UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PARK WEST GALLERIES, INC.,
a Michigan corporation,

Plaintiff,

v.

FINE ART REGISTRY, an Internet site based out of Arizona, BRUCE HOCHMAN, a California resident, and THERESA FRANKS, an Arizona resident,

Defendants.

Case No. 2:08-CV-12247

Hon. Lawrence P. Zatkoff
Mag. Virginia M. Morgan

PARK WEST GALLERIES, INC.,
a Michigan corporation,

Plaintiff,

v.

DAVID CHARLES PHILLIPS,
a Washington resident,

Defendant.

Case No. 2:08-cv-12274

Hon. Lawrence P. Zatkoff
Mag. Virginia M. Morgan

PLAINTIFF PARK WEST GALLERIES, INC.'S MOTION TO DISMISS COUNTER-COMPLAINT

____/

RODGER D. YOUNG (P22652)
JAYE QUADROZZI (P71646)
Young & Susser, P.C.
Counsel for Plaintiff
26200 American Drive, Ste. 305
Southfield, MI 48034
248.353.8620
248.353.6559 (fax)
efiling@youngpc.com

IAN C. SIMPSON (P34454)
Garan, Lucow Miller, P.C.
Counsel for Bruce Hochman
1111 W. Long Lake, Suite 300
Troy, Michigan 48098-6333
248.641.7600
248.641.0222 (fax)
isimpson@garanlucow.com

RALPH C. CHAPA, JR. (P40612)
LAWRENCE C. ATORTHY
JONATHAN H. SCHWARTZ (P70819)
Kaufman, Payton & Chapa
Counsel for Fine Art Registry & Franks
30833 Northwestern Highway, Suite 200
Farmington Hills, MI 48334
248.626.5000
248.626.2843 (fax)

____/

Plaintiff Park West Galleries, Inc., by and through its attorneys, Young & Susser, P.C., requests this Court grant this Motion to Dismiss Counter-Complaint, along with such other relief as the Court deems just, for the reasons stated in its supporting brief.

In compliance with Eastern District of Michigan Local Rule 7.1, counsel for Park West sought the concurrence of Defendants' counsel in the relief sought, and that concurrence has not been granted.

Therefore, Park West respectfully requests that this Honorable Court grant the relief sought by this Motion.

YOUNG & SUSSER, P.C.

BY: s/ Jaye Quadrozzi
RODGER D. YOUNG (P22652)
JAYE QUADROZZI (P71646)
Counsel for Park West Galleries, Inc.
26200 American Drive, Suite 305
Southfield, MI 48034
248.353.8620
efiling@youngpc.com
P71646

Dated: May 18, 2009

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PARK WEST GALLERIES, INC.,
a Michigan corporation,

Plaintiff,

v.

FINE ART REGISTRY, an Internet site
based out of Arizona, BRUCE HOCHMAN,
a California resident, and THERESA FRANKS,
an Arizona resident,

Defendants.

Case No. 2:08-CV-12247

Hon. Lawrence P. Zatkoff
Mag. Virginia M. Morgan

PARK WEST GALLERIES, INC.,
a Michigan corporation,

Plaintiff,

v.

DAVID CHARLES PHILLIPS,
a Washington resident,

Defendant.

Case No. 2:08-cv-12274

Hon. Lawrence P. Zatkoff
Mag. Virginia M. Morgan

---/

BRIEF IN SUPPORT OF PARK WEST GALLERIES, INC.'S
<u>MOTION TO DISMISS COUNTER-COMPLAINT</u>

TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES iii

STATEMENT OF ISSUES PRESENTED iv

I. INTRODUCTION 1

II. FACTS 1

III. STANDARD OF REVIEW 3

IV. LAW/ARGUMENT 4

A. Elements of Defamation 4

1. None of the Alleged Defamatory Statements Set Forth in Count I A. (Bernard Ewell), B. (Online Articles by Beamon and Conner), C. (Louis Postel), and E. (Wikipedia) was published by or under the direction of Park West, its Principals, Agents, or Employees. 6

a. Bernard Ewell (Count I, A) 6

b. Online Articles of Beamon and Conner (Count I, B) 7

c. Louis Postel (Count I, C) 8

d. Wikipedia Entry (Count I, E) 8

2. The Alleged Defamatory Statements Made By Park West's Attorneys Are Protected by the Litigation Privilege. 9

3. The Alleged Defamatory Statements contained in Press Releases Issued by Park West are Protected by the Litigation Privilege and Fair Report Privilege. 10

