UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-CV-01233-LTB-MJW

NATURAL WEALTH REAL ESTATE, INC., a/k/a Greenberg & Associates, Inc., d/b/a Agile Advisors, Inc., a Colorado corporation;
TACTICAL ALLOCATION SERVICES, LLC, d/b/a Agile Allocation Services, LLC, a Colorado limited liability company;
AGILE GROUP, LLC, a Delaware limited liability company;
GREENBERG & ASSOCIATES SECURITIES, INC., d/b/a Agile Group, a Colorado corporation; and
NEAL R. GREENBERG, a Colorado resident,

Plaintiffs and Defendants-on-counterclaim,

v.

LEONARD COHEN, a Canadian citizen residing in California;
KELLEY LYNCH, a United States citizen residing in California; and
JOHN DOE, Nos. 1-25,

Defendants,

and,

LEONARD COHEN, a Canadian citizen residing in California,

Counterclaim Plaintiff,

v.

TIMOTHY BARNETT, a Colorado citizen,

Counterclaim Defendant.

DEFENDANT LEONARD COHEN'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

TABLE OF CONTENTS

TABLE OF CONTENTS ……. i

TABLE OF AUTHORITIES ……..…… iv

I. INTRODUCTION …...……..……..…… 1

II. LEGAL STANDARD ……...……..…..… 2

III. CHOICE OF LAW ……..…… 3

A. Claims for Defamation/Commercial Disparagement ……. 3

B. Unjust Enrichment Claim ……..…… 4

C. Interpleader …… 5

IV. STATEMENT OF UNDISPUTED FACTS …… 5

V. PLAINTIFFS' CLAIMS FOR DEFAMATION AND COMMERCIAL DISPARAGEMENT ……..…… 13

A. Cohen's Allegedly Defamatory Statements ……..…… 13

B. Plaintiffs' Claim for Damages ……..…… 13

C. Plaintiffs Have Not Shown That Cohen Made False Statements Regarding Certain Plaintiffs ……..... 14

VI. PLAINTIFFS' FIRST CLAIM FOR DEFAMATION SHOULD BE DISMISSED ……..…… 14

A. Plaintiffs Consented to the Defamation By Inviting Public Comment By Cohen and Kory ……..…… 14

B. Cohen's Allegedly Defamatory Statements Were Conditionally Privileged ……..…… 17

1. The Conditional Privilege of Self-Defense is Recognized in the Tenth Circuit ….……..... 19

2. Cohen's Statements Made in Self-Defense of His Reputational Interests Did Not Abuse the Privilege ……...…… 24

a. Cohen's Statements Were Responsive to Agile's Attack …… 25

b. Cohen's Statements Were Not Disproportionate to Agile's Attack …… 31

c. Cohen's Statements Were Not Excessively Published …… 33

d. Cohen's Statements Were Not Published With Malice ……...… 34

C. Cohen's Statements Are Not Defamatory As a Matter of Law Because They Are Either True and/or Privileged Expressions of Opinion …… 36

1. Kory's June 14th Response Contains Protected Expressions of Opinion ……..…… 37

a. Broad Context ……..... 38

b. Kory's Specific Statements ……..…… 39

2. Cohen's Allegedly Defamatory Statements Published On Macleans.ca Website Are Statements of Opinion ……..…… 42

a. Broad Context ……..... 43

b. Cohen's Specific Statements …… 44

3. Cohen's Allegedly Defamatory Statements Published on Buddhist Channel Website Are Statements of Opinion …… 46

a. Broad Context ……..... 46

b. Cohen's Specific Statements ……...…… 46

4. Plaintiffs Elected to Become Limited Public Figures and Cannot Show Cohen's Statements Were Published With Malice ……..…… 48

VII. PLAINTIFFS' SECOND CLAIM FOR COMMERCIAL DISPARAGEMENT SHOULD BE DISMISSED …… 50

A. The Absolute Privilege of Consent, the Conditional Privilege of Self-Defense, and the Constitutional Protection Afforded Statements of Opinion Also Apply to Bar Plaintiffs' Commercial Disparagement Claim …… 51

B. Cohen Did Not Knowingly Publish False Statements With the Intent to Cause Harm to Plaintiffs' Pecuniary Interest ……..…… 51

VIII. COHEN IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FOURTH CLAIM FOR RELIEF FOR QUANTUM MERUIT/UNJUST ENRICHMENT 54

A. Plaintiffs' Fourth Claim For Unjust Enrichment/Quantum Meruit 54

B. Plaintiffs Voluntarily and Gratuitously Provided the Traditional Holdings Account Information 55

C. Plaintiffs Did Not Provide the Requested Information Under Duress 56

IX. COHEN IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' TENTH CLAIM FOR RELIEF FOR INTERPLEADER 57

A. Plaintiffs' Interpleader Claim 57

B. Cohen Has Been Declared Rightful Owner of the Deposited Funds in a Valid California State Judgment Against Lynch 59

C. The Doctrine of Res Judicata Requires The Court to Apply the Preclusive Effect of the California State Court Judgment 60

X. THE COURT SHOULD DISMISS PLAINTIFFS' DECLARATORY JUDGMENT CLAIM AS MOOT 62

XI. PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF 64

A. Plaintiffs Should Be Denied Equitable Relief Because of Their Unclean Hands 65

B. Because Cohen's Statements Were Privileged, Plaintiffs Cannot Establish the Necessary Requisite Elements for Preliminary Injunctive Relief 66

C. The Court Should Also Deny Plaintiffs Prospective Equitable Relief 66

XII. CONCLUSION 68

TABLE OF AUTHORITIES

Cases

Amoco Oil Co. v. Rainbow Snow, Inc.,
809 F.2d 656 (10th Cir. 1987) …… 66

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) …… 2

Bacchus Industries, Inc. v. Arvin Industries, Inc.,
939 F.2d 887 (10th Cir. 1991) …… 51

Bangert Bros. Constr. Co. v. Kiewit W. Co.,
310 F.3d 1278 (10th Cir. 2002) ……..…… 55

Beattie v. United States,
949 F.2d 1092 (10th Cir. 1991) ……..…… 63

Britvar v. Schainuck,
791 P.2d 1183 (Colo. Ct. App. 1989) …..…….…….. 55

Burns v. McGraw-Hill Broadcasting Co.,
659 P.2d 1351 (Colo. 1983) ……...…… 18, 25, 37

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) ……..…… 3

Chambers v. Shivers,
497 P.2d 327 (Colo. Ct. App. 1972) ……..……. 55

Club Valencia Homeowners Ass'n. v. Valencia Assoc.,
712 P.2d 1024 (Colo. Ct. App. 1985) ……...……. 18

Continental Group, Inc. v. Amoco Chemicals Corp.,
614 F.2d 351 (3rd Cir. 1980) ……..…… 67

Costa v. Smith,
43 Colo. App. 251 (Colo. Ct. App. 1979) ……..……. 14

DCB Constr. Co. v. Central City Dev. Co.,
965 P.2d 115 (Colo. 1998) …….. 55

DiLeo v. Koltnow,
200 Colo. 119 (Colo. 1980) …….. 25, 48

Dominguez v. Babcock,
727 P.2d 362 (Colo. 1986) ……. 14, 24, 25, 34

Duffy v. Leading Edge Prods.,
44 F.3d 308 (5th Cir. 1995) ……...…. 24

Flight Engineers' Int'l Ass'n v. Trans World Airlines, Inc.,
305 F.2d 675 (8th Cir. 1982) …….. 64

Foretich v. Capital Cities/ABC, Inc.,
37 F.3d 1541 (4th Cir. 1994) ……..…..…….. 21, 22, 26, 31, 33

Gaming Mktg. Solutions, Inc. v. Cross,
2008 WL 858183, 2008 U.S. Dist. LEXIS 25910 (S.D.N.Y. 2008) …….. 67

Garrick v. Weaver,
888 F.2d 687 (10th Cir. 1989) …… 59

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) ……...…… 48

Gordon v. Boyles,
99 P.3d 75 (Colo. Ct. App. 2004) ……..…. 47

Gregory v. Durham County Bd. of Educ.,
591 F. Supp. 145 (M.D.N.C. 1984) ……..….. 21

Gulf States Utilities v. Alabama Power Co.,
824 F.2d 1465 (5th Cir. 1987) ……..….. 58

Hawks v. Agri Sales, Inc.,
60 P.3d 714 (Colo. Ct. App. 2001) …….. 3

Information Control Corp. v. Genesis One Computer Corp.,
611 F.2d 781 (9th Cir. 1980) ……...……. 41, 45

Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs.,
175 F.3d 848 (10th Cir. 1999) …… 47

Jones v. Clinton,
974 F. Supp. 712 (D. Ark. 1997) ……...…… 15

Kelewae v. Jim Meagher Chevrolet, Inc.,
952 F.2d 1052 (8th Cir. 1992) ……..... 15

Keohane v. Stewart,
882 P.2d 1293 (Colo. 1994) ……...…… 18, 36, 37, 41, 43

Kiowa Tribe of Oklahoma v. Lewis,
777 F.2d 587 (10th Cir. 1985) ……..…… 5

Konikoff v. The Prudential Ins. Co. of Am.,
234 F.3d 92 (2nd Cir. 2000) …… 21,22, 24

Last Chance Mining Co. v. Tyler Mining Co.,
157 U.S. 683 (1895) ……...…… 62

Lee v. Calhoun,
948 F.2d 1162 (10th Cir. 1991) ……..…….. 20, 21

Lewis v. McGraw-Hill Broadcasting Co.,
832 P.2d 1118 (Colo. Ct. App. 1992) …… 48

Lieberman v. Fieger,
338 F.3d 1076 (9th Cir. 2003) ……..... 42

Ling v. Whittemore,
140 Colo. 247 (Colo. 1959) ……..…..…… 19, 24, 34

Lottawanna,
87 U.S. 201 (1874) ……. 59

Lucido v. Superior Court,
51 Cal. 3d 335 (Cal. 1990) ……..……. 60, 61

Mares v. ConAgra Poultry Co., Inc.,
971 F.2d 492 (10th Cir. 1992) …….. 2

Masson v. New Yorker Magazine,
501 U.S. 496 (1991) ……..……. 31

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574 (1986) ……..…… 3

Melcher v. Beeler,
48 Colo. 233 (Colo. 1910) ……...……...…….. 15, 65

Meeker v. Post Printing and Publishing Co.,
55 Colo. 355, (Colo. 1913) ……...……. 18

Memphis Light, Gas & Water v. Craft,
436 U.S. 1 (1978) ……..….. 67

Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees and Rest. Employees Int'l Union,
239 F.3d 172 (2nd Cir. 2001) ……..…… 68

Migra v. Warren City Sch. Dist. Bd. of Educ.,
465 U.S. 75 (1984) ……...…… 5

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990) ……...…….. 25, 36, 39, 45

Montana v. United States,
440 U.S. 147 (1979) ……...…… 61

Mountain Medical Equipment, Inc. v. Healthdyne, Inc.,
582 F. Supp. 846 (D. Colo. 1984) …….……..... 67

NBC Subsidiary (KCNC-TV) v. The Living Will Ctr.,
879 P.2d 6 (Colo. 1994) ……. 37

New York Times v. Sullivan,
376 U.S. 254 (1964) ……..... 26, 49

Nicosia v. De Rooy,
72 F. Supp. 2d 1093 (N.D. Cal. 1999) ……. 39, 41

Novecon Ltd. v. Bulgarian-American Enterprise Fund,
190 F.3d 556 (D.C. Ct. App. 1999) ……...…….. 21, 24, 33, 34

Oklahoma Retail Grocers Assoc. v. Wal-Mart Stores, Inc.,
605 F.2d 1155 (10th Cir. 1979) ……..….. 65, 66

Partington v. Bugliosi,
56 F.3d 1147 (9th Cir. 1996) ……..…… 41

Perez v. Sec. of Health, Educ. and Welfare,
354 F. Supp. 1342 (D.P.R. 1972) ……...…… 63

Q-Tech Labs. Pty Ltd. v. Walker,
2002 WL 1331897, 2002 U.S. Dist. LEXIS 16842 (D. Colo. 2002) ……..…… 66

Quigley v. Rosenthal,
327 F.3d 1044, 1062 (10th Cir. 2003) ……..... 18

Russillo v. Scarborough,
935 F.2d 1167 (10th Cir. 1991) ……..…..…. 2

SPX Corp. v. Doe,
253 F. Supp. 2d 964 (N.D. Ohio 2003) ……..…… 39

Schuck Corp. v. Sorkowitz,
686 P.2d 1366 (Colo. Ct. App. 1984) ……..... 55

Seidl v. Greentree Mortgage Co.,
30 F. Supp. 2d 1292 (D. Colo. 1998) ……. 18, 39, 40

Shearson Lehman Bros., Inc. v. M & L Investments,
10 F.3d 1510 (10th Cir. 1993) ……..…… 3

TMJ Implants, Inc. v. Aetna, Inc.,
405 F. Supp. 2d 1242 (D. Colo. 2005),
aff'd, 498 F.3d 1175 (10th Cir. 2007) ……....……. 36, 37, 50

Teilhaber Mfg. Co. v. Unarco Materials Storage,
791 P.2d 1164 (Colo. Ct. App. 1989) …… 14, 50, 51

United Transportation Union v. Michigan Bar,
401 U.S. 576 (1971) ……..…… 67

Walters v. Linhof,
559 F. Supp. 1231 (D. Colo. 1983) ……..… 14, 21

Warga v. Cooper,
44 Cal. App. 4th 371 (Cal. Ct. App. 1996) ……..….. 60

Watters v. Hall,
740 F. Supp. 797 (D. Colo. 1990) ……..……. 5

Williams v. Burns,
540 F. Supp. 1243 (D. Colo. 1982) ……..…… 14, 51

Court Orders

Order (Dec. 4, 2006), *Natural Wealth Real Estate, Inc. v. Cohen*,
2006 WL 3500624, 2006 U.S. Dist. LEXIS 87439 (D. Colo. 2006)
……..…..…… 1, 19, 52, 57, 63

Order (Jan. 23, 2007), *Natural Wealth Real Estate v. Cohen*,
2007 WL 201252, 2007 U.S. Dist LEXIS 5016 (D. Colo. 2007) ……..... 3

Restatements

RESTATEMENT (SECOND) CONFLICT OF LAWS (1971)

§ 150 3

§ 187 ..... 4, 5

§ 188 4

§ 221 ..... 4, 5

RESTATEMENT (SECOND) OF RESTITUTION (1937)

§ 1 55

§ 71 56

RESTATEMENT (SECOND) OF TORTS (1977)

§ 566 ..... 36, 47

§ 571 ..... 18, 33, 40

§ 580 40

§ 583 15

§ 586 18

§ 593 19

§ 594 ..... 20, 21, 24, 31, 51

§ 599 24

§ 603 24

§ 604 ..... 24, 35

§ 605 24

§ 611 18

§ 623 20

§ 623A …… 14, 50, 52

§ 646A …… 51

§ 767 ……..…….…… 52

RESTATEMENT (SECOND) OF TORTS (1979)

§ 558 ……... 14

§ 892 ……..……..……15, 17

Statutes

18 U.S.C. § 1622 …… 32

28 U.S.C. § 1738 ……..…… 5

28 U.S.C. § 2041 ……..……. 59

28 U.S.C. § 2042 ……..…….. 59

28 U.S.C. § 2201 …..…… 62, 63

28 U.S.C. § 2202 ……..…….. 62

CAL. CODE CIV. PROC. § 473 ……. 61, 62

FED R. CIV. P. 12 ……..……...…….. 19

FED R. CIV. P. 44 ……..…… 59

FED R. CIV. P. 56 ……..…….. 1, 2, 3

FED R. CIV. P. 57 ……..…… 62

FED R. CIV. P. 65 ……...……. 2

FED R. CIV. P. 67 ……...……. 58, 59

Treatises

18-130 MOORE'S FEDERAL PRACTICE – CIVIL § 130.21 (2007) ……...……. 5

Defendant Leonard Cohen ("Cohen") pursuant to Fed. R. Civ. P. 56(b)-(d) hereby submits his Motion for Summary Judgment and Memorandum in Support of his Motion for Summary Judgment as to Plaintiffs' claims for defamation, commercial disparagement, unjust enrichment, interpleader, injunction and declaratory relief.

