressly rejected the “any set of facts” (or “no set of facts”) formulation of federal pleading standards that controlled the result in *Cook*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955 (2007).¹ Contrary to *Cook*, the Supreme Court held that a claim should be dismissed where it fails to plead “enough facts to state a claim to relief that is *plausible on its face*.” *Id.* at 1974 (emphasis added). The Court explained that “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65 (internal quotation marks omitted). Where a plaintiff “ha[s] not nudged [its] claims across the line from conceivable to plausible, [its] complaint must

¹ *Cook* expressly cited and relied upon the *Conley v. Gibson*, 355 U.S. 41 (1957), interpretation of pleading standards rejected in *Twombly* and twice concluded that the plaintiff “*might* be able to prove a set of facts” *See Cook*, 141 F.3d at 327-28.

be dismissed.” *Id.* at 1974. ICR’s reliance on an outmoded standard of federal pleading is therefore mistaken. Every case that ICR cites was decided before *Twombly* and relies on the same “no set of facts” reasoning from *Cook*.² (*See* Dkt. No. 82, Resp. at 9-13.)

Indeed, after *Twombly*, multiple courts in the Seventh Circuit have dismissed tortious interference claims notwithstanding the *Cook* decision. For example, in *Hackman v. Dickerson Realtors*, 2007 WL 2570297 (N.D. Ill. Aug. 31, 2007), the court considered claims against several defendants, acknowledging that the plaintiff had pleaded the “bare bones element[s] of his claim,” but nonetheless dismissed the claims as to several defendants because “without more detailed factual allegations it is not clear what [defendants] did that was wrongful that interfered with [plaintiff’s] economic advantage.” *Id.* at *13 (Ex. E); *see also* *Burke v. Lakin Law Firm, PC*, 2008 WL 64521, at *5 (S.D. Ill. Jan. 3, 2008) (citing *Twombly* and dismissing tortious interference claim) (Ex. F); *United Labs. v. Savaiano*, 2007 WL 4557095, at *7 (N.D. Ill. Dec. 21, 2007) (same) (Ex. G); *Junction Solutions, LLC v. MBS Dev., Inc.*, 2007 WL 4234091, at *5 (N.D. Ill. Nov. 20, 2007) (same) (Ex. H). After *Twombly*, ICR cannot cure omissions and contradictions in its complaint by appealing to the federal pleading standards.

B. Harris Has Not Alleged That He Had Any Prospective Interest.

Fish & Richardson has also demonstrated that Harris’s tortious interference claim fails because he expressly pleads that he *sold* the patents at issue well before any of the alleged interfering conduct. (Dkt. No. 53, F&R Harris Mem. at 4-5.) Harris was required to allege facts showing that *he*, not some other party, had a “reasonable expectancy of entering into a valid business relationship.” *Kemmerer v. John D. & Catherine T. MacArthur Found.*, 594 F. Supp.

² *See* *Barrett v. Poag & McEwen Lifestyle Ctrs.*, 1999 U.S. Dist. LEXIS 13594, at *32 (N.D. Ill. Aug. 23, 1999) (“It is sufficient that the court can *postulate facts* consistent with [plaintiff’s] allegations, from which the element of action directed at the third party may be inferred”) (Ex. C); *Wilton Partners III LLC v. Gallagher*, 2003 U.S. Dist. LEXIS 21899, at *12-13 (N.D. Ill. Dec. 5, 2003) (allegations may be “minimally sufficient” in the absence of supporting facts) (Ex. D).

121, 122 (N.D. Ill. 1984). Attempting to meet that requirement, Harris alleged an expectancy of “financially benefiting from the licensing and enforcement of his patent portfolio.” (Dkt. No. 27, Harris Countercl. ¶ 44.) But Harris’s own allegations establish that he sold the patents soon after May 2007, well before any of the allegedly interfering conduct in September 2007 and later. (*Id.* ¶¶ 25-27.) Parties like ICR are now prosecuting the patents.

