

**STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**AUTOMATED TRANSACTIONS, LLC & a.**

**v.**

**AMERICAN BANKERS ASSOCIATION & a.**

**No. 2018-0198**

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**APPEAL FROM THE SULLIVAN COUNTY  
SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7**

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**OPPOSING BRIEF OF THE APPELLEE AMERICAN BANKERS ASSOCIATION**

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**September 14, 2018**

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## **QUESTIONS PRESENTED FOR REVIEW**

At least two issues identified in plaintiffs' opening brief do not pertain to ABA. Issues 1 and 2 do not pertain to ABA because the plaintiffs did not allege that ABA engaged in the referenced speech. *See* APP-19 to 20, ¶¶ 75, 76, 81, 82 (allegations as to ABA and Mr. Brouillard). Plaintiffs' remaining issue statements mischaracterize the relevant inquiry, as will be discussed in this brief. In addition, plaintiffs have not briefed, and have therefore waived, issues 4, 5, 7, and 9 set forth in the Notice of Appeal. *See, e.g., Town of Londonderry v. Mesiti Dev.*, 168 N.H. 377, 380 (2015).

## STATEMENT OF THE CASE AND FACTS

The following facts are drawn from the First Amended Complaint and its exhibits,<sup>1</sup> and assumed true solely for purposes of evaluating the trial court's March 20, 2018 Order.

### **I. Plaintiffs' Background.**

Plaintiff David Barcelou alleges he is a "serial inventor" with an "extensive patent portfolio" and that "his latest inventive and business efforts were directed at Internet-based automated transaction machines ('ATM')." APP-2 ¶ 1. Plaintiff Automated Transactions, LLC ("ATL") alleges it holds exclusive licenses to Barcelou's inventions, which ATL licenses. APP-13 ¶ 56.

With respect, presumably, to the ATM-related patents, plaintiffs allege that they "began investigating the marketplace and found that the industry had widely beg[un] using Mr. Barcelou's technology," prompting ATL to send out "letters to ATM owners and/or operators offering them a license to ATL's ATM patents." *Id.* ¶ 59.

Although ATL generated over \$3 million in licensing revenue from 2011 to 2012, *see id.* ¶ 57, plaintiffs allege that "[s]ome banks and . . . ATM owners and/or operators cho[se] to fight ATL in court." APP-14 ¶ 61. In 2012, as plaintiffs acknowledge, many of ATL's patents were invalidated. *Id.* ¶ 57; *Automated Transactions, LLC v. IYG Holding Co.*, 484 Fed. Appx. 469, 473 (Fed. Cir. 2012), *cert. denied sub nom.*, 133 S.Ct. 955 (2013); *Automated Transactions, LLC v. IYG Holding Co.*, 768 F. Supp. 2d 727 (D. Del. March 9, 2011). Plaintiffs acknowledge a

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<sup>1</sup> The Complaint refers to the written testimony of ABA and Mr. Brouillard, attaches a copy of the written testimony, and references the publication of it on ABA's current website. The Court, therefore, may consider each of these documents as falling within the four corners of the Amended Complaint. *See Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (stating the trial court may, in ruling on motion to dismiss, "consider documents attached to the plaintiff's pleadings . . . or documents sufficiently referred to in the complaint").

steep decline in revenue from 2012 to 2013. APP-23 ¶ 90. Rather than attribute the revenue decline to the patent invalidations, plaintiffs ascribed it to a “malicious defamatory smear campaign launched in the public against Mr. Barcelou and ATL.” *Id.* ¶ 62.

Plaintiffs responded to the perceived slight by commencing this defamation action. Plaintiffs originally named thirteen defendants, plus “Does 1-30.” APP-1. The original defendants included parties and their counsel who litigated against plaintiffs in a federal multi-district litigation (“MDL”) (*In re: Automated Transaction, LLC Patent Litigation*, MDL No. 13-2429-SLR (D. Del.)). Plaintiffs abandoned their claims against most of the defendants and now pursue this appeal only with respect to ABA, Credit Union National Association (“CUNA”), and the Pierce Atwood law firm and one of its attorneys.

## **II. Plaintiffs Allege ABA Defamed ATL.**

ABA is a non-profit “trade association for the U.S. banking industry based in Washington, DC.” APP-3 ¶ 4. On December 17, 2013, ABA submitted a written “Statement for the Record” to the United States Senate Committee on the Judiciary, a copy of which is attached to the Complaint as Exhibit D. APP-61 to 69. ABA submitted its written testimony in advance of a subcommittee hearing the Senate Judiciary Committee titled: “Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse.” *See id.*<sup>2</sup> ABA’s written testimony offered background information and commentary on proposed legislation aimed at curbing abusive patent litigation. *See id.* In particular, the written testimony addressed ABA’s “strong[]

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<sup>2</sup> *See Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse*, 113th Cong. at 419 (December 17, 2013), available at <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg94151/pdf/CHRG-113shrg94151.pdf>.

support” for such legislation, including, specifically, Senate Bill 1720 “introduced by Chairman Leahy and Senator Lee.”<sup>3</sup> APP-63.

ABA’s written testimony also described certain “abusive” practices 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.” APP-62. With respect to Plaintiff ATL, ABA’s written statement read:

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 failed 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. [Citing *In re Transaction Holdings, Ltd, LLC*, 484 Fed. Appx. 469 (Fed. Cir. April 23, 2012), *reh’g and reh’g en banc denied* (July 2, 2012), *cert. denied sub nom.*, 133 S.Ct. 955 (Jan. 14, 2013)]. 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. An example of ATL’s demand letter is attached to this testimony in redacted form.

APP-62 to 63.

ABA’s written testimony included examples of demand letters sent by ATL. APP-65 to 68. In one letter – dated September 2013 – ATL accused the bank of infringing its “patent portfolio covering ATMs.” APP-65 to 66. The letter identified patents that were invalidated almost two years earlier. *Cf.* APP-65 to 66 (asserting infringement, in part, of U.S Patents 7,575,158 and 7,600,677), *to Automated Transactions, LLC*, 768 F. Supp. 2d 727, at 746 (D. Del.

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<sup>3</sup> See S. 1720, 113th Congress (2013), available at <https://www.congress.gov/bill/113th-congress/senate-bill/1720>.

March 9, 2011) (holding that the ‘158 and ‘677 patents, as derivative of a related patent, were “invalid for indefiniteness”), *aff’d* 484 Fed. Appx. 469, 473 (Fed. Cir. 2012), *cert. denied sub nom.*, 133 S.Ct. 955 (2013); *see also* Appellants’ Brief at 20 (citing the *In re Transaction Holdings* Federal Circuit decision). The letter made no mention of this fact. *See* App-65 to 68.

Plaintiffs do not contest the truth of the facts ABA asserted in its written testimony, such as ATL’s use of demand letters and attempted enforcement of invalid patents. *See generally* APP-1 to 27, APP-61 to 69. The First Amended Complaint even tacitly acknowledged that ATL’s demand letter highlighted by ABA had asserted violations of invalidated patents, *see* APP-14, ¶ 57. Plaintiffs also cannot contest the fact that ABA’s written testimony never described ATL as a “patent troll.” APP-61 to 69. Rather, plaintiffs contend ABA defamed ATL by *implying* it is a patent troll. APP-19, ¶ 76. ABA supposedly did this when it wrote the Senate Committee’s hearing title – “Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse” – on the cover page of its written testimony. APP-61.

