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Court: CO Park County District Court 11th JD

Judge: Stephen Groome

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Case Number: 2012CV128

Case Name: GIDUCK, JOHN et al vs. SOCNETCOM et al

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Per C.R.S. 13-17-201, Defendants are awarded their reasonable attorney fees.

/s/ Judge Groome, Stephen

	GRANTED WITH AMENDMENTS	**The moving party is hereby ORDERED to provide a copy of this Order to any pro se parties who have entered an appearance in this action within 10 days from the date of this order.**	**Stephen Groome** **District Court Judge** DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, PARK COUNTY, COLORADO

Court Address: 300 4th Street
P.O. Box 190
Fairplay, CO 80440

Plaintiffs: JOHN GIDUCK; SHARI NICOLETTI; ARCHANGEL GROUP LTD., a Colorado Corporation

vs.

Defendants: SOCNET.COM; JOE NIBLETT; MICHAEL KIRK; MITCHELL ISAAC LAKE; JAY HARRISON; JONATHAN G. CLOUSE; PHILIP D. MARTIN; JERROD BARENTINE; EDWARD D. CLARK; BARRY SALANT; TRACY-PAUL WARRINGTON; SEAN ALLEN WHITTENTIN; MATTHEW LONGBOTTOM; LAURA STANFORD; PATRICK MCALEER; DF BEHR; JASON OLE; PATRICK SLOAN; DANIEL HAMMOND; JOSHUA GARMON; RICHARD AARON MONTCALM; KARL MONGER; JIM HANSON; JOHN DOES 1 THROUGH 30

▲ COURT USE ONLY ▲

Case Number: 12CV128

Division: B

ORDER RE MOTIONS TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5) FILED BY DEFENDANTS JAY HARRISON, MITCHELL ISAAC LAKE AND PATRICK MCALEER

THE COURT, having reviewed the motions to dismiss pursuant to C.R.C.P. 12(b)(5) filed by Defendants Jay Harrison, Mitchell Isaac Lake and Patrick McAleer (collectively "Defendants"), together with any response thereto, and being fully advised in the premises, hereby GRANTS said motions, and enters the following findings, conclusions and order.

This case was commenced by the filing of a Complaint and Jury Demand on June 11, 2012 (the "Original Complaint"). The Original Complaint asserted twelve (12) claims for relief against fifty-one (51) defendants, twenty-one (21) of whom were named and thirty (30) of whom were designated as "John Does 1 through 30."

The Defendants joined in filing a Motion For More Definite Statement arguing that the allegations of the Original Complaint failed to identify which defendants performed particular alleged acts and that the Plaintiffs had "not averred with sufficient definiteness or particularity to enable [them] properly to prepare [their] responsive pleading." C.R.C.P. 12(e).

The Court granted the joint Motions For More Definite Statement specifically stating as follows:

> The Court finds and concludes that the Plaintiffs' complaint lacks sufficient definiteness and particularity to enable the defendants to respond and defend against each alleged wrongdoing.
>
> Therefore, the Court GRANTS the defendants' motion and orders that the Plaintiffs shall have 30 days from the date of this Order in which to file an amended complaint, which provides the defendants with those particulars.

Order re Motion for more Definite Statement, p. 2.

On September 14, 2012, the Plaintiffs filed their Amended Complaint and Jury Demand (the "Amended Complaint"). The Amended Complaint added some detail to the first and second claims for relief (libel per se and libel per quod) alleging specific statements by this Defendant that Plaintiffs claim to be defamatory. The third through twelfth claims remained unchanged and were repeated verbatim from the Original Complaint.

Defendants filed similar motions to dismiss the claims against them for failure to state a claim upon which relief can be granted pursuant to C.R.C.P. 12(b)(5).

As with all motions to dismiss pursuant to C.R.C.P. 12(b)(5) the facts applicable to this motion are those recited in the Amended Complaint which must, for purposes of this motion only, be accepted as true. *Douglas County Nat. Bk. v. Pfeiff,* 809 P.2d 1100 (Colo. App. 1991). The Court is not, however, required to accept as true legal conclusions couched as factual allegations. *Denver Post Corp. v. Ritter,* 255 P.3d 1083 (Colo. 2011).

1. The first and second claims for relief.

The elements of a claim for defamation such as libel are well settled in Colorado.