4. The Alleged Defamatory Statements that are not specifically pled (Count I, D and F) must be dismissed. 11

5. All Claims asserted in Counts II, III, and V. are Premised on Alleged Defamation and Thus Necessarily Fail as a Matter of Law. 14

6. Sanctions. 14

IV. CONCLUSION AND RELIEF REQUESTED 15

CERTIFICATE OF SERVICE 16

INDEX OF AUTHORITIES

CASES

Bufalino v. Detroit Magazine,
433 Mich. 766; 449 N.W. 2d 410 (1989) 9

Helwig v. Vencor, Inc.
251 F.3d 540 (6th Cir. 2001) 3

In re Comshare, Inc. Sec. Litig.,
183 F. 3d 542 (6th Cir. 1999) 4

Kefgen v. Davidson,
241 Mich. App. 611; 617 N.W. 2d 351 (2000) 9

Ledlv. Quik Pik Food Stores, Inc.,
133 Mich. App. 583; 349 N.W. 2d 529 (1984) 5,12

Linebaugh v. Sheraton Mich. Corp.,
198 Mich. App. 335; 497 N.W. 2d 585 (1993) 12

Locricchio v. Evening News Ass'n,
438 Mich. 84; 476 N.W. 2d 112(1991) 5

Morgan v. Church's Fried Chicken,
829 F. 2d 10 (6th Cir.1987) 4

Oesterle v. Wallace,
272 Mich. App. 260; 725 N.W. 2d 470 (2006) 9-10

Papasan v. Allain,
478 U.S. 265 (1986) 4

Rouch v. Enquirer & News (*After Remand*),
440 Mich. 238; 487 N.W. 2d 205(1992) 5

Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.,
197 Mich. App. 48; 495 N.W. 2d 392 (1992). 5

Stencel v. Augat Wiring Systems,
173 F. Supp 2d 669 (E.D. MI, 2001) 12

Wynn v. Cole,,
68 Mich. App. 706; 243 N.W. 2d 923 (1976) 5

STATUTES

47 U.S.C §230. 7

MCL 600.2911 4

MCL 600.2911(3). 11

MCL 600.5805(9). 4

RULES

Fed. R. Civ. P. 11 1,14

Fed. R. Civ. P. 12(b)(6) 1,3

Fed. R. Civ. P. 56 3

OTHER

3 Restatement Torts, 2d, § 586 9,10

STATEMENT OF ISSUES PRESENTED

1. WHETHER DEFENDANTS FAR AND PHILLIPS' COUNTER-COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION AGAINST PLAINTIFF PARK WEST GALLERIES, INC. ("PARK WEST") WHERE THE ALLEGED DEFAMATORY STATEMENTS WERE MADE BY PARTIES OR ENTITIES WHO WERE NOT AGENTS, PRINCIPALS, OR EMPLOYEES OF PARK WEST DURING THE RELEVANT TIME PERIOD.

   Park West says: "Yes."

   Defendants/Counter-Plaintiffs say: "No."

2. WHETHER DEFENDANTS FAR AND PHILLIPS' COUNTER-COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION AGAINST PLAINTIFF PARK WEST WHERE THE ALLEGED DEFAMATORY STATEMENTS WERE MADE BY ATTORNEYS IN THEIR ROLES AS ADVOCATES FOR PARK WEST IN CONNECTION WITH THE SUBJECT MATTER OF PENDING LITIGATION BETWEEN THE PARTIES AND THUS ARE PROTECTED BY THE LITIGATION PRIVILEGE.

