

The State of New Hampshire

SULLIVAN, SS.

SUPERIOR COURT

No. 220-2016-CV-00133

AUTOMATED TRANSACTIONS, LLC and DAVID BARCELOU

v.

AMERICAN BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, INC., ROBERT H. STIER, JR., PIERCE ATWOOD LLP, CHARLES VON SIMSON, W. JOHN FUNK, GALLAGHER, CALLAHAN & GARTRELL, P.C., RALPH E. JOCKE, WALKER & JOCKE CO., LPA, MASCOMA SAVINGS BANK, and STEPHEN F. CHRISTY

ORDER ON MOTIONS TO DISMISS

Plaintiffs Automated Transactions, LLC ("ATL") and David Barcelou sued the defendants named above for both defamation and New Hampshire Consumer Protection Act violations. The plaintiffs contend that in an effort "to exclude others from making, using, and selling patented inventions that they wanted only for themselves," the defendants embarked on a campaign to publicly "denigrate the property rights of . . . patent owner[s] and holder[s]." (Amended Complaint, ¶ 40.) Defendants American Bankers Association, Credit Union National Association, Inc., Robert H. Stier, Jr., Pierce Atwood LLP, W. John Funk, and Gallagher, Callahan & Gartrell, move to dismiss the complaint, while Mascoma Savings Bank and Stephen F. Christy seek summary judgment. A common ground for dismissal or for summary judgment is that the statements attributed to them cannot be construed as defamatory because they are protected expressions of

opinion or do not otherwise qualify as statements of fact. They contend as well that because the Consumer Protection Act claim is based on statements about the plaintiffs that are not assertions of fact, it should be dismissed as well.

Background

The following facts are taken from the plaintiffs' first amended complaint. ATL is a limited liability company incorporated in Delaware and headquartered in New Hampshire. (Amended Compl. ¶ 2). David Barcelou is a recognized inventor and ATL's founding CEO and manager. *Id.* at ¶¶ 3, 42. He has been a New Hampshire resident since 2011. *Id.* at ¶ 3.

After achieving success with various inventions in the 1980's, Mr. Barcelou began working in 1993 toward "automating tournaments." *Id.* at ¶ 48. He hoped to develop a system "where any 'game of skill' could automatically accept an entry fee, administrate a winner, and award the winner an immediate cash prize, anywhere in the world." *Id.* Mr. Barcelou began his development process by researching the ATM industry for most of 1993. *Id.* In 1994 he created a prototype of an "Automated Tournament Machine." *Id.* at ¶ 50. He hired a computer scientist and an industrial design firm to document his new invention. *Id.* at ¶ 51. Subsequently, he built more prototypes of the "Automated Tournament Machine," and developed many advances over existing ATMs. *Id.* at ¶ 52. He filed patent applications to protect the commercial viability of these advances, *id.* at ¶ 53, and started exploring relationships with CoreStates Bank and Hitachi, assembling a management team, and seeking capital investments. *Id.*

Mr. Barcelou's efforts to commercialize his ideas in the late 1990's and early 2000's proved unsuccessful, but he received a consolation prize in 2005 when the United States Patent Office granted him his first ATM-related patent. *Id.* at ¶¶ 54–55. A short time later, he sued 7-Eleven alleging that the corporation's "VCOM" machines infringed on his patent. *Id.* Then, in 2008, he designated ATL as the exclusive licensor of his patent technology. *Id.* at ¶ 56. ATL began to offer patent licenses, suing when necessary, and defending patents in the Patent Office. *Id.* The licensing venture paid off — between 2011 and 2012 ATL generated over \$3 million in licensing revenues from approximately 200 licenses. *Id.* at ¶ 57. The Patent Office also granted Mr. Barcelou more ATM-related patents. *Id.*

Mr. Barcelou and ATL contend that in the wake of ATL's success in 2011 and 2012, the defendants engaged in a "defamatory smear campaign" against them. *Id.* at ¶¶ 62, 64. First, in October 2012 an article on the website bizjournals.com analogized ATL's licensing efforts to bank robbery. *Id.* at ¶¶ 66, 67. Then, in April 2013, another article on bizjournals.com referred to ATL as a "patent troll." *Id.* at ¶ 68. Other pejorative statements by the various defendants followed the articles. *Id.* at ¶¶ 69–85. The plaintiffs attribute a severe decline in ATL's revenue and loss of licensing opportunities to defamatory statements by the defendants whose motions to dismiss and for summary judgment are pending. They say the statements also "permanently damaged" Mr. Barcelou's reputation and caused him emotional distress. *Id.* at ¶¶ 93–94.