In his response brief, Harris tacitly admits that his pleadings fail on this issue—rather than pointing to anything in *his* pleadings that establish a connection between himself and the patents he sold, Harris seeks to rely on *F&R*’s allegation that he retained a contingent interest in settlements related to the patents. (Resp. at 15-16.) Harris cites no authority supporting his attempt to use someone else’s pleadings to fill gaps in his own.³ Further, Harris *denied* that very allegation in his answer to *F&R*’s complaint. (Dkt. No. 28, Ans. ¶ 48.) Harris may not now allege a tortious interference claim based on allegations that he has denied in his own pleadings.

Moreover, even if Harris had pleaded an indirect interest in the patents (and he has not), such an attenuated connection would be insufficient. In *Cooper v. Durham School Servs.*, 2003 WL 22232833, at *2-3 (N.D. Ill. Sept. 22, 2003) (Ex. B to *F&R* Harris Mem.), for example, the court held that a majority owner of a business lacked standing to sue for purported tortious interference with her company’s economic expectations. That analysis is confirmed by the only case that Harris cites on this issue, *Mainstreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 746 (7th Cir. 2007), which found that real estate brokers had no standing to challenge an ordinance regarding the sale of property because the brokers’ interest was only “incidental” to the interest of homeowners. Any indirect interest claimed by Harris is similarly insufficient.

³ See *Miraki v. Chicago State Univ.*, 259 F. Supp. 2d 727, 733 (N.D. Ill. 2003) (rejecting assertions “not found in [plaintiff’s] complaint”).

As a last ditch measure, Harris argues that he still owns “some” patents. (Resp. at 16.) That allegation, however, does not appear anywhere in his pleadings. Harris alleges only that, in May 2007, “he was able to find purchasers for some of his patents,” including ICR and five other companies. (Harris Countercl. ¶ 26.) The later disposition or retention of any other patents by Harris is simply not alleged. Especially after *Twombly*, Harris cannot support his complaint by asking the Court to speculate as to facts nowhere alleged. 127 S. Ct. at 1965-66.

In all events, the entire focus of Harris’s Count I is on the patents he *sold*, not any patent that he retained. Harris expressly alleges that he sold “many of his patents,” and that the “purpose of such sales was to facilitate the licensing and enforcement of [his] patent portfolio by entities other than Mr. Harris personally.” (Harris Countercl. ¶ 43.) It is that “licensing and enforcement” effort—an effort involving patents that Harris *sold*—that underlies the alleged expectancy Harris has attempted (but failed) to plead. (*See id.* ¶ 44.)

C. ICR And Harris Have Failed To Allege A Reasonable Expectation Of Entering Into Valid Business Relationships.

Fish & Richardson has also demonstrated that ICR’s and Harris’s claims fail because their own pleadings establish that no party *actually contemplated* doing business with them before the “interference” began. (*See* F&R ICR Mem. at 6-8; F&R Harris Mem. at 5-6.)⁴ In fact, they plead the opposite, alleging that Google was hostile from the beginning and “immediately complained to Fish” and “sought its help” in repelling ICR’s advances. (*See* ICR Am. Compl. ¶ 14; *see also* Harris Countercl. ¶ 27.) Those allegations negate this element.

In fact, ICR’s and Harris’s inability to allege that any third party actually contemplated doing business with them only highlights the strange and unsupported nature of the expectancy

⁴ *Kemmerer*, 594 F. Supp. at 122 (a plaintiff must plead facts showing that it possessed a “reasonable expectancy of entering into a valid business relationship”); *Parkway Bank & Trust Co. v. City of Darien*, 43 Ill. App. 3d 400, 403 (Ill. App. Ct. 1976) (plaintiff must show that a “clearly identifiable group of third parties [was] *contemplating* prospective contractual arrangements with the plaintiff”) (emphasis added).

they claim. ICR *sued* Google and sent letters threatening litigation to the “other infringers” it now claims as potential business partners. (*See* ICR Am. Compl. ¶¶ 14, 22; Harris Countercl. ¶ 27; Resp. at 13.) ICR and Harris cite no authority finding a protected business expectancy in such a one-way and adversarial “relationship.” The Illinois courts threw out the last tortious interference claim brought by the Niro firm on the same theory. *Solaia Tech., LLC v. Specialty Pub. Co.*, 357 Ill. App. 3d 1 (Ill. App. Ct. 2005); *rev’d in part & aff’d in part on other grounds*, 221 Ill. 2d 558 (2006).

