68345-4

68345-4

No. 68345-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SCOTT AKRIE, et al.,

Respondents,

v.

JAMES GRANT, et al.,

Appellants.

APPELLANTS' OPENING BRIEF

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[1] Copies of these cases are included in Appendix A, hereto.

I. INTRODUCTION

RCW 4.24.525(6)(a) provides that a court "shall award" $10,000 in statutory damages "to a moving party who prevails" on an anti-SLAPP Motion. In this case, Plaintiffs Scott Akrie and Volcan Group, Inc. d/b/a Netlogix ("Akrie") sued five named defendants and two Doe defendants ("Defendants").[1] The five defendants – James Grant; Cassandra Kennan; Davis Wright Tremaine, LLP; Seattle Deposition Reporters, LLC; and T-Mobile USA, Inc. ("Grant, et al.") – filed a special motion to strike under Washington's anti-SLAPP statute, RCW 4.24.525(4)(a). The trial court granted the motion, and dismissed Akrie's case in its entirety. The trial court awarded attorneys' fees and a single $10,000 statutory damages award. However, because there were five Defendants, each of whom constituted a "moving party" under the wording of the statute, the statutory damages mandated by the statute were $10,000 for *each* of the five defendants, for a total sanction of $50,000. This legal question is the only portion of the trial court's decision at issue.

II. ASSIGNMENT OF ERROR

The trial court erred by imposing only a single $10,000 statutory damages award, pursuant to RCW 4.24.525(6)(a)(ii), rather than awarding $10,000 to each of the five moving parties, for a total statutory award of $50,000.

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[1] The Doe defendants are the spouses of Defendants Grant and Kennan. For purposes of RCW 4.24.525(6)(a), Defendants treated Defendant Grant, his spouse and their marital community as a single "moving party," and treated Ms. Kennan the same way.

Issue pertaining to assignment of error: When the court dismisses a case under Washington's anti-SLAPP statute, does RCW 4.24.525(6)(a)(ii) mandate an award of statutory damages to each moving party?

III. STATEMENT OF THE CASE

This state court action arose in the context of proceedings in federal court between Akrie's company, NetLogix, and T-Mobile: *Volcan Group, Inc. d/b/a Netlogix v. T Mobile USA, Inc.*, 2:10-cv-00711 RSM (W.D. Wash.) ("the Federal Litigation").[2] Defendants Grant and Kennan of Davis Wright Tremaine LLP ("DWT") represented T-Mobile in the federal litigation.

Akrie's claim arose from the fact that Defendants Grant, Kennan and DWT filed a motion and supporting papers in the Federal Litigation on behalf of T-Mobile USA, Inc. *See* CP 1 – 12 (Summons and Complaint); CP 15 – 26 (Motion); CP 177 – 78 (Order). That motion concerned Netlogix's destruction and falsification of evidence in the Federal Litigation, which was discovered by T-Mobile's counsel and brought to the attention of the court. *Id.* Because Akrie's claims and alleged damages arose from the filing of the motion in the Federal Litigation, the trial court found that the claims were based on "public participation and petition" by T-Mobile and its counsel and were subject

[2] On March 14, 2012 Judge Martinez dismissed that federal case with prejudice as a sanction for the Plaintiffs' spoliation of evidence and other misconduct, and Plaintiffs have appealed that dismissal to the Ninth Circuit (*Volcan Group, Inc. d/b/a Netlogix v. Omnipoint Communications, Inc., dba T-Mobile; T Mobile USA, Inc.*, USCA No. 12-35217).

to Washington's Anti-SLAPP statute (RCW 4.24.525). CP 177 – 78 (Order), RP 51 (Judge Andrus' ruling from the bench).

Akrie filed a notice of appeal shortly after entry of the judgment (CP 181-87), and Grant, et al. filed a notice of cross-appeal on February 29, 2010 (CP 188-96). Akrie filed an amended notice of appeal on March 13, 2012 to correct the caption (CP 197-203), but subsequently withdrew his appeal. By letter dated April 9, 2012 from Court of Appeals Administrator/Clerk Richard D. Johnson, the cross-appellants (Grant, et al.) were re-designated as Appellants.

IV. ARGUMENT

A. Washington's Anti-SLAPP Statute Mandates A $10,000 Penalty To A Prevailing Moving Party

RCW 4.24.525(6)(a) provides that a court "shall award to a moving party who prevails, in part or in whole, on a special motion to strike . . . without regard to any limits under state law . . . (ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees . . ." The statute defines "moving party" as "a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim." RCW 4.24.525(1)(c).

The underlying Motion to Strike was filed on behalf of the five Defendants—Grant; Kennan; Davis Wright Tremaine, LLP; Seattle Deposition Reporters, LLC; and T-Mobile USA, Inc.—each of whom is therefore a "moving party" for purposes of the statute. The trial court found that the anti-SLAPP statute applied to Akrie's claims and dismissed

his case against all five Defendants. CP 177-78. With respect to the statute's requirement that the court impose a $10,000 sanction, Grant, et al. argued that *each* moving defendant was entitled to the statute's mandatory $10,000 sanction. Counsel raised this issue both in the briefing papers filed with the court (*see* CP 24 (Motion to Strike) ("Defendants therefore request that the Court set a hearing . . . to resolve the following issues: . . . (d) whether each Defendant is entitled to an award of $10,000 against each Plaintiff pursuant to RCW 4.24.525(6)(a)(ii)"); CP 95 (Reply on Motion to Strike) ("Defendants will ask the Court to dismiss Plaintiffs' claims and to award . . . statutory penalties to each Defendant")) and at oral argument. RP 20-23.

Defendants directed the trial court to two federal cases, *Castello v. City of Seattle*, 2010 U.S. Dist. LEXIS 127648, 2010 WL 4857022 (W.D. Wash. 2010)) and *Eklund v. City of Seattle*, 2009 U.S. Dist. LEXIS 60896, 2009 WL 1884402 (W.D. Wash. 2009), *reversed on other grounds* 410 Fed. Appx. 14 (9th Cir. 2010) that interpreted the anti-SLAPP statute to require that $10,000 in statutory damages be awarded to each moving defendant (*see* RP 21-23).[3] As the *Castello* and *Eklund* courts held, the language of the statute clearly contemplates that the award should be made on behalf of *each* moving Defendant. Had the trial court followed the statutory mandate, the total sanction would have been $50,000.

[3] Copies of the federal cases cited herein are attached in Appendix A.

B. The Only Case Law Interpreting the Anti-SLAPP Statute Has Found That The $10,000 Mandated Penalty Should Be Awarded To *Each* Moving Party

There are no reported Washington state court decisions interpreting RCW 4.24.525(6)(a)(ii), but all three federal judges in the Western District of Washington who have examined the language of the statute have determined that it mandates an award of $10,000 to *each* moving party. In *Castello*, an individual sued six defendants. 2010 U.S. Dist. LEXIS 127648 at *1. Two of the defendants moved to strike pursuant to RCW 4.24.525. Judge Pechman found that the statute's "moving party" language mandated an award to each moving party:

> The Court further orders that Plaintiff shall pay Defendants Shea and Simmons $10,000 each as required by the Anti-SLAPP statute. The Court is satisfied that the language of the statute (which calls for the court to award 'a moving party' the statutory damages) requires the assessment of the penalty *as to each defendant*. The Court also notes that this assessment is supported by a similar award ordered by Judge Zilly of this district in *Eklund v. City of Seattle*.

2010 U.S. Dist. LEXIS 127648, at *32 - 33 (emphasis added; internal citation omitted).

In the *Eklund* case, there were five named defendants and four Doe defendants. 2009 U.S. Dist. LEXIS 60896, at *1. Three of the defendants moved to strike pursuant to RCW 4.24.525, and upon granting the motion, Judge Zilly awarded the statutory damages to each moving defendant:

> In addition to attorneys' fees, Defendants . . . move for $10,000 each in statutory damages, which are mandatory under the Anti SLAPP statute ('... A person prevailing upon the defense ... shall receive statutory damages of ten

> thousand dollars....') . . . Accordingly, the Court awards $10,000 each in statutory damages to [each moving party].

2009 U.S. Dist. LEXIS 60896, at *9 - 10.

Similarly, and most recently, Judge Robart awarded the statutory fee to each moving party: "In addition, pursuant to RCW 4.24.525(6)(a), the court ORDERS Amercare Plaintiffs to pay the mandatory statutory penalty of ten thousand dollars to each defendant." *Phoenix Trading, Inc. v. Kayser*, 2011 U.S. Dist. LEXIS 81432, at * 48, 2011 WL 3158416 (W.D. Wash. 2011).

C. The Washington Legislature Has Indicated That The Anti-SLAPP Statute's Provisions Should Be Construed Liberally

In assessing fees and costs, the Court should take into account that the provisions of the Anti-SLAPP statute are to be "construed liberally,"[4] particularly in light of the Legislative finding that, "The costs associated with defending [SLAPP] suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues." Findings—Purpose—2010 c 118.

D. Akrie Chose To Sue Five Defendants And Should Not Escape The Consequences Of This Decision

It was Akrie who chose to file a lawsuit against multiple defendants. Each defendant was entitled to hire its own, separate counsel and to file its own motion to strike under the SLAPP statute. Instead, Grant, et al. opted to have a single attorney represent them in a combined

[4] Application--Construction--2010 c 118: "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." 2010 c 118 § 3.

motion; that does not change the fact that the motion was filed on behalf of each of them. Because each was, in fact, a "moving party" for purposes of the anti-SLAPP statute, the trial court should have awarded $10,000 in statutory damages to each of them. *Castello*, *supra*.

V. CONCLUSION

The anti-SLAPP statute requires the trial court to award $10,000 in statutory damages to each successful moving party. Here, each of the five Defendants moved to strike and all five were successful. As such, Appellants Grant, et al. respectfully request that this Court reverse and direct the trial court to award statutory damages in the amount of $50,000.

DATED this 14 day of May, 2012.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 14TH day of May, 2012, I caused to be served a true and correct copy of the foregoing *Appellants' Opening Brief* by method indicated below and addressed to the following:

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APPENDIX A

Slip Copy, 2010 WL 4857022 (W.D.Wash.), 39 Media L. Rep. 1591
(Cite as: 2010 WL 4857022 (W.D.Wash.))

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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
at Seattle.
Steven CASTELLO, Plaintiff,
v.
CITY OF SEATTLE, et al., Defendants.

No. C10-1457MJP.
Nov. 22, 2010.

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Amy Lowen, Fritz E. Wollett, Seattle City Attorney's Office, Seattle, WA, for City of Seattle.

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Ambika K. Doran, Bruce E. H. Johnson, Davis Wright Tremaine LLP, Seattle, WA, for Mitzi Simmons.

ORDER ON SPECIAL MOTION TO STRIKE PURSUANT TO WASHINGTON ANTI-SLAPP ACT & FRCP 12(C) MOTION TO DISMISS
MARSHA J. PECHMAN, District Judge.

***1** The above-entitled Court, having received and reviewed

1. Defendants Shea and Simmons's Special Motion to Strike Pursuant to the Washington Act Limiting Strategic Lawsuits Against Public Participation (AntiSLAPP Act) & Fed.R.Civ.P. 12(c) Motion to Dismiss (Dkt. No. 11)

2. Plaintiff's Response to Special Motion to Strike and Motion to Dismiss (Dkt. No. 19)

3. Defendants Shea and Simmons's Reply in Support of Special Motion to Strike and Motion to Dismiss (Dkt. No. 23)

and all attached declarations and exhibits, makes the following ruling:

IT IS ORDERED that Plaintiff's claims against Defendants Shea and Simmons for defamation, defamation by implication and false light are STRICKEN pursuant to RCW 4.24.525 (the Washington **Anti-SLAPP** statute).

IT IS FURTHER ORDERED, pursuant to RCW 4.24.525(6)(a), that Defendants Shea and Simmons are each awarded their costs of litigation and reasonable attorneys' fees incurred in connection with this **motion** and additionally are awarded the mandatory statutory **penalty** of $10,000 each. Defendants' counsel shall submit their requests for costs and reasonable attorneys' fees within 7 days of this order; Plaintiff shall submit any response to those requests within 7 days of the filing of the requests.

IT IS FURTHER ORDERED that, pursuant to Plaintiff's motion at oral argument, the claim for wrongful interference with business expectancy is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants' FRCP 12(c) motion for judgment on the pleadings is GRANTED for the civil harassment claim; the Court further finds that leave to amend would be futile and orders this claim DISMISSED with prejudice. The Court notes that Plaintiff's defamation claims are subject to dismissal under FRCP 12(c) for their lack of specificity, and that amendment of the complaint would be futile based on the Court's decision to strike those claims pursuant to RCW 4.24.525.

Background

Plaintiff Castello and Defendants Shea and Simmons (Defendants) are all employed as paramedic/firefighters for the Seattle Fire Department (SFD). Defendants are among the parties named in a state court lawsuit initiated by Plaintiff which was removed to federal court (on federal question grounds) in October 2010. The causes of action alleged against Defendants include claims for defamation, defamation by implication, false light, civil harassment and wrongful interference with business expectancy [FN1]. Complaint ¶¶ 10.3, 11.7, 12.7.

FN1. The wrongful interference claim was orally dismissed with prejudice by Plaintiff's counsel at the hearing on this motion.

