	:	Superior Court of New Jersey
BARBARA BAUER and BARBARA	:	Law Division
BAUER LITERARY AGENCY, INC.	:	Monmouth County
Plaintiffs	:	
v.	:	Hon. Jamie S. Perri
	:	Docket No. L-1169-07
JENNA GLATZER, et al.,	:	
Defendants,	:	Civil Action
	:	
	:	

BRIEF IN SUPPORT OF
DEFENDANT SHWETA NARAYAN'S
MOTION FOR SUMMARY JUDGMENT

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PROCEDURAL HISTORY

This is an action for Internet Defamation. Plaintiffs Barbara Bauer and Barbara Bauer Literary Agency, Inc. ("Bauer") have haled a score of defendants into court in New Jersey, including Shweta Narayan, a California resident.

Bauer's complaint alleges that Ms. Narayan published statements in November 2006, that denigrated Bauer's reputation as a literary agent. It contains additional claims of conspiracy to defame, tortious interference with prospective economic advantage, and conspiracy to tortiously interfere with prospective economic advantage.

Ms. Narayan was a graduate student at U.C. Berkeley in November 2006. For health reasons, she has withdrawn from the university, and currently lives in San Diego.

Ms. Narayan received the complaint indirectly through her brother and sister-in law, who received it in Sunnyvale and delivered it by hand to Ms. Narayan in San Diego. Not knowing what to do, and without hiring a lawyer, Ms. Narayan downloaded forms from the Internet and mailed to New Jersey a pro se answer to the complaint. With help from the Electronic Frontier Foundation, she located volunteer counsel in New Jersey, whom she retained in May 2008.[1]

STATEMENT OF FACTS

Bauer claims that Ms. Narayan should incur tort liability for presenting an academic paper in 2006, at the "Conceptual Structure, Discourse, and Language" (CSDL) conference at the University of California, San Diego. The relevant facts are set forth in Ms. Narayan's certification, submitted herewith.

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[1] The case management order of March 17, 2008, pre-dates by several weeks both the answer and the appearance of counsel filed on behalf of Ms. Narayan.

Two years ago, in May of 2006, as a linguistics graduate student at UC Berkeley, Ms. Narayan noticed interesting linguistic behavior in an Internet chat room sponsored by a writers' community, AbsoluteWrite.com. The chatters complained that AbsoluteWrite's website had been shut down, apparently in response to legal threats from Bauer. Unlike the website, the chat room was not shut down, and it became a hub for the writers who had been displaced from the AbsoluteWrite website.

Later in 2006, Ms. Narayan received a call for submissions to the CSDL conference, a small, highly specialized bi-annual academic conference on cognitive linguistics. Recalling the discourse of the chat room in May 2006, she prepared an abstract and submitted it. The abstract was accepted for purposes of giving a talk at the conference. To prepare the talk, she reviewed "logs" of the conversations and analyzed them as an example of how a community under threat creates interesting and complex conceptual structures to cope with threats -- the sort of topic that CSDL attendees study. The abstract, submitted herewith as Exhibit A, describes a linguistic analysis in the technical vocabulary of the field.

Ms. Narayan presented her talk at the conference on November 4, 2006, to an audience of about 30 to 40 people. The abstract and talk focused on what the chatters were doing, not on Bauer herself, though Bauer was mentioned briefly to contextualize the situation for linguists, who would not otherwise be able to interpret the chatters' conversations. Bauer is referenced in quoted speech by the chatters whose language is being analyzed. The abstract cited the Science Fiction Writers of America; it made no direct statements about Bauer.

Ms. Narayan was invited to write a short paper to be included in a published book of conference proceedings. She has written the paper, but it has not been published.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER MS. NARAYAN BECAUSE HER ACADEMIC ABSTRACT HAD NO EFFECTS IN NEW JERSEY

New Jersey's long-arm jurisdiction should not be a magnet for Internet defamation cases. To the contrary, New Jersey has adopted the "effects" approach articulated by the Appellate Division in Goldhaber v. Kohlenberg, 395 N.J. Super. 380 (App. Div. 2007). Under this approach, "jurisdiction may be posited based upon where the effects of the harassment were expected or intended to be felt." Id. at 389.

