

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TIM and PENNY PATERSON, husband and wife and the marital community thereof,

No. 2:05-CV-01719-TSZ

v.

LITTLE, BROWN AND COMPANY, a)
Massachusetts state corporation, TIME)
WARNER BOOK GROUP, a Delaware state)
corporation, HAROLD EVANS ASSOCIATES)
LLC, a New York state limited liability)
company, HAROLD EVANS, and DAVID)
LEFER.)

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

**NOTE ON MOTION
CALENDAR: Friday, April 20,
2007
ORAL ARGUMENT
REQUESTED**

Defendants.)

**REPLY IN SUPPORT OF SUMMARY JUDGMENT
(05-CV-01719)**

SEA 1995250v5 3910089-000029

Davis Wright Tremaine LLP
LAW OFFICES

LAW OFFICES
2600 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 • Fax: (206) 628-7699

I. INTRODUCTION

Plaintiffs' response goes well over the permissible page limits without leave of Court, contesting factual and legal issues that are not part of their lawsuit, and are thus completely irrelevant to this summary judgment motion. On the critical issues, however, their Response fails to offer any evidence that Defendants' statements are false, provably false, not opinion, or libelous *per se*; or to show why – as a matter of law – the “father of DOS” battling a 25-year public paternity dispute is not a limited-purpose public figure in a libel lawsuit relating to his invention. Having failed on these foundational issues, Plaintiffs cannot offer any evidence to support – let alone sustain their First Amendment burden of proving actual malice with convincing clarity – any element of their *prima facie* case.

Plaintiffs’ lawsuit improperly attempts to enlist libel law to quash a 25-year debate over the respective innovations of Tim Paterson and Gary Kildall in the development of the modern personal computer. Such a task is ultimately futile. As Sir Harold Evans makes clear in *THEY MADE AMERICA* (“The Book”), the greatest inventors have used and transformed the works of their predecessors. Sir Isaac Newton famously summarized this fundamental truth in 1676, by conceding that his own innovations stood “on the shoulders of giants.” Tim Paterson is entitled to no more deference than Sir Isaac Newton. Accordingly, the Court should grant Defendants’ motion for summary judgment.

II. ARGUMENT

A. This Court Should Disregard Plaintiffs' Unsupported Assertions of "Disputed Facts."

Plaintiffs must offer competent evidence, not conclusory assertions, to oppose Defendants' motion. A mere "alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there

1 be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-
 2 48 (1986). No genuine issue of fact for trial exists where the record, taken as a whole,
 3 could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec.*
 4 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

5 Plaintiffs attempt to raise the specter of disputed facts - and thus defeat summary
 6 judgment – merely by setting out a “Disputed Facts” section. *See* Response at pp. 2-4. In
 7 fact, Defendants do not take issue with Plaintiffs’ general characterization of many of these
 8 issues, and agree that the challenged statements listed on page 4 of their Response form the
 9 bases for Plaintiffs’ claims. But none of these purported “facts” (even if supported by
 10 competent evidence) negates Defendants’ entitlement to summary judgment.

11 **B. Plaintiffs Cannot Prove the Elements of Defamation**

12 Under Washington law, “a defamation plaintiff must show four essential elements:
 13 falsity, an unprivileged communication, fault, and damages.” *Mark v. Seattle Times*, 96
 14 Wn.2d 473, 486, 635 P.2d 1081 (1981). This *prima facie* showing must consist of
 15 “specific, material facts” and not mere conclusions or unsupported allegations. *LaMon v.*
 16 *Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989). Summary judgment must be entered
 17 against Plaintiffs if they fail to make a showing sufficient to establish the existence of any
 18 element essential to their case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

19 Here, Plaintiffs have failed to establish **any** of these basic elements, let alone all.

20 **1. Plaintiffs Cannot Establish Falsity**

21 **a. The Response Confirms Defendants’ Statements**

22 Plaintiffs’ response on their falsity argument effectively proves that summary
 23 judgment should be granted against them. Rather than offer evidence refuting statements

1 in the Book that suggest that Mr. Paterson copied elements of, and relied on, Mr. Kildall's
 2 CP/M in designing his QDOS or 86-DOS, Plaintiffs attempt to shadow-box with an
 3 allegation never mentioned in the Book. Thus, they feebly assert that "Paterson did not
 4 copy [CP/M] verbatim," and that in any event, their copying of the key function calls in
 5 CP/M was **justified** to avoid "run[ning] the risk that programmers, unwilling to start from
 6 scratch with another set of labels, would not adapt their programs to [Paterson's] operating
 7 system." Response at 12. Plaintiffs are dueling with a phantom.

