of speculation about something that probably as Americans we will never, ever get the answer to.

MR. RUSSO: It's been quite a journey, I think it's been a great learning experience on the way government doesn't work at critical times. I have learned more about that than I have about who killed President Kennedy, frankly. As you look at this case, you find mistakes, it is just fraught with governmental mistakes, governmental oversights, governmental omissions, commissions, it is just -- it's an education. It's a political education is what it is.

I've also seen journalism that I looked up to when I was younger, books that came out in the early '60s that I know now were just terribly written, terribly researched, so you get a different view of the printed word. When you're younger, you tend to think if it's printed, it must have been well researched. Well, that's not the case. And you learn that the hard way by going out in the field and following up on some of these

earlier writers and talk to the same people they spoke to and you find out a whole different spin on it when you get face to face.

MR. MFUME: I imagine most people watching this show will agree with you when you say it has been an education for you.

MR. RUSSO: Oh, yeah.

MR. MFUME: What have you learned, who do you think killed President Kennedy?

MR. RUSSO: From a physical mechanical standpoint, I think Lee Harvey Oswald kill the president. However, because the government was unable to pursue any leads, they didn't want to, they were afraid to, I think we'll never -- we may never know, outside of some amazing lucky break that comes along, if anyone got him to do it. I think there were strong leads that could have been followed in 1963. I'm writing a book about that that's going to talk about some of the things that we could have done then. I don't think we can do it now.

MR. MFUME: We're going to look at some other things that we perhaps could have or should have done and we're going to do that as it relates to new developments concerning the assassination of Dr. Martin Luther King Jr. We will do that when we come back on the Bottom Line.

(Conclusion of transcribed portion of the videotape.)

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SUAREZ CORP. v. CBS INC.

U.S. District Court
Northern District of Ohio

THE SUAREZ CORP. v. CBS INC., et al., No. 1:92CV0045, June 24, 1992 and February 19, 1993

REGULATION OF MEDIA CONTENT

1. Defamation—Pre-trial procedures—Jurisdiction (§11.1203)

Federal district court in Ohio lacks jurisdiction, under Ohio long arm statute, over Washington television station which employed reporter who broadcast allegedly defamatory report on television network show, in that reporter's use of station's letterhead, and his identification of himself as station employee during course of researching story, do not establish jurisdiction, since acts conferring jurisdiction must be tortious and must in and of themselves give rise to defamation claims asserted, and since plaintiff does not allege that such acts were defamatory.

2. Privacy—Common law right—False light publicity (§13.0104)

Ohio does not recognize cause of action for false light.

3. Defamation—Defamatory content—In general (§11.0501)

Determination of whether statements alleged to be defamatory are actionable is, under Ohio law, matter for trial court to decide as matter of law, and is not question for jury; plaintiff's conclusory allegations concerning television network's broadcast reporting on plaintiff's direct marketing efforts are insufficient to withstand network's motion to dismiss.

Action against television station, reporter, and television network for libel and invasion of privacy. On station's motion to dismiss for lack of jurisdiction, and on remaining defendants' motion to dismiss. Motions granted.

Richard M. Knoth, of Climaco, Climaco, Seminatore, Lefkowitz & Garofoli, Cleveland, Ohio, for plaintiff.

David L. Marburger, of Baker and Hostetler, Cleveland; Douglas P. Jacobs and Madeleine Schachter, CBS Inc., New York, N.Y.; and Gordon S. Conger, of Preston, Thorgrimson, Shidler, Gates & Ellis, Seattle, Wash., for defendants.

Full Text of Opinion

Matia, J.:

This action is before the Court upon (1) defendant, KIRO, Inc.'s Motion to Dismiss and (2) defendants, CBS, Inc. and Herb Weisbaum's Motion to Dismiss Plaintiff's Complaint. The Court has reviewed the written submissions of the parties.

Plaintiff brings this diversity action against CBS, Inc. ("CBS"), KIRO, Inc. ("KIRO"), and Herb Weisbaum ("Weisbaum") for defamation of character and for false light invasion of privacy. Plaintiff is engaged in direct marketing, offering merchandise to consumers through mailings, telemarketing and promotional broadcasts. Under the name "Lindenwold Fine Jewelers," plaintiff alleges that it conducted "a jewelry promotion which offers a free diamond simulant cubic zurconia (sic) stone at no cost to the consumer." Complaint at ¶12. An allegedly defamatory consumer report aired in Ohio on "CBS This Morning" on December 23, 1991. The broadcast concerned sweepstakes offers mailed by plaintiff to potential customers nationwide.

Plaintiff alleges that malicious falsehoods were directed at its trade and business activities that resulted in damage to its business, reputation and character. It is alleged that the broadcast contained false statements relating to the availability of free prizes from the company, the manner in which free prizes must be obtained from plaintiff, statements that plaintiff's promotions are phony and other than legitimate direct marketing endeavors and, finally, that the company would not appear on camera to respond to such scurrilous and disparaging statements. Complaint at ¶18. Plaintiff further alleges that defendants intended to

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settlement agreement. Schwartz indicated at oral argument, and in his brief on appeal, that his agreement to settle was contingent on the agreement being sealed. At oral argument, the SEC, however, argued that the settlement agreement was not contingent on being sealed. On remand, the district court should determine whether the parties have, indeed, settled the case.

have the viewers believe that the subject prizes were not free, delivery was not accomplished fastidiously, the promotions and the company as a whole were phony and, further, that by refusing to appear on camera, plaintiff admitted the alleged wrongdoing. Some of the viewers allegedly understood the broadcast to have such meaning. Complaint at ¶22. Plaintiff states that it has received many inquiries from customers and potential customers relating to the broadcast. See Plaintiff's Brief in Response to CBS and Weisbaum's Motion at 3-4.

KIRO moves the Court to dismiss the complaint for lack of jurisdiction over the person and for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(2) and (6). KIRO also joins in and relies upon defendants, CBS, Inc. and Herb Weisbaum's motion to dismiss.

CBS and Weisbaum also move the Court to dismiss the complaint for failure to state a claim upon which relief can be granted.

I.

In ruling on a motion to dismiss, the allegations of the complaint must be taken as true and construed in a light most favorable to the plaintiff. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The complaint is only to be dismissed if the plaintiff could prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, the Court need not accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

In ruling on KIRO's motion to dismiss, the Court can consider the affidavits of Harold L. Leibowitz, Weisbaum and Glenn C. Wright. *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988).

II.

KIRO argues that it lacks sufficient contacts with the State of Ohio to confer personal jurisdiction over it in this Court. KIRO is a Washington corporation which has its principal place of business in Seattle, Washington. Wright Affidavit at ¶2. It operates KIRO-TV, a television station in Seattle, Washington, which is affiliated with CBS. Weisbaum is employed by both KIRO and CBS. He produced and sold the subject consumer report to CBS without KIRO's involvement. Weisbaum Affidavit at ¶7. For the purposes of his appearances on "CBS This Morning," Weisbaum is a CBS employee. Leibowitz Affidavit at ¶4. Plaintiff has failed to show that Weisbaum was acting in anything other than his capacity as an employee of CBS.

Plaintiff alleges that KIRO is subject to personal jurisdiction in this Court "by virtue of the acts of its agent Weisbaum ..." Complaint at ¶7. It is undisputed that Weisbaum made one telephone call to an officer of plaintiff and mailed one letter (on stationery with CBS and KIRO logos) to plaintiff in the course of researching the consumer report. The call and letter originated in Seattle, Washington. Weisbaum Affidavit at ¶5.

The determination of whether the Court has personal jurisdiction over KIRO is a two-step process. *In-Flight Devices Corporation v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972). Plaintiff relies on Subsection (A)(3) of Ohio Rev. Code Ann. § 2307.382, Ohio's long-arm statute, as the basis for this Court's assertion of jurisdiction in the case at bar. Plaintiff asserts that KIRO is subject to Ohio's long-arm statute because KIRO, by its agent Weisbaum, caused tortious injury to plaintiff by "the defamatory communication" which occurred in this state. Plaintiff's Memorandum in Opposition to KIRO's Motion at 4. Ohio Rev. Code Ann. § 2307.382 provides in pertinent part:

> (A) A court may exercise personal jurisdiction over a person who acts directly or *by an agent*, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> * * * *
>
> (3) Causing tortious injury by an act or omission in this state;
>
> * * * *
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
>
> * * * *
>
> (Emphasis added.)

If jurisdiction lies under the Ohio long-arm statute, the Court must determine whether the assertion of jurisdiction

prives KIRO of due process of law. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316.

Plaintiff has the burden of making a *prima facie* showing that KIRO has minimum contacts with Ohio sufficient to establish personal jurisdiction here. *Welsh v. Gibbs*, 631 F.2d 436 (6th Cir. 1980); 2A Moore, Federal Practice (1991), ¶ 12.07 [2.-2]. For the reasons that follow, the Court finds that plaintiff has not met its burden of showing the existence of personal jurisdiction.

[1] Plaintiff asserts two bases for personal jurisdiction over KIRO, both premised on Weisbaum's alleged agency. First, Weisbaum's use of KIRO letterhead and the identification of himself as an employee of KIRO in a phone call to plaintiff during the course of researching plaintiff's business practices. However, the acts conferring jurisdiction must be tortious and must in and of themselves give rise to the defamation and false light claims asserted. *Fallang v. Hickey*, (1988) 40 Ohio St.3d 106; *Premix, Inc. v. Zappitelli*, 561 F.Supp. 269 (N.D. Ohio 1983). Plaintiff has not alleged that the letter and phone call to plaintiff in Ohio were defamatory.

Second, plaintiff asserts that the announcer's introduction of Weisbaum as being "of KIRO-TV . . . from Seattle" in the broadcast confers personal jurisdiction over KIRO. KIRO argues that apparent agency was not created as to it when Weisbaum was introduced as "of KIRO-TV." However, apparent agency does not apply in the case at bar which alleges a tort and not a breach of contract.

III.

[2] Plaintiff's claim in Count II of the complaint for false light invasion of privacy must be dismissed. Ohio has never recognized the tort of false light privacy. The Ohio Supreme Court's most recent statement is in *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369: "this court has not recognized a cause of action for invasion of privacy under a "false light" theory of recovery." *Id.* at 372. Any doubt on whether the tort of false light invasion of privacy is recognized in Ohio was resolved in *Angelotta v. American Broadcasting Corp.*, 820 F.2d 806 [14 Med.L.Rptr. 1185] (6th Cir. 1987), where the Sixth Circuit Court of Appeals stated that the false light tort is not recognized in Ohio. *Id.* at 808.

IV.

For the foregoing reasons, defendant, KIRO, Inc.'s Motion to Dismiss is GRANTED. Therefore, a judgment dismissing the complaint otherwise than upon the merits will be entered in favor of defendant, KIRO, Inc.

Defendants, CBS, Inc. and Herb Weisbaum's Motion to Dismiss Plaintiff's Complaint is GRANTED IN PART as to Count II of the complaint for false light invasion of privacy for failure to state a claim. The Court reserves ruling on the remainder of the motion which relates to Count I of the complaint for defamation.

IT IS SO ORDERED.

February 19, 1993

This action is before the Court upon defendants, CBS, Inc., and Herb Weisbaum's Motion to Dismiss Plaintiff's Complaint (Doc. #20). The Court has reviewed the memorandum in support, the brief in response (Doc. #25), the reply memorandum (Doc. #28), plaintiff's response to the reply memorandum (Doc. #29) and defendants' response to plaintiff's sur-reply (Doc. #30).

Plaintiff, The Suarez Corporation, filed this diversity action against CBS, Inc. ("CBS"), KIRO, Inc. ("KIRO"), and Herb Weisbaum ("Weisbaum") for defamation of character and for false light invasion of privacy.[1] Plaintiff is engaged in direct marketing, offering merchandise to consumers through mailings, telemarketing and promotional broadcasts. Under the name "Lindenwold Fine Jewelers," plaintiff alleges that it conducted "a jewelry promotion which offers a free diamond simulant cubic zurconia (sic) stone at no cost to the consumer." Complaint at ¶12. An allegedly defamatory consumer report aired in Ohio on "CBS This Morning" on December 23, 1991 (the "Broadcast"). The

[1] The Court previously granted KIRO's motion to dismiss. CBS and Weisbaum's motion to dismiss was granted in part. The complaint was dismissed without prejudice as to KIRO pursuant to Fed. R. Civ. P. 12(b)(2). Count II of the complaint for false light invasion of privacy was also dismissed. The Court reserved ruling on the remainder of CBS and Weisbaum's motion to dismiss which relates to Count I of the complaint for defamation.

Broadcast concerned sweepstakes offers mailed by plaintiff to potential customers nationwide.

Plaintiff alleges that malicious falsehoods were directed at its trade and business activities that resulted in damage to its business, reputation and character. It is alleged that the Broadcast contained false statements relating to the availability of free prizes from the company, the manner in which free prizes must be obtained from plaintiff, statements that plaintiff's promotions are phony and other than legitimate direct marketing endeavors and, finally, that the company would not appear on camera to respond to such scurrilous and disparaging statements. Complaint at ¶18. Plaintiff further alleges that defendants intended to have the viewers believe that the subject prizes were not free, delivery was not accomplished fastidiously, the promotions and the company as a whole were phony and, further, that by refusing to appear on camera, plaintiff admitted the alleged wrongdoing. Some of the viewers allegedly understood the Broadcast to have such meaning. Complaint at ¶22. Plaintiff states that it has received many inquiries from customers and potential customers relating to the Broadcast. See Brief in Response at 3-4.

CBS and Weisbaum move the Court to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

I.

The standard of review for a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is that "to be granted, there must be no set of facts which would entitle the plaintiff to recover. Matters outside the pleadings are not to be considered,[2] and all well-pleaded facts must be taken as true." *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989) (citations omitted). The allegations of the complaint must be taken as true and construed in a light most favorable to the plaintiff. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The complaint is only to be dismissed if the plaintiff could prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, the Court need not accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

II.

CBS and Weisbaum argue that the complaint does not specifically plead the allegedly defamatory language uttered by defendants in the Broadcast. Instead, plaintiff sets forth "four vague and conclusory challenges to the Broadcast." Memorandum in Support at 8. Plaintiff maintains that Count I of the complaint for defamation meets the requirements of Fed. R. Civ. P. 8(a), (e) and (f). See Brief in Response at 4-8. Plaintiff contends that "those falsehoods and *innuendo* center on statements made by defendants' (sic) concerning plaintiff's cubic zirconium promotion and business practices." (Emphasis added.) Brief in Response at 9. Innuendo, however, cannot enlarge words to make them defamatory. Where words, alleged to be defamatory, as ordinarily understood have no reasonable tendency to defame, and no extrinsic facts or circumstances are alleged which would give them a special or covert meaning, an innuendo cannot enlarge their meaning to make them defamatory. *Bigelow v. Brumley*, 138 Ohio St. 574 (1941), paragraph three of the syllabus.

First, it is alleged that the Broadcast contained false statements relating to the availability of free prizes from the company. Plaintiff alleges that defendants intended to have the viewers believe that the subject prizes were not free. The transcript states at page 2:

> [HERB WEISSBAUM (sic)] ... The stone is yours free unless you want to claim your major extra bonus, having your stone professionally mounted[,] for a price of course.

CBS and Weisbaum assert that "while Weisbaum pointed out that the stone could be professionally mounted 'for a price,' he expressly stated that *'the stone is yours free. . . .'* " (Emphasis in original.) Reply Memorandum at 9. Plaintiff counters this assertion by stating that

> [t]he most important word in the entire transcript is intentionally omitted. The term "*unless*" follows the phrase

[2] Lead counsel of record agreed at the Case Management Conference that the Court could consider copies of the transcript and a videotape of the broadcast. The videotape was filed with the Court. (Doc. #17). A copy of the transcript is attached as an exhibit to the memorandum in support.

quoted by defendants and was omitted for obvious reasons. . . . By inserting that very term, defendants did not state that the stone is free. Rather, defendants stated that there is a monetary condition to receipt of the stone, an untruth. (Emphasis in original.)

Plaintiff's Response to the Reply Memorandum at 5.

Second, it is alleged that the Broadcast contained false statements relating to the manner in which free prizes must be obtained from plaintiff. Plaintiff alleges that defendants intended to have the viewers believe that delivery was not accomplished fastidiously. CBS and Weisbaum assert that "[t]he Broadcast included no such statements, but merely indicated that the 'contestant' was required to write two letters in order to obtain the 'prize.' " Reply Memorandum at 9-10. The transcript states at pages 2-3:

HERB WEISSBAUM (sic)
When Carolyn DeMar got this mailing she just wanted her prize, for free. It took a couple of tries to get it.
CAROLYN DeMAR
Two letters. I had to send two letters to them and they finally sent me the stone. . . .

Third, it is alleged that the Broadcast contained false statements that the company would not appear on camera to respond to such scurrilous and disparaging statements. Plaintiff alleges that defendants intended to have the viewers believe that by refusing to appear on camera, plaintiff admitted the alleged wrongdoing. The transcript states at pages 6-7:

HERB WEISSBAUM (sic)
. . . Now the company that's sending out these mailings from Canton, Ohio wouldn't talk to me on camera but the firm's attorney wrote me a letter saying the mailings are simple and straightforward and the company is doing nothing wrong. . . .

As stated above, innuendo cannot enlarge "the company . . . wouldn't talk to me on camera" to make these words defamatory.

Fourth, it is alleged that the Broadcast contained false statements that plaintiff's promotions are phony and other than legitimate direct marketing endeavors. Plaintiff alleges that defendants intended to have the viewers believe that the promotions and the company as a whole were phony. The transcript states at page 7:

EDYE
. . . How do you tell a real contest from a phony contest [?]
HERB WEISSBAUM (sic) Two simple rules I live my life by. If it's a legitimate contest, number one, you have to enter, and number two, you don't have to pay anything. . . . If it's legit, you can enter for free and it doesn't cost you anything. If they want any money, beware.

CBS and Weisbaum assert that plaintiff "does not — and cannot — show that that statement, which actually is a question, is false, defamatory, or even about Suarez." Defendants' Response to Plaintiff's Sur-Reply at f.n.1.

[3] Plaintiff cites *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 [9 Med. L. Rptr. 1936] (7th Cir. 1983), *on remand*, 644 F.Supp. 1240 [13 Med.L.Rptr. 1263] (N.D. Ill. 1986), *aff'd in part and rev'd in part*, 827 F.2d 1119 [14 Med.L.Rptr. 1497] (7th Cir. 1987), *appeal after remand*, 14 Media L. Rep. (BNA) 1861 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), in support of its position that a jury should determine whether the statements are subject to recourse by plaintiff. See Brief in Response at 9-11. However, in the State of Ohio, it is for the Court to decide as a matter of law whether certain statements alleged to be defamatory are actionable or not. *Bigelow, supra*, at 590; *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 372. A defamation is false publication causing injury to a corporation's reputation, or exposing it to public hatred, contempt, ridicule, shame, or disgrace, or affecting it adversely in its trade or business.

In *Sorin v. Board of Ed., etc.*, 464 F.Supp. 50 (N.D. Ohio 1978), District Judge Manos dismissed a counterclaim for failure to set forth the substance of the statement alleged to be defamatory.

> . . . To state a cause of action for defamation, the allegedly defamatory statement must be set forth in the complaint substantially in the language uttered. *Foster v. United States*, 156 F.Supp. 421 (S.D.N.Y. 1957); *National Bowl-O-Mat Corp. v. Brunswick Corp.*, 264 F.Supp. 221 (D.N.J. 1967); see Wright & Miller, *Federal Practice & Procedure* § 1245 at 218-19.

Id. at 53. See, *also, Shimman v. Miller* (June 12, 1986), Cuyahoga App. No. 50757, unreported (affirming dismissal of defamation action for failure to state a claim).

CBS and Weisbaum also invoke the "innocent construction" rule. Reply Memorandum at 11-13. If allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted. *See, e.g., England v. Automatic Canteen Co. of America*, 349 F.2d 989, 991 (6th Cir. 1965).

When plaintiff's complaint is construed in a light most favorable to it, all of its factual allegations are accepted as true and the content of the Broadcast is reviewed, plaintiff undoubtedly can prove no set of facts in support of its defamation claim that would entitle it to relief. See *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 111 S.Ct. 182 (1990). Plaintiff's conclusory allegations cannot change the non-actionable statements of the Broadcast.

III.

For the foregoing reasons, defendants, CBS, Inc., and Herb Weisbaum's Motion to Dismiss Plaintiff's Complaint (Doc. #20) is GRANTED as to Count I of the complaint for failure to state a claim.

IT IS SO ORDERED.

EL VOCERO DE PUERTO RICO v. PUERTO RICO

U.S. Supreme Court

EL VOCERO DE PUERTO RICO (CARIBBEAN INTERNATIONAL NEWS CORP., et al., v. PUERTO RICO, et al., No. 92-949, May 17, 1993

NEWSGATHERING

Access to places—Public institutions—Courtrooms—Criminal actions—Pre-trial (§40.1105.0501)

First Amendment is violated by Puerto Rico Rule of Criminal Procedure 23(c), which provides that preliminary hearing, held before neutral magistrate to determine whether accused felon shall be held for trial, "shall be held privately" unless defendant requests otherwise.

Action by newspaper challenging constitutionality of Puerto Rico Rule of Criminal Procedure 23(c). The Puerto Rico Supreme Court upheld the rule's constitutionality, and the newspaper filed a petition for a writ of certiorari.

Petition granted; judgment of the Puerto Rico Supreme Court reversed.

Juan R. Marchand-Quintero, San Juan, P.R., for petitioners.

Full Text of Opinion

Per Curiam:

Under the Puerto Rico Rules of Criminal Procedure, an accused felon is entitled to a hearing to determine if he shall be held for trial. P. R. Laws Ann., Tit. 34, App. II, Rule 23 (1991). A neutral magistrate presides over the hearing, *People* v. *Opio Opio*, 104 P. R. R. (4 Official Translations 231, 239) (1975), for which the defendant has the rights to appear and to counsel. Rule 23(a)-(b). Both the prosecution and the defendant may introduce evidence and cross-examine witnesses, Rule 23(c), and the defendant may present certain affirmative defenses. *People* v. *Lebron Lebron*, 116 P. R. R. (16 Official Translations 1052, 1058) (1986). The magistrate must determine whether there is probable cause to believe that the defendant committed the offense charged. Rule 23(c) provides that the hearing "shall be held privately" unless the defendant requests otherwise.

Petitioner Jose Purcell is a reporter for petitioner *El Vocero de Puerto Rico*, the largest newspaper in the Commonwealth. By written request to respondents District Judges, he sought to attend preliminary hearings over which they were to preside. In the alternative, he sought access to recordings of the hearings. After these requests were denied, petitioners brought this action in Puerto Rico Superior Court seeking a declaration that the privacy provision of Rule 23(c) violates the First Amendment, applicable to the Commonwealth through the Fourteenth Amendment,[1] and an injunction against its enforcement. Petitioners based their claim on *Press-Enter-*

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[1] The Free Speech Clause of the First Amendment fully applies to Puerto Rico. *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328, 331, n. 1 [13 Med.L.Rptr. 1033] (1986).

LANE v. RANDOM HOUSE INC.

U.S. District Court
District of Columbia

MARK LANE v. RANDOM HOUSE INC., No. 93-2564 (RCL), January 26, 1995

REGULATION OF MEDIA CONTENT

1. Privacy — Common law right — Appropriation (§13.0105)

Book publisher's use, in advertisement for book concerning assassination of President John F. Kennedy, of name and photograph of plaintiff, as one of six authors whose assassination theories are critiqued in book, does not constitute misappropriation, since plaintiff's theories and analysis of his theories are newsworthy, and since publisher's use of plaintiff's name and photograph constituted incidental use.

