SOFTWARE RESEARCH GROUP, INC., Plaintiff, - vs. – WWW.PISSEDCONSUMER.COM., JOHN DOES(S) 1-10, ABA Corporation(s) 1-10, Defendants .	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NUMBER MID-L-1598-10 CIVIL ACTION

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OPINION CORP.'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT AND STATEMENT OF FACTS

This is a lawsuit consisting of five different versions of a defamation claim, brought against a website and an unknown number of anonymous defendants. The website, called PissedConsumer.com, is operated by movant, Opinion Corp., and is what is known as a "gripe site" to detractors or a "consumer reviews" site to supporters. It is an Internet website where people post comments, which can be negative, and are not required to identify themselves. The Complaint's allegations are clear: Plaintiff, a "computer consulting company," does not have, and does not claim to have, any basis to allege that PissedConsumer.com is itself responsible for writing, or even personally posting, the anonymous negative comments that are the basis of this Complaint. Rather the allegations are that the allegedly defamatory statements were made or posted "on PissedConsumer.com." (Complaint ¶¶ 3, 8, 9.)

The Complaint fails as a matter of law. Section 230 of the Communications Decency Act prohibits the imposition of liability under state law on any user or provider of an "interactive computer service" for publishing content provided by another. It is well-established law that sites such as Opinion Corp. fall squarely within the protection of this statute, which applies to all state law claims, regardless of how styled, as long as the act complained of is the publication of third-party content. That is the case here. As it happens, the Complaint is also grievously deficient with respect to pleading the five different "spins" on plaintiff's defamation claim as a matter of New Jersey law as well. This is not surprising. A claim such as this one, patently meritless under established precedent interpreting a crystal-clear statute that protects the constitutional right of free speech, cannot have been drafted with an eye toward anything but intimidation. This Court should not encourage such practice, and should dismiss the Complaint without prejudice.

LEGAL ARGUMENT

I. DEFENDANTS' CLAIMS SOUNDING IN DEFAMATION ARE BARRED BY SECTION 230 OF THE FEDERAL COMMUNICATIONS DECENCY ACT.

A. Legal Standard of R. 4:6-2(e)

When ruling on a motion to dismiss a complaint for failure to state a claim upon which relief can be granted under R. 4:6-2(e), the court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. *Department of Transp., 221 Rieder v.* 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.*

In particular, where, as here, 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 that threatens the constitutional protection of free expression, because the mere cost of defending against such claims has a chilling effect on speech. "The courts of this State have recognized that First Amendment values are compromised by long and costly litigation in defamation cases." *Sedore v. Recorder Pub. Co.,* 315 N.J. Super. 137, 163 (App. Div. 1998). *See*, e.g., *Maressa v. New Jersey Monthly,* 89

N.J. 176, 198 (1982; *Kotikoff v. The Community News,* 89 N.J. 62, 67 (1982) (summary procedures that dispose of questions of law well suited in First Amendment cases).

B. Section 230 of the Communications Decency Act explicitly bars all actions against online publishers such as Opinion Corp. based on content posted by third persons.

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. Opinion Corp. falls squarely within the protection of this statute. Therefore, the complaint fails to state any cause of action against Opinion Corp. and 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 of speaker of information originating from `another information content provider.'" Green v. American Online, 318 F.3d 465, 471 (3d Cir. 2003). *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. Metrosplash.com, Inc.,* 339 F.3d 1119 (9th Cir. 2003). Opinion Corp. therefore qualifies for protection under Section 230 because (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 "content" originated by another. *See*, *Donato*, 374 N.J. Super. at 486, 500-501.

1. Opinion Corp. is an "interactive computer service" protected by Section 230.

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 PissedConsumer.com website, Opinion Corp. is, like any website operator, deemed both a user and a provider of an interactive computer service under § 230. *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).

2. The Complaint is based solely on claims that Opinion Corp. is liable as a result of content written by others and published on its website.

