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WIKIMEDIA FOUNDATION, INC.

BARBARA BAUER and BARBARA BAUER
LITERARY AGENCY, INC.,

Plaintiffs,

v.

JENNA GLATZER, et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
DOCKET NO.: L-1169-07

CIVIL ACTION

**MEMORANDUM OF LAW IN SUPPORT
OF MOTION OF DEFENDANT
WIKIMEDIA FOUNDATION, INC. TO
DISMISS THE COMPLAINT**

I. INTRODUCTION.

Plaintiffs, Barbara Bauer and Barbara Bauer Literary Agency, Inc. ("Plaintiffs"), have sued the Wikimedia Foundation, Inc. ("Wikimedia") for defamation and interference with prospective economic advantage. Wikimedia asks the Court to dismiss the claims against it, with prejudice. The claims against Wikimedia are frivolous because they are barred as a matter of law by the Communications Decency Act (47 U.S.C. § 230(c), "Section 230" or the "CDA"), by the First Amendment, and by New Jersey law.

II. SUMMARY OF PERTINENT FACTS.

Wikimedia is a Florida nonprofit corporation, with its principal place of business in San Francisco, California, which operates an Internet World Wide Web site known as “Wikipedia.” (Second Amended Complaint, filed Jan. 31, 2008, hereafter “SAC” or “Complaint,” p. 25.)

Wikipedia is an online encyclopedia written by its users, the content of which can be created, edited, or removed by anyone. *See, e.g., People v. Fernino*, 19 Misc. 3d 290, 851 N.Y.S.2d 339, 340 n. 3 (“Wikipedia is a free, multilingual, open content encyclopedia project operated by the non-profit Wikimedia Foundation.”); *English Mountain Spring Water Co. v. Chumley*, 196 S.W.3d 144, 149 (“Wikipedia . . . is a multilingual, Web-based, free-content encyclopedia. It is written collaboratively by volunteers with wiki software, meaning articles can be added or changed by nearly anyone.”); *Research Foundation, Inc. v. Bio-Engineered Supplements & Nutrition, Inc.*, No. 9:07-CV-46, 2008 WL 859162, at *8 n. 4 (E.D. Tex. 2008) (“Wikipedia [is] an on-line encyclopedia service that can be altered at will by any user.”); *Colony Nat. Ins. Co. v. Hing Wah Chinese Restaurant*, No. 06-2545, 2008 WL 534756, at *6 n. 9 (E.D. Pa. 2008) (Wikipedia is “the online encyclopedia drafted by internet users.”).

Plaintiffs are residents of New Jersey who apparently operate a literary agency. (SAC, ¶ 1.) Plaintiffs have filed claims of defamation and intentional interference with prospective economic advantage against twenty-two defendants. (SAC, *passim*.) The claims arise from statements made on numerous Internet websites, which Plaintiffs assert describe them as being among the “20 Worst Literary Agents” and having “no ‘. . . significant track record of sales to commercial (advance paying) publishers’” (SAC, *passim*.)

Plaintiffs assert that statements were published on the Wikipedia site “referring to plaintiff as ‘The Dumbest of the Twenty Worst’” literary agents and stating that she [has] ‘no documented sales at all.’” (SAC, p. 25.) Plaintiffs assert that Wikimedia was informed “that the statements about her are false and defamatory” but that Wikimedia “has refused to remove the statements from Wikipedia.” (SAC, p. 26.) Plaintiffs also assert, without alleging any basis for the claim, that all of the defendants conspired to defame Plaintiffs and interfere with their prospective economic advantage. (SAC, pp. 32-34.)