   Park West says: "Yes"

   Defendants/Counter-Plaintiffs say "No"

3. WHETHER DEFENDANTS FAR AND PHILLIPS' COUNTER-COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION AGAINST PLAINTIFF PARK WEST WHERE THE ALLEGED DEFAMATORY STATEMENTS WERE MADE IN PRESS RELEASES ISSUED BY PARK WEST WHICH QUOTE DIRECTLY FROM OR SPECIFICALLY REFER TO ALLEGATIONS IN PENDING LITIGATION BETWEEN THE PARTIES AND THUS ARE PROTECTED BY THE LITIGATION PRIVILEGE AND FAIR REPORT PRIVILEGE.

   Park West says: "Yes"

   Defendants/Counter-Plaintiffs say "No"

4. WHETHER DEFENDANTS FAR AND PHILLIPS' COUNTER-COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION AGAINST PLAINTIFF PARK WEST WHERE THE ALLEGED DEFAMATORY STATEMENTS ARE NOT SPECIFICALLY PLED.

   Park West says: "Yes"

   Defendants/Counter-Plaintiffs say "No"

5. WHETHER COUNT II (TORTIOUS INTERFERENCE), COUNT III (INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE) AND COUNT V (CONSPIRACY) OF FAR AND PHILLIPS' COUNTER-COMPLAINT NECESSARILY FAIL AS A MATTER OF LAW WHERE EACH RESTS ON DEFAMATION CLAIMS WHICH ARE FATALLY DEFICIENT.

   Park West says: "Yes"

   Defendants/Counter-Plaintiffs say "No"

6. WHETHER SANCTIONS ARE APPROPRIATE UNDER FED. R. CIV. P. 11 WHERE THE COUNTER-COMPLAINT WAS FILED TO HARASS AND NEEDLESSLY INCREASE THE COST OF LITIGATION AND CONTAINS CLAIMS AGAINST PARK WEST WHICH ARE NOT WARRANTED BY EXISTING LAW.

   Park West says: "Yes"

   Defendants/Counter-Plaintiffs say "No"

I. INTRODUCTION

Defendants FAR and Phillips filed a Counter-Complaint against Plaintiff Park West Galleries, Inc., arising from alleged defamatory statements gathered primarily from blogs, websites, articles, correspondence, and emails published by various individuals and entities other than Park West. The Counter-Complaint utterly fails to state a claim upon which relief may be granted against Park West, because the 121-paragraph Counter-Complaint is based upon (1) alleged statements which were not published by Park West or any its agents, principals, or employees; (2) alleged statements of Park West attorneys and/or press releases which were made in the context of judicial proceedings and therefore subject to privilege; and (3) alleged defamatory statements of Park West principals and employees which are not specifically pled as required under Michigan law.

Pursuant to Fed. R. Civ. P. 12(b)(6), the counterclaims relating to defamation are legally deficient and must be dismissed as a matter of law. Further, because the Counter-Complaint is not warranted by existing law and was interposed to harass Park West and needlessly increase the costs of litigation, sanctions are appropriate under Fed. R. Civ. P. 11.

II. FACTS

Plaintiff Park West Galleries, Inc. ("Park West") is a private art gallery that does business both in Michigan and throughout the world. These consolidated cases arise out of the actions, *inter alia*, of Defendants Fine Art Registry ("FAR") and David Charles Phillips ("Phillips") , who have made false and defamatory statements about the authenticity of certain art sold by Park West

and have tortiously interfered with Park West's current and prospective business relationships. Specifically, Defendants have communicated with Park West customers, repeated to them their false and defamatory statements about Park West, and have tortiously interfered with Park West's relationships with its customers. In addition to their false and defamatory statements about Park West, Defendants have solicited Park West customers to become FAR members, and encouraged the customers themselves to make false and defamatory statements about Park West based on the false information Defendants provided to them.