According to the parties' briefing, the origins of this litigation stretch back to August 2008, when Defendants submitted a written complaint to Deputy Chief Duggins communicating their concerns about a letter Plaintiff had circulated in the workplace. Simmons Decl., Ex. B. The complaint was investigated and resulted in an Official Reprimand for disorderly conduct against Plaintiff in November 2008. *Id.*, Ex. D, p. 2. Further activity by Plaintiff (the mailing of a survey to the homes of his co-workers, including Defendants) resulted in the submission of another written complaint by Defendant Simmons (*Id.*, Ex. E) and a phone call by Defendant Shea to the Fire Chief (Shea Decl., ¶ 6). When Plaintiff continued to solicit co-workers regarding the survey despite being ordered by the Chief to desist (*see* Simmons Decl., Ex. N, p. 1), Defendant Simmons filed an e-mail complaint with her superiors (*Id .*, Ex. F) and Defendant Shea communicated her concern to the Deputy Chief (Shea Decl., ¶ 7). These complaints were investigated by the City of Seattle Equal Employment Opportunity Office, which concluded in separate reports that, while Plaintiff's actions did not constitute harassment or retaliation (Simmons Decl., Ex. D), they did constitute misconduct. *Id.*, Ex. N. No disciplinary action was taken concerning Plaintiff in the wake of these reports. Simmons Decl., ¶ 11.

***2** In June 2009, Defendant Shea sent an e-mail to the Deputy Chief outlining her concerns for her personal safety and the morale of the battalion based on her observations of Plaintiff's behavior. Shea Decl., Ex. B. The Deputy Chief, citing reports of "harassment" and "disruption" regarding Plaintiff, communicated his concerns to the Chief several days later. Simmons Decl., Ex. H. The following day Defendant Simmons submitted an "Urgent Safety Complaint" concerning Plaintiff to the Deputy Chief. *Id.*, ¶¶ 16-17. The Chief responded by agreeing to investigate the Safety Complaint (*Id.*, Ex. I) and placing Plaintiff on paid administrative leave pending a fit-for-duty evaluation. *Id.*, Ex. L, p. 5. The following month, Plaintiff was declared to be psychiatrically fit for duty; Luhn Decl., Ex. 3.

On June 17, 2009, the day after Plaintiff was placed on administrative leave, he appeared at his workplace. Despite being informed that he was restricted from entering the work environment, Plaintiff remained onsite and the situation escalated to the point where the police were contacted. Simmons Decl. Ex. L, ¶¶ 25-28. These events (which were later incorporated into Defendant Simmons's Urgent Safety Complaint; Simmons Decl., ¶ 20) culminated in a disciplinary action against Plaintiff which he appealed to the City of Seattle Public Safety Commission (PSCSC). Following a hearing on the appeal, the PSCSC issued its decision upholding the disciplinary action (and referring to Plaintiff's behavior as "unacceptable, totally inappropriate, insubordinate" and "inexcusable;" Simmons Decl., Ex. L, ¶¶ 68-69). In the meantime, the investigation into the Urgent Safety Complaint concluded with a December 2009 report which substantiated the factual allegations made by Defendant Simmons, but (with the exception of the June 17 workplace incident) did not find that Plaintiff's actions constituted any violations of the Seattle Municipal Code. *Id.*, Ex. K.

The following year, a local television news program (KOMO News) began looking into issues of unrest and low morale throughout SFD. A number of SFD workers, including Defendants, were interviewed. The investigation culminated in the broadcast of a story entitled "Whistle blowers fear Seattle Fire Department in trouble." A transcript of the broadcast was included as an exhibit to Defendants' briefing. Simmons Decl., Ex. M. Although the focus of the story concerned allegations about the SFD Chief, mention was made of the complaints regarding Plaintiff and the June 17 incident and portions of the Shea and Simmons interviews were played. Notably, Plaintiff was never mentioned by name in the broadcast. *Id.*

In August 2010, Plaintiff commenced this lawsuit. The portions targeting Defendants allude to two categories of communications: (1) their complaints to the investigators and command personnel of SFD and (2) their statements to KOMO News. It is Plaintiff's allegation that Defendants' speech in these circumstances constituted harassment (Complaint, ¶ 10.3), as well as defamation, defamation by implication and false light (*Id.*, ¶ 11.7). Defendants have brought a dual-purpose **motion**, requesting that the claims against them be stricken in accordance with RCW 4.24.525 (the Washington **Anti-SLAPP** statute) and

seeking judgment on the pleadings pursuant to FRCP 12(c).

Discussion

*RCW 4.24.510 and 4.24.525 (**Anti-SLAPP** Statutes)*

***3** For many years, Washington has had in effect a statute intended to curb strategic lawsuits against public participation; i.e., lawsuits which are targeted at communication intended to influence government action. This "**Anti-SLAPP**" statute had a fairly specific focus:

> A person who communicates a complaint or information to any branch or agency of federal, state or local government ... is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.
>
> RCW 4.24.510.

In 2010, the Washington legislature enacted another AntiSLAPP statute that not only broadened the scope of protected communication, but created a procedural device to swiftly curtail any litigation found to be targeted at persons lawfully communicating on matters of public or governmental concern. The types of speech protected by this wider-ranging version of the Anti-SLAPP were expanded into five categories:

> a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceedings or other governmental proceeding authorized by law;
>
> d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or
>
> e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.
>
> RCW 4.24.525(2). An activity qualifying under any of these categories is, by statutory definition, "an action involving public participation and petition" protected by this law. *Id.*

Additionally, the newer Anti-SLAPP statute created a right to bring a "special motion to strike any claim that is based on an action involving public participation and petition," an expedited procedure intended to expeditiously cut off any litigation found to be targeting this protected activity. RCW 4.24.525(4)(b). This provision assigns a moving party the initial burden of demonstrating by a preponderance of the evidence that the claim or claims concern an action involving public participation and petition. *Id.* Once that burden is met, the burden shifts to the Plaintiff to establish by clear and convincing evidence a probability of proving the claim or claims. *Id.* The statute permits a court to consider not only the pleadings, but supporting and opposing affidavits stating the facts on which the liability or defense is based. RCW 4.24.525(4)(c).

***4** Both the older and the more recent **anti-SLAPP** statutes [FN2] provide that a moving party who prevails is entitled to a mandatory award of costs and reasonable attorney fees and a further mandatory **penalty** of $10,000. RCW 4.24.525(6)(a); RCW 4.24.510. (RCW 4.24.510 conditions this on a finding of "good faith" on the part of the moving party, a requirement which is absent from RCW 4.24.525.) The newer statute expands the fee and penalty awards to include a prevailing plaintiff if the court finds the motion to strike was frivolous or dilatory. RCW 4.24.525(6)(b).

> FN2. The Court notes that there is nothing in the language of RCW 4.24.525 to indicate that it supersedes RCW 4.24.510; the later

statute is supplementary.

Defendants' Statements

Based on Plaintiff's voluntary dismissal of his wrongful interference claim and the Court's finding that there is no general civil harassment claim in Washington law, the special motion to strike claims will be addressed to the causes of action sounding in defamation. As mentioned *supra,* Plaintiff's defamation claims fall into two general categories: (1) Defendants' statements to SFD investigators, co-workers and command personnel; and (2) Defendants' statements to KOMO News which were aired in the broadcast. The Court first analyzes whether Defendants have carried their burden of establishing by a preponderance of the evidence that these two categories of communications occurred in the course of "an action involving public participation and petition."

Turning to the first category of statements, RCW 4.24.525 defines "governmental proceeding authorized by law" as a proceeding conducted by any agency or other entity created by local statute or rule that has been delegated authority by a local government agency and is subject to oversight by the delegating agency. RCW 4.24.525(1)(d). The Court finds that SFD is an "agency" of the City of Seattle (Complaint, ¶ 3.2) and, having been established by Article X of the City of Seattle Charter, is likewise an "entity" created by local statute or rule. Section 2 of that charter empowers the Mayor to appoint the Fire Chief and Section 3 delegates the authority to manage SFD to the Chief. Seattle Municipal Code (SMC) Chapter 3.16 delegates further authority from the Seattle City Council to SFD. The Fire Department is thus an agency or entity created by local statute or rule that has been delegated authority by a local government agency and is subject to oversight by the delegating entity.

The only issue remaining on this aspect of Defendants' proof is the question of whether Defendants' statements were made either "in" a governmental proceeding or "in connection with an issue under consideration or review in such a proceeding." RCW 4.24.525 is of such recent vintage that there have been few cases construing it in the months since it was enacted. The parties, in fact, cite only one, a case out of this district entitled *Aronson v. Dog Eat Dog Films, Inc.*, 738 F.Supp.2d 1104, 2010 WL 3489590 (W.D.Wash.2010). *Aronson* cites extensively to California precedent on the grounds that the California **Anti-SLAPP** Act (Cal.Civ.Pro. § 425.16) mirrors Washington's new statute. *Id.* at *3. This Court likewise looks to California precedent as persuasive authority concerning the new **Anti-SLAPP** statute.

***5** Defendants' statements within the Department were made in two contexts: allegations of misconduct which lead to departmental investigations and statements related to disciplinary proceedings. California courts have deemed investigations of misconduct by public agencies to be "proceedings" within the meaning of the Anti-SLAPP statute. The California Court of Appeals has held that statements made by co-workers pursuant to an internal investigation of misconduct concerned "an official proceeding authorized by law" and thus constituted communications "in connection with" that proceeding. *Hansen v. Cal. Dep't of Corrections and Rehab.*, 171 Cal.App.4th 1537, 1541, 90 Cal.Rptr.3d 381 (Cal.Ct.App.2008). Furthermore, "communications preparatory to or in anticipation of the bringing of an official proceeding" likewise fell within the protections of the California Anti-SLAPP Act. *Id.* at 1547, 90 Cal.Rptr.3d 381. Defendants' statements in 2008 thus qualify as statements in connection with a proceeding because they resulted in the Deputy Chief's investigation of Plaintiff and ultimately to disciplinary action.

The Court has no difficulty in finding that the disciplinary proceedings (including the investigation of allegations, the presentation of charges, pre-disciplinary meetings and the appeals process) conducted by SFD and the City of Seattle Public Safety Civil Service Commission (PSCSC) constitute "proceedings" within the purview of the RCW 4.24.525. The PSCSC, which heard Plaintiff's appeal from his departmental disciplinary review, embodies the Washington legislative mandate of a civil service system of personnel management for city firefighters. RCW 41.08. The department's disciplinary regulations, the firefighters' right to appeal to the PSCSC and the judicial review accorded that appeal process all qualify as "governmental proceedings authorized by law," and Defendants' statements (including the Urgent Safety Complaint) in June 2009 which lead to an investigation, a fit-for-duty evaluation, administrative leave and ultimately disciplinary sanctions against Plaintiff also qualify as actions involving public participation and petition.[FN3]

FN3. Plaintiff attempted, during briefing and oral argument, to create an issue out of his belief that Defendants, far from being motivated by a concern for public safety or departmental integrity, were solely interested in achieving his termination from SFD. The Court notes, first of all, that termination is a possible (although not inevitable) outcome of the kinds of concerns that were being investigated by SFD in regard to Plaintiff. Secondly, if the issues raised by Defendants (for whatever reason) were also issues of concern to the Department as a whole (which turned out to be the case), Defendants' motivation for communicating those concerns to the Department is irrelevant. Plaintiff has cited no authority that a speaker's motivation can render an otherwise non-defamatory statement actionable.

Finally, in regard to communications made by Defendants within the Department, the Court notes that all such communications fall within the general "catch all" provision of RCW 4.24.525(2)(e) as "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." Plaintiff's counsel made much at oral argument of the fact that at least one of the e-mail communications by Defendants were copied to a co-worker who was not in a management role or connected with disciplinary proceedings within the unit. The Court is of the opinion that the emotional and psychological stability of an emergency medical worker is "an issue of public concern," and the fact that one or more of Defendants' communications were directed to an individual who was not "up the ladder" in the SFD chain of command will not disqualify those statements from protection under the Anti-SLAPP statute. RCW 4.24.525(2)(e).

***6** Turning to Defendants' statements to KOMO News, the Court finds that a major television network's local news broadcast constitutes a "public forum" within the meaning of 4.24.525(2)(d). Support for this position can be found in California courts which have addressed similar issues. See *Nyard, Inc. v. Lusi-Kertula*, 159 Cal.App.4th 1027, 1038-39, 72 Cal.Rptr.3d 210 (Cal.App. 2 Dist., 2008); *Annette F. v. Sharon S.*, 119 Cal.App.4th 1146, 1161, 15 Cal.Rptr.3d 100 (Cal.App. 4 Dist., 2004) ("[A] news publication is a 'public forum' within the meaning of the anti-SLAPP statute if it is a vehicle for discussion of public issues and it is distributed to a large and interested community.") Although the California cases concerned print media (magazines and newspapers), the Court sees no meaningful distinction between print and broadcast journalism in the context of this statutory scheme.

As previously found, the question of a paramedic's emotional and psychological stability is "an issue of public concern" and Defendants' statements to KOMO News were thus made " 'in connection' with an issue of public interest that potentially affected a large number of [people] beyond the direct participants." *Annette F.*, 119 Cal.App.4th at 1161, 15 Cal.Rptr.3d 100.

And again, as in their statements to the Department, the Court finds that Defendants' communications to KOMO News also fall within the definition of RCW 4.24.525(2)(e) as "the exercise of the constitutional right of free speech in connection with an issue of public concern." In the case of the television news broadcast, that "issue of public concern" went beyond Defendants' personal concerns about Plaintiff's return to his paramedic duties to the issue which was the true focus of the news story: the responsiveness of the SFD Fire Chief to the problems, concerns and morale issues within his department.

The Court finds that all of the statements identified as potentially being the basis for Plaintiff's allegations of defamation against these Defendants have been shown by a preponderance of the evidence to fall under the protection of RCW 4.24.525 as "action[s] involving public participation and petition" defined in the Anti-SLAPP statute. That finding shifts the burden to Plaintiff to demonstrate, by "clear and convincing evidence," a probability of prevailing on his claims against these parties. RCW 4.24.525(4)(b).

