DISTRICT COURT, DENVER COUNTY STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202 (720) 865-8301	
Plaintiffs: WESTWOOD COLLEGE, INC. and ALTA COLLEGES, INC. v. **Defendants:** JILLIAN ESTES; CHRIS HOYER; JAMES HOYER NEWCOMER SMILJANICH & YANCHUNIS, PA; CONSUMER WARNING NETWORK; JAMESHOYER.COM; WESTWOODSCAMMED.ME; WESTWOODSUIT.COM; WARNINGS ABOUT WESTWOOD COLLEGE; LAURIE MACKENZIE and JESSICA MACKENZIE	▲ COURT USE ONLY ▲ Case Number: 2010CV2196 Courtroom: 424

COURT ORDER
(Re: Attorney Defendants' Motion to Dismiss and Attorney Defendants' *POME* Motion to Dismiss)

THIS MATTER is before the Court on Attorney Defendants' Motion to Dismiss and Attorney Defendants' *POME* Motion to Dismiss, as well as, Plaintiffs' Motion to Strike Attorney Defendants' Motion to Dismiss. The Court, having reviewed the Motions, Responses, Replies, Surreply, Supplements, Court file and the applicable legal authorities, finds and orders as follows:

STANDARD OF REVIEW

Motions to dismiss pursuant to C.R.C.P. 12(b)(5) are looked upon with disfavor and should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Verrier v. Colo. Dept. of Corr.*, 77 P.3d 875 (Colo. App. 2003). In ruling on a motion to dismiss for failure to state a claim pursuant to C.R.C.P. 12(b)(5), the trial court must accept the facts of the complaint as true and determine whether, under any theory of law, plaintiff is entitled to relief. The complaint is sufficient if relief could be granted under such circumstances. *W.O. Brisben Co., Inc. v. Krystkowiak*, 66 P.3d 133 (Colo. App. 2002). In ruling on a motion to dismiss, a court may consider only the matters stated within the four corners of the complaint and must not go beyond the confines of the pleading. *Jenner v. Ortiz*, 155 P.3d 563 (Colo. App. 2006).

PLAINTIFFS' MOTION TO STRIKE

In their Motion to Strike, the Plaintiffs argue that the Attorney Defendants' filing of two separate Motions to Dismiss, which total 20 pages, is in clear violation of the Court's August 23, 2010 Order striking the Attorney Defendants' Motions to Dismiss and all responsive pleadings ("Striking Order") and collectively in derogation of C.R.C.P. 10(d)(3), 12(b),(g) and 121 §1-15. The Court agrees.

The Court's Striking Order stated, "The Attorney Defendants may rebrief the issues in a *single* motion to dismiss that complies with C.R.C.P. 121 §1-15." (emphasis added). The Court could not have been clearer.

In response to the Court's Striking Order, the Attorney Defendants filed two briefs, each 10 pages and single-spaced. Any contention that substituting 44 double-spaced pages with 20 single-spaced pages complies with the Striking Order is beyond the Court.

The Plaintiffs filed three responsive pleadings, totaling 25 single-spaced pages. Although the Court granted the Plaintiffs leave to file an over length brief, it too was excessive. The Attorney Defendants subsequently filed three replies, totaling 20 single-spaced pages. Further, the Attorney Defendants filed four supplements and approximate 350 pages of exhibits.

The Attorney Defendants' offer an ill-fated justification for separate briefs, stating the *POME* motion is not a standard Rule 12(b)(5) motion but a variation of a Rule 56 motion. The *POME* argument was an issue raised in the original motions to dismiss and thus falls within the Court's Order requiring a single motion.

The Attorney Defendants also argue that it is impossible to coherently analyze the Plaintiffs' 19-page complaint, six claims for relief and all of the legal and factual argument in one 10-page motion. The Court disagrees. The Parties devote substantial portions of their briefs to analyzing case law from other jurisdictions. The Parties should have better utilized the space with a concise and proper analysis of Colorado law. The Parties also argue the facts of this case and the related class action cases ad nauseam.[1] In a motion to dismiss, the Court is limited to the four corners of the complaint. Accordingly, these extrinsic facts are irrelevant and unnecessary.

As to the exhibits: (1) many exhibit citations are void of pin cites; (2) the briefs frequently offer little explanation as to an exhibit's relevance; (3) many exhibits serve no purpose but to bolster the Attorney Defendants' assertion of the facts; (4) three attached exhibits are not even referenced in the Motions[2]; and (5) the supplemental exhibits offer little assistance and suffer from the same deficiencies. The Attorney Defendants attached a heap of exhibits, expecting the Court to sift through the wreckage. It is not the Court's responsibility to conduct discovery.

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[1] The Defendants even unnecessarily argue the merits of the case and their Motions to Dismiss in their response to the Plaintiffs' Motion to Strike.

[2] Exhibits D, E and P.

Notwithstanding all of the above, in the interest of justice and in an effort to move this case forward, the Court denies the Motion to Strike and rules on the Motions to Dismiss on their merits.

LITIGATION PRIVILEGE

"[A]ttorneys are absolutely privileged to make defamatory remarks during preparation for a judicial proceeding so long as the remarks have some relation to the proceeding." *Buckhannon v. US W. Commc'ns, Inc.*, 928 P.2d 1331, 1335 (Colo. App. 1996). Further, "[a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." *Club Valencia Homeowners Ass'n, Inc. v. Valencia Assocs.*, 712 P.2d 1024, 1027 (Colo. App. 1985).