The first group of motions is from defendants who seek to dismiss the complaint. The plaintiffs raise a preemptive challenge to the motions, citing cases in which the determination of whether a statement was protected opinion was decided on summary judgment. They contend a motion to dismiss is an appropriate vehicle for such an analysis. They identify no case that says this, and one recent decision addressed the issue when it was raised in a dismissal motion. See *Sanguedolce v. Wolfe*, 164 N.H. 644, 645–46 (2013). In fact, “the nature of a libel action lends itself to judicial scrutiny in the early stages of a defamation lawsuit.” *Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1258, n.10 (S.D. Miss. 1988).

Dismissal of defamation suits for failure of the complaint to state a cause of action or to state a claim upon which relief may be granted occurs with relative frequency. One substantial factor is that the communication complained of is usually before the court at the outset; indeed in many jurisdictions it is required that complaints themselves set forth the allegedly defamatory statement. Thus, unlike most litigation, in a libel suit the central event—the communication about which suit has been brought—is usually before the judge at the pleading stage. He may assess it upon a motion to dismiss first hand and in context.

Id. (quoting R. Sack, *Libel, Slander and Related Problems* 533–34 (1980)). So, there is no bar to addressing the issue through the various dismissal motions.

Whether there is merit to a motion to dismiss depends on “whether the allegations in the petitioner’s pleadings are reasonably susceptible of a construction that would permit recovery.” *Morrissey v. Town of Lyme*, 162 N.H. 777, 780 (2011). The facts alleged in the complaint are presumed to be true and reasonable inferences from those facts are drawn in the light most favorable to the plaintiff. *Id.* “The plaintiff must, however, plead sufficient

facts to form a basis for the cause of action asserted." *Mt. Springs Water Co. v. Mt. Lakes Village District*, 126 N.H. 199, 201 (1985). Mere conclusions of law need not be credited. *Id.* (citation omitted).

In order to make a claim of defamation, the plaintiff must allege facts that show "the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the communication." *Pierson v. Hubbard*, 147 N.H. 760, 763 (2002). The "language complained of . . . must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority," and "the defamatory meaning must be one that could be ascribed to the words by 'hearers of common and reasonable understanding.'" *Thomson v. Cash*, 119 N.H. 371, 373 (1979) (quotation omitted).

The defendants contend the statements identified in the complaint as defamatory, are in reality opinions or otherwise not actionable factual assertions.

A statement of opinion is not actionable, unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion. Whether a given statement can be read as being or implying an actionable statement of fact is itself a question of law to be determined by the trial court in the first instance, considering the context of the publication as a whole. If an average reader could reasonably understand a statement as actionably factual, then there is an issue for a jury's determination.

Nash v. Keene Publishing Corp., 127 N.H. 214, 219 (1985) (citations omitted). And,

even a provably false statement is not actionable if "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. . . ." *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)). As the Ninth Circuit has explained, "when an author outlines

the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.” *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995).

Riley v. Harr, 292 F.3d 282, 289 (1st Cir. 2002). See *Thomas v. Telegraph Publishing Co.*, 155 N.H. 314, 339 (2007) (opinion not defamatory when based on disclosed non-defamatory facts).

The statements the plaintiffs allege are defamatory may be separated into two categories. The first consists of instances in which a defendant referred to a plaintiff as a “patent troll.” The second is composed of characterizations of the plaintiffs’ conduct as a “shakedown,” “extortion,” or “blackmail.” The first amended complaint attributes to each defendant the specific statement claimed to be defamatory, and refers to the documents (attached as exhibits to the amended complaint) in which the statement appears. As they appear in the documents (the exhibits), the challenged statements are noted in **bold print**. I have used the documents to show the statements in context, but I consider the statements alleged to be defamatory to be those specified in the complaint. See *White v. Ortiz*, No. 13-CV-251-SM, 2015 WL 5331279, at *5–6 (D.N.H. Sept. 14, 2015).