Plaintiffs’ claims are based on two short phrases.¹ (SAC, p. 25.) The passage from the article that Plaintiff apparently refers to in the complaint states in full as follows:²

Controversy

In 2006, Bauer's agency was listed by Writer Beware (part of the Science Fiction and Fantasy Writers of America writers' organisation) as one of the twenty worst literary agencies—the agencies that they receive the most complaints about. The list is introduced with the following explanation:

None of these agencies has a significant track record of sales to commercial (advance-paying) publishers, and most have virtually no documented and verified sales at all (book placements claimed by some of these agencies turn out to be “sales” to vanity publishers). All charge clients before a sale is made—whether

¹ Although it no longer appears on the Wikipedia site, various versions of an article regarding plaintiff Barbara Bauer were available on Wikipedia from May of 2006 until April of 2007. (Declaration of Mike Godwin in Support of Motion to Dismiss (“Godwin Decl.”), ¶ 2.) Plaintiffs’ complaint appears to refer to a version of the article that appeared in mid-2006; later versions of the article do not include statements pertaining to sales by literary agencies. (Godwin Decl., ¶ 3.)

² In addressing a motion to dismiss, courts may consider documents referred to in the complaint but not attached to the complaint, and doing so does not convert the motion to dismiss into a motion for summary judgment. *New Jersey Citizen Action, Inc. v. County of Bergen*, 391 N.J. Super. 596, 605 (2007). In accordance with this rule, Wikimedia requests that the Court consider a single document: the version of the article regarding Plaintiff Barbara Bauer that appeared on Wikipedia, and which appears to be the basis for Plaintiffs’ claims. Consideration of this article is essential in order for the Court to address the actual statements made on Wikipedia, and the context in which the statements appeared.

directly, by levying fees such as reading or administrative fees, or indirectly, for editing or other adjunct services.

– *Writer Beware*

In Bauer's case, there is some evidence (mostly self-reported) that she made a few legitimate book sales for her clients early in her career. However, an examination of her claims of success for later clients appears to show only books that are either vanity-published or remain unsold. Template: Fact There have been a number of complaints on internet message boards about the fees that Bauer charges.

(Godwin Decl., Ex. 1, hereafter the “Article.”) As explained below, Wikimedia cannot be held liable for the publication of the Article, or of anything contained within it. Therefore, the claims against Wikimedia should be dismissed.

III. STANDARD FOR DISMISSAL.

When ruling on a motion to dismiss pursuant to New Jersey Rule of Court 4:6-2(e) for failure to state a claim upon which relief can be granted, the court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. *Rieder v. Department of Transp.*, 221 N.J. Super. 547, 552 (App. Div. 1987). The court treats all factual allegations as true, and considers only whether the complaint states a cognizable cause of action. *Id.* Where the factual allegations are insufficient to support a claim upon which relief can be granted, the court must dismiss the complaint. *Id.*

If a cause of action triggers First Amendment concerns, courts must be especially vigilant when scrutinizing the sufficiency of the allegations within the complaint. *Darakjian v. Hanna*, 366 N.J. Super. 238, 248 (App. Div. 2004). Otherwise, any person or entity claiming First Amendment protection would be at the mercy of a claimant's empty assertions unsupported by any contentions regarding supporting facts. *Id.* Furthermore, a court should address dispositive motions that implicate the First Amendment in light of New Jersey's policy favoring expeditious resolution of litigation which threatens the protections afforded by the First Amendment. *See, e.g., Maressa v. New Jersey Monthly*, 89 N.J. 176, 198 (1982) (courts should resolve free speech

litigation expeditiously whenever possible because the prohibitive cost of prolonged litigation chills the exercise of free speech); *Kotikoff v. The Community News*, 89 N.J. 62, 67 (1982) (summary procedures that dispose of questions of law are particularly well suited for the sensitive area of First Amendment Law); *Sedore v. Recorder Pub. Co.*, 315 N.J. Super. 137, 163 (App. Div. 1998) (“[t]he courts of this State have recognized that First Amendment values are compromised by long and costly litigation in defamation cases.”).