Plaintiff's Proof of Defamation

A Plaintiff claiming defamation of any sort must establish four elements: (1) falsity, (2) an unprivileged communication, (3) fault and (4) damages. *Mohr v. Grant*, 153 Wash.2d 812, 822, 108 P.3d 768 (2005). The Court examines Plaintiff's proof on each of these elements under the "clear and convincing" standard.

(1) *Falsity*

Statements of opinion are generally held not to be

"provably false" and thereby entitled to First Amendment protection. See *Corbally v. Kennewick Sch. Dist.*, 94 Wash.App. 736, 741, 973 P.2d 1074 (1999); *Robel v. Roundup Corp.*, 148 Wash.2d 35, 55, 59 P.3d 611 (2002). Plaintiff points out that a statement of opinion implying existence of facts which (if communicated in a direct statement) would be defamatory is itself defamatory. *Henderson v. Pennwalt Corp.*, 41 Wash.App. 547, 557, 704 P.2d 1256 (1985).

*7 Plaintiff appears to confine this argument to Defendants' statements after Plaintiff was adjudged fit for duty in July 2009. Response, p. 13. Certainly prior to that date Defendants' concerns regarding Plaintiff's instability and volatility and their opinions concerning the impropriety of some of his actions in the workplace were in fact validated by the Department's actions (misconduct citation, paid administrative leave pending a fitness evaluation, transfer out of paramedic duties) and Plaintiff's own behavior.

Both Plaintiff's complaint and his responsive pleadings have been noteworthy for their failure to identify with specificity any statements to SFD superiors, co-workers or investigators which are "provably false." [FN4] His response to Defendants' motion refers to "inaccuracy, error, [ ] false statement" (*Id.*, p. 5, 704 P.2d 1256) and "baseless allegations" (*Id.*, p. 7, 704 P.2d 1256), but (with the exception of his "fit for duty" evaluation; *see infra*) produces nothing by way of "clear and convincing evidence" of the falsity of which he complains. Indeed, at one point Plaintiff's briefing asserts that "[i]t would be pointless, and consume far too much of this response to detail every inaccuracy ..." (*Id.*, p. 5, 704 P.2d 1256), but in fact that is exactly what was required of Plaintiff. The absence of such details leaves him without clear and convincing evidence of provable falsehood, the cornerstone of his claims, regarding Defendants' statements within the Department.

> FN4. Plaintiff does refer at one point to a piece of "folklore" contained in statements by Defendants (a story he is alleged to have related about an incident where he let the air out of someone's tires in retaliation for taking a parking space) which he denies (Response, p. 7). Perhaps he intends this as proof of the falsity of the allegation, but his denial is rendered less than clear and convincing by the report of the independent investigator hired by SFD in the wake of Defendant Simmons's "Urgent Safety Complaint," which contains a finding that "Castello told this story more than once." Simmons Decl., Ex. K, p. 5.

Such claims of falsehood as he does make are directed at those portions of Defendants' speech which were broadcast as part of the KOMO News story in the spring of 2010. The Court has reviewed those statements and reproduces them here in their entirety:

Defendant Shea:

- "I honestly did not know what the hell was going on."

- "It felt to me like anything was possible and he would have the potential to harm anyone."

- "It's scary, what the hell is going to happen when he comes back?"

Defendant Simmons:

- "He had no boundaries and that's what I kept telling the fire chief."

- "And [Deputy Chief Duggins'] response to me was, 'Chief Dean doesn't want to antagonize the union during the mayor's election bid because he sees it as a thousand votes.' "

Simmons Decl., Ex. M.

Plaintiff's position that these statements are "provably false" rests on two premises: (1) that this speech represents "statements of fact" that he was unfit for duty (Response, p. 13) and (2) that his July 2009 "fit for duty" evaluation "rendered [all of the statements to the effect that Castello presented a risk of harm] provably false.[FN5] Response, p. 13.

> FN5. To the extent that Plaintiff argues that his "fit for duty" evaluation *retroactively* renders any statements of Defendants regarding risk of harm prior to July 2009 "provably false," the Court rejects this as clear and convincing evidence of this element of his claim. As previously stated, the

> disciplinary actions of the Department regarding Plaintiff and the 9-1-1 call made in response to his unauthorized appearance at the fire station lend weight to Defendants' concerns and undermine any attempt to characterize them as "provably false."

As a preliminary matter, the Court questions whether these statements-which never identified Plaintiff by name and were part of a broadcast which never named the Plaintiff-can form the basis for a claim of defamation. Plaintiff presented no legal authority for the proposition that the publication of speech which does not identify its subject can satisfy the legal definition of defamation.

***8** Turning to the merits of Plaintiff's proof, the Court finds that Defendant Shea's statement that "I honestly did not know what the hell was going on" was presented in the context of a comment in the news story that Chief Dean was not responsive to concerns that "trouble [was] brewing within the department" (Simmons Decl., Ex. M) and cannot reasonably be interpreted as speech concerning Plaintiff. Shea's observation that "[i]t felt to me like anything was possible and he would have the potential to harm anyone" was (1) a description of her state of mind at a prior time (before Plaintiff was adjudged fit for duty) and (2) is "pure opinion" which speaks to a feeling that Shea had and does not imply the existence of any defamatory facts. Similarly, her statement of present concern ("It's scary ...") also expresses nothing more than a fearful state of mind and an opinion that "he" represented a potential threat.

Defendant Simmons's quoted comments within the story cannot form the basis for Plaintiff's defamation claim. Her statement that "[h]e had no boundaries" is an expression of opinion (an opinion of a *prior* state of affairs-Simmons did not say "he *has* no boundaries"), and not one that implied the existence of defamatory facts (the facts which were implied-Simmons's prior experiences with Plaintiff-formed the basis for a disciplinary action against Plaintiff which was upheld on appeal). Her other comment regarding Deputy Chief Duggins's response about Chief Dean has nothing whatsoever to do with Plaintiff and clearly cannot be evidence of his defamation claims.

In addition to rejecting Plaintiff's argument that any of Defendants' statements in the KOMO News broadcast constituted "statements of fact" that Plaintiff was unfit for duty, the Court is also not persuaded that Plaintiff's July 2009 "fit for duty" evaluation renders Defendants' opinions regarding the risk of harm represent by Plaintiff provably false and thus actionable as defamation. The Court considers it highly significant that there is no mention in the psychiatrist's report which determined Plaintiff's fitness for duty of any of the details which formed the basis for the disciplinary actions against him. The report reflects that the following information was provided to the psychiatrist prior to making his assessment:

> Mr. Castello indicates that indeed over the past several years he has been involved in a variety of disputes with the department, which include what appear to be some whistle blower type complaints, and he also indicates he has been charged with harassment. *We did not go into high detail on these issues since my task is fairly circumscribed to that of performing a psychiatric evaluation. No personnel files were provided.*

Luhn Decl., Ex. 3, pp. 1-2 (emphasis supplied). Since the report did not address any of the incidents or concerns which lead to the disciplinary actions (including the referral to a "fit for duty" evaluation) of which Defendants' statements formed a part, it cannot be said as a matter of law that the evaluation renders any of those statements "provably false."

***9** The Court finds that Plaintiff has not established the probability of proving this element of his defamation claim by clear and convincing evidence.

(2) *Unprivileged communication*

Defendants present argument that their statements qualify for protection under a number of privileges. First is the absolute privilege accorded statements made in the context of a quasijudicial proceeding. This privilege applies to statements made during the investigative phase of such proceeding and in "situations in which authorities have the power to discipline." *Story v. Shelter Bay Co.*, 52 Wash.App. 334, 338-41, 760 P.2d 368 (1988) (applying the privilege to unsolicited complaints to governmental agencies). The Court finds that the SFD investigations and disciplinary actions, with their accompanying rights of appeal and judicial review, constitute "quasi-judicial proceedings."

Also entitled to privilege status are communications to a public officer who is authorized or privileged to act on the matter communicated on. *Gilman v. MacDonald*, 74 Wash.App. 733, 738, 875 P.2d 697 (1994). Defendants' statements to their superiors within the Department (and to the investigators delegated by those superiors) fall within this category.

Furthermore, the original Anti-SLAPP statute creates absolute immunity for

> A person who communicates a complaint or information to any branch or agency of federal, state or local government ... regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510. For all the reasons cited in the analysis of the Anti-SLAPP statutes *supra*, the Court finds that Defendants were persons communicating information to an agency of local government concerning a matter reasonably of concern to that agency.

Plaintiff argues, based upon a Massachusetts state court case, that this Anti-SLAPP statute applies only to parties petitioning the government "in their status as citizens," (*Kobrin v. Gastfriend*, 443 Mass. 327, 332, 821 N.E.2d 60 (2005)) and therefore its protections do not extend to governmental employees expressing concerns about their conditions of employment. This case is factually inapposite. The defendant in *Kobrin* was an investigator hired by a government agency whose actionable statements were made in that capacity, while here even Plaintiff concedes that Defendants here were acting in their own behalf. The case is legally inapposite: there is no showing (such as the one made in *Aronson*) that the Massachusetts statute mirrors RCW 4.24.510. In fact, it appears that the Massachusetts statute was more narrowly tailored to protect a "party's exercise of its right of petition under the constitution of the United States or of the commonwealth ..." M.G.L.A. 231 § 59H. The Court does not find Plaintiff's Massachusetts authority to be of even persuasive value.

Plaintiff makes no arguments concerning the applicability of the other forms of privilege asserted by Defendants, and the Court finds that, in addition to the immunity provided by RCW 4.24.510, Defendants are protected by the privileges accorded statements made in quasi-judicial proceedings and to public officers authorized to act on the matter communicated on. These privileges only extend to the statements made to the officers and investigators of the SFD.

***10** Concerning the remainder of their statements, Defendants also invoke the conditional or qualified privilege which applies to statements between persons sharing a common interest and statements made on matters of public interest. *Corbally*, 94 Wash.App. at 742, 973 P.2d 1074; see also *Masserly v. Asamera Minerals, (U.S.) Inc.*, 55 Wash.App. 811, 817-18, 780 P.2d 1327 (1989). The Court finds that the "common interest" privilege applies to Defendants to the extent that any of their interdepartmental communications were received by co-workers who shared their interest in workplace safety and the reputation of their department. And, having already found Defendants' statements (both within the Department and to KOMO News) to touch on "matters of public interest," the Court finds their statements broadcast on the local news to be entitled to a privileged status as well.

Plaintiff does raise the defense of "abuse of privilege," arguing that Defendants are not entitled to claim privilege if it can be shown that it was abused. However, as the case Plaintiff cites (*Bender v. City of Seattle*, 99 Wash.2d 582, 664 P.2d 492 (1983)) makes clear, abuse of privilege only applies to a *qualified* privilege (*Id.* at 600, 664 P.2d 492), leaving Defendants' arguments of absolute immunity for their departmental statements uncontested.

In any event, having raised the issue of abuse of privilege concerning conditional immunity and acknowledged that his proof of abuse must meet a heightened "clear and convincing" standard, (*Id.* at 601, 664 P.2d 492). Plaintiff then abandons his proof with the observation that "we are not yet at that point." Response, p. 14. On the contrary, this case is precisely at that juncture where it is mandatory for Plaintiff to come forward with clear and convincing evidence of every element of his claim. Instead, Plaintiff rests on the citation of an inapposite case [FN6] and on conclusory labels such as "false statements," and "allegations of provably false misconduct and/or malicious expressions of opinion." Response, p. 14. This is no substitute for the proof which the Anti-SLAPP statute demands. The Court finds that Plaintiff has failed to establish by clear and convincing evidence the probability of proving that Defendants' communications were unprivileged.

FN6. *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wash.App. 147, 225 P.3d 339 (2010) concerned (1) the dissemination of dmittedly false information which (2) lost its claim to privilege when it was communicated to numerous individuals outside "the agency or organization" (*Id.* at 167, 225 P.3d 339), elements which have not been established in this case.

(3) *Fault*

If Plaintiff were a private party suing for defamation, the degree of fault he would be required to establish is that of negligence; if Plaintiff is a public figure or official, the proof of fault requires evidence of actual malice. *Corbally*, 94 Wn. App., at 741, 973 P.2d 1074. Plaintiff appears to maintain that he is a private individual for purposes of this lawsuit; the case law indicates otherwise. "[Plaintiff's] conduct was that of a public official because it involved the manner in which he performed his [ ] duties pursuant to a public contract." *Id.* At oral argument, Plaintiff cited *Corey v. Pierce County*, a defamation case brought by a county prosecuting attorney against her employer; the Washington Court of Appeals held in that case that "as a public figure, Corey must prove that the Defendant made the defamatory statements with actual malice." 154 Wash.App. at 762, 225 P.3d 367.

***11** As a paramedic/firefighter under public contract to the City of Seattle, Plaintiff is in an identical situation to the teacher in *Corbally* and the prosecutor in *Corey*. The Court finds that he is a public official for purposes of his defamation claim and thus required to present clear and convincing evidence of actual malice on the part of Defendants. It goes without saying that, having characterized himself as a private person in this litigation, Plaintiff presented no evidence of actual malice by Defendants. Indeed, his proof of negligence is similarly non-existent-his responsive pleadings merely observe that "negligence is established by a preponderance of the evidence." Response, p. 12 (citation omitted).

The Court finds that Plaintiff has failed to present clear and convincing evidence of the probability of proving the fault element of his defamation claims.

(4) *Damages*

Plaintiff's pleading does not even address the issue of damages, much less provide clear and convincing evidence of the probability of proving them. There are allegations of damages in his complaint (§ XV, ¶¶ 15.1-15.3), but the Anti-SLAPP statute is unequivocal in its requirement that Plaintiff bears the burden of establishing his claim by clear and convincing evidence once Defendants have met their burden on a special motion to strike. The Court finds that Plaintiff has failed to provide the requisite proof of damages.

