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

JSB LAW PC, JUDITH BETHGE, and ROY BETHGE, Plaintiffs, v. **JOHN LAMBERTO and WEST PUBLISHING CORPORATION d/b/a FINDLAW,** Defendants.	**Case No. 10-cv-06316** **Judge John F. Grady** **Mag. Judge: Sidney I. Schenkier**

MEMORANDUM IN SUPPORT OF WEST'S MOTION TO DISMISS

I. INTRODUCTION.

Plaintiff JSB Law PC ("JSB") is a law firm. (A. Compl. ¶ 3.) Plaintiff Judith Bethge is the principal attorney at JSB and her husband, Plaintiff Roy Bethge, is JSB's office manager in addition to being a police officer. *Id.* at ¶¶ 16-18. Plaintiffs allege that Defendant John Lamberto ("Lamberto"), a Sales Consultant for Defendant WEST PUBLISHING CORPORATION d/b/a Findlaw ("West"), attempted to blackmail them into purchasing marketing services from West by pseudonymously publishing a fraudulent review of JSB on the Google Maps website. In the allegedly fraudulent review, the purported reviewer described JSB as "A Good Choice if You Want An Attorney With A Drunken Cop Husband Running The Firm" (hereafter, the "Statement"). (A. Compl. at Exh. A.) Based solely on the posting of this Statement, Plaintiffs are suing Defendants West and Lamberto for defamation, trade disparagement, tortious interference with prospective economic advantage, and false light publicity.

As a threshold matter, even if the Statement was defamatory and even if it was made by Lamberto, West cannot be held liable for it under any of Plaintiffs' theories because the Statement was not made in furtherance of West's interests or within the scope of Lamberto's employment. Hence, West cannot be held liable for it under the doctrine of *respondeat superior*.

However, even if West could be held liable under the doctrine of *respondeat superior*, each of Plaintiffs' claims still must be dismissed because none states a claim upon which relief can be granted for multiple reasons.

II. STATEMENT OF FACTS.

Plaintiffs allege that in 2009, Lamberto, a West Sales Consultant, approached them and repeatedly tried to sell them certain marketing services, including a website, but that Plaintiffs formally declined this sales proposal on October 5, 2009. (A. Compl. ¶¶ 24-27.)

Plaintiffs further allege that "[o]n or about October 5, 2009, Defendant Lamberto pseudonymously published a fraudulent review of Plaintiffs on the Google Maps website." (*Id.* ¶ 28.) The "fraudulent review," in its entirety, consisted of the Statement. (*Id.* ¶¶ 28, 29 and Exh. A.) Plaintiffs do not provide any supporting details as to why they believe that Lamberto made the Statement, nor do they allege involvement by anyone else affiliated with West.

Nevertheless, Plaintiffs allege, without providing any supporting factual details, that Lamberto made the Statement "for purposes of causing the Plaintiffs to purchase services from [West] as well as to retaliate for Plaintiffs' failure to purchase services from him . . ." and that Lamberto posted the Statement "in the scope of his employment" with West. (*Id.* ¶¶ 36- 37).

Finally, Plaintiffs allege that "individuals and organizations, including prospective clients, will choose not to utilize their services" based on the contents of the Statement. (*Id.* ¶ 46.) Plaintiffs do not identify any particular client or opportunity lost because of the Statement.

III. ARGUMENT.

When deciding a Rule 12(b)(6) motion to dismiss, a Court must determine whether Plaintiffs have pled sufficient facts to establish "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (*citing Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). Under *Iqbal*, "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Rather, a complaint "must state sufficient facts to raise a plaintiff's right to relief above the speculative level." *Bissessur v. Ind. Univ. Bd. Of Trustees*, 581 F.3d 599, 602 (7th Cir. 2009).

