

2020 WL 2027399 (N.J.Super.L.) (Trial Order)
Superior Court of New Jersey, Law Division.
Somerset County

Brent COMYACK, Plaintiff,

v.

Alexa GIANNELLA, Nicole Valentino, Jaclyn Valentino Alexis Devaney,
Shannon Brown, Ryan McGann, and Justin Franco, Defendant.

No. SOM-L-1356-19.

April 21, 2020.

Order for Summary Judgement

Mark S. Carter-ID No. 013981981, Attorney at Law, 79 Main Street, Hackensack, NJ 07601, (201) 487-7666, (201) 488-4407 (Fax), E-Mail: mscesq@aol.com, File No. 6993, for defendant, Ryan McGann.

Hon. Thomas C. Miller, P.J.Cv.

*1 THIS MATTER being opened to the court by Mark S. Carter, Esq., Attorney for Defendant, RYAN McGANN, upon application for summary judgment, and the court having reviewed the certifications and other documents in support of the within application and opposition papers, if any, and the court being satisfied that defendant is entitled to summary judgment as a matter of law, and good cause appearing:

IT IS on this 21st day of April, 2020:

ORDERED AND ADJUDGED that summary judgment in favor of the Defendant, RYAN McGANN, dismissing the complaint and all other claims asserted by any other party herein, is hereby **GRANTED IN PART AND DENIED IN PART** in accordance with the attached Statement of Reasons.

/S/ THOMAS C. MILLER, P.J.Cv.

Hon. Thomas C. Miller, P.J.Cv.

SEE ATTACHED STATEMENT OF REASONS.

Defendants Brown, Devaney, and Valentinos' Motion to Dismiss and Motion for Summary Judgment

Defendant McGann's Cross-Motion for Summary Judgment

Defendant Franco's Cross-Motion for Summary Judgment

Returnable: March 27, 2020

Oral Argument Held Remotely Via "Zoom" on April 8, 2020

I. PARTIES AND RELIEF SOUGHT

Defendants Shannon Brown, Alexis Devaney, Jaclyn Valentino, and Nicole Valentino, collectively self-named the Whisper Network Defendants (“WN Defendants”), by and through their counsel, J. Remy Green, Esq. of Cohen & Green P.L.L.C., move to dismiss the Complaint for failure to state a claim and move for summary judgment. WN Defendants also filed a Reply on March 26, 2020, which was considered by the Court.

Defendant Ryan McGann (“McGann”), by and through his counsel, Mark S. Carter, Esq., cross-moves for summary judgment. McGann also filed a Reply on March 16, 2020, which was considered by the Court.

Defendant Justin Franco (“Franco”), by and through his counsel, Edward G. Washburne, Esq. of McKenna, DuPont, Higgins, & Stone, originally cross-moved for summary judgment. However, during the pendency of his Cross-Motion, Franco filed for bankruptcy protection. As a result of the bankruptcy “stay,” the Court will not decide Franco's Cross-Motion.

Plaintiff Brent Comyack (“Comyack”), by and through his counsel, Paul R. Rizzo, Esq. of DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C., opposes the Motion and the Cross-Motion presently before the Court.

II. POSITIONS OF THE PARTIES¹

A. Motion and Cross-Motions

i. WN Defendants

a. WN Defendants' Statement of Facts

WN Defendants' Statement of Facts is as follows:

1. Comyack's primary place of residence and domicile is in Florida.
2. As of June 29, 2019, Comyack had his primary place of residence in Asbury Park, New Jersey.
3. At an unknown time near or around June 30, 2019, Comyack moved from New Jersey to North Carolina.
4. At a time between the move from New Jersey to North Carolina and July 13, Comyack moved from North Carolina to Tennessee.
5. At the latest, Comyack moved to Tennessee on July 13, 2019.
6. At the latest, Comyack moved to Florida on November 25, 2019.
- *2 7. Comyack has not left Florida since that time and presently resides there.
8. Comyack has specifically posted on social media that he no longer resides in New Jersey while living in Florida.
9. Alexis Devaney is a resident of and has at all relevant times been domiciled in New York State.
10. The other WN Defendants are New Jersey residents.
11. On June 29, 2019, Shannon Brown made a Facebook post (“Brown1”).
12. On August 15, 2019, Shannon Brown made a Facebook post (“Brown2”).

13. On June 29, 2019, Shannon Brown made a Facebook post (“Brown3”).
14. On August 15, 2019 Shannon Brown made a Facebook post (“Brown4”).
15. On July 6, 2019, Alexis Devaney posted a link to a Reddit post entitled, “Women: If this man is your bartender in Asbury, don’t trust his drinks.” (“Devaney1”).
16. The headline quoted in Devaney1 would be and was automatically generated by Facebook when Alexis Devaney entered text linking to the Reddit post.
17. Non-parties generated all of the content in that Reddit post.
18. Between posting Devaney1 and Devaney2 below, Alexis Devaney saw a picture of a positive drug test result for methadone with an indication that it had been taken by someone who had been drugged by Comyack.
19. Between posting Devaney1 and Devaney2 below, Alexis Devaney received dozens of accounts of misconduct in private messages and saw/reviewed other accounts in the Reddit post.
20. On July 23, 2019, Alexis Devaney made a Facebook post (“Devaney2”), republishing a of screenshot of an Instagram Story.
21. Alexis Devaney has not made any post that described Comyack as “being very scummy” and “all around human trash” and stating that she would be in New Jersey “banging on the door of the bar trying to find him and rip his dick off” if she had a car.
22. On August 21, 2019, Jaclyn Valentino made a Facebook post (“JValentino1”).
23. Between June 29 and July 13, 2019, Nicole Valentino made a Facebook post (“NValentino1”).
24. Between June 29 and July 13, 2019, Nicole Valentino made a Facebook post (“NValentino2”).
25. Between June 29 and July 13, 2019, Nicole Valentino made a Facebook post (“NValentino3”).
26. Prior to making any of NValentino1, 2, or 3, Nicole Valentino saw a picture of a positive drug test result for methadone with an indication that it had been taken by someone who had been drugged by Comyack.
27. On or about July 1, 2019, Nicole Valentino had received dozens of accounts of Comyack's misconduct in private messages.
28. Comyack was fired by his former employer in New Jersey on or around June 30, 2019.
29. Brown2 and 4, Devaney1 and 2, JValentino1, and most likely all of the NValentino posts were made after Comyack was fired from his New Jersey job.
30. The sole alleged damages accruing from posts after approximately June 30, 2019 could not cause any of the harm alleged to have taken place in New Jersey.
31. For all posts made after June 30, 2019, any alleged harm must have accrued in one of either North Carolina, Tennessee, or Florida.
32. Comyack has “drugged and raped girls.”

33. Comyack is “known for [drugging and raping girls],” and, as of June 29, 2019, the incident involving Giannella “isn't the first [people ha]ve heard of him doing this.”

*3 34. Prior to making any post referencing a “criminal history,” the WN Defendants saw a video that suggested that Comyack had as many as twenty criminal cases.

35. Comyack has at least two felony convictions available in the public record, and he was sentenced for both of which on February 1, 2013.

36. There are at least ten years' worth of allegations, publicly available as early as July 1, 2019 (the date of the Reddit post), that Comyack engaged in serious sexual misconduct.

37. Those allegations include that Comyack:

- gave a 12-year-old girl a bottle of “ever clear [sic] and tried to take advantage of [her] in his car at the mall”
- “insisted that” a 15-year-old girl have sex with him “even though [she] said no about a hundred times and was physically pulling away. But he INSISTED.”
- “[o]ne woman went to the hospital and the toxicology report stated there was methadone in her system.”
- “is extremely manipulative, and lied about a previous arrest. He claimed to have been arrested for assaulting a man at a college party who was forcing himself on a girl.”
- “the pod (area) of the jail that Brent claimed to be in was specifically reserved as a population separation pod (for people who are not safe in general population such as sex offenders, rapists, those who are being targeted by other inmates, etc.)”
- was involved with “numerous young women who had experiences with him while they were minors (ages 14-16) and he was over the age of 20, where he would attempt to force himself sexually on them or be extremely inappropriate.”
- “Worked with him for a bit, has a serious drug problem. Would dose people at work for fun. I'm off hard drugs 10 years and he put blow in my Pepsi thinking it was funny. Has a dick tattoo of a cross that he uses as an excuse to pull it out.”
- “Assaulted a friend of mine. After filing a police report he threatened her life, she was scared enough to drop the charges.”
- Has been the subject of “‘hearsay’ [that] has been consistent for multiple years and dozens of women. Anyone who doesn't see that he's a menace is wearing rose colored glasses.”
- That a non-party “can confirm: he drugged my sister and her friend. Luckily my sister only had a little of her drink, but her friend drank both hers and my sister[s] ... [B]rent kept insisting the entire time she wasn't good to drive and he'll take them to new Brunswick”

38. Any readers of the relevant statements were aware of the ongoing conversation relating to Comyack's alleged misconduct.

39. All readers of the relevant statements understood the statements to be stating the opinion, in sum and substance, “because I do not believe that this many people would make up stories, I believe that these allegations are true,” referencing the disclosed facts of the existence of the Reddit post and various other collections of allegations.

The Amended Complaint alleges that WN Defendants made the following statements, after being provided information by Alexis Giannella and others, accurately repeating the information that they received. Comyack's counsel provided to all counsel what he described as a collection of all "statements made by the defendants" that are "known to" Comyack and verified that "[t]here are no other statements known at this time." WN Defendants note that the production lacks some of the statements alleged in the Amended Complaint and reveals that the Amended Complaint misattributed or misdescribed several statements. WN Defendants assert that they have attempted to correct such errors. Shannon Brown made the following posts:

- *4 • Brown1: June 29, 2019, Facebook post, stating, "A woman was drugged by someone that tends bar at [Modine] ... He has a long history of being real scummy ... and this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist."
- Brown2: August 15, 2019, Facebook post, stating, "Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender."
- Brown3: June 29, 2019, Facebook post, stating, "We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community ... Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women."
- Brown4: August 15, 2019, Facebook post, with an image containing text, reading, "Brent Comyack is ... reporting posts that mention what he's done. He is a predator. He fled the state once word got out. He is a scumbag."

Alexis Devaney made the following posts:

- Devaney1: July 6, 2019, Facebook post, republishing a Reddit post by non-party user "123dontfukwithme" entitled, "Women: If this man is your bartender in Asbury, don't trust his drinks," with no modification or addition made by Alexis Devaney.
- Devaney2: July 23, 2019, Facebook post, republishing a screenshot of an unknown non-party's Instagram post, with the text, "Brent Comyack is now in North Carolina[.] Spread the word of the rapey bartender!!!! Don't let him get by! [Instagram's indication of a geo-tag, stating a location of "NORTH CAROLINA], NORTH CAROLINA[] Don't let bars let him in!"

Jaclyn Valentino has made one post, as alleged in the Amended Complaint:

- JValentino1: August 21, 2019, Facebook post, stating, "Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record ... There ha[ve] been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done ... We're tired of having to explain why women deserve to be safe. You can share or copy paste to keep others aware. I don't mind. I just want people safe."

Nicole Valentino has made these posts, "[b]etween the dates of June 29 and July 13":

- NValentino1: Facebook post, republishing a post by non-party Rae Ashlee.

- The underlying, re-published post stated, “Hey to all my friends who bar hop or hang out in [A]sbury heads up. This man has been rumored (with many girls coming out having a similar story) to [be] spiking girls drinks!,” and included an image of Brent Comyack's Facebook profile, with his name.
 - Nicole Valentino's re-publication included the comments: “First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool.”
- *5 • NValentino2: Facebook post, stating, “NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey ... SHARE. [A]ny information helps. Keep our state rapist free.”
- NValentino3: Facebook post, stating, “In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task ... Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!”

These statements were part of an ongoing, online conversation. While produced in isolated form, the relevant statements were either made on a Facebook “timeline,” amid other relevant posts, or in the context of a comment thread discussing the full collection of allegations. As to the truth of underlying allegations, WN Defendants state that Comyack drugged Alexis Giannella. In support of that proposition, WN Defendants cite to a positive test for methadone showing as much in the record. Comyack has at least two serious felony convictions. As such, WN Defendants claim that those convictions reflect serious and disturbing misconduct. And, before making most of the statements at issue, WN Defendants saw records suggesting that Comyack had faced more than twenty criminal cases, saw the positive methadone test, and were aware of the dozens of allegations of misconduct, including those above, spanning multiple decades.

WN Defendants also assert that, well before most of the posts at issue, other non-parties have “confirmed” that “this [e.g., to Giannella] isn't the first time [people] have heard of him doing this,” and, indeed, as of June 30, 2019, Comyack was “known for this kind of shit” (e.g., allegedly drugging and attempting to assault Alexis Giannella). WN Defendants submit that, in all events, readers were aware of the broader conversation regarding Comyack's conduct. In the context of that conversation, WN Defendants claim that all participants were not only aware of the “extraordinarily disturbing allegations that already existed about Plaintiff but that that the purpose of the conversation was to discuss and share those allegations. Besides the alleged drugging and attempted sexual assault of Giannella, WN Defendants assert that these publicly available allegations, all made by non-parties, included, among other things, the allegations listed in paragraph 37 above.

WN Defendants also proffer that, beyond the publicly available allegations, the stories of dozens of Comyack's victims, who are all non-parties, are included below with identifying information removed. WN Defendants assert that they “are happy to provide unredacted versions for in camera review.”

- “He definitely had sex with me while I was unconscious[.] And tried to justify it by saying he put my phone on my head and tried calling me twice[, s]o he did try to let me know[.] I was like 14.”
 - “So[,] when I was 18 ... not only did he randomly whip out his dick to show me he had a tattoo of a cross on it, but when we were driving home ... he kissed me and immediate shoved his hands up my dress and began vigorously fingering my vagina. I pushed him away and he kept trying until [I] loudly said STOP and then he called me a ‘little fucking tease,’ even though [I] never told him it was okay to touch me there[.]”
- *6 • “If you block out my info I'll share my Brent experience ... I was like 17, got drunk at a party[,] and fell asleep next to my friend in an upstairs bedroom[. We] locked the door and everything but I woke up still wasted to his dick being shoved inside of me. My friend was still asleep next to me.”

- “Same story as the other girl, I was super young (15, 16?) and he forced himself on me[,] and I tried to reject him multiple times but he just kept going.”

b. Summary of WN Defendants' Argument

WN Defendants argue (1) that the defense of truth protects their statements, (2) that liability for some of their statements is precluded because they are statements of opinion, (3) that their statements are protected by the common interest privilege, (4) that liability for some of their statements is precluded by the Communications Decency Act (“CDA”), (5) that Comyack's failure to adequately allege actual malice in his Amended Complaint is fatal to his claims, (6) that Comyack's preexisting reputation precludes a finding of causation for any injury alleged, and (7) that, because Comyack's claim for defamation must fail, the other claims asserted in the Amended Complaint also must fail.

ii. McGann

a. McGann's Statement of Facts

McGann's Statement of Facts is as follows:

1. In late June or early July of 2019, McGann received post(s) on Facebook as to allegations against Comyack.
2. McGann has never met Comyack or had any interaction with him.
3. On July 4, 2019, McGann forwarded said Facebook posts and made comments thereto.
4. McGann never changed the content of the original Facebook post.