8 First, there was no assertion in the Book that Paterson ever copied CP/M or its
 9 function calls "verbatim." The challenged statements in this case – handpicked, of course,
 10 by Plaintiffs – refer only to Paterson as "taking a ride on Kildall's system," "making the
 11 two systems similar," "copying most of the top part of Kildall's operating system," and
 12 "t[aking] almost unaltered Kildall's Int-21 mechanism." *See Complaint ¶ 1.4.* Plaintiffs'
 13 efforts to show that their copying of CP/M was less than verbatim¹ do not undercut the
 14 essential (and substantial) truth of Defendants' publication, *i.e.*, that many function calls
 15 were identical and thus that Kildall believed that Paterson in fact had appropriated or
 16 copied important elements of his operating system.²

17 Second, Paterson's theory that somehow he "had to use" and was justified in using
 18 Kildall's function calls – which he describes for his convenience as labels, and mere

19 ¹ Plaintiffs also seek to minimize the value of the system interfaces that Paterson acknowledges he copied
 20 from Kildall. Response at 10-14. Since the beginning of the PC revolution, however, the system interface
 21 has been the essence of the modern computer operating system: "The most important hints, and the vaguest,
 22 have to do with obtaining the right functionality from a system, that is, with getting it to do the things you
 23 want it to do. ... Defining interfaces is the most important part of system design. Usually it is also the most
 difficult, since the interface design must satisfy three conflicting requirements: an interface must be simple, it
 should be complete, and it should admit a sufficiently small and fast implementation." Butler W. Lampson,
Hints for Computer System Design, ACM Operating Systems Review, 15, 5 (October 1983), pp.33-48.

² Plaintiffs also attempt to escalate the severity of Defendants' statements by repeatedly equating copying
 with stealing, thievery, or moral turpitude. The Court may disregard deceptive characterizations of the
 undisputed language in the Book, which of course speaks for itself.

1 “veneers” – is irrelevant to the narrow question presented by this motion, which is whether
 2 he in fact copied the CP/M function calls. Far from defeating summary judgment,
 3 Paterson’s proffered justification constitutes an unequivocal admission that the challenged
 4 statements are substantially true.

5 Where, as here, Plaintiffs take on the “gravest of” their concerns³ and ultimately
 6 confirm the substantial truth of the challenged statements, this Court should find that
 7 summary judgment is warranted.

8 **b. The Kildall Chapter is Nonactionable Opinion**

9 Statements must be provable as false before there can be defamation liability.
 10 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990). Opinion statements, or loose,
 11 figurative, or hyperbolic language – precisely because they are not provable as false
 12 statements of fact – are not actionable. *Id; see also Schmalenberg v. Tacoma News,*
 13 *Inc.*, 87 Wn. App. 579, 591, 943 P.2d 350 (1997). Courts have additionally held that “the
 14 lack of precision in the meaning of a word makes [an] assertion [using that word]
 15 incapable of being proven true or false.” *See McCabe v. Rattiner*, 814 F.2d 839, 842-43
 16 (1st Cir. 1987). Accordingly, descriptions such as “rip-off,” and “fraud,” “scandal,”
 17 “snake oil job,” have been found to be non-actionable as a matter of law. *See Phantom*
 18 *Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir. 1992) (“a rip-off, a

19 ³ In an apparent attempt to obfuscate the issues, Plaintiffs also argue that Int-21 was not the heart of Kildall’s
 20 innovation and that Kildall could not have sued Paterson. Plaintiffs thus seek to distract the Court from the
 21 weakness in their defamation case by inviting it to adjudicate a hypothetical copyright infringement action
 22 that could have been brought by Kildall against Paterson, circa 1980. As Paterson himself has
 23 acknowledged, to suggest that he created a “clone” of another’s operating system does not imply any
 illegality, or any violation of anyone’s intellectual property rights. Paterson Dep. 41:5-42:25 (relevant
 excerpts of the transcript of Mr. Paterson’s deposition are included as Exhibit A to the Declaration of Bruce
 E.H. Johnson in Support of Reply in Support of Defendants’ Motion for Summary Judgment) Whether such
 a lawsuit could have been brought or would have been won by Kildall is irrelevant, and is ultimately a matter
 of speculation and opinion, not fact. To pretend that this is a 1980 copyright infringement action is irrelevant
 to the important question of whether the **specifically challenged statements** are substantially true.