On May 4, 2009 Defendants FAR and Phillips filed a Counter-Complaint against Park West which is based largely on alleged defamatory statements made by individuals and entities whom are neither employed by nor affiliated with Park West. The Counter-Complaint contains 121 paragraphs which recite various statements about FAR and Phillips which were posted on blogs and in internet articles and websites by individuals who are neither agents nor employees of Park West and over whom Park West had no authority or control. [See Docket No. 63, Counter-Complaint, Count I, A. (Ewell), B. (Beamon, Conner), C.(Postel), and E. (Wikipedia)]. FAR and Phillips further allege that Park West defamed them through statements made by Park West's attorneys and in press releases, which are clearly subject to well-recognized litigation and/or fair report privileges. [Counter-Complaint, Count I, F (64-65) and G (70-71)]. FAR and Phillips further allege that emails from FAR's own members which purport to relay conversations between those individuals and Park West employees constitute defamation by Park West, despite the obvious lack of standing for any such claim. [Counter-Complaint, Count I, F(61-62)]. The

Counter-Complaint is further deficient as it alleges defamatory statements made by certain Park West principals or employees without requisite specificity, which necessarily fail as a matter of law. (Counter-Complaint, Count I, D(52) and F(60, 66)]. The Affidavit of Albert Scaglione, attached hereto as **Exhibit 1**, establishes that many of the third parties alleged to have made the defamatory statements were not principals, agents, or employees of Park West and were not acting under Park West's authority, direction, or control. (**Ex. 1**)[1].

In their further attempt to harass and needlessly prolong and increase the costs of litigation, Counter-Plaintiffs FAR and Phillips assert three additional counts against Park West in the Counter-Complaint, each of which hinges upon the fatally deficient claims of defamation. These include related claims of tortious interference (Count II), interference with prospective business advantage (Count III) and conspiracy (Count V). Because the Counter-Complaint fails to state a claim upon which relief may be granted against Park West for defamation, each of the related claims premised upon alleged defamation necessarily fails as a matter of law.

III. STANDARD OF REVIEW

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court is to construe the complaint in a light most favorable to the plaintiff. Helwig v. Vencor, Inc., 251 F.3d 540, 553

---

[1] Plaintiff/Counter-Defendant Park West is cognizant that Fed. R. Civ. P. 12 (b)(6) does not expressly permit this Court's consideration of affidavits in support of a motion to dismiss for failure to state a claim. In this case, however, Park West is forced to defend counterclaims against it which, in part, relate solely to alleged defamatory statements made by non-parties, based upon mere conclusory allegations of "agency". To the extent that the attached Affidavit pertains to those claims, Park West respectfully submits that it be considered, as necessary, in the context of the motion pursuant to Fed. R. Civ. P. 56.

(6th Cir. 2001). The court must accept as true "well pleaded" facts set forth therein. In re Comshare, Inc. Sec. Litig , 183 F. 3d 542, 547 (6th Cir. 1999). The court, however, need not accept as true legal conclusions framed as factual allegations. Morgan v. Church's Fried Chicken, 829 F. 2d 10, 12 (6th Cir.1987); see also Papasan v. Allain, 478 U.S. 265, 286 (1986) ("Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation").

As detailed below, FAR and Phillips Counter-Complaint must be dismissed because it does not adequately allege any viable claim for defamation against Park West and such claims and all related claims premised upon alleged defamation by Park West fail as a matter of law.

IV. LAW/ARGUMENT

A. Elements of Defamation

FAR and Phillips' Counter-Complaint purports to set forth a claim for defamation (Count I) and related tortious conduct (Counts II and III, tortious interference and interference with prospective business advantage) and conspiracy (Count V) against Park West. Yet the allegations, while lengthy in number, utterly fail to satisfy the essential elements of a cause of action for defamation under applicable Michigan law and should accordingly be dismissed.

Michigan law of defamation is governed by MCL 600.2911 and common law.[2] False statements that are injurious to business reputation are recognized in Michigan as a subcategory of defamation, governed generally by the same principles that apply to other defamation actions.

---

[2] The applicable statute of limitations is one year. MCL 600.5805(9).

Defamation can be either written statements (libel) or oral statements (slander), with the following necessary elements to plead and prove:

1. a false and defamatory statement concerning the plaintiff;
2. an unprivileged publication to a third party;
3. fault amounting to at least negligence on the part of the publisher; and
4. either actionability per se or the existence of special harm.