In response, ICR and Harris say very little. (Resp. at 12-13, 15-16.) Again, they try to fall back on the *Cook* case without noting that, after *Twombly*, a plaintiff must plead facts that “raise [its] right to relief above the speculative level.” 127 S. Ct. at 1965. Merely stating that the “purpose of Mr. Harris’ sale of the patents to ICR was to enable a licensing effort” (Resp. at 12) does not suffice because it only establishes ICR’s *hopes*, not that any third party actually shared those hopes or contemplated a potential deal.

ICR also argues that it is not required to “identify the other infringers or an ‘actual deal,’” (Resp. at 12), but that misses the point. The issue is not whether ICR has “identified” potential business partners by name, it is that nothing in ICR’s complaint suggests that *anyone*—identified or not—actually contemplated doing business with it. Nor can ICR fix its complaint by going outside of the pleadings and arguing that it now possesses “notice letters” and various license agreements. (Resp. at 13.) *See Wilson v. Chicago Transit Authority*, 1994 WL 75244, at *2 (N.D. Ill. Mar. 9, 1994) (refusing to consider documents not attached to complaint and dismissing claim) (Ex. I). Letters sent and deals reached *after* this litigation began are not evidence that any third party contemplated doing business *before* Fish & Richardson allegedly “interfered.” To the contrary, they suggest that any alleged “interference” actually had no effect.

D. ICR and Harris Have Failed To Allege Causation.

Fish & Richardson has also established that ICR's and Harris's tortious interference claims should be dismissed for lack of causation, another required element.⁵ (F&R ICR Mem. at 8-9; F&R Harris Mem. at 6-7.) ICR's and Harris's pleadings do not contain even a single allegation that F&R induced Google or anyone else to change its mind about entering into a business relationship. To the contrary, ICR and Harris have again pleaded themselves out of court by alleging that Google was firmly set *against* any such transaction before F&R undertook any of the alleged "interfering" acts. (ICR Am. Compl. ¶ 14; Harris Compl. ¶ 27.)

Since the filing of Fish & Richardson's motion, two courts in the Seventh Circuit (one in this District) have dismissed claims for tortious interference because of similar failures to plead causation. In *Junction Solutions*, Judge Gottschall dismissed the tortious interference claim because the plaintiff made "contradictory allegations" regarding causation and "include[ed] facts in the complaint that undermine his claims." 2007 WL 4234091, at *5. Similarly, in *Burke*, the court cited *Twombly* and dismissed the claim on causation grounds because plaintiff "fail[ed] to allege that [defendant's] attempts to lure employees and clients away were *successful*." 2008 WL 64521, at *5 (emphasis added). The same principles apply here.

In their response brief, ICR and Harris only confirm this point, arguing "it was *Google's* communications with Fish which prompted it [Fish] to publish false ownership claims." (Resp. at 12, emphasis added.) They add that, after ICR threatened litigation, "Google immediately complained to Fish and sought its help," and "Fish *provided that help* by asserting ownership

⁵ *Heying v. Simonaitis*, 126 Ill. App. 3d 157, 161 (Ill. App. Ct. 1984) ("the interference complained of must induce *or cause* a breach or termination of the relationship or expectancy"); *McIntosh v. Magna Sys., Inc.*, 539 F. Supp. 1185, 1193 (N.D. Ill. 1982) (plaintiff must plead that "defendants purposely *cause[d]* [a] third party not to enter into or continue a prospective contractual relationship with plaintiff").

claims in the ICR patents[.]” (*Id.* at 7, emphasis added.) The “causation” alleged—Google causing F&R to act—is exactly contrary to a tortious interference theory.