Defamation (Count I)

A. Statements by American Bankers Association

The plaintiffs claim the American Bankers Association defamed them by referring to them as “patent trolls.”

On December 17, 2013, the ABA . . . made statements for the record before the Senate Committee on the Judiciary. The ABA's statements are published in a publication entitled "Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse." The statement was republished on ABA's website at <http://www.aba.com/Advocacy/LetterstoCongress/Pages/default.aspx> and continues to be republished on ABA's website as of the date of the filing of this Complaint. See Exhibit D. The title of the ABA statement includes the phrase "limiting patent troll abuse." The ABA's statement describes ATL's legitimate licensing efforts and then refers to "patent trolls," plainly calling ATL a patent troll. This references [sic] to ATL as a patent troll are false and defamatory and have damaged ATL.

(Amended Complaint, ¶¶ 75-76.)

Exhibit D is a "Statement for the Record on Behalf of the American Bankers Association For the Hearing 'Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse' Before the Senate Committee on the Judiciary." As background, it describes "abusive patent litigation," by "patent assertion entities (PAEs) who use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country." It continues,

Faced with threats of expensive patent litigation, many banks, and especially smaller banks, find that their only option is to settle rather than face paying millions to defend against extortive claims of patent infringement. Well-funded and sophisticated PAEs take advantage of community banks with limited resources and little patent experience, and have amassed significant 'licensing' fees from banks literally for the cost of mailing a threatening letter.

A recent example of this involves a PAE known as Automated Transactions, LLC (ATL), which targeted banks throughout New England, New York, New Jersey, Georgia, Virginia, Pennsylvania, in addition to an ever-growing number of states. ATL claims that transactions facilitated by the use of the banks' ATMs infringe one or more of its patents. What ATL fails to mention, however, is that several of ATL's claims have been invalidated by courts. In particular, the Supreme Court denied certiorari on ATL's appeal of an April 23, 2012, decision by the Federal Circuit to affirm a ruling by the Board of Patent Appeals and Interferences invalidating several of ATL's patent claims. Despite this, the

company continues to assert those patents and sue banks across the country, including banks that do not even have ATMs. While ATL is only one of many different entities that operate as PAEs filing frivolous patent infringement cases against all industries, ATL's tactics and efforts are a prime example of the problem banks and other companies face, primarily with regard to vague and threatening demand letters.

The Association goes on to use the terms "patent assertion entities (PAEs) interchangeably with "patent troll." For instance, it discusses "legislation intended to alleviate some of the incentives that drive abusive litigation by patent PAEs," and the Association's support for legislation "that could potentially deter patent trolls from sending abusive demand letters. . . ." Later, it discusses "other provisions that should be included in **patent troll** legislation."

A second statement attributed to the Association provided an additional source for the plaintiffs' defamation claim against it. According to the complaint,

On April 8, 2014, Rheo Brouillard testified on behalf of the ABA in the House of Representatives. See Exhibit I. He described ATL as a "patent troll." He stated that

These patent trolls use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country. . . . At present patent trolls are able to make patent infringement claims for nothing more than the price of a postage stamp and the paper the claim is written on.

Mr. Brouillard's statements on behalf of the ABA were false and defamatory statements that damaged ATL. ATL was trying to capitalize on its extensive research and development and marketing efforts that resulted in numerous patents – it was not extorting payments. Further, ATL's efforts cost far more than a postage stamp and a few sheets of paper.

(Amended Complaint, ¶¶ 81–82.)

Exhibit I is a statement of testimony by the head of a Connecticut bank before a subcommittee of the House of Representatives' Committee on Energy and Commerce. It discusses that "abusive patent litigation remains a serious threat for banks and financial institutions," and how as "end users of technology," banks "have been inundated by abusive and deceptive patent demand letters by patent assertion entities (PAEs), commonly referred to as '**patent trolls**.'" The statement continues with the excerpts quoted in the amended complaint.