Shweta Narayan's statements were not targeted or intended to have "effects" in New Jersey; they were targeted toward an audience of academic experts in linguistics, in California. In 2006, Ms. Narayan did not know that Bauer was in New Jersey. Much less did she anticipate ever being pulled into court here. Statements on a website in California, directed to attendees at a conference in California, and then an academic talk in California are not sufficient to implicate New Jersey's jurisdiction.

This Court must evaluate on a case-by-case basis whether a defendant has had the requisite minimum contacts with New Jersey. Blakey v. Continental Airlines, 164 N.J. 38, 66 (2000). The question is whether "the defendant's conduct and connection with the forum State are such that [s]he should reasonably anticipate being haled into court there." Id. at 67, citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Here the answer here is a resounding, "No."

Due process requires that a defendant have "minimum contacts" with the forum state, and that the exercise of jurisdiction comport with "traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Minimum contacts "must have a basis in some act by which the defendant purposely avails itself of the privilege of conducting business within the foreign state, thus invoking the benefits and protections of its laws." Asahi Metal Indus. Co., v. Superior Court, 480 U.S. 102, 109 (1987).

Personal jurisdiction may be either "general" or "specific." For general jurisdiction, Ms. Narayan's contacts with New Jersey would have to be so "continuous and systematic" that jurisdiction exists even if the cause of action arose from activities unrelated to the forum. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-16 (1984). Specific jurisdiction, by contrast, "is present only if the plaintiff's cause of action arises out of a defendant's forum-related activities, such that the defendant 'should reasonably anticipate being haled into court' in that forum." World-Wide Volkswagon Corp., 444 U.S. at 297.

Bauer's allegations cannot establish personal jurisdiction under either of these approaches. Ms. Narayan has no contacts with New Jersey, other than this lawsuit. She has never lived in New Jersey or owned property here. She has traveled through the state, prior to age 15.

Making a presentation to an audience of 30-40 academic linguists in San Diego does not establish a relationship with New Jersey sufficient to support an assertion of general jurisdiction. The academic abstract and presentation at U.C. San Diego were not

directed at New Jersey or even at an Internet audience. The "effects" of the linguistics conference do not justify an assertion of jurisdiction over Ms. Narayan.

The U.S. Supreme Court articulated an "effects test" in Calder v. Jones, 465 U.S. 783 (1984), holding that California had jurisdiction when a defamatory magazine article "targeted" a California entertainer and California was "the focal point both of the story and the harm suffered." Id. at 789. According to the Appellate Division, the New Jersey Supreme Court tacitly adopted this test in Blakey, see Goldhaber, 395 N.J. Super. at 389.

As to Ms. Narayan, the "effects" test fails. New Jersey was not the focal point of Ms. Narayan's academic presentation at U.C. San Diego. Ms. Narayan did not aim her academic abstract toward New Jersey. In 2006, she did not know Bauer's geographic location, which was in any event irrelevant to the linguistic analysis. "The mere allegation that the plaintiff feels the effect of defendant's tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy Calder." IMO Industries, 155 F.3d 254, 263 (3d Cir. 1998).

Even if minimal contacts were established here, which they are not, it does not "comport with fair play and substantial justice" to hale Ms. Narayan into court. Burger King v. Rudzewicz, 471 U.S., 462, 476 (1985). The Appellate Division explained the relevant analysis in Accura Zeisel Machinery v. Timco, 305 N.J. Super. 559 (App. Div. 1997):

> Once minimal contacts are established, … the relevant factors under this analysis are (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Id. at 566 (internal citations omitted).

Marching through these factors, it becomes clear that Bauer's lawsuit against Ms. Narayan does offend traditional notions of fair play and substantial justice. (1) The burden on Ms. Narayan, a California resident with significant health issues, is substantial, to say the least. (2) New Jersey's interest is minimal in adjudicating the content of an academic research paper. This is not a case, for example, in which real, or even personal, property located in New Jersey is in dispute. (3) Bauer has an understandable interest in obtaining relief, but her allegations against this defendant appear scattershot and vexatious; it was never within Ms. Narayan's power to damage Bauer's reputation, and Ms. Narayan cannot cure it. (4) As discussed below in Section III, New Jersey's long-arm jurisdiction may bring innumerable Internet defamation cases to the state. To obtain "the most efficient resolution of controversies," our courts will have to entertain a great deal of summary judgment motion practice. (5) This may "further fundamental substantive social policies," but it will be no boon to judicial economy.

