

STATE OF NEW HAMPSHIRE  
SUPREME COURT

Docket No. 2018-0198

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Automated Transactions, LLC, et al. v. American Bankers Association, et al.

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Appeal Pursuant to Rule 7  
from Order of the Sullivan County Superior Court

BRIEF OF PLAINTIFFS/APPELLANTS  
Automated Transactions, LLC and David Barcelou

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## **I. QUESTIONS PRESENTED FOR REVIEW**

1. On a motion to dismiss a defamation claim, whether the trial court erred in finding Defendants' statements that Plaintiffs were "unscrupulous" "patent troll[s]" were protected opinion when the complaint includes claims that the underlying assertions of fact giving rise to the opinion were false or leave undisclosed facts to be implied. Appendix ("APP")-17, 19-21 (First Amended Complaint ("FAC")) ¶¶ 71, 76, 82, 84, 85, and 87).

2. On a motion to dismiss, whether the trial court erred in finding as a matter of law that the term "patent troll" was incapable of being proven true or false, when the complaint established that "patent troll" was defined and reasonably understood by defendants to be a "pejorative term" and specifically published to describe entities which "buy or license patents from inventors (often failing/bankrupt companies)" and enforce the patents "in an aggressive way with no intention to market the patented invention". APP-17, 19, 22 and 23 (FAC ¶¶ 71, 76, 88 and 89).

3. On a motion to dismiss, whether the trial court erred in dismissing Plaintiffs' claims that they were defamed as being an extortionist or unscrupulous "patent troll" in numerous statements and publications directed at a specific audience, when in fact, as alleged in the complaint, Plaintiffs were the self-made inventor and original owners of certain patents and were seeking to protect and enforce their property interests. APP-2, 13, 14 and 21-22 (FAC ¶¶ 1, 53, 54, 58 and 87).

4. On a motion to dismiss, whether the trial court erred as a matter of law in finding the Plaintiffs failed to allege that the factual statements made by the Defendants were false. APP-17, 19-21 and 25 (FAC ¶¶ 71, 76, 82, 84, 85 and 105).

5. On a motion to dismiss, whether the trial court erred in finding as a matter of law that statements asserting that Plaintiffs were committing the criminal acts of a "shakedown", "extortion" or "blackmail" were rhetorical hyperbole that is not actionable when they were seeking to protect and enforce their property interests, as the original inventor and owner, facts of importance not disclosed. APP-21, 22 (FAC ¶ 87).

6. On a motion to dismiss, whether the trial court erred in dismissing the claims against the Defendants for violation of RSA 358-A (Consumer Protection Act) on the ground that the challenged misrepresentations were not factual. APP-25, 26 (FAC ¶¶ 101-112)

## II. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

### RSA 358-A:2

It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following: (*I through XVII*).

## III. STATEMENT OF THE CASE AND FACTS

Plaintiff/Appellant David Barcelou (“Mr. Barcelou”) is a self-made inventor, a term the United States Supreme Court has recognized in the context of patents:

For example, some patent holders, such as university researchers or **self-made inventors**, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves.

*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006) (emphasis added).

In response to Mr. Barcelou’s legitimate activity as a “self-made inventor,” and as the named inventor of the patents at issue, Defendants/Appellees (“Defendants”) engaged in a defamation campaign to brand him and his company as a “patent troll.” This branding was particularly destructive because “[a] patent troll (a pejorative term for non-practicing entity) is a company whose sole business is to acquire patents for the purpose of bringing infringement claims against third parties.” *In re Teltronics, Inc.*, 540 B.R. 481, 483 (Bankr. M.D. Fla. 2015).

Being an accused “patent troll” has such pernicious force that in underlying patent litigation, involving some of the Defendants, Mr. Barcelou obtained the following Order: “Mr. Barcelou is the named inventor of the patents-in suit; Transactions Holdings is the named assignee. No defendant, for the remainder of this litigation in this jurisdiction,

shall describe Mr. Barcelou or Transactions Holdings otherwise. Sanctions shall be imposed on the offending party (and/or his/her counsel) for any violations of this order.” APP-85 (FAC, Exhibit G). Defendants ignored this caution tarnishing Plaintiffs’ reputation.

The term “patent troll” as used by Defendants was intended to disparage Mr. Barcelou and his company, Plaintiff/Appellant Automated Transactions, LLC (“ATL”) (collectively, “Plaintiffs”) as extortionists, blackmailers and abusers of the legal process seeking moneys to which they were not entitled. Defendants used this weaponized term in specific publications directed to specific audiences defaming Plaintiffs. Defendant Credit Union National Association, Inc. (“CUNA”) confirmed the pejorative meaning of “patent troll” and defined its elements:

“Patent troll” is a pejorative term – polite term is “non-practicing entity”.  
... A “patent troll” is an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention. ... Patent trolls buy or license products from inventors (often failing/bankrupt companies).

APP-32 (FAC, Exhibit A). In the banking world, the term “patent troll” is capable of being proven false based on its widely known definition and as defined by CUNA.

Plaintiffs do not meet the underlying elements of being a patent troll. *See, e.g.*, APP-14 (FAC ¶ 58); APP-15 (FAC ¶ 63). Plaintiffs are the original self-made inventors, researchers, developers and owners of their valid patents. APP-12 (FAC ¶ 48-51); APP-13 (FAC ¶¶ 53, 54); APP-14 (FAC ¶ 58); APP-17 (FAC ¶ 71); APP-19 (FAC ¶ 77). They had originally attempted to manufacture and bring to market products based upon their patents, and then later sought to license their valuable patent portfolio to others. APP-14 (FAC ¶ 56). Their business efforts and the patents they were awarded are the result of a lifetime spent inventing, researching, developing and obtaining patent protection. APP-10 (FAC ¶ 43); APP-15 (FAC ¶ 63). When necessary, Plaintiffs defended their patented ideas through court proceedings. APP-13 (FAC ¶ 55); APP-14 (FAC ¶ 56). Plaintiffs did not acquire invalid or spurious patents from failing companies with the intention to monetize them through threats of litigation, which is the hallmark

activity of a “patent troll.” APP-14 (FAC ¶ 58). Rather, they sought to protect and enforce their constitutionally protected property interests in their **own** patented ideas. APP-14 (FAC ¶¶ 56, 58). Defendants’ statements when viewed in context as alleged in the FAC present an inherently factual dispute that cannot be resolved on a motion to dismiss.

For purposes of this appeal, however, the issue is not whether Plaintiffs are “patent trolls.” Rather, the questions are more narrowly tailored to whether the trial court erred in dismissing Plaintiffs’ claims as a matter of law.

**A. Procedural background**

On September 26, 2016, Plaintiffs filed a Complaint and Demand for Jury Trial. On November 23, 2016, Plaintiffs filed their FAC to remove references to certain non-suited defendants and to add additional language regarding Mr. Barcelou’s residency and a claim under New Hampshire’s Consumer Protection Act. APP-1 to 116 (FAC).

Defendant/Appellees American Bankers Association (“ABA”), CUNA, Pierce Atwood, LLP (“Pierce Atwood”) and Robert H. Stier, Jr. (“Mr. Stier”) (collectively, “Defendants”) filed motions to dismiss for failure to state a claim. APP-117, APP-184 and APP-220. Plaintiffs objected. APP-141, APP-201 and APP-240. On May 16, 2017, the trial court held a consolidated hearing on Defendants’ motions to dismiss for failure to state a claim. APP-269 (Transcript of hearing).