The gist of the testimony is the same as in the other Association statement. It describes how "well-funded and sophisticated **patent trolls** take advantage of community banks with limited resources and little patent experience, and have amassed significant 'licensing' fees from banks," who find "their only option is to settle, rather than paying millions to defend against extortive claims of patent infringement."

The witness mentions ATL specifically, stating,

I have seen this first hand at my bank. We, along with 30+ other Connecticut banks, received a vague notice from a firm called Automatic Transactions, LLC (ATL). The notice asserted that our ATMs operated in a way that infringed upon their 'patent portfolio,' and simply listed thirteen sets of seven digit numbers as proof. What the notice failed to mention was that similar suits in other states had already been overturned. A settlement would have cost at least \$27,000 for my bank alone, and would likely have amounted to \$300,000 for the 30 Connecticut banks targeted.

B. Statements by Credit Union National Association

The plaintiffs make the following claim against the Credit Union National Association.

Upon information and belief, on or about September 24, 2013, Robin Cook, Assistant General Counsel for the Credit Union National Association, presented a PowerPoint presentation entitled "Hot Topics in Litigation." See Exhibit A. This presentation makes extremely defamatory statements regarding ATL. For example, it includes a derogatory picture of a troll. The presentation defined patent troll as an entity that had no intention of making a product and acknowledged that the term patent troll is pejorative. It also referred to ATL as a "well-known patent troll." As set forth in earlier paragraphs in this Complaint, ATL was simply pursuing a return on its constitutionally authorized patent rights after having failed in its business efforts to bring Mr. Barcelou's inventions to market. Mr. Cook's statements on behalf of CUNA, highlighted herein and in Exhibit A, were false defamatory statements that damaged ATL and Mr. Barcelou.

(Amended Complaint, ¶¶ 69-71.)

The PowerPoint presentation at Exhibit A, titled "Hot Topics in Litigation," starts with a picture of a troll. The presentation continues with the question "What is a Patent Troll?" and defines the term as "an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention." It says it is a "pejorative term," with "non-practicing entity" being the "polite term." It describes the tactics of trolls as a "shakedown" in the form of demand letters threatening litigation in order to "strong-arm entities into accepting a license," while "know[ing] that you will pay for a license instead of going to court." ATL is listed with other entities under the heading "Well-Known Trolls." The presentation concludes with suggestions on how credit unions may "fight back."

The plaintiffs cite a second set of statements from this defendant, which they claim are defamatory.

CUNA also testified before the Senate and republished its testimony under the same title as the ABA did. See Exhibit E. The CUNA representative stated patent trolls made a business out of what "might look like extortion." It also referred to ATL's licensing activities as being generated based on the "costs of a stamp." It also states the need to control "trolls." These statements are false and defamatory and have damaged ATL. ATL's business was based on decades of research and development, manufacturing, and business development efforts as set forth in prior paragraphs, and was based on far more than the cost of a stamp. ATL's efforts were not akin to extortion, but were instead the efforts to make its technology that was protected through the constitutionally authorized Patent System. Further, ATL was attempting to license patents that resulted from the inventive and business efforts of its manager, David Barcelou over many years. ATL was not a patent troll.

(Amended Complaint, ¶ 77.)

The testimony in question was before the United States Senate Committee on the Judiciary. Testifying on behalf of Credit Union National Association, the head of a Vermont credit union said "the problem of **patent trolls** has gotten out of control." He described his own experience with receiving "an ill-researched, vague demand letter from a company that has made a business out of what, in my opinion, in another context, might look like extortion." He described the letter as being "from an entity vaguely suggesting that one or more of our ATM machines infringed one or more of 13 patents." Later in the testimony, the speaker refers to the entity sending the letters as "**the troll**." But there is no reference to Barcelou or ATL in the testimony.

C. *Statements by Robert Stier and Pierce Atwood*

The claims against Robert Stier and Pierce Atwood are as follows:

On April 3, 2013, an article entitled "Banks fighting 'patent troll' can move forward together" appeared on the Internet at <http://www.bizjournals.com/boston.print-edition/2013/04/02/mass-banks-address-atm-patent.html>. Bob Stier is quoted as saying "Automated

Transactions's suit amounts to nothing more than a shakedown of community banks and that the company has intimidated more than 140 banks into settling." Upon information and belief, this article continued to appear on the Internet.