Ms. Narayan has hardly "availed herself" of the "privilege of conducting activities in the forum State," i.e., New Jersey. See Hanson v. Denckla, 357 U.S. 235, 253 (1958). To the contrary, this litigation appears to be motivated by a desire to recover from defendants who lack the resources to defend themselves in this jurisdiction.

II. PLAINTIFF'S CLAIMS AGAINST NARAYAN MUST FAIL ON GROUNDS OF QUALIFIED PRIVILEGE AND LACK OF DEFAMATORY MEANING

The allegations in the complaint reveal that Ms. Narayan has been sued for presenting an academic paper at the "Conceptual Structure, Discourse, and Language"

(CSDL) conference at the University of California, San Diego. Paragraph 3 on page 27 of the complaint states:

> 3. In or about November, 2006, defendant Narayan published a paper and abstract which contained numerous false and defamatory statements about plaintiffs Barbara Bauer and BBLA, including, but not limited to, referring to plaintiff as "a literary agent AW[Absolute Write] had exposed as a scam artist," and stating that "…Bauer claims to be a real literary agent…" and is a "well known scam artist." On November 4, 2006, Narayan repeated her false and defamatory statements in a public talk at the University of California, San Diego.

These are the only specific "facts" pled with respect to Ms. Narayan; the other counts merely set forth vague accusations of conspiracy and interference with prospective economic advantage.

A. Ms. Narayan's Academic Work is Subject to a Qualified Privilege

Ms. Narayan had a qualified privilege to present her academic research to the CSDL conference in San Diego. In this context, "privileged" means that no liability should attach to the publisher of a defamatory statement. The privilege arises where publication is limited "by, to and about essentially private persons bound together by a specific, identifiable transactional relationship." Bainhauer v. Manoukian, 215 N.J. Super. 9, 13 (App. Div. 1987).

The nature and scope of the conditional occasional privilege has been well-defined in New Jersey. As the New Jersey Supreme Court explained in Dairy Stores v. Sentinel Pub. Co., 104 N.J. 125 (1986), "a qualified or conditional privilege has emerged as one of the prime means for the common law to balance the interests in reputation with the publication of information in the public interest." Id. at 137. This longstanding principle attaches to communications among groups like the linguistics experts:

> [A] communication "made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without the privilege, would be slanderous and actionable.

Coleman v. Newark Morning Ledger, 29 N.J. 357, 375 (1959). See also Bainhauer v. Manoukian, 215 N.J. Super. at 36 (citing cases).

Thus the qualified privilege Ms. Narayan claims falls neatly within the traditional common-law privilege recognized in New Jersey. It arises out of a "legitimate and reasonable need, for private people to be able freely to express private concerns to a limited and correlatively concerned audience, whether or not those concerns also touch upon the public interest in the broad sense." Bainhauer, 215 N.J. Super. at 36; LoBiondo v. Schwartz, 323 N.J. Super. 391, 408 (App. Div. 1999).

Here the legitimate and reasonable need belongs to scholars, researchers and academics, who wish to discuss phenomena they have observed on the Internet.

> "The critical test of the existence of the privilege is the circumstantial justification for the publication of the defamatory information. The critical elements of this test are the appropriateness of the occasion on which the defamatory information is published, the legitimacy of the interest thereby sought to be protected or promoted, and the pertinence of the receipt of that information by the recipient.

Bainhauer, 215 N.J. Super. at 37.

Even if the remarks turn out to be untrue, the qualified privilege protects speech so long as the remarks are provided to those who have a "corresponding interest" in the information. Fees v. Trow, 105 N.J. 330, 338 (1987). Here, the public interests at stake include the scholarly interests of academic linguists, as well as consumer warnings about potentially unfair business practices and Internet censorship. The public has a vital interest in being aware of the pervasive consumer warnings that exist regarding Bauer's

services. See Dairy Stores, 104 N.J. at 151. The public policy underlying this qualified privilege is "that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons or certain interests of the public." Erickson v. Marsh & McLannan Co., 117 N.J. 539, 563 (1990).