To summarize: the Court finds, pursuant to RCW 4.24.525, that Defendants have established by a preponderance of the evidence that the statements at issue in this litigation were made in the course of actions involving public participation and petition. The Court further finds that Plaintiff has not satisfied his burden of proving, by clear and convincing evidence, the likelihood of prevailing on his defamation claims. On that basis, the Court grants Defendants' special motion to strike Plaintiff's defamation claims.

Attorneys' fees and penalties

RCW 4.25.525(6) provides that "[t]he court *shall* award to a moving party who prevails, in part or in whole, on a special motion to strike" (1) the costs of litigation and any reasonable attorneys' fees incurred in connection with the motion and (2) $10,000 above and beyond fees and costs. (Emphasis supplied.)

The Court orders counsel for Defendants to submit, within 7 days of this order, requests for the costs and reasonable attorneys' fees associated with this motion, accompanied by the appropriate supporting declarations and exhibits. Plaintiff will have 7 days thereafter to submit any objections to those requests.

The Court further orders that Plaintiff shall pay Defendants Shea and Simmons $10,000 each as required by the **Anti-SLAPP** statute. The Court is satisfied that the language of the statute (which calls for the court to award "a moving party" the statutory damages) requires the assessment of the **penalty** as to each defendant. The Court also notes that this assessment is supported by a similar award ordered by Judge Zilly of this district in *Eklund v. City of Seattle*, No. C06-181TSZ, 2009 WL 1884402, at *3 (W.D.Wash. June 30, 2009).

Motion to strike

***12** Plaintiff moves in his response to "strike or disregard all incompetent evidence submitted with defendants' motion," followed by a list of exhibits described as "unsworn statements" and "non-binding findings." Response, pp. 7-8. This request is unsupported by any statutory or legal authority and, without knowing the legal basis upon which Plaintiff makes his request, the Court denies it.

FRCP 12(c)

The Court analyzes an FRCP 12(c) motion for judgment on the pleadings utilizing the same standard as a motion to dismiss for failure to state a claim upon which relief can be granted (FRCP 12(b)(6)). *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir.1988). A Plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Defendants seek dismissal of Plaintiff's claims of harassment, defamation by implication and false light on the grounds that these causes of actions are not recognized in the state of Washington. The attack on Plaintiff's harassment claim is well-founded-the Complaint cites no statute, regulation or other legal authority for a cause of action for "harassment." Washington law recognizes no tort of general harassment, only a tort of "malicious harassment" (RCW 9A.36.080-.083) which is related to felony hate crimes and which requires allegations of bodily injury (or the threat thereof) that are totally missing from this Complaint. Plaintiff's harassment cause of action fails to state a claim for which relief can be granted.[FN7] Since the claim is a non-existent tort in the state of Washington and amendment of the complaint would thus be futile, the Court dismisses the civil harassment claim with prejudice.

> FN7. The Court also notes that Plaintiff made no responsive argument in his briefing or at the hearing concerning this aspect of Defendants' motion.

Defendants' claims that the torts of defamation by implication and false light are nonexistent in Washington (Motion, pp. 19-20) do not appear to be well-founded. In fact, Plaintiff produced at oral argument a recent Washington Court of Appeals decision which clearly recognizes the existence of both of these torts. *Corey v. Pierce County*, 154 Wash.App. 752, 761-62, 225 P.3d 367 (2010). This represents something of a hollow victory for Plaintiff.

Because of the potential chilling effect on the exercise of First Amendment rights of free speech, allegations of defamation require a heightened level of specificity-a pleading of defamation will not be found adequate absent "the precise statements alleged to be defamatory, who made them and when." *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir.2002). This Court has previously dismissed similar claims because a Plaintiff failed to identify the specific statements alleged to be false. *Harris v. City of Seattle*, 315 F.Supp.2d 1112, 1123 (W.D.Wash.2004).

Plaintiffs' claims fail to adequately specify the allegedly defamatory statements, who made them and when. Rather than identify what exactly was said, by whom and when, the Complaint rests on assertions of "false complaints" (Complaint ¶ 4.7); "numerous, repeated and false allegations" (*Id.*, ¶ 10) and claims that Defendants' "statements to reporters, investigators, and others" were "false." *Id.*, ¶ 11.2. There is not a single specific statement which Plaintiff cites as false to be found anywhere in the document. These inadequacies affect not only Plaintiff's pleading of simple defamation, but his related claims of defamation by implication and false light.

***13** In the interests of a thorough analysis of Defendants' motion and the legal issues it presents, the Court has examined Plaintiff's defamation claims through the lens of FRCP 12(c). Plaintiff requests leave of the Court to amend his Complaint "to incorporate additional, more specific statements set forth in this response." Response, p. 2. Were there no other motion than a 12(c) motion for judgment on the pleadings, the Court would customarily permit the Plaintiff an opportunity to amend absent any proof that such amendment would be futile.

In this case, however, the Court finds that the FRCP 12(c) motion to dismiss is superseded by the dictates of the Anti-SLAPP statute's special motion to strike. In effect, granting Defendants' motion to strike the defamation claims under RCW 4.24.525 has rendered futile any further amendment of Plaintiff's complaint in this regard.

Conclusion

Pursuant to RCW 4.24.525, Defendants have es-

tablished by a preponderance of the evidence that the statements at issue in this litigation were made in the course of actions involving public participation and petition. Plaintiff has not satisfied his burden of proving, by clear and convincing evidence, the likelihood of prevailing on his defamation claims. On that basis, the Court GRANTS Defendants' special motion to strike Plaintiff's defamation claims, and orders that Plaintiff pay Defendants' costs and reasonable attorneys' fees and $10,000 each to Defendants Shea and Simmons.

Defendants' FRCP 12(c) motion for judgment on the pleadings is GRANTED as to Plaintiff's cause of action for civil harassment, which is DISMISSED with prejudice. Plaintiff's motion to dismiss his claim for wrongful interference with a business expectancy is GRANTED. The FRCP 12(c) motion for judgment on the pleadings concerning the defamation claims is also granted; based on the granting of Defendants' motion to strike, the Court finds that further amendment of the defamation claims in the Complaint would be futile.

The clerk is ordered to provide copies of this order to all counsel.

W.D.Wash.,2010.
Castello v. City of Seattle
Slip Copy, 2010 WL 4857022 (W.D.Wash.), 39 Media L. Rep. 1591

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Slip Copy, 2009 WL 1884402 (W.D.Wash.)
(Cite as: 2009 WL 1884402 (W.D.Wash.))

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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington, at Seattle.
Bruce EKLUND, an individual, Plaintiff,
v.
The CITY OF SEATTLE, et al., Defendants.

No. C06-1815Z.
June 30, 2009.

Mark K. Davis, Duncan Calvert Turner, Badgley Mullins Law Group, Cleveland Stockmeyer, Seattle, WA, for Plaintiff.

Erin L. Overbey, Katrina Robertson Kelly, Seattle City Attorney's Office, Seattle, WA, for Defendants.

ORDER

THOMAS S. ZILLY, District Judge.

***1** THIS MATTER comes before the Court on Defendants Mark Parcher, Gayle Tajima, and Yolande Williams' Motion for Statutory Penalties and Attorney Fees under Washington's Anti-SLAPP Statute, RCW 4.24.510, docket no. 315. Having considered the pleadings and declarations filed in support of and in opposition to the motion, the Court GRANTS Defendants' Motion, docket no. 315, for the reasons outlined in this Order.

Washington's Anti-SLAPP statute provides, in pertinent part:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government ... is immune from civil liability based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

RCW 4.24.510.

Defendants Parcher, Tajima and Williams moved prior to trial for dismissal of Eklund's wrongful termination claim and for statutory penalties and attorneys' fees based on Washington's Anti-SLAPP statute. Defs.' Mot. Sum. J., docket no. 137, at 7-10. They argued that Eklund's wrongful termination claim against them was based on their involvement in the investigation and reporting of the ticket-fixing scheme that ultimately led to Eklund's termination. Specifically, Parcher prepared a written summary of the findings of the ticket-fixing investigation and recommended discipline for five Seattle Municipal Court ("SMC") employees, including Eklund; Parcher, Tajima and Williams, as members of the Executive Leadership Team ("ELT"), reviewed and discussed the findings, and then concluded that Eklund be terminated; and Williams then forwarded the joint recommendation to Judge Bonner. On September 12, 2008, the Court entered an Order concluding that:

> ... Defendants are not precluded from seeking relief under the Anti-SLAPP Law, RCW 4.24.510, in the event they prevail at trial. This statute applies to governmental entities. *See Gontmakher v. City of Bellevue*, 120 Wash.App. 365, 85 P.3d 926 (2004). Governmental individuals and the City of Seattle may seek relief under this statute. Plaintiff's contention that RCW 4.24.510 is inapplicable because it protects communication to governmental agencies, rather than within governmental agencies, is without merit.

Order, docket no. 179, at 2. Eklund has thus been on notice since September 2008 that he would be at risk for attorneys' fees and statutory damages under Washington's Anti-SLAPP statute in the event Parcher, Tajima and Williams prevailed at trial on Eklund's wrongful termination claim.

On March 19, 2006, at the close of the trial, the Court dismissed Defendants Parcher, Tajima and Williams on Eklund's first claim for wrongful termination in violation of public policy as a matter of law. Minutes, docket no. 296. [FN1] As a result of their pre-

vailing party status with regard to Eklund's wrongful termination claim, Parcher, Tajima and Williams now move for attorneys' fees and statutory damages under Washington's Anti-SLAPP statute.

> FN1. On March 23, 2009, the jury returned a verdict in favor of Defendants Parcher, Tajima and Williams as to Eklund's 42 U.S.C. § 1983 claim for violation of Eklund's procedural due process rights. Jury Verdict, docket no. 301. Defendants Parcher, Tajima and Williams did not argue in their summary judgment motion, and they do not now argue in their fees motion, that the AntiSLAPP statute immunizes them from liability for Eklund's 42 U.S.C. § 1983 claim. Defs.' Mot. Sum. J., at 8 n. 5.

***2** Eklund argues that Washington's Anti-SLAPP statute should not apply to intra-agency communications. The Court already ruled that governmental individuals and entities may seek relief under the statute and that the statute applies to protect communications *within* as well as *to* governmental agencies. Washington courts have expressly rejected a limited definition of the word "person" under RCW 4.24.510 that would have only applied the Anti-SLAPP statute to protect "citizens" or "non-governmental entities." *See Gontmakher*, 120 Wash.App. at 371, 374, 85 P.3d 926 (declining to follow dicta to the contrary in *Skimming v. Boxer*, 119 Wash.App. 748, 82 P.3d 707 (2004)). In *Gontmakher*, a Bellevue city employee reported clear-cutting on private land to the State Department of Natural Resources ("DNR"), and the private landowners sued the City of Bellevue based on the employee's communication with the DNR. The *Gontmakher* court stated that "there is a strong public policy rationale for including governmental entities in the definition of 'person,' " concluding that "reports by governmental agencies are common and important to proper agency functioning." *Id.* at 372, 85 P.3d 926; *see also* RCW 4.24.500 (statutory purpose to encourage information gathering that will lead to "the efficient operation of government").

This information-gathering rationale applies with equal force to situations where a government actor is reporting to his or her own agency, especially because public employees are often in the best position to report on matters of reasonable concern to their own agencies. Eklund argues that applying the statute to intra-agency communications discourages public participation. As pointed out by Defendants, Eklund was free to sue the City for wrongful termination, and Judge Bonner as the actual decision-maker; however, when Eklund targeted the people who reported the ticket-fixing, he strayed into territory protected by the Anti-SLAPP statute. Defendants Parcher, Tajima and Williams have submitted declarations in connection with their reply brief explaining how it was discouraging to them as public employees to be sued for reporting misconduct. Parcher Decl., docket no. 359, ¶¶ 2-3; Tajima Decl., docket no. 360, ¶ 2; Williams Decl., docket no. 361, ¶ 2. Applying the Anti-SLAPP statute to these public sector employees upholds the purpose of the statute to encourage communications within public agencies on matters of reasonable concern to them, and will not discourage wrongful termination claims against employers.

Eklund argues that his wrongful termination claim was not based on the intra-agency communications of Parcher, Tajima and Williams regarding Eklund's ticket-fixing. The Court disagrees. The involvement of these defendants in Eklund's termination was the supplying of information and communicating about Eklund's involvement in ticket-fixing to various persons within the SMC. *See, e.g.*, Trial Ex. A-71 (Parcher's June 10, 2004 memo to Williams); Trial Ex. A-100 (Parcher's draft of ELT's disciplinary recommendation as to Eklund); Trial Exs. A-102 and A-119 (Williams' memos of June 16, 2004 and June 22, 2004); *see also* Tajima Decl., docket no. 139, ¶ 15 (discussing her involvement on ELT).

***3** Eklund argues that the statute should not apply to Defendants Parcher, Tajima and Williams because they have not personally incurred any attorneys' fees. This is another rendition of Eklund's argument that the Anti-SLAPP statute should not apply to government officials and intra-agency communications, which the Court rejects. The City of Seattle has had to unnecessarily expend legal resources as a result of Eklund's wrongful termination claim against Parcher, Tajima and Williams. Clearly, the City of Seattle will be reimbursed for any attorneys' fees awarded under the Anti-SLAPP statute to Parcher, Williams and Tajima, and these individual defendants will not receive a personal windfall.