I. INTRODUCTION

Plaintiffs' remaining claims against Cohen are: defamation, commercial disparagement, unjust enrichment/quantum meruit, interpleader, injunction and a claim for declaratory relief. *See* Order (Dec. 4, 2006), *Natural Wealth Real Estate, Inc. v. Cohen*, 2006 WL 3500624, 2006 U.S. Dist. LEXIS 87439 (D. Colo.).

Cohen is entitled to summary judgment as a matter of law on Plaintiffs' defamation claim for the following reasons: 1) Plaintiffs consented to Cohen's statements by publishing a widely disseminated press release containing libelous imputations of criminal conduct to Cohen *prior to* Cohen's allegedly defamatory statements regarding Plaintiffs; 2) Cohen had a personal privilege of self-defense; 3) Cohen's statements are not defamatory as a matter of law because they were either true or were constitutionally protected statements of opinion; and 4) there is no genuine issue of material fact as to the absence of actual malice on the part of Cohen.

Cohen is also entitled to summary judgment as a matter of law on Plaintiffs' claim for commercial disparagement because the allegedly defamatory statements made by Cohen concerning Plaintiffs were: 1) privileged; 2) not actuated by malice; and 3) lacked any intention to interfere with the economic interests of Plaintiffs.

Cohen is entitled to summary judgment as a matter of law on Plaintiffs' unjust enrichment/quantum meruit claim because the documents regarding the Traditional

Holdings' accounts were: 1) provided by Plaintiffs gratuitously without expectation/demand for payment and 2) not produced under duress.

Cohen is entitled to summary judgment on the interpleader claim because Cohen has in a prior California state court proceeding against Lynch been determined to be the rightful owner of the Traditional Holdings funds.

Plaintiffs' claim for declaratory relief is moot because there is no actual and real controversy remaining regarding Plaintiffs' duties owed to Cohen, Lynch or Traditional Holdings. Therefore, the Court should dismiss Plaintiffs' declaratory judgment claim.

Should the Court determine that Cohen's statements were privileged and therefore not actionable, Plaintiffs' claim for equitable injunctive relief also fails because Plaintiffs would be unable to make a prima facie showing that they are entitled to preliminary injunctive relief under FED R. CIV. P. 65. Further, as injunctive relief is an equitable remedy, it is subject to Cohen's equitable defenses, in particular, Cohen's defense of Plaintiffs' unclean hands.

II. LEGAL STANDARD

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir. 1991); FED. R. CIV. P. 56(c). A material fact is one that might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Summary judgment is proper if a reasonable jury could not return a favorable verdict for the non-moving party after viewing the evidence in a light most favorable to that party. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). The

party moving for summary judgment bears the initial burden of explaining the basis for its motion and identifying those portions of the record which it believes "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden then shifts to the nonmovant to produce evidence sufficient to create a genuine issue of material fact for trial. FED. R. CIV. P. 56(e)(2); *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986).

III. CHOICE OF LAW

A federal court sitting in diversity must apply the choice-of-law provisions of the forum state in which it is sitting. *Shearson Lehman Bros., Inc. v. M & L Investments*, 10 F.3d 1510, 1514 (10th Cir. 1993). In Colorado, the "most significant relationship test" of the Restatement (Second) Conflict of Laws (1971) governs choice of law concerning tort claims. *See* Order (Jan. 23, 2007), *Natural Wealth Real Estate, Inc. v. Cohen*, 2007 WL 201252, *5; 2007 U.S. Dist. LEXIS 5016, *13-14 (D. Colo. 2007)(citing to *Hawks v. Agri Sales, Inc.*, 60 P.3d 714, 715 (Colo. Ct. App. 2001)).

A. Claims for Defamation/Commercial Disparagement

Restatement (Second) Conflict of Laws § 150(3) provides with respect to claims for multi-state defamation:

> When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of the most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.
> RESTATEMENT (SECOND) CONFLICT OF LAWS §150(3) (1971).

In defamation actions involving natural persons, "the state of most significant relationship will usually be the state where the person was domiciled at the time, if the

matter complained of was published in that state." RESTATEMENT (SECOND) CONFLICT OF LAWS §150(2) (1971).

Because Neal Greenberg is domiciled in Colorado and the corporate Plaintiffs have their principal place of business within Colorado, Colorado law should govern Plaintiffs' claims for defamation and commercial disparagement.

B. Unjust Enrichment Claim

According to § 221 of the Restatement (Second) Conflict of Laws, the "most significant relationship test" also applies in actions for restitution in view of the following factors:

> (a) the place where a relationship between the parties was centered, provided that the receipt of enrichment was substantially related to the relationship,
> (b) the place where the benefit or enrichment was received,
> (c) the place where the act conferring the benefit or enrichment was done,
> (d) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (e) the place where a physical thing, such as land or a chattel, which was substantially related to the enrichment, was situated at the time of the enrichment.
> RESTATEMENT (SECOND) CONFLICT OF LAWS § 221(1) (1971).

In the instant case, the alleged enrichment was received by Cohen in California and conferred by Plaintiffs in Colorado. Cohen resides in California, while Plaintiffs have their principal place of business in Colorado. The place where the disputed services were performed was Colorado. Comment d to § 221 gives the "greatest weight" to the place of the gravamen of the relationship.

Comment d provides:

> When the enrichment was received in the course of the performance of a contract between the parties, the law selected by application of the rules of §§ 187-188 will presumably govern one party's rights in restitution against the other. The applicable law will be that chosen by the parties if they have made an effective choice under the circumstances stated in § 187.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 221, cmt. d (1971).

The contracts between Plaintiffs and Cohen specify Colorado as the governing law. Therefore, pursuant to Restatement (Second) Conflict of Laws §§ 187 and 221, Colorado law should govern Plaintiffs' unjust enrichment claim.

C. Interpleader

The full faith and credit statute, 28 U.S.C. § 1738, requires a federal court to give judgments rendered by a state court the same preclusive effect as would the courts of the rendering state. Further, state and federal courts must afford judicial proceedings "such faith and credit…they have by law or usage in the courts of the State from which they are taken." 28 U.S.C. §1738; 18-130 MOORE'S FEDERAL PRACTICE - CIVIL §130.21 (2007); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984); *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 590 (10th Cir. 1985) *cert. denied*, 479 U.S. 872 (1986); *Watters v. Hall*, 740 F. Supp. 797, 800 (D. Colo. 1990).

Cohen has obtained a final California judgment declaring that he, not Lynch, is the rightful owner of the Traditional Holdings funds. This Court should apply California law in determining whether summary judgment should be granted to Cohen on Plaintiffs' interpleader claim.

IV. STATEMENT OF UNDISPUTED FACTS

1. Cohen is a songwriter and singer who has been, and continues to be, a well-known celebrity. (SAC ¶ 18; Cohen's Answer and Counterclaims ¶ 18.)

2. In an e-mail dated October 24, 2004, Richard Westin wrote to Neal Greenberg, with a copy to Cohen, that "Kelley Lynch and Leonard Cohen are both members of

Traditional Holdings, LLC, and that, therefore, Leonard [Cohen] has an equal right with Kelley [Lynch] to review the books and records of that entity." (Exh. A-1.)

3. On November 12, 2004, Greenberg sent a letter to Cohen stating that he would help to gather "any relevant information" that Kory "deemed helpful." (SAC, Exh. 9.)

4. Plaintiffs electronically filed their complaint in Boulder District County Court on June 5, 2005 asserting three claims against Cohen and his attorney, Robert Kory: outrageous conduct, civil conspiracy and civil extortion. (Docket No. 1, Notice of Removal, ¶ 1.)

Plaintiffs' June 9th Press Release Disseminated On the Internet Through Business Wire

5. On June 9, 2005, after electronically filing their lawsuit June 5th against Cohen and Kory in Boulder, Colorado, Plaintiffs, through the law firm of Brownstein, Hyatt & Farber, Plaintiffs' former counsel, issued a press release through Business Wire entitled "Agile Group Sues Recording Artist Leonard Cohen for Extortion and Civil Conspiracy." The press release was also published on the Internet by Yahoo! Finance ("Agile's June 9th Press Release"). (Cohen Aff ¶ 2, Exh. B-1; Traub Aff. ¶ 5, Exh. C-1; Cohen's Answer and Counterclaims, Affirmative Defense No. 7.)

6. Agile's press release in its entirety was as follows:

> **Agile Group Sues Recording Artist Leonard Cohen for Extortion and Civil Conspiracy**
>
> BOULDER, Colo. – (BUSINESS WIRE) – June 9, 2005 – Colorado investment company Agile Group ("Agile") has charged international recording artist Leonard Cohen and another individual, Robert Kory, **of civil conspiracy and extortion**. (emphasis supplied)
>
> In a lawsuit filed Monday in Boulder County District Court, **Agile states that Cohen and Kory have threatened to irreparably damage Agile's reputation in order to extort millions of dollars from Agile and its insurer**. Agile states that Cohen and Kory falsely claim that Agile bears

> responsibility for the alleged misappropriation of Cohen's invested funds by Cohen's former manager. The Complaint also states that **Cohen and Kory attempted to (and in some instances did) recruit third parties in their conspiracy and procure false testimony**. (emphasis supplied)
>
> Agile seeks a judgment against Cohen and Kory for all actual, compensatory, punitive and other damages as a result of Cohen and Kory's wrongful conduct. Agile is also asking that Cohen and Kory be prevented from publishing or disseminating false information concerning Agile for the purpose of disparaging and damaging its professional reputation.
>
> Agile is a Colorado broker-dealer and investment advisor that manages over $550 million in funds for more than 400 clients. Its principal, Neal Greenberg, has been a prominent Boulder resident, and an industry and community leader for decades. Leonard Cohen has been a celebrity in the music business since the 1960s. He is best known for his lyrical folk music, including songs such as Suzanne, and Chelsea Hotel, No. 2, a song about Janis Joplin. Cohen's song Hallelujah was featured in the hit movie Shrek. Robert Kory is an entertainment attorney who lives in L.A.
>
> Agile is represented by Sherab Posel, an attorney from New York who formerly was Of Counsel at David Boies' law firm, Boies, Schiller & Flexner; and local attorneys David Chipman and Meghan Martinez of Brownstein Hyatt & Farber, P.C.
>
> (Exh. A-2; also available at: BNET BUSINESS NETWORK, *Agile Group Sues Leonard Cohen for Extortion and Civil Conspiracy*, June 9, 2005, http://findarticles.com/p/articles/mi_m0EIN/is_2005_June_9/ai_n1380708 ; Arjatsalo Aff. ¶ 6; Cohen Aff. ¶ 2, Exh. B-1; Traub Aff. ¶ 5, Exh. C-1.)

7. Agile's June 9th Press Release imputing criminal conduct to Cohen and Kory spread widely throughout the Internet and was translated into many foreign languages. (Arjatsalo Aff. ¶ 9; Cohen Aff. ¶ 8.)

8. Cohen first learned of Agile's June 9th Press Release through one of his fans who emailed him after seeing Plaintiffs' June 9th Press Release on the Internet. (Cohen Aff. ¶ 2, Exh. B-1.)

9. On Friday, June 10, 2005, a registered user of "The Leonard Cohen Files" (www.leonardcohenfiles.com), a website dedicated to documenting Cohen's career,

created a discussion thread in the member "Forum" section of the website entitled: "artist v. con-artist(s): an unhappy battle brewing." (Arjatsalo Aff. ¶ 6.) The discussion thread began with the user posting Agile's June 9th Press Release. (*Id.* at ¶ 6.) The website is owned and operated by Jarkko Arjatsalo in Espoo, Finland. (*Id.* at ¶ 1.) Other members of the website wrote comments on the discussion thread expressing concern and disbelief that Cohen would be involved in criminal activity. (Arjatsalo Aff. ¶ 7, Exh. D-1.)

Kory Engages New York Public Relations Firm to Handle Media Inquiries Following Agile's Public Attack in the Press

10. Kory, at the request of Cohen, contacted the New York public relations firm of Dan Klores Communications ("DKC") to assist Cohen in responding to the world-wide publicity generated after Agile issued its press release. (Cohen Aff. ¶ 3; Traub Aff. ¶ 5.)

11. Cohen intended for Kory's statement to serve as a response to the allegations in Agile's lawsuit and June 9th Press Release in order to counteract the negative effect he believed that the lawsuit and press release had on his professional reputation with his fans. (Cohen Aff. ¶¶ 2-3.)

12. Kory's statement in response to Plaintiffs' lawsuit and June 9th Press Release was first published in the member "Forum" section of the Internet website "The Leonard Cohen Files" (www.leonardcohenfiles.com) on June 14, 2005 ("Kory's June 14th Response"). (Arjatsalo Aff. ¶ 10; Cohen Aff. ¶ 9; Traub Aff. ¶ 7.)

13. Kory's June 14th Response, drafted by DKC on behalf of Cohen, stated in its entirety:

> **ATTORNEY ROBERT KORY STATEMENT IN RESPONSE TO AGILE GROUP SUIT INVOLVING LEONARD COHEN**

> The suit filed by Agile Group Monday, June 6, 2005 is completely consistent with Agile's reckless disregard for its client and his investments.
>
> We had hoped to reach an out-of-court settlement with Agile that returned to Mr. Cohen some portion of the retirement money the firm was authorized to administer on his behalf. Instead, in the middle of negotiations to determine Agile's responsibilities to Mr. Cohen to compensate him for money lost under their management, Agile launched a surprise attack in an effort to besmirch the reputation of one of its notable clients.
>
> Agile repeatedly failed to alert Mr. Cohen to true account balances while allowing improper and unauthorized withdrawals by Cohen's former business manager. In doing so Agile failed to protect Mr. Cohen's interests and retirement savings and knowingly misled him by providing inaccurate financial reports.
>
> We will of course file a counter suit that lays out in detail how Agile acted in a reckless way that violated the firm's fiduciary responsibilities towards Cohen and consequently resulted in the loss of Mr. Cohen's retirement savings.
>
> (Exh. A-3, p. 9 of 11; Traub Aff. ¶ 5, Exh. C-2.)

14. Kory's June 14th Response was first published *five* days after Plaintiffs' June 9th Press Release as a response to Plaintiffs' allegations. (Arjatsalo Aff. ¶¶ 6,10; Cohen Aff. ¶ 9; Traub Aff. ¶ 7.) Cohen requested that Kory's June 14th Response be narrowly distributed to outlets that published or discussed Plaintiffs' June 9th Press Release. (Traub Aff. ¶ 6.)

Cohen and Kory Served Boulder County Complaint After Agile's Issuance of June 9th Press Release

15. Kory was served the Boulder County District Court Complaint on Friday, June 27, 2005. (Exh. A-4, Return of Service of Summons, Boulder County District Court Case No. 2005CV507.)

Agile's Attorney, Sherab Posel, Grants Interviews to the Press Regarding the Controversy

16. On June 27, 2005, Laura Bond, a reporter for the DENVER WESTWORD NEWS, contacted Cohen via e-mail requesting an interview. (Cohen Aff. ¶ 11.) Cohen declined Ms. Bond's request to be interviewed for the Westword article regarding Greenberg's lawsuit. (*Id.*)

17. Plaintiffs' attorney, Sherab Posel, is quoted in the article that Bond wrote entitled "Hellalujah", published on June 30, 2005 at the website for DENVER WESTWORD NEWS, www.westword.com. (Exh. A-13, p. 2 of 3; Cohen Aff. ¶ 12, Exh. B-8.); Laura Bond, *Hellalujah*, DENVER WESTWORD NEWS, June 30, 2005, http://www.westword.com/2005-06-30/news/hellalujah/. Posel is quoted in the article as stating that Agile decided to litigate because they were "left no choice" and elected to "take [their] chances with the court of public opinion." (*Id.*)

Kory Removes Case to District of Colorado

18. Kory removed the case from Boulder County District Court to the District of Colorado on July 1, 2005. (Docket No. 1.)

