IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KIMBALL J. BRADLEY,

Plaintiff, Civil Action No.

vs. **JURY TRIAL DEMANDED**

HERBERT BENNET CONNER,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Rule 12(b)(6) requires a claim to be dismissed if it is apparent from the Complaint that the claims stated in the Complaint are barred by the statute of limitations. In his Complaint, filed on August 17, 2007, Plaintiff asserted claims for defamation and false light based on statements allegedly published between August 2005 and March 2006. Pennsylvania statute, 42 Pa.C.S. § 5523(1), unequivocally sets a one-year statute of limitations for defamation and for false light. Because it is apparent from the Complaint that Plaintiff's claims did not accrue within one year before commencement of this matter, the action is barred by the provisions of 42 Pa.C.S. § 5523(1).

Even if this action were not time-barred by the limitations periods, Rule 12(b)(6) also requires dismissal of a claim if Plaintiff fails to allege a cause of action upon which relief may be granted. Therefore, in the alternative, the Court should dismiss Plaintiff's claims for the following reasons:

- Under Pennsylvania law, only statements of fact – not expressions of opinion – can support a defamation action. Whether statements qualify as opinion or as fact is a question

of law for the Court. Since the statements allegedly posted by Defendant on an internet message board clearly constitute opinion, this Court should dismiss Plaintiff's defamation claim.

- The alleged statements attributed to Defendant relate to Plaintiff acting in his professional capacity as an officer of a publicly-traded company. Because a false light claim must relate to private facts that, also, are not of legitimate concern to the public, alleged statements regarding Plaintiff's professional abilities and actions do not satisfy this claim's elements. Therefore, this Court should dismiss Plaintiff's false light claim.

II. BACKGROUND

Plaintiff, Kimball J. Bradley, is the Chairman, President, and Chief Executive Officer (CEO) of Reunion Industries, Inc., which is a "manufacturing conglomerate." (Compl. ¶¶ 4, 6; **Ex. A**.) Previously, Plaintiff acted as Chief Operating Officer (COO) for Reunion. At all times relevant hereto, Reunion was publicly traded on the NASDAQ exchange under the ticker symbol "RUN." (Compl. ¶ 14.)

Yahoo!, an internet service provider, maintains a website that includes the Yahoo! Finance bulletin board, on which each publicly-traded company has its own designated board. (Compl. ¶ 15.) Each bulletin board provides a forum in which its members can post messages or comments regarding the subject company. (Id.)

Plaintiff has alleged that, beginning in August 2005 and continuing through March 2006, Defendant, Herbert Bennett Conner – using the board name "pun2dex" – posted comments on the

Yahoo! Finance bulletin board designated for Reunion. (Compl. ¶ 16.) Plaintiff identified 12 postings, allegedly posted by Conner on 11 different dates, including the following statements[1]:

- As badly as this company is run, there is no shutdown. Richard Conway (of Le Capital Masters) is in and will be heard. The company has fresh cash and is buying raw material. It will show an operating profit this quarter primarily due to the sales in China by its CPI sub. So long as the bond holders sit still, there could be some upside. (Posted August 10, 2005). (Compl. ¶ 18.)

- Kimball Bradley is still called COO, C E Bradley is still CEO, but the latter is CEO in paycheck only, and will soon be resigning at the request of Mr. Conway. The only way out for [Reunion] is to do what Conway suggests. Look for him to buy junk bonds, reduce and control the debt and spur the growth of the profitable divisions. Check LC Capital Masters and Lampe, Conway Fund Group. Run needs management with a higher IQ than club handicap, with Conway, they get one, even if K. Bradley stays in as COO or even moves to CEO. He will not be calling the shots, except on the Golf Course. (Posted September 21, 2005). (Compl. ¶ 22.)

- . . . the story is all of failure since the young Bradley took over and will not stop until he is long gone. Until that day, this company and this stock will bounce a little, but is going nowhere. (Posted January 1, 2006). (Compl. ¶ 23.)

- If you are intent on paying salaries, you must sell something in context of this company. Check the President, who is a member of the YPO. That means he was unable to be employed anywhere else, so his father made him president of this company so he could hang out with other young guys who were born on third base and think they hit a triple. This company is going nowhere. The next big thing will be a revolt of the bondholders or the banks. The shareholders will not be happy. (Posted January 24, 2006). (Id.)

[1] These statements are included for illustration only and do not represent a complete list of the alleged statements identified in Plaintiff's Complaint. (*See* Ex. A.)