Rouch v. Enquirer & News (*After Remand*), 440 Mich. 238,251; 487 N.W. 2d 205(1992); Locricchio v. Evening News Ass'n, 438 Mich. 84, 115-116; 476 N.W. 2d 112(1991). In Michigan, Plaintiff must specifically plead the defamatory statements on which the complaint is based. Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc. 197 Mich. App. 48; 495 N.W. 2d 392 (1992). Even if the defamation was "by implication", the plaintiff must plead the precise statements made. Id. In Royal Palace Homes, building contractors sued television producers based on a claim that a broadcast relating to unethical conduct by contractors was defamatory. The trial court denied defendant's motion for summary disposition, however, on appeal the Court stated that claims of libel must be pleaded with specificity, setting forth the specific words of libel. Similar decisions were reached in Ledlv. Quik Pik Food Stores, Inc., 133 Mich. App. 583, 589-590; 349 N.W. 2d 529 (1984) (claim of defamation must specifically include "the defamatory words complained of") and Wynn v. Cole, 68 Mich. App. 706; 243 N.W. 2d 923 (1976)(libel complaint must include the contents of the libelous statement).

1. None of the Alleged Defamatory Statements Set Forth in Count I A. (Bernard Ewell), B. (Online Articles by Beamon and Conner), C. (Louis Postel), and E. (Wikipedia) was published by or under the direction of Park West, its Principals, Agents, or Employees.

FAR and Phillips Counter-Complaint is replete with alleged defamatory statements made by third parties other than Park West. These fail to properly allege or satisfy the basic element of publication on the part of Park West which is essential to the defamation and related claims.

a. Bernard Ewell (Count I, A)

These allegations include several blog entries set forth in Count I, Section A., published by Bernard Ewell during the period October 22, 2008 through April 18, 2009. (Counter-Complaint ¶¶ 19 (a-e)). The Affidavit of Albert Scaglione, CEO and founder of Park West establishes unequivocally that Bernard Ewell is not and never has been an agent, principal, or employee of Park West. (**Ex. 1, Affidavit, ¶ 4**). FAR and Phillips have alleged no factual basis whatsoever to impose liability on Park West for the alleged defamatory statements published by others. Counter-plaintiffs admit that it was Ewell who "published the blog" and they assert no factual basis to impose liability, vicarious or otherwise, on Park West for the alleged tortious conduct of a third party. In a failed attempt to link Park West to the actual publisher (Ewell), they assert in a conclusory fashion that Ewell is a "self-proclaimed paid agent and expert of Park West". (Counter-Complaint ¶ 19). The attached Affidavit, however, establishes that Park West did not authorize, direct or ratify statements made by Bernard Ewell on his blog.(**Ex. 1, ¶ 4**) Moreover, the mere allegation that Park West's website contains a "link to Ewell's blog" is

wholly insufficient to establish an agency relationship or potential liability for defamation for statements posted by others on the internet. This was addressed by Congress through the enactment of Section 230 of the Communications Decency Act , which provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another internet content provider". 47 U.S.C §230. Under federal law, Park West cannot not therefore be subject to tort liability merely by offering a link on its website to information published by a third party who was undisputedly the creator and author of the subject content. With respect to statements published by Ewell, FAR and Phillips cannot satisfy the essential element of publication on the part of Park West and those claims therefore fail to state a claim upon which relief may be granted and should be dismissed.

b. <u>Online Articles of Beamon and Conner (Count I, B)</u>

In Count I, B. FAR and Phillips unsuccessfully try to connect Park West to statements made in online articles allegedly published by Tom Beamon and Jill Conner. (Counter-Complaint, 25-32). Counter-plaintiffs struggle to assign some relationship between the actual authors and publishers (Beamon and Conner) and Park West via conclusory terms such as "commissioned" and "arranged' based upon unfounded suspicions as to how the articles originated. Again, the attached Affidavit establishes that these third parties are not and have never been principals, agents, and employees of Park West and Park West did not authorize, direct, or ratify the allegedly defamatory statements made and published by Beamon and Conner. (**Ex. 1, ¶¶ 5,6**). Because there is no factual allegation to support the requisite element of publication on the part

of Park West, these claims fail to state a claim upon which relief may be granted and should be dismissed.