> To state a cause of action for defamation under Colorado law, the plaintiff must allege "(1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication." *Williams v. Dist. Ct., Second Judicial Dist.,* 866 P.2d 908, 911 n. 4 (Colo. 1993).

TMJ Implants, Inc. v. Aetna, Inc., 498 F.3d 1175, 1183 (10th Cir. 2007).

The first element is at issue here.

The Amended Complaint stated specific allegations of the following allegedly defamatory statements posted on the internet by Defendant Harrison:

- Giduck is a 'Piece of Shit'." Amended Complaint ¶ 52(r).
- "I 'find John Giddyupdick disgusting, along with some of the BTDT's he has hired to promote this stupid shit.'" Amended Complaint ¶ 52(x).
- "Giduck's history is a 'scam'." Amended Complaint ¶ 83(dd).
- "I have come to the conclusion he has opened Pandora's box of whoopass." Amended Complaint ¶ 112.

The Amended Complaint stated specific allegations of the following allegedly defamatory statements posted on the internet by Defendant Lake:

- "Giduck is a 'fraud'." Amended Complaint ¶ 52(r).
- "Giduck made up his own credentials and sold false expertise to the government." Amended Complaint ¶ 84(g).
- "Giduck is a liar that defrauded law enforcement agencies." Amended Complaint ¶ 84(nn).
- "[I]f Giduck sends another letter threatening a lawsuit that the 'CO Bar association" should be informed because Giduck 'is violating numerous rules of professional conduct and can be sanctioned.'" Amended Complaint ¶ 93.

- That "Giduck lies, that more should be expected of a member of the bar, and that any grievance should focus on the fact that 'a member of the Colorado Bas [sic] is using the public trust implicit in his office as a member of the Colorado Bar as a vehicle to engage in fraud." Amended Complaint ¶ 93.

- That Lake posted "as part of a thread regarding Giduck, the Colorado Rules of Professional Conduct 4.5 and 8.4, and also published law review articles and more than 120 Colorado cases and their rulings related to attorney misconduct and sanctions of Colorado attorneys." Amended Complaint ¶ 95.

- That Lake "claimed Giduck violated these rules and that the cases noted 'the CO Bar's position on moral turpitude outside the practice of law" and that Lake "queried what the Colorado Bar Association would do to Giduck, 'an attorney making false claims regarding his background in order to obtain funds from government agency . . .'" Amended Complaint ¶ 95.

- That Lake "posted on SOCNET.com information about Giduck being a Colorado lawyer and that he was an attorney of record on 8 cases between 1990 and 1998. Amended Complaint ¶ 96.

- That Lake "told everyone on SOCNET.com that he had the 'right guy in the Colorado Bar Gestapo' which he later equated to the 'Colorado Attorney Grievance people," to get Giduck." Amended Complaint ¶ 97.

The Amended Complaint stated specific allegations of the following allegedly defamatory statements posted on the internet by Defendant McAleer:

- "Giduck is a 'fraud'." Amended Complaint ¶ 52(r).

- "Giduck's credentials are 'bullshit'." Amended Complaint ¶ 84(f).

- "Giduck created his own certifications and appreciation letters to bolster his credentials and his certifications are a joke." Amended Complaint ¶ 84(bb).

The law has long recognized the tension between the law of defamation and basic guarantees of free expression. Thus, for example, even patently defamatory statements concerning public officials and public figures are privileged under the First Amendment unless they are accompanied by "actual malice" defined as knowledge of falsity or reckless disregard of the truth. *New York Times Co. v. Sullivan,* 370 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

It is this tension that has generated numerous cases addressing the first element of a defamation action, i.e. is the statement defamatory. Not every untrue, uncomplimentary or offensive statement concerning an individual is defamatory. Indeed, the law is settled in Colorado that the "mere use of foul, abusive, or vituperative language does not constitute defamation." 7A Colo. Prac., Personal Injury Torts and Insurance § 32.2 (2d ed.), citing *Bucher v. Roberts,* 198 Colo. 1, 595 P.2d 239 (1979). Expressions of opinion, as distinguished from assertions of fact, are generally not actionable since "[u]nder the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2887, 41 L.Ed.2d 784 (1974). Such statements may be (and in practice almost always are) constitutionally privileged in order to safeguard the vigor and candor of public discourse. "Weighed against the individual's right to be free from false and defamatory assertions . . . is society's interest in encouraging and fostering vigorous public debate." *Keohane v. Stewart,* 882 P.2d 1293. 1298 (Colo. 1994).