- Our leader will never consider stepping aside to allow someone with the drive and intellect to run the company, so long as he has no other job prospects and strong cash needs. Instead of figuring out a way to make the company profitable, he sells his assets to keep his check coming in. Go to GHIN.COM in Pennsylvania for Kimball Bradley and you will quickly see where the energy of management is spent, and only a small fraction of the rounds are posted so as not to upset his father. What a waste. The bondholders would be well advised to call his bluff, take control and get someone in who will put the company right. There are only a few assets left to sell, and at Kimball's age he will need to sell them all just to pay his caddies. (Posted January 25, 2006). (Id.)

- This is just more rearranging of the deck chairs on the Titanic. K. Bradley probably thinks he did something meriting a huge bonus or perhaps a pay increase, but look at what has happened since he became COO. Straight down for revenues, profits and share price. I agree he probably can't sleep at night, but he should still put in a full day, although with his ability, the company would do better without him. Still, Dad likes him, so he gets promoted, GO figure. After all the comments about YPO, I did some research and have concluded that they are a circle of jerks or a circle jerk. Our Boy fits right in. (Posted March 9, 2006). (Id.)

Based on Conner's alleged postings, Plaintiff has sued Conner asserting causes of action entitled "Defamation" (Count I) and "False Light" (Count II). (*See* Compl.) For the reasons discussed below, Conner files this Motion to Dismiss.

III. ARGUMENT

A. Standard of Review

The purpose of a Federal Rule of Civil Procedure 12(b)(6) motion is to test the legal sufficiency of a complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir.1993); *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir.1987). When considering such a motion, a court must accept as true all

allegations in the complaint and must draw all reasonable factual inferences in the light most favorable to the plaintiff. *Neitzke v.. Williams*, 490 U.S. 319, 326-27 (1989); *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1255 (3d Cir.1994). To survive a motion to dismiss for failure to state a claim upon which relief can be granted, factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (U.S. 2007). As the United States Supreme Court recently held, dismissal for failure to state a claim upon which relief may be granted does *not* require appearance, beyond a doubt, that plaintiff can prove no set of facts in support of claim that would entitle him to relief. *See id., abrogating Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The burden of demonstrating that the plaintiff has failed to state a claim upon which relief may be granted rests on the movant. *Hedges v. United States,* 404 F.3d 744, 750 (3d Cir.2005); *Young v. West Coast Industrial Relations Assoc., Inc.*, 763 F.Supp. 64, 67 (D.Del.1991) (citations omitted).

B. Plaintiff's Claims Are Barred as Untimely.

Plaintiff's Complaint should be dismissed because the causes of action for defamation and false light are time-barred.

"The defense of the statute of limitations is not a technical defense but substantial and meritorious . . ." *Barrrett v. Catacombs Press*, 64 F. Supp.2d 440, 446 (E.D. Pa. 1999) (citations omitted). A statute of limitations defense can be raised by a Rule 12(b)(6) motion if "the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Robinson v. Johnson,* 313 F.3d 128, 135 (3d Cir. 2002) (citing *Hanna v. U.S.*

Veterans' Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir.1975)). This is consistent with the purpose of Rule 8(c), which requires that defendants assert a limitations defense as early as reasonably possible. *Id*.

Pennsylvania law unequivocally provides a one-year statute of limitations for defamation and for false light. 42 Pa.C.S. § 5523(1). Here, any causes of action for defamation and false light would have accrued on the date of publication of each allegedly defamatory or false statement. *See Dowling v. Philadelphia Newspapers, Inc.*, 1995 WL 1315957 (Pa. C.P. 1995). *See also Barrett v. Catacombs Press*, 64 F. Supp.2d 440, 443 (E.D. Pa.1999); *Easton v. Bristol-Myers Squibb Co.* 289 F. Supp.2d 604, 613 (E.D. Pa. 2003).

Plaintiff has specifically averred the publication date for each statement at issue. According to the Complaint, the allegedly defamatory and false statements were made between August 10, 2005 and March 9, 2006. (*See* Ex. A.) The Complaint was filed on August 17, 2007. (*See* Docket Rpt., **Ex. B**.) Thus, Plaintiff commenced this action more than one year after the alleged torts occurred.

Since the dates alleged in the Complaint establish that the causes of action for defamation and false light have not been brought within the applicable statutes of limitations, this Honorable Court should dismiss, with prejudice, Plaintiff's claims as time-barred.

C. Plaintiff's Defamation Claim Also Should Be Dismissed Because, As a Matter of Law, the Statements at Issue Constitute Non-Actionable Opinion, Not Libel.

Because the statements allegedly made by Conner constitute expressions of opinion, Plaintiff cannot prove any set of facts that would entitle him to relief for defamation.

Under Pennsylvania law, only statements of fact – not expressions of opinion – can support an action in defamation. *Elias v. Erie Insurance Exchange*, 634 A.2d 657, 660 (Pa. Super. 1993).