c. **Louis Postel (Count I, C)**

FAR and Phillips allege that Louis Postel made false and defamatory statements about them in various blog postings on the internet. (Counter-Complaint, ¶¶33-37). In a conclusory fashion, Counter-Plaintiffs try to attribute these statements to Park West as a publisher, or vicariously through a factually unsupportable agency relationship, by alleging merely that Mr. Postel was "yet another one of Park West's paid agents/employees." (Counter-Complaint, ¶33). Yet, as the attached Affidavit demonstrates, Louis Postel is not and has never been an agent, principal, or employee of Park West and Park West has not authorized, directed, or ratified his internet blog postings. (**Ex. 1, ¶ 6**). Moreover, the allegation that a public relations firm hired by Park West referenced Louis Postel's forthcoming book in a press release adds no factual support whatsoever to somehow link the alleged defamatory statements to Park West. (Counter-Complaint, ¶¶38-40).

d. **Wikipedia Entry (Count I, E)**

In a remarkably absurd and baseless claim, FAR and Phillips seek to impose liability against Park West for allegedly defamatory statements posted under "Fine Art Registry" on the website "Wikipedia". (Counter-Complaint, 55-57) . Wikipedia is a widely used online encyclopedia and it is common knowledge that anyone can edit Wikipedia entries with virtual anonymity. With no factual support whatsoever, Counter-Plaintiffs assert that, "upon information and belief" Park West "published" defamatory statements about them on the Wikipedia website.

(Counter-Complaint, ¶ 55). Clearly there is no factual development which could prove that Park West was the "publisher" of the Wikipedia entries. The attached Affidavit, moreover, establishes that Park West did not publish and did not authorize, direct or ratify any of its agents, employees, and/or principals to publish statements about FAR and Phillips on the Wikipedia website. **(Ex. 1, ¶ 8)**. Because Counter-Plaintiffs cannot satisfy the essential elements of publication with respect to defamation by Park West, they fail to state a claim upon which relief may be granted and these claims should be dismissed.

2. The Alleged Defamatory Statements Made By Park West's Attorneys Are Protected by the Litigation Privilege.

Count I, F, does not properly state a claim for defamation because it fails to satisfy the required element that the alleged statement was an "unprivileged" publication. Paragraphs 64 and 65 set forth portions of written communications from Park West attorneys to a FAR member (Lorri Millett) in April, 2008 and to another attorney (John Szostak) in November, 2008. It is a well-recognized principle that communications from attorneys in the context of legal or judicial proceedings are protected by a litigation privilege and not subject to actions based in defamation. 3 Restatement Torts, 2d, § 586

In Michigan, whether a privilege exists in a defamation action is a question of law for the court. See, Bufalino v. Detroit Magazine, 433 Mich. 766; 449 N.W. 2d 410 (1989); Kefgen v. Davidson, 241 Mich. App. 611; 617 N.W. 2d 351 (2000). Statements made in the course of judicial or legislative proceedings are absolutely privileged. Id. An absolute privilege is one that prohibits any liability from being imposed, even for deliberate and malicious defamation. Oesterle

v. Wallace, 272 Mich. App. 260; 725 N.W. 2d 470 (2006). (Absolute privilege attached to statements made by attorneys in a settlement letter after judicial proceedings were commenced, as settlement negotiations constituted "judicial proceedings" to which absolute privilege applied). The purpose of absolute immunity under the judicial proceedings or litigation privilege, as it applies to attorneys, is to promote the public policy "of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." 3 Restatement Torts, 2d, § 586, comment a, p. 247.

Clearly, FAR and Phillips' allegations arising from statements made about them by Park West's attorneys Robert Burlington and Jaye Quadrozzi (Counter-Complaint ¶¶ 64,65) are absolutely privileged as each was made in the context of and in reference to the subject matter of this litigation. Counter-plaintiffs accordingly cannot satisfy a requisite element of a cause of action for defamation, i.e. an "unprivileged publication" to a third party and those claims should be dismissed.

3. The Alleged Defamatory Statements contained in Press Releases Issued by Park West are Protected by the Litigation Privilege and Fair Report Privilege.