ABA later published on its website the written testimony it submitted to the Senate Judiciary Committee.<sup>4</sup> Plaintiffs assert only the fact that ABA republished its written testimony. *See* App-19 ¶ 75. They make no other allegations about the republication or its accuracy, nor do they suggest the republication was made in bad faith. *See id.*

Plaintiffs go on to allege that Mr. Brouillard testified on behalf of ABA before the United States House of Representatives and called ATL a “patent troll.” APP-20 ¶ 81.<sup>5</sup>

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<sup>4</sup> *See* <http://www.aba.com/Advocacy/Testimonies/Pages/default.aspx#2013>.

<sup>5</sup> The First Amended Complaint refers to Mr. Brouillard’s testimony and attaches a written copy of it as Exhibit I. APP-20 ¶ 81, APP-99 to 106. The Court, therefore, may consider this document as falling within the four corners of the First Amended Complaint. *See Beane*, 160 N.H. at 711.

On April 8, 2014, Mr. Brouillard testified before the House Subcommittee of Commerce, Manufacturing, and Trade with respect to the issue of patent abuse generally, the need for legislation to curb it, and the “Innovation Act,”<sup>6</sup> which imposed limitations and requirements on parties alleging patent infringement. APP-99 at 1. The Subcommittee titled the hearing “Trolling for a Solution: Ending Abusive Patent Demand Letters.” *Id.*

Mr. Brouillard spoke about “patent trolls” generally. APP-100. He then discussed his personal experience dealing with ATL and its litigation threats. APP-102 to 103. Mr. Brouillard described ATL’s activities as an example of an entity that makes assertions of patent infringement that are “vague and based on shaky legal standing.” APP-100. He also testified to the following facts about ATL, the truth of which plaintiffs do not contest:

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. Fortunately, we found out about the cases that were dismissed and did not settle. My bank’s case is far from unique, and ATL is far from the only perpetrator using intimidation to target small businesses.

APP-101.

Mr. Brouillard provided to the Subcommittee a copy of a January 3, 2013 demand letter ATL sent his Connecticut bank. APP-105 to 106. The letter claimed the bank was infringing ATL’s patents, but it did not disclose that some of the ATL patents were invalidated almost two years earlier. *Cf.* APP-105 to 106 (asserting infringement, in part, of U.S Patents 7,575,158 and

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<sup>6</sup> See H.R. 3309 113th Congress (2013-2014), *available at*: <https://www.congress.gov/bill/113th-congress/house-bill/3309>.

7,600,677), to *Automated Transactions, LLC*, 768 F. Supp. 2d at 746 (holding that the ‘158 and ‘677 patents, as derivative of a related patent, are “invalid for indefiniteness”).

Plaintiffs asserted two causes of action against ABA in the First Amended Complaint: defamation (Count I) and violation of the Consumer Protection Act (Count II). ABA filed a motion to dismiss the First Amended Complaint for failure to state a claim upon which relief may be granted. After a hearing, the Superior Court (*Tucker, J.*) granted ABA’s motion to dismiss by Order dated March 20, 2018.

## **STANDARD OF REVIEW**

This Court conducts a *de novo* review of Orders granting motions to dismiss. See Appellants' Brief at 14. New Hampshire's motion to dismiss standard mirrors that of the federal courts. See APP-170. A plaintiff must state a claim "that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted), and not just assert "labels and conclusions," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).<sup>7</sup>

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<sup>7</sup> See *Super. Ct. R. 8(a)* (similar to Federal Rule of Civil Procedure 8(a)); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008).

## **SUMMARY OF THE ARGUMENT**

The trial court correctly dismissed plaintiffs' defamation claim against ABA because, as a matter of law, none of the statements allegedly made by ABA were defamatory. The term "patent troll" amounts to no more than a speaker's subjective view of someone as undesirable, whereas words like "extortion" and other exaggerations fall within the doctrine of rhetorical hyperbole. In turn, the trial court correctly dismissed plaintiffs' New Hampshire Consumer Protection Act claim because it was entirely derivative of their defamation claim.

Alternative grounds also support the trial court's disposition, namely, the legislative privilege, the fair reporting privilege, and the *Noer-Pennington* doctrine. Plaintiffs' CPA claim also fails to allege activities in "trade or commerce."

The Court should affirm the trial court's dismissal of all claims against ABA.

## ARGUMENT

Defamation law stands at the intersection of the common law and the constitutional protection of free speech guaranteed by the First Amendment to the Federal Constitution and Part I, Article 22 of the New Hampshire Constitution. “Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

**I. The trial court correctly ruled that plaintiffs failed to state a claim for relief against ABA.**

**a. Count I (Defamation): Statements of opinion are protected as a matter of law by the State and Federal Constitutions.**

The trial court committed no error in dismissing Count I against ABA. “[T]he nature of a libel action lends itself to judicial scrutiny in the early stages of a defamation lawsuit.” Add., Order of March 20, 2018 at 4 (quoting *Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1258 n.10 (S.D. Miss. 1988)). “Whether an allegedly libelous statement is an opinion or an assertion of fact is a matter of law to be determined by the trial court in the first instance.” See *Pease v. Telegraph Publishing Co., Inc.*, 121 N.H. 62, 65 (1981) (collecting authority).

It is important to observe at the outset two legal principles that expose the tenuous nature of plaintiffs’ defamation claim against ABA. First, plaintiffs’ defamation claim hinges largely on alleged statements by ABA that plaintiffs interpret as *implying* ATL is a “patent troll.” Defamation-by-implication claims invite heightened scrutiny because, “[u]nlike explicit statements, publishers cannot be expected to foresee every implication which may reasonably arise from a certain publication.” See *Dallas Morning News, Inc. v. Tatum*, No. 16-0098, 2018 Tex. LEXIS 404, \*33 (Tex. May 11, 2018). “To avoid this chilling effect, the First Amendment

‘imposes a special responsibility on judges whenever it is claimed that a particular communication is defamatory.’” *Id.* (quoting in part *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (brackets omitted)).

Second, ABA’s alleged defamatory speech concerned a public debate over a political issue—pending legislation. Not only is that speech privileged as a matter of law (discussed *infra* in this brief), any assertion of defamation in that context occurs “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571 (N.Y. App. 1975) (heightened standard for matters of public concern); *McGill v. Parker*, 582 N.Y.S.2d 91, 97-98 (App. Div. 1992) (holding private citizens and media receive same degree of protection for speaking out on matters of public concern); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 52 (1st Cir. 2012) (political speech privileged except for “actual malice”).

As set forth below, and as the trial court concluded, plaintiffs failed to state a defamation claim because they complain about constitutionally protected opinions.