The gravamen of the Complaint is simply that allegedly defamatory material was published on Opinion Corp.'s PissedConsumer.com website. The material allegations are that in

January 2010 plaintiff's ownership learned of "defamatory statements made by unidentified individuals, referred to herein as John Doe(s) 1-20, on Pissedconsumer.com" (Complaint ¶ 3); that defendants have refused to remove these comments (¶ 6); and that the statements were "false and maliciously made for the sole purpose of causing harm to" plaintiff. The causes of action are styled, respectively, as tortious interference with contractual and business relations, defamation, "false light," and "declaratory judgment."

Regardless of how they are pleaded, however, all claims under state law are barred due to the explicitly immunity provided by section 230. 47 U.S.C. § 230(e)(3). Consequently, all of Plaintiffs' claims against Opinion Corp. are prohibited by Section 230. *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) (Section 230 bars claims of tortious interference with prospective economic advantage).

Indeed, this rule would apply even without the all-encompassing language of Section 230, as a matter of New Jersey law. 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) (dismissal of tortious interference claim predicated on failed defamation action); *LoBiondo v. Schwartz,* 323 N.J. Super. 391, 417 (App. Div. 1999) (defamation, tortious interference, and intentional infliction of emotional distress claims dismissed). And certainly where, as demonstrated below, the statements at issue in a defamation claim are privileged, as they are here, the privilege cannot be circumvented by allowing the action to proceed under a different label. *Seal Tite Corp. v. Bressi*, 312 N.J. Super. 532, 540 (App. Div. 1998).

For the foregoing reasons, the entire Complaint fails to state a claim and should be dismissed with prejudice as a matter of law as required under Section 230.

II. DEFENDANTS' DEFAMATION-BASED CLAIMS ARE DEFICIENT AS A MATTER OF SUBTANTIVE NEW JERSEY LAW.

A. The fair comment privilege provides extra protection to speech concerning issues of public concern.

The United States Supreme Court has expressly recognized that states may grant broader speech protections than those afforded by the First Amendment of the federal Constitution 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). In particular, New Jersey 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. These same defenses apply to the "false light" tort. *Miele v. Rosenblum*, 254 N.J. Super. 8, 17-18, (App. Div. 1991).

Our 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. 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.

B. The statements published by Opinion Corp. 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 water implicated a matter of legitimate public concern); *Seal-Tite corp. v. Bressi*, 312 N.J. Super. 532, 539 (1998) (statements by mayor and township committee regarding deficiencies in performance of road construction contractor related to a matter of public concern); *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).

The statements targeted by plaintiff in the immediate case relate to a matter of public concern. Plaintiff is, as it alleges, a computer consulting company. (Complaint ¶ 1.) The comments on the website discuss the topic of the manner in which plaintiff treats its contractors. (¶¶ 8-9). By all indications, plaintiffs offer employment or contracting opportunities to the

public (¶ 3), and obviously anticipate that there is legitimate public interest in information pertinent to such engagements (¶¶4-5). *See*, *Dairy Stores*, 104 N.J. at 151. Thus, the statements that Opinion Corp. published regarding the quality and nature of employment or engagement by plaintiff contributes to public discussion regarding a matter of important public interest, and the fair comment privilege applies to Opinion Corp.

C. Plaintiffs have not sufficiently alleged facts constituting malice.

Because the statements published by Opinion Corp. concern a matter of public interest, plaintiff must allege "malice"—that Opinion Corp. knew the statement to be false, or acted in reckless disregard of its truth or falsity—to overcome the fair comment privilege. *Dairy Stores,* 104 N.J. at 151. Although it trots out the boilerplate in alleging "The aforementioned statements were intentionally false and maliciously made for the sole purpose of causing harm to SRG" (Complaint ¶ 10), the Complaint fails to meet this standard.

Conclusory assertions of malice such as the one quoted are insufficient as a matter of law to constitute a bona fide allegation of 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 by a given defendant, which had knowledge of their falsity or acted with a reckless disregard of their truth. *Id.* at 250. The allegations contained within the Complaint fall far short of this standard. This is certainly true regarding the allegations with respect to Opinion Corp. for the Complaint does not allege that Opinion Corp. published the statements at issue here with knowledge of their falsity or reckless disregard for their truth or falsity. Rather, Plaintiffs provide a bare allegation that the statements were "maliciously made." Plaintiffs provide no factual allegation that would amount to legal malice as regards any defendant—but with respect to Opinion Corp., the Complaint simply cannot be

held to allege that it acted maliciously. The Complaint is therefore deficient as a matter of law and should be dismissed.