On March 19, 2018, the trial court granted Defendants’ motions to dismiss for failure to state a claim. Addendum (“ADD”) (Order on Motions to Dismiss (“Order”)).

This appeal followed.<sup>1</sup>

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<sup>1</sup> Trial court defendants Mascoma Savings Bank and Stephen F. Christy filed a motion for summary judgment, which was granted, and which Plaintiffs do not appeal. Trial court defendants Charles von Simson, Ralph E. Jocke, and Walker & Jocke Co., LPA filed motions to dismiss for lack of personal jurisdiction, which were granted, and which Plaintiffs do not appeal. The trial court did not address other defenses to the claims presented and those defenses are not addressed in this brief.

## **B. Factual background as plead in the FAC**

Mr. Barcelou is a self-made inventor and entrepreneur who has pursued businesses based on his inventions. APP-2 (FAC ¶¶ 1); APP-10 (FAC ¶ 42-43). Mr. Barcelou formed ATL to market his original patents. APP-2 (FAC ¶ 1).

Mr. Barcelou had significant success in developing and marketing products based on his patents. APP-13 (FAC ¶ 53). After September 11, 2001, Mr. Barcelou adapted his business to changing economic conditions by choosing to license his patent portfolio to other businesses through ATL. APP-13 (FAC ¶ 54); APP-14 (FAC ¶ 56). Plaintiffs offered sub-licenses and litigated patent infringement cases as necessary. APP-2 (FAC ¶ 1). In response to litigation, Defendants engaged in a defamatory campaign to pejoratively label Plaintiffs as patent trolls. APP-2 (FAC ¶ 1).

When Defendants began their campaign, the term “patent troll” was commonly understood in the banking community and its use was purposely chosen to “lower the plaintiff in the esteem” of his prospective business clientele. APP-15 (FAC ¶ 64); APP-22 (FAC ¶ 88, 89). “Patent troll” was used in conjunction with terms like “extortionist” and “blackmail” to communicate to prospective clients that Plaintiffs were not the inventors of the patents they were seeking to license. APP-15 (FAC ¶¶ 64-65); APP-21 (FAC ¶ 87).

These facts are well-pleaded in the FAC, and the trial court’s Order preempted Plaintiffs’ constitutional right to trial.

### **1. Mr. Barcelou’s history as a self-made inventor and businessman**

The road of a self-made inventor is a long one. In 1977, Mr. Barcelou had an idea for a toy ice-hockey game and raised over \$1,000,000 to develop it. Five years of research and development later, his idea resulted in the CHEXX™ Hockey Game, which was patented as U.S. Patent No. 4,480,833. When a competitor infringed on his CHEXX™ patent, Mr. Barcelou’s company at the time sued the competitor for patent infringement, succeeded in obtaining injunctive relief and the case settled in favor of Mr. Barcelou and his company. APP-10 (FAC ¶¶ 44-45).

By 1983, Mr. Barcelou was exploring “in-car-camera” technologies. Mr. Barcelou successfully raised millions of dollars to develop his idea. After almost a decade of research and development, his product won the International Association of Amusement Parks and Attractions’ top honor -- the “1991 Best New Technology Award” -- and a production model was sent to Six Flags® Texas. APP-11 (FAC ¶ 46). In 1989, BusinessWeek featured Mr. Barcelou in a Science and Technology article that publicized his invention of the first professional race-car simulator, which was based on his “in-car-camera” idea. APP-11 (FAC ¶ 47).

In 1993, Mr. Barcelou began developing the computerization of tournament games, where any “game of skill” could accept an entry fee, determine a winner and award an immediate cash prize anywhere in the world. He had the critical idea to add a cash dispensing functionality to his tournament machines, allowing prize money to be dispensed to a winner. As part of this development, Mr. Barcelou spent most of 1993 researching the related automated teller machine industry. APP-12 (FAC ¶ 48).

## **2. Mr. Barcelou’s idea for Internet-connected automated teller machines**

Recognizing the potential profitability of automated teller machines (“ATMs”) and after research yielded no competing product on the market, Mr. Barcelou developed a more functional ATM. APP-12 (FAC ¶ 48-49). In 1994, he completed a prototype. APP-12 (FAC ¶¶ 50). Mr. Barcelou hired a computer scientist to document his ATM and retained an industrial design firm to help create its “look”. This prototype had many advances over then-existing ATMs, most notably because Mr. Barcelou’s could provide a plurality of services over the Internet that were not otherwise available to consumers at that time. APP-12, 13 (FAC ¶¶ 51-52).

Working from his idea for an ATM with Internet functionality, “Mr. Barcelou started filing patents to protect his ideas and started a business to commercialize his inventions. He explored relationships with CoreStates Bank and Hitachi. He began building a management team to build his business. He shipped his prototype ATM to Hitachi for review and sought capital investments.” APP-13 (FAC ¶ 53). Mr. Barcelou

was prepared to launch his ATM in New York City in 2001, but his business plans were disrupted by the aftermath of the 9/11 terrorist attacks. APP-13 (FAC ¶ 54).

In 2005, after ten years of examination in the Patent Office, Mr. Barcelou was granted his first ATM patent, No. 6,945,457 (“Patent 457”), which contains 37 claims. APP-13 (FAC ¶ 55). By 2012, Mr. Barcelou had obtained 12 other ATM related patents, in addition to Patent 457. APP-106 (FAC Exhibit I).

### **3. Mr. Barcelou and ATL’s enforcement of their patent rights**

Having seen his business prospects diminish in the aftermath of 9/11 but observing other companies using his inventions, Mr. Barcelou’s company filed suit against 7-Eleven alleging that its “VCOM” machines infringed upon his patented ATM technology. APP-13 (FAC ¶ 55). In 2012, 7 of the 37 claims within Patent 457 were invalidated: thus, “not all of the claims in the patent were held invalid.” APP-14 (FAC ¶ 57). *See also In re Transaction Holdings Ltd., LLC*, 484 Fed.Appx. 469 (Fed. Cir. 2012) (invalidating claim numbers 1, 2, 3, 5, 9, 10 and 14 within Patent 457).

In 2008, one of Mr. Barcelou’s companies entered into an exclusive licensing agreement with ATL to allow it to offer his patented technologies at reasonable royalty rates. ATL began offering patent licenses and only suing to protect and defend them as necessary. APP-14 (FAC ¶ 56). ATL’s results were mostly successful. In 2011 and 2012, it generated over \$3,000,000 in licensing revenues from approximately two-hundred licensees. APP-15 (FAC ¶ 60).

In 2012, Plaintiffs were investigating the marketplace and learned that the banking industry had begun widely using some aspects of Mr. Barcelou’s technology without licenses. ATL also concluded that other aspects of Mr. Barcelou’s technology, which had not yet been adopted in the banking industry, would be beneficial to end users. Thus, ATL began sending letters to the owners and/or operators of ATMs informing them of its relevant patents and offering a sub-license for use of its technologies. APP-14 (FAC ¶ 59). Specifically, Plaintiffs’ 13 ATM related patents were the basis for ATL’s offers to sub-license its patent portfolio. *See, e.g.*, APP-66.

Some banks agreed to take a license. Others chose to fight in court. Within these approaches a defamatory campaign was initiated by Defendants who branded Plaintiffs as “patent trolls.” APP-15 (FAC ¶¶ 60-62). The result of these statements was the destruction of Plaintiffs’ reputation, business and licensing efforts.