IV. THE CLAIMS AGAINST WIKIMEDIA SHOULD BE DISMISSED BECAUSE THEY ARE PROHIBITED BY THE COMMUNICATIONS DECENCY ACT.

Section 230 of the Communications Decency Act (47 U.S.C. § 230, hereafter “Section 230”) prohibits the imposition of liability under state law on any user or provider of an “interactive computer service” for publishing content provided by another. Wikimedia falls squarely within the protection of this statute. Therefore, Plaintiffs’ complaint fails to state any cause of action against Wikimedia and the Complaint should be dismissed. *See, e.g., Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (2005) (dismissing complaint where claims were barred by Section 230).

Section 230 provides, in pertinent part, that:

“[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

47 U.S.C. § 230(c)(1); *Donato*, 374 N.J. Super. at 485. Emphasizing that this provision creates a “grant of immunity” from liability under state law, Section 230 expressly states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3); *Donato*, 374 N.J. Super. at 485, 486. Thus, “by its terms, § 230 provides immunity to . . . a publisher or speaker of information

originating from ‘another information content provider.’” *Green v. American Online*, 318 F.3d 465, 471 (3d Cir. 2003).

Wikimedia therefore qualifies for protection under the CDA if: (1) it is a provider or user of an interactive computer service; and (2) the claims against it assert that it is liable for publishing information provided by another information content provider. *Donato*, 374 N.J. Super. at 486, 500-501.³

An “interactive computer service” is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . .” 47 U.S.C. § 230(f)(2); *Donato*, 374 N.J. Super. at 486. An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3); *Donato*, 374 N.J. Super. at 486.

As the operator of the Wikipedia website (SAC, p. 25), Wikimedia is indisputably a user and a provider of an interactive computer service under § 230. A website operator is both a user and a provider of an interactive computer service. *See, e.g., Donato*, 374 N.J. Super. at 487-489 (website operator “qualifies as a user, as well as a provider, or an interactive computer service”); *Batzel*, 333 F.3d at 1031 (website operator, who must access the Internet through some kind of interactive computer service, is necessarily a user of such a service).

³ *See also Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”); *Batzel v. Smith*, 333 F.3d 1018, 1030-1031 (9th Cir. 2003); *Universal Communication Systems, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

In addition, the statements on which Plaintiffs' claims are based were posted on Wikipedia by another information content provider. The Complaint itself indicates that the allegedly defamatory statements on Wikipedia originated elsewhere, alleging that virtually identical statements to those appearing on the Wikipedia site appeared on numerous other websites. (SAC, pp. 3, 5, 6-7, 11, 13, 15, 28.) The Complaint explains that other defendants were "responsible for the content of an Internet website called Writer Beware," and that the statements upon which Plaintiffs' claims are based were published on that site, and subsequently "quoted extensively on numerous other websites and blogs on the Internet." (SAC, pp. 11, 13, 15.) Plaintiffs assert that these other defendants have published defamatory statements about them on "other blogs and websites." (SAC, pp. 11, 13.) The Article specifically attributes the statements about which Plaintiffs complain to Writer Beware, confirming that the statements originated there. (Godwin Decl., Ex. 1.)

Plaintiffs assert only that Wikimedia "published" the statements upon which their claims are based. (SAC, p. 25.) Plaintiffs do not assert that Wikimedia created or developed those statements, in whole or in part. Such an allegation would be inconsistent with the basic nature of the Wikipedia online encyclopedia, which, as noted above, is written and edited by its users.⁴ *People v. Fernino*, 851 N.Y.S.2d at 340 n. 3; *English Mountain Spring Water Co. v. Chumley*, 196 S.W.3d at 149; *Research Foundation, Inc. v. Bio-Engineered Supplements & Nutrition, Inc.*,

⁴ In fact, Wikimedia would retain its immunity even if it edited the page at issue. *See, e.g., Donato*, 374 N.J.Super.at 489-490 (website operator not liable despite allegations of "selective editing, deletion and re-writing of anonymously posted messages."); *Carafano*, 339 F.3d at 1124 ("So long as a third party willingly provides the essential published content, the interactive service provider receives full immunity [under Section 230] regardless of the specific editing or selection process.").