**i. Calling someone a “patent troll” is a statement of opinion, not an objectively verifiable fact.**

The Federal and State Constitutions “unquestionably” protect opinions from claims of defamation. *See Pease*, 121 N.H. at 65; *Douglas v. Shannon Pratt & AP*, 2000 D.N.H. 199, 2000 U.S. Dist. LEXIS 20935, \*9 (D.N.H. September 29, 2000).

An opinion is generally a statement that “involves expressions of personal judgment.” *Pease*, 121 N.H. at 65 (quoting *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 1987)). Only where a statement is “factual or capable of being proven true or false” can the statement form the basis for a defamation claim. *Id.* (citing *Milkovich v. Lorain Journal Co.*, 497

U.S. 1, 20 (1990)). “Whether a statement is a verifiable fact or an opinion can be decided by the court as a matter of law.” *Piccone v. Bartels*, 785 F.3d 766, 772 (1st Cir. 2015); *see also Pease*, 121 N.H. at 65 (“Whether an allegedly libelous statement is an opinion or an assertion of fact is a matter of law to be determined by the trial court in the first instance.”). “This task requires examination of the totality of the circumstances in which the specific challenged statements were made, including the general tenor and context of the conversation and any cautionary terms used by the person publishing the statement.” *Piccone*, 785 F.3d at 7772.

Ambiguous and generic expressions, even if pejorative, unquestionably fall in the category of protected “opinion.” *See, e.g., Steinhilber v. Alphonse*, 501 N.E.2d 550, 554 (N.Y. App. 1986) (identifying factors to consider in “differentiating between fact and opinion”). For example, in *Piccone*, the United States Circuit Court of Appeals for the First Circuit held that the term “unprofessional” is opinion because it has no “single, readily ascertainable meaning.” *Piccone*, 785 F.3d at 772 (quotations omitted). More generally, “[w]here an expressive phrase, though pejorative and unflattering, cannot be ‘objectively verified,’ it belongs squarely in the category of protected opinion.” *Id.* Similarly, in *Pease*, this Court held that the expressions “journalistic smear” and “journalistic scum of the earth” amounted to “a vigorous epithet used by those who consider the plaintiff’s journalism deplorable, and not an assertion of fact.” *Pease*, 121 N.H. at 65 (quotations and citation omitted).

Like the expressive phrases in *Piccone* and *Pease*, the phrase “patent troll” is also ambiguous and incapable of any “single, readily ascertainable meaning.” According to one scholar who traced the etymology of the phrase, “from its inception, the term ‘patent troll’ appears to have had an ambiguous meaning.” E. Lee, *Article: Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform*, 19 Stan. Tech. L. Rev. 113, 119-20 (Fall 2015). The trial

court reached the same conclusion, citing a number of examples where authoritative sources defined the term “patent troll” in different ways. ADD. at 17-19. One law review article observed: “[t]he 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.” *Id.* at 19 (quoting J. Allison et al., *How Often Do Non-Practicing Entities Win Patent Suits?* 32 Berkeley Tech. Law J. 237, 242 (2018); see also J. Rantanen, *Slaying the Troll: Litigation As An Effective Strategy Against Patent Threats*, 23 Santa Clara Computer & High Tech L.J. 159, 164 (2006); J. Golden, *Patent Trolls and Patent Remedies*, 85 Tex. L. Rev. 2111, 2161 n.7 (2007).

Echoing this same sentiment, Chief Judge Randall R. Rader of the United States Court of Appeals for the Federal Circuit, which is the federal appeals court with jurisdiction over appeals of patent infringement claims, gave a speech on September 27, 2011 discussing the problem of patent trolling and recognizing the definitional problem. See Chief Judge Randall R. Rader, United States Court of Appeals for the Federal Circuit, *Improving Patent Litigation* (September 27, 2011), available at <https://patentlyo.com/media/docs/2011/09/raderstateofpatentlit.pdf>. Judge Rader’s remarks underline the fact that a “patent troll” is a generic term that implicates subjective views of value.<sup>8</sup>

Though the term “patent troll” comes with “pejorative and unflattering” connotations, that does not render it defamatory. See *Piccone*, 785 F.3d at 772. Given the inability to ascribe a

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<sup>8</sup> See “Patent Troll,” Wikipedia (visited September 12, 2018) (observing “patent troll” is a “categorical and pejorative term” for one who asserts patent rights “often through hardball legal tactics (frivolous litigation, vexatious litigation, strategic lawsuit against public participation (SLAPP), chilling effects, and the like”), available at [https://en.wikipedia.org/wiki/Patent\\_troll#cite\\_ref-1](https://en.wikipedia.org/wiki/Patent_troll#cite_ref-1). See also *Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 806 (Utah App. 2012) (citing Wikipedia to demonstrate word at issue is ambiguous).

meaning to the term “patent troll” beyond the vague, generalized notion that it refers to someone as being unreasonable, the trial court correctly observed that “[t]he broad range of activity encompassed by the term makes it difficult to define.” ADD at 19.

Recent legislative efforts to combat patent trolling highlight the ambiguous nature of the term beyond its generalized connotation of bad faith or abusive tactics. *See Steinhilber*, 501 N.E.2d at 554 (identifying “broader social context or setting surrounding the communication” as a factor to consider in “differentiating between fact and opinion”); *McCabe v. Rattiner*, 814 F.2d 839, 843 (1st Cir. 1987) (observing same and that use of charged words in debate over public issue “commonly understood to be attempts to influence that public debate”).

In 2014, New Hampshire, like many states, adopted legislation aimed at patent trolling. *See* RSA chapter 359-M. The prime sponsor of the bill (SB 303), Senator Carson, introduced and described it as legislation aimed at “patent trolls,” remarking as follows:

[The bill] seeks to put controls on what we are currently seeing in New Hampshire—**patent trolling** that can do a lot of damage. She explained that some firms do own patents, but there are others who buy broadly worded patents and then very aggressively go after companies, threatening to sue thousands of companies at once. The **trolls** hope that the companies will just pay in order to avoid costly litigation that can go on for years. These **trolls** take advantage of the scope of validity of patents, especially in the software arena, and threaten these companies. . . . The wording here is modeled after Vermont’s **patent trolling legislation** and . . . Nebraska and Minnesota have also adopted similar protections.

*See* Relative to Bad Faith Assertions of Patent Infringement, SB 303-FN, 2014 Session, at 1

(N.H. February 4, 2014), *available at* [http://gencourt.state.nh.us/SofS\\_Archives](http://gencourt.state.nh.us/SofS_Archives)

/2014/senate/SB303S.pdf (remarks of Senator Carson) (emphases added).<sup>9</sup> Notably, however,

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<sup>9</sup> Numerous supporters of that legislation wrote the Senate to express support for curbing “patent trolls.” *See id.* (collection of Senate Archive materials) *available at* [http://gencourt.state.nh.us/SofS\\_Archives/2014/senate/SB303S.pdf](http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB303S.pdf).

even the General Court resorted to a list of possible indicia of bad faith assertion of a patent right, *see* RSA 359-M:2, II (Supp. 2017). New Hampshire’s General Court could not settle on a single definition of the problem it sought to address. What is more, the statute the General Court eventually enacted entirely avoided use of the word “patent troll,” almost certainly because the term is ambiguous and only a colloquial term.