### **C. Defendants’ defamatory statements and their context**

#### **1. CUNA**

On September 24, 2013, CUNA published a presentation entitled “Hot Topics in Litigation” to its members. The subject of this presentation was “Patent Trolls.” APP-16, 17 (FAC ¶¶ 69-71). ATL was targeted as a “well known troll.” APP-37.

CUNA’s statement was of fact, not opinion. It defined “patent troll” as “an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention.” APP-32. “Patent trolls buy or license patents from inventors (often failing/bankrupt companies).” *Id.* CUNA then specified that “‘Patent troll’ is a pejorative term” reserved for those who, like ATL, “strong-arm” and “shakedown” small community banks with frivolous demands. APP-32 to 36. CUNA distinguished “patent trolls” from “companies that actually make stuff” and stated that lawsuits from “practicing entities” are “almost unheard of”. APP-32. CUNA then asserted as fact: the “Federal Circuit has invalidated 7 of 13 patents” held by ATL. *Id.*

CUNA’s statements are false. APP-17 (FAC ¶ 71). Mr. Barcelou and ATL are the inventor and original owner of the patents they sought to license. APP-14 (FAC ¶ 58). They did not buy or license patents from other failing or bankrupt companies. *Id.* Mr. Barcelou commercialized his inventions. APP-13 (FAC ¶ 53). The Federal Circuit did not invalidate 7 of Plaintiffs’ 13 ATM related patents. Rather, it invalidated 7 of the 37 claims within Patent 457. Litigation did not impact the remaining 12 patents and they remain valid. As the FAC alleges, the court proceeding “did not affect the vast majority of Mr. Barcelou’s patent portfolio.” APP-14 (FAC ¶ 57).

CUNA’s statements were made to an audience seeking factual information on the intersection between patent law and financial institutions. The branding of Plaintiffs as a

“patent troll” was based on false assertions, such as the “Federal Circuit has invalidated 7 of 13 patents” and other false implications that carried extra meaning and weight in the context of the specific audience targeted. Based on the allegations in the FAC, these falsities were compounded by CUNA’s failure to identify Mr. Barcelou as the actual inventor and original owner of the patents, as well as its failure to disclose to its audience that the “vast majority” of Mr. Barcelou’s patents were intact.

## **2. ABA**

On December 17, 2013, ABA made statements to the Senate, which were later re-published elsewhere, regarding “Patent Troll Abuse”. APP-60 (FAC, Exhibit D). ABA described entities known as “PAEs” that “use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country.” APP-62. ABA uses the term PAE interchangeably with the term “patent troll”. APP-63. PAEs, according to the ABA, “take advantage” of community banks and “have amassed significant ‘licensing’ fees from banks literally for the cost of mailing a threatening letter.” *Id.* After laying this factual groundwork, ABA stated ATL is a PAE that has sent abusive demand letters. APP-62, 63. ABA posted these statements to its website, adopted the title “Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse,” placed its logo on the cover and published these statements through the Internet. APP-19 (FAC ¶¶ 75-76).

On April 8, 2014, Rheo Brouillard, the Director, President and Chief Executive Officer of the Savings Institute & Bank, on behalf of the ABA made additional statements to the House of Representatives that were later republished through the Internet on ABA’s website. The ABA stated that ATL is a “patent troll” that “targets” banks. APP-20 (FAC ¶¶ 81-82); APP-98 to 106. ABA claimed to have seen this conduct “first hand” in its interactions with ATL. APP-101. ABA stated that “similar suits” and “claims” “had already been overturned” in other states yet failed to disclose that the vast majority of Mr. Barcelou’s patent portfolio remained intact. APP-101, 102; APP-14 (FAC ¶ 57). ABA stated that ATL used “intimidation to target small businesses”. APP-

101. ABA distinguished ATL from “holders of legitimate patents”. *Id.* ABA claimed that patent trolls, such as ATL, “acquire portfolios of patents for the express purpose of extracting payments from anyone to whom the patent could possibly apply.” *Id.* ABA claimed there is “almost no cost for a patent troll to make a patent infringement claim”. *Id.* ABA did not distinguish ATL from patent trolls which “acquire numerous patents from bankrupt companies for next to nothing.” *Id.* Throughout its statement, ABA used charged language such as “scare targets into paying”; “abusive”; “prey on small businesses”; “intimidation”; “extort”; and “underhanded tactics” imputing criminal-like conduct to Plaintiffs. APP-100, 102 and 103. ABA later published its statements to its website, adopted the title, “Trolling for a Solution: Ending Abusive Patent Demand Letters”, placed its logo on the cover, and published the statements over the Internet. In 2014, ABA also republished its defamatory statements from its December 2013 publications.

Like CUNA’s statements, ABA’s statements of and concerning Plaintiffs are false. APP-19 (FAC ¶ 76); APP-20 (FAC ¶ 82). ATL has licensing agreements with approximately 200 entities including banks and other financial institutions based on its patent portfolio. APP-15 (FAC ¶ 60). Mr. Barcelou and ATL are the inventor and original owner of the patents which they sought to enforce. APP-14 (FAC ¶ 58). ATL’s profits are not generated from the “cost of mailing a threatening letter”, but are the result of significant financial investment and many years of development. APP-62); APP-13 (FAC ¶¶ 52-55); APP-20 (FAC ¶ 82). ATL’s patents are not overbroad, and it maintains a valid patent portfolio exclusive of the few claims that were invalidated in one of its patents. APP-14 (FAC ¶ 57). Plaintiffs did not “acquire portfolios of patents” from anyone for any purpose, let alone “extracting payments from anyone to whom the patent could possibly apply.” APP-101; APP-14 (FAC ¶ 58).

### **3. Pierce Atwood and Mr. Stier**

Mr. Stier is a partner at Pierce Atwood. APP-3 (FAC ¶ 6). On April 3, 2013, Mr. Stier was quoted in an article entitled “Banks fighting ‘patent troll’ can move forward

together,” published on the Internet by bizjournals.com. APP-16 (FAC ¶ 68). Mr. Stier stated: “Automated Transaction’s suit amounts to nothing more than a shakedown of community banks and that the company has intimidated more than 140 banks into settling.” APP-16 (FAC ¶ 68). Mr. Stier failed to include that ATL had been offering licenses to financial institutions interested in Mr. Barcelou’s patented technology and that 200 entities had willingly purchased a license from ATL. APP-14 (FAC ¶ 59); APP-15 (FAC ¶ 60).