(Amended Complaint, ¶ 68.)

From 2013 until January 2014, Stier and Pierce Atwood were publishing a defamatory web page on their web site that referred to ATL as a patent troll. ATL was involved in patent litigation at the time and ATL's counsel wrote to the judge in the case to bring these defamatory remarks to the Court's attention. See Exhibit F, which is two different web pages that were downloaded from Pierce Atwood's web site in January 2014. ATL's trial counsel wrote a letter to Court requesting an order barring the defendants from referring to Mr. Barcelou as a patent troll. The Court issued such as [sic] order. See Exhibit G. Stier's and Pierce Atwood's defamatory statements irreparably harmed the plaintiffs.

(*Id.* at ¶ 78.)

The article in Exhibit F begins with a description of how a New York lawyer sent letters to banks informing them that ATL had patents bearing on the operation of their ATMs, and asking about their interest in obtaining a "sub-license" in advance of ATL suing for patent infringement. It continues that Attorney Stier found decisions in which courts invalidated an ATL patent and limited the scope of others. It concluded, "there was no reason to believe that any bank needed a sub-license. The demand for a sub-license was a **classic shakedown**." It described how Pierce Atwood formed "a group of banks and credit unions willing to resist the **shakedown**," known as the "National Automated Transactions Opposition."

Exhibit G is a series of orders issued in litigation by ATL against a number of defendants. There the court ordered the defendants to refer to Mr. Barcelou as "the named inventor of the patents-in-suit," and Transactions Holding as "the named assignee." The

plaintiffs say the orders were prompted by a posting on Pierce Atwood's website that referred to ATL as a "patent troll."

A third alleged instance of defamation is described as follows:

In January 2015, Pierce Atwood published an article entitled "Pierce Atwood Successfully Defends Community Banks and Credit Unions Against Aggressive Licensing Demands from Unscrupulous Patent Troll." See Exhibit K. In the article, which upon information and belief was written by Mr. Stier, ATL was referred to as a patent troll. For the reasons previously discussed, this was a false and defamatory statement that damaged ATL. In September 2015, Mr. Stier presented at a Maine Bankers Association Banking Law Seminar, and upon information and belief, referred to ATL as a patent troll. See Exhibit L. Mr. Stier's statements were false and defamatory and damaging to ATL.

(Amended Complaint, ¶¶ 84-85.)

Exhibit K appears to be an article from Pierce Atwood's website that describes Attorney Stier's success in defeating claims by ATL that ATMs belonging to a group of banks infringed on ATL's patents. It relates to how ATL encouraged settlements by keeping its licensing fees below the cost of litigating a defense to a lawsuit. It concludes by quoting Attorney Stier about his strategy, which "protected an entire class of institutions from harassment by an **unscrupulous patent troll**."

Another article on the Pierce Atwood website (Exhibit L) makes a similar claim in promoting Attorney Stier's appearance before a Maine Bankers Association Banking Law Seminar, at which he will present a "Patent Troll Update." It describes how "after more than 100 banks were brought together in 2012 to defend against a **patent troll** that demanded licenses for their ATMs, that particular **patent troll** lost its appetite for patent

litigation and abandoned its claims." It says "Bob Stier . . . successfully assembled the joint defense group that stood up to Automated Transactions, LLC. . . ."

D. *Statements by W. John Funk and Gallagher, Callahan & Gartrell*

This claim involves statements made during a podcast. The complaint alleges that

Upon information and belief, on November 12, 2013, a transcript of an interview with John Funk appeared on the website of Gallagher, Callahan and Gartrell. The webpage was entitled "'Businesses Offering ATM Services – Beware Patent Trolls' with John Funk, Gallagher, Callahan & Gartrell in New Hampshire." Funk refers to ATL and Mr. Barcelou and notes that there's a whole industry of patent trolls . . ." This implication that ATL is a patent troll was a defamatory statement that has damaged ATL. See Exhibit B. Mr. Funk and GCG have made numerous other references to ATL as a patent troll.