The specific privilege most analogous to Ms. Narayan's is the "fair report" privilege, which permits the re-publication of statements uttered in public proceedings. The New Jersey Supreme Court described this privilege in Costello v. Ocean County Observer, 136 N.J. 594, 606 (1994). Its underlying rationale is that the publisher is merely conveying to the public statements that members of the public would have heard if they had been present in the public proceeding. See also Darakjian v. Hanna, 366 N.J. Super. 238, 245 (App. Div. 2004); Ricciardi v. Weber, 350 N.J. Super., 453, 470 (App. Div. 2002); Orso v. Goldberg, 284 N.J. Super. 446, 451 (App. Div.1995).

Ms. Narayan is entitled to the "fair report" privilege just as a newspaper reporter would be privileged to report statements at a public meeting. She merely reported the conduct of the chatters, for purposes of making a linguistic analysis. The statements were not published for the truth of the matter asserted, so to speak, but to produce a detached scholarly report.

The qualified privilege applies to a broader range of circumstances than an absolute privilege. It "may be recognized for the protection of the publisher's own interest, the interest of the recipient or other third person, or an interest common to the publisher and the recipient." Feggans v. Billington, 291 N.J. Super. 382, 392 (App. Div. 1996) (internal citations omitted).

Ms. Narayan is entitled to the privilege because she had an interest in the subject matter of the communication and distributed it to individuals – academic linguists – who had a corresponding interest. Gulrajaney v. Petricha, 381 N.J. Super. 241, 258 (App. Div. 2005). Groups like the CSDL conference should not have to fear retribution. This is the kind of situation where people should be allowed to communicate without fear of being sued. Fees, 105 N.J. at 338; Gallo v. Princeton Univ., 281 N.J. Super. 134, 142 (App.Div.), certif. denied, 142 N.J. 453 (1995).

Whether Ms. Narayan is entitled to the qualified privilege is a question of law. Hawkins v. Harris, 141 N.J. 207, 216 (1995), and summary judgment is favored to eliminate baseless defamation claims. Feggans, 291 N.J. Super. at 395. It is irrelevant whether the statement at issue was defamatory. Lutz v. Royal Ins. Co. of Am., 245 N.J. Super. 480, 496 (App.Div.1991). At this point in the proceedings, therefore, this Court need not decide what ordinarily would be the threshold question of law, i.e., whether a statement is "reasonably susceptible of a defamatory meaning," Kotlikoff v. The Community News, 89 N.J. 62, 67 (1982). Instead, it should examine the relationship of the parties, the persons to whom the statement is communicated, the circumstances attendant to the statement, and the manner in which the statement is made. Swede v. Passaic Daily News, 30 N.J. 320, 332 (1959).

Although the qualified privilege can be overcome, Williams v. Bell Tel. Labs, 132 N.J. 109, 121 (1993), it carries a presumption of no express malice. Fees, 105 N.J. at 342; Feggans, 291 N.J. Super. at 395, and the burden of proving an abuse of the privilege reposes on the plaintiff. Ibid. Bauer accordingly carries the burden of establishing that

Narayan's academic abstract was written "from an indirect or improper motive, and not for a reason which would otherwise render them privileged." Ibid.

This does not mean that Bauer is entitled to press Ms. Narayan with burdensome discovery demands. In order to state a cause of action for defamation, Bauer had to plead facts sufficient to identify the defamatory words. Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101 (App. Div. 1986). She may not file a conclusory complaint merely for the purpose of opening discovery to find out if a cause of damage exists. Darakjian v. Hanna, 366 N.J. Super. 238, 248-49 (App. Div. 2004).

Here, the statements in Ms. Narayan's academic abstract are entitled to protection from suit by a qualified privilege, regardless of whether the statements were defamatory. The statements were directed at an audience of academic linguists, not toward prospective clients of Bauer. The statements were made with regard to a common interest, i.e., linguistic behavior.

B. The Allegedly Defamatory Statements in the Academic Abstract Cannot Be Attributed to Ms. Narayan

Even if the academic abstract enjoyed no qualified privilege, a brief comparison to the complaint reveals fatal flaws in plaintiff's defamation theory. No finder of fact could reasonably attribute to Ms. Narayan the statements that offended Bauer. The academic abstract, to which the complaint refers, is submitted as Exhibit A.