2. Privacy — Common law right — False light publicity (§13.0104)

Defamation—Privilege—Fair comment/opinion (§11.4502)

Book publisher's advertisement, for book concerning assassination of President John F. Kennedy, which included plaintiff's name and photograph as one of six authors whose assassination theories are critiqued in book, and which included caption "Guilty of Misleading the American Public," does not place plaintiff in false light, nor does it give rise to cause of action for defamation, since statement is protected as fair comment, and since statement is rhetorical hyperbole that cannot be proven true or false.

Action for defamation and invasion of privacy against publisher. On defendant's motions for summary judgment and for attorney's fees.

Summary judgment granted and attorney's fees denied.

Mark L. Davidson, of Davidson & Associates, for plaintiff.

Bruce W. Sanford and Henry S. Hoberman, of Baker & Hostetler, Washington, D.C., for defendant.

Full Text of Opinion

Lamberth, J.:

Defendant Random House, Inc. has moved for dismissal of Plaintiff Mark Lane's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively, Random House has moved for summary judgment under Fed.R.Civ.P. 56. Upon consideration of the filings of counsel and the relevant law, Random House's motion for summary judgment is hereby GRANTED on all counts.

Random House has also requested costs and attorneys' fees. As prevailing party, Random House is entitled to costs as specified by Fed.R.Civ.P. 54(d)(1) and Local Rule 214. The request for attorneys' fees is DENIED.

I. LEGAL STANDARD

Because the parties have submitted evidence outside of the complaint, including copies of the disputed advertisement and book, the court will treat Random House's motion as one for summary judgment. Fed.R.Civ.P. 12(b)(6). Summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *E.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If summary judgment is to be denied, there must be evidence on which the jury could reasonably find for the plaintiff. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 [12 Med.L.Rptr. 2297] (1986). But if the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial," summary judgment may be granted. *Celotex*, 477 U.S. at 322.

As this case arises under the District Court's diversity jurisdiction, 28 U.S.C. §1332, the law of the District of Columbia governs. The Rules of Decision Act, and hence *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), do not strictly apply with respect to D.C. law; nonetheless, the court will apply D.C.'s substantive law for reasons of uniformity and respect for the D.C. Court of Appeals. *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 360–61 (D.C. Cir. 1983).

Based upon these standards, the court concludes that summary judgment in favor of Random House is appropriate on all of Lane's claims.

II. FACTUAL BACKGROUND

This is a libel case concerning an advertisement that appeared in *The New York Times* on two occasions in late August, 1993. The advertisement announced publication by Random House of Gerald Posner's *Case Closed*, a book supporting the Warren Commission's conclusion that Lee Harvey Oswald, acting alone, assassinated President John F. Kennedy. The theme of the book is captured near the bottom of the advertisement — "ONE MAN. ONE GUN. ONE INESCAPABLE CONCLUSION." — followed by the promotional exhortation to "READ: CASE CLOSED BY GERALD POSNER."

Lane's objection is to the body of the advertisement where his photograph appears along with five other literati whose theories about the Kennedy assassination are well-known to American readers and filmgoers. Each photograph is accompanied by a direct quote; and each quote is contrary to the views espoused by Posner in his new book. Above the six photographs is the caption: "GUILTY OF MISLEADING THE AMERICAN PUBLIC."

Immediately after the advertisement appeared, Lane protested to both *The New York Times* and Random House. His demand for a retraction was rejected. Random House indicated that it would not re-run the advertisement — but only because the pre-publication promotional campaign for Posner's book was finished.

Lane does not deny the quote attributed to him in the advertisement: "There is no convincing evidence that Oswald fired a gun from the sixth-floor window of the Book Depository or anywhere else on the day of the assassination." Still, Lane argues that he was injured in two respects. First, he objects to the unauthorized use of his photograph, name and notoriety in promoting the sale of *Case Closed*. Second, he seeks damages for the disparagement of his integrity and candor arising from the perceived suggestion in the advertisement that he has been intellectually dishonest with the American people.

III. ISSUES

The first three counts alleged by Lane deal with misappropriation. Count one is infringement of right of publicity; i.e., violation of Lane's exclusive right to publicize and benefit from the value of his identity, reputation and work. Count two is misappropriation of celebrity; i.e., non-consensual use of Lane's name, likeness and reputation to promote and sell the book *Case Closed*. Count three is appropriation of personal identity; i.e., exploitation of Lane's identity and persona as the most prominent and recognizable Warren Commission critic.

The second distinguishable claim by Lane is contained in his fourth count — the tort of false light. Lane claims that Random House sullied his reputation and disparaged his credibility by knowingly depicting him in a false light and thereby intentionally causing him mental anguish and emotional distress.

Finally, in count five, Lane claims defamation. According to Lane, Random House knew or could easily have determined that Lane had not been charged with nor convicted of fraud on the American public. Nevertheless, with actual malice or extreme recklessness, Random House twice published the offending advertisement. Because the falsity of the statement, "GUILTY OF MISLEADING THE AMERICAN PUBLIC," was objectively determinable, and because the statement was likely to be believed as factual, Lane contends that he was defamed. The appellation "GUILTY" was untrue; Lane was neither charged with nor convicted of misleading his readers.

As a result, Lane says he has not experienced the demand of previous years for his views and commentary; he has encountered increased difficulty in securing production for his other written works; and he anticipates reduced lecture bookings, fewer opportunities for publication, and diminished ability to attract significant clients for lucrative retainers. These concerns have caused Lane mental anguish and emotional distress. He places a $10 million price tag on these assorted grievances, in the form of actual, compensatory, presumed and punitive damages. Additionally, he requests attorneys' fees and costs.

Random House, in its motion for summary judgment, advances these arguments: (1) the advertisement in question contains protected opinion rather than a verifiably false statement of fact; (2) the advertisement constitutes privileged fair commentary on Lane's conspiracy theory; (3) the "newsworthiness" and "incidental use" privileges bar liability for misappropriation, as does the First Amendment; and (4) Lane can not satisfy the standards for the tort of false light.

Random House also requests attorneys' fees and costs.

The court will consider separately Lane's major claims — misappropriation, false light and defamation — then briefly address the issue of attorneys' fees.

IV. MISAPPROPRIATION

Lane's first three counts — infringement of right of publicity, misappropriation of celebrity, and appropriation of personal identity — are indistinguishable as a legal matter. They will be dealt with as a single cause of action for misappropriation.

Conceding that an advertiser's purpose in using someone's identity is central, Lane argues that Random House has exploited his individuality by portraying him in an advertisement for mere commercial gain. *See, e.g., Midler v. Ford Motor Co.*, 849 F.2d 460, 462 [15 Med.L.Rptr. 1620] (9th Cir. 1988) (unauthorized use of sound-alike voice is exploitation if not done for informative or literary purpose). According to Lane, his identity and likeness were misappropriated to promote a book not about him personally, but about conspiracy arguments in which he has been involved as a disputant. *See Tellado v. Time-Life Books, Inc.*, 643 F.Supp. 904, 914 [13 Med.L.Rptr. 1401] (D.N.J. 1986) (plaintiff's picture used solely to hype product, not to depict history of Vietnam war).

These arguments are without merit. Among the principal objectives of *Case Closed*, as set forth in the book's preface, is to resolve the "arguments raised by leading conspiracy critics, such as Anthony Summers, Mark Lane, Jim Marrs, and others . . ." Mark Lane is clearly more than a single combatant in a pervading conflict. He is one of the protagonists; without Lane and his cohorts, the controversy over the Kennedy assassination may well have been put to rest by the Warren Commission.

[1] Because Lane's picture and quotation are newsworthy and incidentally related to a protected speech product, they cannot form the basis for a successful misappropriation claim. Random House may invoke either the newsworthiness privilege or the incidental use privilege.

A. Newsworthiness Privilege

The newsworthiness privilege applies to advertisements for books, films, and other publications concerning matters of public interest. A plaintiff cannot recover for misappropriation based upon the use of his identity or likeness in a newsworthy publication unless the use has "no real relationship" to the subject matter of the publication. *Klein v. McGraw-Hill, Inc.*, 263 F.Supp. 919, 921 (D.D.C. 1966) (quoting *Dallesandro v. Henry Holt & Co.*, 166 N.Y.S.2d 805, 806 (Sup. Ct. 1957)).

Lane cannot seriously contend that the discussion of him in *Case Closed* is not newsworthy. Moreover, "[i]t has always been considered a defense to a claim of invasion of privacy by publication . . . that the published matter complained of is of general public interest." *Pearson v. Dodd*, 410 F.2d 701, 703 [1 Med.L.Rptr. 1809] (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969). Nor can Lane credibly maintain that he has "no real relationship" to Posner's book. Lane has devoted much time and effort establishing himself as paladin of the conspiracists. It is too late for him to retreat to the sidelines as a means of shielding himself from criticism.

In a case not unlike this one, the newsworthiness privilege was upheld as a defense against the unauthorized use of author Ayn Rand's name in a promotion of a book by another writer. The advertisement suggested that Rand would have approved of the ideas presented in the new book. But the court concluded that "a comparison to another author is, of necessity, always newsworthy and of interest to the public, which must consider whether or not to purchase the book." *Rand v. Hearst Corp.*, 298 N.Y.S.2d 405, 412 (Sup. Ct. 1969), *aff'd*, 257 N.E.2d 895 (N.Y. Ct. App. 1970).

Lane's position is even weaker than Rand's. Her name was appropriated to suggest that someone else's ideas might be compatible with her own. Lane's name was appropriated to suggest that his own writings, scrutinized in Posner's book, were themselves the raison d'etre for the book's publication.

To discredit this rather unvarnished application of the newsworthiness privilege, Lane seeks refuge in commercial speech doctrine. Even if a critique of his book is deemed newsworthy, Lane contends that an *advertisement* comprising a critique of his book is entitled to a lesser degree of protection. However, "it is a far-fetched contention that [a photograph] is used for purposes of trade merely because it is employed to illus-

trate a book dealing with the subject to which the plaintiff has made important contributions." *Klein*, 263 F.Supp. at 921.

The court will re-visit the topic of commercial speech in Parts IV(B) and VI(C), *infra*. Meanwhile, it is important to note that the backdrop for this case is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 [1 Med.L.Rptr. 1527] (1964).

While the newsworthiness privilege may not apply to an advertisement for a non-speech product, it does apply to advertisements for speech products — even those that propose a commercial transaction. Lane's theories about a pivotal and baffling public issue are manifestly newsworthy; serious analyses of his theories are derivatively newsworthy; and an advertisement promoting the sale of a book containing such analyses retains a newsworthiness immunity against a claim of misappropriation.

B. Incidental Use Privilege

The second defense advanced by Random House against Lane's misappropriation charge is the "incidental use" privilege. Newsworthiness and incidental use are related privileges, but the latter focuses on the public nature of the activities referenced in the alleged misappropriation. A person's name or likeness "is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities. . ." Restatement (Second) of Torts §652C, cmt. d (1977).

In opposition, Lane turns once again to his commercial speech paradigm. Commercial speech indicia, states Lane, are threefold: (1) a paid-for ad, that (2) refers to a specific product, and (3) is motivated by economic gain. When those ingredients are present, Lane's version of the First Amendment affords no immunity. Unauthorized commercial speech that exploits another's identity, persona or celebrity in advertising is not protected.

But this argument begs the question. The very nature of the incidental use privilege is to exclude certain material from the rubric of commercial speech. Because Lane's criteria for identifying when the commercial speech doctrine is to be invoked are deficient, the court can dispense with his rationale without even deciding how much protection is accorded commercial speech. To be sure, the Random House advertisement is paid-for; it refers to a particular product; and it is motivated in part by economic gain. While all three of Lane's ingredients are present, they are not sufficient to conclude that the advertisement is commercial speech.

"The fact that the defendant is engaged in the business of publication . . . out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of name or likeness." Restatement (Second) of Torts §652C, cmt. d (1977); *accord Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 [15 Med.L.Rptr. 2205] (9th Cir. 1988) (lampooning an anti-pornography activist is not misappropriation even if done to enhance a magazine's profits), *cert. denied*, 489 U.S. 1080 (1989). "It would be illogical to allow respondents to exhibit [speech products] but effectively preclude advance discussion or promotion of their lawful enterprise." *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 462 [5 Med.L.Rptr. 2208] (Cal. 1979).

A similar conclusion was reached only a few months ago in a case that parallels this case in virtually every respect. The court granted defendants' motion for summary judgment in a lawsuit brought by Robert Groden, an author and lecturer on the Kennedy assassination. Groden was pictured in the same advertisement that Lane challenges here. Groden claimed commercial appropriation of his name and likeness under New York law and false advertising under the Lanham Act. *Groden v. Random House, Inc., et al.*, No. 94 Civ. 1074 [22 Med.L.Rptr. 2257] (S.D.N.Y. Aug. 22, 1994).

"[T]he fact that the Advertisement uses plaintiff's name and photograph to indicate the nature of the content of *Case Closed* — namely, a critique of the work of the pictured conspiracy theorists — brings it within the ambit of the incidental use exception. *See Namath v. Sports Illustrated*, 371 N.Y.S.2d 19, 11–12 (A.D. 1st Dept. 1975) (use of plaintiff's photograph for purposes of soliciting subscriptions is an incidental use where photograph gave reader indication of contents of magazine), *aff'd*, 386 N.Y.S.2d 397 (1976); *Rand*, 298 N.Y.S.2d at 410–12 (use of quotation from book review comparing book to work of renowned author

on book jacket was incidental use because purpose of use was to inform public of nature of book being sold)." *Groden*, at 6–7.

"Had defendants merely used plaintiff's name in the Advertisement, that use would clearly fall within the incidental use exception under the above-cited precedents. The fact that the Advertisement also contained Groden's photograph, which defendants concede does not appear in the Book, cannot transform a privileged use into an unlawful use because the goal of the Advertisement — to inform potential readers about the contents of the Book and induce them to purchase it — remains unchanged." *Groden*, at 8.

This court concurs with the Southern District of New York. The incidental use privilege is applicable to the circumstances at issue in this case. Random House is not culpable for infringement of Lane's right of publicity, misappropriation of his celebrity, nor appropriation of his personal identity.

V. FALSE LIGHT

Lane claims that Random House sullied his reputation and disparaged his credibility by knowingly depicting him in a false light and thereby intentionally causing him mental anguish and emotional distress. False light invasion of privacy is defined as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts §652E (1977).

The second prong for false light — knowledge or reckless disregard of the falsity of the underlying statement — is the same "actual malice" requirement for a defamation action set forth in *Sullivan*, 376 U.S. at 279–80. Whereas an action for defamation redresses damage to one's reputation, the tort of false light is intended to remedy mental distress from having been exposed to public view. "Yet, truth or assertion of opinion are defenses in both causes of action." *White v. Fraternal Order of Police*, 909 F.2d 512, 518 [17 Med.L.Rptr. 2137] (D.C. Cir. 1990) (citing *Rinsley v. Brandt*, 700 F.2d 1304, 1307 [9 Med.L.Rptr. 1225] (10th Cir. 1983)). Moreover, the same absolute and conditional privileges available to libel defendants may be invoked in defense of false light claims. *See* Restatement (Second) of Torts §§652F, 652G (1977). As we shall see below, Random House has colorable defenses against defamation. By law, these defenses are valid against false light as well.

With respect to the "highly offensive" prong of the standard, Random House correctly observes that challenging Lane's views by calling them "misleading" is hardly the repugnant conduct necessary to sustain a false light claim. Indeed, it lies comfortably within the boundaries of rough and tumble debate which should have been anticipated by Lane upon publication of his own contentious best-seller. "Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments." *Ollman v. Evans*, 750 F.2d 970, 993 [11 Med.L.Rptr. 1433] (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S 1127 (1985).

Of course, at this stage of the proceedings, the question the court must resolve is whether a fact-finder could rationally conclude that the aspersion to Lane is highly offensive. *Moldea v. New York Times*, 15 F.3d 1137, 1140 [22 Med.L.Rptr. 1321] (D.C. Cir.) (*Moldea I*) (rehearing granted, reversed on other grounds, 22 F.3d 310 [22 Med.L.Rptr. 1673] (D.C. Cir.) (*Moldea II*)), *cert. denied*, ___ U.S. ___, 115 S. Ct. 202 (1994). The standard is an objective one, based upon the reaction that a reasonable person would have if he or she were the subject of the Random House advertisement. *Id.*

Lane entered the public forum by embroiling himself in one of the most factious debates of our time. It is quite simply untenable that someone espousing Lane's views would take umbrage at the rather reserved assessment that he misled the American public. "It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in [Lane's] position . . . ." Restate-

ment of Torts (Second) §652E, cmt. c. Under Lane's lopsided rules of engagement, he gets his choice of weaponry and tactics; Random House must do battle unarmed and march openly in a straight line. A conspiracy theory warrior outfitted with Lane's acerbic tongue and pen should not expect immunity from an occasional, constrained chastisement.

Random House, in publicizing its own book has publicized Lane's as well. In the process, Random House furnished a bibliography from which varying insights on the Kennedy assassination can be extracted and scrutinized, then accepted or rejected. The court is unwilling to substitute its perspective for that of an informed readership. If Lane is aggrieved as he claims, he should know that an already burdened judicial system cannot accommodate protestations of this sort.

[2] Lane's false light allegations are dismissed — both because the statement in the Random House advertisement does not objectively cross the "highly offensive" threshold, and for the reasons discussed below in connection with Lane's defamation claim.

VI. DEFAMATION

In his fifth and last count, Lane claims defamation. According to Lane, Random House knew or could easily have determined that Lane had not been charged with nor convicted of misleading the American public. Nevertheless, with actual malice or extreme recklessness, Random House twice published the offending advertisement. Because the falsity of the charge was objectively determinable and likely to be believed as factual, Lane contends he was defamed.

There is, however, a very real risk in sanctioning recovery for libel under these circumstances. Debate about one of our important historical events could be stifled by threats of costly litigation. As Random House remarked in their motion for summary judgment, "To allow conspiracy theorists to haul book authors into court in an effort to punish written criticism is contrary to our tradition of arriving at truth through a robust exchange of views in the marketplace of ideas." Lane is certainly entitled to his beliefs; but it is not defamatory to criticize him. Books, editorials and talk shows are more appropriate forums than courts for this type of polemic.

Lane is well aware of a judicial disposition in favor of open and unobstructed debate. In his failed libel action as attorney for Willis Carto's Liberty Lobby, Lane and his client were told by the court: "Neither an organization nor a person who sallies forth to espouse a specific creed or conviction can resort to the courts to silence those who disagree with that viewpoint." *Carto v. Buckley*, 649 F.Supp. 502, 508 (S.D.N.Y. 1986).

Both common law and constitutional protections are available to Random House. Ordinarily, an elementary canon mandates that courts not address a constitutional question if there is another ground on which the case can be decided. *See, e.g., Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 657 [16 Med.L.Rptr. 1225] (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring)). However, defamation is inextricably linked with First Amendment concerns. For that reason, courts frequently examine the constitutional implications of libel actions at the summary judgment stage. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 [17 Med.L.Rptr. 2009] (1990); *White*, 909 F.2d at 523; *Ollman*, 750 F.2d at 991. "In the First Amendment area, summary procedures are even more essential. . . . The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself . . . ." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

Accordingly, the court will explore the First Amendment ramifications of Lane's complaint. Although the common law fair comment privilege might also be an adequate basis upon which to grant Random House's motion for summary judgment, the court's dismissal of Lane's defamation count is grounded primarily in the First Amendment. Still, as a preliminary matter, the fair comment privilege is worth a cursory review.

A. Fair Comment Privilege

The common law privilege of fair comment applies where the reader is aware of the factual foundation for a comment and can therefore judge independently whether the comment is reasonable. *Milkovich*, 497 U.S. at 30 n.7 (Brennan, J., dissenting). Fair comments are not actionable in defamation "[b]ecause the reader understands that such

supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts . . . ." *Moldea I*, 15 F.3d at 1144. In the District of Columbia, the fair comment privilege can be invoked even if the underlying facts are not included with the comment. *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. 1965) (relying on *Sullivan v. Meyer*, 141 F.2d 21 (D.C. Cir.), *cert. denied*, 322 U.S. 743 (1944)).

Here, application of the privilege is straightforward. Lane's direct quote is included in the Random House advertisement and the reader is urged to read *Case Closed* (or the works of any or all of the six conspiracists) for a fuller explication of the competing viewpoints. The inclusion of the underlying facts, directly in the form of a quotation and indirectly in the form of a booklist, more than complies with this circuit's criteria for applying the fair comment privilege. *See also, Potomac Valve and Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1290 (4th Cir. 1987) (challenged statement not actionable because "premises are explicit, and the reader is by no means required to share [defendant's] conclusion").

B. First Amendment Protection

The precepts governing the interrelationship between defamation and First Amendment jurisprudence were recently set forth in *Milkovich*, 497 U.S. at 18–21. To be defamatory, a statement must be "objectively verifiable" as true or false. *Id.* at 21. To insure room for "imaginative expression" and "rhetorical hyperbole," statements are only actionable if they have an explicit or implicit factual foundation. *Id.* at 20. Full constitutional protection exists for rhetoric that, due to its loose, figurative tone cannot reasonably be interpreted as stating actual facts about an individual, and for imprecise statements that are not susceptible of being proved true or false. *Id.* at 20–21.

The Seventh Circuit expanded upon the *Milkovich* formulation. "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 [21 Med.L.Rptr. 2161] (7th Cir. 1993) (citations omitted).

"GUILTY OF MISLEADING THE AMERICAN PUBLIC," would seem the ideal prototype of a statement that conforms to the *Milkovich-Haynes* model. It is rhetorical hyperbole; it does not state actual facts about an individual; it cannot be proven true or false. The statement in the Random House advertisement "could not reasonably be interpreted as stating anything other than a subjective belief." *Groden* at 14. Gerald Posner's evaluation in *Case Closed* is that Lane misled the public. That evaluation cannot be objectively verified without resolving thirty years of controversy surrounding the Kennedy assassination. To the extent that Posner's opinion rests on underlying facts, those facts are lodged in his and Lane's books. Events discussed in the two books have resisted objective verification for more than three decades. Readers may believe one book, the other, or neither; but there is no indication that Lane's theories have acquired the imprimatur of received wisdom.

Prior to *Milkovich*, this circuit recognized a strict dichotomy in defamation actions between assertions of opinion and assertions of fact. *See, e.g., Ollman*, 750 F.2d at 971. *Milkovich* rejected this practice. Post-*Milkovich* cases held that opinions can be actionable if they imply a provably false fact. *See, e.g., White*, 909 F.2d at 522. Thus, the task is to "determine as a threshold matter whether a challenged statement is capable of a defamatory meaning; and whether it is verifiable — that is, whether a plaintiff can prove that it is false." *Moldea II*, 22 F.3d at 316–17 (citing *Moldea I*, 15 F.3d at 1142–45). The burden of proving falsity rests squarely on the plaintiff. He or she must demonstrate either that the statement is factual and untrue, or an opinion based implicitly on facts that are untrue.

Applying these principles in a context not far removed from the dispute the court grapples with today, the D. C. Circuit concluded: "[W]hen a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation." *Moldea II*, 22 F.3d at 313. The context in *Moldea II* was a book review "in which the allegedly libelous statements were evaluations quintessentially of a type readers expect to find in that genre." *Id.* at 315. It was Moldea's book at issue, not his character, reputation or competence as a journalist.

While a bad review inevitably injures an author's reputation to some extent, "criticism's long and impressive pedigree persuades us that, while a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre." *Id.* (citing *Sullivan*, 376 U.S. at 272).

Lane insists that his case against Random House is not about who killed President Kennedy. Instead, Random House has accused Lane in no uncertain terms of being guilty of a public deceit, of duplicity and intellectual dishonesty. Random House implied that Lane has been exposed as a charlatan. Indeed, attests Lane, Random House's charges can be proven false; his veracity, integrity, intellectual honesty and candor can all be plumbed in a trial as a matter of fact.