ICR also suggests that it has alleged causation because it pleaded that its “negotiating position has been undermined.” (Resp. at 13.) But the case law requires more than a generalized diminution in bargaining power—a “*breach or termination* of the relationship or expectancy” is necessary. *Heying*, 126 Ill. App. 3d at 161 (emphasis added). No such facts are alleged. Nor does anything in ICR’s complaint suggest that any supposed reduction in “negotiating position” actually led to any party changing its mind about a potential deal.

E. Fish & Richardson’s Actions Were Privileged And Not Wrongful.

Fish & Richardson has also demonstrated that ICR’s and Harris’s tortious interference claims fail because their own allegations establish that F&R undertook the alleged “interfering” conduct: (i) to assert its own legal interests; (ii) to protect its client, Google, and its client relationships; and (iii) in the context of pending and threatened litigation. (F&R ICR Mem. at 9-11; F&R Harris Mem. at 7-9.)⁶ As a matter of law, such conduct is privileged, not wrongful, and not actionable.

In response, ICR and Harris make three invalid arguments. (Resp. at 13-15.) First, without citation to any authority, ICR and Harris assert that the litigation privilege does not apply because their claims are “not based on Fish’s pleadings, but on its actions prior to filing suit.” (Resp. at 13.) But the litigation privilege extends to all communications that “pertain to *proposed or pending* litigation.” *Libco Corp. v. Adams*, 100 Ill. App. 3d 314, 317 (Ill. App. Ct.

⁶ Where a plaintiff’s complaint “establishes the existence of a privilege, the plaintiff must plead and later prove that the defendant acted unjustifiably or inconsistent with such privilege.” *Citylink Group v. Hyatt Corp.*, 313 Ill. App. 3d 829, 841 (Ill. App. Ct. 2000); accord *Hsu v. OZ Optics Ltd.*, 211 F.R.D. 615, 620-21 (N.D. Cal. 2002). Moreover, “a person cannot be liable for interference with prospective economic advantage unless he has taken some *wrongful* action, directed at a third party.” *Young v. Conn. Mut. Life Ins. Co.*, 1990 WL 125496, at *5 (N.D. Ill. Aug. 17, 1990) (Ex. E to F&R ICR Mem.). ICR’s and Harris’s claims fail on both grounds.

1981) (emphasis added). The privilege covers “*prelitigation communications* such as [a] letter defendant sent to plaintiff’s employer.” *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 833 (Ill. App. Ct. 2006) (emphasis added); *see also Rubin v. Green*, 4 Cal. 4th 1187, 1194-95 (Cal. 1993) (same rule). ICR and Harris do not cite a single case to the contrary.⁷

The privilege thus covers all of the alleged interfering conduct that ICR and Harris have pleaded. Indeed, according to their own allegations, all of the various “threats” and “demands” that Fish & Richardson supposedly made upon Harris arose *after* ICR threatened litigation against Google on August 29, 2007, and primarily took place in conversations between *counsel* for the parties. (ICR Am. Compl. ¶¶ 14-18; Harris Countercl. ¶¶ 28-32, 37.) ICR and Harris would turn conversations between counsel regarding each party’s claims and defenses into a tort.

Next, and again without citation to authority, ICR and Harris assert that “there is no legitimate interest in asserting an ownership claim which Fish knows to be false.” (Resp. at 13.) Again, ICR and Harris are wrong. As Fish & Richardson previously briefed, asserting one’s legal rights is not wrongful, “even though [one] may misconceive what those rights are.” *Kaplan v. Helenhart Novelty Corp.*, 182 F.2d 311, 313-14 (2d Cir. 1950); *see also Hayes v. Griffith, Inc. v. GE Capital Corp.*, 1989 WL 135246, at *9 (N.D. Ill. Oct. 24, 1989) (Ex. J) (dismissing a claim where plaintiff’s pleadings showed that alleged injury was incidental result of defendant’s pursuit of its own interests, despite alleged knowing misrepresentation). Furthermore, the litigation privilege affords complete immunity, irrespective of “knowledge of [a] statement’s