III. PLAINTIFF'S TORTIOUS INTERFERENCE CLAIM IS DEFICIENT AS A MATTER OF SUBSTANTIVE NEW JERSEY LAW.

Under New Jersey law, a claim of tortious interference requires a showing of (1) intentional and malicious interference (without justification); (2) with a prospective or existing economic or contractual relationship with a third party; (3) causing the loss of prospective gain; and (4) damages. *See*, e.g., *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 751 (1989). In addition to recasting a defamation claim as a tortious interference claim, which as set out above can be no better than such a claim when examined in the light of the high burdens for defamation plaintiffs in New Jersey, the First Count of the Complaint fails to state a claim on its own terms.

The Complaint fails to allege any facts amounting to intentional or malicious interference with a contract. It merely posits Opinion Corp.'s passive publication of information, which is barely even "intentional" in any meaningful sense as to the publication alone, and is not malicious. "Malice in the legal sense is the intentional doing of a wrongful act without justification or excuse." *Louis Schlesinger Co. v. Rice*, 4 N.J. 172, 181 (1950). To be actionable, such conduct must be "both injurious and transgressive of generally accepted standards of common morality or of law." *Id., Rodin Props.-Shore Mall, N.V. v. Cushman & Wakefiield of Pa., Inc.*, 498 N.J. Super 134, 143 (D.N.J. 1999). It is possible that the author of the content in question transgressed such standards—but nothing in the Complaint suggests that Opinion Corp. did so by maintaining an open discussion forum. Indeed, because Opinion Corp. operates PissedConsumer.com for its own lawful economic benefit, its passive publication of those

comments is exempt for liability under the doctrine of justification. See *Pitak v. Bell Atlantic Networks Svcs., Inc.*, 928 F. Supp. 1354 (D.N.J. 1996).

Moreover, although it conclusorily alleges that "Defendants are aware of the foregoing relationships" (between "clients, employees, vendors and end-users") (Complaint, First Count ¶¶ 3-4) the Complaint fails to describe any particular contract or business relation that Opinion Corp. could plausibly be aware of—thus making the "interference" impossible to describe as "intentional." No cause or effect relationship between Opinion Corp.'s actions and any such "interference" is described; no specified prospective gain is pleaded; no damage is described. This cause of action simply fails to state a claim as a matter of law and is worthy of dismissal even without respect to the other grounds for dismissal set forth above.

IV. PLAINTIFF'S FALSE LIGHT CLAIM IS DEFICIENT AS A MATTER OF SUBSTANTIVE NEW JERSEY LAW.

Plaintiffs can sue for "false light" when false information is spread about them that is false and offensive. The key difference between defamation and false light is that they protect against different harms flowing from such statements. Defamation protects a person's public reputation, while false light protects a person's internal mental tranquility. *Romaine v. Kallinger*, 109 N.J. 282 (N.J. 1988). To establish false light a plaintiff must prove that the defendant (1) made statements about the plaintiff (2) to the public that are (3) offensive and (4) false. To be actionable, a statement must be "highly offensive to a reasonable person." *Id.* (quoting Restatement 2d of Torts § 652E). In other words, it is not enough that the plaintiff is offended; it must be reasonable to take offense. Here the Complaint only alleges that the statement was "false and defamatory"—not that it was "offensive." A false statement that is not offensive does not constitute the tort of false light. *Machleder v. Diaz*, 801 F.2d 46 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

V. DEFENDANTS' DECLARATORY JUDGMENT CLAIM IS FAILS TO STATE A CAUSE OF ACTION AND SHOULD BE DISMISSED.

The Fifth Cause of Action is merely duplicative of the previous four, and hence subject to their fatal deficiencies.

CONCLUSION

For all the foregoing reasons, plaintiff has failed, in all aspects of its Complaint, to state a claim for which relief can be granted against the defendant it has named as WWW.PISSEDCONSUMER.COM, i.e., the operator of that site, Opinion Corp., and the Complaint should be dismissed with prejudice.

Dated: April 26, 2010

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