1 fraud, a scandal, a snake-oil job" was mere hyperbole and, thus, protected opinion); *see*
 2 also *Camer v. Seattle Post-Intelligencer*, 45 Wn.App. 29, 40-41, 723 P.2d 1195 (1986)
 3 (words such as "unethical", "con artists", and "fraud" are statements of opinion).

4 Plaintiffs have identified four statements in the Book that are nonactionable
 5 opinion. These statements include:

6 • "Kildall writes: 'Paterson's Seattle DOS was yet another one of the rip-offs of
 7 the CP/M design. The CP/M machine code was taken apart, using CP/M's own DDT [its
 8 debugger], to determine the internal workings of CP/M in order to make a clone of CP/M
 9 operations.'" Complaint ¶ 1.4.a.

10 • "But for Mr. Paterson to cite the unavailability of CP/M-86 as justification for
 11 appropriating the 'look and feel' of a competing operating system and its utilities seems to
 12 me analogous to telling a judge, 'I needed the car, Your Honor, and the plaintiff wouldn't
 13 sell me his, so I was forced to take it.'" Complaint ¶ 1.4.b.

14 • "... Paterson's adaptation of Kildall's system ..." *Id.* ¶ 1.4.c.

15 • "... Paterson's version of Kildall's program ..." *Id.* ¶ 1.4.d.

16 These statements - as opinions - are not "provable as false," and in light of
 17 Plaintiffs' admissions as discussed *supra* at pp. 3-4, may in fact be substantially true.⁴

19 ⁴ The Hollaar Declaration attached to Plaintiffs' Response should be stricken to the extent that Hollaar
 20 attempts to interpret the Book, and argue that it is false and defamatory. To the contrary, the chapter speaks
 21 for itself and Hollaar's opinions must be disregarded because they address an issue of law. *See Marx & Co.*
v. Diners Club, Inc., 550 F.2d 505, 508-12 (2d Cir. 1977); *FTC v. Amy Travel Services, Inc.*, 875 F.2d 564,
 572-73 (7th Cir. 1989) (defamatory meaning of a publication is a question of law for the Court and an expert
 witness cannot offer testimony as to an issue of law); *McCabe v. Rattiner*, 814 F.2d 839, 843 (1st Cir. 1987)
 (expert testimony on meaning of "scam" would not assist trier of fact); *World Boxing Council v. Cosell*, 715
 F. Supp. 1259 (S.D.N.Y. 1989) (testimony of expert in "media analysis and communications research"
 inadmissible where "layman is perfectly capable of reading [defendant's] book and comparing it with the
 articles he claims to have relied on, without the 'help' of a linguistics expert").

1 Although Plaintiffs take issue with Kildall's use of the term "rip-off" to describe
 2 the extent of Paterson's copying, this statement cannot be actionable. First, the term is
 3 slang, figurative, and has multiple definitions; thus it is not susceptible to being proven
 4 true or false. *See WEBSTER'S II NEW COLLEGE DICTIONARY* 956 (1999) (**rip-off**
 5 (rɪp'ɒf', - əf') *n. Slang.* **1.** A theft. **2.** A thief. **3.** Exploitation. **4.** Something, as a story
 6 or film, that is clearly imitative of or based on something else). Second, and particularly
 7 significant here, the fact that "rip-off" refers to "something...clearly imitative of or based
 8 on something else," indicates that Kildall's description of QDOS is substantially true.
 9 Indeed, Paterson's protestations to this Court that he was "justified" in using Kildall's
 10 function calls confirm that Paterson's work was "something ... clearly imitative of or
 11 based on something else."