⁷ Indeed, ICR’s and Harris’s own authority makes clear that the litigation privilege bars tortious interference claims premised on conduct related to litigation. *See Wilton Partners III*, 2003 U.S. Dist. LEXIS 21899, at *11-12 (cited in Resp. at 11-12) (due to litigation privilege “the filing of the instant suit, and the subpoena served upon the Village in relation to that suit, do not support a cause of action for tortious interference”) (Ex. D). Likewise, under California law, the litigation privilege bars tortious interference claims. *See, e.g., Knoell v. Petrovich*, 76 Cal. App. 4th 164, 169-70 (Cal. Ct. App. 1999) (“the privilege has been extended to *any* communication, whether or not it is a publication, and to *all* torts other than malicious prosecution”) (internal citations omitted).

falsity” or the party’s motives. *Atkinson*, 369 Ill. App. 3d at 834. As the Seventh Circuit has noted, “[t]his absolute privilege is afforded even when malice is *assumed* to have motivated the attorney.” *Scheib v. Grant*, 22 F.3d 149, 156 (7th Cir. 1994) (emphasis added); accord *Doctors’ Co. Ins. Servs. v. Super. Ct.*, 225 Cal. App. 3d 1284, 1294-95 (Cal. Ct. App. 1990).

Moreover, ICR’s and Harris’s own allegations contradict their conclusory assertion that F&R “knows” its position in this litigation to be “false.” They allege that Harris was a partner at F&R, prosecuted patents for himself while at the firm, and then, while still at the firm, agreed to participate in lawsuits against firm clients based upon the patents. (ICR Am. Compl. ¶¶ 8, 10, 13, 14; Harris Countercl. ¶¶ 6, 7, 10, 39, 43.) A breach of duty by Harris is apparent even from those bare facts, providing, at a minimum, a good faith basis for F&R’s assertion of a constructive trust or other legal and/or equitable interest in the patents and proceeds from their assertion against firm clients. As a matter of law, F&R’s good faith assertion of such a lawful interest is not wrongful. See *Essex Real Estate Group, Ltd. v. River Works, L.L.C.*, 2002 WL 1822913, at *7 (N.D. Ill. Aug. 7, 2002) (Ex. C. to F&R ICR Mem.); see also *Reyes v. Atlantic Richfield Co.*, 12 F.3d 1464, 1473 (9th Cir. 1993).

For their last argument on this point, ICR and Harris assert “no privilege could possibly attach to Fish’s effort to intimidate a material witness.” (Resp. at 14.) Fish & Richardson and its counsel of course deny that they “intimidated” anyone and object to this baseless allegation. But even on the pleadings, this argument fares no better than the others. As F&R has already demonstrated, conduct directed at *Harris* cannot support a claim for tortious interference. (F&R ICR Mem. at 5-6, 11; F&R Harris Mem. at 9.)⁸ Further, ICR and Harris have expressly alleged

⁸ ICR’s effort to muddy the water with lengthy quotes from *MIT v. Imclone Systems, Inc.*, 490 F. Supp. 2d 119 (D. Mass. 2007), which did not concern tortious interference or the litigation privilege, is entirely inapt. In that case, Fish & Richardson obtained discovery sanctions against opposing counsel for

that the supposed “intimidation” occurred in conversations between counsel for F&R and counsel for Harris *after* ICR initiated this lawsuit. (See ICR Am. Compl. ¶¶ 15-18; Harris Countercl. ¶¶ 31-32.) The litigation privilege thus applies as discussed above.

II. Harris Fails To Allege Defamation *Per Se*.

Fish & Richardson has also demonstrated that Harris’s Count II should be dismissed on the pleadings. (F&R Harris Mem. at 9-12.) There, Harris attempts to plead a claim for defamation *per se* based on two alleged communications by F&R: (1) a phone call to the Patent Resources Group (“PRG”), the content of which is not alleged; and (2) statements in which F&R allegedly referred to Harris’s patent activities as “not authorized” by the firm. (Harris Countercl. ¶¶ 30, 33.) As shown, those alleged statements cannot support a claim for defamation *per se*. Nothing in Harris’s response alters that result.

With respect to the alleged call to PRG, Fish & Richardson has demonstrated that California law will not allow a claim for defamation *per se* where, as here, the content of the communication is not alleged. (F&R Harris Mem. at 10-11.)⁹ Harris cites no contrary authority and all but abandons this aspect of his claim. (Resp. at 16-18.)