Similarly, Count I, G, fails to state a claim for defamation because it fails to satisfy the required element that the alleged statements contained in Park West's press releases were "unprivileged" publications. Even taking as true the allegation that Park West "commissioned the creation" of the subject press releases, the actual statements complained of are protected by the litigation privilege as they are comprised of actual quotes from Park West's pleadings in the legal

proceedings between the parties. (Counter-Complaint, ¶¶ 70,71, e.g., "never examines the actual art work" taken from the Complaint, and other direct quotes from Park West's counterclaim - "FAR's defamatory attacks began in 2007" - in a state court action pending between the parties).

Further, Count I, G. specifically identifies an article from "Courthouse News Services" as one of the allegedly defamatory press releases. (Counter-Complaint, ¶70, Ex. V). Apart from the absolute litigation privilege which applies to the legal pleadings quoted therein, articles such as this are protected by the well-recognized fair report privilege, which applies to statements relying upon public documents where it is clear that the public document was the source. In Michigan, the fair report privilege has been codified, and protects accurate reports of official proceedings, even if the proceedings reported contain defamatory falsehoods. MCL 600.2911(3). As such, the alleged defamatory press releases, containing accurate accounts of allegations made in court, are privileged those claims should be dismissed.

4. The Alleged Defamatory Statements that are not specifically pled (Count I, D and F) must be dismissed.

Count I, D and F, do not properly state a claim for defamation because the allegations fail to satisfy the required element that the alleged defamatory statements be "specifically pled". (See Section IV A., above).

Count I, D. ("Shapiro"), alleges a single defamatory statement made by Morris Shapiro, the Gallery Director of Park West, in "his own article" entitled "Park West Gallery Sets the Record Straight" (Counter-Complaint ¶¶ 51-54.) The alleged defamatory statement, in its entirety, reads as follows. **"Mr. Phillips does a great disservice to the art world in general and to the**

readers of The Artist's Magazine in particular". (Counter-Complaint, ¶52(a)). This allegation, as pleaded, does not meet the requisite element of specificity as it does not contain any materially false statement or specific words of libel, and is obviously a mere opinion not subject to a claim for defamation. See, e.g., Ledl v. Quik Pik Food Stores, Inc., 133 Mich. App. 583; 349 N.W. 2d 529 (1984). Moreover, even if the defamation claim were adequately pled, there is no actionable defamation against Park West as an employer absent allegations that the defamation occurred in discharge of his Shapiro's duties as agent for his employer or in relation to a matter about which an employee's duties as agent for an employer required him to act. See, Stencel v. Augat Wiring Systems, 173 F. Supp 2d 669 (E.D. MI, 2001), citing Linebaugh v. Sheraton Mich. Corp.,198 Mich. App. 335, 338; 497 N.W. 2d 585 (1993). The allegations set forth in Count I, D. thus fail to state a claim upon which relief may be granted.

Similarly, Count I F, ("Emails from Park West and Defamatory Conversations") alleges defamatory statements made in an email to a reporter sent by Albert Molina, a "high ranking employee" of Park West (Counter-Complaint ¶¶ 60 (a) and (b)). Those statements also fail to meet the specificity required in a defamation claim as they are pled to read as follows: "**Relying on Terry Franks versions of "supposed" conversations she had—"who confirms 30 Park West customers have received refunds for art they felt wasn't worth the value paid" provides you with lies, not the truth"**, (¶ 60 (a)), and "**We can demonstrate through private investigators who we have retained that, even in the rare cases where a client has become unhappy, it is Terry Franks and Bruce Hochman who are lying to Park West clients about value and**

authenticity and attempting to poison them against Park West". (¶ 60, (b)). These statements not only lack specificity, the statements do not specifically pertain to the Counter-Plaintiffs FAR and Phillips, an essential element of the defamation claim. For these reasons and those applicable to the alleged Shapiro statement, these allegations fail to state a claim upon which relief may be granted against Park West and should be dismissed.