The Amended Complaint alleges that McGann was a bartender who knew Comyack. It further alleges that McGann was informed of the allegations made by Alexis Giannella or WN Defendants and then posted false allegations on Facebook and the Bartenders Guild Website (Fraternal Order of Bartenders).

Specifically, the statements made by McGann on the Fraternal Order of Bartenders site, undated, are as follows:

- McGann1: “I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him. Maybe they have called the police or maybe they were scared to come forward. Of course u can judge a book by its cover that's why books have them”
- McGann2: responding to a question as to Comyack's blacklisting, “That [I] don't have an answer to because I am not involved in it all I know is I hope his life is ruined like he ruined other people's lives”
- McGann3: “He was in town he is pretty much been blacklisted”
- McGann4: “yeah he was fired”
- McGann5: “wow what a prick”
- McGann7: “well if you google “Brent Comyack” you can see his picture and what a douche he looks like”

McGann also re-posted the following on the Fraternal Order of Bartenders site, on July 4 at 9:58 a.m.:

- McGann6: “*****Anonymous Post***** This didn't happen to me, but this has been the talk of NJ for quite some time. Asbury Park and [s]urrounding areas, keep out for the name Brent Comyack. This guy has been known for quite some[]time for drugging and attempting to rape women (and apparently successful, if that's the word you want to use) He has an open charge against him as of currently and has recently lost his job due to it, but has been popping up at different places. I also have a friend who was sexually assaulted by him and has known of him doing this for about 10+ years. Keep your reputation in tact [sic] and his name off of your bartending roster.”

b. Summary of McGann's Argument

*7 McGann advances (1) that his statements are protected against the imposition of liability for defamation as statements of opinion, (2) that the imposition of liability for defamation as to his statements at issue is precluded by the CDA, (3) that no proof of malice has been presented, and (4) that Comyack has failed to provide any evidence of actual injury to reputation or any “physical or mental injuries.”

iii. Franco²

a. Franco's Statement of Facts

Franco's Statement of Facts is as follows:

1. Comyack has filed a lawsuit against multiple defendants, including Franco, alleging defamation in making or responding to internet postings concerning Comyack's alleged drugging of a young woman and his alleged activities of sexual abuse.
2. The alleged incidents of defamation by Franco occurred in mid-July of 2019 and not before. Franco posted and/or responded to posts on July 13, 2019.
3. No posts were made prior to July 13, 2019.
4. Numerous individuals, not defendants in this matter, posted comments to the Franco posts.

Specifically, the statements made by Franco on the Fraternal Order of Bartenders site are as follows:

- Franco1: on July 13, “Tennessee bartenders/owners, watch out... [T]his guy just moved to your neck of the woods. He fled New Jersey after allegedly drugging a girl's drink at a bar in Asbury Park. This is not the first instance of him doing this, there are multiple women who have come forward with accounts of him drugging and sexually assaulting women, sometimes at the bars he works at. I heard he moved to Nashville but can't be 100% certain. Keep your integrity and be wary. Edit: ALLEGEDLY because I received Facebook messages from known acquaintances that could be interpreted as an attempt at intimidation so covering my butt.”
- Franco2: undated, “The word so far is he was in Salem and is now in Knoxville but the dude is so manipulative that anything could be a lie.”

Further, the statements made by Franco in “Justin's Post,” undated, are as follows:

- Franco3: “Danielle Hartung not my picture, it's from the Reddit post about him. I do know him though, he started working at his last employer shortly after I left them. He has a number of arrest records but the verbal accounts from multiple women in New Jersey, along with comments about rape he had made to me in person, are enough to convince me.”
- Franco4: “Tyler Wykoff there is a link above to a video of his rap sheet, and I am currently working on finding a record of his arrest for the most recent incident, which, to my knowledge, occurred a few days ago. I will post a link to the reddit and twitter threads on him with multiple (anonymous) firsthand accounts from the women he has victimized over the years.”
- Franco5: posting a Reddit article entitled, “Women: If this man is your bartender in Asbury, don't tru...”
- Franco6: posting a Twitter page entitled, “Who is Brent (@brentcomyack)”
- Franco7: responding to potential allegations against Comyack, “Shannon Michele that's consistent with two other accounts that I've read AT LEAST. I know he's worked in asbury, highlands, New Brunswick, Somerset county, red bank and Trenton in Jersey, who knows where else”
- Franco8: responding to potential allegations against Comyack, “Could have been him. As far as I know, he was run out of the New Brunswick community for that behavior.”
- *8 • Franco9: “Becky West unfortunately, I don't have any [pictures of Comyack] and I believe all his socials are deleted. His IG might still be up, his username was roughxhands (seriously). The reddit thread I linked a while back has a few in there as well I believe.”
- Franco10: “Good to see the word is out and we as a fraternity/sorority of bartenders are doing all we can to keep this guy from doing what he does to another woman and abusing the power our career provides.”

b. Summary of Franco's Arguments

Franco joined in the arguments made by WN Defendants.

B. Opposition

i. Comyack

a. Comyack's Statement of Facts

Comyack's Counterstatement of Facts is as follows:

1. Comyack's domicile is New Jersey. He is residing in Florida on a temporary basis, but, at all times in which the actions that are the subject of this litigation took place, he was a resident of New Jersey.
2. Giannella ingested and consumed marijuana, THC oil, prescription medication, numerous alcoholic drinks, and cocaine during the day and into the evening hours of June 28, 2019 and June 29, 2019 and prior to contacting Comyack.
3. Giannella contacted Comyack in the early morning hours of June 29, 2019, advising that her friends had “ditched” her and requesting that he pick her up.

4. Comyack and Giannella went to a bar. Due to her intoxicated state, Comyack urged her to drink water.
5. Upon returning home, Giannella told her sister that Comyack had placed drugs in her water and had attempted to convince her to have sexual relations with him. She repeated such allegations to the Asbury Park Police Department but, in a second interview with a detective, acknowledged that she did not know that it had happened and stated that her sister and friends had started a social media frenzy over the allegation.
6. Giannella has claimed to have obtained a home drug test and sent a sample to a lab for testing, but she has never produced the results of such testing.
7. On June 29, 2019, WN Defendants began to post social media comments, stating that Comyack had drugged a woman the night before, that it was not his first offense, that he had a history of doing such, that he was a rapist, that he had a long criminal history, and inviting others to post comments about Comyack.
8. Nicole Valentino and Alexis Devaney have claimed to have seen test results indicating the presence of methadone in Giannella's system prior to July 23, 2019.
9. The only evidence of an alleged test does not show evidence of any result of such test, and no test results have ever been produced by Giannella.
10. As a result of the posts of WN Defendants, McGann, Franco, and others, by July 1, 2019, Comyack's employer, Modine's, was receiving threats that caused them to notify the Asbury Park Police Department.
11. Comyack went to the Asbury Park Police Department and discussed the claims against him. No arrest warrant was ever issued for Comyack, and no charges were ever filed.
12. Comyack's only criminal history involves one event in which he pled guilty to conspiracy to commit theft and theft and received a suspended sentence.
13. Comyack attempted to obtain work in North Carolina and Tennessee but was unable to do so due to the posting of defamatory statements by McGann and Franco.

On June 28, 2019, Comyack was employed in Asbury Park, New Jersey at a bar/restaurant called Modine's. After midnight, Giannella texted Comyack, asking if he was in Asbury Park and stating that her friends had "ditched" her and that she was trying not to "get kidnapped." Comyack responded that he was in Asbury Park, and Giannella asked him to let her know if he got off soon and expressed some concern that she was alone. By 12:49 a.m., Comyack responded that he was going to her, and she asked that he "come thru."

*9 When Comyack met with Giannella, he found her to be extremely intoxicated and offered to take her home, but she declined and indicated that she wanted to accompany him to another bar. Comyack agreed, and they proceeded to another bar. Due to Giannella's extreme level of intoxication, Comyack repeatedly urged her to drink water. Ultimately, another friend of Giannella took her home that night.

That same day, Giannella told her sister that Comyack had drugged her and attempted to have sexual relations with her. According to her statement to the police, her sister and her sister's friends then began posting allegations about Comyack.

On that same date, June 29, 2019, Shannon Brown posted a social media message on Twitter stating that a manager at Modine's had drugged a woman "last night" at another establishment; that it was not his first offense; and that Comyack is a dangerous

person with a long criminal record and repeated cases of assaulting women. She requested that her message be shared as she was “trying to clean up the trash.” In fact, Comyack had not drugged a woman the prior night; prior to her post, he had never been accused of drugging or sexually assaulting women; and he does not have a long criminal record, the only such record being a guilty plea to theft and conspiracy to commit theft, which arose from the same set of facts and resulted in a suspended sentence. In support of their Motion, WN Defendants have attached numerous posts by individuals who are not parties to this action, none of which were posted prior to June 29, 2019. On or about June 30, 2019, Shannon Brown posted a message on Facebook stating that Comyack has a long history of being “really scummy to women” and that there was a police report currently being filed against him. In fact, no police report was being filed. Shannon Brown also posted a photograph of Comyack on or about July 6, 2019, stating that if he was your bartender, you should not trust his drinks. She further posted on August 19, 2019 messages again claiming that Comyack had a long criminal history and had drugged several women in his history as a bartender, stating that Comyack was a predator who fled the State, and calling him a “scumbag.” In fact, Comyack never fled the State and, as previously stated, has no long criminal history. On or about July 23, 2019, Shannon Brown further posted a message claiming that Comyack had been found in North Carolina. In fact, he never resided in North Carolina but had applied for work there. She again referred to him as a predator and a scumbag.

Between the dates of June 29 and July 13, 2019, Nicole Valentino posted messages on Facebook referring to Comyack as a rapist; claiming that he had drugged a girl who then had a “police drug test” which was positive for methadone which had been slipped by Comyack into water drunk by the girl; and referred to Comyack as a man who drugs women, forces himself on them, takes advantage of them, and has assaulted them. She further claimed that Comyack had in the past lied about being sterile and impregnated multiple women and that he had sexually assaulted, raped, and drugged women for years. She encouraged individuals to trace his whereabouts to prevent him from working or contacting other women. In fact, there was never a “police drug test,” and by July 13, 2019, there was no test result indicating that the person who made the allegation had tested positive for methadone. Comyack had never lied about being sterile and had not impregnated “multiple women,” nor had he ever been accused of assaulting, drugging, or raping women. Defendant Nicole Valentino began posting on social media and solicited others to submit posts about Comyack.

***10** On or about July 21, 2019, Jaclyn Valentino posted messages on Facebook stating that Comyack had drugged, sexually assaulted, raped, etc., multiple women and had gotten a couple of women pregnant after providing false documentation of being sterile and that, for fun, he bragged about spreading chlamydia. All of these allegations were false. She further claimed there had been a “handful of rape kits that came back positive,” which was also a lie, and claimed there were current court cases going on. There were no court cases concerning the types of allegations made by WN Defendants, and there have been none other than this civil case. She further claimed that Comyack had been jumping from state to state to avoid arrest, court cases, and further proof of his actions. In fact, Comyack had gone to the Asbury Park Police on his own and had been cooperating with them; he was never threatened with arrest, and there were no court cases pending. Comyack had merely attempted to find work in North Carolina and Tennessee, which had been thwarted because of the actions of WN Defendants, McGann, Franco, and Giannella. On July 7, 2019, Jaclyn Valentino advocated violence against Comyack, responding to a message that he was in Asbury, which stated that they should tell “heads” to pay him a visit, by stating “let's vigilante this” with a depiction of a knife.

Modine's began receiving threats as a result of the claims and, as of July 1, 2019, suspended Comyack from employment. On the night of July 3, 2019, Comyack was advised that he was being fired from Modine's not because they believed the false information being circulated but because it would have an adverse impact upon their business to keep him. According to the Asbury Park Police Department report, on July 1, 2019, Christopher Davin of Modine's went to police headquarters to advise that they were receiving threats as a result of the postings. He reported that the business was receiving harassing phone calls and social media posts and that one caller had threatened that, if Comyack was not fired by that night, the business would be set on fire. The Asbury Park Police Department attempted to trace the phone call that was the source of the threat and noted that the number had referred to an individual named Leonardo Morales-Sanchez who resided in Brooklyn, but investigation revealed there was no individual by that name at that residence. It is noted that Alexis Devaney is a resident of the State of New York.

As a result of this information, the Asbury Park Police Department contacted Giannella, and she visited police headquarters at approximately 8:15 p.m. on July 1, 2019. She gave an account in which she claimed that, prior to meeting Comyack, she went to the Bond Street Bar in Asbury Park. She could not state when she had met with Comyack, but she reported that they had one drink together and that she was not drunk. She claimed that she began to feel ill, that Comyack recommended that she have some water, and that he retrieved a cup of water. She claimed that she began drinking but quickly stopped drinking the water and claimed that it tasted “acidic in the pallet.” She then claimed that, after ten or fifteen minutes, her body went numb, and she called for a friend to pick her up. She also claimed at that time that, while waiting for her friend, Comyack kept telling her to relax and asked her repeatedly to go up to his hotel room with him. In fact, Comyack did not have a hotel room. She then advised that, after she was driven home, she explained what had occurred to her sister, and her sister then reached out to several social media groups to explain the situation and warn women about Comyack. She then claimed that she went to Walgreens and purchased an at-home drug test, which she sent out to a lab and which tested positive for methadone. She acknowledged that from 11:00 p.m. to 11:30 p.m., she “did a line of cocaine along with a key bump of cocaine.” However, she maintained she was not drunk. The police report indicates that Comyack met with police and cooperated fully.

There is a supplemental report by Detective Dillon Gourley. His report indicates that he was first assigned the matter on July 9, 2019, and that “weeks later” he made contact with the woman who was making the claim that she was drugged and accusing Comyack. Giannella recounted the events but this time made no mention of the claims that Comyack had attempted to get her to go up to his hotel room. She also noted that, during the entire time in which she was waiting for her friend to come to pick her up, Comyack merely stayed with her and offered to take her wherever she needed to go. She acknowledged that at no time did she observe Comyack or anyone else put anything in her drink. When asked if she had taken any type of medication or illegal narcotics, Giannella then admitted that she smoked marijuana at approximately 10:00 p.m. the night before the incident and again around 11:00 a.m. the morning of the incident. She further advised that she used THC oil throughout the day of the incident and stated that she takes prescription medication for numerous conditions. She stated that, prior to going to the Bond Street Bar, she had numerous drinks at a friend's apartment and had ingested cocaine. She advised that she had taken a home drug test and sent the results to a lab, but she had not gotten the results at that point. Although she was asked to provide the police with a copy of the results, she never responded. The results of the test have never been provided. She never claimed to the detective that the home drug test had shown a positive result for methadone. When the detective inquired of Giannella as to why she had not reported the incident to social media, she advised that she did not really know if it had happened. She further stated that her sister, with her sister's other friends, were the ones who started the whole incident.