2008 WL 859162, at p. *8 n. 4; *Colony Nat. Ins. Co. v. Hing Wah Chinese Restaurant*, 2008 WL 534756 at p. *6, n. 9.

Plaintiffs assert that Wikimedia failed to remove the allegedly defamatory statements after Plaintiffs complained. (SAC, p. 26.) As an initial matter, the Court can confirm by searching Wikipedia (<http://en.wikipedia.org>) that there is no longer any article regarding Plaintiffs on Wikipedia. More fundamentally, however, any failure by Wikipedia to remove the site is irrelevant, because “[n]otice from the offended party that the material is false or otherwise improper does not defeat the immunity.” *Donato*, 374 N.J. Super. at 498-99; *Zeran*, 129 F.3d at 329.

The immunity provided by section 230 explicitly extends to all claims under state law. 47 U.S.C. § 230(e)(3). Consequently, all of Plaintiffs’ claims against Wikimedia are prohibited by Section 230.

V. THE CLAIMS AGAINST WIKIMEDIA SHOULD BE DISMISSED BECAUSE THEY ARE BARRED BY THE FIRST AMENDMENT AND NEW JERSEY LAW.

A. Under the First Amendment and New Jersey Law, the Statements at Issue Constitute Protected Opinions.

Under the First Amendment and New Jersey law, only statements that are capable of defamatory meaning are actionable. *Ward v. Zelikovsky*, 136 N.J. 516, 528 (1994) (the “threshold issue” in any defamation action is “whether the language used is reasonably susceptible of a defamatory meaning.”). Whether the meaning of a statement is susceptible to a defamatory meaning creates a question of law that must be addressed and resolved by the Court. *Id.* at 529. In determining whether the statements are capable of defamatory meaning, the Court must consider the verifiability, content, and context of the challenged statements. *Id.* As the challenged statements are susceptible only to non-defamatory meanings, the Complaint against Wikimedia must be dismissed. *Romaine v. Kallinger*, 109 N.J. 282, 290 (1988).

1. The Statements at Issue Constitute Subjective Opinions Incapable of Verification.

Statements of opinion, *i.e.* statements that do not assert or imply false and defamatory facts capable of verification, are not actionable. *Ward*, 136 N.J. at 531; *Lynch v. New Jersey Educ. Assoc.*, 161 N.J. 152, 167-168 (1999). The First Amendment absolutely protects true speech, thus states may punish only speech that can be proven false. *Id.* at 530-31. The test of verifiability protects the fundamental core of the speaker's First Amendment rights by guaranteeing a speaker's right to express his or her thoughts. *Id.* at 531. Opinions reflect the speaker's state of mind, thus they are generally not capable of proof of truth or falsity. *Ward*, 136 N.J. at 531; *Lynch*, 161 N.J. at 167. Only when a reasonable fact-finder would conclude that an opinion implies specific assertions of verifiable fact will the statement be actionable. *Milkovich v. Lorain Journal*, 497 U.S. 1, 18-20 (1990); *Higgins v. Pascack Valley Hosp.*, 158 N.J. 404, 427 (1999) (citing *Ward*, 136 N.J. at 531). "If a statement could be construed as either fact or opinion, a defendant should not be held liable." *Lynch*, 161 N.J. at 168. Notably, insults, epithets, name-calling, and other forms of verbal abuse, although possibly offensive, are not defamatory. *Ward*, 136 N.J. at 530. Furthermore, an assertion of substandard competency or inadequate professional ability cannot provide the basis for a defamation action, because such statements provide no measure of verifiable truth. *Zheng v. Quest Diagnostics, Inc.*, No. 03-3093, 2006 WL 1933423, at *3 (D.N.J. 2006). "An assessment of the adequacy of a person's skill level is necessarily a subjective opinion."⁵ *Id.*