In 2013 and 2014, Pierce Atwood published on its webpage articles that state ATL is a “patent troll”. APP-19 (FAC ¶ 78); APP-83 (FAC, Exhibit F). In an article entitled “Community Banks and Credit Unions: Don’t pay the ATM patent troll before you read this!”, Pierce Atwood described how it mounted a defense against “a patent troll” in litigation in 2012. APP-83. ATL is the “patent troll” as the article described only one entity -- ATL. *Id.* Pierce Atwood stated that Mr. Stier had over “30 years experience handling patent cases” and uncovered the “disturbing” truth about ATL; that its patents had been “invalidated” and “significantly limited” and there “was no reason to believe that any bank needed a sub-license.” *Id.* The article described ATL’s conduct as a “shakedown”. *Id.* The article was targeted to an audience of potential clients, including bankers who knew “very little about patents” and promoted Pierce Atwood’s knowledge and expertise. *Id.*

Pierce Atwood’s 2013 and 2014 statements are false. APP-21 (FAC ¶ 87). ATL and Barcelou are not patent trolls, and they own valid and enforceable patents. APP-14 (FAC ¶ 57). Contrary to the FAC, Pierce Atwood misrepresented the status of ATL’s patent portfolio. *Id.*

In 2015, Pierce Atwood published on its website another article: “Pierce Atwood Successfully Defends Community Banks and Credit Unions Against Aggressive Licensing Demands From Unscrupulous Patent Troll.” APP-21 (FAC ¶ 84); APP-113 (FAC, Exhibit K). The only entity referenced in the article to which the term “Patent Troll” referred is ATL. APP-113. In the article, Pierce Atwood stated that ATL’s

demand letters claimed “its patented inventions covered every ATM in the country”. *Id.* Pierce Atwood implied additional, special and undisclosed knowledge of ATL’s business strategies, and further stated that “ATL purposely kept license fees low” to entice banks to pay rather than litigate the “spurious” and “questionable” claims. *Id.* The article further stated that “the appellate court with jurisdiction over the patent cases had invalidated the oldest and broadest of these patents”. *Id.* It concluded that there was “no reason to believe that any bank needed a sub-license.” *Id.*

When promoting his specialized services and knowledge to an audience of bankers, Mr. Stier called ATL an “unscrupulous patent troll” harassing banks and seeking to enforce invalid patents. APP-114. These statements are false. APP-21 (FAC ¶ 85). For instance, the Federal Circuit did not invalidate Patent 457. Rather, it invalidated 7 of the 37 claims within Patent 457. ATL’s demand letters did not claim that it held patents to cover every ATM in the country. APP-65; APP-105. Certain of ATL’s patents are valid. They are not “questionable” or “spurious”. APP-14 (FAC ¶ 57). ATL received payment in exchange for the license of its valid patent portfolio from 200 banks. APP-15 (FAC ¶ 60).

#### **IV. SUMMARY OF THE ARGUMENT**

The trial court held that “a common ground for dismissal [ ] is that the statements attributed to [Defendants] cannot be construed as defamatory because they are protected expressions of opinion or do not otherwise qualify as statements of fact.” ADD-1 (Order, pp. 1-2). The trial court’s ruling was premature.

With this limited analysis in place, the trial court incorrectly held Defendants’ statements are protected because “[a] statement of opinion is not actionable unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion.” ADD-5 (Order, pp. 5-6: citing *Thomas v. Tel. Publ’g Co.*, 155 N.H. 314, 338 (2007) and *Nash v. Keene Publ’g Corp.*, 127 N.H. 214, 219 (1985)). Alternatively, the trial court held that “[e]ven if the plaintiffs didn’t implicitly accept the defendants’ factual underpinning for the term ‘patent troll,’ the facts on which the characterization is

based are evident from the context and the complaint doesn't include an allegation that those facts are false." ADD-16 (Order, pp. 15-16).

The trial court erred. *See, e.g., Nash*, 127 N.H. at 219-220 (stating "[i]f an average reader could reasonably understand a statement as actionably factual, then there is an issue for a jury's determination" and holding that "it was error to find that the letter must be read as a non-actionable expression of opinion."). Just like *Nash*, Defendants' statements "can obviously be read as stating facts" including "a series of statements that were ostensibly factual and defamatory." *Id.* at 220. *Nash* held, just as this Court should hold, that "[w]hether readers actually did understand the statements as factual is, of course, not a matter that is before us. But it is clear that the trial court erred in determining that readers could not understand them as factual. In effect, the trial court's ruling resolved an issue that is properly for the consideration of a jury." *Id.*

At this stage of the proceeding, "patent troll" cannot be determined to be constitutionally protected opinion as the facts supporting Defendants' statement are alleged to be false and/or incomplete. A "patent troll" is capable of being proven false because it is a term with a commonly accepted definition. Certain Defendants provided their audience with a definition within the context of their statements, incorporating elements that are capable of being proven false. Plaintiffs have alleged the falsity of facts disclosed and the negative implication of undisclosed facts. The term "patent troll" is unquestionably pejorative, particularly when preceded with the adjective "unscrupulous". Its use lowered Plaintiffs' reputation in the eyes of Defendants' targeted audiences.

## **V. ARGUMENT**

Defamation law is not merely a restraint on speech. It is an important safeguard of reputation. In this case, the Court must resolve the tension between Defendants' speech and Plaintiffs' right to seek redress for attacks upon their reputation.

Courts distinguish between actionable and protected speech by examining the statements at issue including their substance, context and audience. Defendants cannot avoid liability for false statements and implications on the basis that they are cast as

expressions of opinion or rhetorical hyperbole. A statement that contains a “provably false factual connotation” is actionable. *WJLA-TV v. Levin*, 564 S.E.2d 383, 392 (Va. 2002); *Hatfill v. N.Y. Times Co.*, 416 F.3d 320, 331 (4th Cir. 2005) (“A defamatory charge may be made expressly or by inference, implication, or insinuation.” (internal quotations and citation omitted)); *Carwile v. Richmond Newspapers*, 82 S.E.2d 588, 592 (Va. 1954) (“[I]t matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory.”). Opinion is not a defense, in and of itself, particularly where “expressions of ‘opinion’ may often imply an assertion of objective fact.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990).

**A. The trial court’s Order wrongly dismissed Plaintiffs’ defamation claims**

This Court reviews the trial court’s Order granting Defendants’ motions to dismiss *de novo*. See *Kukesh v. Mutrie*, 168 N.H. 76, 81 (2015). Plaintiffs’ allegations are assumed true and all reasonable inferences are construed in their favor. See *Sanguedolce v. Wolfe*, 164 N.H. 644, 645 (2013). The standard “is whether the allegations in the plaintiff’s pleadings are reasonably susceptible of a construction that would permit recovery.” *Id.* For a defamation claim, “the issue at this early, pre-answer stage of the litigation is whether plaintiff’s pleadings sufficiently allege false, defamatory statements of fact rather than mere nonactionable statements of opinion.” *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 149 (1993).

The trial court recognized that “the complaint cited each defendant [ ], as referring to [Plaintiffs] as ‘patent trolls,’ directly or indirectly.” ADD-15 (Order, p. 15). The issue for *de novo* review is whether Defendants’ statements are actionable.

The test for determining whether a statement implies a factual assertion is to evaluate the totality of the circumstances in which it was made.

First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next, we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that

particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

*Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995) (applying the appropriate standard to disparate facts and concluding that the statements in that case were not actionable). Whether a statement is actionable must be determined in context. *Sprague v. Am. Bar Ass'n.*, 276 F. Supp. 2d 365, 367, 369-75 (E.D. Pa. 2001) (holding that statement that the plaintiff was a “lawyer-cum-fixer” in an ABA Journal article must be treated as lawyers would understand it and whether it was defamatory was a question of fact for the trier of fact); *Rudin v. Dow Jones & Co.*, 510 F. Supp. 210, 215-16 (S.D.N.Y. 1981) (statement that lawyer was a client’s “mouthpiece” when addressed to the financial community was to be interpreted as members of the financial community would understand it and whether it was defamatory is a question for the trier of fact at the motion to dismiss stage).