***11** The only claimed evidence submitted to date of a drug test having been completed is the image attached to the moving papers under Exhibit 19 of attorney Green's Certification. Alexis Devaney claims to have seen a “substantially identical photograph” of the image between the dates of July 6 and July 23, 2019 in a private forum, and she further claims that she understood the photograph to represent a drug test that was positive for “MTD,” which she understood to be methadone. The image in Exhibit 19 does not reference a positive drug test, nor do the initials “MTD” appear in the image. Nicole Valentino similarly claims that she saw such an image on or about July 1, 2019 in a private forum and had the same understanding.

Alexis Devaney has alleged that, on or around July 1, 2019, she saw a video discussing Comyack on Facebook, and Shannon Brown has claimed to have seen the same video on or around July 1, 2019. They have not produced a video but have only produced what they claim are “screen shots” of such a video, which does not reflect any discussion of Comyack but appears to purport to be some type of accounting of a criminal record.

Nicole Valentino and Alexis Devaney have alleged that, on or about July 1, 2019, less than 72 hours after the events leading to this litigation, they began to receive numerous accounts from women who had been assaulted by Comyack. They neglect to mention that they had solicited such accounts. They specifically do not allege that such accounts were in posts made prior to July 1, 2019. No evidence has been submitted to date of posts made prior to June 29, 2019 alleging that Comyack had assaulted other women.

On or about July 4, 2019, McGann, a bartender who knew of Comyack but did not know him personally, became aware of the allegations and made comments and republished allegations with comments on social media and a Bartenders Guild website, referring to Comyack as a “douche” and a “prick,” posting a photograph of Comyack, and advocating for individuals to “make it known the kind of person he is” and blacklist Comyack. He further stated that he had hoped that Comyack's life was ruined, as he had ruined other people's lives. He republished posts accusing Comyack of being a rapist who drugged girls while making these comments. He further posted a message stating that Comyack had been known for quite some time for drugging and attempting to rape women; that he had an open charge against him at that time; that he had a friend who had been sexually assaulted by Comyack; and that he has known of Comyack doing such things for approximately ten plus years.

On or about July 13, 2019, Franco, also a bartender, posted messages on Facebook and the Bartenders Guild website stating that it was good to see that the word was out and that they were doing all they could as bartenders to prevent Comyack from doing what he does to another woman. He further stated that, after receiving information that Comyack was attempting to find work in Tennessee, he posted messages that Comyack had moved to that area. He claimed that Comyack had fled New Jersey after allegedly drugging a girl's drink at a bar in Asbury Park; that it was not the first instance of him doing so; that there were multiple women coming forward with accounts of him drugging and sexually assaulting women; and that he used “allegedly” because he had received Facebook messages from known acquaintances that could be interpreted as an attempt at intimidation so he was “covering my butt.” He further posted messages that Comyack had a number of arrest records and that verbal accounts from multiple women in New Jersey, along with comments about rape that Comyack had made to him in person, were enough to convince him that the allegations against Comyack were true. He further claimed that Comyack had an arrest warrant out for him “currently.” At no time was an arrest warrant ever issued for Comyack.

***12** One individual in the ongoing discussion indicated that he had a tracker on Comyack's vehicle, and, accordingly, all of the individuals participating in the social media discussion were aware that Comyack had gone to Tennessee and North Carolina. At one point, they reported that Comyack was in Salem, Massachusetts, which was inaccurate. WN Defendants, McGann, Franco, and other individuals continue to track Comyack, trying to prevent him from engaging in his employment.

Comyack filed a Complaint on October 10, 2019, alleging defamation and intentional infliction of emotional distress. Giannella, McGann, and Franco filed Answers. WN Defendants filed a Motion seeking to compel Comyack to file a more definitive statement. The Court granted the application, stating that the Complaint failed to specify dates on which statements were made, platforms on which statements were made, and other details that would allow WN Defendants to respond to the allegations, despite the fact that three of the seven defendants had, in fact, filed responses to such allegations. The Court further stated that a defamatory statement may be subject to an absolute or qualified privilege. WN Defendants had expressed an intention of asserting a common interest privilege, but the Court stated that further detail was necessary for it to evaluate whether any such privilege may be lost to the abuses of the privilege. The Court noted that the Complaint did not set forth whether Comyack alleges that WN Defendants republished defamatory statements or whether they made original or sufficiently altered defamatory statements. The Court noted that, while the falsity of statements was indicated in the Complaint, the Complaint failed to allege that McGann and Franco acted negligently or with reckless disregard as to the truth or falsity of the statements or with knowledge of their falsity.

In response to the Court's decision, Comyack filed an Amended Complaint. The Amended Complaint set forth specific dates, platforms, and the defamatory statements. Comyack has alleged that the statements were made, not that they were republished. The Amended Complaint, referring to all defendants, stated that their statements were false and resulted in damage to Comyack; that the statements of all defendants purported to be statements of fact; that the statements of all defendants contain false and misleading statements; and that all of the defendants either knew that their statements were false or acted in reckless disregard of the truth or falsity. The Second Count of the Amended Complaint further states that all defendants acted with actual malice by either knowing that their statements were false or acting in reckless disregard of their truth or falsity, forfeiting any alleged privilege.

The Court has parsed the following statements identified by Comyack but not previously identified by WN Defendants, McGann, or Franco:

- Brown1: a more complete version of the Facebook post, dated June 29, 2019, “A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now.”
- ***13** • Brown2: a more complete version of the Facebook post, dated August 15, 2019, “Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't let Facebook shut this down.”
- Brown3: a more complete version of the Facebook post, dated June 29, 2019 and with images attached, “We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful.”
- Brown5: an additional Facebook comment, undated, “[H]e's now joking on Facebook about being a rapist, fun fact. But the restaurant supposedly has a zero tolerance policy [eye roll emoji]”
- Brown6: an additional Facebook comment, undated, “Lol Facebook changed their minds and the post was reinstated. Still brought back attention to it, so why not talk about it again!”
- JValentino1: a more complete version of the Facebook post, dated August 21, 2019, “FAQ section before y'all all ask the same damn questions: ‘Who is Brent Comyack? What has he done?’ Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia ‘for fun.’ There are other things you can find on his record. ‘Is there any proof? Did anyone go to the police? Why isn't he behind bars?’ Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe.”
- JValentino2: an additional Facebook comment, undated, “Kylie he[']s in [A]sbury at the moment! He loves to move around when word gets loose”
- JValentino3: an additional Facebook comment, undated, responding to a non-party's comment stating that “ima def tell some heads to pay him a visit” and calling Comyack a “[f]uckin clown,” “That's what I'm sayin [knife emoji] let's vigilant this”
- JValentino4: an additional Facebook comment, undated, responding to a non-party's comment that Comyack “hollered multiple times on here and the gram but I always dubbed him cuz ew look at him,” “[U]r too cute for him omg”

- *14 • NValentino1: a more complete version of the comments, between June 29, 2019 and July 13, 2019, “First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool .. Also for his gang of apologists who defend him fuck y'all too you're part of the problem.”
- NValentino2: a more complete version of the Facebook post, between June 29, 2019 and July 13, 2019 and with images attached, “NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free”; “EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there.”
- NValentino3: a more complete version of the Facebook post, between June 29, 2019 and July 13, 2019, “In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task. I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!”
- NValentino4: an additional Facebook post, between June 29, 2019 and July 13, 2019, “!!! !UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him..... If you support a man who drugs women “alleged” (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women. If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me.”
- NValentino5: an additional tweet on Twitter, dated July 1, 2019, that Comyack claims is authored by Nicole Valentino and is authored by “goth fieri” with Twitter handle @alexis_psd, “There is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it” and including an image with similar information
- McGann8: an additional comment on the Fraternal Order of Bartenders site, undated, “His profile is active again and he is still a member of this group Brent Comyack” and linking to Comyack's Facebook profile
- McGann9: an additional comment on the Fraternal Order of Bartenders site, undated, “[T]his is what he looks like, please make it known the kind of person he is” and including an image of Comyack
- Franco1: alternate ending to a post on the Fraternal Order of Bartenders site, dated July 13, 2019, emphasized, “Keep your integrity and *don't give this creep a job*” and including an image of Comyack's Facebook profile
- Franco10: an additional comment on the Fraternal Order of Bartenders site, undated, “Furthermore, he made extremely homophobic comments to Ryan. That shit does not fly in AP...”

Comyack's Response to WN Defendants' Statement of Facts is as follows:

1. Denied. None of the photographs referenced in Devaney Exhibit 3 reference the State of Florida, and Alexis Devaney clearly has no personal knowledge of the location of Comyack. Page 3 of Green Exhibit 4 is not accurately quoted. Counsel has injected reference to New Jersey, which does not exist in the conversation. WN Defendants have misrepresented the statements in Green Exhibit 4 at page 4. Nowhere in the conversation is there a reference to New Jersey, and nowhere on that page is there a statement “if I was in NJ man.” The fact that Comyack had interactions with two individuals who may reside in Florida does not establish domicile. Comyack remains domiciled in New Jersey.

*15 2. Denied. Nowhere in the Amended Complaint is there an allegation that, as of June 29, 2019, Comyack's primary place of residence was Asbury Park.

3. Denied. Comyack has stated that he attempted to obtain employment in North Carolina and Tennessee. He has never stated that he moved to either state, and he did not do so. WN Defendants have provided no proof of such but merely jump to such conclusion from the fact that he sought employment in those states, which he ultimately did not obtain.

4. Denied. Comyack has stated that he attempted to obtain employment in North Carolina and Tennessee. He has never stated that he moved to either state, and he did not do so. WN Defendants have provided no proof of such but merely jump to such conclusion from the fact that he sought employment in those states, which he ultimately did not obtain.

5. Denied. WN Defendants reference discussion by individuals with no knowledge of Comyack's residence.

6. Denied. None of the referenced posts are evidence that Comyack has moved to Florida. Comyack does not deny visiting Florida.

7. Admitted that Comyack currently resides in Florida temporarily.

8. Denied. The conversation cited does not contain a statement that Comyack has posted that he no longer resides in New Jersey while living in Florida.

9. Comyack neither admits nor denies, as he does not have information sufficient to form a belief as to the truth and accuracy of the statement.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted with a note that WN Defendants received a copy of documents produced to McGann, as there has been no exchange of discovery with WN Defendants.

14. Admitted.

15. Denied. At this stage, Comyack has no information other than the claims of Alexis Devaney.

16. Denied. There is no evidence that counsel or Alexis Devaney have expertise concerning Facebook and linking to Reddit posts and articles. WN Defendants reference self-serving statements, which Comyack has not had an opportunity to challenge.

17. Denied. All of the comments are by individuals using aliases, and no information is provided as to the identity of these individuals who may be one or more of WN Defendants. The statement does not reference anything in the record and is not made by a person with personal knowledge.

18. Denied. The referenced paragraphs of Alexis Devaney's Certification do not discuss the "picture of a positive drug test," and there is no identification concerning the picture attached as Green Exhibit 19. There is no reference to any drug having been found, of any positive or negative result, or who was posting the picture at that time. It is further noted that Alexis Devaney

does not claim that she saw the picture that is Green Exhibit 19 but claims to have seen a “substantially identical photograph,” which she has not produced.

19. Denied. Alexis Devaney has attached what appear to be two messages, with no identification of the author. She proposes to provide other messages *in camera* to the Court, which is unacceptable and inappropriate.

20. Admitted.

21. Denied.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted.

26. Denied. WN Defendants have not provided the alleged photograph allegedly viewed by Nicole Valentino, and neither the photograph referenced as Green Exhibit 19 nor the information alleged in this paragraph provides any identifying information.

*16 27. Nicole Valentino has provided five posts, with no identification of the author and no other evidence in support of the claim to have received “dozens of similar messages.” As with Alexis Devaney, she improperly seeks to have the Court review alleged messages *in camera* so that Comyack cannot challenge them.

28. To the extent this paragraph references Modine's, Comyack admits to having been terminated as a result of the allegation by Giannella and the posts by WN Defendants, McGann, and Franco.

29. Comyack makes no response to this allegation, as it states a probability and does not set forth a claimed undisputed material fact.

30. Denied. Comyack also notes that this paragraph does not allege an undisputed material fact and argues a position.

31. Denied. Comyack also notes that this paragraph does not allege an undisputed material fact and argues a position.

32. Denied.

33. Denied.

34. Denied. WN Defendants have not produced a video, and Comyack has not “had as many as 20 criminal cases.”

35. Admitted that Comyack has convictions for theft and conspiracy, which arose from the same underlying facts. Denied that the details or the facts are as alleged by Nicole Valentino and noted that she has provided a Certification with such allegations despite having no personal knowledge of such information.

36. Denied. Comyack cannot address a claim of ten years' worth of allegations.

37. Denied. The allegations referenced in this paragraph in Exhibits 20 and 22 do not provide dates of the postings, and there is no evidence submitted that these comments were posted and available “as early as July 1 , 2019.”

38. No response is made to this paragraph, as it expresses opinion and not fact.

39. No response is made to this paragraph, as it expresses opinion and not fact.

Comyack's Response to McGann's Statement of Facts is as follows:

1. Admitted.

2. Comyack can neither admit nor deny this statement. McGann does not refer to any part of the record of the case, and the statement in his Certification is that he has no recollection of ever meeting Comyack or ever having any interaction with him, rather than that he, in fact, ever met Comyack or ever had any interaction with him.

3. Admitted.

4. To the extent that McGann states in this paragraph that he made no changes to the messages or posts that he had received, admitted, although Comyack notes that McGann added his own comments to such posts.

Comyack's Response to Franco's Statement of Facts is as follows:

1. Admitted.

2. Comyack can neither admit nor deny this statement, as Franco does not make reference to the record or any Certification or Affidavit.

3. Comyack can neither admit nor deny this statement, as Franco does not make reference to the record or any Certification or Affidavit.

4. Comyack can neither admit nor deny this statement, as Franco does not make reference to the record or any Certification or Affidavit.

b. Summary of Comyack's Argument

Comyack argues (1) that summary judgment is inappropriate at this juncture, (2) that he has alleged and has sufficient proof to satisfy all of the elements of defamation, (3) that he has alleged sufficient facts in the Amended Complaint to support a claim of defamation, (4) that determining whether the disputed statements are protected by the CDA is premature, (5) that the disputed statements are protected by neither the fair comment privilege nor the common interest privilege, (6) that the disputed statements are not merely statements of opinion, and (7) that the argument asserted as to lack of causation is frivolous.