Similarly, at the federal level, Congress recently considered a variety of bills aimed at patent trolling.<sup>10</sup> At the same Senate Judiciary Committee hearing giving rise to plaintiffs’ claims against ABA, *see* App. at APP-61 (ABA written testimony), Senator Patrick Leahy (Vermont), a sponsor of the bill at issue (Senate Bill 1720), made opening remarks in which he described the problem of “patent trolls” and gave examples of how “[t]hese actions abuse the patent system to extort settlements.” Statement of Senator Patrick Leahy, Chairman (December 17, 2013).<sup>11</sup> The underlying bill, similar to New Hampshire’s, identified various types of bad faith demand letters, but contained no single, comprehensive definition, and no use of the word “patent troll.” *See* S.1720, Sec. 299B. “Bad-Faith Demand Letters.”<sup>12</sup>

As another example, the United States House of Representatives considered a bill in 2016 entitled the “Targeting Rogue and Opaque Letters Act of 2015,” H.R. 2045, 114<sup>th</sup> Congress

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<sup>10</sup> *See, e.g.*, S. 1720, 113th Congress (2013-2014), entitled the “Patent Transparency and Improvements Act” and *available at* <https://www.congress.gov/bill/113th-congress/senate-bill/1720>; S. 1013, 113th Congress (2013-2015), entitled the “Patent Abuse Reduction Act of 2013” and *available at* <https://www.congress.gov/bill/113th-congress/senate-bill/1013>.

<sup>11</sup> *See Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse*, 113th Cong. (December 17, 2013) (Statement of Senator Leahy), *available at* <https://www.judiciary.senate.gov/imo/media/doc/12-17-13LeahyStatement.pdf>.

<sup>12</sup> *Available at* <https://www.congress.gov/bill/113th-congress/senate-bill/1720/text>.

(2015-2016), available at <https://www.congress.gov/bill/114th-congress/house-bill/2045>. A report from one committee contains several references to “trolls” and “trolling” in the context of patents, including a concern over preemption of state laws that had already been enacted “to curb trolling.” See H.R. 2045, Report of the Committee on Energy and Commerce (December 16, 2016).<sup>13</sup> Similar to New Hampshire’s legislation, the federal bill itself (H.R. 2045) proposed no single definition of misconduct, instead setting forth a list of possible indicia of bad faith actions.

These sources each confirm that there is no definition of what is popularly referred to as “patent trolling” and the term is so generic and ambiguous that it cannot be employed in any statute. See *National Ass’n of Gov’t Employees v. Central Broadcasting Corp.*, 379 Mass. 220, 229 (1979) (holding term “communism” was “too vague to be cognizable as the subject of a defamation action”). The term “patent troll” may be pejorative, but its meaning exists in the eye of the beholder, leaving the expression as a default, catch-all term of contempt that is synonymous with simply “undesirable” in terms of asserting patent infringement claims. “Patent troll” connotes only “[e]thical standards [that] are inherently subjective” and personal to each individual. *Catalfo v. Jensen*, 657 F. Supp. 463, 468 (D.N.H. 1987) (holding “sleazy” and “scam” are protected opinion); *Traylor v. Kopp*, No. KNLCV135014624, 2015 Conn. Super. LEXIS 1771, \*19-\*20 (July 2, 2015) (collecting authority holding that description of lawsuit as “frivolous” is opinion); *Pease*, 121 N.H. at 65 (libelous statements such as “journalistic smear,” “journalistic scum of the earth,” and similar statements were not assertions of fact).

Even plaintiffs’ briefing to the trial court evidenced the ambiguous nature of the term “patent troll.” Plaintiffs argued for inconsistent definitions below. See App-155. On appeal, plaintiffs offer no definition of the term “patent troll.” They vaguely assert that the term is

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<sup>13</sup> available at <https://www.congress.gov/114/crpt/hrpt877/CRPT-114hrpt877.pdf>

“pejorative.” See Appellants’ Brief at 21-22. A pejorative term standing alone, however, is not defamatory. See *Piccone*, 785 F.3d at 772. Plaintiffs’ discussion of ABA’s statements is even less elucidating: they offer no factual definition. The closest they come as to ABA is to argue an “implication . . . that ATL is a patent troll that uses overly broad patents to extort payments from others.” Appellants’ Brief at 24. Not only did plaintiffs fail to allege this as the basis for their claim against ABA in the First Amended Complaint, but in substance any such (assumed) allegation would fall well short of stating a claim. The concept of an “overly broad patent” is a subjective viewpoint of protected opinion on a matter open to the public by way of the USPTO. See, e.g., *Perfect Choice Exteriors, LLC v. Better Bus. Bureau of Cent. Ill., Inc.*, 99 N.E.3d 541, 548 (Ill. App. 2018) (holding, in defamation case against Better Business Bureau, that “evaluative judgments” not actionable); *Pritsker v. Brudnoy*, 389 Mass. 776, 780-783 (1983) (holding that food critics comments on restaurant privileged opinion and “conditions of the restaurant . . . open to the public”). Beyond that, plaintiffs acknowledge the patent invalidation. See APP-14, ¶ 57. And, as will be discussed below, the term “extortion” is rhetorical hyperbole.

The trial court correctly concluded that ABA’s statements left no doubt about its opinion of ATL. In the trial court’s view, no defamatory meaning could attach to the statements because the purest form of opinion statement “occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff’s conduct, qualifications or character.” *Restatement (Second) of Torts* § 566 comment *b* (1977). As *Piccone* illustrates, where, as here, a defendant “fully disclosed the non-defamatory facts . . . in a way that allowed [another] to form his own impression” followed by a statement of subjective, personal judgment, the statements of personal judgment cannot form the basis of a

defamation claim. *See Piccone*, 785 F.3d at 773; *see also Cummins v. Suntrust Capital Mkts., Inc.*, 649 F. Supp.2d 224, 261 (S.D.N.Y. 2009) (holding word “abusive” was not defamatory and was statement of protected opinion), *aff’d* 416 Fed. Appx. 101 (2d Cir. 2011); *Falk & Mayfield, LLP v. Molzan*, 974 S.W.2d 821, 824 (Tex. App. 1998) (accusation of “lawsuit abuse” protected as opinion), review denied (Tex. 1998); *Traylor*, 2015 Conn. Super. LEXIS 1771, \*19-\*20 (collecting authority holding that description of lawsuit as “frivolous” is opinion); *Beattie v. Fleet Nat’l Bank*, 746 A.2d 717, 725 (R.I. 2000) (description of appraisal as “fraudulent” not actionable where accompanied by facts on which speakers’ opinion was based).

Ultimately, plaintiffs’ attempt to conjure up every far-fetched implication they can possibly imagine (none of which is alleged in the First Amended Complaint with respect to ABA) fails to overcome the status of ABA’s speech as a protected opinion. Calling someone a “patent troll” remains “a quintessential expression of personal judgment which is subjective in character.” *Piccone*, 785 F.3d at 772 (quotations and brackets omitted). The term conveys nothing more than a viewpoint of undesirable activity and is not defamatory.