If Random House had said what Lane said it said, perhaps we would have a more perplexing case. Even then, it is difficult to imagine how the court could assess Lane's deceitfulness, veracity, etc. without examining the assassination itself. Reckless disregard for the truth might qualify Lane for some of Random House's unstated pejoratives; but the "truth" has remained camouflaged since 1963, notwithstanding protracted analysis and debate. In *Milkovich* terms, if the underlying facts are not "objectively verifiable," the opinion based upon those facts is not actionable. 497 U.S. at 21. In *White* terms, "[a]ssertions of opinion on a matter of public concern . . . receive full constitutional protection if they do not contain a provably false factual connotation." 909 F.2d at 522. The challenged Random House statement has no provably false connotation, nor does it imply provable facts.

Moreover, Random House simply did not mention candor, integrity, duplicity, charlatanism or the other colorful terminology conjured up by Lane. The advertisement expressly said: "guilty of misleading the American public." "Guilty" is defined as "justly chargeable with or responsible for a usually grave breach of conduct." *Webster's Ninth New Collegiate Dictionary* 542 (1990). In this instance, the breach of conduct is misleading the public. "Mislead" is not synonymous with "deceive." The latter implies "imposing a false idea or belief," while the former is merely "a leading astray that *may or may not be intentional.*" *Id.* at 329 (emphasis added). Whether or not Lane has been exposed as a charlatan, one would be hard-pressed to pluck that insinuation from the comparatively bland charge in the Random House advertisement. "Even the . . . assertion that appellants are 'blatantly misleading the public' . . . is subjective and imprecise, and therefore not capable of verification or refutation by means of objective proof." *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 n.7 [19 Med.L.Rptr. 1786] (1st Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2942 (1992).

The contested statement in the Random House advertisement reflects differing interpretations of the murky facts surrounding the Kennedy assassination. By "expressing a point of view only . . . the challenged language is immune from liability." *Phantom Touring*, 953 F.2d at 729. *Groden* concurs: "[K]nown evidence concerning the Kennedy assassination and the extensive debate over the Warren Commission's findings demonstrate that the actual facts will never be verifiable to everyone's satisfaction. Thus, the statements in the advertisement are merely statements of Posner's argument or opinion . . . ." *Groden* at 14–15.

C. Commercial Speech Implications

Lane complains that Random House's purpose in advertising the Posner book was purely commercial. In *Central Hudson*, the Supreme Court sanctioned regulation of commercial speech, applying a level of scrutiny less strict than that reserved for non-commercial political speech. *Central Hudson Gas & Electric Corp. v. Pub. Serv. Commn. of New York*, 447 U.S. 557, 566 [6 Med.L.Rptr. 1497] (1980). Ergo, even though the Kennedy assassination was an event of immense public importance and interest, an advertisement is of lower pedigree than political speech and therefore not entitled to full protection. Lane subscribes to the *Central Hudson* characterization: "[M]any, if not most, products may be tied to public concerns. . . . [But there] is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions." *Id.* at 563 n.5.

On the other hand, the Supreme Court has also held that protected speech remains protected even if styled as a solicitation to purchase. "[I]f the allegedly libelous statements would otherwise be constitutionally protected . . . they do not forfeit that protection because they were published in the form of a paid advertisement." *Sullivan*, 376 U.S. at 266.

"[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 [1 Med.L.Rptr. 1930] (1976).

The critical question is whether the promotional material related to a speech product that is itself protected. "[T]he mere fact that the statements appear in advertisements does not compel the conclusion that the statements are commercial." *National Life Ins. Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627, 645 [20 Med.L.Rptr. 1393] (D. Md. 1992). "Defendants' economic motivation . . . is not enough to turn the statements into commercial speech." *Id.* at 644. In the specific context of the Random House advertisement, the underlying product is a book. Accordingly, it is essential to identify and protect "advertising which summarizes an argument or opinion contained in the book." *Groden*, at 13.

As Random House fittingly observed, the challenged advertisement is not about laundry detergent; it cannot be divorced from the book *Case Closed*; and the book is protected speech. There are 19 references to Lane in Posner's book. Lane and the other conspiracy theorists are featured in the advertisement, in part, because *Case Closed* dissects their theories in painstaking detail. The court finds no justification for categorizing the Random House advertisement as commercial speech, nor for diminishing the constitutional safeguards to which it is properly entitled.

ATTORNEYS' FEES

Random House has cited no applicable statutory exception to the American rule that each party shall bear its own legal fees. None of the statutory exceptions known to the court seem applicable to this case. Nor has Random House documented behavior by Lane that might be considered sanctionable under 28 U.S.C. §1927, or under Fed. R. Civ. P. 11, 16(f), 26(g), 37 or 45(c). Absent such showing, the court has no basis upon which to grant Random House's request for attorneys' fees.

VIII. CONCLUSION

For reasons more fully set forth above, the motion for summary judgment by defendant Random House is granted on all five counts. Costs shall be apportioned in accordance with Fed. R. Civ. P. 54 (d)(1) and Local Rule 214. Random House's request for attorneys' fees is denied.

Mark Lane might well profit from Jefferson's sage advice: "I laid it down as a law to myself, to take no notice of the thousand calumnies issued against me, but to trust my character to my own conduct, and the good sense and candor of my fellow citizens." If nonetheless Lane is affronted by such minor provocations as the court addresses today, he may elect to minimize his exposure by opting for a lower public profile. More likely, having acknowledged that publicity is the lifeblood of his career, Lane will have to overcome his brittleness — or seek solace elsewhere than from this court.

A separate order shall issue this date.

JONES v. CAPITAL CITIES/ABC INC.

U.S. District Court
Southern District of New York

QUEEN ESTHER JONES v. CAPITAL CITIES/ABC INC., WWOR-TV INC., NATIONAL BROADCASTING CO. INC., WPIX INC., CBS INC., WNYN-FOX 5, INNERCITY BROADCASTING CO. WBLS/WLIB, NEW YORK TELEPHONE, their agents, employees, custodians, broadcast journalists, et al., No. 93 Civ. 2915 (JES), February 1, 1995

REGULATION OF MEDIA CONTENT

1. Defamation — Related causes of action — In general (§11.5801)

Liability for non-defamatory communication — In general (§13.01)

Pro se plaintiff's unsupported, vague, and conclusory allegations that defendant television networks and stations engaged in "oral, wire, and electronic" eavesdropping, false imprisonment, and defamation, do not state claim upon which relief could be granted; claims, which arose eight years prior to filing of complaint,

GRODEN v. RANDOM HOUSE INC.

U.S. District Court
Southern District of New York

ROBERT GRODEN v. RANDOM HOUSE INC., THE NEW YORK TIMES CO. INC., and GERALD POSNER, No. 94 Civ. 1074 (JSM), August 22, 1994

REGULATION OF MEDIA CONTENT

1. Privacy — State statutory protections — New York Civil Rights Law (§13.0502.02)

Commercial speech/advertising — False or misleading advertising (§15.15)

Book publisher's use, in advertisement for book concerning assassination of President John F. Kennedy, of name and photograph of plaintiff, as one of six authors whose assassination theories are critiqued in book, constitutes "incidental" use of plaintiff's name and photograph and thus does not violate New York Civil Rights Law Sections 50 and 51, even though plaintiff's photograph does not appear in book itself, nor does such advertisement constitute false advertising in violation of Lanham Act's Section 43(a), 15 USC 1125(a), since caption used with photograph of plaintiff and other authors, stating "Guilty of Misleading the American Public," would not be interpreted by reasonable reader as making verifiable factual assertion about plaintiff's work.

2. Commercial speech/advertising — False or misleading advertising (§15.15)

Book publisher's use, in advertisement for book concerning assassination of President John F. Kennedy, of quotation from book co-authored by plaintiff, does not constitute false and misleading attribution in violation of Lanham Act's Section 43(a), 15 USC 1125(a), even though plaintiff alleges that he does not share views reflected in quotation, since plaintiff has held himself out to public as co-author of entire book, and thus attribution to him of statement from book cannot be false and misleading.

3. Commercial speech/advertising — False or misleading advertising (§15.15)

Book publisher's use, in advertisement for book concerning assassination of President John F. Kennedy, of photographs of six individuals, including plaintiff, who had espoused various assassination theories, under caption reading "Guilty of Misleading the American Public," would not be interpreted by reasonable reader as implying that plaintiff is affiliated with, or endorses views of, other individuals pictured, or that they all conspired together to mislead American public.

Action against book author, publisher, and newspaper for violation of the New York Civil Rights Law Sections 50 and 51 and for violation of the Lanham Act. On defendants' motion for summary judgment.

Granted.

Roger Bruce Feinman, New York, N.Y., for plaintiff.

Victor A. Kovner and Alexandra Nicholson, of Lankenau Kovner & Kurtz, New York, for defendants.

Full Text of Opinion

Martin, J.:

BACKGROUND AND FACTS

Plaintiff, Robert Groden ("Groden"), is an author and lecturer on the subject of the assassination of President John F. Kennedy. He most recently authored a book about the assassination entitled *The Killing of a President*, published in the fall of 1993, and produced a companion video, "JFK: The Case for Conspiracy." Plaintiff is also the co-author of two other books, *JFK: The Case for Conspiracy*, published in 1975, and *High Treason*, published in 1989.

In conjunction with the thirtieth anniversary of President Kennedy's assassination, defendant Random House, Inc. ("Random House") published *Case Closed* ("the Book"), a book written by defendant Gerald Posner ("Posner"). *Case Closed* challenges many of the conspiracy theories which have been developed around the Kennedy assassination, concluding that they are flawed and that

Oswald acted alone. Throughout the Book, Posner refers to plaintiff's work and challenges his research and conclusions.

Random House placed an advertisement in *The New York Times* on August 24 and 27, 1993 promoting *Case Closed* ("the Advertisement"). The Advertisement featured a headline, "GUILTY OF MISLEADING THE AMERICAN PUBLIC," over the photographs of six men whose views are critiqued in the Book. Adjacent to each photograph was the subject's name and occupation, followed by a quote and the year it was published. Under these photographs, the Advertisement states: "ONE MAN. ONE GUN. ONE INESCAPABLE CONCLUSION." At the bottom of the page, the Advertisement urges: "READ: *CASE CLOSED* BY GERALD POSNER." *See* Defendants' Exhibit D.

Plaintiff, who is pictured in the Advertisement, filed this action on February 17, 1994. Plaintiff essentially alleges: (1) that defendants' use of his name and photograph violates Sections 50-51 of the New York Civil Rights Law; (2) the Advertisement constitutes false advertising in violation of Section 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); and (3) the Advertisement falsely implies that he endorses the Book or the views of the other conspiracy theorists featured in the Advertisement in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A).

Defendants have moved to dismiss the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. Because the Advertisement itself is attached to the complaint and both parties have submitted affidavits and other evidence outside the complaint, including a copy of *Case Closed*, the Court will treat the motion as a motion for summary judgment.

DISCUSSION

Summary Judgment

Summary judgment is proper when there is no genuine issue of material fact and, based upon facts not in dispute, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). The court's role on a motion for summary judgment is not to decide disputed issues of fact but only to determine whether there is a genuine issue to be tried. *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir. 1991). The court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. *Rattner*, 930 F.2d at 209 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505 (1986)). Nevertheless, in order to defeat a motion for summary judgment, the factual dispute must be both *material* and *genuine*. In order for a dispute to be genuine, the court must be satisfied that evidence exists upon which the finder of fact could reasonably find for the party opposing the motion. *Anderson v. Liberty Lobby*, 477 U.S. 243, 248-52, 106 S. Ct. 2505, 2510-12 [12 Med.L.Rptr. 2297] (1986). Summary judgment may be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

Applying these standards, the Court concludes that summary judgment in favor of defendants is appropriate on all of plaintiff's claims.

Sections 50-51 of the New York Civil Rights Law

Section 50 of the New York Civil Rights Law provides in relevant part:

> a person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without first having obtained the written consent of such person . . . is guilty of a misdemeanor.

N.Y. Civ. Rights Law § 50 (McKinney 1992). Section 51 of the Civil Rights Law authorizes a civil action for injunctive relief and damages if a defendant violates § 50. *See* N.Y. Civ. Rights Law § 50 (McKinney 1992). The purpose of §§ 50-51 is to protect against the commercial appropriation of a plaintiff's name or likeness for defendants' benefit. *Cohen v. Herbal Concepts, Inc.*, 482 N.Y.S.2d 457, 459 (1984). These provisions must be construed narrowly, *Ayn Rand v. Hearst Corp.*, 298 N.Y.S.2d 405, 410 (A.D. 1st Dept. 1969), *aff'd*, 309 N.Y.S.2d 348 (1970), and constitute the only available relief in New York for the so-called "invasion of privacy" torts recognized at common law. *See Howell v. New York Post Co.*, 596 N.Y.S.2d 350, 354 [21 Med.L.Rptr. 1273] (1993); *Cohen*, 482 N.Y.S.2d at 459.

To state a claim under § 51, plaintiff must satisfy three elements: (1) defendants used his name, portrait or picture, (2) for purposes of trade or advertising, (3) without his written consent. *Cohen*, 482 N.Y.S.2d at 459. The Advertisement itself along with Groden's affidavit testimony to the effect that he did not consent to the use of his name or photograph, *see* Affirmation in Opposition, Affidavit of Robert J. Groden ¶ 4, clearly satisfy the first and third elements. In addition, defendants' use of Groden's name and photograph was "for advertising purposes" within the meaning of the statute since it "appear[ed] in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service." *Beverley v. Choices Women's Medical Center*, 579 N.Y.S.2d 637, 640 [19 Med.L.Rptr. 1724] (1991).

Defendants contend, however, that their use of Groden's name and photograph falls within the scope of both the "incidental use" exception and the "newsworthiness" exception to §§ 50-51. Because the Court concludes that the Advertisement constitutes an incidental use of plaintiff's name and likeness and is therefore outside the scope of the statute, it is unnecessary to address whether the use also falls within the newsworthiness exception.

In *Humiston v. Universal Film Mfg. Co.*, 178 N.Y.S. 752 (A.D. 1st Dept. 1919), the incidental use exception was first adopted. The court held that a news disseminator was entitled to display the name and photograph of a woman who was the subject of the defendant's newsreel for purposes of attracting and selling the film. The court reasoned:

> If it be held that they cannot be used under the statute for purposes of advertising these motion pictures, then it is clear that they cannot advertise the motion pictures at all, because they cannot be fully advertised, at least, without giving the name of the parties represented. . . . [T]he use of the plaintiff's name or picture in the approach to the theater and upon the billboards in front, as advertising what was to appear upon the screen, is . . . incidental to the exhibition of the film itself.

Humiston, 178 N.Y.S. at 758.

[1] The principle enunciated in *Humiston* has been applied to "periodicals and books purveying matter of public interest." *Booth v. Curtis Publishing Co.*, 223 N.Y.S.2d 737, 741 [1 Med.L.Rptr. 1784] (A.D. 1st Dept.), *aff'd*, 228 N.Y.S.2d 468 (1962). The Kennedy assassination is well within the range of subjects which courts have deemed to be of public interest. *See Arrington v. New York Times Co.*, 449 N.Y.S.2d 941, 944 [8 Med.L.Rptr. 1351] (1982) (noting that subjects of public interest are to be "freely defined"), *cert. denied*, 459 U.S. 1146 (1983); *Davis v. High Soc'y Magazine, Inc.*, 457 N.Y.S.2d 308, 315 [9 Med.L.Rptr. 1164] (A.D. 2d Dept. 1982) (holding that well-known female boxer's posing partially nude is a newsworthy event within context of §§ 50-51); *Stephano v. News Group Publications, Inc.*, 485 N.Y.S.2d 220, 226 [11 Med.L.Rptr. 1303] (1984) (article on availability of bomber jacket is a "legitimate news item" for purposes of applying exceptions to § 50). Thus, although defendants' Advertisement might otherwise fall within the scope of the statute, the fact that the Advertisement uses plaintiff's name and photograph to indicate the nature of the contents of *Case Closed* — namely, a critique of the work of the pictured conspiracy theorists — brings it within the ambit of the incidental use exception. *See Namath v. Sports Illustrated*, 371 N.Y.S.2d 10, 11-12 [1 Med.L.Rptr. 1843] (A.D. 1st Dept. 1975) (use of plaintiff's photograph for purposes of soliciting subscriptions is an incidental use where photograph gave reader indication of contents of magazine), *aff'd*, 386 N.Y.S.2d 397 (1976); *Ayn Rand*, 298 N.Y.S.2d at 410-12 (use of quotation from book review comparing book to work of renowned author on book jacket was incidental use because purpose of use was to inform public of nature of book being sold).

This case differs from most other applications of the incidental use exception in that the concept of incidental use is generally applied to instances of "republication", i.e., the challenged depiction of the plaintiff is the same in both the original publication and the advertisement. *See, e.g., Booth*, 223 N.Y.S.2d 737 (photograph of plaintiff used for advertisement/solicitation had previously appeared in defendant's magazine); *Namath*, 371 N.Y.S.2d 10 (same); *Velez v. VV Publishing Corp.*, 524 N.Y.S.2d 186 [14 Med.L.Rptr. 2290] (A.D. 1st Dept.) (same), *appeal denied*, 533 N.Y.S.2d 57 (1988). Here, Groden's photograph is not contained in *Case Closed*, despite the fact that the Book mentions him by name on several occasions and directly dis-

cusses his work. Nonetheless, it is clear that what drives the exception is a First Amendment interest in protecting the ability of the media to publicize its own communications. *See Velez*, 524 N.Y.S.2d at 187 (incidental use exception "is a necessary and logical extension of the clearly protected editorial use of the content of the publication").

There is no question that the purpose of the Advertisement was to promote sales of *Case Closed* and that the combination of the photographs of the conspiracy theorists and the headline "GUILTY OF MISLEADING THE AMERICAN PUBLIC" emblazoned across the top of the page accurately, albeit dramatically, describes the main argument advanced in the Book. Had defendants merely used plaintiff's name in the Advertisement, that use would clearly fall within the incidental use exception under the above-cited precedents. The fact that the Advertisement also contained Groden's photograph, which defendants concede does not appear in the Book, cannot transform a privileged use into an unlawful use because the goal of the Advertisement — to inform potential readers about the contents of the Book and induce them to purchase it — remains unchanged. *See Ayn Rand*, 298 N.Y.S.2d at 411-12 (applying incidental use exception when plaintiff's name was used on book jacket but did not appear inside book).

Accordingly, defendants' motion for summary judgment on the §§ 50-51 claim is granted.

Lanham Act Claims

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides in relevant part:

> (a)(1) Any person who, on or in connection with any goods or services, ... uses in commerce any ... false or misleading description of fact, or false or misleading representation of fact, which—
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
> shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

15 U.S.C.A. § 1125(a)(1) (West Supp. 1994). Since the 1988 amendments to § 43(a) of the Lanham Act, misrepresentations about another's products are as actionable as misrepresentations about one's own. *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1548 n.1 (2d Cir. 1991).[1]

Plaintiff's complaint alleges several types of claims under the Lanham Act. First, plaintiff alleges a false advertising claim pursuant to § 1125(a)(1)(B) in which he contends that the Advertisement misrepresents and disparages his "goods, services [and] commercial activities" by stating that his work is misleading. Second, he makes a false attribution claim pursuant to § 1125(a)(1)(A), arguing that the quotation next to his picture is falsely attributed to him and constitutes a form of "reverse passing off" by falsely suggesting that he endorses the conspiracy theory contained in the quotation. Third, plaintiff alleges a false endorsement claim pursuant to § 1125(a)(1)(A), arguing that the headline "GUILTY OF MISLEADING THE AMERICAN PUBLIC", combined with the format of the six photographs, falsely suggests that he is affiliated with the other conspiracy theorists in a meta-conspiracy to mislead the American public and that he endorses their views. Plaintiff also asserts a slightly different false endorsement claim, arguing that the Advertisement falsely conveys the impression that he willingly appeared in it and thus endorses the Book.

In their motion for summary judgment, defendants contend that there is no false or misleading statement of fact in the Advertisement and that nothing in the Advertisement could reasonably convey to a reader that Groden endorses the Advertisement, *Case Closed*, or the views

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[1] In addition, decisions interpreting the pre-amendment version of § 43(a) remain "valid guides to interpreting and applying the current version of the statute" because the 1988 amendments were intended to codify the interpretation courts had given the statute. *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1548 n.1 (2d Cir. 1991).

of the other conspiracy theorists pictured in the Advertisement.[2]

The Court will address each of plaintiff's claims in turn.

False Advertising

The main thrust of plaintiff's complaint is that defendants' Advertisement misrepresents the nature of his work as a purported expert on the Kennedy assassination by labelling it "misleading". Insofar as plaintiff's publications and expertise constitute "goods, services [and] commercial activities", plaintiff's theory of recovery appears to be based on a claim for false advertising. *See* 15 U.S.C. § 1125(a)(1)(B). *See also Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 493 [16 Med.L.Rptr. 2289] (2d Cir. 1989) (acknowledging that books are commercially-sold products regulated by Lanham Act); *Glenn v. Advertising Publications, Inc.*, 251 F. Supp. 889, 903 (S.D.N.Y. 1966) (publications constitute "goods" under Lanham Act).

To establish a false advertising claim pursuant to § 1125(a)(1)(B), plaintiff must demonstrate: (1) that defendants made false or misleading factual representations of the nature, characteristics, or qualities of plaintiff's goods, services or commercial activities; (2) that defendants used the false or misleading representations "in commerce"; (3) that defendants made the false or misleading representations in the context of commercial advertising or commercial promotion; and (4) that defendants' actions made plaintiff believe that he was likely to be damaged by such false or misleading representations. *National Artists Management Co. v. Weaving*, 769 F.Supp. 1224, 1230 (S.D.N.Y. 1991). Defendants concede that neither the second nor fourth prongs of the test are at issue here.

The Court concludes that summary judgment on this claim is warranted because plaintiff has failed to establish any factual dispute on the threshold element of a false advertising claim: falsity. While it is true that Section 43(a) of the Lanham Act encompasses more than literal falsehoods and applies to more subtle uses of innuendo, suggestion and implication, *American Home Products Corp. v Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978), the statute still requires a showing that the message of the challenged advertisement is false. Falsity may be established in one of two ways: 1) the challenged statement is literally false as a factual matter, or 2) although the advertisement is literally true it is nevertheless likely to deceive or confuse consumers. *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297 (2d Cir. 1992).

A false representation of fact actionable under the Lanham Act must be distinguished from mere "puffing," or a general expression of opinion about a product. *See Radio Today, Inc. v. Westwood One, Inc.*, 684 F.Supp. 68, 74 (S.D.N.Y. 1988). Puffery is not actionable as false advertising under Section 43(a) of the Lanham Act. *See, e.g., Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3rd Cir. 1993); *Cook, Perkiss & Liehe, Inc. v. Northern Calif. Collection Service, Inc.*, 911 F.2d 242, 245 (9th Cir. 1990); *Brignoli v. Balch Hardy and Scheinman, Inc.*, 645 F.Supp. 1201, 1209 (S.D.N.Y. 1986). In order for a statement to be actionable, it must contain "specific assertions of unfavorable facts reflecting on the rival product." *American Express Travel Related Services Co., Inc. v. Mastercard International, Inc.*, 776 F.Supp. 787, 792 (S.D.N.Y. 1991). Subjective claims about products, which cannot be proven either true or false, are not actionable under the Lanham Act. *See W.L. Gore & Associates, Inc. v. Totes, Inc.*, 788 F.Supp. 800, 808 (D. Del. 1992) (finding that advertisement's assertion that product was breathable could mean different things to different people and was a subjective statement, not a statement of fact, for purposes of Lanham Act claim).