C. Replies

i. WN Defendants

*17 WN Defendants' Response to Comyack's Counterstatement of Facts is as follows:

1. Deny. Comyack's bare denial that he has changed his domicile to New Jersey is contradicted by his publicly visible conduct and his own statements. These include dated posts reflecting Comyack in Florida and appearing shirtless outdoors in winter, etc.; statements that Comyack will not "be back [in New Jersey] for xmas"; Comyack declining an invitation "get drunk and look stoopid together" in New Jersey, stating "if [I] was in nj[,] man"; statements that Comyack will "move into" "my own

place” in the “next like 72 hours and then after work I'm free” to spend time with non-party Haley, who “[l]ives in Tampa, Florida”; and Comyack's complaints about the conduct of someone “at the bar [he is] at,” whose spouse's Facebook profile lists the couple as living in “Pinellas Park, Florida.” Comyack's counsel also appeared on New Jersey radio (101.5), stating Comyack “had to move out of state” and “can't live in New Jersey.” Convenient, self-serving denials in Certifications at the summary judgment stage need not be credited when contradicted in this manner by both other evidence and public statements of Comyack and his counsel.

Deny further, insofar as Alexis Devaney is a New York resident and has not been in or acted in New Jersey at any relevant time.

As to the implications regarding the “subject of this litigation,” deny in that comments on the internet are generally not considered to have a locus.

Deny further, in that Comyack seems to be asserting that the actions that are the subject of this litigation, or what might be called the “he said, she said” story of Comyack's encounter with Alexa Giannella, are the strongest connection to any jurisdiction that exists in this case. That may be so, but, in order to assert this, Comyack must admit that there is a sequence of events about which there is a dispute and that the allegations are not invented from whole cloth. Rather, in matters of “he said, she said” in the defamation context, the resolution “need not turn on the resolution of whether [either of the persons involved] told the truth about their relationship [to third parties].”

2. Admit for the purposes of this Motion. This is not a material fact relevant to this case. By asserting that it is, Plaintiff seems to be suggesting that it would be either (1) completely permissible or, (2) at a minimum, something like “not as bad” for him to drug and assault someone who had “ingested and consumed marijuana, THC oil, prescription medication, numerous alcoholic drinks, and cocaine.” That conclusion and argument should trouble the Court.

3. Admit.

4. Deny. There is, at a minimum, a material dispute of fact as to whether Comyack “urged [Giannella] to drink water” “[d]ue to [her] intoxicated state” or because he had drugged the water. At the summary judgment stage, especially as to the question of whether the WN Defendants made statements with “actual malice,” it is entirely appropriate for the Court to consider the dozens of accusations that exist mirroring this pattern, as well as Comyack's prior criminal history and reputation in the community for doing this kind of thing. Comyack fails to provide an alternate account of his criminal conviction other than the account provided that involved Comyack's use of sex as a tool to rob someone. In that regard, Comyack's bare denial in a Certification arguably fails to raise a material question of fact in the opposite direction.

***18** Admit that Comyack and Giannella went to a bar.

5. Admit that Exhibit B states that Giannella made the statements identified, but this paragraph does not provide admissible evidence thereof. Therefore, as to the assertion of material fact, deny. A third party's repetition of a statement by Giannella offered against WN Defendants, as here, is admissible hearsay, because it is offered solely for the truth of the matter asserted and involves two layers of hearsay.

Deny further that Giannella's statement that “she did not know that it happened” has any probative value as to the ultimate truth of the matter involved, even if she did make it and it were offered in an admissible form. Rather, studies have shown that “victim characteristics,” intoxication, and prior relationships with an alleged rapist, in particular, “can be more influential than assault and evidentiary characteristics in determining legal case outcomes.” Studies also show that a victim ultimately declining to press charges after discussions with detectives is common and is likely not an indication one way or another as to the ultimate truth of the matter. Indeed, there is no indication of whether the detective authoring the report was ultimately also driving the withdrawal of the complaint, but that kind of scenario is tragically common.

6. Deny. The result is shown in Green Exhibit 19, Devaney Reply Exhibit A, and in paragraph 9 below.

7. Insofar as this is consistent with the more specific recitation of facts in WN 4:46-2, paragraphs 11-27, admit. Otherwise, deny. WN Defendants hereby incorporate by reference to the same record pin cites provided in WN 4:46-2, paragraphs 11-27.

8. Admit.

9. Deny. Green Exhibit 19 shows a positive QuickScreen for methadone. It is unclear why Comyack asserts this “does not show evidence of any result of a test,” unless he is making some distinction between a “test” and a mere “QuickScreen.” However, to respond to the concerns here and expressed by Comyack in his answer to WN 4:46-2, paragraphs 18 and 26, WN Defendants refer to Devaney Reply Exhibit A:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

10. Deny. Exhibit B cannot show causation in the sense asserted by Comyack, and, if offered for that purpose, it is either hearsay (offered for truth) or speculation. Moreover, Exhibit B standing alone certainly cannot separate the ultimate proximate cause question: whether what really caused Comyack's termination was his own actions and decade of reputation for sexual misconduct coming back to haunt him (or indeed, the hundreds of other comments about him, though, admittedly, the fact asserted technically includes “and others”).

11. Admit, as to this case. Note that there are allegations that other charges have been dropped after Plaintiffs intervention, for example, this July 8, 2019, non-party comment, available in the Reddit article at https://www.reddit.com/r/AsburyPark/comments/c7zfn5/women_if_this_man_is_your_bartender_in_asbury/ and excerpted in Green Exhibit 20:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

12. Deny. Admit that Comyack's adult criminal history only includes a conviction as described. However, insofar as “criminal history” includes charges that were ultimately dropped or that have been sealed or is intended to encompass conduct beyond conduct for which a conviction exists, Comyack's bare assertion is contradicted by allegations made publicly.

*19 13. The fact asserted regards issues not at stake in the WN Defendants' Motion, and a formal response is unnecessary from WN Defendants. Note, however, that the WN Defendants' response in paragraph 10 above likely covers the same problems with the material fact asserted here.

ii. McGann

McGann's Reply Certification is as follows:

1. I am one of the defendants in this matter and make this Certification in reply to the Opposition filed by Comyack as to my Cross-Motion.

2. As stated in my moving papers, I received a Facebook post concerning allegations regarding Comyack. The post that I received was dated July 3, 2019 at 3:34 p.m.

3. The July 3 post was the first time that I heard of any allegations against Comyack. I had no knowledge of any events involving the Asbury Park Police Department on June 28, 2019. The first post that I made was on July 4, 2019, and I just republished the post sent to me the day before. I did not alter the original post.

4. All other posts made by me were comments emanating from the July 3 post. It is my understanding that, under federal law, this action is preempted and must be dismissed.

5. Therefore, I respectfully request that my Cross-Motion be granted.

6. I did post about blacklisting Comyack. I was only giving my opinion as to what was originally sent to me.

III. COURT'S OPINION

The Court will review the Motion and Cross-Motion filed by WN Defendants and McGann, respectively, under the standards of dismissal for failure to state a claim upon which relief can be granted per R. 4:6-2(e) and summary judgment per R. 4:46-2, as either or both standards may have applicability to their requests.³

A. Standards of Review

i. Dismissal Under R. 4:6-2(e)

Under R. 4:6-2(e), a party can file a motion to dismiss for failure to state a claim upon which relief can be granted. In deciding such a motion, “the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim.” [P. & J. Auto Body v. Miller](#), 72 N.J. Super. 207, 211 (App. Div. 1962). Courts therefore “consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.” [Banco Popular N. Am. v. Gandi](#), 184 N.J. 161, 183 (2005) (quoting [Lum v. Bank of Am.](#), 361 F.3d 217, 222 n.3 (3d Cir.), cert. denied, 543 U.S. 918 (2004)) (internal quotation marks omitted).

“The test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts.” [Velantzas v. Colgate-Palmolive Co.](#), 109 N.J. 189, 192 (1988) (internal citations omitted). A complaint should not be dismissed under R. 4:6-2(e) if a cause of action is suggested by the facts such that it can be articulated by way of amendment. See, e.g., [Muniz v. United Hsps. Med. Ctr. Pres. Hsp.](#), 153 N.J. Super. 79, 82-83 (App. Div. 1977). Although all well-pleaded allegations in the complaint must be accepted as true and legitimate inferences are to be drawn in favor of the pleader, courts need not give credence to a complaint's unsubstantiated and conclusory statements of fact and law. See [Holmin v. TRW, Inc.](#), 330 N.J. Super. 30, 32 (App. Div. 2000), *aff'd*, 167 N.J. 205 (2001); [Morse v. Lower Merion Sch. Dist.](#), 132 F.3d 902, 906 (3d Cir. 1997) (internal citations omitted). When a complaint therefore fails to make “the necessary factual allegations and claims for relief sufficient to sustain a cause of action,” the pleading must be deemed inadequate. [Miltz v. Borroughs-Shelving, a Division of Lear Siegler, Inc.](#), 203 N.J. Super. 451, 458 (App. Div. 1985) (internal citations omitted). Such pleadings that are lacking in factual support will not be permitted to proceed to discovery. See [Glass v. Suburban Restoration Co., Inc.](#), 317 N.J. Super. 574, 582 (App. Div. 1998) (internal citations omitted).

ii. Summary Judgment Under R. 4:46-2

*20 Pursuant to R. 4:46-2, courts should grant summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show [(1)] that there is no genuine issue as to any material fact challenged and [(2)] that the moving party is entitled to a judgment or order as a matter of law.” [Brill v. Guardian Life Insurance Co. of America](#), 142 N.J. 520, 528-29 (1995) (quoting R. 4:46-2) (internal quotation marks omitted). With respect to the first prong, courts can grant a motion for summary judgment if the party opposing the motion merely points “to any fact in dispute,” but summary judgment is unavailable to the movant “where the party opposing the motion has come forward with evidence that creates a ‘genuine issue as to any material fact challenged.’” *Id.* at 529 (quoting R. 4:46-2). A genuine issue of material fact exists if “the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” *Id.* at 540. By

contrast, “[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that purported issue is insufficient to constitute a ‘genuine’ issue of material fact for purposes of Rule 4:46-2.” *Ibid.* (citing [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 250 (1986)). The function of the judge under these circumstances is not “to weigh the evidence and determine the truth of the matter but” rather is “to determine whether there is a genuine issue for trial.” *Ibid.* (quoting [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 249 (1986)) (internal quotation marks omitted). With respect to the second prong, if “the evidence is so one-sided that one party must prevail as a matter of law,” courts “should not hesitate to grant summary judgment.” *Ibid.* (quoting [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 252 (1986)) (internal quotation marks omitted).

In the context of defamation claims, courts have favored the summary judgment mechanism to address such actions in appropriate circumstances. See, e.g., [Kotlikoff v. Cmty. News](#), 89 N.J. 62, 67 (1982) (recognizing that “[t]he summary judgment device, as employed by the trial court here in the pre-discovery stage, winnows out nonactionable claims, avoids the expenditure of unnecessary legal fees, and discourages frivolous suits” and encouraging “trial courts to give particularly careful consideration to identifying appropriate cases for summary judgment disposition in this area of the law”). Additionally, “[a] motion for summary judgment is not premature merely because discovery has not been completed, unless plaintiff is able to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.” [Badiali v. N.J. Mfrs. Ins. Grp.](#), 220 N.J. 544, 555 (2015) (internal quotation marks and citation omitted); see also [Trinity Church v. Lawson-Bell](#), 394 N.J. Super. 159, 166 (App. Div. 2007) (finding that “[a] party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete”) (internal citations omitted). However, as in any contested matter, when material facts are in dispute, courts generally defer a determination of summary judgment until the parties have had an opportunity to conduct appropriate discovery. [Salzano v. North Jersey Media Group, Inc.](#), 403 N.J. Super. 403, 424 (App. Div. 2008), *aff’d in part, rev’d in part on other grounds*, 201 N.J. 500 (2010); [Standridge v. Ramey](#), 323 N.J. Super. 538, 547 (App. Div. 1999).

The Court will analyze the Motion and Cross-Motion in the above context. While no discovery has been conducted, the Court will be competent in parsing any issues that are appropriate for an early disposition and can be appropriately decided as a matter of law from those that rest on even a hint of a factual issue or a credibility determination and require the Court to defer consideration until discovery has been conducted.

B. Analysis

i. Count One for Defamation ⁴

The “essential elements” of defamation, in addition to damages, are “(1) the assertion of a false and defamatory statement concerning another,” “(2) the unprivileged publication of that statement to a third party,” and “(3) fault amounting at least to negligence by the publisher.” [DeAngelis v. Hill](#), 180 N.J. 1, 12-13 (2004) (internal citations omitted). The Court will analyze the elements in the context of Comyack’s pleadings and the record before the Court.

a. Assertion of a False and Defamatory Statement Concerning Another ⁵

*21 With respect to the first element, the Court will address (1) whether the statements at issue are defamatory and (2) whether the statements at issue are false.

1. Whether the Statements at Issue Are Defamatory as a Matter of Law

With respect to the first element, generally, “[a] defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred, contempt[,] or ridicule or subjects another person to a loss of the good will and confidence in which he or she is held by others.” [Romaine v. Kallinger](#), 109 N.J. 282, 289 (1988) (internal quotation marks and citations omitted). The threshold inquiry for courts that is dispositive of whether a statement is defamatory “is whether

the statement at issue is reasonably susceptible of a defamatory meaning.” [Id.](#) at 290 (internal citations omitted). “Whether the statement is susceptible of a defamatory meaning is a question of law for the court. In making this determination, courts must consider three factors: (1) the content, (2) the verifiability, and (3) the context of the challenged statement.” [DeAngelis v. Hill](#), 180 N.J. 1, 14 (2004) (internal quotation marks and citations omitted). However, “[c]ertain kinds of statements denote such defamatory meaning that they are considered defamatory as matter of law,” a “prime example” being “the false attribution of criminality.” [Romaine v. Kallinger](#), 109 N.J. 282, 291 (1988) (internal citations omitted).

Statements at issue here that are potentially non-defamatory as a matter of law include:

Statement Reference	Date	Location	Content	Non-Defamatory Portions
Brown3	June 29, 2019	Facebook	<p>“We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/ managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20,</p>	<p>“Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina ... Edit 4: As of yesterday 8/20, he is believed to be back in NJ.”</p>

he is believed to be back in NJ. Please be careful and tell your friends to be careful.”

JValentino1	August 21, 2019	Facebook	<p>“FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more</p>	*22 “Brent is from N.J.”
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information,
 photos of the
 kits and drug
 tests, screenshots,
 whatever you
 want. I don't think
 it's really about
 witch hunting the
 women though so
 please be prepared
 for the attitude
 you will get from
 people. We're
 tired of having
 to explain why
 women deserve
 to be safe. You
 can share or copy
 paste this to keep
 others aware. I
 don't mind. I just
 want people safe.”

JValentino2	Undated	Facebook	“Kylie he[']s in [A]sbury at the moment! He loves to move around when word gets loose”	“Kylie he[']s in [A]sbury at the moment!”
NValentino 2	Between June 29, 2019 and July 13, 2019	Facebook	“NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free”; “EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there.”	“NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE.”
McGann2	Undated	Fraternal Order of Bartenders Website	“That [I] don't have an answer to because I am not involved in it all I know is I hope his	“That [I] don't have an answer to because I am not involved in it”

life is ruined like
he ruined other
people's lives”

McGann8	Undated	Fraternal Order of Bartenders Website	“His profile is active again and he is still a member of this group Brent Comyack”	“His profile is active again and he is still a member of this group Brent Comyack”
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WN Defendants have not directly addressed these statements.

