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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 SEA GREEN PARTNERS LLC,

CASE NO. C20-5142 BHS

9 Plaintiff,

ORDER

v.

10 BARBARA GAIL, et al.,

11 Defendants.
12

13 THIS MATTER is before the Court on Defendants' Motion for Partial Summary
14 Judgment, Dkt. 48. Plaintiff Sea Green Partners LLC, doing business as "Sea Marine," is
15 a full service boatyard and marina in Port Townsend, Washington. Defendants Richard
16 Pack and Barbara Zimonja own Defendant Margene Marine LLC, which in turn owned
17 the Defendant vessel *Barbara Gail*. Defendant Western Waters LLC apparently now
18 owns the *Barbara Gail*.

19 Defendants engaged Sea Marine to perform repair and upgrade work on the
20 *Barbara Gail* in March 2019. The vessel was hauled out at Sea Marine on May 2, 2019,
21 and the vessel was put back into the water on June 21, 2019. Dkt. 1 (verified complaint).
22 Sea Marine claims it spent 489.5 man hours on the vessel, not including canvas work that

1 it was hired to also perform. The parties agree that additional work remained when the
2 vessel was re-launched.

3 Sea Marine billed Defendants over \$125,000 for the work, and the parties
4 negotiated the amounts due. Sea Marine claims that Defendants still owe \$45,441.65 for
5 the work it performed on the *Barbara Gail*. It filed a maritime lien on the *Barbara Gail*
6 based on the outstanding balance. *Id.* at 4. Sea Marine alleges that, in response,
7 Defendants wrote negative, defamatory reviews about Sea Marine on various online
8 platforms. The seven specific reviews at issue are attached to Sea Green's Complaint,
9 Dkt. 1-10, and to its Amended Complaint, Dkt. 37-10. Representative examples are
10 reproduced below:

11 9/27/2019 Previous review

12 Worst experience ever. They do not have any experienced employees. The workmanship is terrible. They
charge for work and parts that they did not install on your boat. Crooks, dishonest, and liars. You may have to
take them to court just to get your boat back.

13 9/25/2019 Previous review

14 Do yourself a favor and go anywhere else!!!! I think they only have 2 guys that work on boats and they are
buffoons. They have no training. One guys job was to install stereos. Now Sea Marine calls him an
electrician. If you need canvas work or any other work done go, go, go somewhere else as fast as you can.

15 Sea Marine sued in February 2020, seeking to foreclose its lien. It also asserts
16 claims for libel, defamation, and false light invasion of privacy, alleging that the reviews
17 were false, defamatory, and damaging. Defendants seek summary judgment on Sea
18 Marine's libel/defamation, and false light invasion of privacy claims, arguing that online
19 reviews are matters of opinion, not fact, and that Sea Marine cannot make out its *prima*
20 *facie* case of defamation. Sea Marine concedes its false light invasion of privacy claim,
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1 Dkt. 57 at 16. Defendants’ Motion for Partial Summary Judgment on that claim is
2 GRANTED, and it is DISMISSED with prejudice.

3 The remaining issues are addressed in turn.

4 **A. Summary Judgment Standard.**

5 Summary judgment is proper if the pleadings, the discovery and disclosure
6 materials on file, and any affidavits show that there is “no genuine dispute as to any
7 material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
8 P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence
9 in the light most favorable to the nonmoving party and draw all reasonable inferences in
10 that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986);
11 *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact
12 exists where there is sufficient evidence for a reasonable factfinder to find for the
13 nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is “whether the evidence
14 presents a sufficient disagreement to require submission to a jury or whether it is so one-
15 sided that one party must prevail as a matter of law.” *Id.* at 251–52. The moving party
16 bears the initial burden of showing that there is no evidence which supports an element
17 essential to the nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
18 Once the movant has met this burden, the nonmoving party then must show that there is a
19 genuine issue for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to
20 establish the existence of a genuine issue of material fact, “the moving party is entitled to
21 judgment as a matter of law.” *Celotex*, 477 U.S. at 323–24.