Defendants Parcher, Tajima and Williams move for $55,323.75 in attorneys' fees, representing

$28,525.00 charged by Assistant City Attorney Erin Overbey (81.5 hours multiplied by the hourly rate of $350 per hour) and $26,798.75 charged by Assistant City Attorney Amy Lowen (97.45 hours multiplied by the hourly rate of $275 per hour). Overbey Decl., docket no. 316, ¶ 3; Lowen Decl., docket no. 317, ¶ 3. The rates are based on prevailing local rates for attorneys with similar experience. Overbey Decl. ¶ 2; Lowen Decl. ¶ 2. These are reasonable and legitimate rates. *United States v. Big D Enters., Inc.*, 184 F.3d 924, 936 (8th Cir.1999) (rates in local legal community serve as benchmark for rates for government's attorney); *United States v. City of Jackson*, 359 F.3d 727, 733 (5th Cir.2004) (upholding payment for public sector attorneys at market rates). The attorneys' fee requests represent just over ten percent of the fees incurred by the defense in this case. Defendants have not claimed fees for time spent in defending Judge Bonner or the City of Seattle, for time spent on discovery and research relating to all Defendants, or for time spent by Assistant City Attorney Katrina Kelly. Overbey Decl. ¶ 3; Lowen Decl. ¶ 3. The request for $55,323.75 in attorneys' fees is reasonable.

In addition to attorneys' fees, Defendants Parcher, Tajima and Williams move for $10,000 each in statutory damages, which are mandatory under the AntiSLAPP statute ("... A person prevailing upon the defense ... *shall* receive statutory damages of ten thousand dollars....") unless "the complaint or information was communicated in bad faith." RCW 4.24.510. Eklund fails to address Defendants' request for statutory damages and makes no argument that the communications were made in bad faith. The Court finds that the communications were made in good faith. Accordingly, the Court awards $10,000 each in statutory damages to Parcher, Tajima and Williams.

In conclusion, Defendants Parcher, Tajima and Williams are entitled to attorneys' fees and statutory damages under the Anti-SLAPP statute for having to defend against the wrongful termination claim, which Eklund alleged against them as a result of their communications to the SMC regarding Eklund's ticket-fixing. The Court GRANTS Defendants Mark Parcher, Gayle Tajima, and Yolande Williams' Motion for Statutory Penalties and Attorney Fees under Washington's Anti-SLAPP Statute, RCW 4.24.510, docket no. 315, and awards Defendants Parcher, Tajima and Williams attorneys' fees in the amount of $55,323.75 and statutory damages in the amount of $10,000 per person, for a total award of $85,323.75.

***4** IT IS SO ORDERED.

W.D.Wash.,2009.
Eklund v. City of Seattle
Slip Copy, 2009 WL 1884402 (W.D.Wash.)

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Slip Copy, 2011 WL 3158416 (W.D.Wash.)
(Cite as: 2011 WL 3158416 (W.D.Wash.))

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington, at Seattle.
PHOENIX TRADING, INC., et al., Plaintiffs,
v.
Steven L. KAYSER, et al., Defendants.

No. C10–0920JLR.
July 25, 2011.

Brooks F. Cooper, Portland, OR, Jerome F. Eline, III, Law Office of Jerome F. Eline III, Vancouver, WA, for Plaintiffs.

Francis S. Floyd, Nicholas L. Jenkins, Floyd Pflueger & Ringer P.S., Seattle, WA, for Defendants.

ORDER

JAMES L. ROBART, District Judge.

I. INTRODUCTION

***1** Before the court are Plaintiffs Phoenix Trading, Inc., dba Amercare Products, Inc. ("Amercare"), and Wendy Hemming's (collectively "Amercare Plaintiffs") motion for partial summary judgment (Dkt.# 29); Defendants Steven L. Kayser, Loops LLC ("Loops"), and Loops Flexbrush LLC's (collectively "Loops Defendants") special motion to strike under Washington's Anti–SLAPP ("strategic lawsuits against public participation") statute, RCW ch. 4.24 (Dkt.# 32); and Loops Defendants cross-motion for partial summary judgment (Dkt.# 48). Having considered the submissions of the parties, the record, and the governing law, and having heard the oral argument of counsel on July 21, 2011, the court GRANTS Loops Defendants' special motion to strike the Amercare Plaintiffs' defamation claims (Dkt.# 32), and DENIES the Amercare Plaintiffs' motion for partial summary judgment (Dkt.# 29) and Loops Defendants' cross-motion for partial summary judgment (Dkt.# 48) as MOOT.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Background Related to the Patent Litigation

The parties have more than one lawsuit presently pending in the Western District of Washington. On July 11, 2008, Loops Defendants sued the Amercare Plaintiffs and others for patent infringement, violations of the Lanham Act, unfair competition under Washington common law, violations of the Washington Consumer Protection Act, and fraud. *See Loops LLC, et al. v. Phoenix Trading, Inc., et al.*, No. C08–1064RSM (W.D.Wash.) ("the Patent Litigation"). [FN1] In short, Loops Defendants alleged in the Patent Litigation that the Amercare Plaintiffs fraudulently obtained a sample of the Loops Flexbrush, sent the sample to China to be copied, and sold the infringing copies at a low price, outbidding Loops on a supply contract. The facts of the Patent Litigation overlap with the present suit, and so the court provides the factual background arising from the Patent Litigation.

> FN1. In the Patent Litigation, the plaintiffs were Loops LLC and Loops Flexbrush LLC. *Loops LLC v. Phoenix Trading, Inc.*, No. C08–1064RSM, 2011 WL 915785, at *1 (W.D.Wash. Mar.15, 2011). Mr. Kayser was not a party to the Patent Litigation. The defendants in the Patent Litigation were Amercare, Wendy and Jeffery Hemming, and H & L Industrial. Mr. Hemming (who is Ms. Hemming's husband and a minority shareholder and employee of Amercare), as well as H & L Industrial (which is Amercare's manufacturer representative in China) are not parties to this lawsuit. The court recognizes this slight disparity with regard to the parties in each of these related lawsuits, and also recognizes that the litigation position of the parties is reversed in this lawsuit. Nevertheless, for ease of discussion, the court consistently refers to "Loops Defendants" throughout even though they were plaintiffs in the Patent Litigation. The court also refers to "Amercare Plaintiffs" throughout even though they were defendants in the Patent Litigation.

Defendant Loops LLC and its president, Defendant Steven L. Kayser, design and market oral hygiene products principally used by jail inmates. *See Loops LLC v. Phoenix Trading, Inc.*, No. C08–1064RSM, 2010 WL 3041866, at *1

(W.D.Wash. July 30, 2010). In August 2004, Loops Defendants submitted a patent application to the United States Patent and Trademark Office ("PTO") for a flexible handle toothbrush, known as the "Loops Flexbrush." *Id.* at *3. In early 2006, Loops Defendants won a New York City Department of Corrections ("DOC") competitive bid for the Flexbrush. DOC purchased Flexbrushes from Loops between August 2006 and June 2007. *See id.* at *1. Loops's patent for the Flexbrush, number 7,334,286 B2 (" '286 patent"), did not issue until February 26, 2008. *Id.* at *3.

In January 2006, Amercare President Wendy Hemming contacted Mr. Kayser asking for Loops's dental floss price quotes and samples of all of Loops's products. *Id.* Mr. Kayser sent samples of Loops's products to Ms. Hemming, including the Loops Flexbrush. *Id.* The Flexbrush samples were wrapped in packaging stating "patent pending." *Id.* at *3. Mr. Kayser agreed to let Ms. Hemming distribute his dental floss, *see id.* at *1, but repeatedly refused to allow Ms. Hemming to distribute his Flexbrush. *Id.* at *1–2. Eventually, Ms. Hemming sent Flexbrush samples to China for copying. *Id.* at *2. Ms. Hemming called the soft handle toothbrush that she manufactured in China "the Amercare Soft Handle." *Id.* The Amercare Soft Handle is an identical copy of the Flexbrush in every respect, except one: where the words "LoopSTM FlexbrushTM" are embossed in raised lettering on the back side of the head of the Loops Flexbrush (opposite the bristles), the name "Amercare" is embossed on the Amercare toothbrush in the same place and in the same font. *Id.* Using the Amercare Soft Handle, as well as her knowledge of Loops's pricing, Ms. Hemming and Amercare successfully replaced Mr. Kayser and Loops as the DOC toothbrush supplier. *Id.*

***2** As noted above, on July 11, 2008, Loops Defendants filed suit against Amercare Plaintiffs. In his July 30, 2010 ruling on Amercare's motion for partial summary judgment, United States District Court Judge Ricardo S. Martinez ruled that Loops Defendants were not entitled to infringement damages or a reasonable royalty with regard to their patent infringement claim. *Id.* at *5–6. Judge Martinez also dismissed Loops's Lanham Act claim, *id.* at *6, its unfair competition under common law claim, *id.* at *7, its fraud claim, *id.* at *7–9, and its Consumer Protection Act claim, *id.* at *9–11.

On March 15, 2011, however, Judge Martinez reversed course based on newly discovered evidence presented by Loops Defendants indicating that Amercare Plaintiffs had suppressed material evidence in the Patent Litigation, had filed false declarations, and had been granted summary judgment based on those false declarations and improperly suppressed evidence. *See Loops LLC v. Phoenix Trading, Inc.*, No. C08–1064RSM, 2011 WL 915785 (W.D.Wash. Mar.15, 2011). Specifically, Judge Martinez found that Ms. Hemming "lied while under oath," and that Amercare Plaintiffs violated the court's discovery order and "may have submitted many numerous false declarations in the lawsuit." *Id.* at *9. Further, Judge Martinez had already found that Amercare Plaintiffs had "lost, destroyed, or withheld material documents, including invoices, purchase orders and emails between Amercare and its Chinese or Taiwanese contracts that were relevant to liability and damages." *Id.* Judge Martinez stated that he was "tremendously concerned with what appears to be a prolonged pattern of misrepresentation and deceit before this Court." *Id.* Judge Martinez concluded:

> [T]he new evidence, combined with the pattern of deception and misrepresentation on the part of [Amercare Plaintiffs] throughout this litigation, indicates that the Court cannot be certain that any order it enters in this case will be supported by the benefit of a full, unadulterated record. Neither [Loops Defendants], nor the Court, will ever "have any comfort that it knows the truth, and that it can properly prepare this case for trial .... The integrity of this Court and our judicial system ... has been undermined ... [by Amercare Plaintiffs'] conduct in this case." *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1379 (Fed.Cir.2004).

Id. at *10. Accordingly, Judge Martinez granted Loops Defendants' Federal Rule of Civil Procedure 37 motion, struck Amercare Plaintiffs' pleadings in the Patent Litigation, including their answer, and entered default judgment against Amercare Plaintiffs in the Patent Litigation. *Id.*

B. Background Related to the Present Lawsuit

On February 18, 2010, in the midst of the Patent Litigation, Amercare Plaintiffs filed the present defamation suit in Whatcom County Superior Court for the State of Washington against Loops Defendants alleging claims for defamation per se and defamation.

(*See* Notice (Dkt.# 1).) In May 2010, Amercare Plaintiffs amended the complaint to add a claim for false or fraudulent registration of trademarks under 15 U.S.C. § 1120. Loops Defendants removed the lawsuit to the Western District of Washington on June 4, 2010. (*Id.*)

***3** The statements at issue were all made in the context of the dispute between the parties in the Patent Litigation described above. First, Amercare Plaintiffs complain about various statements that Mr. Kayser or his counsel made in three letters: (1) an August 20, 2007, letter to Mayor Michael Bloomberg of New York City, and other senior officials within various departments of New York City (Klingbeil Decl. (Dkt.# 31) Ex. E at 1–5); (2) an August 22, 2007 letter from Loops Defendants' counsel to Mario J. Crescenzo, Jr., Agency Chief Contracting Officer and Assistant Commissioner of New York City, and copied to Laurie Kaye, Deputy General Counsel New York City Comptroller, Office of Contract Administration; and (3) a September 12, 2007 letter from Loops Defendants' counsel to Ms. Kaye. (*See* SJ Mot. at 3–4; Resp. to Special Mot. (Dkt.# 42) at 7–8.) In these letters, Mr. Kayser or his counsel assert that Amercare Plaintiffs removed the registered trademark from Flexbrush toothbrushes, repackaged the toothbrushes as Amercare toothbrushes, and submitted the altered toothbrushes to the DOC as a part of the competitive bid process. (Klingbeil Decl. Ex. E at 1–5.) Subsequently, in a July 10, 2008 declaration that he filed in the Patent Litigation, Mr. Kayser admitted that he had erred when he previously stated that Amercare had removed trademarks from Loops Flexbrush toothbrushes. (*Id.*, Ex. F ¶ 119.) Rather, he stated that the sample toothbrushes that Amercare Plaintiffs had submitted to the DOC were "counterfeit Amercare toothbrushes which infringed upon [Loops's] patents and trademarks." (*Id.*)

Second, Amercare Plaintiffs claim that on February 18, 2008, Mr. Kayser again wrote to Mayor Bloomberg, Stu Loesser, the Mayor's press secretary, Daniel Castleman, Chief of the Investigative Division at the Manhattan District Attorney's office, and other City officials, along with Alan Feuer, Dianne Cardwell and Walt Bogdanich, reporters for the New York Times. (*Id.* Ex. E at 18–23.) In this letter, Mr. Kayser states that Amercare toothbrushes are laden with excessive amounts of lead and heavy metals. (*Id.*) In addition, Mr. Kayser states in his July 10, 2008 Patent Litigation declaration that he believes that Amercare's infringing products contain excessive amounts of lead and other heavy metals harmful to consumers, that Amercare's toothbrushes had not been approved by the Food and Drug Administration ("FDA"), and that without such approval the toothbrushes posed a danger to the public. (*Id.* Ex. F ¶¶ 211, 227, 229, 238, 313.) Loops Defendants distributed Mr. Kayser's July 10, 2008 Patent Litigation declaration to third parties not involved in the Patent Litigation, including an Assistant U.S. Attorney, the U.S. Customs Agency in Seattle, and the New York Times. (*Id.* Ex. E at 44 & Ex. J at 158–62.) In addition, Loops Defendants made similar statements in the August 20, 2007, August 22, 2007, and February 18, 2008 letters referenced above. (*Id.* Ex. E at 4, 7, 22.)