Harris’s claim based on the alleged “not authorized” statement likewise fails. F&R demonstrated that defamation *per se* is reserved for only the most plainly damaging communications, words that are so obviously harmful that their defamatory meaning is clear “without the necessity for explanatory matter.” Cal. Civ. Code § 45(a). (F&R Harris Mem. at 10-12.) Even then, only certain categories of statements are actionable as defamation *per se*; the

misconduct in connection with the deposition of an expert witness, a topic far removed from whether ICR and Harris have pleaded valid causes of action. *Id.* at 127.

⁹ See, e.g., *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1612 n.5 (Cal. Ct. App. 1991) (“The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint”); *Chabra v. S. Monterey County Mem’l Hosp. Inc.*, 1994 WL 564566, at *7 (N.D. Cal. Oct. 3, 1994) (same rule) (Ex. H to F&R Harris Mem.).

only conceivably applicable category here is statements that “[t]end[] *directly* to injure [plaintiff] in respect to [plaintiff’s] office, profession, trade or business.” *Id.* § 46 (emphasis added). But again, if explanation is necessary, defamation *per se* will not apply. *E.g., Barnes-Hind, Inc. v. Super. Ct.*, 181 Cal. App. 3d 377, 387 (Cal. Ct. App. 1986).¹⁰

As F&R has established, the mere alleged statement that Harris engaged in patent activities that were “not authorized” by the firm does not indicate on its face—without additional context or explanation—wrongdoing by Harris that would rise to the level of defamation *per se*. To “authorize” means to affirmatively sanction or endorse. *E.g., U.S. v. Fort*, 472 F.3d 1106, 1125 (9th Cir. 2007) (“To authorize is to give legal authority; to empower . . . to formally approve; to sanction”) (internal quotations omitted); *Blair v. Chicago*, 201 U.S. 400, 457 (1906) (“authorize” means “to clothe with authority”); *Landry v. Daley*, 280 F. Supp. 938, 959 (N.D. Ill. 1968) (“authorize” means “to *endow* with authority or effective legal power, warrant or right”) (emphasis added), *rev’d on other grounds*, 401 U.S. 77 (1971). To state that an activity is “not authorized,” without any further explanation, means only that the activity was not affirmatively approved—not that it was prohibited, wrongful, or unethical. (*See* F&R Harris Mem. at 11-12.)

Indeed, Harris continues to argue that his patent activities were wholly separate from F&R. (*E.g.,* Harris Countercl. ¶¶ 10, 11, 14, 15, 36, 39, 40; Resp. at 2, 5-6.) Harris even refers to his patent activities as “*personal* patent filings,” and “*personal* inventorship activities” and analogizes the activities to an “outside commercial venture” and to his own “back yard.” (*Id.* ¶ 40; *see also* Resp. at 4.) It is not defamatory *per se* to refer to such alleged and avowedly outside-of-work activities as “not authorized” by the firm. Nor does it matter that Harris claims

¹⁰ If explanatory matter is necessary, the claim is for defamation *per quod*, not *per se*, and a plaintiff must plead “special damages.” Cal. Civ. Code § 45(a). Here, Harris expressly labels his defamation claim as one *per se* and makes no attempt to plead special damages, foreclosing a *per quod* claim.

that his activities *were* authorized—the question is not the truth of the statement, but whether the statement, even if false, rises to defamation *per se*. It does not.

In response, Harris attempts to twist the anodyne words “not authorized” to mean “wrong and unprofessional”; “engaged in wrongdoing”; and (worst of all) “something bad, *very bad*.” (Resp. at 17-18, emphasis added.) Harris argues that those meanings would be apparent to the “average reader,” but it requires more than an “average” reader to discern so much in so little. Rather, “if the listener would not recognize the defamatory meaning without knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons,” defamation *per se* does not apply. *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 112 (Cal. Ct. App. 2007) (internal citation omitted). Stripped of Harris’s reformulations, the words “not authorized” do not meet that test.