A. ALL CLAIMS AGAINST WEST MUST BE DISMISSED BECAUSE WEST CANNOT BE HELD LIABLE FOR LAMBERTO'S ALLEGED ACTIONS UNDER THE DOCTRINE OF *RESPONDEAT SUPERIOR.*

Under the doctrine of *respondeat superior,* an employer will only be vicariously liable for an employee's torts if the torts were "committed within the scope of employment." *Gianforte v. Elgin Riverboat Casino*, No. 2-02-1390, 2003 WL 22208916 at *3 (Ill.App.Ct. 2d Dist., Sep. 17, 2003). That is, the tortious act must be the kind of act that the employee was employed to perform. *Id.* "[F]or an act to be considered of the kind that the employee is employed to perform . . . *[i]t must be within the ultimate objective of the principal and an act which is not unlikely that a servant might do.*" *Id.* (emphasis added.) *See also*, *Pyne v. Witmer*, 129 Ill.2d 351, 359-60, 543 N.E.2d 1304, 1308, 135 Ill.Dec. 557, 561 (1989). "'Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.'" *Id.* (quoting Restatement (Second) of Agency § 228 (1958)). "[W]hen [an employee's] deviation is

exceedingly marked and unusual, as a matter of law the employee may be found to be outside the scope of employment." *Id.* at 1309.

Here, Plaintiffs allege no facts that would allow the Court to reasonably infer that Lamberto's alleged posting of the Statement was committed within the scope of his employment with West. Quite simply, Plaintiffs have not (and cannot) allege any facts showing that Lamberto was authorized by West to engage in blackmail and retaliation against a prospective customer who rejected his sales overtures, or that any such blackmail and retaliation was the kind of act he was employed to perform. To the contrary, any such actions would be "exceedingly marked and unusual" for a salesperson.

Accordingly, West cannot be held liable for Lamberto's alleged actions, and all claims against West should be dismissed.

B. ALTERNATIVELY, PLAINTIFFS' DEFAMATION CLAIMS (COUNTS I AND II) MUST BE DISMISSED BECAUSE THEY ARE FATALLY FLAWED FOR MULTIPLE REASONS.

1. Plaintiffs' Defamation Claims Must Be Dismissed Because The Statement Is Merely An Expression of Opinion.

Under Illinois law, a statement that merely expresses an opinion is not actionable defamation. "While words may be considered defamatory, they are not actionable if they are constitutionally protected expressions of opinion." *Quinn v. Jewel Food Stores*, 276 Ill.App.3d 861, 865, 658 N.E.2d 1225, 1229, 213 Ill.Dec. 204, 208 (1st Dist. 1995). Illinois courts are clear that the First Amendment protects statements of opinion no matter how pernicious they may be, and they have applied a four-factor test to determine whether a statement is one of fact or opinion. Those four factors are:

> (1) whether the statement has a precise core of meaning for which a consensus of understanding exists, or, conversely, whether the statement is indefinite and ambiguous; (2) whether the statement is verifiable, *i.e.*, capable of being

> objectively verified as true or false; (3) whether the literary context of the statement would influence the average reader's readiness to infer that a particular statement has factual content; and (4) whether the broader social context or setting in which the statement appears signals a usage as either fact or opinion.

Quinn, 276 Ill.App.3d at 865. "[I]f 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, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

Under the criteria set out by the Illinois courts, it is clear that the Statement merely expressed an opinion.

a. The Statement is an expression of opinion because it is indefinite, ambiguous, and subject to myriad interpretations.

As an initial matter, the Statement is ambiguous on its face. It is not clear if it is meant to convey that the "drunken cop husband" is running JSB, or if the attorney running JSB merely has a "drunken cop husband."

Moreover, the term "drunken cop" is itself ambiguous. It could refer to a police offer who, on one occasion 10 years ago, had too much to drink at a wedding and got in to a fight -- or it could refer to a police officer who gets together with friends and occasionally has one beer too many -- or to one who has an after-hours drinking problem which does not affect his ability to do his job -- or to one who actually gets drunk on the job. Regardless, no two people will look at the words "drunken cop" and assign them the same meaning.

b. There is no way to verify whether the statement is objectively true.