**ii. Attaching “extortion” to “patent troll” is rhetorical hyperbole.**

The trial court held, correctly, that plaintiffs do not overcome the constitutional protection for statements of opinion merely because ABA used the word “extortion” in connection with its alleged implication of ATL as a “patent troll.” It reasoned that such expressions constitute mere rhetorical hyperbole and could never be understood as defaming ATL.<sup>14 15</sup>

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<sup>14</sup> The trial court also ruled that Mr. Brouillard’s remark about “a piece of paper and a postage stamp” is rhetorical hyperbole. *See Add.* at 21. That alleged statement is innocuous and, in any event, the trial court’s ruling is correct for the same reasons as the other rulings—it is simply a rhetorical exaggeration. *See, e.g., Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127

“Whether [an allegedly defamatory statement] is rhetorical hyperbole . . . is a question of law.” *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 293-94 (4th Cir. 2008). Similar to other constitutionally protected opinions, “[s]tatements that contain ‘imaginative expression’ or ‘rhetorical hyperbole’” are constitutionally protected opinions and, as such, do not constitute actionable defamation. See *Levesque v. Doocy*, 560 F.3d 82, 89 (1st Cir. 2009); *Pease*, 121 N.H. at 65-66. “For example, a theater critic who wrote that, ‘The producer who decided to charge admission for that show is committing highway robbery,’ would be immune from liability because no reasonable listener would understand the speaker to be accusing the producer of the actual crime of robbery.” *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 727 (1st Cir. 1992); see also *Tucker v. Fischbein*, No. 97-4717, 1999 U.S. Dist. LEXIS 774, \*10-\*13 (E.D. Pa. January 29, 1999) (holding, in lawsuit against administrators of the estate of rapper Tupac Shakur, that lyrics of song at most referred to “one of the plaintiffs . . . [as] a muthafucka” was a vulgar epithet that did not give rise to a tort action).

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F.3d 122, 128 (1st Cir. 1997) (“The First Amendment’s shielding of figurative language reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse.”).

- <sup>15</sup> Plaintiffs argue for the first time on appeal that other statements or implications by ABA were false. Appellants’ Brief at 26 (arguing that “[t]he FAC also challenges ABA’s statement that ATL’s patents are overly broad” and that patent trolls “are able to acquire numerous patents from bankrupt companies for next to nothing.”). Plaintiffs have waived these arguments on appeal because they did not raise them to the trial court. See APP-143 to 162, APP-176 to 185. In any event, the arguments lack merit because ABA made the accused statements in general terms and not specific to ATL. APP-102. What is more, the expression of “overly broad” patents is unquestionably an opinion and rhetorical hyperbole itself, as is the other statement concerning the purchase of patents for “next to nothing.” These newly asserted statements cannot form the basis for a defamation claim.

Both “patent troll” and “extortion” fall well within rhetorical hyperbole. Analyzing the accusation of “blackmail”<sup>16</sup> in a similar context, the United States Supreme held, as a matter of law, that the term did not give rise to an actionable claim for defamation. *See Greenbelt Coop. Pub. Ass’n v. Bresler*, 398 U.S. 6, 7-8 (1970). In *Greenbelt*, a newspaper published two articles stating that attendees of a city council meeting described a real estate developer’s unreasonable negotiating position as “blackmail.” *Id.* at 7-8. The real estate developer sued the newspaper for defamation. The Supreme Court held the case could not proceed as a matter of law:

It is simply impossible to believe that a reader who reached the word “blackmail” in either article would not have understood exactly what was meant: it was [the developer]’s public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [the developer] with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer]’s negotiating position extremely unreasonable.

*Greenbelt*, 398 U.S. at 14.

Just as in *Greenbelt*, where the term “blackmail” could not reasonably be understood to charge a person with the actual crime of blackmail, the alleged implication of ATL as a “patent troll” and use of the word “extortion” is constitutionally-protected “rhetorical hyperbole.” *See Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386, 391 (Ala. Civ. App. 1999) (“In addition, the word ‘extort,’ in the context of Barnes’s remarks, is what the United States Supreme Court has characterized as ‘rhetorical hyperbole, a vigorous epithet used by [Barnes] who considered

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<sup>16</sup> “A criminal offense as a form of extortion; usually, extortion by threat of exposure of a criminal offense by, or of some conduct or act of, the victim which, if made public, will operate to his disadvantage; occasionally applied to extortion by threat of violence to the victim or members of his family.” *Ballentine’s Law Dictionary* (2010); *see also* RSA 637:5, II (2016) (defining “extortion” to include a threat to “[r]eveal any information sought to be concealed by the person threatened”).

[Blevins's] negotiating [tactics] extremely unreasonable.”); *Fasi v. Gannett Co.*, 930 F. Supp. 1403, 1410 (D. Haw. 1995) (“Here, Defendants’ use of hyperbolic language such as ‘Blackmail incorporated,’ ‘Frank ‘The Extortionist’ Fasi,’ and ‘legalized blackmail,’ suggests that they were not making objective statements of fact. Such ‘rhetorical hyperbole’ and ‘imaginative expression’ is protected by the First Amendment.”), *aff’d* 114 F.3d 1194 (9th Cir.), *cert. denied.*, 522 U.S. 916 (1997); *McCabe v. Rattiner*, 814 F.2d 839, 842-43 (1st Cir. 1987) (holding that use of the word “scam” was protected opinion given the context in which it was used).

*Greenbelt*, moreover, is now the textbook example of “rhetorical hyperbole.” *See, e.g., McCabe*, 814 F.2d at 842 (construing *Greenbelt* and observing that “[w]hile the statement ‘X is a blackmailer’ appears, in isolation, to be a criminal allegation, in the context of a well reported public event, the statement can represent the opinion that X’s tactics are not good for the city and ought to be challenged”); *Catalfo v. Jensen*, 657 F. Supp. 463, 466 (D.N.H. 1987) (citing *Greenbelt* and granting summary judgment because allegedly defamatory assertion published in article stating that plaintiff might have slipped “a mickie” could not, in context, be reasonably understood “to suggest that Attorney Catalfo was illegally drugging his guests’ drinks”).

This Court in *Pease* cited, quoted, and applied *Greenbelt* in concluding—as a matter of law—that the phrase “journalistic scum of the earth” was not actionable because “[e]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered’ the plaintiff’s journalism deplorable.” *Pease*, 121 N.H. at 65-66 (quoting *Greenbelt*). Plaintiffs’ allegations against ABA fit the same mold: implying ATL is a “patent troll” or that it engages in “extortion” by using abusive litigation threats fits squarely within the category of “rhetorical hyperbole” confirmed in *Greenbelt* and recognized in *Pease*.

Buttressing this conclusion is the fact that ABA accurately disclosed ATL's specific activities, which plaintiffs do not challenge as false or inaccurate. Again, the purest form of opinion "occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character." *Restatement (Second) of Torts* § 566 comment *b*.