Harris also cites two cases concerning lawyers in an effort to establish defamation *per se*, but the statements considered in those cases are so wildly distinguishable that they actually undermine Harris’s claim. In *Maidman v. Jewish Publications*, 54 Cal. 2d 643 (Cal. 1960), a newspaper alleged that an attorney who was also a prominent Jewish leader had fabricated a “garbled exposition” of a Jewish holiday in order to convince a court to deny his opponent’s scheduling request. *Id.* at 650-51. The implication, that the attorney had “deliberately misled the court,” plainly tended to injure the attorney in respect of his profession and his position as a religious leader. *Id.* Similarly, in *Wang v. Hsu*, 1991 U.S. Dist. LEXIS 4398 (N.D. Cal. Mar. 1, 1991), an attorney’s colleagues were alleged to have said at a social gathering that the lawyer was “a crook.” *Id.* at *15 (Ex. K). Unsurprisingly, the court held that the statement implied “criminal wrongdoing” and thus rose to the level of defamation *per se*. *Id.* at *88.¹¹

¹¹ Harris also cites *MacLeod v. Tribune Publ. Co.*, 52 Cal. 2d 536, 543 (Cal. 1959), which considered an accusation made in the McCarthy era that a political candidate was a “communist.”

Compared to those statements, a comment that Harris's patent activities were "not authorized" by the firm falls well short of the type of facially outrageous words whose defamatory meaning is clear "without the necessity for explanatory matter." Cal. Civ. Code § 45(a). Indeed, Harris himself spends pages attempting to explain and provide context for the "not authorized" comment to show its alleged defamatory meaning. (Resp. at 16-18.)

In all events, and as Fish & Richardson has demonstrated (F&R Harris Mem. at 12), allegedly defamatory statements made in disputed matters are treated as non-actionable opinion under California law, even if the statements are in some part factual in nature. *E.g.*, *Okun v. Super. Ct.*, 29 Cal. 3d 442, 459 (Cal. 1981) (statement in context of policy debate that counsellor "improperly" and "unlawfully" sought to influence city held non-actionable); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1403 (Cal. Ct. App. 1999) (statements in book asserting that a lawyer filed "spurious" lawsuits was not defamation *per se*). Harris has no substantive response to these authorities, again foreclosing his claim.

III. Fish & Richardson Is Entitled To Attorneys' Fees Under 735 ILCS 110.

In its opening brief, Fish & Richardson also demonstrated that it is entitled to attorneys' fees pursuant to Illinois's recently enacted "anti-SLAPP" statute, 735 ILCS 110/5 *et seq.* (F&R Harris Mem. at 12-13.) That statute provides attorneys' fees and costs to a defendant that prevails on a motion to dismiss a claim "on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15. Federal courts in other jurisdictions have applied similar statutes in diversity actions to award attorneys' fees on a motion to dismiss like F&R's, which seeks to protect F&R's rights of free

speech against Harris's claim of defamation *per se*. *E.g., U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999).

In response, Harris points to a requirement under the California anti-SLAPP law that statements protected by the law must be made "in connection with a public issue or an issue of public interest." Cal. Code Civ. P. § 425.16(e)(4). (Resp. at 19-20.) Harris argues that the instant case does not qualify because it is a "private dispute," but Harris misunderstands the law. California does not require a "public interest" element so long as the communications at issue were "made in connection with an issue under consideration or review by a . . . judicial body." *Id.* § 425.16(e)(2). This also protects "communications preparatory to or in anticipation of litigation." *Rhode v. Wolf*, 154 Cal. App. 4th 28, 35 (Cal. Ct. App. 2007). Moreover, the Illinois statute has no "public interest" requirement and, on its face, applies to *all* "acts of the moving party in furtherance of the moving party's rights of . . . speech." 735 ILCS 110/15. Harris's cannot so easily escape the Illinois anti-SLAPP statute and F&R should be awarded its fees.

Conclusion

For the foregoing reasons, this Court should enter judgment on the pleadings against ICR's Count II and Harris's Counts I and II.

Dated: January 22, 2008

Respectfully submitted,

FISH & RICHARDSON P.C.

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