Under the second factor, the Statement is not capable of objective verification. The review does not contain any "specific facts . . . complete or incomplete, capable of being verified as true or false." *Piersall v. SportsVision of Chicago*, 230 Ill.App.3d 503, 510-11, 172 Ill.Dec.

40, 44, 595 N.E.2d 103, 104 (1st Dist. 1992). There is no way that a rational reader could determine what exactly the Statement was meant to convey and whether it was true or not that Plaintiff Roy Bethge was "a drunken cop." There is no objective proof such as a breathalyzer test score or blood alcohol level. Rather, "[a] reasonable reader would not suppose that [the reviewer] had proof, or even the scientific knowledge that might ground a reasonable inference." *Haynes,* 8 F.3d at 1227.

c. The Statement contains no context that suggests factual content.

As in *Quinn*, the Statement is "'not laden with factual content' and cannot be read to imply facts." 276 Ill.App.3d at 867.

Similarly, in *Hopewell v. Vitullo*, 299 Ill.App.3d 513, 519, 233 Ill.Dec. 456, 461, 701 N.E.2d 99, 104 (1st Dist. 1998), the court found that a statement that plaintiff was "fired because of incompetence" was not defamatory:

> [r]egardless of the fact that 'incompetent' is an easily understood term, its broad scope renders it lacking the necessary detail to have a precise and readily understood meaning. There are numerous reasons why one might conclude that another is incompetent; one person's idea of when one reaches the threshold of incompetence will vary from the next person. Without the context and content of the statement to limit the scope of 'incompetent,' we cannot say there is a precise meaning relating to the alleged defamatory statement.

Id. The *Hopewell* court's analysis of "incompetence" is analogous to that of the term "drunken," since one person's idea of what it means to be "drunken" will differ from another's. Moreover, like the charge of incompetence in *Hopewell*, there is no other context surrounding the term "drunken" as used in the Statement that would give it a precise meaning. *Se e Quiroz v. Hargrove Hosp.*, No. 97 C 6515, 1999 WL 281343, at * 15 (N.D. Ill. Mar. 24, 1999) (Hart, J.) (holding that where there were "no specific charges" about the plaintiff's purported deficiencies "with reference to specific facts," the defamation claim failed).

d. In the social context of the Statement, it is clearly an opinion.

Finally, Illinois courts analyze the social context in which an allegedly defamatory statement was made "because some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Quinn*, Ill.App.3d at 867. In the social context of an on-line review posted in cyberspace, evaluations of organizations like JSB communicate subjective opinions. Under the totality of the circumstances, it is clear that the Statement, which was posted on a Google website, contains the opinion of the author and not a factual assertion. Certainly, on-line reviewers do not attest to their opinions in any way, nor do they post their opinions with verifications signed under penalty of perjury. Rather, the on-line forum is designed to be an informal way that Internet users can post their opinions about a host of products and services, including law firms. No rational reader of the review at issue would infer that the Statement was factual.

Thus, for all the foregoing reasons, the Statement that Plaintiffs allege was defamatory was nothing more than a statement of opinion as a matter of Illinois law.

2. Plaintiffs' Defamation Claims Are Also Fatally Flawed Because The Statement Does Not Fall Into One Of The Categories Of Defamation *Per Se* To Any Plaintiff.

Even if this Court finds that the Statement does not express an opinion, Plaintiffs' defamation claims nevertheless fail because the Statement does not fall into one of the categories of defamation *per se* as to any Plaintiff. "A statement is defamatory *per se* if its defamatory character is obvious and apparent on its face and injury to the plaintiff's reputation may be presumed." *Tuite v. Corbitt*, 224 Ill.2d 490, 866 N.E.2d 114, 310 Ill.Dec. 303 (Ill. 2007).

The Illinois courts recognize five categories of statements are defamatory *per se*:

> (1) statements imputing the commission of a crime; (2) statements imputing infection with a loathsome communicable disease; (3) statements imputing an

> inability to perform or a want of integrity in the discharge of duties of office or employment; (4) statements imputing a lack of ability or that otherwise prejudice a person in his or her profession or business; and (5) statements imputing adultery or fornication.