McGann also has not directly addressed these statements.

Comyack has asserted, however, that all of “the statements of all of the [d]efendants sound to the disreputation of” Comyack and “are defamatory on their face.”

The Court's analysis reveals that the indicated statements are simply not defamatory, as a matter of law, given that they are not injurious to Comyack's reputation. These statements amount to (1) assertions as to Comyack's geographic location, (2) a non-responsive answer to an inquiry regarding Comyack, and (3) an indication of Comyack's status on social media. The Court grants summary judgment as to any claims that Comyack has made or intends to make with respect to as to those non-defamatory statements; such claims are therefore DISMISSED WITH PREJUDICE.

2. Whether the Statements at Issue Are False as a Matter of Law

The next issue to be analyzed is whether certain statements at issue are false. This Court will address (1) whether such statements are true as a matter of fact and law and (2) whether such statements are not factual but rather are statements of opinion.

A) Whether the Statements at Issue Are True as a Matter of Law

“True statements are absolutely protected under the First Amendment. Factual statements, unlike non-factual statements, are uniquely capable of objective proof of truth or falsity.” [Ward v. Zelikovsky, 136 N.J. 516, 530 \(1994\)](#) (internal citations omitted). In addition, “[t]ruth may be asserted as a defense even when a statement is not perfectly accurate. The law of defamation overlooks minor inaccuracies, focusing instead on ‘substantial truth.’” [G.D. v. Kenny, 205 N.J. 275, 293-94 \(2011\)](#) (internal citations omitted).

First, the Court has identified the statements alleging that Comyack drugged and attempted to assault Alexis Giannella and containing other similar accusations. The statements included in that category are:

*23 Statement Reference	Date	Location	Content	Portions Concerning Comyack's Alleged Drugging and Assaulting of Giannella and Others
Brown1	June 29, 2019	Facebook	“A woman was drugged by	“A woman was drugged

someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now."

by someone that tends bar @modine Asbury last night ... Brent Comyack (see screenshots) drugged someone last night."

Brown2	August 15, 2019	Facebook	"Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't let Facebook shut this down"	"Brent Comyack ... has drugged SEVERAL women in his history as a bartender."
Brown3	June 29, 2019	Facebook	"We've got a live one right here in Asbury, folks. A manager at	"A manager at Modine drugged a woman last night at another

Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful."

establishment ... Please let anyone you may know in the bar communities that this is a dangerous person with ... repeated cases of assaulting women."

Brown4

August 15, 2019

Facebook

"Brent Comyack is ... reporting posts that mention what he's done. He is a predator. He fled the state once word got

"He fled the state once word got out."

out. He is a scumbag.”

Brown5	Undated	Facebook	<p>“[H]e’s now joking on Facebook about being a rapist, fun fact. But the restaurant supposedly has a zero tolerance policy [eye roll emoji]”</p>	<p>“[H]e’s now joking on Facebook about being a rapist, fun fact.”</p>
JValentino1	August 21, 2019	Facebook	<p>“FAQ section before y’all all ask the same damn questions: ‘Who is Brent Comyack? What has he done?’ Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia ‘for fun.’ There are other things you can find on his record. ‘Is there any proof? Did anyone go to the police? Why isn’t he behind bars?’ Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he’s done. There are current court</p>	<p>*24 “FAQ section before y’all all ask the same damn questions: ‘Who is Brent Comyack? What has he done?’ ... He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia ‘for fun.’ ... There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he’s done.”</p>

cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."

JValentino2	Undated	Facebook	"Kylie he[']s in [A]sbury at the moment! He loves to move around when word gets loose"	"He loves to move around when word gets loose"
NValentino 1	Between June 29, 2019 and July 13, 2019	Facebook	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) ... I've also heard he's gotten girls drink or high to sleep with them."

cool .. Also for his gang of apologists who defend him fuck y'all too you're part of the problem.”

NValentino 2	Between June 29, 2019 and July 13, 2019	Facebook	<p>“NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free”; “EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there.”</p>	“Keep our state rapist free”
NValentino 3	Between June 29, 2019 and July 13, 2019	Facebook	<p>“In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task. I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass</p>	“Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task.”

			cause. Let's keep it rollin!"	
NValentino 4	Between June 29, 2019 and July 13, 2019	Facebook	<p>“!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him..... If you support a man who drugs women “alleged” (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women. If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me.”</p>	<p>“!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him..... If you support a man who drugs women “alleged” (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women.”</p>
NValentino 5	July 1, 2019	Twitter	<p>“There is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it”</p>	<p>*25 “There is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it”</p>
McGann2	Undated	Fraternal Order of Bartenders Website	<p>“That [I] don't have an answer to because I am not involved in it all I know is I hope his life is ruined like</p>	<p>“[A]ll I know is I hope his life is ruined like he ruined other people's lives”</p>

he ruined other
people's lives”

Second, the Court has identified the statements containing allegations as to Comyack's criminal past and record. This category of statements includes:

Statement Reference	Date	Location	Content	Portions Concerning Comyack's Alleged Criminal Past
Brown1	June 29, 2019	Facebook	<p>“A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now.”</p>	<p>“[A]nd there is a police report currently being filed against him.”</p>
Brown2	August 15, 2019	Facebook	<p>“Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't let Facebook shut this down.”</p>	<p>“Brent Comyack has a long criminal history”</p>
Brown3	June 29, 2019	Facebook	<p>“We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment.</p>	<p>“This isn't his first offense ... Please let anyone you may know in the bar communities know that this is a</p>

This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful."

dangerous person with a long criminal record"

JValentino1	August 21, 2019	Facebook	<p>"FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been</p>	<p>*26 "There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously ... There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions."</p>
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jumping from state to
state to avoid arrest, court
case, and further proof
of his actions. I can tag
people who have more
information, photos of
the kits and drug tests,
screenshots, whatever
you want. I don't think
it's really about witch
hunting the women
though so please be
prepared for the attitude
you will get from people.
We're tired of having
to explain why women
deserve to be safe. You
can share or copy paste
this to keep others aware.
I don't mind. I just want
people safe."

WN Defendants themselves concede that “all that appears to be in dispute is the ultimate truth of allegations that ... [WN] Defendants accurately repeated.” They further urge that “the kind of micro-parsing facts for ultimate truth” in which Comyack asks this Court to engage “was specifically and emphatically rejected by the United States Supreme Court” in Sullivan; rather, they ask this Court to consider the substantial truth of their statements. As to the first category of statements alleging that Comyack has engaged in a pattern of drugging and assaulting women, WN Defendants assert that “the dozens upon dozens of accusations” against Comyack and the incident described by Giannella evidence the substantial truth of their statements. Along those lines, with respect to the prior accusations, WN Defendants posit that Comyack “[t]ellingly ... concedes [that] he cannot even begin to ‘address a claim of ‘ten year[s]’ worth of allegations,’” even when ten of them are presented with specificity.” Additionally, with respect to Giannella's accusation, WN Defendants proffer that “[a] [h]e [s]aid, [s]he [s]aid [s]cenario [or, ‘[m]ore accurately’ here, a ‘he said, dozens-of-shes said’ scenario,] [c]annot [b]e the [b]asis for a [d]efamation [a]ction [a]gainst a [t]hird [p]arty”; the two versions of events here are evidenced by Giannella's “positive QuickScreen test for methadone (a drug [that] no one would take recreationally, or in combination with recreational drugs[,] for obvious reasons),” on the one hand, and the police report offered by Comyack “suggesting that Giannella omitted that she had taken recreational drugs the same night she alleged ... [Comyack] drugged her,” on the other hand. WN Defendants argue that, while, “[r]ead generously to” Comyack, “there is reason to doubt both versions,” their “choice to believe Giannella's version (the ‘she said’) is simply not actionable.” As to the second category of statements indicating that Comyack has a criminal past, WN Defendants posit that Comyack does have “a confirmed criminal record,” in which he “pleaded guilty to two serious felonies and paid a significant sum in restitution,” and that WN Defendants' misinterpretation of that record as including more than twenty “unique criminal charges” is in accordance with the interpretation that “reasonable lay members of the community” would adopt.

McGann does not specifically address the issue of truth as a defense to this defamation action that has been brought against him. Nonetheless, the Court will address the issue with respect to McGann here.

Comyack counters that the statements made by WN Defendants and McGann are false and that he “has specified the specific false claims.” With respect to the first category of statements alleging that he has drugged and assaulted women, those false claims include, in his words, that he is a “rapist”; that “he had drugged a girl who then had a ‘police drug test[,]’ which was positive for methadone”; that he “drugs woman [sic], forces himself on them, takes advantage of them[,] and has assaulted them”; “that he had in the past lied about being sterile and impregnated multiple women”; “that he sexually assaulted, raped[,] and drugged women for years”; and “that there had been a ‘handful of rape kits that came back positive.’” As to the prior

accusations, Comyack posits that “many” of the “dozens upon dozens’ of accusations” cited “were anonymous” and may derive from “‘throw away accounts’ created by ... [WN] Defendants [and McGann].” Comyack further notes that, “prior to her [Shannon Brown’s] post, he had never been accused of drugging or sexually assaulting women.” As to Giannella’s accusations, in Comyack’s view, she “has admitted that she does not know that ... [Comyack] did what these [d]efendants have alleged,” “that she never saw ... [Comyack] put anything in her water,” and that she ingested “various drugs and numerous drinks on the day and night in question.” With respect to the second category of statements indicating Comyack’s alleged criminal past, he asserts that the false claims include, in his words, “that there were current court cases involving” Comyack, that he “had been jumping from state to state to avoid arrest and the court cases,” and “that he had a ‘long criminal history.’” Along those lines, he asserts that he “never fled the State,” that “no police report was being filed” against him, and that “he does not have a long criminal record,” with “the only [such] record being a guilty plea to theft and conspiracy to commit theft, which arose from the same set of facts and resulted in a suspended sentence.”

*27 In the Court’s view, attempting to determine the truth, as a matter of law, of the statements (1) concerning Comyack’s history as an alleged serial sexual offender and (2) concerning Comyack’s criminal record is premature. As to the first set of allegations, at this juncture, the record before the Court as to these statements plainly presents a classic case of a genuine issue of material fact: WN Defendants advance that Comyack is a serial predator who has preyed upon many women, one of whom is Giannella, but Comyack counters that Giannella’s alcohol and drug use was self-inflicted, that he cannot address accusations against him that span a decade, and that he has not previously faced such accusations. As to the second set of allegations, while no party disputes that Comyack has a criminal record, the context in which such record is raised by WN Defendants could suggest to the reasonable reader that his criminal record concerns sexual assault, rape, or related crimes, rather than the unrelated crimes of theft and conspiracy, which would be an inaccurate representation. For the Court to determine the truth or falsity of both categories of statements at this stage of the proceedings and before any discovery has occurred would therefore be inappropriate and premature. Even for this Court to evaluate whether any inaccuracies contained in the disputed statements are insubstantial would require the Court to weigh the disparate factual accounts, which is also presently improper. As such, the Court therefore declines to do so. [Miele v. Rosenblum](#), 254 N.J. Super. 8, 15 (App. Div. 1991) (citing [Romaine v. Kallinger](#), 109 N.J. 282, 295 (1988)). This aspect of the Motion and Cross-Motion is DENIED WITHOUT PREJUDICE.

B) Whether the Statements at Issue Are Statements of Opinion and Therefore Not Defamatory as a Matter of Law

“Opinion statements, in contrast, are generally not capable of proof of truth or falsity because they reflect a person’s state of mind. Hence, opinion statements generally have received substantial protection under the law.” [Ward v. Zelikovsky](#), 136 N.J. 516, 531 (1994). With respect to whether a defendant can be found liable in defamation for a statement of opinion, our Supreme Court has said:

[u]nless a statement explicitly or impliedly rests on false facts that damage the reputation of another, the alleged defamatory statement will not be actionable. We require verifiability because[,] insofar as a statement lacks a plausible method of verification, the trier of fact who is charged with assessing a statement’s truth will have considerable difficulty returning a verdict based upon anything but speculation.

Ibid. (internal quotation marks and citations omitted).

Even at this juncture, it would be appropriate for the Court to analyze certain statements or portions of statements made by WN Defendants and McGann to determine if those statements constitute nonactionable and protected opinion. The following statements at issue are potentially nonactionable statements of opinion:

Statement Reference	Date	Location	Content	Embedded Opinion
Brown1	June 29, 2019	Facebook	<p>“A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now.”</p>	<p>“He has a long history of being real scummy to women ... And this is how Modine responds ... Great work, #modineasbury. We won't be untagging anything. Expect more tags now.”</p>
Brown2	August 15, 2019	Facebook	<p>“Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't</p>	<p>“Don't let Facebook shut this down.”</p>

let Facebook shut this down.”

Brown3	June 29, 2019	Facebook	<p>“We’ve got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn’t his first offense. Be careful and guard your drinks. And maybe let’s let Modine know what their bartenders/ managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful.”</p>	<p>*28 “We’ve got a live one right here in Asbury, folks ... Be careful and guard your drinks. And maybe let’s let Modine know what their bartenders/ managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash ... Please be careful and tell your friends to be careful.”</p>
Brown4	August 15, 2019	Facebook	<p>“Brent Comyack is ... reporting posts that mention</p>	<p>“He is a predator ... He is a scumbag.”</p>

			what he's done. He is a predator. He fled the state once word got out. He is a scumbag.”	
Brown5	Undated	Facebook	“[H]e's now joking on Facebook about being a rapist, fun fact. But the restaurant supposedly has a zero tolerance policy [eye roll emoji]”	“But the restaurant supposedly has a zero tolerance policy [eye roll emoji]”
Brown6	Undated	Facebook	“Lol Facebook changed their minds and the post was reinstated. Still brought back attention to it, so why not talk about it again!”	“Lol Facebook changed their minds and the post was reinstated. Still brought back attention to it, so why not talk about it again!”
JValentino1	August 21, 2019	Facebook	“FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?'	“I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste to keep others aware. I don't mind. I just want people safe.”

Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."

JValentino3	Undated	Facebook	"That's what I'm sayin [knife emoji] let's vigilant this"	"That's what I'm sayin [knife emoji] let's vigilant this"
JValentino4	Undated	Facebook	"[U]r too cute for him omg"	"[U]r too cute for him omg"
NValentino 1	Between June 29, 2019 and July 13, 2019	Facebook	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit	"[B]ut he's clearly a [expletive-]ing creep ... Also for his gang of apologists who defend him

on my [girlfriend]
in front of me
(which we both
laughed at) but
he's clearly a
[expletive-]ing
creep[.] I've also
heard he's gotten
girls drink or
high to sleep with
them. And now
this [shrug emoji]
date rape ain't
cool .. Also for his
gang of apologists
who defend him
fuck y'all too
you're part of the
problem.”

fuck y'all too
you're part of the
problem.”