(Amended Complaint, ¶ 72.)

The interview begins with the moderator describing Automated Transactions, LLC as having "been quite busy with suits around patent infringement, which has impacted quite a few businesses large and small." Mr. Funk responds that he has known about ATL "for about two years," and that he "had clients who first started receiving letters from Automated Transactions claiming that they had infringed a patent that it holds that relates to an interface between automated teller machines, so-called ATMs, and the internet." When the moderator asks if "suing for patent infringement is Mr. Barcelou's primary source of income," Funk says "there's a whole industry of **patent trolls** these days that secure patents that may or may not be valid when challenged, proceed to make claims on companies and harvest monies that they may not be entitled to."

E. *Statements by Mascoma Savings Bank and Stephen Christy*

With respect to these defendants, the plaintiffs allege,

On or about April 6, 2014, the Washington Examiner published an article by the Associated Press entitled “New Hampshire bill aims to nip false patent claims” on the Internet. In the article, Steve Christy, as President of Mascoma, describes his bank’s business with ATL and is quoted as calling ATL’s activities as “outright blackmail.” See Exhibit H. On April 7, 2014, the article referred to in the preceding paragraph was published by the Concord Monitor on the Internet and in print. (Amended Complaint, ¶¶ 79–80.)

This Associated Press report in Exhibit H discusses how “lawmakers are considering making it harder for companies with false patent claims – known as patent trolls – to demand that business pay licensing fees or be sued.” It describes how

New Hampshire banks and credit unions – with one exception so far – have paid license fees when accused of patent infringement for dispensing cash through their ATMs. Two years ago, Mascoma Savings Bank joined 96 other banks and credit unions in challenging the claim in court. ‘It’s outright blackmail and we’re not going to be a party to it,’ said Mascoma President Steve Christy. Christy paid a lawyer a fee that was less than the roughly \$40,000 demanded by patent holder Automated Transaction LLC.

It quotes an attorney for ATL as saying that while “there are some companies that are patent trolls,” which “go out and buy up patents,” ATL “isn’t one of them.”

Discussion

The References to “Patent Troll”

Viewed favorably to the plaintiffs, the complaint cites each defendant with the exception of Mascoma Savings Bank and Mr. Christy, as referring to them as “patent trolls,” directly or indirectly. In each instance, however, the facts upon which the label is based are evident from the context, and the complaint’s specific allegations against the defendants do

not include claims that the underlying assertions of fact are false or leave undisclosed facts to be implied. For instance, the plaintiffs accuse the American Bankers Association of “describ[ing] ATL’s legitimate licensing efforts and then refer[ing] to ‘patent trolls,’ plainly calling ATL a patent troll.” The plaintiffs only cite the reference to ATL as a “patent troll” as false and defamatory. Similarly, the plaintiffs don’t contest Rheo Brouillard’s factual assertions leading up to his conclusion that the conduct amounts to that of a “patent troll.” Instead, the plaintiffs explain that ATL was simply “trying to capitalize on its extensive research and development and marketing efforts that resulted in numerous patents.”

The plaintiffs also dispute the conclusion in Credit Union National Association’s powerpoint that ATL is a “patent troll,” on the basis that the underlying facts describe an effort by ATL to “pursu[e] a return on its constitutionally authorized patent rights after having failed in its business efforts to bring Mr. Barcelou’s inventions to market.” Understandably, the plaintiffs disagree that their efforts make them deserving of the label, “patent troll,” but clearly it is a matter of opinion.

Even if the plaintiffs didn’t implicitly accept the defendants’ factual underpinning for the term “patent troll,” the facts on which the characterization is based are evident from the context and the complaint doesn’t include an allegation that those facts are false. Neither does it say the existence of other undisclosed facts is implied. Instead, the plaintiffs contend

Each of these defamatory statements described herein were published by the respective Defendants to third parties, without a privilege to do so. Each is also

false. Neither ATL nor Mr. Barcelou are trolls, shakedown artists, extortionists or blackmailers.

It is well known that being labeled a patent troll, an extortionist, as conducting a shakedown, and the like, are disparaging and damaging, particularly to businesses. The damaging effects of being labeled a "patent troll" are well known.