Moreover, in situations where, as here, an alleged defamer is commenting on a heated and ongoing dispute (even including litigation) of public concern, that circumstance weighs heavily against any attempt to impute a defamatory meaning. *See Hogan v. Winder*, No. 2:12-CV-123 TS, 2012 U.S. Dist. LEXIS 137399, at \*31-\*33 (D. Utah Sep. 24, 2012) (citing *Greenbelt* and dismissing defamation claim because "extortion statements were made in the context of heated civil litigation" and "reasonable readers [of an article] would have perceived that the word extortion was no more than rhetorical hyperbole" (quotation and brackets omitted)); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 285-86 (1974) (holding it is "impossible to believe that any reader . . . would have understood the newsletter to be charging the appellees with committing the criminal offense of treason" and further that "such exaggerated rhetoric was commonplace in labor disputes").<sup>17</sup>

The trial court committed no error in dismissing the defamation count against ABA.<sup>18</sup>

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<sup>17</sup> The pleadings in the numerous litigation matters ATL filed were publicly available and easily accessible online via the federal PACER system. *See Pease*, 121 N.H. at 66 (observing that information in the "public domain" that is available to readers undermines any assertion of defamation).

<sup>18</sup> Plaintiffs should also be collaterally estopped from challenging the term "extortion" as defamatory. The trial court granted summary judgment in this action for Mascoma Savings Bank and Steve Christy, holding that the phrase "outright blackmail" was constitutionally protected as rhetorical hyperbole. *See ADD*. at 21. Plaintiffs have waived their appeal as to Mascoma Savings and Mr. Christy, which means the question of whether "outright

**b. Count II (CPA): Plaintiffs' CPA claim fails as derivative of the defamation count.**

Plaintiffs' grounded their CPA claim, at Count II, on the presumption that ABA defamed them. APP-25 to APP-26. When the trial court determined that plaintiffs' failed to state a claim for defamation against ABA, it concluded that their CPA claim failed as well. The trial court's disposition aligns with the language of the CPA and with decisional law.

To state a claim for violation of the CPA, a plaintiff must sufficiently allege an "unfair or deceptive act or practice." RSA 358-A:2 (Supp. 2017). A CPA claim can either be one for un-enumerated violations, governed by this Court's common-law "rascality" test,<sup>19</sup> or for one of the specifically enumerated proscriptions in the statute. Plaintiffs alleged a rascality violation based solely on their allegations of defamation. APP-25 ¶ 103. Plaintiffs also alleged, or attempted to allege, violations of two provisions enumerating false representations about goods and services, *see* RSA 358-A:2, VII (Supp. 2017), and disparagement of goods and services through "false or misleading representation of fact," RSA 358-A:2, VIII (Supp. 2017). APP-25 to 26 ¶¶ 105, 106. Those assertions, however, still relied on the underlying defamation claim, as plaintiffs'

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blackmail" is defamatory as plaintiffs is finally adjudicated. This is material to ABA because "blackmail" is a form of "extortion." *See Ballentine's Law Dictionary* (2010) (defining "blackmail" as "[a] criminal offense as a form of extortion; usually, extortion by threat of exposure of a criminal offense by, or of some conduct or act of, the victim which, if made public, will operate to his disadvantage; occasionally applied to extortion by threat of violence to the victim or members of his family."); *see also* RSA 637:5, II (defining "extortion" to include a threat to "[r]eveal any information sought to be concealed by the person threatened"). Plaintiffs now should be collaterally estopped from arguing that ABA's use of "extortion" is defamatory. *See Simpson v. Calivas*, 139 N.H. 1, 7 (1994) (listing elements of collateral estoppel).

<sup>19</sup> "Under the rascality test, the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *State v. Moran*, 151 N.H. 450, 452 (2004) (quotation omitted).

arguments on appeal confirm. *See* Appellants’ Brief at 30 (arguing trial court erred with respect to the CPA claims solely “because, as described above, Defendants’ statements about Plaintiffs are factual and thus actionable under RSA 358-A:2”).

“[W]here allegedly defamatory statements do not support a cause of action for defamation, they also do not support a cause of action under G. L. c. 93A.” *Dulgarian v. Stone*, 420 Mass. 843, 853 (1995) (citing *A.F.M. Corp. v. Corp. Aircraft Mgmt.*, 626 F. Supp. 1533, 1551 (D. Mass. 1985)).<sup>20</sup> Given that plaintiffs failed to state an actionable defamation claim, they similarly failed to state a CPA claim.

**c. Adequate, alternative grounds support the trial court’s disposition with respect to ABA.**

This Court “may . . . affirm the result if a valid alternative ground for it exists.” *Long v. Long*, 136 N.H. 25, 28 (1992); *Catalano v. Windham*, 133 N.H. 504, 508 (1990). Various alternative grounds, which the trial court did not reach, independently support dismissal.

**i. Alternative grounds supporting dismissal of defamation count.**

All of the alleged statements by ABA come within protected privileges as a matter of law. ABA’s testimony to Congress fell directly within the absolute legislative privilege. Republication of its testimony came within the fair reporting privilege.

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<sup>20</sup> New Hampshire looks to decisional law construing Massachusetts’ comparable CPA. *See, e.g., Chase v. Dorais*, 122 N.H. 600, 602 (1982). Massachusetts’ CPA prohibits false or misleading conduct through the general language in M.G.L. c. 93A, § 2. *See, e.g., In re Bank of Am. Home Affordable Modification Prog. (HAMP) Contract Litig.*, No. 10-md-02193-RWZ, 2011 U.S. Dist. LEXIS 72079, \*18-\*19 (D. Mass. 2011) (holding that allegedly “deceptive, false or misleading representations regarding . . . eligibility for a permanent loan modification” stated 93A claim). In addition, the regulations promulgated to effectuate Massachusetts’ CPA plainly proscribe false or misleading statements much the same as New Hampshire’s CPA. *See* 90 C.M.R. §§ 3.02, 3.05, available at <http://www.mass.gov/ago/docs/regulations/940-cmr-3-00.pdf>.

Legislative privilege: New Hampshire recognizes certain absolute privileges that shield a speaker against defamation liability. *See generally Restatement (Second) of Torts* §§ 585-592A (1977).<sup>21</sup> A well-established and absolute privilege exists for statements made to legislative bodies:

A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

*Restatement (Second) of Torts* § 590A (1977).<sup>22</sup>

ABA's testimony was unquestionably "part of a legislative proceeding in which [ABA] [was] testifying" within the meaning of § 590A. Plaintiffs expressly acknowledge as much. *See* App. at APP-19, ¶¶ 75, 81.<sup>23</sup> The written testimony had "some relation" to the legislative proceeding within the meaning of § 590A. ATL, therefore, stated no actionable defamation claim based upon ABA's Congressional testimony.

Fair reporting privilege: The republication of ABA's legislative testimony on its website, which is the only defamatory activity alleged by the plaintiffs that occurred outside a legislature,

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<sup>21</sup> *McGranahan v. Dahar*, 119 N.H. 758, 762-763 (1979) (judicial proceedings).

<sup>22</sup> New Hampshire has already adopted an absolute legislative privilege with respect to elected officials in *Voelbel v. Town of Bridgewater*, 144 N.H. 599, 600 (1999).