<p>*29 NValentino 2</p>	<p>Between June 29, 2019 and July 13, 2019</p>	<p>Facebook</p>	<p>“NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free”; “EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there.”</p>	<p>“[A]ny information helps”; “EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there.”</p>
<p>NValentino 3</p>	<p>Between June 29, 2019 and July 13, 2019</p>	<p>Facebook</p>	<p>“In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task. I couldn't have</p>	<p>“In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together ... I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all.</p>

			<p>done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"</p>	<p>I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"</p>
NValentino 4	Between June 29, 2019 and July 13, 2019	Facebook	<p>"!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him..... If you support a man who drugs women "alleged" (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women. If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me."</p>	<p>"If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me."</p>
NValentino 5	July 1, 2019	Twitter	<p>"There is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the</p>	<p>"There is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the</p>

			people who need it”	people who need it”
McGann1	Undated	Fraternal Order of Bartenders Website	“I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him. Maybe they have called the police or maybe they were scared to come forward. Of course u can judge a book by its cover that's why books have them”	“I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him ... Of course u can judge a book by its cover that's why books have them”
McGann2	Undated	Fraternal Order of Bartenders Website	*30 “That [I] don't have an answer to because I am not involved in it all I know is I hope his life is ruined like he ruined other people's lives”	“[A]ll I know is I hope his life is ruined like he ruined other people's lives”
McGann5	Undated	Fraternal Order of Bartenders Website	“[W]ow what a prick”	“[W]ow what a prick”
McGann7	Undated	Fraternal Order of Bartenders Website	“[W]ell if you google ‘Brent Comyack’ you can see his picture and what a douche he looks like”	“[W]ell if you google ‘Brent Comyack’ you can see his picture and what a douche he looks like”

WN Defendants advance that “[t]here can be no liability in defamation for a statement of pure opinion.” They further assert that at least some of the statements at issue are “unambiguously matters of pure opinion,” such as those referring to Comyack as a “scum bag,” a “douche,” a “prick,” and a “predator,” to name a few. WN Defendants further note that, “in context, all readers of the posts alleged to be defamatory knew that the ultimate conclusions were an opinion based on the disclosed facts of the allegations shared in earlier and continuing conversations.”

McGann argues that his statements “are opinion and therefore protected as opinion.”

Comyack counters that statements of opinion “may trigger liability if they imply false underlying objective facts.” He also argues that statements that he “is a sexual predator and that you cannot trust his drinks are not opinion” but rather are statements “based on false allegations[,] which ... [WN] Defendants [and McGann] accepted as facts.” Comyack further “acknowledges that[,] standing alone, calling an individual a ‘douche’ or a ‘prick’ would not be defamatory” but urges this Court that parsing the disputed statements “is not appropriate.”

The Court has viewed these statements not from the perspective of their authors but from a purely objective standard in deciding whether such statements or portions thereof are statements of opinion; application of a subjective standard, by contrast, would be inappropriate at this stage of the proceedings and prior to discovery being conducted. The above statements fall into two categories.

The first category is words used to describe Comyack: “scummy,” “live one,” “trash,” “predator,” “scumbag,” “creep,” “prick,” and “douche.” In the Court's view, these descriptors are not capable of verification as to their truth or falsity but rather reflect the authors' opinions on Comyack.⁶ The Court grants summary judgment in favor of WN Defendants and McGann regarding their statements of opinion.

*31 The second category includes judgments as to how people have responded or, in the authors' views, should respond to the allegations against Comyack: “[a]nd this is how Modine responds ... Great work, #modineasbury. We won't be untagging anything. Expect more tags now.”; “[d]on't let Facebook shut this down.”; “[b]e careful and guard your drinks ... And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable ... Please be careful and tell your friends to be careful.”; “[b]ut the restaurant supposedly has a zero tolerance policy [eye roll emoji]”; “[l]ol Facebook changed their minds and the post was reinstated. Still brought back attention to it, so why not talk about it again!”; “I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe.”; “[t]hat's what I'm sayin [knife emoji] let's vigilant this”; “ur too cute for him omg”; “[a]lso for his gang of apologists who defend him fuck y'all too you're part of the problem.”; “any information helps.”; “EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there.”; “[i]n the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together ... I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!”; “[i]f you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me.”; “[t]here is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it”; “I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him ... Of course u can judge a book by its cover that's why books have them”; and “all I know is I hope his life is ruined like he ruined other people's lives.” These expressions reflect either (1) states of mind that neither have a readily understandable meaning nor can be verified as true or false or (2) pure opinion of the author.⁷ The Court will thus grant summary judgment in favor of WN Defendants and McGann with regards to these statements as well.

Accordingly, Comyack's claim for defamation as to both categories of statements of opinion that are specifically referenced above is DISMISSED WITH PREJUDICE.

b. Unprivileged Publication of Statement to a Third Party^{8 9}

With respect to the second element, “[a]lthough defamatory, a statement will not be actionable if it is subject to an absolute or qualified privilege.” [Erickson v. Marsh & McLennan Co.](#), 117 N.J. 539, 563 (1990). “An absolute privilege is an immunity from liability which springs from society's recognition that the need for unfettered expression is crucial to the public weal”; this “privilege is complete.” [Salzano v. North Jersey Media Group Inc.](#), 201 N.J. 500, 527 (2010), *cert. denied*, 562 U.S. 1200 (2011) (internal quotation marks and citations omitted). A qualified privilege, by contrast “serve[s] to balance the individual's interests in reputation with the public's interest in the reporting of important public matters.” *Ibid.* (internal citations omitted). Deciding “whether a defamatory statement is privileged is a threshold determination to be made by a judge rather than a jury.” [Govito v. West Jersey Health System, Inc.](#), 332 N.J. Super. 293, 310 (App. Div. 2000) (internal citations omitted).

In this matter, WN Defendants and McGann contend that three privileges apply to all or some of the statements that they made about Comyack: (1) the “fair comment” privilege, (2) the “common interest” privilege, and (3) the CDA. The Court will consider the application of each of those privileges below.

1. Whether the Statements at Issue Are Protected by the Fair Comment Privilege

The New Jersey Supreme Court, recognizing “that the need for the free flow of information and commentary on matters of legitimate public concern required heightened protection for the speaker, regardless of whether the target of the speech was a public official or public figure,” has found that, “[a]lthough the United States Supreme Court has withdrawn full First Amendment protection for speech involving matters of public interest in *Gertz*, we found that such speech is sheltered under our common law privilege of fair comment.” *Senna v. Florimont*, 196 N.J. 469, 486 (2008) (internal quotation marks and citations omitted). In order to determine whether speech warrants protections of the privilege, courts must consider the content, form, and context of such speech, analysis of which “allows for clear distinctions between speech worthy of the heightened protection of the actual-malice standard, and speech of a subordinate kind meriting the negligence standard,” in addition to “the disinterested nature of the speaker.” *Id.* at 492-96 (contrasting media defendants, which are “unlikely, for the most part, to derive a direct economic benefit from harming the reputation of a person who is the subject of a story,” with “a business owner [who] maligns his competitor in the marketplace for apparent economic gain”); see also *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-62 (1985) (providing that determining whether particular speech addresses a matter of public concern requires a review of the content, form, and context of the speech, including the identity of the speaker and the targeted audience) (internal quotation marks and citations omitted). More specifically, while “[d]iscourse on political subjects and critiques of the government will always fall within the category of protected speech that implicates the actual-malice standard,” “[p]ublic policy and common sense also suggest that the same protections be given to speech concerning significant risks to public health and safety.” *Id.* at 497 (internal citations omitted). The New Jersey Supreme Court has also found, in discussing “a cause of action based upon the invasion of privacy by the unreasonable publication of private facts,” that “the facts surrounding the commission of a crime are subjects of legitimate public concern.” *Romaine v. Kallinger*, 109 N.J. 282, 297, 302 (1988) (internal citations omitted). The rationale for such privilege is that

*32 speech involving matters of public interest and concern needs adequate breathing room in a democratic society. The significant societal benefit in robust and unrestrained debate on matters of public interest demands that we not impose a regime in which speakers will engage in self-censorship for fear of a ruinous defamation lawsuit. Even the fear of having to defend against a defamation suit may make some too timid to venture into discussions where speech may be prone to error. In those circumstances, actual malice is the proper standard.

Id. at 492-93 (internal citations omitted).

The following statements potentially implicate the fair comment privilege:

Statement Reference	Date	Location	Content	Portions in Which the Fair Comment Privilege Potentially Applies
Brown1	June 29, 2019	Facebook	“A woman was drugged by someone that tends bar at @modineasbury last night and they're	“A woman was drugged by someone that tends bar at @modineasbury last night and they're

more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now."

more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night ... [T]here is a police report currently being filed against him ... By being more worried about their reputation than the fact that they hired a rapist."

Brown2	August 15, 2019	Facebook	<p>"Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't let Facebook shut this down."</p>	<p>"Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender."</p>
Brown3	June 29, 2019	Facebook	<p>"We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment</p>	<p>"A manager at Modine drugged a woman last night at another establishment. This isn't his first offense ... Edit 2: Modine has now posted a comment about this employee being fired ... Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women."</p>

about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful.”

Brown4	August 15, 2019	Facebook	“Brent Comyack is ... reporting posts that mention what he's done. He is a predator. He fled the state once word got out. He is a scumbag.”	“Brent Comyack is ... reporting posts that mention what he's done ... He fled the state once word got out.”
*33 Brown5	Undated	Facebook	“[H]e's now joking on Facebook about being a rapist, fun fact. But the restaurant supposedly has a zero tolerance policy [eye roll emoji]”	“[H]e's now joking on Facebook about being a rapist, fun fact.”
JValentino1	August 21, 2019	Facebook	“FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof?’	“FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' ... He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the

Did anyone go to the police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."

police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want."

JValentino2	Undated	Facebook	"Kylie he[']s in [A]sbury at the moment! He loves to move around when word gets loose"	"He loves to move around when word gets loose"
NValentino 1	Between June 29, 2019 and July 13, 2019	Facebook	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool .. Also for his	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) ... I've also heard he's gotten girls drink or high to sleep with them."

gang of apologists who defend him fuck y'all too you're part of the problem."

*34 NValentino 2	Between June 29, 2019 and July 13, 2019	Facebook	<p>"NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free"; "EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there."</p>	"Keep our state rapist free"
NValentino 3	Between June 29, 2019 and July 13, 2019	Facebook	<p>"In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task. I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"</p>	"Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task."
NValentino 4	Between June 29, 2019 and July 13, 2019	Facebook	<p>"!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him..... If you support a man who drugs women "alleged" (which</p>	"!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him..... If you support a man who drugs women "alleged" (which

it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women. If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me."

it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women."

WN Defendants did not initially address the application of the fair comment privilege. However, in their Reply, they cite to the New Jersey Supreme Court's decision in Kotlikoff v. Cmty. News for the proposition that the United States Supreme Court's decisions in Sullivan and Gertz have rendered the fair comment privilege obsolete.¹⁰

*35 McGann generally implicates the privilege when he asserts that “[a] timely grant of summary judgment in a defamation action has the salutary effect of discouraging frivolous lawsuits that might chill the exercise of free speech on matters of public concern.”

Comyack counters that the fair comment privilege turns on whether the facts are “truly stated” as “the honest expression of the writer's real opinion,” rather than statements that “contain imputations of corrupt or dishonorable motives.” Comyack further argues that determining application of the privilege is premature.

For purposes of its analysis, the Court must consider the alleged conduct to be true *only for the purpose* of analyzing whether the statements in dispute implicate the fair comment privilege. Whether any such privilege may have been abused is discussed below in Section III.B.i.c.

First, the content of these statements concerns drugging, sexual misconduct, sexual assault, rape, and the consequences thereof, which could constitute criminal behavior that certainly implicates the interests of public safety. As such, the public certainly has an interest in being apprised of such conduct.^{11 12} Second, the form of these statements is informal online messaging to spread awareness of Comyack's conduct. Third, the context of these statements is generally twofold: (1) social media postings as part of a so-called “whisper network” to protect women potentially at risk and (2) social media postings involving those in the bartending and restaurant industry. Finally, the authors of these statements are undoubtedly economically disinterested in spreading such information.¹³ As such, the Court finds that the statements cited are protected by the fair comment privilege. Accordingly, this aspect of the Motion and Cross-Motion is GRANTED.

2. Whether the Statements at Issue Are Protected by the Common Interest Privilege

The common interest privilege, or conditional special-interest privilege, is a qualified, “historical, traditional common-law privilege which arises out of a legitimate and reasonable need, in particular situations, for private people to be able freely to express private concerns to a limited and correlatively concerned audience, whether or not those concerns also touch upon the public interest in the broad sense.” Govito v. West Jersey Health System, Inc., 332 N.J. Super. 293, 309 (App. Div. 2000) (internal quotation marks and citations omitted). Determining whether such privilege exists requires an assessment of “the circumstantial justification for the publication of the defamatory information,” the “critical elements” of which “are the appropriateness of the occasion on which the defamatory information is published, the legitimacy of the interest thereby sought to be protected

or promoted, and the pertinence of the receipt of that information by the recipient.” [Id.](#) at 309-310 (internal quotation marks and citations omitted).

*36 The common interest privilege potentially applies to the same statements noted and analyzed in this Court's discussion of the fair comment privilege at Section III.B.i.b.1. The Court therefore incorporates those statements in discussing the common interest privilege here.

WN Defendants argue that their “statements were made as part of the operation of an online, New Jersey whisper network,” “by which women protect one of another from men who are not necessarily held accountable for sexual misconduct”; that the content of such statements themselves evidences the legitimacy of the subject interests and the pertinence of their receipt; and that they viewed their making of such statements as a moral duty to other women. At the heart of this argument is the proposition that, when facing a moral dilemma as to whether to speak out and express an opinion on a subject that is in others' interest or to sit back and shirk one's moral duty, the role of the courts should be to protect the decision made by applying the privilege and therefore requiring the actual malice standard to be met prior to assessing liability.

McGann did not directly address the issue in his briefing.

Comyack counters that WN Defendants and McGann had no firsthand knowledge or evidence of the allegations but rather acted on “a hearsay account” and that such defendants failed to “direct their statements to any particular individual or group,” as required. Comyack additionally argues that determining application of the privilege is premature. Further, Comyack's counterarguments that WN Defendants and McGann's statements are “false” and/or “malicious” conflates the type and level of proofs that will be necessary if the statements in question are determined to be subject to the privilege.

Again, for purposes of its analysis, the Court must consider the alleged conduct to be true *only for the purpose* of analyzing whether the statements in dispute are protected by the common interest privilege.

Whether any such privilege may have been abused is discussed below in Section III.B.i.c.

First, the social media platforms on which the disputed statements were published appear to be an appropriate forum for accomplishing the twofold goals of dispersing messaging about Comyack's conduct to women that may be in his vicinity for their protection and informing bartenders and others in the restaurant industry of Comyack's past conduct in order to warn them as to potential future conduct. Second, protecting women from drugging, sexual misconduct, sexual assault, and rape is certainly a legitimate interest sought to be promoted. Along those lines, the statements in issue are replete with expressions of crusading to protect women in Comyack's vicinity; these expressions corroborate the purpose of the moving defendants in protecting women from Comyack.¹⁴ Third, women and bartenders and restaurateurs potentially in the same geographic region as Comyack are certainly important recipients of such information, given Comyack's actions.