***4** Third, Amercare Plaintiffs assert that Loops Defendants repeatedly stated that the Amercare toothbrush infringed the Loops Defendants' patent prior to February 26, 2008 even though the Flexbrush patent did not issue until that date. (SJ Mot. at 8–9; Resp. to Special Mot. at 11–12.) Amercare Plaintiffs point to statements in Mr. Kayser's February 18, 2008 letter asserting that Amercare was engaged in "[c]ounterfeiting of our patented products." (Klingbeil Decl. Ex. E at 22.) In addition, in an April 21, 2008 letter to various New York City officials, Mr. Kayser implied that "Amercare would be providing counterfeit toothbrushes that infringed on [Loops'] trademark and patents" to the DOC on September 27, 2007. (*Id.* at 26.) Similarly, in his July 10, 2008, Patent Litigation declaration (which was distributed to third parties as noted above), Mr. Kayser claimed that Amercare "intentionally and willfully infringed on ... Loops Flexbrush patents" on April 24, 2007, July 10, 2007, and September 27, 2007, which are all dates prior to the February 26, 2008 issuance of the '286 patent. (*Id.* Ex. F ¶¶ 91–92.)

Finally, Amercare Plaintiffs allege that Loops Defendants falsely stated that Amercare Plaintiffs were "counterfeiting" Loops' trademarks. (SJ Mot. at 9–12; Resp. to Special Mot. at 12–14.) Loops Defendants made these statements in various letters to New York City officials, the International Anti–Counterfeiting Coalition ("IAC") in Washington, D.C., and reporters at the New York Times, Harper's Bazaar Magazine, and the New York Sun. (*Id.* Ex. E at 3, 6, 8–9, 13, 16, 18–22, 25–28, 31–38, 40–41, 43–49.) In addition, Mr. Kayser made similar state-

ments in his July 10, 2008 Patent Litigation declaration, which was distributed beyond the Patent Litigation as described above.

The parties have exchanged no discovery in the present lawsuit. (Reply to Special Mot. (Dkt.# 52) at 2.) Amercare Plaintiffs seek partial summary judgment that the foregoing statements were "provably false," that Loops Defendants were not privileged to make any of the referenced statements, that the statements were made by Loops Defendants with malice, and that each of the statements constitutes defamation per se. (SJ Mot. at 1–2.) On the same day, Loops Defendants brought a special motion to strike Amercare Plaintiffs' defamation claims under Washington's Anti–SLAPP statute, RCW ch. 4.24. (Special Mot. (Dkt.# 32).) Loops Defendants have also cross-moved for partial summary judgment dismissing Amercare Plaintiffs' defamation claims. (*See* SJ Resp. (Dkt. # 48).)

III. ANALYSIS

Prior to recent amendments, the Washington Anti–SLAPP law simply provided, in pertinent part, that "[a] person who communicates a complaint or information to any branch or agency of federal, state, or local government ... is immune from civil liability for claims based upon the communication to the agency ... regarding any matter reasonably of concern to that agency...." RCW 4.24.510. The purpose of the statute was to encourage the reporting of potential wrongdoing to government entities by protecting parties from the threat of retaliatory lawsuits. *See* ***Aronson v. Dog Eat Dog Films, Inc.*, 738 F.Supp. 2d 1104, 1109 (W.D.Wash. 2010)**. If a defendant's statements are found to fall within this portion of Washington's Anti–SLAPP statute, then the defendant is immune from civil liability. *See* *Akmal v. Cingular Wireless*, No. C06–748JLR, 2007 WL 1725557, at *5 (W.D.Wash. June 8, 2007), *aff'd*, 300 F. App'x 463 (9th Cir.2008).

***5** The 2010 amendments to Washington's Anti–SLAPP statute expanded the type of conduct protected by the Act, and created a procedural device to quickly halt any litigation found to be targeted at persons lawfully communicating on matters of public or governmental concern. *See* *Castello v. City of Seattle*, No. C10–1456MJP, 2010 WL 4857022, at *3 (W.D.Wash. Nov.22, 2010). The newly enacted provisions provide that a party may bring a special motion to strike any claim that is based on an action involving public participation and petition. RCW 4.24.525(4)(a). An action involving public participation and petition is defined as "[a]ny oral statement made, or written statement or other document submitted" (1) "in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law," (2) "in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law," (3) "that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law," or (4) "in a place open to the public or a public forum in connection with an issue of public concern." RCW 4.24.525(2)(a)-(d). In addition, the statute contains a catch-all provision that includes "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e). There is nothing in the language of RCW 4.24.525 to indicate that it supersedes RCW 4.24.510. The two provisions are complimentary. *Castello*, 2010 WL 4857022, at *4 n. 2.

A party bringing a special motion to strike a claim has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. RCW 4.24.525(4)(b). If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. *Id.* If the responding party meets this burden, then the court shall deny the special motion. *Id.* In making this determination, the court considers pleadings and supporting and opposing affidavits stating the facts upon which liability is based. RCW 4.24.525(4)(c).

In addition, a moving party who prevails on a special motion to strike under the Anti–SLAPP statute is entitled to an award of attorney's fees and costs incurred in connection with the motion and an additional amount of ten thousand dollars. RCW 4.25.525(6)(a) (i) & (ii). Additional sanctions may be awarded to deter repetitive conduct. RCW 4.24.525(6)(iii). Attorney's fees, costs, and other sanctions may be imposed against the moving party if

the court finds that the special motion is frivolous or is brought solely to cause unnecessary delay. RCW 4.24.525(6)(b).

*6 The Act is to be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from abusive use of the courts. *Aronson*, 738 F.Supp. 2d at 1110. Washington's Anti–SLAPP Act is closely modeled on the California Anti–SLAPP Act, and courts have applied California law as persuasive authority in interpreting Washington's Act. *See, e.g.*, *Castello*, 2010 WL 4857022, at *4; *Aronson*, 738 F.Supp.2d at 110. The court considers Loops Defendants' AntiSLAPP motion first because if granted, it will moot both summary judgment motions.

A. Application of Washington's Anti–SLAPP Provisions

In their responsive brief, Amercare Plaintiffs ignore the first issue the court must determine in assessing a special motion to strike (whether the claim is based on an action involving public participation and petition), and instead jump directly to the second issue (whether the plaintiff can establish by clear and convincing evidence a probability of prevailing on the claim). (*See* Resp. to Special Mot. at 1–2.) The only opposition to the applicability of the Anti–SLAPP statute offered by Amercare Plaintiffs is an assertion that the special motion is untimely. (*Id.* at 1.) The court, nevertheless, considers not only the timeliness of Loops Defendants' special motion, but also the applicability of the AntiSLAPP statute to Amercare's defamation claims.

1. Timeliness of the Special Motion

The 2010 amendments to Washington's Anti–SLAPP statute provide that a "special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper." RCW 4.24.525(5)(a). The operative complaint was filed on May 21, 2010 (Dkt.# 1), but Loops Defendants did not file their special motion to strike the defamation claims until February 25, 2011 (Dkt.# 32).

Although Loops Defendants filed their special motion to strike more than sixty days following service of the applicable complaint, the court finds that the motion is nevertheless timely. As noted above, the parties have exchanged no discovery in this action. Although Amercare Plaintiffs have filed a motion for summary judgment, it was filed on the same day as Loops Defendants' special motion to strike. (*Compare* Dkt. # 29 *with* Dkt. # 32.) Much of the briefing and evidentiary materials filed by the parties with respect to the special motion to strike and the cross-motions for summary judgment are overlapping and applicable to both motions. In addition, Amercare Plaintiffs have not asserted that they have suffered any prejudice as result of the filing of the special motion outside of the sixty-day time period. (Resp. to Special Mot. at 1.)

The statutory language describing the applicability of the 60–day period is permissive. The statute grants the court discretion to allow filing outside of the sixty-day period. *See* RCW 4.24.525(5)(a). Under the circumstances presented here, where the parties have engaged in no discovery, and Amercare Plaintiffs assert no prejudice, the court deems the filing of the special motion beyond the statutory sixty day period following service of the complaint to be timely without the imposition of any terms.

2. Applicability of RCW 4.24.510

*7 The court finds that Loops Defendants are immune from suit under RCW 4.24.510 for their statements to Mayor Bloomberg, other New York City officials, the United States Customs Agency, and an Assistant United States Attorney that (1) Amercare Plaintiffs removed the registered trademark from Flexbrush toothbrushes, repackaged Flexbrush toothbrushes as Amercare toothbrushes, and submitted the altered toothbrushes to the DOC as a part of the public contract competitive bidding process, (2) Amercare toothbrushes, manufactured in China, contain excessive amounts of lead or other heavy metals, and (3) Amercare toothbrushes infringed on Loops Defendants' patents or were counterfeit and violated Loops Defendants' trademarks. The transmittal of this type of information or these complaints to these government agencies is a communication regarding matters reasonably of concern to these government agencies. New York City was contracting with Amercare to provide toothbrushes to its inmate populations. If these toothbrushes were in violation of patents or trademarks, or were contaminated with excessive levels of harmful materials, then this is information that would be of concern to New York City. Likewise, because these items were being imported from China, this information would also be reasonably of concern to the United States Customs Agency, and the United

States Attorney's office. The immunity provided under RCW 4.24.510 attaches even if the information or complaint communicated to the government agency was not done in good faith. *See* *Bailey v. State*, 147 Wash.App. 251, 191 P.3d 1285, 1291 (Wash.Ct.App.2008); *DiBiasi v. Starbucks Corp.*, 414 F. App'x 948, 949 (9th Cir.2011) (unpublished) ("... Washington case law makes clear that the state legislature removed the good faith requirement for entitlement to immunity [under RCW 4.24.510] in 2002."). Thus, under RCW 4.24.510, Loops Defendants are immune from civil liability with regard to all of the above described statements to government agencies or officials.

3. **Applicability of RCW 4.24.525**

In addition to Loops Defendants' statements to government officials or agencies, Amercare Plaintiffs also complain about statements (described above) that Loops Defendants made to a variety of media outlets, as well as to the IAC in Washington, D.C. RCW 4.24.510 only applies to statements made to government agencies or certain selfregulatory organizations. Accordingly, this statutory provision is inapplicable to statements made by Loops Defendants to the press or the IAC. The court, therefore, must analyze whether the recent amendments to Washington's Anti–SLAPP statute, found in RCW 4.24.525, apply to Amercare Plaintiffs' defamation claims. Loops Defendants assert that their statements to various media outlets and to the IAC fall within RCW 4.24.525(2)(d) and (e), and are therefore subject to a special motion to strike.

A defendant may bring a special motion to strike with regard to any claim "that is based on an action involving public participation and petition." RCW 4.24.525(2). Subsection (d) defines such an action to include any statement made "in a place open to the public or a public forum in connection with an issue of public concern." RCW 4.24.525(2)(d). The court has no trouble concluding that the news outlets to which Loops Defendants made their statements constitute public forums under the statute. *See* *Castello*, 2010 WL 4857022, at *6 (finding that a major television network's local news broadcast constitutes a "public forum" under RCW 4.24.525(2)(d)) (citing *Nyard, inc. v. Uusi Kerttula*, 159 Cal.App.4th 1027, 72 Cal.Rptr.3d 210, 217 (Cal.App.Ct.2008); *Annette F. v. Sharon S.*, 119 Cal.App.4th 1146, 15 Cal.Rptr.3d 100, 110 (Cal.Ct.App.2004) ("[A] news publication is a 'public forum' within the meaning of [California's] anti-SLAPP statute if it is a vehicle for discussion of public issues and it is distributed to a large and interested community.")). Further, the statements made by Loops Defendants relate to Amercare Plaintiffs' involvement in public competitive bid contracting and the legality and safety of Amercare's product. New York City purchased substantial qualities of Amercare's toothbrushes for use by DOC inmates using taxpayer dollars. As such, these statements were in connection with issues of public concern, fall within RCW 4.24.525(2)(d), and are subject to a special motion to strike.

***8** Whether the new anti-SLAPP statute is applicable to Loops Defendants' statements to the IAC is a more difficult issue. Loops Defendants assert that the IAC constitutes a "public forum" under RCW 4.24.525(2)(d). (Special Mot. at 12.) The IAC is a non-profit public interest or trade group that addresses counterfeiting and piracy issues. *See, e.g.* *Eli Lilly and Co. v. American Cyanamid Co.*, 82 F.3d 1568, 1579 (Fed.Cir.1996) (Rader, J., concurring) (citing testimony on behalf of IAC before *Intellectual Property Rights: Hearing on S. 1860 and S. 1869 Before the Subcomm. On International Trade of the Senate Comm. on Finance*, 99th Cong., 2d Sess 175, 182 (1986)); *Lonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 260 (9th Cir.1996) (IAC is amicus curiae in copyright and trademark enforcement action); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 831 n. 3 (10th Cir.1993) (court was aided in its analysis of copyright law by amicus curiae IAC). Loops Defendants cite no authority in support of their assertion that such a public interest or trade group constitutes a "public forum" under RCW 4.24.525(2)(d), and the court finds none.

Nevertheless, it is not necessary for the court to decide whether Loops Defendants' statements to the IAC fall within RCW 4.24.525(2)(d) because the statements fall within the Act's catch-all provision of RCW 4.24.525(2)(e). Section (2)(e) states that the protections of the statute apply to "[a]ny lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." RCW 4.24.525. As noted above, Washington's Act is to be applied and construed liberally to effectuate its purposes. *Aronson*, 738 F.Supp. 2d at 1110. The court finds that the Loops Defendants' statements to the IAC concerning alleged counterfeiting in public contracting,

which has potential impacts on taxpayers, DOC inmates, and public contracts suppliers, were made in connection with issues of public concern. As such, Loops Defendants' statements to the IAC fall within the purview of RCW 4.24.525(2)(e), and are subject to a special motion to strike.