The allegations pertaining to Ms. Narayan can be found starting at page 26 of the Second Amended Complaint. The 33rd count quotes snippets of Ms. Narayan's academic abstract – none of which were statements uttered by Ms. Narayan. To the contrary, the statements attributed to Ms. Narayan in the complaint are, in the academic abstract,

attributed to others. That is to say, plaintiff has taken the words of others and placed them in Ms. Narayan's mouth, contrary to the document from which the complaint purports to quote. Under New Jersey law, therefore, Ms. Narayan cannot be held liable.

There are essentially five elements of a defamation claim: 1) the defendant made a defamatory statement of fact; 2) that fact was "of or concerning" the plaintiff; 3) the statement was false; 4) it was made public, or "communicated to persons other than the plaintiff;" and 5) the plaintiff incurred damages as a result. See Feggans, 291 N.J. Super. at 391. The plaintiff bears the burden to prove each of these elements by clear and convincing evidence. DeAngelis v. Hill, 180 N.J. 1, 12-13 (2004).

It is not sufficient merely to allege that a report of defamatory comment was made and that the speaker knew or should have known it was false; the complaint must also allege sufficient particularized facts to overcome a relevant privilege. Darakjian, 366 N.J. Super. at 249-250. Instead of complying with the letter and spirit of the law, Bauer's complaint seems calculated to mislead the Court as to Ms. Narayan's statements.

Shweta Narayan did not publish a paper in November 2006. Nor did her abstract make statements about Bauer, except to quote the statements of others. First, Ms. Narayan did not say that Bauer was a scam artist -- she quoted AbsoluteWrite as having exposed Bauer, citing the "Writer Beware" list published by the Science Fiction Writers of America. Second, she did not say Bauer "claims to be a real literary agent" -- she said another person, "playing" Bauer, claimed to be a real literary agent. Third, the complaint purports to quote the abstract describing Bauer as a "well known scam artist," but the phrase does not occur in the abstract. The abstract does say, "These are ritual enactments

that assert a belief," signifying that the verbatim text of the chat was not to be read literally.

The abstract and the talk both focused on what the chatters were doing, not on Bauer herself. Bauer is mentioned briefly to contextualize the situation for linguists, who would not otherwise be able to interpret the chatters' conversation, and she is referenced in quoted speech by the chatters whose language is being analyzed.

When the abstract describes Bauer parenthetically as "(a literary agent AW had exposed as a scam artist)", it cites the Science Fiction Writers of America, www.sfwa.org/beware/twentyworst.html. Ms. Narayan reasonably believed this organization to be an accepted and apparently reliable authority. Postings from AbsoluteWrite.com are similarly accepted as authority. For example, Judge Richard Posner quotes a posting from AbsoluteWrite.com and cites defendant Jenna Glatzer in his *Little Book of Plagiarism*, (Pantheon Books 2007), at 29-30, 112.

The main thrust of Narayan's abstract was to recount the activities of the group, not to make any direct statements about Bauer. The actionability of a defamatory speech is based on the fault on the part of the speaker and, "fault, by whatever standard it is to be measured, is as much an element of the cause of action as the defamatory publication itself." Bainhauer v. Manoukian, 215 N.J. Super. 9, 31 (App. Div. 1987).

No fact finder can reasonably attach fault to the academic abstract. The abstract refers to the "*notion* that Barbara Bauer runs a scam" (emphasis added). "*Notion*" indicates the proposition is dubious. The statements are expressly attributed to others. The abstract does not endorse the statements.

Where a complaint is so bereft of supportable allegations, the Court must dismiss the claim. "This result is required by First Amendment policies and the responsibilities of the courts to avoid rulings that unduly chill the press's freedom to report on matters of public interest." Darakjian, 366 N.J. Super. at 251.

C. The Academic Abstract is Not Reasonably Susceptible of Defamatory Meaning

Ms. Narayan's academic abstract cannot be considered a defamatory statement. By definition, a statement is defamatory if it is false, communicated to a third person, and inures the subject's reputation in the community. Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 164-165 (1999). But this definition contains a hidden assumption about the relevant community. Plaintiff is not entitled to recover for statements made to a community where she has no reputation, such as a community of academic linguistics experts.

This is a question of law for the Court, and ripe for summary judgment. To make this determination, the Courts must consider three factors: (1) the content, (2) the verifiability, and (3) the context of the challenged statement. DeAngelis v. Hill, 180 N.J. at 14-15.