1 There is no requirement that the moving party negate elements of the non-
2 movant's case. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990). Once the moving
3 party has met its burden, the non-movant must then produce concrete evidence, without
4 merely relying on allegations in the pleadings, that there remain genuine factual issues.
5 *Anderson*, 477 U.S. at 248.

6 Defendants assert that summary judgment plays a particularly important role in
7 defamation cases: "Serious problems regarding the exercise of free speech and free press
8 guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to
9 proceed to trial." Dkt. 48 at 5 (citing *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App.
10 320, 328 (2015)); *see also Tait v. King Broad. Co.*, 1 Wn. App. 250, 255 (1969) (court
11 must evaluate on summary judgment "whether there is substantial evidence presented
12 which, if believed, could persuade a jury with convincing clarity the defendant was guilty
13 of maliciously making a libelous statement"). Defendants argue that Sea Marine cannot
14 meet this standard, and that its defamation claim must be dismissed as a matter of law.

15 **B. Defamation.**

16 As an initial matter, Defendants correctly argue that Washington does not
17 recognize a separate claim for libel; the only viable claim is defamation. Dkt. 48 at 6
18 (citing *Life Designs*, 191 Wn. App. at 341). Sea Marine does not dispute this conclusion.
19 Thus, to the extent Sea Marine asserts a separate libel claim against Defendants, it is
20 DISMISSED.

21 To succeed on its defamation claim, Sea Marine is required to demonstrate four
22 elements: (1) a false statement; (2) lack of privilege; (3) fault; and (4) damages. *Herron v.*

1 *KING Broad. Co.*, 112 Wn.2d 762, 768 (1989). Defendants’ summary judgment motion
2 argues that Sea Marine cannot establish these elements, and that its defamation claim
3 fails as a matter of law. They argue that the statements were matters of opinion, not
4 objective fact; that the online reviews are privileged (and Sea Marine cannot establish
5 that they are not); and that Sea Marine cannot show any damages. Dkt 48.

6 First, Defendants argue that, even if they made the statements, “statements of
7 opinion on matters of public concern that do not contain or imply a provable factual
8 assertion” are not defamatory as a matter of law. *Id.* at 7 (citing *Underwager v. Channel 9*
9 *Australia*, 69 F.3d 361, 366 (9th Cir. 1995)). They argue that, under this standard, the
10 Court must determine “whether a reasonable factfinder could conclude that the contested
11 statement implies an assertion of objective fact.” *Id.* at 7 (citing *Partington v. Bugliosi*, 56
12 F.3d 1147, 1153 (9th Cir. 1995)).

13 Whether a statement is one of opinion or objective fact is determined under the
14 totality of the circumstances, including “(1) the medium and context in which the
15 statement was published, (2) the audience to whom it was published, and (3) whether the
16 statement implies undisclosed facts. *Dunlap v. Wayne*, 105 Wn.2d 529, 539 (1986)

17 Defendants argue that, in the context of an online review of a business,
18 Washington courts have consistently concluded that such reviews are non-actionable
19 opinions about the quality of service provided by the business rather than factual
20 statements supporting a defamation claim. Dkt. 48 at 7–8 (citing *Life Designs*, 191 Wn.
21 App. at 328 (“[A]llowing businesses to sue any unhappy consumer for what they posted
22 online for defamation would stifle freedom of speech.”)). Another Washington case dealt

1 with similar, if not worse, reviews: “The company is lacking in the areas of customer
2 service, honesty and integrity;” “Reprehensible that a female business owner would
3 knowingly give a convicted sex offender a position where he would be entering peoples’
4 homes—homes that could have children in them;” and “Upset me that a woman owner of
5 a company was knowingly employing a convicted sex offender.” *Valdeman v. Martin*, 1
6 Wn. App. 2d 1040, 2017 WL 6336018, at *1 (2017) (unpublished opinion). Division 1 of
7 the Washington Court of Appeals affirmed the dismissal of plaintiff’s defamation claim
8 on summary judgment, recognizing that the audience (those seeking online opinions of a
9 product or service) expect subjective opinions, not facts:

10 [N]egative and positive reviews subject to reviewers’ biases are exactly
11 what an audience researching reviews on Angie’s List and Yelp! expects to
12 find. Current and future customers’ understanding that [defendant’s] posts
represent one person’s subjective evaluation of [plaintiff] supports that her
statements are nonactionable opinion.