Tuite, 24 Ill.2d at 501.

Here, Plaintiffs contend that the Statement was defamatory *per se* because it falls under the third and fourth categories of defamation *per se* (A. Compl. ¶¶ 78, 96.) That contention, however, is not a reasonable inference under the facts as plead.

a. The Statement is not defamatory *per se* as to either Plaintiff JSB or Plaintiff Judith Bethge.

As to Judith Bethge, the fact that she may have a "drunken cop husband" does not impute an inability to perform or a want of integrity in the discharge of her legal duties. Ms. Bethge's performance of her duties as an attorney is in no way related to her husband's sobriety or lack thereof.

Plaintiffs nevertheless claim that the Statement defames Plaintiff Judith Bethge because it indicates that she "exercises poor judgment as an attorney by employing a drunken office manager," and that the statement somehow also conveys that "she is unable to responsibly carry out her fiduciary duties and obligations to her clients, the courts, her colleagues and the community." (*Id.* ¶77.) The alleged facts, however, do not plausibly support Plaintiffs' claims. Plaintiffs allege no facts that support a reasonable inference that having a "drunken cop husband" renders Plaintiff Judith Bethge unable to perform the tasks of an attorney or the duties she owes to clients, courts or her colleagues. The Statement does not include any specific facts about how the "drunken cop" has compromised her practice of law or affected her clients or practice.

As for Plaintiff JSB, Plaintiffs allege that the Statement "conveys that Plaintiff JSB is poorly managed by an alcoholic unable to responsibly handle the operations, accounts, finances,

and obligations of a law firm." (*Id.* ¶76.) In fact, the Statement is nowhere near that clear. An alternative reading is that Plaintiff JSB is run by Plaintiff Judith Bethge, who happens to have a drunken cop husband. Moreover, even if this Court finds that the Statement does convey that the "drunken cop husband" runs the firm, it would be unreasonable to find that therefore the firm itself is "poorly managed" by an "alcoholic" who cannot handle the day-to-day tasks of running a professional law firm. The Statement simply does not support that inference, and this court, under a Rule 12(b)(6) motion is not required to make unreasonable inferences or draw illogical conclusions. *See Iqbal,* 129 S.Ct. at 1937. Thus, the Statement as applied to Plaintiffs JSB and Judith Bethge is not defamatory *per se*.

b. The Statement is not defamatory *per se* as to Plaintiff Roy Bethge.

The Statement is not defamatory *per se* as to Plaintiff Roy Bethge because it does not impute a lack of integrity or lack of ability to perform his job duties, because it does not indicate that he was drunk on the job or in the course of his duties. "[I]n order for a statement to qualify as defamatory *per se,* its defamatory character must be apparent on its face without reference to extrinsic facts." *McKay v. Town and Country Cadillac, Inc.*, No. 97 C 2102, 2002 WL 1611578, at * 9 (N.D. Ill. Jul. 17, 2002). In *McKay*, the Court held that merely "referring to someone as 'a drunk,' without elaboration" was not defamatory *per se* because it did not impute an inability to perform a job or prejudice someone in his profession because it did not impute drunkenness on the job. *Id.*

That is precisely the situation here. Merely referring to Mr. Bethge as a "drunken cop" does not mean that he drinks on the job or that his job performance was affected by alleged drinking.

3. Even If The Statement Was Defamatory *Per Se*, Because It Is Reasonably Capable Of An Innocent Construction, It Is Not Actionable.

"Even if a statement falls into a recognized category, it will not be actionable *per se* if the statement may reasonably be innocently interpreted." *Muzikowski v. Paramount Pictures Corp.,* 322 F.3d 918, 924 (7th Cir. 2003) (internal citations omitted). That is, "if a statement is capable of two reasonable constructions, one defamatory and one innocent, the innocent one will prevail." *Id.* at 925. In *Muzikowski*, the Seventh Circuit, in evaluating defamation claims under Illinois law, explained that the plaintiff's "most serious hurdle" was "whether he has in essence pleaded himself out of court, by showing that the federal trier of fact (whether judge or jury) would be compelled to find an innocent construction" of the defamatory material. *Id.* at 926.