The dispositive inquiry here, then, is whether the reasonable audience **to which Defendants’ statements were made** (*i.e.*, bankers) would understand them as conveying defamatory facts about Plaintiffs. Where an alleged defamatory statement is prefaced or otherwise surrounded by a compilation of factual statements, there exists an implication to the audience that the defamatory statement is not an opinion, but a fact. *See Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 152 (2d Cir. 2000) (holding that a statement published in a guide for lawyers and other professionals that “[a]t least one [person involved in such suits] has described [the defendant] as an ‘ambulance chaser’ with interest only in ‘slam dunk cases,’” to be an actionable statement of fact). *Flamm* explained that “[e]xaggerated rhetoric may be commonplace in labor disputes, but a reasonable reader would not expect similar hyperbole in a straightforward directory of attorneys and other professionals. Indeed, the opposite is true.” *Id.* Further, “it would not be unreasonable for a reader to believe that the [defendant] would not have printed such a statement without some factual basis and to conclude that the statement did indeed state facts about [the plaintiff].” *Id.* *See also Thomas*, 155 N.H. at 338-339 (explaining that a “statement of opinion is not actionable unless it may reasonably be understood to

imply the existence of defamatory fact as the basis for the opinion. Whether a given statement can be read as being or implying an actionable statement of fact is a question of law to be determined by the trial court in the first instance, considering the context of the publication as a whole. If an average reader could reasonably understand a statement as actionably factual, then there is an issue for a jury's determination and summary judgment must be denied."<sup>2</sup>

Defendants' statements were made to specific audiences. Recommendations were given based on expert advice. Their statements were made by speakers with specialized knowledge based on their own investigations and were surrounded by factual recitations, giving their statements an authoritative heft. Exaggerated rhetoric is not expected at these kinds of presentations. Dispassionate factual discourse is the expected currency.

**1. The dismissal of Plaintiffs' claims against CUNA was wrongly decided**

**a. The context of CUNA's statements is actionable**

Context is critical to evaluating whether a statement is actionable or protected. *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248-49 (1st Cir. 2000) ("Whether calling something a 'fake' is or is not protected opinion depends very much on what is meant and therefore the context."); *Gross*, 82 N.Y.2d at 155-56 (holding that references to a medical examiner as "corrupt" in the context of the published articles was not "mere rhetorical flourish" and explaining that "'John is a thief' is actionable when considered in its applicable context, the statement 'I believe John is a thief' would be equally actionable when placed in precisely the same context." But the statement, "'John is a thief' could well be treated as an expression of opinion or rhetorical hyperbole where it is accompanied by other statements, such as 'John stole my heart,' that, taken in context, convey to the reasonable reader that something other than an objective fact is being

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<sup>2</sup> In *Thomas*, a newspaper published an article about the plaintiff's alleged crime spree containing both analysis from a criminal justice professor and statements from the police officers involved. The Court held that the statements of the professor were opinion based on hypothetical facts, not on alleged undisclosed facts. *Thomas*, 155 N.H. at 339. But the police statements in the article, including that the plaintiff had been "suspected in hundreds of burglaries," and that he had "been good, but now he's getting sloppy," although arguably opinions, were nonetheless actionable because "they [were] clearly based upon undisclosed facts resulting from unspecified investigations." *Id.*, appx. at ¶ 61.

asserted.”); *Garrett v. Tandy Corp.*, 295 F.3d 94, 104 (1st Cir. 2002) (“Context makes the difference – and by ‘context’ we mean such factors as the identity of the speaker, the identity of the audience, the circumstances in which the statement is made, and what else is said in the course of the conversation, and a myriad of other considerations.”).

On September 24, 2013, CUNA made its defamatory statements during a meeting of its members and general counsel. APP-16 (FAC ¶ 69); APP-28. The presentation was an informational meeting where ATL was identified as a “Well Known Troll[]”. APP-37. The gist and sting of the session was to advise CUNA’s members not to do business with ATL -- literally advising against “[f]eeding the troll”. APP-39. *Cf. Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1073 (5th Cir. 1987) (“In determining whether the gist and sting of a story is true, the court must view the story through the eyes of the average reader or member of the audience.”).

CUNA identified the issues for discussion: patents and the potential exposure credit unions may have to patent litigation. APP-31. It then defined “patent troll” in precise factual terms capable of being proven false. APP-32. After defining patent troll, CUNA stated ATL is a “Well Known Troll[]”. APP-37. CUNA’s presentation raised and factually answered such questions as: “How does a patent troll make money?” APP-33. CUNA’s answer is factual: “Infringement Litigation” and “Demand Letters”. *Id.* CUNA’s presentation concludes with what its members “Should Do” and “How To Fight Back” against these “trolls”. APP-38 to 42.

CUNA’s audience provides the context for its statements. Its membership is comprised of credit unions and other small financial institutions with limited knowledge and contact with intellectual property law or patents. APP-72 (FAC, Exhibit E). CUNA’s speaker was its Assistant General Counsel. From its presentation, the audience would reasonably understand ATL to be a “patent troll” peddling false wares. APP-29. The trial court erred as a matter of law because CUNA’s statements, when examined in context, “can obviously be read as stating facts”. *See Nash*, 155 N.H. at 220 (“it is clear that the trial court erred in determining that readers could not understand them as factual.

In effect, the trial court's ruling resolved an issue that is properly for the consideration of the jury.").

**b. CUNA's statements are not protected opinion**

The trial court wrongly held that because CUNA provided a recitation of facts to support its assertion that ATL is a "patent troll," its statements are protected opinion. This is not the law. *Cf. Milkovich*, 497 U.S. at 18-19 ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if the assessment of them is erroneous, the statement may still imply a false assertion of fact."). There is no wholesale exception for all statements that can be labeled opinion. *Gast v. Brittain*, 277 Ga. 340, 341 (2003) ("An opinion can constitute actionable defamation if the opinion can reasonably be interpreted, according to the context of the entire writing in which the opinion appears, to state or imply defamatory facts about the plaintiff that are capable of being proved false."); *Gross*, 82 N.Y.2d at 155 ("In all cases ... the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts, to determine whether the reasonable listener or reader is likely to understand the remark as an assertion of provable fact."). "[A]n opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, is a 'mixed opinion' and is actionable." *Davis v. Boenheim*, 24 N.Y.3d 262, 267, 269 (2014) (explaining what "differentiates an actionable mixed opinion from a privileged, pure opinion is 'the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person' being discussed.").

When Plaintiffs' allegations are accepted and construed favorably, as they must, CUNA's statement that Plaintiffs are "patent trolls" is not protected. Its statement that ATL is a patent troll is similar to the actionable statements in *Gross*. There, the New York Times published a series of investigative articles regarding the conduct of a medical examiner, concluding that he was "corrupt." *Gross*, 82 N.Y.2d at 155. The New York Court of Appeals, relying on the framework in *Milkovich*, determined that the plaintiff's

complaint was improperly dismissed at the pre-answer stage because the statement was not “a mere rhetorical flourish or the speculative accusation of an angry but ill-informed citizen made during the course of a heated debate,” but rather “made in the course of a lengthy, copiously documented newspaper series that was written only after what purported to be a thorough investigation.” *Id.* at 155-56. In the same way, CUNA’s statements to its audience gave the listener cause to be “less skeptical and more willing to conclude that the articles contained assertions or implication of fact.” *Id.*

CUNA’s statement that ATL is a patent troll was made in the context of a presentation by its counsel for “Special Projects” that contained 13 slides, containing mostly factual assertions. APP-29. CUNA’s audience would have readily accepted as true its statements about ATL because it would expect that the legal advice given by its counsel to be based on a detailed factual investigation, allowing them to be less skeptical of the statements and more willing to accept the content as factual.