⁵ See also *Williams v. Varig Brazilian Airlines*, 564 N.Y.S.2d 328, 331 (App. Div. 1991) (comments concerning plaintiff's unsatisfactory and inadequate professional performance and poor attitude are expressions of opinion which, as a matter of law, do not constitute defamatory statements); *Marshall v. Planz*, 13 F. Supp. 2d 1246, 1259 (D. Ala. 1998) (statements regarding a doctor's failure to exercise good professional judgment are opinions because such statements constitute highly subjective assessments of professional (footnote continued))

Plaintiffs' claims against Wikimedia are based on statements that allegedly appeared on the Wikipedia website, describing Plaintiff Barbara Bauer as "the Dumbest of the Twenty Worst" literary agents who had "no documented sales at all." (SAC, p. 25.)⁶ It does not appear that the description of Plaintiff as the "Dumbest" ever appeared on the Wikipedia website. (Godwin Decl., ¶ 3.) However, assuming for the purposes of this motion that these statements were made, they are not actionable. These statements are inherently linked to, and evaluative of, Plaintiff's performance as a literary agent. In particular, the words "dumbest" and "worst" cannot reasonably be interpreted as anything other than the speaker's opinion regarding the Plaintiff's competency. They cannot, in any manner, be proven true or false. Rather, they constitute precisely the kind of name-calling that the New Jersey courts have determined is not actionable. Moreover, statements such as these, asserting the inadequacy of person's skills, are not verifiable and therefore are not actionable under New Jersey law. Accordingly, these statements of opinion cannot serve as a basis for Plaintiffs' claims.

2. The Statements at Issue Are Mere Hyperbole.

In addition, the content of the published statements cited by Plaintiffs supports the conclusion that the statements are not capable of defamatory meaning. Courts differentiate between defamatory statements of fact and statements of rhetorical hyperbole. *Ward*, 136 N.J. at

skill); *Lees v. West Greene School Dist.*, 632 F. Supp. 1327, 1334-35 (D. Penn. 1986) (statements that a teacher engaged in improper and inappropriate professional conduct constitute opinion incapable of defamatory meaning).

⁶ Although the Plaintiffs allege that Wikimedia published numerous false and defamatory statements about the Plaintiffs, they identify only two specific statements. (SAC, p. 25.) In order to state a cause of action for defamation, the plaintiff must plead facts sufficient to identify the defamatory words. *Zoneraich v. Overlook Hosp.*, 212 N.J. Super. 83, 101 (App. Div. 1986); *Darakjian v. Hanna*, 366 N.J. Super. 238, 249 (App. Div. 2004). Accordingly, this Court need only address the specific statements actually pled in the Complaint.

530. Loose, figurative, or hyperbolic language is not likely to imply specific facts, and therefore generally is not actionable. *Id.* at 532.

Accepting Plaintiffs' characterization of the statements at issue, the use of extreme descriptions such as "Dumbest," "Worst," and "at all" shows that these statements are hyperbole. Plaintiff is not merely an unintelligent literary agent, she is the "Dumbest;" she is not merely mediocre or inadequate, but rather one of the "Worst;" she does not merely have poor sales, but no sales "at all." When reading these statements, a reasonable person would observe that the speaker's word choice itself reflects an exaggerated, hyperbolic intent and style. Although the plaintiff may well be offended by these statements, that they may be offensive does not make them actionable. Rather, the statements at issue here are non-actionable hyperbole.

3. The Context in which the Statements Appear also Demonstrates that they Are Not Actionable.

The context of the statements to which Plaintiffs object further demonstrates that those statements are not actionable. The context in which a statement appears guides a court's determination of whether that statement is capable of defamatory meaning. *Ward*, 136 N.J. at 533. A court cannot automatically decide whether a statement is defamatory solely by reference to the literal words of the challenged statement. *Id.* at 532. Thus, context can, and often will, alter a statement's meaning. *Russo v. Nagel*, 358 N.J. Super. 254, 263 (App. Div. 2003) (citing *Lynch*, 161 N.J. at 168). Indeed, context may demonstrate that statements or words that are verifiable and capable of defamatory meaning are not reasonably susceptible to a defamatory meaning. *Wilson v. Grant*, 297 N.J. Super. 128, 136 (App. Div. 1996) (finding a statement, although potentially verifiable, was not subject to defamatory meaning when measured in the context of the statements it was grouped); *Cipriani Builders, Inc. v. Madden*, 389 N.J. Super. 154, 178-79 (App. Div. 2006) (isolated phrases potentially capable of verification were not

defamatory when read in context). The context in which the statements at issue here were published shows that they are not reasonably susceptible to a defamatory meaning, and that to the extent they could be read as being defamatory, Plaintiffs have not alleged that they are false.