Here, there are multiple plausible, non-defamatory constructions of the Statement. As explained above (*see supra*, Part III. B.), the Statement is inherently ambiguous and subject to many reasonable interpretations which do not impute any lack of professional ability or want of integrity in the discharge of duties.

Accordingly, even if the Statement fell into one of the categories of *per se* defamation as to any of the Plaintiffs, it is nevertheless not actionable because it is capable of an innocent construction.

C. PLAINTIFF JSB'S TRADE DISPARAGEMENT CLAIM (COUNT III) AGAINST WEST IS FATALLY FLAWED.

The Illinois Uniform Deceptive Trade Practices Act, 815 ILCS § 510/2 ("IUDTPA") makes it unlawful for a person, "in the course of his or her business, vocation or occupation . . . [to] disparage[] the goods, services, or business of another by false or misleading representation *of fact*." 815 ILCS 510/2(a)(8) (emphasis added).[1] In order to state such a claim, "a plaintiff must allege that defendant published untrue or misleading statements that disparaged the

[1] Under the IUDTP, 12 types of deceptive trade practices are prohibited. 815 ILCS 510/2(a). Although the Amended Complaint does not reference the precise prong of the IUDTP that it contends was violated, the only one that is potentially applicable is 815 ILCS 510/2(a)(8).

plaintiff's goods or services." *Morton Grove Pharmaceuticals, Inc. v. Nat'l Pediculosis Ass'n, Inc.*, 494 F.Supp.2d 934, 943 (N.D. Ill. 2007).

In the case at bar, in Count III, Plaintiff JSB alleges that the Statement constitutes trade disparagement in violation of the IUDTPA. For multiple reasons, this claim has no merit.

1. The Statement Was Not Made In The Course Of West's Business.

As a threshold issue, Plaintiffs allege no facts that would allow the Court to reasonably infer that Lamberto's alleged posting of the Statement was committed within the scope of his employment with West. Accordingly, it was not made in the course of West's business, and West cannot be held liable for it.

2. The Statement Does Not Disparage The Goods, Services, or Business of JSB.

Additionally, the Statement does not disparage the goods, services, or business of Plaintiff JSB. The Statement implies nothing about the quality of the legal services or the operation of the firm. *See Associated Underwriters of Am. v. McCarthy*, 356 Ill.App.3d 1010, 1021 826 N.E.2d 1160, 1170, 292 Ill.Dec. 724, 734 (1st Dist. 2005) (finding no trade disparagement where "Plaintiff cites no instance where defendants disparaged its abilities or integrity").

3. The Statement Is Not A False Or Misleading Representation of Fact.

As noted above (*see supra* Part III. B.1), the Statement was not a factual representation; it was a statement of opinion. As such, it is not a statement capable of being proved true or false. Because the Statement is a subjective expression of opinion, Plaintiff JSB cannot succeed on a claim under the IUDTPA, which requires a false or misleading statement of *fact*.

D. PLAINTIFFS' TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE CLAIM (COUNT IV) AGAINST WEST

FAILS BECAUSE PLAINTIFFS DO NOT ALLEGE SPECIFIC FACTS SUFFICIENT TO SUPPORT THE REQUIRED ELEMENTS.

The elements of a claim for tortious inference with prospective economic advantage are as follows:

> (1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from defendant's interference.

Jim Mullen Charitable Found. v. World Ability Fed'n, NFP, 395 Ill.App.3d 746, 761, 917 N.E.2d 1098, 1111, 335 Ill.Dec. 34, 47 (1st Dist. 2009) (internal citations omitted).

1. Plaintiffs Do Not Allege Specific Facts Showing A Reasonable Expectation Of Entering Into A Valid Business Relationship.