*37 Accordingly, the Court finds that the cited statements are protected by the common interest privilege. Therefore, this aspect of the Motion and Cross-Motion is GRANTED.

3. Whether the Statements at Issue Are Protected by the Communications Decency Act (“CDA”)

“Generally, the law of defamation provides redress against a party that reprints defamatory statements.” [Costello v. Ocean County Observer](#), 136 N.J. 594, 606 (1994). “[T]he common law rule [is] that a person who republishes a defamation uttered by another was subject to liability as if he or she were the original defamer.” [Orso v. Goldberg](#), 284 N.J. Super. 446, 451 (App. Div. 1995) (internal citations omitted).

[T]hat defendants accurately reported information from another source will not relieve them of liability. Under that analysis the defense of truth does not refer to the truthful republication of a defamatory statement but to the truth of the statement's contents. Thus, if defendant published that a third person stated that plaintiff has committed a crime, it is no justification that the third party did in fact make that statement. Defendant must prove that in fact plaintiff committed the crime.

[Lawrence v. Bauer Publishing & Printing](#), 89 N.J. 451, 461 (1982), [cert. denied](#), 459 U.S. 999 (1982) (internal citations omitted).

However, the CDA contains an express policy statement that proclaims the United States' desire to preserve the vibrant and competitive free market that presently exists with respect to the internet and other interactive computer services. In adopting the CDA, Congress found in [47 U.S.C. § 230\(a\)](#) that:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

Accordingly, Congress recognized that tort-based lawsuits pose a threat to freedom of speech on the new internet medium. As such, Congress acknowledged that the common law policy needed to be adjusted, given our current modes of electronic communication, so it stated the following as the policy in the United States in [47 U.S.C. § 230\(b\)](#):

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- *38** (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Those policies specifically recognize that the imposition of tort-based lawsuits are another form of intrusive government regulation of speech. The policies also encourage the unfettered and unregulated development of free speech on the internet and caution against lawsuits shutting down or stifling websites and other services on the internet.

In order to effectuate such policies, which, in certain respects, are in derogation of the common law, 47 U.S.C. § 230(c)(1) provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” An “interactive computer service” is defined by 47 U.S.C. § 230(f)(2) as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” An “information content provider” is defined by 47 U.S.C. § 230(f)(3) as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” Further, a provider or user who engages in minimal editing and commenting of information provided by an information content provider does not themselves become an information content provider. See, e.g., [Donato v. Moldow](#), 374 N.J. Super. 475, 486, 489, 497-98 (App. Div. 2005) (considering whether a provider and user becomes “an information content provider with respect to ... anonymously-posted defamatory statements” due to his activities as a provider and user and finding that he is immune from liability for the statements of others and the management of such statements as a provider but that posting “messages of his own and” participating “in the discussion does make him an information content provider with respect to his postings,” though none were “alleged to be actionable”).

47 U.S.C. § 230(e)(3) additionally sets forth that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” “In a clear exercise of its Commerce power, Congress preempted any contrary state law provisions ... Because of this provision and Congress' expressed desire to promote unfettered speech on the Internet, the sweep of § 230's preemption includes common law causes of action.” [Donato v. Moldow](#), 374 N.J. Super. 475, 486 (App. Div. 2005) (internal citations omitted). The CDA is absolute, rather than qualified, in its sweep and effectively functions as an absolute common law privilege.

The statements at issue that potentially implicate the CDA are: ¹⁵

*39 Statement Reference	Date	Location	Content	Modification or Addition by Party
Devaney1	July 6, 2019	Facebook, from Original Source Non-Party “123dontfu kwithme” on Reddit	Article entitled, “Women: If this man is your bartender in Asbury, don't trust his drinks”	None
Devaney2	July 23, 2019	Facebook, from Original Source Unknown Non-Party on Instagram	“Brent Comyack is now in North Carolina[,] Spread the word of the rapey bartender!!!! Don't let him get by! [Instagram's indication of a geo-tag, stating a location of “NORTH CAROLINA],	None

NORTH
CAROLINA[.]
Don't let bars let
him in!"

NValentino 1	Between June 29, 2019 and July 13, 2019	Facebook, from Original Source Non-Party Rae Ashlee	"Hey to all my friends who bar hop or hang out in [A]sbury heads up. This man has been rumored (with many girls coming out having a similar story) to [be] spiking girls drinks!"	<i>"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool .. Also for his gang of apologists who defend him fuck y'all too you're part of the problem."</i>
McGann6	July 4, 2019	Fraternal Order of Bartenders Website, from Original Source Non-Party Kelly Davis	"***** Anonymous Post***** This didn't happen to me, but this has been the talk of NJ for quite some time. Asbury Park and [s]urrounding areas, keep out for the name Brent Comyack. This guy has been known for quite some[]time for drugging and attempting to rape women (and apparently successful, if that's the word you want to use) He has an open charge against him as of currently and has recently lost	<i>"I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him. Maybe they have called the police or maybe they were scared to come forward. Of course u can judge a book by its cover that's why books have them"</i>

his job due to
it, but has been
popping up at
different places. I
also have a friend
who was sexually
assaulted by him
and has known
of him doing
this for about
10+ years. Keep
your reputation in
tact [sic] and his
name off of your
bartending roster.”

*“That [I] don’t
have an answer to
because I am not
involved in it all I
know is I hope his
life is ruined like
he ruined other
people’s lives”*

“He was in town
he is pretty much
been blacklisted”

“yeah he was
fired”

*“wow what a
prick”*

*“well if you
google “Brent
Comyack” you
can see his picture
and what a
douche he looks
like”*

*“His profile is
active again
and he is still
a member of
this group Brent
Comyack”*

“[T]his is what he
looks like, please
make it known the
kind of person he
is”

WN Defendants argue that Comyack “continues to seek liability as to three statements in a manner barred by [Section 230](#).” Along those lines, they seek for immunity from liability under the CDA as to Devaney1, Devaney2, and NValentino1, stating that such statements are mere republications with, in one case, limited added commentary that falls within the scope of the CDA's protections.

*40 McGann offers that he is immune from liability under the CDA because his posts “are protected[,] as the content was not changed, but opinions were offered by” him.

Comyack counters that he does not allege defamation by republication or otherwise as to Devaney1, Devaney2, NValentino1, and McGann6 but that, while he agrees that the CDA “provides immunity if an individual merely republishes a message” with the possibility of liability for additional comments, determining application of the CDA at this juncture is premature.

In Devaney1, Devaney2, NValentino1, and McGann6, the information content providers per [47 U.S.C. § 230\(f\)\(3\)](#), or those who created the subject content, are 123dontfukwithme, an unknown person, Rae Ashlee, and Kelly Davis, respectively. With respect to these republications, WN Defendants and McGann were acting as “user[s] of an interactive computer service,” namely the online platforms on which they republished the content, per [47 U.S.C. § 230\(c\)\(1\)](#) and [47 U.S.C. § 230\(f\)\(2\)](#). That WN Defendants and McGann reposted messages originated by anonymous users or users whose identities were known to them does not affect the broad immunity granted to them by the CDA. See generally [Donato v. Moldow](#), 374 N.J. Super. 475 (App. Div. 2005). Therefore, such republications are absolutely privileged under the CDA, and any state law claims complained of as to such statements are precluded by the CDA. As such, this aspect of the Motion and Cross-Motion is GRANTED. Comyack's claims as to these statements are DISMISSED WITHOUT PREJUDICE. ¹⁶

c. Fault¹⁷

With respect to the third element, New Jersey law “always” requires proof of fault in a defamation action. See [Senna v. Florimont](#), 196 N.J. 469, fn. 16 (2008). Generally, “a plaintiff claiming to be damaged by a false statement will succeed if he shows that the speaker acted negligently in failing to ascertain the truth of the statement.” [Id.](#) at 473. Cases involving the negligence standard require a showing of fault by a preponderance of the evidence. See [id.](#) at fn. 16 (internal citations omitted). However, if a qualified privilege has been implicated, “[a] plaintiff may overcome this privilege by proving that the immunized defendant abused its privilege” if, among other things, “the publisher knows the statement is false or the publisher acts in reckless disregard of its truth or falsity.” [Govito v. West Jersey Health System, Inc.](#), 332 N.J. Super. 293, 312 (App. Div. 2000) (internal quotation marks and citations omitted). While the knowledge prong is self-explanatory, with respect to reckless disregard, the actual malice standard requires “a high degree of awareness of ... probable falsity” or “serious doubts as to the truth of the publication.” [DeAngelis v. Hill](#), 180 N.J. 1, 13 (2004) (internal quotation marks and citations omitted). Along those lines, “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” [St. Amant v. Thompson](#), 390 U.S. 727, 731 (1968). While that standard may be difficult to prove, it intentionally balances “the important public policy that individuals should generally be free to enjoy their reputations unimpaired by false and defamatory attacks” with the “vital counter policy that in certain situations there is a paramount public interest permitting persons to speak or write freely without being restrained by the possibility of a defamation action.” [Swede v. Passaic Daily News](#), 30 N.J. 320, 331 (1959) (internal citations omitted). The privileges are “designed to protect speech in those narrowly defined instances in which the public interest in unrestrained communication outweighs the right of redress.” [Fees v. Trow](#), 105 N.J. 330, 336 (1987). In such a case, if the court has found the qualified privilege to be applicable, an abuse “must be proven by clear and convincing evidence.” [Govito v. West Jersey Health System, Inc.](#), 332 N.J. Super. 293, 312 (App. Div. 2000) (internal citations omitted). Further, “[t]he jury determines whether the defendant abused a special-interest privilege.” [Ibid.](#) (internal citations omitted); [Bainhauer v. Manoukian](#), 215 N.J. Super. 9, 40 (App. Div. 1987) (internal citations omitted).

*41 In terms of the pleading burden with respect to actual malice,

when the allegations of a defamation complaint ... are limited to the fact of publication and a bare conclusory assertion that the press defendants knew and/or reasonably should have known that the statement ... was false, with no other factual reference to lend support to the contention, the court may not simply take the facial assertion as a given, but rather must evaluate the circumstances as best it can to determine whether there is any reasonable basis upon which the defamation claim can be seen to be viable. Were it otherwise, any person or entity claiming First Amendment protection would be at the mercy of a claimant's empty assertions unsupported even by any contentions regarding surrounding facts.

[Darakjian v. Hanna](#), 366 N.J. Super. 238, 248, 251 (App. Div. 2004)¹⁸ (internal quotation marks omitted) (finding that, “because the complaint is bereft of any particular factual allegations beyond a bare contention that the press defendants acted in a way that permits plaintiff to overcome the insulation the fair-report privilege confers, we conclude that count two of the complaint should be dismissed. This result is required by First Amendment policies and the responsibilities of courts to avoid rulings that unduly chill the press's freedom to report on matters of public interest”).^{19 20} As “[m]alice is merely a conclusion of law which is based upon facts,” “[m]ere averment that the words printed or published were malicious is not sufficient ... To withstand a demurrer, the plaintiff must allege the ultimate facts constituting actual malice.” [Id.](#) at 250 (quoting [Stice v. Beacon Newspaper Corp.](#), 340 P.2d 396, 401 (1959)) (internal quotation marks omitted). Further,

*42 [i]t is not enough for [a] plaintiff to assert ... that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can bolster a defamation cause of action through discovery, but not [] file a conclusory complaint to find out if one exists. [A] plaintiff must plead the facts and give some detail of the cause of action.

[Id.](#) at 248-49 (internal quotation marks and citations omitted); see also [Campbell v. St. James African Episcopal Church](#), 2014 N.J. Super. Unpub. LEXIS 2072.

Courts should decide whether to dismiss a complaint if a plaintiff in a defamation action failed to adequately plead a cause of action under the applicable standard; such a plaintiff does not have the benefit of the general indulgence to broad brush pleadings that sweep in elements of a particular cause of action but rather, in view of the “expressive interests and constitutional policies at stake,” has the responsibility not merely to allege that a defamatory comment was made and that the defendant entitled to a privilege knew or should have known that it was false. [Printing Mart v. Sharp Electronics](#), 116 N.J. 739, 773 (1989). Similarly, courts should consider whether to “grant summary judgment dismissing the complaint if a reasonable jury could not find that the plaintiff has established actual malice by clear and convincing evidence”; but,

[b]ecause the issue of a defendant's state of mind does not readily lend itself to summary disposition, courts are wary of disposing of cases involving actual malice through summary judgment. Plaintiffs nonetheless must produce substantial evidence to survive a motion for summary judgment. Although courts construe the evidence in the light most favorable to the non-moving party in a summary judgment motion, the ‘clear and convincing’ standard in defamation action adds an additional weight to the plaintiffs' usual ‘preponderance of the evidence’ burden.

[DeAngelis v. Hill](#), 180 N.J. 1, 12 (2004) (internal quotation marks and citations omitted); [Costello v. Ocean County Observer](#), 136 N.J. 594, 615 (1994) (internal quotation marks and citations omitted). Nonetheless, such a disposition may ultimately be appropriate in a given case.

WN Defendants plainly assert that Comyack has only set forth conclusory allegations relating to any claim of actual malice and has therefore failed to meet his pleading burden, although “[t]he Court more than flagged the issue for” him. Along those lines, WN Defendants note that Comyack makes a clear error in citing the New Jersey Supreme Court's decision in [Leers v. Green](#) “for the outdated proposition that “[f]acts must be completely true” in order “to urge the Court to return to a pre-fault era of defamation law.” However, they proffer that, “[i]n short, without specific facts suggesting *each* defendant entertained serious doubts as to the truth of the various statements, the ... [Amended Complaint] fails to state a cause of action and should therefore be dismissed.” Further, WN Defendants, along with McGann, relay that their sole motive is to protect women from and to inform bartenders and restaurateurs of Comyack's conduct.

McGann concurs when he contends that “[t]here is also no proof of malice” asserted by Comyack against McGann and that “[t]here is no triable fact as to actual malice.”

Comyack counters that WN Defendants and McGann have “spread vile, false statements about” him “and now attempt to impose a higher legal standard by claiming [that] they were performing a public service” and “warning others about” Comyack “in the interest of public safety.”²¹ Comyack effectively suggests that absolutely “no basis” exists for the claims made against him and that WN Defendants and McGann have more surreptitious motives for their actions than they have yet revealed. In support of that argument, Comyack points to the “fact” that the drug test alleged to have been obtained by Giannella, as well as his criminal history, will not and could not have been known to WN Defendants before they instituted their campaign against him. He further insinuates (but does not specifically allege) that WN Defendants are zealous proponents of a cause, or, as one of the moving defendants described it, a “cult,” who have exploited, contrived, and then embellished allegations against him in order to promote their agenda, at the expense of his reputation. Comyack further advances that “argument concerning the existence of actual malice is inappropriate at this point” and that he “must be given an opportunity to explore such.” Finally, Comyack sets forth that he has satisfied his pleading burden as to actual malice by alleging that WN Defendants and McGann “knew their statements were false or acted in reckless disregard of the truth or falsity” and again alleging that “they acted with actual malice either knowing their statements were false or acting in reckless disregard of their truth or falsity[,] forfeiting any alleged privilege they may assert.”