Where the goods or products in question are books, the Court must be careful to distinguish between advertising which actually makes false statements about the goods and advertising which summarizes an argument or opinion contained in the book. Where the alleged misrepresentation is "essentially a matter of argument, . . . the [consumer] to whom the argument [is] addressed [is] free to make up his own mind as to its validity. In [the court's] opinion this is different from a flat statement that a lamp produces a specified candle power." *Glenn v. Adver-*

[2] Defendants have also argued that the Advertisement contains elements of political speech which take it beyond the scope of the Lanham Act. Because the Court can decide this motion without ruling on the constitutional question, the Court need not address defendants' First Amendment argument.

tising Publications, Inc., 251 F.Supp. 889, 904 (S.D.N.Y. 1966).

The issue is therefore whether or not the statement in the Advertisement, "GUILTY OF MISLEADING THE AMERICAN PUBLIC," could be reasonably interpreted as stating or implying provable facts about plaintiff's work. *Cf. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695 [17 Med.L.Rptr. 2009] (1990) (in context of state defamation laws, distinguishing between statements of opinion which imply false assertions of fact and statements of opinion which merely articulate subjective assertions). In *Licata & Co., Inc. v. Goldberg*, 812 F.Supp. 403 (S.D.N.Y. 1993), the court found that disparaging statements about plaintiff's business were not actionable under § 43(a) of the Lanham Act:

> Where a hard, verifiable statement is made which is capable of scientific, accounting or other specific verification, courts . . . can assume that the recipient of the communication will treat the statement as including an implicit representation that such verification has been made. . . Where, by contrast, a statement of personal opinion on a nonverifiable matter is made, the recipient is likely to assume merely that the communicator believes the statement.

812 F.Supp. at 408. While the statements in *Licata* were made by an individual in conversations with plaintiff's competitors, and not in a commercial advertisement, the court's analysis applies with equal force to this case.

A reasonable reader would not interpret the Advertisement as containing a verifiable factual assertion, as opposed to an opinion, about plaintiff's work. The proliferation of theories about the Kennedy assassination is proof that there is no universally accepted factual answer to the question, "Who killed President Kennedy?" The statements "GUILTY OF MISLEADING THE AMERICAN PUBLIC" and "ONE MAN. ONE GUN. ONE INESCAPABLE CONCLUSION" could not reasonably be interpreted as stating anything other than a subjective belief. Therefore, the challenged statements are inherently different than the type of factual representations covered by the Lanham Act.[3]

The Court rejects plaintiff's assertion that each statement in the Advertisement is capable of objective verification. While this may be true hypothetically, the known evidence concerning the Kennedy assassination and the extensive debate over the Warren Commission's findings demonstrate that the actual facts will never be verifiable to everybody's satisfaction. Thus, the statements in the Advertisement are merely statements of Posner's argument or opinion about the assassination, just as the quotations from the various conspiracy theorists also used in the Advertisement represent statements of their competing arguments. Because the statements in the Advertisement are statements of opinion, not fact, plaintiff has failed to establish any genuine issue for trial on his false advertising claim. Therefore, summary judgment in favor of defendants on the false advertising claim is granted.

False Attribution

The Advertisement attributes the following statement to plaintiff:

> Who killed President Kennedy? It took a combination of the CIA controlled Cuban exiles, Organized Crime, and the Ultra Right Wing, with the support of some politically well connected wealthy men to pull it off.

See Defendants' Exhibit D. There is no dispute that this quote is an exact quotation from *High Treason*, which plaintiff admits he co-authored with Harrison Livingstone. *See* Defendants' Exhibit D, Complaint ¶ 15. There is also no dispute that *High Treason* was published in 1989, which is the year given by the Advertisement as the date of plaintiff's statement.

[2] Nonetheless, plaintiff asserts that the Advertisement's attribution of the quotation to him is false and misleading because he did not share his co-author's views regarding the political theories espoused in *High Treason* and was not the author of that particular statement. This argument is without merit. Plaintiff has not produced any evidence, such as a

[3] Had the Advertisement stated, "GRODEN'S BOOK IS NO LONGER IN PRINT. READ OURS INSTEAD," the reasonable reader would be justified in concluding that, in fact, Groden's book was out of print. If in fact Groden's book was still in print, that statement would be actionable as a false statement of fact under § 43(a). Because the truth or falsity of this hypothetical statement would be verifiable, it is fundamentally different from those in the Advertisement.

public disclaimer or renunciation of certain parts of *High Treason*, creating a genuine issue regarding his association with the theories espoused in the 1989 book. Indeed, plaintiff is not only the co-author of *High Treason* but also continues to holds the book's copyright jointly with Harrison Livingstone. *See* Defendants' Exhibit C. Thus, having held himself out to the public as a co-author of the entire work, plaintiff cannot complain that statements taken from the book are attributed to him.

Follett v. New American Library, Inc., 497 F.Supp. 304, 311 [6 Med.L.Rptr. 1868] (S.D.N.Y. 1980), which plaintiff cites in support of his novel argument, is distinguishable. In *Follett*, the court was presented with evidence detailing the relative contributions made to a book by several authors and editors over the course of many years. Based on this evidence, the court found that the publisher's attribution of authorship on the cover and title page of a book as "KEN FOLLETT" in bold type-face with a much smaller subtitle "with Rene Louis Maurice", combined with the use of Follett's name alone on the spine of the book falsely represented that Follett was the principal author of the book and therefore violated § 43(a) of the Lanham Act. *Follett*, 497 F.Supp. at 312.

The situation in *Follett* differs from the case currently before the Court in that Groden has not produced any evidence which could support the conclusion that the Advertisement's attribution to plaintiff is misleading. Groden has submitted his own affidavit testimony in opposition to the motion for summary judgment, stating: "The quote does not represent my views about the assassination of President Kennedy. . . The fact is I wrote some portions dealing with the medical and physical evidence; he wrote all of the material concerning theories of political conspiracy." Groden Affidavit ¶ 5. This evidence is not sufficient to create a genuine issue of material fact because no jury could reasonably find for plaintiff based on this one statement. *See Liberty Lobby*, 477 U.S. at 252, 106 S. Ct. at 2512. Moreover, the question of who actually wrote specific portions of *High Treason* is not material to determining whether or not it is misleading to attribute the contents of *High Treason* to plaintiff, given his undisputed co-authorship.

Accordingly, there is no genuine material factual dispute as to whether the use of the quotation next to Groden's photograph is false or misleading. Summary judgment in favor of defendants on plaintiff's false attribution claim is therefore appropriate.

False Endorsement

[3] Plaintiff also contends that the layout of the Advertisement in conjunction with the headline is false and misleading in that it implies that he is affiliated with or endorses the views of the other conspiracy theorists pictured and that they all conspired together to mislead the American public.[4] In response, defendant asserts that the layout of the six photographs under the headline could not reasonably be interpreted as implying that plaintiff is either engaged in some form of criminal conspiracy with the other theorists or is affiliated with their views.

"When analyzing a challenged advertisement, it must first be determined what message is conveyed. The advertisement must be considered in its entirety and the context is important in discerning the message conveyed." *Allen Organ Co. v. Galanti Organ Builders, Inc.*, 798 F.Supp. 1162, 1166 (E.D.Pa. 1992).

[4] Plaintiff further alleges that the Advertisement, taken as a whole, implies that plaintiff is a "public enemy" and that his work is somehow "criminal" or of "moral turpitude." No reasonable jury could conclude that the Advertisement's use of the six photographs, which plaintiff describes as a "rogues' gallery", in conjunction with the term "GUILTY", makes any statement of fact which might be cognizable under the Lanham Act. Plaintiff's claim is essentially a claim for commercial defamation or libel rather than unfair competition, and is not cognizable under the Lanham Act. *See Johnson & Johnson * Merck*, 960 F.2d at 298 ("the injuries redressed in false advertising cases are the result of *public deception*" (emphasis added); *Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987) (rejecting claim for damaging statement about plaintiff's product on grounds that § 43(a) did not create a federal tort of misrepresentation). Indeed, the only case plaintiff has cited in support of this claim, *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1977), was a libel case. In contrast with this case, in *Regan*, the context in which the plaintiff's photograph was published could have reasonably implied that he was a criminal because his picture was shown alongside of photographs of people who were in fact convicted criminals. *See Regan*, 557 F.2d at 309.

Looking at the communicative impact of the Advertisement as a whole, it is clear that no reasonable jury could conclude that plaintiff is associated with or endorses the views of the other conspiracy theorists pictured. The quotations next to each photograph make clear that each of the six men pictured is a proponent of a conspiracy theory relating to the Kennedy assassination. Thus, to the extent they are all conspiracy theorists of one sort or another, they are linked in the Advertisement. However, there is nothing in the Advertisement from which a reasonable factfinder could conclude that any one theorist pictured actually endorsed the views of the others. When read in conjunction with the text at the bottom of the Advertisement, "ONE MAN. ONE GUN. ONE INESCAPABLE CONCLUSION. READ *CASE CLOSED* BY GERALD POSNER", it is clear that the format of the Advertisement, including the headline "GUILTY OF MISLEADING THE AMERICAN PUBLIC," suggests nothing more than the fact that Posner's book disagrees with the views expressed in the quotations.

While it is somewhat unclear, plaintiff's complaint also appears to allege that the Advertisement falsely implies that he willingly appeared in the Advertisement and therefore endorses both the Advertisement and *Case Closed* itself. There is no genuine issue of material fact on this claim. The highly critical nature of the Advertisement itself is what prompted plaintiff to initiate this action in the first place. Given the undeniable fact that the Advertisement clearly portrays plaintiff in a negative light and expresses the opinion that he, along with the other theorists featured, is "guilty of misleading the American public", the Court finds that no reasonable jury could conclude that the use of plaintiff's name and photograph suggests that plaintiff has endorsed either the Advertisement or *Case Closed*. *See Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585 [17 Med.L.Rptr. 1472] (2d Cir. 1990) (granting summary judgment where plaintiff "cannot possibly show confusion as to source or sponsorship" of baseball calendar due to use of photographs of baseball star in advertising). *Cf. Velez*, 524 N.Y.S.2d at 189 (in context of claim alleging violation of § 50-51 of New York Civil Rights Law, no reasonable reader would believe plaintiff endorsed newspaper which used photograph of past cover featuring plaintiff under highly critical headline in solicitation for subscriptions). Therefore, summary judgment in favor of defendants on the false endorsement claim is granted.

CONCLUSION

The assassination of President Kennedy has engendered a lively marketplace of competing theories. The fact that books advocating different views of this tragic event in American history continue to be published and promoted by persons such as plaintiff and the defendants is proof of the viability of that marketplace. As the Supreme Court has noted, "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 3007 [1 Med.L.Rptr. 1633] (1974). The public interest in "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 [1 Med.L.Rptr. 1527] (1964)), is best served by allowing free competition between proponents of conflicting accounts of the Kennedy assassination, not by stifling it in the name of truth in advertising.

Defendants' motion for summary judgment is hereby GRANTED in its entirety.

SO ORDERED.

FLORIDA v. ROLLING

Florida Circuit Court
Eighth Judicial Circuit
Alachua County

STATE OF FLORIDA v. DANNY HAROLD ROLLING, a/k/a MICHAEL J. KENNEDY, a/k/a MIKE KENNEDY, No. 91-3832 CF A, July 27, 1994

NEWSGATHERING

1. Judicial review — Standing (§66.03)

Florida state attorney has standing to file motion that seeks non-disclosure of photographs of murder victims on ground that such disclosure would invade

1995 U.S. App. LEXIS 27658 printed in FULL format.

GRADY AUVIL and LILLIE AUVIL, husband and wife; ROBERT BERNATH and CATHY BERNATH, husband and wife; ROBERT BRODY and CHARLOTTE BRODY, husband and wife; BURT CHESTNUT and ELLY CHESTNUT, husband and wife; HAROLD COX and LORRAINE COX, husband and wife; FERRELL DEEN and PEGGY DEEN, husband and wife; CHARLES DRAKE and MAXINE DRAKE, d/b/a/ FROSTY RED ORCHARD, INC., husband and wife; JAMES EDDIE, d/b/a EDDIE FARMS, INC.; PAUL HUDSON, a married man on behalf of his separate property; BERT STENNES and EVELYN STENNES, husband and wife, d/b/a SQUAW CREEK RANCH, INC.; NORMAN WILSON and WANDA WILSON, husband and wife, Plaintiffs-Appellants, v. CBS "60 MINUTES", a foreign corporation; COLUMBIA BROADCASTING SYSTEM (CBS), a foreign corporation; RETLAW ENTERPRISES, INC., a corporation, d/b/a KIMA Television; BONNEVILLE INTERNATIONAL CORPORATION, a corporation, d/b/a KIRO Television; KING BROADCASTING COMPANY, a corporation, d/b/a KREM Television, Defendants-Appellees.

AUVIL v. CBS "60 MINUTES"

No. 93-35963

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1995 U.S. App. LEXIS 27658

October 7, 1994, Argued and Submitted, Seattle, Washington

October 2, 1995, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Eastern District of Washington. D.C. No. CV-90-00553-WFN. Wm. Fremming Nielsen, District Judge, Presiding.

COUNSEL: Scott A. Jonsson, Peter A. Ozanne, Mildred J. Carmack, Steve C. Morasch, Schwabe, Williamson & Wyatt, Portland, Oregon, for the plaintiffs-appellants.

P. Cameron DeVore, Bruce E. H. Johnson, Christopher Pesce, William C. Komaroff, Davis Wright Tremaine, Seattle, Washington, and Douglas P. Jacobs, Susanna M. Lowy, Anthony M. Bongiorno, CBS Inc., New York, New York, for the defendants-appellees.

Richard A. Samp, Washington Legal Foundation, Washington, D.C., for amicus Washington Legal Foundation.

Lee Levine, Ross, Dixon & Masback, Washington, D.C., for amicus Capital Cities, et al.

Michael B. Trister, Lichtman, Trister, Singer & Ross, Washington, D.C., for amicus J. Routt Reigart, M.D.

Frederick A.O. Schwarz, Jr., Cravath, Swaine & Moore, New York, New York, for amicus National Wildlife Federation, et al.

JUDGES: Before: Harlington Wood, Jr. *, Procter Hug, Jr., and Harry Pregerson, ** Circuit Judges.

** Judge Tang was originally a member of this panel and heard argument in this case. Judge Tang died prior to circulation of this opinion, and pursuant to General Order 3.2(g), Judge Pregerson was drawn as a replacement. Judge Pregerson was furnished with a tape of the oral argument as well as the briefs and other materials received by the other members of the panel.

[*2]

* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

OPINION: OPINION

PER CURIAM:

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Grady and Lillie Auvil et al., suing on behalf of themselves and other similarly situated Washington State apple growers ("growers"), appeal from the district court's summary judgment in favor of CBS "60 Minutes" ("CBS"). The district court held that the growers failed to prove the falsity of the message conveyed by the "60 Minutes" broadcast of "'A' is for Apple," which concerned the use of Alar, a chemical sprayed on apples. n1 We have jurisdiction under *28 U.S.C. § 1291,* and we affirm because we agree that the growers have failed to raise a genuine issue of material fact as to the falsity of the broadcast.

n1 A transcript of the broadcast at issue in this case is reprinted in an appendix to the lower court opinion. See *Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 937 (E.D. Wash. 1992).*

BACKGROUND

On February 26, 1989, CBS's weekly news show [*3] "60 Minutes" aired a segment on daminozide, a chemical growth regulator sprayed on apples. The broadcast, entitled "'A' is for Apple," also addressed the slow pace of government efforts to recall the chemical. The broadcast was based largely on a Natural Resources Defense Council ("NRDC") report, entitled Intolerable Risk: Pesticides in Our Children's Food ("Intolerable Risk"), which outlined health risks associated with the use of a number of pesticides on fruit, especially the risks to children. "'A' is for Apple" focused on the NRDC report's findings concerning daminozide, as well as the EPA's knowledge of daminozide's carcinogenity. Scientific research had indicated that daminozide, more commonly known by its trade name, Alar, breaks down into unsymmetrical dimethylhydrazine (UDMH), a carcinogen. n2

n2 Alar cannot be removed either by washing the fruit or peeling it. In addition, the substance remains in the flesh of the apple and, as a result, can be found in processed apple products, including apple juice and applesauce.

[*4]

The segment opened with the following capsule summary from Ed Bradley, a "60 Minutes" commentator:

The most potent cancer-causing agent in our food supply is a substance sprayed on apples to keep them on the trees longer and make them look better. That's the conclusion of a number of scientific experts. And who is most at risk? Children, who may someday develop cancer from this one chemical called daminozide. Daminozide, which has been sprayed on apples for more than 20 years, breaks down into another chemical called UDMH.

During the broadcast, Bradley garnered a number of viewpoints on the Alar issue. Those interviewed included an Environmental Protection Agency ("EPA") administrator, an NRDC attorney, a U.S. congressman, a professor of pediatrics at Harvard Medical School, and a scientist from the Consumers Union, which publishes Consumer Reports magazine. After Bradley's opening synopsis, the broadcast segment began with the EPA administrator's admission that the EPA had known of cancer risks associated with daminozide for sixteen years, but that EPA regulations had hampered the removal of the chemical from the market. The U.S. Congressman rejected the EPA administrator's [*5] explanation that the laws were to blame for the EPA's hesitation. He thought that it was well within the EPA's power to remove daminozide from the market, and that the EPA's reluctance stemmed from its fear that Uniroyal, the company that manufactured daminozide, would sue the EPA. The broadcast segment continued with testimonials from the NRDC attorney, who discussed the findings published in Intolerable Risk, focusing on the cancer risks to children from ingestion of apples treated with daminozide. The NRDC's findings were corroborated both by the EPA administrator and the Harvard pediatrician. The broadcast ended with the statements of a Consumers Union scientist, who revealed that most manufacturers of apple products said they no longer use apples treated with daminozide but that the manufacturers were unsuccessful in keeping daminozide completely out of their products.

Following the "60 Minutes" broadcast, consumer demand for apples and apple products decreased dramatically. The apple growers and others dependent upon apple production lost millions of dollars. Many of the growers lost their homes and livelihoods.

In November 1990, eleven Washington State apple growers, representing [*6] some 4,700 growers in the Washington area, filed a complaint in Washington State Superior Court against CBS, local CBS affiliates, the NRDC, and Fenton Communications, Inc., a public relations firm used by the NRDC in 1989. The growers asserted, among others, a claim for product disparagement.

In December 1990, CBS removed the cause to the United States District Court for the Eastern District of Washington on diversity grounds. The growers moved to remand to state court. The district court denied

the growers' motion to remand and dismissed their claims against CBS's local affiliates. *Auvil v. CBS "60 Minutes", 800 F. Supp. 928 (E.D. Wash. 1992)* ("Auvil I"). n3 In addition, the court denied CBS's motion to dismiss or for summary judgment on the issue of whether the television broadcast was "of and concerning" the apple growers or their products. Id. The district court dismissed CBS's argument on the ground that, because all apples were identified as dangerous, the growers could bring suit for the disparagement of their product. *Id. at 932-935.* n4

n3 In a separate order, the district court dismissed the growers' claims against the NRDC and Fenton Communications. *Auvil v. CBS "60 Minutes", 800 F. Supp. 941 (E.D. Wash. 1992)* ("Auvil II").

[*7]

n4 Applicability of the "of and concerning" requirement to product disparagement law is raised on appeal. We need not decide this issue, however, because we agree that, regardless of whether the broadcast was "of and concerning" their product, the growers cannot show falsity.

After discovery, which was limited to the question of the falsity of the CBS broadcast, the growers moved to strike the opinions of CBS's expert witnesses and also for partial summary judgment on the question of falsity. CBS also moved for summary judgment on the question of falsity. The district court denied the growers' motions but granted summary judgment to CBS because the growers did not produce evidence sufficient to create a triable issue of fact as to the falsity of the broadcast. *Auvil v. CBS "60 Minutes", 836 F. Supp. 740 (E.D. Wash. 1993)* ("Auvil III"). The growers appeal the district court's summary judgment ruling that they failed to offer evidence sufficient to present a genuine issue of fact for trial on the falsity of the CBS broadcast.

DISCUSSION

We review the district court's summary judgment [*8] ruling de novo. *Unelko Corp. v. Rooney, 912 F.2d 1049, 1052 (9th Cir. 1990)*, cert. denied, *499 U.S. 961, 113 L. Ed. 2d 650, 111 S. Ct. 1586 (1991)*. To survive CBS's motion for summary judgment, the growers must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. There is no issue for trial unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *106 S. Ct. at 2511* (citations omitted). Thus, while they need not definitively prove the falsity of statements made during the CBS broadcast, "the mere existence of a scintilla of evidence in support of the [growers'] position will be insufficient; there must be evidence on which the jury could reasonably find for the [growers]." *477 U.S. at 252*. Our inquiry, therefore, asks whether reasonable jurors could find that the growers are entitled to a verdict - "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Id. (citation omitted). n5

n5 The Washington courts have not answered directly the question of whether to use a preponderance of the evidence or convincing clarity standard of proof in proving falsity. Compare *Haueter v. Cowles Pub. Co., 61 Wash. App. 572, 811 P.2d 231 (Wash. Ct. App. 1991)* (preponderance of the evidence standard) with *Herron v. King Broadcasting Co., 112 Wash. 2d 762, 776 P.2d 98 (Wash. 1989)* (clear and convincing standard). We do not decide which standard should be used in this context because we find that the growers failed to meet the more generous preponderance of the evidence standard in proving the falsity of the CBS broadcast.

[*9]

Although there are no Washington state cases dealing directly with a product disparagement cause of action, a Washington state appellate court, citing the Restatement of Torts, recognized that those whose products are disparaged face a higher burden of proof than do defamation plaintiffs. See *Waechter v. Carnation Co., 5 Wash. App. 121, 485 P.2d 1000, 1003-04 (Wash. Ct. App. 1971)*. We assume, therefore, that Washington recognizes product disparagement causes of action. We also look to the Restatement, as did the Washington court, for guidance regarding applicable standards.

To establish a claim of product disparagement, also known as trade libel, a plaintiff must allege that the defendant published a knowingly false statement harmful to the interests of another and intended such publication to harm the plaintiff's pecuniary interests. Restatement (Second) of Torts § 623A. Accordingly, for a product disparagement claim to be actionable, the plaintiff must prove, inter alia, the falsity of the disparaging statements. See Restatement (Second) of Torts §§ 623A, 651(1)(c).

Existing case law on product disparagement provides little guidance on the falsity prong. Nonetheless, as a tort whose [*10] actionability depends on the existence of disparaging speech, the tort is substantively similar to defamation. Therefore, we reference defamation cases

to arrive at a decision in the instant matter.

"'A' is for Apple" was based on Intolerable Risk, a scientific report disseminated by the NRDC. The report discussed the findings of cancer research studies on various chemicals used on fruit and questioned the EPA's hesitance in removing Alar from the market. n6 The broadcast contained a number of factual assertions, several of which are pointed out by the growers to support their claim that the broadcast falsely disparaged their product. n7

n6 Neither party disputes that the broadcast disparaged apples. The broadcast communicated that daminozide is a potent human carcinogen that poses a significant risk to children. Because the broadcast focused on the use of daminozide on apples, the disparaging statements made during the broadcast about daminozide reflect negatively on apples.

n7 The statements we recite herein were taken from the growers' briefs. See Appellants' Brief at 7, 8; Appellants' Reply Brief at 13.

[*11]

On the subject of daminozide's cancer-causing potential, the growers point to the following statements:

The most potent cancer-causing agent in our food supply is a substance sprayed on apples to keep them on the trees longer and make them look better.

We know that [daminozide and other chemicals] do cause cancer.

Just from these eight pesticides, what we're finding is that the risk of developing cancer is approximately 250 times what EPA says is an acceptable level of cancer in our population.