"A plaintiff states a cause of action [for tortious interference] *only if* he alleges a business expectancy with a *specific* third party as well as action by the defendant directed towards the third party." *Associated Underwriters*, 356 Ill.App.3d at 1019 (emphasis added).

As a matter of law, this claim must be dismissed because Plaintiffs have failed to identify a single third party with whom the Statement interfered. Having only speculated that certain unnamed and unidentified customers might be dissuaded from engaging Plaintiff JSB's services, Plaintiffs cannot survive a motion to dismiss this claim. *See Village of Itasca v. Village of Lisle*, 352 Ill.App.3d 847, 858, 817 N.E.2d 160, 171, 288 Ill.Dec. 35, 46 (2d Dist. 2004) (dismissing tortious interference claim where the plaintiff failed to establish a reasonable expectation of business to support its claim).

2. Plaintiffs Do Not Allege Specific Facts Showing That West Knew Of Plaintiffs' Reasonable Expectancy.

Plaintiffs' allegations that West knew of their reasonable expectancy are also fatally vague because they offer no facts supporting their contention that Defendants knew of Plaintiffs'

reasonable expectancy. Clearly, West could not be aware of and interfere with the alleged reasonable expectancy, *because Plaintiffs themselves are unable to identify it.*

3. Plaintiffs Do Not Allege Specific Facts Showing Intentional Actions By West Towards A Third Party.

Plaintiffs also fail to plead specific facts showing that West acted intentionally *towards a third party* with whom Plaintiffs expected a business relationship.

4. Plaintiffs Do Not Allege Specific Damages.

Finally, Plaintiffs fail to identify any alleged specific damages resulting from West's interference. There is no claim about a specific lost opportunity or any itemization of their loss. Having failed to alleged specific damages, Plaintiffs cannot proceed with this claim.

E. THE "FALSE-LIGHT PUBLICITY" CLAIM (COUNT V) IS WITHOUT MERIT BECAUSE THE BASIS OF THIS CLAIM IS AN UNSUCCESSFUL DEFAMATION CLAIM.

To sustain a cause of action for false light invasion of privacy, a plaintiff must plead: "(1) he was placed in a false light before the public by the defendant; (2) the false light would be offensive to a reasonable person; and (3) the defendant acted with actual malice." *Seith v. Chicago Sun-Times, Inc.*, 371 Ill.App.3d 124, 139, 861 N.E.2d 1117, 1130, 308 Ill.Dec. 552, 565 (1st Dist. 2007). A false-light publicity claim, however, cannot succeed if it is based on a statement that is not defamatory *per se. See Seith,* 371 Ill.App.3d at 139 (dismissing the plaintiff's false-light claim because "the plaintiff's unsuccessful defamation *per se* claim is the basis of his false-light claim"). Similarly, in *Tuite v. Corbitt*, 224 Ill.2d 490, 515, 866 N.E.2d 114, 129, 310 Ill.Dec. 303, 318 (2006), the Illinois Supreme Court reiterated that a false-light publicity claim cannot succeed unless there is a statement that is defamatory *per se*.

Here, the Statement is the basis of the false-light publicity claims. (*See* A. Compl. ¶¶ 141-151.) As demonstrated above (*see supra* Part III.B), the Statement was not defamatory *per se* as to any Plaintiffs. Because their defamation claims fail, their false-light publicity claim also fails.

IV. CONCLUSION.

For the foregoing reasons, West respectfully requests that this Court either dismiss all claims against West under the doctrine of *respondeat superior*, or that it dismiss the entire complaint due to the fundamental deficiencies with each of Plaintiffs' claims.

WEST PUBLISHING CORPORATION d/b/a Findlaw

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Dated: December 23, 2010

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 23, 2010, she caused the foregoing MEMORANDUM IN SUPPORT OF WEST'S MOTION TO DISMISS to be filed and uploaded to the CM/ECF system which will send notification of such filing to the following:

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