<sup>23</sup> The fact that ABA testified to subcommittees is irrelevant. *See Wright v. Lothrop*, 149 Mass. 385, 389 (1889); *see also Sheppard v. Bryant*, 191 Mass. 591, 593 (1906); *Bio/Basics Int'l Corp. v. Ortho Pharm. Corp.*, 545 F. Supp. 1106, 1114 (S.D.N.Y. 1982); *Jennings v. Cronin*, 256 Pa. Super. 398, 402 (1978). The Restatement comments clarify that "[i]t is not necessary that he give his testimony under oath." *Restatement (Second) of Torts* § 588, comment *b* (1977); *see also Restatement (Second) of Torts* § 590A, comment *a* (adopting and incorporating comments to judicial privilege in § 588). No legislative subpoena is necessary. *See Bio/Basics Int'l Corp.*, 545 F. Supp. at 1116; *Webster v. Sun Co.*, 731 F.2d 1, 5 (D.C. Cir. 1984).

is protected under the fair reporting privilege. “As articulated in the Restatement (Second) of Torts § 611 (1977), the fair reporting privilege applies to ‘the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern . . . if the report is accurate and complete or a fair abridgement of the occurrence reported.’” *Hayes v. Newspapers of N.H.*, 141 N.H. 464, 466 (1996).

Reports on legislative proceedings before the United States Congress plainly fall within the privilege. *See Restatement (Second) of Torts § 611 comment d* (1997) (observing that fair reporting privilege applies to reports on “official proceedings,” which includes “any official proceeding or action of either house of the Congress of the United States.”). The fair reporting privilege extends broadly “to any person who makes an oral, written or printed report to pass on the information that is available to the general public.” *Restatement (Second) of Torts § 611 comment c*.

Unlike the legislative privilege, the fair report privilege “is a conditional, not absolute, privilege” that may be lost if the communicator fails to make a report with sufficient accuracy. *See Thomas v. Tel. Publ’g Co.*, 155 N.H. 314, 327 (2007). That condition, however, has no relevance because ABA published its written testimony verbatim. *See Amended Complaint ¶ 75* (“The statement was republished on ABA’s website . . .” (emphasis added)).

The only possible basis plaintiffs might have argued to preclude the fair reporting privilege is found in a Restatement comment that has proven controversial. Comment *c* to § 611 states: “[a] person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated.” *Restatement (Second) of Torts § 611, comment c*. The better view of that comment reads it to mean that only

bad faith republication sacrifices the privilege. *See, e.g., Stover v. Journal Publ'g Co.*, 731 P.2d 1335, 1339 (N.M. 1985) (“the exception, by its own terms, was obviously intended to prevent the abuse of the fair report privilege. For example, a person might bring a suit or hold a public meeting not with the intention of pursuing the purported objective but to cause harm to another, by pleading or announcing defamatory matter and then using the protective shield of the fair report privilege to republish the defamatory matter to the world or to a targeted audience.”).

The District of Columbia, where ABA maintains its principal place of business and where publication of the alleged defamation occurred, follows the line of cases holding that a person can self-report and come within the privilege provided there is no evidence of an intent to abuse the privilege.<sup>24</sup> *Boley v. Atl. Monthly Grp.*, 950 F. Supp.2d 249, 258-59 (D.D.C. 2013). In

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<sup>24</sup> This Court should follow District of Columbia law in applying the fair report privilege. New Hampshire routinely looks to the *Restatement (Second) of Conflict of Laws* when resolving choice of law issues. *See, e.g., Glowski v. Allstate Ins. Co.*, 134 N.H. 196, 197-98 (1991). Under the doctrine of depeage, referenced in *Restatement (Second) of Conflict of Laws* § 145 comment *d* (1971), “different issues in a single case . . . may be decided according to the substantive law of different states.” *Putnam Resources v. Pateman*, 958 F.2d 448, 465 (1st Cir. 1992); *Lacaillade v. Loignon Champ-Carr, Inc.*, No. 10-cv-68-JD, 2011 U.S. Dist. LEXIS 116596, \*3-\*4 (D.N.H. October 7, 2011). It is well-established that “[u]nder the doctrine of depeage, the issue of whether a statement is defamatory is distinct from the issue of whether that statement is privileged. In determining which law to apply to defenses raised . . . , courts have found the place where the allegedly tortious speech took place and the domicile of the speaker central to the choice-of-law analysis.” *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1035 (N.D. Ill. 2013). Those considerations squarely point to application of the law of District of Columbia to govern ABA’s privilege defenses. *See* App. at APP-3, ¶ 4 (ABA’s principal place of business in D.C.); ¶ 75 (alleging defamatory statements made to United States Congress in D.C. and posted to ABA’s website). Courts have specifically held the allegedly defamatory internet statements presumably occurred in the speaker’s home state in the absence of specific allegations to the contrary in the Complaint. *See Underground Solutions, Inc. v. Palermo*, 41 F. Supp.3d 720, 726 (N.D. Ill. 2014); *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp.3d 1313, 1323 (D. Utah 2015). What is more, ABA briefed the trial court on how the five-factor choice of law question points toward application of D.C. law with respect to the issue of the fair reporting privilege. *See* App. at APP-165 to APP-169. Summarized briefly here: (i) it is important that speakers know which laws protect them when they speak and naturally speakers look to

*Boley*, the plaintiff brought a defamation claim against a witness who submitted an affidavit in a civil suit and then published an article discussing the contents of the affidavit. The fair reporting privilege applied, “even when it is the defendant’s summary of his own prior testimony,” because the summary “fairly and accurately described” the prior testimony. *Boley*, 950 F. Supp.2d at 257-59. *Boley* establishes that a person can self-report and retain the privilege.

Courts in other jurisdictions reached the same conclusion. *See Stover*, 731 P.2d at 1339, *Rosenberg v. Helinski*, 616 A.2d 866, 876-77 (Md. 1992); *cf. McGill*, 582 N.Y.S.2d at 97-98 (holding private citizens and media receive same degree of protection for speaking out on matters of public concern). One court traced the doubtful origins of the Restatement comment:

The commentary . . . does not appear in either of the two tentative draft versions of § 611 produced before the current, published text. *See Restatement (Second) of Torts* § 611 (Tentative Draft No. 20, 1974) and *id.* (Tentative Draft No. 21, 1975). The decision to include the commentary was made after a brief discussion at a meeting of the American Law Institute, during which one participant called the proposed comment “a flat contradiction of the black letter” law as set forth in § 611. *See* 52 A.L.I. Proceedings 188 (1976).

*Rosenberg*, 616 A.2d at 876. The Restatement cites no decisional law adopting the self-report provision for comment *c* and, thus, it cannot be viewed as a true “restatement” of any common law.<sup>25</sup> The *Rosenberg* Court went on to observe scholarly literature supporting what the Court

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the law of the place in which they speak, which in this case was D.C. *See Michel v. NYP Holdings, Inc.*, No. 14-62649-CIV-COHN/SELTZER, 2015 U.S. Dist. LEXIS 38896, at \*7 (S.D. Fla. Mar. 4, 2015); *AroChem Int’l, Inc. v. Buirkle*, 968 F.2d 266, 269-72 (2d Cir. 1992), *Intercon Sols., Inc.*, 969 F. Supp. 2d at 1035 (“In determining which law to apply to defenses raised [in defamation actions] . . . , courts have found the place where the allegedly tortious speech took place and the domicile of the speaker central to the choice-of-law analysis.”), *aff’d* 791 F.3d 729 (7th Cir. 2015), and (ii) the D.C. approach is the sounder rule of law for the reasons summarized above, including, at least in this context, the fact that ABA’s speech was political speech, which has traditionally received heightened protections against defamation claims that is sacrificed only for “actual malice,” *see, e.g., Schatz*, 669 F.3d at 52.