First, with respect to all of the statements, the Article expressly identifies them as part of a “controversy,” indicating that they are disputed. (Godwin Decl., Ex. 1.) All of the statements at issue are expressly attributed to “Writer Beware (part of the Science Fiction and Fantasy Writers of America writers’ organization.” (Godwin Decl., Ex. 1.) They are not endorsed by the author(s) of the Article. In short, the Article simply reports the opinion of the authors of Writer Beware, and the stated basis for that opinion. A statement based on stated facts, or on facts known to the parties or assumed by them to exist, is a statement of “pure opinion.” *Lynch*, 161 N.J. at 168; *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 104 N.J. 125, 147 (1986). Moreover, “where an opinion is accompanied by its underlying nondefamatory factual basis . . . a defamation action premised upon that opinion will fail, no matter how unjustified, unreasonable or derogatory the opinion might be.” *Kotlikoff v. The Community News*, 89 N.J. 62, 72-73 (1982). Therefore, the Article is not actionable.

Second, with regard to the statement concerning Plaintiffs’ sales, the Article explains that the Writer Beware list “is introduced with the following explanation: None of these agencies has a significant track record of sales to commercial (advance-paying) publishers, and most have virtually no documented and verified sales at all (book placements claimed by some of these agencies turn out to be ‘sales’ to vanity publishers).” (Godwin Decl., Ex. 1.) Thus, the statement regarding the lack of “documented and verified sales” is not directly linked to Plaintiffs, but rather is a general characterization of “most” of those on the list. The Article goes on to explain that “there is some evidence (mostly self-reported) that [Plaintiff] made a few

legitimate book sales for her clients early in her career.” (Godwin Decl., Ex. 1.) The Article also makes it clear that the statement regarding the lack of sales pertains to sales to “commercial (advance-paying) publishers.” (Godwin Decl., Ex. 1.) Plaintiff has not asserted the falsity of this significantly more nuanced statement. (SAC, ¶. 25-26.) For these additional reasons, the Article is not actionable.

In sum, when weighed together, the content, context, and lack of verifiability of the statements at issue demonstrate that the statements are not, as a matter of law, capable of defamatory meaning. Rather, the statements utilize hyperbolic language to express a subjective opinion about Plaintiff's skills and abilities. In addition, the Article clearly presents them as the opinions of others. To the extent that they can be deemed statements of fact, the actual statements that appeared on Wikipedia are not alleged to be false. Therefore, that statements upon which Plaintiffs' claims are based are not actionable, and the court should dismiss the claims against Wikimedia.

B. The Statements at Issue Are Protected by the Fair Comment Privilege, and Plaintiffs Have Not Alleged that the Statements Were Made with Actual Malice, so Their Claims Are Barred as a Matter of Law.

Common law has long recognized the privilege of fair comment in defamation actions. *See, e.g., Dairy Stores, Inc.*, 104 N.J. at 136; *Sisler v. Gannett Co., Inc.*, 104 N.J. 256, 275-276. The fair comment privilege embodies the broad need to protect and encourage discussion about matters of public concern. *Id.* at 139. The United States Supreme Court has expressly recognized that states may grant broader speech protections when setting the appropriate standard of care in defamation actions concerning private individuals. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974). New Jersey courts have accordingly employed the fair comment privilege to provide greater protection and a more stable framework for evaluating

defamation actions that involve statements about matters of public concern. *Dairy Stores*, 104 N.J. at 140-41.⁷

The doctrine of fair comment provides a qualified privilege that extends to publications about matters of legitimate public interest. *Dairy Stores*, 104 N.J. at 137, 141. Due to the need for the free flow of information and commentary on matters of public concern, the fair comment privilege provides protection for both statements of opinion and assertions of fact. *Id.* at 148. The privilege applies unless the plaintiff pleads and proves that the speaker made a statement with malice, meaning with knowledge of the statement's falsity or reckless disregard for its truth or falsity. *Id.* at 151. Finally, the fair comment privilege applies to statements made by media and non-media speakers alike. *Id.* at 153.

