

DONNA ROBERTS and DAWN  
ABRAMS,

Plaintiffs/Appellants

v.

CLIFFORD S. MINTZ,

Defendant/Respondent

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1563-14-T4

CIVIL ACTION

On appeal from  
Burlington County Superior Court  
Docket No. BUR-L-1658-10

Sat Below: Honorable Patricia  
Richmond, J.S.C.

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BRIEF OF AMICUS CURIAE  
PUBLIC CITIZEN, INC.  
IN SUPPORT OF DEFENDANT/RESPONDENT

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### INTEREST OF AMICUS CURIAE

Public Citizen, Inc., founded in 1971, is one of the nation's most prominent advocates for the legal rights of consumers. It has more than 350,000 members and supporters nationwide, including 7,500 in New Jersey. Public Citizen has often filed briefs, both on behalf of parties and as *amicus curiae*, in cases where consumers have been sued for their comments about businesses, including in *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001).

Public Citizen seeks to bring its expertise to bear in this case by appearing as *amicus curiae*, because the questions in this case raise significant First Amendment issues.

### PRELIMINARY STATEMENT

Consumers often criticize businesses with which they have interacted, expressing opinions about goods or services that they view as shoddy or about behavior that they believe is unethical. Other consumers often find such opinions useful – but reasonable readers recognize that the statements are indeed opinions based on the consumer's own subjective perceptions, not verifiable factual assertions (unless specific factual claims are indeed being made).

This is particularly so, as many courts have recognized, with regard to personal commentary posted on the Internet. The Superior Court correctly concluded that defendant Mintz's state-

ments about plaintiffs and their alleged business practices – statements posted in the “Rants and Raves” section of his personal blog – were indeed opinion. *Amicus* urges this Court to affirm the decision of the Superior Court granting summary judgment in favor of the defendant.<sup>1</sup>

#### STATEMENT OF PROCEDURAL HISTORY

*Amicus* relies on, and incorporates by reference, the Statement of Procedural History contained in defendant Mintz’s brief.

#### STATEMENT OF FACTS

*Amicus* relies on, and incorporates by reference, the Statement of Facts contained in defendant Mintz’s brief.

#### ARGUMENT

##### I. Mintz’s Statements Are Non-Verifiable Opinion and Therefore Are Not Actionable

To be defamatory, a statement must be a false factual assertion that damages another’s reputation. *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 585 (2009). Expressions of opinion, as opposed to factual assertions, are not actionable. *Id.* And in determining a statement’s meaning, courts “must consider ‘the listener’s reasonable interpretation, which will be based in part on the context in which the statement appears.’” *Id.*

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<sup>1</sup> *Amicus* expresses no views on the other matters discussed in the Superior Court opinion, such as the applicability of the “actual malice” test.

To be deemed defamatory, a statement must include "specific factual assertions that [can] be proven true or false." *Ward v. Zelickovsky*, 136 N.J. 516, 531 (1994). Statements expressed using "[l]oose, figurative or hyperbolic language [are] not likely to imply specific facts, and thus [are] not likely to be deemed actionable." *Lynch v. N.J. Educ. Ass'n*, 161 N.J. 152, 167-68 (1999). Words that are, in context, simply "insults, epithets, name-calling, and other forms of verbal abuse, although offensive, are not defamatory." *Id.* at 167.

Indeed, even terms that are also the names of crimes, such as "blackmail," may in context be properly understood as mere opinion. Thus, for instance, in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970), the U.S. Supreme Court held that in context an allegation that someone engaged in "blackmail" was not defamatory. Reasonable readers, the Court concluded, would not have thought that defendants were "charging [the plaintiff] with the commission of a criminal offense," but would have instead perceived the term as rhetorical expression of an opinion that the plaintiff had engaged in unfair business practices. *Id.* Likewise, in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974), the U.S. Supreme Court held that calling strikebreakers "traitor[s]" was, in context, not an accusation that the target had committed the crime of treason. Rather, a reasonable listener

would have understood the word as being used in a "loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization." *Id.*

The same is true of general allegations of "fraud," another term that is often used as a broad pejorative, like "blackmail" and "traitor." And that is especially so when those allegations are posted (as they were here) by an individual consumer under the label "Rants and Raves."

For instance, in one online defamation case, the Ninth Circuit held that the posts accusing an investment firm of engaging in "illegal activity" and "fraud" were merely opinion. *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1294 (9th Cir. 2014). The Ninth Circuit concluded that the name of the site on which the statements were posted, "obsidianfinancesucks.com," would lead "the reader of the statements [to be] predisposed to view them with a certain amount of skepticism and with an understanding that they will likely present one[-]sided viewpoints rather than assertions of provable facts.'" *Id.* at 1293 (quoting *Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220, 1232 (D. Or. 2011)). The Ninth Circuit also found that the defendant's statements were not factual enough to be proven true or false because they were made on "a non-professional website containing consistently hyperbolic language." *Id.* at 1294.