19. Cohen was served the Boulder County District Court complaint on July 1, 2005. (Exh. A-5, Return of Service of Summons, Boulder County District Court Docket for Case No. 2005CV507.)

Plaintiffs Amend The Complaint in August 2005 Adding Claims for Defamation Against Cohen and Kory Following Kory's June 14th Response

20. Plaintiffs amended their complaint on August 2, 2005 adding a defamation claim against Cohen and Kory alleging that Kory's June 14th Response is defamatory towards plaintiffs. (Docket No. 8-1, Amended Complaint ¶¶ 156-163.)

21. Plaintiffs made no mention in their pleadings of their own June 9th press release issued *prior* to Kory's June 14th Response and alleged that Cohen published Kory's statement on or about June 6th. (Amended Complaint and Jury Demand, Docket No. 8, August 2, 2005; Second Amended Complaint and Jury Demand, Docket No. 93, May 23, 2006; SAC ¶¶ 175, 201.)

22. Cohen granted an interview request to Maclean's magazine, a Canadian publication, in early August 2005 after Cohen learned that Maclean's was determined to publish an article regarding the legal controversy with Plaintiffs regardless of whether Cohen commented for the article. (Cohen Aff. ¶ 13.)

23. Plaintiffs filed their Second Amended Complaint on May 23, 2006 alleging additional defamatory statements based upon republication by others of Kory's June 14th Response on additional Internet websites and Cohen's statements in articles published on Maclean's magazine's and Buddhist Channel's websites in August and October 2005, respectively. (Docket No. 93; SAC ¶¶ 179(a)-(e), 180, 181.)

Kory's June 14th Response Removed From The Leonard Cohen Files After Plaintiffs Sue Cohen and Kory for Defamation

24. Following Plaintiffs' amendment adding a claim for defamation against Cohen and Kory based upon Kory's June 14th Response, Cohen instructed Jarkko Arjatsalo, webmaster of the Leonard Cohen Files website, to remove Kory's June 14th Response from the website at www.leonardcohenfiles.com. (Arjatsalo Aff. ¶ 12; Cohen Aff. ¶ 15.)

25. Agile's June 9th Press Release disseminated through Business Wire publicizing their claims of extortion and civil conspiracy against Cohen remains accessible on numerous Internet websites. For example, Agile's press release remains available for viewing at the following Internet addresses (URLs):

http://findarticles.com/p/articles/mi_m0EIN/is_2005_June_9/ai_n13807078

http://www.thefreelibrary.com/Agile+Group+Sues+Recording+Artist+Leonard+Cohen+for+Extortion+and...-a0133118114

http://www.allbusiness.com/legal/legal-services-litigation/5156254-1.html

(Exh. A-6.)

Remaining Traditional Holdings Funds are Interpled Into the Court's Registry Under Rule 67

26. Plaintiffs, through the August 2, 2005 amendment to the complaint, also added an interpleader claim adding Kelley Lynch as a defendant. (Docket No. 8.)

27. On November 14, 2005, by Order of this Court, Plaintiffs' Amended Motion to Deposit the Interpleaded Funds into the Registry under Federal Rule of Civil Procedure 67 was granted. (Order (Nov. 14, 2005); Docket No. 58.) Pursuant to that Order, on December 14, 2005, Plaintiffs deposited into the Court's Registry total funds in the amount of $152,165.88, which amount is subject of the interpleader claim. (SAC ¶¶ 198, 269, 274; Cohen's Answer and Counterclaims ¶ 198, 274; Docket Nos. 66, 67.)

28. Plaintiffs filed a second unopposed motion for leave to deposit $2,014.90 in additional funds into the Registry of the Court on July 31, 2006. (Docket No. 109.) That motion was granted on August 1, 2006. (Order (Aug. 1, 2006))

29. The total of deposited funds in the Court's Registry is approximately $154,180.78. (Docket Nos. 66, 67.)

30. Cohen claims that the remaining Traditional Holdings Funds belong to him. (SAC ¶ 197; Cohen's Answer and Counterclaims ¶ 197.)

V. PLAINTIFFS' CLAIMS FOR DEFAMATION AND COMMERCIAL DISPARAGEMENT

A. Cohen's Allegedly Defamatory Statements

Plaintiffs' defamation and commercial disparagement claims are based upon five publications of Kory's June 14th Response on interactive and other Internet websites, including three music-oriented blogs, a news article published on the website of the Boulder County Business Report, and Cohen's fan website. (Exhs. A-3, A-7 -10; SAC ¶¶ 179(a)-(e), 217-218.)

In addition, Plaintiffs claim that Cohen made additional "false, disparaging and defamatory statements" to "a reporter for an industry publication known as Macleans." The allegedly defamatory statements were published in an article entitled "A 'Devastated' Leonard Cohen", published on the Internet at Maclean's magazine's website www.macleans.ca on August 17, 2005. (Exh. A-11; SAC ¶¶ 181, 217-218.) Another publication which allegedly contained defamatory statements attributed to Cohen was an article entitled "Leonard Cohen's Troubles May Be a Theme Come True" published on the Internet at the Buddhist Channel website, www.buddhistchannel.tv. (Exh. A-12; SAC ¶¶ 180, 217-218.)

B. Plaintiffs' Claim for Damages

Plaintiffs claim actual, special and consequential damages due to the allegedly defamatory publications, including loss of clients, lost revenues and anticipated future profits. (SAC ¶¶ 188-190, 214.) Plaintiffs also claim punitive damages for both their defamation and commercial disparagement claims. (SAC ¶¶ 215, 222.) Damages sustained by Plaintiffs were allegedly sustained "as a direct and proximate result of Cohen and Kory's conduct and statements." (SAC ¶ 221.)

C. Plaintiffs Have Not Shown That Cohen Made False Statements Regarding Certain Plaintiffs

Plaintiffs have produced no evidence tending to show that Cohen published any false statements regarding Plaintiffs Natural Wealth Real Estate, Inc, Tactical Allocation Services, LLC or Greenberg & Associates Securities, Inc. (SAC ¶¶ 179(a)-(e), 180-181.) Absent evidence of publication, these Plaintiffs cannot maintain either a defamation nor a disparagement cause of action against Cohen.[1] Thus, the defamation and commercial disparagement claims brought by these Plaintiffs against Cohen should be dismissed as a matter of law.

VI. PLAINTIFFS' FIRST CLAIM FOR DEFAMATION SHOULD BE DISMISSED

A. Plaintiffs Consented to the Defamation By Inviting Public Comment By Cohen and Kory

Consent is an absolute bar to recovery for defamatory statements. *Walters v. Linhof*, 559 F. Supp. 1231, 1237 (D. Colo. 1983)(finding constructive consent by inviting public comment and granting summary judgment on defamation claim on basis of privilege); *Dominguez v. Babcock*, 727 P.2d 362, 364 (Colo. 1986); *Costa v. Smith*, 43 Colo. App. 251, 252 (Colo. Ct. App. 1979); *Williams v. Burns*, 540 F. Supp. 1243, 1250

[1] In Colorado, the elements of a cause of action for defamation are: "(1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication." *Walters v. Linhof*, 559 F. Supp. 1231, 1236 (D. Colo. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 558 (1979)). With respect to trade disparagement, Colorado has adopted the following definition from the Restatement:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
> (b) he knows that the statement is false or acts in reckless disregard to its truth or falsity.
> *Teilhaber Mfg. Co. v. Unarco Materials Storage*, 791 P.2d 1164, 1166 (Colo. Ct. App. 1989) (quoting RESTATEMENT (SECOND) OF TORTS § 623(A) (1976)).

(D. Colo. 1982). Under Restatement (Second) of Torts § 892(1) (1979), "consent" as used in Section 583 means "willingness in fact for conduct to occur." Apparent consent, or "words or conduct…reasonably understood by another to be intended as consent," also bars recovery. RESTATEMENT (SECOND) OF TORTS § 583 (1977), RESTATEMENT (SECOND) OF TORTS § 892(2) (1979).

Allegedly defamatory statements cannot form the basis of a defamation suit where statements are solicited by plaintiffs or agents of plaintiff. *Melcher v. Beeler*, 48 Colo. 233, 247-248 (Colo. 1910); *Kelewae v. Jim Meagher Chevrolet, Inc.*, 952 F.2d 1052, 1055 (8th Cir. 1992); *Jones v. Clinton*, 974 F. Supp. 712, 732 (D. Ark. 1997)(finding that Jones invited the President's response to her allegations from a public forum and cannot be heard to complain that the responses issued (to the extent that they were characterized as defamatory) on his behalf were improper). Further, "the plaintiff's consent is a defense even though he procures the publication for the purpose of decoying the defendant into a lawsuit." RESTATEMENT (SECOND) OF TORTS § 583 (1977) comment f, Reporter's Notes, citing to *Melcher*, 48 Colo. 233 at 248.[2]

Sherab Posel, Plaintiffs' attorney, is quoted in an article published June 30, 2005 entitled "Hellalujah", a sardonic play upon Cohen's famous song titled "Hallelujah", as saying that Agile decided to litigate because they were "left no choice" and decided to "take [its] chances with the court of public opinion." (Exh. A-13, p. 2; Cohen Aff. ¶ 12, Exh. B-8.) Plaintiffs' initial filing of the lawsuit on June 5th did not attract media

[2] Comment f to Restatement (Second) of Torts § 583 (1977) provides:

> The privilege conferred by the consent of the person about whom the defamatory matter is published is absolute. The protection given by it is complete, and it is not affected by the ill will or personal hostility of the publisher or by any improper purpose for which he may make the publication, unless the consent is to its publication for a particular purpose, in which case the publication for any other purpose is not within the scope of the consent.

attention. Therefore, the only inference to be drawn from Plaintiffs' June 9th Press Release publicizing the lawsuit is that Plaintiffs deliberately sought public and media attention. Rather than quietly seeking to redress their purported claims against Cohen and Kory which arose out of the failed attempt to privately mediate Cohen's claims, Plaintiffs instead chose to transform what was originally a purely private matter into a very public matter. Plaintiffs unilaterally issued a press release to the widest possible audience while knowing Cohen's celebrity would attract public attention.[3]

In contrast, Cohen attempted to minimize publicity regarding his claims against Plaintiffs. He first sought confidential mediation. Even after Plaintiffs charged him with criminal conduct, Cohen rebutted the charges with care. He first responded to Plaintiffs' charges with a short statement posted on a European fan website that has a few thousand members. (Arjatsalo Aff. ¶ 5.) Several days prior to the DENVER WESTWORD NEWS article's publication at Westword.com on June 30th, Cohen was approached by the author, Laura Bond, to comment upon the litigation with Greenberg. (Cohen Aff. ¶ 11.) Cohen declined to respond. (*Id.*) As a consequence, Bond wrote an article that Cohen felt became a "wholly one-sided article that maliciously attacked [him] and placed [him] in a very bad public light." (Cohen Aff. ¶ 12.) Coupled with Posel's statement that Agile wanted to take the dispute with Cohen to "the court of public opinion", Cohen had every reason to believe that Agile invited his public response. (Cohen Aff. ¶ 12.)

[3] *See* SAC ¶ 18 wherein Plaintiffs acknowledge that Cohen is a "well-known celebrity." Plaintiffs would later claim in the SAC (filed in May 2006), in bringing their defamation claim against Kory and Cohen, that Plaintiffs recognized that they would be "unable to prevail in a contest of trading public accusations with a well-known and popular music figure" (SAC ¶ 210), yet *initiated* such a public contest by issuing a press release on June 9th publicizing their claims and accepting interview requests with a local news reporter shortly after filing in late June 2005 (Posel) and later in October 2005 (Greenberg). (Exhs. A-2, A-12, A-13.)

Even if Plaintiffs did not expressly consent to Cohen's public comments, which they now claim are defamatory, the Court should find that Plaintiffs constructively consented through their conduct to Cohen's media response by issuing a provocative, incendiary press release which they knew, because of Cohen's celebrity and notoriety, would garner much public attention. *See* RESTATEMENT (SECOND) OF TORTS § 892(2) (1979)(defining apparent consent as "words or conduct…reasonably understood by another to be intended as consent."). Plaintiffs additionally knew or anticipated that Cohen would be contacted by the press seeking comment regarding the claims of unseemly criminal conduct contained in the June 9th Press Release. *See, e.g.*, (SAC ¶ 18.) Thus, Cohen is entitled to summary judgment as a matter of law on Plaintiffs' defamation claim on the basis of Plaintiffs' consent.

B. Cohen's Allegedly Defamatory Statements Were Conditionally Privileged

Even if Cohen's statements were defamatory towards Plaintiffs, summary judgment is appropriate as a matter of law because Cohen's allegedly defamatory statements were conditionally privileged under Cohen's personal right of self-defense. Further, Cohen did not abuse the privilege through irrelevant statements, excessive publication of his reply or through the demonstration of bad faith or malice. Rather Cohen crafted a tailored reply addressed narrowly to his fans. He published his reply on a European fan website where a heated discussion of Plaintiffs' incendiary June 9th Press Release and criminal charges against Cohen had begun. Cohen's reply also lacks any indicia of malice as he was acting in good faith to protect his reputational interests as a world renowned celebrity who had been accused by Plaintiffs in their widely disseminated press release of criminal conduct, including extortion and procuring false

testimony, as well as civil conspiracy.[4] Further, Cohen at all times believed that the allegations made by him against Greenberg were true, and Cohen never entertained

[4] It should be noted that Plaintiffs initiated a public attack on Cohen replete with Plaintiffs' own malice and without any claim to privilege. Agile's press release asserted that Cohen and Kory had been "charged" (implying to any reasonable reader that criminal proceedings had been instituted) with "exortion" and "procur[ing] false testimony." Under Restatement (Second) of Torts §571 (1977), statements imputing conduct constituting a criminal offense are libelous *per se*:

> One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be:
> (a) punishable by imprisonment in a state or federal institution, or
> (b) regarded by public opinion as involving moral turpitude.

Both extortion and procuring false testimony are considered criminal offenses in most jurisdictions and crimes that involve moral turpitude. Thus, statements made in Agile's June 9th Press Release are *libelous per se* because the defamatory meaning is apparent from the face of the publication and because they unambiguously impute improper criminal conduct to Cohen and Kory and also imply that criminal charges had been filed against them.

Further, the press release was not privileged under the absolute attorney privilege accorded to attorneys in connection with a court case as set forth in the Restatement (Second) of Torts § 586 (1977) which provides that:

> An 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, a judicial proceeding in which he participates as counsel, *if it has some relation to the proceedings*. (emphasis supplied).

Colorado has adopted the privilege as set forth in the Restatement §586. *Seidl v. Greentree Mortgage Co.*, 30 F. Supp. 2d 1292, 1313 (D. Colo. 1998)(citing to *Club Valencia Homeowners Ass'n. v. Valencia Ass'n.*, 712 P.2d 1024 (Colo. Ct. App. 1985)). In *Seidl*, however, the District of Colorado found that there was no absolute attorney privilege under Colorado law "for statements by an attorney or by a party made to the press or gratuitous statements posted on the Internet for the purpose of publicizing the case to persons who have no connection to the proceeding except as potentially interested observers." *Seidl* at 1315. The *Seidl* court also found that "an attorney who wishes to litigate his case in the press will do so at his own risk." *Id.*

Because no judicial action had been taken on the pleadings reported upon in Agile's press release, the publication was also not privileged under the "fair report" privilege recognized in Restatement (Second) of Torts §611 (1977). *Quigley v. Rosenthal*, 327 F.3d 1044, 1062 (10th Cir. 2003)(citing to *Meeker v. Post Printing and Publishing Co.*, 55 Colo. 355 (Colo. 1913)). Comment e to Restatement § 611 explains that an important reason for denying the fair report privilege to a publication reporting upon a proceeding before any judicial action has been taken is to "prevent implementation of a scheme to file a complaint for the purpose of establishing the privilege to publicize its content and then dropping the action." RESTATEMENT (SECOND) OF TORTS § 611, cmt. e (1977).