13 *Id.* at *4.

14 Defendants argue, and the Court agrees, that the reviews at issue here are not
15 actionable for the same reasons: the medium (the internet), the context (an online
16 review), and the audience (those seeking reviews—opinions—about Sea Marine) lead
17 necessarily to the conclusion that the Defendants’ reviews were rhetorical hyperbole, not
18 false statements of objective fact, and that they are not defamatory as a matter of law.

19 Sea Marine’s Response to Defendants’ motion, Dkt. 57, includes seven pages of
20 additional, allegedly defamatory reviews that are not alleged in its original or its
21 operative amended complaint, Dkts. 37 and 37-10; *see* Dkts. 57 at 2–9 and 57-1 through
22 57-24. Sea Marine asserts that Pack posted other defamatory reviews in late 2019, and

1 further that it believes Pack posted online reviews using fake identities, including
2 “XXXXUnhappy,” “Joe M.,” Darlene F,” and R-english.” *Id.* (citing Dkts. 57-1 to 57-
3 24).

4 Defendants correctly point out these allegedly defamatory reviews were not pled
5 and are not the subject of the lawsuit or the pending summary judgment motion. *See* Dkt.
6 68. They argue, again persuasively, that it is improper to raise new claims in response to
7 a summary judgment motion. Dkt. 68 at 3 (citing *Navajo Nation v. U.S. Forest Serv.*, 535
8 F.3d 1058, 1080 (9th Cir. 2008) (where allegations are not in the complaint, “raising such
9 claim in a summary judgment motion is insufficient to present the claim to the district
10 court”)). Even if they were defamatory, the newly-asserted allegedly defamatory reviews
11 are not in this case.

12 The Court notes, though, that Sea Marine concedes that at least two of the
13 statements of “objective facts” of which it complains are in fact true. It asserts in support
14 of its defamation claim that “Richard P.” complained that Sea Marine “installed my stern
15 thruster upside down.” *See* Dkt. 57 at 11. But Sea Marine has conceded that the statement
16 is true, as to the *Barbara Gail*:¹ “The thruster had to be installed in an upside-down
17 orientation to fit in the space such that the shaft was far enough below the waterline to be
18 effective. This was done in consultation and approval from the vendor, Imtra, not by
19 mistake or incompetence.” Declaration of General Manager Chris Bakken, Dkt. 57-3 at 3.

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21 ¹ Sea Marine’s response also asserts that “fake” reviews complained about the same
22 thing, Dkt. 57 at 4. Sea Marine cites no authority for its implicit claim that the use of a pen name
or a fake name to repeat or reiterate an otherwise non-defamatory review makes the additional
posting tortious.

1 This is not evidence in support of Sea Marine’s claim that the online review contained a
2 false statement of objective fact, rather than an opinion.

3 Sea Marine also implicitly concedes the truth of a second review, regarding re-
4 doing the canvas. Dkt. 57 at 10. It argues (but did not plead) that Defendants defamed it
5 by asserting in an online review that Sea Marine “had to redo the canvas 3 times” and
6 that Bakken “very reluctantly” took that work off the bill. Sea Marine contends that this
7 is a defamatory statement of objective fact, and not an opinion, because Sea Marine “did
8 not charge for re-working the canvas.” *Id.* at 11. Implicit in this statement is the
9 concession that the canvas was re-worked, and that Sea Marine did not charge for that
10 work. That is what the review said, as well. The only part of the statement that Sea
11 Marine could contend is defamatory is the claim that Bakken “reluctantly” took the cost
12 off the bill. Sea Marine’s “reluctance” is not a statement of objective fact, and it is not
13 defamatory as a matter of law. A reasonable and even exculpatory explanation for a true
14 statement does not make the underlying statement false, much less defamatory.