The Ninth Circuit's reasoning applies here as well. Like "obsidianfinancesucks.com," the category "Rants and Raves" would lead a reasonable reader to view posts skeptically, understanding that they would present Mintz's personal viewpoints rather than provable facts. This is especially so given Mintz's informal and vituperative language in the "Rants and Raves" section ("nefarious dog grifter," Appellants' First App. 24a, "Donna and her spawn," *id.* "odious people," *id.*, "despicable human beings," *id.* at 25a, "amoral and unethical scumbags," *id.* at 27a, "jerks," *id.*), language that is indeed characteristic of "rants" — opinionated and over-the-top condemnations.

Indeed, the California Court of Appeal decision in *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 696 (2012), held that online speech was opinion partly because it was posted in a Craigslist forum with the same name as the blog post label in this case — "Rants and Raves." Defendant had written that Summit Bank was a "problem bank," that customers were left "high and dry," and that the bank's Chief Executive Officer thought the bank was her "personel [sic] bank." 206 Cal. App. 4th at 697. The Court of Appeal concluded that all these statements were non-actionable opinion:

[B]ecause Rogers's alleged defamatory statements appeared in a section of the Craigslist Web site entitled "Rants and Raves," the reader of the statements should be predisposed to view them with a certain amount of skepticism, and with



an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts.

*Id.* at 696 (echoing the language from *Obsidian Finance*, 812 F. Supp. 2d at 1232, but without citation). That reasoning equally applies to this "Rants and Raves" case as well.

Many other courts have reached results similar to those in *Obsidian Finance* and *Summit Bank*. Thus, for instance, in *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 982 (N.D. Ohio 2003), the court recognized that, though "[i]n certain contexts, allegations of accounting fraud or the existence of government investigations may be the basis of a defamation claims," the context in that case made clear to reasonable readers that the speaker's claims of "fraud" were expressions of an opinion.

"The Defendant's postings," the court noted, "are fraught with figurative language and hyperbole." *Id.* The defendant's other speech "conveys an unprofessional background." *Id.* (apparently using "unprofessional" in the sense of lacking professional expertise). And a disclaimer on the discussion board "that any postings represent the opinions of the given author," rather than being endorsed by the company being discussed, would further lead reasonable readers to conclude that the statements were rhetoric and opinion. *Id.* Likewise, in this case, the title "Rants & Raves," as well as the context of an aggrieved consumer complaining on his own blog about a business – which sug-

gested a layperson's beliefs rather than a professional's expert knowledge – convey the very same sort of message to reasonable readers.

Indeed, courts have often noted more generally that "Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Ghanam v. Does*, 845 N.W.2d 128, 144 (Mich. Ct. App. 2014) (so stating as to online comments generally accusing a city official of stealing road salt and vehicle tires, made on an online message board dedicated to discussing local politics). "Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely." *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005) (so stating as to statements about a City Councilman's alleged "character flaws" and "obvious mental deterioration"). "If a statement appears in a place usually devoted to, or in a manner usually thought of as representing, personal viewpoints, it is also likely to be understood – and deemed by a court – to be nonactionable opinion." 1 Robert D. Sack, *Sack on Defamation* § 4:3.1 (4th ed. 2011).

To give one last example, in *Couloute v. Ryncarz*, 2012 WL 541089, at \*6 (S.D.N.Y. Feb. 17, 2012), the court stressed the importance of "the larger context of the website on which [the

statements] were posted" in determining whether speech on a Web site was fact or opinion. The site in that case, "liars-cheatersrus.com," was "'specifically intended to provide a forum for people to air their grievances about dishonest romantic partners.'" *Id.* "The average reader would know that the comments are 'emotionally charged rhetoric' and the 'opinions of disappointed lovers.'" *Id.* Given this context, "a reasonable reader would understand the comments to be opinion." *Id.* Likewise, here the name "Rants & Raves" and the hyperbolic and personal tone of the posts signals to reasonable readers that the posts are critical opinions.

To be sure, online as offline, false allegations of specific misconduct could be libelous. If Mintz had falsely said, for instance, that plaintiffs ran dog fights, or submitted unauthorized charges to his credit card, that might well be actionable.

But general condemnations, including inexact and pejorative language such as "scammed," "grifters," "puppy mill," "fraudulent," and "Donna and her spawn," are reasonably perceived by readers as opinions. The Superior Court well set forth the reasons supporting this (reasons that this brief will not repeat in detail). The cases cited in this section support the Superior Court's analysis.

Mintz's statements, evaluated in context, are thus not defamatory. Because they are non-verifiable opinions, the Superior

Court was correct in granting summary judgment in favor of Mintz.

## **II. There Is No Independent Tort Cause of Action for "Cyberbullying"**

The plaintiffs also claim that there is a cause of action for "cyberbullying," with a statute of limitations period of two years (Appellants' Br. 15). They hope to thus bring in statements that the Superior Court declined to address, because those statements were too stale for a defamation claim.

But there is no such cause of action under New Jersey law, and no such cause of action should be recognized. Indeed, consumers' expressing opinions and conveying accurate information about businesses is constitutionally protected speech, and cannot be made tortious. And while false and defamatory factual allegations are not constitutionally protected, there is no need to recognize a new tort to deal with them — such allegations are already covered by the tort of defamation (though, for the reasons given in Part I, that tort is inapplicable here).

# CONCLUSION

Because defendant Mintz's statements were non-verifiable opinions, *amicus* urges this Court to affirm the decision of the Superior Court granting summary judgment in favor of the defendant.

Respectfully submitted,

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