"Whether allegedly defamatory language is constitutionally privileged is a question of law and a reviewing court must review the record *de novo* to insure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression." *NBC Subsidiary (KCNC-TV), Inc. v. The Living Will Center,* 879 P.2d 6, 11 Colo. 1994). *See also Kuhn v. Tribune-Republican Pub. Co.,* 637 P.2d 315, 318 (Colo. 1981). Phrased somewhat differently, "[w]hether a statement constitutes a protected opinion or an actionable statement of fact is a question of law that [the court] may determine on a motion to dismiss." *Wedbush Morgan Securities, Inc. v. Kirkpatrick Pettis Capital Management, Inc.,* 2007 WL 1097872 (D.Colo.).

Applying two landmark cases, one from the United States Supreme Court and one from the Colorado Supreme Court, the Colorado appellate courts have devised a settled test for determining whether allegedly defamatory speech is constitutionally privileged.

> *Milkovich* and *Burns* thus provide the necessary framework to determine if a statement is protected. The framework involves two inquiries. The first inquiry is whether the statement is sufficiently factual to be susceptible of being proved true or false." *Milkovich,* 497 U.S. at 21, 110 S.Ct. at 2707. The second inquiry is whether reasonable people would conclude that the assertion is one of fact. *Id.* The factors relevant to the second inquiry are: (1) how the statement is phrased; (2) the context of the entire statement; (3) the circumstances surrounding the assertion, including the medium through which the information is disseminated and the audience to whom the statement is directed. *Burns,* 659 P.2d at 1360; *see Milkovich,* 497 U.S. at 20, 110 S.Ct. at 2706-07 (holding that loose, figurative, or hyperbolic language may indicate that the statement could not reasonably be interpreted as a statement of fact) . . . .

Keohane, 882 P.2d at 1299.

Thus, expressions of opinion, even if couched in factual terms but which, when read in context are "rhetorical hyperbole," will receive full constitutional protection.

The *Milkovich/Burns* rule has been applied in several Colorado cases (or federal cases applying Colorado law) with factual predicates similar to those presented here to dismiss defamation claims where the allegedly defamatory statement was held to be a protected opinion. *See e.g. Keohane, supra* (references to plaintiff as a "sickie," "terrorist," "sleaze" and "scum"); *NBC Subsidiary, supra* (statement that business was a "scam" and that customers were "totally taken"); *Wilson v. Myer,* 126 P.2d 276 (Colo. App. 2006) (statement that plaintiff lacked "integrity," was "paranoid" and could be "prosecuted for eavesdropping"); *Lockett v. Garrett,* 1 P.3d 206 (Colo. App. 1999) (unequivocal statement that plaintiffs committed "violations of the Open Meeting Law"); *Arrington v. Palmer,* 971 P.2d 669 (Colo. App. 1998) (statement that plaintiff "lied" and "bullied and physically threatened those who disagreed with him"); *Kelley v. New York Insurance and Annuity Corp.,* 2008 WL 5423343 (D.Colo. 2008) (statement that

plaintiff "beats women"); *Wedbush, supra* (statement that plaintiff possibly violated state statutes governing investment of public funds); *Brudwick v. Minor,* 2006 WL 1991755 (D.Colo. 2006) (statement that plaintiff's residence was "probably a meth lab"); *Seidl v. Greentree Mortgage Co.,* 30 F.Supp.2d 1292 (D.Colo. 1998) (allegations of "misappropriation for fraudulent purposes," "computer crime" and "telemarketing fraud" all protected opinion).

The United States Supreme Court has twice held that some words generally connoting criminality may only be reasonably interpreted, when viewed in proper context, as not specifically imputing criminality to the plaintiff. Thus, an accusation of "blackmail" has been held to be mere "rhetorical hyperbole" when applied to a developer's negotiations with a city. *Greenbelt Co-op. Pub. Ass'n v. Bresler,* 398 U.S. 6, 13-14, 90 S.Ct. 1537, 26 L.Ed.2d 6, (1970). Similarly, the use of the word "traitor" as part of a definition of the epithet "scab" was held to be non-actionable when used in the context of a labor dispute, being "merely rhetorical hyperbole, a lusty and imaginative expression of contempt" rather than an actual accusation of treason. *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin,* 418 U.S. 264, 286, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974) Similar cases from across the country finding seeming statements of criminality to be protected expressions of opinion in the form of rhetorical hyperbole are legion. *See e.g.* Elder, *Defamation: A Lawyer's Guide* § 8.27 (Database updated August 2012).