Finally, the Colorado Supreme Court has held that accusations of criminal activity, even in the form of opinion, are not constitutionally protected. *Keohane v. Stewart*, 882 P.2d 1293, 1304 (Colo. 1994)(citing to *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1359 (Colo. 1983)).

doubts as to the truth of his allegations of Greenberg's reckless disregard as to Cohen's reputation or financial interests.

Cohen's self-defense subsequently proved wholly justified as Plaintiffs' claims were later dismissed. The claims for extortion, civil conspiracy and violations of the Colorado Organized Crime Control Act ("COCCA") were dismissed upon Cohen's Motion to Dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) on December 4, 2006. *See* Order (Dec. 4, 2006), *Natural Wealth Real Estate, Inc. v. Cohen*, 2006 WL 3500624, 2006 U.S. Dist. LEXIS 87439 (D. Colo.). Cohen also demonstrated his absence of malice by declining to be interviewed until after Plaintiffs had declared in a wholly one-sided article attacking Cohen that they were taking their claims against Cohen to the "court of public opinion." Cohen, evidenced his belief in the truth of his allegations by advancing his claims first in an effort at confidential mediation and thereafter in this Court, while declining, as much as reasonably possible given his celebrity, Plaintiffs' invitation to litigate in "the court of public opinion."

1. The Conditional Privilege of Self-Defense is Recognized in the Tenth Circuit

The elements of conditional privilege as set out in Restatement Second of Torts § 593 provide that one who publishes defamatory material is not liable if "the matter is published upon an occasion that makes it conditionally privileged, and the privilege is not abused." RESTATEMENT (SECOND) OF TORTS §593 (1977). Colorado recognizes that one has a privilege to communicate in good faith printed or written matter to another notwithstanding that it is defamatory where the publisher is promoting a legitimate individual, group or public interest. *Ling v. Whittemore*, 140 Colo. 247, 250 (Colo.

1959)(and cases cited therein). It is exclusively for the judge to determine whether an occasion on which the alleged defamatory statement was made was such as to render the communication a privileged one. *Id.* at 251. Once it is determined that a communication is privileged, the burden is upon the plaintiff to establish that the defendant acted maliciously. *Id.* at 252. Even if the statements are false, such falsity, of itself, is not sufficient to raise the inference that they were maliciously inspired. *Id.*

A conditional privilege of self defense against defamation is recognized in Section 594, comment k of the Restatement (Second) of Torts (1977). Restatement (Second) of Torts, § 594 regarding the protection of a publisher's interest provides:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.
>
> Comment k. *Defense against defamation*.
> A conditional privilege exists under the rule stated in this Section when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment…*Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another, including the statement that his accuser is an unmitigated liar*. (emphasis supplied).[5]

The privilege of self-defense accorded to one whose reputation is under attack embodied in the Restatement has been recognized in the Tenth Circuit. *Lee v. Calhoun*,

[5] Note 4 to Restatement §623 also provides: "Self-help may be resorted to, not only to reveal the falsity of the defamatory statement and to vindicate the reputation, but also to punish the defamer and retaliate against him." RESTATEMENT (SECOND) OF TORTS §623, note 4 (1977).

948 F.2d 1162, 1166 (10th Cir. 1991); *Walters*, 559 F. Supp. at 1236. In *Lee v. Calhoun*, Lee filed a suit for medical malpractice against Dr. Calhoun claiming that Dr. Calhoun had misdiagnosed his condition and performed emergency surgery without his consent. *Lee*, 948 F.2d at 1162. After the suit was filed, a reporter approached the doctor seeking comment and the doctor's explanation and response to the claims in the malpractice lawsuit appeared in THE DAILY OKLAHOMAN. *Id.* at 1163. After the story appeared in the newspaper, Lee amended his complaint to include a defamation claim and invasion of privacy claim. *Id.* at 1164. The Tenth Circuit affirmed the district court's finding that Calhoun's statements were conditionally privileged under Restatement (Second) of Torts § 594. *Id.* at 1166. The district court, in affirming summary judgment on the defamation claim, had found that the occasion upon which Calhoun made his statements, in response to a reporter's questions regarding the lawsuit, was "clearly an instance upon which Dr. Calhoun was entitled to provide information that affected his important interest in his own reputation as a medical provider." *Id.* Further, the district court found that Lee failed to provide any evidence that Dr. Calhoun had abused his conditional privilege. *Id.*

Other courts have also recognized the Restatement's conditional privilege of self-defense as a complete defense to a claim of libel or slander. *See, e.g. Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559 (4th Cir. 1994); *Gregory v. Durham County Bd. of Educ.*, 591 F. Supp. 145, 156 (M.D.N.C. 1984)(finding school superintendent's statements privileged as self-defense under Restatement (Second) of Torts, § 594 cmt. k (1977)); *Novecon Ltd. v. Bulgarian-American Enterprise Fund*, 190 F.3d 556, 566-567 (D.C. Ct. App. 1999)(finding common-law privilege of self-defense sufficient to sustain dismissal of defamation claim without reaching First Amendment argument); *Konikoff v.*

The Prudential Ins. Co. of Am., 234 F.3d 92, 98 (2nd Cir. 2000)(finding a common law privilege covering a speaker's communications designed to protect speaker's own legitimate interests.)

In *Foretich v. Capital Cities/ABC, Inc.*, the Fourth Circuit found that public statements made to the press and television reporters in response to accusations of sexual misconduct which arose out of litigation surrounding a heated child custody battle were privileged statements made in self-defense because they were responsive, not disproportionate to the accusations of misconduct, and were not excessively published. *Foretich*, 37 F.3d 1541 at 1563. The court, when analyzing the reasonableness of the public reply to the accusations of criminal conduct, looked to the common law "on the conditional (or qualified) privilege of reply, as known as the privilege to speak in self defense or to defend one's reputation" and found that "every man has a right to defend his character against false aspersion" and that "every person whose own good name has been attacked is entitled to answer such attack in his own defense with defamatory charges against his attacker which relate to and answer the plaintiff's charges." *Id.* at 1559-1560 (and cases cited therein).

At the time DKC drafted Kory's proposed response to Agile's press release on behalf of Cohen, Cohen believed that the Agile press release ascribing criminal conduct to him seriously threatened his reputation with his fans worldwide. (Cohen Aff. ¶ 2.) Following the publication of Agile's press release on June 9th on Yahoo! Finance, one of Cohen's fans alerted Cohen to the press release and expressed shock, concern and disbelief. (Cohen Aff. ¶ 5.) In the days that followed Agile's press release, the news that Cohen and his attorney Kory were being accused of criminal conduct by Cohen's former

investment advisor spread virally throughout the Internet and Agile's press release was translated into Polish, Spanish and even Croatian. (Cohen Aff. ¶ 8.) A registered user on "The Leonard Cohen Files", a fan website created a discussion thread in the "Forum" section of the website entitled: "artist v. con-artist(s): an unhappy battle brewing" on Friday, June 10, 2005 after having seen the Agile Press release. (Arjatsalo Aff. ¶ 6.) Other members of The Leonard Cohen Files website wrote comments upon the news item in the Forum section within the discussion thread expressing concern and disbelief that Cohen would be involved in criminal activity. (Arjatsalo Aff. ¶ 7.) Fans requested more information regarding the controversy and wanted to hear Cohen's side of the story. (*Id.*; Cohen Aff. ¶ 5.)

Kory, on behalf of Cohen, contacted DKC, a New York public relations firm, to assist in preparing Cohen's public response to Agile's public attack in the press and to handle press inquiries. (Traub Aff. ¶ 5; Cohen Aff. ¶ 3.) Matthew Traub and Joe DePlasco of DKC drafted a response to Agile's June 9th Press Release on behalf of Cohen to be delivered through Cohen's attorney Robert Kory. (Cohen Aff. ¶ 3; Traub Aff. ¶ 5.) Cohen approved the final language of Kory's statement and wanted to publish Kory's statement on Arjatsalo's website in response to fans' requests for more information regarding the legal controversy and Agile's outrageous and salacious allegations that Cohen and his attorney had engaged in criminal conduct. (Cohen Aff. ¶¶ 3, 9-10.) The full text of Kory's statement was posted in the "Forum" section of the website within the discussion thread regarding the lawsuit on June 14, 2005, five days *after* Plaintiffs' issued their press release. (Arjatsalo Aff. ¶ 10; Cohen Aff. ¶ 9; Traub Aff. ¶ 7.) On these facts, the Court should find that Cohen's statements made in response to Agile's allegations of

criminal conduct meet the initial test of conditional privilege as provided for in Restatement § 594, cmt. k.

2. Cohen's Statements Made In Self-Defense of His Reputational Interests Did Not Abuse the Privilege

A conditional privilege of self-defense may be lost or waived by one claiming the privilege if: 1) his reply includes substantial defamatory matter that is "irrelevant" or "nonresponsive" to the initial attack; 2) his reply includes substantial defamatory matter that is "disproportionate" to the initial attack; or 3) the publication of his reply is "excessive", i.e., addressed to too broad an audience. RESTATEMENT (SECOND) OF TORTS §§ 599, 603-605 (1977).

Additionally, a conditional privilege may be lost upon a showing of malice. *Dominguez,* 727 P.2d at 366; *Ling*, 140 Colo. at 250-251. Other circuits have determined that the common-law malice necessary to overcome the self-defense privilege is considerably different from the "actual malice" necessary to overcome the First Amendment privilege. *Novecon Ltd.*, 190 F.3d at 567 (finding that common-law malice necessary to defeat a conditional privilege in the District of Columbia "emphasizes bad faith and evil motive"); *Konikoff,* 234 F.3d at 99 (finding that the critical difference between common law malice and constitutional malice is that the "former focuses on the defendant's attitude toward the plaintiff, the latter on the defendant's attitude toward the truth.").

The First Amendment actual malice standard is a higher standard than common law malice; only clear and convincing proof will support recovery. *Duffy v. Leading Edge Prods.*, 44 F.3d 308, 313 (5th Cir. 1995). Negligence, lack of investigation, or failure to act as a reasonably prudent person are insufficient to show actual malice. *Id.*

Further, the privilege is not lost if the defendant *actually believed* the defamatory statement to be true. *Id.* at 314 (emphasis supplied).

The Colorado Supreme Court has found that the malice necessary to vitiate a conditional or qualified privilege is knowledge or reckless disregard as to falsity. *Dominguez,* 727 P.2d at 366. A defamatory statement in the media context, as here, made with "actual malice" is a communication "known to be false…or made with reckless disregard of whether it was true or false." *Id.* at 366 n. 1 (citing to *DiLeo v. Koltnow*, 200 Colo. 119, 122 (Colo. 1980)). Further, a person acts with reckless disregard of the veracity of a statement when he "in fact entertain[s] serious doubts as to the truth of his publication." *Id.* (citing *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1361 (Colo. 1983)). The *Dominguez* court distinguished the standard applied in non-media cases and found that the focus in media contexts is a robust press. *Dominguez,* 727 P.2d at 366, n. 1.

The question of malice may be appropriate for resolution by summary judgment if there is no genuine issue concerning malice or reckless disregard. *Id.* at 366-367 (citing to *Ling*, 140 Colo. at 251); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990)(finding that "the question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.")

Cohen's public statements in response to Agile's June 9th Press Release were: 1) responsive to Agile's attacks; 2) proportionate to those attacks; 3) not excessively published; and 4) not published with malice.

a. Cohen's Statements Were Responsive to Agile's Attack

To be "responsive", a reply's contents must clearly relate to its supposed objective – blunting the initial attack and restoring one's good name. *Foretich*, 37 F.3d at 1560. Further, statements that simply deny the accusations, or directly respond to them, or express one's impressions upon first hearing them are certainly responsive. *Id.* The Fourth Circuit found in *Foretich* that "our reading of the extensive case law on abuse of the privilege of reply demonstrates, however, that a public response to a public attack may be 'uninhibited, robust and wide-open'…without stepping over the line into abuse." *Id.* at 1559-1560 (citing to *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

Cohen's public comments regarding the Agile lawsuit and press release, including Kory's June 14th Response made on his behalf, were relevant and responsive to Agile's accusations of criminal conduct made publicly against him in Agile's June 9th Press Release. Notably, the undisputed facts demonstrate that Kory and Cohen made no public comments or statements about the controversy until *after* Agile filed its preemptive complaint in the Boulder District Court and *after* Agile issued its own press release publicizing the lawsuit. *See* § IV, *supra*, ¶¶ 5-14.

Kory's June 14th Response and Republications on Internet Websites

Kory's June 14th Response, first posted on Leonard Cohen's fan website www.leonardcohenfiles.com was labeled as being specifically in response to "Agile Group Suit Involving Leonard Cohen." (Exh. A-3, p. 9 of 11.) The forum discussion thread where Kory's statement was posted was started June 10th by a registered user of the fan website who had seen Agile's June 9th Press Release. (*Id.*; Arjatsalo Aff. ¶ 6.) The discussion thread begins with the publication of Agile's June 9th Press Release in its entirety entitled "Agile Group Sues Recording Artist Leonard Cohen for Extortion and

Conspiracy." (Exh. A-3, p. 1 of 11.) Kory's Response was posted five days later in the online discussion thread. (Arjatsalo Aff. ¶ 10.)

Kory claims in his Response that "the suit filed by Agile…is completely consistent with Agile's reckless disregard for its client and his investments" and that "Agile launched a surprise attack *in an effort to besmirch the reputation* of one of its notable clients", which in the context of the discussion forum in which it was posted, was responsive to both the filing of the lawsuit and Agile's subsequent press release publicizing its claims. Agile's Press Release included allegations of criminal and conspiratorial conduct on the part of Cohen and his attorney Kory, allegations which would impugn Cohen's (and Kory's) reputation and character. Kory concludes his statement "we will of course file a counter suit that lays out in detail how Agile acted in a reckless way that violated the firm's fiduciary responsibilities towards Cohen and consequently resulted in the loss Mr. Cohen's retirement savings."

The four other "derivative" Internet republications of Kory's June 14th Response upon which Plaintiffs base their defamation claim were also responsive to Agile's public attack upon Cohen and Kory.

CMU Music Network

On Thursday, June 16th, 2005, the U.K.-based CMU Music Network posted a news item entitled "Cohen Responds to Finance Firm's Lawsuit" under the website's "CMU Daily – On the Inside" feature which quotes from Kory's June 14th Response. (SAC ¶ 179(b); Exh. A-7.) Plaintiffs claim that this publication contains direct quotes from Kory ("Kory told CMU"). (*Id.*) While Kory made no statement directly to CMU, the news item quoting from Kory's June 14th Response was clearly made in response to

an earlier news report of the Agile lawsuit and press release. (Exh. A-7, "As reported last week"). A search of the news archives of the CMU Music Network website revealed that CMU had posted a daily news item on Friday, June 10, 2005 entitled "Investment Firm Sue [sic] Cohen." (Exh. A-14, pp. 2-3 of 8.) The June 10th news item quotes from Agile's lawsuit and concludes that [as of June 10th] "both Cohen and Kory are yet to comment on the lawsuit", which directly contradicts Plaintiffs' claim that Kory made statements to CMU. (*Id.* at p. 3 of 8; Cohen Aff. ¶ 8, Exh. B-6.)

No Rock and Roll Fun.com

Likewise, Kory's Response was posted by "Anonymous" on June 14, 2005 *after* a June 10th news item reporting Agile's lawsuit on a website entitled "No Rock and Roll Fun.com" located at http://xrrf.blogspot.com/2005/06/leonard-cohen-mr-big.html. (SAC ¶ 179(c); Exh. A-8.)

The Age – MalContent Blog

A blog entitled "MalContent" appearing on a website called "The Age" (www.theage.com.au), an Australian publication, contained a news post entitled "Leonard Cohen Sued by Investment Company, Alleging Civil Conspiracy, Extortion" added by Malcolm Maiden on June 10, 2005 which reported upon Agile's lawsuit. (SAC ¶ 179(d); Exh. A-9.) The blog contained a reply post made by Adrian du Plessis on June 14, 2005 which reprinted Kory's June 14th Statement in its entirety. (Exh. A-9.)