<sup>25</sup> *See Restatement (Second) of Torts* § 611 Reporter’s Notes.

ultimately adopted as the better view: “the privilege will be forfeited only if the defamer illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place.” *Rosenberg*, 616 A.2d at 876-77.

*Rosenberg* mirrors New Hampshire precedent on the limits of the fair reporting privilege. In *Thomas*, this Court considered whether a defamation plaintiff could overcome the fair reporting privilege by proving malice. *See Thomas*, 155 N.H. at 329. By recognizing an “actual malice” exception, *Thomas* aligned New Hampshire law to strike the same balance as in *Rosenberg*. *Thomas*, moreover, cited to this Court’s original adoption of the fair reporting privilege in *Hayes* and observed “it is the terms ‘official,’ ‘action,’ ‘proceeding’ and ‘meeting’ that are critical to the application of the privilege in this state.” *Thomas*, 155 N.H. at 331-32.

Plaintiffs failed to state, or plausibly state, any basis to establish that ABA acted with malice.<sup>26</sup> Plaintiffs’ only allegation on this score consists of the bare assertion that each defendant acted “maliciously.” APP-24 ¶ 97. To state a plausible claim for relief, plaintiffs must allege “more than labels and conclusions.” *Twombly*, 550 U.S. at 555; *Snierson v. Scruton*, 145 N.H. 73, 77 (2000). Plaintiffs alleged no facts to plausibly suggest that ABA made its statements to Congress solely so it could publish them free of tort liability. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (“bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching

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<sup>26</sup> Plaintiffs allege no factual predicate to support even an inference that ABA acted with the type of “malice” necessary to overcome the fair report privilege. Plaintiffs do not allege ABA testified at the Congressional proceeding solely to enable itself (ABA) to report about it later free of defamation risk. *See Stover*, 731 P.2d at 1339.

discovery”). ABA’s written testimony, moreover, was accessible to anyone through the federal government’s own website.<sup>27</sup> ABA fell within the fair reporting privilege as a matter of law.

**ii. Alternative grounds supporting dismissal of CPA count.**

In addition to the derivative nature of the CPA count discussed above, two other bases support dismissing plaintiffs’ CPA claim against ABA.

ABA’s actions did not occur in “trade or commerce”: The CPA does not apply to transactions outside “the ordinary course of a trade or business.” *Hughes v. DiSalvo*, 143 N.H. 576, 578 (1999).

In construing the statutory term “trade or commerce,” and mindful of Massachusetts’ construction of its similar statute, *see Chase*, 122 N.H. at 602, Massachusetts Courts hold that activities by nonprofit organizations such as ABA do not fall within the CPA. *See Poznik v. Massachusetts Medical Prof’l Ins. Ass’n*, 417 Mass. 48, 53 (1994) (holding nonprofit insurance association not engaged in “trade or commerce”), *superseded by statute as stated in* 465 Mass. 297 (2013). *See also Schiff v. AARP*, 697 A.2d 1193, 1197 (D.C. 1997) (holding that claims asserted pursuant to the District of Columbia Consumer Protection and Procedures Act against the AARP failed as a matter of law “because AARP is a nonprofit organization”).

Noerr-Pennington doctrine immunity: Plaintiffs’ allegations concern ABA activities conducted solely in the context of public policy advocacy. ABA’s testimonial activity did not occur “in a business context.” *Chase*, 122 N.H. at 601. In *Green Mountain Realty Corp.*, this Court held that “the CPA does not apply [where the actor’s conduct] occurred in a political setting.” *Green Mountain Realty Corp.*, 161 N.H. 78, 83 (2010) (adopting the *Noerr-Pennington*

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<sup>27</sup> *See* transcript of the December 17, 2013 Judiciary Committee hearing, S. Hrg. 113-637, at 419, *available at* <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg94151/pdf/CHRG-113shrg94151.pdf>.

doctrine of immunity to protect political activities against CPA liability to the same extent as Federal Trade Commission (“FTC”) cases in which FTC claimants alleged misrepresentations “made . . . to influence legislation”). “The CPA, like the Federal Trade Commission Act, is tailored for the business arena, not the political arena.” *Id.* at 86-87.

This Court has also confirmed that *Noerr-Pennington* immunity protects political activities beyond direct statements to a legislative body. In *Green Mountain Realty Corp.*, for example, the Court applied *Noerr-Pennington* immunity to allegedly false and disparaging postcards the defendant designed, printed and distributed to town voters in an attempt to persuade them to vote against two warrant articles. *Id.* at 84-85 (observing the United States Supreme Court has granted *Noerr-Pennington* immunity “to a wide range of activities in addition to traditional lobbying, including sales and marketing efforts and court litigation.”); *see also Doron Precision Systems, Inc., v. FAAC, Inc.*, 423 F. Supp.2d 173, 189 (S.D.N.Y. 2006).

ABA’s direct lobbying, as well as indirect lobbying by disseminating its congressional testimony through its website, is protected under the *Noerr-Pennington* doctrine.

**CONCLUSION AND REQUEST FOR ORAL ARGUMENT**

For the reasons set forth above, the ABA respectfully requests that the Court affirm the trial court's Order dismissing the First Amended Complaint and all claims against ABA. The ABA respectfully requests fifteen minutes of oral argument before the full Court. Jonathan M. Shirley will present oral argument for the appellee, ABA.

Respectfully submitted,

AMERICAN BANKERS ASSOCIATION

By Its Attorneys,

**DEVINE, MILLIMET & BRANCH, P.A.**

Dated: September 14, 2018

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**CERTIFICATION OF COMPLIANCE**

I hereby certify that I have complied with Supreme Court Rules 21 and 26, that this brief complies with the word limitation of Rule 16(11) because this brief contains 9,437 words in the indicated sections of Rule 16(11), and that two copies of this brief have been sent by United States mail this 14th day of September 2018, to the following:

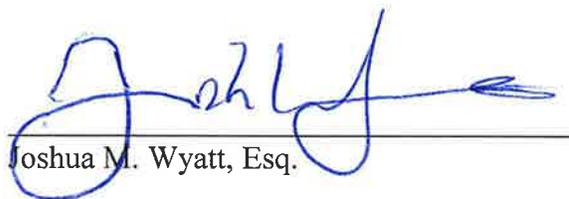
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**ADDENDUM: ORDER APPEALED**

# 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. Hoffmann-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 Trolis" 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.

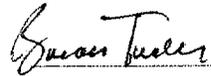
#### *Conclusion*

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



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BRIAN T. TUCKER  
PRESIDING JUSTICE