1. The Statements Published by Wikimedia Relate to a Matter of Public Concern and Are Therefore Privileged.

The assessment of public interest includes a determination of whether a person voluntarily and knowingly engaged in conduct that one in his or her position should reasonably know would implicate a legitimate public interest. *Dairy Stores*, 104 N.J. at 144. The critical determination is whether, on balance, the public interest in obtaining information outweighs the plaintiff's right to protect his or her reputation. *Id.* at 151. Under the fair comment doctrine, and under comparable constitutional and state law doctrines, courts have recognized that substantial issues regarding the integrity or performance of products and services are matters of legitimate public concern. *See, e.g., Dairy Stores*, 104 N.J. at 151 (statements regarding consumer drinking

⁷ The doctrine of fair comment is consistent with the generally enhanced protections that New Jersey law provides for speech. *Dairy Stores*, 104 N.J. at 140-41 (citing *State v. Schmid*, 84 N.J. 535 (1990) (state constitution provides broader free-speech rights than federal constitution); *Maressa*, 89 N.J. at 186 ([s]tate Shield Law affords newsmen an absolute privilege not to disclose in libel action confidential sources concerning editorial process)).

water implicated a matter of legitimate public concern); *Seal-Tite corp. v. Bressi*, 312 N.J. Super. 532, 539, 712 A.2d 262, 266 (1998) (statements by mayor and township committee regarding deficiencies in performance of road construction contractor related to a matter of public concern).⁸

The statements targeted by Plaintiffs in the immediate case relate to a matter of public concern. Plaintiffs undisputedly engage in the business of providing literary services to a national audience of writers, the consumers of such services. (SAC, ¶ 1.) Furthermore, the published statements at issue address both Plaintiffs' sales and the nature of the Plaintiffs' skills and services. In other words, the statements relate to the qualifications of a New Jersey resident and business who voluntarily hold their services out to consumers.

More importantly, these statements form a consumer warning regarding the Plaintiffs' services. The public has a legitimate need to access the information contained within this warning in order to keep itself adequately apprised of the quality of services available to it. Furthermore, Plaintiffs hold their services out to the public, thus Plaintiffs reasonably should have anticipated the legitimate consumer interest in obtaining information pertinent to such services: the public undeniably has a need to learn about the reputation of business entities in the consumer marketplace. *Dairy Stores*, 104 N.J. at 151. Thus, the statements that Wikimedia published regarding the quality and nature of Plaintiffs' consumer services undoubtedly contribute to public discussion regarding a matter of important public interest. Therefore, the

⁸ See also *Steaks Unlimited, Inc. v. Deaner*, 623 F. 2d 264, 280 (3rd Cir. 1980) (consumer reporting enables citizens to make better informed purchasing decisions, and is therefore entitled to First Amendment protection); *Unelko Corp. v. Rooney*, 912 F. 2d 1049, 1056 (9th Cir. 1990) (“protection of statements about product effectiveness will ensure that debate on public issues will be ‘uninhibited, robust and wide-open.’”); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 900 (2004) (statements providing information regarding consumer services contributed to debate on matters of public concern).

fair comment privilege applies to Wikimedia, and it may be overcome only if actual malice is adequately plead and proven.