Taking the facts as alleged in the Complaint, the Court finds that some of the alleged remarks and published matter do not have "some relation to the proceeding" and therefore are not protected by the litigation privilege. Further, remarks and published matter that were made when the Attorney Defendants were acting as consumer advocates, as alleged, would not be privileged, as the Attorney Defendants were not acting as attorneys.

DEFAMATION AND DISPARAGEMENT

Opinion

The Attorney Defendants argue that the alleged defamatory statements are constitutionally protected expressions of opinion. The Court disagrees. Accepting the facts of the Complaint as true, the Court finds that some of the alleged defamatory statements are not expressions of opinion. Notably, alleged statements such as "Westwood falsified data on its Web site" and "Westwood removed all negative postings from its Web site and created false positive postings by current and former students and staff members" are unquestionably not expressions of opinion.

Defamation per se

The Attorney Defendants argue that the alleged defamatory statements are not defamatory per se. The Court disagrees. "A statement is false if its substance or gist is contrary to the true facts, and reasonable people learning of the statement would be likely to think significantly less favorably about the person referred to than they would if they knew the true facts." *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 899 (Colo. 2002) (*quoting* CJI-Civ. 4th 22:11). Accepting the facts of the Complaint as true, the Court finds that statements such as "scam, lie, ripoff, fake and worthless" would likely cause a reasonable person to think significantly less favorably about the Plaintiffs than they would if they knew the true facts, as alleged by the Plaintiffs.

Malice

The Attorney Defendants argue that malice was not adequately pleaded. In a defamation claim, a plaintiff must show that the defendant published the statement with reckless disregard. That is,

at the time of the publication, the defendant believed that the statement was probably false or had serious doubts as to its truth. *Id.* (*quoting* CJI-Civ. 4th 22:3). The Court finds that the Plaintiffs adequately pleaded malice in their Complaint. (*See* Compl. ¶¶ 67, 95.)

INTERFERENCE

The Attorney Defendants argue that the Plaintiffs' interference with contract and prospective business relations claims should be dismissed because the Plaintiffs cannot establish the element of improper conduct. The Plaintiffs' alleged improper conduct is the alleged defamatory statements made by the Attorney Defendants. Accordingly, the Attorney Defendants contend that the inference claims should fail for the same reasons as the defamation claim. The Court finds that as the defamation claim does not fail, the interference claims do not fail under the same analysis.

COLORADO CONSUMER PROTECTION ACT

The Attorney Defendants argue that the Plaintiffs lack standing to bring a claim under the Colorado Consumer Protection Act ("CCPA"). The Plaintiffs respond that they do have standing as a party who "in the course of [their] business or occupation, [was] injured as a result of [the Attorney Defendants'] deceptive trade practice." C.R.S. § 6-1-113(1)(c). Accepting the facts of the Complaint as true, the Court finds the Plaintiffs have standing to bring a claim under the CCPA. The Plaintiffs claim they were injured by both reputation and business profits in the course of their business. They claim the injury was a result of the Attorney Defendants alleged deceptive trade practice of making false representations concerning the Plaintiffs to create pressure on the Plaintiffs to settle the class action lawsuits.

CIVIL CONSPIRACY

The Attorney Defendants argue that because all the underlying claims fail on their face, the Plaintiffs cannot maintain a derivative claim for civil conspiracy. The Court has found that the Plaintiffs established valid underlying claims and therefore may maintain a claim for civil conspiracy.

CERTIFICATE OF REVIEW

The Attorney Defendants argue that the Plaintiffs failed to file a timely Certificate of Review as required by C.R.S. § 13-20-601, 602 and therefore all of the Plaintiffs' claims must be dismissed. "[T]he certificate of review requirement should be utilized in civil actions for negligence brought against those professionals who are licensed by this state to practice a particular profession and regarding whom expert testimony would be necessary to establish a prima facie case." C.R.S. § 13-20-601. The Plaintiffs are not required to file a certificate of review because (1) the Plaintiffs do not assert a claim of professional negligence, or any negligence, and (2) the Attorney Defendants are not licensed by this state to practice a particular profession.

POME

The Attorney Defendants move to dismiss pursuant to the procedure set forth in *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) (hereafter referred to as

"*POME*") on the grounds that the Plaintiffs' case is a SLAPP suit. The Attorney Defendants' argument relies heavily upon case law from California and other jurisdictions that have anti-SLAPP statutes. Colorado has not enacted an anti-SLAPP statute. The Attorney Defendants also rely upon seminal text and opinions of law professors. These sources are persuasive at best. As Colorado has no anti-SLAPP statute, this Court is bound by Colorado case law. The Attorney Defendants cite two Colorado cases to support their position: *POME* and *Krystkiowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859 (Colo. 2004). *POME* provides that "[the heightened standard we herein adopt] requires that when, as here, a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government…" *POME*, 667 P.2d at 1369. *Krystkiowiak*, applying the standard set forth in *POME*, was also a case where the plaintiff sued another for alleged misuse or abuse of the administrative or judicial processes of government. Here the Plaintiffs are not suing the Attorney Defendants for alleged misuse or abuse of the administrative or judicial process of government. Accordingly, the Court finds that the heightened standard set forth in *POME* does not apply.

CONCLUSION

The Attorney Defendants' Motion to Dismiss and Attorney Defendants' *POME* Motion to Dismiss are **DENIED**.

SO ORDERED this 10th day of May, 2011.

BY THE COURT

Sheila A. Rappaport

Sheila A. Rappaport
District Court Judge