[The EPA administrator] took another look at the evidence and decided to start the process of banning daminozide after all. But the process could take five years. So we returned to Washington to ask him why he doesn't just declare daminozide an imminent hazard, and suspend it right away . . . .

The growers offered evidence showing that no studies have been conducted to test the relationship between ingestion of daminozide and incidence of cancer in humans. Such evidence, however, is insufficient to show a genuine issue for trial regarding the broadcast's assertions that daminozide is a potent carcinogen. Animal laboratory tests are a legitimate means for assessing [*12] cancer risks to humans. See *Environmental Defense Fund v. EPA, 548 F.2d 998, 1006 (D.C. Cir. 1976)* (recognizing that EPA relies on animal test data to evaluate human cancer risks), cert. denied sub nom., *Velsicol Chem. Corp. v. EPA, 431 U.S. 925, 53 L. Ed. 2d 239, 97 S. Ct. 2199 (1977); Villari v. Terminix Int'l, Inc., 692 F. Supp. 568, 570 (E.D.Pa. 1988)* (acknowledging that "animal studies are routinely relied upon by the scientific community in assessing the carcinogenic effects of chemicals on humans").

The growers provide no other challenge to the EPA's findings, nor do they directly attack the validity of the scientific studies. All of the statements referenced above are factual assertions made by the interviewees, based on the scientific findings of the NRDC. These findings were corroborated by the EPA administrator and a Harvard pediatrician. The EPA, which often relies on the results of animal studies, acknowledged that it knew of the cancer risks associated with ingestion of daminozide and, in August 1985, classified daminozide as a "probable human carcinogen." Indeed, the EPA estimated that the dietary risk to the general population from UDMH, a metabolite of daminozide, was fifty times an acceptable [*13] risk and ultimately concluded that daminozide posed an unreasonable risk to the general population. See generally *57 Fed. Reg. 46436, 46437-46440 (1992)*. n8

n8 We find it worth noting that on February 1, 1989, the EPA announced that it had started proceedings to remove Alar from the market because of preliminary findings, based on laboratory tests on animals, that the chemical posed a risk of cancer to humans. A few months later, Uniroyal, the manufacturer of daminozide, voluntarily requested a withdrawal of daminozide's food use registrations. The EPA later canceled all food use registrations for daminozide in November 1989. See *54 Fed. Reg. 47492 (1992)*.

The growers' only challenge to the scientific studies is their claim that animal studies cannot be relied on to indicate cancer risk for humans. Because animal studies can be relied upon, their evidence that no studies have been conducted on the effects of daminozide on humans does not create a genuine issue for trial on the falsity of the broadcast's [*14] assertions regarding daminozide's carcinogenicity.

On the subject of cancer risks to children from the use of daminozide on apples, the growers point to the following factual assertions to support their falsity claim:

What we're talking about is a cancer-causing agent used on food that EPA knows is going to cause cancer for thousands of children over their lifetime.

The Natural Resources Defense Council[ ] has completed the most careful study yet on the effect of daminozide and seven other cancer-causing pesticides on the food children eat.

Over a lifetime, one child out of every 4,000 or so of our preschoolers will develop cancer just from these eight pesticides.

[The NRDC study] says children are being exposed to a pesticide risk several hundred times greater than what the agency says is acceptable.

The growers offered evidence showing that no scientific study has been conducted on cancer risks to children from the use of pesticides. However, CBS based its statements regarding cancer and children on the NRDC's findings that the daminozide found on apples is more harmful to children because they ingest more apple products per unit of body weight than [*15] do adults. The growers have provided no affirmative evidence that daminozide does not pose a risk to children. The fact that there have been no studies conducted specifically on the cancer risks to children from daminozide does nothing to disprove the conclusion that, if children consume more of a carcinogenic substance than do adults, they are at higher risk for contracting cancer. The growers' evidence, therefore, does not create a genuine issue as to the falsity of the broadcast's assertion that daminozide is more harmful to children.

Despite their inability to prove that statements made during the broadcast were false, the growers assert that summary judgment for CBS was improper because a jury could find that the broadcast contained a provably false message, viewing the broadcast segment in its entirety. They further argue that, if they can prove the falsity of this implied message, they have satisfied their burden of proving falsity.

The growers' contentions are unavailing. Their attempt to derive a specific, implied message from the broadcast as a whole and to prove the falsity of that overall message is unprecedented and inconsistent with Washington law. No Washington [*16] court has held that the analysis of falsity proceeds from an implied, disparaging message. It is the statements themselves that are of primary concern in the analysis. n9 For example, in *Lee v. Columbian, Inc., 64 Wash. App. 535, 826 P.2d 217 (Wash. Ct. App. 1991)*, the plaintiff brought a defamation suit against a newspaper, claiming that the headline and lead sentence of a newspaper article defamed him. n10 He conceded that both statements were true on their face; nevertheless, he argued that the statements were false and capable of defamatory meaning. *Lee, 826 P.2d at 219.* He contended that "using irony and innuendo, the headline and lead sentence both strongly implied that Plaintiff was using a tax loophole to improperly reduce his taxes." Id. The Washington Court of Appeals found the plaintiff's argument to be meritless because defamatory meaning may not be imputed to true statements. The defamatory character of the language must be apparent from the words themselves. Washington courts are "bound to invest words with their natural and obvious meaning and may not extend language by innuendo or by the conclusions of the pleader."

n9 We note that CBS does not dispute the growers' reliance on an overall message. CBS merely argues that we need not adopt the growers' view of the message of the broadcast. However, CBS confuses the notion that a specific message can be considered in an overall context with the notion that we should analyze the falsity of an overall message.
[*17]

n10 The headline of the article stated, "Cardroom parking fees reduce taxes." The article began with the following lead sentence:

Darrell Lee, a high-profile attorney and enterprising poker promoter, has devised an unusual way to reduce his taxes and stay within the letter of the law on gambling activity at his two La Center cardrooms.

Id. (citing *Sims v. KIRO, Inc., 20 Wash. App. 229, 580 P.2d 642, 645 (Wash. Ct. App. 1978)*, cert. denied, *441 U.S. 945, 60 L. Ed. 2d 1047, 99 S. Ct. 2164 (1979)).*

The Washington courts' view finds support in the Restatement, which instructs that a product disparagement plaintiff has the burden of proving the "falsity of the statement." Restatement (Second) of Torts § 651(1)(c) (emphasis added). This standard refers to individual statements and not to any overall message. Therefore, we must reject the growers' invitation to infer an overall message from the broadcast and determine whether that message is false.

We also note that, if we were to accept the growers' argument, plaintiffs bringing suit based on disparaging speech would escape summary judgment merely by arguing, as the growers [*18] have, that a jury should

be allowed to determine both the overall message of a broadcast and whether that overall message is false. Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability. Furthermore, such uncertainty raises the spectre of a chilling effect on speech. n11

n11 There is an additional problem with the growers' arguments: their approach allows disparagement plaintiffs to construct an overall message that lends itself easily to proof of falsity. The instant case provides a cogent example. Rather than proving the falsity of statements made during "'A' is for Apple" by challenging the studies upon which factual assertions made during the broadcast were based, the growers request that we analyze the message that the studies conclusively show that apples cause cancer in humans. Accordingly, the growers offered evidence that the studies are not conclusive, that there are no studies tracing the specific link between ingestion of daminozide and incidence of cancer in humans. It is considerably easier to prove the falsity of an assertion that studies are conclusive, rather than to prove the falsity of the studies themselves.

[*19]

CONCLUSION

Because the growers have failed to raise a genuine issue of material fact regarding the falsity of statements made during the broadcast of "'A' is for Apple," the district court's decision granting CBS's motion for summary judgment is

AFFIRMED.

Clifford LAPKOFF, Plaintiff,
v.
Kevin WILKS and Volvo Finance of North America, Inc., Defendants.

Civ. A. No. HAR91-559.

United States District Court, D. Maryland.

Oct. 9, 1991.

MEMORANDUM OPINION

HARGROVE, District Judge.

*1 Presently before this court is a motion by Defendants Kevin Wilks ("Wilks") and Volvo Finance North America, Inc. ("Volvo") for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The issues have been fully briefed. No hearing is deemed necessary. Local Rule 105.6.

I.

Plaintiff Clifford Lapkoff ("Lapkoff") has brought the above-referenced defamation suit against Defendants. Kevin Wilks, the regional manager of the mid-Atlantic region of Volvo, made a regular sales call on Brown's Volvo and Subaru of Alexandria, Inc. ("Brown's") in September of 1990. Lapkoff asserts that during this visit, Wilks had a conversation with Ronald Johnston (Johnston), Brown's general manager. Lapkoff alleges that Wilks made statements about him during the conversation which implied his involvement in fraudulent conduct, and which resulted in Johnston firing him from his new position as Brown's sales manager. Lapkoff had only worked for Brown's for six days when he was fired.

Previously, Lapkoff had been the sales manager for the Volvo line of cars sold by another car dealership, Anton Motors, Inc. ("Anton Motors"). While Lapkoff was sales manager at Anton Motors, an individual informed him in confidence that Anton Motor's Finance Manager was changing the credit applications of some car buyers with poor credit. Lapkoff did not report the alleged criminal conduct to his superiors. Rather, he told the individual in question that if the allegations were true, that he should cease such conduct immediately. Lapkoff often heard rumors of criminal activity by Anton Motor employees, but never investigated them or reported them.

In a lunch conversation with Lapkoff, Wilks said that there were several instances in which people had not given credible information on their credit applications when buying cars from Anton Motors, resulting in car repossessions. Wilks said that the people using false information were buyers generated for Anton Motors primarily by a Mr. Byrd ("Byrd"), who was in the business of helping clients with poor credit obtain cars. Lapkoff himself previously had concluded that some of the customers Byrd had brought to Anton Motors had "marginal" credit. Despite this realization, Lapkoff had encouraged an Anton Motors employee to use Byrd more often. At the lunch conversation, Wilks said that if the problems continued, future relationships between Volvo Finance and Anton Motors could be jeopardized.

Lapkoff concluded that there was some credence to the rumors of illegal conduct by the finance manager, but made no mention of Wilks allegations to his superiors. Without further investigation of the Byrd deals, Lapkoff terminated Anton Motor's dealings with Byrd. About six weeks after his conversation with Wilks, Lapkoff resigned from Anton Motors because he felt the finance manager was engaged in illegal conduct, and he did not want to be part of it.

At a sales call to Brown's, Wilks ran into Lapkoff at his new job. The two shook hands and chatted for a few minutes. Wilks then went into Johnston's office for a private meeting in which the two discussed a number of business matters. During the conversation, Johnston asked Wilks if he could tell him about Lapkoff. Wilks essentially stated that Lapkoff was fully capable to perform the duties that he had been hired for. He said Lapkoff was good at training and motivating salespersons, and was very good at closing

deals. He stated, however, that "on a personal basis I wouldn't trust him any farther than I could throw him."

*2 When Johnston inquired further, Wilks said that there had been a problem with Anton Motors being involved in the submission of fraudulent credit applications of customers generated by Byrd. As a result of the situation with Anton Motors, Volvo had experienced a substantially higher delinquency and repossession rate. Wilks did not indicate that Lapkoff participated in the activity, but stated that Lapkoff was at Anton Motors at the time the conduct was going on. He said that if a manager condones such a situation, or if a manager is not aware of such a situation, a problem exists. Wilks then said that he was "anxious to preserve the relationship that Brown's had enjoyed over the last several years."

Subsequent to this conversation, Johnston asked Lapkoff about the situatation at Anton Motors. Lapkoff told him that he knew about it and had not been involved in it. However, Johnston felt that if Lapkoff was aware of such conduct, he should have, as the general sales manager, "made it his business to bring it to an end." Consequently, Johnston fired Lapkoff.

II.

Defendants contend that they are entitled to summary judgment because there has been no defamation under Virginia law. Plaintiff asserts that the implication of Wilks' statements was that Lapkoff was involved in the fraudulent conduct, and that the implication gives rise to a defamation claim.

Summary judgment will be granted when "there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Under Maryland law, a tort action is governed by the law of the state in which the alleged wrong occurred. Hauch v. Connor, 453 A.2d 1207, 1209 (Md.1983). Because the conversation at issue occurred at Brown's in Alexandria, Virginia, the law of Virginia governs.

"Pure expressions of opinion ... cannot form the basis of an action for defamation." Chaves v. Johnson, 335 S.E.2d 97, 101 (Va.1985). The determination of whether an allegedly defamatory statement is a protected opinion is a matter of law for the court. See Old Dominion Branch No. 496, etc. v. Austin, 418 U.S. 264 (1974); Chaves v. Johnson, 335 S.E.2d 97, 119 (Va 1985). Defendants argue that Wilks' statements were not defamatory because they were comprised of true statements of fact and a pure expression of opinion which implied no false assertion of fact.

Wilks' first statement which expressed a negative view of Lapkoff was that Wilks "would not trust him as far as [he] could throw him. The expression of whether a person trusts another person is clearly a matter of personal opinion, and does not constitute actionable defamation. The second statement at issue is the statement by Wilks that Anton Motors had credit fraud problems while Lapkoff was Sales Manager. Plaintiff does not dispute the truthfulness of this statement. In fact, Plaintiff conceded that Anton Motors had such problems when Johnston questioned him. While Wilks' statements made no specific assertions of wrongdoing by Lapkoff, Plaintiff argues that the implication of Wilks' statements in context was that Lapkoff participated in the fraud.

*3 In Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990), the Supreme Court articulated the test for determining whether speech is opinion or fact, and whether it is protected opinion. First, the court looks to whether the words used by the speaker were "loose, figurative or hyperbolic language." 110 S.Ct. at 2707. Wilks' statement that he would not trust Lapkoff farther than he could throw him clearly falls into this category of language, negating any impression on the Johnston that Wilks was making an assertion of objective fact. Wilks' statements about the

problems at Anton Motors were more specific, indicating that Wilks was relating true facts. Plaintiff does not dispute the truthfulness of Wilks' statements about the situation at Anton Motors, however.

Second, the court considers whether the context and totality of the circumstances surrounding the speech implied the existence of undisclosed defamatory facts. 110 S.Ct. at 2706. Wilks' statement of opinion (that he would not trust Lapkoff) is constitutionally protected speech only if it does not imply the existence of undisclosed defamatory facts. Here, Wilks gave the basis for his opinion (that Lapkoff worked at Anton Motors during the Byrd problem), laying out the basis for which a derogatory inference could be drawn. In this case, the facts from which the derogatory inference could be drawn, were true and are uncontested by Plaintiff. Because Wilks disclosed the facts on which his opinion was based and because the disclosed factual basis for his opinion was true, his opinion is shielded from liability. See Lewis v. Time Inc., 710 F.2d 549 (9th Cir.1983), and Myers v. Plan Takoma, Inc., 472 A.2d 44 (D.C.1983) (per curiam).

Further, Johnston, the person who listened to the statements, testified in a deposition that he did not understand Wilks to have implied that Lapkoff participated in the fraud. "It is not enough that the language used is reasonably capable of a defamatory interpretation if the recipient did not in fact so understand it." Restatement § 563 at Comment c; Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511 (10th Cir.1987).

Third, the court determines whether the assertion itself was capable of being proved true or false. 110 S.Ct. at 2707. A statement must be provable as false before liability for defamation can be imposed. 110 S.Ct. at 2706. Wilks' statement that he would not trust Lapkoff is a subjective opinion, not capable of being proven false. Lapkoff himself corroborated the truthfulness of the statements about the wrongdoing at Anton Motors when questioned by Johnston. Thus, Wilks' statements constitute protected opinion and are not actionable as defamatory words.

III.

Therefore, Defendants are entitled to summary judgment as a matter of law. The Court grants summary judgment on its finding that Wilks' statements are protected from liability as "personal opinion" based on truthful, disclosed facts. Further, the Court finds that the statements did not imply a defamatory meaning, and no defamatory meaning was understood by Johnston, the recipient of the statements. Because the court holds as a matter of law that Wilks' statements were not defamatory, the court need not reach the issue of whether Wilks' statements were protected by a conditional business privilege.

*4 The Motion of Defendants Wilks and Volvo for Summary Judgment is granted. It will be so ordered.

ORDER

In accordance with the foregoing Memorandum Opinion, IT IS this 8th day of October, 1991, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendants Kevin Wilks and Volvo Finance North America, Inc.'s Motion for Summary Judgment BE, and the same hereby is, GRANTED.

2. That the Clerk of the Court CLOSE this case

3. That the Clerk of the Court mail copies of this Order and the attached Memorandum Opinion to all parties of record.

END OF DOCUMENT

1995 U.S. App. LEXIS 13769 printed in FULL format.

EARLE E. PARTINGTON, Plaintiff-Appellant, v. VINCENT T. BUGLIOSI; BRUCE B. HENDERSON; W.W. NORTON & COMPANY, INC.; RANDOM HOUSE INC.; CBS INC.; GREEN EPSTEIN PRODUCTIONS, INC.; COLUMBIA PICTURES TELEVISION, INC.; MATTHEW O'CONNOR; TOMMY L. WALLACE; JIM GREEN; ALAN EPSTEIN, and JAMES HENDERSON, Defendants-Appellees.

PARTINGTON v. BUGLIOSI

No. 94-15094

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

56 F.3d 1147; 1995 U.S. App. LEXIS 13769; 23 Media L. Rep. 1929; 95 Cal. Daily Op. Service 4239; 95 Daily Journal DAR 7302

December 13, 1994, Argued and Submitted, San Francisco, California

June 7, 1995, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-92-00529-DAE. David A. Ezra, District Judge, Presiding.

COUNSEL: Neville L. Johnson, Los Angeles, California, for the plaintiff-appellant.

Paul Alston, Honolulu, Hawaii, for the defendants-appellees.

JUDGES: Before: Thomas Tang, Mary M. Schroeder, and Stephen Reinhardt, Circuit Judges. Opinion by Judge Reinhardt.

OPINIONBY: STEPHEN REINHARDT

OPINION: OPINION

REINHARDT, Circuit Judge:

BACKGROUND

This case arises from the notorious Palmyra trials and the publicity surrounding them. Palmyra is an uninhabited island located in the Pacific Ocean. During the summer of 1974, Stephanie Stearns and Buck Walker sailed to the island in an old sailboat. Once there, the couple discovered that the condition of their boat and the lack of adequate supplies prevented their return. Shortly after their arrival, Muff and Mac Graham arrived on a second sailboat. By the end of October that same year, the Grahams had disappeared, and Stearns and Walker had returned to Hawaii sailing the boat that once belonged to the Grahams. In 1981, the bones of Muff Graham were found washed up on Palmyra, and Stearns and Walker were indicted [*2] for her murder.

Earle Partington was appointed to represent Walker, while Stearns hired Vincent Bugliosi to represent her in a separate trial. Partington is a well-known criminal defense lawyer, although his "passive" handling of a controversial murder case once caused the Hawaii Supreme Court to reverse his client's conviction sua sponte. *Partington v. Bugliosi, 825 F. Supp. 906, 910 (D.Hawaii 1993)* (describing the facts surrounding the Hawaii Supreme Court decision). Bugliosi is a noted lawyer and author who prosecuted Charles Manson and wrote the best-selling book Helter Skelter, but whose efforts to attain elected political office were rejected by the voters of California.

In the Palmyra Island murder cases, which took place in the federal district court in Honolulu, Partington's client was convicted and Bugliosi's acquitted. Following the trials, Bugliosi, along with Bruce Henderson, [the "Book Defendants" or "Bugliosi"] wrote And The Sea Will Tell, an account of his successful defense of Stearns. In 1991 CBS, in conjunction with a number of producers and the Epstein Productions company ["Movie Defendants"], produced a made-for-television movie based on Bugliosi's [*3] book.

Partington filed a damage claim against both the Book and Movie Defendants alleging defamation and false light claims. The action was filed in federal district court which had diversity jurisdiction. In Counts II and III, n1 Partington contends that the Book Defendants defamed him and cast him in a false light by implying that he had not read the transcript of the state court theft trial (regarding the theft of the Grahams' boat) and that he was therefore an incompetent attorney. n2 In Count IV, Partington alleged that a statement in the book criticizing him for taking an overly submissive stance toward the judge presiding over Walker's trial cast him in a false light. n3 In Counts V and VI, Partington alleges that the Book Defendants defamed him and cast him in a false light by stating that he failed to introduce into evidence a diary indicating that Stearns and Walker had socialized with the Grahams, thereby implying that he was an incompetent attorney. n4 In Count VII, Partington alleges that the book cast him in a false light when it criticized him for failing to call a particular witness at trial. n5 Finally, Partington alleges that the Movie Defendants defamed him by portraying [*4] Bugliosi as telling Stearns that she would spend the rest of her life in prison if he defended her the way Partington defended Walker. n6

n1 Count I was initially dismissed without prejudice under Fed R. Civ. Pro. 41(a) and is not raised on appeal. Because it is clear from the circumstances surrounding the final dismissal of the action that the district judge intended to dispose of the entire action, the dismissal was a final, appealable order. See *Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 746 (9th Cir. 1993).*

n2 The material which gives rise to the claim begins with Bugliosi's account of the cross-examination in Walker's trial of a witness who had radio communication with Mac Graham while Graham was on Palmyra Island. The cross-examiner is Findlay, Partington's cocounsel. The excerpt from the cross-examination is followed by the authors' commentary. The complete passage reads:

"Do you recall if the subject of your last conversation with Mac Graham on August 28th ever turned to something that was then taking place?" Schroeder asked.

"Well, toward the end of this contact, I could hear a voice in the distance. Then Mac said, 'Wait a minute. Something is going on.' So he went up topside and he came back and said, 'there is a dinghy coming over to the boat.' And his comment was, 'I guess they've made a truce,' or something like that. Then he told me to hang on while he went topside again."

"Did he return to the radio?"

"Yes, he did," Shoemaker said. "He came back in maybe ten or fifteen seconds and said something about their bringing a cake over. And he said, 'I better find out what's happening.' Mac signed off at that point."

"Did you hear anything in the background while Mac was telling you about these events?"

"Yes. I heard a woman's voice, and there was laughter, and I believe Muff was talking, too. It sounded like two females' voices."

From my review of the transcripts of the two theft trials, I knew that Shoemaker, with every opportunity to do so, had never mentioned anything about a cake or a truce in his earlier testimony. Incredibly, Findlay, in his brief cross-examination, did not bring out this critical contradiction. Had Walker's defense lawyers not read the theft-trial transcripts? Our copy had ended up in a warehouse; perhaps theirs had, too.

Vincent Bugliosi, And the Sea Will Tell, 232-33 (1991).

[*5]

n3 The complete passage reads as follows:

Trials never proceed swiftly, except in novels or the movies, and during the ensuing days, a long line of additional prosecution witnesses dutifully took the stand.

The defense's [Partington and Findlay's] cross-examination of these witnesses was consistently uninspiring, failing, for the most part to make any dent in the witnesses' version of events. The mediocre performance of the defense attorneys was hardly enhanced by King's continuing assault upon their competence in open court. Remarks like, "You are wasting a lot of time," "Stop this nonsense and go on to another question," and "Now move on" found their way into his splenetic repertoire.

During a recess, one of the newspaper reporters covering the trial approached Findlay in the hallway.

"He's a peppery judge," the reporter said.

"The judge is so bad, it's unbelievable," snapped a disgusted Findlay, making no effort to keep is comments off the record. "It's more than his demeanor. His prejudice against our side goes to substantive issues."

I knew that King's conduct would likely influence

the jury against Walker, since it would be a small step for a lay person to reason that a judge who treated the prosectors with collegial respect and the defense with such disdain must not like the cause the defense attorneys were representing. But Partington and Findlay stuck with their submissive stance, not unlike steers being led to the slaughterhouse.

It was obvious that King was like a loose cannon on the bench, unmindful of the prejudicial effect to the defendant his outbursts in court would have on the jury.