A similar lack of specificity is found in the alleged statements made "to Phillips from FAR member Guz Zucco" (Counter-Complaint ¶ 61 (a) and (b)) and to Phillips from an unidentified FAR member (Counter-Complaint ¶ 63) making each claim fatally deficient. Those statements purport to "relay" conversations that FAR members allegedly had with Park West employees (in some cases, unnamed). Significantly, FAR obviously lacks proper legal standing to complain of the allegedly defamatory remarks which pertain only to Phillips. Further, the statements themselves are hearsay, unreliable, and lack specificity as they simply do not contain false or defamatory statements, e.g., an unnamed FAR member allegedly wrote: **"I spoke with park west (sic). They claimed the NY Times article was (sic) freelance writer out to disparage them. They claimed you were disgruntled and not very complimentary about you".** (Counter-Complaint ¶ 63). Those allegations fail to state a claim upon which relief may be granted against Park West and should be dismissed.

Another fatally deficient allegation of defamation is set forth at ¶ 66 with respect to an alleged refund contract sent by Park West to a customer. As a matter of law, there is no specificity or <u>any</u> defamatory content in the alleged statement which reads as follows: " **We understand that**

you have received information from sources including Terry Franks, Fine Art Registry, Frank Hunter, and David Phillips that you have relied on requesting a refund". Although you have been misinformed, as a matter of client satisfaction, Park West is prepared to issue a refund..." While FAR and Phillips allege in conclusory fashion that this statement is "untruthful, harmful, disparaging, defamatory, and false", the statement, on its face, is clearly insufficient to satisfy the requisite standard of specificity and should accordingly be dismissed.

5. All Claims asserted in Counts II, III, and V. are Premised on Alleged Defamation and Thus Necessarily Fail as a Matter of Law.

All of the foregoing allegations in the Counter-Complaint are incorporated by reference and form the underlying basis for the additional causes of action set forth in Count II (Tortious Interference), Count III (Interference with FAR's Prospective Business Advantage) and Count V (Conspiracy). While defamatory statements may form the basis of related tort claims in some circumstances, traditional defamation defenses apply. See, Lakeshore Community Hospital v. Perry, 212 Mich App 396, 538 N.W. 2d 24 (1995) (alleging tortious interference but public-figure plaintiff required to show malice). In the instant case, Counts II, III, and V arise from and are premised upon the alleged defamation claims, which for reasons detailed above are fatally deficient. The additional counts therefore fail to state any claim upon which relief may be granted against Park West and must be dismissed as a matter of law.

6. Sanctions

Fed. R. Civ. P. 11 provides for the imposition of sanctions for pleadings which are interposed for an improper purpose, such as to harass or to cause unnecessary delay or needlessly

increase in the cost of litigation and in circumstances where, as here, the claims and other legal contentions are not warranted by existing law or by a nonfrivolous argument extending, modifying, or reversing existing law. The multi-count Counter-Complaint reciting defective allegations of defamation by third parties utterly fails to state a proper claim for relief against Park West and was clearly presented for improper purposes. Park West respectfully submits that appropriate sanctions be awarded in its favor and against the parties and their attorneys, including attorney fees and costs incurred in bringing this motion to dismiss.

V. CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Park West requests that this Court dismiss Counts I, II, III, and V of the Counter-Complaint for failure to state a claim upon which relief may be granted, together with the imposition of sanctions, including reasonable attorney fees and costs, against Defendants/Counter-Plaintiffs FAR and Phillips.

YOUNG & SUSSER, P.C.

BY: s/ Jaye Quadrozzi
RODGER D. YOUNG (P22652)
JAYE QUADROZZI (P71646)
Counsel for Park West Galleries, Inc.
26200 American Drive, Suite 305
Southfield, MI 48034
248.353.8620
efiling@youngpc.com
P71646

Date: May 18, 2009

CERTIFICATE OF SERVICE

I certify that on May 18, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Ralph C. Chapa, Jr., Lawrence C. Atorthy, Ian C. Simpson, and Jonathan Schwartz.

YOUNG & SUSSER, P.C.

BY: s/ Jaye Quadrozzi

RODGER D. YOUNG (P22652)
JAYE QUADROZZI (P71646)
Counsel for Plaintiff
26200 American Drive, Suite 305
Southfield, MI 48034
248.353.8620
efiling@youngpc.com
P71646