15 Sea Marine’s response largely avoids the merits of its defamation claim as to the
16 reviews that are attached to and incorporated into its operative Amended Complaint, and
17 which are the subject of the pending motion. Sea Marine concedes that they were posted
18 to websites that prospective customers visit to determine, based on the reviews of past
19 customers, whether to engage the business. *Id.* at 10. And as the *Life Designs* and
20 *Valdeman* courts recognized, the context and the medium of such reviews necessarily
21 imply that the reviews are based on the reviewer’s subjective opinions about the business.
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1 Such subjective impressions are what the intended audience is looking for, and what they
2 are expecting to find, on such websites.

3 Sea Marine claims that, to be considered statements of opinion, rather than
4 objective fact, the reviews were required to include “cautionary terms of apparency” and,
5 because they did not, they are defamatory. Dkt. 57 at 13 (citing *Life Designs*, 191 Wn.
6 App. at 331). This is not accurate for two reasons. First, several of the disputed reviews
7 are couched in terms of apparency or opinion: “I think Sea Marine must be going out of
8 business,” “worst experience ever,” “in my opinion, they are the worst boatyard I have
9 ever seen or heard of,” “It looks like I will have to get a lawyer to get my boat back,” and
10 “you may have to take them to court to get your boat back.” See Dkt. 37-10. These are
11 plainly statements of opinion and rhetorical hyperbole, and no jury could find that they
12 were false statements of objective fact.

13 Second, given the context, the medium, and the audience, even those statements
14 that are not so couched (“wrong color, crooked, dishonest, they price gouge you, the
15 canvas work is substandard and overpriced,” Dkt. 37-10) are not objective statements of
16 fact, and are not taken as such. As defendants argue, these *Dunlap* factors are “often
17 dispositive” in the context of online reviews and online review websites, where
18 “vigorous, hyperbolic, and often strong comments are expected.” Dkt. 68 at 7.

19 Sea Marine has not cited any Washington authority supporting its claim that
20 negative online reviews are objective statements of fact and not opinions about the
21 service the reviewer received. The medium, the context, and the intended audience for the
22 reviews all overwhelmingly support the claim that the reviews were based on opinion, not

1 objective fact. Indeed, Sea Marine cites no authority supporting a defamation claim based
2 on an online review, anonymous or otherwise, in any jurisdiction. It has not demonstrated
3 with the required clear evidence that Defendants' negative online reviews were false,
4 objective statements of fact. Nor has Sea Marine met its burden of establishing that the
5 reviews were not privileged. It seems to concede that such a determination is dependent
6 on the Court determining that the reviews contained false statements of objective fact.
7 *See* Dkt. 57 at 14 (“[T]he statements at issue are of false facts, and thus not privileged.”).

8 Finally, Sea Marine has not demonstrated that it has been damaged by the online
9 reviews. It claims first that Bakken (who is not a plaintiff) has spent 220 hours
10 “contending with” and “trying to correct” the Defendants’ “online defamatory
11 campaign,” Dkt. 57 at 15. But Sea Marine has not described what Bakken did or how it
12 was a necessary or even reasonable response to any false statement of objective fact,
13 rather than a strongly worded opinion about the reviewers’ experiences at Sea Marine. As
14 to actual damages, Sea Marine claims that three customers have “mentioned” the reviews,
15 raising “the specter that Plaintiff has lost business opportunities from potential customers
16 who, having read these defamatory reviews, elected not to engage Plaintiff’s services.”
17 *Id.* at 16. Sea Marine claims it intends to engage a forensic accountant to review its
18 books, but it has not done so. Sea Marine has not met its summary judgment burden of
19 demonstrating that that any defamatory statement caused it damage.

20 Defendants’ Motion for Partial Summary Judgment on Sea Marine’s defamation
21 claim is **GRANTED**, and Sea Marine’s libel/defamation and false light invasion of
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1 privacy claims are **DISMISSED with prejudice** and without leave to amend. Sea
2 Marine's maritime lien and breach of contract claims remain.

3 IT IS SO ORDERED.

4 Dated this 18th day of January, 2023.

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BENJAMIN H. SETTLE
United States District Judge

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