I hadn't decided how yet, but I already knew I would have to come up with some way to help insure that King acted much differently during Jennifer's trial. If I had anything to say about it, I wouldn't even countenance one such outburst, much less the steady stream of them Walker's attorneys endured.

And the Sea Will Tell, supra note 2, at 234-35.

[*6]

n4 The complete passage is found in the part of the book where Bugliosi recounts the direct testimony of Stearns during her murder trial:

I had Jennifer read aloud a diary entry that involved a social evening Buck and Jennifer had spent aboard the Sea Wind on July 9. "'On our way to bathe took some coconut butter to Mac and Muff. Never got to bathe but had a very enjoyable evening with them, drinking wine, which tasted fine. And then some rum which was a bit too much for me on an empty stomach. Got pretty drunk - smoked two cigarettes. Mac had given R some Bull Durham earlier in the day. Then gave him a pack of some other cigarettes. He has a friend for life now.'"

"Jennifer, you've heard testimony from prosecution witnesses that they never saw you and Buck on the Sea Wind?"

"Yes."

"And why is that?"

"The Sea Wind Mac had backed it into this little cove [as I had her indicate on the chart of the island]. And it was totally horseshoed by land. And there was a little jut of land that came out helping to form the cove. So, there was no line-of-sight vision."

"Did this portion of Cooper Island jutting out into the lagoon have heavy vegetation and tall trees on it?" I asked.

"Yes."

She estimated the distance between the Iola and Sea Wind as two hundred yards.

Between July 6 and August 26, there were a total of twenty-three entries concerning Jennifer's and Buck's contacts with the Grahams. I had Jennifer read each one to the jury.

"The contact, then, between and among the four of you was of a considerable nature? Is that correct?"

"Yes."

The Walker jury had never heard this fact.

And the Sea Will Tell, supra note 2, at 408-09.

[*7]

n5 This passage reads in full:

While Enoki [the prosecutor] still declines to say why he didn't call Williams to testify, Earle Partington is not so reticent. He claims that when the FBI first visited Williams in prison, the agents showed him Ingman's FBI 302 report that outlined Ingman's version of Walker's prison confession, and asked Williams if he could corroborate it. Says Partington: "Williams told them he'd have to think about it. He subsequently wrote to Walker in prison and told him about the FBI's visit. Unbeknownst to me, Walker and Williams then concocted a scheme whereby Williams agreed to fabricate a story for the FBI similar to Ingman's, get himself called as a Government witness, and, on the stand, refute what he'd told the FBI, saying he'd gone along with the FBI because they had offered him such a good deal. Williams would then testify that Walker had made no statements about the

Grahams or what had happened to them. Walker and Williams thought this would discredit Ingman's testimony, making it look as if Ingman, too, was most likely going along with what the FBI wanted him to say. Williams, in fact, did tell the FBI a fabricated story on October 9, 1984, but Enoki, I think, suspected an ambush and decided against calling Williams. Ray Findlay and I briefly discussed calling Williams as a defense witness, but decided against it. With Williams telling two different stories - one to the grand jury and FBI, and another to the trial jury - we couldn't count on which story the jury would end up believing."

Plausible, except for the inconvenience of fact. The FBI interviewed Ingman on October 5, 1984, but the 302 report of that interview wasn't transcribed by an agency clerk until October 17, 1984,

during which he recounted Walker's "walk the plank" story. Williams may indeed have decided at a later date to refute his story on the stand, but it seems apparent that his crony Walker did tell the sadistic tale, true or not, to both Ingman and Williams at McNeil Island Prison.

And the Sea Will Tell, supra note 2, at 562.

[*8]

n6 The statement was made during a scene of the made-for-television movie, also entitled And the Sea Will Tell, which was initially broadcast by CBS on February 24 and 26, 1991.

The district court granted the defendants' motion for summary judgment, concluding that Partington had failed to establish a claim for defamation or false light. *Partington v. Bugliosi, 825 F. Supp. 906 (D.Hawaii 1993)*. Partington appeals.

ANALYSIS

We note preliminarily that there are several issues raised by one or the other of the parties that it is not necessary for us to reach. First, we need not decide whether the disputed statements can fairly be read to imply that Partington represented his client poorly and whether such an implication would be considered defamatory under state law. See *Fernandes v. Tenbruggencate, 65 Haw. 226, 649 P.2d 1144, 1147 (Hawaii 1982)* (noting that, under Hawaii law, a statement is defamatory if it "tends to 'harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'"); id. at 1147 n.1 [*9] (noting that the statements must be reasonably capable of bearing the meaning ascribed to them in order to serve as the basis of a defamation claim). Because we hold that the First Amendment protects these statements regardless of what state law provides, see infra pp. 6470-87, we assume arguendo that the statements do imply that Partington represented his client poorly during the Walker trial. n7

n7 In his complaint, Partington attempts to ascribe an even broader meaning to the passages - that he is a poor attorney in general. Given that every one of the contested statements solely describes his conduct during the Walker trial, we conclude that they cannot be interpreted so broadly. Thus, we do not reach the question whether the First Amendment would protect more general statements regarding a lack of professional ability on Partington's part.

Next, we do not decide whether Partington was a limited purpose public figure or whether the passage of time would have had any effect upon that status [*10] since, whether or not Partington can allege malice, the statements he contests are not actionable. See infra pp. 6470-87. n8 In addition, we do not determine whether the fact that Partington's claim regarding passages in the book rests upon the implication arising from the statements, rather than upon their actual content, would affect the showing that Partington is required to make because, even if Bugliosi had stated directly what Partington contends he implied, his statements would be protected by the First Amendment. See infra pp. 6469-84. n9

n8 The Supreme Court has specifically declined to address whether an individual's status as a public figure can change over time. *Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166 n.7, 61 L. Ed. 2d 450, 99 S. Ct. 2701 (1979)*. Few circuits have addressed this issue, and the Ninth Circuit is not among them. However, it appears that every court of appeals that has specifically decided this question has concluded that the passage of time does not alter an individual's status as a limited purpose public figure. See *Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981)*, cert. dismissed, *454 U.S. 1095 (1981)*; see also *Contemporary Mission v. New York Times Co., 842 F.2d 612 (2d Cir. 1988)*, cert. denied, *488 U.S. 856 (1988)*; *Wolston v. Reader's Digest Ass'n, Inc., 578 F.2d 427, 431 (D.C. Cir. 1978)*, rev'd on other grounds, *443 U.S. 157, 61 L. Ed. 2d 450, 99 S. Ct. 2701 (1979)*; *Brewer v. Memphis Publishing Co., Inc., 626 F.2d 1238 (5th Cir. 1980)*, cert. denied, *452 U.S. 962, 69 L. Ed. 2d 973, 101 S. Ct. 3112 (1981)*; *Time, Inc. v. Johnston, 448 F.2d 378, 381 (4th Cir. 1971)*.

[*11]

n9 Only two circuits have addressed cases in which a defamation claim is based upon the implication arising from the true facts stated by the author; both have held that the mere reporting of facts is not enough to establish liability. The District of Columbia Circuit and the Fourth Circuit agree that a plaintiff cannot succeed on his claim simply by demonstrating that a defamatory implication arises from the factual statements of the defendant or even by proving that the defamation would otherwise be actionable; he must also prove that the defendant endorsed the implication. *Chapin v. Knight-Ridder, 993 F.2d 1087, 1093 (4th Cir. 1993)*; *White v. Fraternal Order of the Police, 909 F.2d 512, 520 (D.C. Cir. 1990)*. The District of Columbia Circuit has justified this approach by noting that when a defendant states true

facts and does not explicitly defame the plaintiff, additional evidence is necessary for a court to conclude that it would be reasonable to find the defendant intended to defame the plaintiff. *White, 909 F.2d at 519.* In applying this principle, the Fourth Circuit rejected a defamation claim arising from the defamatory implications of certain statements in an article because the defendants' article simply "invited inquiry about the [subject]" but did not endorse a particular interpretation of the facts. *Chapin, 993 F.2d at 1095.*

[*12]

Until a few years ago, we drew a sharp, formalistic line between fact and opinion, holding that anything cast in the form of an opinion was absolutely protected by the First Amendment and could not serve as the basis for a defamation claim. See, e.g., *Ault v. Hustler Magazine, Inc., 860 F.2d 877, 880-81 (9th Cir. 1988)*, cert. denied, *489 U.S. 1080, 103 L. Ed. 2d 837, 109 S. Ct. 1532 (1989).*

In *Milkovich v. Lorain Journal Co., 497 U.S. 1, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990)*, however, the Supreme Court rejected the bright-line approach of this and other circuits. It found the opinion/fact dichotomy too simplistic. The Court stated that it had never intended "to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich, 497 U.S. at 18.* The Court reasoned that "simply couching such statements in terms of opinion does not dispel [the false, defamatory] implications" because a speaker may still imply "a knowledge of facts which lead to the [defamatory] conclusion." *Id. at 19.* It therefore held that, while "pure" opinions are protected by the First Amendment, n10 a statement that "may . . . imply a false assertion of fact" is actionable. *Id. at 19.*

n10 "Pure" opinions are those that "do not imply facts capable of being proved true or false." *Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990)*, cert. denied, *499 U.S. 961, 113 L. Ed. 2d 650, 111 S. Ct. 1586 (1991).*

[*13]

We have had only one previous opportunity to interpret Milkovich. In *Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990)*, cert. denied, *499 U.S. 961, 113 L. Ed. 2d 650, 111 S. Ct. 1586 (1991)*, we held that, in reviewing a defamation claim, a court must ask as a threshold matter "whether a reasonable factfinder could conclude that the contested statement 'implies an assertion of objective fact.'" If the answer is no, the claim is foreclosed by the First Amendment. As a starting point for our analysis, we adopted a three-part test: (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false. Id.

Under Unelko's basic framework, we examine the work as a whole, the specific context in which the statements were made, and the statements themselves to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact and therefore fall outside of the protection of the First Amendment. Here, we flesh out [*14] the Unelko framework. Ultimately, we conclude that in this case the general and specific contexts in which the defendants' contested statements were made do not imply the assertion of an objective fact. We also conclude that those statements are not capable of being proved true or false. Accordingly, we hold that the district court correctly concluded that, under the standards outlined in Milkovich, Partington failed to state a defamation claim: while the defendants' descriptions of Partington's performance during Walker's trial may imply that he represented his client poorly, the statements are protected by the First Amendment and are therefore not actionable.

I.

The Supreme Court and other courts have emphasized that one must analyze a statement in its broad context to determine whether it implies the assertion of an objective fact. See, e.g., *Masson v. New Yorker Magazine, 501 U.S. 496, 111 S. Ct. 2419, 2435, 115 L. Ed. 2d 447 (1991); Milkovich, 497 U.S. at 19; Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727* (1st Cir.), cert. denied, *504 U.S. 974, 112 S. Ct. 2942, 119 L. Ed. 2d 567 (1992).* With regard to the two statements in the book that Partington contends are defamatory, we find that the book's [*15] general tenor makes clear that Bugliosi's observations about Partington's trial strategies, and the implications that Partington contends arise from them, represent statements of personal viewpoint, not assertions of an objective fact. See *Phantom Touring, Inc., 953 F.2d at 729* ("[Because] the sum effect of the format, tone and entire content of the articles is to make it unmistakably clear that [the author] was expressing a point of view only, . . . the challenged language is immune from liability.").

And the Sea Will Tell describes two controversial trials that resulted in dramatically different outcomes for defendants who were in some ways similarly situated. The purpose of the book is to offer the personal viewpoint

of the author concerning the trials. Indeed, readers presumably purchased the book not to read a dry description of the facts but to learn of Bugliosi's personal perspective about the trials since he was both a key participant in the controversy and a well-known criminal defense lawyer. Because the book outlines Bugliosi's own version of what took place, a reader would expect him to set forth his personal theories about the facts of the trials and the conduct [*16] of those involved in them. Moreover, lawyers who write popular books, and particularly trial lawyers, are not known for their modesty; one would generally expect such authors to have a higher opinion of their own performance than of the professional abilities exhibited by other counsel. Cf. *Phantom Touring, 953 F.2d at 729* (holding that statements are protected in part because they are found in "the type of article generally known to contain more opinionated writing than the typical news report"). Thus, Bugliosi's book is a forum in which a reader would be likely to recognize that the critiques of the judges, witnesses, and other participants in the two trials - and particularly of the other counsel - generally represent the highly subjective opinions of the author rather than assertions of verifiable, objective facts. Cf. *Moldea v. New York Times Co., 22 F.3d 310, 313* (D.C. Cir.) (Moldea II) (finding that the challenged statements were protected in part because they "were evaluations of a literary work which appeared in a forum in which readers expect to find such evaluations"), cert. denied, *130 L. Ed. 2d 133, 115 S. Ct. 202 (1994); 22 F.3d at 315* (emphasizing the importance of evaluating [*17] a critical analysis "with an eye toward readers' expectations and understandings [of it]").

Moreover, the subject of the book - the events that took place at Palmyra Island and the outcome of the two trials - is one about which there could easily be a number of varying rational interpretations. There is no question that the subject matter of the book, and the sources upon which Bugliosi relies in drawing his conclusions, are inherently ambiguous, and we believe that reasonable minds could differ as to how to interpret the events and actions described in it. Indeed, much of the public excitement surrounding the two trials stemmed from the fact that there is no clear answer as to what precisely occurred at Palmyra Island or as to why the two trials resulted in such different outcomes.

When, as here, an author writing about a controversial occurrence fairly describes the general events involved and offers his personal perspective about some of its ambiguities and disputed facts, his statements should generally be protected by the First Amendment. Otherwise, there would be no room for expressions of opinion by commentators, experts in a field, figures closely involved in a public controversy, [*18] or others whose perspectives might be of interest to the public. Instead, authors of every sort would be forced to provide only dry, colorless descriptions of facts, bereft of analysis or insight. There would be little difference between the editorial page and the front page, between commentary and reporting, and the robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered.

Our concern is shared by many other courts. For example, the Supreme Court has recently emphasized that the First Amendment guarantees authors "the interpretive license that is necessary when relying upon ambiguous sources." *Masson v. New Yorker Magazine, 501 U.S. 496, 111 S. Ct. 2419, 2434, 115 L. Ed. 2d 447 (1991).* The District of Columbia Circuit has concluded from a survey of Supreme Court doctrine that its cases clearly "establish that when a writer is evaluating or giving an account of inherently ambiguous materials or subject matter, the First Amendment requires that the courts allow latitude for interpretation." *Moldea II, 22 F.3d at 315.* Similarly, the Fourth Circuit has held that when an "answer [is] within the wide range of possibilities, [it] is precisely [when] [*19] we need and must permit a free press to ask the question." *Chapin, 993 F.2d at 1096.*

Thus, under the first part of the test we apply, we conclude that the general context in which the statements were made negates the impression that they imply a false assertion of fact. As we have already noted, readers would expect the book to contain the author's personal and subjective views about the trial and the conduct of the participants based on his experiences as a lawyer and his involvement in the case. Given the ambiguous nature of the subject matter from which Bugliosi draws his conclusions, we believe that the First Amendment requires us to give the author substantial latitude in describing and interpreting the events involved.

Although the made-for-television movie represents a distinct type of forum, we conclude that the general tenor of the docudrama also tends to negate the impression that the statements involved represented a false assertion of objective fact. As the Supreme Court has noted, statements made in "a so-called docudrama or historical fiction" should not be accepted unquestioningly. *Masson, 111 S. Ct. at 2430-31.* Docudramas, as their names suggests, often rely [*20] heavily upon dramatic interpretations of events and dialogue filled with rhetorical flourishes in order to capture and maintain the interest of their audience. We believe that viewers in this case would be sufficiently familiar with this genre to avoid assuming that all statements within them represent assertions of verifiable facts. To the contrary, most of them

are aware by now that parts of such programs are more fiction than fact. As the District of Columbia Circuit has observed, "it is in part the settings of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." *Moldea II, 22 F.3d at 314;* cf. *Ollman v. Evans, 750 F.2d 970, 984 (D.C. Cir. 1984)* ("Courts have long 'considered the influence that . . . well-established genres of writing will have on the average reader.'"), cert. denied, *471 U.S. 1127, 86 L. Ed. 2d 278, 105 S. Ct. 2662 (1985).*

We now turn from the general to the specific. Even in contexts in which the general tenor of the work suggests that the author is expressing personal opinions, it is possible that a particular statement of opinion may imply a false assertion of objective fact [*21] and therefore fall outside the scope of the First Amendment's protection as limited by Milkovich. We do not intimate that the First Amendment shields from scrutiny every assertion in a book outlining a particular author's perspective on a public controversy or every statement made in a docudrama based upon such an event; indeed, Milkovich makes clear that authors of both types of publications must attempt to avoid creating the impression that they are asserting objective facts rather than merely stating subjective opinions. Accordingly, before reaching a final judgment, we must look to the specific context in which the statements were made and to the content of the statements themselves in order to determine whether they are protected by the First Amendment. We now consider the specifics of the defendants' statements.

II.

Partington's defamation claim rests on three statements by the defendants that are outlined in Counts II, V, and VIII of the complaint. n11 The second and fifth counts are based on statements in the book. Count II is based on a statement found in a passage that discusses the cross-examination in the Walker trial of a witness who had had radio communications [*22] with one of the murder victims and had testified about those communications in two prior theft trials. Bugliosi reports that in the earlier trials the witness had never mentioned anything about a truce between the two couples that supposedly involved the gift of a cake, but that in the Walker trial the witness testified that such a truce had occurred and was never asked why he failed to tell the previous juries about the alleged incident. He then expresses incredulity that Partington and his cocounsel did not question the witness about the apparent conflict and suggests that defense counsel may have failed to do their homework. The statement reads:

n1 Counts III, IV, VI, and VII allege false light claims.

From my review of the transcripts of the two theft trials, I know that [the witness], with every opportunity to do so, had never mentioned anything about a cake or a truce in his earlier testimony. Incredibly, Findlay, in his brief cross-examination, did not bring out this critical contradiction. Had [*23] Walker's defense lawyers not read the theft-trial transcripts? Our copy had ended up in a warehouse; perhaps theirs had, too.

And the Sea will Tell, supra, at 232-33. Partington claims that this passage is defamatory because it implies that he did not read the transcripts and that he therefore did not adequately represent his client. n12

n12 See supra note 7.

The second statement upon which Partington bases his defamation claim, found in the fifth count, reads as follows:

Between July 6 and August 26, there were a total of twenty-three entries [in Jennifer's diary] concerning Jennifer's and Buck's contacts with the Grahams. I had Jennifer read each one to the jury.

"The contact, then, between and among the four of you was of a considerable nature? Is that correct?"

"Yes."

The Walker jury had never heard this fact.

And the Sea Will Tell, supra, at 408-09. Partington claims that this statement was defamatory because it suggests that he should have offered the diary entries [*24] into evidence at Walker's trial and, accordingly, that he represented his client poorly. n13 We consider both counts together.

n13 See supra note 7. Partington also asserts that Bugliosi should have noted that the diary would have been inadmissible in the Walker trial. However, even viewing the issue from Partington's standpoint, the best that can be said about his argument is that there is a legitimate legal dispute as to the diary's admissibility. Cf. Federal Rules of Evidence 801(d). Thus, Bugliosi's failure to state that it was inadmissible cannot serve as the basis for a defamation claim.

Reading each of the statements in context, we find that the statements themselves, as well as the implications that Partington attributes to them, do not represent assertions of objective fact. When one reads the first passage in context, it is clear that Bugliosi does not claim to know the reason for the defense lawyers' failure to bring out the existence of the contradiction; rather, he speculates on the basis [*25] of the limited facts available to him. The passage clearly represent Bugliosi's personal interpretation of the available information and not a verifiable factual assessment of Partington's conduct. As the Seventh Circuit has noted:

A statement of fact is not shielded from an action for defamation by being prefaced with the words "in my opinion," but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).

With regard to the second statement, Bugliosi merely outlines a set of facts, allowing the reader to draw his own conclusion about them. Even if we were to attribute to Bugliosi's statement the implication that Partington contends arises from it - that Partington represented his client poorly - Bugliosi can only be said to have expressed his own opinion after having outlined all of the facts that serve as the basis for his conclusion.

The courts of appeals that have considered defamation claims after Milkovich have consistently [*26] held that when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment. As the Fourth Circuit noted, "because the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related." *Chapin, 993 F.2d at 1087.* Similarly, the District of Columbia Circuit has noted that "'because the readers understand that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation.'" *Moldea II, 22 F.3d at 317* (citing Moldea I). Finally, the First Circuit has held that, as long as the author presents the factual basis for his statement, if can only be read as his "personal conclusion about the information presented, not as a statement of fact." *Phantom Touring, Inc., 953 F.2d at 730* (emphasis added). Thus, even if Bugliosi had explicitly written what Partington contends his statements imply, the statements would be protected since, read in context, they are not [*27] statements implying the assertion of objective facts but are instead interpretations of the facts available to both the writer and the reader. Thus, we join with the other courts of appeals in concluding that when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.

Further, at least with regard to the first passage, the rhetorical device used by Bugliosi negates the impression that his statement implied a false assertion of fact. Bugliosi's use of a question mark serves two purpose: it makes clear his lack of definitive knowledge about the issue and invites the reader to consider the possibility of other justifications for the defendants' actions. As the Fourth Circuit noted:

A question can conceivably be defamatory, though it must reasonably be read as an assertion of a false fact; inquiry itself, however embarrassing or unpleasant to its subject, is not an accusation. The language cannot be tortured to "make that certain which is in fact uncertain."

[*28] *Chapin, 993 F.2d at 1094* (citation omitted); see also *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, 39 F.3d 191, 195-96 (8th Cir. 1994).* Indeed, the First Circuit has explicitly distinguished a question like Bugliosi's from the statements found actionable in Milkovich: "While the author's readers implicitly were invited to draw their own conclusions from the mixed information provided, the Milkovich readers implicitly were told that only one conclusion was possible." *Phantom Touring, Inc., 953 F.2d at 731;* see also *Beverly Hills Foodland, 39 F.3d at 196.*

Finally, Partington bases his third defamation claim, in Count VIII, on a statement that did not appear in the book. In the made-for-television movie, Bugliosi is portrayed as saying to his client, "If I defend you the way Partington is defending Walker, you'll spend the rest of your life in prison." Partington claims that the statement implies that he had adopted the wrong defense strategy and therefore provided inadequate representation to his client.

In contrast to the two statements above, the speaker does not outline the factual basis for his conclusion. We nevertheless believe [*29] that the context in which the statement was made negates the impression that it implied the assertion of an objective fact. The defendant's use of hyperbolic language strongly suggests that the movie character was not making an objective statement

of fact. *Unelko, 912 F.2d at 1053.* In this case, as the district court noted, *Partington, 825 F. Supp. at 925,* the statement appears to be a rhetorical device used by an attorney to gain his client's confidence - and, at a broader level, a dramatic passage of dialogue designed to maintain the viewer's attention - rather than an objective statement of fact. As the Supreme Court emphasized in Milkovich, the First Amendment protects the "rhetorical hyperbole" and "imaginative expression" that enlivens writers' prose. *Milkovich, 497 U.S. at 20.* Accordingly, we conclude that the statement cannot be read to imply the assertion of an objective fact. *110 S. Ct. at 2705.*

III.