12 Whether the Kildall chapter is an actionable statement of defamatory fact or a
 13 statement of nonactionable opinion is an issue of law for the Court. *Camer v. Seattle Post-*
 14 *Intelligencer*, 45 Wn. App. at 39; *Benjamin v. Cowles Pub'g Co.*, 37 Wn. App. 916, 922,
 15 684 P.2d 739 (1984). In making this determination, the Court must consider the "entire"
 16 publication, as a whole. *Camer*, 45 Wn. App. at 39; *Benjamin*, 37 Wn. App. at 923; *Robel*
 17 *v. Roundup Corp.*, 148 Wn.2d 35, 56, 59 P.3d 611 (2002). The publication "must be
 18 considered as a complete picture and not by isolated segments." *Sims v. KIRO, Inc.*, 20
 19 Wn. App. 229, 234, 580 P.2d 642 (1978); *Kassel v. Gannett Co.*, 875 F.2d 935, 946 (1st
 20 Cir. 1989) (defamatory report to be "taken as a whole" rather than "parsed"); *Foretich v.*
 21 *CBS, Inc.*, 619 A.2d 48, 58 (D.C. App. 1993) (court must consider program as a whole).

22 In the Book, for example, when Kildall was quoted alleging that "The CP/M
 23 machine code was taken apart using CP/M's own DDT {its debugger} to determine the

internal workings of CP/M in order to make a clone of CP/M's operating operation," an unequivocal denial from Paterson immediately followed. *See Harold Evans, Gary Kildall He saw the Future and Made it Work. He was the True Founder of the Personal Computer Revolution and Father of PC Worlds, in THEY MADE AMERICA 402, 410 (2004).*⁵ Thus, the Book states:

Paterson has denied using CP/M source code but admits making the two systems similar to help translate programs into QDOS. "Because of the completely different file-storage format, none of the internal workings has any corresponding relation to anything within CP/M," Paterson says.

Considering the publication as a whole – and not simply the isolated sentences and phrases strung together by Plaintiffs – it is immediately apparent that Defendants have accurately presented **both** Kildall's allegation and Paterson's denial, allowing readers to draw their own conclusions from these two obviously knowledgeable sources. As a matter of law, such a publication is not actionable:

[O]f central importance in this case, even a provably false statement is not actionable if "it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts" *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)). . . .

Riley v. Harr, 292 F.3d 282, 289 (1st Cir. 2002); *see also Moldea v. New York Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) ("Because the reader understands that [the challenged statement] represents the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation.").

⁵ The Kildall chapter at issue in this case is attached to the Das Declaration filed on March 15, 2007, as Exhibit B.

c. The Publication’s “Sting” is Substantially True

The Court may grant summary judgment in a defamation action if the publication’s “sting” is true. *See Herron v. KING Broadcasting Co.*, 109 Wn.2d 514, 522, 746 P.2d 295 (1987) (quoting *Mark*, 96 Wn.2d at 494). The “sting” is the gist of the story as a whole. *Id.* Here, given that Paterson admits (*see* Motion at 5) that he lifted the function calls from Kildall’s CP/M user’s manual (a copyrighted document, whatever the copyrightability of source code in 1980) and relied on Int-21 in developing QDOS, he cannot deny the substantial truth of the challenged statements.

2. Plaintiffs Cannot Establish Fault

Public figures, including limited-purpose public figures, must prove – with evidence of convincing clarity – that Defendants published their false and defamatory statements with actual malice. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 351 (1974). Here, the record shows that Mr. Paterson is a limited-purpose public figure, and Plaintiffs have offered no evidence, certainly no evidence of convincing clarity, that any of the Defendants acted with actual malice.

a. Paterson is a Limited-Purpose Public Figure

The Ninth Circuit recognizes a limited-purpose public figure as “one who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1197 (9th Cir. 1989) (quoting *Gertz*, 418 U.S. at 351). “[A] public controversy is one that touches upon serious issues relating to...community values, **historical events**, governmental or political activity, arts, education, or public safety.” *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999) (emphasis added). Here, where there