Boulder County Business Report – July 8, 2005

A July 8, 2005 article written by Doug Storum published on the website for the Boulder County Business Report entitled "Agile Group Sues Singer Leonard Cohen for Extortion" reported upon the allegations contained in Agile's June 6th lawsuit. (SAC ¶

179(e); Exh. A-10.) The news article also reported that "Kory responded to the lawsuit June 14 on [sic] by posting a statement on Cohen's website, promising to file a countersuit." The article also contains selected quotations from Kory's June 14th Response. (Exh. A-10.)

MACLEANS.CA Article – August 17, 2005

Plaintiffs also claim that Cohen made defamatory statements in an article published on the Internet by Maclean's magazine entitled "A 'Devasted' Leonard Cohen." (SAC ¶ 181; Exh. A-11.) The article contains direct quotes attributed to Cohen and Lynch. (Exh. A-11.) While the article claims that Greenberg "declined to comment for this article", the article contains generous direct quotations and paraphrasing from the allegations contained in Agile's lawsuit, many of which repeat the "salacious details" and allegations of criminal conduct on the part of Cohen and Kory contained in the complaint. For example, the article discusses Agile's allegations of an extortionate plot against Greenberg: "Cohen and Kory began to pressure Lynch to join them in 'their extortion scheme'" and "Cohen was ready to 'forgive' Lynch's obligations to him" and promised that she would "receive a hefty cut of 'whatever funds could be extorted from Greenberg and other advisers with her co-operation.'" (*Id.* at p. 5.) Further, the article also repeated the allegations made in Agile's complaint that Kory and Cohen vowed to "crush" Lynch when she refused to participate in their "extortion scheme" by employing "tactics to terrorize, silence or disparage Lynch" which included "threatening that she would go to jail." (*Id*.) The article also repeated the complaint's accusations that Cohen's and Kory's tactics against Lynch also included "paying two paroled convicts to

make statements that they had observed Lynch's older son brandishing a gun and threatening to kill someone." (*Id.*)

The statements attributed to Cohen in the article, several of which Plaintiffs claim are "false, disparaging and defamatory" towards them, were directly responsive to Agile's accusations of criminal conduct and impropriety on the part of Cohen and his attorney Kory discussed in the article. In his defense, Cohen claimed that he was "blindsided by Greenberg's lawsuit" and insisted that "he and Kory were in the midst of mediation with Greenberg when the financial adviser's lawsuit was suddenly and unexpectedly filed." (*Id.* at p. 6.) Cohen is also quoted as saying that "the mediation had been confidential, at Greenberg's urging, as he [Greenberg] feared for his reputation." (*Id.*) Cohen also expressed "reluctance" at launching his own lawsuits because he "[didn't] want anybody hurt. It's not my nature to contend with people that way." (*Id.*)

The Buddhist Channel Website Publication – October 6, 2005

An article entitled "Leonard Cohen's Troubles May Be a Theme come True", written by Marc Weingarten, a reporter for the New York Times and containing a date line of October 6, 2005, was [re]published on The Buddhist Channel website. (SAC ¶ 181; Exh. A-12.) The article reports upon Cohen's Los Angeles Superior Court lawsuit against Kelley Lynch and Richard Westin as well as Cohen's legal dispute with Plaintiffs and contains quotes apparently directly attributed by the author to both Cohen *and* Greenberg. (*Id.*)

Plaintiffs claim that the article contains allegedly defamatory statements by Cohen about Greenberg. (*Id.*)("Every month my investment manager, an old friend of Ms. Lynch's and a successful trader, sent me a report that my savings were safe, intact, and

even flourishing.") Notably, the article contains several direct quotes attributed to Greenberg. *See Masson v. New Yorker Magazine*, 501 U.S. 496, 511 (1991)(finding that "in general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author.") Greenberg is also reported as having denied that he overcharged Mr. Cohen for his services. (quotation marks appear around the phrase "Those were fees paid to lawyers for the sale of the rights associated with the songs.") (Exh. A-12, p. 2.) Greenberg is also quoted as saying that Cohen and Kory engaged in "fraudulent means and statements, and other torturous [sic] conduct" in order to "extort millions of dollars" from Greenberg. (*Id*.)

Plaintiffs do not claim that Cohen's apparent reference to Greenberg as "an old friend of Ms. Lynch" or a "successful trader" is defamatory, but instead claim that Cohen's statement that monthly reports sent by Greenberg claiming that his "savings were safe, intact, and even flourishing" is "false, disparaging and defamatory." (SAC ¶ 180.) Cohen's assertions are responsive to Greenberg's allegations.

b. Cohen's Statements Were Not Disproportionate to Agile's Attack

Proportionality involves an analysis of whether the public statements "were reasonably proportionate to the magnitude of the…first attack." *Foretich*, 37 F.3d at 1562. Under Restatement §594, comment k, one who reasonably believes his reputation is under attack may publish "in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another,

including the statement that his accuser is an unmitigated liar." RESTATEMENT (SECOND) OF TORTS § 594, cmt. k (1977).

Cohen (and Kory acting on Cohen's behalf as his attorney) was acting for the purpose of protecting his interest in his professional and personal reputation as a world renowned recording artist which had been maligned by false accusations of criminal conduct in Agile's Press Release. The press release falsely implied that Agile had "charged" Cohen and Kory with extortion and civil conspiracy. (Exh. A-2.) The implication of using the word "charged" would likely lead a reasonable reader to believe that criminal proceedings had been undertaken. Further, Agile's press release also implies that Cohen and Kory had attempted to and were in some instances successful in recruiting third parties to join their conspiracy and in procuring false testimony of witnesses. "Cohen and Kory attempted to (and in some instances did) recruit third parties in their conspiracy and procure false testimony." (*Id.*) Under federal criminal law, subornation of perjury is a criminal act subject to monetary penalties and imprisonment not to exceed five years. 18 U.S.C. 79 § 1622. Likewise, the press release also states that Agile "charged" Cohen and Kory with "extortion" in attempting to extort "millions of dollars from Agile and its insurer." (Exh. A-2.) The press release did not distinguish "civil" from "criminal" extortion. In Colorado (the press release "originated" in "BOULDER, Colo." where Plaintiffs are located), there is no cause of action for civil extortion. Thus, a reader unfamiliar with Agile's civil filing would, when reading the press release, likely believe that Cohen's attempt to extort "millions of dollars" from an investment advisor and its insurance company as well as "procuring false testimony" would be criminal acts. Plaintiffs alleged that Cohen, along with his attorney Kory, had

engaged in a nefarious scheme to extort millions from Agile and its insurer. *Compare Novecon Ltd.,* 190 F. 3d at 568 (finding it unlikely that a reader would interpret BAEF's letter as literally charging Novecon with the crime of extortion because the cover letter to the Wall Street Journal made clear that the reference was to Novecon's civil lawsuit and not to some nefarious scheme.).

The common law of defamation has long recognized that statements imputing criminal activity are so obviously and materially harmful to one's reputational interests that they must be deemed defamatory *per se*. *Foretich,* 37 F.3d at 1558 n. 15 (citing to RESTATEMENT (SECOND) OF TORTS § 571 (1977)("words imputing a 'criminal offense' that 'if committed in the place of publication, would be…punishable by imprisonment in a state or federal institution' are defamatory *per se*.").

The statements attributed to Cohen do not exceed the scope of defending himself against Agile's allegations of criminal conduct and do not publish defamatory matter regarding Plaintiffs irrelevant to the legal controversy between the parties.

c. Cohen's Statements Were Not Excessively Published

Another factor to consider in making a reasonableness determination is to analyze to whom the statements were directed. *Foretich*, 37 F.3d at 1563. "Excessive publication is conceptually parallel to the use of excessive force in self-defense" and "the reply must reasonably focus on the audience which heard the attack." *Id.* In Cohen's case, the "audience which heard the attack" by Agile is everyone who viewed Agile's June 9th Press Release widely disseminated on the Internet through Business Wire, and published by Yahoo! Finance and other websites. When the original attack is widespread (as was Agile's press release) the response can be widely disseminated as well. *Id.*

Cohen declined to widely publish his response and instead published his response to Agile's lawsuit and press release upon a fan website devoted to documenting his career as an author and recording artist. (Arjatsalo Aff. ¶¶ 10-11; Cohen Aff. ¶ 10; Traub Aff. ¶ 7.) As such, he countered Agile's June 9th widespread attack five days later with limited publication of a narrow statement addressed to his concerned fans, friends and colleagues seeking his response to Agile's salacious allegations. Rather than respond to hundreds of individual emails, Cohen addressed his fans through the discussion thread on the member forum section of his fan website where discussion of the legal controversy had grown intense and absence of Cohen's public response had become conspicuous. (Cohen Aff. ¶ ¶ 9-10.)

d. Cohen's Statements Were Not Published With Malice

The undisputed facts regarding the timing of Agile's June 9th Press Release and Cohen's subsequent responses demonstrate that there was no waiver of the privilege through malice because Cohen was acting in good faith to refute Plaintiffs' allegations and to protect his reputational interests. Even if Cohen's statements made in his defense were false, such falsity, of itself, is not sufficient to raise the inference that they were maliciously inspired. *Ling,* 140 Colo. at 252. Under the actual malice standard, Plaintiffs must show that Cohen at least "entertained serious doubts as to the truth of the communication." *Dominguez,* 727 P.2d at 366 n. 1. If the language of Cohen's statements and the circumstances attending their publication were not at least "as consistent with the nonexistence of malice, as with its existence, there is no issue for the jury" and therefore summary judgment is proper. *Novecon Ltd.,* 190 F. 3d at 567.

Cohen reasonably believed that his allegedly defamatory statements made in response to Agile's public allegations were proper means of defending his personal reputation and communicating his perspective to his worldwide fans on a legal controversy that Agile had intentionally thrust into "the court of public opinion." (Cohen Aff. ¶¶ 9-10, 12-13; Exh. A-13 wherein Sherab Posel is quoted as saying Agile "decided to take [its] chances with the court of public opinion") [6] He also believed that the allegations in his claims letter and as summarized in Kory's June 14th Response were true. His subsequent litigation is evidence of this belief.

Following Agile's August 2, 2005 amendment of their complaint adding a claim for defamation against Kory and Cohen, Kory's June 14th Response was removed from the "News" section of The Leonard Cohen Files website. (Arjatsalo Aff. ¶ 12; Cohen Aff. ¶ 15.) Cohen asked that this publication be removed to protect his friend, Mr. Arjatsalo, from being embroiled in possible litigation with Plaintiffs. (*Id.*) Cohen has never waivered from his belief that Mr. Greenberg showed reckless disregard to Mr. Cohen by falsely accusing him of criminal conduct and by sending him e-mail assurances that his funds were safe, when the accounts were in fact, empty. Cohen has also not pursued the public dispute with Greenberg.

In contrast, Agile's June 9th Press Release publicizing their lawsuit against Cohen and Kory remains available for viewing on the Internet and prominently ranks in the "results" page of a Google search for "Agile Group" despite the fact that Kory was

[6] Restatement (Second) of Torts § 604 (1977), comment b provides that:

> Often the only practicable means of communicating defamatory matter involves the probability or even a certainty that it will reach many persons whose knowledge of it is of no value in accomplishing the purpose for which the privilege is given. In this case, the publication is not excessive or an abuse of the privilege, if the importance of the interest involved, the gravity of the harm threatened to it and the inconvenience of any other means of communication make the publication reasonable.

dismissed from the lawsuit over two years ago on December 5, 2005 and Agile's claims for extortion and civil conspiracy against Cohen were dismissed for failure to state a claim in December 2006. [7]

C. Cohen's Statements Are Not Defamatory As A Matter of Law Because They Are Either True and/or Are Privileged Expressions of Opinion

Were the Court to find that Plaintiffs had not consented to Cohen's statements made in response to Agile's press release, and that Cohen's statements were not conditionally privileged under his personal right of self-defense, this Court should nevertheless dismiss Plaintiffs' defamation claims because Cohen's statements were constitutionally protected statements of opinion, published without actual malice.

Whether allegedly defamatory language is constitutionally privileged is a question of law. *Keohane v. Stewart*, 882 P.2d 1293, 1299 (Colo. 1994)(en banc). In *Milkovich v. Lorain Journal Co.*, the U.S. Supreme Court recognized the privilege of "fair comment" as incorporated into the law of defamation. *Milkovich*, 497 U.S. at 13. Fair comment protected statements that "concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." *Id.* at 13-14.

Colorado follows Section 566 of the Restatement (Second) of Torts with regard to privileged opinion. *TMJ Implants, Inc. v. Aetna, Inc.*, 405 F. Supp. 2d 1242, 1250 (D. Colo. 2005), *aff'd*, 498 F.3d 1175 (10th Cir. 2007). Section 566 sets out the fair comment principle as follows:

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

[7] A Google search conducted on April 18, 2008 using the search term "Agile Group" yielded Agile's June 9th 2005 Press Release as the fifth result. (Exh. A-15.)

RESTATEMENT (SECOND) OF TORTS, § 566 (1977).

Whether a statement implies the allegation of undisclosed facts is discerned through two inquiries. First, the court resolves whether the statement is "sufficiently factual to be susceptible of being proved true or false." *TMJ Implants, Inc.* 405 F. Supp. 2d at 1250; *Keohane*, 882 P.2d at 1299, *cert. denied*, 513 U.S. 1127. Second, the court decides whether a reasonable person would conclude that the assertion is factual. The relevant factors to this inquiry are: (1) how the assertion is phrased; (2) the context of the entire statement; and (3) the circumstances surrounding the assertion, including the medium through which the information is disseminated and the audience to whom the statement is directed. *Keohane*, 882 P.2d at 1299 (citing to *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1360 (Colo. 1983)); *See also NBC Subsidiary (KCNC-TV), Inc. v. The Living Will Ctr.*, 879 P.2d 6, 10 (Colo. 1994).

1. Kory's June 14th Response Contains Protected Expressions of Opinion

Kory's June 14th Response to Plaintiffs' June 9th Press Release publicizing their lawsuit against Cohen and Kory contained protected expressions of opinion. Therefore, Plaintiffs' defamation claim as to Kory's statement on Cohen's fan website and its republication on additional Internet websites should be dismissed. (SAC ¶ 179(a)-(e).)

Kory's statements cannot reasonably be interpreted as stating actual facts because his response to Agile's press release and the accusations contained therein was replete with speculative and hyperbolic language ("reckless"; "surprise attack"; "besmirch") and the broader context in which they appeared (an online discussion blog regarding Agile's lawsuit and press release on Cohen's fan website) indicated that Kory was stating his opinion. *Keohane*, 882 P.2d at 1300-1301.

a. Broad Context

Kory's statement drafted on behalf of Cohen by DKC was first posted on Cohen's fan website www.leonardcohenfiles.com in the member forum section under a discussion thread begun by a registered user entitled "artist v. con-artist(s): an unhappy battle brewing." (Arjatsalo Aff. ¶ 6 ; Cohen Aff. ¶ 9.) The discussion thread was begun by a user posting Agile's June 9th Press Release in its entirety entitled "Agile Group Sues Recording Artist Leonard Cohen for Extortion and Civil Conspiracy." (Arjatsalo Aff. ¶ 6.) Kory's statement was posted in the discussion thread after Agile's June 9th Press Release was issued and was clearly written in response to the allegations contained in the complaint and repeated in the press release.