(Amended Complaint, ¶ 87–88).

When the opinion is based on facts that are disclosed and when it wouldn't be understood to imply the existence of undisclosed facts, then the opinion is not actionable. *Bourne v. Arruda*, No. 10-CV-393-LM, 2011 WL 2357504, at *4 (D.N.H. June 10, 2011) (citing *Pease v. Telegraph Publishing Co.*, 121 N.H. 62, 66 (1981)). See *McKee v. Cosby*, 874 F.3d 54, 60–61 (1st Cir. 2017) ("[W]hen the speaker outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." (quotation omitted)). From the context, each defendant used "patent troll" to characterize entities, including ATL, which engage in patent litigation tactics it viewed as abusive. And in each instance the defendant disclosed the facts that supported its description and made ATL, in the defendant's mind, a patent troll. As such, to the extent the defendants accused the plaintiffs of being a "patent troll," it was an opinion and not actionable.

A second reason the statements qualify as protected opinion is that to be actionable, the statement cannot be one that is "incapable of being proven true or false." *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (statement that plaintiff engaged in a "scam" was protected opinion, since "readers may have disagreed with the conclusion that it was a

scam, but they could not have said that the conclusion was false, because there is no core meaning of scam to which Rattiner's facts and allegation can be compared.”)

To be sure, some courts have defined the term. The plaintiffs cite one such case and there are others. See *Amgen, Inc. v. F. Hoffman-La Roche Ltd.*, 581 F. Supp. 2d 160, 210 (D. Mass. 2008) (“Patent trolls are ‘nonpracticing entities’ who ‘do not manufacture products, but instead hold . . . patents, which they license and enforce against alleged infringers.’”) (quoting *Taurus IP v. DaimlerChrysler Corp.*, 519 F.Supp.2d 905, 911 (W.D.Wis.2007)).

There are other definitions and not all of them are necessarily pejorative. See Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?* 83 TEX. L. REV. 961, 1023-24 (2005) (defining “patent ‘trolls’” more neutrally as “firms that have no interest in a licensing equilibrium because they produce no products of their own,” but concluding that “trolls are serving a function as intermediaries that specialize in litigation to exploit the value of patents that cannot be exploited effectively by those that have originally obtained them. That is not in and of itself a bad thing”).

The pejorative term “troll” is used by some to refer to any party that doesn’t actually produce goods or services. Indeed, some use “troll” to refer to anyone who is suing them, even practicing entities. Others would exclude some entities—notably universities and individual inventors—from the troll definition. Still others would limit patent trolls further, to include only PAEs—companies whose primary line of business is filing patent suits. And even that definition is too broad for some, who would limit the term patent troll to those who assert patents they bought from others, only those who assert invalid patents, or only those who engage in certain “abusive” tactics in patent litigation, such as pressuring allegedly infringing manufacturers by threatening those manufacturers’ end-user customers, or seeking nuisance-value settlements. The definitional question is sufficiently muddled that two of the authors designed a

taxonomy of twelve different entity types, allowing people to decide for themselves who fits in the troll category.

John R. Allison, Mark A. Lemley, & David L. Schwarz, *How Often Do Non-Practicing Entities Win Patent Suits?* 32 BERKELEY TECH. LAW J. 237, 242 (2018).

The broad range of activity encompassed by the term makes it difficult to define. See Jason Rantanen, *Slaying the Troll: Litigation As an Effective Strategy Against Patent Threats*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 159, 164 (2006); John M. Golden, "Patent Trolls" and Patent Remedies, 85 Tex. L. Rev. 2111, 2161, n. 7 (2007) ("[T]he magnitude of what contemporary fashion terms the "patent-troll problem" remains substantially unknown, in part because a widely accepted definition of a patent troll has yet to be devised."). Given the imprecise meaning, calling another a "patent troll" doesn't enable the reader or hearer to know whether the label is true or false, just as statements that a person "is racist are clearly expressions of opinion that cannot be proven as verifiably true or false." *Squitieri v. Piedmont Airlines, Inc.*, No. 3:17CV441, 2018 WL 934829, at *4 (W.D.N.C. Feb. 16, 2018).