*43 Preliminarily, the Court looks to its Opinion of January 10, 2020, in which it referenced Comyack's initial Complaint and reasoned that:

Again, the allegations against WN Defendants as to their allegedly defamatory statements amount to the following: Jaclyn and Nicole Valentino “began posting messages on social media,” which stated that “Plaintiff was a serial abuser who drugged and raped girls,” and Devaney and Brown “also began to post similar messages alleging Plaintiff to be a serial abuser drugging and raping girls.” No mention of the truth or falsity of these statements is made, let alone whether WN Defendants acted negligently or with reckless disregard as to their truth or falsity or with knowledge of their falsity. As to McGann and Franco, Plaintiff's Complaint sets forth that they “were informed of the allegations” and subsequently “posted the false allegations on the Bartenders Guild website.” While the falsity of the statements is indicated here, Plaintiff's Complaint fails to allege that McGann and Franco acted negligently or with reckless disregard as to the truth or falsity of their statements or with knowledge of their falsity. Without such allegations by Plaintiff as to the requisite degree of fault, not only is a more definite statement required, but Plaintiff's First Count for defamation is deficient.

The statements that must be evaluated under the actual malice standard are those that the Court found are protected by the fair comment and common interest privileges.²² At this stage of the proceedings, in which little to no discovery has been conducted, the Court looks to Comyack's Amended Complaint in order to determine if there are adequate allegations of actual malice contained within the pleading itself. Comyack's general allegations as to actual malice as to WN Defendants and McGann in his Amended Complaint amount only to the following: “[t]he Defendants either knew that their statements were false, or acted in reckless disregard of the truth or falsity”; “[t]he Defendants had knowledge of or acted in reckless disregard as to the truth or falsity of the published matter, and the false light in which the Plaintiff would be placed”; and “[t]he Defendants acted with actual malice by either knowing that their statements were false, or acting in reckless disregard of their truth or falsity, forfeiting any alleged privilege they may have to make a statement about the Plaintiff that was defamatory.” Comyack's allegations as to actual malice in his Amended Complaint basically amount to the definition of actual malice and are precisely the type of allegations that the Appellate Division in Hanna held to be insufficient to sustain a claim for defamation. Recitation of the applicable standard as if they were “magic words” simply does not suffice.²³ The Court further notes that, despite his conclusory claims to the contrary, Comyack has not indicated in his Amended Complaint specific facts suggesting that each or any of the moving defendants knew or entertained serious doubts as to the truth of each of their statements; per Hanna, in the absence of such factual allegations, the bare claim that certain undescribed words were malicious cannot stand. As such, Comyack's Amended Complaint does not, on its face, state a cause of action. Therefore, with regards to Comyack's claims as to the statements identified by the Court that are subject to the fair comment and common interest privileges, the current version of Comyack's Amended Complaint does not state a cause of action. Accordingly, in this respect, the Motion and Cross-Motion are GRANTED. Comyack's claims as to those identified statements are therefore DISMISSED WITHOUT PREJUDICE.

d. Damages²⁴

*44 With respect to the final element,

[i]n an action for slander, or oral defamation, the plaintiff must prove that the defamatory statement caused actual harm to his or her reputation through the production of concrete proof. The plaintiff must prove special damages in the form of proof of pecuniary or economic harm to his reputation. By contrast, in an action for written defamation, or libel, the plaintiff may prove any form of actual damage to reputation, either pecuniary or non-pecuniary. This element of the slander plaintiff's prima facie case is waived if the statement is deemed slander *per se*, because damage to reputation is presumed to flow from such statements. This means that a slander plaintiff may establish a cause of action not only without proving special damages but without proving any form of actual damage to reputation. Four types of slander qualify as slander *per se*: (1) accusing another of having committed a criminal offense; (2) accusing another of having a loathsome disease; (3) accusing another of engaging in conduct, or having a condition or trait, incompatible with his or her business; and (4) accusing another of having engaged in serious sexual misconduct. However, the slander *per se* doctrine has been criticized in recent years, resulting in the courts' refusal to expand any of these four categories or to invoke the doctrine unless it ‘clearly’ applies.

[Ricciardi v. Weber](#), 350 N.J. Super. 453, 475-76 (App. Div. 2002), certif. denied, 175 N.J. 433 (2003) (internal citations omitted).

“The libel proof plaintiff doctrine[, however,] prohibits a plaintiff from recovering for libelous statements where the plaintiff's reputation in the community was so tarnished before the publication that no further harm could have occurred. To hold a plaintiff

libel proof, the court must determine as a matter of law that the plaintiff would not be able to prove compensatory damages.” [Schivone Constr. Co. v. Time, Inc.](#), 847 F.2d 1069, 1079 (3rd Cir. 1988) (internal quotation marks and citations omitted).

WN Defendants argue that Comyack is “libel proof,” given his “pre-existing reputation ... as ... a scumbag at a minimum, and a serial sexual predator at the worst.”

McGann also notes that Comyack “has failed to produce any evidence of actual injury to reputation or injuries physically and mentally.”

Comyack counters that the argument as to causation on the basis of his purported preexisting reputation is frivolous and without basis, as he “has alleged special damages” due to his termination of employment and challenges in securing other employment.

As a preliminary matter, the statements at issue here plainly accuse Comyack of both having committed a criminal offense and of having engaged in serious sexual misconduct. Any statements relating to these charges are therefore defamatory per se, in which case damages are presumed to flow from such statements. Further, the Court declines at this time to decide as a matter of law that Comyack is “libel proof,” given that a reasonable factfinder could find that he was damaged by the statements at issue. That aspect of the Motion and Cross-Motion are DENIED WITHOUT PREJUDICE.

ii. Count Two for False Light and Count Three for Intentional Infliction of Emotional Distress²⁵

*45 [I]f an intentional tort count ... is predicated upon the same conduct on which the defamation count is predicated, the defamation cause completely comprehends the malicious interference cause. That is to say, if the alleged defamation is not actionable, then its consequences are also not actionable because the conduct that caused those consequences was privileged. The Supreme Court has also so held in considering the interplay between defamation and intentional infliction of emotional distress based on the same conduct. It would obviously be intolerably anomalous and illogical for conduct that is held not to constitute actionable defamation nevertheless to be relied on to sustain a different cause of action based solely on the consequences of that alleged defamation. Thus, since there was no actionable defamation here, there can be no claim for damages flowing from the alleged defamation but attributed to a different intentional tort whose gravamen is the same as that of the defamation claim.

[G.D. v. Kenny](#), 411 N.J. Super. 176, 194 (App. Div. 2009) (internal quotation marks and citations omitted), [aff'd](#), 205 N.J. 275 (2011). Essentially, a plaintiff cannot effectively “circumvent” the requirements of and defenses to a defamation claim by pursuing an alternative cause of action. *See, e.g.*, [Griffin v. Tops Appliance City, Inc.](#), 337 N.J. Super. 15, 24 (App. Div. 2001) (internal citations omitted).

WN Defendants argue that, “[b]ecause the ‘gravamen’ of all of ... [Comyack's] claims is the same,” “all claims rise and fall on the same ... analysis.”

McGann did not address this issue.

Comyack also did not address this issue.

The Court finds that, with respect to Comyack's Amended Complaint, Count Two for false light and Count Three for intentional infliction of emotional distress are both predicated on the same conduct as Count One for defamation. Therefore, the Court's findings as to Count One are also applicable to Counts Two and Three.

CONCLUSION

For the foregoing reasons, WN Defendants' Motion and McGann's Cross-Motion are GRANTED IN PART AND DENIED IN PART, as more particularly provided for in the Court's Opinion. The net effect of the Court's ruling is that Comyack's Complaint against WN Defendants and McGann is dismissed without prejudice at this time.

Footnotes

- 1 The positions of the parties are provided near verbatim for completeness of the record, with citations omitted.
- 2 Given that Franco filed for bankruptcy protection during the pendency of his Cross-Motion, his factual assertions are provided merely for context and completeness of the record.
- 3 As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.
- 4 As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.
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- 6 The tougher issue is whether the word “predator” is simply an expression of opinion. Referring to Comyack as a “predator” is the descriptor that is closest to being verifiably true or false. The New Jersey courts have not directly addressed whether use of this term to describe a person is an opinion. The New York Supreme Court in New York County, however, has considered this issue in an unpublished Opinion, and the Court finds convincing its reasoning. That Court reasoned that:
[s]tatements like ‘convicted felon,’ or ‘HIV positive[,]’ or ‘20-weeks pregnant’ have objective verifiable meaning; ‘sex predator’ does not. Rather, it is the sort of loose, figurative[,] or hyperbolic language that is immunized from defamation claims. Indeed, sister-state judges have tossed out of court cases predicated on ‘sexual predator’ language. So-called ‘Nazis,’ ‘racists,’ ‘terrorists,’ ‘scabs,’ ‘fraudsters,’ and ‘traitors,’ no doubt a woefully incomplete list, have all come up empty-handed in court.
Rosado v. Daily News, L.P., 2014 N.Y. Slip Op. 333736(U) 3-4 (Sup. Ct. 2014). In addition, the word “predator” is defined in the Oxford Dictionary as “a person ... that ruthlessly exploits others.” In that context, the determination of whether one exploits another is a matter of opinion that is incapable of being proven to be true or false.
- 7 Such as whether to take an action such as “blacklisting.”
- 8 That the statements at issue were published to a third party is not in dispute and therefore will not be addressed by the Court.
- 9 As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.
- 10 The Court recognizes WN Defendants' argument and agrees that jurisprudence surrounding the fair comment privilege has evolved over time. The simplified approach suggested by Comyack, by contrast, of course ignores whether a given statement was made with actual malice, even if false. In Kotlikoff v. Cmty. News, the New Jersey Supreme Court reasoned that,
[t]raditionally, one could be found liable for defamation if one published an opinion that harmed another's reputation. However, expressions of opinion were privileged if they constituted “fair comment” on a matter of public concern. This Court [in Leers] has articulated the following definition of the fair comment privilege:
In a word, “fair comment” (a) must be based on facts truly stated, and (b) must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticized, save in so far as such imputations are warranted by the facts, and (c) must be the honest expression of the writer's real opinion; and if the comment complies with these conditions, it is fair comment, however incorrect be the views expressed by the critic, or however exaggerated or even prejudiced be the language of the criticism; the “limits of criticism are exceedingly wide.”
However, with the Supreme Court decisions in New York Times v. Sullivan and Gertz v. Welch, the “fair comment” doctrine became obsolete insofar as its application is confined to a mere expression of opinion.
Kotlikoff v. Cmty. News, 89 N.J. 62, 68 (1982) (internal citations omitted). While the Court takes note of this shift in the law, it also recognizes that the New Jersey Supreme Court has since continued to apply a modernized version of the fair comment privilege and will therefore do so here. See generally, e.g., Senna v. Florimont, 196 N.J. 469 (2008).
- 11 The Court also notes that the publication of an article about this matter in the Sunday Edition of the Star Ledger, on page one and “above the fold,” corroborates this Court's finding that this story is a matter of public interest.
- 12 In spite of this finding, the Court does not adopt WN Defendants' assertion in their Reply that Comyack, in fact, conceded that the disputed statements implicate the public interest and should therefore be evaluated under the appropriate privilege.
- 13 The Court notes that Comyack has not offered an alternative motivation for making the disputed statements other than that provided by WN Defendants and McGann.

- 14 Yet, Comyack has not offered any alternative explanation to rebut their offering or to bring forth any disputed issue of fact regarding the issue. To simply say that the moving defendants acted with actual malice does not defeat the argument that they are entitled to the privilege. The claim of actual malice, if properly pled, only bears on whether the moving defendants are liable, notwithstanding their privileged status.
- 15 These statements have not been discussed previously in this Opinion because they are plainly encompassed within the CDA, and Comyack's claims as to such statements are clearly precluded on this basis. Exceptions that were previously addressed are italicized; these statements were analyzed in other contexts because they are plainly or arguably outside the scope of permissible privileged commentary under the CDA.
- 16 With regards to the Court's decision to dismiss Comyack's claims as to these statements without prejudice, the Court notes that Comyack speculates, without citation or evidence, that the cited statements made by WN Defendants and McGann may have been concocted from "throw away" accounts that they themselves created. Comyack's allegations are not supported by any Certification of any witness or party but are simply his (conspiracy) theory that has no apparent basis. Further, Comyack's Amended Complaint makes no such allegation, meaning that he has failed to state a cause of action regarding his claims as to the republished materials. Nonetheless, given that no discovery has yet occurred with regards to Comyack's claims, the Court will only enter a dismissal of these "republished" statements or comments without prejudice.
- 17 As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.
- 18 Notwithstanding Comyack's argument in his brief and at oral argument that the precedential authority requires that discovery be conducted before the Court can opine on this issue, Professor Kestin's opinion in Hanna belies that proposition.
- 19 Given that the fair report privilege is also a qualified privilege that requires a showing of malice, or "knowledge that the reported statement was false or with a reckless disregard for its truth or falsity," the Court sees no reason as to why the pleading burden with respect to actual malice under the fair report privilege would differ from the pleading burden with respect to actual malice under the fair comment or common interest privileges. Darakjian v. Hanna, 366 N.J. Super. 238, 245 (App. Div. 2004) (internal quotation marks and citations omitted).
- 20 Additionally, the Court takes note of R. 4:5-8(a), which states, in pertinent part, that "[m]alice, intent, knowledge, and other condition of mind of a person may be alleged generally"; however, this sentence is preceded by the following language: "[i]n all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable." None of the parties have cited any authority as to the applicability of this Rule to an action based upon allegedly defamatory speech, and the Court's plain reading of the Rule provides no support for its applicability. Accordingly, the Court finds the general pleading requirements for malice under R. 4:5-8(a) to be inapplicable to consideration of the defamation claim that is the subject of this Motion.
- 21 Comyack perplexingly seems to suggest that, because he believes that the allegations about him are, in fact, false, no privilege can apply, and the actual malice standard is not triggered. He, however, has stated the standard incorrectly. Where the actual malice trigger applies, as it does here, the actual malice analysis takes place wholly independent of the question of truth.
- 22 The Court notes that, at this juncture, all non-privileged statements to which Comyack has asserted a claim have already been disposed of, whether with or without prejudice.
- 23 While Comyack has expanded somewhat on those claims in the papers submitted in his Opposition to the Motion and Cross-Motion, those claims are not found in his pleadings. For instance, he attaches an Asbury Park Police Department report to suggest that the version of events that WN Defendants relied upon is fallacious. Even if the hearsay report is considered by the Court, there is no indication that WN Defendants were aware of its contents. Additionally, even the discussion in Comyack's Opposition does not clearly suggest a motive or intent that can be ascribed to the moving defendants other than what they themselves have described in an uncontradicted manner. Rather, it leaves the Court to inappropriately speculate as to their potential ulterior motives.
- 24 As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.
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