Plaintiffs concede that Kory's statement appeared in a "chat room" for The Leonard Cohen Files. (SAC ¶ 179(a).) The Internet discussion in the "chat room"/message board was part of a heated debate among Cohen's fans concerning a legal dispute with Cohen and his former investment adviser. The forum member who initially posted the thread titled the thread "artist [Cohen] v. con-artist(s)", apparently referring to Agile Group as "con-artists", which was clearly a statement of the member's opinion regarding Agile's Business Wire press release. (Exh. A-3, p. 1 of 11.) This member additionally found that Agile's press release "ha[d] the aroma of the 'best defence [sic] is a good offence' [sic] school of legal brinkmanship." (*Id.*) Courts that have considered allegations of defamatory statements published on Internet message boards and chat rooms, which are electronic forums through which anyone with Internet access can post messages about a given topic, have found that statements published through Internet

discussion groups are less likely to be viewed as factual assertions. *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999); *SPX Corp. v. Doe*, 253 F. Supp. 2d 964, 981 (N.D. Ohio 2003)(finding that "different types of writing have …widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion…statements appearing in such locations as forum and commentary newspaper sections, or other venues often associated with 'cajoling, invective, and hyperbole' are more likely opinion.")

b. Kory's Specific Statements

Kory's statement that the lawsuit [was] "completely consistent with Agile's reckless disregard for its client and his investments" is, in the context of his entire statement, and in the context of the Internet discussion thread where it was posted, a statement of opinion, as shown by the use of rhetoric and hyperbole. *Seidl v. Greentree Mortgage*, 30 F. Supp. 2d 1292, 1317 (D. Colo. 1998)(finding attorney's statements that the use of the domain name was for "fraudulent purposes" and was "reckless, willful and wanton, or at best, negligent" in the context of a demand letter (which had also been posted on the Internet) were statements of opinion.); *Milkovich*, 497 U.S. at 19 (holding that loose, figurative, or hyperbolic language may indicate that the statement could not reasonably be interpreted as a statement of fact.).

When taken in the context of the posting in the discussion board following Agile's own press release accusing Kory and Cohen of extortion, procuring false testimony and civil conspiracy, reasonable persons would understand that Kory's statement "represents the opening salvo of what became litigation by an interested party and that the [statement] is that party's position, or opinion." *Seidl*, 30 F. Supp. 2d at 1316.

Kory ends the statement by promising to "file a counter suit that lays out in detail" Cohen's position.

Agile concedes that Cohen is a public figure. Agile in its SAC repeatedly refers to Cohen as a "noted recording artist" and "a well-known celebrity." *See, e.g.*, (SAC ¶ 18.) Agile's June 9th Press Release, publicizing the allegations contained in the complaint, accused Cohen and his attorney Kory of criminal conduct. (Exh. A-2; Cohen Aff. ¶ 2, Exh. B-1.) As such, Agile's press release was libelous *per se*. RESTATEMENT (SECOND) OF TORTS ¶ 571 (1977). Restatement (Second) of Torts §580(a) (1977) concerning defamation of a public figure provides that:

> One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other person; or
>
> (b) acts in *reckless disregard* of these matters. (emphasis supplied).

Thus, Kory's statement that Agile acted in "reckless disregard [of] its client", whom they knew to be a famous celebrity, would be viewed by a reasonable reader in the context of the discussion of Agile's publicized legal claims against Cohen, to constitute Kory's opinion, as Cohen's attorney, that Agile acted in "reckless disregard" of Cohen's reputation by abruptly breaking off negotiations and launching its pre-emptive lawsuit which leveled accusations of unseemly criminal conduct against Cohen and Kory and that Agile's public attack was "an effort to *besmirch* [defame] the reputation of one of its notable clients." (emphasis supplied).

What is more, Kory's statement contains accusations and speculation. *See Seidl*, 30 F. Supp. 2d at 1317. Kory accuses Agile of "repeatedly failing to alert Cohen to true account balances while allowing improper and unauthorized withdrawals by Cohen's

former business manager." Kory's statement that Cohen and Kory will file a "countersuit that will lays out in detail how Agile acted in a reckless way" implies that there is an ongoing investigation into Cohen's legal claims in response to Agile's lawsuit which shows speculation and conjecture. *See Keohane*, 882 P.2d at 1300.

The third paragraph of Kory's statement outlines the facts available to him in forming the basis of his opinion that Agile acted in a "reckless disregard of his [Cohen's] investments." Kory asserts that "Agile repeatedly failed to alert Mr. Cohen to true account balances while allowing improper and unauthorized withdrawals by Cohen's former business manager." Kory thus outlined the facts available to him as he was beginning to investigate Cohen's legal claims against Agile, "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." *Nicosia,* 72 F. Supp. 2d at 1102 (citing to *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995)).

Finally, the readers of Kory's statement in the chat room on Cohen's fan website were familiar with the circumstances surrounding the legal controversy because the discussion thread was begun by posting Agile's own press release publicizing its claims. Readers of Kory's statement would thus likely view his statements as of "a kind typically generated in a spirited legal dispute in which the judgment, loyalties and subjective motives of the parties are reciprocally attacked and defended in the media and other public forums." *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980)(finding that "the test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires the

court examine the statement in its totality in the context in which it was uttered or published."). *See also Lieberman v. Fieger*, 338 F.3d 1076, 1082 (9th Cir. 2003) (The court affirmed the district court's grant of the defendant's motion for summary judgment dismissing slander claims and found that a "reasonable viewer (of the TV interview) would know that the plaintiff and the defendant were locked in a legal dispute, that the plaintiff had issued a press release about some aspect of it, and that defendant was hotly disputing the claims.").

Plaintiffs' claim of defamation based upon Kory's statements posted upon The Leonard Cohen Files must be dismissed because they are not actionable. Further, Plaintiffs' claim of defamation based upon subsequent republications of Kory's statement on other Internet websites by others must also be dismissed because Kory's statements in those instances appear in the context of Internet discussion blogs in which Agile's June 9th Press Release was republished and was being discussed.

2. Cohen's Allegedly Defamatory Statements Published on Macleans.ca Website Are Statements of Opinion

Cohen's statements in the Maclean's article cannot reasonably be interpreted as stating actual facts because the general tone of the article in which his statements appear was one in the nature of an editorial opinion of the author (describing Cohen's legal battles as "nasty"; "rapidly escalating"; "the makings of a Hollywood blockbuster" and a "dramatic tale of betrayal" with "bizarre twists"). Cohen's statements throughout the article contain poetic, colorful, speculative and hyperbolic language (referring to Agile's lawsuit as "suddenly and unexpectedly filed", the "massive improprieties" discovered in an investigation of his accounts; and calls himself "devastated", but not "shattered" by the his current legal troubles and calls his situation "a tragedy") which strongly indicate

to a reasonable reader that his statements are his opinion regarding his current financial circumstances. *See Keohane*, 882 P.2d at 1301-1302.

a. Broad Context

The Maclean's article titled "A '*Devastated*' Leonard Cohen" (apparently referring to Cohen's statement that he "was devastated" to find that his retirement funds had dwindled to $150,000) begins with an opening stanza from one of Cohen's songs "I said there's been a flood/I said there's nothing left", which sets the overall sensational tone and tenor of the article regarding Cohen's legal battles with his former manager and investment advisers. While Greenberg is not quoted in the article, the author generously quotes and paraphrases from the accusations in Agile's "hyperbole-laden" complaint, which the author felt painted a "preposterous picture" of Cohen and notes that "none of the allegations [in Agile's complaint] have been proven in court." (Exh. A-11, p. 2 of 7.) The article also repeats the "disturbing" allegations of criminal conduct on the part of Cohen and Kory contained in Agile's complaint calling it an "extortionate scheme" in which they tried, but failed to recruit Lynch to participate. (*Id.* at p. 5 of 7.) Thus Cohen statements, when lifted out of the context of the entire article as Plaintiffs have done in their SAC, appear to be assertions of fact. However, when viewed in the broad context of the article, which discusses Cohen's current strife with his former advisers, would lead a reasonable reader to view Cohen's statements as venting his anger and frustration. *Keohane*, 882 P.2d at 1301.

b. Cohen's Specific Statements

Statement #1

"…I took great pains to pay these professionals well and to solicit their advice and to follow it"…"**And I was receiving a report every month from Greenberg indicating that my retirement savings were safe."** Cohen insists he was **not made aware that Lynch had been named majority owner of Traditional Holdings**…he says he was shocked to learn that Lynch had almost complete ownership. (SAC ¶¶ 181, 203; Exh. A-11, pp. 4-5.)

The context in which this quoted text appears in the article is in response to Agile's portrayal of Cohen in their lawsuit as "the soulful songwriter…who paid little attention to his financial affairs and so was easily duped by a conniving personal manager." (Exh. A-11, p. 2 of 7.) The article indicates that Cohen "disagrees" with Agile's assessment of him and the article describes Cohen as "vitally interested in his financial affairs." (*Id.* at p. 4 of 7.) Cohen is quoted as saying that "It wasn't that I wasn't involved – on the contrary, I took great pains to pay these professionals well and to solicit their advice and to follow it." (*Id.* at pp. 4-5 of 7.) The factual basis upon which he bases his belief that he followed his professional advisers' advice and paid attention to his financial affairs is given in the quoted statement that Plaintiffs claim is "false, disparaging and defamatory" towards them. (SAC ¶ 181.) Cohen says he relied upon monthly reports from Greenberg that "indicate[d] his retirement savings were safe" and also was "not made aware that Lynch had been made majority owner of Traditional Holdings." Further he claims to have been "*shocked* to learn that Lynch had almost complete ownership." The paragraph in which the allegedly defamatory statements are contained begins by noting that "on other points, Cohen *disagrees*", and that "he insists" which clearly indicates to a reader that what follows is Cohen's point of view on the disputed issue of Cohen's attention to his financial affairs and a statement of Cohen's

opinion and beliefs. *Milkovich,* 497 U.S. at 31 (1990)(finding that "when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.'"); *Information Control Corp.*, 611 F.2d at 784 ("even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an "audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole.")

Statement #2

He insists that he and Kory were in the midst of mediation with Greenberg when the financial adviser's lawsuit was suddenly and unexpectedly filed. He says that mediation had been confidential, at Greenberg's urging, as he feared for his reputation. (SAC ¶¶ 181, 203; Exh. A-11, p. 6 of 7.)

The language of the allegedly defamatory statement begins with cautionary phrasing "he insists", which clearly qualifies and labels what follows as statements of Cohen's belief and opinion.

Statement #3

"Face up to it, Neal [Greenberg]", the email continues, "and square your shoulders: You were the trusted guardian of my assets, and you let them slip away…Restore what you lost, and sleep well." (SAC ¶¶ 181, 203; Exh. A-11, p. 7 of 7.)

The third statement from the Maclean's article that Plaintiffs claim is defamatory towards them is a quote from an e-mail Cohen sent to Neal Greenberg. Cohen, calling Greenberg "the trusted guardian of my assets" intones Greenberg to "face up to it", "square your shoulders" and "restore what you lost, and sleep well", colorful and figurative language which a reader in the context of a story regarding Cohen's financial woes and legal battles with his former advisers is likely to see as rhetorical hyperbole, and as such a statement of his opinion and beliefs.

3. Cohen's Allegedly Defamatory Statement Published on Buddhist Channel Website are Statements of Opinion

a. Broad Context

Plaintiffs allege that one paragraph out of a two page article published on the Buddhist Channel website in October 2005 entitled "Leonard Cohen's Troubles May Be a Theme Come True" contains a defamatory statement regarding Plaintiffs attributed to Cohen. (SAC ¶ 180.) The article discusses Cohen's legal disputes with Lynch, Westin and Greenberg. (Exh. A-12.) Lynch "declined to comment on the charges" and Westin "denied wrong doing" and is quoted as saying "none of Leonard Cohen's problems have their genesis with me." (*Id.* at p. 2.) Greenberg, like Westin, also "denied wrong doing." In discussing Greenberg's lawsuit against Cohen, Lynch and Kory, Greenberg is quoted as saying that Cohen and Kory:

> engaged in "fraudulent means and statements, and other torturous [sic] conduct" in order to "extort millions of dollars" from Greenberg when they realized that Ms. Lynch would not be able to pay back the money. (*Id.* at p. 2.)

b. Cohen's Specific Statements

With regard to Cohen's claims against Greenberg, the article says that "Mr. Cohen is also seeking damages against Neal Greenberg, his investment adviser from 1997 to 2004, who the singer said allowed Ms. Lynch to steal millions by not telling him what was going on." (*Id.* at p. 1.) The basis for Cohen's claim that Greenberg "did not tell him what was going on" is explained later in the article in the paragraph that Plaintiffs claim contains the allegedly defamatory statement regarding Greenberg:

> Mr. Cohen said he had not suspected that his money was depleted until October 2004 when an informant tipped off his daughter, Lorca Cohen. **"**Every month my investment manager, an old friend of Ms. Lynch's, and

> a successful trader, **sent me a report that my savings were safe, intact, and even flourishing."** Mr. Cohen said, referring to Mr. Greenberg. (*Id.* at p. 2; SAC ¶¶ 180, 202; Exh. A-12, p. 2 of 2.)

A statement of opinion "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion." RESTATEMENT (SECOND) OF TORTS § 566 (1977). In other words, provided that the facts underlying an opinion are fully disclosed and those facts are themselves not false and defamatory, the opinion is not actionable. *See id.* cmt. c; *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs.*, 175 F.3d 848, 853 (10th Cir. 1999)(finding that if the factual premise underlying an opinion is fully disclosed, the statement will be protected as opinion.) Cohen's opinion, paraphrased by the reporter in the beginning of the article, is that "[Greenberg] allowed Ms. Lynch to steal millions by not telling him what was going on." (Exh. A-12 at p. 1.) The disclosed facts underlying Cohen's opinion regarding Greenberg is that "every month my investment manager, an old friend of Lynch's, and a successful trader, **sent me a report that my savings were safe, intact, and even flourishing**" and thereby did not "keep him informed of what was going on." (*Id.* at p. 2.) The disclosed facts forming the basis for Cohen's opinion are substantially true and not defamatory. Truth is a complete defense to defamation. *Gordon v. Boyles*, 99 P.3d 75, 81 (Colo. Ct. App. 2004)(finding that "absolute truth is not required; instead, a defendant need only show substantial truth, that is, 'the substance, the gist, the sting of the matter is true.'"). Plaintiffs admit that Greenberg sent Cohen monthly e-mail reports which did not disclose Lynch's withdrawals. (SAC ¶ 150(i)(4-5)(referring to Cohen's monthly reports as "courtesy e-mails"); SAC, Exh. 9 (monthly e-mails from Plaintiffs to Cohen showing profitability of Cohen's investment accounts)).

Because the facts which formed the basis of Cohen's opinion are substantially true and are not in themselves defamatory, the statement made by Cohen republished on the Buddhist Channel website is a protected statement of opinion and therefore is not actionable. Plaintiffs claim for defamation based upon the Buddhist Channel statement must also be dismissed.

4. Plaintiffs Elected to Become Limited Public Figures and Cannot Show Cohen's Statements Were Published With Malice

Because this case involves personal speech in a media context, and thus implicates free speech concerns under the First Amendment, in which the defamation *defendant* is, as Plaintiffs admit, a public figure, the Court must also determine whether Plaintiffs were private or public figures to determine the appropriate standard of liability to apply to Cohen's speech. The concept of limited purpose public figure has been explicated in several Colorado cases. *Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 1118, 1122 (Colo. Ct. App. 1992)(and cases cited therein). These Colorado cases apply the United States Supreme Court's definition of limited purpose public figure set out in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Under *Gertz*, a limited public figure is one who "voluntarily interjects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351.

In determining whether a defamation plaintiff is a limited public figure, a court must primarily focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *DiLeo*, 200 Colo. at 124. Even if initially purely a private matter, if a person invites public attention and comment by filing a lawsuit and then initiating contact with newspapers and reporters, it may become a matter of public concern. *Id.* As the plaintiff in *DiLeo* became a public figure through his

efforts to publicize his dispute following his lawsuit regarding his termination with the Boulder Police Department, Plaintiffs thrust themselves to the forefront of their controversy with Cohen in order to influence the resolution of the issues involved and by doing so, decided to "take their chances with the court of public opinion." Thus, the Court should find that Plaintiffs, by publicizing their claims against a well-known celebrity in a press release disseminated widely through Business Wire on the Internet, and later granting interviews to members of the press, sought media attention of their claims and thus became limited public figures for the purposes of their legal dispute with Cohen.

