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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**S PANELS HOLDINGS, LLC,**

*Plaintiff,*

vs.

**DEAN JOLLY, ET AL,**

*Defendant.*

Case No. **CV 2013 4710**

**MEMORANDUM DECISION AND ORDER  
GRANTING PLAINTIFF'S MOTION TO  
DISMISS DEFENDANT DEAN JOLLY'S  
COUNTERCLAIM OF FRAUD, AND  
DENYING PLAINTIFF'S MOTION TO  
DISMISS DEAN JOLLY'S  
COUNTERCLAIM OF DEFAMATION**

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

This matter is before the Court on plaintiff S Panels Holdings, LLC's (S Panels) "Motion to Dismiss Defendant Dean Jolly's Counterclaims."

The lawsuit arises out of a breach of contract action initiated on March 26, 2013, by the plaintiff, S Panels Holdings, LLC (S Panels). See Amended Complaint and Demand for Jury Trial, p. 5. In his counterclaim, the defendant, Dean Jolly (Jolly), alleges that S Panels has misrepresented the presence of a "Confidentiality/Non-Disclosure Agreement" (Agreement) between S Panels and Jolly and committed fraud as a result of said misrepresentation. Defendant Dean Jolly's Answer to Amended Complaint, Affirmative Defenses, Counterclaim, and Demand for Jury Trial, pp. 8-10. Count 1. Further, Jolly alleges that S Panels communicated to others in a defamatory manner that he entered into and subsequently breached the Agreement, thereby damaging his reputation, employment, and business dealings. *Id.*, p. 10, Count 2.

The parties agree Jolly was employed by S Panels from July 2012 until he terminated his employment on January 28, 2013. See Amended Complaint and Demand for Jury Trial, p. 2 ¶ 9; see *also* Defendant Dean Jolly's Answer to Amended Complaint, Affirmative Defenses, Counterclaim, and Demand for Jury Trial, pp. 2-3 ¶ 9. It is alleged by S Panels that Jolly entered into the Agreement when he was hired. Amended Complaint and Demand for Jury Trial, p. 2 ¶ 10. The Agreement was attached to the Amended Complaint, but will not be considered for purposes of this motion to dismiss. *Id.*, Exhibit A. Jolly maintains he did not sign, nor enter into, the Agreement. Defendant Dean Jolly's Answer to Amended Complaint, Affirmative Defenses, Counterclaim, and Demand for Jury Trial, pp. 8-10.

On July 8, 2010, S Panels filed the present motion to dismiss, requesting that the Court dismiss all of Jolly's counterclaims. Plaintiff's Motion to Dismiss Defendant Dean Jolly's Counterclaims, p. 1. In support of their motion, S Panels also filed the "Memorandum in Support of Plaintiff's Motion to Dismiss Defendant Dean Jolly's Counterclaims." Jolly responded on August 5, 2014, with "Defendant Dean Jolly's Response to Plaintiff's Motion to Dismiss." On August 8, 2014, S Panels filed its "Reply Memorandum in Support of Plaintiff's Motion to Dismiss Defendant Dean Jolly's Counterclaims."

Hearing on S Panel's motion to dismiss counterclaims was held on August 12, 2014. The motion was taken under advisement at that time. For the reasons set forth below, the motion to dismiss is granted in part and denied in part.

### **III. STANDARD OF REVIEW.**

"A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for 'a short and plain statement of the claim showing that the pleader is entitled to

relief' and a demand for relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citing I.R.C.P. 8(a)(1), (2)). A court may only consider matters within the pleadings as part of a Rule 12(b)(6) motion. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990) (citing I.R.C.P. 12(b)). If matters outside the pleadings are "[p]resented to and considered by the court it is the *duty* of the court to treat such motion to dismiss as a motion for summary judgment." *Id.* (citing *Boesiger v. DeModena*, 88 Idaho 337, 399 P.2d 635 (1965)) (emphasis in original).

A complaint should not be dismissed under Rule 12(b) "[u]nless it appears beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief." *Dumas v. Ropp*, 98 Idaho 61, 62, 558 P.2d 632, 633 (1977) (citing *Wackerli v. Martindale*, 82 Idaho 400, 353 P.2d 782 (1960); *Stewart v. Arrington Construction Co.*, 92 Idaho 526, 446 P.2d 895 (1968)). "The non-moving party is entitled to have all inferences from the record and pleadings viewed in his/her favor, and only then may the question be asked whether a claim for relief has been stated." *Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 729 (1993) (citing *Miles v. Idaho Power*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989)). In addition to being viewed in the light most favorable to the nonmoving party, any doubt must be resolved in their favor. *Garder v. Hollifield*, 96 Idaho 909, 611, 533 P.2d 730, 732 (1975) (citing *Stewart*, 92 Idaho at 530-31, 446 P.2d at 895).

If the record reveals that there are no genuine issues of material fact and the case can be decided as a matter of law, the granting of a Rule 12(b)(6) motion will be affirmed. See *Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App. 1996). When reviewing an order of the district court to dismiss a

case pursuant to Rule 12(b)(6), “[t]he issue is not whether the plaintiff will ultimately prevail, but whether the party ‘is entitled to offer evidence to support the claims.’”

*Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v. Suzuki Moto Co. Ltd.*, 776 F. Supp. 698, 701 (E.D.N.Y. 1991)).

### III. ANALYSIS.

#### **A. Jolly’s Counterclaim for Fraud is Dismissed Because Jolly Has Not Pled Fraud With Sufficient Particularity; S Panels’ Motion to Dismiss Jolly’s Counterclaim of Fraud is Granted.**

At oral argument, counsel for Jolly relied on I.R.C.P. 8(a)(1) for defending the lack of specificity in Jolly’s counterclaims. Such reliance is entirely misplaced.

Idaho Rule of Civil Procedure 9(b) requires that fraud be pled with particularity. I.R.C.P. 9(b). “The party alleging fraud must support the existence of each of the elements of the cause of action for fraud by pleading with particularity the factual circumstances constituting fraud.” *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 518, 808 P.2d 851, 855 (1991). A party must establish nine elements to prove a claim of fraud: “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; (9) his consequent and proximate injury.” *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127, 106 P.3d 449, 453 (2005) (citing *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 89, 996 P.2d 303, 308 (2000)). “Fraud is never presumed. All of the essential elements thereof must be established by . . . clear and convincing evidence [at trial]. . . .” *Country Cove Development, Inc. v. May*, 143 Idaho 595, 600, 150 P.3d 288, 293 (quoting *Barron v. Koenig*, 80 Idaho 28, 39, 324 P.2d 388, 394 (1958)).

The dismissal of a fraud claim not pled with particularity will be affirmed by the Idaho Supreme Court. See *Glaze v. Deffenbaugh*, 144 Idaho 829, 833, 172 P.3d 1104, 1108 (2007). In *Glaze*, the Court found the fraud claim to have been properly dismissed because the alleging party had failed to support all of the nine elements by specifying “[w]hat factual circumstances constituted the fraud.” *Id.* (citing I.R.C.P. 9(b); *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005)). Specifically, the Court held that “[t]he [alleging party does] not plead any false representations . . . rendering the fraud claim fatally defective.” *Id.* Thus, a fraud claim will be dismissed when the alleging party has not supported each and every element with factual circumstances.

Conclusory allegations do not support the elements of a fraud claim. See *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986). In *Witt*, the Idaho Supreme Court held the district court was correct in finding that the alleging party had not supported the elements of fraud with facts because the complaint contained “[n]o particular factual allegations disclosing what these so-called tactics were, what made them devious, or when they were made.” *Id.* A similar pleading requirement in federal courts requires the “who, what, when, where, and how” of the alleged fraud. See *Cooper v. Pickett*, 137 F.3d 616, 626 (9th Cir. 1997) (citing *DiLeo v. Ernst & Young*, 901 F.2d 624, 627-28 (7th Cir. 1990)). Thus, a fraud claim will be dismissed if the elements are only supported by general allegations.

S Panels argues Jolly’s claim for fraud must be dismissed. Memorandum in Support of Plaintiff’s Motion to Dismiss Defendant Dean Jolly’s Counterclaim, p. 2. It argues I.R.C.P. 9(b) requires fraud be plea with particularity and Jolly has not pled the required facts. *Id.*, pp. 2-3. In addition to the alleged factual deficiencies, S Panels

argues that “[e]ven without a signed agreement, Jolly is prohibited by other laws from disclosing trade secrets and other proprietary and confidential information. As a result, there could be no action for fraud on S Panels’ statement because whether based in contract or not, Jolly could not disclose S Panels’ information.” *Id.*, p. 3. Finally, S Panels asserts Jolly’s fraud claim fails because Jolly himself, and not a third party, would have had to been the recipient of a false statement, justifiably relied on that statement, and been damaged as a result of that reliance. Reply Memorandum in Support of Plaintiff’s Motion to Dismiss Defendant Dean Jolly’s Counterclaims, p. 5. Thus, S Panels argues that even if there was a sufficient pleading, any alleged action on their part could not rise to the level of fraud.

In response, Jolly argues that the fraud claim has been plead with sufficient particularity. Defendant Dean Jolly’s Response to Plaintiff’s Motion to Dismiss, pp. 4-5. Jolly argues that S Panels has failed to provide any authority regarding the specificity required under Rule 9(b) and that the standard is not as stringent as S Panels implies. *Id.*, p. 6. Further, Jolly argues that the pleadings are not simply a recitation of the elements of fraud, but

[r]ather, the allegations explain the circumstances and the facts pertinent to each element.” For example, counterclaim paragraph 8 not only alleges that those who have heard S Panels’ defamatory statement about Jolly would be justified in relying upon the statements to Jolly’s detriment, but it also explains why such persons would be so justified.

*Id.*, p. 7. None of those contentions of Jolly are true. Jolly’s Counterclaim of Fraud, Count 1, at paragraph 8 reads:

8. Those who have heard or read Plaintiff’s misrepresentation that Defendant Jolly entered into and breached a Confidentiality/Non-Disclosure Agreement with sPanels were justified in relying upon Plaintiff’s misrepresentation because, if it were true, such misrepresentation would demonstrate a lack of trustworthiness.

*Id.*, p. 9, ¶ 8. Ignoring for the moment the conclusory nature of this allegation (which

itself renders the allegation a nullity in analyzing a fraud claim on a motion to dismiss as mentioned above under *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477), this paragraph in Jolly's counterclaim for fraud does nothing to tell us "who" made the statement, to "whom" the statement was made, "when" the statement was made, "where" the statement was made, and "how" the statement was made. *Cooper*, 137 F.3d 616, 626. At oral argument, counsel for Jolly stated that the standard at this motion to dismiss is "whether any set of facts exist". By making that claim, Jolly argues, "There might be some facts out there, I don't know what they are, but if those facts exist, even if I never find them, I survive the motion to dismiss." That is not the standard. Indeed, it would turn the standard on its head. The actual standard, as noted by Jolly in his briefing, is that "it must appear beyond a doubt that the claimant can prove no set of facts in support of his claim which would entitle him to relief. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (App. 1991)." Defendant Dean Jolly's Response to Plaintiff's Motion to Dismiss, p. 3. In essence, the time is now for Jolly to allege what the facts are, the who, what, where, when and how. Jolly has failed to do this.

The Court finds Jolly's counterclaim for fraud must be dismissed. Jolly has not supported each element of fraud with factual circumstances. In the Answer, Jolly has made allegations such that "[t]hose who have heard or read Plaintiff's misrepresentation that Defendant Jolly entered into and breached a Confidentiality/Non-Disclosure Agreement with [S Panels] have relied upon Plaintiff's misrepresentations in determining their own future conduct." Defendant Dean Jolly's Answer to Amended Complaint, Affirmative Defenses, Counterclaim, and Demand for Jury Trial, p.9 ¶ 7. Like the alleging party in *Witt*, Jolly has failed to state with any

particularity when the representations were made. Further, Jolly has not alleged to whom the representations were made to with any specificity, instead only referring generally to “those who have heard.” Therefore, Jolly has failed to meet the burden of alleging factual circumstances for all the elements of fraud.

As such, Jolly’s counterclaim for fraud fails; the Court grants S Panels’ motion to dismiss on this issue.

**B. Jolly’s Counterclaim for Defamation Has Been Pled, a Genuine Question Remains; S Panels’ Motion to Dismiss Jolly’s Counterclaim for Defamation is Denied.**

To support a defamation claim, Idaho law requires it be proven that a defendant: “(1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication.”

*Hopper v. Swinnerton*, 155 Idaho 801, 811, 317 P.3d 698, 708 (2013) (citing *Clark v. The Spokesman-Review*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007)). The Idaho Supreme Court has defined a “defamatory” statement as one “tending to harm a person’s reputation, [usually] by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person’s business.” *Weitz v. Green*, 148 Idaho 851, 862, 230 P.3d 743, 754 (2010) (quoting *Black’s Law Dictionary* 660 (3rd pocket ed. 2006)).

In his counterclaim for defamation, Jolly alleges:

11. Plaintiff has communicated to others that Defendant Jolly entered into and breached a Confidentiality/Non-Disclosure Agreement with [S Panels].
12. Such communications were defamatory in that they were false and harmed Defendant Jolly’s reputation and business relationships.
13. As a result of Plaintiff’s communications, Defendant Jolly has suffered damages to his reputation, employment, and business dealings in a manner that may not be able to be fully measured or compensated in economic terms but in any event exceeds \$10,000.00.

Defendant Dean Jolly’s Answer to Amended Complaint, Affirmative Defenses,

Counterclaim, and Demand for Jury Trial, p. 10 ¶ 11-13. Additionally, Jolly incorporated nine other paragraphs from the fraud counterclaim, including the allegation that “Plaintiff intended that those who heard or read Plaintiff’s misrepresentation would form a negative opinion of Defendant Jolly’s character and choose not to hire or otherwise do business with Defendant Jolly.” *Id.* p. 9 ¶ 6.

S Panels argues Jolly has failed to state a claim for defamation and that the facts alleged do not support a cause of action. Memorandum in Support of Plaintiff’s Motion to Dismiss Defendant Dean Jolly’s Counterclaims, p. 5. It argues that employers regularly have employees enter into non-disclosure agreements and that a duty of loyalty exists at common law. *Id.* Further, S Panels asserts that a legal cause of action cannot serve as the basis for defamation. *Id.* Additionally, S Panels argues that “[a]sserting to competitors or customers that Jolly owed S Panels a duty, whether contractual or not, to maintain its information confidential and not disclose such information is nothing more than a recitation of the legal requirements of a former employee.” *Id.* Thus, it argues Jolly cannot use the alleged signing and breach of the Agreement to support a cause of action for defamation. *Id.* p. 6.

In response, Jolly argues he has stated a defamation claim upon which relief can be granted. Defendant Dean Jolly’s Response to Plaintiff’s Motion to Dismiss, p. 6. Jolly states that “[S Panels] has cited to no authority in support of its apparent contention that asserting a claim for breach of contract, as a matter of law, cannot be defamatory.” *Id.*, p. 4. Finally, Jolly argues that the alleged defamatory statements are not limited to those made during the course of the lawsuit. *Id.* He states that “[a]n alleged breach of contractual duty of confidentiality raises unique concerns about a person’s honesty and integrity which are crucial to the proper conduct of Defendant

Jolly's profession; it is not simply a run-of-the-mill allegation of contractual breach." *Id.* (emphasis omitted).

In their reply memorandum, S Panels argues Jolly cannot sustain "[a] cause of action for defamation based upon allegations raised in or associated with a complaint..." Reply Memorandum in Support of Plaintiff's Motion to Dismiss Defendant Dean Jolly's Counterclaims, p. 3. This Court notes Jolly is simply wrong in claiming "[S Panels] has cited to no authority in support of its apparent contention that asserting a claim for breach of contract, as a matter of law, cannot be defamatory." Defendant Dean Jolly's Response to Plaintiff's Motion to Dismiss, p. 4. In its opening brief, S Panels cited *Phillips v. Carter*, 58 A.D.3d 528 (N.Y.App. Div. 2009), *Union Pacific R.R. Co. v. Vill. Of S. Barrington*, 958 F.Supp. 1285, 1300 (N.D. Ill. 1997), and *Springer v. Arwig*, 418 N.E.2d 870, 872 (1981). S Panels pointed out Jolly's errant claim to the contrary in its reply brief. Reply Memorandum in Support of Plaintiff's Motion to Dismiss Defendant Dean Jolly's Counterclaims, p. 2. S Panels claims its allegations in the Complaint are protected by an absolute privilege. Reply Memorandum in Support of Plaintiff's Motion to Dismiss Defendant Dean Jolly's Counterclaims, p. 4. Further, S Panels argues that the alleged defamatory statements do "[n]ot imply dishonesty and a lack of integrity." *Id.*, p. 3. Finally, they argue that even if there was an implication of dishonesty or integrity, there still could be no cause of action for defamation by implication because Idaho does not appear to recognize such an action. *Id.*, p. 4.

While Jolly's defamation allegations are vague, the Court does not hold Jolly to the level of particularity that it must with Jolly's fraud claims. On his counterclaim of defamation, Jolly can seek refuge under I.R.C.P. 8(a)(1). Jolly has properly stated a claim for defamation as his pleading has alleged each element of defamation. He

alleges S Panels communicated information about him to others; that it breached a confidentiality/non-disclosure agreement; that the communication was defamatory because it was false and harmed his reputation and business relationships; and that he suffered damages to his reputation, employment, and business dealings as a result. This sufficiently states a cause of action for defamation.

The Court notes that S Panels' Complaint will not give rise to any counterclaim of defamation by Jolly. In addition to the cases cited by S Panels, *Phillips, Union Pacific R.R. Co.*, and *Springer v. Arwig*, asserting a legal cause of action in the context of a judicial proceeding is absolutely privileged and cannot be defamatory if done in relation to the proceeding. See Restatement (Second) of Torts § 587 (1977). The Second Restatement of Torts explains:

A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

*Id.* The rationale for allowing an absolute privilege of statements in the course of a judicial proceeding “[i]s based upon the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes.” *Id.*, Comment A. The Idaho Supreme Court has recognized a similar policy, stating, “[p]roceedings connected with judicature of the country are so important to the public good it is only in extreme cases and circumstances that a libelous publication in a judicial proceeding can be used as the basis for damages in a libel suit.” *Richeson v. Kessler*, 73 Idaho 548, 552, 255 P.2d 707, 709 (1953). Thus, if S Panels published allegedly defamatory material in relation to a judicial proceeding, those statements cannot serve as the basis for Jolly's cause of action, and will not be admissible as

evidence at trial.

Moreover, an allegedly defamatory comment may be a conditional or qualified privilege even if made to a third party. See *Arnold v. Diet Center, Inc.*, 113 Idaho 581, 585-86, 746 P.2d 1040, 1044-45 (Ct. App. 1987). The Second Restatement of Torts provides that “[a]n occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.” Restatement (Second) of Torts § 596. In *Arnold*, communications to remaining employees regarding the importance of confidentiality after an individual was dismissed for failing to maintain confidentiality was not defamatory because “[t]here was no evidence offered . . . to show that the statements . . . were made in bad faith, without belief in the truth of the matter communicated or with a reckless disregard of the truth or the falsity of the matter.” *Arnold*, 113 Idaho at 585-86, 746 P.2d at 1044-45 (citing *Barlow v. International Harvester Co.*, 95 Idaho 881, 892, 522 P.2d 1102, 1113 (1974)). Thus, if S Panels published defamatory materials to remaining employees regarding Jolly and it was not done in bad faith, it could not serve as the basis for Jolly’s cause of action.

However, the making of a defamatory statement regarding a business competitor in order to acquire customers personally is not a conditional privilege. See Restatement (Second) of Torts § 594. A conditional privilege may be found if “(a) there is information that affects a sufficiently important interest of the publisher . . . .” *Id.* In Comment G to the Second Restatement of Torts § 594, it states:

*Competition.* The interest in competition for prospective advantage, of which the obvious illustration is that of one businessman who, in order to acquire customers for himself, personally defames another, is not within Clause (a). The interest is not one that is entitled to this type of

protection, and whatever importance and value it may have from a social point of view, the recognized necessity of keeping competitive methods within “fair” and reasonable bounds excludes personal defamation as a legitimate means of depriving a rival of potential benefits. (Cf. §§ 766B, 768).

*Id.*, Comment G (emphasis in original). It is significant that competition for a prospective advantage is not an interest sufficient to warrant a conditional privilege.

Here, when all inferences are drawn in favor of the nonmoving party, a genuine issue remains as to whether the alleged statements made by S Panels warrant either an absolute or conditional privilege. Jolly’s Answer and Counterclaim does not reveal to whom S Panels communicated regarding the allegedly defamatory statements. See Defendant Dean Jolly’s Answer to Amended Complaint, Affirmative Defenses, Counterclaim, and Demand for Jury Trial, p. 10, ¶¶ 10-13. Were the alleged statements made by S Panels to an attorney in preparation for judicial proceedings or in a court filing, an absolute privilege would apply. If the statements were made to remaining S Panels employees in an attempt to emphasize the importance of confidentiality, a conditional privilege may exist.

In contrast, if the alleged statements by S Panels were made to potential clients in pursuit of a competitive advantage, no privilege would apply and the allegation that the disputed Agreement was breached may be defamatory. Jolly has alleged that the communications harmed his “business relationships” and caused damage to his “business dealings.” *Id.* p. 10 ¶ 12-13. A complaint not subject to heightened pleading standards should not be dismissed unless it is “[b]eyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief.” *Dumas*, 98 Idaho at 62, 558 P.2d at 633. Because the existence of an Agreement remains a disputed fact, it is not beyond doubt at this time that Jolly may prove no set of facts entitling him to relief. Drawing all inferences from the face of the pleadings in favor of Jolly, there remains a

genuine possibility that any alleged statements were made to gain a prospective economic advantage. The Complaint itself sets forth that “[i]mmediately subsequent to Jolly terminating his employment with Plaintiff, Jolly began working for Precision and/or FMI. Precision and FMI are direct competitors with Plaintiff.” Amended Complaint and Demand for Jury Trial, p. 4 ¶ 18. S Panels could have submitted evidence to the Court establishing whom it spoke with about the allegedly defamatory communications, if it in fact did communicate with anyone at all. However, had they done so, the Court would have to consider the motion as one for summary judgment. As currently pled, a genuine questions remains as to whether any privilege should apply to the publishing of the alleged defamatory statements.

Moreover, in contrast to S Panels’ arguments, the pleadings do not assert defamation by implication. While the words “dishonesty” or “integrity” are not used in the defamation counterclaim, Jolly does assert that the alleged defamatory communications would cause others to “form a negative opinion of Defendant Jolly’s character” and “[i]f [the communications] were true, such misrepresentation would demonstrate a lack of trustworthiness.” Defendant Dean Jolly’s Answer to Amended Complaint, Affirmative Defenses, Counterclaim, and Demand for Jury Trial, p. 9 ¶¶ 6-8. Further, defamation by implication is not at issue in this case because, as S Panels’ own cited authority provides, the allegations would need to appear to be based on “false suggestions, impression and implications arising from otherwise truthful statements.” Reply Memorandum in Support of Plaintiff’s Motion to Dismiss Defendant Dean Jolly’s Counterclaims, p. 4 (quoting *Stepanov v. Dow Jones & Co.*, 987 N.Y.S.2d 37, 42 (N.Y. App. Div. 2014)). A genuine issue of material fact remains whether the communications involved here were “otherwise truthful statements.” Jolly has specifically pled that he never entered into the agreement and that “[s]uch

communications were defamatory in that they were false and harmed Defendant Jolly's reputation and business relationships." Defendant Dean Jolly's Answer to Amended Complaint, Affirmative Defenses, Counterclaim, and Demand for Jury Trial, p. 10 ¶ 12. Thus, defamation by implication is not at issue in this case.

As such, the motion to dismiss Jolly's counterclaim for defamation is denied because the basic notice-pleading elements for defamation have been met and the pleadings do not reveal whether any privilege should apply to communications allegedly made by S Panels.

#### **IV. CONCLUSION AND ORDER.**

For the reasons stated above,

IT IS HEREBY ORDERED plaintiff S Panels' Motion to Dismiss defendant Jolly's Counterclaim of Fraud is GRANTED.

IT IS FURTHER ORDERED plaintiff S Panels' Motion to Dismiss defendant Jolly's Counterclaim of Defamation is DENIED.

Entered this 13<sup>th</sup> day of August, 2014.

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John T. Mitchell, District Judge

#### **Certificate of Service**

I certify that on the \_\_\_\_\_ day of August, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>		<u>Lawyer</u>	<u>Fax #</u>
DeAnne Casperson/ Amanda E. Ulrich Darrin L. Murphey	208-523-9518 667-7625		Fonda Jovick Brent G. Schlotthauer	208-448-2100 765-4702

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Jeanne Clausen, Deputy Clerk