As to Ms. Narayan, the most important factor is the context of the challenged statement. Ward v. Zelikovsky, 136 N.J. 516, 532 (1994). This Court cannot automatically decide whether a statement is defamatory solely by reference to the literal words of the challenged statement. Ibid. Yet discovery is not necessary; the Court may look no farther than the allegations of the complaint, and dismiss the claim on summary judgment. Carlini v. Curtiss-Wright Corp., 71 N.J. Super. 101, 107-08 (App. Div. 1961).

Here, the context of the abstract, presented to an academic conference in San Diego, determines the meaning of the statements that referred to Bauer. Russo v. Nagel, 358 N.J. Super. 254, 263 (App. Div. 2003), citing Lynch, 161 N.J. at 168 (context can, and often will alter a statement's meaning). Context may demonstrate that statements or words, while capable of defamatory meaning, are not reasonably susceptible to a defamatory interpretation. Wilson v. Grant, 297 N.J. Super. 128, 136 (App. Div. 1996) (finding a statement, although potentially verifiable, was not subject to defamatory meaning when measured in the context of the statements in which it was grouped); Cipriani Builders, Inc. v. Madden, 389 N.J. Super. 154, 178-79 (App. Div. 2006) (isolated phrases potentially capable of verification were not defamatory when read in context). Such is the case with respect to Ms. Narayan's abstract.

As to verifiability, Bauer's defamation claim must fail because the allegedly defamatory statements are merely statements of opinion, not fact. A statement based on stated facts, or on facts known to the parties or assumed by them to exist, is a statement of "pure opinion." Lynch, 161 N.J. at 168; Dairy Stores, 104 N.J. at 147.

Observing conduct in the Internet chat room, Ms. Narayan's subjective opinion is irrelevant as to the truth of the statements about Bauer. Narayan's own statements analyzed the chat. Since they make no assertions of "fact," they are devoid of defamatory meaning. Statements that do not assert or imply false and defamatory facts capable of verification – i.e., statements of opinion - are not actionable. Ward, 136 N.J. at 531; Lynch, 161 N.J. at 167-168. To the contrary, "statements of opinion, as a matter of constitutional law, enjoy absolute immunity." Dairy Stores, 104 N.J. at 147.

To put it a different way, Ms. Narayan's linguistic analysis pertained to the chatters, not to Bauer. The analysis did not depend upon the truth *vel non* of the chat. For Narayan's purposes, there simply existed no facts, only chat. As such, the abstract is not susceptible of defamatory meaning. Only when a reasonable fact-finder would conclude that an opinion implies specific assertions of verifiable fact will the statement be actionable. Milkovitch v. Lorain Journal, 497 U.S. 1, 18-20 (1990); Higgins v. Pascack Valley Hosp., 158 N.J. 404, 427 (1999), citing Ward, 136 N.J. at 531.

This Court can easily dispose of the claims against Ms. Narayan on summary judgment. "If a statement could be construed as either fact or opinion, a defendant should not be held liable.' Lynch, 161 N.J. at 168.

Bauer cannot support the allegations in the complaint against Narayan. "If the plaintiff fails to prove that the defendant published the statement, that the statement is defamatory, or either that the statement is defamatory per se or that the plaintiff suffered special damages" Lynch, 161 N.J. at 169, the case must be dismissed.

III. INTERNET DEFAMATION CASES REQUIRE SUMMARY JUDGMENT MOTION PRACTICE TO WEED OUT CLAIMS THAT WILL CHILL EXPRESSION AND SWAMP THE COURTS

Plaintiff has exploited New Jersey's long-arm jurisdiction to haul in defendants from different states across the country, yet a Google search of "Barbara Bauer" reveals that the New Jersey courts face an endless stream of similar litigation. If Bauer's claim against the likes of Shweta Narayan are permitted to go forward, the costs of litigation will substantially chill expression on the Internet.

Actions for defamation raise very significant free speech concerns. For this reason, the Court must exercise special vigilance and scrutinize the sufficiency of the

allegations in the complaint. Darakjian, 366 N.J. Super. at 248. Otherwise, free speech would be at the mercy of a claimant's empty assertions unsupported by any contentions regarding supporting facts. Id.