As limited public figures for the purposes of the controversy surrounding Cohen's investment relationship with Plaintiffs, they must make a prima facie showing that Cohen published the alleged defamatory statements with actual malice. Even if Plaintiffs were to prevail in demonstrating that Cohen's statements contained demonstrably false assertions of fact, the U.S. Supreme Court has indicated that the First Amendment requires a showing of actual malice with "convincing clarity" when a public official or public figure institutes a defamation action. *Id.* at 125 (citing to *New York Times v. Sullivan*, 376 U.S. 254 (1963)).

Aside from Plaintiffs' general allegations that Cohen's statements were false, or that Cohen should have known they were false, Plaintiffs have not produced any credible evidence that Cohen published his statements knowing they were false or entertaining serious doubts as to the truth of his statements. Thus, summary judgment is appropriate on Plaintiffs' defamation claim on the basis that Cohen's statements constituted protected

expressions of privileged opinion, published without malice, and as such are not actionable as defamation.

VII. PLAINTIFFS' SECOND CLAIM FOR COMMERCIAL DISPARAGEMENT SHOULD BE DISMISSED.

A commercial disparagement claim requires that a plaintiff demonstrate that: (1) defendant made a false statement; (2) published to a third party; (3) that was derogatory to the plaintiff's title to his property or its quality, to his business in general or to some element of his personal affairs; (4) through which defendant intended to cause harm to the plaintiff's pecuniary interest or either recognized or should have recognized that such harm was likely to occur; (5) which the defendant published with malice; and (6) special damages to the plaintiff resulting from the statement. *TMJ Implants, Inc.*, 405 F. Supp. 2d at 1249. Colorado has adopted Restatement (Second) of Torts § 623A regarding liability for publication of injurious falsehood. *Teilhaber Manuf. Co. v. Unarco Materials Storage, Inc.*, 791 P.2d 1164, 1166 (Colo. Ct. App. 1989). Restatement (Second) of Torts § 623A provides:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if:
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, *and*
> (b) he knows that the statement is false or acts in reckless disregard to its truth or falsity. (emphasis supplied)

Thus, the requirements of commercial disparagement are more "stringent" than that of slander "in three important aspects – falsity of the statement, fault of the defendant and proof of damage." RESTATEMENT (SECOND) OF TORTS, § 623A cmt. g (1977).

A. The Absolute Privilege of Consent, the Conditional Privilege of Self-Defense, and the Constitutional Protection Afforded Statements of Opinion Also Apply to Bar Plaintiffs' Commercial Disparagement Claim

A privilege is an affirmative defense to commercial disparagement claims. *Williams*, 540 F. Supp. at 1248. Consent and the doctrine of invited public comment in particular, are applicable to claims for commercial disparagement. *Id*. at 1250. The conditional privilege of self-defense of Restatement (Second) of Torts, § 594, comment k, also applies to a claim for commercial disparagement. RESTATEMENT (SECOND) OF TORTS, § 646A cmt. a (1977)("The rules on conditional privileges to publish defamatory matter stated in §§ 594 to 598A…apply to the publication of an injurious falsehood." Further, "comments under those sections are equally applicable"). In addition, the constitutional protections afforded a defendant in a defamation action are also applicable to a defendant in a trade libel/commercial disparagement action. *Teilhaber Mfg. Co.*, 791 P.2d at 1167. Therefore, the absolute and conditional privileges discussed with regard to defamation, as well as protected opinion, see *infra* section VI, A, B, and C, should also be applied to dismiss Plaintiffs' claim for commercial disparagement.

B. Cohen Did Not Knowingly Publish False Statements With the Intent to Cause Harm to Plaintiffs' Pecuniary Interest.

In order to survive summary judgment on their commercial disparagement claim, Plaintiffs must provide credible evidence that Cohen knowingly published false statements intending to harm their pecuniary interest. *See Bacchus Industries, Inc. v. Arvin Industries, Inc.*, 939 F.2d 887, 893 (10th Cir. 1991). This Court has previously found, in deciding upon Cohen's motion to dismiss Plaintiffs' claim for intentional interference with prospective economic advantage that:

> The end for which Mr. Cohen acted when he released his statement on the internet and to the press does not commend a finding of impropriety…Only after plaintiffs filed this pre-emptive suit did Mr. Cohen respond publicly with his version of events. Even assuming, as I must, that Mr. Cohen's public assertions were defamatory and untrue, I am left with no grounds on which to find that any interference with the plaintiffs' prospective business relations was anything other than incidental to his purpose.

See Order (Dec. 4, 2006), *Natural Wealth Real Estate, Inc. v. Cohen*, 2006 WL 3500624, *6, 2006 U.S. Dist. LEXIS 87439, *17-18 (D. Colo. 2006). The Court, applying the factors contained in Restatement Section 767, which bear upon the degree of impropriety of any interference, found that "to the extent that Mr. Cohen's motives and interests can be discerned from the allegations, it appears that he was attempting to refute plaintiffs' allegations." *Id.* at *19.

The intent requirement for injurious falsehood outlined in Restatement § 623A, comment b requires "the publisher must . . . as a reasonable man recognize the likelihood that some third person will act in reliance upon his statement, or that it will otherwise cause harm to the pecuniary interests of the other because of the reliance." *See* RESTATEMENT (SECOND) OF TORTS § 623A cmt. b (1977). Thus the publisher "is not liable if he has no reason to anticipate that the publication of his statement will in any way affect the conduct of any third person; and this is true although the publisher knows that the matter that he asserts is false." *Id.* Comment b further cautions:

> It is not enough that the publisher knows that there is some remote possibility that a reasonable man would not take into account, that some third person might be influenced by his publication. He does not take the risk that by some unlikely possibility his casual statement may prevent a sale or lease of land or goods. He must know of some circumstances that would lead a reasonable man to realize that the publication of the falsehood would be likely to cause the pecuniary loss to the other. It is not enough to make him liable that he could by reasonable diligence have discovered the likelihood that it would do so.[8]

[8] Further illustrating the intent requirement, illustration 6 of § 623A provides:

Cohen's allegedly disparaging public statements were made in response to Agile's allegations in their lawsuit and their subsequent press release to defend his reputation, a purpose that is a privileged one. Cohen first published Kory's statement in a discussion thread regarding Plaintiffs' lawsuit and press release on his fan website, which is hosted in Finland. (Arjatsalo Aff ¶¶ 5, 10; Cohen Aff. ¶ 9.) Republications of Kory's June 14th Response were published primarily on obscure music-oriented blogs in response to news items covering Agile's lawsuit and press release. (Exhs. A-7 -10.) The allegedly disparaging statements attributed to Cohen published in an article which also discussed in detail Agile's claims appeared on the website www.macleans.ca, which is likely viewed by primarily a Canadian audience because it is the website of a Canadian print magazine. (Cohen Aff. ¶ 13; Exh. A-11.) Thus, Cohen did not know that his statements to his fans on the Internet were likely to reach prospective customers of Plaintiffs in Colorado; the possibility was too remote that some third person seeing his statements might be influenced by his publications.

Because Plaintiffs cannot make the required showing that Cohen intended for publication of his statements to result in harm to Plaintiffs' pecuniary interests, or that either he recognized or should have recognized that the publications were likely to do so, summary judgment is appropriate on Plaintiffs' claim for commercial disparagement.

> A, in the presence of a circle of his friends, casually says that Blackacre is owned by B. A knows that his statement is false and that Blackacre is owned by C. As a result of the statement one of A's friends who had intended to buy Blackacre from C does not do so. Unless A knew that a prospective purchaser was present or that the statement was likely to reach him, A is not liable to C. RESTATEMENT (SECOND) OF TORTS 623A, illus. 6 (1977).

VIII. COHEN IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FOURTH CLAIM FOR RELIEF FOR QUANTUM MERUIT/UNJUST ENRICHMENT.

A. Plaintiffs' Fourth Claim For Unjust Enrichment/Quantum Meruit

The basis of Plaintiffs' claim for unjust enrichment is that following Cohen's dismissal of Lynch in late October 2004, Cohen and Kory "requested and coerced Plaintiffs to ascertain, compile and analyze information, and prepare detailed reports, coercing the transaction and performance history of Traditional Holdings." (SAC ¶ 231.) Plaintiffs allege that Kory "threatened Plaintiffs that anything short of immediate and total dedication to Cohen's demands for information from Plaintiffs and from outside banks, funds, and custodians, would carry dire legal and other consequences." (SAC ¶ 107.)

Further, in response to Kory's information requests on behalf of Cohen, Plaintiffs allege that "senior executives and staff members at Plaintiffs' offices in Colorado, not as part of their customary duties, but specifically in response to Cohen's extraordinary threats and demands, spent over a hundred hours of their time, *at no charge*." (SAC ¶ 108.)(emphasis supplied). After "Plaintiffs had fully cooperated with Cohen and Kory to investigate the amounts borrowed from Traditional Holdings" (SAC ¶ 118), "Cohen and Kory acknowledged Plaintiffs' extraordinary cooperation" and "Kory praised their investment work of Cohen's behalf." (SAC ¶ 112.) Plaintiffs claim that it would be inequitable and unjust for Cohen to receive the benefit of Plaintiffs' services without paying for them. (SAC ¶ 234.)

B. Plaintiffs Voluntarily and Gratuitously Provided the Traditional Holdings Account Information

In Colorado, a plaintiff seeking recovery for unjust enrichment or quantum meruit must prove: (1) at plaintiff's expense; (2) defendant received a benefit; (3) under circumstances that would make it unjust for defendant to retain the benefit without paying. *Bangert Bros. Constr. Co. v. Kiewit W. Co.*, 310 F.3d 1278, 1301 (10th Cir. 2002).[9] Unjust enrichment "is a legal claim in quasi-contract for money damages based upon principles of restitution." *DCB Constr. Co. v. Central City Dev. Co.*, 965 P.2d 115, 118 (Colo. 1998). According to the Restatement (First) of Restitution, § 1, comment c:

> Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not itself sufficient to require the other to make restitution therefor.
> RESTATEMENT (FIRST) OF RESTITUTION § 1, cmt. c (1937).

Thus, in order to recover for unjust enrichment, Plaintiffs must show that it would be unjust for Cohen to retain the benefit they conferred on him absent compensation for the benefit. As set out below, Plaintiffs are unable to make this showing because the undisputed facts demonstrate that Plaintiffs voluntarily and gratuitously provided the information following a good faith request by Cohen.

A plaintiff cannot recover under a theory of unjust enrichment on a quasi-contractual claim for services rendered absent proof of circumstances indicating that compensation is reasonably expected. *Britvar v. Schainuck*, 791 P.2d 1183, 1184 (Colo. Ct. App. 1989)(citing to *Schuck Corp. v. Sorkowitz*, 686 P.2d 1366, 1368 (Colo. Ct. App. 1984)); *Chambers v. Shivers*, 497 P.2d 327, 328-329 (Colo. Ct. App. 1972)(finding that

[9] In Colorado, unjust enrichment and quantum meruit have essentially the same elements and are used interchangeably. This motion will use the label "unjust enrichment" to discuss Plaintiffs' "unjust enrichment/quantum meruit" claim from the Second Amended Complaint.

"the services must have been performed under such circumstances as to give the recipient thereof some reason to think they are not gratuitous, nor performed for some other person, but with the expectation of compensation from the recipient.")

In their Second Amended Complaint, Plaintiffs admit that they had no expectation of payment and the disputed services were provided "at no charge." (SAC ¶ 108.) Plaintiffs also admit that Richard Westin confirmed in an e-mail to Greenberg dated October 24, 2004 that "because Cohen held a membership interest in Traditional Holdings, Agile Group, LLC could share information with him about Traditional Holdings' investments." (SAC ¶ 103.) In that same October 24, 2004 e-mail, Westin informed Greenberg that Cohen had the right "to review the books and records" of Traditional Holdings. See § IV, *supra*, ¶ 2.

Thus, the undisputed facts demonstrate that Agile voluntarily provided Cohen the requested information at no charge and in response to Westin's confirmation that Cohen was entitled to review Traditional Holdings' books and records. Because the services were performed gratuitously and without the expectation of payment at the time the services were rendered, Plaintiffs should not be permitted to recover under an unjust enrichment theory and summary judgment should be granted to Cohen as to this claim.

C. Plaintiffs Did Not Provide the Requested Information Under Duress

A party is not entitled to restitution for a benefit conferred merely because another has threatened to begin civil proceedings against them. RESTATEMENT (FIRST) OF RESTITUTION, § 71(1)(b) (1937). In order for Plaintiffs to be entitled to restitution, they must show that Cohen used means of coercion or duress to obtain the requested information. RESTATEMENT (FIRST) OF RESTITUTION, § 71(1) (1937). Comment b to § 71(1) specifically cautions:

> The threat of beginning a civil action to enforce a claim, if made in good faith and unaccompanied by threatened seizure of property of the person or by other oppressive circumstances, is not duress and, *if payment is made without mistake of fact, there can be no restitution even though the claim is baseless and the claimant is unreasonable in believing that it has validity*. (emphasis supplied)

In deciding Cohen's Motion to Dismiss Plaintiffs' claim for civil conspiracy, the Court observed that "nothing in the Second Amended Complaint indicates that plaintiffs undertook these efforts [responding to Cohen's and Kory's demands for information concerning Traditional Holdings] as a result of the extortion attempt. Indeed the Second Amended Complaint proclaims that Mr. Kory extolled the plaintiffs' *voluntary cooperation* in the aftermath of the Cohen-Lynch separation." *See* Order (Dec. 4. 2006) 2006 U.S. Dist LEXIS 87439, *22-23 (emphasis added), 2006 WL 3500624, *8; (SAC ¶¶ 108, 112.)

Thus, Plaintiffs did not provide the requested information to Kory "under oppressive circumstances" that constituted duress and are therefore not entitled to restitution and recompense for costs of assembling and providing the account information. What is more, the undisputed facts demonstrate that Kory did not threaten civil litigation until several months *after* Plaintiffs provided the requested account information when Kory sent the April 10, 2005 claims letter to Posel. (SAC ¶ 149.) Kory had merely advised Plaintiffs when requesting the account information in November 2004 that Cohen had "natural doubts" about all of his advisers.

IX. COHEN IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' TENTH CLAIM FOR RELIEF FOR INTERPLEADER.

A. Plaintiffs' Interpleader Claim

In the Second Amended Complaint, Plaintiffs claim that there are "conflicting positions and demands of Lynch and Cohen" with respect to the Traditional Holdings Funds. (SAC ¶ 272.) Plaintiffs disclaim any interest in the Traditional Holdings Funds and allege that "Lynch claims that 99.5% of the Traditional Holdings Funds belong to her and has demanded that Agile Group, LLC immediately distribute those funds to her. At the same time Cohen claims that the Traditional Holdings Funds belong to him." (SAC ¶ 271.)

On November 14, 2005, by Order of the Court, Plaintiffs' Amended Motion to Deposit the Interpleaded Funds into the Registry under Federal Rules of Civil Procedure Rule 67 was granted. *See* § IV, *supra*, ¶ 27. Pursuant to that Order, on December 14, 2005, Plaintiffs deposited into the Registry of the Court $152,165.88, which amount is subject to Plaintiffs' Interpleader claim. *Id.* Plaintiffs filed a second unopposed motion for leave to deposit $2,014.90 in additional funds into the Registry of the Court on July 31, 2006. *See* § IV, *supra*, ¶ 28. That motion was granted on August 1, 2006. Therefore, the total of deposited funds is approximately $154,180.78. *See* § IV, *supra*, ¶ 29.

Rule 67, as amended in 1983, provides:

> In any action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing.

"The purpose of Rule 67 is 'to relieve the depositor of responsibility for a fund in dispute,' such as in an interpleader action." *Gulf States Utilities v. Alabama Power Co.*, 824 F.2d 1465, 1474 (5th Cir. 1987). Under Rule 67, the disbursement of funds is

governed by 28 U.S.C. §§ 2041 and 2042. FED. R. CIV. P. 67(b). These statutory provisions assign the power and duty of approving disbursements exclusively to the depositary court, and require that the depositary court disburse the funds only to persons judicially determined to be rightful owners. Thus, the Court has the power to disburse the deposited funds to Cohen if he is able to show that he is so entitled.