Applying the settled law set forth above to the facts alleged in the Amended Complaint the Court finds and concludes that the statements attributed to these Defendants are constitutionally privileged statements of opinion protected by the First Amendment. The Court will briefly address the statements attributed to each of the Defendnats.

a. Defendant Harrison.

Defendant Harrison's statement that Plaintiff Giduck is a "piece of shit" or that Defendant Harrison finds him "disgusting," while colorful, is patently Harrison's opinion and is not actionable. If every statement along these lines formed the basis for a libel or slander case, the courts of this country would be entirely devoted to the litigation of defamation claims. These are statements of opinion and are protected under the rules enunciated in *Milkovich* and *Burns*.

Similarly, the statement that Giduckis perpetrating a "scam" is protected opinion. In fact that was exactly the accusation at issue in *NBC Subsidiary, supra.*

The final statement, that "I have come to the conclusion he has opened Pandora's box of whoopass," is a metaphorical statement of opinion that Plaintiff has taken on more than he can handle, rather than a statement of fact.

b. Defendant Lake.

The statements by Defendant Lake that Plaintiff Giduck was untruthful or that he puffed up his credentials are not actionable. Opining that someone is a liar, a fraud or was untruthful about his or her background, is, perhaps unfortunately, a common implement in American discourse. Such epithets are obviously statements of opinion and are protected under the rules enunciated in *Milkovich* and *Burns*.

Similarly, the suggestion that Giduck's conduct in threatening lawsuit against those who disagree with him is unethical is certainly Plaintiff Lake's opinion and is protected. Other statements, such as the alleged posting on SOCNET.com of "information about Giduck being a Colorado lawyer and that he was an attorney of record on 8 cases between 1990 and 1998, "and

that Lake "told everyone on SOCNET.com that he had the 'right guy in the Colorado Bar Gestapo' which he later equated to the 'Colorado Attorney Grievance people," to get Giduck" are not, as a matter of law, defamatory since they are not alleged to be untrue and, even if they were, do not defame the Plaintiff in any way.

- **Defendant McAleer.**

The statement that Plaintiff Giduck is a "fraud" and that his credentials are "bullshit" is patently McAleer's opinion and is not actionable. These types of statements of opinion are protected under the rules enunciated in *Milkovich* and *Burns*.

Similarly, the statement that Giduck puffed up or fabricated his credentials and that his certifications are "a joke" is likewise protected opinion. In fact these opinions are certainly far less insulting or potentially damaging than most, if not all, of the statements found privileged in the cases cited above.

The statements attributed to these Defendants regarding Giduck were blunt, uncomplimentary, and probably "rhetorical hyperbole." But they were also privileged statements of opinion protected by the First Amendment as applied in a litany of Supreme Court and Colorado appellate cases. The application of those cases is a question of law that must be addressed by this Court before the case goes any further. Dismissal of the defamation claims contained in the Amended Complaint is required for failure to state a claim upon which relief can be granted.

2. Third through twelfth claims for relief.

The Court's Order of August 15, 2012 directs the Plaintiffs to file an amended complaint of "sufficient definiteness and particularity to enable the defendants to respond and defend against each alleged wrongdoing." As to the third through twelfth claims for relief the Plaintiffs

have ignored this direction. Instead they have simply repeated verbatim the allegations from the Original Complaint with no attempt whatsoever to tie the alleged wrongdoing to any particular defendant. There is absolutely no allegation in any of these nine claims for relief that these Defendants did anything wrong, did anything injurious to Plaintiffs, or, for that matter, that these particular Defendants did anything at all.

The failure to allege any wrongdoing by these specific Defendants in any of these nine claims requires that they be dismissed for failure to state a claim.

ORDER

For all the reasons set forth above, the Defendants motions to dismiss the claims against them pursuant to C.R.C.P 12(b)(5) are GRANTED.

DONE AND SIGNED this _____ day of _____, 2012.

BY THE COURT

_____
DISTRICT COURT JUDGE