The law of defamation balances two important, and sometimes competing, rights: the right to engage in free speech and the right to be free from untrue attacks on reputation. Dairy Stores, 104 N.J. at 135-36. To accommodate the tension between these interests, the courts must give weight to the constitutional right to free speech. Costello v. Ocean County Observer, 136 N.J. 594, 614 (1994); Sisler v. Gannett Co., 104 N.J. 256, 271 (1986); Kotlikoff v. The Community News, 89 N.J. 62, 73 (1982). The Court should therefore address dispositive motions that implicate the First Amendment in light of New Jersey's policy favoring expeditious resolution of litigation which threatens free speech. See, e.g., Maressa v. New Jersey Monthly, 89 N.J. 176, 198, cert. denied, 459 U.S. 907 (1982) (courts should resolve free speech litigation expeditiously whenever possible, because the prohibitive cost of prolonged litigation chills the exercise of free speech).

The New Jersey Supreme Court has repeatedly encouraged the use of summary judgment "to dispose expeditiously of meritless defamation, thereby to lessen the chill that the institution of such actions inevitably has on the exercise of free speech." LoBiondo, 323 N.J. Super. at 415. As explained in Kotlikoff, summary judgment "winnows out nonactionable claims, avoids the expenditure of unnecessary legal fees, and discourages frivolous suits. We therefore encourage trial courts to give particularly careful consideration to identifying appropriate cases for summary judgment disposition in this area of the law." 89 N.J. at 67-68. See also Maressa, 89 N.J. at 196; Molin v. The

Trentonian, 297 N.J. Super. 153, 159-160 (App. Div. 1997), certif. denied, 152 N.J. 190, cert. denied, 525 U.S. 1036 (1998).

The Appellate Division spoke to its concerns about the chilling effect in Karnell v. Campbell, 206 N.J. Super. 81 (App. Div. 1985): "Indeed it may become too costly for ordinary citizens to exercise the right to free speech which undergirds a democratic society. We are profoundly concerned with the chilling effect that plaintiffs' lawsuit in these rather unremarkable circumstances may have on other citizens who would ordinarily speak out on behalf of what they perceive to be the public good." Id. at 95. See also, Kolitkoff., 89 N.J. at 67; Orso v. Goldberg, 284 N.J. Super. 446, 458 (App. Div.1995).

This Court should entertain dispositive motions prior to completion of discovery. "The summary judgment standard is encouraged in libel and defamation actions because the threat of prolonged and expensive litigation has a real potential for chilling criticism and comment …." DeAngelis v. Hill, 180 N.J. 1, 12 (2004). See also Maressa, 89 N.J. at 198 (courts should resolve free speech litigation expeditiously whenever possible, because the prohibitive cost of prolonged litigation chills the exercise of free speech); Kotikoff, 89 N.J. at 67 (summary procedures that dispose of questions of law are particularly well suited for the sensitive area of First Amendment law); Sedore v. Recorder Pub. Co., 315 N.J. Super. 137, 163 (App. Div. 1998) ("courts of this State have recognized that First Amendment values are compromised by long and costly litigation in defamation cases.").

Bauer's action is a species of "cyber-SLAPP suit." The acronym SLAPP stands for Strategic Lawsuits Against Public Participation. A phenomenon well documented for more than a decade, it was described by the Appellate Division as litigation

> commenced by commercial interests for the purpose of intimidating ordinary citizens who exercise their constitutionally protected right to speak out. In this way, commercial interests seek to quell effective opposition. In other words, protesting citizens are sued into silence. Ultimately prevailing in the litigation is not the point – rather, the litigation exercise is undertaken in order to impose upon the citizens the expense and burden of defending a lawsuit against them.

LoBiondo, 323 N.J. Super. at 418.

Several states, not including New Jersey, recognize SLAPP suits legislatively.[2] Nevertheless, the courts have adjudicated any number of cases that, without invoking the acronym, involve meritless complaints alleging defamation and various other intentional torts, such as infliction of emotional distress and interference with business advantage, all "brought for the apparent purpose of silencing citizen protest." LoBiondo, 323 N.J. Super. at 420 (citing cases).