In *Flamm*, the Second Circuit reversed the dismissal of a claim based upon statements made by a professional organization that plaintiff was an “ambulance chaser” surrounded by other statements of fact, which, when understood in the context of the audience they were addressed to, were actionable. *Flamm*, 201 F.3d at 152. As in *Flamm*, the audience receiving CUNA’s statements regarding ATL and its business practices would reasonably understand the conclusion that ATL is a patent troll to be a statement of fact rather than opinion.

**c. Plaintiffs alleged that CUNA’s statements are false**

When an “opinion” is based on facts that are incorrect or incomplete, it may be actionable. *Milkovich*, 497 U.S. at 18-19. In the context of *de novo* review, this Court needs only to determine whether Plaintiffs have plead sufficient facts (which are assumed true and construed favorably) to put at issue CUNA’s statement that ATL is a patent troll as being either incorrect or incomplete. *See id.* (“Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”).

*See also Rodriguez v. Panayiotou*, 314 F.3d 979, 986 (9th Cir. 2002) (explaining that “statements including provably false factual assertions which are made or implied in the context of an opinion are not absolutely protected from defamation liability under the First Amendment” before reversing the trial court’s dismissal of defamation claims for failure to state a claim).

The trial court erred when it found that Plaintiffs did not allege CUNA’s statement that ATL was a patent troll, or the facts underlying that statement, were false. ADD-16 (Order, p. 16). Plaintiffs alleged both that the express use of the term “patent troll” as well as the disclosed and implied foundation for that statement are false. *See, e.g.*, APP-10, 12, 13, 14 and 17 (FAC ¶¶ 43, 50, 53, 57, 58 and 71).

Plaintiffs have pleaded that CUNA’s representation that ATL is a “patent troll” is false and based on incorrect and/or incomplete assertions of fact. For instance, CUNA stated that a patent troll is distinguishable from a company which actually creates and markets a product. APP-32. CUNA based its statement that ATL is a patent troll on ATL’s failure to “make stuff”. In doing so, CUNA misrepresents Plaintiffs’ manufacturing history and the fact that Mr. Barcelou developed and marketed products based on his patented technology. APP-13 (FAC ¶ 53). CUNA also stated that the “Federal Circuit has invalidated 7 of 13 patents” belonging to Plaintiffs. APP-37. This is false. *See In re Transaction Holdings*, 484 Fed.Appx. 469.

**d. CUNA’s statements are capable of being proven false**

The trial court further erred in holding that “patent troll” is incapable of definition and thus incapable of being proven false. ADD-17 (Order, pp. 17-18). CUNA provided a clear definition of “patent troll” stating that it is commonly understood to include three elements: (1) use of litigation as a primary business model with no intention to market or produce a product; (2) attempted enforcement of invalid and spurious patent rights; and (3) purchase of those rights from the original inventor. *See also, e.g., Highmark, Inc. v. Allcare Health Mgmt. Sys. Inc.*, 706 F.Supp.2d 713, 727 n.5 (N.D. Tex. 2014) (“‘Patent troll’ is a pejorative term used to describe an entity that ‘enforces patent rights against

accused infringers in an attempt to collect licensing fees, but does not manufacture products or supply services based on upon the patents in question’ ... the term ‘patent troll’ [has a] negative connotation.”) (vacated and remanded on unrelated grounds).

The critical issue is not what a law professor may think but what would CUNA’s audience reasonably conclude based on its presentation that ATL is “an entity that owns patents and enforces them in an aggressive way with no intention to market the patented invention”; that ATL’s patents were purchased from a “failing/bankrupt company”; and that Plaintiffs do not “actually make stuff.” Or that 7 of Plaintiffs’ 13 patents were invalidated by the Federal Court of Appeals. Each of these factual predicates are alleged to be false. When the allegations in the FAC are accepted and all reasonable inferences drawn in Plaintiffs’ favor, it is clear that CUNA’s statements, underlying and undisclosed facts and implications are actionable.

**e. The trial court erred in concluding the term “patent troll” is not pejorative**

A statement is defamatory if it tends to lower the plaintiff’s reputation in the eyes of **any** substantial and respectable group, even if that group is a small minority. *Thomson v. Cash*, 119 N.H. 371, 373 (1979). The alleged defamatory meaning must be analyzed as reasonably understood by the audience to whom the language was directed.

CUNA’s statements must be examined in the context of how “patent troll” would have been reasonably understood by the audiences it was directed to, particularly the banking community. *Veilleux v. Nat’l Broadcasting Co.*, 206 F.3d 92, 108 (1st Cir. 2000). Within this community, “patent troll” is a widely accepted and objectively understood pejorative term.<sup>3</sup> Pointedly, CUNA’s target audience would have understood “patent troll” to be pejorative because CUNA said so. APP-32 (“‘Patent troll’ is a pejorative term”). These pejorative definitions and understandings are consistent with the body of authorities on the subject. Being labelled a “patent troll” is sufficiently prejudicial that litigants routinely move for the prohibition of its use. APP-20, 85 (FAC ¶

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<sup>3</sup> See, e.g., Kris Frieswick, *The Real Toll of Patent Trolls*, Inc. Magazine, (Feb. 14, 2013), <https://www.inc.com/magazine/201202/kris-frieswick/patent-troll-toll-on-businesses.html> (“Troll is a derogatory term for the most aggressive types of [Non-Practicing Entities].”).

78 and Exhibit G). Such motions are routinely granted. *See, e.g., Parthenon Unified Memory Architecture LLC v. Apple, Inc.*, No. 15-cv-621, 2016 WL 7743510, \*1 (E.D. TX Sept. 21, 2016) (holding that “pejorative terms such as ‘patent troll’ ... [and] ‘shakedown’” are excluded from use during argument); *Carucel Investments, L.P. v. Novatel Wireless, Inc.*, No. 16-cv-118, 2017 WL 1215838, \*14 (S.D. Cal. Apr. 3, 2017) (“Plaintiff moves to preclude Defendants from using derogatory or misleading characterizations ... including ... ‘patent troll’ ... Defendants state they agree not to use derogatory terms, such as ‘patent troll’ ...”).

Despite the overwhelming weight of authority that the term “patent troll” is pejorative, the trial court held that the term does not necessarily carry a pejorative meaning based on two academic articles that define it “more neutrally.” ADD-18 (Order, pp. 18-19).<sup>4</sup> In so holding, the trial court created and relied upon a false equivalence between two academic articles, on one hand, and the overwhelming weight of authority, industry knowledge, common sense and actual use, on the other hand. CUNA’s audience was advised against “feeding the troll” and to “fight back.” On a motion to dismiss, the statement is clearly defamatory. The very purpose of the presentation was to tarnish Plaintiffs’ reputations and to dissuade CUNA’s audience from doing business with them.

**f. CUNA’s use of the term “patent troll” is not rhetorical hyperbole**

The trial court’s holding that “to call one a ‘patent troll’ ... is [also] protected as ‘mere rhetorical hyperbole’” is wrong for the reasons above and because that term’s use in context carries an understood, defined and pejorative meaning. Just as it failed to consider the full context of Defendants’ statements when interpreting them as opinion, so too did the trial court fail to consider the context of those statements and the reasonable understanding of the audiences when determining that the term “patent troll” was used as “loose, figurative language, hyperbole and epithet.” ADD-19 (Order, pp. 19-20).