While we conclude that the general and specific contexts in which the contested statements were made negate the impression that they implied the assertion of an objective fact, we do not rest our decision solely upon that analysis. Instead, continuing to follow [*30] the Unelko framework, we turn to the third part of the test our court applies: whether the statements at issue are capable of being proved true or false. Here, too, the answer to our inquiry compels the conclusion that Partington has failed to state an actionable defamation claim. Partington contends that all of the contested statements imply that he should have adopted different trial strategies and therefore that he provided inadequate representation to his client. We conclude that negative statements concerning a lawyer's performance during trial, even if made explicitly, are generally not actionable since they are not ordinarily "susceptible of being proved true or false." *Milkovich, 497 U.S. at 21.*

To begin, assessments of a lawyer's trial performance are inherently subjective and therefore not susceptible of being proved true or false. Opinions vary significantly concerning what skills make a good trial lawyer and whether a particular individual possesses them. There is no objective standard by which one can measure an advocate's abilities with any certitude or determine conclusively the truth or falsity of statements made regarding the quality of his or her performance. [*31] Moreover, as the Supreme Court has noted, there is a wide variation in opinion concerning the appropriate trial strategy that should be pursued in a given circumstance; in the words of the Court, "there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client the same way." *Strickland v. Washington, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).* n14 Critiques of a lawyer's performance in a particular case generally cannot be proved true or false and, consequently, cannot ordinarily serve as the basis of a defamation claim. n15 Reasonable minds can and do differ as to what strategy should be adopted in a trial, particularly in a trial before a jury. Indeed, what may be a good strategy before one jury may be a disastrous one before another. Thus, we decline to chill Bugliosi's right to express his opinion regarding what constituted good and bad trial strategy in the Palmyra Island cases.

n14 As Strickland itself holds, however, courts can and do measure whether an attorney's performance has been so inadequate as to constitute ineffective assistance of counsel under the standards outlined in Strickland. Bugliosi's criticisms do not rise to that level, and Partington does not contend that he made any such allegation.

[*32]

n15 While we hold that criticisms of a lawyer's performance in a specific trial are generally not actionable, we do not consider here whether criticisms that suggest that a lawyer has committed a serious ethical breach or that a lawyer lacks the professional qualifications necessary to practice are protected by the First Amendment. That question is not before us. In this case, we merely conclude that criticisms about strategic choices made during a trial or of a lawyer's overall performance during a trial are generally not actionable because they are incapable of being proved true or false.

Our conclusion that statements about a lawyer's performance constitute "subjective" statements and are not susceptible of being proved true or false is well supported by existing caselaw. For example, the Seventh Circuit has held that criticisms of an attorney's performance "are more in the nature of opinions on performance rather than statements of fact." *Quilici v. Second Amendment Foundation, 769 F.2d 414, 418 (7th Cir. 1985),* cert. denied, *475 U.S. 1013, 89 L. Ed. 2d 307, 106 S. Ct. 1192 (1986).* Indeed, our court has gone so far [*33] as to hold that "the inference that [the plaintiff's] . . . legal abilities were doubtful . . . is a broad, unfocused, wholly subjective comment . . . ." *Lewis v. Time, Inc., 710 F.2d 549, 554 (9th Cir. 1983)* (emphasis added). Here, we conclude only that an evaluation of a lawyer's performance in a specific trial is not actionable; the case before us is in the Quilici rather than the Lewis mold. n16

n16 Although both decisions were published before Milkovich, their analyses of the nature of statements concerning a lawyer's abilities is still relevant to our decision. Even if other parts of these decisions

might have been undermined by Milkovich, that case does not disturb the long-standing rule that statements on matters of public concern, at least when media defendants are involved, are absolutely protected if they are not susceptible of being proved true or false. *Milkovich, 497 U.S. at 21.* Thus, there is no reason that pre-Milkovich opinions which analyze whether a particular type of statement is susceptible to objective proof should be any less binding than before. However, because in this case we need not consider whether criticisms of a lawyer's abilities in general, rather than critiques of his performance during a particular trial, are actionable, see supra note 7, we do not reach the question whether Milkovich would cause us to reconsider the relevant part of our decision in Lewis. Instead, we only note that Quilici's holding that comments about a lawyer's trial performance are not susceptible of being proved true or false remains unaffected by Milkovich.

[*34]

The courts of appeals that have recently addressed claims based upon comments that are in the nature of personal assessments or criticisms have continued to hold that the First Amendment protects subjective evaluations because they are not susceptible of being verified as true or false. For example, the First Circuit has held that a statement alleging that a production was "fake" and "phony" is "unprovable, since those adjectives admit of numerous interpretations." *Phantom Touring, Inc., 953 F.2d at 728.* Similarly, the Fourth Circuit has held that the phrase "hefty mark-up" is too subjective a phrase to be verifiable, *Chapin, 993 F.2d at 1093,* and the Eighth Circuit has reached a similar conclusion concerning the term "unfair." *Beverly Hills Foodland, Inc., 39 F.3d at 196.*

We find the District of Columbia Circuit's recent decision in *Moldea v. New York Times Co., 22 F.3d 310 (D.C. Cir. 1994)* (Moldea II), to be especially relevant to our decision. The District of Columbia Circuit, in a reversal of its earlier opinion in Moldea I, recently rejected a claim similar to Partington's. n17 In Moldea II, the plaintiff alleged that statements made by an author [*35] implied that he was an incompetent journalist. The court held that criticisms of a journalist's "sloppy journalism" and unprofessional techniques are not actionable under Milkovich because "reasonable minds can and do differ as to how to interpret a literary work." *Id. at 316.*

n17 Indeed, Partington has provided little legal support for his contentions other than the initial Moldea decision (Moldea I), which was reversed on rehearing by the panel that initially issued it.

The District of Columbia Circuit emphasized that courts should be reluctant to hold comments concerning the professional abilities of an individual actionable, noting that "it is highly debatable whether [a statement regarding the plaintiff's "sloppy journalism"] is sufficiently verifiable to be actionable in defamation." *Moldea II, 22 F.3d at 317.* Indeed, the District of Columbia Circuit noted that in Moldea I it had "failed adequately to heed the counsel of both the Supreme Court and our own precedents that 'where [*36] the question of truth or falsity is a close one, a court should err on the side of nonactionablility.'" *Moldea II, 22 F.3d at 317* (quoting *Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1292* (D.C. Cir.), cert. denied, *488 U.S. 825, 102 L. Ed. 2d 51, 109 S. Ct. 75 (1988)).*

We agree with the District of Columbia Circuit that statements like the ones before us are not actionable. Authors should have "breathing space" in order to criticize and interpret the actions and decisions of those involved in a public controversy. n18 If they are not granted leeway in interpreting ambiguous events and actions, the public dialogue that is so important to the survival of our democracy will be stifled. We must not force writers to confine themselves to dry, factual recitations or to abstract expressions of opinion wholly divorced from real events. Within the limits imposed by the law, we must allow, even encourage, them to express their opinions concerning public controversies and those who become involved in them.

n18 It is clear that the subject of And the Sea Will Tell is a public controversy. The different outcomes of the two trials, as well as Partington's own commentary to the press about the alleged bias of the judge and the conduct of the government's witnesses, see infra note 19 and accompanying text, raise questions about the fairness of the Walker trial and the legitimacy of its verdict; the event clearly warrants public attention. Given that the trial did not involve purely private matters but had broader implications concerning the public's perception of the justice system, we conclude that the trials were a public controversy. See *Unelko Corp. v. Rooney, 912 F.2d 1049, 1056 (9th Cir. 1990),* cert. denied, *499 U.S. 961, 113 L. Ed. 2d 650, 111 S. Ct. 1586 (1991); Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1197 (9th Cir. 1989),* cert. denied, *493 U.S. 812, 107 L. Ed. 2d 26, 110 S. Ct. 59 (1989);* see also *Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123, 137 (2d Cir. 1984),* cert. denied, *471 U.S.*

1054, 85 L. Ed. 2d 479, 105 S. Ct. 2114 (1985) (defining a public controversy as "any topic upon which sizeable segments of society have different, strongly held views").

[*37]

We find these principles to be especially relevant with regard to controversial trials like the one before us. While we recognize that there is no wholesale protection extended to commentary upon trials, see *Time, Inc. v. Firestone, 424 U.S. 448, 457, 47 L. Ed. 2d 154, 96 S. Ct. 958 (1976)*, we believe it important that the public be fully informed about what transpires inside our courtrooms. This is especially true when, as here, one of the attorneys has publicly accused the presiding judge of biased decisionmaking and a government witness of lying. n19 Thus, while the divorce of a socialite does not in itself constitutes a matter of public controversy, *Time, Inc., 424 U.S. at 457*, controversial trials that raise questions concerning the fairness of the justice system clearly do. Indeed, in cases like the one before us, we believe that openness, debate, and the free exchange of ideas are necessary to maintain the legitimacy of the court in the eyes of the public.

n19 These represent some of the statements that Partington made to the press during and after the trial.

[*38]

We recognize that there is a risk in exposing the judicial process to full and open examination and an even greater risk in expanding the boundaries of permissible criticism that may be leveled at judicial officers and lawyers. Substantial harm occurs when over a period of time the public views highly publicized but unrepresentative proceedings that significantly mislead it regarding what transpires in the normal course of trials. Similarly, permitting highly subjective criticism of judges and opposing counsel involves a true cost. In the short run, respect for the justice system may be lessened by any or all of these events. Nevertheless, the Constitution requires that we permit the people to be fully informed about the operations of government, including the operation of the judicial branch. It also requires that we tolerate individual expressions of opinion, hostile or otherwise, regarding the performance of those who carry out all aspects of our governmental functions.

For the reasons set forth above, we conclude that the contested statements, and the implications Partington contends arise from them, are absolutely protected by the First Amendment and cannot serve as the basis [*39] for a defamation claim. Thus, we affirm the district court's decision to dismiss Counts II, V, and VIII.

IV.

Partington also contends that he is placed in a false light by two statements we have discussed in Parts I-III, as well as by two other statements that we have not previously discussed. n20 The first of the two additional statements is that Partington (and his cocounsel Findlay) "stuck with their submissive stance [during the Walker murder trial] not unlike steers being led to the slaughterhouse." See supra note 3. The second statement relates to Partington's failure to call a prisoner by the name of J. W. Williams as a witness. See supra note 5.

n20 Although Partington generally concedes the truth of the contested statements, he claims that a series of untrue inferences was created by the omission of certain facts in the relevant passages of the book.

The parties dispute whether Hawaii recognizes the tort of false light. We do not reach this issue, however, because we conclude that all of the contested statements are protected by the First Amendment and therefore are not actionable.

[*40]

We reject Partington's false light claims regarding the two contested statements discussed in Parts I-III of our opinion for the same reason that we rejected his defamation claims based on those statements: both statements are protected by the First Amendment, regardless of the form of tort alleged. See *Moldea II, 22 F.3d at 319.* Thus, we affirm the district court's dismissal of Counts III and VI of Partington's complaint.

We also reject Partington's two additional false light claims. The statement describing Partington and his cocounsel as "steers being led to the slaughterhouse" is protected for precisely the same reasons as the statements we have previously discussed. The general context in which the steers-to-the-slaughterhouse statement was made negates any implication that it constitutes a false assertion of fact. See supra pp. 14-19. So, too, does the content of the statement; it is cast in colorful, indeed hyperbolic, terms - precisely the type of rhetorical flourish that the First Amendment protects. See supra pp. 23-24. Moreover, it is, beyond question, not susceptible of being proved true or false: it solely concerns the quality of an attorney's trial performance [*41] in a particular case. See supra pp. 23-28.

Partington's remaining false light claim essentially involves three contentions. The first - that the passage

casts him in a false light by implying that he represented Walker poorly - cannot give rise to an actionable claim for the reasons we have already explained. See id.

Second, Partington contends that, in contrast to other parts of the book which he concedes correctly state the facts, the passage at issue here misrepresents what actually transpired. n21 However, the factual misstatements if any are, in the circumstances of this case, of minor importance. We have assumed in our previous discussion that Bugliosi's book portrays Partington as having represented Walker poorly. The additional charge adds little if anything to the gist of Bugliosi's criticisms. It merely sets forth a comparatively minor incident that tends to support the basic protected characterization. Courts have consistently rejected attempts to base damage claims upon minor factual errors when the gist of the work, taken as a whole, cannot serve as the basis for a defamation or false light claim. See e.g., *Moldea II, 22 F.3d at 318-19; White, 909 F.2d at 520.* [*42] As the Seventh Circuit noted, "in determining the 'gist' or 'sting' of a newspaper article [to assess whether it is actionable, a court] must look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance . . . ." *Vachet v. Central Newspapers, 816 F.2d 313, 317 (7th Cir. 1987).* We must evaluate Partington's final claim in light of the general picture which exists independent of the statement on which the claim is based. If, as Partington himself contends, n22 all of the other contested statements - which we hold protected - would lead a reader to believe that he represented his client poorly, the additional item (even assuming it includes factual errors) will not in any way affect the reader's view of Partington. The light in which this remaining claim puts Partington is precisely the light in which he has already been put by material that is protected by the First Amendment. Under these circumstances, the additional example of which Partington complains cannot support a false light action.

n21 It is unclear from Partington's complaint whether he is arguing that Bugliosi incorrectly summarized Partington's statements regarding the incident or correctly summarized them but should have reported that Williams was told about rather than shown Ingman's statements.

[*43]

n22 Throughout his brief and his complaint, Partington has asserted that the only reasonable inference that can be drawn from the contested passages is that he performed poorly at trial. See supra note 7 and accompanying text.

Finally, Partington contends that by stating that his version of the facts is not correct, the passage implies that he is a "liar" and therefore casts him in a false light. We reject this contention because the inference that Partington draws is not tenable. Bugliosi has not accused him of being a "liar" or a "perjurer." He has instead asserted that Partington's explanation of one incident to a prospective author is not consistent with the facts.

It is true that Bugliosi has suggested that at some time during the lengthy and detailed interviews that Partington voluntary granted to the authors of And the Sea Will Tell he deliberately misrepresented what transpired in connection with the decision not to call a particular witness. However, such a charge is not sufficient to support a false light claim. There is a significant difference between suggesting that [*44] someone misrepresented the facts regarding a single tactical decision in a criminal trial and accusing that individual of being a "liar" or a "perjurer." The disputed statement, read in context, simply is not of the same order as the example of actionable defamation set forth in Milkovich - the statement that "Mayor Jones is a liar," *Milkovich, 497 U.S. at 20.* Moreover, Milkovich's holding does not extend nearly so far as to cover an allegation that a person engaged in the type of minor misrepresentation of which Bugliosi accuses Partington. Id. Reporters and historians routinely dispute the accuracy or truthfulness of the statements of their sources when those statements conflict with the facts as the authors perceive them. We would severely limit the ability of such writers to explain fully many of the ramifications of crucial issues of public importance were we to allow them to be sued every time they suggested that one of their sources was being less than truthful in describing an incident that is discussed in the published work. Finally, we note that unlike the obligation of a witness testifying in court, a person being interviewed by an author-for-profit is under [*45] no duty of full and accurate disclosure. A comparatively minor misrepresentation made to such a writer clearly does not render the interviewee a liar or a perjurer.

For the above reasons, we affirm the district court's dismissal of Counts IV and VII of Partington's complaint.

V.

Finally, we conclude that the district court did not err in denying Partington's request for leave to amend his complaint. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely

given when justice so requires." Although, as Partington points out, there is a policy that favors allowing parties to amend their pleadings, *Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973)*, a district court may properly deny such a motion if it would be futile to do so. *DCD Programs, Ltd. v. Leighton., 833 F.2d 183, 186 (9th Cir. 1987)*. Here, the district court correctly concluded that, because Partington had failed to state a claim for defamation or false light, it would be futile to allow him to amend his complaint to plead malice or special damages. *Partington, 825 F. Supp. at 925*. Because it is clear that the deficiency in Partington's complaint could not have been overcome [*46] by amendment, the district court did not abuse its discretion in this case. *DCD Programs, Ltd., 833 F.2d at 186*.

CONCLUSION

For the above reasons, the district court's decisions denying Partington leave to amend and dismissing his complaint with prejudice are

AFFIRMED.

III

In conclusion, I find the legislative history insufficient to persuade me that we should ignore the plain meaning of the words. Rather, I agree with Judge Tamm: the result of applying Exemption 8 as written is not "absurd," "unreasonable," or "'plainly at variance with the policy of the legislation as a whole' * * *." *United States v. American Trucking Ass'ns, Inc., supra,* 310 U.S. at 543. Yet I do not think that our and Congress' result sits entirely comfortably with the broad thrust of the FOIA, or that congressional alterations could not improve enforcement of the Truth in Lending Act. Indeed, the matter is, I believe, in serious need of legislative attention. First, a central proposition underlying Exemption 8 — that certain information must be kept from the public for fear that it will be misunderstood and lead to overreaction — is somewhat inconsistent with the philosophy behind the FOIA.[21] Second, the mere fact that there is a long-standing tradition of confidentiality for bank records — a tradition occasionally referred to with some reverence in testimony before the Senate subcommittee[22] — strikes me as irrelevant. It may be time for a reexamination. Third, the Comptroller's argument that confidentiality is necessary to maintain the smooth functioning of the examination process and the cooperation of bank officials seems to me to be of very limited force. Not only does the Comptroller have a considerable arsenal of weapons at his disposal to compel disclosure,[23] but the costs of employing that arsenal are assessed upon the institutions he supervises.[24] Recalcitrance on the part of the banks would therefore lead simply to higher assessments. Further, it should go without saying that preserving good relations between regulators and those they regulate is a goal which, however desirable in moderation, can if overemphasized be flatly inconsistent with the very purposes of regulation itself. Fourth, the present practice of not disclosing the identities of banks which violate the Truth in Lending Act (and of not notifying injured borrowers of violations) may be retarding achievement of substantial compliance with that Act.[25]

I join, therefore, with appellant in feeling that further study and some change is necessary. But I join with the majority of this panel and the District Court in suggesting that it seek relief from Congress rather than the courts.

[21] *See* authorities cited at majority op. note 19.

[22] *See* 1964 Senate Hearings, *supra* note 8, at 177c, 179, 191,549.

[23] *See* 12 U.S.C. §481 (1976) (giving examiners power to examine all documents and to compel testimony, and setting forth sanctions for failure to cooperate).

[24] *See* 12 U.S.C. §§481-482 (1976).

[25] This question was slated for further study by the House Committee on Government Operations in its 1977 report. *See* note 14 *supra.* In the instant case appellant has submitted affidavits suggesting that a policy of disclosure can be an important way of furthering Truth in Lending Act enforcement. *See* Affidavit of John E. Quinn, Superintendent of the Bureau of Consumer Protection for the State of Maine, February 15, 1977, JA 63a; Affidavit of Lawrence Connell, Jr., Bank Commissioner for the State of Connecticut, March 9, 1977, JA 67a.

CRAIG v. MOORE

Florida Circuit Court
Duval County

GUY R. CRAIG, v. ALLEN MOORE, JOSEPH J. MCCLUSKEY, General Manager of Radio Station WAPE-690; WAPE-690, a radio station licensed to do business in the State of Florida, and S.I.S. RADIO, INC., No. 78-3204-CA, August 30, 1978

REGULATION OF MEDIA CONTENT

Defamation — Defamatory content (§11.05)

Defamation — Standard of liability — Public official/figure plaintiffs — Knowledge of falsity (§11.3011)

Defamation — Standard of liability — Public official/figure plaintiffs — Reckless disregard (§11.3012)

Radio station's broadcast labeling mayor who was running for re-election as "deceptive individual" who "often misleads, if not blatantly lies" to station's reporters is, in mayor's Florida libel action against station, constitutionally protected statement of editorial opinion concerning mayor's fitness for office.

Libel action against radio station. On defendants' motion for summary judgment.

Granted.

David U. Tumin and William M. Tomlinson, Jacksonville, Fla., for plaintiff.

Harold B. Wahl and George D. Gabel, Jr., Jacksonville, for defendant.

Full Text of Opinion

Oakley, J.:

This cause came on to be heard on defendants' motion for summary judgment in this libel suit, supported by the pleadings, the depositions of plaintiff and defendants, and various affidavits.

Paragraph 7(A) of the Complaint alleges:

> "(A) On or about September 28, 1977, at the peak of a political campaign where in the plaintiff was running for reelection as Mayor of the City of Jacksonville Beach, Florida, the defendant, Allen Moore, as News Director/Commentator of Radio Station WAPE-690, broadcast at 6:00 a.m. a news story about 'beach cleanliness,' concluding therein as follows:
>
> > 'Well, what else can we expect from Mayor Guy Craig? This deceptive individual who quite often misleads, if not blatantly lies to reporters from this radio station. What often* (sic) could you expect from him? Can you believe people elected him to begin with? Can you believe people will probably reelect him'
> >
> > *else"

It is clear that at a time of a political election when plaintiff was seeking reelection as mayor, the defendants expressed their opinions or ideas as to the fitness of the plaintiff for public office and why he should not be reelected.

When the mayor's deposition was taken, both he and his counsel conceded, as they necessarily must have done, that the language sued on was an editorial commentary. It was clearly an expression of *opinion*, as the mayor conceded at pages 27 and 40.

There has been no showing that this expression of opinion was a calculated falsehood. See *Curtis v. Butts* (1967) 388 U.S. 130, at 153, [1 Med.L.Rptr. 1568] where the court said that the burden was on the plaintiff to prove "in effect, a calculated falsehood". There is no evidence of any kind, let alone evidence of convincing clarity [as required by *New York Times v. Sullivan* (1964) 376 U.S. 254, [1 Med.L.Rptr. 1527] and succeeding cases] that defendants made this statement knowing it to be false or having serious doubts as to its truth with intent to harm through falsehood. On the other hand, there is no dispute but that the defendant Moore, as News Director of the station, had reports from his reporters, and others, that the mayor could not be relied upon and that they could not trust his statements; that the publication was merely an honest expression and opinion based upon the experiences with the mayor.

As stated in *Gertz v. Welch* (1974) 418 U.S. 323 [1 Med.L.Rptr. 1633] at 344 and 345:

> "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the court pointed out in Garrison v. Louisiana, 379 U.S. at 77, 13 L.Ed 2d, 125, 85 S.Ct. 209, the public's interest extends to 'anything which might touch on an official's fitness for office. . .' Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."
>
> * * *
>
> ". . .the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an 'influential role in ordering society'. Curtis Publishing Co. v. Butts, supra, at 164, 18 L.Ed. 2d 1094 (Warren, C.J., concurring in the result.)" (Italics here and elsewhere added unless otherwise indicated.)

Further it is stated at pages 339 and 340:

> "Under the First Amendment *there is no such thing as a false idea.* However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas."

For plaintiff to recover for libel he must show "by proof of convincing clarity that the publication was false and that the defendants either knew it was false or had se-

rious doubts (reckless disregard) as to its truth". See *New York Times*, supra, at 286; *St. Amant v. Thompson* (1968) 390 U.S. at 731 [1 Med.L.Rptr. 1586]; and *Beckley v. Hanks* (1967) 389 U.S. at 83 [1 Med.L.Rptr. 1585].

The burden is on the plaintiff to prove in effect "a calculated falsehood". *Curtis*, supra, at 153.

Defendant is not required to have even "a reasonable belief" in the truth of the publication. *Garrison v. Louisiana* (1964) 379 U.S. 64 at 78 and 79.

A case strikingly similar to this one is that of *Palm Beach Newspapers v. Early* (Fla. D.C.A.4, 1976) 334 So.2d 50, cert. den., 354 So.2d 351, where the trial jury gave a million dollar verdict to the plaintiff county school superintendent after the newspaper had run several hundred articles, which was reversed completely on appeal. As stated on page 51 of the Opinion:

> ". . .Both papers, through their respective editorial and news staffs, embarked upon a *concerted campaign admittedly designed to bring about the removal of Mr. Early* from his elected position. In pursuance of this objective, the defendants published over a period of approximately fourteen months several hundred news articles and editorials, all of which were generally hostile to or critical of Early and many of which were of a *defamatory* nature."

See further on page 52:

> "Plaintiff/appellee complained that the defendants characterized his tenure in office as unsuccessful, and stated that he was unfit to hold the office of Superintendent of Public Instruction because of his ineptness, incompetence and indecisiveness. All of these charges were clearly matters of *opinion*, not statements of fact, and were proper subject of comment on a public official's fitness for office."