2. Plaintiffs Have Not Sufficiently Alleged Malice.

Because the statements published by Wikimedia concern a matter of public interest, Plaintiffs must allege "malice" in order to overcome the fair comment privilege. *Dairy Stores*, 104 N.J. at 151. This means that, in order to overcome the fair comment privilege, a plaintiff must establish that the publisher knew the statement to be false or acted in reckless disregard of its truth or falsity. *Id.* Conclusory assertions that a speaker "knew and/or reasonably should have known that the statement . . . was false . . ." are insufficient to allege the requisite malice. *Darakjian*, 366 N.J. Super. at 249. Rather, in order to overcome the qualified privilege, a complaint must allege sufficient particularized facts to that the statements at issue were published with knowledge of their falsity or a reckless disregard for the truth or falsity of the statements. *Id.* at 250.

The allegations contained within the SAC are insufficient to allege malice, as a matter of law. Plaintiffs do not allege that Wikimedia published the statements at issue here with knowledge of their falsity or reckless disregard for their truth or falsity. Rather, Plaintiffs provide a bare conclusory allegation that the statements "were made maliciously." (SAC, p. 25, ¶ 4.) Plaintiffs provide absolutely no accompanying factual support for this bare contention that Wikimedia acted maliciously. The SAC is therefore deficient as a matter of law and should be dismissed.

VI. WITH NO VIABLE UNDERLYING DEFAMATION CLAIM AGAINST WIKIMEDIA, PLAINTIFFS' REMAINING CLAIMS ALSO FAIL.

Plaintiffs' defamation claim is barred as a matter of law. Plaintiff's remaining claims, for tortious interference with prospective economic advantage and conspiracy, also fail to state a

claim, both because they are barred by Section 230 and because Plaintiffs' failure to establish a viable defamation claim means that their remaining claims are barred by New Jersey law. As discussed above, Section 230 of the CDA creates an immunity to any and all claims made pursuant to state law. Section 230 has been applied to bar the same kinds of derivative claims asserted by Plaintiffs. *See, e.g., Doe v. SexSearch.com*, 502 F.Supp.2d 719, 726 (N.D. Ohio 2007) (Section 230 is construed broadly and is not limited to defamation claims); *Novak v. Overture Services, Inc.*, 309 F.Supp.2d 446 (E.D.N.Y. 2004) (applying Section 230 to a claim of tortious interference with prospective economic advantage).

Even if it did not, New Jersey law is clear. If an alleged defamation is not actionable, then its consequences are not actionable under any theory. *See, e.g., Russo v. Nagel*, 358 N.J. Super. 254, 268-69 (App. Div. 2003) (affirming dismissal of tortious interference claim predicated on defamation action where plaintiff failed to establish that defamatory statements were made); *LoBiondo v. Schwartz*, 323 N.J. Super. 391, 417 (App. Div. 1999) (defamation, tortious interference, and intentional infliction of emotional distress claims dismissed). In particular, where—as here—the statements at issue in a defamation claim are privileged, the privilege cannot be circumvented by allowing the action to proceed under a different label. *Seal Tite Corp.*, 312 N.J. Super. at 540. Furthermore, an alleged conspiracy cannot be the subject of a civil action unless an act is done which, independent of any conspiracy, would create a cause of action. *Board of Education, Asbury Park v. Hoek*, 66 N.J. Super. 231, 241 (App. Div. 1961); *Lopez v. Sawyer*, 62 N.J. 267, 300 (1973). The Complaint fails to establish any wrongful conduct by Wikimedia, and fails to allege any basis for the claimed conspiracy.

In short, all of Plaintiffs' claims against Wikimedia are barred as a matter of law, and all should be dismissed.

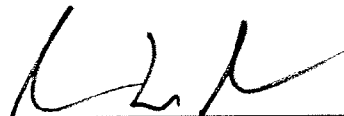
VII. CONCLUSION.

Plaintiffs' claims are barred by the Communications Decency Act, by the First Amendment, and by New Jersey law. Indeed, Plaintiffs' claims against Wikimedia are so baseless as to be frivolous. Wikimedia therefore respectfully requests that Plaintiffs' claims be dismissed forthwith.

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By: _____



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