See also Bogash v. Elkins, 176 A.2d 677 (Pa.1962) (Opinion, without more, is not actionable as libel.). Therefore, since Conner's alleged statements represent expressions of opinion only, this Court should dismiss Plaintiff's defamation claim.

In Pennsylvania, the trial court must determine, as a matter of law, whether a statement is one of fact or of opinion and whether the challenged statement is capable of having defamatory meaning. *Constantino v. University of Pittsburgh*, 766 A.2d 1265 (Pa. Super. 2001). In deciding whether a statement is an actionable opinion, the court may rely on Section 566 of the Restatement (Second) of Torts which states that:

> A defamatory communication may consist of a statement in the form of an opinion but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Comment (c) of section 566 clarifies the distinction where it states, in pertinent part, that:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.

Under Pennsylvania law, to determine whether a statement is defamatory, a court "must consider not only the language of the statements, but also the context in which they were published." *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir. 1978). In addition, the court must evaluate "the effect [the statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Corabi v. Curtis Publ'g Co.*, 273 A.2d 899 (Pa. 1971).

Here, Plaintiff may view the statements attributed to Conner as unreasonable or even derogatory, but careful reading of these alleged statements discloses the expression of opinion.

Moreover, the context is an open and uncontrolled forum on the internet, where the discourse tends to consist of subjective speculation and rhetorical hyperbole rather than actual fact. Indeed, the discourse on financial boards has been compared to gossip, i.e., "highly 'spontaneous'" and relying "more on humor and guesswork than . . . on rational argumentation." *See* Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 899 (2000). Although the internet is not a legally distinct form of communication, "certain factual and contextual issues relevant to chat rooms and blogs are particularly important in analyzing the defamation claim itself." *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005). "Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely." *Id.*

In 2003, the United States District Court of the Northern District of Ohio decided a case arising from remarkably similar facts as alleged in this matter. *See SPX Corp. v. Doe*, 253 F. Supp.2d 974 (N.D. Ohio 2003). In *SPX*, a publicly-traded corporation brought a defamation action against an individual who allegedly posted false statements about the corporation on a Yahoo! message board devoted to that corporation. The court held that these statements – accusing the corporation of accounting fraud and warning readers to "get ready for" an "FBI and SEC probe" and advising them to sell corporation's stock – were not defamatory and, instead, were "privileged opinion."

In reaching its decision, the *SPX* Court analyzed whether, under the totality of the circumstances, the statements at issue expressed facts or opinions using the following four factors: (1) the specific language used; (2) whether the statement is verifiable; (3) the written context of the statement; and (4) the broader social context in which the statement is made. *Id.* at 980. In weighing

these factors, the Court viewed the statements from the standpoint of a reasonable reader rather than considering the subjective intent of the author. *Id.*

Regarding the context in which the statements were made, the Court noted the following:

> Here, the Defendant's statements were posted on an Internet message board. Such message boards are accessible to anyone of the tens of millions of people in this country (and more abroad) with Internet access, and no one exerts control over the content. Pseudonym screen names are the norm. **A reasonable reader would not view the blanket, unexplained statements at issue as "facts" when placed on such an open and uncontrolled forum.** Indeed, Yahoo! places a disclaimer which appears on the copies of the postings submitted with the Complaint:
>
> > Reminder: This board is not connected with the company. **These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose** .... For more information regarding investments and the Internet, please visit the SEC Website.

Id. (Emphasis added).

Here, the statements alleged in this case are comparable in tenor to and were allegedly made in the same context as those in *SPX*. Considering the context – given that Conner's alleged statements appeared on an open, uncontrolled Internet message board – a reasonable person would not view such statements as fact. *See also Nicosia v. De Rooy*, 72 F. Supp.2d 1093, 1101 (N.D. Cal.1999) (statements published through Internet discussion groups are less likely to be viewed as factual assertions).

In another defamation case, *Rocker Management, LLC v. John Does 1 through 20*, the United States District Court of the Northern District of California addressed allegedly defamatory statements made in Internet chat room discussions regarding the performance of a specific publicly-traded

company. 2003 WL 22149380 (N.D. Cal. 2003). The court noted that the messages tended to be "replete with grammar and spelling errors; most posters do not even use capital letters. Many of the messages are vulgar and offensive, and are filled with hyperbole." *Id.* at *2. Therefore, the court found that "in this context readers are unlikely to view messages posted anonymously as assertions of fact." *Id.*

Similarly, in another California federal case, the court made these findings regarding allegedly defamatory statements made in an internet chat room:

> . . . the statements were posted in the general cacophony of an internet chat-room in which about 1,000 messages a week are posted . . . Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents . . . To put it mildly, these postings . . . lack the formality and polish typically found in documents in which a reader would expect to find fact.

Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp.2d 1261, 1264 (C.D. Cal. 2001). Accordingly, the court concluded that the general tone, context, style, and content of the postings, "strongly suggest[ed] that they [were] the opinions of the posters," and that the "reasonable reader, looking at the hundreds and thousands of postings about the company from a wide variety of posters, would not expect that [the defendant] was airing anything other than his personal views." *Id.* at 1267-68.

In a recent case, *DiFolco v. MSNBC Cable LLC*, the United States District Court of the Southern District of New York considered allegedly defamatory statements regarding a news reporter published under the alias "Jill Journalist" on a message board called the "Watercooler." 2007 WL 959085 (S.D.N.Y. 2007). The Court found that the website's readers expected that statements published in such media would contain considerable speculation and opinion. *Id.* at *7. The Court also noted that the anonymity of the author provided the reader with no information to support the

veracity of his or her statements; that a reasonable reader would conclude from the tone and language used that it did not purport to be serious factual finding; and that the statement contained gossipy comments regarding Plaintiff's "cleavage" and makeup, called her career "irrelevant" and stated that she "pouted like a spoiled child." *Id.* Based on these findings, the Court concluded the reasonable reader would determine from the context that the statements consisted of opinions, not fact. *Id.* at *8. Accordingly, the Court dismissed the plaintiff's defamation claim.

Based on the above cases, although there is no blanket protection for statements made on the Internet, a reasonable person tends to view message board statements as opinion. In analyzing these statements, an important factor to consider is the type of language used; e.g., loose, figurative or hyperbolic language or a breezy tone. Here, several of Conner's alleged statements contain gossip or censure about Plaintiff's golf playing and his being a YPO member. Remarks such as "[a] monkey could do better" or "[t]his guy is rearranging deckchairs on the Titanic" are contained throughout. The last message identified by the Plaintiff concludes with this coarse metaphor: "After all the comments about YPO, I did some research and have concluded that they are a circle of jerks or a circle jerk. Our Boy fits right in." And all of these statements are made under an anonymous pseudonym.

Given the type of language allegedly used – including hyperbole and colloquialisms – by an anonymous poster on an internet message board, a reasonable person would not conclude that these postings included serious factual findings. Rather, these statements reveal opinions, which cannot constitute libel. Accordingly, this Honorable Court should dismiss Count I of Plaintiff's Complaint.

D. Plaintiff Has Not Sufficiently Pled a Cause of Action for False Light

Plaintiff's false light claim should be dismissed because Plaintiff has failed to establish the requisite elements of this cause of action. Publicity that places a person before the public in a false light is "false light invasion of privacy" if (1) the false light would be highly offensive to a reasonable person, and (2) the actor knew or acted in reckless disregard of the falsity of the publicized matter and of the false light in which the victim would be placed. Restatement Second, Torts § 652E. A false light claim "is intended to protect a plaintiff's interest in keeping **private matters** from public view." *See Phillips v. Selig*, 2006 WL 2947667 *6 (Pa. C.P. 2006) (emphasis added). The elements of a cause of action for false-light invasion of privacy are:

(1) publicity;
(2) **given to private facts**;
(3) that would be highly offensive to reasonable person; and
(4) **are not of legitimate concern to the public**.

Strickland v. University of Scranton, 700 A.2d 979 (Pa. Super. 1997); *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377 (Pa. Super. 1984). (Emphasis added).

In his Complaint, Plaintiff did not identify statements disclosing matters of private concern; therefore, Plaintiff has not established the second element of a cause of action for false light. Indeed, because the statements at issue clearly relate to Plaintiff in his professional capacity – and not to private matters– the false light claim is not viable here. *See Phillips*, 2006 WL 2947667 *6 (reaching same result regarding statements relating to plaintiff's professional capacity as legal counsel for MLB umpire union). Moreover, Plaintiff's performance as COO or CEO of a publicly-traded company is "of a legitimate concern to the public" – and Plaintiff has not averred otherwise. Therefore, Plaintiff also has not established the fourth element of a false light cause of action.

Based on the above, this Court should strike Count II of Plaintiff's Complaint.

V. CONCLUSION

The Defendant, Herbert Bennett Conner, respectfully requests that this Honorable Court dismiss Plaintiff's Complaint for the following reasons:

- Because the one-year limitations periods applicable to Plaintiff's Defamation and False Light claims expired before Plaintiff filed his Complaint, this action is time-barred.

- Plaintiff has failed to state a claim for defamation because the statements at issue constitute opinion, which cannot support a defamation action.

- Plaintiff has failed to state a claim for false light because (1) the statements at issue clearly relate to Plaintiff in his professional capacity and not to private matters; and (2) since the statements at issue relate related to Plaintiff's professional capacity as an officer of a publicly-traded company, they relate to a legitimate concern of the public – and Plaintiff has not averred otherwise.

Respectfully submitted,
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