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<sup>4</sup> Both articles relied on by the trial court recognize the pejorative meaning of “patent troll.” Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?* 83 TEX. L. REV. 961, 1023 (2005) (describing patent trolls as a “problem”); John R. Allison, Mark A. Lemley & David L. Schwarz, *How Often Do Non-Practicing Entities Win Patent Suits?* 32 BERKELEY TECH. LAW J. 237, 242 (2018) (describing “patent troll” as a pejorative).

The context of CUNA's use of the term "patent troll" with its accompanying false statements, implications and undisclosed facts cannot find safety in rhetorical hyperbole because its use was not loose or figurative nor was it an epithet. By way of comparison, CUNA's use of a cartoon troll, standing alone, might be protected as rhetorical hyperbole. See APP-17 (FAC ¶ 70). But Plaintiffs' claim is not that CUNA used a cartoon troll to state or imply that they are actual trolls, *inter alia*, because everyone knows that trolls do not exist. Thus, Defendants' publication of the cartoon troll, without more, might be rhetorical hyperbole. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding a plaintiff could not recover against a defendant that published a parody without showing in addition that the publication contained false statements of fact).

But there is much more, including that CUNA's publications contained false and/or undisclosed facts and implications that its audience would have understood and been led to believe. See *Morrisette v. Cowette*, 122 N.H. 731, 734 (1982) (explaining "We must take into consideration 'all the circumstances in which the words were written, their context, [and] the meaning which could reasonably be given to them by the readers. ...'" while holding that the challenged language was protected under circumstances not present in this case). Context remains key. While certain contexts may alert an audience that a statement contains hyperbole, other contexts (like the ones here) create a reasonable presumption that the statements are or imply facts. See *Morrisette*, 122 N.H. at 734 (holding that hyperbolic speech "predictably accompanies political endorsements" as compared to other contexts).

Plaintiffs' claims are based upon the fact that the term "patent troll" has a commonly accepted meaning that does not apply to them. CUNA's statements are dissimilar to the political flyer in *Morrisette*. CUNA's statements were not made in a context where the audience "could only reasonably conclude" that the purpose was not to defame the Plaintiffs. Rather, the context of CUNA's presentation is more like the statements in *Thomas*. There, defamatory statements regarding a plaintiff's criminal activity were published in the context of "objective reporting". 155 N.H. at 340.

Although the *Thomas* defendants tried to analogize their statements with statements made in a “clearly opinionative” letter, the Supreme Court held there is a material difference between statements presented as an “objective reporting of the plaintiff’s alleged ... criminal activities” and statements that due to their “unique nature and tenor” are “hyperbole” or a “call to action”. *Thomas*, 155 N.H. at 340.

CUNA’s statements were presented to an audience in the context of an objective presentation on the intersection between intellectual property and the banking industry. APP-28. CUNA used language like its reference to “Well Known Trolls” and false statements like as 7 of Plaintiffs’ 13 patents being invalid to reinforce these understandings. CUNA’s audience would have reasonably understood its statements about Plaintiffs to be factual and/or based on undisclosed facts that support the statement and thus actionable.

## **2. The dismissal of Plaintiffs’ claims against ABA was wrongly decided**

### **a. The context of ABA’s 2013 statements is actionable**

The context of the statements made by ABA in 2013 support a finding that the statements are assertions of fact. For instance, ABA’s December 2013 statement on the topic of “Patent Troll Abuse,” which was republished outside of a legislative context, sought to limit the conduct of “patent trolls”. APP-61. This context implies the factual and defined content of the ABA’s statement because legislation cannot address an issue that cannot be defined.

ABA begins by defining entities known as “Patent Assertion Entities” as entities that “use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country.” APP-62. The term is then used interchangeably with the term “patent troll”. APP-63. ABA then identified ATL as a PAE. The implication is that ATL is a patent troll entity that uses overly broad patents to extort payments from others. APP-62.

**b. The context of ABA’s 2014 statements is actionable**

On April 8, 2014, ABA made defamatory statements about ATL, claiming that ATL is a “patent troll” that targets banks. APP-20 (FAC ¶¶ 81-82). The statements to the House of Representatives, which were later published on the ABA’s website, were presented as a series of factual assertions regarding ATL’s extortionist business practices. APP-100 (FAC, Exhibit I). Legislation is to be based on facts and not hyperbole. The statement began by defining “PAEs” and “patent trolls” interchangeably to describe entities that “use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country.” APP-100. ABA then elaborated, describing the low cost of entry for entities like ATL that make claims for patent infringement “for nothing more than the price of a postage stamp and the paper the claim is written on.” *Id.*

ABA made no effort to distinguish between ATL, on one hand, and other PAEs, on the other hand, that do “acquire portfolios of patents for the express purpose of extracting payments” from other entities and use “overly broad patents”. The audience would reasonably understand ABA’s statements to mean that all the factual allegations regarding PAEs and/or trolls applied to ATL, as it directly references ATL in the article.

**c. ABA’s statements are not protected opinion**

ABA’s statements regarding ATL are not constitutionally protected opinion as they are based on facts that are incorrect or incomplete or leave untrue implications to be made or all of the above. *A. S. Abell Co. v. Kirby*, 227 Md. 267, 274 (1961) (“the imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact and as such not within the defense of fair comment.”).

ABA represents that ATL “had already had its claims overturned in another state”, implying that ATL’s patent infringement claims in their entirety are invalid as they are on “shaky legal standing”. This statement implies that an investigation had been undertaken that supports these factual claims – the facts of the investigation are not disclosed. APP-

101-103. Additionally, ABA references ATL's patent portfolio by placing the words in quotes: *i.e.*, "This firm purported that it held a 'patent portfolio' which covers the manner in which ATMs communicate over the internet.". *Id.* The use of quotes surrounding the term "patent portfolio" imputes a false quality to ATL's patent portfolio.

ABA describes patent trolls as entities "that acquire portfolios of patents for the express purpose of extracting payments from anyone whom the patent could possibly apply" and that the troll acquires its patents "from bankrupt companies for next to nothing". APP-102. ABA's repeated use of such emotionally-charged words as "abusive", "extort", "threatening", "intimidation", "perpetrator" and its limited description of its interaction with ATL adds further weight to the statements being actionable as the descriptors are based on facts that are false, incomplete and the implications are inaccurate.

**d. Plaintiffs alleged that ABA's statements are false**

The trial court erred when it held that Plaintiffs did not allege ABA's statements were false. ADD-16 (Order, p. 16). The FAC alleges the ABA's statement that ATL is a patent troll is false. APP-19 (FAC ¶ 76). The FAC also challenges ABA's statement that ATL's patents are overly broad because it states that the "vast majority" of its patent portfolio remained unaffected by adverse decisions in other matters. APP-14 (FAC ¶ 57). Plaintiffs expressly denied ABA's claim that its patent claims were based on the cost of a postage stamp due to the actual cost of research and development. APP-20 (FAC ¶ 82). Plaintiffs also alleged that it did not purchase patents from failing companies. APP-14 (FAC ¶ 58). Plaintiffs are the original owners of the valid patents upon which their licensing demands were based. APP-14 (FAC ¶¶ 57, 58).