1 was a long-standing debate (*see* Defendants' Motion at 8-14) over the origins of QDOS
 2 and the extent to which "the father of DOS" copied or relied on elements of Kildall's
 3 CP/M system — a debate that began with the first "leak" to *InfoWorld* in 1981 about
 4 similarities between CP/M and the operating system of the still-secret IBM PC (Das Decl.
 5 Ex. S) — it cannot be seriously disputed that a legitimate public controversy exists.⁶

6 Paterson, moreover, has played a key role in that dispute. Plaintiffs' statement that
 7 Defendants can "at most...point to a couple of articles in trade journals...and one
 8 [Paterson] letter to the editor..." (Response at 8) is a transparent effort to attempt to
 9 minimize his public relations efforts, which included providing an interview for a best-
 10 selling history of Bill Gates and Microsoft (Motion at 12). Moreover, the trade journals
 11 are targeted to and read by the very community concerned with these issues, which is the
 12 basis for Paterson's limited public figure status.⁷ The conclusion is clear that, over the
 13 decades, Paterson has repeatedly sought dissemination of his views about the importance
 14 of his invention, the relationship between QDOS and CP/M, and his role in the creation of
 15 MS-DOS in these journals and books, and in repeated interviews, thereby voluntarily
 16 injecting himself into the public discourse about this important historical subject.⁸

19 ⁶Indeed, Paterson's own website, <http://www.patersontech.com/>, acknowledges the "Origins of DOS"
 20 controversy and again offers to set the record straight. Paterson Dep. 73:5-74:18; Paterson Dep. Exs. 6 and 7
 attached as Exs. B and C to Johnson Decl.

21 ⁷*See Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1290, 1300 (D.C. Cir. 1980) (supermarket
 22 executive whose actions were reported in trade publications was a limited-purpose public figure); *Daniel
 Goldreyer Ltd. v. Dow Jones & Co., Inc.*, 259 A.D.2d 353, 687 N.Y.S.2d 64 (1st Dep't 1999) (art restorer
 known in the art profession but "not outside of it" found to be public figure with respect to "controversy"
 surrounding his questionable techniques in the restoration of a valuable painting).

23 ⁸Paterson's failure to allege or prove special damages mandates that he prove actual malice. *Demopolis v.
 Peoples Nat. Bank of Washington*, 59 Wn. App. 105, 116, 796 P.2d 426 (1990) (citing *Caruso v. Local Union
 No. 690 of Int'l Broth. of Teamsters*, 100 Wn.2d 343, 354, 670 P.2d 240 (1983) ("a libelous *per se* statement
 is actionable without proof of special damages only if the defendant acted with actual malice)).

b. Plaintiffs Cannot Establish Actual Malice

Actual malice can be proven only by “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) (emphasis added).

It is axiomatic that Defendants could not have acted with reckless disregard for falsity when the substance of the statements at issue is either true or is opinion not susceptible to being proven true or false. Paterson’s own admissions and efforts to justify his copying, discussed *supra* pp. 3-4, confirm the gist of the challenged factual statements. But even if this were not the case, the undisputed evidence⁹ shows widespread consensus that QDOS and 86-DOS were clones of CP/M. Indeed, given this overwhelming public record, including a United States District Court ruling (*see Motion at 9-12*), it would have been **unreasonable** to entertain any such doubts.

Plaintiffs point¹⁰ to Evans’ choice not to interview Paterson as the “**most telling**” of their “legion” of evidence of Evans’ reckless disregard. Response at 27. Here, Plaintiffs’ “**most telling**” evidence is a *non sequitur*. First, as Mr. Evans testified (Evans Dep. 19:10-21:16, 38:19-39:24 and 120:5-121:17), Paterson’s “translation-compatibility” defense to the “clone” charges was already in the public record (indeed, since 1983), and in fact the Book quoted from Paterson’s 1994 apologia (Das Decl. Ex. J), which presented the identical defense that Paterson again offers the Court today, and would have offered if he had been contacted by Mr. Evans. Given that Paterson’s position in the public controversy was anything but a secret, consulting with him again would have changed nothing.

⁹ See Motion at 8-14. In his deposition, Mr. Evans listed many of these sources. Evans Dep. 35:9-36:3, 38:19-41:25, 53:15-55:16, 77:8-78:6, 140:19-142:11, and 147:6-151:10.

¹⁰ Plaintiffs also dump into the record a collection of unauthenticated emails and other documents, which the Court may disregard. *Orr v. Bank of America*, 285 F.3d 764, 773-74 (9th Cir. 2002).

1 Second, a mere failure to investigate is not actual malice. *See Herron v. Tribune*
 2 *Pub. Co., Inc.*, 108 Wn.2d 162, 171, 736 P.2d 249 (1987) (actual malice is not proved by
 3 showing that the publisher failed to investigate the basis for his statements or that a more
 4 prudent person would have refrained from such publications); *Parry v. George H. Brown*
 5 *& Associates, Inc.*, 46 Wn. App. 193, 197, 730 P.2d 95 (1986) (actual malice is not shown
 6 by failure to investigate); *DARE America v. Rolling Stone Magazine*, 101 F. Supp.2d 1270,
 7 1284 n.3 (C.D. Cal. 2000) (defendants “not required” to contact “subjects of the article
 8 before publication”), *aff’d*, 270 F.3d 793 (9th Cir. 2001).

9 **3. Plaintiffs Cannot Establish Libel *Per Se***

10 Plaintiffs proffer no **evidence** to establish libel *per se*. Rather, they offer the
 11 conclusion¹¹ that an “ordinary reader of the defamatory statements would hate Paterson,
 12 ridicule him, hold him in contempt and distrust – both in business dealings and otherwise,”
 13 and that it is “abundantly obvious that these comments deprive Mr. Paterson of the benefit
 14 of public confidence, and injure him in his business and occupation.” Response at 9-10.
 15 This failure of proof is not surprising, because Paterson can hardly complain about the
 16 Book’s recognition that, in creating QDOS, he stood on the shoulders of a computer
 17 industry giant, Gary Kildall. While Paterson may prefer a more laudatory critique, that
 18 characterization cannot constitute libel *per se*. *See, e.g., Sims v. KIRO, Inc.*, 20 Wn. App.
 19 at 234 (defamatory character must be “certain and apparent from the words themselves”);
 20 *Exner v. AMA*, 12 Wn. App. 215, 219, 529 P.2d 863 (1974).¹²

21
 22

¹¹ Paterson’s claim of damages is likewise a mere conclusion. Conclusory statements cannot prevent
 23 summary judgment. *LaMon v. Butler*, 112 Wn.2d at 197.

¹² A statement that says a person has done something he is legally entitled to do is **not** libelous. *See Southard*
 v. *Forbes, Inc.*, 588 F.2d 140, 145 (5th Cir. 1979).

C. Failure to Prove Defamation Requires Dismissal of False Light Claim

Any cause of action alleging damages arising from allegedly false and defamatory speech must satisfy the same standards as defamation. *See, e.g., Hoppe v. Hearst Corp.*, 53 Wn. App. 668, 675-76, 770 P.2d 203 (1989) (false light claim based on same facts as libel claim must be dismissed). Their failure to prove falsity or actual malice, or negate the application of the First Amendment opinion privilege, dooms Plaintiffs' false light claim. Finally, Plaintiffs have decided to ignore the *Hoppe* rejection, cited by Defendants, of their false light tort. *Hoppe*, 53 Wn. App. at 677 (trial court may properly dismiss false light claim since Washington "has not recognized the tort").

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that their motion for summary judgment be granted, and the action dismissed with prejudice.

DATED this 20th day of April, 2007.

Davis Wright Tremaine LLP
Attorneys for Defendants

By /s/ Bruce E. H. Johnson

Bruce E. H. Johnson, WSBA #7667
Nigel P. Avilez, WSBA #36699
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
Telephone: (206) 628-7683
Fax: (206) 628-7699
E-mail: brucejohnson@dwt.com

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2007, I caused to be filed electronically with the court using the CM/ECF system, which will send notification of such filing, and I served a true and correct copy of the within and foregoing document entitled exactly:

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY

JUDGMENT

by the method indicated below and addressed as follows:

D. Michael Tomkins
Dietrich Beimiller
8420 Dayton Avenue North
Seattle, WA 98103
Tel: (206) 547-1000
Fax: (206) 297-5990
Email: aadmt@aol.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile
 CM/ECF Notification

DATED this 20th day of April, 2007.

By /s/ Bruce E. H. Johnson
Bruce E. H. Johnson