B. Amercare Plaintiffs Cannot Establish by Clear and Convincing Evidence a Probability of Prevailing on their Defamation Claims

Because the court has concluded that Loops Defendants have met their burden of demonstrating the applicability of the Anti–SLAPP statute by a preponderance of the evidence, the burden shifts to Amercare Plaintiffs to establish by clear and convincing evidence a probability of prevailing on their defamation claims. *See* RCW 4.24.525(4)(b). Amercare Plaintiffs fail to meet this difficult burden because there are numerous applicable defenses available to Loops Defendants, and because, even more fundamentally, Amercare Plaintiffs fail to demonstrate they can prove all of the required elements of their defamation claims.

1. Absolute Immunity

First, Amercare Plaintiffs cannot demonstrate by clear and convincing evidence a probability of prevailing on any defamation claim based on statements Loops Defendants made to government entities concerning Amercare and its product. As discussed above, Loops Defendants are entitled to absolute immunity from civil liability with regard to these statements under RCW 4.24.510.

2. Statute of Limitations

***9** Second, Amercare Plaintiffs cannot demonstrate by clear and convincing evidence a probability of prevailing on their defamation claims with regard to statements Loops Defendants made accusing Amercare of removing the trademark from the Loops Flexbrush and counterfeiting because these claims suffer from a serious statute of limitations infirmity. The statute of limitations with regard to defamation claims in Washington is two years. *See* RCW 4.16.100; *Albright v. State*, 65 Wash.App. 763, 829 P.2d 1114, 1118 n. 3 (Wash.Ct.App.1992).

On August 20, 2007, Mr. Kayser wrote to Mayor Bloomberg and various other New York City officials and accused Amercare of removing Loops' registered trademark from Flexbrush toothbrushes and submitting the altered toothbrushes to the DOC under Amercare's label. (*See* Klingbeil Decl. (Dkt.# 31) Ex. E at 3.) On October 4, 2007, Mr. Mario Crescenso, Jr., a New York City official, forwarded this and other letters the City had received from representatives of Loops Defendants protesting the award of the toothbrush contract to Amercare onto Ms. Hemming asking for a written response. (*See* Jenkins Decl. (Dkt.33–35) Ex. 6.) Ms. Hemming sent a letter no later than October, 2007, to Mr. Crescenso in which she responded to the allegations in Mr. Kayser's August 20, 2007 letter. (*See id.* Exs. 7–8.) In her letter, Ms. Hemming states that "[i]t would be impossible to file off or remove the Loops Flexbrush logo off of Mr. Kayser's toothbrushes," and that Amercare "did not do this in any way." (*Id.* Ex. 7 at 1.)

Loops Defendants assert, on the basis of the foregoing correspondence, that Amercare Plaintiffs were on notice of Loops Defendants' accusations concerning the removal of Flexbrush trademarks no later than October 2007. Because Amercare Plaintiffs did not file their complaint in state court until February 18, 2010, Loops Defendants argue that the two-year statute of limitations had run with regard to these statements. Amercare Plaintiffs respond that the correspondence described above does not show evidence of malice on the part of Mr. Kayser, or his knowledge of the falsity of his statements, and that Amercare Plaintiffs therefore did not know all of the facts necessary to give rise to their present claims until they had received both Mr Kayser's July 10, 2008 Patent Litigation declaration (which was filed on July 17, 2008), as well as the first set of discovery documents in the Patent Litigation on January 28, 2010. (Resp. to Special Mot. at 3, 14–15 & n. 4.)

In Washington, the discovery rule operates to prevent the commencement of the running of the statutory period until the time the claimant knew, or should have known, of the facts giving rise to his or her claim. *See, e.g., Reichelt v. Johns Manville Corp.*, 107 Wash.2d 761, 733 P.2d 530, 534–35 (Wash.1987). The discovery rule, however, does not require knowledge of the existence of a legal cause of action. *Id.* "[W]hen a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further inquiry to ascertain the scope of the actual harm." *Clare v. Saberhagen Holdings, Inc.*, 129 Wash.App. 599, 123 P.3d 465, 467 (Wash.Ct.App.2005). "[O]ne

who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose." *Id.* (quoting *Hawkes v. Hoffman*, 56 Wash. 120, 105 P. 156, 158 (1909)); *see also Green v. A.P.C.*, 136 Wash.2d 87, 960 P.2d 912, 916 (Wash.1998). Generally, whether a plaintiff is on notice of facts sufficient to put him or her upon inquiry and begin the running of the statutory period is a question of fact for the jury. *See Hipple v. McFadden*, No. 39802811, — P.3d —, 2011 WL 1653194, at *4 (Wash.Ct.App. Apr.28, 2011). However, the plaintiff bears the burden of proof that facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period. *Clare*, 123 P.3d at 467. Further, where reasonable minds can reach but one conclusion, application of the discovery rule may be determined as a matter of law. *Hipple*, 161 Wash.App. 550, 2011 WL 1653194, at *4.

***10** Here, Amercare Plaintiffs received notice at least by October 2007 from New York City officials that Loops Defendants had accused Amercare Plaintiffs of removing the trademark from or otherwise counterfeiting Flexbrush toothbrushes. Amercare Plaintiffs responded in an October 2007 letter declaring the falsity of these allegations. At this point, Amercare Plaintiffs knew that Loops Defendants were asserting arguably false allegations to New York City officials and challenging the propriety of DOC's award of a public contract to Amercare Plaintiffs. These facts constitute sufficient evidence for a jury to find that Amercare Plaintiffs were on notice to require further inquiry, and to initiate the running of the statutory period. Whether this issue ultimately would be decided by the jury or the court, in light of the foregoing evidence, Amercare Plaintiffs have failed to demonstrate by clear and convincing evidence a probability of prevailing on the statute of limitations issue with regard to these types of statements by Loops Defendants.

3. **Qualified Privilege**

Third, Loops Defendants' statements to the IAC concerning Amercare Plaintiffs' alleged counterfeiting are subject to the conditional or qualified privilege which applies to statements made between persons sharing a common interest on matters of public concern. *See Castello*, 2010 WL 4857022, at *10 (citing *Corbally v. Kennewick Sch. Dist.*, 94 Wash.App. 736, 973 P.2d 1074, 1078 (Wash.Ct.App.1999)); *see also Fahey v. Shafer*, 98 Wash. 517, 167 P. 1118, 1121 (Wash.1917). In *Fahey*, the defendants made allegedly defamatory statements accusing the plaintiff of false advertising to the Seattle Ad Club. *Id.* at 1120. The Seattle Ad Club was a professional organization "of advertising and newspaper men" with a "purpose of looking after questionable advertising." *Id.* The court found that the "mutuality of interest" between the defendants, who were Seattle merchants, and the Seattle Ad Club, was "apparent." *Id.* at 1121. The defendants had made accusations of false advertising against the plaintiff and asked the Seattle Ad Club to investigate. *Id.* The Washington Supreme Court found that "[t]he trial court committed no error in holding that ... the relation of the parties to the subject-matter was such as to invoke the rule of qualified privilege." *Id.* The court finds the facts of *Fahey* similar to those involving Loops Defendants' statements to the IAC concerning alleged counterfeiting. Similar to the Seattle Ad Club, the IAC is a public interest or trade group, except instead of focusing on false advertising, the IAC addresses counterfeiting and piracy issues. Accordingly, the court finds that this qualified privilege applies with regard to Loops Defendants statements to the IAC. *See id.*

In their response, Amercare Plaintiffs offer no opposition to the applicability of this qualified privilege. (*See generally* Resp. to Special Mot.) Instead, Amercare Plaintiffs assert that the qualified privilege is lost because Loops Defendants acted with malice. (*Id.* at 18, 167 P. 1118.) Although an absolute privilege or immunity will absolve a defendant of all liability for defamatory statements, a qualified privilege may be lost and liability for defamatory statements imposed if it can be shown that the qualified privilege has been abused. *Bender v. City of Seattle*, 99 Wash.2d 582, 664 P.2d 492, 504 (Wash.1983). In order to demonstrate that a qualified privilege has been abused, the plaintiff must prove by clear and convincing evidence that the defendant acted with malice or knowledge or reckless disregard as to the truth or falsity of a statement. *Id.* at 504–05. Here, Amercare Plaintiffs have acknowledged that they must prove the element of fault by demonstrating that Loops Defendants acted with malice. (*See* SJ Mot. at 18; Resp. to Special Mot. at 18.) Accordingly, the court will address the issue of whether Amercare Plaintiffs have demonstrated by clear and convincing evidence a probability of success with regard to defeating the qualified privilege defense in conjunction with its discussion of Amercare's evidence of fault below.

4. Fault

***11** A defamation claim consists of four elements: (1) a false statement, (2) lack of privilege to make the statement, (3) fault, and (4) damages. *Duc Tan v. Le*, No. 39447-2-II, ---- P.3d ----, 2011 WL 1491697, at *5 (Wash.Ct.App. Apr.19, 2011). The case law indicates that Amercare Plaintiffs must prove the element of fault in this matter not simply by demonstrating that Loops Defendants acted with negligence, but rather by demonstrating that Loops Defendants acted with actual malice or knew that their statements were false or recklessly disregarded the probable falsity of their statements. *See id.* at *9 (setting forth standard for "actual malice"). If the plaintiff is a public official, proof of fault requires evidence of actual malice by clear and convincing evidence. *Castello*, 2010 WL 4857022, at *10–11 (citing *Corbally*, 973 P.2d at 741). Here, Loops Defendants' allegedly defamatory statements all pertained to the manner in which Amercare Plaintiffs either won a public contract from the DOC or subsequently performed under that public contract. Amercare Plaintiffs' "conduct was that of a public official because it involved the manner in which [they] performed [their] duties pursuant to a public contract." *Corbally*, 973 P.2d at 741; *see also Valdez Zontek v. Eastmont Sch. Dist.*, 154 Wash.App. 147, 225 P.3d 339, 347 (Wash.Ct.App.2010) (Plaintiff "is a public official *to the extent her conduct involved the manner in which she performed her job duties* pursuant to a public contract.") (italics in original). Accordingly, Amercare Plaintiffs must establish fault by proving actual malice on the part of Loops Defendants.

a. Statements Concerning Alteration of Flexbrush Toothbrushes

Amercare Plaintiffs assert that Mr. Kayser admitted in a declaration submitted in the Patent Litigation that his earlier statements concerning his claim that Amercare Plaintiffs had physically altered Loops Flexbrushes and removed the trademark from samples that Amercare submitted in connection with its bid application to New York City were false. (*See* SJ Mot. at 4, 18.) Amercare Plaintiffs assert that Mr. Kayser's refusal to retract his statements despite his admission that that his earlier allegations were incorrect demonstrates malice. (*Id.*) Amercare Plaintiffs cite only foreign authority and no Washington authority in support of their position. (*See* SJ Mot. at 18–19 (citing *Zerangue v. TSP Newspapers Inc.*, 814 F.2d 1066, 1071 (5th Cir.1987) (refusal to retract an exposed error tends to support a finding of actual malice, whereas, a readiness to retract tends to negate actual malice); *Augusta Chronicle Pub. Co. v. Arrington*, 42 Ga.App. 746, 157 S.E. 394 (Ga.Ct.App.1931).)

In response, Loops Defendants assert that although Mr. Kayser was incorrect in his assertions that Amercare Defendants removed the trademark from Flexbrush toothbrushes, he was not incorrect with regard to the broader allegation that Amercare Plaintiffs in fact created a knock-off of his product. (SJ Resp. at 10.) Loops Defendants assert (and cite evidence supporting their assertion) that Mr. Kayser's mistake was due to an investigative error, and accordingly does not demonstrate actual malice. (*Id.*; Klingbeil Decl. Ex. F ¶¶ 84–89.) Under Washington law, investigative mistakes do not rise to the level of actual malice. *Herron v. KING Broadcasting Co.*, 109 Wash.2d 514, 746 P.2d 295, 302 (Wash.1987).

***12** Further, Loops Defendants assert that the context of this dispute is relevant and strengthens their position concerning the inadequacy of investigative errors to establish malice. Loops Defendants point to the fact that Amercare Plaintiffs have been found by another court in this district to have suppressed material evidence, lied under oath, and filed false declarations concerning Mr. Kayser's claims of patent and trademark infringement. *Loops LLC*, 2011 WL 915785, at *9–10. Loops Defendants contend that these circumstances underscore the conclusion that they should not be held liable if Mr. Kayser's investigation, which was improperly thwarted by Amercare Plaintiffs, produced factual mistakes. The court agrees. On this record, particularly in light of Amercare Plaintiffs' conduct in the related Patent Litigation, the court cannot conclude that Mr. Kayser's investigative mistakes amount to malice.

In any event, Loops Defendants assert that Mr. Kayser's admission in his July 10, 2008 Patent Litigation declaration that he erred with regard to his statements that Amercare Plaintiffs had removed the trademark from Flexbrush toothbrushes constitutes a retraction of his earlier statement. (SJ Resp. at 8; *see* Klingbeil Decl. Ex. F ¶¶ 119–20.) Thus, Loops Defendants assert that even if the court were to apply the foreign authority put forward by Amercare Plaintiffs, the evidence here would demonstrate that Mr. Kayser had retracted his earlier mistaken statements con-

cerning the methodology Amercare Plaintiffs utilized to knock off his product.[FN2]

> FN2. In their reply memorandum, Amercare Plaintiffs assert for the first time that Mr. Kayser republished his earlier statements claiming fraudulent product alteration after his retraction of those remarks in his July 10, 2008 Patent Litigation declaration. (SJ Reply (Dkt.# 59) at 2, 8–10.) In support of this assertion, Amercare Plaintiffs cite to three letters sent by Mr. Kayser dated April 21, 2008, May 19, 2008, and September 8, 2008. (*See* Second Klingbeil Decl. (Dkt.# 61) Exs. K, L & M.) The court notes that the first two of these letters are in fact dated prior to Mr. Kayser's retraction in his July 10, 2008 Patent Litigation declaration, and therefore could not constitute a republication after that date. The court also notes that the letters dated April 21, 2008 and September 8, 2008 were directed to government officials, and therefore would be covered by the absolute immunity provided under RCW 4.24.510. Further, "[t]he district court need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.2007) (citing *Koerner v. Grigas*, 328 F.3d 1039, 1049 (9th Cir.2003)).