**e. ABA's statements are capable of being proven false**

For the reasons above, ABA's statements including its use of the term "patent troll" is capable of being proven false.

**f. ABA's statements about Plaintiffs are pejorative**

Throughout its statements, ABA references the manner that trolls "take advantage", "extort payments", "use underhanded tactics", "intimidate businesses", "scare targets into paying," "prey" on others, "target" smaller institutions, and "drain the U.S. economy". APP-100 to 103. These are not neutral words. In context, they are words designed to lower Plaintiffs' esteem before a targeted audience and encourage banks not to do business with ATL.

**g. ABA's use of the term "patent troll" is not rhetorical hyperbole**

For the reasons above, ABA's statements including its use of the term "patent troll" do not constitute rhetorical hyperbole.

**3. The dismissal of Plaintiffs' claims against Pierce Atwood and Mr. Stier was wrongly decided**

**a. The context of Pierce Atwood and Mr. Stier's statements is actionable**

Pierce Atwood and Mr. Stier published their defamatory statements on their professional website. The statements were presented in a series of articles concerning ATL and promoting Pierce Atwood's services to the banking industry, an audience that knew "very little about patents". APP-83. The articles carried the titles of: "Community Banks and Credit Unions: Don't pay the ATM patent troll before you read this!" and "Pierce Atwood Successfully Defends Community Banks and Credit Unions Against Aggressive Licensing Demands From Unscrupulous Patent Troll". *Id.*; APP-112; APP-116 (FAC, Exhibit L). ATL is the target of the articles. APP-83; APP-113. The articles are authoritative in purpose and purport to be factually based.

Within each article are statements of fact intended to support the conclusion that ATL is an "unscrupulous patent troll". The articles state that ATL had its patents "invalidated", that there was no reason to believe that any bank needed a sub-license for the use of ATL's technology and that ATL's demands were a "classic shakedown". APP-83. The statements are factually buttressed by Mr. Stier's expertise as an attorney with "more than 30 years' experience handling patent cases" and implied special,

undisclosed knowledge about ATL's patent portfolio, or, more importantly, the lack thereof. *Id.*; APP-113. The article touts Mr. Stier's investigation and study of ATL's patents in support of his assertion that ATL was an "unscrupulous patent troll." APP-114. There is no language to alert the audience that the statements contained within the article are expressions of opinion.

**b. Pierce Atwood and Mr. Stier's statements are not protected opinion**

The trial court erred in concluding that Pierce Atwood and Mr. Stier's statements are constitutionally protected opinion because their articles contained statements of fact which were incomplete and/or untrue. The articles premise their conclusion that ATL is a patent troll on the following facts: (1) a court "invalidated (ATL's) oldest and broadest patent; (2) "the scope of other patents had been significantly limited by court rulings"; (3) there was no reason to believe that any bank needed a sub-license; (4) ATL claimed "its patented inventions covered every ATM in the country"; (5) ATL "purposely kept license fees low" and (6) ATL's conduct was a "shakedown" and it was continuing. APP-113.

Similar to the statements of CUNA and ABA, Plaintiffs allege facts that put these assertions in issue. APP-14, 15, 21 and 22 (FAC ¶¶ 57, 60 and 87). The essence of the articles is that ATL's patents are not enforceable and if you receive a "threat letter" call call Pierce Atwood. It is directed to the banking community, seeking clients. APP-83. The FAC disputes this claim and alleges that the "vast majority of Mr. Barcelou's patent portfolio" was not affected by the court's ruling and that the patents are enforceable. APP-14 (FAC ¶¶ 57, 58). As the allegations in the FAC are "reasonably susceptible to a construction that would permit recovery", this dispute cannot be resolved on a motion to dismiss.

Additionally, the statements in the articles that form the conclusion that ATL is a patent troll and its patents invalid inferring the existence of undisclosed facts. For instance, by claiming that ATL "purposely" kept licensing fees low or that no sub-license fee was needed, Pierce Atwood implies it has a special knowledge of ATL's business strategy and the law, leading the target audience to conclude that ATL knew its claims

were without merit and that it intentionally set its licensing fees below the legal fees to be incurred in defending a potential suit. APP-113. These statements implied, contrary to the allegations in the FAC, that the entirety of Plaintiffs' patent portfolio was invalid and not enforceable. *Milkovich*, 497 U.S. at 18 ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."). The implication of the undisclosed facts is the assertion that ALT's patent claims are without merit and there is no legal basis to pay the sub-licensing fees. Like the policeman in *Thomas*, the statements are not privileged because they are based on undisclosed facts resulting from Mr. Stier's investigation. The actionability of these statements cannot be determined on a motion to dismiss in light of Plaintiffs' allegations in their FAC.

**c. Plaintiffs alleged that Pierce Atwood and Mr. Stier's statements are false**

The trial court erred when it found that Plaintiffs did not allege that Mr. Stier and Pierce Atwood's statements regarding ATL were false. ADD-16 (Order, p. 16). Plaintiffs specifically denied that ATL is a patent troll. APP-21 (FAC ¶ 84). Plaintiffs affirmatively pleaded that ATL had a valid patent portfolio. APP-14 (FAC ¶ 57). Plaintiffs pleaded that payments from over 200 entities were made in exchange for licensing privileges. APP-15 (FAC ¶ 60).

**d. Pierce Atwood and Mr. Stier's statements are capable of being proven false**

For the reasons above, Pierce Atwood and Mr. Stier's statements including its use of the term "unscrupulous patent troll" is capable of being proven false.

**e. Pierce Atwood and Mr. Stier's statements about Plaintiffs are pejorative**

Mr. Stier described ATL as an "unscrupulous patent troll". In labeling ATL in this manner, the Defendants were seeking to have banks hire them to litigate against ATL's

false claims and thwart its “shakedown”. This clearly had the effect to reduce Plaintiffs’ reputation before the targeted audience.

**f. Pierce Atwood and Mr. Stier’s use of the term “patent troll” is not rhetorical hyperbole**

For the reasons above, Pierce Atwood and Mr. Stier’s statements including its use of the term “patent troll” do not constitute rhetorical hyperbole.

**B. The trial court’s Order wrongly dismissed Plaintiffs’ Consumer Protection claims**

The trial court wrongly held that “since the challenged misrepresentations are not factual, the Consumer Protection Act claim in Count II is dismissed as well.” ADD-21 (Order, p. 21). The trial court’s reasoning and holding is wrong because, as described above, Defendants’ statements about Plaintiffs are factual and thus actionable under RSA 358-A:2. Accordingly, the trial court’s dismissal of the Plaintiffs’ Consumer Protection claims, based on that analysis, must be reversed.

**VI. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this honorable Court reverse the trial court’s Order granting Defendants’ motion to dismiss for failure to state a claim and remand for further proceedings in accordance therewith.

**VII. REQUEST FOR ORAL ARGUMENT**

Oral argument is requested.

**VIII. CERTIFICATION OF COMPLIANCE**

The below signed certifies that the decisions being appealed are in writing and are appended to this brief, an original and eight copies of this brief were delivered to the Clerk of the Supreme Court of New Hampshire and two copies of this brief were served via first class mail, postage pre-paid, to all counsel of record.

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Respectfully submitted on behalf of  
Plaintiffs/Appellants,

DAVID BARCELOU and  
AUTOMATED TRANSACTIONS, LLC

By their Attorneys,

SHAHEEN & GORDON, P.A.

Dated: August 16, 2018

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