Lastly, the statements are not actionable because to call one a "patent troll" or "unscrupulous," or to say one's conduct is like "extortion" or "blackmail," is protected as "mere 'rhetorical hyperbole.' This is a well-recognized category of, as it were, privileged defamation," [which] consists of terms that are either too vague to be falsifiable or sure to be understood as merely a label for the labeler's underlying assertions." *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

In this sense, “patent troll” is “loose, figurative language, hyperbole and epithet.” *Douglas v. Pratt*, No. 98-CV-416-M, 2000 WL 1513712, at *4 (D.N.H. Sept. 29, 2000). It is stated as an alternative description for bodies otherwise known as “patent assertion” or “non-practicing” entities.

The References to “Shakedown,” “Extortion,” and “Blackmail”

A similar analysis applies to the descriptions of the plaintiffs’ conduct as a “shakedown,” “extortion,” or “blackmail.” “Courts have consistently found that statements calling into question the legitimacy of litigation are non-actionable statements of opinion.” *Live Face on Web, LLC v. Five Boro Mold Specialist Inc.*, No. 15 CV 4779-LTS-SN, 2016 WL 1717218, at *2 (S.D.N.Y. Apr. 28, 2016). So, statements by an American Bankers Association representative that “these patent trolls use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country,” and by Mr. Christy that “ATL’s activities [constitute] ‘outright blackmail,’” and by Mr. Stier that ATL’s lawsuit was a “shakedown,” are “of the ‘loose, figurative, or hyperbolic’ sort that is not actionable for defamation.” *Small Business Bodyguard Inc. v. House of Moxie, Inc.*, 230 F. Supp. 3d 290, 312 (S.D.N.Y. 2017) (quotation omitted). See *Bourne v. Arruda*, No. 10-CV-393-LM, 2011 WL 2357504, at *5 (D.N.H. June 10, 2011) (reference to plaintiff as “terrorist” was, in context, a “hyperbolic expression of his opinion about Bourne and his litigation tactics”); *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997) (citing as examples of hyperbolic opinion, *Letter Carriers v. Austin*, 418 U.S. 264, 284–86 (1974) (use of the word “traitor” to define a worker who crossed a picket line was not actionable); *Greenbelt Co-op.*

Publishing Assoc. v. Bresler, 398 U.S. 6, 13–14 (1970) (newspaper's characterization of a developer's negotiating position as "blackmail" was not defamatory; the word was simply an epithet and, under the circumstances, did not suggest commission of a crime); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir. 1992) (calling a play "a rip-off, a fraud, a scandal, a snake-oil job" was mere hyperbole and, thus, constitutionally protected)).

The plaintiffs say they disagree with Mr. Brouillard's assertion that that their litigation "requires only a piece of paper and a postage stamp," but that statement is readily understood as hyperbole and not a statement of fact.

The claims for defamation against the defendants in Count I are dismissed, except as to Mascoma Savings Bank and Stephen Christy who are granted summary judgment.

Violation of Consumer Protection Act (Count II)

The plaintiffs base their claim of violations of the Consumer Protection Act on the disparagement of their patent activity. The claimed disparagement is based on the defendants' purportedly false assertions of fact. See RSA 358-A:2, VIII (statute violated by "disparaging the goods, services, or business of another by false or misleading representation of fact"). Since the challenged misrepresentations are not factual, the Consumer Protection Act claim in Count II is dismissed as well. See *Douglas v. Pratt*, at *7.

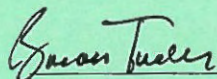
Conclusion

For the reasons given, the motions to dismiss filed by the American Bankers Association (doc. no. 39), Credit Union National Association (doc. no. 73), Robert Stier and

Pierce Atwood, LLP (doc. no. 77), W. John Funk and Gallagher, Callahan & Gartrell (doc. no. 79), and the motion for summary judgment of Mascoma Savings Bank and Stephen F. Christy (doc. no. 87) are GRANTED.

SO ORDERED.

DATE: MARCH 19, 2018



BRIAN T. TUCKER
PRESIDING JUSTICE