Finally, Loops Defendants also assert that Mr. Kayser's statements have been demonstrated to have a factual basis in light of the court's ruling in the Patent Litigation finding Amercare liable on all of Mr. Kayser's claims, including trademark infringement. (Reply to Special Mot. at 4 (citing *Loops LLC*, 2011 WL 915785).) In light of the foregoing, the court cannot conclude that Amercare Defendants have demonstrated by clear and convincing evidence a probability of prevailing on this issue of fault with regard to statements made by Loops Defendants concerning the alteration of Loops toothbrushes by Amercare Plaintiffs.

b. Statements Concerning Excessive Levels of Lead or Heavy Metals

In 2007, Mr. Kayser tested Amercare's flexible toothbrush for the presence of heavy metals and lead. (Sec. Klingbeil Decl. (Dkt.# 46) Ex. H.) The test results indicated the presence of lead and other heavy metals, but at levels that complied with federal requirements for those substances. (*See id.*) Despite these results, Mr. Kayser sent letters in early 2008 stating that Amercare's toothbrushes were "laden with heavy metals," that they "contain[ed] excessive amounts of lead," and that providing Amercare toothbrushes to inmates amounted to "feeding lead and heavy metals" to them. (*Id.* Ex. E at 21–23.) Amercare Plaintiffs assert that these statements amount to actual malice because Mr. Kayser knew that Amercare's toothbrushes complied with federal standards for lead and other heavy metals.

***13** Loops Defendants respond that Mr. Kayser had a factual basis for his statements because the test results he relied upon at the time did indicate that Amercare toothbrushes contained lead and heavy metals.[FN3] They further assert that Mr. Kayser never stated that the toothbrushes did not meet federal standards. In fact, the test indicates that certain parts of Amercare's toothbrush contained approximately 30% of the allowable limit for extractable lead and extractable arsenic. (*See id.* Ex. H.) According to Loops Defendants, whether the levels of lead and heavy metals contained within Amercare's toothbrushes are "excessive" is a matter of opinion, not provable fact. A statement that communicates only ideas or opinions cannot support a defamation claim, because there is no such thing as a false idea or opinion. *Schmalenberg v. Tacoma News, Inc.*, 87 Wash.App. 579, 943 P.2d 350, 357 (Wash.Ct.App.1997). Use of the word "excessive" connotes an opinion that is not provably false. *Johnson v. Grays Harbor Cmty. Hosp.*, No. C06–5502BHS, 2008 WL 819724, at *19 (W.D.Wash. Mar.25, 2008).

> FN3. Amercare Plaintiffs also point to expert opinions, dated March 2011, which criticize the methodology used in the tests that Mr. Kayser performed on Amercare toothbrushes in 2007. (Dkt.44 & 45.) Even if the court assumes that Amercare Plaintiffs' experts are correct, this does not demonstrate that Mr. Kayser had any reason to doubt the methodology or accuracy of the tests conducted in 2007, or that he acted with malice at that time.

Washington courts also examine a statement in the totality of the circumstances in which it is made to determine whether the statement should be considered as nonactionable opinion. *Dunlap v. Wayne*, 105

Wash.2d 529, 716 P.2d 842, 848 (Wash.1986). Washington courts consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts. *Id.* With regard to factors one and two, Loops Defendants point out, Mr. Kayser's statements concerning "excessive" levels of lead or heavy metals in Amercare's toothbrushes occurred in the context of a highly adversarial dispute over a competitive bid public contract, in which legal counsel had become involved. Loops Defendants also assert that the New York City officials and the New York media outlets to which Loops Defendants distributed their statements were aware of the adversarial context and had reason to evaluate those statements for subjective bias. (Reply to Special Mot. at 5.) In similar adversarial contexts, Washington courts have found that statements of opinion and exaggeration should be expected. *See, e.g., Dunlap,* 716 P.2d at 540–41 (negotiations between attorneys concerning dispute). With regard to the third factor, Mr. Kayser's statements concerning excessive lead and heavy metals in Amercare's toothbrushes could be construed to imply the undisclosed fact that those levels were in excess of federal standards. Nevertheless, Loops Defendants point out that Mr. Kayser's counsel offered to share the test results he had obtained with New York City officials. (Klingbeil Decl. Ex. H at 8–10.) Although it is a closer call, based on its evaluation of all of the circumstances and factors at issue, the court cannot conclude that Amercare Plaintiffs have demonstrated by clear and convincing evidence a probability of prevailing on the issue of fault with regard to Amercare Plaintiffs' defamation claims arising out of Loops Defendants' statements concerning the amounts of lead and heavy metals in Amercare Plaintiffs' product.

c. Statements Alleging Patent Infringement

***14** The patent which pertains to Loops Defendants' Flexbrush did not issue until February 26, 2008. *Loops LLC,* 2011 WL 915785, at *3. Amercare Plaintiffs provided the DOC with Amercare toothbrushes from October 21, 2007 until May 22, 2008. *Id.* Amercare Plaintiffs assert that Mr. Kayser defamed them when he made statements prior to February 26, 2008, the date that the patent issued, to the effect that Amercare was infringing upon his patent for the Loops Flexbrush. (SJ Mot. at 16; Resp. to Special Mot. at 20.) Amercare, however, continued to sell and the DOC continued to purchase Amercare toothbrushes subsequent to the patent's issuance. In addition, although its ruling was not on merits, but rather imposed as a consequence for discovery abuses, as noted above, the court in the Patent Litigation found Amercare Plaintiffs liable for infringement of the patent pertaining to the Loops Flexbrush. *See Loops LLC,* 2011 WL 915785, at *10. In Washington, a defendant need only establish that a statement is substantially true, or that the gist of the story, the portion that "carries the sting," is true. *See, e.g., Mohr v. Grant,* 153 Wash.2d 812, 108 P.3d 768, 775 (Wash.2005). Here, the portion of the allegedly defamatory statements that carried the sting was Mr. Kayser's assertion that Amercare Plaintiffs had infringed upon a patent, not the inaccurate portion concerning the dates upon which that infringement occurred. In light of the fact that Loops Defendants have demonstrated post-patent sales, as well as the prior findings by the court in the Patent Litigation, this court concludes that Amercare Plaintiffs have not established by clear and convincing evidence a probability of prevailing on this issue of fault with regard to their defamation claims arising out of Loops Defendants' statements alleging patent infringement.

d. Statements Alleging Counterfeiting

Amercare Plaintiffs assert that Mr. Kayser acted with malice or knowledge of the falsity of his statements, or reckless disregard for the truth when he repeatedly stated in 2007 and 2008 that Amercare was engaged in counterfeiting the Loops Flexbrush. (SJ Mot. at 20; Resp. to Special Mot. at 20–21.) The only evidence of malice that Amercare Plaintiffs put forward, however, are statements by Mr. Kayser in his February 7, 2011, deposition. (Resp. to Special Mot. at 20–21.) In this deposition, Mr. Kayser defines "counterfeiting" as making an identical copy of another's product and then "[p]ass[ing] it off" as the other's product—in other words, providing a false designation of origin. (Klingbeil Decl. Ex. J (Kayser Dep.) at 83–87.) He testified that, although the Amercare toothbrush is a "knock off%' of the Flexbrush, he has no evidence that Amercare ever sold its product under the name of the Loops Flexbrush. (*Id.*)

Mr. Kayser's testimony in 2011 does not establish that he acted with malice, knowingly made false statements, or made statements in reckless disregard of their falsity in 2007 and 2008. Even if Mr. Kayser's subsequent investigation into this issue revealed that his statements in 2007 and 2008 were incorrect at least

in part, and one could therefore infer from this that his earlier investigation had been inadequate, this would still be insufficient to establish malice on Mr. Kayser's part by clear and convincing evidence. Investigatory mistakes or a failure to investigate alone are insufficient for a court to find malice. *Herron,* 776 P.2d at 106. Yet, Amercare Plaintiffs offer nothing else. (*See* SJ Mot. at 20; Resp. to Special Mot. at 20–21.) Simply put, the fact that Mr. Kayser implicitly acknowledged in his 2011 deposition that his statements in 2007 and 2008 were incorrect (at least in part), is insufficient to prove by clear and convincing evidence that he acted with malice when he made the statements in 2007 and 2008. Further, as noted above, the context of Mr. Kayser's statements is also relevant here. The court is mindful of the fact that another federal district court has found that Amercare Plaintiffs have suppressed relevant evidence and provided false testimony concerning Loops Defendants' patent and trademark claims in the related Patent Litigation. *Loops, LLC,* 2011 WL 915785, at *9–10. In this context, the court would be reluctant to find liability on the part of Loops Defendants for any investigative errors on Mr. Kayser's part. Accordingly, the court cannot conclude that Amercare Plaintiffs have established by clear and convincing evidence a probability of prevailing on this issue.

***15** The court's conclusions that Amercare Plaintiffs have demonstrated insufficient evidence concerning malice not only result in a failure of proof with regard to element of fault, but also result in a failure of proof with regard to Loops Defendants' qualified privilege discussed above.

5. Defamation Per Se and Damages

Amercare Plaintiffs do not attempt to demonstrate actual damages in this matter. Rather, they rely upon the doctrine of defamation per se. (SJ Mot. at 20–24; Resp. to Special Mot. at 21–24.) Generally, a plaintiff may only recover the actual damages caused by defamation. *Valdez Zontek,* 225 P.3d at 349. Damages may be presumed in some circumstances, however, if a communication constitutes defamation per se. *See Dodson v. Morgan Stanley DW, Inc.,* No. C06–5669RJB, 2007 WL 3348437, at *16 (E.D.Wash. Nov.8, 2007). Where the plaintiff is a public figure or the matter involves an issue of public concern, presumed damages are impermissible unless a plaintiff has shown actual malice. *See id.; see also Maison de France, Ltd. v. Mais Oui!, Inc.,* 126 Wash.App. 34, 108 P.3d 787, 798 (Wash.Ct.App.2005). Here, we have both a public plaintiff and an issue of public concern. Therefore, Amercare Plaintiffs may not be awarded presumed damages unless they also establish actual malice on the part of Loops Defendants. As noted above, Amercare Plaintiffs have not established by clear and convincing evidence a probability of prevailing with regard to the issue of actual malice. Accordingly, they also fail to establish defamation per se or presumed damages. The court finds that Amercare Plaintiffs have not provided clear and convincing evidence of a probability of proving the element of damages.[FN4]

> FN4. Amercare Plaintiffs submitted a declaration from Ms. Hemming (Dkt.# 60) with their reply memorandum in support of their motion for summary judgment (Dkt.# 59). In this declaration, Ms. Hemming asserts for the first time that she suffered "a great deal of worry and upset" as a result of Loops Defendants' allegedly defamatory statements. (Hemming Decl. (Dkt.# 60) ¶ 3.) On the basis of this declaration, Amercare Plaintiffs assert for the first time in their reply memorandum that this declaration is sufficient to establish actual damages even in the absence of economic damages. (SJ Reply (Dkt.# 59) at 14–15.) Prior to the submission of their reply memorandum and Ms. Hemmings's declaration, Amercare Plaintiffs relied solely upon the doctrine of defamation per se and presumed damages to meet this damages element of their claim. Amercare Plaintiffs have provided no explanation as to why they did not present this evidence and discuss issue in conjunction either with their opening memorandum in support of summary judgment (Dkt # 29) or in their memorandum in response to Loops Defendants' special motion to strike (Dkt.# 42). As noted above, "[t]he district court need not consider arguments raised for the first time in a reply brief." *Zamani,* 491 F.3d at 997 (citing *Koerner,* 328 F.3d at 1049). Because Amercare Plaintiffs provide no explanation or demonstration of good cause concerning why this issue and evidence were not raised prior to their summary judgment reply, the court declines to consider this issue.

As described above, Amercare Plaintiffs' claims for defamation and defamation per se suffer from infirmities involving absolute immunity under RCW 4.24.510, expiration of the statute of limitations, qualified immunity, a failure of proof concerning the element of actual malice, and a failure of proof concerning damages. As a result, the court cannot conclude that Amercare Plaintiffs have met their burden under RCW 4.24.535(4)(b) of establishing by clear and convincing evidence a probability of prevailing on their defamation claims.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS Loops Defendants' Special Motion to Strike Amercare Defendants' defamation claims (Dkt.# 32), and DENIES Amercare Plaintiffs' motion for partial summary judgment (Dkt.# 29), as well as Loops Defendants' cross motion for partial summary judgment (Dkt.# 48) as MOOT.

In addition, pursuant to RCW 4.24.525(6)(a), the court ORDERS Amercare Plaintiffs to pay the mandatory statutory penalty of ten thousand dollars to each defendant. Pursuant to the same statutory provision, the court also ORDERS Amercare Plaintiffs to pay Loops Defendants' costs of litigation, along with the reasonable attorneys' fees incurred by Loops Defendants in connection with the special motion to strike the defamation claims (Dkt.# 32).

***16** Loops Defendants' counsel shall submit their request for costs and reasonable attorneys' fees within 7 days of the date of this order. Amercare Plaintiffs shall submit any response to the request within 7 days of the filing of the request.

W.D.Wash.,2011.
Phoenix Trading, Inc. v. Kayser
Slip Copy, 2011 WL 3158416 (W.D.Wash.)

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