In practice, threats to file lawsuits for defamation are sometimes used to shut down legitimate comments on the Internet. In the case at bar, the burdens of discovery add to the potential chill. In LoBiondo, the Appellate Division pointed out that "it is not only the defendant in a SLAPP suit who suffers. The common weal is obviously impaired as well since the consequence of a SLAPP suit is not only to silence the defendant but to deter others who might speak out as well." 323 N.J. Super. at 424.

While a significant distinction may be drawn between Bauer's allegations and the land-use allegations at issue in LoBiondo, similar concerns nevertheless apply. The wider

[2] Assembly bill A-1101 would authorizes a motion to dismiss in SLAPP suits arising from a defendant's valid exercise of free speech.

issue at stake in the case at bar is Internet censorship. As applied to Ms. Narayan and her academic studies, this case carries a substantial risk of infringing upon research and academic speech.

Scholarly research and Internet censorship are at stake here, along with more obvious concerns about consumer fraud. These issues merit swift disposition prior to conducting discovery. "Summary judgment practice is particularly well-suited for the determination of libel actions, the fear of which can inhibit comment on matters of public concern." Lynch, 161 N.J. at 169. See comment on R. 4:46-2 (compiling cases supporting use of summary judgment in defamation actions).

Defamation law is a relatively ineffective tool to protect against the spread of rumors on the Internet. Daniel J. Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet,* 118 (2007). Defamation law does not protect one from being the target of negative opinions, criticisms, satire or insults. Certainly it is not to be used as a remedy for being insulted by criticism or satire. Indeed, the current wisdom of the blogosphere is, "Don't sue for defamation, because even if you win, you'll lose." http://federalism.typepad.com/crime_federalism/2006/06/todd_hollis_and.html (commentary on effort to recover from the "Don't Date Him Girl" website).

A Google search today of "Barbara Bauer" will reveal that this case against Ms. Narayan is incapable of making plaintiff whole. Moreover, it will reveal the peril of permitting futile Internet defamation claims to proceed in New Jersey. Traditionally, someone can be liable even for spreading information originated by someone else, Restatement (Second) Torts § 559. On the Internet, however, it will not be possible to

extend liability to every speaker without drawing the New Jersey Judiciary into a bottomless vortex of limitless litigation.

IV. THE REMAINING CLAIMS MUST BE DISMISSED

With no viable defamation claim, Bauer's remaining claims against Ms. Narayan must fail as well. Built upon the underlying defamation claim, additional makeweight claims are for conspiracy to defame, tortious interference with prospective economic advantage, and conspiracy to tortiously interfere with prospective economic advantage.

Without a viable claim for defamation, the related claims must die. See e.g., Russo v. Nagel, 358 N.J. Super. 254, 269 (App. Div. 2003) (dismissing claim for tortious interference because plaintiff failed to prove defamation); LoBiondo, 323 N.J. Super. at 417 (dismissing claims for defamation, tortious interference and intentional infliction of emotional distress).

Under both New Jersey and federal law, speech-related torts are subject to defamation defenses. In order to give adequate "breathing space" to the freedoms protected by the First Amendment, Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1987), the same legal principles that govern Bauer's defamation claim must apply to her even more attenuated tort claims, rendering them defunct. See Decker v. Princeton Packet, 116 N.J. 418, 432 (1989) (there is "a certain symmetry or parallel between claims of emotional distress and defamation that calls for consistent results"); Dairy Stores, 104 N.J. at 137.

An alleged conspiracy cannot be the subject of a civil action unless an act is done which, independently of any conspiracy, would create a cause of action. Board of Educ. v. Hoek, 66 N.J. Super. 231, 241 (App. Div. 1961); rev'd in part on other grounds, 38

N.J. 213 (1962) (instruction on conspiracy charge confused the jury). Nor can a plaintiff revive a failed defamation claim merely by attaching a different label, as by claiming intentional infliction of emotional distress. Seal Tite Corp. v. Bressi, 312 N.J. Super. 532, 540 (App. Div. 1998).

The complaint fails to establish any wrongful conduct by Shweta Narayan. Since the underlying defamation claim is barred as a matter of law, all remaining claims must be dismissed as well.

CONCLUSION

For all the reasons set forth above, Bauer's action against Ms. Narayan should be dismissed with prejudice.

GRAYSON BARBER, L.L.C.

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Grayson Barber

Dated: