**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| ALEXANDER RHODES and NO FAP LLC<br><br>Plaintiffs,<br><br>v.<br><br>AYLO HOLDINGS S.A.R.L. (d/b/a PornHub), AYLO USA, INC. (d/b/a PornHub), AYLO GLOBAL ENTERTAINMENT, INC. (d/b/a PornHub), AYLO BILLING LIMITED (d/b/a PornHub), NICOLE PRAUSE, Ph.D., UNIVERSITY OF CALIFORNIA, LOS ANGELES (d/b/a UCLA), DAVID LEY, Ph.D. and TAYLOR & FRANCIS GROUP, LLC<br><br>Defendants. | : | CIVIL ACTION NO. 2:25-cv-01956<br><br>**LEGAL BRIEF IN SUPPORT OF DEFENDANT DAVID LEY, Ph.D.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT** |

**LEGAL BRIEF IN SUPPORT OF DEFENDANT DAVID LEY, Ph.D'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

Defendant, David Ley, Ph.D., through his undersigned attorneys, files the within Legal Brief in Support of his Motion to Dismiss Plaintiffs' Complaint.

Respectfully submitted.

**Segal McCambridge Singer & Mahoney, Ltd.**

By: */s/ Jeffrey F. Hall-Gale, Esq.*

Jeffrey F. Hall-Gale, Esquire
Attorney ID No. 318850
Segal McCambridge Singer & Mahoney, Ltd.
One Commerce Square
2005 Market Street

Suite 3110
Philadelphia, PA 19103
215-972-8015
Jhall-Gale@smsm.com
Counsel for Defendant
David Ley, Ph.D.

Date: January 30, 2026

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases** **Page**

**Statutes**

**Rules**



**Treatises**

## I. INTRODUCTION

Plaintiffs' lawsuit was filed in the Court of Common Pleas of Allegheny County on November 27, 2025. This matter was removed to the Western District of Pennsylvania, by Notice of Removal dated December 16, 2025 by Defendant, The Regents of the University of California, incorrectly identified as University of California, Los Angeles d/b/a UCLA. Plaintiffs' First Amended Complaint was filed on December 30, 2025. Plaintiffs allege in the First Amended Complaint, that Defendants were part of a retaliation campaign to discredit Plaintiff Rhodes, founder of peer-support website NoFap, LLC, and NoFap, LLC.

Plaintiffs bring forth multiple counts against the Defendants. As to Defendant David Ley, Ph.D., Plaintiffs bring forth the following claims: 1. Racketeering (RICO, 18 U.S.C. § 1962) (Count 1 of the Amended Complaint); 2. Unfair Competition under Lanham Act 15 U.S.C. § 1125 (Count 2 of the Amended Complaint).; 3. Trademark Dilution (15 U.S.C. § 1125(c)) (Count 3 of the Amended Complaint); 4. Trademark Infringement (15 U.S.C. § 1114) (Count 4 of the Amended Complaint); 5. Trade Disparagement (Count 5 of the Amended Complaint); 6. Fraudulent Inducement (Count 7 of the Amended Complaint); 7. Tortious Interference (Count 8 of the Amended Complaint); 8. Defamation Per Se and Per Quod (Count 9 of the Amended Complaint); 9. Publicity Placing Person in False Light (Count 10 of the Amended Complaint); 10. Publicity Given to Private Life (Count 11 of the Amended Complaint); 11. Intrusion into Private Affairs (Count 12 of the Amended Complaint); 12. Intentional Infliction of Emotional Distress (Count 13 of the Amended Complaint); 13. Civil Conspiracy (Count 14 of the Amended Complaint); 14. Gross Negligence (Count 15 of the Amended Complaint); and 15. Declaratory Judgment (Count 17 of the Amended Complaint).

David Ley, Ph.D., files the instant Motion to Dismiss for multiple reasons. Plaintiffs, for all counts, fail to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs' conclusory allegations that Defendant David Ley, Ph.D. violated the Lanham Act and other statutes are insufficient to allow the Court to draw an inference that Plaintiffs' claims for relief are plausible. As explained in detail below, the Court should dismiss these claims in their entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs fail to plead all the requisite claim elements and/or provide any factual support that could permit this Court to draw a reasonable inference that any of those claims are plausible

## II. FACTUAL BACKGROUND

### i. Parties

This matter is brought by Plaintiff Alexander Rhodes and his limited liability company Plaintiff NoFap, LLC. NoFap is a website and community forum that purports to serve as a support group for those who wish to give up pornography and masturbation. Aylo Holdings S.A.R.L, Aylo Global Entertainment Incorporated, and Aylo Billing Limited (hereinafter the "Aylo Defendants") are part of a Canadian multinational pornographic conglomerate that operate pornography websites such as Pornhub. Defendants Nicole Prause, Ph.D. ("Dr. Prause") and David Ley, Ph.D. ("Dr. Ley") are licensed psychologists and authors. Defendant Taylor & Francis Group, LLC ("Taylor & Francis') is an academic publisher. Defendant The Regents of the University of California is the governing board of the University of California, including the University of California, Los Angeles ("UCLA") and an employer of Defendant Nicole Prause.

### ii. Facts of Case

Plaintiffs' lawsuit improperly attempts to convert academic disagreement and public criticism into a vast conspiracy by the Defendants, with claims of federal racketeering,

defamation and violations of the Lanham Act. Plaintiffs have brought claims against Defendants sounding in Racketeering, invasion of privacy, defamation, negligence, civil conspiracy, trademark violations, breach of contract, fraudulent inducement, and tortious interference.

Plaintiffs allege Dr. Ley participated in this conspiracy by publishing academic opinions, critiquing Plaintiffs' claims about "porn addiction" and speaking publicly on matters of scientific and public concern. The First Amendment does not allow claims of defamation based on opinion or academic disagreement. Even accepting all well-pleaded allegations as true, Plaintiffs fail to state any plausible claim for relief as to Dr. Ley as Plaintiffs plead no actionable false statements, no unlawful conduct, and no plausible causal nexus between any act of Dr. Ley and Plaintiffs' alleged damages. Accordingly, all claims against Dr. Ley should be dismissed with prejudice.

## III. QUESTION PRESENTED

Question: Whether the claims against Dr. Ley should be dismissed because Plaintiffs' Amended Complaint fails to allege facts sufficient to sustain a claim against Dr. Ley.

Suggested Answer: Yes.

## IV. STANDARD OF REVIEW

### a. Rule 12(b)(6) Standard

A court should grant a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss where the complaint fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). When ruling on a motion to dismiss, a court must accept all factual allegations as true and draw all reasonable inferences in a light most favorable to the plaintiff. *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005). A well-pleaded complaint must contain more than mere labels and conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)

To survive a Rule 12(b)(6) motion, a complaint must allege facts sufficient to state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007);*Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Courts conduct a two-part analysis to determine whether dismissal is appropriate. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the factual and legal elements of a claim are separated. *Id*. The court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. *Id.* at 210–11. Second, the court must determine whether the facts alleged in the complaint are sufficient to show that plaintiffs have a "plausible claim for relief." *Id.* at 211; see also Iqbal, 556 U.S. at 679; Twombly, 550 U.S. at 570. Factual allegations must be adequate to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. *Twombly*, 550 U.S. at 545.

The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). That a complaint pleads facts that "are merely consistent with" a defendant's liability, does not mean that it plausibly states a claim for relief. *Id.* (citations omitted). Thus, for good reason, the assumption of truth is inapplicable to legal conclusions or to "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements." *Id*.

## V. LEGAL ARGUMENT

### A. Plaintiffs' Allegations should be Dismissed for Failure to State a Claim Pursuant to Rule 12(b)(6)

#### 1. Count I - Racketeering- (RICO 18 U.S.C. § 1962) Should be Dismissed for Failure to State a Claim

Plaintiffs attempt to equate academic commentary, media interviews and criticism as a racketeering activity, despite a lack of any indictable criminal act as required by the RICO statutes. Sustaining a claim under RICO requires racketeering activity, defined as the commission of at least two criminal predicate acts, such as fraud. 18 U.S.C. §§ 1961-1968.

Count One of the Amended Complaint should be dismissed as it fails to state a claim upon which relief can be granted. To prevail on a claim for civil racketeering, the federal civil RICO statute allows "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [to] sue therefor in any appropriate United States district court." 18 U.S.C. § 1964(c). The adequacy of a plaintiff's claim of "injury to business or property" implicates his standing to sue under civil RICO. *See Maio v. Aetna, Inc.*, 221 F.3d 472, 482 (3d Cir. 2000). Thus, these questions properly are resolved by way of a Rule 12(b)(6) motion. *Id.* at 482 n.7; *see also Anderson v. Ayling*, 396 F.3d 265, 269 (3d Cir. 2005). Although RICO is to be read broadly, see *Tabas v. Tabas*, 47 F.3d 1280, 1291 (3d Cir. 1995), Congress's limitation of recovery for "business or property" injury "retains restrictive significance." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). This restrictiveness "helps to assure that RICO is not expanded to provide a federal cause of action and treble damages to every tort plaintiff." *Maio*, 221 F.3d at 483. We have stated that "a showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest." *Id.* (citation and internal quotation marks omitted).

Congress did not intend to recognize a cause of action in civil RICO where the damages from the injuries alleged are "speculative." *See Maio*, 221 F.3d at 495; see also *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 188 (3d Cir. 2000) (expressing doubt that "lost speculative opportunity" would be an injury to business or property under the civil RICO

statute). Here, Plaintiffs' claims are unassignable and cannot be valued yet, so their claims are too speculative to confer RICO standing. *See In re Taxable Mun. Bond Securities Litig.*, 51 F.3d 518, 522-23 (5th Cir. 1995) (lost opportunity to obtain low interest loan too speculative to support RICO standing); *see also Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847-48 (1st Cir. 1990) (unliquidated, inchoate damages too speculative to support civil RICO claim).

Plaintiffs have not alleged any tangible damages allegedly caused by Dr. Ley. In *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992), the Supreme Court interpreted § 1964(c) to mean that a RICO plaintiff must show that defendant's RICO violation was not only a "but for" cause of his injury, but also that it was the proximate cause. Then, in *Beck v. Prupis*, 529 U.S. 494, 507 (2000), the Court held "that a person may not bring suit under § 1964(c) predicated on a violation of § 1962(d) for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute." The Court held that a plaintiff needed to allege that he or she was injured by "an act that is independently wrongful under RICO," *id*. at 505-06, and not merely by a non-racketeering act in furtherance of a broader RICO conspiracy. Plaintiffs' Complaint fails to articulate an unlawful act of Dr. Ley and resulting damages.

Nor have Plaintiffs established any harm which was proximately caused by an unlawful act of Dr. Ley. The proximate cause factors are discussed in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999). In *Steamfitters*, the Third Circuit found that antitrust standing principles have been incorporated into civil RICO standing doctrine, and adopted antitrust standing jurisprudence to more fully explore the RICO proximate causation requirement. *See Id.* at 921, 932. Citing *Associated Gen. Contractors, Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519 (1983) (AGC), the Third Circuit set out six factors to be considered in the antitrust standing analysis, which the Supreme Court adopted to incorporate

into civil RICO standing: (1) the causal connection between defendant's wrongdoing and plaintiff's harm; (2) the specific intent of defendant to harm plaintiff; (3) the nature of plaintiff's alleged injury . . . ; (4) "the directness or indirectness of the asserted injury"; (5) whether the "damages claim is . . . highly speculative"; and (6) "keeping the scope of complex antitrust trials within judicially manageable limits," i.e., "avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Steamfitters*, 171 F.3d at 924 (citing *AGC*, 459 U.S. at 537-38, 540, 542-44). Not only have Plaintiffs failed to allege a wrongful act by Dr. Ley, they have also failed to establish any causal nexus between the alleged act intended to harm Plaintiffs or the specific nature of the harm allegedly suffered by Plaintiffs.

**i. Plaintiffs' Amended Complaint Fails to Satisfy the Pleading Standard Applicable to Civil Racketeering Claims under the RICO Act**

Federal Rule of Civil Procedure Rule 9(b)'s "particularity requirement requires a plaintiff to allege 'all of the essential factual background that would accompany the first paragraph of any newspaper story - that is, the who, what, when, where, and how of the events at issue.'" *US ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 176 (3rd Cir. 2019) (quoting *U.S. ex rel. Moore & Company, P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016) and *In Re Rockefeller Center Properties, Inc. Securities Litigation*, 311 F.3d 198, 217 (3d Cir. 2002)). To satisfy the Rule 9(b) requirement, "a plaintiff must plead or allege the date, time, and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Federico v. Home Depot*, 507 F.3d 188, 200 (3rd Cir. 2007). "Rule 9(b) is not satisfied where a plaintiff merely lumps the who, what, when and where together." *Riachi v. Prometheus Group*, 822 Fed. Appx. 138, 142 (3d Cir. 2020).

Plaintiffs' Amended Complaint fails to adequately plead its case pursuant to Rule 9(b) Plaintiffs merely provide conclusory statements, such as:

> 420. Defendants constitute an enterprise within the meaning of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., having systematically engaged in an ongoing pattern of racketeering activity affecting interstate and international commerce.
>
> 421. Relevant to Plaintiffs, Defendants engaged in a pattern of racketeering activity, including but not limited to: distribution of obscene materials through interstate commerce (18 U.S.C. §§ 1461-1465); obstruction of justice (18 U.S.C. § 1503); tampering with a witness, victim or informant (18 U.S.C. § 1512); wire fraud (18 U.S.C. § 1343); retaliating against a witness, victim or informant (18 U.S.C. § 1513); and interference with commerce by threats or violence (18 U.S.C. § 1951).
>
> 422. In broader scope, however, the enterprise further involves peonage, slavery, and trafficking in persons (18 U.S.C. §§ 1581-1592); money laundering (§§ 1956–1957); and child sexual exploitation offenses (18 USC §§ 2251–2252A).
>
> 423. Each Defendant in this action has participated in the enterprise described above.
>
> 424. Plaintiffs have suffered significant harm as a direct result of Defendants' racketeering activities, including financial loss, reputational damage, interference with professional relationships, and suppression of their ability to provide critical services for those suffering from pornography addiction.

(Plaintiffs' First Amended Complaint, Paragraphs 420-424).

Plaintiffs fail to provide any details as to what the specific racketeering activity involved, when it occurred, how it affected Plaintiffs resulting in financial loss, reputational damage, interference with professional relationships, and suppression of their ability to provide critical services for those suffering from pornography addition. Plaintiffs, in a conclusory manner, without any factual support, group all Defendants together and do not state how each Defendant participated in the alleged enterprise. *See Cisneros v. Petland, Inc.*, 972 F.3d 1204, 1217 (11th Cir. 2020) (stating that it is improper for a RICO plaintiff to blend "the identities of the defendants" and expect a court to infer one defendant's "complicity into an allegation that

specifically names" another defendant). Moreover, Plaintiffs have not alleged why any statement attributable to Dr. Ley was fraudulent. Plaintiffs have also failed to clearly enumerate their damages to show how they are connected to Dr. Ley's alleged involvement in racketeering activity and how Plaintiffs actually sustained a business or property injury and to what extent. Plaintiffs have failed to provide sufficient details to allow Dr. Ley to defend against this claim. This fails to meet even the basic pleading standards, much less a heightened standard applicable to this RICO claim.

**ii. Plaintiffs lack standing to pursue a claim under RICO**

To prevail on a claim for civil racketeering, the federal civil RICO statute allows "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [to] sue therefor in any appropriate United States district court." 18 U.S.C. § 1964(c). "[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479. 496 (1985); *Heimbecker v. 555 Assoc.*, No. 01-6140, 2003 WL 21652182, *14 (E.D. Pa. Mar. 26, 2003) (Davis, J.). The phrase 'business or property' retains restrictive significance. It would for example exclude personal injuries suffered." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). "[A] showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest." (*Steele v. Hospital Corp. of Am.*, 36 F.3d 69, 70 (9th Cir. 1994)).

Here, Plaintiffs have alleged the following harms: (1) financial loss, (2) reputational damage, (3) interference with professional relationships, and (4) suppression of their ability to provide critical services for those suffering from pornography addiction. Plaintiffs point to no concrete losses, financial or otherwise, stemming from the alleged enterprise. The *Steamfitters*

factors also support a dismissal of this action: (1) the causal connection between wrongdoing and harm is attenuated, as there is no specific connection alleged between Dr. Ley's alleged fraud and plaintiffs' harm; (2) there is little indication of specific intent to harm plaintiffs, as the pleading was sparse; (3) the nature of the injury, reputational damage, interference with professional relationships, and suppression of Plaintiffs' ability to provide critical services for those suffering from pornography addiction[1], are not normally found to create RICO standing in *Beck* and *Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989)*; (4) the injury is extremely indirect; (5) the damages claim is speculative insofar as plaintiffs did not plead a financial loss with any specificity, and there is no evidence that Dr. Ley's acts have proximately caused the financial loss, reputational damage, interference with professional relationships, and suppression of Plaintiffs' ability to provide critical services for those suffering from pornography and it is difficult to determine to what extent plaintiffs' damages were due to the alleged RICO acts and to what extent it was due to intervening factors; and (6) while there is little danger of duplicate recovery, there is significant danger of duplicative litigation, as this lawsuit appears to be at least in part an attempt to relitigate issues with Defendant Prause. Thus, under both the Supreme Court's RICO standing decision in *Beck* and the Third Circuit's proximate cause analysis in *Steamfitters*, and *Anderson* have failed to allege facts sufficient to support a civil RICO cause of action with regard to the fraud that allegedly led to their damages.

**iii. Plaintiffs' Stated Injuries Were Not Proximately Caused By The Alleged Racketeering Activity**

The Supreme Court has made clear that RICO plaintiffs must make a threshold showing that their injuries were proximately caused by the defendants' alleged racketeering activity. *Anza*

[1] It is unclear how Plaintiffs' ability to provide services to those suffering from pornography addiction is a harm to Plaintiffs.

*v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *see also Maio*, 221 F.3d at 483. Plaintiffs have not done that here.

Plaintiffs do not and cannot allege any harm that was proximately caused by any act of Dr. Ley. The cause of Plaintiffs' alleged harms is unclear by the reading of Plaintiffs' Amended Complaint. There is no true nexus between Dr. Ley's alleged RICO violations and any quantifiable business or reputational harm to Plaintiffs.

**iv. Plaintiffs Have Not Alleged A Pattern of Racketeering Activity**

Plaintiffs' RICO claims are further deficient as a matter of law, because Plaintiffs have not sufficiently plead that their injuries were caused by a pattern of "racketeering activity." To state a claim for a violation of either §1962(c) or (d), a plaintiff must adequately plead a pattern of racketeering activity, i.e., the commission of at least two "predicate acts" of racketeering. *See Allen Neurosurgical Assoc. v. Lehigh Valley Health Network*, No. 99-4653, 2001 WL 41143, *2 (E.D. Pa. Jan. 18, 2001) (dismissing RICO Counts since Plaintiff's Amended Complaint failed to adequately plead a single act of racketeering). This requirement obligates a plaintiff to plead that each defendant "person" engage in two or more of the predicate acts enumerated in §1961(1). *See Hall v. Tressic*, 381 F. Supp. 2d 101, 107 (N.D. N.Y. 2005) (granting motion to dismiss RICO claims against various individual defendants and the Diocese of Albany on the grounds that Plaintiffs failed to allege the requisite predicate acts).

Plaintiffs have failed to allege that Dr. Ley committed two predicate acts. The only allegations that Plaintiffs have made with respect to the actions of Dr. Ley is the conclusory statement that Defendants engaged in a pattern of racketeering activity, including but not limited to: distribution of obscene materials through interstate commerce (18 U.S.C. §§ 1461-1465); obstruction of justice (18 U.S.C. § 1503); tampering with a witness, victim or informant (18

U.S.C. § 1512); wire fraud (18 U.S.C. § 1343); retaliating against a witness victim or informant (18 U.S.C. § 1513); and interference with commerce by threats or violence (18 U.S.C. § 1951) and "the enterprise further involves peonage, slavery, and trafficking in persons (18 U.S.C. §§ 1581-1592); money laundering (§§ 1956–1957); and child sexual exploitation offenses (18 USC §§ 2251–2252A)." (Plaintiffs' First Amended Complaint, Paragraphs 421-422). The Complaint further alleges "each Defendant in this action has participated in the enterprise described above." (Plaintiffs' First Amended Complaint, Paragraph 423). These allegations, standing alone, however, do not establish that ***Dr. Ley*** engaged in a pattern of racketeering activity. As the *Tressic* Court cogently observed:

> Before considering the plaintiff's claim, it must be noted that the complaint and RICO statement list numerous activities engaged in by members of the Catholic church and law enforcement officials in handling allegations of sexual abuse by priests in an attempt to cover up such abuse. The extensive and colorful portrayal of the social and political backdrop to defendants' alleged conduct is essentially irrelevant to the facts of this case. RICO requires that plaintiff demonstrate defendant conduct in a pattern of racketeering that injures the plaintiff. "The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962(d).

*Hall*, 381 F. Supp. 2d at 107-08 (emphasis added) (quoting *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987)).

Here, Plaintiffs have not articulated the specific predicate acts of Dr. Ley. Instead, Plaintiffs attempt to contort their tort claims into the RICO framework through vague and conclusory allegations. Indeed, there is nothing in the Complaint- nor could there be- to satisfy the elements of any of the federal criminal offenses listed by Plaintiffs. For instance, Plaintiffs do not even suggest that they were the victims of these offenses.

As discussed above, in order to make out a RICO claim on the basis of wire fraud, Federal Rule of Civil Procedure 9(b) requires a plaintiff " to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise

misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Schuylkill Skyport Inn, Inc. v. Rich*, No. 95-3128, 1996 WL 502280 at *35 (E.D. Pa. Aug. 21,1996) (striking RICO claims for failure to specifically plead predicate acts against attorneys) (citing *Seville Indus. Machinery v. Southmost Machinery*, 742 F.2d 786 (3d Cir. 1984)). In a RICO complaint, "plaintiff's pleadings must identify the purpose of the mailing within the defendant's fraudulent scheme and specify the fraudulent statement, the time, place, and speaker and content of the alleged misrepresentation." *Bonavitacola Electric Contractor, Inc. v. Boro Developers, Inc.*, No. Civ. A. 01-5508, 2003 WL 329145 *5 (E.D. Pa. Feb 12, 2003).

Plaintiffs in this case have not articulated the predicate acts of wire fraud with the requisite particularity. Plaintiffs' sparse conclusory allegations concerning the use of wire fraud (Plaintiffs' First Amended Complaint, Paragraph 421), on their face, do not meet the heightened pleading requirements of Rule 9(b). They do not specify the fraudulent statement, or otherwise address the time, place, speaker and content of the alleged misrepresentation. *See Bonavitacola* 2003 WL 329145 at *5.

Under well settled federal law, Plaintiffs have failed to plead the predicate acts of wire fraud. Their RICO claims must be dismissed.

**v. The First Amended Complaint Fails to Allege a Proper RICO Enterprise**

Plaintiffs have not satisfied the enterprise element of RICO. This is yet another reason why Plaintiffs' RICO claims cannot stand. "[A]n enterprise . . . may be an individual, a legal entity such as a corporation, or 'any union or group of individuals associated in fact although not a legal entity." *In re American Investors Life Ins. Co. Annuity Marketing & Sales Practices Lit.*, MDL No. 1712, 2006 WL 1531152 at *7 (E.D. Pa. Jun 2, 2006). In order to prove that a RICO

enterprise exists, plaintiffs must demonstrate: "(1) an ongoing organization, formal or informal; (2) that the various associates function as a continuing unit; and (3) that the enterprise has an existence sperate and a part from the alleged pattern of racketeering activity." *Id.* (citing *United State v. Turkette*, 452 U.S. 576, 583 (1981)). The enterprise element must be narrowly construed, otherwise, "RICO would encompass every fraud against a corporation, provided only that a pattern of fraud and some use of the mails or telecommunications to further the fraud were shown; the corporation would be the RICO person and the corporation plus its employees the 'enterprise.'" *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226 (7th Cir. 1997). As Judge Posner warns in *Fitzgerald*, the "danger" of not circumscribing the enterprise element is that the RICO statute could be "applied to situations absurdly remote from the concerns of the statute's framers." *Id.* at 227.

Plaintiffs allege a vague RICO enterprise that "[e]ach Defendant in this action has participated in" and "Defendants constitute an enterprise within the meaning of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., having systematically engaged in an ongoing pattern of racketeering activity affecting interstate and international commerce. (Plaintiffs' First Amended Complaint, Paragraphs 419-425). Plaintiffs' vague assertion of an enterprise demonstrates, in and of itself, that the allegations in the Complaint purporting to state the existence of a RICO enterprise are without merit. Not one of these eleven "enterprises" supports a viable claim § 1962(c).

Plaintiffs certainly do not aver facts tending to support the existence of any such enterprises. For example, they do not allege how the entities or persons alleged to be part of the enterprise functioned as a continuing unit or how a pattern of racketeering activity was conducted through these enterprises. Instead, Plaintiffs simply conclude that "[e]ach Defendant

in this action has participated in" and "Defendants constitute an enterprise within the meaning of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., having systematically engaged in an ongoing pattern of racketeering activity affecting interstate and international commerce. (Plaintiffs' First Amended Complaint, Paragraphs 419-425). This approach falls squarely within the concerns expressed by Judge Posner in the *Fitzgerald* case. As a result, Plaintiffs' enterprise allegations must fail. *See In re American Investors*, 2006 WL 1531152 at *7 (granting motion to dismiss because alleged enterprise had no structure). Absent any evidence of a coordinated enterprise, Plaintiffs' RICO claim must fail.

**vi. Plaintiffs Fail to State a Claim for RICO Conspiracy**

Plaintiffs have also failed to state a claim for conspiracy as required by the RICO statute. In Count 1 of the Amended Complaint, Plaintiffs purport to allege a RICO claim under

> §1962, which provides in relevant part:
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d)It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.
>
> 18 U.S.C. §1962 (c) and (d).

As the Third Circuit has held, any claim under §1962(d) based on a conspiracy to violate the other subsections of §1962 necessarily fails if the substantive claims are themselves deficient. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993) ("Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 must necessarily fail if the substantive claims are themselves deficient."); *see also Teti v. Towamencin Township*, No. 96-5402, 2001 WL 1168102, at *8 (E.D. Pa. Aug. 27, 2001).

Plaintiffs cannot establish a claim under §1962(c). As a matter of law, therefore, Plaintiffs' conspiracy claim under §1962(d) must be dismissed as well.

**2. Count II - Unfair Competition under Lanham Act 15 U.S.C. § 1125 Should be Dismissed for Failure to State a Claim**

Despite Plaintiffs' threadbare accusations, there is no evidence of likelihood of confusion or false representation of Plaintiffs' mark. Opinion-based criticism is not "unfair" competition. The Lanham Act is intended to prevent consumer confusion and regulate unfair competition in the marketplace. Plaintiffs fail to articulate any likelihood of confusion, but instead seek to stifle Dr. Ley's opinions and academic criticism. Count Two of the Amended Complaint should be dismissed as it fails to state a claim upon which relief can be granted.

**i. Unfair Competition Standard**

To prevail on a claim for Unfair Competition under the Lanham Act, a plaintiff must prove: (1) the defendant has made a false or misleading statement regarding his own product or another's; (2) that has a tendency to deceive the intended audience; (3) the deception is material and is likely to influence purchasing decisions; (4) the advertised goods traveled in interstate commerce; and (5) there is a likelihood of injury to the plaintiff. *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 198 (3d Cir. 2014) (citing *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 248 (3d Cir. 2011)). To state a claim, "the complaint must include sufficiently detailed allegations regarding the nature of the alleged falsehood to allow defendant to make a proper defense." *Robert Bosch LLC v. Pylon Mfg. Corp.*, 632 F. Supp. 2d 362, 365 (D. Del. 2009) (internal citations and quotation marks omitted).

**ii. Plaintiffs' Amended Complaint Fails to Satisfy the Intermediate Pleading Standard Applicable to Unfair Competition Claims under the Lanham Act**

An intermediate standard, blending Federal Rule of Civil Procedure 8 and 9, applies to causes of action under the Lanham Act. *See N.J. Physicians United Reciprocal Exch. v. Boynton & Boynton, Inc.*, 141 F. Supp. 3d 298, 307-08 (D.N.J. 2015) (applying an intermediate approach to Lanham Act claims); *see also Liqwd, Inc. v. L'Oreal USA, Inc.*, CA No. 17-14-JFB-SRF, 2019 WL 10252725 at *5 n. 4 (D. Del. Apr. 30, 2019) (adopting the intermediate approach to false advertising claims under the Lanham Act) ("The intermediate pleading requirement is sufficient to address the fraudulent element of a Lanham Act counterclaim and ensure that plaintiff is on notice of 'the nature of the alleged falsehoods to allow [it] to make a proper defense.'") (quoting *Trans USA Prods., Inc. v. Howard Berger Co., Inc.*, 2008 WL 852324 at *5 (D.N.J. Mar. 28, 2008)).

Rule 9(b)'s "particularity requirement requires a plaintiff to allege 'all of the essential factual background that would accompany the first paragraph of any newspaper story - that is, the who, what, when, where, and how of the events at issue.'" *US ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 176 (3rd Cir. 2019) (*quoting U.S. ex rel. Moore & Company, P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016) and *In Re Rockefeller Center Properties, Inc. Securities Litigation*, 311 F.3d 198, 217 (3d Cir. 2002). To satisfy the Rule 9(b) requirement, "a plaintiff must plead or allege the date, time, and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Federico v. Home Depot*, 507 F.3d 188, 200 (3rd Cir. 2007). "Rule 9(b) is not satisfied where a plaintiff merely lumps the who, what, when and where together." *Riachi v. Prometheus Group*, 822 Fed. Appx. 138, 142 (3d Cir. 2020).

Plaintiffs' Complaint fails to adequately plead its case pursuant to Rule 8, much less 9(b) or an intermediate standard. Instead, Plaintiffs merely provide conclusory statements, such as

"Defendants engaged in a systematic disinformation campaign, including but not limited to falsely representing Plaintiffs' marks and services, discrediting its website, and misleading the public regarding its mission and operations" or "Defendants deliberately engaged in acts of deception, including the use of fraudulent academic publications, suppressing academic research, influencing professional organizations, and disseminating defamatory statements designed to harm Plaintiffs' credibility and economic viability." (Plaintiffs' First Amended Complaint, Paragraph 430-431). Plaintiffs failed to provide any detail as to what the specific false statements were, where they were published, who published them, the date they were published, the times they were published, the circumstances under which they were published, or any other details sufficient to defend against this claim. This fails to meet even the basic pleading standards, much less a heightened standard applicable to this Lanham Act claim.

**iii. Plaintiffs' Claims also fail as to Elements One, Two, Three, Four and Five**

Plaintiffs claim for Unfair Competition must also be dismissed because their allegations as to elements one, two, three, four and five of the unfair competition test are merely threadbare recitals of the legal elements of a claim for unfair competition.

As to element one (the defendant has made a false or misleading statement regarding his own product or another's), Plaintiffs have failed to plead, as required, with any detail, as to what the specific false statements were, where they were published, who published them, the date they were published, the times they were published, the circumstances under which they were published, or any other details sufficient to defend against this claim.

As to element two, (actual deception, or at least a tendency to deceive a substantial portion of the intended audience), Plaintiffs merely allege the threadbare legal conclusion that "Defendants deliberately engaged in acts of deception, including the use of fraudulent academic

publications, suppressing academic research, influencing professional organizations, and disseminating defamatory statements designed to harm Plaintiffs' credibility and economic viability." (Plaintiffs' First Amended Complaint, Paragraph 431). These allegations are nothing more than a recitation of the legal element unsupported by any specific factual allegations and thus Plaintiffs have not met their burden to plead this element of their Unfair Competition claim. *See Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3rd Cir. 1993) ("[P]laintiff bears the burden of proving actual deception by a preponderance of the evidence. Hence, it cannot obtain relief by arguing how consumers could react; it must show how consumers actually do react.") (internal citations omitted). See also United States District Court for the District of Delaware, *CareDx, Inc v. Natera, Inc.*, Memorandum Opinion, 19-662-CFC, July 17, 2023, ("Memorandum Opinion"), p. 4 ("[T]here must be a showing of some customer reliance on the false advertisement" to establish damages under the Lanham Act.").

The Complaint also does not allege sufficient facts to support the third element (that the deception is material in that it is likely to influence purchasing decisions). Rather, Plaintiffs fail to allege any specific facts that the alleged deception is likely to influence purchasing decisions or that the alleged misrepresentation is material. Thus, Plaintiffs have failed to allege that any deception is material in that it is likely to influence purchasing decisions, let alone what would be purchased by Plaintiffs. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3rd Cir. 1997) (plaintiff's "'boilerplate and conclusory allegations will not suffice, and plaintiffs have an obligation to accompany their legal theory with factual allegations that make their theoretically viable claim plausible.'") (internal citations omitted).

As to the fourth element, Plaintiffs' Complaint fails to articulate what goods Dr. Ley allegedly advertised and transported in interstate commerce. As a result, Plaintiffs have failed to

articulate exactly how the advertised goods traveled in interstate commerce. Thus, Plaintiffs have failed to allege the fourth element of a Lanham claim.

As to the fifth element, Plaintiffs similarly fail to meet the fifth element of the unfair competition test (likelihood of injury to Plaintiff in terms of declining sales, loss of goodwill, etc.) because it has only pled legal conclusions. Here, Plaintiffs merely assert that the alleged Unfair Competition has caused Plaintiffs to suffer significant financial losses, reputational damage, lost business opportunities, and ongoing harm to their business and professional interests" without identifying any particular loss, damage, harm, or any specific facts to demonstrate the extent and nature of the alleged loss, damage, or harm. (See Plaintiffs' First Amended Complaint, Paragraph 434). Indeed, Plaintiffs do not allege any facts that their finances and business opportunities decreased or when the decrease occurred. Plaintiffs also failed to correlate Dr. Ley's alleged Unfair Competition to their alleged lost finances or state any other causal link between any lost finances and business opportunities and Dr. Ley's alleged unfair competition. See *Nespresso USA, Inc. v. Ethical Coffee Co. SA*, CA No. 16-194-GMS, 2017 WL 3021066 at *4 (D. Del. July 14, 2017) (finding counterclaim failed to plead facts that plausibly allege a link between defendant's lost sales or goodwill and plaintiff's statements even where the counterclaim alleged that defendant "ha[d] and will continue to be injured by inter alia, lost sales, loss of business opportunities, and loss of goodwill. . .."); *see also U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922 (3rd Cir. 1990) ("To recover damages, a plaintiff must show that the 'falsification [or misrepresentation] actually deceives a portion of the buying public.'") (*quoting Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3rd Cir. 1958)).

Thus, Plaintiffs fail to meet the fifth element of the unfair competition test. Accordingly, this Court should dismiss Count II because Plaintiffs have failed to state a claim for Unfair Competition under the Lanham Act.

**iv. Punitive Damages are unavailable under the Lanham Act and therefore should be stricken from Count II**

The Lanham Act does not include punitive damages as a remedy for infringement of federally registered marks. Plaintiffs seek punitive damages as part of Count II: "Because Defendants' conduct was outrageous and done with deliberate disregard for the rights of others, Plaintiffs request an award of punitive damages." However, Section 35(a) of the Lanham Act expressly states that damages "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). Federal courts have uniformly interpreted this provision to mean that punitive damages are unavailable under the Act. *See e.g. Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 112 (2d Cir. 1988). Accordingly, Plaintiffs may not recover punitive damages under Count 2, and this claim should be stricken.

**3. Count III - Trademark Dilution (15 U.S.C. § 1125(c)) Should be Dismissed**

**i. Plaintiffs' Amended Complaint Fails to Satisfy the Intermediate Pleading Standard Applicable to Dilution Claims under the Lanham Act**

An intermediate standard, blending F.R.C.P. 8 and 9, applies to causes of action under the Lanham Act. See *N.J. Physicians United Reciprocal Exch. v. Boynton & Boynton, Inc.*, 141 F. Supp. 3d 298, 307-08 (D.N.J. 2015) (applying an intermediate approach to Lanham Act claims).

Plaintiffs' Amended Complaint fails to adequately plead its case pursuant to Rule 8, much less 9(b) or an intermediate standard. It merely provides conclusory statements, such as "Defendants used Plaintiffs' trademark without consent to identify goods and/or services that caused a likelihood of confusion to Plaintiffs' commercial interests" or "[a]fter obtaining its

recognized status, Defendants use of Plaintiffs' mark in commercial activities caused dilution of the mark's quality through blurring and/or tarnishment and caused confusion to Plaintiffs' commercial interests." (Plaintiffs' First Amended Complaint, Paragraph 439). Plaintiffs failed to provide any detail as to what the specific use of Plaintiffs' mark was, where they were published, who published them, the date they were published, the times they were published, the circumstances under which they were published, how Dr. Ley's use created a likelihood of confusion as to Plaintiffs' commercial interests or any other details sufficient to defend against this claim. This fails to meet even the basic pleading standards, much less a heightened standard applicable to this Lanham Act claim.

**ii. Plaintiffs' Claims failed to meet the requirements of a Dilution claim under Section 43(c) of the Lanham Act**

Section 43(c) of the Lanham Act provides that " the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury." 15 U.S.C. § 1125(c). In order to establish a federal dilution claim, a plaintiff must show: (1) the plaintiff is the owner of a mark that qualifies as a 'famous' mark in light of the totality of the four factors listed in § 1125(c)(2)(A); (2) the defendant is making commercial use in interstate commerce of a mark or trade name; (3) defendant's use began after the plaintiff's mark became famous; and (4) defendant's use causes dilution by lessening the capacity of the plaintiff's mark to identify and distinguish goods or services. *Lingo v. Lingo*, 785 F. Supp. 2d 443, 455 (D. Del. 2011) (*citing Times Mirror Magazines, Inc. v. Las Vegas Sports News*, 212 F.3d 157, 163 (3d Cir. 2000)).

According to the statute:

> [A] mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:
> (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
> (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
> (iii) The extent of actual recognition of the mark.
> (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

15 U.S.C. § 1125(c)(2)(A).

As to the first factor, Plaintiffs must establish the trademark for NoFap is famous. Plaintiffs have only alleged that "The trademark for NoFap is well-known and distinctive" with no factual support or reliance on the § 1125(c)(2)(A) four factors. (See Plaintiffs' First Amended Complaint, Paragraph 437).

As to the second factor, Plaintiffs have not pleaded any facts to support an allegation that Dr. Ley is making commercial use in interstate commerce of the NoFap mark or trade name. Plaintiffs only allege that "After obtaining its recognized status, Defendants use of Plaintiffs' mark in commercial activities caused dilution of the mark's quality through blurring and/or tarnishment and caused confusion to Plaintiffs' commercial interests." (See Plaintiffs' First Amended Complaint, Paragraph 439). Plaintiffs have not stated what commercial activities Dr. Ley engaged in that caused dilution of the NoFap mark. This is especially important as the anti-dilution statute expressly exempts from its reach "[a]ny fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services." 15 U.S.C.

§1125(c)(3)(A) & (C). As Dr. Ley is an academic, academic fair use is an important consideration.

Pursuant to 17 U.S.C. § 107:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work....

Dilution claims exclude news reporting, commentary, criticism and commercial speech. Dr. Ley's alleged conduct and academic commentary is subject to these exclusions. As such, Plaintiffs' claim fails to meet the second factor of a Lanham Act Dilution claim.

As to the third factor (defendant's use began after the plaintiff's mark became famous), there are absolutely no specific factual allegations, including dates, to determine when Dr. Ley allegedly used the NoFap mark. Plaintiffs do not detail when Dr. Ley utilized the NoFap mark in a manner which caused the alleged dilution and alleged confusion. As such, Dr. Ley is unable to determine if the alleged use began after the Plaintiffs' mark became famous and the third factor is not met.

As to the final factor (defendant's use causes dilution by lessening the capacity of the plaintiff's mark to identify and distinguish goods or services), Plaintiffs have not alleged that Dr. Ley's use caused dilution by lessening the capacity of the Plaintiffs mark to identify and distinguish goods or services and have failed to also provide any factual support that Dr. Ley's use caused dilution by lessening the capacity of the Plaintiffs' mark to identify and distinguish

goods or services. Plaintiffs have not alleged how Dr. Ley's alleged use of the mark has created any confusion among customers in the marketplace. As a result, Plaintiffs fail to meet the fourth factor.

**iii. Punitive Damages are unavailable under the Lanham Act and therefore should be stricken from Count III**

Again, the Lanham Act does not include punitive damages as a remedy for infringement of federally registered marks. Plaintiffs seek punitive damages as part of Count 3: "J. Awarding actual, compensatory, treble and/or punitive damages." (Plaintiffs' First Amended Complaint, Count 3, J.). However, Section 35(a) of the Lanham Act expressly states that damages "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). Federal courts have uniformly interpreted this provision to mean that punitive damages are unavailable under the Act. *See e.g. Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 112 (2d Cir. 1988). As a result, punitive damages are unavailable under the Lanham Act.

**4. Count IV - Trademark Infringement (15 U.S.C. § 1114) Should be Dismissed**

**i. Plaintiffs' Amended Complaint Fails to Satisfy the Intermediate Pleading Standard Applicable to Trademark Infringement Claims under the Lanham Act**

An intermediate standard, blending F.R.C.P. 8 and 9, applies to causes of action under the Lanham Act. *See N.J. Physicians United Reciprocal Exch. v. Boynton & Boynton, Inc.*, 141 F. Supp. 3d 298, 307-08 (D.N.J. 2015) (applying an intermediate approach to Lanham Act claims).

In their Amended Complaint, Plaintiffs fail to adequately plead their case pursuant to Rule 8, much less 9(b) or an intermediate standard. It merely provides conclusory statements, such as "Defendants used Plaintiffs' trademark without consent to identify goods and/or services that caused a likelihood of confusion to Plaintiffs' commercial interests." (Plaintiffs' First Amended Complaint, Paragraph 444).

Plaintiffs failed to provide any detail as to what the specific uses of Plaintiffs' mark was, where they were published, who published them, the date they were published, the times they were published, the circumstances under which they were published, how Dr. Ley's use created a likelihood of confusion as to Plaintiffs' commercial interests or any other details sufficient to defend against this claim. This fails to meet even the basic pleading standards, much less a heightened standard applicable to this Lanham Act claim.

**ii. Plaintiffs' Claims fail to meet the requirements of a trademark infringement claim under 15 U.S.C. §1114**

Count IV of Plaintiffs' First Amended Complaint alleges trademark infringement. In order to establish federal trademark infringement, a plaintiff must demonstrate that: (1) the mark is valid and legally protectable; (2) plaintiff owns the mark; and (3) the defendant's use of its mark to identify goods or services is likely to create confusion concerning the origin of the goods or services. *Checkpoint Sys. v. Check Point Software Tech.*, 269 F.3d 270, 279 (3d Cir. 2001). "If the mark at issue [i]s federally registered and ha[s] become incontestable, ... validity, legal protectability, and ownership are proved." *Ford Motor Co. v. Summit Motor Prod., Inc.*, 930 F.2d 277, 291 (3d Cir. 1991) (citation omitted). A mark is incontestable if it has been "in continuous use for five years subsequent to the date of ... registration and is still in use in commerce." 15 U.S.C. § 1065. "Where a mark has not been federally registered or has not achieved incontestability, validity depends on proof of secondary meaning, unless the unregistered or contestable mark is inherently distinctive." *Ford Motor*, 930 F.2d at 291. To determine likelihood of confusion, courts in the Third Circuit employ "the *Lapp* factors." However, "[i]f products are directly competing, and the marks are clearly very similar, a district judge should feel free to consider only the similarity of the marks themselves." A*&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 214 (3d Cir. 2000).

The *Lapp* factors are based on the case of *Interpace Corporation v. Lapp, Inc.* 721 F.2d 460 (3d Cir. 1983) and are used to determine the likelihood of confusion. The ten *Lapp* factors are:

> (1) similarity of the marks;
> (2) the strength of the owner's mark;
> (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;
> (4) the length of time the defendant has used the mark without evidence of actual confusion;
> (5) the intent of the defendant in adopting the mark;
> (6) the evidence of actual confusion;
> (7) whether the goods are marketed or advertised through the same channels;
> (8) the extent to which the targets of the parties' sales efforts are the same;
> (9) the relationship of the goods in the minds of consumers; and
> (10) other factors suggesting that the consuming public might expect the prior owner to manufacture both products, or manufacture a product in the defendant's market, or expect that the prior owner is likely to expand into the defendant's market.

The Lanham Act prohibits the "use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(a); *see also Island Insteel Sys. V. Waters*, 296 F.3d 200, 212 (3d Cir 2002). In addition, plaintiff must allege facts sufficient to establish that defendants' use of the registered mark "is likely to cause confusion . . . as to the affiliation, connection, or association of [Defendants] with [Plaintiff], or as to the origin, sponsorship, or approval of [Defendants'] goods, services, or commercial activities by [Plaintiff]." *1-800 Contacts, Inc. v. WhenU.Com, Inc.* 414 F.3d 400, 407 (2d Cir. 2005).

Dr. Ley does not dispute that Plaintiffs have registered the "NoFap" mark and thus have trademark rights in the mark. However, there can be no infringement of those rights if the Defendants did not make use of the marks in commerce. A mark is used in commerce for

trademark infringement purposes, for goods, when (1) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale," and (2) the goods are sold or transported in commerce[.]" 15 U.S.C. § 1127. A mark is used in commerce for trademark infringement purposes, for services, "when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services." *Id.* A mark is not used in commerce unless the alleged infringer uses it as a unique indicator of the source of the related goods or services. *See Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995) (federal trademark law prevents competitors from copying "a source-identifying mark," thus ensuring the owner will "reap the financial, reputation- related rewards associated with a desirable product"). Defendants' use of NoFap, on the facts alleged by Plaintiffs, does not infringe Plaintiffs' trademark rights because the mark is not associated with any of Dr. Ley's products or their sale.

Not every unauthorized use of a protected mark is actionable. *See, e.g., Yankee Pub. Inc. v. News Am. Pub. Inc.*, 809 F. Supp. 267, 272 (S.D.N.Y. 1992). Rather, the Lanham Act is concerned only where a defendant has employed the plaintiff's mark as a designation of the source of the defendant's own goods or services. "It is the source denoting function which trademark laws protect, and nothing more" *Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296, 301 (9th Cir. 1979). "If a defendant uses a trademark in a non-trademark way, the laws of trademark infringement are not implicated." *Volkswagen AG v. Dorling Kindersley Publ'g Inc.*, 614 F. Supp. 2d 793, 808-09 (E.D. Mich. 2009).

Section 33(b)(4) of the Lanhan Act provides an affirmative defense to an infringement claim where the use of the mark "is a use, otherwise than as a mark, . . . which is descriptive of and used fairly and in good faith only to describe the goods . . . of such party[.]" 15 U.S.C. § 1115(b)(4). The fair use defense permits use of protected marks in descriptive ways, but not as marks identifying the user's own product. *See Car-Freshner Corp. v. S.C. Johnson & Son, Inc.*, 70 F. 3d 267, 270 (2d Cir. 1995). Where, as in this case, the plaintiff cannot allege that the unauthorized use serves to identify the source of the defendant's product, such use is not protectable as trademark infringement. *See ETW Corp. v. Jireh Pub., Inc.*, 332 F. 3d 915. 922 (6th Cir. 2003) (citing J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 3:1 (2002)).

Defendants use of the term "NoFap" is a classic example of non-trademark use. While Plaintiffs only allege, in a conclusory manner, Dr. Ley "used Plaintiffs' trademark without consent to identify goods and/or services that caused a likelihood of confusion to Plaintiffs' commercial interests" and Dr. Ley's "use of Plaintiffs' mark in commercial activities caused confusion to Plaintiffs' commercial interests", it is clear from the use of the terms that Plaintiffs selected to incorporate in the Complaint, that Dr. Ley's use of "NoFap" was a descriptive term used by Dr. Ley to discuss "NoFap" academically and not as a mark to identify the source of anything sold by Dr. Ley. (Plaintiffs' First Amended Complaint, Paragraphs 444 and 445). Accordingly, there is no likelihood of confusion, as Dr. Ley's alleged use of the mark was not "use in commerce." Instead, Dr. Ley's alleged use of the mark was for purposes of commentary, criticism and academic discussion, which is non-commercial speech and not prohibited by The Lanham Act. Plaintiffs do not and cannot allege any facts which suggest Dr. Ley sells competing products or branded his work as affiliated with Plaintiffs.

While Plaintiffs attempt to allege that "Because Defendants' conduct was outrageous and done with deliberate disregard for the rights of others, Plaintiffs request an award of treble damages," Plaintiffs cannot support the allegation that Dr. Ley used the NoFap mark in bad faith. (Plaintiffs' First Amended Complaint, Paragraphs 447). Plaintiffs are required to show that Defendants "intended to trade on the good will of [Plaintiff] by creating confusion as to source or sponsorship." *Arnold v. ABC, Inc.*, 2007 U.S. Dist. LEXIS 5802, 2007 WL 210330, at *3 (S.D.N.Y. Jan 29, 2007) (quotations and citation omitted). Conclusory allegations aside, the Complaint alleges no facts which, if true, would lead to the conclusion that Defendants sought to gain advantage by associating their products with Plaintiffs. Accordingly, the use of NoFap by Dr. Ley is a fair use under 15 U.S.C. § 1115(b), and Plaintiffs' trademark infringement claim should be dismissed.

**iii. Punitive Damages are unavailable under the Lanham Act and therefore should be stricken from Count IV**

The Lanham Act does not include punitive damages as a remedy for infringement of federally registered marks. Plaintiffs seek punitive damages as part of Count 4: "o. Awarding actual, compensatory, treble and/or punitive damages." (Plaintiffs' First Amended Complaint, Count 4, o.). However, Section 35(a) of the Lanham Act expressly states that damages "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). Federal courts have uniformly interpreted this provision to mean that punitive damages are unavailable under the Act. *See e.g. Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 112 (2d Cir. 1988). As a result, punitive damages are unavailable under the Lanham Act.

**5. Count V - Trade Disparagement Should be Dismissed**

**i. Trade Disparagement Standard**

In Pennsylvania, businesses have a legally viable claim against another for the oral or written publication of a disparaging statement concerning that business where:

1. The statement is false;
2. The publisher either intends the publication to cause financial loss or reasonably should recognize the publication would result in financial loss;
3. Financial loss does in fact result; and
4. The publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity.

*Pro Golf Mfg. Inc. v. Tribune Review Newspaper Co.* , 809 A.2d 243 (Pa. 2002).

**ii. Plaintiffs' Claims fail to meet the requirements of a Trade Disparagement Claim**

Plaintiffs' claim of trade disparagement is insufficient and fails to meet the elements of a Trade Disparagement Claim as Plaintiffs' Complaint only includes conclusory statements without any factual support.

As to the first element (the statement is false), Plaintiffs have failed to provide any of the alleged statements from Dr. Ley that were false and/or defamatory[2]. Plaintiffs have also failed to explain how any of the statements were false or defamatory. Plaintiffs only provide a conclusory statement that "Defendants engaged in a pattern and practice of publishing false and/or defamatory statements regarding Plaintiffs' organization." (Plaintiffs' First Amended Complaint, Paragraph 450).

As to the second element (the publisher either intends the publication to cause financial loss or reasonably should recognize the publication would result in financial loss), Plaintiffs do not allege Dr. Ley intended his alleged publication(s) to cause financial loss or reasonably should have recognized the publication would result in financial loss. Nor can Plaintiffs support such an allegation, since Dr. Ley did not publish anything with the intent to cause financial harm.

[2] One aspect of Dr. Ley's defense is to demonstrate that the statement was not false. If Plaintiffs fail to plead details, defendant is unable to defend himself.

As to the third element (resulting financial loss), Plaintiffs merely assert that "[a]s a direct and proximate result of Defendants' trade disparagement, Plaintiffs' organization has suffered damages, including reputational injury, loss of goodwill, and financial harm." (Plaintiffs' First Amended Complaint, Paragraph 451). Plaintiffs fail to identify any particular loss, damage, or harm, or any specific facts to demonstrate the extent and nature of the alleged loss, damage, or harm. Indeed, Plaintiffs do not allege any facts that their finances and business opportunities decreased or when the decrease allegedly occurred. Plaintiffs also failed to correlate Dr. Ley's alleged publication to their alleged financial loss or state any other causal link between any financial loss or business opportunities and Dr. Ley's alleged publications.

As to the fourth factor (the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity), Plaintiffs fail to establish which specific statements from Dr. Ley were objectively false, that Dr. Ley knew the alleged statements were false or that he acted in reckless disregard of its truth or falsity. Plaintiffs provide no factual support or even any allegation that Dr. Ley knew the alleged statements were false or that he acted in reckless disregard of its truth or falsity. As a result, Count 5, trade disparagement, must be dismissed for failure to state a claim upon which relief can be granted.

**6. Count VII - Fraudulent Inducement Should be Dismissed**

**i. Fraudulent Inducement Standard**

To sustain a claim of Fraudulent Inducement, under Pennsylvania law, plaintiffs are required to prove the following elements: (1) a representation; (2) material to the transaction at hand; (3) made falsely with knowledge of its falsity or recklessness as to its truth; (4) with intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury. *Broederdorf v. Bachelor*, 129 F.Supp.3d 182, 198 (E.D. Pa. 2015). Successfully

pled, such contracts are voidable. *Giannone v. Ayne Institute*, 290 F.Supp.2d 553, 564 (E.D. Pa. 2003).

However, in Pennsylvania, such claims are subject to the parole evidence rule. If the court finds that the agreement at issue constitutes "a writing that represents the 'entire contract between the parties,' then the court may not consider 'preliminary negotiations, conversations[,] verbal agreements,' or any other extrinsic evidence of representations made by the parties prior to the execution of the written contract." *Batoff v. Charbonneau*, 130 F.Supp.3d 957, 970 (E.D. Pa. 2015). And so, the parole evidence rule will bar the admission of statements necessary to establish a fraud in the inducement claim, resulting in its dismissal. For instance, in *Batoff*, the court dismissed the fraud in the inducement claim because the settlement agreement clearly represented the entire contract between the parties through its integration clause. In a similar case, the Eastern District Court dismissed a fraud in the inducement claim because the contract expressly stated, "This Agreement contains the whole agreement between Seller and Buyer, and there are no other terms," which triggered the parole evidence rule. *Charlton v. Gallo*, 2010 WL 653155, at *4 (E.D. Pa. 2010).

**ii. Plaintiffs failed to Sufficiently Plead a Fraudulent Inducement Claim as Required By Federal Rule of Civil Procedure 9(b)**

Rule 9(b)'s "particularity requirement requires a plaintiff to allege 'all of the essential factual background that would accompany the first paragraph of any newspaper story - that is, the who, what, when, where, and how of the events at issue.'" *US ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 176 (3rd Cir. 2019) (quoting *U.S. ex rel. Moore & Company, P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016) and *In Re Rockefeller Center Properties, Inc. Securities Litigation*, 311 F.3d 198, 217 (3d Cir. 2002)). To satisfy the Rule 9(b) requirement, "a plaintiff must plead or allege the date, time, and place of the alleged fraud or otherwise inject

precision or some measure of substantiation into a fraud allegation." *Federico v. Home Depot*, 507 F.3d 188, 200 (3rd Cir. 2007). "Rule 9(b) is not satisfied where a plaintiff merely lumps the who, what, when and where together." *Riachi v. Prometheus Group*, 822 Fed. Appx. 138, 142 (3d Cir. 2020).

Plaintiffs' Amended Complaint fails to adequately plead its case pursuant to Rule 9(b). Plaintiffs merely provide conclusory statements throughout the Fraudulent Inducement count. Plaintiffs failed to provide any detail as to what the specific collaboration between Dr. Ley and Defendant Prause was, when it occurred, or how it affected Plaintiffs such that it resulted in pressure for Plaintiffs to sign a settlement agreement.[3] Plaintiffs further fail to provide details concerning the confidential information that was exchanged between Defendants Prause and Dr. Ley. Plaintiffs also fail to detail the social media posts about the ongoing mediation that Defendants Prause and Dr. Ley made and when they were made and how these social media posts pressured Plaintiffs into entering into a settlement agreement under terms more favorable to Dr. Ley when Dr. Ley was not involved in the subject lawsuit nor was he a party to the settlement agreement. Plaintiffs have failed to provide sufficient details to allow Dr. Ley to defend against this claim. Plaintiffs' claim for Fraudulent Inducement fails to meet even the basic pleading standards, much less a heightened standard applicable to this fraud claim.

**iii. Plaintiffs fail to meet the requirements of a Fraudulent Inducement Claim**

Plaintiffs fail to adequately plead the elements of a Fraudulent Inducement claim. As to the first prong, Plaintiffs fail to state what representation Dr. Ley made that induced Plaintiffs to sign a settlement agreement in a lawsuit Dr. Ley was not involved in. Plaintiffs do not even allege Dr. Ley made a fraudulent representation; it is only alleged that Dr. Ley collaborated with

[3] Plaintiff NoFap was not a party to the Release/Non-Disparagement agreement and therefore has no standing for this Count.

Dr. Prause when she made fraudulent representations regarding Plaintiffs. Even the alleged representations by Dr. Prause are unclear. (Plaintiffs' First Amended Complaint, Paragraph 462).

As to the second prong, Dr. Ley is not accused of making any representations let alone any material to the transaction at hand. Without an allegation that Dr. Ley made a false statement, this claim fails on its face as to Dr. Ley.

As to the third prong, Dr. Ley is not accused of making false representations with knowledge of falsity or recklessness as to the truth. Only Dr. Prause was, without specifics, accused of making "knowingly false statements to Plaintiffs during the settlement negotiations." (Plaintiffs' First Amended Complaint, Paragraph 462).

As to the fourth prong, there is no allegation that Dr. Ley intended to mislead another into a reliance. Only Dr. Prause, without specifics, is accused of having known or liable because she should have known "that her false statements would induce Plaintiffs and/or a reasonable person to rely upon their statements." (Plaintiffs' First Amended Complaint, Paragraph 464).

As to the fifth prong, there is no allegation that Plaintiffs justifiably relied on a misrepresentation by Dr. Ley. Plaintiffs only allege, without any factual basis, that "Plaintiffs reasonably relied on Defendant ***Prause's*** representations of future compliance and good faith when entering the agreement." (Plaintiffs' Amended Complaint, Paragraph 468) (emphasis supplied). There is no such allegation or factual basis to support a similar allegation against Dr. Ley.

Lastly, as to the sixth prong, there is no factual allegation detailing a resulting injury resulting from a representation from Dr. Ley. Plaintiffs only assert, in a conclusory matter, that "[a]s a direct and proximate result of Defendants Prause and Ley's fraudulent inducement, Plaintiffs have sustained substantial harm, including reputational damage, emotional distress,

financial losses, and additional damages exceeding the jurisdictional minimum, with the exact amount to be proven at trial." (Plaintiffs' First Amended Complaint, Paragraph 473). Plaintiffs have failed to plead with specific facts and any specific extent how they sustained reputational damage, emotional distress, financial losses and additional damages as a result of Dr. Ley's representations involving a lawsuit he was not a party to.

As a result, it is respectfully submitted that Plaintiffs' Fraudulent Inducement claim should be dismissed as to Dr. Ley.

**7. Count VIII - Tortious Interference Should be Dismissed**

**i. Tortious Interference Standard**

Plaintiffs have failed to meet the necessary requirements of pleading a claim for Tortious Interference. In Pennsylvania, intentional interference with contractual relations[4] requires the following elements: "(1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct." *Hennessy v. Santiago*, 708 A.2d 1269, 1278 (Pa. Super. Ct. 1998) (citing *Triffin v. Janssen*, 626 A.2d 571, 574 (Pa. Super. Ct. 1993)). A fundamental requirement of interference with contractual relations is the existence of a contract between the plaintiff and a third party. *E.g.*, *Nix v. Temple Univ. Of Commw. Sys. Of Higher Educ.*, 596 A.2d 1132, 1137 (Pa. Super. Ct. 1991) ("The tort of interference with contract is defined in terms of unprivileged interference with a contract with a third party. Essential to the right of recovery on this theory is the existence of a contractual relationship between plaintiff and a party other than the

[4] Pennsylvania law also refers to the tort as "intentional interference with contract," "tortious interference with contract," and "malicious interference with contract." There is no substantive difference between these claims.

defendant."); *Glenn v. Point Park Coll*., 272 A.2d 895, 898 (Pa. 1971); see generally Restatement (Second) of Torts § 766. Plaintiffs have failed to plead the basic requirements of a claim for Tortious Interference.

**ii. Plaintiffs' Claims fail to meet the requirements of a Tortious Interference claim**

Plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted. As to first element, it is unclear from Plaintiffs' Amended Complaint whether Plaintiffs are alleging Dr. Ley interfered with Plaintiffs' contract with Dr. Prause (as suggested by paragraph 477) or whether Plaintiffs are claiming Dr. Ley allegedly interfered with some other undefined prospective relationship. In either event, Plaintiffs' claim fails. If the latter, Plaintiffs have failed to allege the specific contractual or prospective relationships required to sustain the claim. *Glenn v. Point Park College*, 272 A.2d 895 (Pa. 1971). Furthermore, "Commentary on matters of public concern, even if harmful to business interests, is privileged." *Walnut Street Associates v. Brokerage Concepts*, 982 A.2d 94 (Pa. Super. Ct. 2009). Plaintiffs failed to establish a reasonable probability of entering business relationships and failed to define the allegedly improper acts of Dr. Ley.

As to the second prong (an intent on the part of the defendant to harm the plaintiff by interfering with the contractual relationship), there is no allegation that Dr. Ley intended to harm the Plaintiffs by interfering with the contractual relationship. Plaintiffs only alleged a conclusory statement that "Defendants intentionally interfered with the contractual agreement between Plaintiffs and Defendant Prause." (Plaintiffs' First Amended Complaint, Paragraph 477). Plaintiffs fail to state how Dr. Ley acted with intent to harm Plaintiffs and fail to state how Dr. Ley even knew or should have known about the agreement between Prause and Plaintiffs when he is not a party to it and was not involved in the underlying litigation.

As to the third prong, any statements of opinion or academic criticism are subject to the privileges of the First Amendment.

As to the fourth prong (damages resulting from the defendant's conduct), Plaintiffs have only provided conclusory statements and have not provided the extent of the alleged damages or a factual basis for the damages. Plaintiffs allege that "[a]s a direct and proximate result of Defendants' intentional and malicious interference, Plaintiffs have suffered substantial economic damages, loss of opportunities, and reputational harm exceeding the jurisdictional minimum, with exact amounts to be proven at trial." (Plaintiffs' First Amended Complaint, Paragraph 481). Plaintiffs have failed to state how Dr. Ley contributed to Plaintiffs' reputational harm, substantial economic damages, and loss of opportunities related to a settlement agreement with Dr. Prause in a lawsuit that did not involve Dr. Ley. As a result, Plaintiffs' Tortious Interference claim cannot stand, as it fails to allege an intent on the part of Dr. Ley to harm the Plaintiffs by interfering with a contractual agreement and further fails to show how Dr. Ley's conduct caused damage to Plaintiffs.

**8. Count IX - Defamation Per Se and Per Quod Should be Dismissed**

**i. Defamation Standard**

In Pennsylvania, Defamation is the tort of detracting from a person's reputation, or injuring a person's character, fame, or reputation, by false and malicious statements. *Joseph v. Scranton Times L.P.*, 959 A.2d 322 (Pa.Super. 2008). "A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession." *Id.* at 334. "[To]be actionable, the words must be untrue, unjustifiable, and injurious to the reputation of another. When communications tend to lower a person in the estimation of the community, deter third persons from associating with him, or

adversely affect his fitness for the proper conduct of his lawful business or profession, they are deemed defamatory." *Id.*

Under Pennsylvania law, a claim for defamation must allege: (1) The defamatory character of the communication; (2) Its publication by the defendant; (3) Its application to the plaintiff; (4) The understanding by the recipient of its defamatory meaning; (5) The understanding by the recipient of it as intended to be applied to the plaintiff; (6) Special harm resulting to the plaintiff from its publication; and (7) Abuse of a conditionally privileged occasion. 42 Pa.C.S.A. §8343(a). The defendant has the burden of proving, when the issue is properly raised: (1) The truth of the defamatory communication; (2) The privileged character of the occasion on which it was published; and (3) The character of the subject matter of defamatory comment as of public concern. 42 Pa.C.S.A. §8343(b). In most cases, a plaintiff must also allege special harm resulting to the plaintiff from the publication of the defamatory content. *Id.* "A complaint for defamation must allege with particularity the content of the defamatory statements, the identity of the persons making such statements, and the identity of the persons to whom the statements were made." *Itri v. Lewis*, 422 A.2d 591, 592 (Pa.Super. 1980).

Dr. Ley's stated opinions are protected. "Statements of opinion, as opposed to statements of fact, are not actionable in defamation." *Mathias v. Carpenter*, 587 A.2d 1 (Pa. Super. Ct. 1991). Moreover, "Scientific disputes are not defamation." *ONY, Inc. v. Cornerstone Therapeutics*, 720 F.3d 490 (2d Cir. 2013). Any statements attributable to Dr. Ley which are opinions, academic disagreement or methodological criticism, cannot be defamatory.

**ii. Plaintiffs' claims for Defamation Per Quod and Defamation Per Se in the Plaintiffs' Amended Complaint are insufficient as a matter of law**

In Pennsylvania, a claim for defamation must be plead with particularity, including the content of the defamatory statements, the identity of the persons making such statements, and the

identity of the persons to whom the statements were made." *Itri v. Lewis*, 422 A.2d 591, 592 (Pa.Super. 1980).

Pennsylvania requires a provably false statement to sustain a claim for defamation. 42 Pa. Cons. Stat. § 8343(b)(1). Plaintiffs have failed to identify a specific false statement by Dr. Ley, how it is objectively false and how Dr. Ley knew it was false. Plaintiffs' Complaint falls woefully short of this requirement. Plaintiffs generally allege that various statements were made but does not state by which Defendant. Specifically, Plaintiffs allege:

> 483. Defendants published false and defamatory statements pertaining to Plaintiffs in a journal published by Defendant Taylor & Francis, on the Internet (including websites, social media, and various online forums), and through other outlets. These false statements included, but are not limited to, the assertions that:
>
> a. Plaintiff Rhodes is a criminal, including accusations that he engaged in hacking, financial fraud, stalking, domestic terrorism, sexual assault, and attempted murders;
> b. Plaintiff NoFap is a hate group and Plaintiff Rhodes is its leader, endorsing violence, bigotry, and extremism;
> c. Plaintiff NoFap is a designated terrorist organization and Plaintiff Rhodes is its leader;
> d. Plaintiffs endorse violence, including claims that their platforms contain a disproportionate amount of violence-themed posts;
> e. Plaintiff Rhodes is a fraudster who fabricated struggling with excessive pornography use for ulterior motives, such as fame and money; and
> f. Plaintiff Rhodes is severely mentally ill, violent, abusive to women, and dangerous.
>
> 484. In addition to these false statements, Defendants further made other false and defamatory statements against Plaintiffs.

(Plaintiffs' First Amended Complaint, Paragraphs 483 and 484). Plaintiffs fail to provide information as to the identity of the persons making such statements. Plaintiffs just group all of the Defendants together and attribute all of the statements to all of the Defendants. Plaintiffs also fail to identify the person(s) to whom the alleged defamatory statements were made. As a result of the lack of specificity, Defendant cannot adequately respond to Plaintiffs' Defamation Per Se and Per Quod claims and the claim must be dismissed for failure to state a claim upon which relief can be granted.

**9. Count X - Publicity Placing Person in False Light Should be Dismissed**

**i. False Light Standard**

In Pennsylvania, the tort of False Light is defined as follows:

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

*Larsen v. Philadelphia Newspapers*, 543 A. 2d 1181 (Pa. Super. 1988).

As clearly stated in Restatement (Second) of Torts § 652E , a publication is actionable if it is not true, is highly offensive to a reasonable person and is publicized with knowledge or in reckless disregard of its falsity. *Id.* (citations omitted). Further, to constitute a tortious invasion of privacy an act (publication) must "cause mental suffering, shame or humiliation to a person of ordinary sensibilities.'" *Hull v. Curtis Publishing Co.*, 125 A.2d 644, 646 (Pa. Super. Ct. 1956) , quoting *Smith v. Doss*, 37 So.2d 118, 120-21 (N.D. Ala. 1948).

**ii. Plaintiffs' First Amended Complaint Fails to Adequately Plead a Claim of Publicly Placing a Person in False Light and Should be Dismissed**

Plaintiffs' First Amended Complaint fails to provide any information as to the alleged false statements made by Dr. David Ley. For example, Plaintiffs' first Amended Complaint fails to provide the date of the false statement, where Dr. Ley published the false statement, and how the statement was false.

Additionally, Plaintiffs fail to plead and allege facts that establish Dr. Ley had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. Instead, Plaintiffs only plead that "Because Defendants' conduct was outrageous and done with deliberate disregard for the rights of others, Plaintiff

Rhodes requests an award of treble and/or punitive damages." (Plaintiffs' First Amended Complaint, Paragraph 514). Plaintiffs fail to plead Dr. Ley knowingly or recklessly disregarded the falsity of the allegedly false statement. It is not even clear what false statement or statements Plaintiffs believe Dr. Ley made. As a result, the Publicly Placing a Person in False Light claim should be dismissed for failure to plead the statutory requirements.

**10. Count XI - Publicity Given to Private Life Should be Dismissed.**

**i. Publicity Given to Private Life Standard**

In Pennsylvania, the tort of publicity given to private life has the following elements: "(1) publicity, given to (2) private facts, (3) which would be highly offensive to a reasonable person and (4) is not of legitimate concern to the public." *Harris By Harris v. Easton Pub. Co.*, 483 A. 2d 1377 (Pa. 1984) (*citing Brown v. Mullarkey*, 632 S.W.2d 507 (Mo.App. 1982); *Forsher v. Bugliosi*, 26 Cal.3d 792, 163 Cal.Rptr. 628, 608 P.2d 716 (1980)).

**ii. Plaintiffs' First Amended Complaint Fails to State a Claim of Publicity Given to Private Life and Count 11 should be dismissed**

Plaintiffs allege that

509. Defendants disclosed and published private matters related to Plaintiff Rhodes to the public at large.
510. The disclosure of private information was and/or could be construed as highly offensive to a reasonable person.
511. No public interest exists relative to Defendants' disclosure and/or publication of Plaintiff Rhodes' private matters.
512. At various times and for malicious purposes, Defendants obtained private and highly personal material pertaining to Plaintiff Rhodes. These alleged facts and items included, but were not limited to, Plaintiff Rhodes' personal address, the address of Plaintiff Rhodes' family members, personal photographs from his teenage years, medical records, the names of Plaintiff Rhodes' former romantic partners, partially unclothed photographs of Plaintiff Rhodes, obtained via opposition research.

(Plaintiffs' First Amended Complaint, Paragraphs 509-512).

First, Plaintiffs fail to show what private information of Plaintiff Rhodes that Dr. Ley published. Plaintiffs only cites that "[a]t various times and for malicious purposes, Defendants obtained private and highly personal material pertaining to Plaintiff Rhodes. These alleged facts and items included, but were not limited to, Plaintiff Rhodes' personal address, the address of Plaintiff Rhodes' family members, personal photographs from his teenage years, medical records, the names of Plaintiff Rhodes' former romantic partners, partially unclothed photographs of Plaintiff Rhodes, obtained via opposition research." (Plaintiffs' First Amended Complaint, Paragraph 512). However, in Pennsylvania addresses are generally considered public information. *See Harris By Harris v. Easton Pub. Co.*, 483 A. 2d 1377 (Pa. 1984) (holding no "absolute right to keep private their addresses and amount of assistance in certain cases"). Home addresses are found in various official documents like property deeds and voter registrations. Moreover, personal photographs of Plaintiff Rhodes do not meet the second prong of the publicity given to private life as photographs are not "private facts." Moreover, it is unclear what medical records were allegedly released and there is no allegation that the contents of said medical records being released would be "highly offensive to a reasonable person." Lastly, the names of romantic partners being released is not "highly offensive to a reasonable person."

Moreover, there is no allegation that Defendants, including Dr. Ley, published "Plaintiff Rhodes' personal address, the address of Plaintiff Rhodes' family members, personal photographs from his teenage years, medical records, the names of Plaintiff Rhodes' former romantic partners, partially unclothed photographs of Plaintiff Rhodes." The only allegation is that Defendants obtained that information. There is no specific allegation as to what Dr. Ley, as opposed to the other defendants, allegedly published. Therefore, the allegations are vague and impossible for Dr. Ley to respond to.

As a result, Plaintiffs' First Amended Complaint fails to state a claim of publicity given to private life and should be dismissed.

**11. Count XII - Intrusion into Private Affairs Should be Dismissed**

**i. Intrusion into Private Affairs Standard**

In Pennsylvania, the tort of intrusion upon seclusion does not depend upon any publicity given to the person whose interest is invaded or to his affairs. *Harris By Harris v. Easton Pub. Co.*, 483 A. 2d 1377 (Pa. 1984) (citing Restatement (Second) of Torts § 652B, comment a). The invasion may be (1) by physical intrusion into a place where the plaintiff has secluded himself, (2) by use of the defendant's senses to oversee or overhear the plaintiff's private affairs, or (3) some other form of investigation or examination into plaintiff's private concerns. *Id.* (citation omitted).

The defendant is subject to liability under this section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. *Id.*, (*citing Fogel v. Forbes, Inc.*, 500 F.Supp. 1081, 1087 (E.D.Pa. 1980). There is also no liability unless the interference with the plaintiff's seclusion is substantial and would be highly offensive to the ordinary reasonable person. *Id.*

**ii. Plaintiffs' First Amended Complaint Fails to State a Claim of Intrusion into Private Affairs and Count 12 should be dismissed**

Plaintiffs allege in Count 12 that "at all times relevant, Plaintiff Rhodes had a reasonable expectation of privacy in his personal life, communications, and sensitive personal information—including, but not limited to, his private correspondence, medical records, family relationships, social media usage, and other intimate or confidential details. (Plaintiffs' First Amended Complaint, Paragraph 518). Here, there is no expectation of privacy in social media usage. *See Commonwealth v. Kurtz*, Case No.: 8-100 MAP 2023 at *2-3 (Pa. 2025) (finding no

expectation of privacy with IP addresses or Google search). *See also citing Fogel v. Forbes, Inc.*, 500 F.Supp. 1081, 1087 (E.D.Pa. 1980) (finding no Intrusion into Private Affairs claim for photograph taken at Miami Airport as the Miami Airport is open to the general public).

Additionally, there is no specific allegation as to what Dr. Ley, as opposed to the other defendants, allegedly published. Therefore, the allegations are vague and are impossible to respond to. There is no specific allegation or factual support that Dr. Ley, as opposed to another Defendant, (1) physically intruded into a place where the plaintiff has secluded himself, (2) by use of the Dr. Ley's senses to oversee or overhear the plaintiffs' private affairs, or (3) some other form of investigation or examination into plaintiffs' private concerns.

As a result, Plaintiffs' First Amended Complaint fails to state a claim of publicity given to private life and should be dismissed.

**12. Count XIII - Intentional Infliction of Emotional Distress Should be Dismissed**

**i. Intentional Infliction of Emotional Distress Standard**

As to the tort of Intentional Infliction of Emotional Distress, there is very little Pennsylvania or federal case law addressing this cause of action. *See Hoy v. Angelone*, 720 A.2d 725 (Pa. 1998). However, courts have been chary to allow recovery for a claim of intentional infliction of emotional distress. *Id.* "Only if conduct which is extreme or clearly outrageous is established will a claim be proven." *Id.* The Pennsylvania Superior Court has noted, "[t]he conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.* (*quoting Buczek v. First National Bank of Mifflintown*, 366 Pa.Super. 551, 558, 531 A.2d 1122, 1125 (1987)). Described another way, "[i]t has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict

emotional distress, or even that his conduct has been characterized by `malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." *Id.* (*citing Restatement (Second) of Torts § 46*, comment d; *Daughen v. Fox*, 372 Pa.Super. 405, 412, 539 A.2d 858, 861 (1988)).

Cases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have presented only the most egregious conduct. *Id. See e.g., Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970)(defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where it was discovered two months later and returned to parents (recognizing but not adopting section 46)); *Banyas v. Lower Bucks Hospital*, 293 Pa.Super. 122, 437 A.2d 1236 (1981)(defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d. Cir.1979)(defendant's team physician released to press information that plaintiff was suffering from fatal disease, when physician knew such information was false).

According to the Pennsylvania Superior Court:

> "There remains some question as to whether the courts of this Commonwealth recognize a cause of action for intentional infliction of emotional distress. *See, e.g., Hoy v. Angelone*, 554 Pa. 134, 150-51 n. 10, 720 A.2d 745, 753-54 n. 10 (1998). However, our Supreme Court has indicated that in order for a plaintiff to prevail on such a claim, he or she must, at the least, demonstrate intentional outrageous or extreme conduct by the defendant, which causes severe emotional distress to the plaintiff. *Id.*, at 151, 720 A.2d at 754. In addition, a plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct. *Fewell v. Besner*, 444 Pa.Super. 559, 664 A.2d 577, 582 (Pa.Super.1995).

*Reeves v. Middletown Athletic Ass'n,*, 866 A.2d 1115, 1122 (Pa.Super.2004).

**ii. Plaintiffs' First Amended Complaint Fails to State a Claim of Intentional Infliction of Emotional Distress and Count 13 should be dismissed**

Plaintiffs, in Count 13 allege:

> 529. As a direct and proximate result of Defendants' extreme and outrageous conduct, Plaintiff Rhodes has suffered—and continues to suffer—severe emotional pain and suffering, humiliation, anxiety, depression, reputational harm, and other damages. Plaintiff Rhodes has also incurred substantial economic losses, loss of opportunities, and other injuries, including reputational harm.

(Plaintiffs' First Amended Complaint, Paragraph 529).

Here, Plaintiff Rhodes fails to allege that he suffered some type of resulting physical harm due to Dr. Ley's alleged outrageous conduct. As such, the Intentional Infliction of Emotion Distress claim cannot stand. *Reeves v. Middletown Athletic Ass'n*, 866 A.2d 1115, 1122 (Pa.Super.2004). (holding a plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct).

Plaintiffs also allege in Count 13:

> 524. Defendants intentionally conspired to fabricate false and defamatory accusations against Plaintiffs for the purposes of harming their reputation and standing in the community.
> 525. Defendants conduct was extreme and outrageous.
> 526. The above-detailed acts and omissions by Defendants—including but not limited to (a) disseminating fabricated and defamatory allegations against Plaintiffs; (b) conspiring with an estranged and unstable biological family member of Plaintiff Rhodes; (c) repeatedly falsely accusing Plaintiff Rhodes of serious crimes; (d) filing false administrative and law-enforcement reports targeting Plaintiff Rhodes; (e) closely surveilling, data-mining, and conducting extensive opposition research on Plaintiff Rhodes; (f) relaying disparaging and defamatory statements about Plaintiff Rhodes to his associates and the public up to dozens of times per day; (g) coordinating efforts with each other and/or third parties to undermine Plaintiff Rhodes' reputation and professional standing; and (h) relaying celebratory messages concerning the death of Gary Wilson to his friend Plaintiff Rhodes—constitutes extreme and outrageous conduct.

(Plaintiffs' First Amended Complaint, Paragraphs 524-526).

Here, this conduct as alleged does not rise to the level of extreme or clearly outrageous to reach the degree of going "beyond all possible bounds of decency, and to be regarded as

atrocious, and utterly intolerable in a civilized society." *Hoy v. Angelone*, 720 A.2d 725 (Pa. 1998). Additionally, it is unclear what specifically Dr. Ley allegedly did (as differentiated from the other defendants), which makes it impossible to respond to the allegations. As such, there is no evidence as plead that Dr. Ley's conduct rises to the level of extreme or clearly outrageous to reach the degree of going beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. As a result, Plaintiffs' Claim for Intentional Inflection of Emotional Distress should be dismissed for failure to state a claim.

**13. Count XIV - Civil Conspiracy Should be Dismissed**

**i. Civil Conspiracy Standard**

Pursuant to Pennsylvania law, "[c]ivil conspiracy occurs when two or more persons combine or agree intending to commit an unlawful act or do an otherwise lawful act by unlawful means." *Weaver v. Franklin County*, 918 A.2d 194, 202 (Pa.Cmwlth. 2007). A plaintiff bringing a civil conspiracy claim is required to aver "material facts which will either directly or inferentially establish elements of conspiracy." *Id.* Additionally, a plaintiff must allege (1) the persons combined with a common purpose to do an unlawful act or to do a lawful act by unlawful means or unlawful purpose, (2) an overt act in furtherance of the common purpose has occurred, and (3) the plaintiff has incurred actual legal damage. *Id.* Importantly, absent a civil cause of action for a particular underlying act, there can be no cause of action for civil conspiracy to commit that act. *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655 (Pa.Super. 2000).

"Proof of malice, i.e., an intent to injure, is an essential part of a conspiracy cause of action; this unlawful intent must also be without justification." *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 212 (Pa.Super. 2003). Further, all of the elements of a claim for civil conspiracy may

be proven circumstantially by subsequent acts of the alleged conspirators, provided that the evidence is "full, clear and satisfactory." *Id.*

**ii. Plaintiffs' First Amended Complaint Fails to State a Claim of Civil Conspiracy and Count 14 should be dismissed**

In Count 14, Plaintiffs allege:

> 532. Defendants entered into an agreement, understanding, or concerted action intended to harm Plaintiffs by engaging in defamatory, fraudulent, and otherwise tortious conduct.
> 533. Specifically, the Defendants conspired to target Plaintiffs with tortious conduct, including to cause reputational and economic harm to Plaintiffs.
> 534. Each Defendant committed one or more overt acts in furtherance of the conspiracy, including but not limited to: conducting coordinated opposition research on Plaintiffs; publishing and disseminating false, defamatory, and contract-breaching disparaging statements; and actively participating in efforts to suppress Plaintiffs' organization.
> 535. Defendants acted with malicious intent, specifically intending to cause Plaintiffs harm, injury, and financial loss through coordinated, deliberate efforts.
> 536. As a direct and proximate result of Defendants' civil conspiracy, Plaintiffs suffered substantial damages, including economic losses, loss of business opportunities, severe reputational injury, emotional distress, and other compensable injuries exceeding the jurisdictional minimum, with exact amounts to be proven at trial.

(Plaintiffs' First Amended Complaint, Paragraph 532-536).

Here, Count 14 of the First Amended Complaint is full of conclusory statements and has no factual support. First, Plaintiffs have failed to aver material facts that either directly or inferentially establish elements of conspiracy. *See Weaver v. Franklin County*, 918 A.2d 194, 202 (Pa.Cmwlth. 2007). Additionally, there are no facts to establish that Dr. Ley (1) combined with others for a common purpose to do an unlawful act or to do a lawful act by unlawful means or unlawful purpose, and (2) committed an overt act in furtherance of the common purpose that has occurred. *Weaver v. Franklin County*, 918 A.2d 194, 202 (Pa.Cmwlth. 2007). It is unclear

what the alleged unlawful activity is that was committed by Dr. Ley. Plaintiffs simply group all Defendants together and provide no factual basis for their claims.

Plaintiffs have also failed to provide any proof or factual basis that Dr. Ley acted with malice and intended to harm Plaintiffs. Plaintiffs also fail to plead that Dr. Ley's alleged actions were without justification. *See Reading Radio, Inc. v. Fink*, 833 A.2d 199, 212 (Pa.Super. 2003) (holding "proof of malice, i.e., an intent to injure, is an essential part of a conspiracy cause of action; this unlawful intent must also be without justification.).

Lastly, as to damages, it is unclear what the extent of Plaintiffs' alleged damages are and how those damages are causally related to Dr. Ley's conduct. As currently pled, there is no factual support regarding damages, making the damages speculative and unclear.

As a result, Plaintiffs fail to properly plead a Civil Conspiracy Claim with a factual basis to support the claim against Dr. Ley and Count 14 (Civil Conspiracy) should be dismissed for failure to state a claim for which relief can be granted.

**14. Count XV - Gross Negligence and Negligence Should be Dismissed**

**i. Negligence and Gross Negligence Standard**

In Pennsylvania, "[i]t is axiomatic that in order to maintain a negligence action, the plaintiff must show that the defendant had a duty "to conform to a certain standard of conduct;" that the defendant breached that duty; that such breach caused the injury in question; and actual loss or damage." *Phillips v. Cricket Lighters*, 841 A. 2d 1000 (Pa. 2003) (*citing Morena v. South Hills Health System*, 501 Pa. 634, 462 A.2d 680, 684 n.5 (1983)).

Of these four elements, the primary one is whether the defendant owed a duty of care. *Id.* (*citing Althaus v. Cohen*, 756 A.2d 1166, 1168 (Pa. 2000)). To determine whether the defendant owed a duty of care, we must weigh the following five factors: "(1) the relationship between the

parties; (2) the social utility of the [defendant's] conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the [defendant]; and (5) the overall public interest in the proposed solution." *Id.* (*citing Althaus* 756 A.2d. at 1169). No one of these five factors is dispositive. *Id.* Rather, a duty will be found to exist where the balance these factors weighs in favor of placing such a burden on a defendant. *Id.*

As to Gross Negligence, it has been described as "the want of even scant care" and "the failure to exercise even that care which a careless person would use." *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A. 2d 695, 704-705 (Pa. Super. 2000) (*citing* W. Keeton, D. Dobbs, R. Keeton & D. Owens, *Prosser and Keeton on Torts, § 34* at 183 (5th ed.1984) and *County of Sacramento v. Lewis,* 523 U.S. 833, 863, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (describing the type of conduct necessary to satisfy the deprivation standard of the due process clause as "something less than intentional conduct, such as recklessness or gross negligence.") and *Ambrose v. New Orleans Police Dept. Ambulance Serv.*, 639 So.2d 216, 219-20 (La. 1994) (internal quotations and citations omitted) (stating "Gross negligence has been defined as the want of that diligence which even careless men are accustomed to exercise. Gross negligence has also been termed the entire absence of care and the utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others. Additionally, gross negligence has been described as an extreme departure from ordinary care or the want of even scant care."); and Black's Law Dictionary, defining gross negligence as "[a] lack of slight diligence or care," and "[a] conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party...." Black's, 1057 (7th Ed.1999)).

**ii. Plaintiffs' First Amended Complaint Fails to State a Claim of Negligence and Count 15 should be dismissed as Dr. Ley, a non-treating psychologist, owes only a duty of ordinary care to Plaintiffs**

In Count 15, Plaintiffs allege:

> 538. As licensed psychologists, Defendants Prause and Ley owed a professional duty of care to exercise reasonable judgment, avoid foreseeable harm, and refrain from conduct that foreseeably inflicts emotional or reputational injury on others, including Plaintiffs. They breached that duty by engaging in coordinated harassment, defamation, and exploitation of vulnerable individuals for professional or commercial advantage.

(Plaintiffs' First Amended Complaint, Paragraphs 532-536).

Dr. Ley, as a non-treating, psychologist, however, does not owe Plaintiffs any duty of care to exercise reasonable judgment, avoid foreseeable harm or refrain from conduct that foreseeably inflicts emotional or reputational harm to Plaintiffs. Dr. Ley only owes a duty of ordinary care to Plaintiffs.

The Michigan Supreme Court decision in *Dyer v. Trachtman*, 470 Mich. 45 (Mich. 2004) is instructive to the facts of this case. In *Dyer*, the Michigan Supreme Court held that "[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports." *Dyer*, 470 Mich at 50. At issue in Dyer was whether an examinee can assert a medical malpractice claim against a physician who performs an IME given that a traditional physician-patient relationship does not exist in such a context. *Id.* at 48-55. The *Dyer* Court ultimately concluded that "an IME physician has a limited physician-patient relationship with the examinee that gives rise to limited duties to exercise professional care." *Id.* at 49. In reaching this conclusion, the *Dyer* Court noted that an IME physician's relationship with an examinee is "limited" in that "[i]t does not involve the full panoply of the physician's typical responsibilities to diagnose and treat the examinee for medical conditions." *Id.* at 50. Based on this observation, the *Dyer* Court indicated that "[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports." *Id.* Rather, the limited relationship only

"imposes a duty on the IME physician to perform the examination in a manner not to cause physical harm to the examinee." I*d.* The *Dyer* Court stated that "[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports," *Id.* at 50.

As such, a non-treating doctor, like the doctor in *Dyer*, has a limited duty to another individual. Dr. Ley, as a non-treating, psychologist owes Plaintiffs a limited duty of care as Dr. Ley does not correspond with Plaintiffs or even examine them. As a result, Dr. Ley cannot be found negligent in this matter as alleged in Count 15 as he is a non-treating psychologist who did not encounter Plaintiffs. As a result, Count 15 should be dismissed as Dr. Ley owed a limited duty of ordinary care to Plaintiffs as a non-treating psychologist.

**15. Count XVI - Declaratory Judgment Should be Dismissed**

**i. Declaratory Judgment Standard**

The Declaratory Judgment Act (hereinafter "DJA") states that federal courts "may declare the rights and other legal relations of any interested part seeking such declaration." 28 U.S.C. § 2201(a). Declaratory judgment is an appropriate remedy when it will terminate the controversy giving rise to the proceeding. Fed. R. Evid. 57 advisory committee's note. However, the DJA grants discretion to federal district courts, who have "no compulsion" to exercise their jurisdiction over cases seeking declaratory judgment. *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) ("District courts possess discretion in determining whether and when to entertain an action under the DJA.").

Declaratory judgments are intended to "define the legal rights and obligations of the parties in anticipation of some future conduct" and are not meant to "simply proclaim that one party is liable to another." *Andela v. Admin. Office of U.S. Courts*, 569 F. App'x 80, 83 (3d Cir.

2014). The Third Circuit has adopted the "independent claim" test to determine whether an action seeking declaratory relief may be separated from a claim for legal relief. *Rarick v. Federated Serv. Ins. Co.*, 852 F. 3d 223 (3d Cir. 2017). Rarick defines an independent claim as one which is "alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief." *Id.* at 228. If a Complaint seeking declaratory judgment contains a legal claim that is independent, the district court has a "virtually unflagging obligation" to hear those claims, subject to the presence of "exceptional circumstances." *Id.* at 229 (*quoting Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 814 (1976)).

Where an action seeking declaratory relief does not contain an independent claim seeking legal relief, the discretion of the district court is broader. District courts must weigh a number of factors in deciding whether or not to exercise their jurisdiction over a case seeking declaratory judgment. One such consideration is "practicality and wise judicial administration." *State Auto Ins. Cos. v. Summy*, 234 F. 3d 131, 134 (3d Cir. 2000). Courts must also consider the proper relationship between federal and state courts, the likelihood that a federal court will be able to resolve the uncertainty of obligation that gave rise to the controversy, and the public interest in settlement of the uncertainty of obligation, among other factors. *Reifer v. Westport Ins. Corp.*, 751 F. 3d 129, 141 (3d Cir. 2014). Where the action presents novel, unsettled, and/or complex issues of state law, district courts should be particularly reluctant to exercise their jurisdiction. *Id.* "The fact that district courts are limited to predicting, rather than establishing state law requires serious consideration." *Id.* at 148.

Plaintiffs' request for injunctive relief is also improper. In order to obtain an injunction in federal court, the party seeking it (movant) must generally show: (1) Likelihood of Success on

the Merits, (2) Irreparable Harm without the order, (3) the Balance of Hardships favors them, and (4) the injunction serves the Public Interest, as established by the Supreme Court in *Winter v. Natural Resources Defense Council* 555 U.S. 7 (2008). Plaintiffs' Amended Complaint offers only conclusory assertions of ongoing harm, particularly as to Dr. Ley who is not a party to the Non-Disparagement Agreement.

**ii. Plaintiffs' First Amended Complaint Fails to State a Proper Declaratory Judgment Claim against Dr. Ley and Count 17 should be dismissed**

Plaintiffs' allegations in Count 17 against Dr. Ley for Declaratory Judgment are improper, as Dr. Ley is not a party to the subject Non-Disparagement Agreement. He was also not a party to the litigation that the Non-Disparagement Agreement stemmed from. As a result, he has no rights, obligations and liabilities under the Non-Disparagement Agreement. Only Plaintiff Rhodes and Defendant Dr. Prause are parties to the Non-Disparagement Agreement. As such, Dr. Ley has no actual, substantial, and immediate controversy related to the Non-Disparagement Agreement.

Additionally, Plaintiffs are seeking a declaratory judgment for prior conduct and not future disputes as to Dr. Ley, especially when asking for a judicial declaration that Defendants Ley, Taylor & Francis, UCLA, and the Aylo Defendants facilitated, conspired, or otherwise participated in Defendant Prause's alleged breaches of the Non-Disparagement Agreement;

A declaratory judgment for past conduct is expressly forbidden in the Third Circuit in *Andela v. Admin. Office of U.S. Courts*, 569 F. App'x 80, 83 (3d Cir. 2014) (holding that Declaratory judgments are intended to "define the legal rights and obligations of the parties in anticipation of some future conduct" and are not meant to "simply proclaim that one party is liable to another").

Here, the District Court, as Count 17 is plead, it is within its discretion to dismiss the declaratory action. There is no independent claim seeking legal relief, there is no public interest in hearing the declaratory judgment count, there is no ongoing controversy between Plaintiffs and Dr. Ley related to the Non-Disparagement agreement, and the declaratory judgment count seeks judicial intervention related to Dr. Ley's alleged prior conduct. As a result, Count 17 (declaratory judgment) is improper and should be dismissed as it fails to state a claim for which relief can be granted.

## VI. CONCLUSION

For the reasons set forth above, Defendant Dr. David Ley respectfully requests dismissal of all claims with prejudice.

**Respectfully submitted.**

**Segal McCambridge Singer & Mahoney, Ltd.**

By: */s/ Jeffrey F. Hall-Gale, Esq.*

Jeffrey F. Hall-Gale, Esquire
Attorney ID No. 318850
Segal McCambridge Singer & Mahoney, Ltd.
One Commerce Square
2005 Market Street
Suite 3110
Philadelphia, PA 19103
215-972-8015
Jhall-Gale@smsm.com
Counsel for Defendant
David Ley, Ph.D.

Date: January 30, 2026

**CERTIFICATE OF CONFERRAL**

In accordance with the Court's Local Rules of Court, and Your Honor's Standing Order and Procedures on Civil Motion Practice, I, Jeffrey F. Hall-Gale, Esq., hereby certify that on January 26, 2026, counsel for Defendant, David Ley, Ph.D., conferred with counsel for Plaintiffs via email to determine whether any of the identified deficiencies could be cured by amendment. The parties do not believe that the identified deficiencies can be cured by amendment.

/s/ Jeffrey F. Hall-Gale, Esq.

Jeffrey F. Hall-Gale, Esq.

**CERTIFICATION OF SERVICE**

I, Jeffrey F. Hall-Gale, Esquire, hereby certify that a true and correct copy of the foregoing was served via e-filing upon the following indicated below:

Peter T. Kobylinski, Esquire
Kobylinski & Kobylinski
Praetorian Law Group, LLC
Mitchell Building
304 Ross Street, Suite 510
Pittsburgh, PA 15210
pete@koby.law
**Counsel for Plaintiffs**

Courtney C.T. Horrigan, Esquire
Hudson M. Stoner, Esquire
Alexa L. Austin, Esquire
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
chorrigan@reedsmith.com
hstoner@reedsmith.com
aaustin@reedsmith.com
**Co-Counsel for Defendants**
**Aylo Holdings S.A.R.L. (d/b/a PornHub)**
**Aylo Billing Limited (d/b/a PornHub)**
**Aylo USA, Inc. (d/b/a PornHub)**
**Aylo Global Entertainment, Inc. (d/b/a PornHub)**

Ralph A. Dengler, Esquire
Venable LLP
151 W. 42nd Street, 49th Floor
New York, NY 10036
RADengler@Venable.com
Co-Counsel for Defendants
**Aylo Holdings S.A.R.L. (d/b/a PornHub)**
**Aylo Billing Limited (d/b/a PornHub)**
**Aylo USA, Inc. (d/b/a PornHub)**
**Aylo Global Entertainment, Inc. (d/b/a PornHub)**

Ernest F. Koschineg, Esquire
David G. Volk, Esquire
Jessica M. Heinz, Esquire
Cipriani & Werner, P.C.
450 Sentry Parkway, Suite 200
Blue Bell, PA 19422
ekoschineg@c-wlaw.com
dvolk@c-wlaw.com
jheinz@c-wlaw.com
**Counsel for Defendant**
**Nicole Prause, Ph.D.**

Alexander Nemiroff, Esquire
Gordon Rees Scully Mansukhani, LLP
Three Logan Square
1717 Arch Street, Suite 610
Philadelphia, PA 19103
anemiroff@grsm.com
**Counsel for Defendant**
**The Regents of the University of California (incorrectly identified as University of California Los Angeles (d/b/a UCLA))**

Kaitlin M. Gurney, Esquire
Elizabeth Seidlin-Bernstein, Esquire
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
gurneyk@ballardspahr.com
seidline@ballardspahr.com
**Counsel for Defendant**
**Taylor & Francis Group**

**Segal McCambridge Singer & Mahoney, Ltd.**
By: /s/ Jeffrey F. Hall-Gale, Esq.
Jeffrey F. Hall-Gale, Esquire

Date: January 30, 2026