We quote further on pages 53 and 54:

> "Most of the articles and cartoons would fall in the category of what the courts have chosen to call '*rhetorical hyperbole*' or 'the conventional give and take in our economic and political controversies.' In this category were statements to the effect that public confidence in the school system was eroding, that the public was clamoring for new leadership in the school system, that plaintiff enjoyed TV and news exposure, that plaintiff had not, prior to his election, held an administrative position in the school system higher than acting principal, and such cartoons as depicted the school buildings falling down or crumbling under plaintiff's leadership, as typical examples.
>
> We do not here attempt to discuss or classify more than a smattering of the *several hundred derogatory articles and cartoons* which defendants published of and concerning plaintiff. Suffice it to say that while *most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism, there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice as defined in the New York Times case.* We thus conclude that the defendants' motion for a directed verdict at the close of the evidence should have been granted by the trial court. The judgment is therefore reversed and the cause remanded with directions to enter a judgment in favor of the defendants."

The *Early* decision was not only upheld by the Florida Supreme Court when it denied certiorari, but is supported by the decisions of the United States Supreme Court. In *Greenbelt v. Bresler* (1970) 398 U.S. 6 [1 Med.L.Rptr. 1589], at 11, 14 and 15, charges of "blackmail" were held insufficient; in *Old Dominion Letter Carriers v. Austin* (1974) 418 U.S. 264, the charge of being a "traitor" was held insufficient; in *Curtis v. Birdsong* (C.A.5 1966) 364 F.2d 344, at 348, the charge of being a "bastard" was held insufficient; and in *Time v. Johnston* (C.A.4 1971) 448 F.2d 378, at 384, the charge of being "destroyed" was held insufficient; the courts in all those cases holding the charges were merely "rhetorical hyperbole" and the "conventional give and take in our economic and political controversies". See also *Bennett v. Transamerican Press* (U.S.D.C. Iowa 1969) 298 F.Supp. 1013, where a charge against a legislator that he was a "liar" was held to be merely the expression of the opinion of the writer, and not libelous under the *New York Times* standard.

In addition to the *Bennett* case where the court held that the word "liar" was not actionable, the Illinois court has likewise held the word "liar" would be non-actionable in an appropriate context such as here. See *Wade v. Sterling Gazette Co.* (Third District, 1965) 56 Ill.App.2d 101.

Other cases have held non-actionable the words "lousy agent", *Valentine v. North American Co.* (Ill. Third District, 1973) 16 Ill.App.3d 227; "scab" and "traitor", *Old*

Dominion Letter Carriers v. Austin (1974) 418 U.S. 264; "dishonorable and deluded", *Delis v. Sepsis*, (Ill.App., 1972)9 Ill.App.3d 317; "fixes parking tickets", (Ill.App., 1967), *Kamsler v. Chicago American Publishing Co.*, 82 Ill.App.2d 86; "nut", "mishuginer" and "screwball", *Skolnick v. Nudelman*, (Ill.App., 1968), 95 Ill.App.2d 293, 237 N.E. 2d 804; "completely loses his cool, turns purple * * * Prussian dictator", (Ill.App., 1973) *Von Solbrig v. Licata*, 15 Ill.App.3d 1025, 305 N.E. 2d 252; and "asshole", *McGuire v. Jankiewicz*, (Ill.App., 1972), 8 App.3d 319, 290 N.E.2d 675.

The courts have held that these expressions "may be characterized as extreme, bitter, and may hold up plaintiffs to execration, yet are not libelous per se".

In *Cohen v. New York Times (1912), 153 App.Div. 242, 138 N.Y.S. 2d 206*, someone, friend or foe, inserted an advertisement in the New York Times that Cohen had died on May 6. Cohen sued the newspaper. His complaint was dismissed, the Court saying at page 246:

> "Such publication may be unpleasant; it may annoy or irk the subject thereof, it may subject him to joke or jest or banter from those who knew him, even to the extent of affecting his feelings but this is not enough".

Forty years later a similar joke was played on John Cardiff. The announcement went a step further and stated that the plaintiff was lying "in state at 566 4th Avenue" which was the address of his saloon. Still the Court held there was no libel, *Cardiff v. Brooklyn Eagle Inc.*, (1947), 190 Misc. 730, 733, 75 N.Y.S. 222, holding:

> "At its worst the publication might cause some amusement to the plaintiff's friend. But it is difficult to see where his reputation would be impaired in the slightest degree and the law of defamation is concerned only with injuries thereto."

In *Kimmerle v. New York Evening Journal, Inc.*, (1933) 262 N.Y. 99, the plaintiff was described as being courted by a murderer who had left "a dirty, blood-stained record behind" him in Chicago and who was later hung. In dismissing the complaint, the Court of Appeals said (262 N.Y. at 103):

> "Embarrassment and discomfort no doubt came to her from the publication, as they would to any decent woman under like circumstances. Her own reaction, however, has no bearing on her reputation . . .We are unable to find anything in this article which could appreciably injure the plaintiff's reputation".

Nor is it libelous to charge an individual with a single mistake or of acting foolishly on a single occasion.

This principle is well illustrated by *Twiggar v. Ossining Printing & Publishing Co.* (1914), 161 App.Div. 718, 146 N.Y.S. 429, where the article said that the plaintiff, a dentist, had removed the root of a tooth so unskillfully that three other teeth were exposed, and a cavity in the roof of the patient's mouth and a disease of the gums and jaws set in. The Court held that infallibility is not a human trait and even the most skillful may make a mistake on a single occasion, so that the assertion of a single act of negligence was not libelous.

See also *Battersby v. Collier*, (1898) 34 App.Div. 347, 54 N.Y.S. 363; *Arnold Bernhard & Co., Inc. v. Finance Publishing Corp.*, (1968), 32 A.D.2d 516, 298 N.Y.S.2d 740; *Hirschhorn v. Group Health Ins.*, (1958), 13 Misc. 2d 338, 175 N.Y.S.2d 775; *Cowan v. Time Inc.*, (1963) 41 Misc.2d 198, 245 N.Y.S. 2d 723.

One of the strongest cases is the decision of the United States Court of Appeals for the 2nd Circuit in *Hotchner v. Castillo-Puche (1977)*, 551 Fed.2d 910 [2 Med.L.Rptr. 1545]. There, the author described the plaintiff "as a manipulator, a 'toady', a 'hypocrite' and 'exploiter' of Hemingway's reputation, who was never 'open and above board'." The author also said about plaintiff, "I don't really trust him."

The lower Court entered up judgment for the plaintiff which was *reversed* by the Court of Appeals, and the United States Supreme Court denied certiorari at U.S. . the key point of the opinion is found at page 913;

> "A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. See *Gertz v. Robert Welch*, 418 U.S. at 339-40; *Buckley v. Littell*, 539 Fed.2d 882 at 893."

The *Hotchner* case is squarely in point here: The defendants merely express their opinion of Mayor Craig and there can be no recovery "however unreasonable the opinion or vituperous the expressing of it may be."

See also *Edwards v. National Audubon Society*, et seq. USCA 2 [2 Med.L.Rptr. 1849] (1977) 556 Fed. 2d 113, cert. den. U.S. ; and *Rinaldi v. Holt*, (N.Y. 1977) 42 N.Y. 2d, 396, 2 Med.L.Rptr.

2169. There, New York's highest Court upheld Summary Judgment against the plaintiff public official and said at 2 Med.L.Rptr. 2173:

> "The expression of *opinion, even in the form of pejorative rhetoric*, relating to fitness for judicial office or to performance while in judicial office, is safeguarded. (Cf., Old Dominion Branch No. 496, *Assn. of Letter Carriers v. Austin*, 418 U.S. 264, 283-284.) Erroneous opinions are inevitably made in free debate but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience. (See *New York Times Co. v. Sullivan*, 376 US 254, 271-272, supra.) Plaintiff may not recover from defendants for simply expressing their opinion of his judicial performance, *no matter how unreasonable, extreme or erroneous* these opinions might be. (See *Hotchner v. Castillo-Puche*, 551 F.2d 910, 912.)

The publisher had accused the plaintiff, Judge Rinaldi, of being incompetent, stated that he should be removed from office, and that he was probably corrupt. Nonetheless, the Court held defendants had the right to have and express their opinion.

What is expressed in an editorial opinion like that here is a matter which is beyond the reach of libel law. The plaintiff who claims he has been libeled by another's published opinion of him, if he is a public official, cannot, consistent with the First Amendment, sue the publisher for having expressed his opinion. Such an action constitutes an "impermissible intrusion into the function of editors," *Miami Herald Publishing Co. v. Tornillo*, (1974), 418 U.S. 241 [1 Med.L.Rptr. 1898], 258. In *Tornillo*, the Supreme Court invalidated a Florida statute granting a political candidate equal space for reply in newspapers which were editorially critical of him, saying:

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time." 418 U.S. at 258.

Cf. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, (1973)412 U.S. 94 [1 Med.L.Rptr. 1855] (broadcaster has right to refuse paid editorial advertisements; where the Court said: "For better or worse, editing is what editors are for; and editing is selection and choice of material." 412 U.S. at 124.)

Beyond their specific holdings, *Tornillo* and *CBS* serve as a reminder that any "intrusion into the function of editors" cannot be permitted under the First Amendment; to forget that reminder is to run the risk that "uninhibited, robust and wide-open" debate, *New York Times v. Sullivan*, (1964) 376 U.S. 254, 271, will be lost, and that the expression of personal opinions and views which is fundamental to vigorous debate will be stifled.

The editorial in question here is an expression of opinion for which the plaintiff cannot constitutionally recover in a libel action. Accordingly, the defendants' Motion for Summary Judgment must be sustained.

The burden is on plaintiff to prove his case by "clear and convincing" evidence. *Gertz v. Robert Welch, Inc.*, (1974) [1 Med.L.Rptr. 1633] 418 U.S. 323, 342; *Beckley Newspapers Corp. v. Hanks*, (1967) [1 Med.L.Rptr. 1585], 389 U.S. 81, 83; *New York Times v. Sullivan*, (1964) [1 Med.L.Rptr. 1527] 376 U.S. 254, 285-286. Accordingly, the plaintiff must show, when challenged by the Motion for Summary Judgment filed by the defendants, that the evidence he will introduce at trial will establish constitutional malice with the convincing clarity required of him. *Fadell v. Minneapolis Star & Tribune Co., Inc.* (U.S.C.A. 7 1977) 557 F.2d 107 [2 Med.L.Rptr. 2198], cert. den. (1977) U.S. 98 S. Ct. 508, aff'g (N.D. Ind. 1976) 425 F.Supp. 1075 [2 Med.L.Rptr. 1961]; *Carson v. Allied News Co.*, (U.S.C.A. 7 1976) 529 F.2d 206; *Bon Air Hotel, Inc. v. Time, Inc.*, (U.S.C.A. 5 1970) 426 F.2d 858; *Wasserman v. Time, Inc.* (U.S.C.A.D.C. 1970) 424 F.2d 920 (Wright, J., concurring); *United Medical Laboratories v. Columbia Broadcasting System* (U.S.C.A. 9 1968) 404 F.2d 706; *Washington Post Co. v. Keogh* (U.S.D.C. 1966) 365 F.2d 965; *Hutchinson v. Proxmire*, (W.D. Wis. 1977) 431 F.Supp. 1311; affirmed (U.S.C.A. 7 1978) -F.2d-, 4 Med. L. Rptr. 1016 (involving Senator Proxmire's "opinion" of plaintiff Hutchinson); *Wolston v. Reader's Digest Assn., Inc.*, (D.C.D.C. 1977) [2 Med.L.Rptr. 1289]; 429 F.Supp. 167; *Oliver v. Village Voice, Inc.*, (S.D.N.Y. 1976) 417 F.Supp. 235; *Raganov v. Time, Inc.*, (M.D. Fla. 1969) 302 F.Supp.

1005; *Bandelin v. Pietsch*, (1977) 98 Idaho 337, 563 P.2d 396 [2 Med.L.Rptr. 1600]; *Johnson v. Capital City Press*, (La. 1977) 346 So.2d 280 [2 Med.L.Rptr. 2255]; *Adams v. Frontier Broadcasting Co.*, (Wyo. 1976) 555 P.2d 556 [2 Med.L.Rptr. 1166]; *O'Brien v. Tribune* Publishing Co., (1972) 7 Wash.App. 107, 499 P.2d 24.

The court in *Bandelin v. Pietsch*, supra, said as follows in upholding Summary Judgment:

"When a defendant's communications are constitutionally privileged [under *New York Times*], a plaintiff cannot prevail at trial unless he establishes malice with convincing clarity. This is the standard against which the court must examine the evidence *on motion for summary judgment* because this is the standard that determines materiality of disputed questions of fact. Unless there is evidence which if believed by a jury would establish malice clearly and convincingly, a defendant is entitled to summary judgment. Disputed issues of fact that if resolved in favor of the plaintiff would still fall short of establishing malice with convincing clarity are not material." 563 P.2d at 399.

The plaintiff cannot resist the defendants' Motion for Summary Judgment merely by arguing that there is an issue for the jury as to malice, unless he makes come specific showing from which malice may definitely be inferred. *Thompson v. Evening Star Newspaper Co.*, (1968) 129 U.S. App.D.C. 299, 394 F.2d 774; *Johnson v. Capital City Press*, (La. 1977) 346 So.2d 820. It is not enough for the plaintiff to allege that a defamatory falsehood has been published, or that the defendant acted carelessly; absent proof with "convincing clarity", summary judgment must be granted to the defendants. *Fadell v. Minneapolis Star & Tribune Co., Inc.* (U.S.C.A. 7 1977) 557 F.2d 107 [2 Med.L.Rptr. 2198], cert. den. (1977) U.S. 98 S.Ct 508, aff'g (N.D. Ind. 1976) 425 F.Supp. 1075 [2 Med.L.Rptr. 1961].

To require the defendants to incur the further expense of a trial in this matter, where on this record there is no proof, let alone clear and convincing proof, of constitutional malice on their part, would be wholly contrary to the command of the *New York Times v. Sullivan* principle. In *Fadell v. Minneapolis Star and Tribune Co., Inc.*, supra, the district court stated:

"It is in order to prevent the 'chilling effect' of such burdens on the press, and to facilitate free debate on issues of public concern that the courts have more and more taken the position that the First Amendment issues which arise out of libel suits should *be disposed of on summary judgment* where a public official plaintiff has failed to establish 'actual malice'. . .

"In *Washington Post Co. v. Keogh*, [supra], the court stated: . . .

'In the First Amendment area, *summary procedures are even more essential.* For the stake here, if harrassment succeeds, is free debate. One of the purposes of the [*New York Times v. Sullivan*] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself especially to the advocates of unpopular causes.'"

See also *Guitar v. Westinghouse Electric Corp.*, supra, 396 F.Supp. at 1053 ("*Summary judgment is the rule, and not the exception, in defamation cases*" (emphasis in original); *Grant v. Esquire, Inc.*, 367 F.Supp. 876, 881 (S.D.N.Y. 1973) (public figure plaintiff must "*make a far more persuasive showing than required of an ordinary litigant in order to defeat a defense motion for summary judgment.*")

In *Jenoff v. Hearst* (U.S.D.C. Md. 1978) F.S. 4 Med.L.Rptr. 1023 at 1028, as late as June 27, 1978, the court held, citing authorities:

"Of course, where the actual malice standard of *New York Times v. Sullivan* is applicable, the *granting of summary judgment is the rule, rather than the exception* because of the difficulty encountered by a plaintiff in showing the existence of actual malice. *Anderson v. Stanco Sports Library*, 542 F.2d 638, 640 (4th Cir. 1976); *Time, Inc. v. Johnston*, 448 F.378 (4th Cir. 1971) at 383-84."

There are discussed hereinafter the Florida cases, including many from Duval County, upholding the right of the media defendant to summary judgment in situations like that here.

Of interest is the decision of the United States Court of Appeals for the Second Circuit in *Lando v. Herbert* (1977) 568 F.2d 974 [3 Med.L.Rptr. 1241], which went so far as to prevent pretrial discovery or dis-

closure of the editorial process of the press in deciding what to publish.

Plaintiff contends that he is entitled to recover in an individual capacity even if he cannot recover as mayor. Unfortunately for plaintiff, this contention has been squarely rejected in both *Gertz*, supra, and *Garrison*, supra, where the court held that "the public's interest extends to anything which might touch on an official's fitness for office and that few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though those characteristics may affect the official's private character" and defendants' First Amendment protection "is not rendered inapplicable remedy because an individual's private reputation, as well as his public reputation, is harmed". See 379 U.S. at 77.

In sum, this court holds that here the news media defendants, as they had a right to do, expressed their opinion of plaintiff's fitness for office and of the way in which he handled that office and his dealings with the press and public; that there is no showing under the *New York Times* cases which permit recovery.

Under the circumstances, it is the court's duty to enter up summary judgment to avoid the expense, delay, and hazard of a trial and to protect the First Amendment rights of the news media. See *Bon Aire Hotel v. Time* (C.A.5 1970) 426 F.2d 858, 863-865, pointing out why summary judgment is required. See also *Washington Post v. Keogh* (U.S.C.A. D.C. 1966) 365 F.2d 965 at 968, cert. den., 385 U.S. 1011, holding that "in the First Amendment area summary procedures are even more essential".

Bishop v. Wometco (Fla. D.C.A.3 1970) 235 So.2d 759 (cert. den. at 240 So.2d 813) upheld summary judgment and quotes many of the same authorities cited in *Bon Air*. It also calls attention to the fact that the court in *White v. Fletcher* (Fla. 1956) 90 So.2d 129, affirmed summary libel judgment (for defendant) and "anticipated the later decision in *New York Times*".

Among the other Florida cases upholding summary judgments for the news media in such situations (and where the showing for the plaintiff was more and that for the media was less, if anything, than here) are *Hill v. Lakeland Ledger* (Fla. D.C.A.2 1970) 231 So.2d 254; *Amos v. Florida Publishing Company* (Fla. C.C. Duval 1964) 23 Fla. Supp. 169; *Barrow v. Florida Publishing Company* (Fla. C.C. Duval 1965), affirmed per curiam at 178 So.2d 28, cert. dismissed at 183 So.2d 215; *Carroll v. Florida Publishing Company* (Fla. C.C. Duval 1965) 25 Fla.Supp. 5; *West v. Florida Publishing Company* (Fla. C.C. Duval 1968) 30 Fla. Supp. 1; *LaBruzo v. Miami Herald* (Fla. C.C. Dade 1971) 36 Fla. Supp. 1; *Sullivan v. Florida Publishing Company* (Fla. C.C. Duval 1966) 26 Fla. Supp. 57; *Merritt-Chapman v. Associated Press* (Fla. C.C. Dade 1970) 33 Fla. Supp. 102; *MacGregor v. Miami Herald* (Fla. D.C.A.2 1960) 119 So.2d 85; *Walker v. Times Publishing Co.* (C.C. Pinellas 1965) 26 Fla. Supp. 90; *Menendez v. Key West Newspaper Corp.* (Fla. D.C.A.3 1974) 293 So.2d 751; and *Nelson v. Globe Communications* (C.C. Duval 1977) 45 Fla. Supp. 48 [2 Med.L.Rptr. 1219].

See also the decision of the Supreme Court of Florida in *Florida Publishing Company v. Fletcher* (1976) 340 So.2d 914 [2 Med.L.Rptr. 1088], cert. den. (5-25-77) U.S. , where the Supreme Court of Florida reversed the District Court of Appeal and upheld summary judgment entered by the Duval County Circuit Court for the newspaper at 40 Fla. Supp. 1; and *Ocala Star-Banner v. Damron* (1971) 401 U.S. 295 [1 Med.L.Rptr. 1624], where the United States Supreme Court reversed a libel judgment for the plaintiff which the District Court of Appeal and the Florida Supreme Court had refused to set aside. Thereafter when the case came back, summary judgment was entered by the same judge who had upheld the original judgment to the plaintiff, and the First District Court of Appeal unanimously affirmed at 263 So.2d 291, stating at page 292:

> "Apparently the Federal Supreme Court has ruled that a public figure is without recourse when the news media, without proof of 'express malice', of 'convincing clarity' chooses to publish defamatory falsehoods about such public figure. Thus we are compelled to affirm the (summary) judgment appealed."

As late as April 26, 1978, the Supreme Court of the United States again affirmed freedom of speech and of the press granted by the Constitution. We quote from *First National Bank of Boston v. Bellotti* (April 26, 1978), U.S. , 55 L.Ed.2d 707, at 717 [3 Med.L.Rptr. 2105], 718:

> "'The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . . Freedom of discussion, if it would fulfill its historic function in this

nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U.S. 88, 101-102, 84 L.Ed. 1093, 60 S.Ct. 736 (1940)."

* * * *

"As the Court said in Mills v. Alabama, 384 U.S. 214, 218, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966), 'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' "

* * * * * * * * * * * * *

A very recent case is the decision of the United States Court of Appeals for the Third Circuit in *Pierce v. Capital Cities Communications* (April 12, 1978) 576 F.2d 495, 3 Media Law Reporter 2259, where the court under the First Amendment upheld summary judgment and where the Media Law Reporter Headnote reads:

"CA 3: Federal district court did not err in granting summary judgment for television station in libel action brought by former chairman of Delaware River Port Authority for station's broadcast of program concerning port authority, based on evidence demonstrating that broadcast's only false statement was 'honest utterance, even if inaccurate,' on evidence showing that certain other statements challenged as libelous would be construed by reasonable viewers as hyperbole, and on finding that station's failure to positively rule out possibility that plaintiff used insider information did not constitute actual malice."

In *Wolston v. Reader's Digest* (U.S.C.A. - D.C. 1978) F.2d , 3 Media Law Reporter 2334, the court upheld summary judgment for the publisher, and affirmed the trial court in holding that whether plaintiff was a public figure was a question of law for thecourt. We quote from page 2335:

"PUBLIC OR PRIVATE FIGURE - A QUESTION OF LAW

The District Court held that whether Wolston was a public figure was a question of law, to be decided by the court. Wolston contends that in this the court erred because 'this complex factual question . . . . whether plaintiff is a public figure is properly a jury matter.' We think the District Court was right. In Rosenblatt v. Baer, 383 U.S. 75, 88 [1Med.L.Rptr. 1558] (1966) the Court remarked that 'as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official". We think the same rule should be applied when the question is whether a plaintiff is a 'public figure'. The Court observed '[s]uch a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions.' 383 U.S. 88 n.15. We add that a jury of laymen is hardly qualified to apply the nice and sometimes intricate distinctions between public and private figures which have been developed in the cases following New York Times Co. v. Sullivan, 376 U.S. 254 [1 Med.L.Rptr.1527] (1964)."

The Court further said at page 2339:

"We reject the argument that Barron was reckless because he failed to make inquiry to verify the statements in the F.B.I. report. *Failure to investigate does not itself establish bad faith or recklessness.* New York Times Co. v. Sullivan, 376 U.S. 254, 287-88 [1 Med.L.Rptr. 1527] (1964); St. Amant v. Thompson, 390 U.S. 727, 733 [1 Med.L.Rptr. 1586] (1968)." (underlining added.)

Construing the case here most strongly against the defendants there is no basis on which a jury could find proof of convincing clarity of calculated falsehood. The decisions of the United States Supreme Court and of the Florida courts make it clear that summary judgment is the remedy in a situation of this kind.

IT IS ORDERED that the plaintiff Craig take nothing by his suit; that each of the defendants go hence without delay, and that each of the defendants have and recover its or his costs from the plaintiff, such costs to be hereafter taxed by the court.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 30th day of August, 1978.

It does not identify
the type of bullet by
which was in the Hacker
weapon. It is not enough to say it was soft and it gives no proof it was
soft either. For a military bullet the behavior it gives with respect to
general momentum