Further, funds deposited in the Registry of the Court cannot be executed against in the absence of a court order. *Garrick v. Weaver*, 888 F.2d 687, 695 (10th Cir. 1989)(citing to *Lottawanna*, 87 U.S. 201, 224 (1874)(fund in registry "is not subject to attachment either by foreign attachment or garnishment" and "no money deposited…shall be withdrawn except by order of the judge.").

B. Cohen Has Been Declared Rightful Owner of the Deposited Funds in a Valid California State Judgment Against Lynch.

On May 15, 2006, in a California state court case Cohen brought against Lynch and Cohen's former legal advisor, Richard A. Westin, a Los Angeles Superior Court entered a default judgment in favor of Cohen against Lynch in the amount of $5,000,000 in damages and $2,341,345 in prejudgment interest, for a total judgment of $7,341,345. A properly authenticated copy of the Los Angeles Superior Court Judgment, civil case number BC338322, is attached hereto as Exhibit A-16. [10]

In rendering its judgment, the court declared:

> (1) *Lynch is not the rightful owner of any assets in Traditional Holdings*, LLC, Blue Mist Touring Company, Inc., or any other entity related to Cohen; (2) that any interest she has in any legal entities set up for the

[10] The attached judgment is an exemplified copy of the California judgment that complies with the authentication requirements of Rule 44(a)(1) of the Federal Rules of Civil Procedure. A district court may grant summary judgment to enforce an out-of-state judgment submitted in substantial compliance with Rule 44(a)(1). *AMFAC Distribution Corp. v. Harrelson*, 842 F.2d 304, 306 (11th Cir. 1988)(finding that two things are required to authenticate a copy of a state court judgment. First, the copy must be attested to by the officer having legal custody of the judgment or by his deputy. Second, there must be a certificate that the attesting officer has legal custody.)

> benefit of Cohen she holds as trustee for Cohen's equitable title; (3) that she must return that which she improperly took, including but not limited to "loans;" and (4) that Cohen has no obligations or responsibilities to her. (emphasis supplied).

Under the California judgment, Cohen has been determined to be the rightful owner of *any* assets of Traditional Holdings, LLC. Further, *any* interest Lynch held in Traditional Holdings was determined to be held in trust for Cohen's equitable title. Therefore, the ownership of the remaining Traditional Holdings' funds has been conclusively determined by the California state court judgment.

C. The Doctrine of Res Judicata Requires The Court to Apply the Preclusive Effect of the California State Court Judgment

If an issue has been finally determined by a court of competent jurisdiction, *res judicata* precludes parties from relitigating that issue. *Warga v. Cooper*, 44 Cal. App. 4th 371, 377-378 (Cal. Ct. App. 1996). An issue is considered to have been conclusively determined, and *res judicata* applies, if: 1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; 2) this issue was actually litigated in the former proceeding; 3) it must have been necessarily decided in the former proceeding; 4) the decision in the former proceeding must be final and on the merits; 5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Finally, the party asserting collateral estoppel bears the burden of establishing these requirements. *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (Cal. 1990).

In the Los Angeles Superior Court case, as in the instant interpleader claim, Cohen and Lynch were parties in a controversy concerning ownership of the assets of

Traditional Holdings, LLC.[11] The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. *Lucido*, 51 Cal. 3d at 342. Thus, there is an identity of the parties and the issue to be litigated in the present action is based upon identical factual allegations Cohen made against Lynch in the California case. In the prior California state court proceeding, Cohen was determined to be rightful owner of *any* assets of Traditional Holdings, LLC. (Exh. A-16.) Thus, the issue to be relitigated in the interpleader claim has been conclusively decided by the California state court judgment.

Federal courts are bound to apply the *res judicata* doctrine to state court proceedings where the parties have had "a full and fair opportunity to litigate." *See Montana v. United States*, 440 U.S. 147, 153 (1979). On August 24, 2005, Lynch was served with a Summons, Complaint, Civil Case Cover Sheet, Notice of Case Assignment and Alternative Dispute Resolution documents. After refusing to make an appearance in the case or otherwise participate in the proceedings, Lynch was served with a Request for Entry of Default on November 22, 2005 and a default was entered on December 5, 2005. Following service of notice of entry of default taken against her in the Los Angeles action, Lynch did not apply for relief from the judgment under the provisions of Section 473 of the California Code of Civil Procedure within the time period specified in the statute.[12] Therefore, any potential challenge by Lynch to the default judgment would be time barred under California law.

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[11] The California civil case involved seven causes of action against Lynch, including breach of fiduciary duty, fraud, breach of contract, accounting, conversion, imposition of a constructive trust, injunctive relief and professional negligence.

[12] California Code of Civil Procedure § 473 provides that a "court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." Cal. Code Civ

Finally, even though obtained by default, a judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion. *Last Chance Mining Co*. v. *Tyler Mining Co*., 157 U.S. 683, 691 (1895)(finding that "a failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission."). Because Lynch's potential challenge to the default judgment would be time barred under California law and because a judgment of a court having jurisdiction of the parties and subject matter operates as *res judicata*, the California judgment must be considered final and on the merits.

The issues ultimately determined by the prior California proceeding, among them that Cohen is the rightful owner of any assets in Traditional Holdings, LLC, are conclusive as to the parties and should, respectfully, lead the Court to grant summary judgment to Cohen on Plaintiffs' Interpleader claim.

X. THE COURT SHOULD DISMISS PLAINTIFFS' DECLARATORY JUDGMENT CLAIM AS MOOT

Plaintiffs' ninth claim for relief asks the Court to enter a declaratory judgment pursuant to FED. R. CIV. P. 57 and 28 U.S.C. §§ 2201-2202. (SAC ¶¶ 265-267.) The requested relief included in Plaintiffs' claim is for a declaration that, *inter alia*, Plaintiffs owed no duty to Cohen, Lynch or Traditional Holdings with respect to the acts, conduct or omissions of Traditional Holdings or its managers or members. (SAC ¶ 267.) This claim, because of this Court's prior rulings, is moot as there is no actual and real controversy remaining regarding Plaintiffs' duties owed to Cohen, Lynch or Traditional

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Proc. § 473(b). Application for such relief shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order or proceeding was taken. *Id.*

Holdings. (SAC ¶ 266.) There is no longer a live need for a declaration of the Plaintiffs' rights and duties. *See* Order (Dec. 4, 2006), 2006 WL 3500624, *10, 2006 U.S. Dist. LEXIS 87439, *29 (D. Colo. 2006).

The existence of a live case or controversy must subsist through all stages of federal judicial proceedings. *Beattie v. United States*, 949 F.2d 1092, 1093 (10th Cir. 1991). Mootness is to be judged at the present moment and not at the time of the filing of the complaint. *Perez v. Sec. of Health, Educ. and Welfare*, 354 F. Supp. 1342, 1346 (D.P.R. 1972)(dismissing claim for declaratory judgment because the issues of law before the court were moot and declining to issue an "advisory opinion"). With respect to declaratory relief, the court must "look beyond the initial controversy which may have existed at one time and decide whether the facts alleged show that there is a substantial controversy of sufficient *immediacy and reality* to warrant the issuance of a declaratory judgment." *Beattie*, 949 F.2d at 1094 (emphasis in original). Finally, there is no reasonable expectation that this particular controversy is likely to recur and Plaintiffs' would be subjected to the same action again. *Id.* (finding that the "capable of repetition, yet evading review" exception to mootness not applicable because there was no reasonable expectation that the same complaining party would be subjected to the same action again.)

Under the Declaratory Judgment Act, a declaratory judgment may be rendered only to resolve some actual controversy. 28 U.S.C. § 2201. Further, an action becomes moot, and thus not proper for declaratory judgment or any other form of adjudication, when the judgment sought, even if granted, could have no practical effect upon the then

existing controversy. *Flight Engineers' Int'l Ass'n v. Trans World Airlines, Inc.*, 305 F.2d 675, 680 (8th Cir. 1982).

Cohen's sole remaining counterclaim against Plaintiffs regarding Traditional Holdings is a claim for an accounting in which Cohen seeks a full and accurate accounting of the funds held, transactions and disbursements made on Cohen's invested accounts. (Cohen's Answer and Counterclaims ¶¶ 106-110.) Resolution of Cohen's remaining accounting claim does not implicate the declaratory relief requested by Plaintiffs. Further, Plaintiffs have interplead the remaining Traditional Holdings funds into the Court's Registry and have declared that neither Agile Group LLC nor any of the other Plaintiffs has any interest in the Traditional Holdings funds. (SAC ¶ 270.) Cohen has demonstrated that he has obtained a final California state court judgment declaring that he and not Lynch, is the rightful owner of the Traditional Holdings funds and is therefore entitled to summary judgment on Plaintiffs' interpleader claim under the doctrine of *res judicata.*

Because there is no longer a live and actual controversy between the parties regarding Plaintiffs' duties owed to Cohen, Lynch and Traditional Holdings, the Court should decline to hear Plaintiffs' declaratory judgment claim and dismiss Plaintiffs' declaratory relief claim as moot.

XI. PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF

Plaintiffs in their eighth claim for relief seek permanent, prospective as well as mandatory injunctive relief based upon Cohen's allegedly defamatory statements. (SAC ¶¶ 259-264.)

Because Cohen's statements were privileged and therefore not actionable as defamation, the Court should deny Plaintiffs' request for equitable relief because Plaintiffs will be unable to show that they are entitled to any such relief. The Court should also deny Plaintiffs request for equitable relief because of Plaintiffs' unclean hands.

A. Plaintiffs Should Be Denied Equitable Relief Because of Their Unclean Hands

Plaintiffs' unclean hands warrant this Court denying any equitable relief to Plaintiffs. Plaintiffs omitted to disclose to this Court their June 9th Press Release, which the uncontroverted facts demonstrate was published before Cohen's statements regarding Plaintiffs. *See* § IV, *supra*, ¶¶ 5-14, 20-21. Plaintiffs' press release repeated and widely publicized, without any refuge in privilege[13], the libelous accusations against Cohen contained in their complaint, which ultimately proved to be unfounded in law or fact. *See* § IV, *supra*, ¶¶ 7, 25. When Cohen responded to the Plaintiffs allegations through Kory's statement narrowly published to his fans, Plaintiffs amended their complaint adding a claim of defamation against Cohen and Kory. *See* § IV, *supra*, ¶¶ 20-21. Thus, Plaintiffs' invited and "procured" the harm for which they now seek damages. As such, Plaintiffs should not be heard to complain of reputational harm based upon Cohen's privileged responses or allowed to profit from their own wrongdoing. *See, e.g.*, *Melcher*, 48 Colo. at 248 (finding that "if the defendants were guilty of no wrong against the plaintiffs…except a wrong invited and procured by them to be committed for the purpose of making it the foundation of an action, it would be unjust to permit them to profit by it. He who thus acts values money more than character."); *See also Oklahoma Retail*

[13] See Footnote 4, *supra*.

Grocers Ass'n. v. Wal-Mart Stores, Inc., 605 F.2d 1155, 1157 (10th Cir. 1979)(finding that the "trial court was correct in taking the stand that the Association is not entitled to injunctive relief on behalf of its members when its members are engaged in the very same activity that the defendant is guilty of and for which injunctive relief is sought…A court of equity looks with disfavor upon such activity. It will, in the proper case, withhold aid in accordance with the clean hands doctrine.")

B. Because Cohen's Statements Were Privileged, Plaintiffs Cannot Establish the Necessary Requisite Elements for Preliminary Injunctive Relief

In the Tenth Circuit Court of Appeals, the following four criteria must be satisfied by a prima facie showing before a preliminary injunction will be granted:

> (1)[The] movant must establish that the injunction would not be adverse to the public interest**;** (2) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; (3) that the movant will suffer irreparable injury unless the injunction issues; and (4) that there is substantial likelihood that the movant will eventually prevail on the merits.
> *Amoco Oil Co. v. Rainbow Snow, Inc.*, 809 F.2d 656, 661(10th Cir. 1987).

Plaintiffs are entitled to preliminary injunctive relief only if they satisfy all of the requisite elements. *Q-Tech Labs. Pty Ltd. v. Walker*, 2002 WL 1331897, *11, 2002 U.S. Dist. LEXIS 16842, *32 (D. Colo. 2002). Because Cohen's statements were privileged and therefore not actionable, Plaintiffs will be unable to satisfy these prerequisites. Further, past economic losses do not constitute a harm that may be remedied through injunctive relief**.** *Id.* at *41(citing to *Mountain Medical Equipment, Inc. v. Healthdyne, Inc.*, 582 F. Supp. 846, 849 (D. Colo. 1984)).

C. The Court Should Also Deny Plaintiffs Prospective Equitable Relief

Plaintiffs also should be denied prospective equitable relief. Plaintiffs request that the court grant injunctive relief to prevent Cohen from publishing *future* statements

regarding Plaintiffs, including, *inter alia*, "*any* statements of *any* kind to *any* third parties concerning Plaintiffs, without Plaintiffs' prior knowledge or consent." (SAC ¶ 263(a)-(d).)

In a preliminary injunction setting, the burden is on the movant to establish that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct. *Mountain Medical Equip., Inc.*, 582 F. Supp. at 849 (citing to *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 8 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 584 (1971)). Further, an injunction should not issue if it merely serves to remove any temptation for the defendant to participate in unlawful activity. *Mountain Medical Equip., Inc.*, 582 F. Supp. at 849. Neither will an injunction issue merely to allay the fears and apprehensions of a plaintiff. *Id.; See also Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3rd Cir. 1980)(finding that the requisite for injunctive relief has been characterized as a "clear showing of immediate irreparable injury," [citation omitted] "or a presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law."). What is more, the "irreparable harm" required for injunctive relief must be imminent, not remote or speculative**,** and the alleged injury must be one incapable of being fully remedied by monetary damages. *Gaming Mktg. Solutions, Inc. v. Cross*, 2008 U.S. Dist. LEXIS 25910, *12-13, 2008 WL 858183, *6 (S.D.N.Y. 2008)(denying requested injunctive relief to enjoin future speech because remote and speculative allegations of possible harm do not constitute a threat of "irreparable harm.")

Plaintiffs seek to enjoin Cohen from uttering any future statements to third parties regarding Plaintiffs, whether or not those statements are defamatory. Because Cohen's statements at issue in this action were privileged, Plaintiffs are unable to show a threat of an immediate irreparable injury or a presently existing actual threat, such that broadly reaching prospective injunctive relief enjoining Cohen's speech is necessary. What is more, should Cohen's future speech involve defamatory utterances regarding Plaintiffs, Plaintiffs have an adequate remedy at law.[14]

XII. CONCLUSION

For the foregoing reasons, Cohen prays that the Court dismiss Plaintiffs' First Claim for Relief, defamation, Second Claim for Relief, commercial disparagement, Fourth Claim for Relief, quantum meruit/unjust enrichment, Eighth Claim for Relief, injunction, Ninth Claim for Relief, declaratory judgment and Tenth Claim for Relief, interpleader.

DATED: April 29, 2008

Respectfully submitted,

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[14] *See, e.g., Metropolitan Opera Ass'n, Inc., v. Local 100, Hotel Employees and Rest. Employees Int'l Union*, 239 F.3d 172, 177 (2nd Cir. 2001)(finding that the universal rule in the United States is that "equity will not restrain by injunction the threatened publication of a libel…[because] injunctions are limited to rights that are without an adequate remedy at law, and because ordinarily libels may be remedied by damages, equity will not enjoin a libel absent extraordinary circumstances.")

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2008, I electronically filed the foregoing **DEFENDANT LEONARD COHEN'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

R. Daniel Scheid (dan@lewisscheid.com)
Kurt S. Lewis (kurt@lewisscheid.com)
Sherab Posel (poselaw@gmail.com)

I hereby certify that I served the foregoing document on the following non CM/ECF participant by e-mail and U.S. First Class Mail, postage prepaid to the following:

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/s/ Michelle L. Rice